No. 08-651

In The
Supreme Court of the United States

JOSE PADILLA,

Petitioner,

versus

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Does the Sixth Amendment require counsel to give advice about potential civil deportation consequences in a criminal case?

2. May advice about civil collateral matters beyond the scope of representation in a criminal proceeding violate the Sixth Amendment?

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STATEMENT

Petitioner Jose Padilla was arrested for smuggling over half a ton of marijuana (1,033 pounds) in his tractor-trailer. R. 1-2, 5, 38; J.A. 47-49, 50-52. With the aid of competent counsel, Padilla obtained a favorable guilty plea whereby he limited his prison sentence to five years rather than the ten years possible for the most serious charged offense. R. 38, 44-48; J.A. 50-52, 61-68. Nearly two years after the entry of his final judgment, Padilla became dissatisfied with his plea agreement and sought post-conviction relief under Kentucky Rule of Criminal Procedure (RCr) 11.42. J.A. 71-74.

In his *pro se* post-conviction motion, Padilla alleged for the first time that his trial counsel had advised him that he did not have to worry about his immigration status since he had lived in the United States so long. J.A. 72-73. Padilla further alleged that but for this misadvice regarding his immigration status he would not have pleaded guilty, but instead, insisted on going to trial. J.A. 73. After multiple levels of review, the Kentucky Supreme Court rejected Padilla's claim of counsel ineffectiveness. Kentucky's highest court found that advice on a collateral consequence, such as deportation, is beyond the scope of the Sixth Amendment. Further, the Kentucky Supreme Court found no appreciable difference between the absence of advice on a collateral matter and counsel's misadvice on a collateral matter. Pet. App. 23; *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008). Having faithfully applied this Court's

precedent, the Kentucky Supreme Court's decision should be affirmed.

A. Facts Underlying Padilla's Convictions

On September 17, 2001, Padilla was arrested in Hardin County, Kentucky, after authorities discovered over 1000 pounds of marijuana during a search of his tractor-trailer. R. 1-2, 5, J.A. 47-49. Padilla was formally indicted for trafficking in marijuana, a class C felony, for "possessing with the intent to sell or transfer approximately 1033 pounds of marijuana in [a] semi-tractor trailer," and three other lesser offenses. J.A. 47-49. Prior to his decision to plead guilty, Padilla sought to suppress evidence seized during a search of his tractor-trailer. R. 25-27.

During the subsequent evidentiary hearing on Padilla's motion to suppress, the Commonwealth presented the testimony of Inspector Scott Dennis, an officer with Kentucky Vehicle Enforcement, indicating that he performed a "driver paperwork safety inspection" because he was unfamiliar with the trucking company indicated on Padilla's truck. R. 32. In the course of the paperwork check Inspector Dennis noticed Padilla's nervous behavior and the fact he was "off route," and asked for consent to search. R. 32-33. Padilla's written/signed consent to search his truck, trailer, person, and belongings was made an exhibit during the suppression hearing and placed in the record. R. 30.

Items suggesting personal use of marijuana, including a green leafy material, were found in the passenger compartment of the truck, which resulted in Padilla being placed under arrest. R. 33. Padilla was informed of his rights under *Miranda v. Arizona*, 384 U.S. 436, 478 (1996), and executed a signed waiver of those rights. R. 31, 33. Then, with Padilla's assistance, the trailer he was hauling was searched. The officers found 23 wrapped styrofoam boxes not accounted for in the shipping manifest. When asked what was inside, Padilla responded "maybe drugs." R. 33. Padilla also indicated to police that he had been paid by someone to transport the boxes in question. R. 34. Ultimately, the 23 styrofoam boxes were found to contain approximately 1033 pounds of marijuana. R. 33. Finding both Padilla's consent to search and his waiver of rights to be valid, the Kentucky trial court overruled the motion to suppress the evidence seized during the search and Padilla's statements to police. R. 34.

Thereafter, Padilla accepted the prosecution's plea offer and submitted his motion to enter an "unconditional guilty plea"[1] on a standardized Kentucky form entitled, "Motion to Enter Guilty Plea," in which

[1] Kentucky Rule of Criminal Procedure (RCr) 8.09 authorizes, with the approval of the court, the entry of a conditional guilty plea. A conditional guilty plea preserves a defendant's right to appeal adverse rulings and provides a right to withdraw the plea if the defendant prevails on appeal. Padilla did not seek to enter a conditional plea.

he affirmatively acknowledged and waived his constitutional rights and expressly certified that his guilty plea was being entered, "freely, knowingly, intelligently and voluntarily." J.A. 50-52; R. 38. Pursuant to the plea agreement, a judgment convicting Padilla of Possession of Marijuana;[2] Possession of Drug Paraphernalia;[3] and Trafficking in Marijuana, Greater than Five Pounds[4] was entered in the written record on October 4, 2002. J.A. 61-68; R. 44-48. For these crimes Padilla was sentenced as recommended in the plea offer to a total sentence of ten years, with five years to serve and five years to be probated. J.A. 61-68; R. 44-48.

Had Padilla insisted on going to trial, he would not have had any viable defenses and would have certainly been convicted. He would have also risked being sentenced to serve ten years imprisonment rather than the five years bargained for in the plea agreement.

B. Post-Conviction Facts and Proceedings

Padilla's motion to enter a guilty plea was accepted in open court on August 22, 2002. J.A. 57-60. Thereafter, on September 17, 2002, Padilla again appeared for the pronouncement of judgment and

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[2] KRS 218A.1422 (Class A Misdemeanor)

[3] KRS 218A.500(2) (Class A Misdemeanor)

[4] KRS 218A.1421 (Class C Felony)

final sentencing on his plea of guilty. That judgment was reduced to writing and entered into the record on October 4, 2002. J.A. 61-68; R. 44-48. At no point during this time period did Padilla express any dissatisfaction with his counsel nor did Padilla express any concern for his immigration status.

Nearly two years after entry of final judgment and just months before his ultimate release from incarceration, Padilla sought post-conviction relief; alleging for the first time that his counsel had misadvised him of the effect his plea may have on his immigration status. J.A. 71-74; R. 58-61. The Commonwealth was not required to, and chose not to respond to Padilla's motion. R. 72; Pet. App. 42; *See Polsgrove v. Commonwealth*, 439 S.W.2d 776 (Ky. 1969).

