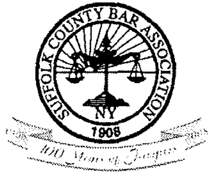

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Supreme Court Requires Deportation Advice In Plea Bargains

The "Padilla Warning"

By David M. Sperling

David M. Sperling

In a landmark ruling, the Supreme Court held that criminal-defense lawyers have the obligation to advise their noncitizen clients whether a decision to plead guilty can lead to deportation.

In a 7-2 decision, the high court extended the Constitution's Sixth Amendment guarantee of "effective assistance of counsel" in criminal cases to immigration advice, especially when the collateral effects of a guilty plea far outweigh the actual sentence.

Justice John Paul Stevens wrote for the majority in *Padilla vs. Kentucky* , 559 U.S;__(2010) issued March 31 that "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 counsel must inform the client whether his plea carries a risk of deportation."

In particular, the court noted the steady erosion of judicial discretion and other discretionary relief in deportation cases since 1990. An ever-growing category of crimes called "Aggravated Felonies," carry automatic penalties of mandatory detention and deportation.

Immigration lawyers have long expressed frustration that many of their potential clients are ineligible for relief and face certain deportation (or "removal") because they pleaded guilty to a crime without being advised of the plea's harsh immigration consequences. For example, every drug crime, except possession of 30 grams or less of marijuana, is a deportable offense. And virtually every New York Penal Code crime involving sex with a minor, whether consensual or not, is an Aggravated Felony, even if the crime is only a misdemeanor and no jail time is imposed. One or more "Crimes of Moral Turpitude," a nebulous and ever-shifting category, often leads to deportation. Until a recent policy change, many New York immigrants lost their legal status after being convicted of such minor offenses as PL 240.20 - disorderly conduct, and VTL 509.1- driving without a license.

Padilla involved a Vietnam War veteran who had been a lawful permanent resident of the United States for 40 years. He was arrested in 2001 and pleaded guilty to marijuana trafficking, a felony. He later said he had agreed to the plea based on his lawyer's incorrect advice that it would not affect his immigration status. The court remanded the case to Kentucky's top court that will decide whether Padilla's guilty plea should be thrown out.

The issue in *Padilla* was whether bad legal advice about the collateral consequences of a guilty plea amounted to ineffective assistance of counsel under the Sixth Amendment. For the majority, the answer was yes. If the relevant immigration law is

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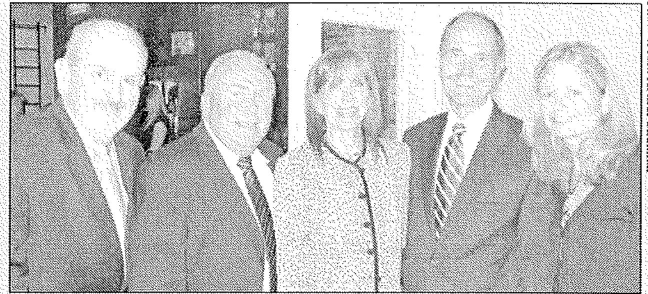

Photo credit: Arthur Shulman

The SCBA Executive Committee hosted the second of two dinner receptions at H2O Seafood Grill in recognition of Suffolk County's District and Family Court Judges. Enjoying the evening were from left, District Court Judge James P. Flanagan, Family Court Judge James F. Quinn, SCBA President Ilene Cooper, District Administrative Judge H. Patrick Leis III, and Family Court Judge Marlene Lange Budd

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Education Of Homeless Students Displaced By The Earthquake In Haiti

By Kathryn J. Maier and Richard J. Guercio

Kathryn J. Maier

Richard J. Guercio

After the devastation caused by the recent earthquake in Haiti in January 2010, and the potential influx of Haitian citizens migrating to the United States, New York schools should be prepared for the possible enrollment of displaced school-age students.

Under Federal and State law and regulations, these children may fall within the definition of "homeless children." As such, their right to receive an education may be governed primarily by the McKinney-Vento Homeless Assistance Act of 1986 [1] (hereinafter referred to as "the Act" or "McKinney-Vento"), Section 3209 of the Education Law and Section 100.2 of the Commissioner's Regulations. These laws require school districts to ensure homeless children have access to the same free and appropriate public education as other children residing within a school district.

