UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ORESTE LLANES,
Petitioner,

v. Case No. 8:11-cv-682-T-23TBM

UNITED STATES OF AMERICA,
Respondent.
_____/

O R D E R

Llanes pleaded guilty to conspiracy to both possess and distribute approximately six thousand pounds of marijuana. Llanes is the lead defendant in United States of America v. Oreste Llanes, 8:93-cr-245-T-26(MAP).[1] In 1995 Llanes's 108-month sentence was reduced to eighty-four months under Rule 35, Federal Rules of Criminal Procedure. Llanes, through retained counsel, petitions for the writ of error coram nobis (Doc. 1) and challenges the validity of his conviction. "Federal courts have authority to issue a writ of error coram nobis under the All Writs Act, 28 U.S.C. § 1651(a)." United States v. Mills, 221 F.3d 1201, 1203 (11th Cir. 2000), cert. denied, 531 U.S. 1144 (2001). See also Moody v. United States, 874 F.2d 1575, 1576 (11th Cir. 1989) ("In United States v. Morgan, 346 U.S. 502, 74 S. Ct. 247, 98 L. Ed. 248 (1954) (5-4 decision), the sharply-divided Supreme Court determined that the broad all-writs section of the judicial code bestows on federal courts the authority to issue writs in the nature of

[1] The criminal case was originally assigned to the late Honorable Ralph W. Nimmons, Jr.

coram nobis."), cert. denied, 493 U.S. 1081 (1990)). However, this extraordinary writ is available only "when the petitioner has served his sentence and is no longer in custody, as is required for post-conviction relief under 28 U.S.C. § 2255." United States v. Peter, 310 F.3d 709, 712 (11th Cir. 2002). Llanes represents that he has completed both his sentence and the term of supervised release. Llanes's claim lacks merit.

Llanes alleges that trial counsel rendered ineffective assistance by failing to advise him that pleading guilty risks automatic deportation.[2] Llanes asserts entitlement to relief based on Padilla v. Kentucky, ___ U.S. ___, 130 S. Ct. 1473, 1486 (2010), which holds "that counsel must inform her client whether his plea carries a risk of deportation." Llanes contends that Padilla applies retroactively based on Teague v. Lane, 489 U.S. 288 (1989), which "clarif[ied] how the question of retroactivity should be resolved for cases on collateral review," 489 U.S. at 300, and holds that, "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310. Retroactively applying a "new rule" is disfavored. See Teague, 489 U.S. at 309 ("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.").

Despite Teague's reminder about the need to address the retroactivity of a decision—"the question whether a decision announcing a new rule should be given

[2] Although "removal" is the current term used to describe the returning of an alien to his country of origin, deportation is used throughout this order because that was the correct term when Llanes pleaded guilty.

prospective or retroactive effect should be faced at the time of that decision," 489 U.S. at 300 (internal quotations omitted)—Padilla fails to resolve (or even discuss) retroactivity, and no federal circuit court has addressed Padilla's retroactivity.

In support of Padilla's retroactive application, Llanes first contends that Padilla is not a "new rule" because the ruling is based on Strickland v. Washington, 466 U.S. 668 (1984). Despite Llanes's arguments, Padilla announces a "new rule." In deciding whether a rule is new, Saffle v. Parks , 494 U.S. 484, 488 (1990), suggests determining "whether a state court considering Parks's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule Parks seeks was required by the Constitution." Padilla specifically recognized that the "new rule" was abrogating the law in most of the states and in each of the federal circuits. The concurring opinion cites an article in which the authors report that eleven federal circuit courts plus more than thirty states and the District of Columbia "'hold that defense counsel need not discuss with their clients the collateral consequences of a conviction,' including deportation." 130 S. Ct. at 1481 and 1487. Based on the near uniformity of law that Padilla abrogated, a court "would [not] have felt compelled by existing precedent" to conclude that trial counsel renders ineffective assistance by not advising a client about the risks of deportation. No earlier Supreme Court decision extended Strickland's ineffective assistance of counsel test to this circumstance. To the contrary, Eleventh Circuit precedent foreclosed a claim of ineffective assistance of counsel based on comparable facts. See, e.g., United States v. Campbell, 778 F.2d 764 (11th Cir. 1985).

Alternatively, Llanes argues that, if Padilla is a "new rule," retroactive application is proper "because it involves a 'watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings.'" Petition at 3, quoting United States v. Swindall, 107 F.3d 831, 835 (11th Cir. 1997). A "new rule" is defined as "a rule that 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.'" Parks, 494 U.S. at 488. Generally, a "new rule" is not retroactively applied.

