New Duties for Criminal Defense Counsel Under *Padilla v. Kentucky*

by Nate Nieman

According to the United States Supreme Court's recent decision in *Padilla v. Kentucky*,[1] defense attorneys must now be well-versed in not only criminal law and procedure, but immigration law as well. The *Padilla* decision, which Justice Alito calls in his concurrence "a major upheaval in Sixth Amendment law,"[2] now requires defense counsel to advise defendants of the effect their guilty plea will have on their immigration status.[3] Illinois case law did not require this of defense counsel prior to *Padilla*.[4] This article discusses Illinois case law on this issue prior to *Padilla*, the *Padilla* holding and the criticisms provided by Justice Alito in his concurrence and Justice Scalia in his dissent. This article then provides a synthesis of the *Padilla* rule and the surviving duties under Illinois case law, giving defense counsel guidance on their duties to advise after *Padilla*, and discusses resources defense counsel may consult to satisfy their post-*Padilla* duties to their clients.

Defense Counsel's Duties to Advise Regarding Immigration Consequences of Guilty Plea Prior to *Padilla*

The Illinois Supreme Court first addressed the issue of whether defense counsel must inform a defendant of the effect that his guilty plea would have on his immigration status in *People v. Correa*.[5] In *Correa*, defense counsel erroneously advised the defendant prior to pleading guilty that his plea would not affect his immigration status because the defendant's wife was a U.S. citizen.[6] The court held that defense counsel's "erroneous and misleading" advice constituted ineffective assistance of counsel and that the defendant's plea was therefore involuntarily made.[7]

Subsequently, in *People v. Padilla*,[8] the Illinois Appellate Court, First District, using the *Strickland* test,[9] extended the holding of *Correa* to cases where defense counsel knows that the defendant is an alien but fails to advise him on the immigration consequences of his guilty plea.[10] Defense counsel's duty was broadened even further in *People v. Huante* (hereinafter "*Huante I*"),[11] where the court held that defense counsel must advise the defendant on the immigration consequences of his guilty plea if defense counsel *knew or should have known* that his client was an alien.[12] *Huante I* reached the Illinois Supreme Court one year later, where the court departed from the trend established in *People v. Padilla*.[13] In *People v. Huante* (hereinafter "*Huante II*"), the Illinois Supreme Court reversed the First District's decision, holding that failure to advise the defendant on the immigration consequences of his guilty plea does not constitute ineffective assistance of counsel because such consequences are collateral to the guilty plea and therefore fall outside of the ambit of defense counsel's duties to his client.[14]

The standard announced in *Huante II* would remain undisturbed until the U.S. Supreme Court's 2010 decision of *Padilla v. Kentucky*, with two appellate court decisions citing *Huante II* during the interim nineteen years.[15] The court in *People v. Bouzidi*, observed that the Illinois Supreme Court had made a puzzling decision in *Huante II* by not disapproving of the *Correa* decision as it had done by disapproving of *Maranovic*, *Miranda*, and *People v. Padilla*.[16] Though the *Bouzidi* court declined to "resolve this particular puzzle" because the case before it only concerned failure to give advice and not the giving of erroneous advice,[17] the *Huante II* court's failure to disapprove of *Correa* is not, in fact, so puzzling, even though *People v. Padilla* and its progeny crafted their rule by extending the *Correa* decision. This is because *Correa* concerns erroneous advice, not failure to give advice. Therefore, under either *Correa* or *Huante II*, it would not be ineffective assistance of counsel if defense counsel failed to give advice to the defendant regarding the immigration consequences of his plea. However, if counsel *did* choose to give that advice, and it turned out to be erroneous, *that* would, pursuant to *Correa*, constitute ineffective assistance of counsel. Under this rule, then, to avoid rendering ineffective assistance to the defendant, defense counsel need only advise on the immigration consequences of his client's guilty plea if the attorney is certain that his advice is legally accurate. While this rule appears reasonable on its face, it is precisely this formulation of the rule that the United States Supreme Court would later attack and upend in *Padilla v. Kentucky*.[18]

Padilla v. Kentucky

The facts of *Padilla v. Kentucky* are similar to both the *Correa* line of cases concerning erroneous advice and the *Huante II* line of cases concerning failure to give advice. In *Padilla*, the defendant, a lawful permanent resident in the United States, was facing deportation after pleading guilty to drug trafficking.[19] The defendant claimed that his defense counsel "not only failed to advise him of this [immigration] consequence prior to entering his plea, but also told him that 'he did not have to

worry about immigration status since he had been in the country so long.'"[20] The defendant, relying on his counsel's advice, plead guilty to drug charges that made his deportation "virtually mandatory."[21] The defendant alleged "that he would have insisted on going to trial if he had not received incorrect advice from his attorney."[22] The Kentucky Supreme Court denied the defendant post-conviction relief, holding that "neither counsel's failure to advise the petitioner about removal, nor counsel's incorrect advice, could provide a basis for relief" because deportation is a collateral consequence of his conviction.[23]

