

No. _____

IN THE
Supreme Court of the United States

Alejandro Avila Salazar,

Petitioner,

v.

State of Tennessee,

Respondent.

**On Petition For Writ Of Certiorari
To The Tennessee Court of Criminal Appeals,
Middle District**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

- 1) In providing the effective assistance guaranteed by the Sixth Amendment, does defense counsel never have the duty to advise a defendant whether the offense to which he is pleading guilty will result in a mandatory lifetime community supervision?
- 2) Whether a State violates the Due Process Clause of the Fourteenth Amendment, when it makes a determination from a silent record that lifetime supervision is not a material element of the plea bargain, in direct violation of Boykin v. Alabama, 395 U.S. 238, 242 (1969) and Johnson v. Zerbst, 304 U.S. 458, 464 (1938)?

Parties to the Proceeding

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Alejandro Avila Salazar, an inmate. The State of Tennessee is the Respondent.

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The opinion of the Court of Criminal Appeals, App. 2(a)-10(a) is available at *Alejandro Avila Salazar v. State*, 2017 Lexis Tenn.Crim.App. Lexis 442, No. M2016-01336-CCA-R3-HC. The Tennessee Supreme Court's Order denying Petitioner's Application for Permission to Appeal, App. 1(a) is not reported but is available at *Avila Salazar v. State*, No. M2016-01336-SC-R11-HC (Sept. 21, 2017). The opinion of the Wayne County Circuit Court Decision Denying State Writ of habeas Corpus; App. 11(a) is not reported.

Jurisdiction

The Tennessee Supreme Court entered final judgment on September 21, 2017 and denied an Application for Permission to Appeal. The Tennessee Court of Criminal Appeal denied relief on May 30, 2017. Petitioner timely filed the petition for writ of certiorari on December 6, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Statutory and Constitutional Provisions Involved

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

"No State shall. . . deprive any person of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides:

'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . .and to have the Assistance of Counsel for his defense.'

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq.*), provides in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Introduction

Alejandro Avila Salazar moved from Mexico to the United States and has lived here legally ever since. After completing high school, moved to Nashville, Tennessee. Regrettably, he also became involved in a botched sexual liaison with a prostitute and a drunken associate that resulted in the death of the prostitute, and a state conviction for 2nd Degree murder and Rape.

Because the evidence against Avila Salazar was considered quite strong, his attorney advised him to plead guilty in exchange for a shorter sentence, and failed to in any way address, discuss, or explain that Life time supervision and registration on a international registry for sex offenders would be part and parcel of the deal.

The attorney assured Mr. Avila Salazar that the plea entailed only 40 years reducible by 15%, after which time petitioner would not be subject to any other punishments. However, this was not correct.

Conviction for attempted aggravated Rape carry's with it a mandatory lifetime community supervision provision, as well as a requirement to to be placed on a sexual-offender registry Tenn. Code Ann. § 39-13-524(a) (2006).

Upon learning of this consequence, Mr. Avila Salazar moved to vacate his conviction and sentence under and Tenn. Const. art. I, § 15. Tenn. Code Ann. § 29-21-101 to 29-21-130. claiming *inter alia*, ineffective assistance of counsel. 31(a), and that his conviction were obtained in violation of his U.S. Const XIV, Due Process rights and his U.S. Const. VI to effective assistance of counsel.

There was an evidentiary hearing held on May 12, 2016, wherein the rules severely restricted the evidence and arguments that Petitioner Avila Salazar, was able to make in support of his argument that his conviction was obtained in violation of both *U.S. Const XIV, Due Process rights* and his *U.S. Const. VI to effective assistance of counsel*.

Indeed, neither Mr. Avila Salazar, the original District Attorney, nor his original trial attorney, were able to testify as to what their specific understanding of the plea agreement entailed.

The Appellate Court noted pursuant to Tennessee State law and procedure:

"the Petitioner's burden of proof in this regard is a substantial obstacle," and that "... particularly considering that the record is "strictly limited to the face of the judgment and the record of the underlying proceedings," 2(a) which, in this case, includes only the guilty plea agreement and the guilty plea hearing..... However, we cannot conclude, in light of the limited record in this appeal and the Petitioner's burden of proof, that the absence of community supervision was a material element of the Petitioner's agreement. ..."

Despite the limited record the State Court unequivocally concluded:

In the present case, neither the transcript of the guilty plea hearing, the judgment form, nor the Petitioner's guilty plea agreement reference the community supervision for life requirement. Indeed, the entire record is completely silent as to community supervision. Although the Petitioner argues that he "bargained for the ability to live the remainder of his life upon release ..

