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No. 08-651

IN THE
Supreme Court of the United States

JOSE PADILLA,
Petitioner,
v.
COMMONWEALTH OF KENTUCKY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. In providing the effective assistance guaranteed by the Sixth Amendment, does defense counsel never have a duty to investigate and advise a non-citizen client whether the offense to which he is pleading guilty will result in his deportation?

2. If a criminal defense attorney falsely advises a non-citizen client that his plea of guilty will not result in deportation, can that misadvice constitute ineffective assistance of counsel under the Sixth Amendment?

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BRIEF OF PETITIONER

OPINIONS BELOW

The Kentucky Supreme Court's opinion is reported at 253 S.W.3d 482 (Ky. 2008) and is reprinted in the Petition Appendix (Pet. App.) 19-27. The Kentucky Supreme Court's order denying rehearing was not reported and is reproduced at Pet. App. 28. The opinion of the Kentucky Court of Appeals was designated to be published but was not. It is reproduced at Pet. App. 29-40. The Hardin County Circuit Court's order denying Petitioner's motion for post-conviction relief was not reported and is reproduced at Pet. App. 41-44.

JURISDICTION

The Kentucky Supreme Court entered final judgment on January 24, 2008 and denied a petition for rehearing on June 19, 2008. On September 16, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including November 16, 2008. Petitioner timely filed the petition for writ of certiorari on November 14, 2008, which this Court granted on February 23, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The relevant statutory and regulatory provisions are set forth in an appendix to this brief.

STATEMENT OF THE CASE

When defense counsel represents an immigrant in a criminal prosecution, "'[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (quoting 3 Bender, *Criminal Defense Techniques* §§ 60A.01, 60A.02[2] (1999)). Petitioner Jose Padilla, a longtime lawful permanent resident of the United States and U.S. Army veteran, pleaded guilty in 2002 to a state felony offense for marijuana drug trafficking. Padilla did so on the advice of defense counsel that he did not need to worry about deportation because he had been in this country for so long. In fact, the Kentucky drug trafficking offense is an "aggravated felony" under federal law

that effectively subjects Padilla to mandatory deportation. The Kentucky Supreme Court nonetheless denied Padilla's motion to vacate his plea on the grounds of ineffective assistance of counsel. Pet. App. 23. The Kentucky court held that advice on the "collateral consequence" of deportation is outside the scope of the Sixth Amendment guarantee, and that neither failure to advise nor even affirmative misadvice about such consequences can give rise to a claim of ineffective assistance of counsel. *See id.* The Kentucky rule has no basis in precedent or logic, and this Court should reject it.

A. Immigration Law Background

Because of recent amendments to the Immigration and Nationality Act, a great number of criminal convictions now lead to the dire and inevitable consequence of deportation. Criminal convictions have long been a basis for deportation of immigrants. *See St. Cyr,* 533 U.S. at 294-97. By 1988, deportable crimes included convictions of "a crime involving moral turpitude committed within five years after entry" and a sentence of imprisonment or actual imprisonment for at least one year; convictions related to controlled substances; and convictions of aggravated felonies. 8 U.S.C. § 1251(a)(4), (11) (1988).[1] At the time, aggravated felonies encompassed only crimes of murder, drug trafficking, and arms trafficking. *Id.*

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[1] Unless otherwise noted, references to federal and state statutes and regulations are to the provisions in effect in 2002, the year of Petitioner's conviction.

In earlier decades, deportation was not an inevitable consequence of conviction because of widely available mechanisms of judicial and administrative relief. From the inception of the Immigration and Nationality Act of 1917 until 1990, courts had the power to issue a Judicial Recommendation Against Deportation ("JRAD"), 8 U.S.C. § 1251(b) (1988), in order "to make the total penalty for the crime less harsh and less severe when deportation would appear to be unjust." *Janvier v. United States*, 793 F.2d 449, 453 (2d Cir. 1986) (citing 53 Cong. Rec. 5169-74 (1916)). A JRAD was binding upon the Attorney General and conclusively determined that a particular conviction could not serve as the basis for deportation. *Id.* at 452. Indeed, a JRAD was so essential to avoiding the collateral consequence of deportation that courts found failure to request a JRAD for a defendant facing deportation to be ineffective assistance of counsel under the Sixth Amendment. *See*, *e.g., United States v. Castro,* 26 F.3d 557, 563 (5th Cir. 1994); *Janvier*, 793 F.2d at 456.

Immigration officials also had ample power to relieve immigrants of the deportation consequences of their convictions. For example, until the 1990s, the Attorney General had "broad discretion" under Section 212(c) of the Immigration and Nationality Act to issue a waiver of deportation. *St. Cyr,* 533 U.S. at 294-95. "Factors meriting favorable exercise of administrative discretion included family ties in the United States, hardship, and length of residence in the United States, even where adverse factors in an application were present." Lea McDermid, *Deportation is Different: Noncitizens and Ineffective*

Assistance of Counsel, 89 Cal. L. Rev. 741, 759 (2001). The Attorney General granted relief in more than half the cases in which waiver was sought. *Id.* at 759-60. Between 1989 and 1995, more than 10,000 aliens received relief under this provision. *St. Cyr*, 533 U.S. at 295-96.

Beginning in 1990, the entire landscape changed. The Immigration and Nationality Act of 1990 eliminated the JRAD procedure, both prospectively and retroactively. *See* 8 U.S.C. § 1251(b) (1988), *repealed by* Immigration Act of 1990, Pub. L. No. 101- 649, § 505, 104 Stat. 4978, 5050. In the 1990 Act, Congress designated substantially more crimes as aggravated felonies, *see id.* § 501, and limited the forms of legal relief available to them. It barred aggravated felons from proving "good moral character," thus making them ineligible for various immigration benefits. *Id.* §§ 509, 515(a) (codified as amended at 8 U.S.C. §§ 1101(a)(43), 1101(f)(8), 1158, 1229(b)-(c), 1259(c), 1427(d)). It also barred immigrants from waiver of deportation if they had served five or more years in prison for an aggravated felony. *See id.* § 511(a), 104 Stat. 5072; *Matter of Ramirez-Somera*, 20 I. & N. Dec. 564, 564-65 (BIA 1992).

Six years later, the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) stiffened the immigration laws for aggravated felonies even further. Congress prospectively eliminated Section 212(c) relief, although it is still retroactively available in some cases. *See* AEDPA, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1276-77 (codified as amended at 8 U.S.C.

§ 1105a(a)(10)); IIRIRA, Pub. L. No. 104-208, § 304(b) (1996); *see also St. Cyr,* 533 U.S. at 297. In its stead, Congress gave the Attorney General the authority to "cancel" removal for a defined class of deportable immigrants. *See* IIRIRA, § 304(a)(3) (codified at 8 U.S.C. § 1229b(a)) (cancellation of removal for permanent residents). Congress made individuals convicted of aggravated felonies ineligible for the cancellation remedy. IIRIRA § 304(a)(3) (codified as amended at 8 U.S.C. § 1229b(a)-(c)); Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law and Crimes* § 10:23 (2008).

The 1996 laws further expanded the range of offenses that qualify as aggravated felonies. McDermid, *supra*, at 744. As a result, aggravated felonies now encompass a wide array of nonviolent offenses for which the sentence imposed is a term of imprisonment of at least one year (regardless of time served or suspension of sentence). Those offenses include such crimes as passport or document fraud, obstruction of justice, forgery, perjury, commercial bribery, and trafficking in vehicles with altered identification numbers. *See*, *e.g.*, 8 U.S.C. § 1101(a)(43)(P), (R), (S); Kesselbrenner & Rosenberg, *supra*, at § 7:37. Accordingly, courts have held that even state misdemeanor offenses may qualify as aggravated felonies for purposes of federal immigration law, regardless of whether the defendant served a term of imprisonment. *See, e.g.*, *United States v. Graham*, 169 F.3d 787, 788-91 (3d Cir. 1999) (holding that petty theft with a one-year suspended sentence is an aggravated felony for immigration purposes). Indeed, many offenses, such as drug trafficking (the offense at issue here), are

aggravated felonies regardless of the sentence imposed. *See* 8 U.S.C. § 1101(a)(43)(B); *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006); *see also, e.g.*, 8 U.S.C. § 1101(a)(43)(M)(i), (ii) (2009) (tax evasion or fraud in which the loss exceeds $10,000).

Thus, once removal proceedings are commenced, immigrants have virtually no defense if their convictions fall into the capacious category of "aggravated felonies." Criminal defense counsel are the last line of defense. Counsel who are aware of immigration consequences achieve significant victories for their clients in the criminal prosecution by crafting trial and plea bargaining strategies to avoid conviction of offenses that may be classified as aggravated felonies. Often, the target disposition is simple: for example, counsel may obtain agreements to plead guilty to a different count in the indictment that is either not deportable or does not disqualify the defendant from eligibility for cancellation for removal. *See* Norton Tooby & Joseph Rollin, *Safe Havens: How to Identify and Construct Non-Deportable Convictions* (2005) ("Tooby on Safe Havens") (collecting decisions ruling certain offenses not to be aggravated felonies or not deportable, and advising on the creation of safe havens from deportation in sentencing). Furthermore, counsel may achieve sentences below the level that cause certain offenses to be classified as aggravated felonies (for example, a 364-day sentence rather than a 365-day sentence). *See, e.g.*, *State v. Quintero-Morelos*, 137 P.3d 114, 119 (Wash. Ct. App. 2006); Norton Tooby & Joseph Rollin, *Criminal Defense of Immigrants* § 10.1 (4th Ed. 2007) ("Tooby on Criminal Defense"). Finally, if all else fails, counsel may take a

case to trial if the client makes the calculated decision to do so considering all the circumstances, including the threat of deportation.

B. Petitioner's Conviction

Petitioner Jose Padilla, born in Honduras in 1950, is a lawful permanent resident of the United States. J.A. 44, 77. He arrived in the United States from Honduras in the 1960s, and later served honorably in the U.S. military in the Vietnam War. J.A. 77; Pet. App. 19. He lives with his family in California. J.A. 77.

In September 2001, Padilla, a licensed commercial truck driver, was arrested in Kentucky for transporting marijuana. J.A. 1-2. In October 2001, he was indicted in Hardin County Circuit Court for misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia, felony trafficking in marijuana, and failing to have a weight and distance tax number on his truck. J.A. 47-49.

Padilla initially pleaded not guilty, and was released on bond. J.A. 8-9. The Immigration and Naturalization Service soon thereafter lodged an immigration detainer instructing the custodian to retain him 48 hours because "investigation has been initiated to determine whether this person is subject to removal from the United States" for unlawful entry. J.A. 44-46. The Hardin District Court misinterpreted this standard notice of investigation to suggest that Padilla "is believed to be an illegal alien" and revoked bail on September 19, 2001. J.A. 43. His counsel never raised with the District Court

that Padilla was a lawful permanent resident of the United States, and Padilla remained unnecessarily in custody prior to conviction for almost a year.

