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Introduction

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INTRODUCTION

LYNN S. BRANHAM*

On March 31, 2010, the Supreme Court discharged the legal equivalent of “the shot heard round the world.”¹ The shot was the Court’s decision in *Padilla v. Kentucky*.² The world in which that shot reverberated was the world of criminal justice.

Perhaps because I have taught and worked in the field of criminal justice for so long, I confess that it is a rarity for a Supreme Court decision to take me off guard. Of course there are Court decisions that I find disappointing—misinterpretations, in my opinion, of legal rights. And then there are those decisions, ones that I consider correctly decided, that evoke relief and even delight. But because most of us steeped in the law have become so inured to the reality that the Supreme Court can be, well, predictably unpredictable, the decisions of the Court typically do not engender surprise, much less deep surprise.

Padilla v. Kentucky is an exception to that rule. As will become evident when reading the articles in this symposium issue, its implications for criminal-justice systems in this country are profound and potentially even stunning in their scope.

When Jose Padilla pleaded guilty to a drug-related crime, he undoubtedly did not expect that his last name, like that of Ernesto Miranda,³ might become a household word to criminal-justice practitioners. Originally from Honduras, Padilla had lawfully lived in the United States for over forty years and served in the military during the Vietnam War.⁴ After being charged with the transportation of a large amount of marijuana in Kentucky, Padilla conferred with his defense attorney about the impact a conviction would have on his immigration status.⁵ His attorney told him “not . . . to worry”—that since Padilla had lived in the United States for so long, a conviction would have no

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1. 9 RALPH WALDO EMERSON, *Concord Hymn*, in THE COMPLETE WORKS OF RALPH WALDO EMERSON 158, 158 (1904).

2. 130 S. Ct. 1473 (2010).

3. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that police must give *Miranda* warnings and secure a valid waiver before subjecting a person to custodial interrogation).

4. *Padilla*, 130 S. Ct. at 1477.

5. *Id.* at 1477–78.

effect on his ability to remain in the country.⁶ The attorney was wrong. In fact, the drug-related conviction, like most such convictions, would subject Padilla to mandatory deportation from what had become his home country.⁷

Padilla claimed that he had been deprived of his Sixth Amendment right to the effective assistance of counsel, rendering his guilty plea invalid.⁸ In order for a violation of this right to occur, counsel's performance must have fallen below the level of "reasonable professional assistance."⁹ In addition, the defendant must have been prejudiced by this deficient performance.¹⁰

In assessing whether Padilla's attorney had provided unreasonable professional assistance in derogation of the first prong of this Sixth Amendment test, the Supreme Court could have endorsed the longstanding interpretation of the Sixth Amendment applied in the lower courts. According to that interpretation, a defense attorney only had to advise a client of the "direct consequences" of a conviction, typically interpreted as those that are or may be part and parcel of the sentencing order.¹¹ The defense attorney, for example, had to apprise the defendant of the maximum prison sentence that could be imposed if the defendant pled guilty to a charged crime. However, the attorney had no constitutional duty to advise the defendant of other consequences that would or might ensue from a criminal conviction, such as eviction from public housing, loss of employment, revocation of a license, registration as a sex offender, or denial of voting rights. According to these lower courts, advice about these so-called "collateral consequences" fell outside the ambit of the "reasonable professional assistance" demanded by the Sixth Amendment.¹²

The Supreme Court in *Padilla* alternatively could have applied an exception that some lower courts had carved out to this general rule. Under this exception, actual misadvice, like that which had been tendered to Padilla, about the deportation repercussions of a guilty plea constituted the ineffective assistance of counsel, provided the defendant was also prejudiced by that erroneous advice.¹³

The Supreme Court, however, refrained in *Padilla* from placing its imprimatur on the distinction that had been erected by the lower courts, when defining the scope of defense counsels' constitutional obligations, between the

6. *Id.* at 1478.

7. *Id.* at 1477 n.1, 1478.

8. *Id.* at 1478.

9. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

10. *Id.* at 692.

11. *See, e.g., Santos-Sanchez v. United States*, 548 F.3d 327, 334–36 (5th Cir. 2008).

12. *See id.* at 336 ("We, like our sister circuits, have drawn a bright line between the direct and collateral consequences of a guilty plea and require that counsel advise a defendant of only the former.").

13. *See Rubio v. State*, 194 P.3d 1224, 1230 n.36 (Nev. 2008) (listing cases).

