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 FOR LEGAL ETHICS, CRIMINAL PROCEDURE, AND CRIMINAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the Sixth Amendment's guarantee of effective assistance of counsel require a criminal defense attorney to advise a client who is not a citizen that pleading guilty to an aggravated felony will trigger mandatory, automatic deportation?

2. If the criminal defense attorney misadvises his noncitizen client that a guilty plea will not lead to deportation, and that misadvice induces a guilty plea, does that misadvice amount to ineffective assistance of counsel and warrant setting aside the guilty plea?

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae legal ethics, criminal procedure, and criminal law professors are 37 law professors who teach, research, and write about criminal law, criminal procedure, or legal ethics, including their intersection. The names, titles, and institutional affiliations (for identification purposes only) of these *amici* are listed in Appendix A. Some *amici* work as clinical professors, in which capacity they regularly counsel and advise clients in criminal matters and train attorneys on how to effectively represent such clients. *Amici* have a professional interest in this Court's consideration of the doctrinal, historical, and policy issues involved in this Court's interpretation of the Sixth Amendment's guarantee of effective assistance of counsel, and the related issues surrounding standards of attorney competence.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Strickland v. Washington*, this Court established a two-part test for evaluating ineffective assistance of counsel claims under the Sixth Amendment: "First, the defendant must show that counsel's performance was deficient"—i.e., that it "fell below an objective standard of reasonableness." 466 U.S. 668, 687–88 (1984). "Second, the defendant must show

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1 This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici* and their counsel contributed monetarily to its preparation or submission. The parties have consented to the filing of this brief and copies of their letters of consent have been lodged with the Clerk of the Court.

that the deficient performance prejudiced the defense." *Id*. In *Hill v. Lockhart*, this Court held that the test set out in *Strickland* applies in the guilty plea setting. 474 U.S. 52, 56–57 (1985). However, the scope and manner in which *Strickland* applies to attorney advice on the "collateral consequences" of a plea—those consequences not directly imposed by the trial judge[2]—is still a matter of much debate.

A small number of courts—including the Kentucky Supreme Court in the decision under review—have held that attorney advice relating to collateral consequences is completely outside the scope of the Sixth Amendment, *see Commonwealth v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008), because such advice does not relate directly to a "determination of guilt or innocence." *Commonwealth v. Fuartado*, 170 S.W.3d 384, 386 (Ky. 2005). A larger group of courts have held that *Strickland* applies to collateral consequences advice, because "[t]his Court's precedent 'dictate[s]'" that the courts below apply *Strickland* when entertaining ineffective-assistance claims, *Williams v. Taylor*, 529 U.S. 362, 391 (2000), but that attorney advice relating to collateral consequences is "*never* deficient performance under *Strickland*." *Santos-Sanchez v. United States*, 548 F.3d 327, 334 (5th Cir. 2008) (emphasis added). This position is based on the legal fiction that consequences not imposed directly by the court, no matter their actual severity, can *never* be material to defendants

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[2] The definition of, and dividing line between, "collateral" and "direct" consequences is itself a matter of much confusion in the lower courts. *See infra* pp. 30–32. This is one of the common formulations. *See infra* note 19.

in deciding whether to plead guilty. Finally, a third group of courts have held that attorney advice regarding collateral consequences must be analyzed under *Strickland*, *see Williams*, 529 U.S. at 391; *Wiggins v. Smith*, 539 U.S. 510, 521 (2003), and that because *Strickland* requires a case-by-case evaluation of attorney performance, such advice can, at least in some circumstances, violate *Strickland*'s performance prong. *See, e.g.*, *State v. Paradez*, 101 P.3d 799, 804–05 (N.M. 2004).

The first two approaches are inconsistent with this Court's Sixth Amendment decisions. The approach adopted by the Supreme Court of Kentucky conflicts with this Court's decision in *Lockhart*, which rejected the contention that advice relating to collateral consequences is outside the scope of the Sixth Amendment, and held that "the two-part *Strickland v. Washington* test applies." 474 U.S. at 58. The approach of the majority of courts—that advice relating to collateral consequences can never violate *Strickland*'s performance prong—conflicts with this Court's teaching that the attorney performance analysis must be case-specific and context-based, and that categorical rules for attorney performance are therefore "not appropriate," *Strickland*, 466 U.S. at 688–89. This approach is also inconsistent with our legal system's circumstance-dependent conception of attorney competence.

Both categorical approaches are also inconsistent with counsel's Sixth Amendment responsibilities in ensuring a voluntary and intelligent guilty plea. Where an issue is of critical importance to the client in deciding whether to plead guilty or go to trial, this Court's decisions make clear that the competent attorney will discuss that issue with the client in ad-

vance of the plea, and that the plea is only intelligent with the benefit of such advice. The collateral consequences doctrine categorically—and wrongly—obviates that responsibility of counsel, simply because courts do not have such a responsibility under the Due Process Clause.

Application of *Strickland*'s settled test to attorney advice on collateral consequences will not prove unduly burdensome to courts or counsel. In many cases, *Strickland*'s demanding prejudice prong will serve as an effective and efficient bar to relief without necessitating any inquiry into attorney performance, as defendants generally will have difficulty demonstrating that they would have insisted on going to trial but for the attorney's allegedly deficient advice on a collateral consequence. For claims that survive the prejudice prong, courts will apply *Strickland*'s settled, common sense, and easily-understood test of objective reasonableness under the circumstances, a standard that will eliminate much of the confusion and difficulty that has developed around the supposedly bright line of the collateral consequences doctrine. *Strickland*'s context-dependent standard also will serve an important limiting function with respect to counsel's duties in the collateral consequences context, as an attorney is only required to advise to the extent that is reasonable under the circumstances, rather than on every conceivable collateral consequence and in every case.

ARGUMENT

I. Exclusion Of All Attorney Advice Relating To Collateral Consequences From Sixth Amendment Scrutiny Is Inconsistent With This Court's Sixth Amendment Decisions

Contrary to the holding of the Kentucky Supreme Court, this Court has specifically declined to carve out collateral consequences-related advice from the scope of the Sixth Amendment, *see Lockhart*, 474 U.S. at 56, which applies to all critical stages of the criminal proceeding. Moreover, while a majority of lower courts have held that collateral consequences-related advice can *never* be constitutionally deficient, *Strickland* and its progeny make clear that courts must engage in a context-dependent evaluation of attorney performance in light of all the circumstances. Finally, this Court has made clear that the Sixth Amendment requires that an attorney provide advice adequate to facilitate an intelligent plea, which often requires advice on consequences of import to the particular defendant that—for the purposes of the court's duties—may be deemed collateral.

