

PADILLA v. KENTUCKY: IMMIGRATION CONSEQUENCES DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL

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I. INTRODUCTION

After forty years in the United States, a resident alien named Jose Padilla faces deportation because he pled guilty to three drug charges, including a felony drug trafficking charge.¹ After learning that he would be deported because of the convictions, Padilla sought to change his plea by claiming that he had only pled guilty because his appointed attorney told him that the guilty plea would not affect his immigration status.² Padilla's claim that his attorney's gross misadvice violated his right to effective assistance of counsel highlights a quandary within Sixth Amendment law: does the Sixth Amendment right to counsel set standards for the advice attorneys give criminal clients about the collateral consequences of plea agreements and, if so, is the standard for failure to advise different from affirmative misadvice? In *Padilla v. Kentucky*,³ the Supreme Court will address that question and, in doing so, help decide if Jose Padilla can remain in the United States.

II. FACTS

Jose Padilla is facing deportation because he pled guilty to three drug crimes.⁴ Prior to his arrest, Padilla was a legal resident in the United States working as a commercial truck driver.⁵ In September

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1. Brief for the Petitioner at 8–10, *Padilla v. Kentucky*, No. 08-651 (U.S. May 25, 2009).

2. *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008).

3. *Padilla*, No. 08-651 (U.S. argued Oct. 13, 2009).

4. Brief for the Petitioner, *supra* note 2, at 9–10.

5. *Id.* at 8.

2001, Padilla was stopped by police officers for failing to display a weight and distance tax ID on his truck.⁶ Padilla consented to a search of the truck and officers uncovered over 1,000 pounds of marijuana.⁷ Padilla was indicted by a grand jury on four charges, including felony trafficking in marijuana.⁸ Before trial, the prosecution offered Padilla a deal in which he would plead guilty to felony trafficking in marijuana and the two misdemeanor drug charges and they would recommend a sentence for Padilla of five years in prison and five years on probation.⁹

According to Padilla, he pleaded guilty because his appointed lawyer assured him that he “did not have to worry” about deportation because he had lived in the United States for more than forty years.¹⁰ The trial court accepted the proposed agreement on October 4, 2002.¹¹ Two years after he pleaded guilty, Padilla filed a *pro se* motion to vacate his conviction.¹² In it, he claimed that his lawyer violated his Sixth Amendment right to effective counsel by giving him incorrect advice on the deportation consequences of his guilty plea.¹³

The trial court denied Padilla’s motion, holding that the defendant did not have to be educated on all possible consequences of his guilty plea in order for it to be valid.¹⁴ On appeal, the Kentucky Court of Appeals reversed the trial court’s decision, holding that although attorneys do not have to educate their clients on all possible consequences in order for the pleas to be valid under the Sixth Amendment, they cannot give such advice incorrectly.¹⁵ The court held that, for purposes of the Sixth Amendment, there is a difference between failure to advise and affirmative misadvice. The Commonwealth of Kentucky appealed the ruling to the state supreme

6. Brief for the United States as Amicus Curiae Supporting Respondent at 2, *Padilla*, No. 08-651 (U.S. Aug. 17, 2009).

7. *See id.* at 2–3 (discussing the attempt by Padilla’s defense counsel to suppress the evidence uncovered by the search; the trial court eventually found that both the consent and search were valid).

8. *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008).

9. *Id.*

10. *Id.*

11. *Id.*

12. Brief for the Petitioner, *supra* note 1, at 11.

13. *Id.* at 11 (explaining that Padilla requested an evidentiary hearing to determine whether his guilty plea was prejudiced by his attorney’s incompetence).

14. *Padilla*, 253 S.W.3d at 483.

