

IN THE
Suprema Court of the United States

JOSE PADILLA,
versus *Petitioner*

COMMONWEALTH OF KENTUCKY,
Respondent

**On Petition for Writ of Certiorari
to the Supreme Court Kentucky**

RESPONDENT'S BRIEF IN OPPOSITION

WM. ROBERT LONG, JR.*
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601
(502) 696-5342
Counsel for Respondent

* *Counsel of Record*

**COUNTERSTATEMENT OF QUESTIONS
PRESENTED**

- I. Whether a criminal defense attorney has an affirmative duty to investigate and advise a criminal defendant in state court of collateral consequences, such as deportation, that defendant may face as a result of his guilty plea in state court?

- II. Assuming there is no affirmative duty to advise a state court defendant of collateral consequences stemming from a guilty plea entered in state court, could misadvice regarding a collateral consequence, such as deportation, constitute ineffective assistance of counsel under the Sixth Amendment?

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FEDERAL STATUTES CITED:

28 U.S.C. § 1257(a) 1
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OPINION BELOW

Citations to the official and unofficial reports of the opinions below are adequately set forth in the certiorari petition, as well as in the appendix thereto.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). The petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are adequately set forth in the Petition.

COUNTERSTATEMENT OF THE CASE

The facts of this case were best summarized by the Kentucky Supreme Court in Commonwealth v. Padilla, 253 S.W.3d 482 (Ky. 2008) as follows:

Jose Padilla is a native of Honduras who has lived in this country for decades. He served in the United States military during the Vietnam War. Padilla was indicted by the Hardin County Grand Jury for trafficking in more than five pounds of marijuana, possession of marijuana, possession of drug paraphernalia, and operating a tractor/trailer without a weight and distance tax number. Padilla, represented by counsel, moved to enter a guilty plea to the three drug-related charges, in exchange for dismissal of the remaining charge, and a total sentence of ten years on all charges. The plea agreement provided that Padilla would serve five years of this ten year sentence, and would be sentenced to probation for the remaining five years. Final judgment was entered on October 4, 2002.

On August 18, 2004, Padilla filed an RCr 11.42 motion for post-conviction relief alleging that his attorney was ineffective in misadvising him about the potential for deportation as a

consequence of his guilty plea. Padilla alleged that his counsel told him that he “did not have to worry about immigration status since he had been in the country for so long.” The Hardin Circuit Court denied the RCr 11.42 motion on the basis that a valid guilty plea does not require that the defendant be informed of every possible consequence of the guilty plea. It reasoned that since Appellee’s [Padilla’s] bond was changed because he was suspected of being an illegal alien, he was aware of the possibility of deportation, and the court noted that counsel did discuss the issue with him. The court concluded that: “Padilla’s counsel does not make a deportation decision and neither does this Court.”

On appeal, the Court of Appeals reversed the decision of the Hardin Circuit Court and remanded the case for an evidentiary hearing. The Court of Appeals had the benefit of this Court’s recent decision in *Commonwealth v. Fuartado*, which determined that collateral consequences are outside the scope for representation required by the Sixth Amendment and that failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel. However, the

majority of the Court of Appeals panel found this case distinguishable from that unequivocal holding in *Fuortado*. The Court of Appeals held that although collateral consequences do not have to be advised, “an affirmative act of ‘gross misadvice’ relating to collateral matters can justify post-conviction relief.” The Court of Appeals concluded that counsel’s wrong advice in the trial court regarding deportation could constitute ineffective assistance of counsel.

Id. at 483-484 (footnotes omitted).

On discretionary review the Kentucky Supreme Court reversed the Court of Appeals holding that,

As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel’s failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief. 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*.

Commonwealth v. Padilla, 253 S.W.3d 482, 485 (Ky. 2008), (additional citations omitted).

REASONS FOR DENYING THE WRIT

I. The Sixth Amendment Does Not Guarantee a Criminal Defendant to Any Advice from Counsel Concerning Collateral Consequences that Defendant May Face as a Result of a Guilty Plea.

Effective assistance of trial counsel as guaranteed by the Sixth Amendment, “. . . extends to and encompasses only those activities which tend to protect a criminal defendant; right to a fair and intelligent determination of guilt or innocence.” Commonwealth v. Fuartado, 170 S.W.3d 384, 386 (Ky. 2005), citing Strickland v. Washington, 466 U.S. 668 , 686 (1984). Further, it is well settled that, “[t]he defendant need only understand the direct consequences of the plea; he need not be made aware every consequence that, absent a plea of guilty, would not otherwise occur.” U.S. v. Hernandez, 234 F.3d 252, 255 (5th Cir. 2000), citing Trujillo v. United States, 377 F.2d 266, 266 (5th Cir.), cert. denied, 389 U.S. 899, 88 S.Ct. 224, 19 L.Ed.2d 221 (1967).

