

[J-32-2011]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 36 WAP 2010
	:	
Appellant	:	Appeal from the Order of Superior Court
	:	entered June 8, 2010, at No. 1158 WDA
	:	2009, reversing the Order of the Court of
v.	:	Common Pleas of Allegheny County
	:	entered June 22, 2009, at CP-02-CR-
	:	0005423-2008, and remanding.
JOSEPH ABRAHAM,	:	
	:	996 A.2d 1090 (Pa. Super. 2010)
Appellee	:	
	:	ARGUED: April 13, 2011

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE

DECIDED: DECEMBER 7, 2012

I join the Majority Opinion in its entirety. I write separately only to address the foundational federal question, noted but not decided by the Majority, see Slip Maj. Op. at 6 n.6, of whether the U.S. Supreme Court's decision in Padilla v. Kentucky, 130 S.Ct. 1473 (2010), applies retroactively to a defendant in appellee's circumstances. The question of Padilla's retroactive applicability has been accepted for review but has not yet been resolved by the High Court; as the Majority notes, the Circuit Courts of Appeals and various district courts have otherwise divided on the issue. Notably, the Circuit split has arisen -- and the U.S. Supreme Court agreed to decide the matter -- after the case before us was briefed and argued.

Padilla was decided in March 2010, after appellee's conviction or plea became final, which raises a threshold question of whether appellee is entitled retroactively, on collateral review, to the application of the constitutional principle articulated in Padilla.

See Teague v. Lane, 489 U.S. 288, 300 (1989) (plurality) (retroactivity properly treated as threshold question). The parties assume that Padilla is not a new rule, and accordingly that its holding applies. The Majority accepts the assumption as presented, and passes on to the disputed merits question of whether Padilla abrogated the direct versus collateral consequences test adopted by this Court in Commonwealth v. Frometa, 555 A.2d 92 (Pa. 1989). The Majority distinguishes Padilla, and holds that Frometa continues to apply in cases that do not involve deportation. I join the Majority, given the decisional posture of the case.

Pending guidance from the U.S. Supreme Court respecting the retroactive applicability of Padilla (to cases in varying procedural postures), and in light of this Court not passing upon Padilla's retroactive application to the circumstances here, the bench and bar in Pennsylvania are left with both a Third Circuit decision, United States v. Orocio, 645 F.3d 630 (3d Cir. 2011), and a Superior Court decision, Commonwealth v. Garcia, 23 A.3d 1059 (Pa. Super. 2011), having concluded that the case does not establish a new rule, and hence may apply retroactively. I am not so convinced, however. Generally, a constitutional principle announced by the High Court may apply retroactively to criminal cases on direct or collateral review if it is an "old rule," *i.e.*, a result on new facts that was "dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301 (emphasis omitted). A "new rule" generally is applicable only to cases that are still on direct review with two exceptions that permit retroactive application on collateral review. Whorton v. Bockting, 549 U.S. 406, 416 (2007). These exceptions apply: (1) if the decision "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; and (2) if the decision is a "watershed rule[] of criminal procedure" that "alter[s] our understanding of the bedrock procedural elements that

must be found to vitiate the fairness of a particular conviction.” Teague, 489 U.S. at 311 (emphasis omitted).

In June 2011, the Third Circuit held that Padilla applied retroactively because the constitutional principle articulated by the U.S. Supreme Court “followed from the clearly established principles of the guarantee of effective assistance of counsel” and derived from precedent existing at the time of defendant’s conviction. United States v. Orocio, 645 F.3d at 637 & 639. According to the Third Circuit, “[f]ar from extending the [Sixth Amendment ineffective assistance of counsel Strickland v. Washington, 466 U.S. 668 (1984)] rule into uncharted territory, Padilla reaffirmed defense counsel’s obligations to the criminal defendant during the plea process, a critical stage in the proceedings.” Id. at 638. The court rejected the argument that the application of Strickland to the “new factual context” of warning criminal defendants of immigration consequences was a new rule for retroactivity purposes. Id. at 639 (citing Teague). The Third Circuit applied Padilla retroactively to find Orocio’s counsel constitutionally deficient under the first prong of Strickland, and remanded for an evidentiary hearing on the question of prejudice.¹

