Would've, Could've, Should've: Ineffective Assistance of Counsel and Plea Bargaining in Illinois

BY NATE NIEMAN

Recent decisions in the U.S. and Illinois Supreme Courts have complicated the landscape for ineffective-assistance-of-counsel claims brought in the state.

THE U.S. SUPREME COURT'S OPINION IN *LEE v. UNITED STATES*[1] IS THE LATEST in a string of cases clarifying the "prejudice" requirement of *Strickland v. Washington*'s ineffective-assistance-of-counsel test.[2] *Lee* resolved a circuit split over what defendants must show to demonstrate that they were prejudiced by their trial counsel's deficient performance. While *Lee*'s holding is somewhat difficult to pin down, the *Lee* court did reject the government's proposal to adopt a rule that "a defendant with no viable defense cannot show prejudice from the denial of his right to trial," which dovetailed with Illinois law prior to *Lee*.[3] Instead, the *Lee* court directed lower courts to focus on "a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial."[4]

Lee's rejection of the government's proposed *per se* rule makes sense given American courts' tradition of protecting the constitutional rights of all defendants—guilty or innocent. However, *Lee*'s holding breaks with decades of Illinois law, which previously required a defendant to prove that he had a meritorious defense (or that he was actually innocent) to show that he had been denied the effective assistance of counsel guaranteed by the Sixth Amendment during the plea phase.[5]

Lee, by contrast, held that a defendant need not demonstrate that he would have prevailed at trial to show that his Sixth Amendment right to counsel had been violated; rather, after *Lee*, courts are to look at a defendant's "expressed preferences" to determine whether it would

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1. *Lee v. United States*, 137 S.Ct. 1958 (2017).
2. *Id.* at 1964 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).
3. *Id.* at 1966.
4. *Id.*
5. See, *e.g.*, *People v. Hall*, 217 Ill. 2d 324, 335-36 (2005).

TAKEAWAYS >>

- In *Lee v. United States*, the U.S. Supreme Court directed lower courts to rely on the circumstantial decision-making of defendants regardless of the likelihood of conviction when determining ineffective assistance of counsel. The Court's opinion breaks with Illinois law.

- After *Lee*, the Illinois Supreme Court, in *People v. Brown*, attempted to distinguish an ineffective assistance of counsel claim involving a matter of trial strategy related to a defendant's acquittal prospects from a claim involving a defendant's understanding of the consequences of pleading guilty.

- With various tests for ineffective assistance now in tension, questions may become more difficult to resolve when such tests can be applied to the same case.

have been rational for that defendant to proceed to trial instead of having pleaded guilty, even when his chances of prevailing at trial would have been slim.[6]

Prong and prejudice

The right to the effective assistance of counsel is guaranteed by the Sixth Amendment of the United States Constitution. Even noncriminal practitioners are likely familiar with the U.S. Supreme Court case *Strickland v. Washington*,[7] which set forth the test for determining whether this right has been violated. The *Strickland* test requires a defendant to show that his counsel's "representation fell below an objective standard of reasonableness"[8] (the "performance" prong) and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"[9] (the "prejudice" prong). The Court extended the *Strickland* test to the plea phase in *Hill v. Lockhart*, which held that a "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" in order to satisfy the prejudice prong of *Strickland* in the plea phase.[10]

But the Illinois Supreme Court later held in *People v. Huante* that "[t]he mere allegation of prejudice is not enough" to satisfy *Strickland*'s prejudice prong, citing the eleventh circuit case of *United States v. Campbell*.[11] The state supreme court reiterated this position in *People v. Rissley*, which cited *Huante* and two seventh circuit cases for the proposition that "a bare allegation that had counsel not been deficient during plea discussions, defendant 'would have pleaded differently and gone to trial' is not enough to establish prejudice."[12] Indeed, the *Rissley* court held, the defendant must show "something more" than such an allegation, which was, according to the court, "subjective, self-serving, and insufficient to satisfy the *Strickland* requirement for prejudice."[13]

