

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
INDICTMENT NO. 3:06CR-90-H**

UNITED STATES OF AMERICA

PLAINTIFF

vs.

MOTION TO VACATE FINAL JUDGMENT

JIAN TIAN LIN

DEFENDANT

*** **

Comes the Defendant, Jian Tian Lin, and respectfully requests this Court to vacate his judgment of conviction, previously entered herein. As grounds therefore, Defendant states that, at the time of his plea, Defendant was not advised by his counsel that “removal” (i.e., deportation) was a consequence of his offense of conviction. Given that Defendant was known to be an undocumented alien, the failure to apprise the Defendant of this consequence is fatal to his plea, and the judgment of conviction herein should be vacated.

Respectfully submitted,

/s/ C. Thomas Hectus _____

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Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was electronically filed, on this the 1st day of July, 2012, with the Clerk, United States District Court, Western District of Kentucky, 106 Gene Snyder U.S. Courthouse, 601 West Broadway, Louisville, Kentucky 40202, who will electronically provide notice to the following:

Daniel Kinnicutt, Esq.
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/s/ C. Thomas Hectus

C. THOMAS HECTUS

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
INDICTMENT NO. 3:06CR-90-H**

UNITED STATES OF AMERICA

PLAINTIFF

v.

DEFENDANT'S AFFIDAVIT

JIAN TIAN LIN

DEFENDANT

*** **

Comes the Defendant, Jian Tian Lin, by counsel, and after being duly sworn, states as follows:

1. My name is Jian Tian Lin, and I was the Defendant in the above action.

2. On December 18, 2006, judgment was entered as a result of my plea of guilty to Counts 2 and 9 of the indictment. Count 2 of the indictment charged me with knowingly conspiring to conceal, harbor and shield from detection persons who were aliens. (Count 9 was a criminal forfeiture offense). I was sentenced to a total term of seven (7) months imprisonment, followed by a 2 year term of supervised release. I had already served the 7 months, and after my guilty plea, I was released on these charges.

3. On November 13, 2008, this Court terminated my supervised release.

4. Recently, I was denied asylum status, but only due to my conviction under 8 USC §1324(a)(1)(A)(v)(I) and §1324 (a)(1)(B)(i), for allegedly harboring aliens. The United States Immigration and Customs Enforcement (I.C.E.) determined that, pursuant to Section 101(a)(43) of the Immigration and Nationality Act, because a conviction for harboring constitutes an "aggravated felony," I am not eligible for asylum status. Harboring aliens is an automatically deportable (or "removable") offense.

5. I am a Chinese national, and have lived in the United States for 19 years. I am 39 years old, and I am married to Ling Li, who is a lawful resident alien who is seeking citizenship. We have two young children who are U.S. citizens. My oldest son attends public school in Radcliff, and my younger son is pre-school age.

6. At no time during my lawyer's negotiation of a plea agreement, or at the time of my guilty plea, did my lawyer ever advise me that harboring aliens was an aggravated felony under the immigration laws, or that I would be subject to automatic removal. I was told that if I pleaded guilty, I could be released immediately. I did not know to inquire about the consequences of my guilty plea. While in China before my entry into the United States, I only finished middle school, or the equivalent of 9th grade in the U.S., and in China, I was educated not to question those in authority.

7. Because of my marital status and my family, preservation of my right to stay in the United States is more important to me than the 7 month jail sentence I received. I would not have pleaded guilty if I understood the consequences of my plea with regard to my immigration status. If I am returned to China, I would face imprisonment for leaving the country illegally, as well as being subject to a mandatory vasectomy for violating China's "one child" policy. My wife and children would likely have to remain in the United States.

8. I was especially harmed by my guilty plea because, in fact, I did not harbor any aliens. My brother, Jian Chai Lin, operated a Chinese restaurant in Radcliff, Kentucky (the "Golden China Buffet"). I began working for my brother as a cook in the restaurant in 2001.

9. My brother was charged with the same offenses, but his plea agreement allowed him to plead guilty only to "hiring" offenses, rather than "harboring." Since hiring is not an "aggravated" felony, my brother is not subject to deportation.

10. If I had proceeded to trial, the evidence would have demonstrated that I did not harbor any aliens, but instead, was the one *being* harbored. Nor did I conceal any aliens, but instead, was the one *being* concealed. Finally, I did not shield any aliens from detection, but instead, was the one *being*

shielded from detection. I am confident that I could have proceeded to trial and obtained a verdict of “not guilty” of any offense constituting an aggravated felony under the immigration laws.

11. I pleaded guilty only because I had been detained for 7 months, and was told that I would be released if I pleaded guilty.

FURTHER, AFFIANT SAYETH NAUGHT.

JIAN TIAN LIN

JIAN TIAN LIN

VERIFICATION

Movant, Jian Tian Lin, having had the foregoing statements read to him and then translated, states that the statements contained therein are true, based upon his information and belief.

