

## Ineffective Assistance Of Counsel: Failure To Warn Client About Immigration Consequences Before Criminal Plea

### *Padilla v. Kentucky* Decided March 31, 2010

#### U.S. Supreme Court 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.

#### **Held:**

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

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## Suppression Of Evidence Already In The Government’s Possession

### *People v. Tolentino*: N.Y. Court of Appeals, 2010 NY Slip Op 02643, March 30, 2010

**Issue:** Whether evidence already possessed by a governmental agency is subject to suppression and the exclusionary rule as a result of an illegal search and seizure under the Fourth Amendment.

**Held:** No, evidence already in possession of a governmental agency is not subject to suppression or the exclusionary rule because of an illegal search and seizure.

On New Year’s day in 2005 the defendant, José Tolentino, was driving his car on Broadway in New York City. The police stopped him for playing music too loudly and ran a computer check with the Department of Motor Vehicles. The check revealed that the defendant’s license was suspended and he was subsequently arrested. As part of his Omnibus motion he sought to suppress his driving record, alleging that the police unlawfully stopped his car and that his driving record was obtained as fruit of a Fourth Amendment violation.

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:** José Padilla, a native of Honduras and lawful resident of the United States faced 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 failed to advise him of immigration consequence prior to entering the plea, and 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 *Continued on page 2*



The defendant argued the steps required to obtain a DMV record are the stop of the vehicle and getting the driver’s name or a drivers license number and that his DMV records would not have been obtained but for the police illegality. The trial court denied his request for a *Mapp* hearing, holding that an individual does not possess a legitimate expectation of privacy in files maintained by the DMV.

The New York Court of Appeals held that evidence already in the possession of a governmental agency is not subject to suppression or the exclusionary rule as the result of an illegal search and seizure under the Fourth Amendment.

The Court of Appeals relied on the case of *INS v. Lopez—Mendoza*, 468 U.S. 1032 (1984) where the US Supreme Court held that the body or identity of the defendant in a criminal or civil proceeding is never suppressable as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search or interrogation occurred. *Continued page 4*

## Ineffective Assistance of Counsel: *Padilla v. Kentucky* cont'd

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 Kentucky Supreme Court 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.

### **The United States Supreme Court Held:**

1. 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 pleaded guilty to specified crimes.
2. 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.
3. 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 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.

### **The Standard For Ineffective Assistance Of Counsel In Strickland v. Washington:**

Under the two prong *Strickland* analysis the first prong, or the performance prong, is whether the attorney's representation fell below an objective standard of reasonableness.

Under the second prong, or the prejudice prong, one asks 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 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 Court left to be decided by the Kentucky courts since it had not been addressed previously.

### **Immigration And Deportation Consequences No Longer Collateral Consequences:**

The US Supreme Court 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.

Additionally, Counsel who possesses the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea-bargain creatively with the prosecutor to reduce the likelihood of deportation or as avoid a conviction that automatically triggers removal.

### **Affirmative Misrepresentations As Well As Failure To Inform About Immigration Consequences**

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

A holding limited to affirmative misadvice would invite two absurd results:

First, it would give counsel incentive to remain silent on matters of great importance, even when answers are readily available. Silence under the circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of the plea agreement. When an attorney knows that their clients face possible exile from this country and separation from their families they should not be encouraged to say nothing at all.

Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide a client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the *Strickland* analysis. **End.**

## Miranda Warnings and The Right To Counsel

**Florida v. Powell**, U.S. Supreme Court February 23, 2010  
559 U.S. \_\_\_\_, 130 S.Ct. 1195

**Issue:** *Whether the Miranda warnings given by Florida police were sufficient to warn the defendant that he had the right to an attorney throughout the questioning by police.*

**Held:** *The Miranda warning were sufficient to inform defendant that he had the right to an attorney before and during the questioning as long as they convey the basic information set out in Miranda and the U.S. Supreme Court declined to specify any rigid formulation to Miranda warnings.*

In 2004 the Tampa Florida police entered an apartment rented by the defendant's girlfriend. They spotted the defendant coming from a bedroom and the officer searched the room, finding a handgun under the bed. They arrested the defendant and before questioning him read him this standard consent and release form:

*"you have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning period you have the right to use any of these rights at any time you want during this interview."*

The defendant then admitted that he owned the handgun, and was later charged with possession of a weapon. He moved to suppress his statements arguing that the *Miranda* warnings were deficient because they did not adequately conveyed his right to the presence of an attorney during questioning.

