PRACTICE ADVISORY

Jae Lee v. U.S.: Establishing Prejudice under *Padilla v. Kentucky*

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Introduction

In 2010, *Padilla v. Kentucky* held that the Sixth Amendment requires criminal defense counsel to advise noncitizen defendants of the immigration consequences of a conviction. 559 U.S. 356 (2010). In *Padilla*, the Court found that a lawyer's misadvice about the immigration consequences or a failure to advise of those consequences would qualify as deficient performance for the purposes of an ineffective assistance of counsel claim. The Court, then, remanded the case for a lower court determination as to whether his attorney's erroneous advice prejudiced Mr. Padilla—a defendant must make both showings to win an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984).

On June 23, 2017, in *Jae Lee v. United States*, __ U.S.__, 2017 WL 2694701 (2017), the Supreme Court considered the standard for proving prejudice under *Padilla v. Kentucky*. The Court reiterated the *Strickland* standard of a "reasonable probability" that, but for counsel's errors, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Court, however, rejected the Sixth Circuit's *per se* rule that a defendant who pleads guilty where there is strong evidence of guilt could *never* show that she was prejudiced by her attorney's incompetent immigration advice. Instead, the Court found that assessing prejudice is a context-specific determination that may turn on evidence of a noncitizen's strong connections to the United States and a desire to remain in the country.

In this advisory, we review the Supreme Court's decision in the *Lee* case and what the decision may mean for others seeking post-conviction relief based on a defense attorney's failure to advise or misadvice of the immigration consequences of a guilty plea (see Section I). We also examine whether the decision and its favorable holding may be applied retroactively to criminal convictions that were final before the decision (see Section II). Lastly, we review and offer practice tips on issues that the Court expressly did not reach, including whether an individual can show prejudice based on evidence of other possible plea dispositions that might have been negotiated to avoid potential immigration consequences or whether a judge's warning about potential immigration consequences may be deemed to cure prejudice from incompetent advice regarding these consequences (see Section III).

I. THE *JAE LEE* DECISION

A. Brief Summary of the Case

In 2008, Jae Lee, a long time permanent resident, was indicted on one count of possessing ecstasy with intent to distribute. *Jae Lee v. United States*, __ U.S.__, 2017 WL 2694701, *3. The case arose when a confidential informant told federal officials that Lee had sold him drugs numerous times over an eight-year period. After obtaining a search warrant, federal officials found 88 ecstasy pills, three Valium tablets, $32,432 in cash, and a loaded rifle in Lee's house. Lee admitted that the drugs were his and that he had given ecstasy to his friends. *Id*.

Lee was very concerned about the potential immigration consequences flowing from the criminal charge. He had moved to the United States from South Korea in 1982 at the age of 13.

He graduated high school in New York City and then opened restaurants in Tennessee. In the thirty-five years he had spent living in the United States, Lee had never returned to South Korea. *Jae Lee*, 2017 WL 2694701, at *3. But unlike his parents, Lee had not naturalized and remained a permanent resident. Because of his strong ties to the United States, Lee informed his attorney of his noncitizen status and repeatedly asked him whether he would face deportation as a result of the criminal proceedings. His defense lawyer, however, told Lee that he would *not be* deported as a result of pleading guilty to the possession with intent to distribute charge. In fact, he advised Lee that if deportation was not in the plea agreement, "the government cannot deport you." *Id*. at *4. Lee's attorney was dead wrong—a plea to the charge would actually constitute a drug trafficking aggravated felony under 8 U. S. C. § 1101(a)(43)(B) triggering virtually mandatory deportation. Based on that false assurance, Lee accepted the plea and received a prison sentence of a year and a day. Upon learning that he was facing virtually certain deportation, Lee filed a motion seeking to vacate his conviction on that the ground that, in accepting the plea, he had received ineffective assistance of counsel in violation of the Sixth Amendment.

