

Hand of Counsel

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On Aug. 1, 2013, an 18-year-old woman calmly walked into a local drug store, made her way over to aisle two, picked up two cans of baby formula, placed them in a large diaper bag, and quietly walked out without paying for them. Outside, an undercover police officer who had watched her every move patiently waited for her to come through the sliding doors to arrest her. After confiscating the merchandise, the officer asked for and was given permission to search her car. In it, he found a small plastic bag he believed contained traces of meth, although no tests were ever conducted to determine whether it really was. Within days, the state of Arizona charged “Sasha” with one count of shoplifting and one count of possession of drug paraphernalia.

Sasha was indigent and undocumented. At her first and only court hearing before the criminal court, the state offered her a plea agreement requiring her to plead guilty to both criminal counts in exchange for a probationary sentence and a fine. Her court-appointed counsel advised her to accept the state’s plea offer.

Sasha had no previous experience with the criminal justice system, and the offer seemed innocuous to her, given the light consequences, so she accepted. Her court-appointed counsel, however, never explained the immigration consequences to her or even asked Sasha if she had lawful status in the United States. The only consequences her defense counsel considered were direct ones (i.e., the maximum prison term and the fine for the offenses charged), not the immigration consequences.¹ A month later, the U.S. Department of Homeland Security (DHS) filed a Notice to Appear—a charging document issued to a non-citizen that is equivalent to a criminal complaint or indictment—charging her as removable due to her drug paraphernalia conviction.

At her initial immigration hearing, the immigration judge (IJ) advised Sasha that she had the right to counsel but not at government expense. (She did not understand why in criminal court she had a right to court-appointed counsel but did not in removal proceedings, and the IJ never explained it to her.) Because her drug paraphernalia conviction subjected her to mandatory detention, she was also ineligible for an immigration bond, and, worse, her drug paraphernalia conviction was automatic grounds for removal.² Though she was born abroad, Sasha had lived all but one year of her life in the United States. She now faced the very real possibility of permanent expulsion from the United States. With no assistance of counsel, and only a high-school education, Sasha lacked the heavy guns of argument to launch a counterattack against the government’s large arsenal of laws waiting to deport her. Had Sasha been appointed an immigration attorney during her criminal case, in addition to her court-appointed criminal defense counsel, she might have avoided removal proceedings altogether.

Punishment or Collateral Consequence?

In the landmark case of *Gideon v. Wainwright*, the U.S. Supreme Court ruled that indigent defendants have a constitutional right to court-appointed counsel in criminal proceedings.³ Writing for the Court, Justice Hugo Black explained that a defendant unskilled in the ways of the law needed the “guiding hand of counsel at every step in the proceeding against him,” because without it, “he faces the danger of conviction.”⁴ Counsel was needed, Black said, to defend himself against the government’s vast “machinery” that is poised to prosecute defendants accused of a crime, and to avoid a conviction.⁵

Before *Gideon*, indigent defendants had a constitutional right to court-appointed counsel, but only in federal capital cases.⁶ Since *Gideon*, the Supreme Court has extended this right to any criminal prosecution in which a defendant faces a prison sentence.⁷ In all the cases extending the right to court-appointed counsel, the high court underscored the importance of warding off the pernicious consequences of a criminal conviction. Describing the penal consequences of misdemeanor convictions, Justice William O. Douglas explained that “[t]he consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable conditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label ‘petty’.”⁸ The Court subsequently crystallized the rule by holding that any time the state sought to punish a person with imprisonment, the defendant was entitled to court-appointed counsel.⁹ What these cases have in common is the Court placing a high value on liberty, whenever there is a threat of punishment, to trigger the right to court-appointed counsel.

But the Supreme Court has never extended such a right to indigent noncitizens in removal proceedings. To the contrary, federal law explicitly states that immigrants have no right to court-appointed

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ed counsel in removal proceedings.¹⁰ A key reason for this prohibition has to do with the nature of the proceedings. Whereas criminal proceedings involve some form of punishment, “[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish.”¹¹ The immigration judge’s “sole power is to order deportation; the judge cannot adjudicate guilt or punish the respondent.”¹² Because the sole purpose of deportation proceedings is to look “prospectively” and not retrospectively at an immigrant’s right to remain in the United States, deportation is not punishment; it is, at most, a collateral consequence to violating the laws of this country.¹³ Without exception, criminal courts adopted the Supreme Court’s reasoning by finding that in the criminal context, a trial court was not required to inform a noncitizen defendant of the immigration consequences of his criminal conviction.¹⁴

Banishment is Punishment

In 1922, Justice Louis Brandeis wrote that deportation results in the “loss of both property and life; or of all that makes life worth living.”¹⁵ If deportation results in the loss of liberty, then it is difficult to see how deportation is not equivalent to punishment. By small degrees the Supreme Court and other federal courts are beginning to acknowledge that deportation isn’t purely a civil action or a collateral consequence but rather an actual punishment akin to probation and incarceration—and sometimes the most egregious punishment for a noncitizen.

In *Padilla v. Kentucky*, the Supreme Court laid out a road map for advocates and defense counsel asserting the right to court-appointed immigration counsel in criminal proceedings. Though the holding of *Padilla* was limited to the duty of criminal defense counsel to explain the immigration consequences of criminal convictions to noncitizens, the opinion landed like a bomb. For the first time, the Supreme Court recognized that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants.”¹⁶ The Court tacitly acknowledged that deportation is punishment and “intimately related to the criminal process.”¹⁷ The Court’s poignant observation revealed the symmetry between criminal and immigration consequences and placed deportation on the same level as a prison sentence, if not worse.