The U.S. Supreme Court granted certiorari, but it confined the issue to whether defense counsel "had an obligation to advise [defendant] that the offense to which he was pleading guilty would result in his removal from the country," declining to address the erroneous advice issue.[24] The Court held that defense counsel's assistance was ineffective, and that the defendant's plea was therefore involuntary, because "counsel must inform her client whether his plea carries a risk of deportation."[25] The rule that the Court created for these types of cases, however, is not as clear as the Court's holding.

The Solicitor General, in its amicus brief, urged the Court to adopt a rule that mirrors the rule in Illinois prior to *Padilla v. Kentucky*: "'counsel is not constitutionally required to provide assistance on matters that will not be decided in the criminal case . . .,' though counsel is required to provide accurate advice if she chooses to discusses [sic] these matters."[26] The Court, however, rejected the Solicitor General's proposed rule, reasoning that it would "give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'"[27] Secondly, "it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available."[28] While the Court provided no clearly defined alternative rule in its decision, Justice Alito, in his concurrence, pieces together the majority's rule as thus:

Where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[s]" of a conviction, the Court says, counsel has an affirmative duty to advise the client that he will be subject to deportation as a result of the plea. But "[w]hen 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."[29]

This mandate, as Justice Alito notes,[30] creates a host of confusing problems for the criminal defense attorney, as well as complicating the already existing duties of defense attorneys established by Illinois case law.

Analysis

Prior to *Padilla v. Kentucky*, Illinois defense attorneys were not obligated to advise clients on the immigration consequences of their guilty pleas,[31] but if they did, their advice had to be legally accurate.[32] Now, *Padilla* has created a duty to advise clients on immigration consequences of guilty pleas where, after *Huante II*, there had been no such duty. After *Padilla*, if the relevant immigration statute is "'succinct, clear, and explicit in defining the removal consequence[s]' of a conviction," the defense attorney is obligated to advise the defendant on the removal consequences of his guilty plea.[33] If the statute is "not succinct and straightforward" the attorney must merely advise that "pending criminal charges may carry a risk of adverse immigration consequences."[34] The obviously troubling aspect of this mandate is, as Justice Alito observes, that "it will not always be easy to tell whether a particular statutory provision is 'succinct, clear, and explicit,'" especially for an attorney who "lacks general immigration law expertise,"[35] which a criminal defense attorney is "not expected to possess—and very often do[es] not possess."[36] The effect of *Padilla*, then, will be that criminal defense attorneys must now become more than just casually acquainted with immigration statutes and case law that pertain to removal in connection with criminal convictions. This, as Justice Alito explains in length in his concurrence, is no small feat when immigration law is so complex, unsettled, and often contradictory.[37]

Padilla's requirement that defense attorneys counsel their clients on the possible immigration consequences of entering a guilty plea abrogates the rule in *Huante II*, which states that defense counsel need not provide such advice.[38] The *Padilla* holding, however, is confined to the issue of whether it is ineffective assistance of counsel for a defense attorney to fail to give advice regarding these consequences. The *Padilla* decision is silent on whether it is ineffective assistance for defense counsel to provide erroneous advice on immigration consequences. So while the *Padilla* decision acts to abrogate *Huante II* and its progeny, the *Correa* rule remains intact because the Supreme Court chose not to address it. In Illinois, then, *Padilla* and *Correa* combine to create the following rule:

Defense counsel must advise her client on the immigration consequences of his guilty plea if the applicable immigration statute is succinct, clear, and explicit. When the applicable immigration statute is not succinct, clear, and explicit, defense counsel must advise her client that his pending criminal charge could have adverse immigration consequences. Whether defense counsel's advice is specific (where the statute is clear) or general (where the statute is unclear),

the advice must be legally accurate. Where defense counsel fails to give the appropriate specific or general advice, or where the advice given is legally erroneous, defense counsel's assistance will be deemed ineffective, and any guilty plea made in reliance on counsel's ineffective assistance will therefore be deemed involuntary.

