

Criminal defendant must be advised of immigration consequences of plea bargain

Padilla v. Kentucky (U.S. Sup. Ct. 2010)

By Max Nuyen

The U.S. Supreme Court held a non-citizen defendant in a criminal case must be advised by his lawyer beforehand that pleading guilty to certain criminal offenses would result in his being removed from the United States.

The case arose because the petitioner, a 40-year permanent resident, who was a defendant in a criminal drug case, pled guilty to transportation of a large quantity of marijuana. Beforehand, he asked his lawyer what would be the immigration consequences if he pled guilty. His lawyer told him incorrectly that he had nothing to worry about because he had been in the country for so long.

However, the reality is, under U.S. immigration laws, a conviction for drug trafficking is practically a guaranteed one-way ticket to removal proceedings. Aside from very limited exceptions, it is mandatory that a person with such a conviction be removed. By law, immigration courts do not have the discretion to save a convicted drug trafficker from removal.

The petitioner was indeed placed in removal proceedings as a result of his conviction. He sought to have the conviction, which was based on his guilty plea, overturned so he could request a trial. He argued if he had known about the immigration consequences of his plea and his lawyer properly advised him of such, he would not have accepted the guilty plea and would have tried to fight the charges in court. At the very least, he could have sought a plea bargain based on lesser offenses, which would not have triggered the mandatory removal provision.

The Court agreed with the petitioner. In its decision, the Court wrote at length about the numerous changes which the regulations on removal have undergone in the last 20 years. In the

past, the U.S. had very few offenses which would subject a person to the drastic punishment of removal/deportation. For such offenses, the immigration and criminal courts were invested with the authority to prevent an immigrant, who pled guilty to a crime, from being deported. However, in 1990 and 1996, Congress eliminated such discretion and broadened the scope of crimes which may cause an immigrant to be removable. The current state of the law is still in flux because courts are finding more crimes, not fewer, to be removable offense.

This decision and other recent changes have created an intersection between criminal law and immigration law. Criminal defense lawyers must now be more knowledgeable about the true consequences of their clients pleading guilty to certain offenses. The Court observed often times a non-citizen defendant faced with removal is more concerned about his immigration status than the criminal sanctions which he may face. The threat of removal and lifetime banishment, where a person would be separated from his family in the U.S., may be much more consequential than a few months in jail or a fine.

The Court found a criminal defense lawyer has the obligation to affirmatively warn his clients about adverse immigration consequences, especially when the consequences are not only clear, but mandatory, as in this case. A lawyer who fails to do so will be considered to have failed in his duties to defend his client. A defendant who had been ineffectively assisted by counsel is considered to not have his Constitutional rights protected. For this reason, the petitioner was permitted to pursue retraction of his guilty plea in his criminal case.