Padilla pleaded guilty to the misdemeanor drug and paraphernalia possession counts and the felony marijuana trafficking count; the fourth count was dismissed. J.A. 57-58. The marijuana trafficking statute to which Padilla pleaded guilty provides that "a person is guilty of trafficking in marijuana when he knowingly and unlawfully traffics in marijuana." Ky. Rev. Stat. Ann. § 218A.1421(1). A first offense of trafficking in five pounds or more of marijuana is a Class C felony, which is punishable by a term of imprisonment of five to ten years. Ky. Rev. Stat. Ann. §§ 218A.1421(4)(a), 532.060(2)(c).

The plea agreement recommended a sentence to the maximum term of imprisonment on each count, to run concurrently for a total of 10 years, with five years served and five probated. J.A. 58-59.[2] Padilla also agreed to forfeit his truck and trailer. *Id.* On October 4, 2002, the court entered judgment convicting Padilla of those counts and imposing the agreed-upon sentence. J.A. 61-68. The court gave

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[2] A ten-year concurrent sentence is the maximum sentence that could have been imposed by law. Ky. Rev. Stat. Ann. § 532.110(1)(a) (2002) (sentences for a misdemeanor (referred to as a "definite term") must run concurrently with sentences for felonies (referred to as an "indeterminate term"), and both sentences are satisfied by service of the felony sentence).

Padilla credit for 365 days time served toward his sentence. J.A. 67. [3]

Padilla accepted the plea bargain in reliance on advice by his attorney that he did not have to worry about his immigration status as a result of the plea. *Cf. Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (2001) (allegations of post-conviction petition are taken as true unless conclusively refuted by the record). The plea bargain provided only meager benefit to Padilla. Had Padilla gone to trial, he would not only have forced the Commonwealth to its proof of guilt by a reasonable doubt, but he also would have been entitled to request jury sentencing (and to present mitigating sentencing evidence). Ky. Rev. Stat. Ann. § 532.055(2). He may have received a substantially lower sentence than ten years, perhaps the minimum of five years. In any event, he would have been parole eligible after serving 20% of his sentence. 501 Ky. Admin. Regs. 1:030. Thus, even if he had gone to trial and received the maximum sentence of ten years, he would have been eligible for parole within approximately a year from conviction (given his credit of 365 days for time served). Padilla nonetheless chose to accept the certainty of a five year term of imprisonment with five years probated.

Padilla was misadvised by his attorney on the deportation consequences of his plea. J.A. 72.

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[3] Padilla's *pro se* petition indicated that six days after judgment, "the movant had an Immigration Detainer lodged against him." J.A. 71. It appears that the correctional facility notified the INS on that date that it had lodged the 2001 detainer, not that the INS issued a second detainer. *See* J.A. 69-70.

Padilla's felony drug conviction was a deportable crime, and indeed an aggravated felony. 8 U.S.C. § 1101(a)(43)(B); 8 U.S.C. § 1227(a)(2)(A)(iii) & (B)(i). Padilla's counsel had failed to investigate the immigration consequences associated with the proposed plea, and yet nonetheless affirmatively advised his client that he "did not have to worry about immigration status since he had been in the country so long." J.A. 72; Pet. App. 3. Had Padilla known the true consequences of his plea, he would not have pleaded guilty and would have insisted on going to trial. J.A. 72-73.

C. Post-Conviction Proceedings

On August 18, 2004, Padilla filed a *pro se* motion for post-conviction relief in the Hardin County Circuit Court alleging ineffective assistance of counsel. J.A. 71-74. As noted above, Padilla alleged that counsel was required to investigate possible immigration consequences, and that counsel's wrongful advice on the deportation consequences of his plea without investigation constituted ineffective assistance. J.A. 72. Padilla further alleged that he suffered prejudice as a result of the mistaken advice and failure to investigate, and that he would have gone to trial if properly advised. J.A. 72-73.

Under Kentucky law, a petitioner for post-conviction relief is entitled to an evidentiary hearing if the petition "on its face states grounds that are not conclusively refuted by the record and that, if true, would invalidate the conviction." *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000); Ky. R. Crim. P. 11.42. The Circuit Court *sua sponte* denied Padilla's motion, without awaiting the State's

answer and without an evidentiary hearing. The Circuit Court ruled that advice on collateral deportation consequences cannot give rise to a Sixth Amendment claim. Pet. App. 43-44. The Circuit Court also found that Padilla was aware of the possibility of deportation because of the 2001 immigration detainer (even though that detainer noticed an investigation of the lawfulness of his entry, [4] and did not concern the deportation consequences of conviction). Pet. App. 44.

On appeal, the Kentucky Court of Appeals reversed. It concluded that under *Commonwealth v. Fuartado*, 170 S.W.3d 384 (Ky. 2005), a defendant cannot bring an ineffective-assistance claim based on counsel's failure to investigate (or advise the defendant regarding) the immigration consequences of his plea. Pet. App. 32-34. However, relying on *Sparks v. Sowders*, 852 F.2d 882 (6th Cir. 1988), the Court of Appeals held that Padilla had stated a claim with respect to his allegation that counsel affirmatively misadvised him: "We are persuaded that counsel's wrong advice regarding deportation *could* constitute ineffective assistance of counsel pursuant to *Sparks* . . . ." Pet. App. 36 (emphasis added). The Kentucky Court of Appeals held "[t]he record does not refute [Padilla's] allegation that counsel had affirmatively assured him he would not be deported as a result of pleading guilty; nor does it refute his claim that but for counsel's mistaken advice, he would not have pled guilty." Pet. App. 36.

[4] The reason for the INS's investigation of Padilla's entry status is unclear, since he is a lawful permanent resident. J.A. 77-78.

Finding that there were "relevant and substantial issues of fact" to be resolved, the Court of Appeals remanded for an evidentiary hearing. Pet. App. 36.

A divided Kentucky Supreme Court reversed. Pet. App. 19. The court held that counsel's failure to investigate immigration consequences, in and of itself, could not support an ineffective-assistance claim. Pet. App. 23. The court then went further, concluding that even affirmative misadvice on the subject of immigration consequences was not cognizable under the Sixth Amendment. Pet. App. 23. While recognizing that many courts have drawn a distinction between a lawyer's failure to advise and the rendering of incorrect advice, the court refused to do so: "As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise [Padilla] of such collateral issue or his act of advising [Padilla] incorrectly provides no basis for relief." Pet. App. 23. Because "[i]n neither instance is the matter required to be addressed by counsel," the Kentucky court held that "an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington* [466 U.S. 668 (1984)]." Pet. App. 23. Because the collateral-consequences rule foreclosed relief without need of an answer by the Commonwealth or an evidentiary hearing, the Kentucky Supreme Court did not address the question of whether it could be conclusively determined from the record whether Padilla's attorney's performance was objectively unreasonable or prejudicial.

Two Justices dissented, declaring, "Counsel who gives erroneous advice to a client which

influences a felony conviction is worse than no lawyer at all. Common sense dictates that such deficient lawyering goes to effectiveness." Pet. App. 26 (Cunningham, J., dissenting). The dissenting Justices agreed with the court of appeals that Padilla was entitled to a hearing. Pet. App. 26.

SUMMARY OF THE ARGUMENT

The Kentucky Supreme Court's collateral-consequences rule has no foundation in the Sixth Amendment and contravenes this Court's precedents. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that Sixth Amendment claims of ineffective assistance of counsel are determined under a two-pronged test requiring [1] a showing that counsel's performance fell below an objective standard of reasonableness and [2] prejudice to the defendant. And in *Hill v. Lockhart,* 474 U.S. 52 (1985), this Court declined to import the collateral-consequences doctrine, which governs a court's duty to advise the defendant before accepting a guilty plea, into the Sixth Amendment. It held instead that an ineffective-assistance claim based on counsel's misadvice regarding the collateral consequence of parole eligibility must be resolved under *Strickland*. *Hill* compels rejection of the rule below.

Even if *Hill* did not foreclose invocation of the collateral-consequences rule, that rule conflicts with the Sixth Amendment. First, the collateral-consequences doctrine arose to define the duties of *a court* with regard to accepting guilty pleas under Fed. R. Crim. P. 11. It is not germane to the different and much broader duties of *defense counsel* in defending a criminal prosecution. Courts are passive and neutral.

They conduct no investigation into the prosecution's case or available defenses. Most critically, unlike courts, defense counsel have a paramount Sixth Amendment duty to protect the interests of the client that are at risk in the prosecution. Clients are not concerned solely with the direct penal consequences of conviction. They seek protection from the most significant harms of conviction, regardless of the source. For many immigrant defendants, the deportation consequences of conviction will matter much more than the criminal punishment. Indeed, when charges that fit the immigration classification of aggravated felonies hang in the balance, the criminal prosecution is effectively the defendant's only opportunity to prevent deportation. Competent representation in the criminal prosecution may require that counsel advise the client of the deportation risks of a proposed plea. Competent counsel may also need to shape defense strategy to avoid deportation by bargaining for pleas to nondeportable crimes, by advocating for sentences that will not trigger deportation, or by avoiding a plea and taking a case to trial.

Not only is the collateral-consequences rule a mismatch for the Sixth Amendment, but *Strickland* expressly rejects such mechanical definitions of an attorney's duties in a criminal representation. Instead, *Strickland* commands a contextual determination of the "reasonableness" of an attorney's performance under prevailing professional norms, such as ABA Model Rules and standards. The Kentucky Supreme Court's conception of a truncated duty of counsel that excludes investigation and advice regarding even dire collateral consequences of

conviction is contrary to the most basic ethical rules of the profession. For defense counsel, like any attorney, the client defines the objectives of the representation. Counsel must give the client informed advice about his legal rights, obligations, and risks, and must consult with the client regarding how to pursue his objectives. Counsel cannot limit the scope of the representation without the client's informed consent and without ensuring that the representation will remain competent if it is limited. The duty of competent representation does not permit counsel to remain oblivious of law with which counsel is unfamiliar. Counsel must either acquire the knowledge required by the representation or associate with an attorney competent in the field. Defense counsel cannot simply wash his hands of protecting his client from the most devastating consequences of conviction.

Kentucky's rule also flies in the face of specific professional standards of the American Bar Association and public defenders' organizations requiring criminal defense counsel to investigate and advise clients about the collateral consequences of conviction (especially deportation). This Court should not erode *Strickland*, or countenance wooden rules that leave defendants with no relief even if their pleas of guilty are prejudiced by the stark incompetency of their counsel. In all events, the dichotomy between "direct" and "collateral" consequences is a false one. Because prosecutors take collateral consequences into account in charging decisions, and because judges consider them in sentencing, defense counsel generally must investigate *collateral* consequences in order to reduce

the *direct* penal consequences of conviction. Investigation of collateral consequences is essential to performing counsel's unquestioned function of bargaining for pleas to lesser counts and advocating for reduced sentences.

Alternatively, even if this Court does not wish to decide the fate of the collateral-consequences rule generally, it should not apply it to deportation or to misadvice. Deportation is unlike any other collateral consequence in the combination of its severity, its virtual certainty upon conviction, and the temporal continuity of deportation consequences with criminal punishment. Deportation is irreversible and life-altering, and its imposition has become more certain and less discretionary under the successive revisions to the immigration statutes. This Court, which has already recognized that competent defense counsel generally take relevant immigration law into account during criminal proceedings, *St. Cyr*, 533 U.S. at 323 n.50, should not indulge the damaging fiction that competent counsel would not attend to the deportation implications of conviction in defending the criminal prosecution of an immigrant.

Finally, even if it were *per se* reasonable under *Strickland* not to investigate and advise about collateral consequences, defense counsel's affirmative misadvice to his client about legal questions that the attorney has not adequately researched is objectively unreasonable by any measure. If defense counsel assumes the duty to advise his client and then delivers incompetent advice that induces the client to plead guilty, counsel's performance should be judged by the *Strickland* standards, as virtually every court has ruled.

On any of these grounds, Kentucky's aberrant collateral-consequences rule should fall, and this case should be remanded for a determination of Padilla's entitlement to an evidentiary hearing under state law.

ARGUMENT

I. THE COLLATERAL-CONSEQUENCES RULE IS INCOMPATIBLE WITH THE SIXTH AMENDMENT

A. Strickland v. Washington's *Two-Part Test Governs Claims of Ineffective Assistance of Counsel*

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. This guarantee "embodies a realistic recognition . . . that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty . . . ." *Johnson v. Zerbst,* 304 U.S. 458, 462-63 (1938). The right to counsel is therefore necessarily "the right to effective assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986). "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . . ." *McMann v. Richardson,* 397 U.S. 759, 771 (1970).

The right to effective assistance of counsel applies at every critical stage of the prosecution, including guilty pleas. *Mempa v. Rhay,* 389 U.S. 128,

134 (1967); *White v. Maryland,* 373 U.S. 59, 60 (1963).

> A guilty plea . . . is an event of signal significance in a criminal proceeding. By entering a guilty plea, a defendant waives constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers. While a guilty plea may be tactically advantageous for the defendant, the plea is not simply a strategic choice; it is itself a conviction, and the high stakes for the defendant require the utmost solicitude.

Florida v. Nixon, 543 U.S. 175, 187 (2004) (citations omitted).

Ineffective-assistance claims are determined under the two-part test announced in *Strickland v. Washington*: the defendant must establish that "counsel's representation [1] fell below an objective standard of reasonableness" and [2] prejudiced the defendant. 466 U.S. 668, 687-88, 691-92 (1984); *Knowles v. Mirzayance,* 129 S. Ct. 1411, 1419 (2009).

Under *Strickland*'s first prong, reasonableness turns on whether counsel was professionally competent, not whether he was right. *Yarborough v. Gentry,* 540 U.S. 1, 8-9 (2003). The reasonableness of attorney conduct is measured by "prevailing professional norms" in effect at the time. *Strickland,* 466 U.S. at 688. Thus, the Court has looked to standards of professional conduct, such as ABA

standards, as guides to determine whether counsel's conduct is reasonable. *Id.*; *Williams v. Taylor,* 529 U.S. 362, 396 (2000); *Wiggins v. Smith,* 539 U.S. 510, 524-25 (2003); *Rompilla v. Beard,* 545 U.S. 374, 387 (2005). The Court requires this case-by-case inquiry into reasonableness because "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland,* 466 U.S. at 688-89; *Rompilla,* 545 U.S. at 381 ("A standard of reasonableness applied as if one stood in counsel's shoes spawns few hard-edged rules . . . ."). Consequently, this Court has never held a particular type of performance by a criminal defense attorney to be *per se* reasonable.

Strickland's second prong requires a defendant to establish that his counsel's objectively unreasonable performance prejudiced him. Prejudice exists in this context where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694 (noting that prejudice need not be shown by a preponderance of the evidence).

The two-part *Strickland* test applies to guilty pleas as it does to other critical phases of the criminal proceeding. *Hill*, 474 U.S. at 57. Where counsel is ineffective at the guilty-plea stage, a defendant is prejudiced if "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." *Id.* at 59.[5]

Notwithstanding *Hill*, the Kentucky Supreme Court did not apply the two-part *Strickland* test to Padilla's claim that his counsel's misadvice about the deportation consequences of his plea prejudiced him. The state court held that "collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel," and thus "it follows that counsel's failure to advise [Padilla] of such collateral issue or his act of advising [Padilla] incorrectly provides no basis for relief." Pet. App. 23. Opining that "[i]n neither instance is the matter required to be addressed by counsel," the Kentucky court held that "an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*." *Id.* The categorical exclusion established by the court below is inconsistent with the Sixth Amendment and this Court's precedents.

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[5] Lower courts have held that, in appropriate circumstances, a defendant may also show prejudice if the attorney's performance caused the defendant to plead guilty to harsher charges or receive a higher sentence. *See*, *e.g.*, *United States v. Kwan*, 407 F.3d 1005, 1017-18 (9th Cir. 2005) (prejudice shown where defendant could have avoided deportation by persuading court or prosecutor to shorten sentence by two days); *cf. Puckett v. United States,* 129 S. Ct. 1423, 1433 n.4 (2009) (prejudice from breach of plea bargain can be shown by adverse effect on sentence); *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004) (citing *Strickland*, 466 U.S. at 694) (to show prejudice from court's plain error in administering Rule 11, the defendant "must show a reasonable probability that, but for the error, he would not have entered the plea").

B. Hill v. Lockhart *Rejected Application of the Collateral-Consequences Rule to Sixth Amendment Claims*

Hill v. Lockhart compels rejection of the collateral-consequences rule as a Sixth Amendment doctrine. In *Hill*, this Court held that while *a court* taking a guilty plea has no duty to advise a defendant regarding the collateral consequence of parole eligibility, the two-part *Strickland* test governs claims of ineffective assistance of *counsel* for misadvice on the same subject. The Kentucky court's invocation of the collateral-consequences rule to avoid *Strickland* analysis is irreconcilable with *Hill*.

Like Petitioner, Hill pleaded guilty to a felony in state court, was sentenced, and then challenged his plea on the ground that his counsel had misled him about a crucial piece of information. *Hill,* 474 U.S. at 53-55. Hill claimed his counsel had led him to believe he would be eligible for parole after serving only one third of his sentence. *Id.* However, as a repeat offender, Hill was required by statute to serve half his sentence before becoming eligible for parole. *Id.*

The Eighth Circuit panel rejected Hill's claim that due process obligated the sentencing court to inform him about parole eligibility. It held that "[t]he details of parole eligibility are considered collateral rather than direct consequences of a plea, of which a defendant need not be informed before pleading guilty." *Hill v. Lockhart,* 731 F.2d 568, 570 (8th Cir. 1984). The panel did not apply that rule to the petitioner's ineffective-assistance claim; instead, it

held that the attorney's advice did not constitute "gross misconduct" warranting vacatur of the plea. *Id.* at 571. On rehearing, an equally divided en banc court of appeals affirmed the district court. *Hill v. Lockhart,* 764 F.2d 1279 (1984).

In this Court, Hill raised only an ineffective-assistance claim, arguing that he satisfied *Strickland's* two-part test. Brief of Petitioner at 4, *Hill v. Lockhart,* 474 U.S. 52 (1985) (No. 84-1103), 1985 WL 669995. The State responded by arguing that parole eligibility was "a collateral consequence of a guilty plea," such that incorrect advice on the issue "does not render the plea involuntary." Brief of Respondent at 5, 10-19, *Hill v. Lockhart,* 474 U.S. 52 (1985) (No. 84-1103), 1985 WL 669998. Alternatively, the State contended that Hill had failed to show prejudice under *Strickland. Id.* at 34-40.

Even though *courts* bear no due process duty to advise defendants of collateral consequences, this Court declined to import that doctrine into the Sixth Amendment to exempt *defense counsel* from any such duty.[6] Noting the Eighth Circuit panel's "holding that parole eligibility is a collateral rather than a direct consequence of a guilty plea," this Court observed that "[w]e have never held that the United States Constitution requires *the State* to furnish a defendant with information about parole eligibility in

[6] *In re Resendiz*, 19 P.3d 1171, 1180-81 (Cal. 2001) (discussing *Hill);* Sarah Keefe Molina, *Rejecting the Collateral Consequences Doctrine Silence About Deportation May or May Not Violate* Strickland*'s Performance Prong*, 51 St. Louis U. L.J. 267, 283 (2006).

order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in the federal courts." *Hill*¸ 474 U.S. at 55-56 (citing Fed. R. Crim. P. 11(c)) (emphasis added).

That categorical rule under the Due Process Clause and Fed. R. Crim. P. 11 did not answer the distinct question of ineffectiveness of counsel. Rather, analyzing its Sixth Amendment precedents on guilty pleas, the Court proceeded to "hold . . . that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Id.* at 58.

Applying *Strickland,* the Court did not reach the question under the first prong of "whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel," agreeing with the State that Hill had failed to allege the requisite prejudice under the second prong of *Strickland*. *Id.* at 60. Crucially, Hill "did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial." *Id.*

Thus, under *Hill*, the categorical collateral-consequences rule that applies to Rule 11 and due process claims against the State does not dispose of ineffective-assistance claims. The question under *Strickland* is whether counsel's performance was objectively "reasonable[] under prevailing professional norms," and (if not) whether the

deficient performance was prejudicial. 466 U.S. at 687-88, 691-92. In this case, the Kentucky Supreme Court failed to conduct the required *Strickland* analysis.

C. *The Collateral-Consequences Rule Limiting Judicial Duties of Advisement Has No Place in Determining Defense Counsel's Effectiveness*

Even if *Hill* did not directly foreclose Kentucky's collateral-consequences rule, that rule conflicts with the Sixth Amendment. First, the collateral-consequences doctrine originated from Rule 11 jurisprudence to define the duties of *a court* with regard to guilty pleas. It has no bearing on the distinct and more far-reaching duties of *defense counsel* with which the Sixth Amendment is concerned. Second, *Strickland* rejects any such "mechanical rules" to define attorney duties across all criminal representations. Instead, it favors a context-specific determination of the "reasonableness" of an individual attorney's performance "under prevailing professional norms." 466 U.S. at 688. Here, the Kentucky court has impermissibly adopted a *per se* rule that an attorney never has a duty to advise the client of collateral consequences, no matter how devastating. Its conception of duty is contrary to both the most basic ethical rules and specific professional norms requiring criminal defense counsel to investigate and advise clients about the collateral consequences of conviction (especially deportation). This Court should reject the Kentucky collateral-consequences rule.

1. The collateral-consequences rule originated as a pragmatic limit on judicial duties of advisement under Federal Rule of Criminal Procedure 11

Under the Due Process Clause, a court must ensure that a defendant's guilty plea is voluntary, knowing, and intelligent. *Kercheval v. United States*, 274 U.S. 220, 223 (1927); *Walker v. Johnston*, 312 U.S. 275, 286 (1941). Accordingly, Fed. R. Crim. P. 11 has long required federal courts, before accepting a plea, to ensure that the defendant "made [the plea] voluntarily with understanding of the nature of the charge." Fed. R. Crim. P. 11 (1944).

Courts interpreted Rule 11 from its inception to "mean that the defendant should understand the 'consequences of the plea,'" and indeed a 1966 amendment added that phrase. *See Trujillo v. United States*, 377 F.2d 266, 268 (5th Cir. 1967); Fed. R. Crim. P. 11 advisory committee's note (1966). Rule 11 did not impose a duty upon courts to advise defendants "of every 'but for' consequence which follows from a plea of guilty," *Trujillo*, 377 F.2d at 268, for that would entail "judicial clairvoyance of a superhuman kind." *United States v. Cariola*, 323 F.2d 180, 186 (3d Cir. 1963). The rule emerged that so long as the court advised the defendant of the direct consequences of conviction (such as maximum or mandatory sentences), it "need not instruct an accused on all possible legal disadvantages and collateral consequences of his conviction on the charges in an indictment." *United States v. Washington*, 341 F.2d 277, 286 (3d Cir. 1965); *Durant v. United States*, 410 F.2d 689, 692 (1st Cir. 1969).

Although courts have formulated various tests for distinguishing between "direct" and "collateral" consequences,[7] the prevailing standard is whether the consequence is within the court's responsibility and control. 5 Wayne R. LaFave, et al., *Criminal Procedure* § 21.4(d) (3d ed. 2008) ("LaFave"). That approach befits the purpose of the rule as a limitation upon the trial court's duty of advisement. Because collateral consequences are often subject to manifold factual contingencies or the vagaries of state law, requiring judges to explain all of them completely would "impose upon the judge an impractical burden out of all proportion to the essentials of fair and just administration of the criminal laws." *Cariola*, 323 F.2d at 186. As one leading scholar commented:

> [I]t is simply impracticable for a trial judge to advise the defendant of all possible consequences, especially because the judge will not be aware at the time of the plea of the special circumstances which would make some of those

[7] *See, e.g., United States v. Salerno,* 66 F.3d 544, 551 (2d Cir. 1995) (a consequence is direct if it has a definite, immediate, and largely automatic effect on the range of punishment); *Mitschke v. State,* 129 S.W.3d 130, 135 (Tex. Crim. App. 2004) (a consequence of a guilty plea is direct if it is punitive); *El-Nobani v. United States,* 287 F.3d 417, 421 (6th Cir. 2002) (a consequence is direct if it is within the "control and responsibility" of the sentencing court); Jenny Roberts, *The Mythical Divide Between Collateral And Direct Consequences Of Criminal Convictions: Involuntary Commitment Of "Sexually Violent Predators*," 93 Minn. L. Rev. 670, 689-93 (2008) (discussing tests formulated by lower courts to define "direct" consequences).

> consequences possible, . . . *[D]efense counsel should be expected to discuss with his client the range of risks* attendant [to] his plea.

LaFave § 21.4(d) at 829 (emphasis added). Accordingly, Rule 11 does not require that the court at the allocution stage advise the defendant that he may lose his passport and voting rights, be deported, be dishonorably discharged from the armed services, or have limited eligibility for parole. *Trujillo*, 377 F.2d at 268-69; *Durant*, 410 F.2d at 692.[8]

This Court embraced the direct/collateral distinction in due process cases of the same vintage. In 1969, the Court held that a court must make a determination of a plea's voluntariness on the record by "canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Boykin v. Alabama*, 395 U.S. 238, 242, 243-44 (1969). Shortly thereafter, the Court clarified that a guilty plea by a properly counseled defendant was voluntary if "'entered by one fully aware of the direct consequences,'" absent coercion, threats, or improper promises or

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[8] When Rule 11 was subsequently amended in 1974 to enumerate the consequences the court had to disclose, the Advisory Committee emphasized the paramount concern with the practicality of the burdens imposed upon the court. It noted that "certain consequences of a plea of guilty, such as parole eligibility, may be so complicated that it is not feasible to expect a judge to clearly advise the defendant" at the allocution stage. Fed. R. Crim. P. 11 advisory committee's note (1974). "Similar complications exist with regard to other, particularly collateral consequences, of the plea." *Id.*

representations. *Brady v. United States*, 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds,* 356 U.S. 26 (1958) (per curiam)).

This Court has never defined the duties of defense counsel under the Sixth Amendment by reference to Rule 11/*Brady* obligations. Indeed, contemporaneously with *Boykin* and *Brady*, this Court held that a defendant is entitled to "effective assistance of counsel" in pleading guilty. The constitutional standard for such effective assistance was whether the advice "was within the range of competence demanded of attorneys in criminal cases." *McMann*, 397 U.S. at 770-71; *see also Hill*, 474 U.S. at 56. Nonetheless, many lower courts have mechanically grafted the collateral-consequences rule onto the Sixth Amendment, foregoing the standard inquiry under *McMann* and *Strickland* into whether the attorney's performance was objectively reasonable under prevailing professional norms. LaFave § 21.4(d).

There is no valid justification for extending the collateral-consequences rule to the Sixth Amendment. "The collateral consequences rule does not capture, even as a rule of thumb, . . . the concerns of competent lawyers or their clients, . . . [and] should be irrelevant to a *Strickland* analysis." Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 712 (2002). "Defense counsel clearly has far greater duties toward the defendant than has the court taking a plea," *Resendiz*, 19 P.3d at 1181, and the rationale for the collateral-consequences rule – the impracticality of requiring

passive judges to investigate and advise about such consequences – has no force in the Sixth Amendment context. Indeed, judges' duties to ensure the voluntariness of pleas are restricted precisely because competent counsel will provide a broader range of advice tailored to each particular defendant's needs.

2. The duties of courts do not define the duties of defense counsel

The restrictions of the collateral-consequences doctrine reflect the limited role and capability of a court taking a guilty plea. Courts are passive and neutral. Courts do not conduct investigations; they do not develop legal strategies. They do not consult with the defendant on the merits of the prosecution's case or available defenses. They do not negotiate with the prosecution. And they do not consult with the defendant on the advantages or disadvantages of a plea. *People v. Ford*, 657 N.E.2d 265, 267 (N.Y. 1995) ("a criminal court is in no position to advise on all the ramifications of a guilty plea personal to a defendant"); *Cariola*, 323 F.2d at 186; Fed. R. Crim. P. 11(c). A court's duty is limited to preventing abuses of power, which ensures that defendants are not deprived of liberty without due process of law. *See Brady,* 397 U.S. at 755-57; *Mabry v. Johnson*, 467 U.S. 504, 511 (1984).

A guilty plea results in a conviction that forfeits the defendant's constitutional rights and entails the exercise of state power. Thus, a court must create a sufficient public record showing that a defendant's plea is "voluntary in a constitutional sense." *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976)*; Boykin*, 395 U.S. at 243-44. That judicial

inquiry is limited to ensuring (in the absence of coercion, improper threats, misrepresentations, or promises) that the accused understands the nature of the constitutional protections that he is waiving, *Henderson*, 426 U.S. at 645 n.13, that he has sufficient understanding of the nature of the charges such that his plea can stand as "an intelligent admission of guilt," *id.*, and that he understands the "direct consequences" of the conviction. *Brady*, 397 U.S. at 755. For due process purposes, the accused need not understand "the *specific detailed* consequences" of the plea or the rights waived thereby. *United States v. Ruiz*, 536 U.S. 622, 629 (2002). The defendant's "'lack of a full and complete appreciation of the consequences'" will not defeat "'the State's showing that the information it provided to him satisfied the constitutional minimum.'" *Iowa v. Tovar*, 541 U.S. 77, 92 (2004) (waiver of right to counsel) (quoting *Patterson v. Illinois*, 487 U.S. 285, 294 (1988)).

Unlike the court's narrow duty to ensure minimal knowledge and voluntariness, defense counsel's paramount duty is to protect the client's overall interests. "Counsel's concern is the faithful representation of the interest of his client." *Tollett v. Henderson*, 411 U.S. 258, 268 (1973). Thus, counsel must pursue "all reasonable lawful means to attain the objectives of the client." *Nix v. Whiteside*, 475 U.S. 157, 166 (1986); *see also Strickland,* 466 U.S. at 688 ("From counsel's function as assistant to the defendant derive[s] the overarching duty to advocate the defendant's cause . . . ."). Among other things, counsel must investigate facts relevant to liability and sentencing, *Rompilla*, 545 U.S. at 377; *Wiggins*,

539 U.S. at 521-22; "consult with the defendant on important decisions," *Strickland*, 466 U.S. at 688; "discuss potential strategies with the defendant," *Nixon*, 543 U.S. at 178; and predict the strength of the State's case and the likelihood of conviction, *McMann*, 397 U.S. at 769-71.

Thus, with regard to guilty pleas, counsel (unlike a court) must investigate and advise the defendant of "the advantages and disadvantages of a plea agreement." *Libretti v. United States*, 516 U.S. 29, 50-51 (1995) (noting that the Sixth Amendment duties of counsel extend beyond "the small class of rights that require specific advice from the court under Rule 11(c)"); *Brady*, 397 U.S. at 754. "Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948); *McMann,* 397 U.S. at 770-71 (counsel has a Sixth Amendment duty to provide reasonably competent advice on whether to plead guilty); Chin & Holmes, *supra*, at 727. By contrast, "the court's function and duties quintessentially *exclude* such assistance, advocacy and consultation." *Resendiz*, 19 P.3d at 1182.

