

21-8267

No.-----

ORIGINAL

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

DAVE LAWRENCE

PETITIONER

V.

I.N.S, ATTORNEY ROBERT BASCOM, CENTER COUNTY DISTRICT ATTORNEY OFFICE.

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT

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STATEMENT OF QUESTION PRESENTED

I. Whether the United States Supreme Court decision recognizing ineffective assistance of counsel claims for criminal defense counsel's failure to advise or to misadvise a defendant of immigration consequences of a plea announced a constitutional right that changed Pennsylvania law after Defendant's conviction was final and has retroactive effect.

The Trial Court determined that Defendant's claims were not based on a "new" right recognized to be retroactive and, therefore, Defendant's claims were not within the time limit exceptions of the PCRA statute.

II. Whether Defendant should be entitled to establish equitable tolling of the 60 day requirement of 42 Pa.C.S. § 9545(b)(2) or the sixty-days should run from the affirmation of retroactivity.

The Trial Court did not specifically address tolling but did hold that the sixty day time limit applied to Defendant from the publication of *Padilla* not from interpretive decisions regarding retroactivity.

III. Whether Defendant's claims fall under habeas corpus relief that is outside of the PCRA statute and its time limits.

This issue was not posed directly to the Trial Court, however, the Trial Court implicitly ruled that Defendant's claims were controlled by the PCRA statute and were subject to its time limitations.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

List of Parties

[*] All parties appear in the caption of the case on the cover page.

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Related Cases.

CP- 14-CR-0821-1997

CP- 14-CR-0822-1997

SUPERIOR COURT NO. 85 MDA 2011

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at (D.C. NO. 3:18-CV-00859); or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 22, 2021

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 1st, 2021, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including EXTENSION (date) on JUNE 26, 2022 (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Jurisdiction

This court has jurisdiction pursuant to 28 U. S. C. S § 1257(a)

Final judgments, or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme court by writ of certiorari where...the validity of a statutes of any state is drawn into question on the ground of its being repugnant to the constitution....of the United States, or where any title, right, Privilege, or immunity is specially set up or claimed under the Constitution of The United States. Petitioner contends that his plea was not voluntary, knowing, and intelligent as a result of not being fully informed of the immigration consequences of automatic removal from the United States. Petitioner contends that this was a result of counsel's ineffective assistance.

In 1998, the Pennsylvania Supreme Court overruled prior law and established the rule that failure of a criminal defense attorney to inform a defendant of the immigration consequences of a plea was a collateral, not direct, consequence and, therefore, did not provide a basis for ineffective assistance of counsel. However, on March 31, 2010, the United States Supreme Court announced that, indeed, advice regarding immigration consequences of a criminal plea was part of the duty of a criminal defense attorney and that failure to advise or misadvise about such consequences would constitute grounds for ineffective assistance of counsel.

Petitioner, contends that the United States Supreme Court decision reversing Pennsylvania law announces a right and is retroactive to allow for defendants to renew PCRA. Further, Petitioner contends that the sixty- day period for filing a PCRA following a change in the law should not be strictly applied and that Defendant should be permitted to establish grounds of equitable tolling or waiver of the statutory deadline such commencement of the sixty-day time period after interpretive decisions found Padilla to be retroactive, and therefore, available to Petitioner. Alternatively, Petitioner contends his claims are of a nature of habeas corpus that was not subsumed under the PCRA statute and should, therefore, be exempt from its time limitations.

Constitutional Provisions & And executive order involved

U.S Const. Amend. XIV Sec. 1:

[Citizens of the United States] all persons born or naturalized in the United States, and subject to the Jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No. state shall make or refuse any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person within its jurisdiction the equal protection of the laws.

U. S. Const. Amend. IV

The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

U.S Const. Amend. VI

In a criminal prosecution, 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 witness against him; to have compulsory process for obtaining witness in his favor, and to have the assistance of Counsel for his defense.

The Executive order is attached as Appendix C.

