

“THE FEDERAL CORNER”

The D.C. Circuit Relies on *Padilla* in Deciding An Ineffective Assistance of Counsel Issue

Buck Files

Over the last several months, I have realized that it has been some time since I wrote a column about a case having an ineffective assistance of counsel issue. Then along came *United States v. Aguiar*, 894 F.3d 351 (D.C. Cir. 2018) [Panel: Circuit Judges Rogers, Griffith and Srinivasan (Opinion by Rogers; Griffith dissenting)]. In *Aguiar*, a divided panel of the Circuit held that the defendant’s attorney performed deficiently in failing to advise his client of the clear and easily determinable consequences of rejecting a plea offer.

What caught my eye when I read *Aguiar* was the reliance by Judge Rogers on *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). In the past, I have always thought of *Padilla* as that *immigration case* in which the lawyer failed to advise his client of the consequences of the plea of guilty that he was about to enter. My emphasis, unfortunately, was on the words *immigration case*. Judge Rogers shows us that there is much more to *Padilla*. His opinion reads, in part, as follows:

[The Background of the Case]

In superseding indictments, Aguiar and five co-defendants were charged with RICO and armed bank robbery conspiracies, two armed bank robberies, three counts of unlawful possession of a firearm by a convicted felon, and two counts of possession or use of a fully automatic assault weapon in connection with a crime of violence in violation of 18 U.S.C. § 924(c)(1)(B)(ii). Earlier Aguiar had rejected the government’s offer of a plea to three counts: RICO conspiracy, felon in possession of a firearm, and § 924(c)(1)(B)(ii), with a likely total sentence of between 47 and 51 years, including a mandatory 30 years on the § 924(c) count. A jury found Aguiar guilty of all charges except possession or use of fully automatic assault weapons, instead finding him guilty of possession or use of semi-automatic weapons in violation of §§ 924(c)(1)(B)(i) & (C)(i). He was sentenced to an aggregate term of 60 years’ imprisonment, including mandatory consecutive terms of 10 and 25 years’ imprisonment for the § 924(c) convictions, and ordered to pay restitution of \$361,000. On direct appeal, this court affirmed the judgment of conviction. See *United States v. Burwell, et al.*, 642 F.3d 1062 (D.C. Cir. 2011), *aff’d*, 690 F.3d 500 (D.C. Cir. 2012).

[The Writ Alleging Ineffective Assistance of Counsel]

Thereafter, on September 12, 2012, Aguiar, *pro se*, filed a motion pursuant to 28 U.S.C. § 2255(a) to vacate the judgment of conviction on the grounds of ineffective assistance of trial counsel. He argued that counsel ... failed to explain to him the sentencing consequences for the two § 924(c) counts of rejecting the

plea offer and going to trial, in violation of his Sixth Amendment right to effective assistance of counsel. Under the two-part test of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Aguiar had to show counsel's performance was deficient 'under prevailing professional norms,' *id.* at 688, 104 S.Ct. 2052, and that the deficient performance was prejudicial, creating a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' *id.* at 694, 104 S.Ct. 2052. The district court denied Aguiar's motion without an evidentiary hearing because he had not proffered factual allegations to require a hearing and 'the files and records of the case' showed he was entitled to no relief. *United States v. Aguiar*, 82 F.Supp.3d 70, 74, 76 (D.D.C. Feb. 12, 2015); 28 U.S.C. § 2255(b).

[The Sixth Amendment Right to the Effective
Assistance of Counsel Extends to Plea Bargaining]

The Sixth Amendment right to the effective assistance of counsel extends to the 'critical stage' of plea bargaining. *Lafler v. Cooper*, 566 U.S. 156, 162–63, 165, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012). Constitutionally adequate representation requires counsel to adhere to 'prevailing professional norms' and thereby 'play[] a role that is critical to the ability of the adversarial system to produce just results.' *Strickland*, 466 U.S. at 685, 688, 104 S.Ct. 2052. The Supreme Court concluded 'the proper standard for attorney performance is that of reasonably effective assistance,' *id.* at 687, 104 S.Ct. 2052, with the consequence that counsel's representation is constitutionally deficient if it falls 'below an objective standard of reasonableness,' *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052. Reasonably effective assistance requires that counsel be more than a mere bystander and avoid making 'errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

