



## A New Constitutional Mandate for Defense Counsel

**Author :** Jeff Welty

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by School of Government Immigration Law Specialist Sejal Zota

Is defense counsel constitutionally obligated to inform a noncitizen criminal defendant whether his guilty plea carries a risk of deportation? Yesterday, the United States Supreme Court said yes in a case called [Padilla v. Kentucky](#).

In *Padilla*, the petitioner—a lawful permanent resident (green card holder) for over 40 years and Vietnam veteran—faced drug-distribution charges in a Kentucky trial court. His attorney advised him to plead guilty in exchange for a lighter sentence and not “to worry about [deportation] since he had been in the country so long.” Padilla took this advice. When he learned that his lawyer’s immigration advice was wrong and he would face deportation for his conviction, he sought to overturn it by arguing that he would have gone to trial but for counsel’s incorrect advice. The Supreme Court of Kentucky rejected his claim, holding that advice about deportation is a “collateral consequence” of conviction, and outside the scope of representation required by the Sixth Amendment.

Holding that deportation is an integral part of the penalty that may be imposed on noncitizen criminal defendants, the United States Supreme Court reversed. The Court found that the protections of *Strickland v. Washington*, 466 U.S. 688 (1984)—which entitle criminal defendants to effective assistance of counsel before deciding to plead guilty—apply to advice regarding deportation. The Court also found the Kentucky court’s distinction between direct and collateral consequences was beside the point.

In evaluating Padilla’s ineffectiveness claim, the Court found that counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms—“This is not a hard case in which to find deficiency: The consequences of Padilla’s plea could be easily determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.” Clear and unambiguous immigration law made the crime of drug distribution to which Padilla pled guilty a basis for deportation of noncitizens because it relates to a nontrivial possession of a controlled substance.

The Court’s ruling yesterday did not wholly resolve Padilla’s claim. The Court declined to address whether he had been prejudiced by his attorney’s actions and remanded for further proceedings. In assuaging a “floodgates” concern, the Court held that to establish prejudice, a reviewing court must be convinced that a petitioner’s decision to reject a plea bargain would have been rational under the circumstances.

What’s interesting about this case is the Court could have limited the holding to “affirmative misadvice”—finding representation may be constitutionally deficient only when defense counsel *actually* provides advice about deportation and that advice is patently wrong. Before yesterday, many state and federal courts had long held such a view. But instead, the Court’s ruling recognized the seriousness of deportation as a consequence of a criminal plea, and now obligates defense counsel to inform noncitizen clients about the risk of deportation. The Court has given defense counsel across the Nation an important responsibility that many had already undertaken in cooperation with immigration attorneys. But it will not always be an easy task.

“When the deportation consequences are truly clear, the duty to give correct advice is equally clear.” As someone who

regularly consults in this area, I can tell you that determining deportation consequences can be complex stuff. Deportation may depend on various factors such as a client's immigration status; the length of sentence; whether the state offense falls under broad grounds of deportation like crimes involving moral turpitude, whether a state disposition will be treated as a conviction for immigration purposes ... you get the picture. It may often be the case that the deportation consequences of a particular plea are unclear to defense counsel. In those instances, the Court places a lesser burden on defense counsel: when the deportation consequences of a particular plea 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."

Fortunately, many defender offices around the country, including in North Carolina, are ahead of the curve. Many already train staff on immigration consequences with the help of networks of experts. Foreshadowing the Padilla decision, the School of Government has already published a manual on the [Immigration Consequences of a Criminal Conviction in North Carolina](#). It appears that the manual may become required reading for the criminal defense bar. I am also available to help public defenders and assigned counsel determine the immigration consequences of convictions.