Statement of Case:

STATEMENT OF CASE

Procedural History

Original Trial Court Procedures

In 1997, Defendant was charged with violations of the Controlled Substance Act in three separate criminal actions in Centre County: CP-14-CR-821-1997; CP-14-CR-822-1997; and CP-14-CR-823-1997. (The CP-14-CR-823-1997 matter was consolidated into CP-14-CR-822-1997). On or about March 31, 1998, Defendant plead guilty to one count of Delivery of Cocaine and one count of Criminal Attempt—Delivery of Cocaine. On July 2, 1998, Defendant was sentenced to serve periods of incarceration of 1-2 years on the Attempt (97-821) and 2-4 years on the Delivery through the Pennsylvania Department of Corrections. At that time, Defendant was represented by Attorney David Crowley of the Centre County Public Defender's Office.

PCRA I

On November 3, 2000, Defendant filed a PCRA Petition alleging ineffective assistance of counsel and constitutional violations. The Trial Court appointed Attorney Robert Bascom to represent Defendant in the PCRA Petition. The Trial Court dismissed the PCRA Petition. The denial of the PCRA was appealed to the Superior Court *pro se*. In that appeal, the Superior Court did not rule on the merits of the PCRA but determined that Defendant did not have effective assistance of counsel for the PCRA Petition and issued an order on May 21, 2002, remanding the matter and requiring new counsel. Pursuant to that order, Attorney Stephanie Cooper was appointed as counsel for Defendant on July 18, 2002.

However, prior to the Superior Court's May 21, 2002, decision, Defendant had already served the maximum sentence and had been released from the Pennsylvania Department of Corrections on August 28, 2001. In addition, during his period of incarceration, Defendant had been ordered removed (ie "deported") from the United States based on the criminal convictions. The removal order was executed on or about February 12, 2002, even prior to the May 21, 2002, Superior Court decision.

PCRA II – “Amended PCRA”

On April 5, 2006, Defendant filed an Amended Post-Conviction Relief Act Petition through Attorney Stephanie Cooper. A hearing was held on the Amended Petition by the Trial Court on July 17, 2006. At the hearing, the Commonwealth moved to dismiss the Petition as moot as Defendant was no longer in custody. The Trial Court ruled that because Defendant's removal from the United States was a direct result of the conviction and that removal was such an adverse consequence, the Petition was not moot despite having been released from custody.

On November 7, 2007, the PCRA II Trial Court dismissed Defendant's second PCRA (“Amended PCRA”) based on lack of jurisdiction as falling outside the filing deadline set forth under the Post-Conviction Relief Act (Brown, J.). No appeal of the second PCRA was taken.

PCRA III

On July 1, 2010, Defendant filed a third Post-Conviction Relief Act Petition, *pro se*, based on a change in the law regarding the immigration consequences of a criminal plea by the United States Supreme Court issued on March 30, 2010.

On December 7, 2010, the PCRA III Trial Court dismissed PCRA III as untimely on its face and not within one of the exceptions of the one-year filing deadline of the Post-Conviction Relief Act. (Ruest, J.). Specifically, the PCRA III Trial Court held that the United States Supreme Court case relied upon by Defendant as supporting a change in the law did not announce a new rule and was not, therefore, retroactive to allow for a renewed PCRA. Further, the PCRA III Trial Court ruled that Defendant had filed his renewed PCRA within the sixty-day window following the United States Supreme Court decision.

Statement of Facts

Defendant was originally arrested and incarcerated on or about April 30, 1997, in these matters. PCRA II Hearing 07/17/2006 Trans. p. 9. A Preliminary Hearing was held soon after that date. PCRA II Hearing 07/17/2006 Trans. p. 9. At that point, Defendant was represented by Attorney Douglas Chester. PCRA II Hearing 07/17/2006 Trans. p. 10. Several months later, Attorney Chester withdrew and was substituted for by Attorney David Crowley of the Centre County Public Defender's Office. PCRA II Hearing 07/17/2006 Trans. p. 10.

Defendant believed that a plea offer was pending when Defendant contacted Attorney Crowley on June 11, 1998, to inform Attorney Crowley that Defendant wanted to reject the offer and to proceed to trial. PCRA II Hearing 07/17/2006 Trans. p. 10-11. Defendant believed that he then appeared before the Trial Court on July 2, 1998, to enter a plea and to be sentenced. PCRA II Hearing 07/17/2006 Trans. p. 13. Just prior to the hour of the sentencing hearing, Defendant had been arrested and charged with possession of paraphernalia. PCRA II Hearing 07/17/2006 Trans. p. 23.