The duty to provide reasonably effective representation at sentencing presumes knowledge of statutory penalties and familiarity with the U.S. Sentencing Guidelines. *See Abney*, 812 F.3d at 1089; *United States v. Gaviria*, 116 F.3d 1498, 1512 (D.C. Cir. 1997). Representation is deficient when counsel fails to protect his client's interests in accord with the prevailing norms for criminal defense counsel or offers a ' "plainly incorrect" estimate of the likely sentence due to ignorance of applicable law of which he "should have been aware." ' *United States v. Booze*, 293 F.3d 516, 518 (D.C. Cir. 2002) (quoting *Gaviria*, 116 F.3d at 1512). The former situation is illustrated in *Abney*, 812 F.3d at 1092, where counsel's failure to seek a continuance of sentencing so his client could benefit from a likely imminent favorable amendment to the Sentencing Guidelines, as other defense counsel had done, meant *Abney* was unable to benefit from a five-year reduction in a mandatory minimum that would have been available. The latter situation is illustrated in *Booze*, 293 F.3d at 518–19, where counsel's

erroneous advice about a likely sentence upon conviction at trial resulted in the defendant rejecting a plea offer involving a sentence two-thirds lower than the sentence that was imposed after trial. Similarly, in *Gaviria*, 116 F.3d at 1512, counsel's advice, contrary to the court's precedent, that his client would be sentenced as a career offender, and thereby face thirty years to life imprisonment, resulted in *Gaviria's* rejection of a plea offer with a likely sentence of fifteen to twenty-two years' imprisonment.

[The First *Padilla* Section of the Opinion]

In Padilla v. Kentucky, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), the Court concluded that even though removal is a civil proceeding, 'advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.' Because the law has 'enmeshed criminal convictions and the penalty of deportation,' *id.* at 365–66, 130 S.Ct. 1473, and because 'deportation is a particularly severe penalty,' *id.* at 365, 130 S.Ct. 1473 (internal quotation marks and citation omitted), ... counsel's failure to advise the defendant that pleading guilty would make him eligible for deportation was contrary to reasonable professional norms under *Strickland's* first prong, *id.* at 368–69, 130 S.Ct. 1473. Counsel must advise defendants of 'clear' and 'easily determined' immigration-related collateral consequences of entering a guilty plea. *Id.* Because 'there is no relevant difference between an act of commission and an act of omission in this context,' *id.* at 370, 130 S.Ct. 1473 (internal quotation marks and citation omitted), the Court rejected the government's view that *Strickland* should be limited to situations where the defendant has received 'affirmative misadvice' on matters in the criminal case, *id.* at 369–70, 130 S.Ct. 1473.(emphasis added)

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[Aguiar's Contention That He Was
Denied the Effective Assistance of Counsel]

Aguiar contends he was denied the effective assistance of counsel when trial counsel failed to explain to him that, upon rejecting the plea offer and going to trial, the government's superseding indictment would include more than one § 924(c) count and increase his mandatory minimum sentencing exposure, even to as much as life imprisonment. He maintains his 'counsel needed only elementary reasoning to know what would happen if Aguiar rejected the plea offer.' Appellant's Br. 49. In an affidavit attached to his § 2255 motion, Aguiar states:

My attorney ... informed me verbally that the government had offered me a thirty (30) year [mandatory minimum] plea to resolve my case. He failed to inform me and explain to me the consequences of the consecutive sentences exposure[] I was actually facing, if I was convicted at trial. He failed to advise me regarding the desirability of accepting the plea offered, rather than to proceed to trial. Had I been aware[] that I was actually

facing a total of 35-years for the two (2) § 924(c) counts consecutively with an additional 30-years for the remaining counts, I would ha[ve] accepted the 30-year plea offer and pleaded guilty in a timely manner instead of proceeding to trial.

[The District Court's Rejection of Aguiar's Contention]

The district court rejected Aguiar's argument without holding an evidentiary hearing, reasoning that Aguiar's 'counsel's performance did not fall below an objective standard of reasonableness under prevailing professional norms by failing to explain to him the sentencing implications of violations to which he was not charged at the time that the plea offer was extended and expired without acceptance.' *Aguiar*, 82 F.Supp.3d at 80.

