"THE FEDERAL CORNER"

Is the Supreme Court About to Limit *Habeas* Relief Under *Padilla*?

Buck Files

Last June, the United States Court of Appeals for the Sixth Circuit held that a non-citizen defendant could not establish prejudice resulting from his lawyer's deficient performance in advising him that he would not be subject to deportation if he pleaded guilty to a drug offense and affirmed the district court's denial of Lee's § 2255 motion to vacate his conviction and sentence.*Lee v. United* States, 825 F.3d 311 (6th Cir. 2016) [Circuit Judges Norris, Batchelder and Sutton (Opinion by Batchelder)].Seealso*Lee v. United States*, (W.D. Tenn. Mar. 20, 2014), not reported in F. Supp.3d, 2014 WL 1260388.

In December, the Supreme Court granted certiorari in *Lee* to determine whether overwhelming evidence of guilt can preclude prejudice from a lawyer's deficient performance about the deportation consequences of a guilty plea. *Lee v. United States*, 2016 WL 4944484 (December 15, 2016). In deciding this issue, the Supreme Court will resolve a conflict between the Circuits.

This is the first case with a *Padilla* issue that I have looked at since 2010. Out of curiosity, I did three quick searches on WestLaw and found that 3,634 federal cases and 2,111 state cases (including 231 from Texas courts), in the past seven years, have cited *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

For immigration lawyers, *Padilla* was a financial boon. Criminal lawyers began to light up their telephones to ask, "If my client pleads guilty, is he going to get deported?" Even before *Padilla*, we relied on the advice of Richard Fischer, an immigration lawyer from Nacogdoches who has a state wide reputation as a guru on these issues – and we continue to do so.

[The Similarities Between Mr. Padilla and Mr. Lee and Their Legal Issues]

> Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U.S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.
>
> In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he ' "did not have to worry about immigration status since he had been in the country so long."'253 S.W.3d 482, 483 (Ky.2008). Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.
> *Padilla v. Kentucky*, 130 S.Ct. 1473, 1477-78 (2010)

> Jae Lee, now 47 years old, moved to the United States from South Korea with his family in 1982 and has lived here legally ever since. After completing high school in New York, he relocated to Memphis, Tennessee, where he became a successful restaurateur. He also became a small-time drug dealer, and, in 2009, following a sting operation, he was charged with possession of ecstasy with intent to distribute in violation of 21 U.S.C. § 841(a)(1).
>
> * * *
>
> Here's the wrinkle: even though he has lived in the United States for decades, Lee, unlike his parents, never became an American citizen, and though he did eventually plead guilty, he did so only after his lawyer assured him that he would not be subject to deportation—'removal,' in the argot of contemporary immigration law. This advice was wrong: possession of ecstasy with intent to distribute is an 'aggravated felony,' rendering Lee deportable. *See*8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii). *Lee v. United States*, 825 F.3d 311, 312-313 (6th Cir. 2016)

[Mr. Lee's Offense]

Mr. Lee was indicted for possessing ecstasy in violation of 21 U.S.C. § 841(a)(1). His U.S.S.G. Sentencing Range was 33-41 months.

[Mr. Lee's Plea Hearing]

During the plea hearing, United States District Judge Bernice B. Donald, of the Western District of Kentucky, Western Division, and Mr. Lee had the following colloquy:

> *Q. And are you a U.S. citizen?*
> *A. No, Your Honor.*
> *Q. Okay. A conviction on this charge then could result in your being deported. It could also affect your ability to attain the status of a United States citizen.* If you do become a United States citizen, it could affect your rights to participate in certain federal benefits, such as student loans.
> Does that affect at all your decision about whether you want to plead guilty or not?
> A. Yes, Your Honor.
> Q. Okay. How does it affect your decision?
> A. I don't understand.
> Q. Okay. Well, knowing those things do you still want to go forward and plead guilty?
> A. Yes, Your Honor.
> (emphasis added)

[Mr. Lee's Sentencing Hearing]

Mr. Lee was sentenced to a term of imprisonment of twelve months and one day, followed by a three-year period of supervised release and a fine of $5,000. Judge Donald made it clear that he believed Mr. Lee's offense to be serious:

> As you and your attorney and the government has all recognized, this is a very ... serious offense, and it's one that has been ongoing for some period of time. It was not simply one aberrant act, but apparently one time getting caught.
>
> And while we, you know, the number of pills that we are looking at is just under 300. There is nothing to suggest that that's the universe of pills that were involved in this ten year period.
>
> And I think it would be fool hardy to believe that the ten year term included only the three hundred.

