WHO'S YOUR EXPERT

When Expert and Fact Witness are One and the Same

By Hillary Frommer

There have been some recent decisions where the courts have addressed issues arising when a fact witness and expert witness were one and the same.

In *Matter of Mallin*[1] the proponent of a will in a contested probate proceeding moved to quash a subpoena issued by the objectants on the decedent's treating psychiatrist. After the doctor was deposed, he submitted an affidavit, which raised a new diagnosis to which the witness had not previously testified and which was not recorded in any of his medical records. The proponent sought to preclude that additional deposition arguing, in part, that the psychiatrist was the designated testifying expert witness. The court did not agree with the proponent's argument, stating "the fact that the proponent has now identified [the doctor] as an expert witness he intends to call at trial does not preclude the objectants from deposing him further as a fact witness regarding this newly-revealed diagnosis."[2] If you practice in the New York Surrogate's Court or Supreme Court (other than in the Commercial Division, in which case, you should familiarize yourself with Rule 13), you know that a party is not automatically entitled to depose the opposing party's expected testifying expert witness. Depositions are limited to fact witnesses, unless a party demonstrates to the court that special circumstances exist that warrant a deposition.[3] While it might seem like the proponent had a clever idea, the court in *Matter of Mallin* inherently (and correctly) recognized that it is a transparent effort to avoid a deposition of that witness altogether.

Hillary A. Frommer

Two other decisions involved permitting the trial testimony of a witness who was both a fact and expert witness. *Slomczewski v Ross*[4] presents an interesting situation. In that personal injury action, the plaintiff brought suit after she fell down steps outside a residence owned by the defendant. The court made several rulings prior to the first trial, which ended in a mistrial, and which carried over to the second trial, in which the jury returned a verdict in the plaintiff's favor. The trial court precluded the defendant from offering the individual who had repaired the steps to testify as a fact witness with respect to the condition of the steps at the time of the accident, on the grounds that he had not been identified to the plaintiff. The Appellate Division affirmed that decision, noting that the defendants had a "prolonged and almost complete disregard for their pretrial disclosure obligations with regard to the identity of a known fact witness."[5] However, the Appellate Division reversed, as an abuse of discretion, a second ruling by the trial court, which precluded that same individual from testifying as an expert "given the timeliness and sufficiency of the defendants' expert disclosure." On the eve of the second trial, the trial court reversed its own decision which had previously allowed that expert to testify and then denied the defendants' request for a 24-hour continuance to obtain different expert testimony. This decision is interesting because it is more common for a court to preclude a witness from testifying as an expert rather than as a fact witness on the grounds that the required CPLR 3101(d) disclosure was not timely made.

In *Sing v PGA Tour, Inc.*,[6] the professional golfer Vijay Singh brought suit against the PGA Tour following disciplinary action taking against him for alleged anti-doping violations. The plaintiff moved to strike an affidavit and trial testimony Richard Young, one of the defendant's fact witnesses, who was the primary drafter of the PGA Tour's Anti-Doping Program, and the World Anti-Doping Code, on which that program was based. One of the plaintiff's arguments was that Mr. Young was really being offered as an expert at trial, and he was not disclosed pursuant to CPLR 3101(d). The court rejected that argument, finding that the statements set forth in Mr. Young's affidavit "are limited to his personal knowledge from having drafted both the [Anti-Doping] Program and the [World Anti-Doping] Code and, therefore, Mr. Young is not offering expert testimony nor will it be considered as such by this Court."[7]

Note: Hillary A. Frommer is counsel in Farrell Fritz's Estate Litigation Department. She focuses her practice in litigation, primarily estate matters including contested probate proceedings and contested accounting proceedings. She has extensive trial and appellate experience in both federal and state courts. Ms. Frommer also represents large and small businesses, financial institutions and individuals in complex business disputes, including shareholder and partnership disputes, employment disputes and other commercial matters.

[1] 2017 NY Misc LEXIS 2047 [Sur Ct, Nassau County May 17, 2017]. This action was litigated in the Commercial Division and, thus, was governed by Rule 13, which requires the provision of an expert report that is more extensive than the disclosure under CPLR 3101(d), and allows for the deposition of expert witnesses.

[2] *Id.* at *4. In addition to rejecting the "expert witness" argument, the Court also determined that the objectants should have an opportunity to depose the doctor about the newly-identified diagnosis, and further expressed that it would have more sympathy for the argument that such deposition would inconvenience the doctor had he testified about that diagnosis at a prior deposition and not raised it for the first time in the post-deposition affidavit.

