

Supreme Court Sends a Message to Criminal Defense Attorneys Whose Clients Are Not Citizens: Do Not Ignore the Defendant's Immigration Status

When defending a client who is not a U.S. citizen in a criminal case, does defense counsel have an obligation under the Sixth Amendment to alert and inform his client of the possible deportation consequences that could arise from the client's acceptance of a plea bargain? In a recent decision, *Padilla v. Kentucky*, No. 08-651, 130 S. Ct. 1473 (March 31, 2010), the U.S. Supreme Court answered the question in the affirmative, holding that the Sixth Amendment guarantee of effective assistance of counsel applies to noncitizen clients in criminal cases in which deportation consequences may arise from the client's acceptance of a plea bargain. The Supreme Court's ruling establishes a new standard of practice that criminal defense attorneys must follow when representing clients who are not citizens. This article discusses the Supreme Court's *Padilla* decision and the legal ramifications of that decision for criminal defense attorneys who represent defendants who are not citizens.

Background of the Padilla Case

Jose Padilla was born in Honduras but had been a lawful permanent resident of the United States for more than 40 years. A veteran of the Vietnam War, Padilla was working as a licensed commercial truck driver at the time of his arrest.

In September 2001, Padilla was arrested in Kentucky for transporting marijuana. He was indicted, inter alia, on misdemeanor drug possession charges and felony trafficking of marijuana. Padilla pled guilty to both charges in reliance on his criminal defense attorney's advice that Padilla did not have to worry about his immigration status if he accepted the plea. Padilla did not consult separately with an immigration lawyer. Unfortunately, Padilla's attorney's advice on the deportation consequences of the plea was incorrect. Under immigration law, Padilla's felony drug conviction constituted an aggravated felony, which was a crime for which a convicted criminal could be deported.

In post-conviction proceedings that took place in a state court, Padilla sought to vacate the plea by alleging ineffective assistance of counsel. In his motion, Padilla claimed that his attorney's failure to investigate the deportation consequences of his plea and his erroneous advice constituted the ineffective assistance

of counsel that Padilla experienced. Padilla argued that he relied on his counsel's advice when he pled guilty to the drug charges and asserted that, had he been properly advised that he would be deported if he accepted the terms of the plea bargain, he would have chosen to go to trial instead.

The Kentucky Circuit Court denied Padilla's motion sua sponte and ruled that advice on collateral deportation consequences cannot give rise to a Sixth Amendment claim. The Kentucky Court of Appeals reversed the circuit court's decision and remanded the case for an evidentiary hearing, concluding that there were relevant and substantial issues of fact to be resolved because the record did not refute Padilla's allegations that counsel had affirmatively assured him that he would not be deported for pleading guilty or that he would not have pled guilty but for his counsel's advice. The Supreme Court of Kentucky reversed the appellate court's decision and rejected Padilla's claim of ineffective assistance of counsel on the grounds that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation, because that advice was a "collateral" consequence of Padilla's conviction. *Kentucky v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008). In so holding, the court noted that the advice was collateral, because it involved matters outside the sentencing authority of the state trial court. The Kentucky Supreme Court based its decision on well-established precedent that "collateral consequences are outside the scope of representation required by the Sixth Amendment." *Id.*

The U.S. Supreme Court granted certiorari to determine whether Padilla's criminal defense counsel had had an obligation to advise him that the offense to which he was pleading guilty might result in his deportation. In a split decision, the Supreme Court majority (with Justice Stevens delivering the Court's opinion) reversed the Kentucky Supreme Court's judgment and held that defense counsel must inform their clients who are not citizens about the possibility that accepting a plea bargain carries a risk of deportation. The Court concluded that, in criminal cases that involve plea bargains, advice regarding possible deportation consequences was encompassed within the Sixth Amendment right to effective assistance of competent counsel.

The Supreme Court's Decision

In its opinion, the Supreme Court addressed the issue of whether deportation was a direct or a collateral consequence of a criminal conviction, because the Sixth Amendment right to effective assistance of counsel had previously been applied only to direct consequences of a criminal conviction. The majority opinion declined to classify deportation resulting from a plea bargain as either a direct or a collateral consequence of a conviction on the basis that deportation was unique in nature. The Court observed that deportation was intimately related to the criminal process but, even though it was not itself a criminal sanction, deportation was a particularly severe penalty that involved both the exile of the noncitizen defendant and the possible separation of established family units. The Court also noted that immigration reform in the United States had expanded the class of deportable offenses and limited judges' authority to alleviate the harsh consequences of deportation such that deportation was nearly an automatic result for a broad class of offenders who were not citizens. The Court declined to expressly find that deportation was a direct consequence of conviction but held that the Sixth Amendment right to the effective assistance of counsel did encompass advice regarding deportation in the context of plea bargains for criminal charges, because "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Padilla*, 130 S. Ct. at 1480. The Court noted that "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important." *Id.*

The Supreme Court next applied the standard for effective assistance of competent counsel test (as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)), to its *Padilla* decision. The first prong of the test asks whether counsel's representation fell below an objective standard of reasonableness. *See id.* at 688. The second prong requires a determination of prejudice to the defendant—that is, whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *See id.* at 692.

In *Padilla*, the Court found that the defense counsel's incorrect advice to Padilla fell below the reasonableness standard, because counsel could have read the texts of relevant immigration statutes to easily determine that the felony drug trafficking count would lead Padilla to automatic deportation. *Padilla*, 130 S. Ct. at 1483. The Court considered professional standards, such as those set forth by the American Bar Association, and found that "the weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." *Id.* at 1482. Accordingly, the Court determined that Padilla had sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*. The Court declined to determine whether Padilla satisfied the second prong

of *Strickland* and, instead, remanded the case to the Kentucky courts for further consideration.