A. Claims Related To Collateral Consequences Of Guilty Pleas Are Not Outside The Sixth Amendment's Effective Assistance Guarantee

A small number of lower courts, including Kentucky's Supreme Court in the decision under review, have held that advice on collateral consequences is completely "outside the scope" of the Sixth Amendment. *Padilla*, 253 S.W.3d at 485; *see also United States v. Matar*, 209 F. App'x 553, 556 (7th Cir. 2006) (unpublished opinion) ("[C]ollateral aspects of the

prosecution [are] not covered by the Sixth Amendment."); *Rumpel v. State*, 847 So. 2d 399 (Ala. Crim. App. 2002). In reaching this conclusion, the Kentucky Supreme Court adopted the reasoning of its recent decision in *Fuartado*, which held that because "'[t]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial[,]'" 170 S.W.3d at 386 (quoting *Strickland*, 466 U.S. at 684), that right "encompasses only those activities which tend to protect a criminal defendant's right to a fair and intelligent determination of guilt or innocence." *Id.* Because the collateral consequences of a guilty plea are "irrelevant to the determination of a defendant's guilt or innocence[,]" *id.*, the court concluded, they do not implicate the Sixth Amendment at all.

This argument has an element of déjà vu: Before this Court's decision in *Hill v. Lockhart*, a large majority of lower courts had held that "a defendant need not be informed regarding parole eligibility because that matter is not a direct consequence of his guilty plea." Br. of Resp't at *25–26, *Hill v. Lockhart*, No. 84-1103, 474 U.S. 52 (1985), 1984 U.S. Briefs 1103 (citing cases). In *Lockhart*, Kansas argued that this result was correct because advice (and, in *Lockhart* itself, misadvice) relating to parole eligibility "was not part of the plea bargain" and could not, therefore, form the basis of a Sixth Amendment claim. *Id.* at *49. But this Court rejected the proffered collateral-consequences carve-out, instead making clear that even where advice or misadvice relates to the collateral consequences of a guilty plea, "the two-part *Strickland v. Washington* test applies." *Lockhart*, 474 U.S. at 58. The small number of courts that have held otherwise—including Kentucky's Supreme Court—are therefore in error.

In reaching its decision, the Kentucky Supreme Court misconstrued the nature and scope of the Sixth Amendment guarantee. The "plain wording" of the Sixth Amendment encompasses counsel's assistance not only at trial, but "whenever necessary to assure a meaningful 'defense'." *United States v. Wade*, 388 U.S. 218, 225 (1967) (quoting U.S. Const. amend. VI). In ineffective-assistance cases, this Court therefore looks to the nature of the interaction between the defendant and the State—specifically, whether it is a "'critical' stage[]" of the proceedings at which fundamental rights "might be sacrificed or lost" to the State, in the absence of competent counsel—to determine whether the Sixth Amendment attaches. *Id.* at 224; *accord Kansas v. Ventris*, No. 07–1356, 556 U.S. ___, ___ (2009) (slip op. at 4–5) ("The assistance of counsel has been denied . . . at the . . . critical stage which produced the inculpatory evidence [that led to a conviction.]").

There is no doubt that the plea is one such "critical stage," as a plea of guilty is itself a conviction through which the defendant relinquishes a number of constitutional rights, in an adversarial interaction with the State. *See Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969) (identifying defendant's rights to trial by jury, to confront the witnesses against him, and to refrain from testifying against himself). Since the defendant has a right to counsel at this stage, he has a right to effective assistance of counsel *at this stage*; this Court has never carved out specific advice from Sixth Amendment scrutiny once the right attaches. Instead, once the right attaches, whether the attorney's performance violates the Sixth Amendment is a question to be decided under *Strickland*'s two-part test. *See Wiggins*, 539 U.S. at 521; *Williams*, 529 U.S. at 391; *Lockhart*, 474 U.S. at 56.

The Kentucky Supreme Court turned this inquiry on its head by asking whether the attorney advice at issue reaches directly to a determination of guilt or innocence when the plea for which that advice is given undoubtedly does.

B. Categorical Rules Of Attorney Performance Are Inconsistent With *Strickland* And Its Progeny, And With The Role Of Counsel In Our Legal System

1. Despite the clear command from this Court that an attorney's performance must be evaluated for reasonableness on a "case-by-case," *Williams*, 529 U.S. at 391, "circumstance-specific," *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000), "context-dependent," *Wiggins v. Smith*, 539 U.S. 510, 521 (2003), basis, and "in light of all the circumstances," *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986), many lower courts have created a bright-line rule that failure to advise on collateral consequences is "*never* deficient performance under *Strickland*." *Santos-Sanchez*, 548 F.3d at 334, 336 (emphasis added); *see also id*. at 336 ("We, like our sister circuits, have drawn a bright line between . . . direct and collateral consequences."); Br. of *Amicus Curiae* Criminal and Immigration Law Professors et al. in Support of Pet'r at 10–11, *Padilla v. Kentucky*, No. 08-651 (January 2009) [hereinafter *Certiorari Amicus* Brief of Law Professors] (citing cases).[3] This

[3] Many of these same courts acknowledge that affirmative misadvice regarding collateral consequences can violate *Strickland*'s performance prong. *See* Br. of Pet'r at 55 n.16, *Padilla v. Kentucky*, No. 08-651 (May 26, 2009) (citing cases). While it is

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approach violates the plain instructions of *Strickland* and its progeny.[4]

Roe v. Flores-Ortega is instructive on the inappropriateness of categorical rules governing attorney performance under the Sixth Amendment. The Courts of Appeals for the First and Ninth Circuits had applied a "bright-line rule," 528 U.S. at 478, and held that counsel's performance is *per se* deficient if counsel does not file a notice of appeal absent contrary instructions from the defendant. This Court emphatically rejected that approach, holding that "this *per se* rule [i]s inconsistent with *Strickland*[,]"

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undoubtedly true that misadvice on collateral consequences can amount to ineffective conduct, there is no principled reason rooted in the collateral nature of the consequence at issue that a bright-line rule on collateral consequences should be acceptable in cases of nonadvice where it is not acceptable in cases of misadvice. In both types of cases, the consequence is still collateral.

