Law Review: Penn professor and students help win Supreme Court case

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It all began at a gathering of former clerks of **_Supreme Court_** Justice Anthony Kennedy in Washington in 2008. It was there that University of Pennsylvania **_law_** **_professor_** Stephanos Bibas connected with his old friend Stephen Kinnaird.

The two had attended Yale **_Law_** School together and both had, at different times, clerked for Kennedy.

At the reunion, they agreed to connect Kinnaird's **_Supreme Court_** practice with a program that Bibas planned to develop at **_Penn_** to introduce **_students_** to what is the most esoteric and rarefied kind of **_law_**: Arguing **_cases_** before the **_Supreme Court_**.

That meeting would **_help_** to remake the **_law_** for thousands of legal immigrants to the United States. It might someday serve as the basis for shaping important new legal protections for native-born Americans as well.

The fateful call from Kinnaird came a few months after the Washington meeting. He had taken a pro bono **_case_** involving Jose Padilla, a Honduran immigrant who had been arrested in Kentucky in 2001 on drug charges after police pulled over his tractor-trailer and found more than 1,000 pounds of marijuana inside.

Padilla's **_court_**-appointed attorney advised him to plead guilty, assuring Padilla the conviction would not impact his immigration status.

The lawyer was dead wrong.

Padilla's guilty plea in 2002 to drug charges triggered an automatic process that all but guaranteed Padilla, identified as a Vietnam War veteran in **_court_** papers and a truck driver who had spent decades living quietly in Southern California with his wife and children, would be deported.

The outcome is exactly the kind of **_case_** that might drive tea party activists and others concerned about America's porous borders to distraction: An immigrant from Central America is arrested with a half-ton of marijuana, faces deportation, takes the **_case_** all the way to the **_Supreme Court_** over years of appeals, and then beats the rap with the **_help_** of some slick, well-paid lawyers.

But as the briefs amply make clear, this **_case_** has little to do with the current immigration debate.

Padilla's **_case_** was about fairness, procedure, and making sure defendants knew the consequences of pleading guilty - issues that concern every criminal defendant in America, whether they are citizens or not.

"When you are charged with a crime, your lawyer needs to tell you the full picture," said Bibas, a former assistant U.S. attorney in Manhattan who teaches criminal procedure at **_Penn_**, and who lives with his wife and two children in Fairmount. "You would never hire a business lawyer to advise you on a contract for a company if the lawyer was not also able to say that this might get you in trouble with antitrust authorities or you will be liable for violating someone's patent."

Padilla's green card allowed him to work and stay in the U.S. indefinitely, and he was classified as a legal permanent resident. Apart from the right to vote, he had many of the same constitutional rights as a full citizen.

That meant he should have been afforded full due process, which includes the right to competent counsel, under the Sixth Amendment. Since his lawyer gave him bad advice on the immigration consequences of a guilty plea, Padilla argued, the conviction should be thrown out.

The Kentucky **_Supreme Court_** differed. It agreed he had gotten bad advice. But a majority of the **_court_** said it didn't matter because Padilla's deportation was a "collateral consequence" of the criminal proceeding and not central to the **_case_**.

As two dissenting jurists in Kentucky put it, having a lawyer give a client bad advice is worse than having no lawyer at all.

The U.S. **_Supreme Court_** had never taken a position on the issue raised by Padilla, so it was a ripe **_case_**. Bibas and his **_students_** threw themselves into the work with gusto. Bibas and **_Penn_** lecturer Yolanda Vazquez wrote an amicus brief while the **_students_** did research on the extent of the problem in criminal **_courts_** around the country and handled other tasks, often working nights and weekends.

"They had a real client and something meaningful to fight for," Bibas said of his **_students_**.

After the **_Supreme Court_** agreed to take the **_case_**, the group traveled to Washington to hear the oral arguments. The **_students_** waited in line for hours to sit in the chambers. Bibas sat at the counsel table and offered advice to Kinnaird, of the firm of Paul, Hastings, Janofsky & Walker L.L.P., who argued the **_case_**. When the **_court_** ruled in their favor earlier this year, adopting much of the language contained in their briefs, it was a rush for everyone.

"This is the first time that the **_court_** has ever gotten into this," Bibas said.

It was exciting in no small part because Padilla's legal team had persuaded seven of the **_court_**'s nine justices, conservatives as well as liberals, to adopt much of their reasoning.

Only Justices Antonin Scalia and Clarence Thomas dissented.

The ruling was carefully tailored to apply only to immigration **_cases_**.

But Bibas says the logic of the opinion suggested it might well be extended to other instances in which the indirect consequences of a guilty plea can have devastating consequences, such as a nurse losing a professional license, or a parent losing custody of a child.

"What defendants most need to know are the big predictable consequences [of a conviction]," says Bibas.

What Bibas and his **_students_** **_helped_** to bring before the **_Supreme Court_** would seem to ensure that more defendants will be getting that information.

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