Because deportation does not stem directly from the conviction and because the sentencing court has no power over deportation decisions it is clear that a criminal defendant's risk of deportation is collateral to any criminal conviction. Presently, all circuits that have addressed the issue, "...have concluded that deportation is a collateral consequence of the criminal process and hence the failure to advise does not amount to ineffective assistance of counsel." United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003), citing United States v. Banda, 1 F.3d 354, 356 (5th Cir.1993).¹

¹*accord* United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir.2000); Varela v. Kaiser, 976 F.2d 1357, 1358 (10th Cir.1992), cert. denied, 507 U.S. 1039 (1993); United States v. Del Rosario, 902 F.2d 55, 59 (D.C.Cir.1990), cert. denied, 498 U.S. 942 (1990); Santos v. Kolb, 880 F.2d 941, 945 (7th Cir.1989), cert. denied, 493 U.S. 1059 (1990); United States v. Yearwood, 863 F.2d 6, 7-8 (4th Cir.1988); United States v. Campbell, 778 F.2d 764, 769 (11th Cir.1985); United States v. Santelises, 509 F.2d 703, 704 (2d Cir.1975)(per curiam); United States v. Couto, 311 F.3d 179, 187 (2nd Cir. 2002); El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002); United States v. Romero-Vilca, 850 F.2d 177, 179 (3d Cir.1988).

Petitioner argues that the that because changes in immigration laws have made deportation mandatory for certain criminal offenses deportation should no longer be considered a collateral consequence. However, this argument as also been rejected by the circuits. In Santos-Sanchez v. United State, 548 F.3d 327, 336 -337 (5th Cir.2008), the Fifth Circuit rejected this argument as follows:

Santos-Sanchez notes that recent changes in immigration laws, particularly the closure of avenues for discretionary relief from deportation in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009-546, have rendered deportation a certainty for some defendants that enter guilty pleas. Santos-Sanchez suggests changes in the law have so altered the nature of deportation that it is now in some cases a direct consequence of a guilty plea. Santos-Sanchez thus asserts that, at least in cases where deportation is a near-certain consequence of a guilty plea, counsel must inform defendants of the immigration consequences of their guilty plea to provide effective assistance.

This argument has been working its way through the circuit courts. In the first case to address this issue, the First Circuit held that IIRIRA did not alter the court's prior holding that deportation was a collateral consequence of a guilty plea. See United States v. Gonzalez, 202 F.3d 20, 28 (1st Cir.2000). The court first noted that “the immigration consequences of a plea are collateral irrespective of the reason for which an alien is deemed deportable.” Id. at 26. It went on to state that

[w]hat renders the plea's immigration effects collateral is not that they arise virtually by operation of law, but the fact that deportation is not the sentence of the court which accepts the plea but of another agency over which the trial judge has no control and for which he has no responsibility.

Id. at 27 (quotations and alterations omitted). The court reasoned that, regardless of how automatic IIRIRA might have rendered deportation, it was still beyond the control and responsibility of the district court. Id. The First Circuit thus “reject[ed] the argument that [IIRIRA has] so altered the relationship between conviction and

deportation that revisitation of [its] prior holdings on that relationship [was] required.” Id. at 28. Consequently, the collateral nature of deportation “bar[red] any ineffective assistance claims based on an attorney's failure to advise a client of his plea's immigration consequences.” Id.

The Tenth Circuit came to the same conclusion in Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir.2004). Like the First Circuit, the Tenth Circuit had previously held that “ ‘deportation is a collateral consequence of the criminal proceeding and therefore the failure to advise does not amount to ineffective assistance of counsel.’ ” Id. at 1256 (quoting Varela v. Kaiser, 976 F.2d 1357, 1358 (10th Cir.1992)). In Broomes, the court held that neither IIRIRA nor the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub.L. No. 104-132, 110 Stat. 1214, altered the collateral nature of deportation. Broomes, 358 F.3d at 1256-57. As the court noted, “[a] consequence is collateral if it ‘remains beyond the control and responsibility of the district court in which that conviction was entered.’ ” Id. at 1256 (quoting Gonzalez, 202 F.3d at 27). The Tenth Circuit thus concluded that

[s]tate courts have no more control over whether a criminal defendant will be deported today than they did prior to the 1996 Acts. Accordingly, deportation remains a collateral consequence of a criminal conviction, and counsel's failure to advise a criminal defendant of its possibility does not result in a Sixth Amendment deprivation.