[4] Academic commentators have recognized this tension in great numbers. *See* Sarah Keefe Molina, Comment, *Rejecting the Collateral Consequences Doctrine*, 51 St. Louis U. L.J. 267, 283–84 (2006) ("Many critics correctly identify the collateral consequences doctrine as inconsistent with *Strickland*. . . . *Strickland* requires a 'circumstance-specific' inquiry[, rather than] [*p*]*er se* bright-line rules.") (footnotes omitted) (citing academic commentators); *see also, e.g.*, Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 712 (2002) ("[T]he first prong of *Strickland-Hill* analysis requires evaluating attorney competence. The collateral consequences rule does not capture, even as a rule of thumb, anything important about the concerns of competent lawyers or their clients. . . . [I]t should [therefore] be irrelevant to a *Strickland* analysis.").

and "that alone mandates vacatur and remand." *Id.*; *see also Kimmelman*, 477 U.S. at 378 (rejecting *per se* rule that carved out Fourth Amendment-related advice from ineffectiveness review, in federal habeas corpus proceedings). Instead, "the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Roe*, 528 U.S. at 479.

2. *Strickland* is explicit on its reasons for rejecting static, categorical Sixth Amendment rules such as the collateral consequences doctrine. Fundamentally, the rejection of bright-line rules is necessary 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." 466 U.S. at 688–89. Each case and each defendant is unique, and "an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693.

The legal profession has long recognized that "[n]o code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life." ABA Canons of Prof'l Ethics pmbl. (1908). As the nation's first code of lawyer ethics stated, "[w]hat is right and proper must . . . be ascertained in view of the peculiar facts [of the case], in the light of conscience." Code of Ethics (Ala. State Bar Ass'n 1887); *see also* Carol Rice Andrews et al., *Gilded Age Legal Ethics: Essays on Thomas Goode Jones' 1887 Code and the Regulation of the Profession* (2003) (discussing monumental achievement and influence of the 1887 code). Following this open-

textured conception of attorney competence, modern ABA and state rules of professional conduct—rules to which this Court has repeatedly looked in ascertaining attorney competence in the ineffective-assistance context, *see infra* note 5—generally leave the ultimate question of adequate performance to reasonableness under all the circumstances. *See, e.g.*, Model Rules of Prof'l Conduct R. 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation *reasonably necessary* for the representation.") (emphasis added).

3. Petitioner's case highlights four distinct problems with the collateral consequences doctrine as it is applied to attorney performance under *Strickland*. *First*, the doctrine does not permit distinctions between more and less severe collateral consequences. *Second*, the doctrine does not admit of differences between types of deficient attorney performance. *Third*, the doctrine does not allow for the evolution of attorney performance standards as the underlying substantive law changes. *Fourth*, by excluding whole categories of conduct from effective review, the doctrine opens the field for unconstitutional conduct.

a. This Court has often recognized the unique severity—and consequent importance to defendants—of deportation, explaining that it is the "equivalent of banishment or exile." *Costello v. INS*, 376 U.S. 120, 131 (1964); *see also, e.g.*, *Lehmann v. United States ex rel. Carson*, 353 U.S. 685, 691 (1957) (Black, J., concurring) ("To banish [individuals] from home, family, and adopted country is punishment of the most drastic kind."); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation deprives a person of "all that makes life worth living"). Recently, this Court has described immigration consequences as

one of the "principal" issues affecting an immigrant's decision on "whether to accept a plea offer or instead to proceed to trial." *INS v. St. Cyr*, 533 U.S. 289, 323 (2001). Even most jurisdictions that follow the collateral consequences doctrine recognize the unique severity of deportation. *See, e.g.*, *Rubio v. State*, 194 P.3d 1224, 1230 (Nev. 2008) (stating that, "[l]ike other jurisdictions, we recognize the particularly harsh and penal nature of deportation") (citing cases). Indeed, authorities of every stripe—including the American Bar Association,[5] criminal defense and

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[5] ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2(f) & cmt. at 126 (3d ed. 1999). These Standards are especially noteworthy, because this Court has regularly looked to them in determining prevailing professional norms in the Sixth Amendment context. *See Strickland*, 466 U.S. at 688; Reply Br. of Pet'r at 11 n.2, *Padilla v. Kentucky*, No. 08-651 (Feb. 3, 2009) (citing cases); *Florida v. Nixon*, 543 U.S. 175, 191 (2004). *But see Roe*, 528 U.S. at 479 ("'[P]revailing norms of practice as reflected in the American Bar Association standards and the like . . . are only guides.'") (quoting *Strickland*, 466 U.S. at 688). The state courts also have regularly looked to the ABA Standards for Criminal Justice, and often specifically to the Pleas of Guilty standards, in evaluating attorney conduct for ineffectiveness. *See, e.g.*, *State v. Donald*, 10 P.3d 1193, 1198–99 (Ariz. Ct. App. 2000); *People v. Barocio*, 264 Cal. Rptr. 573, 577, 579 (Cal. Ct. App. 1989); *MacDonald v. State*, 778 A.2d 1064, 1071–72, 1075 (Del. 2001); *Cottle v. State*, 733 So. 2d 963, 966 (Fla. 1999); *People v. Manning*, 883 N.E.2d 492, 502 (Ill. 2008); *Lagassee v. State*, No. CR-92-407, 1993 Me. Super. LEXIS 236, at *2–5 (Me. Sup. Ct. Sept. 23, 1993); *Commonwealth v. Stanton*, 317 N.E.2d 487, 490 n.3 (Mass. App. Ct. 1974); *State v. Loyd*, 190 N.W.2d 123, 124 (Minn. 1971); *State v. Paredez*, 101 P.3d 799, 805 (N.M. 2004); *People v. Reyes*, No. 678195, 2006 WL 3891499, at *6 (N.Y. Sup. Ct. Dec. 14, 2006); *State v. Yanez*, 782 N.E.2d 146, 154–55 (Ohio Ct. App. 2002); *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994); *State*

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public defender organizations,[6] authoritative treatises,[7] and state and city bar publications[8]—

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v. Bean, 762 A.2d 1259, 1266 (Vt. 2000); *Booker v. Commonwealth*, No. 1325-07-2, 2008 WL 926246, at *3 (Va. Ct. App. Apr. 8, 2008); *In re Pers. Restraint of Stenson*, 16 P.3d 1, 15–16 (Wash. 2001).

6 *See, e.g.*, *Assigned Counsel Manual: Policies and Procedures*, ch. IV, Guidelines Governing Representation of Indigents in Criminal Cases § 5.4(o) (Mass. Comm. for Public Counsel Servs. 2009); Performance Guidelines for Criminal Defense Representation §§ 6.2–6.4 (Nat'l Legal Aid and Defender Ass'n 1997); Performance Guidelines for Criminal Defense Representation §§ 6.2–6.4 (N.M. Pub. Defender Dep't 1998); Scott E. Bratton & Elizabeth Kelley, *Representing a Noncitizen in a Criminal Case*, Champion, Jan./Feb. 2007, at 61 (Nat'l Ass'n of Criminal Def. Lawyers).

7 *See, e.g.*, Norton Tooby, *Criminal Defense of Immigrants* § 1.3 (3d ed. 2003); Nat'l Lawyers Guild, *Immigration Law and Crimes* §§ 4:7, 7:21 (2008); Thomson Reuters/West, 2 *Crim. Prac. Manual* §§ 45:3, 45:15 (2009).

8 Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases § 2.8 (Or. State Bar 2007); Brian Bates, *Good Ideas Gone Bad: Plea Bargains and Resident Aliens*, 66 Tex. B.J. 878, 882 (Nov. 2003); Comm. on Criminal Justice Operations, *The Immigration Consequences of Deferred Adjudication Programs in New York City*, 62 Rec. 312, 324 (2007) (Ass'n of The Bar of the City of New York); David C. Koelsch, *Proceed with Caution: Immigration Consequences of Criminal Convictions*, 87 Mich. B.J. 44, 46 (2008); Fernando A. Nunez, *Collateral Consequences of Criminal Convictions to Noncitizens*, 41 Md. B.J. 40, 42 (2008); Eric Pinkard, *Representing the Foreign National in Criminal Court: Deportation Consequences of a Criminal Conviction and Overcoming Problems of Communication*, 73 Fla. B.J. 16, 22 (1999); Maria Baldini-Poterman & Mary M. O'Leary, *Five Things Every Lawyer*

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universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients, such as Petitioner, in recognition of the importance of deportation consequences to defendants in deciding whether to plead guilty or go to trial.[9] But the collateral consequences doctrine admits of no distinctions between an attorney's failure to advise on this most significant consequence, and the failure to advise on relatively minor consequences such as the loss of a driver's license.

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Should Know About Immigration Law, Chi. Bar Ass'n Record, Nov. 2003, at 42; Steve Brazelton, *Immigration Pitfalls of the Plea Bargain: Criminal Attorneys Beware*, Nev. Law., Nov. 1999, at 13 (Nev. Bar Ass'n); Allen C. Ladd, *Protecting Your Non-Citizen Client From Immigration Consequences of Criminal Activity*, S.C. Law., May 2004, at 44 (S.C. State Bar); *see also* Michael G. Balocca, *Bar Actions: Discipline*, Or. St. B. Bull., Apr. 2007, at 44, 44–45 (one year suspension for "lack[ ] [of] competence" for, *inter alia*, failure to advise on deportation consequences).

9 In addition, a majority of states and the District of Columbia now require, as a matter of state law, that the *courts* inform defendants of such consequences at the plea colloquy. *See Certiorari Amicus* Brief of Law Professors at 17 (citing statutes and rules in 23 states and the District of Columbia); Alaska R. Crim. P. 11(c)(3)(C); Iowa R. Crim. P. 2.8(2)(b)(3); Vt. Stat. Ann. tit. 13, § 6565(c)(1) (2009). These statutes and rules are not a replacement for attorney advice, insofar as the court cannot effectively counsel or strategize with the defendant in the same way as would his attorney. *See infra* pp. 21–22. But they do provide further evidence of the material importance of deportation consequences for the defendant in deciding whether and how to plead.

b. In addition, the collateral consequences doctrine admits of no distinctions between different types of deficient attorney performance (e.g., ignorance of a material fact or law, failing to provide advice, failing to provide advice once informed of its importance, providing incorrect advice, etc.). In the deportation consequences context, it is abundantly clear that a lawyer is "egregiously derelict in the discharge of his duty to his client" where he gives wrong advice contrary to the deportation statute. *United States v. Parrino*, 212 F.2d 919, 925 (2d Cir. 1954) (Frank, J., dissenting); *id.* at 924 (incorrect advice regarding deportation "disclose[d] unmistakably glaring incompetence on the part of that lawyer"). Judge Frank's position has been regularly endorsed by virtually every authority since.[10] As the dissent below recognized, "[c]ounsel 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." *Padilla*, 253 S.W.3d at 485 (Cunningham, J., dissenting). Yet honest application of the collateral consequences doctrine—which does not distinguish

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[10] *See* 8A James Wm. Moore, *Moore's Federal Practice* ¶ 32.07 [3b], at 32-80 (Cipes ed. 1969) ("[T]he vigorous dissent of Judge Frank more likely reflects the present attitude of the . . . judiciary."), *quoted in United States v. Briscoe*, 432 F.2d 1351, 1353–54 (D.C. Cir. 1970); *Strader v. Garrison*, 611 F.2d 61, 64 (4th Cir. 1979) (same); *Rubio v. State*, 194 P.3d 1224, 1230–31 n.36 (Nev. 2008) (citing numerous cases from the 1980s, 1990s, and 2000s); *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002) ("[A]n affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable.").

between various shades of attorney performance on the identical "collateral" matter—replaces this common sense notion with the fiction that even gross misadvice is categorically unrelated to attorney ineffectiveness.

c. The interaction of the collateral consequences doctrine with the changes to immigration laws at issue in Petitioner's case illustrates a third problem: that the collateral consequences doctrine fails to evolve with the substantive law, and thus fails to adequately gauge the severity of counsel's errors. Before enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009-546, deportation was triggered by only a small set of offenses, and even in those cases defendants could apply for equitable waivers of deportation, which were regularly granted. *See* Rob A. Justman, Comment, *The Effects of AEDPA and IIRIRA on Ineffective Assistance of Counsel Claims for Failure to Advise Alien Defendants of Deportation Consequences of Pleading Guilty to an "Aggravated Felony,"* 2004 Utah L. Rev. 701, 702, 705–08 (2004). Against this backdrop, most courts held that attorneys were not required to advise concerning deportation consequences. *See id.* at 712–13.