. as a free man,".... "[t]he petitioner's subjective expectations are irrelevant, and, correspondingly, his testimony that the illegal sentence was a bargained-for element of his plea agreement is irrelevant." 14(a).

Statement of the Case

On September 27, 2004 Salazar was arrested in Davidson County, Tennessee for his involvement in the death of Emma Lee Fuller, during the perpetration of or attempt to perpetrate rape. Salazar eventually plead guilty based upon the advise of his counsel, that he would not be deported but never advised him of the mandatory consequences of accepting to plea, i.e. **(i)** mandatory lifetime supervision on the Sex Offender Registry; **(ii)** mandatory deportation; **and** **(iii)** possible civil commitment. The plea agreement recommended a sentence of 40 years of imprisonment, but was silent to these mandatory consequences of acceptance of the plea. The court gave Salazar credit for time served toward his sentence but never explained the mandatory consequences of accepting such a plea. At the time of his guilty plea, Salazar was presumably informed that he would receive an effective sentence of forty years. The constitutional principles governing guilty pleas and the right

to counsel require a defendant to be advised of the criminal penalty that he faces. *Brady v. United States*, 397 U.S. 742, 749 (1970). However, neither the sentencing court nor defense counsel in his criminal case was required. Petitioner Avila Salazar, a resident of the United States since 1992, pleaded guilty in 2006 to second-degree murder and attempted aggravated rape. Salazar did so on the advice of defense counsel that he did not need to worry about deportation because he had been in this country for so long, and did not advise Salazar that it would be mandatory for him to register on the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004. In fact, the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004, defines an attempted aggravated rape that subjects Salazar to mandatory registry. Additionally, attempted aggravated rape in Tennessee is an aggravated felony under federal law that effectively subjects Salazar to mandatory deportation. The Tennessee Supreme Court nonetheless denied Salazar's motion to vacate his plea on the grounds of ineffective assistance of counsel and that he did not enter his

guilty plea unknowingly, involuntarily, and unintelligently since it was not based upon a misunderstanding, even in light of the facts that Salazar was never advised of the consequences of his guilty plea. The Tennessee court held that although the omission of the mandatory community supervision for life rendered the attempted aggravated rape sentence void, nothing in the record has established that the illegal sentence was a material bargained-for element of the plea agreement, which included a 40-year sentence on a reduced charge of second degree murder and therefore Petitioner's convictions will remain intact, and he is not entitled to relief in this matter.

Salazar accepted the plea bargain in reliance on advice by his attorney that he did not have to worry about his immigration status as a result of the plea, and the fact the 40 years was the only consequence in return for accepting the offer. The plea bargain provided only meager benefit to Salazar. Had Salazar gone to trial, he would not only have forced Tennessee to its proof of guilt by a reasonable doubt, but he also would have been entitled to request jury sentencing and to present mitigating sentencing evidence.

He may have received a substantially lower sentence than forty years, perhaps the minimum of 15-years within his range. In any event, he would have been eligible to be released after serving 12.75 years if he had received a 15-year sentence. Thus, even if he had gone to trial and received the maximum sentence of 60 years, he would have been eligible for release in 25-years, due to the state of affairs dealing with the possibility of parole for the 60-year sentences since it has for the last three years been subjected to significant legislative action in attempts to amend the statute, T.C.A. § 40-35-501 based upon its unconstitutionality. Salazar nonetheless chose to accept the certainty of a forty year term of imprisonment with 15% reduction.

Salazar was misadvised by his attorney on the deportation consequences of his plea. Salazar's aggravated rape & second-degree murder convictions were not only mandatory imposed deportable crimes and indeed aggravated felonies as established pursuant to 8 U.S.C. § 1101(a)(43)(B)(iii), but also required mandatory lifetime supervision under the Sex Offender Registry Act (SORA) and possible civil commitment pursuant to the Sexually Violent Predator Acts

signed into law by President George W. Bush authorizing the disbursement of federal grant money to States that establish involuntary commitment programs for sexually dangerous persons.¹ Salazar's counsel had failed to investigate the immigration consequences associated with the proposed plea, and yet nonetheless affirmatively advised his client that he "did not have to worry about immigration status since he had been in the country so long." Salazar's counsel also failed to investigate the sex registry and civil commitment consequences associated with the proposed plea, and instead remained silent. Had Salazar known the true consequences of his plea, he would not have pleaded guilty and would have insisted on going to trial.