The case wended its way to the Florida Supreme Court where the following question was certified to the court: "does the failure to provide express advice of the right to the presence of counsel during questioning vitiate *Miranda* warnings which advised of both the right to talk to a lawyer before questioning and the right to use the right to consult a lawyer at any time during questioning?"

### The Adequacy Of Miranda Warnings:

The issue in this case was whether the defendant was clearly informed that he had the right to consult with a lawyer and have the lawyer with him during questioning.

The US Supreme Court stated that the issue before them was simply whether the warnings recently convey to a suspect his rights as required by *Miranda*. The Court relied heavily on two previous cases: *Duckworth v. Eagan*, 492 U.S. 195 (1989) and *California v. Prysock*, 453 U.S. 355 (1981) both concerned a suspect's entitlement to adequate notification of the right to appointed counsel.

The Florida Supreme Court had found that the warnings were misleading because it believed the temporal language – that the defendant could talk to a lawyer before answering any of the questions – suggested that defendant can consult with an

attorney only before the questioning began.

The US Supreme Court disagreed stating that the term "before" merely conveyed the right to an attorney became effective before he answered any questions at all. They found that nothing in the words used indicated that counsel's presence would be restricted after the questioning commenced.

Defendants attorney had argued that most jurisdictions throughout the nation expressly advised suspects of the right to have counsel present both before and during interrogation and that anything less would tempt law enforcement to circumnavigate *Miranda* by amending their warnings to introduce ambiguity. The US Supreme Court noted that law enforcement agencies have little reason to assume the litigation risk of experimenting with novel *Miranda* formulations and that it is desirable police practice to state warnings with maximum clarity.

Ultimately, the Supreme Court declined to state any precise formulation necessary to meet the required *Miranda* warnings.

**End**

## Invoking Right To Counsel At A Second Police Interrogation: The New 14 Day Rule.

**U.S. Supreme Court: Maryland v. Shatzer**  
559 U.S. \_\_\_\_, 130 S.Ct. 1213 February 24, 2010

**Issue:** *Whether inculpatory statements made by a defendant at a second police interrogation, occurring 2 ½ years after the first police interrogation, are admissible when the defendant, at the first interrogation, had invoked his right to counsel and refused to speak to the police without an attorney present.*

**Held:** *Yes, the statements are admissible because there was a sufficient break between the first custodial interrogation and the second custodial interrogation, and a break in the custodial interrogation of 14 days will allow the police to re-interrogate a suspect without counsel being present.*

**Issue:** *Whether incarceration on a separate and distinct crime constitutes custody for *Miranda* purposes.*

**Held:** *No, incarceration on a separate and distinct conviction does not constitute custody for *Miranda* purposes.*

In 2003 a detective tried to question the defendant who was incarcerated. The defendant invoked his *Miranda* rights to counsel and the detective terminated the interview and closed the investigation.

In 2006 another detective reopened the investigation and attempted to interrogate the defendant who was still incarcerated. The defendant waived his *Miranda* rights and made inculpatory statements.

The United States Supreme Court held that because the defendant experienced a break in *Miranda* custody lasting more than 14 days between the first and second attempts at interrogation the holding in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) does not mandate suppression of his 2006 statements.

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The Court of Appeals agreed with this reasoning and held that there is no sanction when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence.

