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 THE STATES OF LOUISIANA, ALABAMA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, IDAHO, INDIANA, KANSAS, MARYLAND MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLAVNIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON & WYOMING AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JAMES D. "BUDDY" CALDWELL
Attorney General of Louisiana
KYLE DUNCAN
Appellate Chief
1885 N. Third Street
Baton Rouge, La. 70802
(225) 326-6079

GENE C. SCHAERR
Counsel of Record
ADÈLE HUTTON AUXIER
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

SCOTT BURNS
National District Attorneys Ass'n
44 Canal Center Plaza
Alexandria, VA 22314
(703) 549-9222

LINDA T. COBERLY
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

Counsel for Amici Curiae
[Additional counsel listed on inside cover]

TROY KING
Attorney General of Alabama
500 Dexter Avenue
Montgomery, AL 36130
(334) 242-7300

JOHN W. SUTHERS
Attorney General of Colorado
1525 Sherman Street
Denver, CO 80203
(303) 866-4500

KEVIN T. KANE
Chief State's Attorney
State of Connecticut
300 Corporate Place
Rocky Hill, CT 06067
(860) 258-5800

BILL MCCOLLUM
Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399
(850) 414-3300

MARK J. BENNETT
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

LAWRENCE G. WASDEN
Attorney General of Idaho
700 W. State Street
Boise, ID 83720
(208) 334-2424

GREGORY F. ZOELLER
Attorney General of Indiana
302 W. Washington Street
IGC-South, Fifth Floor
Indianapolis, IN 46204
(317) 232-6201

STEVE SIX
Attorney General of Kansas
120 SW 10th Ave, 2nd Floor
Topeka, KS 66612
(785) 296-2215

DOUGLAS F. GANSLER
Attorney General of Maryland
200 Saint Paul Place
Baltimore, MD 21202
(410) 576-6300

MARTHA COAKLEY
Attorney General of Massachusetts
One Ashburton Place
Boston, MA 02108
(617) 727-2200

MICHAEL A. COX
Attorney General of Michigan
P. O. Box 30212
Lansing, MI 48909
(517) 373-1110

JIM HOOD
Attorney General of Mississippi
P.O. Box 220
Jackson, MS 39205
(601) 359-3680

CHRIS KOSTER
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101
(573) 751-3321

JON BRUNING
Attorney General of Nebraska
PO Box 98920
Lincoln, NE 68509
(402) 471-2644

CATHERIN CORTEZ MASTO
Attorney General of Nevada
100 North Carson Street
Carson City, NV 89701
(775) 684-1113

WAYNE STENEHJEM
Attorney General of North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505
(701) 328-2210

W.A. DREW EDMONDSON
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921

JOHN R. KROGER
Attorney General of Oregon
1162 Court St. N.E.
Salem, OR 97301
(503) 378-4400

THOMAS W. CORBETT, JR.
Attorney General of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

HENRY D. MCMASTER
Attorney General of South Carolina
P. O. Box 11549
Columbia, SC 29211
(803) 734-3970

LAWRENCE E. LONG
Attorney General of South Dakota
1302 E. Highway 14
Pierre, SD 57501
(808) 586-1500

ROBERT E. COOPER, JR.
Attorney General & Reporter of Tennessee
P.O. Box 20207
Nashville, TN 37202
(615)741-3491

MARK L. SHURTLEFF
Attorney General of Utah
Utah State Capitol
350 North State Street
Suite 230
Salt Lake City, UT 84114
(801) 538-9600

WILLIAM C. MIMS
Attorney General of Virginia
900 East Main Street
Richmond, VA 23219
(804) 786-2071

ROBERT M. MCKENNA
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504
(360) 753-6200

BRUCE A. SALZBURG
Attorney General of Wyoming
123 Capitol Building
200 W. 24th Street
Cheyenne, WY 82002
(307) 777-7841

QUESTIONS PRESENTED

1. Whether a State has an affirmative duty, as a condition of preserving a duly entered guilty plea, to provide counsel to investigate and advise a criminal defendant in state court of collateral consequences, such as deportation, that may result from the plea.

2. Assuming there is no such affirmative duty, whether "gross misadvice" regarding a collateral consequence of a plea, such as deportation, can constitute ineffective assistance of counsel under the Sixth Amendment, and thereby entitle the defendant to vacatur of the plea.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION

STATE STATUTES

OTHER AUTHORITIES

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

As this court has recognized, plea agreements are the backbone of "the orderly administration of justice" in this country. *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979). Indeed, in the state courts—which typically account for over ninety percent of all felony convictions in the United States—plea agreements make up the overwhelming majority of those convictions.[2] But if this Court were to adopt Padilla's position, and thereby abolish or weaken the settled rule that those who plead guilty need only understand the *direct* consequences of their pleas—a principle known as the "collateral consequences" rule—that ruling, at least in the States, would likely break the back of the plea agreement system.

---

[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than the *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. NDAA is filing its brief with the consent of all parties. Letters of consent have been lodged with the Court.

[2] Bureau of Justice Statistics, U.S. Dept. of Justice, Criminal Sentencing Statistics, http://www.ojp.usdoj.gov/bjs/sent.htm (last visited Aug. 11, 2009) (number of felony convictions entered in state and federal courts); Administrative Office of the United States Courts, Statistical Tables for the Federal Judiciary, June 30, 2008, Tbl. D4, http://www.uscourts.gov/stats/june08/D04Jun08.pdf (noting that from June 30, 2007 to June 30, 2008, there were 2,585 federal felony convictions entered following trial and 77,962 entered following a plea agreement); Bureau of Justice Statistics, United States Department of Justice, State Court Sentencing of Convicted Felons 2004 - Statistical Tables, Felony Case Processing in State Courts, Tbl. 4.1, http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04401tab.htm (noting that an estimated 95% of state court felony convictions in 2004 were the result of a plea agreement).

