Public Defender Spotlight
Norman Handwerger

Norm Handwerger has been a member of the Post Conviction Defenders Division since December of 1991. Over the years he has served as a staff attorney, supervising attorney and Deputy Chief Attorney. In addition to representing indigent persons in post conviction cases throughout the state of Maryland, he also has expertise in extradition matters, *Unger* litigation and sentencing interpretation issues. In fact, it was the sentence interpretation case of *Robinson v. Lee* that went from the Circuit Court of Washington County to the Maryland Court of Appeals that eventually effectuated the release of over 400 incarcerated persons due sentencing misinterpretations by the Division of Correction.

Norm was a graduate of Towson State University, with a double major in philosophy and English. He also attended the University of Colorado philosophy Masters program, and subsequently the University of Baltimore School of Law. After obtaining his law degree in 1987, he worked at the Prisoner Assistance Project for several years actively engaged in prisoner civil rights litigation in both state and federal court. He has been a professor at the University of Maryland School of Law in the appellate and post conviction writing clinic. He was awarded the Public Defender Spirit Award in 2015, and is currently the supervising attorney for the Post Conviction Defenders Division intern program.

MODIFICATION OF SENTENCE FOR MANDATORY DRUG SENTENCES (Crim. Law 5-609.1)

A person who is serving a term of confinement that includes a mandatory drug sentence of 10 years without parole (2nd time offender) 25 years without parole (3rd time offender) or 40 years without parole (4th time offender), may apply to the court to modify or reduce the mandatory sentence, pursuant to Md. Rule 4-345, regardless of whether a motion to modify was previously filed or not. This law goes into effect on 10/1/2017.

An application for a hearing shall be submitted to the court between October 1, 2017 and September 30, 2018, and thereafter only for good cause shown.

Apply for Representation. If you qualify to file a motion under this section, please contact the Public Defender's Office in the county where you were convicted. If you have an active post conviction case, please contact your attorney at the Post Conviction Defenders for representation.

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Hope & Justice for Maryland's Incarcerated

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POST CONVICTION DEFENDERS DIVISION

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BEWARE THE UNAUTHORIZED PRACTICE OF LAW

By Eli Braun

It's Halloween season—the time of year for carving pumpkins, trick-or-treating, telling horror stories, and wearing costumes. It's "scary" but cheerful. So the scariest costumes this year won't be ghosts or goblins or witches or werewolves. They'll be non-lawyers masquerading as lawyers. Don't be spooked or tricked by non-lawyers wearing lawyer masks. They'll be charging thousands of dollars for "legal services" they're neither trained nor permitted to provide.

Some of these businesspeople have paralegal degrees. Some are formerly incarcerated, now trying to make a buck by jailhouse lawyering from the outside. Some claim—falsely—to have worked with lawyers in the Post Conviction Defenders Division. Some might mean well.

But you don't need their services. You can write a pro se petition if not on your own, then with a little help from friends or from people in the law library. A post conviction petition doesn't require much. Md. Rule 4-402 sets out exactly what a pro se petition must contain:

The petition shall state whether or not petitioner is able to pay costs of the proceeding or to employ counsel and shall include: (1) The petitioner's name, place of confinement, and inmate identification number. (2) The place and date of trial, the offense for which the petitioner was convicted, and the sentence imposed. (3) The allegations of error upon which the petition is based. (4) A concise statement of facts supporting the allegations of error. (5) The relief sought. (6) A statement of all previous proceedings, including appeals, motions for new trial and previous post conviction petitions, and the determinations made thereon. (7) A statement of the facts or special circumstances which show that the allegations of error have not been waived.

That's it. It does not have to be long or polished or even spell-checked. You'd send it to the court where you were convicted. That court would send it on to us, the Post Conviction Defenders, and we'd appoint a lawyer who'd meet with you, represent you, and in some cases, file a supplement to your pro se petition. You don't need to hire a paralegal to get your foot in the door.

I'm not against jailhouse lawyering. Jailhouse lawyers, in many cases, possess exceptional legal ability. Our system benefits when more knowledgeable prisoners provide advice and mentorship to less experienced prisoners. I welcome the sharing of ideas and brainstorming that happens in prison libraries and hallways across Maryland. By all means, keep talking about your cases.

What concerns me, though, is exploitation. Lawyers in this Division have met people who put up literally thousands of dollars of their families' money, coaxed by pie-in-the-sky assurances of success, to pay non-lawyers to prepare a petition packed with losing issues. But you wouldn't hire a gardener to install your plumbing. You would not hire a nurse to perform your heart surgery. So don't hire a non-lawyer to prepare your pro se petition, especially when you could do it yourself. Many prison law libraries have sample petitions or templates to help you get started.

Concerns about exploitation led to § 10-601(a) of the Business Occupations & Professions Article of the Maryland Code, which says that "a person may not practice, attempt to practice, or offer to practice law in the State unless admitted to the Bar." "The goal of the prohibition," said the Court of Appeals in 1988, "is to protect the public from being preyed upon by those not competent to practice law—from incompetent, unethical, or irresponsible representation."

