

Case at a Glance

The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. The defendant, a lawful alien, has resided in the United States for more than forty years, never applying for citizenship. He pled guilty to felony drug trafficking in reliance upon his attorney's advice that the plea would have no effect on his lawful permanent resident status. In reality, the defendant's plea triggers near-certain deportation. May the defendant withdraw the plea on the grounds of ineffective assistance of counsel?



Jessica E. Slavin is an associate professor of legal writing at Marquette University Law School in Milwaukee, Wisconsin. In addition to legal writing and appellate advocacy, she teaches seminars in refugee law and in law and rhetoric. She can be reached at jessica.slavin@marquette.edu or 414.288.7486.

ISSUES

Under the Sixth Amendment's guarantee of the effective assistance of counsel, is a longtime permanent resident defendant's guilty plea to drug trafficking undermined by ineffective assistance because his attorney wrongly advised him that the guilty plea would have no effect on his immigration status?

If so, can the defendant here establish the second prong of an ineffective assistance claim, prejudice?

FACTS

The petitioner, Jose Padilla, was born in Honduras in 1950 and arrived in the United States in the 1960s. He has resided in the United States since that time, more than 40 years, and even serving with the U.S. military during the Vietnam War. Though he is a lawful permanent resident of the United States, he never applied to become a naturalized citizen.

Was a Lawful Permanent Resident Deprived of Effective Assistance of Counsel?

by Jessica E. Slavin

PREVIEW of United States Supreme Court Cases, pages 24–27. © 2009 American Bar Association.

In September 2001, Padilla was living in California with his family and working as a truck driver. During a “driver paperwork safety inspection,” Kentucky authorities became suspicious of Padilla, and subsequent searches and investigation resulted in the discovery of approximately 1,033 pounds of marijuana in Padilla's truck. Padilla was arrested and later charged with a number of state crimes, including felony drug trafficking.

After initially pleading not guilty to all of the charges, Padilla was released on bond, but immigration authorities (INS) soon directed the Commonwealth of Kentucky (the Commonwealth) to take Padilla back into custody for 48 hours pending investigation of whether Padilla “is subject to removal from the United States.” The Hardin County District Court seems to have misconstrued this INS order, stating during a subsequent bail hearing that Padilla was “believed to be an illegal alien.” Padilla's counsel did not correct the court's misimpression about Padilla's immigration status, despite the fact that, as a lawful

PADILLA V. KENTUCKY
DOCKET NO. 08-651

ARGUMENT DATE:
OCTOBER 13, 2009
FROM: SUPREME COURT OF
KENTUCKY



permanent resident of the United States, Padilla could have been permitted to stay out on bond. Instead, bail was revoked, and Padilla remained in jail for the year preceding his guilty plea in October 2002.

That guilty plea came about after the Commonwealth offered Padilla a plea agreement. This agreement required Padilla to plead guilty to certain misdemeanor drug charges and to a felony marijuana trafficking charge. In exchange, the Commonwealth agreed to recommend that the maximum term of imprisonment on each charge be served concurrently, for a total of 10 years, with five years served in jail and five years on probation.

Padilla states that during his consideration of this plea offer, he asked his attorney whether the plea would affect his status as a lawful permanent resident. His attorney reassured him that he “did not have to worry about immigration status since he had been in the country so long.” Padilla thereafter accepted the plea bargain, and was sentenced.

Padilla’s attorney’s advice about the immigration consequences of the plea was, unfortunately, wrong. His guilty plea to drug trafficking, an “aggravated felony,” means he is no longer eligible for any immigration benefits and has virtually no defense to deportation from the United States upon his release from prison. Padilla now asserts that he would not have pled guilty had he known these immigration consequences.

Prior to his scheduled release from prison, Padilla filed in August 2004 a pro se motion for postconviction relief on the basis of ineffective assistance of counsel. In this motion, Padilla claimed that his attorney was required to investigate the potential immigration consequences of his plea and that his

attorney’s misadvice regarding those consequences constituted ineffective assistance. He further argued that he had suffered prejudice as a result of the attorney’s ineffective assistance, as he would have rejected the plea if he had been properly advised.

