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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent cannot defend the Kentucky collateral-consequences rule. *Strickland v. Washington*, 466 U.S. 668 (1984), forbids *per se* rules and commands a contextual inquiry into the reasonableness of attorney conduct under prevailing professional norms. The Kentucky rule jettisons professional standards altogether in favor of a *per se* rule that it is always reasonable for counsel to disregard the "collateral" consequences of conviction. A lawyer does not render effective assistance by turning a blind eye to the client's most important interests in contravention of professional standards, conducting a partial investigation of the facts and law, and negotiating a catastrophic guilty plea that an informed client never would have accepted.

Respondent fares no better in arguing that misadvice about immigration consequences can never constitute ineffective assistance of counsel. As *amicus curiae* the United States recognizes, if defense counsel assumes the duty to advise a defendant regarding the deportation consequences of conviction, she must do so competently. Virtually every court has long applied *Strickland* to misadvice claims, without ill effects.

Finally, this Court should ignore Respondent's invitation to decide whether the record conclusively refutes Padilla's claim of prejudice. That state-law issue is outside the question presented, not passed on or presented below, waived, and beyond this Court's power to decide. Regardless, Respondent is wrong on the merits. This Court should reject the Kentucky rule and remand for further proceedings.

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

1. Respondent argues that the Sixth Amendment duties of defense counsel with regard to guilty pleas parallel those of courts under *Brady v. United States*, 397 U.S. 742 (1970). Thus, defense counsel's advice regarding a guilty plea is not ineffective unless it impairs the defendant's understanding of his constitutional rights, the charges against him, or the direct consequences of his plea. Resp. Br. 13-14. Respondent misconceives both *Brady* and the constitutional rights at stake.

Brady is a due process case regarding constraints on the exercise of state power. A guilty plea is not just a confession but "a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). The state may not exercise the power of conviction, judgment, and punishment without canvassing on the record the voluntariness of the plea and the defendant's understanding of his constitutional rights, the charges brought against him, and the consequences that the court may impose in sentencing for the offense. *Id.* at 242-44; *Brady*, 397 U.S. at 755. But *Brady*'s narrow due process inquiry presumes that the guilty plea is "made by competent defendants with adequate advice of counsel," *id.* at 758, for "intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney." *Id.* at 748 n.6; *Mabry v. Johnson*, 467 U.S. 504, 508 (1984) ("a voluntary and intelligent plea of guilty made by an accused person, *who has been advised by*

competent counsel, may not be collaterally attacked" (emphasis added)).

The Due Process Clause and the Sixth Amendment are independent sources of constitutional rights for defendants who plead guilty. *United States v. Broce*, 488 U.S. 563, 574 (1989). The standards are different because the duties and function of courts and defense counsel are different. Unlike a passive and neutral court, defense counsel must "make an independent examination of the facts, circumstances, pleadings and laws involved and then ... offer his informed opinion as to what plea should be entered," *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (Black, J., plurality), advising the defendant of "the advantages and disadvantages of a plea agreement." *Libretti v. United States*, 516 U.S. 29, 50-51 (1995). Whereas the court accepting a guilty plea must apprise the defendant of *what* rights he waives and *what* consequences it may impose, defense counsel has the very different function of investigating the relevant factors and advising the defendant *whether* to plead guilty. Accordingly, even apart from the due process voluntariness standard of *Brady*, a defendant may attack a guilty plea if his attorney's representation was objectively unreasonable and prejudicial under *Strickland*. *Hill v. Lockhart,* 474 U.S. 52, 57 (1985); Br. Legal Ethics Professors *et al.* ("Professors' Br.") 20-23.[1] Thus, *Brady* permits a court accepting a guilty plea to presume the adequacy of counsel's investigation and

[1] Contrary to Respondent's claims, Resp. Br. 22, applying *Strickland* here would have no effect on the duties of courts.

advice in accepting a guilty plea, but *Strickland* and *Hill* ensure that the defendant has a remedy when that investigation or advice turns out to be defective.

