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Attorneys fear 'Padilla' means more work

Advising clients of deportation risk is now mandatory

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Criminal defense attorneys have mixed feelings about the recent decision by the U.S. Supreme Court requiring criminal defense attorneys to inform clients whether their plea carries a risk of deportation.

"It's good for the clients but it's undoubtedly going to be more homework for the defense attorney," said criminal defense attorney Bruce Williams, who practices on the Iron Range. "It's one more thing that defense attorneys are going to have to work with."

Minneapolis attorney Paul Baertschi, who does prosecution and defense work, said the decision revolutionizes the attorney's obligation to advise clients on the immigration consequences of convictions.

"I think it really does create a new level of concern for the defense attorney," he said. "There's more of a duty to know more than what they thought they needed to know."

The 7-2 decision, *Padilla v. United States*, was written by Justice John Paul Stevens. Justice Samuel Alito and Chief

Justice John Roberts concurred in the judgment. Justices Antonin Scalia and Clarence Thomas dissented.

Bad advice

Jose Padilla was born in Honduras, but was a lawful

resident of the United States for 40 years and had served in the U.S. military in the Vietnam War. He was charged with transport-

ing a large amount of marijuana. Padilla asked his attorney about possible immigration consequences and was told that he "did not have to worry about immigration status since he had been in the

Court denied Padilla post conviction relief, finding that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it's merely a

Statement of ABA President Carolyn B. Lamm on 'Padilla v. Kentucky'

[The] ruling by the Supreme Court of the United States underscores how significantly our nation's immigration laws have changed in recent years and how dramatic the impact of those changes are when noncitizens are accused of crimes. As Associate Justice John Paul Stevens said in the majority opinion, "The importance of accurate legal advice for noncitizens accused of crimes has never been more important." It rightly places the burden on criminal defense lawyers to understand that pleading guilty to certain crimes will result in deportation, and acknowledges that deportation can be an even more important penalty "than any potential jail sentence" to a noncitizen. As the court also noted, the American Bar Association standards

reflect the prevailing norms of practice and the intersection of modern criminal prosecutions and immigration law. We will to continue, and even redouble our efforts, to make sure that defense lawyers have the tools they need to fulfill their Constitutionally mandated role and our system ensures due process and access to justice as recommended by the ABA report on Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases.



Carolyn Lamm

permanent resident of the United States for 40 years and had served in the U.S. military in the Vietnam War. He was charged with transport-

country so long." The defendant agreed to a plea and became subject to automatic deportation.

The Kentucky Supreme

"collateral" consequence of his conviction.

The U.S. Supreme Court reversed, holding that criminal

'Padilla' Defense attorneys should know at least basics of immigration law

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defense attorneys must inform their clients whether their plea carries a risk of deportation.

"Our longstanding Sixth Amendment precedents, the seriousness of deportation as a

some of their clients.

"It's important that people understand what they are doing when they plead guilty," said Northfield attorney John Fossum, chair of the Minneso-

“It’s good for the clients but it’s undoubtedly going to be more homework for the defense attorney.”

—Virginia, Minn. criminal defense attorney Bruce Williams



consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less,” wrote Stevens.

The high court noted that defense counsel in this case could have easily determined that Padilla’s plea would make him eligible for deportation simply by reading the statute, but that instead, his attorney provided him false assurance that his conviction would not result in his removal from this country.

In cases where the law is less clear, however, the court explained that the attorney’s duty is more limited.

“When the law is not succinct and straightforward ... 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,” Stevens wrote.

Practitioners say the decision is a wake-up call to criminal defense attorneys that they need to be thinking about the immigration consequences a plea or conviction may have for

ta State Bar Association’s Criminal Law Section. He suggested that the first thing a lawyer should do with a new client is determine whether the person is a noncitizen or not.

“If you don’t ask, you’re not going to find there’s an issue there,” he said.

Unclear cut

Practitioners expressed concern that even if they know about their client’s noncitizen status, determining whether the immigration consequences are “succinct and straightforward” — therefore requiring a warning about the risk of deportation — isn’t necessarily an easy undertaking.

“It’s problematic because [immigration] is a complicated area,” said Baertschi. “It’s really hard to say what’s going to be clear cut.”

Hennepin County Chief Public Defender William Ward noted that his office has a volunteer lawyer who works with the defenders on the immigration consequences of criminal convictions.

“Immigration is one of those areas that we’re doing the best we can but it’s difficult to keep up on it because it changes so much,” he said.

Some practitioners say that the decision will inevitably mean more work for defense attorneys.

According to Williams, when the deportation consequences are unclear, the burden will likely fall on the defense attorney’s shoulders to do more than just advise a client that pending criminal charges may carry an adverse immigration consequence.

“This is in addition to all the other [conviction consequences] we have to tell them. ... In my view, it’s one more thing that falls at the feet of defense attorneys,” he said.

Ward said he’s heard some concern among the defense bar that the decision will expand

most criminal convictions that it’s difficult to know what they all are,” he said.

But Richfield criminal defense attorney Richard Ohlenberg rejected the notion that eventually defense attorneys will be required to discuss *all* collateral consequences of a plea or conviction.

“I don’t think it there will be a chain reaction here,” he said. “The decision is limited to immigration consequences. ... It should stop here.”

Ohlenberg also lauded the high court’s recognition of the policy implications of its decision. The court specifically noted that “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.”

Ohlenberg agreed that when judges and prosecutors are

“There are so many things that now happen as a result of most criminal convictions that it’s difficult to know what they all are.”

—Northfield criminal defense attorney John Fossum



into other areas as well, resulting in attorneys being required to be aware of even more of the consequences of a plea or conviction.

Fossum pointed out that it’s already a challenge for defense lawyers to keep up with the collateral consequences of certain convictions.

“There are so many things that now happen as a result of

aware that a noncitizen is involved, many are “willing to help out and fashion a creative remedy that’s not going to lead necessarily to deportation.”

Above and beyond

Despite the high court’s proclamation that defense lawyers need only advise a client that a plea may have ad-

verse immigration consequences when those consequences are unclear, attorneys believe that in actuality their duty goes beyond that.

Defense attorneys are always safe in telling a client that they are not sure of the immigration consequences of a criminal conviction and that the client should contact an immigration attorney if he or she is worried about it, said Baertschi. "That's perfectly ethical and the plea will survive."

But to serve their clients well, defense attorneys say they need to know at least the basics of immigration law and how their client's immigration

status may be affected by a plea.

"Criminal defense attorneys need to be armed with a little more knowledge," said Baertschi. "To really do a good job for the client, a criminal defense attorney really needs to do more than just pass it off."

St. Louis Park criminal defense attorney Jeffrey Ring said that clients go to defense attorneys to get *all* the information they need with respect to their situation. "You want to be a total font of information as to what are the consequences to your client," he said.

Baertschi suggested that if

the defense attorney doesn't know the potential immigration consequences of a conviction then he or she should get assistance from someone who does.

Ring agreed. "All of us need to be schooled," he said. "This is one of those areas where [criminal defense] lawyers say, 'I need a lawyer,' because it's not our bailiwick."

Burden on the courts?


While the *Padilla* decision deals with the obligations of defense counsel, lawyers said it could end up being a burden on the courts as well.

Fossum explained that in

order to have a good plea allocation, the court may need to ask about citizenship status, and whether or not the accused had been advised on the potential immigration consequences.

"Without that as part of the record, the court may face a lot of requests to withdraw pleas based on a failure to advise on immigration consequences," he said.

That's a result judges will want to avoid, Williams added.

"They won't want a lot of cases coming back to them because an attorney failed to do what he should've done." 

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