

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, : Case No. 09-1423
Appellee, :
v. : On Appeal from the
Aaron K. Richey, : Franklin County Court
Appellant. : of Appeals, Tenth
 : Appellate District
 : Court of Appeals
 : Case No. 08AP-923

REPLY BRIEF OF DEFENDANT-APPELLANT

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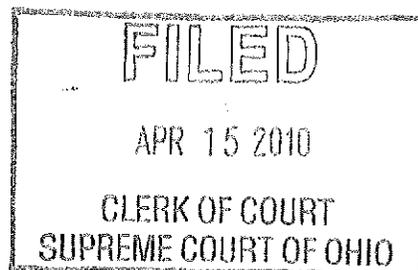


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REPLY ARGUMENT

PROPOSITION OF LAW

Legislative enactments that impose new collateral sanctions for conviction of a misdemeanor, including felony consequences for non-compliance with the sanctions, where such consequences and sanctions are greater and more serious than those applicable at the time of the no contest plea, constitute manifest injustice sufficient to justify withdrawal of a no contest plea.

The law of contracts is clearly applicable to the enforcement and interpretation of plea agreements. This case can be compared to a situation where a municipality contracted to build a new municipal building and city council, after entering into the contract, then decided to enact new building codes requiring all municipal office buildings to be built of marble and with an earthquake resistant steel structure. If compliance with the new code would double the construction cost, no court would ever hold that the city could unilaterally change the terms of its contract by enacting new building codes. One of several legal outcomes would prevail, the builder could be allowed to proceed under the original terms of the contract, the builder could proceed under the new code provisions but with the increased costs being paid by the city, or the builder could be allowed to withdraw from the original contract and be made as whole as possible. Under no legal scenario would the builder be compelled to build the new building at double the cost of his contracted price to his detriment and to the benefit of the city.

This is exactly what the state is seeking to do in this case. The defendant entered into an agreement where he gave up important constitutional rights. He gave

up his right to have the jury prove him guilty beyond a reasonable doubt, his right to confront and cross-examine witnesses, his right to present witnesses on his own behalf, and his right to a jury trial. These rights were given up with the expectation that there were legal limitations on the consequences of his plea. Every plea agreement is given with the understanding that the defendant has some awareness of the consequences of the plea. This awareness is necessary for the plea to be constitutionally viable. Some of these consequences must be directly conveyed to the defendant during the plea colloquy, the other consequences exist as a matter of law at the time the plea is entered into. However, when the state later attempts to materially alter the plea by imposing new consequences, it cannot take advantage of its original contract with the defendant anymore than a city could enact a building code to the detriment of its contractor.

The state maintains that the consequences are merely collateral to the conviction and do not warrant vacating the plea. The United States Supreme Court, on March 31, 2010, decided a case that directly dealt with what the government claimed were collateral issues in *Padilla v. Kentucky* (Mar. 31, 1020) 599 U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2010 WL 1222274 (U.S.Ky.), 78 USLW 4235, Case No. 08-651. The Supreme Court dealt with a situation where Padilla, a lawful permanent resident of the United States for over 40 years, faced deportation after pleading guilty to drug-distribution charges in Kentucky. In postconviction proceedings, he claimed that his counsel not only failed to advise him of the deportation consequence before he entered the plea, but also told him not to worry about deportation since he had lived in this country so long. He alleged that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla postconviction relief on

the ground that the Sixth Amendment's effective-assistance-of-counsel guarantee did not protect defendants from erroneous deportation advice because deportation is merely a "collateral" consequence of a conviction. The United States Supreme Court reversed the Kentucky Supreme Court and held that the failure of the defendant to be properly advised of his deportation consequences constituted ineffective assistance of counsel and affected the validity of his guilty plea.