The District Court denied relief. Applying the two-part test for ineffective assistance claims from *Strickland v. Washington*, the District Court concluded that while Lee's counsel had performed deficiently, Lee could not show he was prejudiced by his attorney's erroneous advice "[i]n light of the overwhelming evidence of Lee's guilt." *Jae Lee*, 2017 WL 2694701, at *5 (internal citation omitted). The Sixth Circuit affirmed. The Court explained that to establish that he was prejudiced by his attorney's deficient performance, Lee was required to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" under *Hill v. Lockhart*, 474 U. S. 52, 59 (1985). In applying *Hill*, the Court found that because Lee had "no bona fide defense, not even a weak one," he "stood to gain nothing from going to trial but more prison time." *Id*. The Court concluded that Lee could not show prejudice because "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." *Id*.

B. Supreme Court Holding

In a 6-2 decision, authored by Chief Justice Roberts, the Supreme Court reversed the Sixth Circuit's *per se* rule that defendants facing strong evidence of guilt, regardless of their ties to the U.S. and strong desire to remain here, can never be prejudiced by erroneous advice or a failure to advise about deportation. The Government had also argued for such a *per se* rule, reasoning that a defendant with no viable defense can never show a reasonable probability that the outcome of the proceeding would have been different under *Strickland*. According to the government, that's because a defendant like Lee would have lost at trial had he rejected the plea offer so the ultimate outcome would have been the same—he would have been convicted of the charge, received a longer sentence and subsequently deported in either instance.

In rejecting the Government's arguments, the Court first reiterated 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." *Jae Lee*, 2017 WL 2694701, at *7 (quoting *Williams v. Taylor*, 529 U.S. 362, 391 (2000); *Strickland*, 466 U.S. at 695). In other words, assessing prejudice is generally a fact-intensive inquiry specific to the context of the case and not subject to *per se* rules.

Second, and more importantly, the Court explained that the inquiry in *Hill v. Lockhart – would a defendant have rejected the plea and insisted on going to trial*—focuses on a particular defendant's decision-making, which may not turn solely on the likelihood of conviction after trial. *Jae Lee*, 2017 WL 2694701, at *7. In doing so, the Court explained that where an attorney error allegedly affects how a trial would have played out, as opposed to a choice of whether or not to plead guilty, a factfinder assesses that error's effects on a defendant's decision-making by making a prediction of the likely trial outcome. In contrast, a prediction of the likely outcome at trial is *not* appropriate where, as here, the error is one that is not claimed to be pertinent to a trial outcome, but is instead claimed to have "affected a defendant's understanding of the consequences of his guilty plea." *Id*. at *8 n.3. For someone like Lee, for whom avoiding deportation was "the determinative factor," a court must consider 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 decision making." *Id*. at *8. The likelihood of conviction, thus, is one of several factors that a defendant like Lee will weigh when deciding how to proceed in a case.

In applying the *Hill* standard to Lee's case, the Court looked to contemporaneous evidence to substantiate his expressed priorities, and instructed lower courts to do the same. *Id*. at *9. In finding that Lee had demonstrated that he was prejudiced by the attorney error, the Court noted that "deportation was the determinative issue in Lee's decision whether to accept the plea deal." *Id*. Specifically, the court pointed to Lee's repeated inquiries to his attorney about the risk of deportation, and his and his attorney's testimony in the post-conviction proceedings that he would have gone to trial had he known the immigration consequences. *Id*. The Court also relied on Mr. Lee's strong connections to the United States noting that, "[a]t the time of his plea, Lee had lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents—both naturalized American citizens." *Id.*

Lastly, the Court addressed the government's contention that it would not have been "rational" for a defendant to reject the plea bargain in Lee's circumstances, an additional showing that a defendant must make under *Padilla*:

> 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. 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.

Id. at *10 (emphasis in original). Significantly, the Court placed itself in Lee's shoes in gauging what would have been a rational choice.