The Hardin County Circuit Court *sua sponte* denied Padilla’s motion, holding that the attorney’s advice regarding immigration consequences was collateral to the criminal proceedings and could not support a Sixth Amendment claim. Furthermore, the court reasoned, Padilla should have been aware of the possibility that he might be deported, since the INS had requested his detainer during pretrial proceedings. In summary, the trial court stated, “Padilla cannot show ineffective assistance of counsel merely because of a statement of opinion on whether the Immigration and Naturalization Service would choose to deport Padilla given his length of time in the United States.”

Padilla appealed, and the Kentucky Court of Appeals reversed. The court noted the recent decision of the Kentucky Supreme Court in *Fuortado v. Commonwealth*, 170 S.W.3d 384 (Ky. 2005), holding that defense counsel’s failure to advise a client about immigration consequences of conviction cannot support a claim of ineffective assistance of counsel. That reasoning, however, was distinguishable, according to the Kentucky Court of Appeals, because of the difference between failure to advise and affirmative misadvice: “The record does not refute [Padilla’s] allegation that counsel affirmatively assured him he would not be deported as a result of pleading guilty; nor does it refute his claim that but for counsel’s mistaken advice, he would not have pled guilty.” In that context, the Kentucky Court of Appeals held

Padilla was entitled to a hearing on his ineffective assistance claim.

The Commonwealth sought, and was granted, discretionary review of the Kentucky Court of Appeals’ decision, and the Kentucky Supreme Court reversed and reinstated the trial court’s holding. Acknowledging that “[a]ppellee correctly asserts that a number of jurisdictions which have held that failure to advise of a collateral matter is not ineffective assistance have nevertheless held that there is an exception for cases where the attorney misadvised the defendant on the consequences of his plea with regard to immigration,” the court nonetheless concluded that it made no difference whether the attorney failed to give advice or affirmatively gave false advice. According to the court, “In neither instance is the matter required to be addressed by counsel, and so an attorney’s failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*.”

Two justices dissented, agreeing with *Fuortado* that failure to advise about immigration consequences was not ineffective assistance, but arguing that affirmative misadvice is different: “Counsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all.”

After his petition for rehearing was denied, Padilla filed and was granted a petition for a writ of certiorari in the United States Supreme Court.

CASE ANALYSIS

In his brief, Padilla first argues that, under *Hill v. Lockhart*, 474 U.S. 52 (1985), and general principles underlying the Sixth Amendment guarantee of effective assistance, the collateral-

(Continued on Page 26)



consequences doctrine—the doctrine that a judge’s colloquy with a defendant who is pleading guilty need not extend to collateral consequences of the plea, but only the nature of the plea itself—simply does not apply. In Padilla’s view, the collateral-consequences doctrine applies only in the context of deciding whether a court properly advised a defendant before the defendant’s guilty plea; its reasoning “is not germane to the different and much broader duties of *defense counsel* in defending criminal prosecution.” Furthermore, “*Strickland* expressly rejects such mechanical definitions of an attorney’s duties in a criminal representation.”

In the alternative, Padilla asserts that “even if this Court does not wish to decide the fate of the collateral-consequences rule generally, it should not apply it to deportation or to misadvice.” Deportation, Padilla argues, “is irreversible and life-altering, and its imposition has become more certain and less discretionary under the successive revisions to the immigration statutes. This Court ... should not indulge the damaging fiction that competent counsel would not attend to the deportation implications” of an immigrant’s guilty plea. Finally, at the very least, Padilla claims, “defense counsel’s affirmative misadvice to his client about legal questions that the attorney has not adequately researched is objectively unreasonable by any measure.”

The Commonwealth responds that “[f]or a guilty plea to be voluntary in a constitutional sense a defendant need only understand the direct consequences of his or her plea,” a standard that is satisfied by the trial court’s colloquy with the defendant. According to the Commonwealth, “the ineffective assistance inquiry approved in *Hill* seeks to ensure that a defendant voluntarily entered his guilty plea,” which depends only on the defen-

dant’s understanding of the direct consequences of conviction and the rights being waived. With regard to the distinction between failure to advise and affirmative misadvice, the Commonwealth asserts that “[a] criminal defense attorney’s act of gratuitously offering [advice on collateral matters] does not somehow change the collateral nature of the advice nor create a drastically new distinction in the constitutional analysis.”

Finally, with regard to Padilla’s particular case, the Commonwealth argues that “[e]ven if this Court should decide to expand the protections granted by the Sixth Amendment to Padilla’s situation, ... Padilla ... cannot demonstrate ... that he suffered prejudice necessitating reversal” under *Strickland*.