This rule is a severe departure from pre-*Padilla* case law in Illinois. It creates a burden, rooted in the Constitution, on criminal defense attorneys to gain expertise in an area of law which is only tenuously connected to their field. While critics may argue that criminal defense attorneys need only focus on the few statutes that concern removal in connection with criminal convictions, there is an entire body of case law committed to deciphering what terms such as "moral turpitude" or "aggravated felony" mean within immigration statutes.[39] It is therefore unreasonable for the Supreme Court to require defense attorneys to understand the complicated and nuanced area of immigration law--that even its practitioners cannot pin down[40]--in order to avoid providing ineffective assistance of counsel to their clients.

The Illinois Appellate Court, Second District, echoed this concern twenty years ago in *People v. Mehmedoski*,[41] when the court held that defense counsel was not required to advise his client of the impact his guilty plea would have on his deportation proceeding because "the practical effect of a rule which would require attorneys to inform their clients of the incidents and collateral consequences of deportation proceedings would be to require attorneys in criminal proceedings to have knowledge and expertise in the intricacies of immigration law and procedure. Such a rule would create an unwarranted burden and we decline to adopt it." While *Padilla* requires defense counsel to advise the defendant on the consequences that his guilty plea will have on his immigration status and not the consequences that it will have on subsequent deportation proceedings, the same rationale applies. Criminal defense attorneys must now become the experts in immigration law that Illinois courts refused to require them to become prior to *Padilla*.

The *Padilla* decision also possibly foreshadows future decisions in which the Roberts Court may require defense counsel to advise clients on other collateral consequences beyond immigration consequences. The *Padilla* Court's reasoning rests on the principle that, to a defendant, immigration consequences can be just as important, if not more important, than the possibility of imprisonment.[42] However, as Justice Scalia notes in his dissent, "'[W]e have held that 'defence' [in the Sixth Amendment's language] means defense at trial, not defense in relation to other objectives which may be important to the accused.'"[43] The *Huante II* court used similar reasoning in reaching its decision, noting other important collateral consequences that defense counsel need not counsel his client on that "might be as serious to another defendant as deportation may be to this defendant."[44] A guilty plea carries with it numerous legal and personal consequences which affect each defendant differently. If the Supreme Court is willing to classify immigration consequences as "important" enough to require legal advice, it may begin classifying consequences such as loss of voting rights, employment opportunities, driving privileges, and the freedom to travel as "important" enough collateral consequences to require defense counsel to apprise the defendant of the impact of his guilty plea on these freedoms because, as Justice Scalia observes, "Adding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping point." These added duties will burden criminal defense attorneys with advising clients on the myriad consequences which may be unfamiliar to a criminal defense attorney and which may, therefore, be unforeseen.

Conclusion

Whether or not it is unreasonable to require a defense attorney to gain expertise in immigration law, defendants, after *Padilla*, will now be able to claim ineffective assistance of counsel if their defense counsel did not advise them of the immigration consequences of their guilty pleas or gave erroneous advice on that issue. While the Supreme Court does not anticipate "a flood" of these claims following *Padilla*,[45] the requirement that the advice be provided, combined with the requirement in *Correa* that it be accurate, now requires criminal defense attorneys to educate themselves on the impact of guilty pleas on a defendant's immigration status. An excellent resource for defense counsel to begin with is Maria Theresa Baldini-Potermin's free manual,[46] which provides defense counsel with the information the *Padilla* Court expects defense counsel to know.

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1 559 U.S. __, No. 08-651 (Mar. 31, 2010).
2 *Padilla v. Kentucky*, No. 08-651, slip op. at 9 (U.S. Mar. 31, 2010) (Alito, J. concurring).
3 *See Padilla v. Kentucky*, No. 08-651, slip op. at 17 (U.S. Mar. 31, 2010).
4 *See*, *e.g.*, *People v. Huante*, 571 N.E.2d 736 (Ill. 1991).
5 485 N.E.2d 307 (Ill. 1985).
6 *People v. Correa*, 485 N.E.2d 307, 309 (Ill. 1985).
7 *Id.* at 312; *see also People v. Lotero*, 560 N.E.2d 1104, 1106 (Ill. App. 1990) (citing *Correa* to reach the same result in factually identical case).
8 502 N.E.2d 1182, 1186 (Ill. App. 1986).
9 *See Strickland v. Washington*, 466 U.S. 668, 688-94 (1984) (Defendant must show that (1) defense "counsel's representation fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for defense counsel's unprofessional errors, the result of the proceedings would have been different." The *Strickland* test was applied to the plea process in *Hill v. Lockhart*, 474 U.S. 52, 56, 106 (1985), where the Court modified the second prong of the

