

In The
Supreme Court of the United States

JOSE PADILLA

Petitioner,

v.

STATE OF KENTUCKY

Respondent.

**On Writ of Certiorari To The
Supreme Court of Kentucky**

**CASE OVERVIEW FOR
AP AMERICAN GOVERNMENT
FIRST SEMESTER**

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I. Case Background

In this case, Jose Padilla, who had lived in the United States for 40 years as a legal resident, was arrested for possession of a large amount of marijuana. After the arrest, the prosecutor charge him with a number of state crimes, including felony drug trafficking. After a mix up concerning his resident status, the court ordered Mr. Padilla held without bond until his trial.

After consulting with the court-appointed attorney he has the right to under the Supreme Court's interpretation of the Sixth Amendment in *Gideon v. Wainright* 372 U.S. 335 (1963), Mr. Padilla pleaded guilty to the prosecutor's charges. According to the petitioner, the court-appointed attorney had advised Mr. Padilla that if he pled guilty to the charges, he would not face deportation. This advice proved to be wrong as the INS immediately began deportation proceedings immediately after Mr. Padilla pled guilty (Slavin, 2009).

Mr. Padilla successfully appealed his conviction to the Kentucky Court of Appeal. The court ruled that Mr. Padilla was entitled to a hearing concerning his inadequate counsel hearing. The state appealed to the Kentucky Supreme Court who reversed the lower court's appellate decision and ruled that Mr. Padilla did in fact face deportation because his inadequate counsel claimed was invalid because the deportation advice was not a direct part of the case that the attorney represented him.

This case seems to hinge on the justices interpretation on *Hill v. Lockhart* 474 U.S. 5 (1985) (Christensen, 2009a). In *Hill*, the Court laid out the collateral-consequences doctrine that held a judge's colloquy with a defendant who is pleading guilty need not to extend to collateral consequences of the plea, but only the nature of the plea itself. Therefore, does the principal of collateral-consequences doctrine also apply to court-appointed attorneys and his Mr. Padilla's

deportation a direct consequence of the plea or a collateral consequence of his plea? According to the principles of *Strickland v. Washington* 466 U.S. 668 (1984), counsel is effective if the attorney properly advises the client on issues of guilt and innocence as well as penalties associated with guilt. In this case, however, the issue of deportation is cloudy as it concerns whether or not it should be directly associated with the guilty plea for the felony charge of drug trafficking.

Interestingly, the Amicus Brief for the United States, written by the Solicitor General (SG), offers a possible middle ground in which the Court can rule on this case without establishing a clear precedent. In the brief, the SG argues that the collateral-consequences doctrine does not apply to the Sixth Amendment's guarantee of effective assistance of counsel. At the same time, the SG argues that the facts of some cases are such that the effects of advice should "fall within the range of competence demanded of attorneys in criminal cases." (Kagan et al., 2009).

In this manner, according to the SG, the Supreme Court can rule in favor of Mr. Padilla while not establishing a broad new category of effective counsel as guaranteed by the Sixth Amendment. Essentially, the SG makes an appeal to the conservatives on the bench (rule on a case-by-case basis) and the liberals on the bench (broad interpretation of the right to effective counsel). With this as the case, it would not be hard to expect a plurality decision in this case, which would guarantee no new broad rule created by the Court (Slavin, 2009).

II. Summary of relevant Supreme Court decisions

The right to effective counsel as guaranteed by the Sixth Amendment to the United States has been guaranteed as fundamental right of the people. The Supreme Court defined the right as an essential right in all Federal felony cases in *Johnson v. Zerbst* 304 U.S. 458 (1938). The Court

affirmed the right of the people to effective counsel in felony cases in *Gideon v. Wainwright* 372 U.S. 335 (1963) and made it applicable to the various States in *Gideon*. The Court further expanded the right to effective counsel in *In re Gault* 387 U.S. 1 (1967) by ruling that juveniles had the right to effective counsel in juvenile delinquency proceedings. In the majority opinion in *Argersinger v. Hamlin* 407 U.S. 25 (1972), the Court ruled that the right to effective counsel extended to misdemeanor charges as well as it focused the right to effective counsel should extend to all cases where there is a potential loss of liberty.

The decisions in *Gideon*, *Gault* and *Argersinger* are the best known of the right-to-counsel cases in the Supreme Court, but they were part of a broader array of decisions rendered by the Court in the past three decades, all of which protect the right to counsel for people who cannot afford to hire a private lawyer. The Court recognized the low-income defendant's right to counsel at such critical stages of criminal proceedings as:

- post-arrest interrogation, in *Miranda v. Arizona* 384 U.S. 436 (1966), and *Brewer v. Williams* 430 US 387 (1977);
- line-ups, in *United States v. Wade* 388 U.S. 218 (1967);
- other identification procedures, in *Moore v. Illinois* 434 US 220 (1977);
- preliminary hearings, in *Coleman v. Alabama* 399 US 1 (1970);
- arraignments, in *Hamilton v. Alabama* 368 U.S. 52 (1961); and
- plea negotiations, in *Brady v. United States* 397 U.S. 742 (1970), *McMann v. Richardson* 397 US 759 (1970), and *Strickland v. Washington*, 466 U.S. 668 (1984).