Because the interests of the client define counsel's Sixth Amendment duty to defend criminal prosecutions, the distinction between collateral and direct consequences is irrelevant. The defendant is concerned with *all* significant consequences of conviction upon him and his family. The client does not care whether it is the criminal court or a subsequent governmental actor that will visit the

consequence upon him. The client seeks to minimize the overall harms. *Resendiz*, 19 P.3d at 1183.[9]

Counsel often cannot render effective assistance without investigating and advising the accused of the collateral consequences of conviction, particularly consequences as devastating as deportation. Avoiding deportation is often more critical to a defendant than avoiding incarceration or other direct consequences. *INS v. St. Cyr*, 533 U.S. 289, 322 (2001). It is "'well-documented'" that "'an alien charged with a crime . . . would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial.'" *Id.* (quoting in a parenthetical *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999)); *e.g.*, *Downs-Morgan v. United States*, 765 F.2d 1534, 1541 (11th Cir. 1985) (defendant, who had pleaded guilty to conspiracy to distribute marijuana and received a three-year sentence, "would certainly be imprisoned for many years and possibly be executed" if deported to communist Nicaragua). Defendants who become deportable based on criminal convictions classified as aggravated felonies cannot later (except in the rarest circumstances) avoid deportation at the immigration hearing. Tooby on Criminal Defense § 2.15.

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[9] This Court has recognized the continuing injury of conviction to defendants from deportation and other collateral consequences even after they have served their criminal sentences. *See Fiswick v. United States,* 329 U.S. 211, 221-22 (1946) (completion of defendant's sentence did not moot attack on conviction); *United States v. Morgan,* 346 U.S. 502, 512-13 (1954) (same).

Because the permanent immigration consequences greatly outweigh the criminal consequences in the vast majority of all criminal cases brought against immigrants, "the criminal defense strategy should be directed primarily to avoiding the immigration consequences, and only secondarily to minimizing the criminal judgment or sentence." *Id.* § 2.14. Avoiding deportation factors into criminal defense strategy for plea bargaining, acceptance of a plea, and sentencing. *See infra* at I(C)(4).

Accordingly, it would be "illogical and counterproductive" "to tie defense counsel's Sixth Amendment duties to the constitutional minima the due process clause requires of courts." *Resendiz*, 19 P.3d at 1182. Indeed, the minimal obligations of courts under *Brady*, *Boykin*, and Rule 11 presume that the accused has received effective assistance of counsel in deciding to plead guilty. They are rules for determining the voluntariness of pleas "made by competent defendants with adequate advice of counsel." *Brady*, 397 U.S. at 758. Courts, *Brady* declared, must scrutinize uncounseled pleas more closely because "intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney." *Id.* at 748 n.6.[10] Minimal due process and Rule 11 standards

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[10] *See also Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) ("Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently."); *McMann*, 397 U.S. at 770-71 (finding plea intelligent where "based on reasonably competent advice"); *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) ("a counseled plea of guilty" has sufficient reliability to justify the State's imposition of

(continued...)

that *presume* effective assistance of counsel cannot reasonably *define* what constitutes effective assistance.

The collateral-consequences rule is a pretender to the Sixth Amendment throne. This Court should chase it from the realm and restore *Strickland* to its rightful place.

3. Kentucky's **per se** *rule is inimical to* **Strickland***'s requirement of measuring attorney performance against prevailing professional norms*

Not only are the origin and rationale of the collateral-consequences rule inapposite to ineffective-assistance claims, but the decision below runs directly afoul of *Strickland*. It imposes a *per se* rule in an area where this Court has declared such rules improper. And it defines the duties of counsel contrary to the prevailing professional norms that are the touchstone of Sixth Amendment duties.

a. *Strickland* forbids *per se* rules for determining attorney competency

This Court has time and again resisted attempts to impose fixed rules delineating the

(...continued)

punishment); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion . . . .").

obligations of counsel under the Sixth Amendment. *Roe v. Flores-Ortega*, 528 U.S. 470, 478-79 (2000). "Attorney errors come in an infinite variety[.]" *Strickland*, 466 U.S. at 693. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-89. The Sixth Amendment does not "specify[] particular requirements of effective assistance." *Id.* at 688. Instead, it "relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill [its] role in the adversary process . . . ." *Id.* Accordingly, "[i]n *any case* presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable *considering all the circumstances*." *Id.* (emphasis added). "Prevailing norms of practice as reflected in American Bar Association standards and the like" are helpful "guides to determining what is reasonable." *Id.*

b. Prevailing professional norms require counsel to investigate and advise clients about collateral consequences

Not only did the Kentucky Supreme Court announce an impermissible *per se* rule, but its conception of defense counsel's duty tramples on the most basic ethical rules of the profession. It held that defense counsel categorically has no duty to advise defendants about collateral consequences and no duty, if giving advice, to advise correctly. Pet. App. 36. But under ABA Model Rules in force at the time

of Padilla's plea, counsel's duties are not so limited. *See, e.g.,* Model Rules of Prof"l Conduct R. 1.1, 1.2 & 1.4 (2000).[11] Under Rule 1.2, "[a] lawyer shall abide *by a client's decisions concerning the objectives of representation* … and shall consult with the client as to the means by which they are to be pursued." *Id.* 1.2(a) (emphasis added).[12]

Moreover, "as advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." *Id.* Preamble [2]. The lawyer "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* 1.4(b); *see* Rule 1.4 cmt. [5] ("The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.").

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[11] Kentucky has patterned its state code of professional responsibility after the ABA Model rules, with deviations not relevant here. *See* Ky. SCR 3.130 (1.1) – (8.4); Ky. Supreme Court Order Amending Supreme Court Rules 2009-05, at 98, *available at* http://apps.kycourts.net/Supreme/Rules/2009-05ORDERAMENDING.pdf. Every other state, excepting California, has adopted in whole or in part the ABA Model Rules. *See* American Legal Ethics Library, Topical Overview, Index of Narratives, *available at* http://www.law.cornell.edu/ethics/comparative/index.htm#1.1 (listing adoption status of Model Rules by state).

[12] The ABA Model Rules were revised in August 2002. Rules 1.1, 1.2, 1.4, and their commentary remain the same or substantially similar to the 2000 version.

These basic professional standards do not permit defense counsel to ignore the collateral consequences of convictions, especially devastating consequences like mandatory deportation that can be averted *only* if addressed in the criminal prosecution. Tooby on Criminal Defense, *supra*, at §§ 2.15; 2.22; Ariz. Comm. on Rules of Prof'l Conduct, Formal Op. 97-06 (1997), *available at* http://www.myazbar.org/*Ethics*/opinionview.cfm?id=482 (Notwithstanding prevailing Sixth Amendment jurisprudence, Arizona Ethical Rule 1.4(b) requires investigation and advice regarding collateral consequences, for "[t]he client obviously would find it important to consider the effect of his decision on his immigration status, or his physical safety, or any number of other aspects of his life.").

At a minimum, under prevailing professional standards, defense counsel cannot exclude collateral consequences from the representation without securing the client's informed consent. "A lawyer may limit the objectives of the representation," but only if an informed client consents after consultation and the limitation would be consistent with the requirement of competent representation. Model Rules of Prof'l Conduct R. 1.2(c) & cmt. [4-5]; Tooby on Criminal Defense, *supra*, at § 2.26. The last requirement would be difficult to satisfy. Criminal representation that forsakes the only opportunity to prevent dire collateral consequences to the client is likely incompetent.

A criminal defense attorney cannot escape these ethical duties by pleading unfamiliarity with immigration law. "A lawyer shall provide competent representation to a client. Competent representation

requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rules of Prof'l Conduct R. 1.1.

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar . . . . A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Id. cmt. [2]. "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners" as well as "adequate preparation." *Id.* cmt. [5]. If defense counsel cannot provide competent representation to an immigrant defendant in this fashion, he must decline the representation (if applicable rules permit him to do so). Tooby on Criminal Defense, *supra*, at § 2.25; *Kwan*, 407 F.3d at 1015-16.

Consistent with these precepts, the ABA Standards for Criminal Justice require criminal defense counsel to investigate and advise the client regarding collateral consequences of conviction, especially deportation:

> [T]o the extent possible, defense counsel should determine and advise the

> defendant, sufficiently in advance of the entry of any pleas, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

ABA Standards for Criminal Justice § 14-3.2(f) (1999).

Such advice is not to be given in the abstract, but rather based on the particular client's circumstances. "[C]ounsel should interview the client to determine what collateral consequences are likely to be important to a client's particular personal circumstances and the charges the client faces." *Id.* at § 14-3.2(f) cmt.; *see also* Chin & Holmes, *supra*, at 714. This directive to counsel recognizes the breadth of collateral consequences that may flow from a conviction – including deportation – and their importance to the defendant's decision-making process:

> An increasing burden must fall to defense counsel by virtue of the growing number and range of consequences of conviction . . . these consequences may include civil or criminal forfeiture, mandatory restitution, court martial or disqualification from the armed forces, loss of or ineligibility for licenses granted by the state, loss of civil rights, loss of federal benefits . . . and, for non-citizens, immigration consequences, to name a few. Because such discussions may involve the disclosure of privileged or incriminatory information (such as the defendant's immigration status), only defense counsel

> is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case.

ABA Standards for Criminal Justice § 14-3.2(f) cmt..

The ABA specifically recognizes that a trial court's last-minute, formal inquiry into the defendant's understanding of the consequences of the plea is not an adequate substitute for advice by counsel. *Id.* at 14-1.4(c) cmt. Only counsel's early, tailored advice can produce the "mature reflection" necessary to ensure that the defendant's acceptance of the plea is in fact knowing, voluntary, and intelligent. *Id.* at 14-3.2 cmt.

Moreover, standards promulgated by the National Legal Aid and Defender Association likewise declare that defense counsel should "be fully aware of, and make sure that the client is fully aware of … consequences of conviction such as deportation" and should explain to the client the potential consequences of any plea agreement. National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation 6.2(a)(3), 6.3(a), 8.2(b)(8), & 8.2(c)(3) (1997), *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.

Finally, underscoring the professional norms that defense counsel are expected to protect clients from the collateral consequences of conviction, this Court recognized (in the year before Padilla's guilty plea) that "numerous practice guides" have long been available to "competent defense counsel" regarding

strategies for avoiding the deportation consequences of conviction. *St. Cyr*, 533 U.S. at 323 n.50.[13]

Petitioner does not seek a *per* se rule for determining when counsel's investigation or advice regarding collateral consequences is incompetent; objective reasonableness is always a case-specific inquiry that considers all the circumstances. *Strickland*, 466 U.S. at 688; *Rompilla*, 545 U.S. at 387; *Rompilla*, 545 U.S. at 399-400 (Kennedy, J., dissenting). Where immigration consequences are at issue, many factors may affect the analysis. Such factors include the information available to the attorney that would have given notice of potentially grave immigration consequences; the nature of the charges, such as whether offenses that would be deemed aggravated felonies were charged; the nature of the investigation conducted or advice rendered (if any); the possibility of alternative plea bargains or sentences; and the relative materiality of direct and immigration consequences to the defendant. *See People v. Pozo*, 746 P.2d 523, 525-26, 529 (Colo. 1987). The defendant's duration of residency in the United States and family status, among other circumstances, may affect how the defendant regards deportation. A

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[13] The *Amici Curiae* Brief from the National Association of Criminal Defense Lawyers et al., cited in *St. Cyr*, 533 U.S. at 323 n.50, listed 39 published manuals, treatises, and practice guides concerning the immigration consequences of conviction, as well as numerous training sessions from before 1996. Brief for the National Association of Criminal Defense Lawyers et al. as *Amici Curiae* in Support of Respondent at apps B & C, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767), 2001 WL 306179; *see also* Chin & Holmes *supra*, at 714-18 (listing a sample of sources available by 2002, the date of Padilla's plea).

considered strategic decision by counsel not to investigate immigration consequences, if supported by reasonable professional judgment, is more likely to be found reasonable than inattention to those consequences. *Wiggins*, 539 U. S. at 533-34.