test to require a showing "that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.").
[10] *Padilla*, 502 N.E.2d at 1186; *see also People v. Miranda*, 540 N.E.2d 1008, 1014 (Ill. App. 1989) (citing *Padilla* to reach the same result).
[11] 550 N.E.2d 1155 (1st Dist. 1990).
[12] *Id.* at 1159 (citing *Correa*, *Padilla*, & *Miranda*); *see also People v. Maranovic*, 559 N.E.2d 126, 128 (Ill. App. 1990); *People v. Luna*, 570 N.E.2d 404, 407 (Ill. App. 1991) (citing *Huante I* for the same principal).
[13] *See People v. Huante*, 571 N.E.2d 736, 742 (Ill. 1991) (noting the disapproval of *Maranovic*, *Miranda*, and *Padilla* "to the extent that those decisions are inconsistent with our present opinion.")
[14] *Id.* at 741.
[15] *See People v. Bouzidi*, 773 N.E.2d 699, 706 (Ill. App. 2002) (citing *Huante* for principal that failure to advise defendant on immigration consequences of defendant's guilt does not constitute ineffective assistance of counsel); *People v. Pequeno*, 786 N.E.2d 1071, 1076 (Ill. App. 2003) (same).
[16] *Bouzidi*, 773 N.E.2d at 706.
[17] *Id.*
[18] *See Padilla v. Kentucky*, No. 08-651, slip op. at 13 (U.S. Mar. 31, 2010).
[19] *Id.* at 1.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id*. at 2.
[24] *Padilla v.Kentucky*, No. 08-651, slip op. at 2 (U.S. Mar. 31, 2010).
[25] *Id.* at 17.
[26] *Id*. at 12 (citing Brief for United States as Amicus Curiae, 10).
[27] *Id*. at 13 (quoting *Libretti v. United States*, 516 U.S. 29, 50-51 (1995)).
[28] *Padilla v. Kentucky*, No. 08-651, slip op. at 13 (U.S. Mar. 31, 2010).
[29] *Padilla v. Kentucky*, No. 08-651, slip op. at 7 (U.S. Mar. 31, 2010) (Alito, J. concurring).
[30] *See id.* at 4-7.
[31] *Huante*, 571 N.E.2d at 741.
[32] *Correa*, 485 N.E.2d at 312.
[33] *See Padilla v. Kentucky*, No. 08-651, slip op. at 11 (U.S. Mar. 2010).
[34] *See id*. at 11-12.
[35] *See Padilla v. Kentucky*, No. 08-651, slip op. at 7-8 (U.S. Mar. 31, 2010) (Alito, J. concurring).
[36] *Id.* at 2.
[37] *See id.* at 4-7.
[38] *Huante*, 571 N.E.2d at 741.
[39] *See Padilla v. Kentucky*, No. 08-651, slip op. at 4-6 (U.S. Mar. 31, 2010) (Alito, J. concurring).
[40] *See id.*
[41] 565 N.E.2d 735, 738 (Ill. App. 1990).
[42] *See Padilla v. Kentucky*, No. 08-651, slip op. at 10 (U.S. Mar.31, 2010) (citing *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)).
[43] *Padilla v. Kentucky,* No. 08-651, slip op. at 2 (U.S. Mar. 31, 2010) (Scalia, J., dissenting) (quoting *Rothgery v. Gillespie County*, 554 U.S. 191 (2008) (Alito, J., concurring); *see also Padilla v. Kentucky*, No. 08-651, slip op. at 2-3 (U.S. Mar. 31, 2010) (Alito, J., concurring) (discussing several other adverse consequences arising from guilty pleas which do not require counsel's advice).
[44] *Huante*, 571 N.E.2d at 741 (citing *U.S. v. Cairiola*, 323 F.2d 180 (3d Cir. 1963) (loss of right to vote); *U.S. v. Crowley*, 529 F.2d 1066 (3d Cir. 1976) (loss of civil service employment); *Moore v. Hinton*, 513 F.2d 781 (5th Cir. 1975) (loss of right to driver's license); *Meaton v. U.S.*, 328 F.2d 379 (5th Cir. 1964) (loss of right to travel freely abroad)).
[45] *See Padilla v. Kentucky*, No. 08-651, slip op. at 14 (U.S. Mar. 31, 2010).
[46] Maria Theresa Baldini-Potermin, Defending Non-Citizens in Illinois, Indiana, and Wisconsin (2009), *available at* http://www.immigrantjustice.org/resourcesattorneys/attorneysdocs/defendersmanual.html.

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