On September 14, 2004, the Hardin Circuit Court rendered its Findings of Fact, Conclusions of Law and Order Denying RCr 11.42 Motion, in which it found that "Padilla was thoroughly questioned, and there is no question that his plea was a knowing, intelligent and voluntary action on his part." R. 72-76; Pet. App. 41-44. Noting that a valid guilty plea does not require that a defendant be informed of every possible consequence of that plea, and that Padilla was aware of the possibility of deportation and discussed that possibility with counsel, the Hardin Circuit Court denied Padilla's allegation of ineffective assistance of counsel. *Id*. Padilla served out his prison sentence

and was released from custody on November 11, 2004.[5]

C. Decisions On Appeal

On appeal, the Kentucky Court of Appeals, in a split decision (2-1), reversed the judgment of Hardin Circuit Court and remanded the case for an evidentiary hearing to determine whether or not Padilla had been misadvised and whether that misadvice prevented Padilla from entering a knowing, intelligent and voluntary guilty plea. Pet. App. 29-40. Judge Henry dissented in part because he did not find credible Padilla's assertion that a brief statement by his defense counsel concerning the possibility of deportation affected the voluntariness of his plea. Pet. App. 37-38.

In a 5-2 decision, the Kentucky Supreme Court reversed the Kentucky Court of Appeals and reinstated the trial court's judgment denying Padilla's post-conviction challenge. Pet. App. 19-23. Essentially, the Kentucky Supreme Court agreed with the Commonwealth that the "failure to advise" and "misadvice" are not meaningfully distinguishable with regard to collateral consequences such as deportation, the right to vote, or the right to possess firearms. Pet.

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[5] Release date obtained from the Kentucky Department of Corrections, Official Resident Record Card for Padilla.

App. 21. In either case, a misunderstanding, or even a complete lack of awareness, of a collateral matter does not fundamentally affect the voluntariness of the waiver of constitutional rights upon entry of the guilty plea. Pet. App. 21. Thus, the Kentucky Supreme Court held that: "[a]s collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provided no basis for relief." Pet. App. 23.

SUMMARY OF THE ARGUMENT

Neither this Court nor the federal circuits have held that the trial court or defense counsel must inform defendants of all possible consequences flowing from a guilty plea. The only duty of the trial court is to ensure that the defendant understands the "direct" consequences of the plea. That is the consistently held position of every federal circuit to have considered the issue.

1. For a guilty plea to be voluntary in a constitutional sense a defendant need only understand the direct consequences of his or her plea. *Brady v. United States*, 397 U.S. 742, 755 (1970). To ensure voluntariness, this Court requires trial courts to confirm, on the record, a defendant's understanding of the direct consequences of his or her plea and their understanding of the constitutional rights being

waived by pleading guilty. *Boykin v. Alabama*, 395 U.S. 238 (1969). This limitation is consistent with the fundamental purpose of the Sixth Amendment, i.e. to protect a defendant's right to "a fair and intelligent determination of guilt." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

A defendant's misunderstanding of a collateral matter does not affect that defendant's understanding of the right to trial by jury, right of confrontation, the protection against self-incrimination, or any other right waived when pleading guilty. Padilla makes no claim that his counsel's allegedly deficient advice affected his ability to understand the rights he waived. Further, Padilla makes no assertion of actual innocence and it is evident that his alleged misunderstanding of his deportation risk did not affect the validity of his admission of guilt.

It is nearly impossible to catalogue all of the potential collateral consequences of a criminal conviction. Collateral consequences are typically civil in nature and beyond the scope of attorney representation in a criminal case. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) ("the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorney in criminal cases.'"). Accordingly, the ineffective assistance inquiry approved in *Hill* seeks to ensure that a defendant voluntarily entered his guilty plea. And this Court has already established in *Brady* and *Boykin* that for a plea to be voluntary a defendant

need only know the direct consequences of conviction and understand the rights being waived.

The Sixth Amendment issue in this case is not "'. . . what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp,* 483 U.S. 776, 755 (1987); *citing United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984). Advice about potential consequences collateral to a criminal prosecution is not a cognizable basis for claiming counsel ineffectiveness. Not every word uttered by an attorney implicates the Sixth Amendment. The right to "counsel for his defence" contemplates a criminal prosecution, not a civil proceeding. The scope of attorney representation in a criminal case is necessarily finite. Criminal defense counsel must focus on issues affecting innocence or guilt and punishment. One who retains counsel for the specific purpose of defending a criminal charge cannot reasonably expect the representation to include other matters. The client and the lawyer both know that the scope of representation is limited to the criminal charge. Thus, the Sixth Amendment does not envision a duty on the part of criminal defense counsel to dispense advice concerning every possible aspect of the client's future. Advice extraneous or peripheral to the protection of specific constitutional rights is not itself possessed of constitutional dimension.

2. Any distinction drawn between the "failure to advise" and "affirmative misadvice" would be arbitrary. The validity of a guilty plea in either case hinges on the voluntariness of the plea. When

evaluating the voluntariness of the plea, a criminal defendant's knowledge and understanding of the direct consequences of that plea are the central inquiry and the basis for any misunderstanding is immaterial. The constitution does not compel defense counsel to advise a criminal defendant on all collateral matters because those matters fall well outside the criminal proceeding. A criminal defense attorney's act of gratuitously offering such advice does not somehow change the collateral nature of the advice nor create a drastically new distinction in the constitutional analysis.

Strikingly absent in all of the contrary cases relied on by Padilla, is any legal or rational basis for holding that misadvice could constitute ineffective assistance of counsel under the Sixth Amendment. Instead, a close inspection of those cases reveals result-driven opinions that seem to rely on a general "feeling" that misadvice is bad. While the desire to provide a remedy for criminal defendants who have received bad advice is laudable, there is simply not a rational basis for elevating misadvice on a collateral matter to a constitutional infirmity.

3. State and federal criminal trial courts do not control deportation proceedings. Even had Padilla mentioned his immigration status prior to his guilty plea, neither the prosecutor nor the trial judge could have bound the immigration authorities. For that reason, the potential of deportation by immigration authorities must continue to be viewed as a consequence collateral to the criminal proceeding.

Padilla urges this Court to declare that the potential of deportation is a collateral consequence too terrible to be treated as such. Padilla's brief, at pp. 51-54, actually suggests that deportation is as bad or worse than imprisonment. Surely even Padilla would concede that is not always the case. (Deportation to a favorable country or a country in which the defendant still has family or other connections is far better than a death sentence, life imprisonment, or other significant penal sanction.) Padilla does not identify anything in the Bill of Rights forfeited by reason of attorney advice or misadvice. He is reduced to arguing that but for attorney advice about a collateral consideration, he would have weighed the benefits of his plea bargain differently. Such a claim is simply not cognizable. Creating special protections for non-citizens from collateral matters will increase litigation by citizens concerning why the collateral consequence they hold so important should not be treated like deportation.

4. Even if this Court should decide to expand the protections granted by the Sixth Amendment to Padilla's situation, Padilla himself is still not entitled to relief from his Kentucky conviction. Padilla has not demonstrated and cannot demonstrate how the criminal proceeding was fundamentally unfair or that he suffered prejudice necessitating reversal under the second prong of *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984).