Per se rules of any stripe have no place in the determination of attorney competence under *Strickland*.[14] In resolving Padilla's ineffective-assistance claim, the proper inquiry under the first prong of *Strickland* is not whether deportation is a collateral consequence. Rather, it is, first, whether it was objectively unreasonable under prevailing professional norms at the time for Padilla's counsel to have failed to investigate whether the Kentucky offense was an aggravated felony for which deportation was effectively mandatory. Second, the inquiry is whether it was objectively reasonable for counsel, having not investigated the law, to have advised Padilla falsely that he did not need to worry about deportation consequences.

[14] By contrast, this Court has held that certain conduct is *per se* prejudicial under the second prong of *Strickland*. That is a rule that reflects the impossibility of proving prejudice in certain contexts, such as an attorney conflict of interest affecting representation. *See, e.g.*, *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980). This Court has never declared any conduct *per se* reasonable or unreasonable under the first prong of *Strickland*.

4. Defense counsel must investigate collateral consequences to reduce the direct penal consequences of conviction

Beyond its incompatibility with *Strickland*, the dichotomy between direct and collateral consequences is a false one. Defense counsel cannot ignore collateral consequences, if only because prosecutors take collateral consequences into account in charging decisions and plea bargaining, and judges take them into account in sentencing. Defense counsel thus can use information regarding collateral consequences to reduce the direct penal consequences of conviction, which no one disputes is a core duty of defense counsel.

a. Prosecutors take collateral consequences into account in charging decisions and plea bargaining

A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Because the sovereign's interest is not limited to simply obtaining maximum criminal punishment of the defendant, plea bargains commonly encompass collateral matters. United States Attorneys, for example, coordinate criminal prosecutions with civil investigations and may resolve civil and criminal liabilities in the plea agreement. *See* United States

Attorneys' Manual §§ 9-42.010(A), (C), (E) (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm; *Id.* at § 9-113.106 (settlement of forfeiture in conjunction with plea bargaining); *Id.* at § 9-42.451 (settlement of administrative remedies in plea bargains in Medicare fraud cases); *see also* Chin & Holmes, *supra*, at 720-23 & nn.203-09. Conversely, a United States Attorney may *decline* to prosecute based on the availability of adequate collateral civil remedies. *See* United States Attorneys' Manual §§ 9-27.220-27.250. Prosecutors also bargain for the cooperation of defendants in collateral prosecutions of other targets. *Id.* at § 9-27.420; U.S. Sentencing Guidelines Manual § 5K1.1.

Moreover, prosecutors' paramount interest in doing justice affords them discretion to take into account any "undue hardship caused to the defendant," including hardship caused by collateral consequences. National Prosecution Standards § 68.1 (2d ed. 1991), *available at* http://www.ndaa.org/pdf/ndaa_natl_prosecution_standards_2.pdf; *Dretke v. Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting) ("The rigors of the penal system are thought to be mitigated to some degree by the discretion of those who enforce the law."). The United States Attorneys' Manual expressly provides that "[p]rosecutors may consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases." United States Attorneys' Manual § 9-28.1000A. Recommending that prosecutors consider collateral consequences at

the plea bargaining stage, a former president of the National District Attorneys Association has stated: "[C]ollateral consequences cannot easily be charged or bargained away when justice requires them. But we must consider them if we are to see that justice is done. . . . [P]rosecutor[s] . . . must comprehend th[e] full range of consequences that flow from a crucial conviction." Robert M.A. Johnson, Message from the President: Collateral Consequences (May 2001), http://www.ndaa.org/ndaa/about/president_message_ may_ june_2001.html (last visited May 25, 2009).

Because prosecutors consider collateral consequences in plea bargaining, competent defense counsel investigate them for use in reducing the direct criminal punishment of the defendant. Tooby on Criminal Defense, *supra*, at §§ 2.22-23. Sometimes, prosecutors recognize that deportation would be too harsh for a particular defendant or his family given the circumstances of the crime. In other cases, they wish to reward defendants' cooperation by preventing deportation. In these cases, prosecutors may be willing to forego prosecution altogether; accept a plea to lesser counts that do not have the same severe immigration consequences; or negotiate or recommend sentences that would not trigger deportation. *See* Tooby on Criminal Defense, *supra*, at §§ 8.16-8.30; Flo Messier, *Alien Defendants in Criminal Proceedings: Justice Shrugs*, 36 Am. Crim. L. Rev. 1395, 1415-16 (1999). Thus, in *United States v. Gonzalez*, 58 F.3d 459 (9th Cir. 1995), federal prosecutors successfully moved to dismiss a count to which an immigrant defendant had pleaded guilty in order to avoid his deportation. The Government noted that he had not been properly informed by his

counsel of those consequences and had provided valuable cooperation. *Id.* at 460-63.

Moreover, some defendants have little incentive to plead guilty because they will be subject to immigration detention and deportation immediately after release from criminal custody. If a prosecutor knows that, he may sweeten the plea agreement to avoid trial. Messier, *supra*, at 1415. Defense counsel often cannot properly perform his unquestioned function of bargaining for convictions of lesser offenses or lesser criminal punishment if he fails to investigate collateral consequences.

Even where the prosecutor declines to exercise discretion in favor of the defendant, defense counsel may use collateral consequences to achieve the defendant's objectives of avoiding deportation. Counsel may bargain for the defendant to serve more time, plead guilty to greater offenses, or cooperate with the government in return for structuring the plea deal to avoid crimes that trigger mandatory deportation. Tooby on Criminal Defense, *supra*, at §§ 2.14, 8.2. "If collateral proceedings are relevant to federal prosecutors, either as add-ons or in lieu of criminal charges, it is hard to see why competent defense lawyers who are negotiating with the government should consider them categorically irrelevant." Chin & Holmes, *supra*, at 721.

b. Judges take collateral consequences into account at sentencing

"As a general proposition, a sentencing judge 'may appropriately conduct an inquiry broad in scope,

largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" *Nichols v. United States*, 511 U.S. 738, 747 (1994) (quoting *United States v. Tucker*, 404 U. S. 443, 446 (1972)). "Reviewing the immigration consequences with a noncitizen defendant and counsel for both parties enables a judge to exercise discretion in entering dispositions that achieve justice for the victims and community impacted by a crime, and address potential immigration consequences for the noncitizen defendants and their families." ABA, *A Judge's Guide to Immigration Law in Criminal Proceedings* 4-17 (P. Goldberg & C. Wolchok eds., 2004) ("ABA Judge's Guide").

Many of the offenses that constitute aggravated felonies or other deportable crimes under the INA depend on the length of the sentence the court imposes. For example, for several aggravated felony categories, a conviction qualifies if the sentence imposed is a term of imprisonment of at least one year. Tooby on Criminal Defense, *supra*, at § 10.66 (listing offenses); 8 U.S.C. § 1101(a)(43)(F). Thus, counsel can avoid the defendant's deportation by convincing the court to impose a 364-day term rather than a 365-day term, *see, e.g.*, *Quintero-Morelos*, 137 P.3d at 119 (upholding sentence imposed to avoid deportation), or to impose the same term of imprisonment but on different counts. Counsel assuredly has a duty to investigate considerations (collateral or otherwise) that could result in the reduction of the imprisonment that a sentencing court imposes. *See Glover v. United States*, 531 U.S. 198, 204 (2001) (any increase in incarceration is prejudicial under *Strickland*).

Moreover, the sentencing court may wish to restructure the sentence in the defendant's favor because certain aspects of the sentence (such as work release, probation, drug rehabilitation programs, or halfway houses) cannot be served if the defendant is immediately taken into immigration custody after release from prison. Tooby on Criminal Defense, *supra*, at § 10.2; *e.g.*, *United States v. Lopez-Salas*, 266 F.3d 842, 846-51 (8th Cir. 2001) (holding that "alien status and the collateral consequences flowing therefrom may be an appropriate basis for departure").

Thus, the collateral-consequences rule is incoherent as Sixth Amendment doctrine. Kentucky may not excuse that doctrinal incoherence by arguing that applying *Strickland* to collateral-consequences advice is unduly burdensome. While in some contexts the Court may limit the application of constitutional rules "for reasons of prudence and comity" if it deems "the price of the rule to exceed its utility," this Court has held that "the Constitution constrains our ability to allocate as we see fit the costs of ineffective assistance. The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." *Kimmelman*, 477 U.S. at 379.

Regardless, the demanding *Strickland* test itself is the proper safeguard, as this Court held in *Hill*. *Hill,* 474 U.S. at 57-60. Because *Strickland* relies on contemporaneous professional standards as guides to determining reasonableness, it does not impose upon attorneys duties that they do not already have. *See Strickland,* 466 U.S. at 688. Moreover, "requiring a showing of 'prejudice' from defendants who seek to challenge the validity of their

guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas[.]" *Hill*, 474 U.S. at 58.

Kentucky's exclusionary collateral-consequences rule is unfounded. The Sixth Amendment is only violated if counsel renders ineffective assistance "in any criminal prosecution," U.S. Const. amend. VI, and prejudices the defendant in that prosecution, *Hill*, 474 U.S. at 59. But no fixed rules define the competency of attorney performance; the test is simply "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. The decision below is contrary to *Strickland*.

II. DEPORTATION SHOULD BE SUBJECT TO *STRICKLAND* ANALYSIS REGARDLESS OF WHETHER OTHER COLLATERAL CONSEQUENCES ARE

Even if this Court were disinclined to pronounce the fate of the collateral-consequences rule generally, this Court should not apply that rule to ineffective-assistance claims based on advice about deportation consequences.

Indeed, deportation qualifies as a "direct consequence" under some definitions of the term because it has a "definite, immediate and largely automatic effect on the range of the defendant's punishment." *See Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973). Statutory changes to the deportation regime have made it almost impossible to dub deportation "collateral" under this definition. McDermid, *supra*, at 762-64.