When the law was changed to eliminate waivers of deportation and to significantly expand the class of deportable offenses to include even some misdemeanors, *see, e.g.*, *United States v. Christopher*, 239 F.3d 1191, 1194 (11th Cir. 2001) (misdemeanor shoplifting is an "aggravated felony" triggering deportation), it would only have been proper under

Strickland—and a matter of common sense—for courts to take this change into account in determining whether counsel was ineffective. *See United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002) (acknowledging that in a case of failure to advise the court might "reconsider whether the standards of attorney competence have evolved to the point that a failure to inform a defendant of the deportation consequences of a plea would by itself now be objectively unreasonable"). But instead, the majority of lower courts have formalistically reaffirmed their prior holdings, notwithstanding the material change in substantive law. *See, e.g.*, *United States v. Gonzalez,* 202 F.3d 20 (1st Cir. 2000); *Rumpel v. State*, 847 So. 2d 399 (Ala. Crim. App. 2002); *see also* Justman, *supra*, at 729–30 (citing cases). In this way, the collateral consequences doctrine (and similar bright-line rules) effectively ossify the standards governing attorney conduct, foreclosing the contextual inquiry that the Sixth Amendment and the real-world practice of law require.

d. Finally, where (as here) the bright-line rule categorically *excludes* conduct from meaningful reasonableness review, there is a particular and significant risk that counsel may engage in egregious behavior, under the circumstances, without any recourse for the client. *See Arizona v. Gant*, No. 07–542, 556 U.S. ___, ___ (2009) (slip op. at 4) (Scalia, J., concurring) (declining to adopt broad rule in the Fourth Amendment context that "opens the field to what I think [is] plainly unconstitutional [conduct]"). This Court recognized that problem in *Kimmelman v. Morrison*, where it examined a bright-line rule carving out from ineffective-assistance review all claims arising out of Fourth Amendment-related ineffectiveness, in federal habeas corpus proceedings.

477 U.S. 365, 381 (1986). The Court rejected this *per se* treatment of attorney performance because to do otherwise would "deny all defendants" whose counsel performed inadequately with respect to this class of issues "the opportunity to protect their right to effective . . . counsel" under any circumstances. *Id.* at 378.

C. The Collateral Consequences Doctrine Is Inconsistent With Counsel's Sixth Amendment Responsibilities In Ensuring A Voluntary And Intelligent Guilty Plea

1. In carving out collateral consequences from the scope of the Sixth Amendment, the lower courts have frequently borrowed a concept from an area of law that diverges in critical respects from this Court's Sixth Amendment jurisprudence. Due Process requires federal trial courts to ascertain whether a guilty plea is made "voluntarily . . . and with full understanding of the consequences." *Kercheval v. United States*, 274 U.S. 220, 223 (1927); *see also McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void."). In *Boykin v. Alabama*, 395 U.S. 238 (1969), this Court held that, in discharging that function, a court "cannot presume a waiver of . . . important federal rights from a silent record," *id*. at 243, and that the Due Process Clause accordingly forbids a trial court from accepting a defendant's guilty plea "without an affirmative showing that [the plea] was intelligent and voluntary," *id*. at 242. *Boykin* thus required trial courts to canvass the guilty plea with the accused on the re-

cord, both "to make sure he has a full understanding of what the plea connotes and of its consequence," and to "leave[] a record adequate for any review that may be later sought." *Id*. at 244.

This Court clarified the scope of a trial court's Due Process duties in the plea setting in a trilogy of cases decided a year later. In *McMann v. Richardson* and *Parker v. North Carolina*, this Court held that a guilty plea is not involuntary or unintelligent—and thus the trial court is not prohibited from accepting it—where the plea was motivated by an earlier, allegedly coerced confession, as long as the guilty plea itself was a voluntary act, entered with the advice of competent counsel and with an awareness of the relevant circumstances and likely consequences of the plea. 397 U.S. 759, 767–68 (1970); 397 U.S. 790, 796 (1970). And in rejecting a voluntariness challenge to a plea in *Brady*, this Court stated that, in canvassing the consequences of a plea, Due Process requires trial judges to advise defendants only on *direct* consequences—i.e., consequences that are imposed directly by the trial court, *see infra* note 19—and not collateral consequences. *Brady v. United States*, 397 U.S. 742, 755 (1970). These constitutional standards are now incorporated in Federal Rule of Criminal Procedure 11(b).[11]

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[11] In entertaining challenges to guilty pleas premised on non-advice as to a collateral consequence of the plea, courts generally do not differentiate between Due Process and Rule 11 duties, insofar as compliance with Rule 11 establishes a "presumption that the plea is constitutionally adequate" for the purposes of Due Process. *See Downs-Morgan v. United States*, 765 F.2d 1534, 1541 n.14 (11th Cir. 1985). We refer herein to both duties as courts' "*Boykin*/*Brady*" duties. While state

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But the Sixth Amendment—as distinct from a trial judge's *Boykin/Brady* duties—is animated not by the court's obligation to ensure that the defendant voluntarily and intelligently accepts the penalties that the court imposes, but by counsel's obligation to ensure that his client intelligently evaluates whether and how to plead in the first place, in light of the advantages and disadvantages of the plea for that client. *See Libretti v. United States*, 516 U.S. 29, 50 (1995) ("Apart from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement."); *Lockhart*, 474 U.S. at 56 (differentiating between court's *Boykin/Brady* obligations and counsel's obligations under the Sixth Amendment). Indeed, a significant part of the reason that the court's role in advising on the consequences of the plea is so limited is *because* "counsel and not the court has the obligation of advising [the defendant]" of collateral consequences that may be important to his decision. *Michel v. United States*, 507 F.2d 461, 465 (2d Cir. 1974).[12] In light of this distinction be-

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courts are not bound by the Federal Rules of Criminal Procedure, nearly all states have state-law analogs to Rule 11, *see, e.g.*, Ky. R. Crim. P. 8.08, and state courts must in any event follow the constitutional dictates of *Boykin/Brady*.