In what is probably the most significant of the numerous amicus briefs filed in the case, the solicitor general of the United States of America takes a middle position. First, like the Commonwealth, the United States’ brief argues that the guarantee of effective assistance of counsel “does not extend to providing advice beyond the scope of the criminal case.” In other words, according to the solicitor general, the collateral-consequences doctrine does extend to the Sixth Amendment guarantee. However, unlike the Commonwealth’s brief, the solicitor general’s brief takes the position that affirmative misadvice may, in a proper case, be the basis of an ineffective assistance claim: “Although defense counsel has no affirmative duty to advise the defendant on removal and other consequences that are beyond the scope of the criminal proceeding, counsel must ensure that if she does provide advice on such consequences, it falls ‘within the range of competence demanded of attorneys in criminal cases.’ ”

Nevertheless, with regard to Padilla’s particular claim, the United States’ position is that Padilla’s conviction should be affirmed “on the ground that petitioner cannot establish *Strickland*’s second requirement—that counsel’s errors prejudiced him.” While acknowledging that the Supreme Court typically declines to pass on issues not raised below (such as the prejudice issue in Padilla’s case), the solicitor general argues that “as in *Hill*, and in light of the importance of the prejudice inquiry to the analysis of misadvice claims, a decision applying the prejudice standard ... would provide valuable guidance.”

One potential response to the no-prejudice argument is outlined in the brief for the amici Asian American Justice Center, Mexican American Legal Defense and Educational Fund, and Other Immigrants’ Rights Organizations in Support of Petitioner. This amici notes that “[w]hether immigration law classifies a particular criminal conviction as one that results in detention or deportation, however, can turn largely on the specifics of a non-citizen’s plea agreement,” such as replacement of one charge with another similar charge that would be classified differently, or through the specifics of a sentencing recommendation.

SIGNIFICANCE

The significance of this case for the approximately 12.8 million lawful permanent residents of the United States is highlighted in the same amicus brief, which points out that “[b]ecause detention and deportation tear apart families and disrupt long-settled expectations, for many non-citizens, the immigration consequences of a particular conviction are the most important consideration” when evaluating a plea. These consequences are even more dramatic, this brief asserts, when one



considers the extreme breadth of the “aggravated felony” definition after the 1996 amendments to the immigration law of the United States.

A brief filed by various associations of criminal defense attorneys argues that a defense counsel’s effective assistance includes the duty to provide a noncitizen defendant with advice about the immigration consequences of his plea. In supporting Padilla, this brief points to *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001), which barred retroactive application of legislation severely limiting relief from deportation. *St. Cyr* further “concluded that ‘[e]ven if the defendant were not initially aware [of the amended statute], competent defense counsel, following the advice of numerous practice guides, would have advised him concerning [it].’”

On the other hand, the amicus brief filed on behalf of a number of states and the National District Attorneys Association takes the position that the Supreme Court should rule that deportation is a collateral consequence, outside the scope of the Sixth Amendment’s protections, in part because “it would be unwise to interfere with the states’ experimentation in this area.”

Finally, practical effects on the finality of criminal convictions are raised in the solicitor general’s brief, which asserts that, in addition to requiring criminal defense attorneys to give advice about legal issues with which they may not be familiar, the availability of such challenges “would undermine the finality of plea-based convictions and could strain judicial and prosecutorial resources,” especially because defendants often may not challenge the conviction until years later, when they become aware of the immigration consequences of the plea.

ATTORNEYS FOR THE PARTIES

For Petitioner Jose Padilla
(Stephen B. Kinnaird,
202.551.1700)

For Respondent Kentucky (Wm. Robert Long Jr., 502.696.5342)

AMICUS BRIEFS

In Support of Petitioner Jose Padilla

American Bar Association (H. Thomas Wells Jr., 312.988.5000)

Asian American Justice Center (Paul R. Q. Wolfson, 202.663.6000)

Constitutional Accountability Center (Elizabeth B. Wydra, 202.296.6889)

Legal Ethics, Criminal Procedure, and Criminal Law Professors (Miguel A. Estrada, 202.955.8500)

National Association of Criminal Defense Lawyers (Iris E. Bennett, 202.639.6000)

In Support of Respondent Kentucky

Louisiana (Gene C. Schaerr, 202.282.5000)

In Support of Affirmance

United States (Elena Kagan, 202.514.2217)