On the other hand, deportation (which is usually ordered in administrative removal proceedings) is collateral if the test is whether the consequence "remains beyond the control and responsibility of the district court in which that conviction was entered." *E.g.*, *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000). But the Court need not tarry over these alternative formulations. In the area of deportation, "involving as it may the equivalent of banishment or exile, we do well to eschew technicalities and fictions and to deal instead with realities." *Costello v. INS*, 376 U.S. 120, 131 (1964).

This Court should permit ineffective-assistance claims for the failure to investigate or advise about deportation consequences of conviction because of the special nature of that sanction. Unlike many collateral consequences, deportation is as severe as (or more severe than) direct criminal punishment in many cases. It is largely automatic upon conviction, especially when the conviction is an aggravated felony, and can be defended against only in the criminal prosecution. Finally, with mandatory immigration detention, the immigrant faces continuous deprivation of liberty after the criminal conviction. Immigration consequences for persons convicted are so severe in nature and so immediately and deeply interwoven with the criminal prosecution and sentence that effective assistance of counsel must extend to protecting the accused against such consequences.

This Court has long recognized the uniquely brutal nature of permanent exclusion from one's adopted homeland. Deportation is "a savage

penalty," *Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting), "the equivalent of banishment," *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), often resulting in the "loss of both property and life, or of all that makes life worth living," *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Padilla, who has resided in this country since his teenage years and served honorably in its military in the Vietnam War, was 51 years old at the time of his conviction. He lives with his family in California. J.A. 44, 72, 77. He confronts a "life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens." *Jordan*, 341 U.S. at 243 (Jackson, J., dissenting). *See also*, *e.g.*, David C. Koelsch, *Proceed With Caution: Immigration Consequences of Criminal Convictions*, 87 Mich. Bar J. 44, 45 (2008) (describing plight of a young woman who had come to the U.S. at age 3, but, after pleading guilty to a sentence of probation for illegal discharge of a firearm, was deported "to Russia where she no longer had family and knew no one, didn't speak the language, and had few skills needed to survive"). Deportation can be so devastating, and so disproportionate to the criminal penalties for the deportable conviction, that it should not be categorically excluded from the Sixth Amendment. As noted above, many aggravated felonies result in deportation regardless of whether any prison term is imposed, and others result in deportation for a sentence of as little as one year imprisonment. *See supra* p. 5; *cf. Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (Sixth Amendment right to counsel attaches to any proceeding in which actual imprisonment is imposed).

Moreover, the collateral-consequences rule is intended to exclude from the ambit of the Sixth Amendment not only consequences that are more trifling than criminal penalties, but also those that are contingent or speculative. *See supra* pp. 25-26. But, in the past twenty years, deportation has evolved into a "largely automatic" process after conviction, with few checks on its administration by either the executive or judicial branch. *United States v. Shaw*, No. CRIM.A. 99-525-01, Civ.A. 03-6759, 2004 WL 1858336, at *5 (E.D. Pa. Aug. 11, 2004). The remedy of cancellation of removal is available only for a defined class of immigrants, and those with aggravated felony convictions are ineligible for that relief. *See supra* pp. 5-6. For the latter, deportation, and other malign consequences, are virtually a foregone conclusion. Kesselbrenner & Rosenberg, *supra*, at § 1:7, at 1-13 ("Even a long-term permanent resident who is convicted of an aggravated felony will almost certainly be quickly deported, permanently banished, disqualified from almost all immigration benefits, subjected to mandatory detention, and penalized by a sentence of up to twenty years in prison for illegal reentry after deportation."). Where the criminal prosecution is the principal or only opportunity to prevent the potentially life-shattering consequence of deportation, the duty of effective assistance of counsel in the criminal prosecution should extend to taking reasonable steps to seek to protect the client against deportation.

Finally, in terms of practical effect, one can no longer draw distinct lines between criminal and immigration consequences. Immigration detention follows immediately once the criminal sentence of

imprisonment is served, and is mandatory for aggravated felonies. *See, e.g.,* Kesselbrenner & Rosenberg, *supra* at § 8.7, at 8-36 to 8-37; 8 U.S.C. § 1231(a)(2). Detention may last until removal is ordered. *DeMore v. Kim*, 538 U.S. 510, 531 (2003). From the vantage point of the defendant, immigration detention is simply a continued deprivation of liberty, under conditions commonly more onerous than criminal incarceration. Tooby on Criminal Defense, *supra*, *at* §§ 2.20, 6.34, & 6.36. After conviction, the immigrant will move immediately from criminal incarceration to immigration custody to the even more final penalty of deportation. The unbroken continuity of criminal and immigration consequences, all kindred in severity, underscores that defense counsel should have a similar duty to defend the client against the latter in the only proceeding in which defense is possible.

In short, deportation is different in kind from other collateral consequences. About half of states recognize it as uniquely similar to direct consequences in that, by statute, these states require even *trial courts* to advise defendants generally of possible deportation consequences of conviction in guilty plea proceedings. Kesselbrenner & Rosenberg, *supra,* at § 4:19, at 4-90 to 4-91 (24 States and the District of Columbia); *see also St. Cyr*, 533 U.S. at 322 n.48.[15] This Court should avoid wooden application

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[15] Such statutes require a standard general warning, regardless of the personal circumstances of the defendant. Coming so late in the process, they do not adequately substitute for a defense attorney's individualized assistance to his client. *Resendiz*, 19 P.

(continued...)

of the collateral-consequences rule in the deportation context, and hold that Padilla's claims should be resolved by traditional *Strickland* analysis.

III. THE COLLATERAL CONSEQUENCES RULE CANNOT BE EXTENDED TO PRECLUDE AN INEFFECTIVE-ASSISTANCE CLAIM BASED ON ACTUAL MISADVICE

Even if this Court were to declare that it is *per se* reasonable for defense counsel to limit their investigation and advice to exclude collateral consequences, there can be no doubt that a lawyer's *misadvising* the client on legal questions of importance to the plea, without exercising even reasonable diligence to investigate the issue, is "objectively unreasonable" in almost all circumstances. As the dissenting Justices below declared, "Counsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all. Common sense dictates that such deficient lawyering goes to effectiveness." Pet. App. 26 (Cunningham, J., dissenting). Unsurprisingly, the overwhelming majority of courts that apply the collateral consequences rule to failure-to-advise claims also hold that that rule does not apply where counsel misadvises the defendant.[16]

(...continued)

3d at 1178-79; Jennifer Welch, Comment, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively,* 92 Cal. L. Rev. 541, 555-56 (2004).

[16] *See United States v. Couto,* 311 F.3d 179, 187-88 (2d Cir. 2002); *Strader v. Garrison,* 611 F.2d 61 (4th Cir. 1979); *Sparks v.*

(continued...)

A criminal defendant is highly vulnerable in a criminal prosecution. As noted above, "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty . . . ." *Zerbst,* 304 U.S. at 462-63. Guilty pleas in particular, because they result in convictions, demand "the utmost solicitude" for the defendant. *Nixon*, 543 U.S. at 187. "[I]ntelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney," *Brady*, 397 U.S. at 748 n.6., including an independent examination of the law as applied to the facts. *Von Moltke*, 332 U.S. at 721. Thus, the defendant necessarily relies on the accuracy of the representations defense counsel

(...continued)

Sowders, 852 F.2d 882 (6th Cir. 1988); *United States v. Kwan,* 407 F.3d 1005, 1016-18 (9th Cir. 2005); *Beavers v. Saffle,* 216 F.3d 918 (10th Cir. 2000); *Downs-Morgan v. United States,* 765 F.2d 1534, 1541 (11th Cir. 1985); *Djioev v. State,* No. A-9158, 2006 WL 361540 (Alaska App. Feb. 15, 2006); *Alguno v. State,* 892 So. 2d 1200 (Fla. 4th DCA 2005); United States v. Shaw, No. CRIM.A. 99-525-01, Civ.A. 03-6759, 2004 WL 1858336 (E.D. Pa. Aug. 11, 2004); *Rollins v. State,* 591 S.E.2d 796, 799 (Ga. 2004); *People v. Correa,* 485 N.E.2d 307 (Ill. 1985); *Rubio v. State,* 194 P.3d 1224, 1230-31 (Nev. 2008); *State v. Garcia,* 727 A.2d 97 (N.J. Super. Ct. App. Div. 1999); *North Carolina v. Goforth,* 503 S.E. 2d 676 (N.C. App. 1998); *State v. Creary,* No. 82767, 2004 WL 351878, at *3 (Ohio App. 8 Dist. Feb. 26, 2004); *King v. State,* No. M2006-02745-CCAR3-CD, 2007 WL 3052854 (Tenn. Crim. App. Sept. 4, 2007); *State v. Rojas-Martinez,* 125 P.3d 930 (Utah 2005); *Commonwealth v. Tahmas,* Nos. 105254 & 105255, 2005 WL 2249587 (Va. Cir. July 26, 2005); *Valle v. State,* 132 P.3d 181, 184 (Wyo. 2006); *People v. McDonald,* 296 A.D.2d 13 (N.Y.A.D. 3 Dep't 2002), *aff'd*, 802 N.E.2d 131 (N.Y. 2003); *Mott v. State,* 407 N.W.2d 581, 582 (Iowa 1987); *Goodall v. United States,* 759 A.2d 1077 (D.C. 2000).

makes regarding the law and its application, for typically the defendant lacks the wherewithal to question them.

As this Court has recognized, deportation consequences will commonly be important to plea decisions, and in some circumstances the most important factor. *St. Cyr*, 533 U.S. at 322. Thus, it is a breach of trust and of the special relationship between counsel and client for counsel to render advice, without even investigating its accuracy, on matters so critical to the defendant in deciding whether to plead guilty to a felony and forfeit his constitutional rights. The Ninth Circuit so concluded in *Kwan*, reasoning that even if counsel did not have to give the defendant advice about deportation, misleading him on the subject was "objectively unreasonable under contemporary standards for attorney competence." 407 F.3d at 1015-16. Having held himself out as competent to provide advice on the subject, counsel violated "a basic rule of professional conduct that a lawyer must maintain competence by keeping abreast of changes in the law and its practice." *Id.* at 1016 (citing Model Rules of Prof'l Conduct R. 1.1[6]).