Padilla urges the Court to hold that a criminal defendant who knowingly, intelligently, and voluntarily accepted the direct consequences of a plea agreement can unilaterally revoke the bargain he struck with the state upon a showing that he was uninformed or misinformed by counsel about a non-criminal, collateral consequence of his conviction. To be sure, his case arises in the difficult context of deportation, where Congress has made a policy choice against permitting immigrants who engage in criminal conduct to remain in the United States. But the rule Padilla urges cannot in principle be limited to that context. And if this Court follows his suggestion and abolishes or weakens the collateral consequence rule, defendants who have pleaded guilty could soon be empowered to re-open their plea agreements based on a host of collateral consequences, including such things as parole eligibility, firearms privileges, and child custody issues. Moreover, given the enormous numbers of aliens who are charged with crimes in this Nation, even an "exception" limited to deportation and/or affirmative "misadvice" would wreak havoc with the plea agreement system.

Accordingly, the *amici* States have an obvious, powerful interest in this Court's resolution of the questions presented. And the same is true of *amicus* National District Attorneys Association (NDAA), the oldest and largest professional organization representing U.S. criminal prosecutors. NDAA's members are state and local prosecutors who will bear the burden of re-prosecuting thousands of defendants like Padilla if this Court abandons or weakens the collateral consequences rule. *Amici* recognize, of course, that prosecutors considering plea agreements must take into account any undue hardship the plea may

create, and NDAA's officials have spoken out about the sometimes harsh impact of collateral consequences on criminal defendants.[3] These ethical obligations and policy concerns do not, however, add up to a new constitutional right to sound advice from state-paid counsel on the collateral consequences of a criminal conviction—enforceable through vacatur of an otherwise fully informed guilty plea.

STATEMENT

This case is about a confessed drug smuggler who relied on the advice of competent counsel to voluntarily plead guilty in *State* court, in the face of overwhelming evidence against him, and who now seeks to vacate his plea in hopes of escaping the *federal* immigration consequences of his crime.

In September 2001, a Kentucky law enforcement officer stopped Padilla's truck to perform a routine paperwork check. J.A. 47-49. In the subsequent consent-based search, the officer found 23 wrapped Styrofoam boxes that were mysteriously absent from the truck's shipping manifest. R. 33. When he asked Padilla what was in the boxes, Padilla responded, "maybe drugs." *Id.* As it turned out, Padilla was hauling nearly half a ton of marijuana. *Id.*

Represented by a state-paid lawyer who was fully competent in criminal-law matters, Padilla lost his bid to suppress the drugs and the confession. Recognizing that he was left without defenses, and facing

---

[3] NDAA, National Prosecution Standards § 68.1, http://www.ndaa.org/pdf/ndaa_natl_prosecution_standards_2.pdf; Robert M.A. Johnson, *Message from the President: Collateral Consequences*, THE PROSECUTOR, May 2001, *available at* http://www.ndaa.org/ndaa/about/president_message_may_june_2001.html.

the prospect of a jury that would not take kindly to drug smuggling, he elected to plead guilty to three offenses: misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia, and felony trafficking in marijuana. R. 34, J.A. 61-68. Padilla's felony drug trafficking conviction carried a maximum sentence of ten years. Ky. Rev. Stat. Ann. § 218A.1421(4)(a); 532.060(2)(c). Padilla, who expressed no dissatisfaction with his counsel's representation at the time, received a sentence of five years in prison and five years probated, with credit for time already served. His prison time was thus only half of what it could have been if he had gone to trial and lost—which was a virtual certainty.

Two years later, in 2004, Padilla filed a pro se motion for postconviction relief under state law. J.A. 71-74. He alleged that he had received constitutionally ineffective assistance of counsel because his attorney told him that his conviction would not affect his immigration status, when in fact, as a felony drug offense, it made him eligible for deportation. J.A. 71-74. Padilla thus argued that his plea was invalid because the assistance he received fell short of that required by the Sixth Amendment. The local Kentucky Circuit Court denied his motion because it found that his plea was "knowing, intelligent, and voluntary." R. 72-76.

The Kentucky Court of Appeals, in a 2 to 1 decision, reversed and remanded the case for an evidentiary hearing to determine whether Padilla had been misadvised, and whether this misadvice had rendered his plea agreement involuntary. Pet. App. 29-40, 36. The Kentucky Supreme Court reversed, holding that collateral consequences of a criminal conviction were "outside the scope of the . . . Sixth Amend-

ment right to counsel" and could not render Padilla's plea involuntary. Pet. App. 23.

SUMMARY OF ARGUMENT

As Kentucky's brief carefully and cogently explains (at 12-23), the "collateral consequences" rule is almost universally accepted, not only in the state courts, but in virtually all the federal circuits. That is because the rule—which limits the Sixth Amendment effectiveness inquiry to the direct consequences of a prosecution—rests on a common-sense principle that helps courts adhere to the text of the Sixth Amendment while honoring the government's interest in finality and efficiency. This court should embrace it.

By its terms, the Sixth Amendment guarantees each criminal defendant "the assistance of counsel for his *defense*" in "all *criminal* prosecutions." U.S. CONST. amend. VI (emphasis added). Thus, an attorney's effectiveness for Sixth Amendment purposes must be evaluated with reference to "the range of competence demanded of attorneys in *criminal cases*." *Hill* v. *Lockhart,* 474 U.S. 52, 57 (1985) (quoting *McMann* v. *Richardson,* 397 U.S. 759, 771 (1970)) (emphasis added). By excluding matters "over which the trial judge has no control and for which he has no responsibility," the collateral consequences rule allows courts to focus on the defense attorney's competence in handling the "criminal prosecution" to which the Sixth Amendment attaches. *United States* v. *Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000).