Before *Padilla*, federal and state criminal courts considered immigration consequences as collateral to, not a direct consequence of, a defendant’s criminal case. But the *Padilla* Court blew up this distinction, because, the Court said, federal “law has enmeshed criminal convictions and the penalty of deportation for nearly a century.”¹⁸ In other words, the Court was not announcing a new principle; it was merely stating what had been true for almost 100 years: Deportation is punishment. Moreover, because immigration law made deportation “nearly an automatic result,” it was difficult to divorce the penalty from the criminal conviction in the immigration context.¹⁹ By recognizing that deportation is a form of punishment—often a worse punishment than incarceration—the Court had created an opening for advocates to argue the need for court-appointed immigration counsel in criminal proceedings. One federal circuit court is trailblazing the way for this to happen.

Elizabeth Rodriguez-Vega was a long-time, lawful, permanent resident. In 2012, she pleaded guilty to “alien smuggling.”²⁰ Fifteen days after her guilty plea, the Department of Homeland Security issued a Notice to Appear, alleging she was removable because her conviction qualified as an aggravated felony.²¹ Rodriguez-Vega filed a 2255 petition,²² alleging her defense attorney had been ineffective in failing to explain the immigration consequences of her criminal conviction. While recognizing that her defense attorney had advised her of the “potential” of removal, the Ninth Circuit Court of Appeals found that his advisement was insufficient because he was required to inform her that her conviction “rendered her removal virtually certain.”²³ Because alien-smuggling was identified as a ground for removal, noted the court, her removal was virtually certain.

In holding that her criminal defense attorney was ineffective, the Ninth Circuit concluded that deportation was a worse punishment than imprisonment: It is “often reasonable for a non-citizen facing nearly automatic removal to turn down a plea and go to trial risking a longer prison term, rather than plead guilty to an offense rendering her removal virtually certain.” Echoing the words of Justice Brandeis,

the court highlighted that Rodriguez-Vega “made a concerted effort to avoid separation from her family, all of whom reside in the United States.”²⁶ A noncitizen “may rationally risk a far greater sentence for an opportunity to avoid lifetime separation from her family and the country in which they reside,” opined the court.²⁶ By demonstrating her desire to remain in the United States, Rodriguez-Vega signaled her preference for a short prison sentence over expulsion in perpetuity from the United States. Given the increasing demands and responsibility the Ninth Circuit is placing on criminal defense counsel to advise noncitizen defendants of criminal consequences, when deportation is “virtually certain,” *Rodriguez-Vega* illustrates the importance of having a court-appointed immigration counsel in criminal proceedings.

Counsel Is a Necessity, Not a Luxury

The Supreme Court has held that any time a defendant faces a loss of liberty—namely, the punishment of imprisonment—he is entitled to court-appointed counsel. Because the Supreme Court has also found that deportation is punishment, even when there is no risk of actual imprisonment, an indigent noncitizen defendant should also be assigned a court-appointed immigration attorney to assist his criminal defense attorney during his criminal case. Appointing immigration counsel from the inception of the criminal case would help ensure that noncitizen defendants have all relevant information before deciding whether to accept a plea or take their chances at trial to avoid deportation. Some public defender offices have an in-house immigration attorney to assist them with their noncitizen clients. It should not be the case that only large cities have this luxury. Given the development in this area of the law, the legal landscape is fertile for advocates to argue for a constitutional mandate making in-house immigration counsel a necessity.

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appointed immigration attorney, she would have known that pleading guilty to a drug paraphernalia offense was automatic grounds for removal.²⁶ She also would have avoided six months of custody in an immigration detention center, which was longer than any sentence she would have received under the criminal charges. Like Rodriguez-Vega, had Sasha known that pleading guilty would mean losing her family, she would never have pleaded guilty to the charges. As the Ninth Circuit recognized, an immigrant “may rationally risk a far greater sentence for an opportunity to avoid lifetime separation from her family and the country in which they reside.”²⁷ ◉

Endnotes

¹*United States v. Parrino*, 212 F.2d 919, 921 (2d Cir. 1954) (explaining that deportation is a collateral consequence of conviction).
²*Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000). Sasha’s case occurred

before the U.S. Supreme Court decided *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015).

³*Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

⁴*Id.*

⁵*Id.* at 344.

⁶*Powell v. Alabama*, 287 U.S. 45 (1932).

⁷*Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979).

⁸*Argersinger*, 407 U.S. at 48 (internal quotations omitted).

⁹*Scott v. Illinois*, 440 U.S. 367, 374 (1979).

¹⁰8 U.S.C. § 1229a(b)(4)(A)1252(b)(2) (“the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings”).

¹¹*INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

¹²*Id.*

¹³*Id.*

¹⁴*See, e.g., United States v. Amador-Leal*, 276 F.3d 511 (9th Cir. 2002) (explaining that the trial court need not inform defendant of immigration consequences).

¹⁵*Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

¹⁶*Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (emphasis added).

¹⁷*Id.* at 365.

¹⁸*Id.* at 366–67.

¹⁹*Id.* at 366.

²⁰*United States v. Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015).

²¹*Id.* at 782.

²²28 U.S.C. § 2255.

²³*Rodriguez-Vega*, 797 F.3d at 782.

²⁴*Id.*

²⁵*Id.*

²⁶Sasha filed a petition for post-conviction relief for ineffective assistance of counsel under *Padilla*, and her conviction was later vacated. Moreover, she asked for and was granted prosecutorial discretion by DHS. She is now home with her family.

²⁷*Rodriguez-Vega*, 797 F.3d at 789.



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