ARGUMENT

I. THE SIXTH AMENDMENT DOES NOT GUARANTEE A CRIMINAL DEFENDANT LEGAL ADVICE CONCERNING COLLATERAL CONSEQUENCES, SUCH AS DEPORTATION.

A. Padilla's Guilty Plea Was Voluntary.

Effective assistance of trial counsel as guaranteed by the Sixth Amendment " . . . extends to and encompasses only those activities which tend to protect a criminal defendant; right to a fair and intelligent determination of guilt or innocence." *Commonwealth v. Fuartado*, 170 S.W.3d 384, 386 (Ky. 2005), *citing Strickland v. Washington*, 466 U.S. 668, 686 (1984). When determining whether or not a guilty plea is being voluntarily entered the inquiry must focus on the defendant's understanding of the direct consequences of his plea. *Brady v. United States*, 397 U.S. 742, 755 (1970).

In *Brady,* this Court reiterated the standard as to the voluntariness of guilty pleas holding that,

> "[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature

> improper as having no proper relationship to the prosecutor's business (e.g. bribes)."

Id. at 755 (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957)). It must be presumed that this Court purposely focused on "direct consequences" when referring to the type of information a defendant must be fully informed of before pleading guilty. *United States v. Sambro*, 454 F.2d 918, 922 (D.C. Cir. 1971). This limitation makes perfect sense given the fundamental purpose of the Sixth Amendment is protect a criminal defendant's right to "a fair and intelligent determination of guilt or innocence." *Fuartado*, 170 S.W.3d at 386, *citing Strickland v. Washington*, 466 U.S. 668, 686 (1984).

Padilla's misunderstanding of his deportation risk did not affect his understanding of the constitutional rights he waived during the entry of a guilty plea or the consequences he would have faced as a direct result thereof. "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." *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (citations omitted). A criminal defendant's misunderstanding of a collateral matter does not affect that defendant's understanding of his or her constitutional rights he or she waives when pleading guilty. Furthermore, a misunderstanding of a collateral matter does not affect the validity of a criminal defendant's admission in open

court to committing charged acts. *See Sambro*, 454 F.2d at 921-22.

This Court's precedents require only that a criminal defendant be fully aware of the "direct consequences" of a guilty plea in order for that plea to be voluntary in a constitutional sense. Further, it is the duty of the trial court to ensure a criminal defendant's guilty plea is voluntarily entered. *Kercheval v. United States*, 274 U.S. 220, 223 (1927); *Walker v. Johnston*, 312 U.S. 275, 286 (1941). In *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969), this Court re-emphasized the trial court's responsibility and mandated that the trial judge create a sufficient record evidencing the voluntariness of a guilty plea to permit meaningful review of voluntariness on appeal. Thus, under *Boykin* trial courts customarily engage a defendant in a colloquy in open court to ensure the defendant's full understanding of the direct consequences of his guilty plea and understanding of the constitutional rights he or she is waiving.

Padilla has never claimed that he did not commit the crimes to which he pleaded guilty, nor made any claim that would even question his full understanding of the direct consequences of his plea. Likewise, Padilla has not even alleged that his misunderstanding of his deportation risk had any effect on his full understanding of the constitutional rights he waived when pleading guilty. Any error in counsel's assessment of Padilla's deportation risks was an "ordinary error" as described in *McMann v.*

Richardson, 397 U.S. 759, 770 (1970) ("It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits guilt, . . . , he assumes the risk of ordinary error in either his or his attorney's assessment of the law and fact."). It simply does not offend the constitutional protections afforded to Padilla to hold that he assumed that risk. Thus, under this Court's precedents the trial court properly fulfilled its obligation to ensure the voluntariness of Padilla's guilty plea.

In *United States v. Ruiz*, 536 U.S. 622 (2002), this Court, again focusing on direct consequences, held that guilty pleas may remain voluntary despite the fact a defendant labors under misapprehensions of direct aspects of the case. Summarizing several prior holdings, this Court found: " . . . that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." *Id.* at 630 (citations omitted). *See also Mabry v. Johnson*, 467 U.S. 504, 509 (1984) (disapproved of on other grounds by *Puckett v. United States*, 129 S.Ct. 1423 (2009)).

In *Brady,* a defendant's guilty plea was constitutionally voluntary despite the fact that the defendant misapprehended the quality of the state's case, the likely penalties, and of his attorney's failure to anticipate a favorable change in law regarding

punishment. *Brady*, 397 U.S. at 757. Likewise, this Court found that misjudging the admissibility of a confession, *McMann v Richardson*, 397 U.S. 759, 770 (1970), and counsel's failure to discover a constitutional infirmity in a grand jury proceeding, *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), did not render a criminal defendant's guilty plea involuntary.

The defendants in *Brady*, *McMann*, and *Tollett* all misunderstood or lacked material information that related directly to the criminal proceeding yet this Court found that none of their misapprehensions rendered their respective pleas involuntary. Padilla, on the other hand, concedes that he fully understood the direct consequences of his plea as well as his constitutional rights; i.e. the right to a trial, to confrontation, to not testify, to appeal, etc. Further, Padilla does not dispute that he is in fact guilty. Because Padilla is guilty and because he possessed full knowledge and understanding of the direct consequences of his decision to plead guilty, that plea was voluntarily made.

Consistent with those rulings, this Court has never required trial courts to address collateral consequences with defendants who are pleading guilty. It follows, then, that the Court has long concluded that knowledge of the myriad of collateral consequences to a conviction is not needed for a plea to be voluntary.

The reason that advising defendants on the collateral consequences of a guilty plea should not be

elevated under the Sixth Amendment is due, in part, to the varying types and degrees of collateral consequences that exist. In short, collateral consequences are numerous and broad-sweeping. They range from the obvious (inability to hold public office – Ky. Const. § 150) to the inconspicuous (removal from the Board of Directors of the United States Institute of Peace – 22 U.S.C. § 4605(f)(1)). While traditional collateral consequences are more well-known, such as the commonly understood loss of civil rights and liberties (e.g., restrictions on the right to vote, to drive a car, or to own a firearm), state and federal statutes also impose a great number of less apparent collateral consequences. For example, in Kentucky, an "exploration of the Kentucky Revised Statutes reveals hundreds of collateral consequences that affect ex-offenders upon their release from incarceration." Troy B. Daniels et al., *Kentucky Statutory Collateral Consequences Arising From Felony Convictions: A Practitioner's Guide*, 35 N. Ky. L. Rev. 413 (2008). *See also* U.S. Department of Justice, *Federal Statutes Imposing Collateral Consequences Upon Conviction* (visited July 24, 2009) <http://www.usdoj.gov/pardon/collateral_consequences.pdf>.

