

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARIO RUIZ,	§	
	§	No. 54, 2011
Movant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE	§	ID No. 89006317DI
	§	
Respondent Below-	§	
Appellee.	§	

Submitted: May 31, 2011

Decided: July 6, 2011

Before **HOLLAND, JACOBS** and **RIDGELY**, Justices.

ORDER

This 6th day of July 2011, it appears to the Court that:

(1) Movant-Below/Appellant, Mario Ruiz, appeals from a Superior Court judgment, which denied his second motion for postconviction relief. Ruiz contends that the Superior Court erred in denying that motion because his counsel was ineffective when he failed to request a judicial recommendation against deportation (“JRAD”).¹ Ruiz argues that any action for deportation would be

¹ The federal Immigration and Nationality Act of 1917 provided for the JRAD procedure. This “critically important procedural protection” provided that “[a]t the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation ‘that such alien shall not be deported.’” *Padilla v. Kentucky*, 130 S. Ct. 1473, 1479 (2010). The JRAD procedure is no longer part of our law. *Id.* at 1480.

precluded if his counsel had requested a JRAD and the trial court had granted it. We find no merit to Ruiz's appeal and affirm.

(2) Nearly twenty-two years ago, Ruiz pled guilty to assault second degree. The Superior Court sentenced Ruiz to five years at Level V, suspended immediately for five years at Level II probation. A few years later, Ruiz was charged with violating the conditions of his probation. The Superior Court found him guilty and sentenced him to five years at Level V, suspended for five years at Level III, suspended after eighteen months for three and one-half years at Level II. Ruiz did not appeal or file a motion for postconviction relief. Five years later, the Superior Court discharged Ruiz from probation, and the case closed.

(3) Ten years after the case closed, Ruiz filed a motion for postconviction relief. In Ruiz's motion, he submitted that "[h]e is now facing removal from the United States as a consequence of the aforesaid proceedings as well as a subsequent incident which resulted in a violation of the probation and a felony charge which would not have been a felony had not the subject of this post conviction relief position not resulted in a guilty plea." The Superior Court determined that Ruiz's claim was procedurally barred, but also addressed its merits.² The Superior Court concluded that Ruiz's argument that he lacked adequate information to enter the plea was unfounded because Ruiz had admitted

² *State v. Ruiz*, 2007 WL 4577586, at *1–2 (Del. Super. Dec. 5, 2007).

that he was aware that the federal government would be notified of his illegal alien status and that he might be deported.³ The Superior Court summarily dismissed Ruiz’s allegation that he did not fully understand the colloquy or that he entered into his plea without informed consent because “he responded to every question asked by the Court, either to the judge or to the court translator, without ever showing a lack of understanding.”⁴ The Superior Court also concluded that Ruiz could not demonstrate that his trial counsel was ineffective under *Strickland v. Washington*⁵ because he could not show cause or prejudice.⁶ Accordingly, the Superior Court denied his motion.⁷

(4) Ruiz appealed that determination to this Court. We explained that a person loses standing to move for postconviction relief under Superior Court Criminal Rule 61 where the defendant is not in custody or subject to future custody for the underlying offense or challenged sentence.⁸ We concluded that Ruiz lacked standing to seek postconviction relief because the Superior Court had discharged Ruiz from probation and he was not subject to any future custody for the original

³ *Id.* at *2–3.

⁴ *Id.* at *3.

⁵ 466 U.S. 668 (1984).

⁶ *Ruiz*, 2007 WL 4577586, at *3–5.

⁷ *Id.* at *5.

⁸ *Ruiz v. State*, 956 A.2d 643, 2008 WL 1961187, at *2 (Del. 2008) (TABLE) (citing *Pumphrey v. State*, 937 A.2d 140, 2007 WL 3087405, at *1 (Del. 2007) (TABLE)).

charges.⁹ We affirmed the Superior Court's denial of his motion for post-conviction relief without reaching the merits of his claim.¹⁰

(5) Ruiz has now moved for postconviction relief again. The Superior Court assigned the motion to a court commissioner for findings of fact and recommendations pursuant to Superior Court Criminal Rule 62(a)(5).¹¹ The commissioner recommended that the Superior Court deny Ruiz's motion because Ruiz again lacks standing, given that he is not a person in custody or subject to future custody under a sentence of the court. The Superior Court adopted the commissioner's report and denied Ruiz's motion. This appeal followed.

(6) We review the Superior Court's denial of a motion for postconviction relief for abuse of discretion.¹² We review questions of law arising from the denial of a motion for postconviction relief *de novo*.¹³

(7) In *Padilla v. Kentucky*,¹⁴ the United State Supreme Court explained:

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process,

⁹ *Id.*

¹⁰ *Id.*

¹¹ Rule 62(a) relevantly provides:

Each Commissioner shall have all powers and duties conferred or imposed upon Commissioners by law, by the Rules of Criminal Procedure for the Superior Court, and by Administrative Directive of the President Judge, including, but not limited to: . . . (5) . . . [t]he power to conduct . . . hearings involving post-conviction relief pursuant to Super. Ct. Crim. R. 61, and to submit to a judge of the Court proposed findings of fact and recommendations for the disposition, by a judge, of [the] matter.