The determination of whether a student from Haiti is homeless, and therefore entitled to attend district schools, must be made on a case-by-case basis. According to the Act, a student is eligible for McKinney-Vento services if he or she lacks a "fixed, regular, and adequate nighttime residence," and includes children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping

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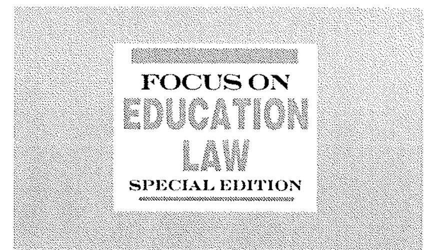
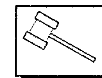
FOCUS ON EDUCATION LAW SPECIAL EDITION





BAR EVENTS

Second Annual Women's Health Symposium "The Doctors Are In"
Tuesday, April 20, 5:30 to 8:30 p.m. Bar center
The SCBA, the Suffolk County Women's Bar Association and the North Shore LIJ Health System Katz Women's Hospital/Women's Health Institute will hold an event devoted to women's health issues. Light supper included. $25/pp.
(For further information, see page 4)

SCBA Annual Meeting, Elections of Officers and Awards Presentation
Monday, May 3 at 6 p.m. Bar center, $30

Book Signing by Author and Journalist Roxana Saberi "Between Two Worlds: My Life And Captivity In Iran"
Introductory Remarks by Joye Brown, Journalist, Newsday
Tuesday, May 11, at 6:00 p.m. Bar center

The American journalist abducted by while in Iran and falsely accused of espionage and imprisoned, will speak of her experiences. Dinner included. $20.
(For further information see page 11)

Annual Installation Dinner Dance
Thursday, June 3, at 6 p.m.
Villa Lombardi's, Holbrook

The "Padilla Warning"

(Continued from page 1)

"succinct and straightforward," Justice Stevens wrote, the attorney has the duty to explain the possible consequences of a guilty plea. Otherwise, the lawyer "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."

Justice Samuel Alito, joined by Chief Judge John Roberts, concurred with the majority, but pointed out that immigration law is "a complex specialty that generally lies beyond the scope of a criminal defense attorney's expertise." He termed the "succinct and straightforward" standard "a vague, halfway test" that "will lead to much confusion and needless litigation."

Instead, Judge Alito suggested that when a criminal-defense lawyer becomes aware that a client is not a citizen, "the attorney should advise the client that a criminal conviction may have adverse effects under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject." This was the prevailing sentiment among many members of the immigration bar on Long Island.

"Immigration law is so complex that although criminal defense attorneys do not need to know the exact consequences of accepting a certain plea, they have to make sure that everyone who is not a U.S. Citizen consults with an immigration attorney specializing in this area before making any decisions that could lead to their removal from the United States," said Eric Horn, co-chair of the Suffolk County Immigration Law Committee.

Steve Fondulis, co-chair of the SCBA Criminal Law Committee and vice president of the Suffolk County Criminal Bar Association, acknowledged that many attorneys do not take into consideration their client's immigration status in negotiating pleas. Some others, he said, provide "bad advice" instead of referring clients to immigration attorneys when deportability may be an issue.

But, he said, "In the real world, if a client is illegal, in jail and is charged with a felony, ICE [Immigration and Customs Enforcement] already has a detainer" and the client's top priority is to get the shortest jail term possible.

Nevertheless, he said the Padilla decision will "alert the bar" that attorneys now have to inquire into their client's legal status and consider possible immigration consequences. He said the Suffolk County Criminal Bar Association will be discussing the case at its next meeting and plans an immigration seminar in the near future.

Gary Miller, a criminal-defense attorney based in Bay Shore who represents many immigrants from Central America, said "the first question I ask a client is their immigration status."

He said that one's immigration status is not always clear since many immigrants arrive illegally as children, and speak English flawlessly, yet have no legal status. Miller also pointed out that until a few months ago, an immigrant with Temporary Protected Status could lose his status and eventually be placed in removal proceedings by pleading guilty to a simple violation or traffic infraction.

Some observers have suggested that trial judges incorporate a "Padilla warning" into their plea colloquy to insulate the conviction against future collateral attack. It is unclear what effect the ruling will have on old plea bargains.

Judge Stevens rejected the "floodgates" argument, noting that those who collaterally attack their guilty pleas "lose the benefit of the bargain obtained as a result of the plea." The court also noted that 21 states and the District of Colombia already require their trial courts to advise noncitizens of the possible immigration consequences of a guilty plea.

New York is not one of those states. Until now, it has been very difficult for attorneys to have a guilty plea vacated if the former counsel did notadvise the client of collateral consequences, or even if they provided affirmative misadvice.

Furthermore, a Board of Immigration Appeals case called *Matter of Pickering* , 23 I&N Dec.521 (BIA 2003) holds that post-conviction relief obtained solely for immigration purposes was invalid. *Padilla* will now trump *Pickering* in cases in which attorneys provided wrong advice, or no advice at all regarding immigration consequences of guilty pleas. In New York, at least, *Padilla* may lead to a flurry of 440 motions to vacate.

One effect of the ruling, as suggested by the *Padilla* court, may be more creative plea bargaining. For example, certain crimes that carry a prison sentence of one year or more are considered Aggravated Felonies. A bargained-for sentence of 364 days is not. A guilty plea to one section of a divisible statute may be a "Crime of Moral Turpitude," but another section may not. (*Mens rea*is crucial -- harm due to recklessness is not a Crime of MoralTurpitude.)

"By bringing deportation consequences into this process," the court stated, "the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties."

Note: David Sperling has practiced immigration law in Suffolk County for 15 years concentrating in deportation / removal relief. His offices are located in Huntington Station and Central Islip. He can be reached at Sperlinglaw@ gmail.com.

You Just Can't Do That in Court!

(Continued from page 3)

The lying witness

Observing a trial truly gives you a perspective you just cannot receive in class. This is where the lying witness comes in. In my evidence class we spoke about how one can impeach a witness, but we never talked about *how* to actually talk to a lying witness. Recently, I was observing a trial where there was a witness on the stand who was so evasive that he almost completely derailed the attorney who was questioning him. Here is an example of the exchange:

Attorney: [*Question*]
Witness: "I don't know."
Attorney: "You don't know?"
Witness: "I don't recall."
Attorney: "But didn't you just testify to [*prior testimony*]?"
Witness: "I don't remember."
Attorney: "You don't remember your testimony that you gave two minutes ago?"
Witness: "I don't know."

It was like watching Arlen Specter questioning Alberto Gonzales. It really made me appreciate the skill that it takes to question a witness who just doesn't want to spill the beans.

Lesson #5: Most people in this world are honest, the rest of them are in the witness box.

The third-base coach

While clerking for Judge Grossman, I was able to sit next to the witness box and get a different perspective of the courts—literally. My seat allowed me to face the bankruptcy trustee and debtor's counsel while they were questioning a witness (the same witness mentioned above in " *the lying witness* "). In between his Alberto Gonzalez responses, he would look over at his attorney for how to answer the question.

Lesson #6: While your witness is on the stand, you're an attorney, not Razor Shines[1].

The nail biter

I can commiserate with this person. Since as long as I can remember, I have been plagued with the habit of biting my nails. But there is a time and a place for doing so and biting your nails while you are sitting at trial with a client next to you is not one of theses times. It is a good thing this matter was not a jury trial, because the last thing you want a juror to see is the attorney ostensibly nervous while trying to defend his client.

Lesson #7: Your client is on trial, not you, so stop biting your nails.

The cocky objector

Looking back to my evidence class, I recall our professor telling us that almost everything that is introduced in court can be objectionable, but you can't object to everything, or you will "piss off the judge [or jury]." Now we turn to the cocky objector. Every time he gets up to object, it's the same routine. He gets up slowly (as if he has a bad back), he squints (as if someone threw orange pulp in his eye), and then just says "your honor" as if the question was so egregious that he should not even have to explain the basis of his objection. After a few rounds of these objections, the judge appeared to grow seemingly tired of the attorney's antics and would say "overruled" as soon as the attorney began to object.

Lesson #8: Put up (and shut up).

The confused intern

I can relate a lot to this guy, mainly because I *am* this guy. The confused intern wanders around aimlessly at times, burned out from doing terms and connector searches for a case that does not exist. Despite his tenuous grasp on his sanity, he manages to produce a quality work product and learns a great deal as well.

Lesson #9: All you need to know is that crap rolls downhill, hot is on the left, Friday is payday, and the rest will fall into place. My dad told me this at an early age. I think he was talking about plumbers, but I think it can apply to the legal profession as well.

Note: Andrew VanSingel is a 3L at Touro Law School and an editor of the Touro Law Review. The writer would like to give special thanks to another parade of characters who helped him throughout his law school career: Tom Maligno, Director of Public Interest at Touro Law Center; Larry Raful, Dean, Touro Law Center; Hazel Weiser, Executive Director, Society of American Law Teachers; and most importantly, his parents who have always been a constant source of support.

[1] Shines is the first base coach for the New York Mets.

IOLA Sets Floor Under Interest Rate Option

On April 7, 2009, the interest on Lawyer Account Fund of New York (IOLA) set a 1% floor under an option in its regulations that enables banks to index their IOLA account interest rates to the Fed Funds Target Rate.

The option provides a convenient method for banks to adjust IOLA interest rates when the Fed Fund rate changes. If the option is chosen, rates must be set at the greater of 1% or 60% of the Fed Funds Target Rate.

More than 190 banks in New York offer 50,000 IOLA accounts. IOLA interest rates vary from bank to bank. IOLA anticipates that as the economy strengthens, and interest rates begin to rise, banks with higher rates may be attracted to the convenience of the option. The result for banks will be easier administration of IOLA rates and, for the Fund, potentially more income.

IOLA's mission is to support civil legal services for low-income New Yorkers by making grants to non-profit organizations. Historically, IOLA has been the largest in-state funder to organizations providing these services.

Important Information from the Lawyers Committee on Alcohol & Drug Abuse:

THOMAS MORE GROUP TWELVE-STEP MEETING

Every Wednesday at 6 p.m.,

Parish Outreach House, Kings Road - Hauppauge

All who are associated with the legal profession welcome.

LAWYERS COMMITTEE HELP-LINE: 631-697-2499