

Didn't See That Coming: Effective Assistance of Counsel in Plea Agreements

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The vast majority of criminal convictions are the result of plea agreements, not trials, largely because many criminal defendants wish to have some semblance of control over their futures. For most criminal defendants, plea bargaining results in a lighter sentence for a less severe charge than might stem from a conviction at trial. Pleading guilty also usually reduces attorney's fees and provides the accused with a far quicker resolution and much less stress than a trial would. However, pleading guilty carries certain risks for both the person accused and the lawyer advising them.

A decade ago, the United States Supreme Court held that criminal defense counsel must inform clients about potential immigration consequences of a guilty plea (*Padilla v. Kentucky*, 559 U.S. 356 (2009)), and earlier this summer the Court further expanded the obligations of criminal defense counsel when it reaffirmed the "dual sovereignty doctrine" (*Gamble v. United States*, 139 S. Ct. 1960 (2019)). Criminal defense lawyers should be cognizant that advising clients to plead guilty without fully evaluating the risks—even in areas outside the criminal defense lawyer's area of expertise—could lead to allegations of ineffective assistance of counsel, and malpractice or ethics claims (not to mention unintended consequences for the client).¹

Padilla v. Kentucky

While pleading guilty to certain crimes may be the best option for a citizen, it could lead to deportation for a non-citizen, and a malpractice or ethics complaint for the lawyer advising them. Criminal defense attorneys are not required to be experts in immigration law, but they should exercise caution when advising non-citizens to enter a guilty plea, and be certain to inform the client that such a plea could result in removal from the United States.

The petitioner in *Padilla* was a lawful permanent resident who pled guilty to marijuana trafficking, an offense that made his deportation virtually mandatory under the removal statute. *Padilla*, 559 U.S. at 359. Padilla claimed that his counsel told him not to worry about deportation since he had been living legally in the United States for more than 40 years. Padilla sought post-conviction relief based on ineffective assistance of counsel, claiming that he would have gone to trial rather than plead guilty had he been properly advised. The Kentucky Supreme Court denied relief after holding that the Sixth Amendment did not protect a criminal defendant from erroneous advice about deportation because it was merely a collateral consequence of his conviction. *Id.*

The United States Supreme Court granted certiorari and held that the distinction between collateral and direct consequences of a guilty plea was not appropriate in the context of deportation, especially because the consequences of Padilla's plea could be easily determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was clearly incorrect. The Court determined that Padilla sufficiently alleged that his counsel was constitutionally deficient, and remanded for a determination on whether he had been prejudiced. *Id.* at 374. The

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Court further held that constitutionally mandated effective assistance of counsel requires counsel to inform her client whether a guilty plea carries a risk of deportation. *Id.*

In coming to its determination, the Court outlined how the judicial system had historically addressed the intersection of criminal convictions and immigration consequences: “While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.” *Id.* at 360. The Court noted that under contemporary law if a non-citizen is found to have committed a removable offense his removal is practically inevitable aside from limited discretion vested in the Attorney General to cancel removal proceedings. *Id.* at 365. The Court noted that although removal is a civil proceeding, deportation is a penalty that has long been enmeshed with criminal convictions for non-citizens, and that is now a nearly automatic penalty for certain offenses. *Id.* at 355-366.

The Court disagreed with the Kentucky Supreme Court’s distinction between direct and collateral consequences to define the scope of constitutionally mandated effective assistance of counsel required under *Strickland v. Washington*, 466 U.S. 668 (1984) (the leading case on determination of effective assistance of counsel) in the context of deportation. Observing that other states analyzed similar situations as the Kentucky Supreme Court had, the Court said that given the unique nature of deportation as a “penalty” it need not address the distinction between collateral and direct consequences of a guilty plea in determining whether the defendant received effective assistance of counsel. *Id.* Deportation is so closely aligned with the criminal process, the court held, “advice regarding deportation is not categorically removed from the ambit of Sixth Amendment right to counsel” and *Strickland* applies to determine the effectiveness of the assistance of counsel. *Id.* at 366.

The *Strickland* standard is a two-part analysis. First, the court must determine if the representation fell below an “objective standard of reasonableness.” *Id.* Second, the court must determine whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* Applying this standard to the facts of *Padilla*, the Court ruled that “when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.” *Id.* at 369. The Court acknowledged that some areas of immigration law are murky and that in such a circumstance it was the duty of the criminal defense lawyer to advise the defendant of the potential adverse immigration consequences. *Id.* The Court rejected an argument from the solicitor general that only affirmative mis-advice could constitute ineffective assistance of counsel, as that conclusion would lead to absurd results. *Id.* at 370.