Id. at 1257.

We agree with the First and Tenth Circuits that the changes wrought by IIRIRA have not so altered the nature of deportation as to wholly undermine our holding in Banda. We, like our sister circuits, have drawn a bright line between the direct and collateral consequences of a guilty plea and require that counsel advise a defendant of only the former.

Santos-Sanchez, 548 F.3d at 335-336.

Likewise, the 6th Circuit reached the same conclusion in El-Nobani v. United States, 287 F.3d 417 (6th Cir.2002), holding that,

the automatic nature of the deportation proceeding does not necessarily make deportation a direct consequence of the

guilty plea. A collateral consequence is one that “remains beyond the control and responsibility of the district court in which that conviction was entered.” United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir.2000). While this Court has not specifically addressed whether deportation consequences are a direct or collateral consequence of a plea, it is clear that deportation is not within the control and responsibility of the district court, and hence, deportation is collateral to a conviction. United States v. Romero-Vilca, 850 F.2d 177, 179 (3d Cir.1988) (“[W]e hold that potential deportation is a collateral consequence of a guilty plea.”); United States v. Quin, 836 F.2d 654, 655 (1st Cir.1987) (“[D]eportation in this context is generally regarded as a collateral consequence.”); United States v. Campbell, 778 F.2d 764, 767 (11th Cir.1985) (“[D]eportation is a collateral consequence of a guilty plea.”); United States v. Russell, 686 F.2d 35, 39 (D.C.Cir.1982) (“It has become well settled, however, that Rule 11 does not require informing a defendant of the possibility of deportation.”). Thus, the fact that petitioner was unaware of the deportation consequences of his pleas does not make his pleas unknowing or involuntary.

Id. at 421.

Because it is settled amongst the circuits that deportation is collateral and that recent changes to immigration laws have not altered that holding, this Court need not grant certiorari.

II. Because Potential Deportation is a Collateral Consequence, an Attorney's failure to advise is indistinguishable from alleged misadvice.

Petitioner essentially acknowledges that a criminal defense attorney has no affirmative duty to inform a criminal defendant of collateral consequences like deportation. However, Padilla argues that once a criminal defense attorney attempts to give advice on a collateral matter that advice must be accurate or the attorney risks being ineffective and thus, depriving his client of the right of counsel under the Sixth Amendment. While petitioner is correct that several circuits have in fact held that "gross misadvice" with regard to a collateral consequence may give rise to an ineffective

assistance of counsel claim,² those decision are fatally flawed.

Because consequences, like deportation, are collateral to a criminal conviction drawing an arbitrary distinction between the “failure to advise” and “affirmative misadvice” effectively destroys the legal premise on which consequences are determined to be collateral are based. The right to counsel under the Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel to ensure that he or she receives a fair trial and a just determination of guilt. Strickland v. Washington, 466 U.S. 668 , 684-686 (1984). The reasoning for not requiring criminal defense counsel to advise a criminal defendant of a consequence not directly stemming from a conviction, i.e. collateral consequence, is that the Sixth Amendment encompasses criminal prosecutions only and does not extend to matters not directly stemming from the criminal prosecution. Thus, it is nearly universally

²See authority cited by Petitioner in footnote n 12 of his petition.

accepted that a defendant's trial counsel cannot be ineffective for failing to advise his client as to the risk of deportation or other collateral consequences.

In its prior decision in Commonwealth v. Fuartado, 170 S.W.3d 384, 386 (Ky. 2005), the Kentucky Supreme Court, relying on applicable precedent from this Court, logically and accurately reasoned that,

The constitutional requirement of effective assistance of counsel, therefore, extends to and encompasses only those activities which tend to protect a criminal defendant's right to a fair and intelligent determination of guilt or innocence. *See id.* [Strickland v. Washington, 466 U.S.] at 686, 104 S.Ct. 2052 ("In giving meaning to the requirement [of effective assistance of counsel], ... we must take its purpose-to ensure a fair trial-as the guide."); McMann v. Richardson, 397 U.S. 759, 766, 90 S.Ct. 1441, 1446, 25 L.Ed.2d 763 (1970) (since a guilty plea is also a waiver of trial, it is endowed with certain constitutional protections.)