A. Post-Conviction Proceedings

Petitioner Salazar filed a pro se petition for post-conviction relief and a subsequent State writ of habeas corpus, the subject of this Writ, alleging ineffective assistance of counsel and involuntarily and unknowingly entered guilty-plea. Salazar alleged counsels wrongful advice on the deportation, sex registry, and civil commitment

¹ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 301, 120 Stat. 587, 618–19 (to be codified in scattered sections of 18 and 42 U.S.C.).

consequences of his plea, without investigating constituted ineffective assistance of counsel. The State court, although recognizing that although the omission of the mandatory community supervision for life rendered the attempted aggravated rape sentence void, nothing in the record has established that the illegal sentence was a material bargained-for element of the plea agreement, which included a 40-year sentence on a reduced charge of second degree murder and the Petitioner's convictions remain intact, and he is not entitled to withdraw his plea of guilty in this matter. Whether the counsels misadvice and failure to advise Salazar of these severe consequences, the State court refused to adjudicate, other than stating that trial counsel's testimony was more credible than the Petitioner's.

Reasons for Granting the Writ

The Tennessee's collateral consequence rule has no foundation in the Sixth Amendment and contravenes this Court's precedents. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that Sixth Amendment claims of ineffective assistance of counsel are determined under a two-pronged test requiring [1] a showing that counsel's

performance fell below an objective standard of reasonableness and [2] prejudice to the defendant. And in *Hill v. Lockhart*, 474 U.S. 52 (1985), this Court declined to import the collateral consequences doctrine, which governs a court's duty to advise the defendant before accepting a guilty plea, into the Sixth Amendment. It held instead that an ineffective-assistance claim based on counsel's misadvice regarding the collateral consequence of parole eligibility must be resolved under *Strickland*. *Hill* compels rejection of the rule below.

Even if *Hill* did not foreclose invocation of the collateral-consequences rule, that rule conflicts with the Sixth Amendment. First, the collateral consequences doctrine arose to define the duties of *a court* with regard to accepting guilty pleas under Fed. R. Crim. P. 11. It is not germane to the different and much broader duties of *defense counsel* in defending a criminal prosecution. Courts are passive and neutral. They conduct no investigation into the prosecution's case or available defenses. Most critically, unlike courts, defense counsel have a paramount Sixth Amendment duty

to protect the interests of the client that are at risk in the prosecution.

Clients are not concerned solely with the direct penal consequences of conviction. They seek protection from the most significant harms of conviction, regardless of the source. As for deportation issue, doctrinally, a clear application of the existing standard for effective assistance of counsel, this Court in *Padilla v. Kentucky* 559 U.S. 356 ripped the foundations from the perennially unsound “collateral/direct” consequence distinction. Justice Stevens’ analysis and rhetoric set off a seismic event. In addition to effectively repudiating decades of lower court case law, doing what many lower courts failed miserably to do—apply these clear professional norms in a *Strickland* analysis of objective standards of reasonableness related to ineffective assistance of counsel claims. The *Padilla* decision was most striking in its shift in analytical perspective. Instead of engaging the traditional frames of formalism, the institutional concerns of courts, or the presumed inability of defense counsel to learn anything other than criminal law, this Court embraced *Mr. Padilla* as a man who faced serious

and actual penalties as a result of his conviction. In crediting the actual priorities of people charged with crimes in the context of the actual penalties imposed, this Court effectively undermined any future application of the "collateral/direct" consequences distinction in the Sixth Amendment context. An examination of the opinion reveals how this Court's holding quickly expands beyond the required advice on deportation risk. Despite some language denominating deportation as "unique," this Court's definition of this term in practical effect applies to a broad range of penalties traditionally considered "collateral" and outside the concern of the criminal justice system.

The majority opinion, from this Court in *Padilla* signed by five justices and authored by Justice Stevens, devoted the entire first section to undermining the foundation of the collateral consequences doctrine in the context of deportation. Rather than directly attacking the doctrine, this Court buried it under the weight of reality until it broke. Justice Stevens expended fifteen hundred words of a five thousand word opinion detailing the process over the last ninety years by which Congress has intimately related

deportation with criminal convictions. The end result: deportation now forms an “integral part” of the penalty resulting from criminal cases against non-citizens. With this conclusion, this Court effectively stripped the legitimacy from any argument that deportation—perhaps the classic “collateral” consequence as detailed in decades of case law—was “collateral” in any way to a conviction. The rhetorical battle already won, the Court opened Part II with a summary dismissal of the collateral consequences doctrine itself: “[w]e . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance.’” *Padilla*, 559 U.S. 356. With that one sentence, this Court explosively corrected (as is its purview) decades of lower court case law, across multiple jurisdictions, with a clear application of its own precedent.

