

No. _____

In The
Supreme Court of the United States

REBA MARCELLE MYERS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE PETITIONER WAS DENIED HER SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HER TRIAL COUNSEL FAILED TO CONSIDER THE PETITIONER'S CRIMINAL HISTORY WHEN NEGOTIATING THE PLEA AGREEMENT AND THE PETITIONER BEING ON PROBATION DURING THE TIME PERIOD OF THE OFFENSE CHARGED IN THE INFORMATION.

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STATUTES AND RULES

Sixth Amendment to the United States Constitution	<i>passim</i>
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OPINION BELOW

The United States Court of Appeals for the Fourth Circuit filed its unpublished opinion affirming the Judgement of the District Court on September 14, 2017.

JURISDICTION

This Court has jurisdiction to consider a petition for writ of certiorari from the United States Court of Appeals for the Fourth Circuit pursuant to Title 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Sixth Amendment to the United States Constitution

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 defense.

STATEMENT OF THE CASE

The Petitioner was named in a one count information filed on December 12, 2016 in the United States District Court for the Northern District of West Virginia. Prior to the filing of the information, the Petitioner had retained counsel in January 2014 to represent her with regard to an ongoing tax investigation. The Petitioner signed a plea agreement on October 26, 2016 that had been negotiated by her counsel, William J. Powell, and Assistant United States Attorney Michael D. Stein. The Petitioner appeared before United States Magistrate Robert W. Trumble and entered a plea of guilty to the single count information on January 10, 2017. The Petitioner was sentenced on April 3, 2017 to twelve months and one day of incarceration based upon her conviction for the single count information. The Petitioner filed an appeal to the United States Court of Appeals for the Fourth Circuit which affirmed the Judgement of the District Court on September 14, 2017.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The information charged Petitioner with violating Title 26 U.S.C. § 7202. The aforementioned statute in conjunction with Title 18 U.S.C. § 3231 established subject matter jurisdiction in the United States District Court. The United States Court of Appeals for the Fourth Circuit had jurisdiction for the direct appeal pursuant to Title 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT**QUESTION PRESENTED**

WHETHER THE PETITIONER WAS DENIED HER SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HER TRIAL COUNSEL FAILED TO CONSIDER THE PETITIONER'S CRIMINAL HISTORY WHEN NEGOTIATING THE PLEA AGREEMENT AND THE PETITIONER BEING ON PROBATION DURING THE TIME PERIOD OF THE OFFENSE CHARGED IN THE INFORMATION.

The Petitioner contends that her trial counsel was ineffective when negotiating her plea agreement with the United States for failing to take into consideration the fact that the Petitioner was on probation for one year commencing on May 7, 2010 following the Petitioner's conviction for three counts of filing fraudulent returns of a pass through entity in violation of Virginia Code § 58.1-394.2. The Petitioner's conviction and sentence were clearly listed on page 4 of the investigative report prepared by Agent Whitesell that had been disclosed to the Petitioner's trial counsel in June 2016 (Appendix Sealed). The Petitioner's trial counsel acknowledges receiving the investigative report in correspondence to the Petitioner and her husband on June 27, 2016 (Appendix 8).

Although the plea agreement does not set forth a specific date for the failure to pay a tax violation, the information which was filed on December 12, 2016 sets forth that the offense occurred on July 31, 2010 and thereafter.

Inexplicably, Petitioner's trial counsel did not seek to have the United States amend the information to a date either prior to the Petitioner commencing her probation or subsequent to a date after the Petitioner had completed her probation. The relevant conduct stipulation as well as the investigative report indicate that the time period of the conduct alleged against the Petitioner and her husband was both prior to the date that the Petitioner had been placed upon probation as well as subsequent to the date that the Petitioner completed her probation.

Petitioner is not sure why her trial counsel did not realize that the time period alleged in the information would result in two additional criminal history points being assessed against the Petitioner resulting in the Petitioner's criminal history category being raised from category I to category II. It appears that the Petitioner's trial counsel either did not carefully review the investigative report from the case agent or failed to consider the fact that the Petitioner had a prior conviction in the State of Virginia and had been placed upon probation for one year. The Petitioner's trial counsel's correspondence to her after the presentence report was disclosed indicated that her counsel was unaware of the Petitioner's prior criminal history (Appendix 21).

Although the Petitioner's trial counsel moved the District Court to vary from the advisory guideline range and impose an alternative sentence of probation, Petitioner submits that it is highly unusual for a sentencing court to grant alternative sentencing such as probation when the person being sentenced has a criminal history greater than criminal history category I. Petitioner believes that

this error would have been avoided had her counsel appropriately taken into consideration her prior criminal history and the fact that she had been placed upon probation for one year when negotiating the plea agreement with the United States and also prior to having the Petitioner enter a guilty plea to the single count information given the time period of the offense alleged in the information.

Petitioner claims that the record in her case conclusively establishes that she received ineffective assistance of counsel at the time that her plea agreement was negotiated with the United States and when the Petitioner subsequently agreed to plead guilty in accordance with the plea agreement to the single count information that was filed on December 12, 2016. Petitioner contends that it is without question that her counsel should have been aware of the Petitioner's prior conviction in Frederick County, Virginia as well as the sentence that was imposed including the time period that the Petitioner had been placed upon probation. Petitioner contends that had her counsel adequately considered the information that he had been provided by the United States during the course of plea negotiations that the Petitioner's counsel would have negotiated a plea agreement and information that set forth a date that the Petitioner was not on probation. The fact that the Petitioner's trial counsel failed to take this into consideration when negotiating the plea agreement and also when counseling the Petitioner on pleading guilty to the information is evident in counsel's February 17, 2017 correspondence to the Petitioner (Appendix 21).

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court set forth the standard for considering an ineffective assistance of counsel claim

“First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”

(466 U.S. at 687).

Unfortunately, the error by the Petitioner’s trial counsel resulted in the Petitioner being subject to two additional criminal history points pursuant to Guideline § 4A1.1(d) ultimately resulting in the Petitioner’s criminal history category being elevated from category I to category II resulting in a higher advisory guideline range. Petitioner believes that this error ultimately resulted in her receiving a sentence of actual imprisonment as opposed to an alternative sentence such as home incarceration or probation.

In *Massaro v. United States*, 538 U.S. 500 (2003), this Court set forth, “There may be cases in which trial counsel’s ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal.” (538 U.S. at 508). Petitioner contends that the record in her case is sufficient to establish her ineffective

assistance of counsel claim as the report provided by the Assistant United States Attorney lists the Petitioner's prior conviction in Virginia, the report is referenced in correspondence from the Petitioner's trial counsel and inexplicably after receiving the presentence report, the Petitioner's trial counsel advised that he was unaware of the Petitioner's prior criminal history.

In *Padilla v. Kentucky*, 559 U.S. 356 (2010), this Court agreed with Mr. Padilla “. . . that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.” (559 U.S. at 360). The Court reiterated that “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 (1970); *Strickland*, 466 U.S., at 686.” (559 U.S. at 364). This Court further recognized that Padilla's counsel could have easily determined by reviewing the text of the statute that the offense to which he was pleading would result in deportation. (559 U.S. at 368-369). Although the Court recognized that in certain circumstances the results of a particular plea may be unclear or uncertain where a consequence is truly clear, then counsel is obligated to give correct advice. (559 U.S. at 369).

Petitioner contends that the same analysis is applicable in her case as her trial counsel merely had to review the report provided to him by the Assistant United States Attorney which set forth that the Petitioner had a prior misdemeanor conviction in the State of Virginia for which she had been placed on probation during the time period set forth in the information that was drafted by the

United States. Furthermore, a review of Guideline § 4A1.1(d) succinctly sets forth that should a defendant be on probation during the time period of the offense of conviction, then that defendant is subject to two additional criminal history points which in the Petitioner's case had the effect of increasing her criminal history category level upward. Had Petitioner's trial counsel properly advised her of the consequence of pleading guilty to the information drafted by the United States, the Petitioner could have made an informed decision on whether or not she desired to actually accept the plea agreement extended by the United States. Had the Petitioner's trial counsel accurately advised her as to the consequence of pleading to the information, the Petitioner would not have gone forward with the plea agreement. At the time that the Petitioner entered her guilty plea, she had not been indicted, and therefore, more than sufficient time existed to either properly consider the true consequences of pleading to the information or prepare for trial.

This Court further reiterated in *Padilla v. Kentucky* that "It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation, and the failure to do so 'clearly satisfies the first prong of the Strickland analysis.'" *Hill v. Lockhart*, 474 U.S. 52, 62 (1985)." Petitioner contends that the failure of her trial counsel to properly advise her as to the direct consequence of pleading to the information as drafted, specifically the two level increase to her criminal history category due to the Petitioner having been on probation during the time period set forth in the information, establishes that her counsel was ineffective. Had the Petitioner been properly

advised that her criminal history category would be increased from a category I to a category II based upon the charge set forth in the information, the Petitioner would have rejected the plea agreement as an increase in her criminal history category would have the likelihood of denying unto the Petitioner consideration for probation as opposed to actual incarceration. Petitioner contends that such a decision would have been rational under the circumstances of her case. (559 U.S. at 372).

This Court further stated in *Padilla v. Kentucky*, “In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. *Hill*, 474 U.S., at 57; see also *Richardson*, 397 U.S., at 770-771.” (559 U.S. at 373). This Court further concluded “It is our responsibility under the Constitution to ensure that no criminal defendant – whether a citizen or not – is left to the “mercies of incompetent counsel.” *Richardson*, 397 U.S., at 771.(559 U.S. at 374). Petitioner contends that her trial counsel erred in not considering her prior misdemeanor conviction and sentence in Virginia even though he should have been aware of both given the report provided by the Assistant United States Attorney. Only after the Petitioner signed a plea agreement, agreed to be prosecuted by way of an information, and entered a guilty plea before the United States Magistrate did her trial counsel become aware of the Petitioner’s prior criminal history after receiving the presentence report. Petitioner contends that this unequivocally demonstrates that the Petitioner’s trial counsel did not provide effective assistance of counsel and the Petitioner was prejudiced thereby.

In *Lafler v. Cooper*, 566 U.S. 156 (2012), this Court considered whether the respondent's right to effective assistance of counsel was violated where respondent rejected a plea proposal that would have resulted in a sentence significantly less than the sentence imposed upon the respondent following the respondent's conviction at trial. The respondent contended that he rejected the plea offer based upon erroneous advice from his trial counsel that ". . . the prosecution would be unable to establish his intent to murder Mundy because she had been shot below the waist." (566 U.S. at 161).

This Court set forth

"Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process. *Frye, ante*, at 1386 - 1387, 132 S.Ct. 1399; see also *Padilla v. Kentucky*, 559 U.S. ----, ---- 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010); *Hill, supra*, at 57, 106 S.Ct. 366. During plea negotiations defendants are "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). In *Hill*, the Court held "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S., at 58, 106 S.Ct. 366.

(566 U.S. at 162-163).

The Court further set forth

“To establish *Strickland* prejudice a defendant must “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, at 694, 104 S.Ct. 2052. In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice.”

(566 U.S. at 163). Petitioner contends that the outcome of the plea process in her case would have been different had counsel provided competent advice, namely had counsel properly considered the Petitioner’s misdemeanor conviction in Virginia for which she had been sentenced to probation and considered how the probation would have affected the Petitioner’s criminal history given the time period set forth in the information to which the Petitioner entered a guilty plea. Petitioner contends that the outcome of her case would have been different had her trial counsel properly recognized that by pleading to the information as drafted, the Petitioner would be subjected to two additional criminal history points which increased the Petitioner’s criminal history. Unfortunately, the record shows that the Petitioner’s trial counsel did not realize this error until after the Petitioner had entered a guilty plea and the presentence report had been prepared. The Petitioner’s trial counsel could have easily requested that the information encompass a time period during which the Petitioner was not on probation which would have avoided the

assessment of the additional criminal history points resulting in a higher criminal history category.

This Court set forth in *Lafler v. Cooper* that “The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. . . .The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel’s advise.” (566 U.S. at 165).

This Court further reasoned

“The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney’s deficient performance during plea bargaining. . . .That position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. . . .As explained in *Frye*, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.”

(566 U.S. at 169-170)

In *Lee v. United States*, 582 U.S. ____ (2017), this Court reiterated that

“The Sixth Amendment guarantees a defendant the effective assistance of counsel at “critical stages of a criminal proceeding,”

including when he enters a guilty plea. *Lafler v. Cooper*, 566 U.S. 156, 165 (2002); *Hill*, 474 U.S. at 58. To demonstrate that counsel was constitutionally ineffective, a defendant must show that counsel's representation "fell below an objective standard of reasonableness and that he was prejudiced as a result. *Strickland*, 466 U.S. at 688, 692."

(Slip Opinion at p. 5). Mr. Lee contended that he was prejudiced by his plea counsel's incorrect advice that he would not be subject to deportation based upon his conviction pursuant to a plea agreement with the government. Mr. Lee contended he could establish prejudice as he would never accepted the guilty plea if he knew that he would be deported (Slip opinion at p. 7).

This Court set forth

"The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. See *Ins v. St. Cyr*, 533 U.S. 289, 322-323 (2001). When these consequences are, from the defendant's perspective, similarly dyer, even the smallest chance of success at trial may look attractive."

(Slip opinion at p. 9). Similar to *Lee v. United States*, the Petitioner contends that she has established prejudice due to her trial counsel's failure to take into consideration the Petitioner's prior criminal history and the fact that she was on probation during the time period set forth in the information

when representing the Petitioner during the plea process. Unfortunately, the Petitioner's trial counsel's error in not either reviewing or remembering the petitioner's criminal history or taking into consideration her being on probation during the time period set forth in the information adversely affected the Petitioner at sentencing as the Petitioner's criminal history category was increased from a level I to a level II due to trial counsel's failure to consider this information in negotiating the plea agreement and also in approving the information.

Petitioner contends that this error would have been avoided had her counsel taken into consideration the investigative report listing the Petitioner's criminal history which was disclosed by the United States many months prior to the Petitioner accepting a plea agreement and also prior to the Petitioner's guilty plea to the single count information on January 10, 2017. Petitioner does not understand why her trial counsel did not raise this issue with the United States prior to the Petitioner's plea hearing on January 10, 2017 or subsequent to the disclosure of the presentence report at which time Petitioner's trial counsel should have realized the error in negotiating the agreement and agreeing to plead to the information filed on December 12, 2016.

CONCLUSION

Therefore, based upon the aforementioned grounds and reasons, your Petitioner respectfully prays that this Honorable Court grant her petition for writ of certiorari.

Respectfully submitted,
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