The collateral consequences rule also serves the state's strong interest in the finality of plea agreements. As this Court has recognized, "[e]very 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." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (quoting *United States* v. *Smith*, 440 F.2d 521, 529 (7th Cir. 1971) (Stevens, J., dissenting)). This interest is at its height in the plea agreement context, both because "the vast majority of criminal convictions result from such pleas" and because "the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *Id.*

Given the overwhelming number of plea agreements entered in state courts each year (an estimated 1.2 million in 2004),[4] as well as the enormous cost of indigent defense in state courts—more than $2.8 billion in 2002[5]—States and prosecutors have a critical interest in the finality of those pleas. The collateral consequences rule protects this finality interest by preventing convicted criminals from re-opening their pleas based on matters that are outside the scope of the state's criminal prosecution. The rule thus protects the state's interest in an efficient justice system by preventing it from having to pay for counsel to advise defendants on a variety of specialized collateral matters outside the sentencing court's control, and by

---

[4] Bureau of Justice Statistics, U.S. Dept. of Justice, Criminal Sentencing Statistics, http://www.ojp.usdoj.gov/bjs/sent.htm (last visited Aug. 11, 2009).

[5] The Spangenberg Group, American Bar Association Bar Information Program, State and County Expenditures for Indigent Defense Services in Fiscal Year 2002, at 35 (2003), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf.

limiting the number of plea bargains that are reopened and sent to trial.

The collateral consequences rule is also necessary to prevent the right to counsel from becoming completely detached from the text and history of the Sixth Amendment. As this Court has previously recognized, and scholars of all stripes agree, the Framers understood the Sixth Amendment to guarantee only the right to *employ* counsel in criminal cases, not the right to receive state-paid counsel. While this Court departed from that understanding in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963)—and we do not quarrel with that decision—this historical background counsels restraint when faced with an invitation to dramatically expand the right to state-paid counsel beyond its present bounds.

But that is exactly what Padilla's arguments would do. Besides attacking the collateral consequences rule altogether, he argues for two exceptions that would effectively swallow the rule: a "deportation" exception, and a "misadvice" exception. Neither one makes sense.

As to the first: Deportation is a *federal* civil proceeding that must be initiated by the Department of Homeland Security in a special federal Immigration Court. It is subject to its own multi-layer review process, and is completely outside of the control of a state court presiding over a criminal prosecution. The collateral consequences rule clearly and correctly excludes such proceedings from the scope of the Sixth Amendment right to criminal trial counsel. And, given the large number of aliens who are charged with crimes, an "exception" for deportation issues

would substantially burden the plea agreement system, and dramatically increase its cost.

Adopting an exception based on "misadvice" would be equally if not more unwise. As Kentucky has explained, the distinction between misadvice and "non-advice" is often elusive in theory. And, as a practical matter, recognition of a "misadvice" exception would effectively open *every* guilty plea to an expensive, time-consuming collateral attack. Indeed, such an exception would give criminal defendants a powerful incentive to fabricate allegations about legal advice they were given by their court-appointed lawyers—allegations that would often be difficult to disprove months or years after the fact. It would also create incentives for unscrupulous appointed counsel to *deliberately* misadvise their clients on some collateral issue, thereby creating a latent "misadvice" claim that the client could invoke if she later had misgivings about her plea.

Perhaps most important, constitutionalizing advice on collateral consequences would effectively preempt the states' ongoing efforts to address the effect of deportation on criminal defendants. As another *amicus* has pointed out, twenty-eight states and the District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas. Br. of the Nat'l Assn. of Crim. Defense Lawyers et al., *Amici Curiae,* App. 11a; *see also INS* v. *St. Cyr*, 533 U.S. 289, 323 n.48 (2001) (citing laws in eighteen states and the District of Columbia). There simply is no need for this Court to displace the States' efforts, or future efforts by Congress, to address this policy problem in the manner they think best.

I. The Collateral Consequence Rule Serves Important Governmental Interests And Is Fully Consistent With the Text and History of the Sixth Amendment, as Well As this Court's Precedents

A. The Rule Protects the Strong State Interest in the Finality of Plea Agreements, Which are the Backbone of the U.S. Criminal Justice System

Thirty years ago in *Timmreck*, this Court recognized that "new grounds for setting aside guilty pleas" have a disproportionate impact on the "orderly administration of justice" because "the vast majority of criminal convictions result from such pleas." 441 U.S. at 784. If anything, that observation is even more true now than it was then: In 2004, 95% of all state felony convictions—and 96% of state felony drug convictions—were entered via plea agreements.[6] The proportions are similar in federal courts.[7] These numbers make clear that the state's interest in the finality of plea agreements is at least as strong today as it was thirty years ago.

Because plea agreements are so essential in the U.S. justice system, ensuring their finality is likewise essential. As Kentucky has shown (at 19-20), the col-

---

[6] Bureau of Justice Statistics, U.S. Dept. of Justice, Criminal Sentencing Statistics, http://www.ojp.usdoj.gov/bjs/sent.htm (last visited Aug. 11, 2009).

[7] Federal courts appear to rely on plea agreements at least as much as state courts. Of the 89,069 criminal defendants in the U.S. District Courts between June 2007 and June 2008, just 3124 were tried by a jury or a judge. Nearly 78,000—or 96%—pleaded guilty.

lateral consequences rule protects the state's strong interest in finality by preventing felons who pleaded guilty to their crimes from overturning their conviction on grounds unrelated to their guilt or the integrity of the criminal proceedings against them. *See Timmreck,* 441 U.S. at 784.