[12] The *Brady* trilogy itself makes clear that the court's role in ensuring a voluntary and intelligent plea is premised upon the competency of counsel. *See Parker*, 397 U.S. at 797–98 (finding plea intelligent because "the advice [defendant] received was well within the range of competence required of attorneys"); *McMann*, 397 U.S. at 770 ("[A] defendant's plea of guilty based

[Footnote continued on next page]

tween the role of courts and counsel in the plea setting, it makes little sense for a doctrine that limits the obligations of the court to be employed in analyzing the performance of counsel.[13]

The overarching distinctions between the responsibilities of counsel and the court make clear why counsel's role extends to consultation and advice on guilty plea consequences that need not be addressed by the court. Counsel's basic duty of competency encompasses duties "to perform . . . appropriate factual research [and] legal analysis, and [to] exercise . . . professional judgment" in consulting with and advising the client, Restatement (Third) of the Law Governing Lawyers § 16 cmt. d (2000), none of which are applicable to the court. As this Court observed in *Powell v. Alabama*, 287 U.S. 45, 61 (1932), "[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? . . . He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between

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on reasonably competent advice is an intelligent plea."); *Brady*, 397 U.S. at 754 (finding plea voluntary because defendant "had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty").

[13] This Court's recognition of the distinction between the roles of courts and counsel in the plea setting is a particular manifestation of a larger truth: that the Sixth Amendment overlaps with, but is at times broader than, the Fifth. *See, e.g.*, *Wade*, 388 U.S. at 223–27, 237 (rejecting Fifth Amendment self-incrimination claim while granting Sixth Amendment right to counsel claim, and discussing relationship between the two).

counsel and accused which sometimes partake of the inviolable character of the confessional." In the context of inadequate fact investigation in particular, this Court has regularly found constitutionally ineffective assistance of counsel, notwithstanding the absence of a similar duty for the courts. *See, e.g.*, *Wiggins*, 539 U.S. at 521–27; *Williams*, 529 U.S. at 395–96; *Kimmelman*, 477 U.S. at 385.

In the plea setting, these broad norms of attorney competency are manifest in ways that are clearly distinct from, and in many ways broader than, the responsibilities of the court. Counsel has an obligation to conduct at least a minimal fact investigation in advance of the plea; to familiarize himself with relevant law; to learn the client's priorities (avoiding jail time, avoiding deportation, etc.); and to advise the client as to the best course of action in the face of the evidence mustered by the State, the range of possible sentences and other consequences, and the prosecutor's tender. The court has no such obligations, and is not institutionally capable of performing such a role. *See* ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2 cmt. at 118 (3d ed. 1999) ("[T]he court['s] inquir[y] . . . into the defendant's understanding of the possible consequences [of the plea] . . . is not, of course, any substitute for advice by counsel. The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have.").

As such, the lower courts that have deemed the scope of a counsel's duties under *Strickland* and its progeny coextensive with a trial court's duties under

the Due Process Clause have erred. The early Sixth Amendment ineffective assistance of counsel cases decided in the wake of *Brady*, in fact, regularly recognized the distinction between the court's *Boykin/Brady* obligations and those of counsel under the Sixth Amendment, *see, e.g.*, *Michel*, 507 F.2d at 463; *Colson v. Smith*, 438 F.2d 1075, 1079 (5th Cir. 1971); *Tafoya v. State*, 500 P.2d 247, 251 (Alaska 1972), and distinguished earlier cases that had examined the performance of counsel under the Due Process Clause, rather than the Sixth Amendment. *See, e.g.*, *Strader*, 611 F.2d at 64 (distinguishing two earlier collateral consequences cases because "[i]n neither case was the problem approached in terms of the constitutional entitlement to the effective assistance of counsel"); *People v. Pope*, 590 P.2d 859, 864–65 (Cal. 1979) (same); *see also United States v. Mora-Gomez*, 875 F. Supp. 1208, 1213 (E.D. Va. 1995) (discussing cases).[14] Nevertheless, over time, as more and more courts mechanically imported the collateral consequences doctrine from its *Boykin/Brady* roots into the Sixth Amendment ineffective assistance of counsel context, these critical distinctions were more often than not overlooked.

2. Because the collateral status of a consequence for *Boykin/Brady* purposes has little or no relation-

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[14] Many of these courts nevertheless denied ineffective assistance of counsel claims because the failure to advise as to deportation and similar collateral consequences did not make a "farce and mockery" of the proceeding. *See, e.g.*, *Tafoya*, 500 P.2d at 252; *Vizcarra-Delgadillo v. United States*, 395 F.2d 70, 71 (9th Cir. 1968). This Court's holding in *Strickland* supplanted the "farce and mockery" standard. *See* 466 U.S. at 696–97.

ship to the importance of that consequence to a particular defendant, those consequences cannot and should not be categorically excised from the Sixth Amendment. In the plea context, sufficiency of counsel is inexorably linked to the critical decision that the defendant must make: whether to plead guilty (and thereby relinquish a panoply of constitutional rights) or proceed to trial. Where an attorney does not provide advice sufficient for the client to approach this critical decision intelligently, the plea can be invalidated. *See McMann v. Richardson*, 397 U.S. 759, 770–71, 774 (1970).

A plea is "intelligent" where a defendant possesses the information or understanding necessary to weigh the advantages of a plea against the advantages of trial, and choose between the two, in light of the likely consequences of a guilty plea. *Brady*, 397 U.S. at 748 ("Waivers of constitutional rights . . . must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."); *see also Wofford v. Wainwright*, 748 F.2d 1505, 1508–09 (11th Cir. 1984) ("[T]he accused [must be able to] make an informed and conscious choice between accepting the prosecution's offer and going to trial."); *Hawkman v. Parratt*, 661 F.2d 1161, 1170 (8th Cir. 1981) ("A guilty plea must represent the informed, self-determined choice of the defendant among practicable alternatives."). An intelligent plea is therefore "the culmination of a rational decision-making process, in which the accused assesses the numerous factors which bear upon his choice of whether to formally admit his guilt or to put the State to its proof." *Healey v. United States*, 553 F.2d 1052, 1056 (7th Cir. 1977).