Practice Tip

Practitioners should argue that lower courts must follow the Supreme Court in *Lee* in adjudicating *Padilla* motions by focusing on what would have been rational for a person in the client's shoes. Under *Jae Lee*, a noncitizen simply must show that she would have rolled the dice and taken her *chances* at trial to establish that she was prejudiced by her attorney's failure to advise her of the immigration consequences. In doing so, practitioners should submit contemporaneous evidence of a probability that the client would not have pled guilty if properly advised of the immigration consequences, including evidence of expressed concern regarding the immigration consequences and evidence of any strong connections to the United States. In addition, while the Court found that it is inappropriate to focus solely on likelihood of success at trial, it is clear that a showing of prejudice would be buttressed by any evidence of possible defenses that the client could have raised at trial.

II. RETROACTIVITY IMPLICATIONS FOR *PADILLA* CLAIMS

Some lower courts may ask whether the *Lee* decision and its favorable holding may be applied retroactively to cases involving criminal convictions that were final before the decision. When deciding requests for post-conviction relief, courts generally look to the law that existed when a case became final on direct appeal because the post-conviction petition is deciding whether the decision was unfair when initially rendered. *Teague v. Lane*, 489 U.S. 288, 301 (1989). If a Supreme Court case creates a new criminal rule after a petitioner's case became final, then the default will be that a petitioner for post-conviction relief cannot benefit from the new rule. If, however, a new Supreme Court case merely applies an *existing* rule to a different set of facts, then it does not create a new rule, but merely applies correctly the law that existed when a person's case became final.

In *Lee*, the Supreme Court did not announce a new rule of constitutional criminal procedure; rather, the language of the decision makes clear that it applied to a specific set of facts the long-standing principles of *Strickland v. Washington* and *Hill v. Lockhart*. The Supreme Court does *not* announce a "new rule" for *Teague* purposes when it merely applies "the principle that governed a prior decision to a different set of facts." *Chaidez v. United States*, 568 U.S. 342, 133 S. Ct. 1103, 1107 (2013) (internal citations omitted). As Justice Kennedy has explained, "[w]here the beginning point" for a new decision is a prior, more general holding "designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Id*. (citing Justice Kennedy).

Because the *Strickland* test is a rule of "general application" and "provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims," *Williams v. Taylor*, 529 U.S. at 391, the Court has repeatedly held that decisions applying the "clearly established" principles of *Strickland* in new contexts do *not* announce "new rules." *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

The same is true of *Lee*. In finding that Lee was prejudiced, the Court did not overrule precedent or break new ground. Instead, the Court applied to the facts at hand *Hill*'s lesson that

"when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Jae Lee*, 2017 WL 2694701, at *6 (quoting *Hill*, 474 U.S. at 59); *id.* at *7 ("And, more fundamentally, the Government overlooks that the inquiry we prescribed in *Hill v. Lockhart* focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial."). Moreover, the Court repeatedly noted that the error here is "precisely [the] kind" confronted in *Hill*. *Id.* at *7. The Court concluded by holding that Lee has satisfied the *Hill* test. *Id.* at *10 ("[W]e conclude Lee has demonstrated a 'reasonable probability that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'") (quoting *Hill*, 474 U.S. at 59).

The dissent in *Jae Lee* argued that the Court announced a "novel standard for prejudice at the plea stage," by not requiring a defendant to establish that he would have been better off in the end had his counsel not erred. *Jae Lee*, 2017 WL 2694701, at *11 (Thomas, J. dissenting). *Hill*, however, has long meant that a defendant need not demonstrate that that the outcome would have been different where the prejudice is the forfeiture of "a judicial proceeding to which he was otherwise entitled." *Roe v. Ortega-Flores*, 528 U. S. 470, 485 (2000).

That *Lee* is not a new rule, and therefore applies retroactively, is also supported by the case law finding that the prejudice inquires in *Frye* and *Lafler* also do not establish a new rule of constitutional law. *See In re Graham*, 714 F.3d 1181, 1182 (10th Cir. 2013); *Gallagher v. United States*, 711 F.3d 315, 315–16 (2d Cir. 2013); *Williams v. United States*, 705 F.3d 293, 294 (8th Cir. 2013); *Buenrostro v. United States*, 697 F.3d 1137, 1140 (9th Cir. 2012); *In re King*, 697 F.3d 1189, 1189 (5th Cir. 2012); *Hare v. United States*, 688 F.3d 878, 879, 881 (7th Cir. 2012); *In re Perez*, 682 F.3d 930, 932–34 (11th Cir. 2012). Nevertheless, changes in the Court's composition and other factors can affect whether the Court will later decide that a decision applies retroactively. *See, e.g.*, *Chaidez*, 568 U.S. 342 (holding that *Padilla* did not apply retroactively after Justice Stevens retired).