The traditional consequences merely scratch the surface of the variety of ways that a convicted defendant can face consequences unrelated to his actual crime and sentence. For example, a defendant can face property forfeiture, penalty enhancements on future crimes, offender registration (e.g., violent or sexual offender registration), or losses affecting his/her ability to receive public housing, to purchase

or be served alcohol, to live in certain places, to receive student loans, to enlist in the U.S. military, to hold certain public jobs, to gain certain professional licenses (or loss/suspension of a held license), and to serve on a jury – just to name a few. Also, in some instances, collateral consequences have been defined so broadly as to include familial consequences, such as child support arrearage, termination of parental rights, loss of child custody/visitation, or forced adoption, etc. Similarly, collateral consequences have been generally defined to include the negative impact convicted felons often have on disadvantaged communities. Examples include increased risk of homelessness for released felons, greater likelihood of poverty, the likelihood of recidivism, the risk of contracting infectious diseases while incarcerated (that go untreated before release), and lack of treatment for drug abuse and/or mental illness. Given the breadth and diversity of the consequences noted, placing a duty on defense counsel to be aware and advise a defendant of any likely collateral consequence would be overly burdensome and wholly impractical.

Because misunderstanding a collateral consequence is independent of the constitutional rights waived in a guilty plea, voluntariness is not affected. The difference between collateral consequences of a criminal conviction and direct consequences is one of kind, not degree. Understanding collateral consequences is not essential to a voluntary plea. The relative importance of a collateral consequence to a

particular defendant does not give rise to a constitutional right to be apprised of, or a negative outcome to be relieved from, if misadvised. To do so would open the door to innumerable challenges to pleas based on incorrect advice regarding a multitude of collateral consequences.[6]

Further, opening the inquiry on voluntariness to include collateral matters would greatly lessen the certainty and finality sought by use of the plea process. *See United States v. Timmreck*, 441 U.S. 780 (1978). In *Timmreck*, this Court unanimously denied habeas corpus relief to a petitioner who challenged the voluntariness of his plea because he was not aware of the mandatory parole term associated with his sentence. *Id.* Further, this Court cautioned that:

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. **The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas.** Moreover, the concern that unfair

[6] Although Padilla claims to be a legal resident, his arguments would extend to illegal immigrants, which, as this Court has recognized, have no legal entitlement to remain in the United States. *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 488 and 491-492 (1999); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 (2006).

> procedure may have resulted in the conviction of an innocent defendant is only rarely raised by a petitioner to set aside a guilty plea.

Id. at 784 (emphasis added).

Similarly, in *McMann, supra* (where the petitioner alleged his plea was involuntary because he and his counsel misjudged the admissibility of his confession) this Court refused to invalidate the guilty plea in part to avoid, " . . . an improvident invasion of the State's interest in maintaining the finality of guilty-plea convictions that were valid under constitutional standards applicable at the time." 397 U.S. at 774.

B. Collateral Matters Do Not Directly Impact the Voluntariness of a Guilty Plea.

This Court's holdings in *Hill v. Lockhart*, 474 U.S. 52 (1985), and *McMann v. Richardson*, 397 U.S. 759 (1970), do not bring collateral matters into the inquiry when reviewing the voluntariness of a guilty plea. While it is true that those cases tie voluntariness of a guilty plea to the performance of counsel, the performance of counsel must be judged within the narrow confines of the criminal proceeding. In *Hill,* this Court applied the two prong *Strickland* test to challenges to guilty pleas based on ineffective assistance of counsel. 474 U.S. at 58. It was concluded that, "the voluntariness of the plea

depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Id*. at 56; quoting *McMann,* 397 U.S. at 771; *See also Tollett v. Henderson*, 411 U.S. 258 (1973) (a defendant must show that counsel's advice violated the standard espoused in *McMann* in order to attack a guilty plea.). It would be a drastic expansion of the holdings in those cases for the minimum level of competence guaranteed by the Sixth Amendment to include competence on the myriad of collateral matters a person may face by pleading guilty to a felony offense.

Accordingly, the ineffective-assistance inquiry approved of in *Hill* seeks to ensure the voluntariness of a defendant's guilty plea. As mentioned in the preceding argument, this Court has established in *Brady*, *Boykin*, *etc.*, that a criminal defendant need only possess full knowledge of the direct consequences of his plea and understanding of the constitutional rights being waived for his or her guilty plea to voluntary.

By advocating that the voluntariness of his guilty plea is dependent on the reasonableness or effectiveness of counsel's advice with regard to collateral consequences, Padilla is essentially asking this Court to abandon *Boykin* and its progeny. In practice, any trial judge that diligently follows the requirements of *Boykin* and/or Fed. R. Crim. P. 11, but fails to inquire into the defendant's knowledge and understanding of collateral consequences, such as deportation, no

longer ensures that the guilty plea the court accepts is being made voluntarily.

Under Padilla's proposed rule no judicial inquiry, short of direct questioning regarding the content and reasonableness of counsel's advice regarding deportation and direct questioning of Padilla's understanding of his deportation risk, would have been adequate to ensure the voluntariness of Padilla's plea. Because it may be nearly impossible to identify what collateral consequence may ultimately be of significance to a particular criminal defendant, Padilla's rule would have the practical effect of causing the judiciary to interject itself into the attorney-client relationship and to second guess whether a defendant has been sufficiently advised of all of the collateral consequences to his or her guilty plea. *Boykin* and its progeny establish a rule under which, regardless of what counsel says to the defendant, the court can ensure the plea is voluntarily made. A rule that would make a plea involuntary if the defendant is not made aware of some or all collateral consequences cannot be reconciled with *Boykin*.

In every circuit to have addressed this issue, it is well-settled that there is no affirmative duty under the Sixth Amendment to advise a criminal defendant of collateral consequences. *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003), citing *United States v.*

Banda, 1 F.3d 354, 356 (5th Cir. 1993).[7] The holding in *Hill v. Lockhart* is not contrary to this firmly entrenched rule. In *Hill* the Court expressly refrained from determining whether or not misadvice regarding a collateral matter (parole eligibility) could constitute ineffective assistance of counsel under the Sixth Amendment. 474 U.S. at 60. Instead, it was stated that:

> In the present case the claimed error of counsel is erroneous advice as to eligibility for parole under the sentence agreed to in the plea bargain. App. 31. We find it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of "prejudice."

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[7] *accord United States v. Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000); *Varela v. Kaiser*, 976 F.2d 1357, 1358 (10th Cir. 1992), cert. denied, 507 U.S. 1039 (1993); *United States v. Del Rosario*, 902 F.2d 55, 59 (D.C. Cir. 1990), cert. denied, 498 U.S. 942 (1990); *Santos v. Kolb*, 880 F.2d 941, 945 (7th Cir. 1989), cert. denied, 493 U.S. 1059 (1990); *United States v. Yearwood*, 863 F.2d 6, 7-8 (4th Cir. 1988); *United States v. Campbell*, 778 F.2d 764, 769 (11th Cir. 1985); *United States v. Santelises*, 509 F.2d 703, 704 (2d Cir. 1975) (*per curiam*); *United States v. Couto*, 311 F.3d 179, 187 (2d Cir. 2002); *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002); *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988).