Thus Salazar's misadvice from counsel to not worry about being deported because he had been in the U.S. for too long, is in effect clear and convincing evidence that counsel fell below the demanded norm and rendered the ineffective

assistance of counsel which requires Salazar's plea to be withdrawn.

It is from this Court's holding in *Padilla* that takes the Petitioner Salazar to assert that *Padilla* represents at once both an entirely clear application of the existing standard of ineffective assistance of counsel and a revolutionary shift in analysis with an impact on practice that can hardly be overstated.

As was clear before *Padilla*, the term "collateral consequences" was woefully inaccurate and misleading.

After *Padilla*, there is an opportunity to propose a new, more realistic terminology and legal analysis for this wide range of penalties. It has been suggested that "enmeshed penalties" as a possible term should be utilized because it evokes the intimate relationship with criminal charges, directly references the opinion, and has the benefit of being short. The idea is to find and use language that reflects the fact that these penalties are intimately related to criminal charges (not just convictions), and are serious, often draconian, and lifelong. Existing terminology has the opposite purpose and effect. By this term, the suggestion intends to capture every

penalty that requires any level of individualized advice and advocacy by defense counsel, from basic advice that a plea may hold a risk of a particular penalty to individualized, specific advice integrated into defense strategy at every stage of criminal representation.

Such penalties would be as they are in Salazar's case, a sexual offense that requires mandatory sex offender registry upon conviction, which in turn subjects Salazar to possible civil commitment. Another "enmeshed penalty" would be that of the possibility of parole, especially in light of the clear shift that this Court has taken over the years to show that America's youth are rehabilitative and require a realistic opportunity to be released.

Courts created the collateral consequences doctrine to limit Fifth Amendment Due Process challenges to guilty pleas based on court failures to notify the person charged of all penalties resulting from that plea. Without proper notice, decisions to plead guilty could not be knowing, voluntary, or intelligent. Mindful of the incredible volume of pleas and the wide variety of penalties imposed outside of the criminal justice system, courts created the "collateral consequences"

doctrine, drawing a line between what judges were required to advise (“direct” consequences) and what they could ignore (“collateral” consequences). A pure legal fiction, this doctrine spawned different definitions in different courts. Some drew the line at penalties over which the sentencing court had control, others focused on automatic penalties, and still others limited notice to merely the maximum incarceration and fines.² This very Court itself in *Padilla* noted the inconsistency of these definitions. See *Padilla*, 559 U.S. at 356 n.8.

As understood by this Court when reaching the holding in *Padilla*, to many immigrant defendants, the deportation consequences of conviction will matter much more than the criminal punishment. Indeed, when charges that fit the immigration classification of aggravated felonies hang in the balance, the criminal prosecution is effectively the defendant’s only opportunity to prevent deportation. The fact this very Court has since *Padilla* determined that counsel must inform a defendant of such mandatory consequences such as deportation, or otherwise be deemed ineffective, it

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S.. Gabriel J. Chin & Richard W. Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 CORNELL L. REV. 697, 712-13 (2002) (arguing that while weight of authority adopted the collateral consequences rule, it nevertheless was a clearly erroneous application of the *Strickland* performance prong) and note 31, at 705-06 (citing numerous cases to show the variety of treatments different courts give to the collateral consequences doctrine).

only makes sense to make it mandatory for counsel to inform defendant's of severe consequences such as lifetime supervision, which is in no way optional if convicted of certain offenses. Competent representation in the criminal prosecution may require that counsel advise the client of the deportation, sex registry and civil commitment risks of a proposed plea. Competent counsel may also need to shape defense strategy to avoid deportation, sex registry, and civil commitment by bargaining for pleas to non-deportable crimes, non-sex offenses that require registry and are subject to civil commitment by advocating for sentences that will not trigger deportation, sex registry or by avoiding a plea and taking a case to trial.

Not only is the collateral-consequences rule a mismatch for the Sixth Amendment, but *Strickland* expressly rejects such mechanical definitions of an attorney's duties in a criminal representation. Instead, *Strickland* commands a contextual determination of the "reasonableness" of an attorney's performance under prevailing professional norms, such as ABA Model Rules and standards.