Defendant contends that on or about June 11, 2006, he instructed Attorney Crowley to reject the plea offer and to proceed to trial. The records indicate and the Commonwealth's position is that a plea had already been entered on March 31, 1998, with a sentencing date of July 2, 1998. Defendant contends that even if a plea had been entered, Defendant could have requested and likely would have been granted withdraw prior to sentencing. Therefore, Defendant's averment that his counsel did not follow his request to proceed to trial based on Defendant's June 11, 1998, instruction carries merit. Further, Defendant alleges that he was under the influence of controlled substances on the date of plea/sentencing of July 2, 1998, and that on July 2, 1998, he again instructed Attorney Crowley that he wanted to go to trial. PCRA II Hearing 07/17/2006 Trans. p. 23-24.

Attorney Crowley testified that Defendant did contact him prior to the sentencing date to indicate that Defendant wanted to go to trial and that he would likely be hiring private counsel, either a Philip Masorti or a Joseph Amendola. PCRA II Hearing 07/17/2006 Trans. p. 34-35, 40.

After serving his criminal sentence on August 28, 2001, Defendant was transferred to custody of United States Immigration and Naturalization Service and held until execution of the removal order on February 12, 2002. PCRA II Hearing 07/17/2006 Trans. p. 15. Defendant was removed on grounds of being an "aggravated felon" based on the conviction of the drug charges in this matter. PCRA II Hearing 07/17/2006 Trans. p. 15.

Defendant contends that he was never advised by Attorney Crowley that his plea would result in removal. PCRA II Hearing 07/17/2006 Trans. p. 16. Had Defendant understood this, he would not have entered the plea.

Defendant's Petition is based on his claim of ineffective assistance of counsel in that (1) Attorney Crowley failed to proceed to trial and/or to withdraw the plea, if entered; and (2) Attorney Crowley failed to advise Defendant that his plea would lead to automatic removal from the United States. PCRA II Hearing 07/17/2006 Trans. p. 20-21.

The PCRA III Trial Court dismissed Defendant's third PCRA as being untimely on its face (beyond one year of final order) and not falling within an exception.

I. United States Supreme Court decision recognizing ineffective assistance of counsel claims for criminal defense counsel's failure to advise or to misadvise a defendant of immigration consequences of a plea announced a constitutional right that changed Pennsylvania law after Defendant's conviction was final and has retroactive effect.

Defendant concedes that his third PCRA filed on July 1, 2010, was well beyond the one-year filing deadline set by the PCRA statute. However, Defendant argues that the United States Supreme Court decision recognizing ineffective assistance claims for incorrect advice or non-advice as to immigration consequences of a criminal plea established a new constitutional right in Pennsylvania and was given implicit retroactive effect. Thus, the exception to the one-year time bar for PCRA's found at 42 Pa.C.S. § 9545(b)(1)(iii) should apply.

The time-bar exception at 42 Pa.C.S. § 9545(b)(1)(iii) requires that:

the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

Right Announced After Final Conviction

For a long period of jurisprudence in Pennsylvania, it was recognized that a criminal defense attorney had an obligation to review the immigration consequences of a plea and failure to advise accordingly would be ineffective assistance. *Commonwealth v. Wellington*, 305 Pa.Super. 24, 451 A.2d 223 (1982); *Commonwealth v. Frometa*, 366 Pa.Super. 313, 531 A.2d 434 (Pa.Super. 1987). In 1988, however, in the appeal of *Frometa* from the Superior Court, the Pennsylvania Supreme Court found that immigration consequences were collateral and not direct. Therefore, according to the Pennsylvania Supreme Court, such consequences were among the myriad of consequences that could befall a convict¹ and not of the kind that required

¹ The *Frometa* Court cited the loss of the right to vote, U.S. Const. amend. XIV, § 2; to enlist in the armed services, 10 U.S.C.A. § 504; to own a firearm, 18 Pa.C.S.A. § 6105, or fishing license, 30 Pa.C.S.A. § 928; to inherit property, 20 Pa.C.S.A. §§ 8802-11; to practice a particular profession, e.g., 63 P.S. §§ 422.22(b),

inquiry by criminal defense counsel or a court in entering a plea. *Commonwealth v. Frometa*, 520 Pa. 552, 555 A.2d 92 (Pa. Supr. 1988). Thus, after 1988, there was no constitutional right related to ineffective assistance of counsel for immigration consequences of criminal pleas in Pennsylvania.

