

COMMONWEALTH OF PENNSYLVANIA v. MASHAL KHAZI, Defendant  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch  
Criminal Action No. 1499-2008

*Post Conviction Relief Act; Adequacy of Counsel; Plea; Immigration Status*

1. All PCRA petitions must be filed within one year of the date a judgment of sentence becomes final, unless the petitioner pleads and proves one of these three statutory exceptions: (1) interference by government officials in the presentation of the claim; (2) newly discovered facts; or (3) an after recognized constitutional right. 42 Pa.C.S.A. §9545(b)(1)(i-iii).
2. A case announces a new rule when it breaks new ground or imposes new obligations on the States or Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. When the Court overturns its own prior precedent, clearly a new rule is established. It is more difficult, however, to determine whether a new rule is announced when a decision extends the reasoning of prior cases.
3. New constitutional rules are applied retroactively if: (1) the new rule places certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe; or (2) the new rule alters a bedrock procedural element of criminal procedure which implicates the fundamental fairness and accuracy of the trial.
4. Deportation was previously a collateral consequence, and therefore, the failure of a defendant's attorney to warn him or her of the possibility of deportation as a result of a guilty plea was not grounds for an ineffective assistance of counsel claim. Deportation is no longer considered a collateral consequence. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).
5. For ineffective assistance of counsel claims, a defendant must establish: 1) his counsel's representation "fell below an objective standard of reasonableness," and 2) that he was prejudiced as a result of the ineffective assistance. Strickland v. Washington, 466 U.S. 668 (1984).
6. In Pennsylvania, a PCRA petitioner must meet a three-prong test for ineffective assistance establishing: 1) his claim has arguable merit; 2) counsel had no reasonable basis for his action, and 3) the petitioner was prejudiced by counsel's ineffective assistance. The Pennsylvania test for ineffective assistance of counsel is considered co-extensive with the Strickland test.
7. Padilla v. Kentucky is the type of case that merely extends an existing rule rather than creating a new one. A new constitutional rule was not announced. The well-settled rules of ineffective assistance of counsel were merely applied to a particular set of facts.
8. Where a Post Conviction Relief Act petition is filed beyond the one-year time bar but within sixty days of the ruling in Padilla v. Kentucky, jurisdiction is not retained because Padilla did not announce a new rule and the petition falls outside the enumerated exceptions to the Post Conviction Relief Act.
9. Padilla commands that counsel use all avenues of inquiry to determine what a client's immigration status is, how a plea may affect their status, and inform their client of these consequences; otherwise counsel will be deemed ineffective.

Appearances:

Franklin County District Attorney's Office

## OPINION

Meyers, J., November 29, 2010

### Introduction

On September 1, 2010, a hearing was conducted on the Defendant's Petition for Post Conviction Collateral Relief, pursuant to 42 Pa.C.S.A. §9543 et seq., filed on May 25, 2010. Supplemental briefs were filed by the Commonwealth on September 23, 2010 and the Defendant on October 14, 2010. During argument and in the briefs, the Commonwealth asks the court to dismiss the Defendant's petition because the court lacks jurisdiction due to the untimely filing of the PCRA petition. Even if the court had jurisdiction, the Defendant's claim fails because there is no arguable merit for the Defendant's ineffective assistance of counsel claim. The defense opposition is primarily based on the pronouncements by the United States Supreme Court in Padilla v. Kentucky, 130 S. Ct. 1473 (2010). While the Defendant admits that his PCRA is filed beyond the one year time bar, the defense argues that the PCRA was filed timely within the PCRA's sixty day exception for retroactive constitutional rules.<sup>[1]</sup>

After consideration of the arguments of the attorneys, this court does not retain jurisdiction to consider the merits of the Defendant's PCRA petition.