“direct” and “collateral” consequences of a conviction.¹⁴ Nor did the Court limit unconstitutional ineffectiveness of counsel to those instances when a defense attorney has actually funneled incorrect information to a client about the impact of a conviction on the ability to remain within the country.¹⁵

Instead, the Supreme Court held that a defense attorney’s failure to apprise a noncitizen client of the deportation consequences of a conviction can violate the Sixth Amendment right to the effective assistance of counsel.¹⁶ More specifically, the Court ruled that when an immigration statute is “succinct, clear, and explicit” in defining the impact of a guilty plea on the defendant’s removal from the United States, the defense attorney must notify the defendant that a conviction *will* result in his or her deportation.¹⁷ And if the law is not “succinct and straightforward” in its explication of these deportation consequences, the defense attorney still has a constitutional duty to advise the noncitizen client that a conviction *may* result in the client’s removal from the country.¹⁸

In February 2011, the Saint Louis University School of Law’s *Public Law Review*, in conjunction with the American Bar Association’s Criminal Justice Section, convened renowned experts from across the country to discuss the implications of the Supreme Court’s seminal decision in *Padilla*. The presenters included a federal district judge, a justice on a state’s supreme court who was also a member of the state’s sentencing commission, a prosecutor, several defense attorneys, an administrator of a federal probation office, leading experts on immigration law, the law of sentencing, and plea bargaining, and several individuals who have immersed themselves, for years, in effectuating policy reforms governing what some are now calling the “enmeshed penalties” of a conviction¹⁹—penalties other than those subsumed within the sentencing order itself. The array of ideas propounded, both during the symposium and in the articles that were its byproducts are, in my opinion, truly groundbreaking.

14. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (“We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.” (citation omitted)).

15. See *id.* at 1484 (rejecting this “affirmative misadvice” construction of defense counsels’ constitutional duties, in part because it might induce attorneys to refrain from discussing certain pros and cons of a plea agreement with their clients).

16. *Id.* at 1486.

17. *Id.* at 1483.

18. *Id.*

19. In *Padilla*, the Supreme Court referred to how criminal convictions and deportation have, under the law, become “enmeshed.” *Id.* at 1481.

Professor Maureen Sweeney, Director of the Immigration Clinic at the University of Maryland Carey School of Law, and her co-author, Hillary Scholten, a former Board of Immigration Appeals accredited representative and student at the law school, have written an article suggesting that *Padilla* has provided the foundation for refinements in Eighth Amendment jurisprudence. They note, with approval, the Supreme Court's recognition in that case that deportation is "an integral part—indeed, sometimes the most important part—of the penalty" that can ensue from a noncitizen's guilty plea.²⁰ The authors then explain why deportation can therefore sometimes constitute a grossly disproportionate punishment barred by the Eighth Amendment's prohibition on cruel and unusual punishments. And while the authors concede that the Supreme Court usually accords a great deal of deference to legislatures when assessing whether a penalty is grossly disproportionate to the crime for which it is inflicted, they argue that no such deference is due when assessing whether deportation in an individual case or for a particular category of crimes is a grossly disproportionate punishment. The intriguing rationale for their conclusion is that Congress, not anticipating the Supreme Court's decision in *Padilla*, never considered deportation as part of the penalty for a crime—that Congress never undertook the sentencing-policy assessment to which, if undertaken, the courts must grant a degree of deference.

Professor Stephen H. Legomsky, the John S. Lehmann University Professor at the Washington University School of Law in St. Louis and recently appointed Chief Counsel of U.S. Citizenship and Immigration Services, has proposed in his article that *Padilla*'s constitutional implications go far beyond a defense counsel's obligations in the criminal-justice context. He points out that by rejecting what can be considered a false dichotomy between the "criminal" and "civil" consequences of a conviction, *Padilla* embraced a "functional approach" to defining the scope of the Sixth Amendment right to effective assistance of counsel. After examining the parallels between deportation and penalties traditionally considered "criminal," Professor Legomsky then concludes that *Padilla*, upon close examination, has provided the foundation for recognizing that the constitutional right to the effective assistance of counsel extends to deportation proceedings.

The article written by Professor Gabriel Chin, who teaches at the University of California-Davis School of Law and served as the Reporter in the drafting of both the Uniform Collateral Consequences of Conviction Act²¹ and the American Bar Association's Criminal Justice Standards on Collateral

20. *Padilla*, 130 S. Ct. at 1480 (footnote omitted).

21. UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT (2010).

Sanctions and Discretionary Disqualification of Convicted Persons,²² centers on how *Padilla* should propel changes in the preparation of pre-sentence reports. He recommends that pre-sentence reports be completed or at least substantially completed in advance of plea negotiations. He notes that funneling the information in these reports, such as the defendant's criminal history, to both parties at this point would yield a number of benefits, including the making of better-informed decisions during the negotiation process. Professor Chin furthermore urges that pre-sentence reports identify the "relevant collateral consequences" stemming from a conviction of the crime with which the defendant is charged. Incorporating into plea discussions such consequences as the onus of being registered as a sex offender or the loss of eligibility for student loans will then further the realization of the retributive, deterrent, rehabilitative, or other objectives of a sentence. In addition, consideration during plea discussions of what can be the draconian "collateral consequences" of a conviction is dictated, according to Professor Chin, by the tenets of basic fairness.