[Back in the District Court Seeking *Habeas* Relief]

A year later, Mr. Lee filed a § 2255 motion seeking *habeas* relief. [NOTE: Judge Donald had been appointed as a judge on the United States Court of Appeals for the Sixth Circuit and she was succeeded by Judge John T. Fowlkes, Jr.] Mr. Lee's case was referred to United States Magistrate Judge Diane K. Vescovo, who conducted an evidentiary hearing. One of his grounds for such relief alleged that his trial counsel rendered ineffective assistance by

> '…not only failing to inform Lee that a collateral consequence of his pleading guilty would subject him to deportation, but actually affirmatively misadvising him that he would not be deported if he pleaded guilty;'

The balance of Judge Fowlkes' opinion reads, in part, as follows:

[Magistrate Vescovo's Report and Recommendation]

> On August 6, 2013, Magistrate Judge Vescovo issued her R & R, which recommended that Movant's § 2255 Motion be granted. (ECF No. 59.) Specifically, the R & R concluded that 'Fitzgerald's representation of Lee was objectively unreasonable in that he affirmatively misadvised Lee as to the immigration consequences of pleading guilty to the drug-trafficking crime for which Lee was indicted.' The R & R also found that Lee was prejudiced by his attorney's erroneous advice. Although recognizing that the standard for assessing prejudice is objective rather than subjective, the R & R found that, had Lee known that he would have been deported as a collateral consequence of his guilty plea, he would have insisted on going to trial.
>
> * * *
>
> [The Strength of the Government's Case]

… the Government's case against Lee was strong. Lee, through counsel, has accepted the Government's version of events at the guilty plea hearing and also has not objected to the factual summary in the PSR. At the evidentiary hearing, Lee's attorney testified that there did not appear to be a valid motion to suppress (Evidentiary Hr'g Tr. ('§ 2255 Hr'g Tr.') 87, *Lee v. United States,* No. 10–2698–JTF–dkv (W.D.Tenn.), ECF No. 56) and that the only colorable defense at trial would have been to argue that the pills that were found were intended for personal use. Based on the number of pills that were seized and the sales to the confidential informant, Fitzgerald believed that it would have been 'difficult, let's put it that way, not impossible but it would [have been] difficult' to succeed at trial. Fitzgerald testified that 'I thought it was a bad case to try.' Lee's claim that he provided the pills to friends at cost also is not a viable defense to a drug trafficking charge. *See, e.g.,* *United States v. Moore*, 423 F. App'x 495, 500 n.2 (6th Cir.2008) ('A defendant need not intend to *sell* narcotics in order to be guilty of possession with intent to distribute.').

[The Benefits to Mr. Lee]

Lee also received tangible benefits from the plea deal. Judge Donald sentenced Lee to a term of imprisonment of one year and one day, a significant downward variance from the guideline sentencing range of twenty-four (24) to thirty-six (36) months. Had Lee been sentenced after a trial, he would have lost the three-point reduction for acceptance of responsibility, leaving him with an offense level of 20. Given his criminal history category of I, the guideline sentencing range would have been thirty-three (33) to forty-one (41) months. Thus, the guilty plea itself appears to have greatly reduced Lee's sentence.

[The Proper Standard on the Issue of Prejudice]

Although the R & R purports to apply an objective standard, its analysis of prejudice, which focuses on Lee's ties to the United States and his desire to avoid deportation, is entirely subjective. The proper focus under an objective standard is on whether a reasonable defendant in Lee's situation would have accepted the plea offer and changed his plea to guilty. In light of the overwhelming evidence of Lee's guilt, a decision to take the case to trial would have almost certainly resulted in a guilty verdict, a significantly longer prison sentence, and subsequent deportation. (emphasis added)

* * *

… Lee has no rational defense to the charge and no realistic prospect of avoiding conviction and deportation. … Lee may strongly prefer to remain in the United States, but a rational person in his circumstances would have accepted the plea agreement.

[The Court's Holding]

The Court rejects this portion of the R & R and holds that Lee has not established prejudice. Therefore, Lee is not entitled to relief on his claim that his attorney rendered ineffective assistance by affirmatively misadvising him of the deportation consequences of a guilty plea.

[The District Court Grants a Certificate of Appealability]

Twenty-eight U.S.C. § 2253(a) requires the district court to evaluate the appealability of its decision denying a § 2255 motion and to issue a certificate of appealability ("COA") "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also* Fed. R.App.P. 22(b). No § 2255 movant may appeal without this certificate.

* * *

In this case, reasonable jurists could disagree about the resolution of Claim 1 of Movant's § 2255 Motion, that trial counsel affirmatively misadvised him about the deportation consequences of a guilty plea. The Court grants a certificate of appealability on that claim.