2. The United States recognizes this distinction, Br. for United States ("U.S. Br.") 12-13, but asks this Court to embrace a new principle of "Sixth Amendment jeopardy" to limit defense counsel duties. *Id.* at 15 n.4. It contends that a lawyer satisfies constitutional standards by *partial* investigation and disclosure of the disadvantages and advantages of pleading guilty. According to the United States, defense counsel need only advise the defendant of "the facts and law necessary to enable the defendant to evaluate the plea's strategic implications for the defendant's *interests within the criminal case*," which it defines as only criminal liability and punishment. *Id.* at 11 (emphasis added). Petitioner does not agree with the crabbed view that criminal liability and punishment are the only "interests" of the defendant at stake "within the criminal case"; immigration status and consequences are inextricably intertwined with the defense of criminal charges against an immigrant defendant, and only in the criminal case can a defendant charged with an aggravated felony effectively defend his right to remain in this country. *See infra* pp. 11-13. Regardless, this position is unsound.

First, contrary to the United States' claim, U.S. Br. 9, that distinction is not founded in the Constitution's text. The Sixth Amendment states only that "[i]n all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The only textual requirement is that the assistance be rendered in

defending the criminal prosecution (such as advising on a guilty plea). Once the right attaches, the Sixth Amendment does not "specify[] particular requirements of effective assistance" or limit the type of assistance to which the accused is entitled. *Strickland*, 466 U.S. at 688; Professors' Br. 7-8. Moreover, Padilla did not allege prejudice in a civil proceeding. Critically, he alleged prejudice in the criminal prosecution itself (namely, the forfeiture of a jury trial on the criminal charges because of his attorney's incompetent advice to plead guilty). JA 72-73. That satisfies the prejudice prong of *Strickland*. *Hill*, 474 U.S. at 56-57; *infra* pp. 7-8.

Second, the collateral-consequences rule is irreconcilable with *Hill* and *Strickland*. *Hill* embraced this rule in defining the duties of courts in accepting guilty pleas, but held that for ineffective assistance claims the two-part *Strickland* analysis applies. *Hill,* 474 U.S. at 56-57. Respondent and the United States counter that *Hill* did not foreclose adoption of the collateral-consequences rule under the first *Strickland* prong. Resp. Br. 23-24; U.S. Br. 13 n.3. That is not so, for the collateral-consequences rule is the antithesis of *Strickland*.

Strickland forbids "mechanical rules" of attorney duty because they cannot "take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." 466 U.S. at 688-89, 696. Instead, the Sixth Amendment "relies ... on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill [its] role in the adversary process ...." *Id.* at 688. Accordingly, "[i]n *any case* presenting

an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable *considering all the circumstances*." *Id.* (emphasis added).

Respondent and the United States advocate nothing less than abrogating *Strickland* in this context. They acknowledge (Resp. Br. 24-27; U.S. Br. 14) that, under prevailing professional standards, defense counsel must investigate and advise the client regarding collateral consequences (including deportation) that are material to the plea decision, and perform these tasks competently. Petr. Br. 36-42; Br. of American Bar Ass'n ("ABA Br.") 5-25; Br. of National Association of Criminal Defense Lawyers *et al.* ("NACDL Br.") 10-18. They instead invoke the undisputed propositions that the Sixth Amendment does not "constitutionalize particular standards of professional conduct," *Nix v. Whiteside*, 475 U.S. 157, 165 (1986), and that professional standards are "only guides" in a reasonableness inquiry, *Strickland*, 466 U.S. at 688, and not the equivalent of "binding statutory text," *Rompilla v. Beard,* 545 U.S. 374, 400 (2005) (Kennedy, J., dissenting). *See* Resp. Br. 24-26; U.S. Br. 14. But Padilla has disclaimed any *per se* rule in his favor, and seeks only the application of professional standards as guides for determining whether his attorney's performance was objectively unreasonable. Petr. Br. 42-43.

Respondent and the United States do not urge using professional standards as guides in conformity with *Strickland*. Rather, they ask this Court to discard them altogether in favor of a *per se* rule that defense counsel may always disregard collateral consequences in advising on guilty pleas. In short,

they advocate abandoning *Strickland*'s core holding that the Sixth Amendment "relies ... on the legal profession's maintenance of standards," and that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 466 U.S. at 688; *Knowles v. Mirzayance,* 129 S. Ct. 1411, 1420 (2009).

