



PADILLA V. KENTUCKY:
THE NEW YORK CITY CRIMINAL COURT SYSTEM,
ONE YEAR LATER

**A Report of the Criminal Courts and
Criminal Justice Operations Committees
of the New York City Bar Association**

I. Introduction

On March 31, 2010, the United States Supreme Court decided *Padilla v. Kentucky*, holding that criminal defense attorneys have a Sixth Amendment duty to advise noncitizen defendants about the immigration consequences of their criminal convictions.¹ The Court recognized that many criminal convictions—including misdemeanors and lesser offenses—are grounds for deportation and other severe consequences under federal immigration law.² Given the interrelationship between criminal and immigration laws, the Court observed that “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.”³ The Court examined prevailing professional norms and concluded that they require defense counsel to investigate and advise clients of any immigration consequences they may face as a result of potential dispositions in their criminal cases.⁴ As the Supreme Court recognized, “informed consideration” of these consequences encourages both the defendant and the prosecution to “reach agreements that better satisfy the interests of both parties” in the plea-bargaining process.⁵

In many ways, *Padilla* has reaffirmed longstanding practices valued in the criminal justice system in New York City. New York City has a significant immigrant population for whom immigration penalties often matter more than the criminal penalties associated with

¹ *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

² *Id.* at 1488-89.

³ *Id.* at 1480.

⁴ *Id.* at 1482-83.

⁵ *Id.* at 1486.

criminal charges.⁶ For years, many New York criminal defense attorneys have investigated and advised their clients about the immigration consequences of their pleas and convictions.⁷ When approached by defense counsel with immigration-related concerns, many New York district attorney's offices have considered those consequences on a case-by-case basis in plea bargaining. Criminal court judges, too, have accounted for immigration consequences in accepting pleas and/or rendering sentencing decisions in many instances.

There can be no doubt, however, that *Padilla* represents a significant shift from the previous precedent governing how various entities within the criminal justice system must approach immigration issues in New York. Prior to *Padilla*, New York state and federal case law on this issue was more limited in scope. Under pre-*Padilla* case law, defense counsel had a duty not to *misadvise* noncitizens about the immigration consequences of their pleas and convictions.⁸ However, older New York state case law held that there was no affirmative duty to advise immigrants of the immigration consequences of their pleas and convictions.⁹ This old rule created a Catch-22 for defense counsel. If they chose to advise their clients of immigration consequences, they risked a claim of ineffective assistance if they got that advice wrong. If they did not choose to advise their clients, defense counsel would risk nothing—but, of course, their clients would not receive the benefit of knowing whether or not a particular plea would result in deportation, detention, ineligibility to naturalize, and other severe consequences. *Padilla* resolves this problem by recognizing that the Sixth Amendment does require affirmative advice.

Padilla also potentially calls into question the role of New York criminal courts in this process. Under New York law, New York criminal courts are required to advise defendants that a plea may result in immigration consequence in the case of felony charges only.¹⁰ Moreover, the New York law further provides that the absence of such a warning does not provide any basis for a vacatur of a plea.¹¹ While *Padilla* did not address the role of judges in the process, it does

⁶ Approximately thirty-six percent of New York City residents are foreign-born. See U.S. Census Bureau, American Community Survey, New York City 2009.

⁷ Even before *Padilla*, the New York State Bar Association's Performance Standards for Providing Mandated Representation stated that "zealous, effective and high quality representation" includes, "at a minimum," "[o]btaining all available information considering the client's background and circumstances for purposes of . . . avoiding, if at all possible, collateral consequences including, but not limited to, deportation" and "[p]roviding the client with full information concerning such matters as . . . immigration . . . under all possible eventualities." New York State Bar Association, Performance Standards for Providing Mandated Representation, Standard I-7(A)(V) & (e)(V) (2005).

⁸ *People v. McDonald*, 1 N.Y.3d 109, 115 (2003); see also *United States v. Couto*, 311 F.2d 179, 188 2d Cir. 2002) (holding that "affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable").

⁹ *People v. Ford*, 86 N.Y.2d 397 (1995).

¹⁰ N.Y. C.P.L. 220.50(7).