15. *Padilla v. Commonwealth*, No. 2004-CA-001981-MR, 2006 Ky. App. LEXIS 98, *7 (Ky. Ct. App. Mar. 31, 2006) (distinguishing counsel’s misadvice on collateral consequences from the lack of advice).

court.¹⁶

III. LEGAL BACKGROUND

The Sixth Amendment seeks to ensure that a defendant in a criminal case is provided with counsel who advises the defendant on the consequences of a conviction that are relevant to the criminal prosecution. When a criminal defense lawyer advises a defendant to plead guilty, the courts are generally concerned with the voluntariness of the defendant's plea. The Supreme Court, in *Brady v. United States*¹⁷ and *Boykin v. Alabama*,¹⁸ established that a plea may be considered voluntary as long as the defendant knows the direct consequences of conviction and understands the rights being waived.

If a defendant claims that his attorney's ineffective assistance led him to plead guilty, he must satisfy the test established in *Strickland v. Washington*.¹⁹ The *Strickland* test considers whether counsel acted incompetently and, if so, whether counsel's incompetence prejudiced the defendant by rendering the plea involuntary.²⁰

The Supreme Court has never determined whether misadvice on collateral consequences can be the basis of a Sixth Amendment ineffective assistance of counsel claim. The closest that the Supreme Court has come to addressing this issue is *Hill v. Lockhart*.²¹ In *Hill*, a criminal defendant claimed that his Sixth Amendment right to counsel had been violated when his lawyer misadvised him on parole eligibility.²² The Court found that the defendant had not shown that his lawyer's advice prejudiced him.²³ Consequently, it declined to address whether the defendant's lawyer was ineffective by misadvising the defendant on the collateral consequence of parole eligibility.²⁴

Without direction from the Supreme Court on this issue, federal and state courts have developed a doctrine of limited exception for

16. *Padilla*, 253 S.W.3d at 483.

17. *Brady v. United States*, 397 U.S. 742, 755 (1970) (finding that only an understanding of direct consequences is necessary for a defendant to provide a voluntary guilty plea).

18. *Boykin v. Alabama*, 395 U.S. 238 (1969) (establishing that a trial court must confirm with the defendant on the record that the defendant understands the direct consequences of a guilty plea and the constitutional rights it waives).

19. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

20. *Id.*

21. *Id.*

22. *Id.* at 53–55.

23. *Id.* at 60.

24. *Id.*

misadvice on collateral consequences. Currently, all of the Federal circuits and twenty-one states allow defendants whose lawyers misadvised them on the collateral consequences of their guilty pleas to use the ineffective assistance of counsel claim to challenge the voluntariness of their pleas.²⁵ This doctrine does not alter or contest the norm that a defendant must only understand the direct consequences of a guilty plea for it to be considered voluntary;²⁶ it does, however, develop a Sixth Amendment standard for advice a defense lawyer *chooses* to give regarding collateral consequences.

The federal and state courts that have encountered this issue have adopted different interpretations of the Sixth Amendment's standard for advice on collateral consequences. Some jurisdictions have held that the Sixth Amendment imposes a general standard that misadvice on collateral consequences may constitute a claim for ineffective assistance of counsel if the misadvice was a material component in the decision to plead guilty.²⁷ Other jurisdictions have been unwilling to interpret the Sixth Amendment as setting out a general standard for advice on collateral consequences, but have held that misadvice on collateral *immigration* consequences may constitute ineffective assistance of counsel.²⁸

Many of the federal circuit courts began establishing a Sixth Amendment standard on misadvice about collateral consequences in

25. See *Commonwealth v. Padilla*, 253 S.W.3d 482, 484–85 (Ky. 2008) (listing cases that have concluded that gross misadvice of a collateral consequence may constitute ineffective assistance of counsel).

26. Brief for the Respondent at 7, *Padilla v. Kentucky*, No. 08-651 (U.S. May 25, 2009).

27. *Padilla*, 253 S.W.3d at 484. See also *Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988) (finding that gross misadvice regarding parole eligibility may be cause for ineffective assistance of counsel); *Cepulonis v. Ponte*, 699 F.2d 573, 577 (1st Cir. 1983) (“[A]lthough defendant need not be informed of the details of his parole eligibility, ‘misinformation may be more vulnerable to constitutional challenge than mere lack of information.’”); *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979) (holding that gross misadvice by a defendant’s lawyer concerning parole eligibility may constitute ineffective assistance of counsel).