The rationale for this exception to the exclusionary rule was that the exclusionary rule enjoins the government from benefiting from evidence it has unlawfully obtained; it does not reach backward to obtained information that was in official hands prior to any illegality.

The Court of Appeals also relied on *People v. Pleasant*, 54 NY2d 972 (1981) where defendant was illegally arrested in Suffolk County (*surprisingly*) and it was later discovered that he possessed a gun used in a robbery in Bronx County.

Suffolk police conveyed this information to Bronx police who retrieved the defendant's photograph and showed it to the robbery victims, who positively identify the defendant.

In that case the Court of Appeals rejected the notion that a photographic identification should be suppressed as the fruit of an illegal arrest because it was only the defendant's identity that was obtained as a result of the unlawful seizure and the photographs and it was not an exploitation of the antecedent illegality because they were obtained from a source independent of the unlawful arrest.

The court analogized that the DMV records in this case were obtained by the police from a source independent of the claimed illegal stop.

The Court of Appeals also distinguished this case from two United States Supreme Court cases: *Davis v. Mississippi*, 394 U.S. 721, (1969) and *Hayes v. Florida*, 470 U.S. 811(1985).

In those cases the defendants were illegally stopped for the purpose of obtaining evidence – fingerprints – that would connect the defendants to the crimes under investigation. The "identity evidence" was not pre-existing.

Additionally, the fingerprints were used not to establish the identities of the individuals apprehended but to connect those individual fingerprints to latent fingerprints recovered from the crime scene.

The Court Of Appeals stated "we merely hold that a defendant may not invoke the fruit of the poisonous tree doctrine when the only link between improper police activity and the disputed evidence is that the police learned the defendants named." **End**

**New 14 Day Rule Continued**

*Edwards* created a presumption that once a suspect invokes the Miranda right to the presence of counsel, any subsequent waiver is involuntary. *Edwards'* fundamental purpose is to preserve the integrity of an accused's choice to communicate with police only through counsel by preventing police from badgering him into waiving his *Miranda* rights.

Where a suspect has been released from custody and returned to his normal life for some time, there is little reason to think that he changed his mind about talking to the police due to coercion.

The Supreme Court's analysis begins with the Fifth Amendment: the Fifth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself. The Supreme Court has previously held that an interrogation in an unfamiliar, police dominated atmosphere, involves psychological pressures which worked to undermine the individuals will to resist and compel him to speak where he would not otherwise do so freely.

In its opinion the Supreme Court referred heavily to *Edwards v. Arizona*, 451 U.S.477 (1981).

In *Edwards*, the Court determined that traditional standard for waiver was not sufficient to protect a suspect's right to have counsel present at a subsequent interrogation if he had previously requested counsel; additional safeguards were necessary.

*"When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights. He is not subject to further interrogation by the authorities until council has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."*

The rationale of *Edwards* is that once a suspect indicates that he is not capable of undergoing custodial questioning without advice of counsel, any subsequent waiver that has come at the authorities behest, and not at the suspect's own instigation, is itself a product of the inherently compelling pressures and not the purely voluntary choice of the suspect.

The court imposed a 14 day rule whereby when there is a break in the custodial interrogation of at least 14 days, the police will then be allowed to interrogate the suspect again despite the fact that he previously invoked the right to counsel. The Court reasoned that it was appropriate to specify a period of time to avoid the consequence that continuation of the *Edwards* presumption will not reach the correct result most of the time. Further, the Court stated that the 14 day period was appropriate because it provided plenty of time for the suspect to get re-acclimated to his normal life, to consult with friends and counsel, and to shake off any residual course of effects of his prior custody.

The court also decided the issue of whether incarceration constitutes custody for *Miranda* purposes.

The Court held that lawful imprisonment imposed upon conviction does not create the coercive pressures identified in *Miranda*. The Court reasoned that interrogated suspects who have previously been convicted of a crime live in prison. When they are released back into the general population they return to their customary surroundings and daily routine, they regain the degree of control they had over their lives prior to the interrogation. Sentenced prisoners are not isolated with their accusers; they live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone.