¹¹ The law specifically states that "[t]he failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction, nor shall it afford a defendant any rights in a subsequent proceeding relating to such defendant's deportation, exclusion or denial of

reinforce a longstanding criticism of the current New York law: that by focusing only on felony cases, the New York law itself may create the misimpression that only felonies lead to deportation and other immigration penalties.¹² Many misdemeanor and even noncriminal violations under New York law carry immigration consequences.¹³ In any event, by most accounts, the New York law has not been widely implemented. Most courts had not provided standard immigration warnings even in felony cases, and, as the language of the statute provides, there was no consequence for failing to do so. It remains unclear whether, and to what extent, *Padilla* means that courts should take a more active role in ensuring that defense counsel are meeting their obligations in advising their clients of immigration consequences.

Finally, *Padilla* has also ushered in more motions for vacatur of past pleas under N.Y. C.P.L. 440. This has sparked some debate in New York courts regarding whether *Padilla* is “retroactive,” with the most recent appellate decision holding that *Padilla* may be used to vacate pleas taken prior to the decision.¹⁴ Without weighing in on the legal question, it is certainly clear that the increase in 440 motions has a practical effect for the various entities within the criminal justice system and is part of the story of how *Padilla* is being implemented today.

One year has passed since *Padilla* was decided by the Supreme Court on March 31, 2010, and much is left to be debated and decided within our court system. This preliminary report attempts to identify some of the practices, challenges, and questions that have arisen in the wake of *Padilla* in New York City. While this report does not attempt to answer or resolve these issues, it does include some recommendations for ensuring that all of the various entities within the criminal justice system continue to consider these issues carefully and in a collaborative manner.

II. Initial Findings on the Impact and Implementation of *Padilla* in the New York City Criminal Court System

A. Criminal defense counsel

Padilla implementation has taken three main forms within the criminal defense community: (a) trainings for criminal defense counsel about the immigration consequences of pleas and convictions, (b) developing in-house expertise and support on immigration consequences within institutional defenders’ offices, and (c) providing the individual, case-by-case investigation, advisal, and plea-bargaining with respect to immigration consequences. In

naturalization.” *Id.*

¹² See, e.g., New York City Bar Association, *The Immigration Consequences of Deferred Adjudication Programs in New York City* 10 (June 2007).

¹³ See, e.g., Manuel Vargas, *Immigration Consequences of Guilty Pleas or Convictions*, 30 N.Y.U. REV. L. & SOC. CHANGE 701 (2006) (describing how New York misdemeanors, violations, and in some instances, dispositions that are not considered “convictions” under New York State law, are nonetheless deemed removable offenses).

¹⁴ *People v. Nunez*, 917 N.Y.S.2d 806 (App. Term, 2d Dept., 2010).

addition, institutional providers who work on 440 motions—or respond to 440 motions against their offices—address *Padilla* issues in that context as well.

Trainings. Institutional defender offices, bar associations, and others have taken a proactive role in providing trainings on the immigration consequences of criminal pleas and convictions for defense attorneys in the city. The Legal Aid Society, for example, organized four one-day trainings for their criminal defense attorneys, appellate attorneys and support staff titled “Fulfilling our Sixth Amendment Duty Post-*Padilla v. Kentucky*.” New York County Defender Services has had three CLE sessions for all legal staff. These offices and others have also sent attorneys to local and/or national training programs.

For assigned counsel, the First and Second Departments have also co-sponsored a 2 hour training session on *Padilla* entitled “Representing Immigrant Defendants: *Padilla v Kentucky* and the Duty of Immigration Advisal” and plan to provide ongoing CLE trainings to assist 18-b lawyers in fulfilling their duties. Many defense attorneys express concern about whether 18-b attorneys have sufficient training and support to engage in an analysis of immigration consequences and have suggested more support for such training.

Several bar associations have made *Padilla* trainings available to interested members, including public defenders and assigned counsel. Post-*Padilla* immigration trainings and CLEs have been organized by the New York City Bar Association, Bronx County Bar Association, New York County Lawyers’ Association, New York Criminal Bar Association, and New York State Defenders Association. Several other bar associations indicated that they would be willing to organize future trainings on *Padilla*.