This standard is necessarily personal and circumstance-dependent, and conditions intelligence on the individual defendant's ability to understand and assess the advantages and disadvantages of the plea in light of the factors most important to that particular defendant. *See Adams v. United States ex rel. McCann*, 317 U.S. 269, 278 (1942) ("[W]hether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case."); *cf. Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.").

In light of the legal intricacies and strategic considerations that are often involved in ascertaining and understanding the advantages and disadvantages of a plea, "an intelligent 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; *see also* ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2 cmt. at 117 (1999) ("[T]he system relies, at heart, on defense counsel to ensure that a defendant's guilty plea is . . . entered in his or her best interests."). The defendant "needs the aid of counsel [at the plea stage] lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment." *Williams v. Kaiser*, 323 U.S. 471, 476 (1945). As a result of these impediments, "[o]nly counsel [can] discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate." *Id.* at 475–76.

It is for these reasons that "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); *see also Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) ("Only the presence of counsel could have enabled th[e] accused to . . . plead intelligently."). Therefore, the attorney "must actually and substantially assist his client in deciding whether to plead guilty[,] . . . [with] advice [sufficient to] permit the accused to make an informed and conscious choice." *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974); *see also Colson*, 438 F.2d at 1079 ("[I]t [i]s obvious that the Supreme Court envisioned a system under which the defendant, advised by reasonably competent counsel, makes an informed and conscious choice."). Whether that assistance relates to matters considered collateral with respect to the duties of the court is irrelevant: because an intelligent choice in the plea setting is context- and person-specific, *see Adams*, 317 U.S. at 278; *Johnson v. Zerbst*, 304 U.S. at 464, a competent attorney must reasonably advise on the advantages, disadvantages, and consequences of import to that particular defendant. The Sixth Amendment does not support a more rigid or formalistic conception of the attorney's duties at the plea stage.

II. Application Of *Strickland*'s Context-Dependent Test To Collateral Consequences Advice Will Not Prove Burdensome Or Unworkable

Because collateral consequences abound,[15] and because a large percentage of cases end in a plea,[16] some lower courts have expressed concern that the application of *Strickland*'s context-dependent test to collateral consequences-related advice will prove burdensome for courts and counsel. Of course, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of [defendants' constitutional rights]." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978), *quoted in Gant*, 556 U.S. at ___ (slip op. at 16). But even examined purely through the lens of administrability, application of *Strickland*'s objective reasonableness standard to collateral consequences-related advice does not raise serious concerns.

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15 One recent study identified eight primary categories of collateral consequences: employment, education, government benefits, financial, housing, family, civic, and immigration consequences. *See* N.Y. State Bar Ass'n, *Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings* (2006).

16 *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Justice Statistics*, 2005, at 5 tbl.8 (2008) (86% of federal cases ended in a plea in 2005).

A. Application Of *Strickland*'s Context-Dependent Test To Collateral Consequences Advice Will Not Create Undue Burdens For The Courts

Given that defendants for whom collateral consequences are of grave import already routinely raise ineffective assistance of counsel claims when they have not been properly advised on those consequences, *see* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions*, 86 B.U. L. Rev. 623, 639–647 (2006) (citing and discussing cases), there is no readily apparent reason to believe that application of *Strickland* to collateral consequences advice will materially increase the number of such claims brought in the lower courts.[17] And for those claims that are brought, *Strickland*'s prejudice prong stands as an effective and efficient bar to relief in all but the most deserving cases. *See* Chin & Holmes, *supra* note 4, at 739.

Under *Strickland*'s prejudice prong, courts can expediently dispose of non-meritorious ineffective

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[17] Despite the fact that the overwhelming majority of convictions are by guilty plea, most post-conviction claims are filed by habeas petitioners who have been convicted at trial rather than by plea. *See* Victor E. Flango, *Habeas Corpus in State and Federal Courts* 36–38 (Nat'l Ctr. for State Courts 1994) (discussing studies showing that most habeas corpus petitions—66% of those filed by state prisoners, and 74% of those filed by federal prisoners, according to the author's own analysis—are filed by prisoners who have been convicted at trial, and explaining findings as a function of the messier nature of trial convictions).

assistance of counsel claims without even reaching the question of attorney performance, *see Strickland*, 466 U.S. at 697, an especially powerful tool in the plea context. Prejudice exists in that setting only where there is "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty" to the offense charged. *Lockhart*, 474 U.S. at 59. So, for example, a defendant who has pleaded guilty to a violent offense such as murder, assault, or rape, and has received a decades-long sentence, likely will have great difficulty demonstrating that his plea decision would have been materially altered if he had known of any of the myriad collateral consequences that accompanied it.[18] By the same token, the less objectively important a collateral consequence—for instance, loss of a driver's license—the less likely it is that a defendant could show that attorney advice would have impacted the decision whether to plead guilty. In the ordinary course, then, only a small slice of claims are likely to get past the prejudice prong to be judged on the merits: those in which a defendant pleaded guilty to an offense that does not carry an especially severe sentence, a serious collateral consequence flowed from that plea (e.g., automatic deportation), and the defendant's attorney failed to provide advice, or provided misadvice, on that consequence. *See, e.g.*, *Sial*

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[18] Serious offenders with lengthy sentences are a significant majority of habeas petitioners. *See* Flango, *supra* note 17, at 35–38; *see also* U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 11 (1995) (62% of petitioners challenging state convictions on federal habeas review were convicted of homicide, rape, sexual abuse, robbery, or kidnapping).

v. State, 862 N.E.2d 702 (Ind. Ct. App. 2007) (finding prejudice where defendant was not advised as to deportation consequences of theft charge carrying eighteen-month sentence).