The collateral consequences rule likewise prevents the States from being held responsible for proceedings—and related legal advice—that are effectively beyond their control. Indeed, the First Circuit has defined "collateral" in just such functional terms: A consequence is deemed "collateral" if it is "controlled by an agency which operates beyond the direct authority of the trial judge" or otherwise "remains beyond the control and responsibility of the district court in which [the] conviction was entered." *United States* v. *Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000). The collateral consequences rule thus protects the state's interest in finality by protecting guilty pleas from being attacked by defendants who have discovered too late the broad array of social and legal consequences that follow from a felony conviction.[8]

That protection is essential. Given the overwhelming number of State criminal convictions entered as a result of guilty pleas each year—over 1.2 million in 2004 alone[9]—even an incremental weakening in the finality of these pleas may have a dramatic

---

[8] *See, e.g.,* U.S. DEP'T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION, http://www.usdoj.gov/pardon/collateral_consequences.pdf (last accessed August 5, 2009).

[9] Bureau of Justice Statistics, U.S. Dept. of Justice, Criminal Sentencing Statistics, http://www.ojp.usdoj.gov/bjs/sent.htm (last visited Aug. 11, 2009).

effect on the integrity and effectiveness of the U.S. system of justice. *See Timmreck,* 441 U.S. at 784. That alone is a powerful reason to embrace the collateral consequences rule, and to reject Padilla's efforts to abolish or weaken it.

B. The Rule Protects States From The Potentially Enormous Costs Of Expanding The Right To State-Paid Counsel To Include Competent Advice On Collateral Matters Outside The States' Responsibility And Control.

Another powerful reason for the collateral consequences rule is protecting both the States' fiscs, and their judicial and prosecutorial resources.

The direct costs of providing counsel to indigent defendants are already enormous, and have risen substantially in the last 20 years. In 1986, the cost of indigent defense in the 50 states and the District of Columbia was just under $1 billion; by 2002, the cost had risen to over $2.8 billion.[10] Obviously, the more subjects on which the State must provide indigent defendants with competent legal advice, the greater those costs will be. Merely giving non-citizen defendants access to an immigration-law expert would substantially increase the States' costs of providing counsel to those they prosecute. And those costs could become truly exorbitant if the States were also required to provide sound legal advice on other poten-

---

[10] The Spangenberg Group, American Bar Association Bar Information Program, State and County Expenditures for Indigent Defense Services in Fiscal Year 2002, at 35 (2003), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf.

tial collateral consequences of a plea agreement—such as its effects on divorce or child-custody proceedings; on landlord-tenant matters; on certain types of employment; or on the availability of public housing or other public services. Each of these areas is a distinct legal specialty. And without the collateral consequences rule, one can well envision a regime in which a State would be required to provide a "dream team" of five or more lawyers for each indigent defendant. The aggregate costs would be astronomical.

The addition of such costs, moreover, would go well beyond the rationale for requiring State-paid counsel. The logic of requiring states to pay for criminal defense counsel rests on the assumption that the states have a responsibility to ensure the basic fairness of the criminal prosecutions brought under their authority. States, as this Court has noted, "quite properly spend vast sums of money to establish machinery to try defendants accused of crime," and "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963).[11] The collateral consequences rule keeps

---

[11] This limited role is consistent with the rationale advanced by the Progressive thinkers who founded the first Public Defender's Office in Los Angeles in 1913. Against the more combative model endorsed by some, they envisioned the public defender as "an officer of the court protecting the innocent and pleading the guilty . . . even when he went to trial, . . . present[ing] the evidence in a balanced and fair way—his interest not solely that of the client, but of truth and justice, which entitled him to the same respect accorded to the prosecutor." Babcock, Barbara Allen, *Inventing the Public Defender,* 43 AM. CRIM. L. REV. 1267, 1275 (2006).

this limited constitutional right to state-paid counsel—designed to protect the right to a fair trial in a criminal prosecution—from evolving into a broad-ranging right to state-paid counsel to advise an indigent defendant on any number of non-criminal matters.

As noted, the fiscal consequences of allowing criminal defendants to re-open their plea agreements based on defective advice on collateral matters are potentially huge. Plea agreements are "an essential component of the administration of justice" partly because "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Santobello* v. *New York*, 404 U.S. 257, 260 (1971). For example, one investigation in the mid-1990s found that in Washington State, normal felonies resolved by a plea bargain cost about $600 to defend," while "defense in a full-blown criminal trial could cost as much as $50,000 per case."[12]

If the States were required to provide sound legal advice on the full range of potential collateral consequences, the costs associated with plea bargains would certainly double or triple in size. And that, of course, would reduce the State's incentive to resolve cases through plea bargains, and would thereby put

---

[12] Nkechi Taifa, *Symposium, Violent Crime Control and Law Enforcement Act of 1994: "Three-Strikes-and-You're-Out" Mandatory Life Imprisonment for Third Time Felons*, 20 DAYTON L. REV. 717, 722 (1994); *see also* Tina M. Olson, *Strike One, Ready for More? The Consequences of Plea Bargaining "First Strike" Offenders under California's "Three Strikes" Law*, 36 CAL. W. L. REV. 545, 562 n.159 (2000).

even greater strain on judicial resources at both the state and federal levels.

C. The Sixth Amendment's Text And History Militate Against Any Further Extension Of The Right To State-Paid Counsel.

The Sixth Amendment's text and history also counsel strongly against any extension of the right to State-appointed counsel to include advice regarding collateral consequences. As this Court recognized in *Scott* v. *Illinois*, "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." 440 U.S. 367, 370 (1979). Indeed, there appears to be *no* serious dispute among legal scholars and historians that the Amendment, as originally enacted, provided nothing more than a right of an accused to the assistance of his or her own, personally funded counsel, and in no way mandated that counsel be provided by the government, be it federal or State.[13]

Amici recognize that, as to the States, the Court departed from this understanding more than 50 years ago when it held, in *Gideon* v. *Wainwright*, 372 U.S.