The United States Supreme Court noted:

Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S., at 686, 104 S.Ct. 2052. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, *i.e.*, those matters not within the sentencing authority of the state trial court. 253 S.W.3d, at 483-484 (citing *Commonwealth v. Fuartado*, 170 S.W.3d 384 (2005)). In its view, "collateral consequences are outside the scope of representation required by the Sixth Amendment," and, therefore, the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel." 253 S.W.3d, at 483. [*Id.* Padilla v. Kentucky 2010 WL 1222274, 6 (U.S.Ky.) (U.S.Ky.,2010), footnotes omitted]

The Court then noted:

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland*, 466 U.S., at 689, 104 S.Ct. 2052. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

* * *

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, 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. *Strickland* applies to Padilla's claim. [Id. *Padilla v. Kentucky* 2010 WL 1222274, 6 (U.S.Ky.) (U.S.Ky.,2010)]

The Court then examined existing standards of practice and determined that it was incumbent upon counsel to properly advise their criminal clients of the risks of deportation associated with a guilty plea. The Supreme Court then noted that it had previously recognized that preserving the client's right to remain in the United States may be more important than any potential jail sentence. The Supreme Court also noted that there was no relevant difference between acts of omission and acts of commission in this regard. Otherwise, it would give counsel an incentive to remain silent on matters of grave importance.

Padilla is instructive on the issue of direct or collateral consequences of guilty pleas because it essentially holds that it does not matter whether something is labeled as a direct or collateral consequence. What matters is whether or not the consequence is significant and closely connected to the criminal process. The court noted:

We have long recognized that deportation is a particularly severe "penalty," *Fong Yue Ting v. United States*, 149 U.S. 698, 740, 13 S.Ct. 1016, 37 L.Ed. 905 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984), deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, see Part I, *supra*, at ---- - ----. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. *United States v. Russell*, 686 F.2d 35, 38 (C.A.D.C.1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See *St. Cyr*, 533 U.S., at

322, 121 S.Ct. 2271. [*Id.* *Padilla v. Kentucky* 2010 WL 1222274, 6 (U.S.Ky.) (U.S.Ky.,2010)]

The United States Supreme Court held that the simple fact that a conviction will result in the severe civil sanction of deportation proceedings was enough to require counsel to inform his client of this fact in order to ensure the fairness of the proceedings. Thus the client must be informed of significant sanctions that are closely connected with the criminal process, whether they are civil or collateral in nature.

Thus a defendant must be informed of significant sanctions, whether civil, collateral, or criminal, that can be imposed against him as a result of a guilty plea. This duty will always fall upon defense counsel and to a large extent upon the court according to the rules requiring the court to ensure that the plea is knowingly, voluntarily, and intelligently entered.

It is impossible for a defense attorney or a court to inform a defendant of unknown future consequences that the legislature might attach to guilty pleas. Thus any significant change in the terms of the plea agreement entered into between the state and the defendant must either be found not binding upon the defendant or result in the vacation of the agreement.

This Court in *State v. Carpenter* (1993), 68 Ohio St.3d 59, 623 N.E.2d 66, held that the state cannot indict a defendant for murder after the court has accepted a negotiated guilty plea and the victim later dies of injuries sustained in the crime, unless the state expressly reserves the right to file additional charges on the record at the time of the defendant's plea. This stands for the proposition that the defendant is entitled to the benefit of his bargain and state cannot change the terms of the agreement based

upon future events unless it specifically reserves the right to do so. The state could never enter into a binding plea agreement if the agreement contained a clause reserving the right for the state to change the consequences based upon unknown future consequences or changes in the law the legislature might wish to attach to the conviction. Such a contract would be illusory in nature and unenforceable. A contract that would allow the state to vary the terms of a construction contract by unknown future enactments of the legislature would also be illusory and unenforceable.

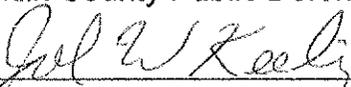
If the instant legislation did not deal with sex offenders, there would not even be a discussion as to the invalidity of an attempt by the state to change its past contractual obligations through future legislation. But the law applies equally to all of us. When the courts start applying the law and the constitutions to only those deemed worthy, then we are no longer a country of laws; we are an oppressive tyranny.

CONCLUSION

For the reasons presented, the defendant requests that this Court reverse the judgment of the Franklin County Court of Appeals and that the defendant be allowed to withdraw his plea to the misdemeanor offense of sexual imposition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this reply brief was served upon Melanie R. Tobias, Director of the Appellate Unit of the Columbus City Prosecutor's Office, 375 South High Street, 17th Floor, Columbus, Ohio 43215, by hand delivery on this Thursday, April 15, 2010. A copy was also hand-delivered to Steven L. Taylor, Assistant Prosecuting Attorney, 373 S. High St., Columbus, OH, 43215, Counsel of Record for Amicus, Franklin County Prosecutor,



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