III. ISSUES NOT REACHED BY THE COURT

A. Establishing Prejudice by Demonstrating Defense Counsel Could Have Negotiated a Better Plea Deal

In *Jae Lee*, the Court expressly reserved the question of whether a petitioner could establish prejudice by proving that defense counsel could have negotiated a plea that would have been safer for immigration purposes. The Court stated:

> 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.

Jae Lee, 2017 WL 2694701, at *7 n.2. Notably, the dissent would have held that such a showing does not demonstrate prejudice because a defendant has no right to a plea offer. *Id.* at *12 (Thomas, J. dissenting).

That being said, practitioners should be aware that three circuits have held that a defendant establishes prejudice if there is a reasonable probability that the defendant could have negotiated a plea agreement that did not affect his immigration status. *United States v. Swaby*, 855 F.3d 233, 241 (4th Cir. 2017); *United States v. Rodriguez–Vega*, 797 F.3d 781, 788–89 (9th Cir. 2015); *Kovacs v. United States*, 744 F.3d 44, 52–53 (2d Cir. 2014). There is arguably authority in the Tenth Circuit also to support the argument that the Court reserved in footnote 2. *See United States v. Moya*, 676 F.3d 1211, 1214 (10th Cir. 2012) (noting in a non-immigration case the lack of evidence to support an argument that an alternative plea would have been available).

Concretely, a defendant can establish prejudice by showing that the prosecution offered alternative pleas that would have avoided the immigration consequence at issue. Alternatively, a defendant can establish prejudice by offering evidence that other defendants facing similar charges receive alternate plea offers that would not have made them removable. *See United States v. Rodriguez–Vega*, 797 F.3d at 788. If the nature of the harm, for example, was that a court's one-year sentence made the conviction an aggravated felony, then presumably evidence that the court provides shorter sentences for the same offense would establish prejudice too.

Practice Tip

The two theories of prejudice–(1) the defendant would have opted for a trial or (2) the defendant would have sought an alternative plea—are not mutually exclusive. That is, a noncitizen defendant's "particular emphasis" on avoiding immigration consequences can be sufficient to show that the defendant would have rejected the plea offer. *Hill*, 474 U.S. at 60. *Hill* has long meant that a defendant need not demonstrate that that the outcome would have been different where the prejudice is the "denial of the entire judicial proceeding . . . to which he had a right." *Roe v. Ortega-Flores*, 528 U. S. 470, 483 (2000). This understanding of *Hill* means that a factfinder should not evaluate a defendant's attempt to show prejudice in terms of its impact on an outcome where the defendant has shown that immigration concerns are what led a defendant to accept a plea rather than go to trial. Nevertheless, while establishing prejudice by showing the possibility of an alternative plea deal was not specifically endorsed by *Jae Lee*, a defendant should provide such evidence where possible that there was a reasonable probability that the defendant could have pled to a disposition that would not have adverse immigration consequences or such severe adverse consequences (e.g., a plea that would have enabled the defendant to apply for LPR cancellation of removal).

B. Impact of Judicial Warnings on Demonstrating Prejudice

A majority of states require a court to warn defendants about potential immigration consequences before accepting a plea. *See* Kesselbrenner and Rosenberg, *Immigration Law and Crimes*, Appendix A (Thomson Reuters 2017) (listing state provisions). At the oral argument, Justice Kennedy asked about the impact on prejudice of such warning statutes or court rules.