Since this case deals with Mr. Padilla's plea negotiation, the last three cases bear special relevance. In *Brady*, the Court held that any plea made voluntarily and without coercion was a valid plea and not a violation of the defendant's due process rights. Furthermore, the Court established that any plea, even if against counsel wishes, that is a voluntary plea is not a violation of the defendant's right to effective counsel. In *McMann*, which was decided in the same term as *Brady*, found that any coercion in the plea negotiations was unconstitutional and the plea to be

excluded from the new trial. In *Strickland*, the Court established a two-part test for establishing a claim of ineffective assistance of counsel. Under this test, a criminal defendant may not obtain relief unless he can show that counsel's performance fell below an objective standard of reasonableness, and that counsel's performance gives rise to a reasonable probability that, if counsel had performed adequately, the result of the proceeding would have been different.

Furthermore, the petitioner and the respondent both focus on the due process case of *Hill v. Lockhart* 474 U.S. 52 (1985). In this case, the Court established the collateral-consequences doctrine as it pertained to the judge's conversation with the defendant in understanding the implication of the plea. The Court ruled that the judge was only responsible for advising the defendant of the consequences directly related to the guilty plea and not responsible for advising against any collateral consequences, i.e. custody of children, job loss, probation violations, etc.

III. Analysis of Oral Arguments¹

At first glance, this case seems to break along the traditional ideological lines that have developed within the Roberts Court. When Stephen Kinnaird, the advocate for Mr. Padilla, was in front of the justices, the "conservative"² justices dominated the questioning. Chief Justice John Roberts and Associate Justice Samuel Alito asked the first five questions. In all, including Kinnaird's rebuttal, the "conservative" justices asked 26 questions, including all seven rebuttal questions, versus six questions from the "liberal" justices. A nearly identical analysis, except in ideological reverse, of the questioning occurred Robert Long's, advocate for the State of Kentucky, oral argument time. Associate Justices Sonia Sotomayor and Stephen Breyer asked

¹ The transcript of the oral arguments in this case were found at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-651.pdf. These were printed and accessed on 27 October 2009.

² Chief Justice Roberts and Associate Justices Scalia, Kennedy, Thomas and Alito are considered the conservatives on the Court. Associate Justices Stephens, Ginsburg, Breyer and Sotomayor are considered the liberal wing of the Court.

seven of the first eight questions to Long. In all, the “liberal” justices asked 14 questions, while the “conservative” justices asked only six question of Mr. Long.

At first glance, this case seems no different than many of the other cases that have split this narrowly divided Court. The questioning of the Deputy Solicitor General, Michael Dreeben, reveals the same analysis. In the case, the Solicitor General’s office had put forth a middle ground argument where the justices could vote in favor of Mr. Padilla while avoiding the development of a general rule as it concerns the effective counsel clause of the Sixth Amendment. With this line of argument, the conservatives were more active in the questioning along lines similar to the questioning of Kinnaird. The conservatives asked 15 of the 19 questions, with the Chief Justice asking the first seven question of the Deputy Solicitor General.

However, a closer analysis of the questioning reveals that a couple of the conservatives were mostly concerned with avoiding the slippery slope of allowing Mr. Padilla to withdraw his plea based on the ineffective counsel. While Justice Scalia openly mocked there is no way to avoid opening a Pandora’s Box of challenges of ineffective counsel if the Court were to allow one collateral consequence to be an acceptable appeal, Chief Justice Roberts and Justice Alito were not as hostile to the idea of limited ruling in this case.³ When Chief Justice Roberts opened the questioning of Dreeben, he wanted to know how the Court could rule on this issue without making every collateral consequences part of the Sixth Amendment’s guarantee of effective counsel. Justice Alito asked a similar question halfway through Dreeben’s oral argument time. Both seemed satisfied with the Deputy Solicitor General’s answer that in cases of immigrants, deportation “is always a primary concern of the immigrant defendant” (page 29, lines 22-23).

Especially of interest, after Dreeben satisfied the concerns of a slippery slope, the tone of the questioning began to change among three of the conservatives. During the oral argument of

³ As per his custom, Associate Justice Clarence Thomas did not ask any questions during the oral argument session.

Long, Chief Justice Roberts, along with Justices Alito and Kennedy, were very pointed in their questioning of the advocate for the State of Kentucky. Even Justice Scalia openly mocked the poor counsel offered Mr. Padilla as it concerns the question of deportation and his plea.

However, the questioning of Long revealed the Roberts, Alito and Kennedy seemed open to the possibility of ruling for Mr. Padilla so long as the Court creates no new rule as it concerns the collateral-consequences doctrine of *Hill*.

