

In *Padilla vs. Kentucky*, 559 U.S. 356 (2010), the Supreme Court held that because immigration outcomes are inextricably entwined with the outcome of criminal proceedings, and because of the fundamental importance and potential severity of those immigration outcomes, criminal defense counsel have a Sixth Amendment obligation to advise noncitizen defendants of the immigration consequences of their criminal cases. While the Court held that such advice was already required by prevailing professional norms, *Padilla* represented a major shift for many criminal defense attorneys. Many have struggled to determine what precisely is required of them, and already-overburdened public defense systems have struggled to determine how best to meet their new obligations. But because poor noncitizens are particularly vulnerable to discriminatory immigration enforcement, are less likely to have access to immigration counsel, and are less likely to prevail in seeking relief from removal, it is especially important for indigent defense systems to provide adequate immigration advice to noncitizen clients and to defend against their criminal charges with a careful understanding of the relevant immigration context.

This memo sets out the specific obligations of criminal defense counsel under *Padilla*. It begins with a discussion of the facts at issue in *Padilla* itself, and the holding that derived from those facts. It then discusses subsequent caselaw, both in Iowa and in the Eighth Circuit. Next, it sets out the method for advising noncitizen defendants required by *Padilla*, and finally provides several examples of that method in practice.

Padilla vs. Kentucky

Jose Padilla was born in Honduras. *Padilla*, 559 U.S. at 359. He had been a lawful permanent resident of the United States for more than 40 years, during which time he had served as a member of the U.S. Armed Forces in the Vietnam War, when he pled guilty to transporting a large amount of marijuana in Kentucky. *Id.* Mr. Padilla entered his guilty plea on the advice of his counsel, who not only failed to advise him of the particular consequences of his plea and conviction, but assured him that he “did not have to worry about immigration status since he had been in the country so long.” *Id.*

This was, of course, wholly inaccurate advice. Lawful permanent residents remain subject to criminal grounds of removal from the United States regardless of how long they have been in the country. And the Immigration and Nationality Act, which codifies the grounds for removing a person from the United States, explicitly and unambiguously states that

Any alien who at any time after admission has been convicted of a violation of . . . 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.

8 U.S.C. § 1227(a)(2)(B)(i). Mr. Padilla’s conviction thus rendered him removable from the United States, his home of more than 40 years.

The Supreme Court held that Mr. Padilla’s defense counsel’s performance was constitutionally deficient under the Sixth Amendment. *Padilla*, 559 U.S. at 369. The Court first noted that “deportation is . . . intimately related to the criminal process,” and that “changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.” *Id.* at 365–66. Moreover, “deportation is a particularly severe ‘penalty’” associated with a criminal conviction. *Id.* (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)). The Court reviewed “prevailing professional norms,” as well as prior caselaw recognizing the importance of preserving a noncitizen defendant’s right to remain in the United States or eligibility for relief from removal. *Id.* at 367–68 (citing, inter alia, *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)). In ultimately concluding that Mr. Padilla’s counsel was ineffective, the Court stated “[t]his is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.” *Id.* at 368–69.

Importantly, the Court did not limit its holding to affirmative misadvice by defense counsel. Rather, the Court expressly held that “[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation.” *Id.* at 371. Limiting defense counsel’s duty to avoiding affirmative misadvice “would invite two absurd results”: first, counsel would have incentive to avoid giving any advice at all even when the appropriate advice is obvious or readily identifiable, and second, it would deny “a class of clients least able to represent themselves” the most basic information about the consequences of their criminal convictions.

The final holding of *Padilla* is simple and unequivocal: criminal defense counsel must inform noncitizen defendants “whether [their] plea carries a risk of deportation.” *Id.* at 374. The details of how defense counsel is to determine the immigration consequences of any particular criminal conviction and the scope of the advice counsel is required to provide are left for future consideration.

Subsequent Caselaw—Iowa and Eighth Circuit

The majority of Iowa caselaw dealing with *Padilla* has reiterated its basic holding, but has done little to explicate its real-life application. *See State v. Dzopa*, 828 N.W.2d 632 (Iowa Ct. App. 2013) (unpublished) (noting that defense counsel had a “professional obligation under *Padilla* to provide [Dzopa] with advice regarding the risk of deportation before he entered his guilty plea,” and preserving his claim for post-conviction relief); *State v. Al Yassiri*, 873 N.W.2d 775 (Iowa Ct. App. 2015) (unpublished) (“Al Yassiri’s trial counsel breached an “essential duty” by failing to inform her of the potential immigration consequences of her plea.”); *State v. Porte*, No. 15-1159, 2016 WL 3556451, at *1 (Iowa Ct. App. June 29, 2016) (unpublished) (“Counsel is required to advise a criminal defendant client ‘whether his [or her] plea carries a risk of deportation.’”). The few decisions to have discussed *Padilla*’s application held that it was not clear whether certain guilty pleas carried a risk of deportation, and therefore that counsel was only required to advise the defendant that their conviction “may carry the risk of adverse immigration consequences.” *Lopez-Penalosa v. State*, 804 N.W.2d 537 (Iowa Ct. App. 2011); *Diaz v. State*, 885 N.W.2d 829 (Iowa Ct. App. 2016) (unpublished) (on petition for further review).¹ An additional unpublished decision held that defense counsel was not required to advise the defendant of all possible immigration consequences of a particular conviction. *State v. Romos*, 787 N.W.2d 480 (Iowa Ct. App. 2010) (unpublished).