Id. This Court abstained from making a decision on this issue because it was determined that Hill failed to demonstrate prejudice under the second prong of *Strickland*.

C. Ethical Obligations Are Not Constitutional Requirements.

While certain rights flow to a criminal defendant from the right to counsel, duties stemming from ethical obligations are not the same as constitutional requirements. *See Montejo v. Louisiana*, ___ U.S. ___, 129 S.Ct. 2079, 2087 (2009) ("the Constitution does not codify the ABA's Model Rules"). Padilla repeatedly refers to the American Bar Association's Model Rules and suggests that they establish professional norms for constitutionally effective counsel. To the contrary, as this Court has noted, to the extent that they are relevant, the Model Rules merely serve as a guide for evaluating the reasonableness of an attorney's representation. *See Strickland*, 466 U.S. at 687 ("Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . are guides to determining what is reasonable, but they are only guides.") (emphasis added); *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) ("breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel").

Further, Justice Kennedy's dissenting opinion in *Rompilla v. Beard*, 545 U.S. 374, 399-400 (2005)

pointed out that this Court has " . . . warned in the past against the creation of 'specific guidelines' or 'checklist[s] for judicial evaluation of attorney performance.'" *Id.*, *citing Strickland*, 466 U.S. at 688; *See also Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Historically, this Court has resisted creating specific guidelines for evaluating the performance of counsel because:

> "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. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." *Strickland*, 466 U.S., at 688-689, 104 S.Ct. 2052 (citations omitted).

Rompilla v. Beard, 545 U.S. 374, 399-400 (2005) (KENNEDY, J., dissenting opinion). Because no set of particular rules will be sufficient to govern defense counsel's conduct under the Sixth Amendment, Justice Kennedy further pointed out that, "while we have referred to the ABA Standards for Criminal Justice as a useful point of reference, we have been

careful to say these standards 'are only guides' and do not establish the constitutional baseline for effective assistance of counsel." *Ibid.* Likewise, the American Bar Association, parroting Justice Kennedy, concedes in their amicus brief filed in this case that, "[t]he ABA Standards do not provide per se rules or a 'checklist' for judicial evaluation of attorney performance, nor do they purport to establish the constitutional baseline for effective assistance of counsel." ABA's Amicus Brief at 3.

Padilla's repeated reliance on *INS v. St. Cyr*, 533 U.S. 289 (2001) is misplaced. Simply put, the constitutional issue central to Padilla's case was not before this Court in *St. Cyr*. At most this Court briefly discussed (in footnote 50) what it assumed was "prudent and appropriate" functions for counsel to perform. However, in *Burger v. Kemp*, 483 U.S. 776, 794 (1987), this Court clarified that with regard to the Sixth Amendment the issue is not "' . . . what is prudent or appropriate, but only what is constitutionally compelled.'" *Citing United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984). In *State v. Rojas-Martinez*, 125 P.3d 930 (Utah 2005), the Utah Supreme Court criticized the same expansive interpretation of *St. Cyr* that Padilla makes in his brief. The Utah Supreme Court further explained its understanding of *St. Cyr* stating that, "[t]he practice standards referenced by the Supreme Court were not accompanied by any language that would suggest that it was the Court's intention to cloak these practice guidelines in constitutional garb." *Id*. at 937-38.

While it may be preferable for defense attorneys to advise their criminal clients of the collateral consequences of a favorable guilty plea, such advice is not required under the Sixth amendment. This Court should heed its own warnings and refrain from elevating the ABA's model rules to constitutional minimums for criminal defense lawyers. For, "[a] public defender or attorney in private practice who represents defendants in criminal cases should not be found to be 'ineffective' for failing to advise his client about a body of civil law which is not directly related to the issues involved in a Crim. P. 11 hearing." *People v. Pozo*, 746 P.2d 523, 533 (Colo. 1987) (ROVIRA, J., dissenting opinion).

The rule that defense counsel are not required to advise defendants regarding the collateral consequences of a criminal conviction fairly balances a criminal defendant's Sixth Amendment right and "the fundamental interest in the finality of guilty pleas." *Hill*, 474 U.S. at 58. While the Sixth Amendment assures an accused of effective assistance of counsel in criminal prosecutions, this assurance does not extend to collateral aspects of the prosecution. Actual knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea. On this issue, as conceded by Padilla, the States and the U.S. Circuit Courts are not split.

II. COUNSEL'S FAILURE TO ADVISE A CRIMINAL DEFENDANT OF POSSIBLE COLLATERAL CONSEQUENCES IS INDISTINGUISHABLE FROM ALLEGED MISADVICE CONCERNING COLLATERAL CONSEQUENCES.

As shown in Section I, a guilty plea is voluntary, and therefore may not be withdrawn, if a defendant is made aware of the direct consequences of the conviction and the rights being waived. Failure by defense counsel to give advice regarding collateral consequences, such as deportation, do not bear on the direct consequences of the plea or the defendant's waiver of rights. Because failure to advise cannot be the basis for withdrawal of a guilty plea, voluntariness is unaffected and a defendant's Sixth Amendment right to counsel is not implicated. It logically follows that misadvice about consequences that are collateral to a criminal conviction also cannot form the basis for a Sixth Amendment claim. A guilty plea is valid even if counsel affirmatively misinformed the defendant about the plea's deportation consequences. *See United States v. Sambro*, 454 F.2d 918, 921-22 (D.C. Cir. 1971); *United States v. Parrino,* 212 F.2d 919, 921-22 (2d Cir. 1954), cert. denied, 348 U.S. 840 (1954).

"[F]aithful representation" of a client means "that an attorney must consult with the client fully on matters of a constitutional magnitude." *Tollett v. Henderson*, 411 U.S. 258, 272 (1973). "If a prisoner pleads guilty on the advice of counsel, he must

demonstrate that the advice was not 'within the range of competence demanded of attorneys in criminal cases.'" *Id*. (*citing McMann v. Richardson*, 397 U.S. 759, 771 (1970)). As has been discussed, deportation is not a direct consequence of a guilty plea and does not fall within the purview of counsel's constitutional obligations when advising a client during the plea process. *See United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993). The range of competence must be limited to advice that pertains to matters directly stemming from the criminal proceeding. Immigration law is not within the range of competence associated with criminal attorneys; it is beyond the scope of attorney representation in a criminal case. This is particularly important because immigration law is a highly-specialized, dynamic legal subject and its parameters continue to evolve. *See, e.g., Nijhawan v. Holder,* 129 S.Ct. 2294 (2009). Incorrect advice about a criminal conviction's potential effect on a future civil (removal) proceeding, involving an agency of the federal government, applying federal immigration law, is collateral to the plea and sentence on which counsel is advising and cannot constitute ineffective assistance of counsel during the criminal proceeding. The right of an accused to "the assistance of counsel for his defence," U.S. Const. Amend. VI, does not include the right to accurate forecasting of matters outside the context of a criminal case.