That "something more," the *Rissley* court concluded, was "a claim of innocence or the articulation of any plausible defense that he could have raised had he opted for a trial."[14] Thus, after *Rissley*, a defendant was required to make this showing in order to demonstrate prejudice during the plea phase.[15] Accordingly, his chances of prevailing on this prong would depend "largely on predicting whether the defendant would have likely been successful at trial."[16]

The requirement that a defendant must show "a claim of innocence or the articulation of any plausible defense that he could have raised had he opted for a trial" later came under fire in the third district case of *People v. Guzman*.[17]

The *Guzman* court sidestepped the *Rissley* requirement, using the standard set forth in *Hill* (i.e., that there is a reasonable probability that the defendant would not have pled guilty and would have insisted on going to trial) and *Padilla v. Kentucky* (i.e., that the decision to reject a plea bargain would have been rational under the circumstances) to determine that the defendant in that case met the prejudice prong.[18] Without considering the likelihood of the defendant prevailing at trial, the *Guzman* court found that it was rational under the circumstances for Guzman to forgo a plea bargain because the "defendant might have been willing to risk a lengthier prison sentence in exchange for even a slight chance of prevailing at trial and thereby avoiding deportation."[19]

Justice Holdridge in a special concurrence in *Guzman,* criticized the *Rissley* rule. Holdridge argued that "a defendant facing potential deportation may show that his decision to reject a plea offer and go to trial would have been *rational* (which is all that *Padilla* requires) without showing that he would likely have succeeded at trial."[20] This is because it may be rational to go to trial and risk greater penalties for the slim chance that a defendant may be able to avoid deportation. "Under such circumstances," Holdridge wrote, "it would be inappropriate and overly burdensome to require the defendant to assert either a claim of actual innocence or a plausible defense that could have been raised at trial."[21] Despite the first district reaching the opposite conclusion in *People v. Gutierrez*,[22] it earlier cited Holdridge's concurrence as being persuasive but declined to adopt

6. See *Lee*, 137 S.Ct. at 1967.
7. *Strickland v. Washington*, 466 U.S. 668 (1984).
8. *Id.* at 688.
9. *Id.* at 694.
10. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).
11. *People v. Huante*, 143 Ill. 2d 61, 73 (1991).
12. *People v. Rissley*, 206 Ill. 2d 403, 458 (2003).
13. *Id.* at 459.
14. *Id.*
15. See, *e.g.*, *People v. Hall*, 217 Ill. 2d 324, 335-36 (2005); *People v. Hughes*, 2012 IL 112817, ¶ 64.
16. *Hughes*, 2012 IL 112817, ¶ 64.
17. *People v. Guzman*, 2014 IL App (3d) 090464.
18. *Id.* at ¶ 36 (citing *Padilla v. Kentucky*, 559 U.S. 356 (2010)).
19. *Id.* at ¶ 35.
20. *Id.* at ¶ 78.
21. *Id.*
22. *People v. Gutierrez*, 2011 IL App (1st) 093499, ¶ 45.

LEE REPEATEDLY ASKED HIS ATTORNEY IF HIS DRUG CONVICTION WOULD RESULT IN HIS DEPORTATION. LEE'S ATTORNEY TOLD HIM THAT "HE WOULD NOT BE DEPORTED AS A RESULT OF PLEADING GUILTY." BASED ON THIS REPRESENTATION, LEE PLEADED GUILTY AND WAS LATER SENTENCED TO ONE YEAR AND ONE DAY IN PRISON. LEE THEN LEARNED THAT HIS DRUG CONVICTION WAS CONSIDERED AN AGGRAVATED FELONY UNDER IMMIGRATION LAW AND THAT HE WOULD BE DEPORTED AFTER SERVING HIS SENTENCE.

that position because it was bound by prior Illinois Supreme Court precedent.[23] With the exception of *Guzman*, the *Rissley* rule remained the law in Illinois leading up to the *Lee* decision,[24] though that would change somewhat after *Lee*.