For claims that do get through *Strickland*'s prejudice prong, the courts will apply a standard that is no less workable—and, in fact, more straightforward—than the "bright-line" collateral consequences rule. Reasonableness under the circumstances tests are commonplace in constitutional criminal procedure, and *Strickland*'s two-part test is both well-settled and well-understood. In applying that test, courts remain free to develop and employ rules of thumb that operate within *Strickland*'s case-by-case framework to aid in the efficient evaluation of claims. *See, e.g.*, *Roe*, 528 U.S. at 481 (rejecting *per se* rule while stating that "[w]e expect that courts evaluating the reasonableness of counsel's performance using [*Strickland*] . . . will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal"); *see also United States v. Banks*, 540 U.S. 31, 36 (2003) (while reasonableness under Fourth Amendment requires "examining the totality of circumstances[,]" this Court has "pointed out factual considerations of unusual . . . significance" that, while "not dispositive[,]" provide a helpful framework for the evaluation of individual claims).

Indeed, the application of *Strickland*'s settled test to collateral consequences-related advice will actually *eliminate* many burdens that now plague lower courts under the collateral consequences doctrine. The collateral consequences bright line is "not easily drawn," *Ex parte Morrow*, 952 S.W.2d 530, 539 (Tex. Crim. App. 1997) (Baird, J., dissenting), and

the persistence of the doctrine has created a multitude of splits of authority and unwieldy issues of definition and application. Three widely-used definitions of "direct" and "collateral," for example, currently compete in *Strickland* cases in the lower courts.[19] Under any given definition, courts sometimes disagree about whether to place particular consequences in one category or the other, creating subsidiary splits.[20] Courts also have struggled with whether and how to adopt a "misadvice exception" to the collateral consequences doctrine.[21] And courts that have done so grapple further with whether that exception applies only to "gross misadvice" or to sim-

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[19] *Compare, e.g.*, *United States v. Salerno*, 66 F.3d 544, 551 (2d Cir. 1995) ("[D]irect [versus] collateral depends on whether the undesired consequence is *definite, immediate, and largely automatic*.") (quotation marks omitted) (emphasis added), *with, e.g.*, *State v. Rojas-Martinez*, 125 P.3d 930, 933 (Utah 2005) ("[A] consequence is collateral if *an agent independent of the court* . . . must act to cause that consequence.") (emphasis added), *and with, e.g.*, *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988) ("[A] collateral consequence is [any] one that is not related to the length or nature of the sentence imposed on the basis of the plea.").

[20] For instance, there is a split between the Fourth Circuit and "the majority of circuits deciding the issue" on whether parole ineligibility is a collateral or direct consequence of a plea, giving rise to an ineffective assistance of counsel claim. *See Bustos v. White*, 521 F.3d 321, 325–26 (4th Cir. 2008).

[21] *Compare, e.g.*, *Downs-Morgan*, 765 F.2d at 1540–41 (declining to adopt blanket misadvice exception to collateral consequences doctrine), *with, e.g.*, *Ostrander v. Green*, 46 F.3d 347, 355 (4th Cir. 1995) (adopting blanket exception), *overruled on other grounds by O'Dell v. Netherland*, 95 F.3d 1214, 1222–1223 (4th Cir. 1996).

ple "erroneous advice" as well.[22] Courts often further divide on the boundaries of these subcategories. *See Hornak v. Warden*, 488 A.2d 850, 852 (Conn. Super. Ct. 1985) ("[T]here is a division of authority on what constitutes gross misadvice."); *see also State v. Sharkey*, 927 A.2d 519, 523 (N.H. 2007) ("Although numerous federal courts have used the 'gross misinformation' standard, there has been no conclusive definition of the term.").

These difficulties with the supposedly bright line of the collateral consequences doctrine are indicative of the problem—repeatedly acknowledged and warned against by this Court—of adopting rigid *per se* rules for Sixth Amendment ineffective assistance of counsel claims. Rejection of that doctrine and application of *Strickland*'s context-dependent test to attorney advice on collateral consequences would eliminate these difficulties in favor of this Court's well-settled, common sense, and easily-applied standard: objective reasonableness under the circumstances, in light of prevailing professional norms.

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22 *Compare, e.g.*, *Strader*, 611 F.2d at 65 (standard for ineffective assistance on parole eligibility is "gross misadvice"), *with, e.g.*, *Garmon v. Lockhart*, 938 F.2d 120, 121 (8th Cir. 1991) (simple "erroneous advice" concerning parole eligibility may be sufficient).

B. Compliance With *Strickland*'s Rule Of Reasonableness On Collateral Consequences Advice Will Not Unduly Burden Criminal Defense Lawyers

Strickland requires only *reasonable* performance under the circumstances. *See* 466 U.S. at 688–91. Given that there are only a limited number of collateral consequences that will be important to most defendants, *see* Chin & Holmes, *supra* note 4, at 737–38, and given the practical limitations of real-world practice, a defense attorney need not advise every client on every remote or insignificant collateral consequence under *Strickland*. To fulfill his Sixth Amendment obligations in the ordinary case, the attorney would need to ask only a few basic questions regarding immigration status, prior convictions, and government benefits when first meeting with a client. *See id.* at 738. The attorney also would need to conduct reasonable legal research.[23] Then, based on what he has learned, he would need to reasonably advise the client as to potential collateral consequences of note. *See* ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2(f) (3d ed. 1999) ("*To the extent possible*, defense counsel should

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[23] The attorney would be able to complete the necessary legal research quickly and inexpensively in most cases, as practice guides and handbooks abound that detail the relevant federal and state laws regarding collateral consequences. *See, e.g.*, U.S. Dep't of Justice, *Federal Statutes Imposing Collateral Consequences Upon Conviction* (2000); Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* (2006).

determine and advise the defendant . . . as to the possible collateral consequences that might ensue from entry of the contemplated plea.") (emphasis added). Reasonable fact investigation, legal research, and advice are already obligations under undisputed professional norms. *See supra* pp. 21–22.

Reasonableness is the measure: An attorney is not required to advise as to every collateral consequence any more than he is required to find every potentially helpful fact or case, choose the absolute best strategy, execute that strategy perfectly, intuit that his client is lying or hiding material information, or divine unspoken, unusual preferences on the part of the client. *See Strickland*, 466 U.S. at 688–91. In this way, *Strickland*'s contextual standard will serve an important limiting function with respect to collateral consequences-related attorney duties.

CONCLUSION

The judgment of the Supreme Court of Kentucky should be reversed.

Respectfully submitted.

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APPENDIX A:

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