JIAN TIAN LIN

JIAN TIAN LIN

COMMONWEALTH OF KENTUCKY)
) SS
COUNTY OF JEFFERSON)

SUBSCRIBED AND SWORN to before me by JIAN TIAN LIN, this the 24th day of May, 2012.



NOTARY PUBLIC
State of Kentucky at Large

MY COMMISSION EXPIRES: 08-04-12

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
INDICTMENT NO. 3:06CR-90-H**

UNITED STATES OF AMERICA

PLAINTIFF

vs.

**DEFENDANT'S MEMORANDUM IN SUPPORT OF
MOTION TO VACATE FINAL JUDGMENT**

JIAN TIAN LIN

DEFENDANT

*** **

Comes the Defendant, Jian Tian Lin, and in support of his Motion to Vacate the Final Judgment herein, submits the following Memorandum:

INTRODUCTION

It is now clear that a defense attorney is required to advise a defendant about the possible immigration consequences that may result from entering a guilty plea. *Padilla vs. Kentucky* 559 U.S. ___, 130 S.Ct. 1473 (2010). Because the failure to do so amounts to ineffective assistance of counsel in violation of the Defendant's Sixth Amendment rights, Defendant's conviction must be vacated.

STATEMENT OF FACTS

The Defendant, Jian Tian Lin, is a 39 year old Chinese national who has lived in the United States for 19 years. [Affidavit of Jian Tian Lin, attached hereto, ¶4]. He is married to Ling Li, a lawful resident alien. [Id]. Defendant and Ling Li have two young children who are U.S. citizens. Their oldest son attends public school in Radcliff, and their younger son is pre-school age. [Id].

The Defendant's brother, Jian Chai Lin, operated a Chinese restaurant in Radcliff, Kentucky (the

“Golden China Buffet”). He began working for his brother as a cook in the restaurant in 2001. [Affidavit of Jian Tian Lin, ¶8].

In 2006, Defendant was indicted for various offenses, including transporting and harboring illegal aliens. However, had the case proceeded to trial, the evidence would have shown that, in fact, Defendant did not harbor any aliens, but instead, was the one being harbored. [Affidavit of Jian Tian Lin, ¶10]. Nor did he conceal or shield any aliens, but instead, was the one being concealed and shielded from detection. [Id].

Defendant’s brother, Jian Chai Lin, who owned the restaurant and hired Defendant, was charged with the same offenses, but his plea agreement allowed him to plead guilty only to “hiring” offenses, rather than “harboring.” Since hiring is not an “aggravated” felony, Jian Chai Lin was not subject to deportation. [Affidavit of Jian Tian Lin, ¶9].

On December 18, 2006, judgment was entered as a result of Defendant’s plea of guilty to Counts 2 and 9 of the indictment. [Affidavit of Jian Tian Lin, ¶2]. Count 2 of the indictment charged him with knowingly conspiring to conceal, harbor and shield from detection persons who were aliens. Count 9 was a criminal forfeiture offense. Defendant was sentenced to a total term of seven (7) months imprisonment, followed by a 2 year term of supervised release. Because Defendant had already served the 7 months, he was released from custody after his guilty plea. [Affidavit of Jian Tian Lin, ¶2]. [Id]. On November 13, 2008, this Court terminated Defendant’s supervised release. [Affidavit of Jian Tian Lin, ¶3].

Recently, Defendant was denied asylum status, due only to his conviction under 8 USC §1324(a)(1)(A)(v)(I) and §1324 (a)(1)(B)(i), for allegedly harboring aliens. [Affidavit of Jian Tian Lin, ¶4]. The United States Immigration and Customs Enforcement (I.C.E.) determined that, pursuant to Section 101(a)(43) of the Immigration and Nationality Act, because Defendant’s conviction for harboring constitutes an “aggravated felony,” he is not eligible for asylum status.

[Affidavit of Jian Tian Lin, ¶4]. Harboring aliens is an automatically deportable (or “removable”) offense. [Id].

At no time during his lawyer’s negotiation of his plea agreement, or at the time of his guilty plea, was Defendant ever advised that harboring aliens was an aggravated felony under the immigration laws, or that he would be subject to automatic removal. [Affidavit of Jian Tian Lin, ¶6]. Defendant was only told that if he pleaded guilty, he would be released immediately. [Id]. Defendant did not know to inquire about the consequences of his guilty plea. [Id]. While in China, before his entry into the United States, Defendant only finished middle school (the equivalent of 9th grade in the U.S.). [Id]. In China, Defendant was educated not to question those in authority. [Id].

Defendant pleaded guilty only because he had been detained for 7 months, and was told that he would be released if he pleaded guilty. [Affidavit of Jian Tian Lin, ¶11]. Defendant was especially prejudiced by his guilty plea because, in fact, he was not guilty of any offense constituting an aggravated felony under the immigration laws. [Affidavit of Jian Tian Lin, ¶10].

Because of his marital status and his family, preservation of the Defendant’s right to stay in the United States is more important to him than the 7 month jail sentence he received. [Affidavit of Jian Tian Lin, ¶7]. He would not have pleaded guilty if he understood the consequences of his plea with regard to his immigration status. [Id]. If Defendant is returned to China, he will face imprisonment for leaving the country illegally, as well as being subject to a mandatory vasectomy for violating China’s “one child” policy. [Id]. Defendant’s wife and children would likely have to remain in the United States. [Id].

