

## Outside Counsel

## Expert Analysis

# ‘Padilla v. Kentucky’ and the Hidden Costs of Criminal Conviction

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the U.S. Supreme Court held that an attorney’s failure to render correct legal advice to a noncitizen criminal defendant concerning the deportation consequences of a guilty plea constituted ineffective assistance of counsel under the Sixth Amendment to the U.S. Constitution. This holding, and the rationale underlying it, are already generating far-reaching repercussions for the entire criminal justice system—and, in particular, the criminal defense bar. While criminal defense counsel have felt the most immediate effects, subsequent case law makes clear that trial courts also have the duty to ensure that criminal defendants are properly advised of the important consequences of a guilty plea. Indeed, since *Padilla* was decided, courts around the country have imposed upon the courts and defense counsel alike the duty to advise criminal defendants not only of the deportation consequences of a guilty plea, but of a variety of other consequences that could flow from criminal conviction.

This article discusses the significance of the *Padilla* decision and rationale, examines post-*Padilla* case law in New York and throughout the country, analyzes the implications of *Padilla* and its progeny, and recommends strategies to assist defense counsel in navigating through this uncertain and evolving area of law.

### Direct and Collateral

The *Padilla* decision is particularly significant because it blurred the line between “direct” and “collateral” consequences of criminal conviction, a distinction that traditionally determined whether and to what extent counsel was required to advise a criminal defendant about a particular consequence. Prior to the decision, courts generally

characterized consequences of criminal conviction as either direct or collateral, and attorneys were required to advise defendants only about direct consequences. In *Padilla*, however, the Court noted that it had never recognized a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance required under the Sixth Amendment. While the Court declined to address the propriety of the direct/collateral distinction, *Padilla*’s holding and rationale severely undercut the significance of such a distinction. Indeed, rather than characterizing deportation as a direct or a collateral consequence, the Court held that deportation fell within a new, third category of “unique” consequences that, while not “direct” in the traditional sense, are sufficiently important that they require counsel’s advice.

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The Court’s rationale opens the door for countless other important consequences to fall within *Padilla*’s rubric—a concern expressed by the justices who did not join the majority opinion. For example, as Justice Samuel Alito explains in his concurring opinion: “This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil confinement, civil forfeiture, loss of right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses.” Further, “a conviction for a particular offense may render an alien excludable but not removable...the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States.”

Recognizing these far-reaching implications, courts throughout the country have already recognized that *Padilla*’s rationale can be extended to a wide variety of consequences of criminal conviction outside the context of removal from the United States. One such consequence is exclusion from the United States. See *Gudiel-Soto v. United States*, 2011 WL 256297 (D.N.J. Jan. 25, 2011) (stating as dicta: “Whether a person is removed from the United States or prevented from coming back in makes very little difference in that regard; he is ‘exiled’ either way”).

A second consequence is parole eligibility. Since *Padilla*, at least two courts have held that erroneous advice concerning parole eligibility could constitute ineffective assistance of counsel. See *Webb v. State*, 2011 WL 1157549 (Mo. March 29, 2011) (holding that an attorney’s erroneous advice that his client would be eligible for parole after serving 40 percent of his sentence, when the law actually required him to serve at least 85 percent of his sentence, could constitute ineffective assistance; remanding for an evidentiary hearing on the claim); *Pridham v. Commonwealth*, 2010 WL 4668961, at \*3 (Ky. Ct. App. Nov. 19, 2010) (concluding that “gross misadvice concerning parole eligibility may amount to ineffective assistance of counsel” and remanding for an evidentiary hearing).

A third consequence involves sex offender registration requirements. See *Taylor v. State*, 698 S.E.2d 384, 389 (Ga. App. 2010) (holding that “failure to advise a client that pleading guilty will require him to register as a sex offender is constitutionally deficient performance”); see also *In re C.P.H.*, 2010 WL 2926541, \*6 (N.J. App. Div. July 23, 2010) (stating that “Megan’s Law [mandating registration for certain sex offenders] requirements, especially for a juvenile sex offender, are an important consequence of conviction of a sex crime”).

A fourth consequence is loss of vested pension rights. At least one court has held, relying on *Padilla*, that counsel rendered ineffective assistance by failing to warn a criminal defendant who pleaded

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guilty to indecent assault about the potential loss of his vested teacher's pension rights as a consequence of that conviction. See *Com. v. Abraham*, 2010 WL 2278743 (Pa. Super. June 8, 2010).

A fifth consequence involves adverse effects in future civil litigation. At least one court has found ineffective assistance where a criminal defendant was misinformed that his no contest plea could not be used against him in the expected civil case. See *Wilson v. State*, 244 P.2d 535 (Alaska Ct. App. 2010). As these diverse examples demonstrate, *Padilla's* rationale can and does extend far beyond the context of removal.