As the issue of immigration consequences of conviction will principally occur during plea negotiations, the Court held that in order to provide effective assistance “counsel must inform her client whether his plea carries a risk of deportation.” *Id.* at 374. In the dissent that perhaps portends the consequences of the *Gamble* decision we will discuss next, Justice Scalia, joined by Justice Thomas, found that the original meaning of the Sixth Amendment was only that it would allow a criminal defendant to employ or obtain volunteer counsel and that the Constitution is not an “all-purpose tool for judicial construction of a perfect world” in which a criminal defendant would be advised of all of the potential consequences of his guilty plea. The extent of the collateral consequences that a criminal defendant must be advised of has not been addressed further by the Supreme Court, but with the reaffirmation of the dual sovereignty doctrine in *Gamble*, that may soon be a topic that it will need to address.

Gamble v. United States

The protection against double jeopardy pre-dates the Constitution and is among the most valuable protections available to citizens. In *Gamble*, however, the court reaffirmed the “dual sovereignty doctrine” which holds that a trial or conviction under state law is not the “same offense” as defined in the Fifth Amendment as a trial or conviction for the same conduct under a federal statute. 139 S. Ct. 1660, 1664. The reverse also holds. *Id.*

Gamble, a convicted felon, pled guilty to the Alabama state crime of felon in possession of a firearm. *Id.* He was sentenced to ten years with all but one year suspended. *Id.* at 1989. For some reason that is not clear from either the opinion or the oral argument, *Gamble* was then indicted and charged under the federal analog, 18 USC §922(g)(1), for the same conduct of being a felon in possession of a firearm. *Gamble* pled guilty to the federal charge and was sentenced to an additional three years in prison, for a total of four years. *Id.* The Court’s holding was based upon the interpretation of “same offense” in the Fifth Amendment, which does not relate to conduct, but to violations of statute, as defined by each sovereign. *Id.* at 1964-1965. Given that each sovereign has its own laws, they may enforce them and not place a criminal defendant in double jeopardy thereby.

As observed by Justice Ginsberg in her dissent, joined by Justice Gorsuch, the majority’s holding is misguided because “the Federal Government was able to multiply *Gamble*’s time in prison because of the doctrine that, for double jeopardy purposes, identical criminal laws enacted by ‘separate sovereigns’ are different ‘offenses.’” *Id.* at 1989. The dissent argued that the Double Jeopardy Clause should bar successive prosecutions for the same offense by parts of the whole USA. *Id.* In his concurrence, Justice Thomas pointed out that “[t]he founding generation foresaw very limited potential for overlapping criminal prosecutions by the States and Federal Government.” *Id.* at 1980. It is undoubtedly the case that, for good or ill, that is exactly what now exists in the criminal law. The creation of a federal system was designed to create a “double security for the rights of the people,” but with the development of concurrent federal and state criminal laws and the application of dual sovereignty, “federalism is invoked to withhold liberty.” *Id.* at 1991. The double jeopardy clause has been turned from a protection of the people and a restraint on government into a power of government to prosecute an individual twice for the same conduct under separate sovereigns. *Id.*

Conclusion

The consequence of the *Gamble* decision is not only that state and federal authorities could successively try a criminal defendant, should the first be unsuccessful, but could also use the defendant’s guilty plea to one sovereign as evidence to support a separate set of charges brought by the other sovereign for the very same conduct. The latter is precisely what happened to the defendant in *Gamble*. In addition, the ability of one sovereign to successively try a defendant for the same conduct should the first be unsuccessful, is likely to be used as a threat to extract better plea deals. Such threats could then require criminal defense counsel to obtain an agreement from the non-charging sovereign to agree not to charge the defendant should the defendant plead guilty to the first set of charges brought.

As the prospect of successive prosecution exists after the *Gamble* decision, and with the court having held in *Padilla* that deportation is a consequence that a criminal defendant must be advised of, it seems likely that those bringing claims against criminal defense lawyers will argue that there is a requirement for the provision of effective assistance of counsel that criminal defense counsel advise of the possibility of successive charges being brought by a separate sovereign. Likewise, a consequence of a guilty plea being used as evidence in successive prosecution may need to be among the matters a criminal defendant is advised of before proceeding to trial or pleading guilty. The double jeopardy protections

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of state constitutions may need to be invoked to prevent such consequences. Irrespective of how this area of the law develops, it is likely that claims will be brought against criminal defense counsel.

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