Transcript of Oral Argument at 3-6, *Jae Lee v. United States*, 582 U.S. ____ (2017) (No. 16-327) In what appears to be a response to Justice Kennedy's concern, the Court observed in a footnote:

> Several courts have noted that a judge's warnings at a plea colloquy may undermine a claim that the defendant was prejudiced by his attorney's misadvice. *See, e.g., United States v. Newman*, 805 F.3d 1143, 1147 (D.C. Cir. 2015); *United States v. Kayode*, 777 F. 3d 719, 728–729 (5th Cir. 2014); *United States v. Akinsade*, 686 F.3d 248, 253 (4th Cir 2012); *Boyd v. Yukins*, 99 Fed. Appx. 699, 705 (6th Cir. 2004). The present case involves a claim of ineffectiveness of counsel extending to advice specifically undermining the judge's warnings themselves, which the defendant contemporaneously stated on the record he did not understand. There has been no suggestion here that the sentencing judge's statements at the plea colloquy cured any prejudice from the erroneous advice of Lee's counsel.
>
> *Jae Lee*, 2017 WL 2694701, at *11 n.4.

Nothing in the footnote or decision means that a person cannot establish prejudice after having received a warning from a judge or having signed a plea agreement acknowledging the possibility of removal. Unlike judicial warnings about the length of a possible criminal sentence, immigration warnings generally lack the specificity to counteract an attorney's misadvice. *See Akinsade*, 686 F.3d at 253 (distinguishing between specificity of criminal punishment in Fed. R. Crim. P. 11 warnings and generality of immigration warnings); *Rodriguez-Vega*, 797 F.3d at 790 (same); *Swaby*, 855 F.3d at 240-41 (same). In addition, even if the Court's footnote were to be read to be an endorsement of lower court rulings indicating that a judicial warning could undermine a prejudice claim, the Court's language that warnings "may" affect a prejudice determination shows the Court certainly did not intend to create a *per se* rule.

The Third Circuit appears to have reached a different conclusion in holding that a defendant could not show prejudice who acknowledged in a Rule 11 colloquy that he would have pled guilty even if removal were automatic. *United States v. Fazio*, 95 F.3d 421, 428 (3d Cir. 2015). Practitioners in the Third Circuit should argue that the *Fazio* Court was not intending to create a *per se* rule in light of Court's repeated warnings that prejudice determinations require a "case-by-case examination" of the "totality of the evidence." *Jae Lee*, 2017 WL 2694701, at *7 (quoting *Williams v. Taylor*, 529 U.S. 362, 391 (2000); *Strickland*, 466 U.S. at 695).

Practice Tip

A state or the United States is likely to cite to footnote 4 to defeat a noncitizen's attempt to demonstrate prejudice where a court provided a general immigration warning. In response, a petitioner should raise both legal and fact-specific arguments to demonstrate prejudice to the defendant notwithstanding a judicial warning. A judge and defense counsel have distinct roles in the criminal justice process and there are distinct constitutional provisions underlying their respective roles. A judge is a neutral arbiter while an attorney is the defendant's advocate. The warning that a judge provided is rooted in the Fifth Amendment's due process clause, which requires that a defendant's plea be knowing and voluntary. *Boykin v. Alabama*, 395 U.S. 238,

242-44 (1969). By contrast, an attorney's obligation is part of a defendant's Sixth Amendment right to counsel. A judge will not know whether the defendant is a noncitizen, including his or her specific immigration status and relief options, and will not know how much the immigration consequences may matter to an individual defendant. A generic warning fulfils a judge's obligation. *See* Fed. R. Crim. P. 11. These arguments support the view that generally a judge's warning will not mitigate the prejudice from misadvice. Nevertheless, best practice would dictate providing as much specific evidence as possible to show that avoiding immigration consequences was the key factor in a defendant's willingness to enter a plea. The lesser the evidence of a defendant's concern about immigration consequences the greater the likelihood that a warning will defeat prejudice. *See United States v. Fazio,* 795 F.3d at 427, n.3 (describing defendant's failure to testify as undermining prejudice claim). Documenting the extent of the concern, as Mr. Lee did, may be the difference between winning and losing the case.