---

[13] See, *e.g.*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 114 (1998) ("[T]he Sixth Amendment gave the accused some freedom, some autonomy, in controlling the shape of 'his defence' [including] . . . whom (if anyone) to hire as a lawyer."); Anthony Lewis, *Gideon's Trumpet* 110 (Vintage Books 1989) (1964) ("Historically speaking, the amendment was almost certainly not envisaged by its framers as reaching the problem of the man too poor to hire a lawyer for his defense.").

335 (1963), that the Sixth and Fourteenth Amendments provide indigent defendants a right to State-provided counsel in State felony proceedings. *Id.* at 344-45.[14] *Amici* have no quarrel with that settled precedent. Nevertheless, in deciding whether to overturn or weaken the collateral consequences rule, and thereby *expand* the right to State-paid counsel, the Court may wish to be mindful of the pertinent textual and historical evidence on the original understand of the Sixth Amendment's right to counsel. That evidence includes (a) the English common law as it existed just before the adoption of the Sixth Amendment; (b) the Framers' decision not to follow State laws that expressly provided a right to appointed counsel in certain circumstances; and (c) the interpretation of the Amendment's right-to-counsel provision by the first Congress. These materials establish that at its adoption the Sixth Amendment was not viewed as granting *any* right to government-provided representation. And that fact strongly sug-

---

[14] The shift had already begun in *Powell* v. *Alabama*, 287 U.S. 45 (1932), which held that in some federal cases, which the Court said would be determined on a case-by-case basis, "the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel." *Id.* at 72. Six years later, the Court interpreted the Sixth Amendment to require the appointment of counsel in *all* federal cases where a defendant's "life or liberty is at stake." *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938). However, for the next 25 years, the Court refused to incorporate this interpretation of the Sixth Amendment against the States. Instead, it adhered to its earlier holding in *Betts* v. *Brady*, 316 U.S. 455, 461-62 (1942), that "[t]he Sixth Amendment of the national Constitution applies only to trials in federal courts," and that due process required appointed counsel in State cases only where necessary to avoid "a denial of fundamental fairness, shocking to the universal sense of justice." But *Betts* was overruled by *Gideon*.

gests that the right to State-paid counsel, recognized in *Gideon* and its progeny, should not be expanded beyond its present bounds.

1. The Sixth Amendment's right-to-counsel provision was a response to the traditional English common-law rule, which severely limited the assistance of counsel in serious criminal cases. Under that rule, "a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest." *Powell*, 287 U.S. at 60; see William M. Beaney, *The Right to Counsel in American Courts* 8-10 (Greenwood 1972) (1955). By contrast, "parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel." *Powell*, 287 U.S. at 60. Thus, as this Court has recognized, the English rule "perversely gave less in the way of right to counsel to accused felons than to those accused of misdemeanors." *Scott*, 440 U.S. at 372; *Powell*, 287 U.S. at 60 (noting that the English rule was "outrageous" in that it gave "the right to the aid of counsel in petty offenses" but not "in the case of crimes of the gravest character, where such aid is most needed").[15]

Because of the absurdity of the English rule, many Colonies abandoned it before the Sixth Amendment was even drafted. See *Betts*, 316 U.S. at

---

[15] Contemporaneous commentators also challenged the English rule. Blackstone inquired: "Upon what face of reason can that assistance be denied to save the life of a man, which is yet allowed him in prosecutions for every petty trespass?" 4 William Blackstone, *Commentaries on the Laws of England* 355 (12th ed. 1795), *quoted in* Beaney, *supra*, at 11. And Zephaniah Swift referred to the English rule as a "cruel and illiberal principle." 2 *A System of Laws of the State of Connecticut* 398-99 (1795-96).

465 (noting that that Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, and Pennsylvania had abandoned the English Rule before the Sixth Amendment was adopted). As this Court has explained, in "light of th[e] common law practice, it is evident that the[se] constitutional provisions . . . were intended to do away with" that rule. *Id.* at 466. Or, as one commentator put it, the intent of the Framers "was clearly to abrogate this perverse English common law rule by constitutional amendment and to provide the defendant with the right to be represented by counsel, presumably of his own choice and at his own expense." B. Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged With Misdemeanors Entitled To Court Appointed Counsel?*, 5 Roger Williams U. L. Rev. 417, 425-26 (2000).

2. While making a decisive break with the English rule, the Sixth Amendment did not adopt the more expansive right to appointed counsel already recognized by some States. In fact, a comparison of the Sixth Amendment's language with that of contemporaneous State statutes mandating appointed counsel reveals that the Sixth Amendment's drafters deliberately avoided creating any right to appointed counsel.

When the Sixth Amendment was drafted, apparently only Connecticut and New Jersey appointed counsel for defendants facing felony indictments generally. See *Betts*, 316 U.S. at 467 n.20. Another five States provided counsel for defendants only in capital cases. See *Betts*, 316 U.S. at 467 n.20 (Delaware, Pennsylvania, Massachusetts, and New Hampshire); Beaney, *supra*, at 17 (South Carolina). Like New Jersey, these States did so through explicit statutory

language providing for "assigned" counsel.[16] Moreover, these appointed counsel provisions supplemented more general statutory language providing the right to retain one's own counsel. See Beaney, *supra*, at 16-21.