IV. Overview of Media Reports

Jesse Holland (2009) of the Associated Press kept the analysis of the oral arguments very straightforward, but seemed to highlight the questioning of the conservatives, which would indicate the Holland would expect the Court to rule in favor of Kentucky. However, Liptak (2009), of the New York Times highlighted the sympathetic questioning from the liberal on the Court as well as the slippery slope argument that was of concern to Chief Justice Roberts and Justice Alito.

The Washington Post ran two articles on the case, one from their Court reporter and the other an editorial. Barnes (2009), the paper's Court reporter, highlighted the obvious ideological split in the questioning, and, like Liptak, put special emphasis on the questions concerning the slippery slope argument concerning the opening of the Pandora's Box of considering collateral consequences as part of the effective doctrine clause. In its editorial, the Post (2009) clearly is on the side of Padilla and the creation of the legal rule that in the case of immigrants, the threat of deportation is not a collateral consequence of the plea, but instead is a direct consequence because of the special legal status that immigrants hold.

V. Conclusions

As indicated above, there are two distinct possible outcomes in this case. The first possible outcome is that the Court rules in favor of Padilla, but with a plurality decision. It seems clear that Chief Justice Roberts and Justices Kennedy, Breyer and Alito are willing to rule in favor of Padilla, but want to make sure that no other collateral consequences in the evaluation of whether or not a defendant received effective counsel. It also seems clear that Justices Sotomayor, Ginsburg and Stevens would be willing to consider any collateral consequence on which an attorney gives bad advice as a violation of a defendant's effective counsel right. It is further clear that Justice Scalia will not vote for Padilla and the history of his decisions would indicate Justice Thomas would have the same opinion. If this view holds, the decision would fall 7-2 that Padilla should be able to withdraw his plea because he gave bad advice. However, the seven would split 4-to-3 on the reasons why the plea can be withdrawn.

It is also very possible, and actually, the most likely, the Court's possible split of the seven votes would not happen as the seven justices would seek common ground to give a clear decision for Padilla, but one that only deals with immigrants and the possibilities concerning deportation. This is actually the Solicitor General's argument and when the Solicitor General offers a middle-ground possibility free of clear ideological bias, the Court often sides with the views of the Solicitor General (Wohlfarth, 2009; Bailey et al., 2005).

Therefore, the Court will rule 7-to-2 that Padilla may withdraw his plea because deportation is a serious consequence and his attorney clearly gave him bad advice. However, the Court will make it very clear, using the language of the Solicitor General, that this consequence does not mean the Court will be willing to hear other cases where an attorney gave bad advice to a client concerning such consequences. The decision will affect only cases where the defendant is an immigrant and any type of guilty plea where deportation would be a possible consequence.

VII. My Decision

In previous Supreme Court cases, the bad advice from public counsel that has a direct bearing in the case has been determined to be a violation of a criminal defendant's right to effective counsel. While the respondent would want us to concern ourselves with the collateral-consequences doctrine of *Hill*, the facts of this case clearly are different. Counsel in this case knew the defendant was a legal permanent resident of the United States. When asked about the deportation consequences of a plea, counsel gave Mr. Padilla wrong advice. A quick review of immigration law on the Internet will find that Mr. Padilla would face deportation charges if convicted of a felony. As it concerns the Sixth Amendment, the duty of finding this information falls to counsel and not the individual defendant.

Furthermore, the deportation of Mr. Padilla and his plea in the case are one in the same. Mr. Padilla made this clear in asking his court-appointed attorney about the impact a plea would have on his resident status. Upon receiving bad advice, but he assumed to be good advice, Mr. Padilla made his plea. If he would have received the proper advice, Mr. Padilla is on record as saying he would not have pled guilty. Therefore, the deportation of Mr. Padilla is not a collateral consequence. It is a direct consequence. I vote for Mr. Padilla. His plea is withdrawn and he will stand trial on the charge of drug trafficking.

APPENDIX A

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APPENDIX B

For Supreme Court cases, the following websites were used:

www.oyez.org – Northwestern University Law School
caselaw.findlaw.com – FindLaw For Legal Professionals
supreme.justia.com – U.S. Supreme Court Center

List of Cases Discussed (In Order of First Appearance in Review)

1. *Gideon v. Wainright* 372 U.S. 335 (1963)
2. *Hill v. Lockhart* 474 U.S. 5 (1985)
3. *Strickland v Washington* 466 U.S. 668 (1984)
4. *Johnson v. Zerbst* 304 U.S. 458 (1938)
5. *In re Gault* 387 U.S. 1 (1967)
6. *Argersinger v. Hamlin* 407 U.S. 25 (1972)
7. *Miranda v. Arizona* 384 U.S. 436 (1966)
8. *Brewer v. Williams* 430 US 387 (1977)
9. *United States v. Wade* 388 U.S. 218 (1967)
10. *Moore v. Illinois* 434 US 220 (1977)
11. *Coleman v. Alabama* 399 US 1 (1970)
12. *Hamilton v. Alabama* 368 U.S. 52 (1961)
13. *Brady v. United States* 397 U.S. 742 (1970)
14. *McMann v. Richardson* 397 US 759 (1970)
15. *Strickland v. Washington*, 466 U.S. 668 (1984).