Any distinction between the failure to advise and misadvice about collateral matters is arbitrary; there should be no legal distinction. In both instances, a

defendant's understanding of the direct consequences and his constitutional waiver of rights is unchanged. Advice that is not constitutionally compelled by the Sixth Amendment's right to counsel does not become a constitutional violation by virtue of counsel's giving of advice on a collateral matter. This rationale was acknowledged below when it was held that because,

> 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. In neither instance is the matter required to be addressed by counsel, and so an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*.

Commonwealth v. Padilla, 253 S.W.3d 482, 485 (Ky. 2008).

In assessing the impact of collateral consequences in relation to the Sixth Amendment, there is no genuine difference between an act of commission and an act of omission. Such a premise has a sound basis in many areas of the law. For example, in assessing contractual obligations, a "breach of contract" has been defined as "the commission of an act, or the omission of some act, specified or implied in the contract". *Dulworth v. Hyman*, 246 S.W.2d 993, 995 (Ky. 1952). Determinations of negligent conduct also utilize rules that do not differentiate between a party's actions or a failure to act. *See NKC Hospitals,*

Inc. v. Anthony, 849 S.W.2d 564, 567 (Ky. App. 1993) ("[n]egligence may rest on an omission as comfortably as positive acts; the consequence is the same"). Similar principles apply when establishing criminal liability; *See* KRS 501.030(1) – "A person is not guilty of a criminal offense unless . . . (1) He has engaged in conduct which concludes a voluntary act or the omission to perform a duty which the law imposes upon him. . . ." In each of these contexts, there is no logical differentiation between acting and failing to act – the ultimate outcome is the same. Whether it is an allegation of failure to advise or misadvice about deportation consequences, a criminal defendant's personal assessment of the direct consequences and constitutional waivers remains the same. In each instance the result is a valid, voluntary plea.

Padilla's assertions of overwhelming support for his position are illusory. *See* Petitioner's Brief, pg. 55, fn. 16. When reviewing the cited cases, one is confronted with a set of result-driven, incestuous decisions that are completely lacking in legal or rational bases.[8] Of the three federal circuits confronting the

[8] Of the six federal circuits cited (at Brief for Petitioner, pg. 55, fn. 16), three of the cases designated as support (from three unique circuits) relate to misadvice regarding parole eligibility rather than deportation – *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979), *Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988) (*citing Strader*), and *Beavers v. Saffle*, 216 F.3d 918, 925 (10th Cir. 2000) (*citing Sparks*). Parole eligibility is inapplicable in this context because it is more like a direct consequence – as it relates to actual custody under a sentence of conviction by a State. Deportation, on the other hand, is not under the control of

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issue of whether misadvice with respect to immigration consequences can constitute ineffective assistance of counsel under the Sixth Amendment, none offer any legal foundation for their conclusions. Notably, in *Downs-Morgan v. United States*, 765 F.2d 1534, 1541 (11th Cir. 1985), the first such opinion, the conclusion of the court rested entirely upon its facts, which included allegations that upon a return to Nicaragua, Downs-Morgan believed he would be subjected to imprisonment for many years and/or execution. In a footnote at the end of the opinion authorizing a remand, the *Downs-Morgan* Court stated that "[w]e emphasize the narrowness of our decision. We do not hold . . . that an affirmative misrepresentation by counsel in response to a specific inquiry about the possibility of deportation or exclusion, without the additional factors of imprisonment and execution, is sufficient to warrant collateral relief." *Downs-Morgan*, 765 F.2d at 1541 fn. 15. Over time, and due to repeated citation, it appears the narrowness of this decision has been mistakenly eroded.

In *United States v. Couto*, 311 F.3d 179 (2d Cir. 2002), the Second Circuit Court of Appeals, held that an affirmative misrepresentation regarding immigration consequences was objectively unreasonable. *Couto*, 311 F.3d at 187. The conclusory holding in

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the States and does not directly relate to the criminal proceeding in any fashion. From that basis, the two are not comparable.

Couto was made without explanation of any kind.[9] The Ninth Circuit Court of Appeals followed with *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005), and found that Kwan's attorney had affirmatively misled Kwan and such advice was objectively unreasonable. The primary basis for *Kwan's* holding was *Couto* (and *Downs-Morgan* in a footnote). Noting similar facts from *Couto*, the *Kwan* Court did little to explain the elevation of immigration misadvice to a colorable claim under the Sixth Amendment right to counsel.[10]

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[9] The application of the holding in *Couto* to Padilla's case is also unclear because the *Couto* holding was driven by the fact that Couto was, unlike Padilla, subject to the expedited immigration proceedings of 8 U.S.C. § 1228(b)(5) for non-resident permanent aliens or conditional resident aliens. Assuming Padilla's intimations are true – that he is a permanent resident alien – he is not subject to the expedited procedures.

[10] In *Kwan*, in addition to detailing the factual similarities of *Couto*, the Ninth Circuit cited to the ABA Standards of Criminal Justice as support for its conclusion that misadvice regarding deportation could be ineffective assistance of counsel. In particular, the *Kwan* Court cited to this Court's opinion in *INS v. St. Cyr*, 533 U.S. 289 (2001), where it was noted that the ABA standards provided that "if a defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the defendant of these consequences.'" *St. Cyr*, at 323 n. 48 (quoting 3 ABA Standards for Criminal Justice 14-3.2 Comment, 75 (2d ed.1982)). Reliance by the *Kwan* Court on this standard in this context is misplaced. According to the standard, defense counsel has an affirmative duty to advise a client regarding deportation consequences. However, pursuant to *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003), the Ninth Circuit had previously held that an attorney's failure to

