

**PADILLA V. KENTUCKY : United States Supreme Court,
Decided March 31, 2010**

___ S.Ct. ___, 2010 WL1222274

Issue: Whether the failure of an attorney to inform his client of deportation consequences resulting from a plea to a criminal charge will constitute ineffective assistance of counsel under the Sixth Amendment expounded in *Strickland v. Washington*, 466 U.S. 668 (1984).

Strickland versus *Washington* set out a two-pronged standard for ineffective assistance of counsel: a “performance prong” and a “prejudice prong”. Under the performance prong, counsel’s actions most fall below an objectively reasonable standard. Under the prejudice prong the defendant must show that he suffered some prejudice as the result of counsel’s actions.

Holding: The Supreme Court held in this case that failure to advise a client of the immigration consequences at a plea to a criminal charge falls below the objectively reasonable standard set out in *Strickland* and fulfills the first prong of the two-pronged test. However, the court declined to review the question of whether or not Padilla suffered prejudice because the question was not addressed in the lower court.

It is our responsibility under the Constitution to ensure that no criminal defendant – whether a citizen or not – is left to the mercies of incompetent counsel. To satisfy this responsibility, we now hold that council must inform his or her client whether his plea carries a risk of deportation. Our long-standing Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Facts Of The Case: José Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40

years. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.

Padilla claims that his attorney not only failed to advise him of the consequence prior to entering the plea, but also told him that he did not have to worry about immigration status since he had been in the country so long. Padilla relied on his attorney's erroneous advice when he pleaded guilty to a drug charge that made his deportation mandatory. He alleged that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

The case made its way to the Kentucky Supreme Court, which held that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely "a collateral" consequence of his conviction.

The United States Supreme Court Held: The importance of accurate legal advice for noncitizens accused of crimes has never been more important. As a matter of federal law deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed upon noncitizen defendants who plead guilty to specified crimes. Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel. Although removal proceedings are simple in nature, and deportation is nevertheless intimately related to the criminal process and we find it most difficult to divorce the penalty from the conviction in the deportation context. The Constitution must ensure that no criminal defendant – whether a citizen or not – is left to the mercies of incompetent counsel. To satisfy this responsibility, we now hold that counsel must inform his or her client whether the plea carries a risk of deportation. Our long-standing Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

The Standard For Ineffective Assistance Of Counsel In Strickland v. Washington: Under the two prong Strickland analysis the first prong, i.e., the performance prong, analyzes whether the attorney's representation fell below an objective standard of reasonableness.

Under the second prong, i.e., the prejudice prong, it is analyzed whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

The first prong is linked to the practice and expectations of the legal community: the proper measure of attorney performance remains simply reasonableness under prevailing professional norms. The Supreme Court has long recognized that prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable.

The Court determined that the weight of prevailing professional norms supports the view that counsel must advise a client regarding the risk of deportation.

However, the Supreme Court declined to make a finding of ineffective assistance of counsel in this case and noted that whether counsel was ineffective here depends on whether he can satisfy the second prong of Strickland, which the U.S. Supreme Court left to be decided by the Kentucky courts since it had not been addressed in the previous lower court decisions.

Immigration And Deportation Consequences No Longer Collateral Consequences: It had been consistently held in New York that immigration consequences of a plea to a criminal charge are "collateral" consequences and not direct consequences of the plea and that these "collateral" immigration consequences were not the direct result of the criminal plea.

The US Supreme Court addressed this argument and noted that the Court has never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable

professional assistance required under Strickland; the collateral versus direct distinction is ill-suited to evaluating a Strickland claim concerning the specific risk of deportation. The weight of prevailing professional norms supports the view that counsel must advise his or her client regarding the risk of deportation.

The Supreme Court's Rationale For Imposing A Duty Upon Counsel To Inform Clients About Immigration Consequences:

Informed consideration of possible deportation can only benefit both the state and noncitizen defendants during the plea bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.

Additionally, Counsel that have the rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea-bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as a way of avoiding a conviction for an offense that automatically triggers the removal consequence.

Moreover, making immigration consequences part of the plea bargaining process will facilitate the process whereby the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

An Attorney's Affirmative Misrepresentations As Well As Failure To Inform About Immigration Consequences Fulfill The First Prong Of The Strickland Standard:

The Supreme Court specifically addressed the distinction between omitting to advise one's client of deportation and affirmatively misrepresenting deportation consequences: it held that there is no relevant difference between an act of commission and an act of omission in the deportation context.

The Finality Of Convictions Argument Dismissed By The Majority:

The Solicitor General argued in its brief that should the Supreme Court hold an attorney was ineffective under Strickland for failure to advise a client about deportation consequences it would cause the flood gates to open creating excessive litigation.

Justice Stevens, writing for the majority, countered this argument in the majority opinion when he stated that the US Supreme Court had confronted a similar “floodgates” argument in *Hill v. Lockhart*, 474 U.S. 52 (1985).

The majority held that a flood did not follow in the wake of that decision. Additionally, he reasoned that the lower courts, now quite experienced with applying Strickland, can effectively and efficiently use its framework to separate specious claims from those with substantial merit. Finally, he stated that for at least the past 15 years professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.