28. See *Padilla*, 253 S.W.3d at 484–85 (citing several cases upholding misadvice exception). See, e.g., *United States v. Kwan*, 407 F.3d 1005, 1015–16 (9th Cir. 2005) (finding that affirmative misrepresentation of deportation consequences qualifies as ineffective assistance of counsel where counsel represented himself as an expert in immigration law yet did not recommend to the sentencing judge a sentence two days shorter to ensure that his client was not deported); *United States v. Couto*, 311 F.3d 179, 187 (2d Cir. 2002) (affirmative misrepresentation regarding immigration consequences is deficient according to the first prong of the *Strickland* test for reasonable effectiveness); *Downs-Morgan v. United States*, 765 F.2d 1534, 1539–41 (11th Cir. 1985) (finding affirmative misrepresentation regarding immigration consequences, coupled with likelihood that petitioner would be imprisoned and executed after deportation, could be ineffective assistance); *State v. Rojas-Martinez*, 125 P.3d 930, 935 (Utah 2005) (holding that counsel is not required to advise on deportation consequences of a guilty plea, but recognizing the exception for when counsel affirmatively misadvises a client on such consequences).

cases that involved misadvice regarding parole eligibility.²⁹ For instance, in *Sparks v. Sowders*, the Sixth Circuit held that a defense lawyer's incorrect advice to a client that he must plead guilty to be eligible for parole may have violated the defendant's Sixth Amendment right to counsel and raised legitimate questions about whether the defendant entered into the plea agreement voluntarily.³⁰ According to *Sparks*, an affirmative act of gross misadvice regarding the collateral consequence of parole eligibility may constitute a claim for post-conviction relief.³¹

Commonwealth v. Padilla was the first case before the Supreme Court of Kentucky that presented the question of whether misadvice on a collateral consequence could amount to ineffective assistance of counsel. Before *Padilla*, *Commonwealth v. Fuartado* was the only collateral consequences case that Kentucky's supreme court had heard.³² In *Fuartado*, the Kentucky court held that a criminal defense attorney's failure to advise on collateral consequences, such as deportation, did not constitute a claim for a Sixth Amendment violation.³³

Given that *Fuartado* only treated the issue of failing to advise, the Kentucky Court of Appeals found Padilla's claim that misadvice on collateral consequences violated his Sixth Amendment right to counsel was one of first impression.³⁴ Consequently, it looked to the Sixth Circuit's decision in *Sparks*, and held that the misadvice Padilla received could constitute a claim for ineffective assistance of counsel.³⁵

IV. HOLDING

In *Commonwealth v. Padilla*, the Supreme Court of Kentucky held that misadvice on a collateral consequence of a guilty plea can never be the basis for a Sixth Amendment claim.³⁶ In doing so, the majority held that an affirmative act of misadvice on collateral consequences is

29. *Sparks*, 852 F.2d at 885.

30. *Id.*

31. *Id.*

32. *Commonwealth v. Fuartado*, 170 S.W.3d 384 (Ky. 2005).

33. *See id.* at 386 (defendant alleging that defense counsel's failure to advise him on the potential deportation consequences of a guilty plea to marijuana trafficking constituted ineffective assistance of counsel).

34. *Padilla v. Commonwealth*, No. 2004-CA-001981-MR, 2006 Ky. App. LEXIS 98, at *7 (Ky. Ct. App. Mar. 31, 2006).

35. *Id.*

36. *Padilla*, 253 S.W.3d at 485.

no different than the failure to advise on collateral consequences.³⁷ Because it held that misadvice on collateral consequences is the same as failing to advise, the Supreme Court of Kentucky concluded that it was bound to follow *Commonwealth v. Fuartado*.³⁸

The court maintained this position even after acknowledging that a number of jurisdictions regarded misadvice and failure to advise on collateral consequences as different with regard to Sixth Amendment claims of ineffective assistance of counsel.³⁹ Though it recognized that several jurisdictions had held that affirmative misadvice regarding collateral consequences could be the basis of a Sixth Amendment claim,⁴⁰ the Kentucky court ultimately concluded that it was obligated to follow the rationale of *Fuartado*. Because *Fuartado* held that advice on collateral consequences is not within the scope of the Sixth Amendment, the Kentucky court concluded that misadvice on collateral consequences is also outside the scope of a claim for ineffective assistance of counsel.⁴¹