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The majority of States that have reached similar conclusions have relied on these federal cases as support – particularly in cases that post-date 2002. *See* Alaska – *Djioev v. State*, No. A-9158, 2006 WL 361540 (Alaska App. Feb. 15, 2006) (unpublished) (primarily relied on *Kwan*, but also cited to *Couto* and *Downs-Morgan*); Georgia – *Rollins v. State*, 591 S.E.2d 796, 799 (Ga. 2004) (*citing Downs-Morgan*); Nevada – *Rubio v. State,* 194 P.3d 1224, 1230-31 (Nev. 2008) (*Couto* and *Kwan* – footnoted *Downs-Morgan*); New York – *People v. McDonald*, 745 N.Y.S.2d 276 (N.Y. Ct. App. 2002) (*Downs-Morgan*); Ohio – *State v. Creary*, No. 82767, 2004 WL 351878 (Ohio App. 8 Dist. Feb. 26, 2004) (*Couto*); Utah – *State v. Rojas-Martinez*, 125 P.3d 930 (Utah 2005) (*Couto*); Virginia – *Commonwealth v. Tahmas*, Nos. 105254 & 105255, 2005 WL 2249587 (Va. Cir. Ct. July 26, 2005) (*Couto* and *Kwan*); and Wyoming – *Valle v. State*, 132 P.3d 181, 184 (Wyo. 2006) (*Couto* and *Kwan*).[11]

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advise a client of the immigration consequences of a conviction does not constitute ineffective assistance of counsel under *Strickland*. It is illogical that the ABA standard supporting an affirmative duty to advise on deportation would cause misadvice to elevate to a potential claim of ineffective assistance of counsel in *Kwan*, when it did not elevate the affirmative duty itself in *Fry*.

[11] In fact, of the cases cited by the Petitioner representing thirteen different States which have dealt with this issue, eight jurisdictions cited the seminal federal cases as support. Of those that did not, the Illinois case pre-dated the significant federal cases while Florida, Iowa, and Tennessee relied on their own precedent. New Jersey relied on federal case law from one of the

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Noticeably absent from any of Padilla's support is explicit, detailed reasoning for concluding that misadvice on collateral matters is a constitutional infirmity. On the contrary, these cases reveal a dearth of support and a perfunctory determination of the ultimate issue. The cases seem to be relying on a "feeling" that misadvice is bad – rather than a logical connection to an identifiable constitutional right. Nevertheless, this Court has never held that the right to counsel is implicated in the context of collateral consequences. As an obvious extension, it has never been held that bad advice from defense counsel on collateral consequences that follow a felony conviction are a constitutional basis to invalidate a guilty plea or trial. Elevating misadvice on collateral consequences to a cognizable claim under the Sixth Amendment right to counsel would amount to a drastic expansion of the law regarding ineffective assistance of counsel.

The difference between collateral consequences of a criminal conviction and direct consequences is one of kind or type, not degree of importance. Advice regarding potential consequences collateral to the criminal proceeding cannot form a basis for claiming counsel ineffectiveness. The relative importance of a collateral consequence to a particular defendant does not create a constitutional right. To do so would open

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aforementioned Court of Appeals cases regarding misadvice on parole eligibility.

the floodgates wherein pleas are challenged based on incorrect advice regarding any and all types of consequences collateral to a valid plea. Because the scope of criminal defense is limited, it must pertain only to advice regarding the criminal charge. This reasoning compels the conclusion that misadvice regarding a collateral consequence, because it does not bear on direct consequences or the waiver of rights, cannot justify withdrawing a guilty plea by claiming counsel ineffectiveness. A defendant does not have to have an understanding of collateral consequences in order to enter a voluntary plea. Misunderstanding a collateral consequence is independent of the direct consequences of a guilty plea and the constitutional rights being waived; therefore, voluntariness is not affected.

III. DEPORTATION SHOULD NOT BE TREATED DIFFERENTLY THAN OTHER COLLATERAL CONSEQUENCES.

In Argument II of his brief (pp. 50-55), Padilla persists in challenging the voluntariness of his plea, through a claim of ineffectiveness of counsel, by asking this Court to treat deportation differently than other collateral matters. It is well-settled that deportation is a consequence collateral to a criminal conviction and there is no logical or legal justification for treating deportation differently than other collateral matters.

Despite Padilla's attempt to liken deportation to a direct consequence, it is widely accepted deportation is collateral to a criminal proceeding. Presently, all circuits that have addressed the issue " . . . have concluded that deportation is a collateral consequence of the criminal process and hence the failure to advise does not amount to ineffective assistance of counsel." *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003), *citing United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993). Because deportation does not stem directly from the conviction and because the sentencing court has no power over deportation decisions it is clear that a criminal defendant's risk of deportation is collateral to any criminal conviction. In *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000), the First Circuit explained that "[w]hat renders the plea's immigration effects collateral is not that they arise virtually by operation of law, but the fact that deportation is not the sentence of the court which accepts the plea but of another agency over which the trial judge has no control and for which he has no responsibility." The collateral nature of deportation is most obvious in relation to a state court criminal proceeding. Kentucky ultimately has no role whatsoever in determining whether or not Padilla will be deported.[12]

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[12] In fact, should a state actor (judge or prosecutor) make concessions to circumvent deportation, such action would be invalid. *In re Sanusi v. Gonzales*, 474 F.3d 341 (6th Cir. 2007) (court action not based on a procedural or substantive defect is invalid if done to circumvent deportation).

Primarily, Padilla argues that deportation is unique because of the quasi-automatic nature of deportation for aggravated felons. However, Padilla concedes on page 33 of his brief that even an aggravated felon may sometimes avoid deportation. Padilla himself has managed to avoid incarceration and deportation since he was released by the Kentucky Department of Corrections on November 8, 2004. J.A. 77 (Padilla's release date obtained from his Official Resident Record Card maintained by the Kentucky Department of Corrections).

Padilla attempts to frame defense counsel as the "last line of defense"; as "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." Brief of Pet. at 7. However, criminal defense counsel may be characterized as the "last line of defense" for any criminal defendant wishing to avoid any one of a myriad of civil collateral consequences that arise automatically.[13] The mere fact that a number of civil collateral consequences, such as deportation or the loss of a citizen's right to

[13] *See* U.S. Department of Justice, *Federal Statutes Imposing Collateral Consequences Upon Conviction* (visited July 24, 2009) <http://www.usdoj.gov/pardon/collateral_consequences.pdf; *also see* Troy B. Daniels *et al., Kentucky Statutory Collateral Consequences Arising From Felony Convictions: A Practitioner's Guide,* 35 N. Ky. L. Rev. 413 (2008).

vote or bear arms, are automatic does not change the collateral nature of those consequences. The criminal sentencing court has no authority or control over civil consequences arising from a criminal conviction and thus, those consequences are collateral.

Further, the law on the issue of immigration is in flux, and determinations as to whether a defendant is deportable in a separate civil proceeding is not always apparent or automatic. For example, substantial litigation exists as to what constitutes an "aggravated felony" and what must be proved in that context. *See, e.g., Nijhawan v. Holder*, 129 S.Ct. 2294 (2009); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (*abrogating Le v. United States Attorney General*, 196 F.3d 1352 (11th Cir. 1999)).