Stephanos Bibas, a professor at the University of Pennsylvania Law School who shepherded *Padilla*, along with co-counsel, to a victory before the Supreme Court, too recognizes the interplay between *Padilla* and plea bargaining. He proffers a number of suggestions to more fully inform defendants deciding whether to enter into a plea agreement or go to trial. Perhaps most notably, he describes how safeguards like those afforded by consumer-protection laws could be imported into the law governing plea bargaining. Plea agreements then, for example, would have to be written in plain English, and pro-defendant rules of construction could be devised, thereby providing prosecutors an incentive to draft these agreements with clarity.

Margaret Colgate Love, who served as U.S. Pardon Attorney for a number of years and chaired the ABA task force that produced the standards alluded to earlier on collateral sanctions and discretionary disqualifications, has written a piece that, in part, contrasts the due-process standard governing the information that a court must relay to a defendant in order for a guilty plea to be valid with the information that a defense attorney is obliged, by the Sixth Amendment, to share with the defendant. She notes that if the attorney's duty of advisement paralleled a court's, the attorney's advisement would be superfluous, amounting, in effect, to no duty at all. Ms. Love then propounds a test that she believes should define the scope of the defense attorney's advisement obligations under the Sixth Amendment. Under this test, counsel must advise a client of what she terms "status-related consequences" of a conviction that are severe, certain, and "of predictable importance to the

22. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d. ed. 2004).

client.” Ms. Love then concludes her article with several policy recommendations designed to prevent enmeshed or status-related penalties from destabilizing the plea process. One of these recommendations is to limit the “collateral sanctions” that can ensue automatically from a conviction.

The next three articles examine *Padilla* from the perspective of insiders—those who work within the trenches of the criminal-justice system. Robert Johnson, a longtime prosecutor from Minnesota and former president of the National District Attorneys Association, begins by emphasizing that prosecutors are supposed to “seek justice,” not just secure convictions. Drawing from that premise, he espouses the view that when making charging and plea-bargaining decisions, prosecutors should take into account the “collateral consequences” of a conviction as they assess what would be a just disposition in a case. And, importantly, he profiles a question left open after *Padilla*: Who has the responsibility to inform a pro se defendant of certain consequences, such as deportation or sex-offender registration, that will or may ensue from a conviction?

McGregor Smyth, an attorney who works at The Bronx Defenders and a pioneer in what is called “holistic defense,” applauds *Padilla* in his article because of its potential to unveil what he calls “the secret to great advocacy”—a secret to which, it is evident, he has been long privy. At the center of a criminal case, he reminds us, is a person. And that person often has pressing needs and interests, involving such matters as housing, child custody, and employment, that are intermixed with the criminal charges. Mr. Smyth relates, in detail, how through the provision of integrated defense services—services that address these needs and interests in accordance with priorities established by the client, the quality of advocacy is enhanced dramatically. He describes, for example, dispositions in criminal cases being altered as defense counsel have educated judges and prosecutors about a conviction’s adverse consequences, such as the loss of a professional license and ensuing loss of employment—consequences that neither the judges nor prosecutors anticipated or wanted.

Judge Robert Pratt, from the United States District Court for the Southern District of Iowa, also welcomes *Padilla*, though for a different reason. The Supreme Court’s decision, he notes, has served as a needed reminder to some judges who have routinized the guilty-plea process through boilerplate questions and the elicitation of perfunctory responses to those questions. The lesson for judges that Judge Pratt gleans from *Padilla* is that guilty pleas should be accorded the same “respect and reverence” as a jury trial. And Judge Pratt intones that during this solemn and significant plea process, judges have an affirmative obligation to ensure that there has been “full disclosure” of a guilty plea’s consequences to a defendant tendering that plea, including an appraisal of the likelihood or possibility of deportation.

Professor Michael Wolff, Director of the Center for Interdisciplinary Study of Law at the Saint Louis University School of Law, in his article proffers observations about *Padilla* from the perspective of someone who has served as the chair of the Missouri Sentencing Advisory Commission (as well as a justice on the Supreme Court of Missouri). Having seen close-up the operations of a sentencing guidelines commission, Professor Wolff reports that it would be feasible for sentencing commissions to compile lists of the consequences of a conviction in their state that traditionally have been described as “collateral.” These lists would then facilitate defense attorneys’ imparting of information and advice to their clients and their development of defense strategies, both during plea negotiations and at sentencing. And the lists would be useful to other individuals within the criminal-justice system making charging, plea-bargaining, and sentencing decisions.

The thought-provoking articles written by presenters at the symposium held at the Saint Louis University School of Law should prompt an examination by the wide spectrum of individuals who handle criminal cases—judges, defense attorneys, prosecutors, probation officials, and others—of both how *Padilla* changes, and should change, a status quo with which they may have become, over time, a bit too comfortable. These articles also provide much food for thought for policy makers, including legislatures and sentencing commissions. One can only hope that a clearer understanding of the severe impact that “enmeshed penalties” can have on defendants will spawn these policy makers to institute reforms, both in the imposition of those penalties and the way in which they are factored into decision making in criminal-justice systems. These reforms, catalyzed in part by this symposium, will make our justice systems more of what they are supposed to be. Just.