### Factual and Procedural History

On June 3, 2008, the Defendant was arrested for selling oxycodone pills. The Defendant did not have a prescription for the pills. On March 11, 2009, the Defendant entered into a guilty plea to the charge of Manufacturing, Delivering, or Possessing with the Intent to Deliver Narcotics pursuant to 35 Pa.C.S.A. §780-113. On the same day, the Defendant was sentenced to twenty-four (24) months probation.<sup>[2]</sup> The Defendant was represented by Christopher Reibsome of the Franklin County Public Defender's Office prior to and at the time of his guilty plea. At the time the Defendant entered into his guilty plea, the Defendant was a lawful permanent resident of the United States but not a citizen of the United States. Mr. Reibsome did not inquire as to the Defendant's citizenship or immigration status before advising him regarding his guilty plea. As a result of the Defendant's guilty plea, the Defendant was stripped of his green card and placed into removal proceedings by the United States Citizenship and Immigration Service. After removal proceedings, as a result of the Defendant's guilty plea, he was ordered removed from the United States to his country of citizenship, Iraq.

On May 25, 2010, the Defendant filed a Petition for Post Conviction Collateral Relief. A hearing was held on the issues raised by Defendant's counsel on September 1, 2010. Defendant's counsel alleges that the Defendant's PCRA claim is not untimely based on recent ruling in Padilla v. Kentucky, 130 S. Ct. 1473 (2010). Additionally, defense counsel alleged that the Defendant's counsel during his plea, Mr. Reibsome, was ineffective for not adequately advising the Defendant as to the consequences of pleading guilty on his immigration status therefore making the guilty plea unknowing. The Commonwealth argued that the PCRA was untimely and that the Defendant's counsel rendered effective assistance. The court granted leave to allow the Commonwealth and defense counsel to submit briefs to the court on the issues.

This opinion will first address the issue of jurisdiction and then ineffective assistance of counsel. While the need to address ineffective assistance of counsel is nonessential based on the jurisdictional outcome, the court believes it will be instructive because counsel must appreciate the impact of deportation and its place in querying a client effectively.

### Discussion and Conclusions of Law

#### **1. Jurisdiction**

In order for a Post Conviction Relief Act petition to be timely, the petition must be filed within one year of the date on which the judgment of sentence becomes final. 42 Pa.C.S.A. §9545(b). A judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review. 42 Pa.C.S.A. §9545(b)(3). The courts of this Commonwealth lack jurisdiction to grant PCRA relief when a PCRA Petition is filed in an untimely manner. Commonwealth v. Padden, 783 A.2d 299, 306 (Pa. Super. 2001).

All PCRA petitions must be filed within one year of the date a judgment of sentence becomes final, unless the petitioner pleads and proves one of these three statutory exceptions: (1) interference by government officials in the presentation of

the claim; (2) newly-discovered facts; or (3) an after recognized constitutional right. 42 Pa.C.S.A. §9545(b)(1)(i-iii). Any petition invoking an exception shall be filed within sixty (60) days of the date the claim could have been presented. 42 Pa.C.S.A. §9545(b)(2).

In 42 Pa.C.S.A. §9545(b)(1)(iii), a petitioner is permitted to apply for relief later than one year after the judgment of sentence becomes final if he can articulate a right that was infringed. Such a right must be "a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by the court to apply retroactively." 42 Pa.C.S.A. §9545(b)(2).

"A case announces a new rule when it breaks new ground or imposes new obligations on the States or Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague v. Lane, 489 U.S. 288, 301 (1989). The Teague analysis generally turns on whether a particular decision announced a new rule or merely applied an old rule in a new context. When the Court overturns its own prior precedent, clearly a new rule is established. Saffle v. Parks, 494 U.S. 484, 488 (1990). "[I]t is more difficult, however, to determine whether we announce a new rule when a decision extends the reasoning of our prior cases." Id. A federal constitutional rule of criminal procedure is applicable to those cases which have become final before it was announced, unless it creates a new rule of law. Teague, 489 U.S. at 311. "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." Id. at 309.

New constitutional rules are applied retroactively if: (1) the new rule places certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe; or (2) the new rule alters a bedrock procedural element of criminal procedure which implicates the fundamental fairness and accuracy of the trial.<sup>[3]</sup> Teague, 489 U.S. at 306-07. A case announces a new constitutional rule of criminal procedure, for purposes of determining whether retroactive application is appropriate, if the result was not dictated by precedent existing at the time the defendant's conviction became final. Id. at 311-12.

Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." Strickland v. Washington, 466 U.S. 668 (1984); See Hill v. Lockhart, 474 U.S. 52 (1985); McMann v. Richardson, 397 U.S. 759 (1970). It is quintessentially the duty of plea counsel to provide her client with available advice about an issue like deportation, and the failure to do so clearly establishes the first prong of the Strickland analysis. Padilla, 130 S. Ct. at 1488. Deportation was previously a collateral consequence, and therefore, the failure of a defendant's attorney to warn him or her of the possibility of deportation as a result of a guilty plea was not grounds for an ineffective assistance of counsel claim. Commonwealth v. Frometa, 555 A.2d 92 (Pa. 1989). However, the United States Supreme Court rejected the direct versus collateral distinction with respect to advice concerning deportation, and held that the Sixth Amendment requires criminal defense attorneys to advise their noncitizen clients if there is a risk of deportation as a consequence of a conviction. Padilla, 130 S.Ct. at 1482.

The majority did not expressly state in Padilla that its holding should be applied retroactively to cases on collateral review. Therefore, if Padilla created a "new rule," the rule can only be applied to the Defendant's conviction, which became final well before the Padilla decision was rendered, if the rule falls within one of two narrow exceptions enumerated in Teague. In Padilla, the Court did not overrule a clear past precedent. Rather, the Court held that Strickland applies to advice concerning deportation, whether mis-advice or no advice at all, because deportation was such a devastating result "intimately related to the criminal process." Padilla, 130 S. Ct. at 1476.

The Supreme Court has held in another case that applying Strickland to a new set of facts did not establish a new rule under Teague. In Williams v. Taylor, 529 U.S. 362 (2000), the Court recognized the "inevitable difficulties" that come with "attempting to determine whether a particular decision has really announced a "new" rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." Williams, 529 U.S. at 380-381. However, the Williams Court held that merely applying Strickland to a new scenario does not create a new rule, as "it can hardly be said that recognizing the right to effective counsel breaks new ground or imposes a new obligation on the States." Id. at 391. The rationale behind this aspect of the holding in Williams is illustrated by Justice Kennedy's explanation that:

If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule... Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel

that it forges a new rule, one not dictated by precedent. Wright v. West, 505 U.S. 277 (1992) (opinion concurring in judgment).

The rule in Strickland necessarily requires a fact-specific analysis, and Padilla held that Strickland should be applied in the context of advice concerning deportation. Padilla, 130 S. Ct. at 1473. Padilla is the type of case that merely extends an existing rule rather than creating a new one.<sup>[4]</sup> Padilla did not announce a new constitutional rule, but merely applied the well-settled rule in Strickland to a particular set of facts as illustrated in Teague. Teague, 489 U.S. at 301 (1989).

Moreover, the Supreme Court stated “we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas” ... “It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains.” Padilla, 130 S. Ct. at 1483.

Insofar as past precedent “dictated” that this court apply the Strickland test to an ineffective assistance claim, prior to Padilla, that aspect of the “new rule” analysis does not compel a different result. See Williams, 529 U.S. 362; See also Graham v. Collins, 506 U.S. 461 (1993); Saffle v. Parks, 494 U.S. 484 (1990). While Padilla abrogated the ruling in Frometa, the Supreme Court did not purport to be announcing a new rule, breaking new ground, or imposing new obligations. Justice Stevens explained:

For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.  
Padilla, 130 S. Ct. at 1485.

The holding in Padilla did not arise as a purely novel concept. It solidified the professional norms that existed for nearly two decades before the case was decided. *Id.* at 1482-83. “The American Bar Association’s Standards for Criminal Justice provide that, if a defendant will face deportation as a result of conviction, defense counsel should fully advise the defendant of these consequences.” I.N.S. v. St. Cyr, 533 U.S. 289, 323 (2001). Padilla is the offspring of the test for ineffective assistance of counsel in Strickland and what constitutes competent defense counsel in St. Cyr as opposed to issuing a wholly new rule.

Here, the Defendant filed his PCRA petition beyond the one year time limit from the date the judgment became final. The Defendant did file his PCRA petition within the sixty day exception pursuant to 42 Pa.C.S.A. §9545(b)(2). However, Padilla does not issue a new rule and its application is not retroactive because it does not fall into one of the categorical exceptions enumerated in Teague. Therefore, the Defendant’s PCRA petition is untimely filed, and this court cannot retain jurisdiction to determine the merits of the Defendant’s claim.