In dissent, Justice Cunningham argued that *Fuartado*'s holding did not prevent the court from finding that the Sixth Amendment imposed a standard on attorneys who choose to advise their clients on collateral consequences.⁴² The dissent declared that “[c]ounsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all,” and proposed that lawyers should admit lack of knowledge rather than give erroneous advice.⁴³

V. ANALYSIS

The Kentucky Supreme Court should have differentiated between the failure to advise illustrated in *Fuartado* and the misadvice present in *Padilla*. A defendant in a criminal case deserves accurate advice in order to ensure that his plea is voluntary. Advice should be accurate for both direct and collateral consequences, even if the lawyer is not required to provide advice on collateral consequences. The questions presented by *Fuartado* and *Padilla* are sufficiently distinct to justify the establishment of a holding on misadvice regarding collateral consequences. The Kentucky court's disregard of the widely-

37. *Id.*

38. *Id.*

39. *Id.* at 484.

40. *Id.* at 484–85.

41. *Id.* at 485.

42. *Id.* (Cunningham, J., dissenting).

43. *Id.*

recognized distinction between claims based on a failure to advise and claims based on misadvice is problematic.⁴⁴

In the space of one paragraph, the Kentucky court applied the *Fuortado* rationale to foreclose Sixth Amendment claims based on misadvice on collateral consequences. This leap in reasoning lacks a sufficient legal explanation and is especially startling since almost all jurisdictions that have treated this issue have determined that misadvice may support a defendant's claim of a Sixth Amendment violation.⁴⁵

By almost any fair reading of the facts in *Padilla* and *Fuortado*, Padilla's claim of misadvice was one of first impression for the court and the court was not bound by its holding in *Fuortado*. The court's reliance on *Fuortado* would have been more appropriate if Padilla's claim had focused solely on his counsel's failure to advise him on the possible deportation consequences of his guilty plea.⁴⁶ Instead, Padilla specifically inquired about the deportation consequences and his counsel dispensed erroneous advice.⁴⁷ The supreme court should have recognized this, and realized that *Fuortado*'s holding did not determine whether the Sixth Amendment set a standard for the attorneys who choose to advise their clients on the collateral consequences of their guilty pleas. The Supreme Court has not yet defined the scope of the Sixth Amendment in this respect, so the Sixth Amendment may indeed protect criminal defendants from gross misadvice on collateral consequences even if it does not require their defense lawyers to actively advise on collateral consequences.

VI. ARGUMENTS AND DISPOSITION

A. Petitioner's Argument

Padilla claimed that the Sixth Amendment does set a standard for legal advice on collateral consequences of guilty pleas, and because

44. See Petition for Writ of Certiorari at 12, *Padilla v. Kentucky*, No. 08-651 (U.S. Nov. 14, 2008) (citing several state and federal court decisions that have held affirmative misadvice is a violation of the Sixth Amendment).

45. See *Padilla*, 253 S.W.3d at 484–85 (listing cases that have concluded that gross misadvice of a collateral consequence may constitute ineffective assistance of counsel). See Petition for Writ of Certiorari, *supra* note 44, at 13 (noting that all of the Federal circuits and twenty-one states hold that giving incorrect advice on collateral consequences may qualify as ineffective assistance of counsel).

46. *Padilla*, 253 S.W.3d at 485.

47. *Id.* at 483.

there is a standard for advice on collateral consequences, Padilla argued that claims like his should be reviewed using the two-part *Strickland v. Washington* test.⁴⁸ The Sixth Amendment seeks to ensure that criminal defendants receive legal representation that meets or exceeds a certain standard. Permitting a limited constitutional norm that holds that misadvice (as opposed to failure to advise) on collateral consequences may constitute a claim under the Sixth Amendment allows the courts to safeguard criminal defendant's effective representation.