> [T]he general principle is that new rules will not be applied on collateral review [except if (1)] the rule places a class of private conduct beyond the power of the State to proscribe . . . or addresses a "substantive categorical guarante[e] accorded by the Constitution," such as a rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense," [or (2) the rule is a] "watershed rule of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.

Parks, 494 U.S. at 494-95 (quoting Teague).

Recognizing the inapplicability of the first exception, Llanes argues for retroactive application based on the second exception. The "watershed" exception is extremely limited, applying only to a situation involving "the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." Teague, 489 U.S. at 311, quoting Mackey v. United States, 401 U.S. 667, 694 (1971) (opinion concurring in judgments in part and dissenting in part) (emphasis original). "Although the precise contours of this exception may be difficult to discern, we have usually cited Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), holding that a defendant has the right to be represented by counsel in all criminal trials for serious

offenses, to illustrate the type of rule coming within the exception." Parks, 494 U.S. at 495. Padilla's requirement that counsel provide advice about the risk of deportation is far different from Gideon's establishment of the right to counsel. For example, Graves v. United States Attorney General, 611 F.3d 1337, 1345 n.7 (11th Cir. 2010), while citing Padilla, recognizes that "neither the Supreme Court nor this Court has specifically held that a defendant's ignorance of immigration consequences renders his guilty plea involuntary." Consequently, the "watershed rule" exception to non-retroactivity is inapplicable. Llanes is not entitled to the retroactive application of Padilla to his conviction or to his fully expired sentence.[3]

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[3] Although district courts split on whether Padilla announced a "new rule," the best reasoned decision is Dennis v. United States, 2011 WL 1480398 at 3-4 (D. S.C. 2011), particularly the following "new rule" analysis:

> [W]hile it may have been the professional norm for criminal defense lawyers to advise their clients of possible deportation consequences, neither the defendant's trial counsel nor this court would have had any indication that this best practice was an actual constitutional right. "[T]he habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place," Teague, 489 U.S. at 306 (emphasis added) (internal quotation omitted), and based on the Fourth Circuit's holding in [United States v.] Yearwood, [863 F.2d 6, (4th Cir. 1988),] this court would not have felt compelled to find such a constitutional standard existed at the time of the defendant's decision to plead guilty.
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> To be sure, the Supreme Court concluded that the two-prong ineffective assistance of counsel standard announced in Strickland v. Washington applied to Padilla's case, which forms the basis of the defendant's contention that Padilla merely applied existing precedent to a new context rather than established a new rule. But prior to concluding that the Strickland analysis applied to Padilla's claim, the Court had to first address the role of the direct versus collateral consequences distinction, which many lower courts had invoked to resolve ineffective assistance of counsel claims based on an allegation of a failure to be advised about the risk of deportation. It was only after the Court concluded that the direct versus collateral distinction was "ill-suited" to evaluate a Strickland claim based on the specific risk of deportation did it conclude "that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." Padilla, 130 S. Ct. at 1482 (emphasis in original). The court believes this finding of the Court makes its decree a new rule, for the Supreme Court has never addressed the issue of whether or not the direct versus collateral consequence is appropriate to use in defining the scope of constitutionally "reasonable professional assistance" required under Strickland. In other words, although the Supreme Court did not overturn any precedent it had established, it did, for the first time, expand the Sixth Amendment right to counsel to

A further reason cautions against Llanes's benefitting from the "new rule." Padilla's holding—that counsel performs deficiently if counsel fails to advise about the risks of automatic deportation—substantially relies on the gradual movement toward automatic deportation. Until 1990, because both the judiciary and the Attorney General could block deportation, a defendant's deportation following conviction was not certain. In 1990 Congress removed a sentencing judge's authority to issue a "judicial recommendation against deportation," a "procedure [that] had the effect of binding the Executive to prevent deportation . . . ." 130 S. Ct. at 1479. Six years later Congress withdrew, except in a limited array of circumstances, the Attorney General's authority to grant discretionary relief from deportation. The loss of both judicial and executive discretion to prevent a deportation causes the current automatic deportation following conviction. The following observation in Padilla, 130 S. Ct. at 1480, shows that the movement toward automatic deportation strongly encouraged the decision to require advice about the risk of deportation:

> These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

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cover the immigration implications of a criminal conviction by rejecting several lower courts' method of evaluating the issue.

Llanes's plea occurred in 1990, three years before the withdrawal of the Attorney General's authority to grant discretionary relief. Llanes's motion to vacate (Doc. 1) is **DENIED**. The clerk shall enter a judgment against Llanes and close this action.

ORDERED in Tampa, Florida, on June 22, 2011.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE