

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Popular Media

Public Discourse

6-27-2017

Blog Post: Supreme Court supports immigrant's right to understand consequences of conviction

Jenny Roberts

Follow this and additional works at: https://digitalcommons.wcl.american.edu/pub_disc_media



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

COLLATERAL CONSEQUENCES RESOURCE CENTER

Collateral Consequences of Criminal Conviction and Restoration of Rights: News, Commentary, and Tools



[HOME](#) [RESTORATION OF RIGHTS PROJECT](#) [COLLATERAL CONSEQUENCES](#) [RESOURCES](#) [COMMENTARY](#) [ABOUT](#)



Supreme Court supports immigrant's right to understand consequences of conviction

| [June 27, 2017](#) | [Jenny Roberts](#)

The author of the following post about the Supreme Court's decision in [Jae Lee v. United States](#) drafted an [amicus brief](#) in the case for several national immigrant rights organizations.

In 2010, *Padilla v. Kentucky* established that criminal defense lawyers must advise clients about the deportation consequences of a conviction, as part of their duties under the Sixth Amendment right to the effective assistance of counsel. Jose Padilla won in the Supreme Court because his trial lawyer erroneously informed him that he would not be deported after pleading guilty to drug trafficking because he had been in the U.S. for so long and had served in the military in Vietnam. However, Padilla's case was remanded for a lower court determination of whether his trial lawyer's incompetence caused him prejudice, since a defendant can win an ineffective assistance of counsel claim under the Court's 1984 decision in *Strickland v. Washington* only by showing both attorney incompetence and prejudice.

Last week, in *Lee v. United States*, the Court considered the standard for proving prejudice, ruling in Lee's favor in a 6-2 decision by Justice Roberts (Justices Alito and Thomas dissented). The Government conceded that Jae Lee's trial lawyer failed to meet his duty under *Padilla* by assuring him that he would not be deported if he pled guilty to selling ecstasy. The only issue for the Court was the proper standard for proving prejudice when a defendant pleads guilty in a case involving strong evidence of guilt.

Like Jose Padilla, Jae Lee had strong ties to the United States. Justice Roberts started the opinion by detailing those ties. Lee's parents, who both later naturalized as United States citizens, brought him here as a teenager. Lee graduated high school in New York City and then opened restaurants in Tennessee. He lived in the United States for more than 30 years, never returning to South Korea. Unlike his parents, Lee never became a citizen, instead remaining a lawful permanent resident and thus subject to mandatory deportation for a drug sale conviction. Justice Roberts also

detailed the strong evidence against Lee, including a confession that he possessed the 88 ecstasy pills seized in his apartment and had given ecstasy to his friends, a confidential informant who told federal officials about various drug sales over an eight-year period, and the seizure of \$32,432 in cash from Lee's apartment.

The strong immigration equities in Lee's favor and the strong evidence against him in the criminal case put the issue in stark relief: can a defendant ever prove that his lawyer's incompetence prejudiced him when the evidence against him is strong? The Government argued for a *per se* rule that defendants facing such evidence, whatever ties they have to the U.S. and whatever strong desire to remain here they may have expressed (and Lee made multiple expressions of that desire), can never be prejudiced by incompetent advice about deportation. According to the Government, such defendants can never show a reasonable probability that the outcome of the proceeding would have been different but for that incompetence. The government's view of Lee's case is that he almost certainly would have lost at trial had he rejected the plea offer, so the outcome would have been the same – conviction for the drug sale, followed by mandatory deportation.

In an important distinction that considers the situation from the perspective of the defendant making the critical decision about whether to plead guilty or go to trial and risk a higher sentence, the Court drew a line between "certainly" and "almost certainly" being deported:

We cannot agree that it would be irrational for a defendant in Lee's position to reject the plea offer in favor of trial. But for his attorney's incompetence, Lee would have known that accepting the plea agreement would certainly lead to deportation. Going to trial? Almost certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. See *id.*, at 6. Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

This led the Court to reverse the U.S. Court of Appeals for the 6th Circuit's holding that "no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence."

A few interesting notes about the decision. First, the Court recognized how ineffective assistance claims often involve mistakes trial counsel made during the proceedings, such as failing to raise an objection. Lee's case, by contrast, involved foregoing the right to trial in favor of accepting a guilty plea that Lee thought protected him from deportation. This "arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000)). This is significant for lower courts that will apply the decision, because Lee did not have to prove a reasonable probability that he would have won a trial, but simply that he would have rolled the dice and taken his chances at trial (aiming for the small window between "certainly" v. "almost certainly"). This method of proving prejudice applied because Lee's attorney's error had nothing to do with his chances at trial (in contrast to an error like failing to suppress an improperly obtained confession).