The Bar, simply stated, is a roster of lawyers qualified to practice law. Being admitted to the Maryland bar is no easy task. To be admitted, you have to take a 12-hour, multiple-day exam. Just 2 out of 3 applicants pass the exam on their first try, and that's not 2 out of 3 people off the street. That's 2 out of 3 people who had, before the exam, studied for 3 years in law school.

If a non-lawyer comes trick-or-treating this Halloween season, don't be fooled.

UNDERSTANDING THE PREJUDICE PRONG: CHANGES AND DEVELOPMENTS IN THE LAW SINCE PADILLA V. KENTUCKY

by Gabriela Kahrl

In *Padilla v. Kentucky,* 559 U.S. 356, 130 S.Ct. 1473 (2010), the Supreme Court held that trial counsel was obligated under the Sixth Amendment Right to Effective Assistance of Counsel to advise the non-citizen defendant of the deportation risk of a criminal conviction. Where the immigration consequences are clear, trial counsel is required to give specific, accurate advice concerning those immigration consequences. *Padilla,* 130 S.Ct. at 1483. Where the immigration consequences are complex, the court should apply the *Strickland* standard to evaluate the level of detail required to satisfy trial counsel's duty under *Padilla*. *Id.* at 1482. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 1482*, citing to Strickland v. United States*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Since the Supreme Court's decision in *Padilla v. Kentucky,* there have been further cases that have sought to clarify what an attorney's obligation to his non-citizen client is, whether the court can compensate or cure trial counsel's failure to give advice or misadvice, and what petitioner must prove to show that she was prejudiced by trial counsel's failings. The focus of this article will be two recent cases from the United States Fourth Circuit Court of Appeals and the Supreme Court of the United States respectively. Both courts agree that there are instances where it would be rational for a non-citizen defendant to choose trial, rather than a plea, even when there is not strong defense at trial. Both courts further agree that a non-citizen's ties to the United States are a significant factor in assessing whether it would be rational for the non-citizen defendant to choose trial, had the attorney provided accurate information about the deportation risks of pleading guilty.

In *Hill v. Lockhart,* 474 U.S. 52 (1985) the Supreme Court held that, to satisfy the prejudice prong, the defendant must show that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

That standard was applied to a *Padilla* claim in Maryland by the Court of Appeals in *Denisyuk v. Maryland,* 422 Md. 462, 30 A.3d 914 (2011). In *Denisyuk,* the Maryland Court of Appeals reiterated that the *Hill* analysis was applicable and clarified that the "appropriate determination is **not** whether Petitioner would have ultimately been convicted following a trial." *Denisyuk*, 422 Md. at 488 (Emphasis added). Despite the Maryland Court of Appeals position on this subject, circuit courts across the state have denied *Padilla* claims because they held that no rational defendant would risk going to trial in a case where the State's case was strong, the odds of success at trial were slim, and a plea included the benefit of a lower sentence.

In *United States v. Swaby,* a recent opinion from the United States Court of Appeals from the Fourth Circuit, Slip Opinion, No. 15- 7616, No. 15- 762, decided April 24, 2017, the Court followed its precedent in *United States v. Akinsade*, 686 F.3d 248, 255 (2012) and reiterated that the petitioner does not have to show that success at trial was a realistic outcome to prove prejudice. Instead, the court articulated a different standard:

> (...)It merely requires the defendant to show a reasonable likelihood that a person in the defendant's shoes would have chosen to go to trial. The decision does not need to be optimal and does not need to ensure acquittal; it only needs to be rational.
>
> *Swaby,* Slip Opinion, page 18.

In doing so, the Court allowed for the possibility that a it would be rational to choose to go to trial even in a losing case, as long as the petitioner could prove there were compelling reasons, such as avoiding deportation, that were guiding the petitioner's decision-making.

In the case before the court, Mr. Swaby was a legal permanent resident and citizen of Jamaica. His attorney advised him, after consultation with an immigration attorney, that a plea in federal court would not make him deportable. However, defense counsel had provided the immigration attorney with the incorrect statute, and the plea did, in fact, make Mr. Swaby deportable. Mr. Swaby had received generic advice on the record from the court that the plea might make him deportable, but the Court in *Swaby*, once again followed its precedent in *Akinsade* to determine that generic advice supplied by the Court could not correct trial counsel's misadvice.

The question then became whether it was rational for Mr. Swaby to reject the plea, had he known it would make him deportable. The Court concluded for two reasons that a reasonable person in Mr. Swaby's position would have rejected the plea. First, the Court was persuaded that Mr. Swaby had shown that a reasonable probability existed that his attorney could have negotiated an immigration friendly outcome. Second, the Court concluded that there was a reasonable probability that Mr. Swaby, given his familial connections to the United States, would have chosen to go trial, despite the risks it presented.