False representations that the attorney freely makes on legal matters distort the defendant's decision to plead guilty, and must be subject to *Strickland* analysis if the defendant enters a guilty plea that he would not have otherwise made. It is common to draw a line in the law based on the decision to speak in circumstances where one induces reliance. For example, absent an independent duty to speak, silence will not give rise to liability for negligent misrepresentation. But if a professional

supplies false information that induces justifiable reliance by others, he will be liable for failing to exercise due care. *Restatement (Second) of Torts* § 552 (1965).[17] On the same principle, if a lawyer supplies false information about deportation consequences that affects the defendant's decision to plead guilty, the lawyer has been ineffective in assisting the defendant, even if he had no duty to investigate collateral consequences in the first place. "One would not suppose that the collateral consequence rule . . . would apply in a situation in which defendant's guilty plea was induced by actual misadvice respecting some collateral consequence when that consequence was of substantial importance to the defendant." *Mott v. State,* 407 N.W.2d at 583-84 (internal quotation marks omitted). "If the defendant's pleas were made in reasonable reliance upon the advice or representation of his attorney, which advice or representation demonstrated incompetence, then it can be said that the defendant's pleas were not voluntary[.]" *People v. Correa,* 485 N.E.2d at 310; *accord Strader,* 611 F.2d at 65. *See also Evitts v. Lucey*, 469 U.S. 387 (1985) (State has no obligation to provide appeal, but must assure effective assistance of counsel if appeal is provided).

Indeed, this Court has held that guilty pleas may be withdrawn if the defendant was prejudicially induced to plead guilty by representations or promises in the plea agreement that did not come to

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[17] Every error in interpreting and applying immigration law will not be grounds for a finding ineffective assistance; the standard is incompetence. *See supra* Part I(C)(3).

be. *See Santobello v. New York*, 404 U.S. 257, 262 (1971). In *Brady*, the Court recognized that misrepresentation by the court, the prosecutor, or his own counsel that induces a plea may invalidate it. 397 U.S. at 755. In the same vein, false representations by incompetent counsel on the critical issue of deportation that prejudicially induce a guilty plea should give rise to a Sixth Amendment claim.

Moreover, any policy justifications for relieving counsel of an affirmative duty to investigate collateral consequences would not justify exempting misadvice. There can be no concern of overburdening counsel with inquiry into manifold collateral consequences where counsel has stepped forward to advise the client on a specific collateral consequence. Moreover, if defense counsel is not prepared to do the spadework to advise competently on deportation consequences, he should refrain from giving possibly inaccurate advice, or apprise the client that he should consult immigration counsel. But, when counsel undertakes to advise on a specific matter, he must do so competently. Indeed, the act of giving advice may deter the defendant from seeking immigration advice elsewhere. The reason for any categorical exemption having vanished, counsel's performance is thus subject to analysis under *Strickland* for objective reasonableness and possible prejudice within the criminal prosecution.

Thus, while the collateral-consequences rule as a whole is incoherent as Sixth Amendment doctrine, at a minimum there is no reason to extend it to prevent claims of ineffective assistance for misadvice. The courts have recognized misadvice on deportation

for thirty years as a ground for ineffective assistance claims, *see Strader,* 611 F.2d 61, and the system has handled the few claims that arise without difficulty.

Here, defense counsel specifically told Padilla that he "did not have to worry about immigration status since he had been in the country so long." J.A. 72. Padilla accordingly accepted a plea of slim benefit, falsely induced by his own lawyer to believe that his immigration status was unaffected by the plea. Counsel's advice was mistaken, and "had counsel properly advised" him that he would be deported if convicted of felony drug trafficking, Padilla "would have gone to trial." J.A. 72-73. Padilla is entitled to have his ineffective-assistance claims resolved under *Strickland*.

IV. THE CASE SHOULD BE REMANDED FOR A DETERMINATION OF WHETHER PADILLA IS ENTITLED TO AN EVIDENTIARY HEARING UNDER STATE LAW

Under Kentucky rules of criminal procedure, a hearing on a motion for post-conviction relief "is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." *Fraser*, 59 S.W.3d at 452. "The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Id.* at 452-53.

Applying this state-law standard, the Kentucky Court of Appeals held "[t]he record does not refute [Padilla's] allegation that counsel [had]

affirmatively assured him he would not be deported as a result of pleading guilty; nor does it refute his claim that but for counsel's mistaken advice, he would not have pled guilty." Pet. App. 36. It accordingly concluded that "Padilla is entitled to an evidentiary hearing on his motion." *Id.* The Kentucky Supreme Court did not reach this state-law question because of its misplaced reliance on the collateral-consequences rule. This Court should reject the collateral-consequences rule, and remand to the state court for further proceedings.

CONCLUSION

The judgment of the Kentucky Supreme Court should be reversed.

Respectfully submitted,

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Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

8 U.S.C. § 1101(a)(43)(B), (M), (P), (R), (S)

8 U.S.C. § 1101 [2002]. Definitions

(a) As used in this chapter--

(43) The term "aggravated felony" means--

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion)

in which the revenue loss to the Government exceeds $10,000;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18, or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

8 U.S.C. § 1227(a)(2)(A)(iii), (B)(i)

8 U.S.C. § 1227 [2002]. Deportable aliens

(a) Classes of deportable aliens – Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(2) Criminal offenses

(A) General crimes

(iii) Aggravated felony – Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(B) Controlled substances

(i) Conviction – Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign

country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1229b(a)-(c)

8 U.S.C. § 1229b [2002]. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents – The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien--

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general – The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is

inadmissible or deportable from the United States if the alien--

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

<u>8 U.S.C. § 1231(a)(2)</u>

8 U.S.C. § 1231 [2002]. Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general – Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the

alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period – The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(2) Detention – During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) [criminal grounds] or 1227(a)(4)(B) of this title.

Ky. Rev. Stat. Ann. § 218A.1421

Ky. Rev. Stat. §218A.1421 Trafficking in marijuana; penalties

(1) A person is guilty of trafficking in marijuana when he knowingly and unlawfully traffics in marijuana.

(2) Trafficking in less than eight (8) ounces of marijuana is:

(a) For a first offense a Class A misdemeanor.

(b) For a second or subsequent offense a Class D felony.

(3) Trafficking in eight (8) or more ounces but less than five (5) pounds of marijuana is:

(a) For a first offense a Class D felony.

(b) For a second or subsequent offense a Class C felony.

(4) Trafficking in five (5) or more pounds of marijuana is:

(a) For a first offense a Class C felony.

(b) For a second or subsequent offense a Class B felony.

(5) The unlawful possession by any person of eight (8) or more ounces of marijuana shall be prima facie evidence that the person

possessed the marijuana with the intent to sell or transfer it.

Ky. Rev. Stat. Ann. § 532.055

Ky. Stat. Ann. § 532.055 Verdicts and sentencing by jury in felony cases

(1) In all felony cases, the jury in its initial verdict will make a determination of not guilty, guilty, guilty but mentally ill, or not guilty by virtue of insanity, and no more.

(2) Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury. In the hearing the jury will determine the punishment to be imposed within the range provided elsewhere by law. The jury shall recommend whether the sentences shall be served concurrently or consecutively.

(b) The defendant may introduce evidence in mitigation or in support of leniency; and

(c) Upon conclusion of the proof, the court shall instruct the jury on the range of punishment and counsel for the defendant may present arguments followed by the counsel for the Commonwealth. The jury shall then retire and recommend a sentence for the defendant.

Ky. Rev. Stat. Ann. § 532.060(2)

Ky. Stat. Ann. § 532.060 Sentence of imprisonment for felony

(1) A sentence of imprisonment for a felony shall be an indeterminate sentence, the maximum of which shall be fixed within the limits provided by subsection (2), and subject to modification by the trial judge pursuant to KRS 532.070.

(2) The authorized maximum terms of imprisonment for felonies are:

(c) For a Class C felony, not less than five (5) years nor more than ten (10) years;

Ky. Rev. Stat. Ann. § 532.110(1)(a)

532.110 Concurrent and consecutive terms of imprisonment

(1) When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:

(a) A definite and an indeterminate term shall run concurrently and both sentences shall be satisfied by service of the indeterminate term;

501 Ky. Admin. Regs. 1:030

501 Ky. Admin. Regs. 1:030. Determining parole eligibility

Section 3. Parole Eligibility. (1) Initial parole review date. Except as provided by Section 2 of this administrative regulation, a person confined to a state penal institution or county jail shall have his case reviewed by the board, in accordance with the following schedules:

(a) If convicted of a felony offense after December 3, 1980:

Sentence Being Served	*Time Service Required Before First Review (Minus Jail Credit)*
1 year, up to but not including 2 years	4 months
2 years, up to and including 39 years	20% of sentence
More than 39 years, up to and including life	8 years
Persistent felony offender I in conjunction with a Class A, B, or C felony	10 years

Ky. Rule of Professional Conduct 1.1

Ky. Supreme Court Rule 3.130(1.1)
Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Ky. Rule of Professional Conduct 1.2

Ky. Supreme Court Rule 3.130(1.2)
Scope of representation

(a) A lawyer shall abide by a client's decision concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall inform the client regarding the relevant limitations on the lawyer's conduct.

Ky. Rule of Professional Conduct 1.4

Ky. Supreme Court Rule 3.130(1.4)
Communication

(a) A lawyer should keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Ky. Rule of Criminal Procedures 11.42

Ky. Rule of Crim. Proc. 11.42

11.42 Motion to vacate, set aside or correct sentence

(1) A prisoner in custody under sentence or a defendant on probation, parole or conditional discharge who claims a right to be released on the

ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it.

(2) The motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

(3) The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

(4) The clerk of the court shall notify the attorney general and the Commonwealth's attorney in writing that such motion (whether it be styled a motion, petition or otherwise) has been filed, and the Commonwealth's attorney shall have 20 days after the date of mailing of notice by the clerk to the Commonwealth's attorney in which to serve an answer on the movant.

(5) Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant appoint counsel to represent the movant in the proceeding, including appeal.

(6) At the conclusion of the hearing or hearings, the court shall make findings determinative of the material issues of fact and enter a final order accordingly. If it appears that the movant is entitled to relief, the court shall vacate the judgment and discharge, resentence, or grant him or her a new trial, or correct the sentence as may be appropriate. A final order shall not be reversed or remanded because of the failure of the court to make a finding of fact on an issue essential to the order unless such failure is brought to the attention of the court by a written request for a finding on that issue or by a motion pursuant to Civil Rule 52.02.

(7) Either the movant or the Commonwealth may appeal from the final order or judgment of the trial court in a proceeding brought under this rule.

(8) The final order of the trial court on the motion shall not be effective until expiration of time for notice of appeal under RCr 12.04 and shall remain suspended until final disposition of an appeal duly taken and perfected.

(9) Original applications for relief of the nature described in this Rule 11.42 that are addressed directly to a court other than the one in which the sentence was imposed shall be transmitted to the court in which the sentence was imposed for further disposition in the manner above set forth.

(10) Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

If the judgment becomes final before the effective date of this rule, the time for filing the motion shall commence upon the effective date of this rule. If the motion qualifies under one of the foregoing exceptions to the three year time limit, the motion shall be filed within three years after the event establishing the exception occurred. Nothing in this section shall preclude the Commonwealth from relying upon the defense of laches to bar a motion upon the ground of unreasonable delay in filing when the delay has prejudiced the Commonwealth's opportunity to present relevant evidence to contradict or impeach the movant's evidence.