In cases where defendants are agreeing to plead guilty in accordance with a plea bargain, this principle of protecting a criminal defendant's right to be fairly tried and justly convicted is extended to

include investigating and advising the criminal defendant on all aspects of the plea and the direct consequences thereof-such as the sufficiency of the evidence supporting the plea, the availability of substantial defenses, the loss of several fundamental constitutional rights, and the punishment that may be imposed by the trial court. See Brady v. United States, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472, 25 L.Ed.2d 747 (1970) (defendant must be “fully aware of the direct consequences” of a guilty plea) (emphasis added); Beasley v. United States, 491 F.2d 687, 696 (6th Cir.1974) (setting forth standards for effective assistance of counsel). The existence of collateral consequences is irrelevant to the determination of a defendant's guilt or innocence and completely outside the authority or control of the trial court. Accordingly, we find, along with the majority of other courts determining the issue, that the Sixth Amendment requires representation encompassing only the criminal prosecution itself and the direct consequences thereof. Because the consideration of collateral consequences is outside the scope of representation required under the Sixth Amendment, failure of defense counsel to advise Appellee of potential deportation consequences was not

cognizable as a claim for ineffective assistance of counsel.

Fuortado, 170 S.W.3d at 386.

In the present case the Kentucky Supreme Court merely applied the well-settled logic employed to reach its conclusion in Fuortado finding that,

As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief. 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*.

Commonwealth v. Padilla, 253 s.W.3d 482, 485 (Ky. 2008).

Logically, if the scope of the Sixth Amendment extends only to criminal prosecutions and the consequences stemming therefrom, then a defendant's counsel cannot be constitutionally ineffective for failing to advise or misadvising his

client with regard to consequences that are collateral.

That is not to say that defense attorney's should feel free to misadvise their clients as to those collateral matters in an effort to placate those clients. Ultimately, a criminal defense attorney still retains an ethical obligation separate and apart from the guarantees of the Sixth Amendment to his or her client and may still face adverse repercussions from such behavior from the bar or civil court in an action for malpractice. However, this Court must not extend a criminal Sixth Amendment right to counsel in criminal prosecutions to matters wholly collateral to the criminal prosecution. To do so would essentially erode the reasoning and logic established by this Court and employed by the circuits to determine what consequences are in fact collateral.

CONCLUSION

WHEREFORE, certiorari review should be denied.

Respectfully submitted,

JACK CONWAY

Attorney General of Kentucky

WM. ROBERT LONG, JR.*

Assistant Attorney General

Office of Criminal Appeals

Office of the Attorney General

1024 Capital Center Drive

Frankfort, Kentucky 40601-8204

(502) 696-5342

**Counsel of Record*

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PROOF OF SERVICE

I, Wm. Robert Long, Jr., a member of the Bar of this Court, hereby certify that on this 21st day of January, 2009, three copies of the Brief in Opposition in the above-entitled case were mailed, first class postage prepaid, to counsel for petitioner, Hon. Stephen B. Kinnaird Paul, Hastings, Janofsky & Walker, 875 15th Street, NW, Washington, DC 20005; and Hon. Richard Edwin Neal, 600 East Main Street, Suite 100, Louisville, Kentucky 40202. I further certify that all parties required by Rule 28 to be served have been served.



WM. ROBERT LONG, JR.
ASSISTANT ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KY 40601 / (502) 696-5342
COUNSEL FOR PETITIONER

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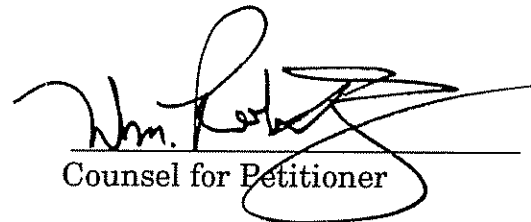
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CERTIFICATE OF COMPLIANCE

I, Wm. Robert Long, Jr., Assistant Attorney General of the Commonwealth of Kentucky as Counsel for Petitioner, certify that the foregoing Brief in Opposition was typed using Century Schoolbook 12 point font, as set forth in Rule 33(1)(b) of the Rules of the Supreme Court of the United States, contains 2,926 words and that this petition conforms to all the specifications set forth in Rule 33 of the Rules of the Supreme Court of the United States.


Counsel for Petitioner