[The Second *Padilla* Section of the Opinion]

... *the question after Padilla is whether there were 'clear' and 'easily determined' severe sentencing consequences of Aguiar's rejection of the plea offer. Padilla, 559 U.S. at 368–69, 130 S.Ct. 1473.* The indictment pending at the time of the plea offer repeatedly described Aguiar's involvement in four armed bank robberies: it stated three times that Aguiar acted 'while armed with firearms,' once that he 'equi[pped] [himself] with handguns, pistols, [and] assault weapons,' three times that he was 'armed with assault weapons and pistols,' three times that he 'demand[ed] money at gunpoint,' and once that he 'hid ... weapons.' Indictment at 2–8 (Aug. 5, 2004). The references to possession and use of a firearm during commission of a violent crime would alert competent counsel that the government had grounds to seek Aguiar's indictment on multiple counts of violating § 924(c). Doing so would be consistent with prosecutorial policy on firearms offenses in the *United States Attorneys' Manual*. But even if the indictment alone did not alert counsel, the plea offer did. Counsel did not have to be clairvoyant. The plea offer included a § 924(c) count and stated that the government would 'not file *additional* § 924(c) violations' if Aguiar accepted the plea offer. Plea Offer at 2 (Sept. 17, 2004) (emphasis added)

[The Third *Padilla* Section of the Opinion]

In Padilla, the Supreme Court, in reaffirming that 'negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel,' concluded that counsel's Sixth Amendment duty to provide reasonable assistance to his client extends beyond the pending charges in an indictment. 559 U.S. at 373, 130 S.Ct. 1473. Although at the time the plea offer was pending Aguiar had yet to be indicted for violating § 924(c), it would have been 'clear' and 'easily determined' by competent counsel that upon rejection of the plea offer the government would seek a superseding indictment charging Aguiar with more than one § 924(c) count and that upon his conviction on both counts the 'severe' sentencing consequences, *id.* at 365, 130 S.Ct. 1473,

extended to mandatory life imprisonment under § 924(c)(i)(C)(ii). Even if Aguiar were to be convicted only of possession or use of semi-automatic weapons, his mandatory sentence would increase to 35 years' imprisonment under §§ 924(c)(1)(B)(i), (C)(i). Reasonably effective assistance under *Strickland's* first prong required counsel to advise Aguiar of these sentencing consequences of rejecting the plea offer. A failure to do so is legally indistinguishable from affirmatively misinforming the defendant as a result of ignorance of relevant law. *See id.* at 370, 130 S.Ct. 1473. (emphasis added)

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[The Fourth *Padilla* Section of the Opinion]

What Aguiar needed to know before he decided whether or not to accept the plea offer was the worst-case scenario if he rejected the plea and went to trial. Although this 'court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, '[t]he record is quite sketchy regarding plea discussions,' *United States v. Winstead*, 890 F.3d 1082, 1088 (D.C. Cir. 2018). '[T]he motion and the files and records of the case' do not 'conclusively show' Aguiar was advised that a consequence of rejecting the plea offer was mandatory life imprisonment or at least a longer mandatory minimum sentence. 28 U.S.C. § 2255(b). *Consequently, the district court erred in denying his ineffective assistance of counsel claim without holding an evidentiary hearing given the inconclusiveness of the record and the failure to apply the legal standard announced in Padilla, 559 U.S. at 365, 368–69, 130 S.Ct. 1473.* Therefore, we remand for an evidentiary hearing on this part of Aguiar's Sixth Amendment challenge. 28 U.S.C. § 2255(b); *cf. Winstead*, 890 F.3d at 1088 (citing *United States v. Rashad*, 331 F.3d 908, 910 (D.C. Cir. 2003)). Aguiar will have the opportunity to proffer any 'contemporaneous evidence' about 'how he would have pleaded but for his attorney's [alleged] deficiencies,' as did the defendant in *Lee v. United States*, — U.S. —, 137 S.Ct. 1958, 1967, 198 L.Ed.2d 476 (2017). (emphasis added)

[The Result]

Accordingly, ...we reverse and remand the plea bargaining challenge.

[My Thoughts]

- In WestLaw's All Federal database, *Padilla* is cited 4,451 times. By comparison, *Strickland* has been cited more than 9,999 times.
- One of the great lawyers of our time and an early leader of TCDLA was heard to say that the client of today is the enemy of tomorrow. Perhaps he was being a bit cynical, but there is a great deal of truth in what he said. There are two groups of criminal defense lawyers: Those who have had an allegation of ineffective assistance of counsel brought against them and those who are waiting for it to happen.

- It just doesn't hurt for us to review *Strickland* and *Padilla* in order that we may be reminded of how important it is that we be clear and accurate in the advice that we give to our clients.