Padilla contended that criminal defendants actually get "objectively unreasonable" representation when their lawyers misadvise them on collateral consequences.⁴⁹ Gross misadvice constitutes objectively unreasonable representation under the Sixth Amendment, Padilla contends, because criminal defendants are uniquely vulnerable during a criminal prosecutions and trust that their attorneys will dispense informed advice.⁵⁰ In this delicate situation, Padilla contends that the Sixth Amendment requires criminal defense lawyers' advice on collateral consequences to meet a standard of competence.⁵¹ Even if the Sixth Amendment does not impose an affirmative obligation on criminal defense attorneys to advise their clients on collateral consequences, this standard of competence requires that any attorney who chooses to advise his client on collateral consequences "must do so competently."⁵²

Padilla claimed that *Hill v. Lockhart* shows that the Supreme Court has been willing to consider Sixth Amendment claims based on misadvice about collateral consequences.⁵³ He argued that the Court, by using the *Strickland* test to evaluate the claim in *Hill*, implicitly rejected the notion that the Sixth Amendment did not set any standards for advice that criminal defense attorneys choose to give on collateral consequences.⁵⁴ He contended that the Court's reliance on the *Strickland* test in *Hill* indicated that Sixth Amendment claims based on misadvice about collateral consequences would be reviewed for reasonableness on a case-by-case basis, not by a *per se* rule.⁵⁵

48. Brief for Petitioner, *supra* note 1, at 50.

49. *Id.* at 57.

50. *Id.* at 56-57.

51. *Id.*

52. *Id.* at 59.

53. *Id.* at 14.

54. *Id.*

55. *Id.* at 15.

Padilla argued that if the Court is unwilling to hold that misadvice on collateral consequences may constitute a basis for an ineffective assistance of counsel claim, it should create an exception for misadvice on collateral immigration consequences because they are so severe.⁵⁶ Specifically, Padilla asked that deportation consequences be analyzed under the *Strickland* test because deportation consequences are uniquely harsh in their immediate effects and because defense counsel has the ability to assist a defendant in avoiding this consequence throughout the trial and sentencing processes.⁵⁷ For Padilla and other non-citizen defendants who are convicted of aggravated felonies, deportation is “virtually a foregone conclusion.”⁵⁸ The automatic and direct nature of deportation is inconsistent with the rationale behind excluding collateral consequences from counsel’s legal obligations. As Padilla noted, deportation is considered such a serious consequence of a guilty plea that trial courts in twenty-four states and the District of Columbia notify defendants of possible deportation consequences during plea hearings.⁵⁹

B. Respondent’s Argument

Kentucky argued that the Sixth Amendment only requires a minimum level of competency for advice on the direct consequences of the plea, and therefore misadvice on collateral consequences cannot be a Sixth Amendment violation. Noting that trial courts are only required to ensure that a defendant understands the direct consequences of his guilty plea,⁶⁰ Kentucky argued that the Sixth Amendment only sets standards for legal advice on direct consequences of a plea.⁶¹ Kentucky contended that interpreting the Sixth Amendment as imposing standards for advice on possible collateral consequences “would be overly burdensome and wholly impractical” because defense counsel would then have a duty to ascertain and apply the vast range of collateral consequences to the client.⁶²

56. *Id.* at 50.

57. *Id.* at 51.

58. *Id.* at 53.

59. *Id.* at 54.

60. Brief for the Respondent, *supra* note 26, at 7.

61. *Id.* at 9.

62. *See id.* at 17-18 (noting that collateral consequences can include familial consequences, property forfeiture, and the loss of the ability to purchase alcohol).

Kentucky also argued that there was “no legal or rational basis” for maintaining that the Sixth Amendment does not require advice on collateral consequences but sets a standard for such advice when it occurs.⁶³ It contended that Padilla’s reliance on *Hill v. Lockhart* was misplaced because that case did not explicitly hold or even address whether misadvice on collateral consequences could be ineffective assistance of counsel under the Sixth Amendment.⁶⁴

C. Oral Arguments

At oral argument, the Court appeared sympathetic to Padilla’s plight, yet concerned about limiting the scope of its ruling.