The language of the Sixth Amendment, by contrast, made no mention of "assigned" or appointed counsel. This silence is particularly telling given that most of the founders were generally aware of the developments in State law at the time and that the federal Constitution was in many ways modeled after

---

[16] *See*, *e.g.*, 3 Statutes at Large of Pa. 199 (Busch 1896), *quoted in* Beaney, *supra*, at 16 ("[U]pon all trials of said capital crimes, lawful challenges shall be allowed, and learned counsel assigned to the prisoners."); Act of Aug. 20, 1731, 43 Laws of the Province of S.C. 518-19 (Trott 1736), *quoted in* Beaney, *supra*, at 17 (stating that if a capital defendant "shall desire coun[sel], the court . . . is hereby authorized and required, immediately, upon his or their request, to assign . . . such and so many council not exceeding two, as the person or persons shall desire") (omissions in Beaney); 1791 N.H. Laws 247 (Melcher 1792), *quoted in* Beaney, *supra*, at 21 (stating that a capital defendant "shall at his request have counsel learned in the law assigned him by the court"); 2 Laws of the Commonwealth of Massachusetts from November 28, 1780 to February 28, 1807, ch. 71 app. at 1049 (providing for assigned counsel for defendants accused and indicted for treason: "And in caſe any perſon or perſons, ſo accuſed and indicted, ſhall deſire council, the Court before whom ſuch perſon or perſons, ſhall be tried, or ſome Judge of that Court, ſhall, and is hereby authorized and required, immediately upon his or their requeſt, to aſſign to ſuch perſon or perſons, ſuch and ſo many council, not exceeding two, as the perſons ſhall deſire, to whom ſuch counsil ſhall have free acceſs at all ſeaſonable hours."); Act of 1719, ch. 22, § 4, 1 Del. Laws 64, 66 (S. Adams & J. Adams, 1797) (requiring counsel in capital cases: "And that upon all trials of the ſaid capital crimes, lawful challenges ſhall be allowed, and learned council aſſigned to the priſoners.").

contemporaneous State constitutions.[17] Accordingly, the Sixth Amendment's silence on the right to appointed counsel reveals that—unlike the State laws that explicitly required appointed counsel—the Amendment was not designed to impose such a requirement.

3. Actions of the first Congress support the conclusion that the Sixth Amendment did not require appointed counsel. For example, the Judiciary Act of 1789, signed the day before the Sixth Amendment was proposed in Congress, contained the following provision: "[I]n all the courts of the United States, the parties may plead and manage their own causes personally *or* by the assistance of such counsel or attorneys at law as by the rules of the said courts . . . shall be permitted to manage and conduct causes therein." Ch. 20, § 35, 1 Stat. 73, 92 (1789) (emphasis added). Unlike the State statutes providing for appointed counsel in some circumstances, the Judiciary Act made no mention of that subject. And as Prof. Beaney has noted, "If Congress had thought that the proposed Sixth Amendment counsel provision embodied a startling change from this statutory rule, some discussion concerning the proposal would undoubtedly have occurred on the floor." Beaney, *supra*, at 28.

Even more telling is a 1790 statute requiring that anyone indicted for treason or other capital crimes be offered "assigned counsel":

---

[17] See Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and its Influences on American Constitutionalism*, 62 Temp. L. Rev. 541-43 (1989) (noting that the delegates "had wide experience" with the contemporary state constitutional debates).

> I. [Such a defendant] shall also be allowed and admitted to make his full defense by counsel learned in the law; and the court before whom such person shall be tried . . . shall, and they *are hereby authorized and required immediately upon his request to assign to such person such counsel*, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours . . . .

Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112, 118 (emphasis added).

The enactment of this statute contemporaneously with the Sixth Amendment clearly indicates that Congress did not believe the Sixth Amendment itself required "assigned" counsel in such cases. For if the Sixth Amendment itself provided such a right, the right provided in the statute would have been both redundant and woefully under-inclusive. As this Court has repeatedly held, "[a]n Act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.'" *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983) (omission in original) (quoting *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)); see *Franklin* v. *Massachusetts*, 505 U.S. 788, 803-04 (1992) ("[I]nterpretations of the Constitution by the First Congress are persuasive."); *Bowsher* v. *Synar*, 478 U.S. 714, 723-24 & n.3 (1986) (listing 20 members of the first Congress who had been delegates to the Philadelphia Convention).[18]

---

[18] This Court adopted a similar interpretation some 100 years later when it had what appears to have been its first opportu-

Like the other historical evidence, the actions of the first Congress cast substantial doubt on the propriety of further expanding the federal right to appointed counsel to include advice on the collateral consequences of conviction.

II. Padilla's Proposed "Deportation" Exception Makes No Sense As A Matter Of Law Or Policy.

Apparently mindful of the importance of the collateral consequences rule, Padilla attempts to craft a narrow "deportation" exception to that rule. However, as Kentucky shows in its brief, deportation is unquestionably a collateral consequence of a criminal proceeding. Resp. Br. at 36-41. And as the Ninth Circuit has noted, "[a]ll other circuits to address the question 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). That conclusion is correct: Deportation is a civil proceeding initiated in

---

nity to address expressly the scope of the Sixth Amendment's right to counsel. In *United States* v. *Van Duzee*, 140 U.S. 169, 173 (1891), the Court addressed a claim by several federal court clerks for reimbursement for the cost of providing copies of indictments to criminal defendants. This required the Court to determine whether such copies were required by the Sixth Amendment. The Court held they were not. Under the Sixth Amendment, the Court held, "[t]here is . . . no general obligation on the part of the government either to furnish copies of indictments, summon witnesses or retain counsel for defendants or prisoners." *Id.* The Court reasoned that "[t]he object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to [criminal defendants]; but it was not contemplated that this should be done at the expense of the government." *Id.*

federal administrative courts and subject to its own extensive review process. The states, moreover, are already addressing the policy concerns surrounding the deportation of convicted criminals, and this Court should not prematurely pre-empt this process by constitutionalizing immigration advice to criminal defendants.

