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WAS THE ATTORNEY REALLY INEFFECTIVE IN KOVACS V. UNITED STATES?

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In *Kovacs v. United States*, the United States Court of Appeals for the Second Circuit reversed a lower district court's decision denying a writ of error *coram nobis* to vacate a 1999 guilty plea to misprision of felony on the ground that his lawyer rendered ineffective assistance.

While the outcome of the Second Circuit's decision is extremely beneficial for the petitioner Stephen Kovacs, who would otherwise suffer adverse immigration consequences, it does not appear that his attorney Robert Fink rendered ineffective assistance. When Kovacs, a lawful permanent resident, took the guilty plea for misprision of felony in 1999 it was not considered a crime involving moral turpitude, and would not have then resulted in adverse immigration consequences. Indeed, after taking the plea in 1999, Kovacs, an Australian national, continued to travel internationally without incident when in 2009 immigration officials questioned his ability to reenter the country on the ground that misprision of felony is considered a crime of moral turpitude.

The writ of *coram nobis* is an extraordinary remedy that is sought to correct errors, such as a criminal conviction, based on the following three factors: 1) there are circumstances compelling such action to achieve justice, 2) sound reasons exist for failure to seek appropriate earlier relief, and 3) the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting the writ. *See Foont v. United States*, 93 F.3d 76, 79 (2d Cir. 1996).

Kovacs' key argument for why he deserved to be granted the writ of *coram nobis* is that his attorney at that time, when he took the guilty plea for misprision of felony, was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). A claim of *Strickland* ineffectiveness involves a demonstration that: 1)

the defense counsel's performance was objectively unreasonable; and 2) the deficient performance prejudiced the defense.

The Second Circuit agreed that Fink's representation of Kovacs, when he took the guilty plea for misprision of felony, was ineffective under the *Strickland* test. The Court relied on *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002), which held that an affirmative misrepresentation of the deportation consequences of a guilty plea fell outside the range of professional competence and thus met the *Strickland*test.

There is, however, surprisingly no discussion in the Court's decision on why Fink's assistance of Kovacs was ineffective in 1999. It was only in 2006 when the Board of Immigration Appeals in *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006) determined that a misprision of felony conviction under 18 U.S.C. §4 was a crime involving moral turpitude. In 1999, when Kovacs took the misprision plea, the BIA's holding in *Matter of Sloan*, 12 I&N Dec. 840 (A.G. 1968, BIA 1966), established that misprision of felony was not a crime involving moral turpitude. *Matter of Sloan* was only overruled by *Matter of Robles* many years later! *Robles* also retroactively applied to non-citizens previously convicted of misprision of felony. Any competent and diligent attorney in 1999 could have relied on *Matter of Sloan*in advising the non-citizen client to take a plea for misprision for felony as it did not have adverse deportation consequences at that time. To make this more bizarre, the Ninth Circuit in *Robles-Urrea v. Holder*, 678 F.3d 702 (9th Cir.2012), ultimately overturned the BIA in the same case by holding that misprision is not categorically a crime involving moral turpitude because it does not require a specific intent to conceal the felony, but only knowledge of the felony. Therefore, based upon an analysis of minimal conduct necessary to be implicated under the misprision statute, the Ninth Circuit held that such conduct is not inherently base, vile or depraved to be considered morally turpitudinous. Even if a Circuit Court has overruled a BIA decision, it would only be inapplicable within the jurisdiction of that Circuit Court, which in *Robles-Urrea* is the Ninth Circuit, but the overruled BIA decision is still applicable everywhere else in the country.

The grant of a writ of *coram nobis* is undoubtedly a wonderful outcome for Kovacs whose circumstances were very sympathetic, but the question is whether his attorney was ineffective in 1999, and affirmatively misrepresented the deportation consequences so as to be judged to have rendered ineffective assistance. This did not appear to be the case on the part of his attorney under

Matter of Sloan, the precedential decision at that time. Moreover, the holding in *Matter of Sloan* is still considered good law in the Ninth Circuit. Perhaps there may have been some sort of strategic collusion here that is not readily apparent to an objective reader of the decision. Fink may have wanted to help his former client and did not come in the way. The government also may not have wanted to impede the retroactive applicability of *Matter of Robles*. When an attorney's incompetence is not so clear cut, the non-citizen affected by the criminal conviction may consider seeking alternative remedies such as challenging the retroactive holding of the BIA. It may sometimes be impermissible for an agency to make a retroactive ruling that affects reasonable reliance interests. *See*Heckler v. Community Health Servs. of Crawford County, Inc., 467 U.S. 51, 60 n.12 (1984), Miguel-Miguel v. Gonzales, 500 F.3d 941, 950-953 (9th Cir. 2007), Lehman v. Burnley, 866 F.2d 33, 37-38 (2d Cir. 1989). If the plea occurred before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), then non-citizen LPRs who have been convicted of crimes involving moral turpitude can still be admitted if their trips overseas were brief, casual and innocent. *See* Vartelas v. Holder, 132 S. Ct. 1479 (2012). If the conviction occurred after the passage of IIRIRA, then a non-citizen may still seek a waiver under INA 212(h) to overcome the inadmissibility caused by the crime of moral turpitude.

This is not to suggest that non-citizens should be reluctant to seek to vacate their criminal convictions based on ineffective assistance of counsel. In Padilla v. Kentucky, 130 S. Ct. 1473 (2010), the Supreme Court allowed a non-citizen's plea to be vacated upon ineffective assistance of counsel when his attorney did not advise him about the immigration consequences of his plea. Later, in Chaidez v. United States, 133 S. Ct. 1103 (2013), the Supreme Court clarified that Padilla would not be applied retroactively to criminal cases that were already final when *Padilla* was decided. However, *Chaidez's* preclusion against retroactivity is inapplicable when the attorney affirmatively misadvised the non-citizen about the immigration consequences of the criminal plea, as was the case in *Kovacs*, rather than fail to provide any advice. Still, that advice ought to have been wrong before an ineffective assistance claim can pass muster. While an attorney who is found to have rendered ineffective assistance in the criminal context will likely not be disciplined, one would not want to be publicly found by a Court of Appeals to have been incompetent and rendered ineffective assistance several years later just because the law changed retroactively. An

attorney, besides being expected to thoroughly research the prevailing law at a given point in time, ought not to be expected to gaze into a crystal ball to determine whether the law can change many years later in order to avoid being ambushed by an ineffective finding!