After being denied *habeas* relief, Mr. Lee did give notice of appeal. The United States Court of Appeals for the Sixth Circuit affirmed Judge Fowlkes' denial of *habeas* relief. Judge Batchelder's opinion reads, in part, as follows:

[Evaluating anIneffective Assistance of Counsel Claim]

We evaluate claims of ineffective assistance of counsel using the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Was the attorney's performance deficient? And (2) did the deficient performance prejudice the defense? The government concedes that Lee has satisfied the first prong, so the only question we have to decide on this appeal is whether Lee has met the high bar of demonstrating prejudice. *See id.*at 693–95, 104 S.Ct. 2052. To prevail, he must show 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'*Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). 'The test is objective, not subjective; and thus, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."'*Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)).

[Has *Lee* Satisfied the *Strickland* Standard?]

Whether Lee has satisfied this standard is not immediately obvious. On the one hand, the district court's conclusion that the evidence of guilt was 'overwhelming' is not clearly erroneous, and deportation would have followed just as readily from a jury conviction as from a guilty plea. Thus, aside from the off chance of jury

nullification or the like, Lee stood to gain nothing from going to trial but more prison time. On the other hand, for those such as Lee who have made this country their home for decades, deportation is a very severe consequence, 'the equivalent of banishment or exile,' as the Supreme Court memorably put it. *Delgadillo v. Carmichael*, 332 U.S. 388, 391, 68 S.Ct. 10, 92 L.Ed. 17 (1947). As a factual matter, we do not doubt Lee's contention that many defendants in his position, had they received accurate advice from counsel, would have decided to risk a longer prison sentence in order to take their chances at trial, slim though they were.

[TheCircuit Conflict on the Issue of "Rational Decision"]

But would such a decision be 'rational'? Several courts, including this circuit, have said 'no': being denied the chance to throw 'a Hail Mary' at trial does not by itself amount to prejudice. *See Pilla*, 668 F.3d at 373; *Haddad v. United States*, 486 Fed.Appx. 517, 521–22 (6th Cir. 2012); *see also, e.g.*, *Kovacs v. United States*, 744 F.3d 44, 52–53 (2d Cir. 2014); *United States v. Akinsade*, 686 F.3d 248, 255–56 (4th Cir. 2012); *United States v. Kayode*, 777 F.3d 719, 724–29 (5th Cir. 2014).

Others have reached the opposite conclusion. *See, e.g.*, *United States v. Orocio*, 645 F.3d 630, 643–46 (3d Cir. 2011), *abrogated on other grounds by Chaidez v. United States*, ––– U.S. ––––, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013); *DeBartolo v. United States*, 790 F.3d 775, 777–80 (7th Cir. 2015); *United States v. Rodriguez–Vega*, 797 F.3d 781, 789–90 (9th Cir. 2015); *Hernandez v. United States*, 778 F.3d 1230, 1234 (11th Cir. 2015).

* * *

[The Court's Conclusion]

We have no ability, of course, as a panel, to change camps. And in that sense, this is a straightforward case. In *Pilla* we held that no rational defendant charged with a deportable offense and facing 'overwhelming evidence' of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence. 668 F.3d at 373. Lee finds himself in precisely this position, and he must therefore lose.

* * *

… in other words, the merits matter. And we therefore join the Second, Fourth, and Fifth Circuits in holding that a claimant's ties to the United States should be taken into account in evaluating, *alongside the legal merits*, whether counsel's bad advice caused prejudice. *See, e.g.*, *Kovacs*, 744 F.3d at 52; *Akinsade*, 686 F.3d at 255–56; *Kayode*, 777 F.3d at 725. The problem for Lee is that he has no *bona fide* defense, not even a weak one. Thus, despite his very strong ties to the United States, he cannot show prejudice.

In reaching this conclusion, we should not be read as endorsing Lee's impending deportation. It is unclear to us why it is in our national interests—much less the

interests of justice—to exile a productive member of our society to a country he hasn't lived in since childhood for committing a relatively small-time drug offense. But our duty is neither to prosecute nor to pardon; it is simply to say 'what the law is.'*Marbury v. Madison*, 5 U.S. 1 Cranch 137, 177, 2 L.Ed.60 (1803). Having discharged that duty, we affirm the district court's denial of Lee's § 2255 motion to vacate his conviction and sentence.

[My Thoughts]

- If there is any lesson that I have learned over the years, it is this: Never predict how a judge or an appellate court – especially the Supreme Court–is going to rule. So, now I will break my own rule. I will predict that the Supreme Court is going to follow the lead of the United States Court of Appeals for the Sixth Circuit as they have joined with the Second, Fourth and Fifth Circuits. They will decide that overwhelming evidence of guilt can preclude prejudice from a lawyer's deficient performance about the deportation consequences of a guilty plea.
- When the Supreme Court decides in favor of Mr. Lee, just call me and remind me never to make predictions.