Similarly, there is little Eighth Circuit caselaw on *Padilla*, and none that has further explained or developed what is required of defense counsel. *Abraham v. United States*, 699 F.3d 1050, 1053 (8th Cir. 2012) (holding that where the presentence report stated the immigration consequences of conviction, and defense counsel discussed the report with the defendant, the defendant could not satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668

¹ These decisions are dubious, and it is likely unwise to frame a system of *Padilla* advisals around their reasoning. See following discussion of clear and unclear consequences.

(1984)); *Correa-Gutierrez v. United States*, 455 F. App'x 722, 723 (8th Cir. 2012) (unpublished) (under same circumstances, the defendant could prove neither deficient performance nor prejudice).

A Note on Clear vs. Unclear Consequences

Some language in *Padilla* has led some attorneys to focus on distinguishing between “clear” and “unclear” immigration consequences. While there are certainly circumstances in which the precise immigration consequences of a given conviction are unclear, determining whether the consequences of a conviction are clear or unclear cannot be a *preliminary* step in the *Padilla* process. Just as defense counsel cannot ascertain the precise outcome of a criminal case merely by reviewing the charging document, counsel cannot determine the immigration consequences of a conviction knowing only the offense.

Rather, counsel must conduct an immigration analysis including the defendant's immigration status and/or potential status, criminal history, and the specifics of the conviction in question. Without doing so, it is impossible to accurately determine whether the consequences of a conviction are clear or unclear. Following such an analysis, it may be that the consequences of the conviction are unclear; and if so, the clear/unclear distinction made in *Padilla* speaks to the advice counsel is required to provide to the defendant. Counsel's focus for the purposes of *Padilla*, however, must be on developing the capacity to accurately determine a defendant's immigration circumstances and analyze the effect of a given conviction.

Some courts have given undue weight to the clear/unclear distinction, and have issued holdings that turn entirely on this point to the exclusion of all other issues. Holdings that suggest defense counsel can, knowing only the offense of conviction and without further investigation, determine whether immigration consequences are clear or unclear and provide constitutionally adequate advice accordingly reflect a fundamentally inaccurate view of immigration law. The consequences of a given conviction depend on the particulars of a person's immigration status and criminal history, as well as the conviction itself. These holdings therefore fail to provide accurate guidance, and inevitably lead to greater frustration on the part of defense counsel, who are found ineffective seemingly at random.

Padilla Advice

Despite a lack of informative and clarifying caselaw, *Padilla* itself, as well as professional standards published both before and after the decision, provide a reasonably clear roadmap for adequate representation of noncitizen defendants.

First, defense counsel must determine the defendant's immigration status and complete criminal history. A person's immigration status includes both their current status and any facts pertinent to potential eligibility for relief from removal (for example, marriage to a United States citizen), because both are necessary to accurately assess the immigration consequences of a conviction.

Second, based on the information gathered about the defendant's immigration status and criminal history, defense counsel must analyze the immigration consequences of the potential plea and/or a conviction on the charges the defendant is facing. In some cases, this analysis will be straightforward, while in others it will be complex and may need to be reevaluated multiple times throughout the case. The analysis should incorporate the plea or conviction's effect on the defendant's removability from the United States, as well as the effect on the defendant's eligibility for relief from removal. *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010).

Third, defense counsel must advise the defendant of the immigration consequences of their plea or conviction. Importantly, *Padilla* is clear that silence on this issue—in other words, failure to provide advice as well as affirmatively incorrect advice—constitutes ineffective assistance of counsel. *Padilla*, 559 U.S. at 370. Merely advising a defendant to seek immigration counsel is effectively equivalent to silence and is inadequate, because that advisal does not inform the defendant of the potential immigration consequences they face.

It is also important to note that "*Padilla* specifically places the burden of informing the defendant of the consequences of the plea upon the defendant's attorney." *State v. Diaz*, 803 N.W.2d 128 (Iowa Ct. App. 2011). Though defense counsel may fulfill this duty in consultation with an immigration attorney, the duty unequivocally remains with the defense attorney to provide accurate advice as to the immigration consequences of a guilty plea and conviction. *See State v. Avila*, 803 N.W.2d 128 (Iowa Ct. App. 2011) (where "defendant was advised by defense counsel, his immigration attorney, and the court that there may be immigration consequences" as the result of his plea, there was no *Padilla* violation).

