

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MADY CHAN, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES SUPREME COURT FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should the holding in *Padilla v. Kentucky*, 559 U.S. 356 (2010) that an attorney's failure to advise a criminal client of succinct, clear, and explicit law constitutes ineffective assistance of counsel extend to the attorney's failure to advise a client that under succinct, clear, and explicit law a Speedy Trial Act violation cannot be waived?

PARTIES TO THE PROCEEDING

Petitioner, Mady Chan, is an individual. The Respondent is the United States of America.

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Mady Chan petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The unpublished opinion of the Ninth Circuit Court of Appeals affirming the district court's denial of Petitioner's petition for writ of habeas corpus was entered on May 3, 2018. (Appendix A) The district court's judgment and order denying the petition for writ of habeas

corpus are attached as Appendices B and C. The original judgment of conviction is attached as Appendix D.

JURISDICTION

The Ninth Circuit Court of Appeals entered judgment in this case on May 3, 2018. (Appendix A.) Petitioner's timely filed petition for rehearing was denied on July 17, 2018. (Appendix E.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the statutory and constitutional provisions involved in this case are as follows:

* * *

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 3162

(a)(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by

section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprocsecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

STATEMENT OF THE CASE

Jurisdiction in the Courts Below

The district court had jurisdiction pursuant to 18 U.S.C. § 2255.

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253.

Facts Material to Consideration of the Question Presented

On June 22, 2000, Petitioner was convicted in the Northern District of California for his participation in a computer chip robbery. (ER 2:91.) For that conviction, he was sentenced to 904 months in prison. (ER 2:94.) On appeal, his conviction was affirmed, but the case was remanded for resentencing. (ER 2:129.) On June 12, 2009,

Petitioner was resentenced to 640 months. (ER 2:108.) That sentence was affirmed on December 29, 2010. (ER 2:135.)

In 1996, while the Northern District case was proceeding, Petitioner and other defendants were indicted in this case in the Eastern District of California for money laundering related to the same computer chip robberies involved in the Northern District Case. (ER 4:351-423.) Once Petitioner was convicted in the Northern District, he was transferred to the county jail in Sacramento pending resolution of the money laundering case.

Seventeen years after the government charged Petitioner and others in this case, the court issued an order to show cause why the case should not be dismissed as a violation of the Speedy Trial Act (“STA”) 18 U.S.C. §§ 3161-3162. In the seven years following the last status conference and speedy trial finding, the government did nothing to move this case forward. Under the law, the resulting STA violation was clear and dismissal of the case was mandatory.

When the court ordered the government to show cause why the case should not be dismissed, instead of filing a motion to dismiss, Petitioner’s lawyer negotiated a plea agreement. During plea

negotiations, the government informed Petitioner, because he and his attorneys had asked for extensions and he had not filed a dismissal motion, he waived his STA rights. The government's assertions were contrary to clearly established law. Under the law, STA rights cannot be waived. Defense counsel failed to advise Petitioner the government was wrong. Based on this erroneous advice, Petitioner entered into a plea.

REASONS FOR GRANTING THE WRIT

I.

UNDER THE HOLDING OF *PADILLA V. KENTUCKY*, 559 U.S. 356 (2010), COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO ADVISE PETITIONER THAT, UNDER SUCCINCT, CLEAR, AND EXPLICIT SPEEDY TRIAL ACT HOLDINGS, THE COURT WOULD GRANT A MOTION TO DISMISS, BUT INSTEAD, COUNSEL ADVISED PETITIONER TO ENTER A GUILTY PLEA.

In his habeas corpus petition filed under 28 U.S.C. § 2255, Petitioner claimed ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel was ineffective because instead of filing a speedy trial dismissal motion requested by the district court, counsel convinced Petitioner to plead guilty. In advising

Petitioner, defense counsel failed to correct an erroneous statement of the law presented by the government to Petitioner in order to convince him to forgo his speedy trial rights.

The government advised Petitioner that 1) his STA motion would fail because he had asked for trial extensions over the government's objection, or 2) in assessing whether to grant a speedy trial motion the court would consider the fact that he failed to file such a motion earlier. This was a gross misrepresentation of the law.

The holding that a STA violation cannot be waived is as clear a legal precedent as any in the law. *See, Zedner v. United States*, 547 U.S. 489, 503-506 (2006), *United States v. Ramirez-Cortez*, 213 F. 3d 1149, 1156 (9th Cir. 2000); *United States v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997); and *United States v. Berberian*, 851 F.2d 236, 239 (9th Cir. 1988). As stated in *United States v. Rodriguez-Vega*, 707 F.3d 781, 786 (9th Cir. 2015), the STA law is "succinct, clear, and explicit."

In this case, although defense counsel did not directly give this bad advice to Petitioner, he did nothing to correct the government's erroneous analysis. An attorney who renders affirmative advice, has a

duty to correct that advice when there are changes to the law. *See, United States v. Kwan*, 407 F.3d 1005, 1016 (9th Cir. 2003), abrogated on other grounds in *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010). By analogy, an attorney has a duty to correct an incorrect analysis asserted by opposing counsel.

Padilla expanded *Kwan* and is instructive. *Kwan* affirmed previous holdings that it was not ineffective assistance of counsel for an attorney to refrain from giving advice on immigration consequences of the plea. *Kwan*, 407 F.3d at 1015. It was, however, ineffective assistance of counsel for an attorney to voluntarily choose to give advice and, in so doing, misrepresent the law. *Ibid. Kwan* was abrogated because in *Padilla* the Supreme Court held that failing to render legal advice on legal issues that are “succinct, clear, and explicit” satisfied the first prong of *Strickland*. *Padilla*, 559 U.S. at 368-369.

In this case, defense counsel failed to advise Petitioner under “succinct, clear, and explicit” law, the government’s analysis was wrong. Under the reasoning in *Padilla*, Petitioner satisfied the first prong of *Strickland*, that counsel’s representation fell “below an

objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. As to the second *Strickland* prong, if petitioner was correctly advised the court would dismiss his case as a speedy trial act violation, he would not have pleaded guilty and “the result of the proceeding would have been different.” *Id.*

CONCLUSION

This petition for a writ of certiorari should be granted.

Dated: October 2, 2018 Respectfully submitted,

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