### New York Courts

The potential for such an expansion exists in New York as well. While most New York courts that have interpreted *Padilla* have limited its application to the deportation context, the New York Court of Appeals has recently recognized in dicta the potential for the rationale underlying the *Padilla* decision to extend much more broadly. In *People v. Gravino*, 14 N.Y.3d 546 (2010), and *People v. Harnett*, 2011 WL 445643 (Feb. 10, 2011), respectively, the Court of Appeals considered whether a guilty plea could be invalidated because of the trial court's failure to warn a criminal defendant charged with a sex offense of Sex Offender Registration Act (SORA) or Sex Offender Management and Treatment Act (SOMTA) consequences. Reaffirming the direct/collateral distinction, the Court ruled that SORA and SOMTA consequences are collateral and, accordingly, failure to warn a defendant of those consequences is not necessarily grounds for reversing the conviction.

Notably, however, in both *Gravino* and *Harnett* the Court noted that a plea may nevertheless be invalidated where "a defendant can show that he pleaded guilty in ignorance of a consequence that, although collateral for purposes of due process, was of such great importance to him that he would have made a different decision had that consequence been disclosed." According to the Court, SOMTA consequences could be sufficiently important to a particular defendant that a court's failure to advise about such consequences could render the plea involuntary and therefore warrant invalidating the plea.

Furthermore, the Court recognized that whether a plea could be invalidated on voluntariness grounds is "closely linked" to whether the defendant received the effective assistance of counsel, because in either case the defendant would have to prove that he was unaware of the consequence at issue. While technically dicta, this language foreshadows the approach the Court of Appeals would likely employ in cases questioning the sufficiency of advice given by courts and counsel to criminal defendants concerning important consequences of criminal conviction.

The approach outlined by the Court of Appeals in *Gravino* and *Harnett* is significant because, similar to *Padilla*, it could potentially impose upon courts and counsel the duty to render correct advice to a criminal defendant regarding a wide range of consequences of criminal conviction that may be important to that defendant's decision whether to plead guilty. This is no small task. Over the past 20 years, federal and state legislatures and administrative agencies have added thousands of statutory and regulatory consequences of criminal convictions. Even a cursory review of these statutes and regulations demonstrates that they are not only numerous and highly complex, but also confusing, as they consistently cross-reference each other and different statutes and regulations. See generally <<http://isrweb.isr.temple.edu/projects/accproject/searchagain.cfm>> (database sponsored by the American Bar Association that allows searches of adult criminal consequences by state). In New York alone, the federal and state consequences of criminal conviction number in the thousands.

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Since 'Padilla' was decided, courts around the country have imposed upon the courts and defense counsel alike the duty to advise criminal defendants not only of the deportation consequences of a guilty plea, but of a variety of other consequences that could flow from criminal conviction.

What should defense counsel do? In order to meet the daunting responsibility potentially imposed upon them by *Padilla* and its progeny, defense counsel must begin by getting to know their client, their client's situation, and the types of consequences that may be important to their client. As post-*Padilla* case law demonstrates, and Justice Alito's concurring opinion in *Padilla* suggests, these consequences could include immigration issues, parole eligibility, sex offender registration requirements, civil confinement, civil forfeiture, loss of civil rights (such as voting rights), disqualification from public benefits, impact on future civil litigation, loss of financial aid for higher education, loss of the ability to engage in hobbies (such as gun ownership), dishonorable discharge from the Armed Forces, and loss of business or professional licenses.

If any of these or other consequences are "important" to the client in light of his particular circumstances, defense counsel should—at a minimum—inform the client that there is a risk of such a consequence occurring. More specific advice may be required, depending upon the circumstances. In all instances, counsel should carefully document the advice given to each client

concerning any and all potential consequences of conviction, as well as the reasons for giving such advice.

### Conclusion

Blurring the previous distinction between "direct" and "collateral" consequences, *Padilla* and its progeny, including recent New York Court of Appeals decisions, potentially require criminal defendants to be advised correctly about any number of consequences of criminal conviction that may be important to a particular defendant's decision whether to plead guilty. Until there is more clarity from the courts, whether a particular consequence meets these thresholds is uncertain and necessarily dependent upon the offense, criminal defendant, and type of consequence at issue.

What is clear, however, are the continuing risks for all participants in the criminal justice system. Defendants in criminal cases continue to face the dangerous prospect of entering guilty pleas without understanding all the important consequences that could flow from conviction. Defense counsel could increasingly face ineffective assistance and legal malpractice claims for failing to render correct advice about all consequences of conviction that may be important to a particular client.

Prosecutors and courts are already being forced to duplicate their efforts in re-trials due to invalidation of guilty pleas and reversal of convictions where defendants were not properly advised of the consequences of conviction. Finally, these risks affect society at large, which has an interest in the finality of convictions and the sound and efficient administration of justice.