Justice Ginsburg and Justice Sotomayor focused on deportation as a unique consequence of a guilty plea and reflected on the difficulty of ensuring that a defendant makes an informed, strategic choice. Justice Ginsburg asked “why wouldn’t a lawyer whose client is an alien have an obligation, when there is an aggravated felony as the charge, to say: This will be the consequence?”⁶⁵ Justice Sotomayor also commented that a defendant deserves to make a strategic and well-informed choice on whether to plead guilty or go to trial.⁶⁶ She hypothesized that an alien may choose to go to trial and risk serving a longer sentence because he could serve the sentence in the United States and avoid “starv[ing] to death” in his home country.⁶⁷

Justice Scalia doubted the Court’s ability to craft an exception solely for deportation, commenting that one defendant might be interested in advice on keeping custody of his children, while another defendant may be very concerned about losing his truck, “which is his main means of livelihood.”⁶⁸ Justice Scalia questioned whether it would be possible to follow the petitioner’s suggestion to declare deportation a special consequence and “leave for another day” other consequences.⁶⁹ Justice Scalia’s concerns highlight the Court’s probable unwillingness to set out special standards for advice on collateral consequences like deportation without treating collateral

63. *See id.* at 10 (noting that the cases Padilla offered in Petitioner’s Brief do not contain “any legal or rational basis” for establishing that misadvice regarding collateral consequences may result in a violation of the Sixth Amendment).

64. *Id.* at 23.

65. Transcript of Oral Argument at 47, *Padilla v. Kentucky*, No. 08-651 (U.S. Oct. 13, 2009).

66. *Id.* at 35.

67. *Id.*

68. *Id.* at 7.

69. *Id.*

consequences in general.

Although he agreed with Padilla's counsel that deportation is a severe consequence for someone calling the United States home, Justice Alito asked whether courts would be faced with an unworkable standard if the Supreme Court holds that misadvice on collateral consequences is a Sixth Amendment violation. If a defendant claims that defense counsel dispensed advice on collateral consequences, but there is no documentation of this advice, how will courts decide whether counsel actually said anything regarding collateral consequences? In the same vein as Kentucky's argument that it would be impractical to require counsel to cover all possible consequences of a guilty plea, Justice Alito also pictured a public defender overburdened and "unable to remember what, if anything, was said about the immigration consequences" of a past case resurrected for post-conviction relief.⁷⁰

D. Likely Disposition

The Supreme Court will likely hold that the Sixth Amendment does not require defense counsel to advise clients on the collateral consequences of guilty pleas, but that it does require counsel that chooses to advise clients on the collateral consequences of guilty pleas not to provide gross misadvice.⁷¹ Such a holding will dispose of the need to make a special Sixth Amendment rule for misadvice about deportation resulting from a guilty plea. Such a special rule would be untenable because there is no clear way to distinguish deportation from other serious collateral consequences, such as parole eligibility and loss of custody.

Allowing defendants to file ineffective assistance of counsel claims for misadvice regarding collateral consequences would not result in a new norm for competent counsel. Instead, courts, in permitting such claims, would be able to hold lawyers accountable to preexisting standards for the advice that they already *chose* to give. Nor would such a standard lead courts to overturn many guilty pleas: even if misadvice is a basis for a *Strickland* claim, defendants must still show that the misadvice prejudiced them.

Even if the Court finds that the misadvice Padilla received could constitute a Sixth Amendment violation, the Court might still hold

70. *Id.* at 10.

71. Brief for the United States as Amicus Curiae, *supra* note 6, at 5–7.

that Padilla does not have an ineffective assistance of counsel claim. The Court could refuse to send the case back to Kentucky for an evidentiary hearing on the grounds that Padilla cannot show that his attorney's misadvice prejudiced his decision to plead guilty. Though such an outcome is possible, it seems unlikely because it is unclear from the record whether Padilla can show whether misadvice prejudiced his decision to plead guilty.