Something more … or *Lee*

The defendant in *Lee v. United States* shared many of the same characteristics as other defendants in the *Padilla* line of cases. Jae Lee was a lawful permanent resident who had been living in the United States for 35 years when he was charged with a single count of possessing ecstasy with intent to distribute after he had admitted to possessing drugs, cash, and a loaded gun that police had seized from his home. Lee's attorney advised him that it was "very risky" to go to trial and that he would receive a lighter sentence if he pleaded guilty instead of standing trial.[25] Lee repeatedly asked his attorney if the drug conviction would result in his deportation. Lee's attorney told him that "he would not be deported as a result of pleading guilty."[26] Based on this representation, Lee pleaded guilty and was later sentenced to one year and one day in prison.

Lee then learned that his drug conviction was considered an aggravated felony under immigration law and that he would be deported after serving his sentence. Lee filed a motion under 28 U.S.C. Section 2255, asking that his conviction and sentence be vacated because he had received ineffective assistance of counsel. The district court found that Lee's attorney had performed deficiently under the first prong of *Strickland*, but it found that Lee had not suffered prejudice under the second prong because "the overwhelming evidence of Lee's guilt" would have "almost certainly" resulted in a finding of guilt at trial, a longer prison sentence, and subsequent deportation.[27] The Sixth Circuit Court of Appeals affirmed the district court's denial of Lee's Section 2255 motion, agreeing with the district court that "Lee had 'no *bona fide* defense, not even a weak one,' so he 'stood to gain nothing from going to trial but more prison time.'"[28] The Supreme Court granted *certiorari*.

The government conceded that Lee's counsel's performance was deficient, so the question before the Court was whether Lee showed that he was prejudiced by his counsel's deficient performance. The government asked the court to "adopt a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial," which tracks Illinois' *Rissley* rule.[29] The Court ultimately declined to do so, citing *Hill*'s focus on "a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial."[30] Rather, the Court noted that "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences."[31] In Lee's case, that meant determining his "expressed preferences" toward deportation versus a slightly longer prison sentence.[32] Like the *Guzman* court, the *Lee* court ultimately decided that it would have been rational for Lee to risk one or two more years in prison for even a slight chance of avoiding deportation. Therefore, Lee had adequately shown a "reasonable probability that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" under *Hill*.[33]

Lee should have had the effect of abrogating the *Rissley* rule because that rule, like the government's proposed rule in *Lee*, "overlooks that the inquiry [the Supreme Court has prescribed] in *Hill v. Lockhart* focuses on a defendant's deci-

ISBA RESOURCES >>

- Kerry J. Bryson, *Quick Take on Illinois Supreme Court Opinion,* People v. Dupree, Illinois Lawyer Now (Nov. 1, 2018), law.isba.org/2FXeItM.
- Ed Finkel, *The Feared 14-Day Letter: What to Do and Not to Do When the ARDC Comes Knocking*, 106 Ill. B.J. 22 (Nov. 2018), law.isba.org/2OfpyGJ.
- ISBA Professional Conduct Advisory Opinion No. 16-02, *Court Obligations; Frivolous Arguments; Reporting Lawyer Misconduct* (June 2016), law.isba.org/2RSY1RR.

23. *People v. Dodds*, 2014 IL App (1st) 122268, ¶ 46.
24. See, *e.g.*, *People v. Valdez*, 2016 IL 119860, ¶ 29.
25. *Lee v. United States*, 137 S.Ct. 1958, 1963 (2017).
26. *Id.*
27. *Id.* at 1964.
28. *Id.*
29. *Id.* at 1966.
30. *Id.*
31. *Id.* at 1967.
32. *Id.*
33. *Id.* at 1969.

sionmaking, which may not turn solely on the likelihood of conviction after trial."[34] *Lee* rejected the bright-line rule that "a defendant with no viable defense cannot show prejudice from the denial of his right to trial" in favor of a case-by-case inquiry into whether it was rationale under that particular defendant's circumstances to have rejected a plea bargain in favor of going to trial, regardless of the merits of his case. This holding echoes *Guzman*, which advocated *Lee*'s approach over *Rissley*'s categorical rule. *Lee*'s holding also is consistent with *Rissley*'s requirement that a defendant must show "something more" than a bald claim that the defendant would have gone to trial but for his defense counsel's deficient performance. Under *Lee*, that "something more" is no longer actual innocence or a plausible defense, it is merely a showing that the decision to reject a plea bargain would have been rational under the circumstances.

