1-13-2011

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Roger Williams University School of Law

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Professor Mary Holper, director of RWU Law's Immigration Clinic, spoke to the Washington Post about a controversial new immigration decision in Virginia.

From the Washington Post*: "Va. high court says judges may not reopen immigrant cases" by Tom Jackman, Washington Post Staff Writer*

RICHMOND, Va., January 13, 2011: Judges in Virginia may not use an obscure writ to reopen the cases of immigrants who say they weren't told that a criminal conviction could lead to their deportation, the Virginia Supreme Court ruled Thursday.

The high court's ruling came in an Alexandria case in which a Circuit Court judge revisited a 12-year-old case involving a permanent legal resident from Liberia. The defendant had pleaded guilty to embezzling $15,000, and was sentenced to one year in jail. Even immigrants with legal status, or "green cards," are subject to deportation for crimes involving sentences of a year or more, and when the man applied for citizenship years later, he was ordered deported.

The man, Emmanuel Morris, said his attorney told him in 1997 that his plea would not affect his permanent residency. Revisiting the case in 2009, Alexandria Circuit Court Judge Donald M. Haddock reduced Morris's sentence to 364 days, making him ineligible for deportation. Similarly, a Norfolk Circuit Court judge in 2009 retroactively reduced permanent resident Wellyn Chan's 2005 sentence for misdemeanor assault from a year to 360 days.

More recently, a General District Court judge in Loudoun County has vacated the convictions of people who say their attorneys didn't tell them of the immigration consequences of their pleas, allowing them to restart their cases over the objections of prosecutors there.

Immigration lawyers in Virginia were heartened by the U.S. Supreme Court's ruling in Padilla v. Kentucky, which found that failing to advise a defendant of immigration implications was a violation of the Sixth Amendment right to effective counsel. But Virginia's rules on post-trial relief are strict: a 21-day period to file post-trial motions, and up to two years to file a habeas corpus motion, which may be filed only by a defendant in custody.

So lawyers in the commonwealth filed writs of "coram vobis," meaning the "error before us." They argued that the original defense attorneys' failure to tell their clients, and the court, of any immigration consequences was a factual error that required the case to be reopened.

Argument rejected

The Virginia Supreme Court rejected that argument. In a ruling joined by the entire court, Justice Donald W. Lemons wrote that "ineffective assistance of counsel does not constitute an error of fact for the purposes of coram vobis."

Lemons addressed the Padilla issue, saying that "while Morris and Chan may have suffered ineffective assistance of counsel according to Padilla, and may have been successful had they timely filed petitions for writs of habeas corpus, neither did so." Neither defendant learned of the problems their convictions would cause them until years after they had completed their sentences.

"This is the right result," Alexandria Commonwealth's Attorney S. Randolph Sengel said. "If it does nothing else, hopefully this decision will curtail the filing of these writs in state courts in Virginia and put issues of immigration consequences of old criminal convictions in the proper forum, which is the federal immigration court."

But **Mary Holper**, a former immigration lawyer in Virginia and now **a law professor and immigration clinic director at the Roger Williams University**

School of Law, said the state court made a mistake. "The Virginia Supreme Court has effectively rendered the U.S. Supreme Court's powerful Padilla decision useless in the state," she said.

Holper said the suggestion that these issues be handled in immigration courts is misplaced. "Once someone has an aggravated felony conviction," **Holper said**, "there's no 'dealing with it' in deportation proceedings. It means mandatory deportation."

Morris's attorney, Jennifer S. Varughese, said she was considering an appeal to the U.S. Supreme Court, which she said recognized the harshness of federal immigration courts in its Padilla ruling.

Morris was a refugee from the civil war in Liberia and obtained permanent legal resident status. He acknowledged that while employed at a Sears store, he was part of a buy-and-return scam. Haddock suspended all but one month of his one-year sentence and ordered him to pay $15,000 restitution, which he did.

Morris married, became a pastor, a father of four and active social worker in North Carolina. Deportation proceedings against him were delayed, not dropped, when he appealed his old Alexandria case, and they are set to resume in March, Varughese said.

She said Haddock recognized that Morris had paid his debt to society, and the judge wrote that he would have sentenced Morris to 364 days in 1997 if he had been aware of the immigration situation. "It would be a travesty for him to return to Liberia," leaving his family and ministry behind, Varughese said.

Mixed approach

Dan Kesselbrenner, executive director of the National Immigration Project of the National Lawyers Guild, said that state courts nationwide have taken a mixed approach on whether Padilla should apply retroactively and that states have different rules on how long defendants have to revisit their convictions.

"But in a world with common sense," Kesselbrenner said, "you wouldn't have prosecutors going in and appealing a one-day sentence reduction."

Loudoun Chief Deputy Commonwealth's Attorney James P. Fisher said that the ruling was "a victory for the rule of law" and that "this should stop the flow of petitions that have continued to roll into our courts in Loudoun."