¹² *Claudio v. State*, 958 A.2d 846, 850 (Del. 2008).

¹³ *Id.*

¹⁴ 130 S. Ct. 1473 (2010).

uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.¹⁵

Ruiz argues that “[b]y failing to request a [JRAD] as part of the plea bargain, or subsequent thereto, Ruiz’[s] . . . counsel failed to provide correct advice concerning deportation.” Ruiz also argues that *Padilla* “create[d] a newly recognized substantive right, [which] should be accorded retroactive application under Delaware law.”

(8) Superior Court Criminal Rule 61(a) defines the scope of the postconviction procedure as follows: “This rule governs the procedure on an application by a person in custody or subject to future custody under a sentence of this court” Ruiz lacks standing to seek postconviction relief because the Superior Court has discharged Ruiz from probation and he is not subject to any future custody for the original charges. We reached the same conclusion when Ruiz first moved for postconviction relief.¹⁶

(9) There may be several other reasons to deny Ruiz’s second motion for postconviction relief, including the following: (1) Ruiz’s appeal is likely moot, given that deportation proceedings against him have been dismissed because the

¹⁵ *Id.* at 1482.

¹⁶ *See Ruiz*, 2008 WL 1961187.

Immigration and Naturalization Service (“INS”) failed to timely file a briefing,¹⁷ (2) Ruiz likely cannot show that the procedural bar of Superior Court Criminal Rule 61(i)(4) does not apply to his second motion for postconviction relief,¹⁸ and (3) the rule in *Padilla* likely would not retroactively apply to this case.¹⁹ But, we need not, and do not, make those determinations because one point is clear: Ruiz lacks standing to move for postconviction relief under Rule 61 because he is not a “person in custody or subject to future custody under a sentence of th[e] court.”²⁰

There may be certain circumstances that require the Court to broadly interpret the

¹⁷ The United States Court of Appeals for the Third Circuit currently adheres to the minority position that dismissal of deportation proceedings precludes revival of those proceedings. The majority position among the Circuits is that dismissal of deportation proceedings is without prejudice and, thus, revival of those proceedings is permissible. In Ruiz’s supplemental brief, he argues that INS is now seeking to overturn the Third Circuit’s rule and that the Third Circuit is “highly likely” to alter its rule to conform with the other Circuits.

¹⁸ Superior Court Criminal Rule 61(i)(4) provides: “Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.”

¹⁹ Although courts have disagreed on whether the rule in *Padilla* deserves retroactive effect, United States Supreme Court and Delaware Supreme Court precedents suggest that the rule in *Padilla* may not retroactively apply. For example, in *Richardson v. State*, 3 A.3d 233 (Del. 2010), we explained:

To qualify as watershed under the second exception, a rule must meet two requirements. First, the rule “must be necessary to prevent ‘an impermissibly large risk’ of an inaccurate conviction.” Second, the “rule must ‘alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.’” In *Whorton v. Bockting*, the United States Supreme Court held that its Confrontation Clause decision in *Crawford v. Washington* was not a “watershed rule” warranting retroactive application, despite having overruled *Ohio v. Roberts*. Further, the United States Supreme Court has only retroactively applied one decision -- *Gideon v. Wainwright*.

Id. at 239 (citations omitted). We are not required to decide whether the rule in *Padilla* retroactively applies here.

²⁰ See Super. Ct. Crim. R. 61(a); *Epperson v. State*, 829 A.2d 935, 2003 WL 21692751 (Del. 2003) (TABLE).

“in custody” requirement of Superior Court Criminal Rule 61(a) to confer standing upon a movant even though he is not technically “in custody.”²¹ But, we conclude that Ruiz has not satisfied the “in custody” requirement of Rule 61.²² The sentence imposed for his conviction has fully expired. The Superior Court did not err in denying Ruiz’s second motion for postconviction relief.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

²¹ For example, the United States Supreme Court has held that a prisoner who had been placed on parole was still “in custody” for purposes of the federal habeas corpus statute -- title 28, section 2255 of the United States Code. *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). But, the United States Supreme Court has explained that a prisoner is not “in custody” if the sentence imposed for the conviction has “fully expired.” *Maleng v. Cook*, 490 U.S. 488, 491 (1989).

²² At least two federal courts have similarly interpreted the “in custody” requirement of the federal habeas corpus statute. See *Resendez v. Kovensky*, 416 F.3d 952, 956 (9th Cir.) (“Immigration consequences, such as deportation, have long been viewed as ‘collateral,’ and thus are not themselves sufficient to render an individual ‘in custody.’”), *cert. denied*, 546 U.S. 1043 (2005); *United States v. Krboyan*, 2010 WL 5477692, at *6 (E.D. Cal. Dec. 30, 2010) (“*Padilla* does not address the ‘in custody’ requirement of Section 2255.”).