## **2. Ineffective Assistance of Counsel**

While this court lacks jurisdiction to rule on the merits of the issues raised in the Defendant’s PCRA petition, this court believes instruction is valuable on this issue of immigration status and collateral consequences. This court has become acutely concerned that defense counsels’ blind eye toward the appearance of discrimination may create a hesitancy to aggressively question a client regarding their immigration status. As addressed in the Padilla opinion, deportation has become an integral consideration linked to the issues of criminal proceedings.

While prevailing professional norms require defense counsel to investigate and advise non-citizen defendants about the potential immigration consequences of a guilty plea, the outcome in Padilla requires a more stringent investigation into that client’s understanding and the potential immigration consequences. As such, lawyers must have appreciation to take into account the issues that are not discriminatory towards their client, but sometimes instruct despite insult or the veil of stereotype.

This court is concerned that ineffective assistance will continue to be perpetrated because counsel is constrained by the idea of not asking a critical question because they may appear discriminatory. Padilla essentially commands that counsel use all avenues of inquiry to determine what a client’s immigration status is, how a plea may affect their status, and inform their client of these consequences. As outlined in the legal argument to follow, counsel was ineffective. This court is concerned, generally, that defense counsel will truncate their inquiries into immigration status because of the perceived impropriety associated with querying a client as to their immigration status. With these concerns in mind, the court turns to the issue of ineffective assistance of counsel and the effect of Padilla on that analysis.

An alien convicted of any drug trafficking offense is guilty of an aggravated felony. INA §101(a)(43)(B). A conviction under 35 Pa.C.S.A. §780-113 relating to possession with intent to distribute is one such deportable offense under the

Immigration and Naturalization Act (INA). Id. An alien convicted of an aggravated felony is deportable. INA §237(a)(2)(A)(ii).

Claims of ineffective assistance of counsel are to be analyzed pursuant to the test announced in Strickland v. Washington, 466 U.S. 668 (1984). Pursuant to Strickland, a defendant must establish: 1) his counsel's representation "fell below an objective standard of reasonableness," and 2) that he was prejudiced as a result of the ineffective assistance. Strickland, 466 U.S. at 686-88. To establish prejudice in the context of a guilty plea, a "defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have plead guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).<sup>[5]</sup>

In Pennsylvania, a PCRA petitioner must meet a three prong test for ineffective assistance establishing: 1) his claim has arguable merit; 2) counsel had no reasonable basis for his action, and 3) the petitioner was prejudiced by counsel's ineffective assistance. Commonwealth v. Rios, 920 A.2d 790, 799 (Pa. 2007). The Pennsylvania test for ineffective assistance of counsel is considered coextensive with the Strickland test. Commonwealth v. Pierce, 527 A.2d 973, 976 (Pa. 1987).

The first prong of the test is whether the Defendant's claim has arguable merit. Pierce, 527 A.2d at 976. During the PCRA hearing in this case, counsel indicated that he did not inform the Defendant that he would be deported or risk deportation for pleading guilty to the charge of Manufacturing, Delivering, or Possessing with the Intent to Deliver Narcotics pursuant to 35 Pa.C.S.A. §780-113. Counsel testified that he asked the Defendant if he was in the United States legally to which he responded affirmatively. Counsel further inquired as to whether the Defendant's family was in the United States legally to which the Defendant replied affirmatively again. Counsel did not further delve into the issue of the Defendant's immigration status, he did not inform the Defendant that he could potentially be deported if he were legally in the United States but not a U.S. citizen, and the plea colloquy that the Defendant signed is devoid of language indicating that a person's immigration status may be affected by pleading guilty to various criminal charges. See Plea Agreement, signed March 11, 2008. The Defendant's counsel breached existing professional norms in his failure to advise the Defendant of the deportation consequences of his guilty plea.