In August 2011, the U.S. Courts of Appeals for the Seventh Circuit and the Tenth Circuit rejected the Third Circuit’s analysis and conclusion. Chaidez v. United States,

¹ In Garcia, the Superior Court addressed the issue of whether Padilla was an old or a new rule in a different context: the appellant argued that his PCRA petition, filed more than a year after his conviction became final, was not time-barred because Padilla was a constitutional right newly recognized by the U.S. Supreme Court that was held by that court to apply retroactively. 23 A.3d at 1063 (citing 42 Pa.C.S. § 9545(b)(1)(iii)). The Superior Court rejected the argument and denied relief, holding that Padilla merely “clarified and refined the scope of a criminal defendant’s long-standing constitutional right to the effective assistance of counsel during the guilty plea process.” Id. at 1064 (footnote omitted). The procedural circumstance in Garcia effectively required the appellant to undertake a strategy opposite to that of the appellant in Orocio, the case decided by the Third Circuit.

655 F.3d 684 (7th Cir. 2011); United States v. Chang Hong, 671 F.3d 1147 (10th Cir. 2011). Both the Seventh Circuit and the Tenth Circuit held that Padilla announced a new rule that did not fall within either of Teague's exceptions and, therefore, did not apply retroactively to cases on collateral review. According to the courts, although the decision in Padilla was grounded in and was an extension of Strickland, Padilla was not dictated or compelled by the decision in Strickland, and it was not "the sole reasonable interpretation of existing precedent." Chaidez, 655 F.3d at 692; Chang Hong, 671 F.3d at 1153-54. The decision in Padilla to apply Strickland to collateral civil consequences of a conviction was a "dramatic" shift in jurisprudence, and the result was "sufficiently novel" to qualify as a new rule. Chaidez, 655 F.3d at 690, 692-93; Chang Hong, 671 F.3d at 1155. Furthermore, while in Chaidez the parties agreed that neither exception to non-retroactivity applied, in Chang Hong, the Tenth Circuit rejected application of the exceptions after argument, holding that the Padilla rule was procedural but did not overcome the "watershed" requirement. According to the court, "Padilla is simply not germane to concerns about risks of inaccurate convictions or fundamental procedural fairness," concerns which are crucial to a finding that a rule, though new, should apply retroactively. Chang Hong, 671 F.3d at 1158-59.

In April 2012, the U.S. Supreme Court granted the petition for a writ of *certiorari* in the case decided by the Seventh Circuit -- Chaidez. See Chaidez v. United States, 132 S.Ct. 2101 (2012) (*per curiam*). On appeal, Chaidez is seeking retroactive application of Padilla, ultimately, to obtain relief from a 2004 federal conviction on three counts of mail fraud, to which she pled guilty. See 655 F.3d at 686; 18 U.S.C. § 1341. The High Court entertained oral argument on November 1, 2012, and a decision should issue by the end of the term.

On the question of retroactivity in the context of state prisoners on collateral attack, for my part, I think the Seventh Circuit and Tenth Circuit have the better of this dispute; the Third Circuit’s interpretation appears to be an unreasonable application of retroactivity principles. Even if appellee could prove that Padilla would command an award of relief, I would be inclined to deny PCRA relief because Padilla is a new and non-retroactive rule, and trial counsel cannot be deemed ineffective, in hindsight, for failing to predict the development.²

² As a point in clarification, I would also note that, read in isolation, the provision of the Public Employee Pension Forfeiture Act (“PEPFA”) cited by the Majority speaks in the present tense, *i.e.*, “is,” and ostensibly would apply only to a conviction or a guilty plea by a current public employee, and not to an already retired or former employee like appellee. Thus, that provision would not put counsel on notice of the collateral consequence. See 43 P.S. § 1313(a). The definitional section of PEPFA, however, appears to extend the application of the forfeiture provision to retired employees. 43 P.S. § 1312 (defining “public official” or “public employee” as “[a]ny person who is elected or appointed to any public office or employment . . . or who is acting or who has acted in behalf of the Commonwealth or a political subdivision or any agency thereof including but not limited to any person who has so acted and is otherwise entitled to or is receiving retirement benefits . . .”). A political subdivision includes a school district. Id.