A. The Collateral Consequences Rule Clearly And Correctly Excludes State-Paid Counsel's Advice Regarding Civil Deportation Proceedings Carried Out in Special Administrative Courts Under the Authority of a Different Sovereign.

As Kentucky correctly points out (at 37), deportation is a collateral matter both because it does not stem directly from the conviction and because the sentencing court has no power over deportation decisions. Indeed, as the First Circuit has held, "what renders the plea's immigration effects collateral . . . [is] 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 . . . ."[19] *Gonzalez*, 202 F.3d at 27 (quotations omitted).

In fact, deportation is the result of a civil proceeding carried out in federal administrative courts and subject to its own extensive review process, up to and

---

[19] Because the distinction between collateral and direct consequences of a criminal conviction turns largely on whether the consequence is under the sentencing court's "control," *Gonzalez*, 202 F.3d at 27, it is particularly odd for Padilla to argue, as he does at p. 51 of his merits brief, that restrictions on the *U.S. Attorney General's* ability to cancel post-conviction deportation somehow transfers responsibility for deportation proceedings from the executive branch to the state or federal court presiding over the prior criminal prosecution.

including review in this Court. *See, e.g., Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2298 (2009). To deport a criminal immigrant, the Department of Homeland Security first files a Notice to Appear in Immigration Court, an administrative court under authority of the Executive Office for Immigration Review.[20] In these proceedings, criminal immigrants can and do raise claims under the Convention Against Torture in Immigration Court, and are allowed to present evidence that they have a credible fear of torture if they return to their home country and should not be removed from the U.S. *See, e.g., Kolkevich* v. *AG of the United States*, 501 F.3d 323, 325-26 (3d Cir. 2007).

Once the Immigration Judge rules on the immigrant's removal, both the DHS and the immigrant may appeal the Immigration Judge's decision to the Board of Immigration Appeals. Immigration Court Practice Manual at 101.

After the BIA issues its ruling, there follows another layer of review, this time in a federal Court of Appeals. *Kolkevich,* 501 F.3d at 326.

Finally, when a removal proceeding presents important unresolved legal questions, this Court may grant a writ of certiorari and review. *See, e.g., Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2298 (2009).

This whole process, which is subject to its own layers of review and appeal, unquestionably qualifies as a "collateral consequence" of the immigrant defen-

---

[20] Office of the Chief Immigration Judge, Immigration Court Practice Manual 55 (2008), *available at* http://www.usdoj.gov/eoir/vll/OCIJPracManual/Chap%204.pdf [hereinafter "Immigration Court Practice Manual"].

dant's criminal conviction. Of that there can be no doubt.

The practical consequences of Padilla's proposed "deportation exception," moreover, are staggering. Available statistics indicate that there are currently 22 million non-citizens residing in the United States; of those nearly 1000,000 are in custody—suggesting that substantial numbers are charged with crimes every year.[21] Given those numbers, an exception to the collateral consequences rule for immigration issues alone would dramatically expand the costs of the criminal justice system in many States. And such an exception would undermine the finality of a substantial percentage of State plea agreements. Padilla's "deportation exception," therefore, would come close to swallowing the collateral exception rule—and would certainly and substantially weaken the protections it provides to the States' treasuries, and to their prosecutorial and judicial resources.

B. In A Variety Of Ways, Most States Are Already Addressing The Collateral Effects Of Plea Agreements On Immigration Issues, And It Would Be Unwise To Interfere With The States' Experimentation In This Area.

A "deportation exception" would also inappropriately "take the development of rules and procedures in this area out of the hands of legislatures and state

---

[21] Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs, Bulletin, Prison Inmates at Midyear 2007, June 2008, NCJ 221944, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf ; American Community Survey, Selected Social Characteristics in the United States: 2007, *available at http://www.census.gov/acs/www/Products/index.html.*

courts shaping policy in a focused manner and turn it over to federal courts . . . ." *DA's Office* v. *Osborne*, 129 S. Ct. 2308, 2312 (2009). It is far more desirable—as a matter of well as Sixth Amendment jurisprudence—to let the states develop their own rules and policies in this area.

The States, moreover, are *already* grappling with this difficult and sensitive issue. As *amici* National Association of Criminal Defense Lawyers et al. have shown, 28 states and the District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas. Br. of the Nat'l Assn. of Crim. Defense Lawyers et al., *Amici Curiae,* App. 11a [hereinafter NACDL Brief]; *see also St. Cyr*, 533 U.S. at 323 n.48 (citing laws in eighteen states and the District of Columbia). Some states, like Texas, require the court to inform the defendant that his plea may result in deportation. Tex. Code Crim. Proc. art. 26.13. Washington requires a specific warning and allows an unwarned defendant who is at risk of deportation to withdraw his plea. Rev. Code Wash. (ARCW) § 10.40.200. California requires the court to give the defendant both a warning, and, upon request, additional time to consider the possible immigration consequences of his plea. Cal Pen Code § 1016.5. Other states take different approaches. And Kentucky itself has recently revised its plea forms to include a warning to non-citizens that they "may be subject to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service." Ky. Form AOC-491, Rev. 2-03; Ky. Form AOC-491.2, Rev. 1-03.

This kind of experimentation among the States currently occurs at the judicial level as well. One re-

cent survey of state judges found that sixty percent of them discuss collateral consequences with defendants at sentencing. Alec C. Ewald et al., *Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench*, 29 JUSTICE SYSTEM JOURNAL 145 (2008).

Given the variety of ways that states and judges are already addressing these issues, "[t]here is no reason to constitutionalize" advice of counsel on the immigration consequences of a guilty plea *Osborne,* 129 S. Ct. at 2312.