The importance Padilla or other convicts may place on deportation, or any one of a myriad of other collateral consequences, does not somehow convert these collateral matters into direct consequences of a criminal proceeding. "The loss of one's right to vote, exclusion from military service, or other disabilities attached to a felony conviction may be just as harsh a consequence to a citizen defendant as deportation may be to an alien." *People v. Pozo*, 746 P.2d 523, 532 (Colo. 1987) (ROVIRA, J., dissenting opinion).

Excepting deportation from the collateral consequence doctrine simply because of the importance many non-citizens may place on that consequence, as suggested by Padilla, is unfair and will

only spur additional litigation. Citizens will seek similar protection arguing that a particular collateral consequence is just as important to them as deportation is to a non-citizen and will justifiably complain that granting non-citizens greater protection from collateral matters than citizens is unfair. Attempting to treat deportation differently than other collateral matters will open the Pandora's box of collateral matters that will have to be addressed individually by the courts, thereby further overburdening an overtaxed judicial system. *See Pozo*, 746 P.2d at 533 (dissenting opinion).

Ultimately, attempting to carve out an exception to the collateral consequences rule for immigration matters is unworkable. This Court has held that the constitutional standard focuses on attorney competence in criminal cases, not civil or administrative cases. "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985), *quoting from McMann v. Richardson*, 397 U.S. 759, 771 (1970). Immigration law is civil/administrative in nature and is constantly in flux. This Court should not constitutionally mandate that advice be given with regard to immigration consequences simply because those consequences arise automatically or because of the importance some criminal defendants may place on those issues.

IV. PADILLA WAS NOT PREJUDICED BY HIS TRIAL COUNSEL'S ALLEGED MISADVICE.

Even if this Court should choose to drastically expand its current precedent to grant Sixth Amendment protection to criminal defendants who receive misadvice regarding collateral consequences, Padilla has still failed to demonstrate how his counsel's allegedly deficient performance prejudiced him. To establish prejudice Padilla must be able to show that, " . . . 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." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In *Roe v. Flores-Ortega*, 528 U.S. 470, 484-486 (2000), this Court further explained that the decision to reject the plea and insist on going to trial must be rational. Imposing logic and reason as a component of the prejudice component of *Hill* and *Strickland* suggest an "objective" inquiry. *See Meyer v. Branker*, 506 F.3d 358, 369 (4th Cir. 2007). Therefore, the prejudice inquiry should include evaluation of the strategic considerations impacting the plea process; i.e. likelihood of conviction or acquittal and likely length of sentence, when determining whether insisting on a trial would have been a rational choice.

Padilla's self-serving affidavit falls well short of demonstrating there was a "reasonable probability" he would have actually demanded a jury trial given the overwhelming evidence against him and the favorable terms offered in the plea agreement. *See Evola v. Carbone*, 365 F.Supp.2d 592 (D.N.J. 2005)

(holding that the Petitioner could not show prejudice – the only evidence Evola would have insisted on going to trial came from his own self-serving statements and he did not make a claim of innocence or address the favorableness of his plea deal), *aff'd by Evola v. Atty. Gen. of U.S.*, 190 Fed.Appx. 171 (3rd Cir. 2006) (unpublished). Padilla voluntarily consented to a search of his truck and trailer. The search led to the discovery that Padilla was smuggling more than one thousand pounds of marijuana through Kentucky. Pursuant to KRS 218A.1421, trafficking in more than five pounds of marijuana (an amount Padilla exceeded by approximately 1000 pounds) is a class C felony – with a penalty range of five to ten years in prison. Padilla unsuccessfully tried to challenge his incriminating statements to police, his consent to search, and the probable cause to arrest him. R. 30-34. Padilla had no apparent defenses to the charges against him. Given these circumstances, Padilla's conviction at trial was certain.

It is not reasonable to believe that Padilla would have been convicted of any lesser charge or that a jury would have recommended a sentence more favorable than the minimum prison time Padilla received by pleading guilty. Given the overwhelming evidence of his guilt, Padilla cannot rationally show that but for his counsel's advice, he would have insisted on going to trial. In fact, there was more than a substantial risk that a jury would have recommended that Padilla be sentenced to the maximum term of ten years given the substantial amount of

marijuana he was attempting to smuggle through Kentucky. By pleading guilty, Padilla received substantial leniency.

Generally, "defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation." *Mickens v. Taylor*, 535 U.S. 162 (2002). The "prejudice" component of the *Strickland* analysis focuses on whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *United States v. Cronic*, 466 U.S. 648, 687 (1984). "It is true that while the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis." *Williams v. Taylor*, 529 U.S. 362, 391 (2000). Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him. *Id.* at 393, fn. 17; *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

For instance, in *Williams v. Taylor*, *supra*, this Court concluded that counsel's error violated Taylor's federal constitutional right to have the jury consider all relevant mitigating evidence under the Eighth Amendment before imposing a death sentence. 529 U.S. at 399. As that case makes clear, under *Strickland* counsel's error must deprive the defendant of a constitutional right pertaining to a fair criminal trial or sentencing proceeding, not a subsequent civil or

administrative proceeding. *Id. See also Lockhart v. Fretwell*, 506 U.S. 364 (1993).[14]

In this case Padilla was provided competent counsel as required under the Sixth Amendment who ensured that Padilla was fully aware of the rights he was waiving by entering a guilty plea and the direct consequences of that plea. To further safeguard Padilla's rights the trial court engaged in a full *Boykin* colloquy to again ensure Padilla's full understanding of the direct consequences that would flow from his guilty plea. The law, unless dramatically expanded by this Court, entitles Padilla to nothing more. Because counsel's alleged misadvice did not render the proceeding fundamentally unfair nor deprive Padilla of any right to which he was entitled, the prejudice prong of *Strickland* and *Hill* was not met.

That Padilla may have irrationally demanded trial but for the alleged misadvice given by his counsel is unimportant. To establish prejudice sufficient to justify relief, Padilla's decision to insist on going to trial must be rational and objectively reasonable. Further, because it would have been unreasonable to demand trial given the circumstances of this case, Padilla was not deprived of any substantive or

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[14] While the holding in *Williams v. Taylor*, 529 U.S. 362 (2000) limited *Lockhart*, both cases stand for the proposition that *Strickland* error must deprive a defendant of a constitutional right pertaining to a fair criminal trial or sentencing, rather than a subsequent civil or administrative proceeding.

procedural right that would have fundamentally affected the overall fairness of the criminal proceeding. Because the performance of Padilla's trial counsel did not affect the fundamental fairness of the criminal proceeding and because it is evident that Padilla's guilty plea was voluntary, this Court should uphold the judgment denying Padilla post-conviction relief regardless of how this Court decides the ultimate fate of the collateral consequences doctrine or the impact misadvice may have on that doctrine.

CONCLUSION

WHEREFORE, the judgment of the Supreme Court of Kentucky should be affirmed.

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