To find that there was a reasonable probability of an immigration friendly plea, the Court noted that Mr. Swaby and the State had structured the plea agreements with the sole purpose of avoiding immigration consequences. The government acquiesced to changes that were made to avoid immigration consequences. For that reason, but for trial counsel's errors, Mr. Swaby demonstrated a reasonable likelihood that he could have negotiated a different plea agreement.

To determine the reasonable likelihood that Mr. Swaby would have gone to trial, the Court indicated that the strength of the State's case was only one factor that it took into account to assess the rationality of rejecting or accepting a plea offer. The Court once again followed the reasoning laid out in *Akinsade* and held that it was rational for a non-citizen defendant with strong familial ties to the United States to risk loss at trial rather than accept a plea and with it the certainty of deportation.

A few months, after *Swaby,* the United States Supreme Court held in *Jae Lee v. United States* that it was rational for a non-citizen defendant to reject a plea, even when the odds of success at trial were not great, in cases where it was clear that avoiding deportation was the determinative factor for the defendant in the case. *Lee v. United States,* Slip Opinion No. 16-327, October Term 2016 (Decided June 23, 2017).

In the *Lee* case, the Government conceded that the trial counsel's performance had been deficient. The only issue was whether trial counsel's inadequate representation and bad advice prejudiced Mr. Lee.

Mr. Lee came to the U.S. from Korea when he was 13 years old, in 1982. Mr. Lee had never returned to Korea, but stayed in the U.S. as a lawful permanent resident for 35 years. He ran lawful businesses in the United States. He also engaged in some illegitimate activity. When he was indicted for that activity, Mr. Lee retained counsel. Mr. Lee told his attorney that he was a noncitizen of the United States. When the Government made a plea offer, Mr. Lee repeatedly asked his attorney about the immigration risk of accepting the plea offer. His attorney told him that he would not be deported if he pled guilty. Mr. Lee pled guilty. Shortly thereafter, deportation proceedings were initiated. Mr. Lee filed a motion to challenge his conviction under 28 U.S.C. § 2255. At the evidentiary hearing, both counsel and Mr. Lee testified that avoiding deportation was the determinative factor for Mr. Lee during plea negotiations. Trial counsel also testified that, had he known of the immigration consequences of the plea, he would have advised Mr. Lee to go to trial instead, despite the weaknesses of the case. The District Court denied Mr. Lee's motion. It held that even though trial counsel's performance had been deficient, that no rational person in Mr. Lee's position would have chosen to go to trial instead because of the "overwhelming evidence of Lee's guilt."

The Court of Appeals for Sixth Circuit affirmed the denial of relief, relying on precedent 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." Therefore, the Court concluded, that Mr. Lee could not prove prejudice. The Supreme Court granted certiorari.

The Court concluded that "in the unusual circumstances of this case", Mr. Lee had adequately demonstrated that, notwithstanding the strength of the criminal case against him, he would have chosen to go to trial instead. The Court considered the following factors: That Mr. Lee had asked his attorney repeatedly whether there was any risk of deportation, and both he and his attorney testified at the evidentiary hearing that he would have gone to trial/his attorney would have counseled that Mr. Lee go to trial had the deportation consequences been known. Further, the plea colloquy itself bore out that Mr. Lee's priority in handling his criminal case was avoiding deportation. When the judge advised Mr. Lee during the plea colloquy that the conviction could make him deportable, and asked Mr. Lee whether that affected his decision to move forward with the plea, Mr. Lee affirmatively responded that it would, and did not proceed with the plea until his attorney assured him that the judge's advice was a "standard warning". The Court further considered Mr. Lee's strong ties to the United States: he had lived in the United States for three decades, was the only family member who could provide care to his U.S. citizen parents, and further that he had no connections to South Korea. The Court also considered that the benefit conferred by pleading guilty in this case (a sentence of 1 year and one 1 day in prison) was not so great that choosing trial would be irrational.

The Court therefore concluded that it was not irrational for Mr. Lee to reject a plea that would certainly result in deportation in favor of trial which would "*almost* certainly" result in deportation.

Arguably, these cases could be extended beyond deportation cases. Both of these cases stand for the proposition that, but for trial counsel's misadvice/lack of advice, it would have been rational for a defendant to reject a plea, even in cases where the defendant did not have a good defense at trial, provided the defendant can show there was some reason, equivalent to deportation in importance, that was a determinative factor in the defendant's decision-making. The strongest cases include evidence other than the defendant's testimony at the post conviction hearing. This evidence could be found in comments made at the plea colloquy, corroborating testimony by trial counsel, or equitable factors that generally support the defendant's claim that her decision to plead guilty was based entirely upon one factor, and she did not receive accurate advice she was constitutionally entitled to, which, had she received it, would have led her to choose trial, over the plea offer.

The Office of the Public Defender will assist you with filing one motion under Sections 8-505/8-507. If you would like assistance, you should contact the local Public Defender's Office in the county or city where you were originally convicted.