Illinois Supreme Court preserves *Rissley*

The Illinois Supreme Court tried to square *Lee* with its existing doctrine in *People v. Brown*,[35] which was decided approximately five months after *Lee*. The defendant in *Brown* filed a postconviction petition alleging that his trial counsel improperly advised him of the proper amount of good-time credit he would have received under his plea agreement, and that he "would not have accepted the plea and would have taken the case to trial wherein he would have been acquitted."[36] The petition was denied and the appellate court affirmed, holding that Brown's allegation of prejudice was insufficient under *Rissley*.

Brown argued at the supreme court that *Lee* "strongly supports his argument that a static prejudice standard cannot be used to adjudicate all claims of ineffective assistance of guilty plea counsel."[37] In examining *Lee*, the *Brown* court noted that "*Lee* distinguished an ineffective assistance claim involving a matter of trial strategy related to a defendant's acquittal prospects from a claim involving a defendant's understanding of the consequences of pleading guilty,"[38] and that prior Illinois law was not inconsistent with *Lee*. *Valdez* and *Hughes*, which concerned "ineffective assistance claims related to a defendant's understanding of the consequences of pleading guilty" used *Padilla*'s "rational under the circumstances" standard, just as *Lee* had.[39] In contrast, the court had taken a different approach when reviewing "an ineffective assistance claim related to a defendant's defense strategy or chance of acquittal, i.e., a defendant's prospect at trial."[40] In that context, the supreme court, citing *Hall* and *Rissley*, required a "claim of innocence or a plausible defense to establish prejudice."[41] The *Brown* court agreed with the defendant that the *Rissley* rule did not apply to his case because he alleged the error related to his understanding of the consequences of pleading guilty, as opposed to his prospects at trial. The *Brown* court determined that the appropriate test was *Padilla*'s "rational under the circumstances" test embraced by *Lee*.[42] The *Brown* court determined that the defendant could not meet that test and affirmed.

The *Brown* decision was somewhat surprising given the court's efforts to preserve the *Rissley* rule when the *Lee* court had condemned such an inflexible *per se* rule. The *Brown* court was able to save the *Rissley* rule by dividing claims of ineffective of assistance of counsel into two distinct types (advice regarding trial prospects and advice regarding plea consequences), despite the *Lee* court failing to do so. The sixth circuit had applied its own version of the *Rissley* rule prior to the supreme court accepting the case, and the supreme court reversed that decision. But while *Lee* appeared to reject the *Rissley* approach in favor of the *Padilla* approach, *Lee* did not expressly overrule the *Rissley* rule, even though it acknowledged that it is often unworkable. Nevertheless, the Illinois Supreme Court chose to keep the *Rissley* doctrine in place, though it had to dramatically limit the class of cases to which *Rissley* would apply. The Illinois Supreme Court left for another day the difficult question of which test will apply when both claims of ineffective assistance of counsel combine in a single circumstance. That question will likely be difficult to resolve. IBJ

THE GOVERNMENT CONCEDED THAT LEE'S COUNSEL'S PERFORMANCE WAS DEFICIENT, SO THE QUESTION BEFORE THE U.S. SUPREME COURT WAS WHETHER LEE SHOWED THAT HE WAS PREJUDICED BY HIS COUNSEL'S DEFICIENT PERFORMANCE. THE GOVERNMENT ASKED THE COURT TO "ADOPT A *PER SE* RULE THAT A DEFENDANT WITH NO VIABLE DEFENSE CANNOT SHOW PREJUDICE FROM THE DENIAL OF HIS RIGHT TO TRIAL," WHICH TRACKS ILLINOIS' *RISSLEY* RULE. THE COURT ULTIMATELY DECLINED TO DO SO.

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34. *Id.* at 1966.
35. *People v. Brown*, 2017 IL 121681.
36. *Id.* at ¶ 15.
37. *Id.* at ¶ 30.
38. *Id.* at ¶ 34
39. *Id.* at ¶ 42.
40. *Id.* at ¶ 45.
41. *Id.*
42. *Id.* at ¶ 46.

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