III. Padilla's Proposed "Misadvice" Exception Is Equally Misguided.

Nor is there any basis for Padilla's attempt to create a special exception for "misadvice." As Kentucky has shown (at 31-35), the decisions making exceptions to the collateral consequences rule for "misadvice" have failed to grapple with the text and history of the limited Sixth Amendment guarantee of counsel. Moreover, constitutionalizing misadvice on collateral consequences would not achieve the policy results Padilla seeks. To the contrary, a rule penalizing misadvice but not nonadvice would reward defense attorneys for *refusing* to answer their clients' questions about collateral matters—a perverse result in light of the ethical standards that encourage open discussion of collateral consequences.[22]

Even worse, as a practical matter, recognition of a "misadvice" exception would effectively open every

---

[22] *See, e.g.*, National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation § 6.2(a)(3), 6.3(a), 8.2(b)(8), & 8.2(c)(3) (1997), *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.

guilty plea up to a time-consuming and expensive collateral attack. Such an exception would give criminal defendants a powerful incentive to fabricate allegations about legal advice they were given by their court-appointed lawyers—allegations that would be difficult after the fact. And such an exception would make it possible for unscrupulous appointed counsel to give their clients a later opportunity to reopen their plea agreements: All such counsel would need to do is to deliberately misadvise a client on some collateral issue, knowing that she could later invoke that misadvice if she had misgivings about her plea.

In short, a "misadvice" exception to the collateral consequences rule makes no sense as a matter of theory or practice.

IV. Abandoning Or Weakening The Collateral Consequences Rule Will Distort This Court's Sixth Amendment Jurisprudence Without Truly Benefiting Immigrants

Ultimately, the lengthy and uncertain process of petitioning to set aside a plea agreement is a poor substitute for the only remedy that would give Padilla and similarly situated immigrants meaningful relief: legislative change. As past NDAA president Robert M.A. Johnson said in 2001, "[a]t times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences."[23] Moreover,

---

[23] Robert M.A. Johnson, *Message from the President: Collateral Consequences*, THE PROSECUTOR, May 2001, *available at* http://www.ndaa.org/ndaa/about/president_message_may_june_2001.html.

"[t]he efforts of prosecutors and judges do not fully deal with the problem" because they "lack [] the ability . . . to control the whole range of [collateral] restrictions and punishment imposed on an offender." Johnson thus concluded that ultimately, "[t]here must be some reasonable relief mechanism" in the laws that *impose* the collateral consequences.

Padilla's own case makes this point eloquently. He claims that but for the misadvice he allegedly received from his counsel, he would have gone to trial. Pet. Br. at 11. But his likelihood of success at trial was minuscule: Court records show that, in the year Padilla was arrested, only one defendant charged with a drug-related offense was acquitted by a jury.[24] What is more, the evidence against Padilla—which included over 1,000 pounds of marijuana in his truck and his admission that he knew that he was smuggling drugs—was overwhelming. R. 33-34. Thus, although Padilla asserts that going to trial and requesting jury sentencing *may* have resulted in earlier parole eligibility, Pet. Br. at 10, the reality is that anything less than a full acquittal would still have left him in exactly the same position he finds himself in today: an immigrant whose criminal conviction makes him deportable. Even the best pre-plea immigration advice would not have saved him from that fate. And that, of course, is why he cannot establish genuine prejudice from the misadvice he allegedly received.

---

[24] Administrative Office of the Courts, Kentucky Court of Justice, Hardin County Drug Offenses Disposed by Trial Type, Offense, Final Plea & Disposition (Aug. 10, 2009) (on file with author).

By contrast, the results Padilla urges here—excluding deportation from the collateral consequences rule or abandoning it altogether—would permanently distort the Sixth Amendment's limited guarantee of effective assistance of counsel "in all criminal prosecutions." It would also fail to truly address the harsh consequences of U.S. immigration laws for immigrant criminals. As the Seventh Circuit has put it, although "it is highly desirable that both state and federal counsel develop the practice of advising defendants of the collateral consequences of pleading guilty," in the end, "what is desirable is not the issue before us." *Santos* v. *Kolb*, 880 F.2d 941, 945 (7th Cir. 1989), *superseded by statute*, Pub. L. No. 101-649, Title V, 505(b), 104 Stat. 5050*, as recognized in Rodriguez* v. *United States*, No. 92-3163, 1995 U.S. App. LEXIS 7920, at *3 (7th Cir. Apr. 6, 1995). Ultimately, "[t]he failure of petitioner's counsel to inform him of the immigration consequences of his guilty plea, however unfortunate it might be, simply does not deprive petitioner of the effective assistance of counsel guaranteed by the Constitution." *Id.*

CONCLUSION

In sum, providing accurate counsel to a criminal defendant about the immigration-law consequences of a guilty plea is certainly good practice for a State-paid attorney, and may well be required by the attorney's ethical obligations. But that does not mean that the *State* is required by the Sixth Amendment to ensure that such counsel is provided—on pain of losing the finality of a duly entered guilty plea. A contrary ruling would effectively destroy the collateral consequences rule and, in so doing, wreak havoc on the plea bargaining regime that is the backbone of the U.S. criminal justice system.

For all these reasons, the Court should affirm the decision of the Supreme Court of Kentucky.

Respectfully submitted.

JAMES D. "BUDDY" CALDWELL
Attorney General of Louisiana
KYLE DUNCAN
Appellate Chief
1885 N. Third Street
Baton Rouge, La. 70802
(225) 326-6079

GENE C. SCHAERR
Counsel of Record
ADÈLE HUTTON AUXIER
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

SCOTT BURNS
National District Attorneys Ass'n
44 Canal Center Plaza
Alexandria, VA 22314
(703) 549-9222

LINDA T. COBERLY
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

Counsel for Amicus Curiae

AUGUST 2009