**End**



## New York Persistent Felony Offender Statute Found Unconstitutional and Subject To Harmless Error Analysis.

Besser v. Walsh 2010 WL122194, Second Circuit Court of Appeals, March 31, 2010

**Issue:** whether New York State court decisions affirming a sentence enhancement under New York's persistent felony offender statute, New York Penal Law § 70.10, unreasonably applied clearly established Federal Law.

**Held:** Yes, New York's persistent felony offender statute did unreasonably apply clearly established Federal Law. The Sixth Amendment right to a jury trial, applicable to the states as incorporated by the 14<sup>th</sup> amendment, prohibits the type of judicial fact-finding resulting in enhanced sentences under New York's persistent felony offender statute. This prohibition was not clearly established until the United States Supreme Court decided the case of *Blakely v. Washington*, 542 U.S. 296 (2004).

**Facts:** five New York prisoners, sentenced under New York's persistent offender statute petitioned for a writ of habeas corpus to the federal district courts.

Under the persistent felony offender statute, the defendant who has been previously convicted of two felonies is a persistent felony offender. New York Penal Law § 70.10 (1) (a).

A persistent felony offender is sentenced to an indeterminate sentence in the range authorized for class A-I felony offenders rather than the range authorized for the class of the defendants actual offense. Class A-I felonies carry a minimum sentence of 15 years and a maximum of life.

In order to sentence a defendant under the persistent felony offender statute, the sentencing court must make a finding of at least two prior felony convictions and the court must make a determination as to whether the history, character of the defendant, and nature and circumstances of the criminal conduct is such that the defendant should be given a class A-I sentence.

In making this finding the court must conduct a hearing at which the prosecution bears the burden of proof, and matters pertaining to the defendant's history and character and nature and circumstances of his criminal conduct must be established by a preponderance of the evidence.

### Four Step Analysis For Violation Of Clearly Established Sixth Amendment Law:

(1) Whether it was objectively unreasonable to uphold petitioners' class A-I sentence in light of the Supreme Court decisions applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000). [i.e. *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *Cunningham v. California*, 549 U.S. 270 (2007)]

(2) Whether that law was clearly established at the relevant time for each petitioner.

(3) What period of time to look to in determining whether a legal rule was clearly established under AEDPA

(4) To what extent does spelling mode AEDPA allow us to consider Supreme Court cases that post date relevant time period selected.

**The Rule In *Apprendi v. New Jersey*:** the Sixth and Fourteenth Amendments guarantee, in federal and state criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. If a state makes an increase in the defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the state labels it – must be found by a jury beyond a reasonable doubt.

The statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

If the jury verdict alone does not authorize the sentence and the judge must find an additional fact to impose the longer-term, the Sixth Amendment requirement is not satisfied.

### The Second Circuit's Holding:

The Second Circuit found that the rules set out in *Apprendi*, *Blakely*, and *Cunningham* were clearly established law for purposes of four out of the five petitions filed: Besser had been sentenced before the decision in *Blakely* and his sentence was found to be constitutional.

The Second Circuit held that New York's persistent felony offender sentencing scheme did not satisfy the Sixth Amendment's requirement because the law allows a higher sentencing when a sentencing judge has made factual findings related to a defendant's criminal history, character, and the nature of the criminal conduct that justify the higher sentencing range.

### Harmless Error Analysis:

The Second Circuit held that the sentencing scheme is subject to harmless error analysis. In deciding whether the application of the unconstitutional statute was harmless error the test in *Brecht v. Abrahamson*, 507 U.S. 619 (1993) must be applied where one asks if the error had substantial and injurious effect or influence on the sentence.

The Court remanded the cases to the U.S. District Court for further proceedings to determine whether there was harmless error because no detailed analysis of the harmless error issue was done below and the Second Circuit did not believe that the record on appeal was sufficiently developed to address the matter.

**End**

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