The second prong of the Pennsylvania test is whether counsel had no reasonable basis for his actions. Pierce, 527 A.2d at 976. Here, counsel was aware that the Defendant was in the United States legally as was his family. However, counsel did not inquire or investigate further to determine the actual legal status of the Defendant. As a green card holder, Defendant's status is markedly different from a naturalized citizen. Counsel did not inquire into the operative facts of the Defendant's status. Counsel testified that he did not ask the directed question of what was the Defendant's status in the United States at the time of his plea. Counsel believed that his inquiry as to whether the Defendant was legal in the United States was sufficient. However, this produces an absurd result where an attorney who does not directly ask a defendant about their immigration status may then cloak themselves in their lack of knowledge directly caused by their failure to inquire. Padilla, 130 S. Ct. at 1484.<sup>[6]</sup> Counsel could have simply asked, "What is your immigration status?" This would have led to further investigation of the immigration consequences of the pending plea agreement. Counsel had no reasonable basis for his failure to inquire.

The third prong of the Pennsylvania test is whether the Defendant was prejudiced by counsel's ineffectiveness. Pierce, 527 A.2d at 976. In the plea context, the analysis is governed by the standard in Hill. Hill, 474 U.S. at 59; Commonwealth v. Hickman, 799 A.2d 136, 142 (Pa. Super. 2002) (applying Hill standard). To succeed in showing prejudice, the defendant must show that it is reasonably probable that, but for counsel's errors, he would not have pleaded guilty and would have gone to trial. Hickman, 799 A.2d at 141 (quoting Hill, 474 U.S. at 59). The "reasonable probability" test is not a stringent one. Id.; See Nix v. Whiteside, 475 U.S. 157, 175 (1986) (reasonable probability standard less demanding than preponderance standard). Here, the Defendant testified that had he known the consequences of pleading guilty, he would have not plead guilty and instead gone to trial. The Defendant has no immediate family in Iraq. He speaks English. The Defendant's entire family lives in Pennsylvania, and the Defendant has been a resident here for many years. Given the facts presented in this case, there is little doubt that the Defendant would have rejected a guilty plea and instead taken every course of action to avoid deportation. The Defendant in this case has made a clear showing that counsel was ineffective, there was no reasonable basis for counsel's actions, and the Defendant was prejudiced as a result.

However, as previously reasoned, this court unfortunately does not retain jurisdiction to hear the merits of the Defendant's claim.

November 29, 2010, the Court having considered the Defendant's PCRA Petition, the petition is denied.

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[1] 42 Pa.C.S.A. §9545(b)(1); 42 Pa.C.S.A. §9545(b)(1) (iii).

[2] Judgment of sentence became final thirty (30) days after sentence on April 10, 2009.

[3] The Supreme Court equates a watershed rule of criminal procedure to be comparable to its holding in Gideon v. Wainwright, 372 U.S. 335 (1963). O'Dell v. Netherland, 521 U.S. 151, 167 (1997). The Supreme Court has even gone so far as to opine that the constitutional right to a jury trial would not be so vital as to require retroactive effect under Teague. Schiro v. Summerlin, 542 U.S. 348, 357 (2004).

[4] Other courts have found that Padilla did not create a new rule for retroactivity purposes. See, e.g., U.S. v. Guzman-Garcia, 2010 WL 1791247 (E.D.Cal. 2010) (stating that Padilla did not “newly recognize a right upon which defendant may rely to reset the running of the limitations period.”); People v. Bennett, 28 Misc.3d 575 (N.Y.City Crim.Ct. 2010) (stating that Padilla did not establish a new rule).

[5] According to Padilla, the Court held that failure to advise regarding immigration consequences necessarily meets the first prong of the Strickland test. Padilla, 130 S. Ct. at 1484. Under Padilla, the defendant would only need to prove prejudice in order to meet the Strickland test. Id. Following Hill, a defendant must establish that, had counsel performed effectively, the defendant would have not plead guilty and would have instead gone to trial. Hill, 474 U.S. at 59. In the context of advice regarding immigration consequences, a defendant must show that, had they known of the immigration consequences of pleading guilty, they would have chosen to go to trial. Padilla, 130 S. Ct. at 1482; Hill, 474 U.S. at 59.

[6] The Court in Padilla stated that “a holding limited to affirmative mis-advice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available.” Id. at 1484.