Future Applications of the Padilla Case

It is clear from the *Padilla* decision that criminal defense attorneys will now be required under the Sixth Amendment to advise their noncitizen clients of the possible immigration consequences of a guilty plea and that failure to so advise clients may constitute ineffective assistance of counsel. The Court distinguished two types of advice that may be required. For cases involving immigration consequences of criminal offenses that are "succinct and straightforward" (such as *Padilla*), the Court found that defense counsel had a duty to give correct advice about those consequences. *Id.* at 1483. For other cases in which the deportation consequences are unclear or uncertain, defense counsel "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.*

In a concurring opinion, Justice Alito, joined by Chief Justice Roberts, suggested that, given the complexity of immigration law and most criminal defense counsel's unfamiliarity with that area of law, defense counsel should advise a noncitizen client that a conviction may have immigration consequences, that immigration is a specialized field of law, that the attorney is not an immigration lawyer, and that the client should consult with an immigration specialist if the client wants advice on the subject. *Id.* at 1494. In a dissenting opinion, Justice Scalia, joined by Justice Thomas, wrote that there was no basis in the text or the principle of the Constitution to extend constitutionally required advice regarding guilty pleas beyond matters germane to the criminal prosecution at hand—more specifically, to the sentence that the plea will produce, to the higher sentence that could result from trial, and to the chances of conviction at trial. *Padilla*, 130 S. Ct. at 1495.

Conclusion

As a practical matter, defense counsel should (1) be sufficiently familiar with immigration law to be able to render correct advice on the immigration consequences of various criminal charges; (2) consult with an immigration attorney when provided with a plea offer from which immigration consequences are, or may be, unclear; or (3) advise the client that a plea may have immigration consequences and refer the client to an immigration attorney for direct consultation about the immigration consequences of the plea. A criminal defense attorney can protect against a claim of ineffective assistance of counsel by providing the noncitizen client with a thorough, well-researched legal opinion of the immigration consequences of the proposed plea.

The Supreme Court's ruling in *Padilla* also affects the practices of prosecutors in that they should consider deportation consequences during the plea negotiations

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filing claims under ERISA to try to recover attorneys' fees based on even low levels of success. For example, the Court noted that it was not determining the issue of whether a remand order automatically constitutes some success on the merits sufficient to justify an award of attorneys' fees. However, in many ERISA cases, it is typical for a court to remand decisions to the plan administrator in order to allow the deficiencies to be cured without further interference from the court. It is not hard to imagine that lower courts will have significant trouble making any determination without a "lengthy inquiry" into the sufficiency of the claimant's success on the merits. Indeed, the Court has provided no standard by which to measure the inquiry. Therefore, a likely consequence could be that some lower courts will determine that remand alone will be an indication of sufficient success on the merits.

Once the determination has been made regarding whether a claimant is entitled seek attorneys' fees, a court must still determine whether or not to actually award such fees. The Court did state that its decision in *Hardt* does not foreclose the possibility that, once a claimant has satisfied the "some success on the merits" requirement, a court may consider the five factors adopted by the Fourth Circuit in *Quesinberry v. Life Ins. Co. of North Am.* when deciding whether to award attorneys' fees.¹⁰ However, the Court stopped short of enunciating these factors as guidelines or requirements.

In leaving the question open, the Court left it to the individual circuits to determine standards for awarding attorneys' fees once a claimant has shown some success on the merits enough to entitle the claimant to seek attorneys' fees under the act. The *Hardt* decision undoubtedly expands the number of claimants entitled to seek attorneys' fees under ERISA, and the district courts will now be the gatekeepers charged with filtering out those who deserve an award of attorneys' fees and those who do not.

During these lean economic times, employee benefits are becoming the subject of more and more litigation. The questions raised—and left unanswered—by the *Hardt* decision may well create a perfect storm for inconsistent decisions from one circuit to the next.

As the issue of what constitutes "some success on the merits" is litigated and re-litigated, employers may face costly consequences as employees recover attorneys' fees for succeeding on some part of their claims. **TFL**

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Endnotes

¹*Hardt v. Reliance Standard Life Ins. Co.*, ___ U.S. ___ (May 24, 2010), full text available at www.supremecourt.gov/opinions/09pdf/09-448.pdf (last visited June 2, 2010).

²*Hardt v. Reliance Standard Life Ins. Co.*, No. 08-1896, 2009 U.S. App. LEXIS 15478 (4th Cir. July 14, 2009).

³*Hardt*, *supra* note 1, at 4.

⁴*Id.* at 7.

⁵*Id.* at 9.

⁶*Id.*

⁷*Id.*

⁸*Id.* at 4.

⁹*Id.* at 12.

¹⁰*Id.* The factors the Fourth Circuit considered were: (1) the degree of opposing parties' culpability or bad faith; (2) ability of opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. *Quesinberry v. Life Ins. Co. of North Am.*, 987 F.2d 1017, 1029 (4th Cir. 1993).

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and be amenable to a disposition that protects the non-citizen defendant's immigration status. As noted by the Supreme Court, thoughtful and effective plea bargaining incorporates the noncitizen defendant's potential deportation consequences in the plea bargaining process so that the eventual plea agreement satisfies the interests of both the state and the defense. *Id.* at 1486. **TFL**

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