ARGUMENT

Padilla v. Kentucky, U.S. ___, 130 S.Ct. 1473 (2010), is dispositive of Defendant’s right to have been informed of the consequences of his plea with regard to his immigration status. Jose Padilla was a native of Honduras who came to the United States in the 1960s. He served in the

United States military during the Vietnam War. In September 2001, Padilla was arrested for transporting marijuana. Padilla pled guilty to drug charges in exchange for a recommended sentence of five years to serve, after which he would remain on probation for another five years. Under federal law, Padilla's felony drug conviction was an aggravated felony and a deportable crime. *See* 8 U.S.C. §§§ 1101(a)(43)(B), 1227(a)(2)(A)(iii), 1227(B)(i).

Padilla filed a motion for post-conviction relief, alleging that he had received ineffective assistance of counsel in that his attorney had misadvised him regarding the potential for deportation as a result of his guilty plea.

The Supreme Court of Kentucky ruled that counsel's failure to advise Padilla of "collateral consequences" of his plea, and even counsel's "misadvice" regarding those consequences, did not provide a basis for post-conviction relief.

The United States Supreme Court granted Padilla's petition for a writ of certiorari. The Court reversed Padilla's conviction based upon Padilla's Sixth Amendment right that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." The Court had already interpreted the Sixth Amendment to require that defendants receive "effective assistance of counsel." *See e.g., Gideon v. Wainwright*, 372 U.S. 335; *McMann v. Richardson*, 397 U.S. 759 (1970).

In *Padilla*, the U.S. Supreme Court reversed the Kentucky Supreme Court, holding that "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." The Court determined that deportation is an integral part—indeed, some-times the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. "The severity of deportation – 'the equivalent of banishment or exile,' (cite omitted) – only underscores how

critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.” *Id.* at _____. The Court noted that it had never drawn a distinction between direct and collateral consequences when defining what constituted reasonable assistance of counsel, and held that “the weight of prevailing professional norms supports the view that *counsel must advise her client regarding the risk of deportation.*” (Emphasis Added).

When the deportation consequences are clear, as they were in Defendant’s case herein, defense counsel must correctly advise a defendant of those consequences. In this case, Defendant was undoubtedly prejudiced. As noted herein, Defendant pleaded guilty only because he was told he would be released from custody after having been detained for 7 months. He pleaded guilty, and as promised, he was released. Now, however, he faces deportation to China, a consequence about which he was not advised.

In *Strickland v. Washington*, the U.S. Supreme Court adopted a two-prong test to determine whether a defendant received ineffective assistance of counsel. First, the defendant must establish that his counsel’s representation was objectively unreasonable. *See Strickland v. Washington*, 446 U.S. 668, 687 (1984). Based upon *Padilla*, Defendant herein has met this prong.

Second, a defendant must demonstrate that he was prejudiced as a result of his counsel’s ineffective representation. To satisfy this prong, the defendant must show that counsel’s errors were serious enough to undermine confidence in the result of the trial. *Id.* The *Strickland* standard also applies to the entry of guilty pleas. *See e.g., Hill v. Lockhart*, 474 U.S. 52 (1985). The prejudicial error test is satisfied if there is a reasonable probability that the defendant would not have pleaded guilty but for his counsel’s erroneous advice. Here, the Defendant undoubtedly could not have been convicted of harboring, concealing or shielding, since he was the one being

harbored. Furthermore, Defendant would not have pleaded guilty but for his ignorance of the immigration consequences of his plea. Consequently, Defendant has met the second prong of *Strickland*, as well.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests this Court to grant this motion and vacate the judgment of conviction previously entered herein. Defendant also requests that this Court set a date for further proceedings in this case.

Respectfully submitted,

/s/ C. Thomas Hectus

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CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was electronically filed, on this the 1st day of July, 2012, with the Clerk, United States District Court, Western District of Kentucky, 106 Gene Snyder U.S. Courthouse, 601 West Broadway, Louisville, Kentucky 40202, who will electronically provide notice to the following:

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/s/ C. Thomas Hectus

C. THOMAS HECTUS

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
INDICTMENT NO. 3:06CR-90-H**

UNITED STATES OF AMERICA

PLAINTIFF

vs.

**ORDER GRANTING MOTION
TO VACATE FINAL JUDGMENT**

JIAN TIAN LIN

DEFENDANT

*** **

Upon Motion of the Defendant, Jian Tian Lin, to vacate his judgment of conviction previously entered herein, and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED THAT Defendant's Motion is GRANTED. The final judgment previously entered herein, and Defendant's plea of guilty, are VACATED.

This matter is set for further proceedings on the Indictment on the ____ day of _____, 2012 at _____ a.m./p.m.

JUDGE, U.S. DISTRICT COURT

DATE ENTERED: _____

Distribution:

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