[3] CPLR 3101(d)(iii).

[4] 148 AD3d 1648 [4th Dept 2017].

[5] *Id.* at 1649.

[6] 2017 NY Misc LEXIS 1897 [Sup Ct, NY County May 15, 2017].

[7] *Id.* at *19.

CONSTITUTION

Jae Lee v. United States: Immigration Consequences Trump Prejudice Prong of Ineffective Assistance of Counsel Analysis Under Strickland

By Zach Segal and Cory Morris

Six Supreme Court Judges recently decided, as the dissent noted, "a defendant can undo a guilty plea, well after sentencing and in the face of overwhelming evidence of guilt because he would have chosen to pursue a defense at trial with no reasonable chance of success if his attorney had properly advised him of the immigration consequences of his plea."[1] For criminal defense attorneys, this case means a defendant can succeed in an ineffective counsel claim when the decision to plea was predicated on deportability and, not, whether there is a showing of prejudice or any realistic chance of winning at trial.

Deportation and immigration related detention is of vital importance to criminal defendants. "The landscape of federal immigration law has changed dramatically over the last 90 years."[2] Although never naturalized, petitioner, Jae Lee ("Lee"), had permanent resident status in the United States and ran multiple businesses for decades. Lee was also engaged in the sale of marijuana and ecstasy. The government searched Lee's residence and found 88 ecstasy pills. Lee was charged with one count of possessing ecstasy with intent to distribute in violation of 21 U.S.C. § 841(a)(1), a felony offense carrying a mandatory 10 years in prison.

Zach Segal

Cory Morris

Lee's criminal defense attorney told him it was a near certainty that Lee would be found guilty should he pursue a trial. Lee, however, had not been advised by his defense attorney that his guilty plea would make him automatically deportable but was told by the District Court that his plea "could result in your being deported.[3] Lee's defense counsel explained to him, as with most federal criminal defendants, Lee would receive a lower sentence if he would accept criminal responsibility for his actions. Lee's attorney maintained, "he would not be deported as a result of pleading guilty." Lee's attorney was wrong.

Indeed, although Lee pled and received one year and one day in jail, had he gone to trial he would not only suffer deportation but could suffer a much longer term of incarceration.[4] Lee, however, soon discovered, to his dismay, the crime for which he pled guilty was considered an aggravated felony in violation of the Immigration and Nationality Act, meaning Lee would be deported immediately after the expiration of his federal sentence. This information was readily available to the defense attorney.

Supreme Court Chief Justice Roberts highlighted Lee's repeated inquiries of his criminal defense attorney as to whether a guilty plea would result in deportation.[5] According to Chief Justice Roberts, these repeated inquiries confirm "Lee's claim that he would not have accepted a plea had he known it would lead to deportation." Accordingly, the court opined that "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.'"

The Sixth Amendment guarantees a criminal defendant the effective assistance of counsel at "critical stages of a criminal proceeding," including when a defendant enters a guilty plea.[6] As per *Strickland v. Washington*, a criminal defendant may establish a claim of ineffective assistance of counsel by showing his "counsel's representation fell below an objective standard of reasonableness" and, as relevant here, the representation prejudiced the defendant by "actually ha[ving] an adverse effect on the defense." Prior and subsequent history extended *Strickland* to plea agreements focusing on whether the attorney's deficient performance denied defendant of the entire judicial proceeding.

The analysis in regard to a defendant's plea derived from a previous holding, involving immigration repercussions.[7]

Long before President Trump, the Supreme Court noted, "[t]he importance of accurate legal advice for noncitizens

(Continued on page 23)

Jae Lee v. United States *(Continued from page 18)*

accused of crimes has never been more important." The Sixth Circuit affirmed the district court's reversal in Lee's case, holding the outcome would not have changed because Lee likely would have lost at trial anyway. No prejudice. Contrary to the circumstances in *Lafler v. Cooper*, the Sixth Circuit found Lee was not prejudiced considering the outcome would be the same if he went to trial, if not worse.[8] Diminishing the second prong of the analysis, the Supreme Court rested the requirement of prejudice on essentially, the gamble of a criminal defendant who may suffer deportation as the result of his or her actions.