In addition, nonprofit organizations and groups like the Immigrant Defense Project and CUNY Law School’s Community Legal Resource Network have provided CLEs and other trainings to criminal defense attorneys.

In-house expertise and support. Several institutional defender offices have in-house immigration experts who provide direct advice and support to defense counsel on immigration issues. These offices include: Bronx Defenders, Brooklyn Defender Services, The Legal Aid Society, and Neighborhood Defender Service of Harlem. Several of these offices report hiring additional staff after *Padilla* in order to meet the increased demand for immigration advice. Other offices report that they are in the process of new hiring to meet this need.

In addition to hiring attorneys with immigration expertise, defender offices also report that fostering immigration expertise among arraignment staff and paralegal assistance is also key to ensuring compliance with *Padilla*. Several defender offices are in the process of seeking funding and support for both new attorneys and staff.

Several public defender offices also reported that they ensure that attorneys and staff have access to written materials and guides to help their analysis of criminal convictions. Several offices use reference guides compiled by immigration specialists in-house or through a nonprofit organization, the Immigrant Defense Project, to assist them in navigating arraignment

dispositions and plea offers. Offices also discussed how they have adapted their arraignment interview process to account for immigration issues. New York County Defender Services, for example, revised their criminal court folders to include a *Padilla* checklist to be completed during the arraignment interview.

For the many criminal defense attorneys in New York City who do not have the benefit of in-house support, they may avail themselves of the Immigrant Defense Project. The Immigrant Defense Project operates a hotline (212-725-6422) to answer questions from defendants, criminal defense attorneys, and others. It also provides trainings and publishes a manual, *Representing Immigrant Defendants in New York*, which includes a chart that outlines possible immigration consequences for many common New York criminal pleas.¹⁵

Case-by-case implementation. Criminal defense attorneys have the ultimate duty to carry out *Padilla* by investigating immigration consequences, advising their clients, and using that information as part of the plea-bargaining process. On a case-by-case basis, many criminal defense attorneys report success in addressing these issues through plea bargaining to eliminate or mitigate immigration consequences. Several institutional defender organizations report that their attorneys often work with prosecutors to obtain appropriate plea bargains through phone calls, written submissions (letters and supporting documents) and in-person meetings. These efforts may include seeking a plea to a lesser-included offense or mutually satisfactory alternative offense that avoids deportation consequences altogether or ensures eligibility for discretionary relief from removal before an immigration judge. Attorneys also work with criminal court judges on these issues, including through the presentation of written sentencing and other legal memoranda specific to individual clients. Many criminal defense attorneys report, however, that prosecutors' and judges' willingness to engage in or accommodate the mitigation of immigration penalties following *Padilla* varies greatly depending on the individual Assistant District Attorney or judge (in addition to variations based on the individual facts of the defendant's case).

440 motions. As noted in greater detail below, *Padilla* has sparked an increase in 440 motions raising ineffective assistance of counsel claims against defense attorneys who failed to advise or misadvised their clients regarding immigration consequences. Some defense counsel offices have pursued 440 motions on behalf of their clients. However, most offices will not bring 440 motions where ineffective assistance of counsel is alleged against their own attorneys because they view it as a conflict of interest.

Many defense counsel offices have also been reviewing their files in response to 440 motions leveled against their attorneys. Some institutional defender offices report having a policy of providing supportive affidavits when a 440 motion is leveled against their attorneys and the files indicate that no immigration advice was given in that case. Other institutional defender offices do not provide supporting affidavits but will respond to court requests for information. Many defense attorneys report handling these motions on a case-by-case basis.

¹⁵ Manuel Vargas, Immigrant Defense Project, *Representing Immigrant Defendants in New York* (4th Ed. 2006).

B. District Attorney's offices

District Attorney's offices have addressed *Padilla* in two main ways: (a) case-by-case consideration and plea-bargaining with respect to immigration consequences, and (b) some written warnings and defendant outreach on *Padilla* issues. In addition, each of the District Attorney's offices also handles the 440 motions that raise *Padilla* issues.