However, on March 31, 2010, the United States Supreme Court recognized that the Sixth Amendment right to counsel's effective assistance prong requires that criminal defense counsel inform a client of the risk of deportation when evaluating a plea. *Padilla v. Kentucky*, ___ US ___, 130 S.Ct. 1473 (2010) [No. 08-651, 2010 U.S. LEXIS 2928]. Accordingly, Defendant's claim for ineffective assistance of counsel based on defense counsel's mis-advice or failure to advise with regard to immigration consequences is now recognized under the United States Constitution and, by extension, under the Pennsylvania Constitution's effective assistance of counsel rights.²

As the PCRA III Trial Court pointed out, *Com. v. Abdul-Salaam*, 812 A.2d 497 (Pa.Super.2002), interpreted 42 Pa.C.S. § 9545(b)(1)(iii) to establish two parts: the recognition of a constitutional right after a conviction's finality and retroactive application. The PCRA III Trial Court interpreted *Abdul-Salaam* as requiring that a "new" constitutional right be announced by a decision following finality of the PCRA petitioner's underlying case. The PCRA III Trial Court then held that *Padilla* did not recognize a new right but rather an application of the familiar *Strickland v. Washington*³ standard of effective assistance of counsel.

First, Defendant contends that neither 42 Pa.C.S. § 9545(b)(1)(iii) nor *Abdul-Salaam* require that the announcement of a later court decision be of a *new* right. It simply states that there be a recognition of a constitutional right after the PCRA petitioner's case became final. Whether that is a new right or simply a clarification of a right as applied to a particular set of

422.40(b), 422.41(3) (physician), 63 P.S. § 479.11(a) (funeral director), 63 P.S. § 34.19(a)(8) (architect); grounds for divorce 23 P.S. § 201(a)(5); termination of parental rights, *In re Adoption of M.J.H.*, 348 Pa.Super. 65, 501 A.2d 648, appeal denied, 514 Pa. 636, 522 A.2d 1105, appeal dismissed, U.S. , 108 S.Ct. 49, 98 L.Ed.2d 13 (1987); disqualification from public office, Pa. Const. Art. II § 7; and, dismissal for cause from public employment, 18 Pa.C.S.A. § 9125.

² In *Padilla*, the United State Supreme Court specifically mentioned the effect of its decision would be to overrule Pennsylvania's *Frometa* decision. See *Padilla*, footnote 9.

³ *Strickland v. Washington* 466 U.S. 668 (1984).

facts is not specified by 42 Pa.C.S. § 9545(b)(1)(iii). The requirement is simply that a right be recognized by a later court.

Second, Defendant contends that the United States Supreme Court's decision in *Padilla* wholly overruled the prior Pennsylvania *Frometa* rule regarding duty to inform a criminal defendant of immigration consequences of a plea that had been in place since the 1988 Pennsylvania Supreme Court decision. Where there was once no right to accurate immigration consequence advice in criminal proceedings in Pennsylvania under *Frometa*, *Padilla* now prescribes such a right. Plainly, *Padilla* has created a new constitutional right in Pennsylvania under the umbrella of the effective assistance of counsel. Defendant thus contends that the PCRA III Trial Court erred in its requirement of a "new" right and in its assertion that *Padilla* did not create a new constitutional right for ineffective assistance of counsel claims in Pennsylvania. At the time Defendant's conviction became final, the Pennsylvania Supreme Court precedent prevented him from raising his ineffective assistance claim with regard to immigration consequence mis/non-advice. That changed with *Padilla* and the first part of 42 Pa.C.S. § 9545(b)(1)(iii) is thus satisfied.

Retroactivity

The PCRA III Trial Court next asserted that *Abdul-Salaam*'s analysis of 42 Pa.C.S. § 9545(b)(1)(iii) requires that a retroactive application of the new right have been made at the time of the filing of the PCRA petition. The PCRA III Trial Court then pointed out that the *Padilla* decision itself did not specify whether its ruling was to be retroactive. Further, the PCRA III Trial Court indicated that no authority was cited that the *Padilla* rule had been deemed retroactive. Thus, the PCRA III Trial Court held that, without demonstration of retroactive application, *Padilla* did not invoke the time-bar exception.