Finally, after advising the defendant, counsel must ascertain the defendant's priorities in resolving the case and defend the case accordingly. *Padilla*, 559 U.S. at 373. If the defendant's priority is a good immigration result, they may be willing to accept a less-favorable resolution of the criminal case to achieve that goal. Defense counsel must therefore be aware of the options for resolving cases in an immigration-safe way. And because some of these resolutions may seem counterintuitive, defense counsel should be vigilant in protecting the defendant's priorities and explaining to judges and prosecutors why those priorities require a particular approach to resolving the case.

Examples

The following examples may be useful to illustrate what *Padilla* advice might look like in specific cases, as well as the information required to determine the appropriate advice and some possible advocacy strategies.

Case 1. The client is a lawful permanent resident (LPR, also sometimes referred to as green-card holder) charged with possession of marijuana and possession of drug paraphernalia. She entered the United States in 2005, and received LPR status in 2009. She has no prior criminal history, is married to an LPR, and has two United States citizen children. The client's primary priority is being able to stay in the United States with her family. This client should be advised as follows:

- Conviction of the offenses as charged would make her removable from the United States under 8 U.S.C. § 1227(a)(2)(B)(i) (conviction of a controlled substances offense).
 - If she can plead to possession of 30 grams or less of marijuana for her own personal use and have the paraphernalia charge dismissed, the client will fall within an exception to the controlled substances offense removal ground and will not be removable from the United States.
- If she is unable to make a safe plea and is placed in removal proceedings, she is likely eligible for a form of relief called cancellation of removal. She should seek immigration counsel for assistance if she is placed in removal proceedings.
 - She will be subject to mandatory detention during the course of her removal proceedings.

- Even if she makes a safe plea and is not removable from the United States, she cannot safely travel outside the country—she will be deemed inadmissible when she attempts to reenter. She should not leave the country until she is naturalized.
- Though this conviction should not prevent her from naturalizing, any conviction can complicate the naturalization process. She should seek immigration counsel before applying to naturalize.

Defense counsel should attempt to negotiate a plea to possession of 30 grams or less of marijuana for the client’s own personal use (specifying the amount and intended use in the plea agreement), and should try to have the paraphernalia charge dismissed. This will avoid removability for the client entirely.

Case 2. The client is undocumented, and is charged with theft in the third degree. His country of origin is El Salvador. He and his family fled El Salvador for the United States in 2003, after suffering severe harm at the hands of gang-affiliated police officers. They entered the United States without inspection at a border checkpoint. The client is now married to a United States citizen who is unable to work due to a serious health condition, and would suffer significant hardships if he were removed. The client fears that he will be harmed or killed if he returns to El Salvador. He has a prior conviction for theft in the fifth degree, for which the sentence was a fine. This client should be advised as follows:

- A theft conviction in any degree would be his second conviction for a “crime involving moral turpitude.” This would make him removable under 8 U.S.C. § 1227(a)(2)(A)(ii).
- However, because the client is already removable for being unlawfully present in the United States, the more significant issue is maintaining eligibility for relief.
 - He could be the beneficiary of a visa petition filed by his U.S. citizen wife. However, if convicted on the fraudulent practices charge, he would be inadmissible to the United States. He therefore could not adjust status to become an LPR without returning to El Salvador and seeking a waiver of his inadmissibility. This could leave him in El Salvador for months, if not longer.
 - He may have a good claim for asylum. A successful asylum claim would give him status in the United States without having to leave the country. However, asylum cases are very difficult, and success is not guaranteed.

- In any case, the client will be subject to mandatory detention during his removal proceedings.

The best defense option in this case would be identifying a factual basis for a plea to any offense that is not a crime involving moral turpitude. This would protect the client's admissibility to the United States, and allow him to adjust status based on his wife's approved visa petition. Otherwise, because theft in any degree has the same immigration effect, the client may wish to proceed to trial on any available theory, or simply avoid any time in custody to decrease the likelihood that he will be taken into immigration custody.

Case 3. Client was an LPR until 2011, when his status was revoked and he was removed to Mexico, his country of origin. He was removed based on a conviction for assault with a dangerous weapon, for which he received a one-year suspended sentence. His wife, who is undocumented, and his children, U.S. citizens aged 12, 15, and 17, remained in the United States. The client reentered the United States without inspection in 2015. He is charged with failure to appear relating to a pending OWI, and is in custody. This client should be advised as follows:

- Assault with a dangerous weapon is an aggravated felony. As a person who has been previously removed from the United States after having been convicted of an aggravated felony, he is removable.
- He is ineligible for most forms of relief from removal. A U-visa or withholding of removal/Convention Against Torture relief are likely his only options that would allow him to remain in the United States.
- He is also inadmissible, and it is extremely unlikely that he would be eligible for a waiver of inadmissibility.
- He is also subject to federal prosecution for reentering the United States without authorization after having been convicted of an aggravated felony, and faces up to 20 years in prison.

Defense counsel's priority with regard to immigration should be resolving his pending charges and having him released from custody as soon as possible, to minimize the chances of the client falling into immigration custody.