Case-by-case consideration. District Attorney offices report considering questions of immigration consequences that arise during plea bargaining on a case-by-case basis. Some offices noted that they have seen an increase in these issues being raised, usually due to increased awareness on the part of certain defense counsel.

Written warnings. Three offices, New York County District Attorney's Office, Queens County District Attorney's Office, and the Office of the Special Narcotics Prosecutor, have issued their own written advisals, indicating that convictions may lead to immigration consequences and listing types of offenses that may trigger these consequences. The language and the list of sample offenses are somewhat different on the forms (the New York County and the Office of the Special Narcotics Prosecutor forms share the same language; both differ from the language in the Queens County form). The New York County District Attorney's Office provides the form to defense counsel at the time of felony indictment in Supreme Court only. The Queens County District Attorney's Office provides the form to defense counsel at the time of the plea allocation in misdemeanor and felony cases in Criminal Court and Supreme Court, and in some but not all cases involving violations. The Office of the Special Narcotics Prosecutor provides the form to defense counsel at the time of arraignment in all cases that they handle in Supreme Court and prior to the plea allocation in Part N cases. All three offices indicate that they generally note on the record that they have served the defendant through counsel with a notice of immigration consequences.

Some defense attorneys and immigration experts have expressed concerns about the written advisals because they list only some grounds of deportation and may be misread by defendants to suggest that some charges are "safe" when they are not. Conversely, some offenses listed in the forms as grounds for deportation might be "safe" for some defendants.

440 motions. Each District Attorney's office reported seeing 440 motions based on immigration consequences. Some offices reported a slight increase in 440 motions based on immigration consequences since *Padilla*, while others reported a much more significant increase (more than double since the prior year). A significant percentage of the *Padilla*-based 440 motions are reportedly *pro se* (40-50% in some offices).

C. Criminal courts

Criminal courts have addressed *Padilla* in two significant ways: (a) some courts have issued oral warnings during arraignment or plea allocutions regarding immigration consequences, and (b) some courts have facilitated plea bargaining or sentencing discussions

with respect to immigration issues on a case-by-case basis. In addition, courts in all five boroughs have been adjudicating 440 motions that raise *Padilla* issues.

Oral warnings. Judges report that practices vary courtroom-to-courtroom on whether, when, and how judges will raise *Padilla*-related warnings and questions in cases. As noted above, current New York law requires judges to provide a brief warning in felony cases, but this rule had not been widely followed. Since *Padilla*, however, many more judges are providing some kind of warning to defendants in many cases, including felonies and misdemeanors. The nature of the warning varies. In some cases, judges reportedly tell defendants that they “will be” deported when the deportation consequence appear clear. In other cases, judges reportedly tell defendants that they should discuss possible immigration consequences with their attorneys prior to taking a plea. In some cases, judges reportedly ask defendants about their immigration status during arraignment or the plea allocution. The Immigrant Defense Project published a practice advisory cautioning judges against inquiring into defendants’ immigration status on the record.¹⁶

The Office of Court Administration reports that it has not issued any formal guidance to courts regarding if and how judges should address *Padilla*-issues in their courtrooms. Many judges have met to discuss the issues within their various court systems. However, there does not appear to be a consistent or formal position among judges within the various courts.

Case-by-case consideration. Judges report that they have, in appropriate cases, permitted additional time for the defense and prosecution to negotiate a plea where immigration issues are at stake. Judges also report that they have, on a case-by-case basis, considered these issues where appropriate in terms of sentencing. Some (though certainly not all) immigration consequences may turn in part on the sentence ordered by the judge, in addition to the plea.

440 motions. Judges in all five boroughs report adjudicating 440 motions raising *Padilla* issues, as noted above. Courts follow different practices with respect to *pro se* 440 motions. Some judges indicate that they will assign counsel to *pro se* motions on a case-by-case basis, usually assigning an 18-b attorney, but the practice is not common. Section 722(4) of Article 18-b of County Law requires courts to appoint counsel when ordering an evidentiary hearing pursuant to a 440 motion. However, it may be difficult for courts to determine whether an evidentiary hearing is necessary if a defendant initially litigates the 440 motion *pro se*. Some defense attorneys urge judges to expand the practice of appointing counsel to *pro se* cases, particularly where there are issues of law or fact that an attorney will be able to help develop with respect to the ineffective assistance of counsel claim, the need for an evidentiary hearing, and/or the applicability of the *Padilla* framework.