The majority focused on Lee's decision to plead as riding on the erroneous advice of counsel.[9] The majority, however, disregards the overwhelming evidence considered by *Hill v. Lockhart* and *INS v. St. Cyr*, in showing that, even with this erroneous advice, there was a remote possibility Lee would have been found not guilty after a trial and, therefore, suffered no prejudice under *Strickland*. Moreover, the majority of the court disagreed with the government's argument that Lee could not show prejudice because Lee's decision to reject the plea would be irrational.

While it is accepted that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation,"[10] the *Jae Lee* case solidifies the onus placed on the criminal defense attorney to understand immigration law, irrespective of a colloquy inquiring as to immigration consequences. Indeed, "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear."[11]

The Supreme Court in *Padilla* declined to decide whether the failure to consider immigration consequences constituted prejudice.[12] In *Jae Lee*, rather than determining whether the "outcome of the plea process would have been different with competent advice,"[13] the evidence overwhelmingly indicated that Lee was willing to take a "Hail Mary"[14] and go to trial to avoid deportation; therefore, the attorney's advice prejudiced Lee because there is a reasonable probability it impacted his decision regarding the plea agreement.

Unlike in 2010 when *Padilla v. Kentucky* was decided, today, deportation of noncitizens is an issue of public, political and legal scrutiny. *Jae Lee* is a reminder that a criminal defense counsel's failure to "inform her client whether his plea carries a risk of deportation[,]" can violate the Sixth Amendment, when deportation is the determinative issue regarding accepting a plea.

Note: Zach Segal is an incoming 2L at Touro Law Center and is ranked number 2 in his class. Prior to law school, Zach worked as an advocate for prisoners with the Aleph Institute. He is a Canadian citizen who moved to the United States in order to get his law degree with the hopes of continuing in criminal law.

Note: Cory Morris is a civil rights attorney, holding a Master's Degree in General Psychology and currently the Principal Attorney at the Law Offices of Cory H. Morris. He can be reached at http://www.coryhmorris.com.

[1] *Lee v. United States*, 137 S.Ct. 1958, 1969 (2017).
[2] *Padilla v. Kentucky*, 559 U.S. 356, 359 (2010).
[3] *Lee v. United States*, Sup. Ct. Dkt. No. 16-327, Joint Appendix at 103.
[4] See 21 U.S.C § 841 (b) (2012) ("such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life.")
[5] *Lee*, 137 S. Ct. at 1968-9.
[6] *Id*. at 1964 (citing *Lafler v. Cooper*, 566 U. S. 156, 165 (2012)).
[7] *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) ("Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.")
[8] *Lee*, 137 S. Ct. at 1968 ("Lee insists he would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal that would let him remain in the United States."); *See also Cooper v. Lafler*, 376 F. App'x 563, 573 (6th Cir. 2010), *vacated*, 566 U.S. 156 (2012) ("Petitioner lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him because he was deprived of his constitutional right to effective assistance of counsel. Thus, he has established prejudice.")
[9] *Id*. at 1968. (when Lee entered his plea, the District Court judge asked if Lee understood the implications regarding his immigration status, Lee paused to speak with his attorney who told him, Lee, the judge's questions were legal formalities, which should not concern him. Moreover, Lee's attorney testified, "[I]f he had known Lee would be deported upon pleading guilty, he would have advised him to go to trial."
[10] *Padilla*, 559 U.S. at 367.
[11] *Lee*, 137 S.Ct. at 1958, 1969 (2012).; *See also*, *Padilla*, 559 U.S. at 369.
[12] *Padilla*, 559 U.S. at 369 (Court remanded the prejudice question to Kentucky Court of Appeals because Kentucky has a different standard to determine prejudice.)
[13] *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (citations omitted); see *Kovacs*, 744 F.3d at 52 (recognizing that "the ultimate outcome of a plea negotiation depends on whether the government is willing to agree to the plea the defendant is willing to enter"); see also *United States v. Pi Yuen Chen*, 2017 WL 2334972 (S.D.N.Y. 2017).
[14] C.f. *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012); *Haddad v. United States*, 486 Fed. Appx. 517, 521–22 (6th Cir. 2012); see, e.g., *Kovacs v. United States*, 744 F.3d 44, 52–53 (2d Cir. 2014); see also *United States v. Akinsade*, 686 F.3d 248, 255–56 (4th Cir. 2012), *United States v. Kayode*, 777 F.3d 719, 724–29 (5th Cir. 2014).