This raises a second, related part of the decision. The Court rooted its analysis of Lee's attorney's error in a refreshingly defendant-centered view of the plea bargaining process. Chief Justice Roberts noted how Lee's attorney's error "affected Lee's understanding of the consequences of pleading guilty," and thus affected Lee's entire decisionmaking process. This theme of the case is consistent with the Court's approach in *Padilla*, which brought the Sixth Amendment to bear on the attorney-client relationship during counseling. The Lee decision also pointed out that it was simply applying the standard for prejudice set out in *Hill v. Lockhart* (1985), noting how "the inquiry we prescribed in *Hill* . . . focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial." In short, the likelihood of conviction is one of several factors that a defendant will weigh when deciding how to proceed in a case. For someone like Lee, for whom staying in the U.S. is the primary consideration, the Court must take into account, when "asking what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decisionmaking." For other defendants, the Court's reliance on the well-established standards in *Strickland* and *Hill* suggests that the Lee decision should apply retroactively, an issue that the Court may face in the future.


Third, the Court noted how Lee's situation presented the flip side of the situations in the 2012 cases of *Lafleur v. Cooper* and *Missouri v. Frye*, where the defendants rejected favorable plea offers and ended up with longer sentences. The Lee decision clears up lingering confusion about these different situations by noting how the basic two-prong *Strickland* standard for ineffective assistance of counsel claims applies to all of the cases. But because the context of each case varies, so will "how the required prejudice may be shown." Lee's rejection of the Government's request for a per se rule that defendants without viable trial defenses can never show prejudice was also attuned to the need for context-specific inquiries in assessing prejudice. "The Government . . . forgets that categorical rules are ill suited to an inquiry that we have emphasized demands a 'case-by-case examination' of the 'totality of the evidence.'" (quoting *Williams v. Taylor*, 529 U.S. 362, 391 (2000)).

A fourth noteworthy aspect of the case is the Court's continued theme of the serious nature of the consequence of deportation, particularly for those with strong ties to the United States. There have been many immigration decisions since Congress significantly broadened the scope of deportation grounds in 1996, some describing how deportation can be experienced as a "penalty" more severe than any jail or prison time. Lee continues in that tradition, stating that "[d]eportation is always 'a particularly severe penalty,'" and noting how "remain[ing] in the United States may be more important to the client than any potential jail sentence." (quoting *Padilla* and *INS v. St. Cyr*, 533 U. S. 289, 322-323 (2001)).

Finally, there are two important issues that the Court flagged but did not decide. First, Lee's counsel argued that Lee could prove prejudice by proving a reasonable probability, had he known the deportation consequences of the plea he took, either that, 1) he would have insisted on a trial rather than pleading guilty; or 2) he would have bargained for a plea that avoided mandatory deportation. The Court left this for another day, stating in a footnote: "Lee also argues that he can show prejudice because, had his attorney advised him that he would be deported if he accepted the Government's plea offer, he would have bargained for a plea deal that did not result in certain deportation. Given our conclusion that Lee can show prejudice based on the reasonable probability that he would have gone to trial, we need not reach this argument." Second, the Court cited several Circuit Court of Appeals decisions holding that "a judge's warnings at a plea colloquy may undermine a claim that the defendant was prejudiced by his attorney's mistake." In Lee's case, the claim was that counsel "specifically undermin[ed] the judge's warnings themselves," leaving

any such argument by the Government for another day. However, the facts in Lee underscore the danger of treating judicial advisement as a potential “cure” for defense counsel’s failure to adhere to Padilla. The trial judge warned Lee about potential deportation and later asked how that potential affected his decision to plead guilty. Lee’s response, “I don’t understand,” was a somewhat unusual explicit expression of confusion at a moment when many defendants might simply forge forward with the plea, answering “yes” or “no” to all inquiries. Still, despite his explicit confusion, his trial lawyer quickly “assured him that the judge’s statement was a ‘standard warning,’” leading to Lee’s entry of the guilty plea.

The prejudice prong of ineffective assistance of counsel claims is much, and rightly, maligned. It has led to denials of claims where counsel was drunk or asleep during the trial, on the grounds that the outcome would not have been different with sober counsel who stayed awake. Lee, although limited to the particular facts of strong immigration equities and an explicitly-stated goal of remaining in the U.S., is an application of the rule in Hill that provides a significant opening in the often impenetrable wall of prejudice prong jurisprudence. The decision offers some chance of a meaningful remedy for some defendants who would have rejected a plea had they been advised properly regarding the likelihood of being deported.

 About the Author

 Latest Posts

Jenny Roberts

Jenny Roberts is a Professor of Law and Associate Dean for Scholarship at American University, Washington College of Law. She co-directs the Criminal Justice Clinic and writes about misdemeanors, collateral consequences, and plea bargaining.

[Visit Author's Website](#)

[Divided Wisconsin Supreme Court declines to extend Padilla to other serious consequences](#)

Last month the Wisconsin Supreme Court held in *State v. Lemere* that the Sixth Amendment does not require defense counsel to advise a

June 10, 2016

[Defendant entitled to "Hail Mary" effort to avoid deportation](#)

The Supreme Court has settled a dispute lingering in the lower courts since its decision seven years ago in *Padilla v. Kentucky*: If a

June 24, 2017

[Georgia high court extends Padilla to parole eligibility](#)

The Supreme Court of Georgia has extended the doctrine of *Padilla v. Kentucky* to a failure to advise about parole eligibility.

May 14, 2015

[Caselaw](#)

[Constitutional Law](#)

[Immigration](#)

[Right to counsel](#)