This leads to what should be the prevailing professional norms since this Court in *Padilla* tied the requisite specificity of advice and advocacy to the specificity of the enmeshed penalty. At the highest level, a “succinct, clear, and explicit” penalty mandates specific, individualized advice to a person charged with a crime about the risk of its imposition. When the enmeshed consequence is truly clear, the duty to give correct advice is equally clear. Professional norms similarly require incorporation of this risk into defense strategy.

Advocates and courts should not make the mistake of confusing complexity with a lack of clarity. This Court made that clear when it applied the highest standard of advisement and advocacy to the intersection of immigration and criminal law, a body of law and practice variously described as “complex” and labyrinthine a maze of hyper-technical statutes and regulations. To the uninitiated, this complexity appears daunting and confusing. Of course, the same holds true for any significant body of law. Proper training and familiarity can reveal significant clarity in the application of complex laws to specific facts. Congress has decided to intertwine criminal and immigration law, and

defense attorneys can no more ignore these real penalties than they can a complex new sentencing guidelines regime. This Court made it clear that defense counsel has the duty to learn the laws that impose penalties enmeshed with criminal charges.

At the other end of the spectrum, if the penalty is severe and enmeshed but also is unclear or uncertain or not succinct and straightforward, counsel must still advise about the risk. Lack of clarity of the law does not obviate the need for counsel to say something about the possibility of an enmeshed penalty, even though it will affect the scope and nature of counsel's advice. More important, identifying enmeshed penalties of any stripe constitutes a critical tool for defense advocacy. Indeed, the real power of *Padilla* flows not from its application to post-conviction relief but from the leverage to achieve better results (for clients and their communities) in pending and future criminal cases provided by the imprimatur of this Honorable Supreme Court.

As in Mr. Salazar's case that is before this Court, the fact that he did not ask about being required to register as a lifetime sex offender or whether he would be subject to a civil

commitment, does not alter his trial counsel's duty to bring these sufficiently serious enmeshed penalties to Salazar's attention, whether or not they subjectively know to care about it. For an attorney to make a "strategic" decision to be reasonable, it must be based upon information the attorney has made after conducting a reasonable investigation. Counsel must exercise due diligence to investigate facts relevant both to the offense and to the potential penalties sufficient to make a "fully informed and deliberate decision" about litigation and plea bargaining strategy.³ As this Court established in *Strickland*, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."

A. Sex Offender Law Background

All fifty States, including Tennessee now require people convicted of certain sex offenses to register with their local police departments.⁴ The passage of sex offender registry acts (SORAs) was spurred by the Violent Crime Control and

³ *S., Wiggins v. Smith*, 539 U.S. 510, 522, 527 (2003) ("*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy."); ABA DEFENSE FUNCTION STANDARDS, *supra* note 77, 4-4.1.

⁴ See KAREN J. TERRY & JOHN S. FURLONG, *SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION: A "MEGAN'S LAW" SOURCEBOOK* (2d ed. 2006), note 154, at III-1, III-3 to III-4.

Law Enforcement Act of 1994,⁵ which linked federal funds to the establishment of registries. In 1996, Congress passed what is commonly known as “Megan’s Law” to require public notification of information about certain people registered under SORAs. The most recent development is the involuntary civil commitment of individuals convicted of qualifying sexual offenses, which Tennessee’s laws currently adopt. The fact Salazar is subject to not only mandatory registry on the Sex Offender Register, mandatory deportation, he is also subject to possible civil commitment. As of 2006, there is also federal money available “for the purpose of establishing, enhancing, or operating effective State civil commitment programs for sexually dangerous persons.” The combined effect of — higher rates of guilty pleas, an era of increasing adjudication of minor offenses, and increasing consequences—creates a need for greater transparency in the plea bargain process. Thus Defendant’s should be made aware of the myriad consequences of a guilty plea and, in particular, of the most serious consequences. The collateral-consequences rule is

⁵ See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, Pub. L. No. 103-322, 108 Stat. 2038 (codified as amended at 42 U.S.C. § 14071 (2000 & Supp. 2006)).

particularly problematic when a defendant faces a relatively minor penal consequence yet also faces, and is unaware of, an overwhelmingly more serious "consequence".

Therefore this petition should be granted to set forth the foundation for more productive outcomes for people charged with crimes of this nature by clarifying for defense counsel's what a client, facing serious ramifications upon pleading guilty, must be advised of, rather than ignored as "collateral", which has been the predominate means of dealing with an overwhelmed justice system and has resulted in severe, draconian, and lifelong penalties.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully Submitted,

Alejandro Avila S.Z.

Alejandro Avila Salazar, *pro se*

Dated December 6, 2017