While it is true that the *Padilla* court did not state whether the decision was specifically retroactive, the case arose in the context of a habeas proceeding and was, in that sense, giving retroactive effect to that particular case. Moreover, the language of the decision suggests retroactivity in application as it evaluates, for example, that the decision will not open the floodgates to claims or have a significant impact on prior cases. This language is suggestive that

the Court anticipated retroactivity but did not believe that such cases would overwhelm the court system. Essentially, the *Padilla* Court invoked the principles of retroactivity but intended for the lower courts to apply those principles in a case-by-case analysis.

Defendant notes that lower courts and state courts have disagreed about the retroactive effect of *Padilla*. However, at the time Defendant filed his third petition on July 1, 2010, there had been courts that had determined that *Padilla* was retroactive. See *People v. Bennett*, --- Misc.3d ----, 903 N.Y.S.2d 696, 700, 2010 WL 2089266 (N.Y. Crim. Ct. 2010) (May 2010); *United States v. Hubenig*, No. 6:03-mj-040, 2010 WL 2650625, at *8 (E.D. Cal. July 1, 2010); but see *People v. Obonaga*, 2010 WL 2629748 (Eastern District of New York 2010)("[r]easonable jurists have disagreed about whether *Padilla* has retroactive effect."); *Gacko v. United States*, No. 09-CV-4938 (ARR), 2010 U.S. Dist. LEXIS 50617, 2010 WL 2076020, at *3 (E.D.N.Y. May 20, 2010) (not retroactive); *People v. Kabre*, No. 2002NY029321, 2010 N.Y. Misc. LEXIS 3275, 2010 WL 2872930, at *10 (N.Y. Crim. Ct. July 22, 2010) (not retroactive).

While, there is some disagreement about *Padilla*'s retroactivity, there were courts that had held *Padilla* to be retroactive at the time Defendant filed his third PCRA on July 1, 2010, and thus, the second requirement of 42 Pa.C.S. § 9545(b)(1)(iii) is met.

II. Defendant should be entitled to establish equitable tolling of the 60 day requirement of 42 Pa.C.S. § 9545(b)(2) or the sixty-days should run from the affirmation of retroactivity.

Defendant recognizes that 42 Pa.C.S. § 9545(b)(2) requires that a PCRA petitioner must act within 60 days of the event that gives rise to the exception filing outside of the normal one-year time-bar of the PCRA⁴. And, here, the time difference from the issuance of the March 31, 2010, decision of the Supreme Court in *Padilla* and the July 1, 2010, filing of the third PCRA is, in fact, 92 days.

Nonetheless, Defendant contends that he should be entitled to establish equitable tolling.

⁴ 42 Pa.C.S. §9545(b)(2) ("Any Petition invoking an exception ... shall be filed within 60 days of the date the claim could have been presented).

Conclusion

The Petitioner contends that the PCRA III Trial court erred in determining that he did not merit an exception to the PCRA statue. Alternatively, Petitioner contends that his claims are of a nature under habeas corpus that are not subsumed under the PCRA statutes and should not be subjected to its time limitations.

The Petitioner notes that the jurisdiction over the right to inform of immigration consequences of a criminal plea has had a long, litigious, and storied history. In Pennsylvania alone the tide has turned several times each time with some measure of compelling logic. Thus, the rights now firmly recognized by the United States Supreme court in this arena should be accorded habeas corpus consideration that falls outside of the restriction of the PCRA statutes and its time limits.

Thus, the Petitioner particular situation attempting to secure his right to have had effective assistance of counsel that is now firmly recognized by the United States Supreme court and the United States Third Circuit court of appeal. The Petitioner is seeking relief in the form of Civil rights:

Compensation

- 1) Clean Slate
- 2) Lost Wages
- 3) Medical expenses
- 4) Confinement Compensation
- 5) Out of Pocket Expenses
- 6) Pain and Suffering
- 7) Humiliation
- 8) Reputation Damages
- 9) Punitive Damages
- 10) Attorney Fees

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 06/17/2022