¹⁶ Immigrant Defense Project, *Ensuring Compliance With Padilla v. Kentucky Without Compromising Judicial Obligations: Why Judges Should Not Ask Criminal Defendants About Their Citizenship/Immigration Status* (Nov. 2010), available at http://www.immigrantdefenseproject.org/docs/2011/IDP_Judicial_Inquiry_Into_Status_Nov2010%5B1%5D.pdf.

III. Preliminary Recommendations

While it is too early to make many definitive statements regarding the impact of *Padilla* on the New York City criminal court system, there are a number of areas where further steps should clearly be taken to ensure compliance with *Padilla* and address some of the challenges that have arisen since March 2010:

Trainings. We commend the defender organizations and bar associations for presenting trainings on *Padilla* and generally the immigration consequences of criminal pleas and convictions. The number, frequency, and geographic availability of these trainings should be increased, so that defense attorneys throughout New York City may benefit from updates on the law and the overall reinforcement of the idea that *Padilla* is part of their Sixth Amendment duties as counsel. We encourage those bar associations and organizations that can but have not yet organized trainings to do so soon. Several people with whom we spoke highlighted a particular need to provide these trainings to assigned counsel and defenders who do not have the benefit of in-house expertise on immigration issues.

Resources. The responsibility for implementing *Padilla* lies with defense counsel, and it is clear that every criminal defense office would benefit from resources to support in-house expertise, staffing, training, and changes to internal guidelines and written materials to reflect the need to address immigration consequences. We encourage lawmakers and both government and private funders to consider these needs in apportioning funds to defender offices. For defense counsel who do not have the benefit of in-house immigration expertise and resources, we encourage courts to consider these needs in cases where expert fees for immigration experts may be necessary. Courts may also direct defense counsel to avail themselves of existing resources, such as the Immigrant Defense Project's hotline and written materials.¹⁷

We also encourage courts to appoint counsel to a broader range of *pro se* cases that are raising *Padilla*-related claims in the 440 context. *Pro se* 440 movants generally do not have the benefit of assistance from their former trial counsel when raising ineffective assistance claims. While some *pro se Padilla* 440 motions may be unmeritorious on their face, other motions may raise complex issues of law and fact that should be developed and addressed with the benefit of appointed counsel. This is particularly true when counsel may help the court determine whether an evidentiary hearing is necessary to decide the 440 motion.

Ensuring Case-By-Case Consideration and Collaboration. The “success stories” of *Padilla* are based on the case-by-case consideration of and collaboration towards achieving appropriate plea bargains that eliminate or mitigate immigration consequences. Defense counsel and prosecutors alike should continue to engage in the process of negotiation as these issues arise, and educate each other about the various circumstances and options that may be available to resolve a defendant's case with both criminal justice and immigration concerns in mind. Courts may encourage these practices by promoting the necessary discussion between defendants

¹⁷ See description of Immigrant Defense Project resources at page 4 above.

and their lawyers and by giving the parties time to investigate and negotiate. Courts may also directly consider these issues as they arise in plea and sentencing considerations.

Greater Clarity and Consistency Regarding Roles in Supporting Compliance with *Padilla*. District Attorney's offices and judges are still in an experimentation phase, of sorts, in terms of figuring out how to best ensure that defense attorneys are complying with their duties under *Padilla*. As best practices are developed and problematic practices are identified, prosecutors and judges should re-assess whether and how to approach *Padilla* issues on a more clear and consistent basis. This may involve collaborating to decide what type of warning, if any, is appropriate at the arraignment and/or plea colloquy stage, how to revise New York State law's immigration advisal statute, and how to ensure that the primary duty of ensuring compliance with *Padilla* continues to rest with criminal defense attorneys. To that end, it is important to note that no consensus has been reached as to whether District Attorney's offices or judges must or should play any role in addressing immigration consequences, other than to encourage defendants to speak with defense counsel. These issues should be revisited in the future and steps should be taken to ensure and promote best practices.

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