Respondent's invocation (Resp. Br. 25-26) of Justice Kennedy's dissent in *Rompilla* is misplaced. It was common ground among the *Rompilla* majority and dissenters that ABA standards are guides for determining reasonableness under the Sixth Amendment. *Compare Rompilla,* 545 U.S. at 380-81, 389-90, *with id.* at 399-401 (Kennedy, J., dissenting). The dissent questioned only the majority's fidelity to that principle and regarded the attorneys' performance in that case as objectively reasonable. *Id.* at 404-05. The *Rompilla* dissent, which vigorously defends *Strickland*'s rejection of *per se* rules, *id.* at 400, does not support a *per se* rule undermining *Strickland*.

Moreover, the United States and Respondent miscite *Strickland* for the proposition that counsel's assistance is constitutionally ineffective only if it undermines the reliability of the guilt determination or sentence. Resp. Br. 12-13; U.S. Br. 10. But that is the touchstone only when the allegation is attorney error in conducting the defense at trial and sentencing. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). That showing need not be made when the error "led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." *Id.* It is enough to show that deficient attorney performance caused the forfeiture of a

proceeding within the criminal prosecution to which the defendant was entitled. *Id.* at 484. *Flores-Ortega* cited *Hill* for the proposition that deficient advice leading to the entry of a guilty plea is prejudicial simply if it caused the defendant to forfeit a jury trial: "the decision whether to plead guilty (*i.e.*, waive trial) rested with the defendant and, like this case, counsel's advice in *Hill* might have caused the defendant to forfeit a judicial proceeding to which he was entitled." *Id.* at 485. The defendant does not need to show that it would have likely prevailed in the forfeited proceeding, or even the issues that he would have raised. *Id.* at 486 (holding that a defendant deprived of an appeal by attorney incompetence is prejudiced if "but for counsel's deficient conduct, he would have appealed").

Third, and most fundamentally, the position of the United States and Respondent cannot be reconciled with defense counsel's core function. "Counsel's concern is the faithful representation of the interest of his client." *Tollett v. Henderson*, 411 U.S. 258, 268 (1973). "The impact of deportation upon the life of an alien is often as great, if not greater than, the imposition of a criminal sentence." *Bridges v. Wixon*, 326 U.S. 135, 164 (1945); Br. of Asian American Justice Center *et al.* ("AAJC Br.") 14-27. Typically "'an alien charged with a crime . . . would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial.'" *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (quoting *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999)). An attorney does not render effective assistance under the Sixth Amendment by (1) disregarding paramount interests of the client

that cannot be protected except in the criminal proceeding; (2) disregarding established ethical duties to ensure competent representation, inform the client of the legal risks, and ascertain and pursue the informed client's objectives; and (3) negotiating a plea deal that visits catastrophe upon the client and that the client would never have accepted if fully informed. Petr. Br. 31-35. Defense counsel "cannot ignore the practical implications of a legal proceeding for the client." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1041 (1991) (Kennedy, J., plurality).

Moreover, the position of Respondent and the United States rests on a false premise. Counsel is not limited to advising on a subset of issues relevant to the plea – *i.e.*, facts and law relating to criminal liability and punishment, U.S. Br. 11 – while leaving the client to evaluate other consequences of conviction on his own or with the help of another lawyer. As the United States elsewhere acknowledges (U.S. Br. 21), counsel has a duty, *after* investigating the facts and law, to "offer his informed opinion as to what plea should be entered." *Von Moltke*, 332 U.S. at 721; *see also Hill*, 474 U.S. at 59; *Williams v. Kaiser*, 323 U.S. 471, 475 (1945). This duty reflects the recognition that the defendant needs the expertise of a lawyer not merely to *identify* the advantages and disadvantages of a plea, but also to *balance* them. It serves to protect the defendant – often uneducated, mentally limited, or intimidated – from becoming the "victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment." *Williams*, 323 U.S. at 476.

Defense counsel cannot perform this core Sixth Amendment function by viewing criminal

consequences in isolation. Counsel examining only criminal punishment might rationally recommend a plea deal for probation attached to a suspended sentence, even where the defendant has a strong defense, to spare the defendant and his family the expense and pain of trial. But no lawyer would recommend such a plea if it will result in life-shattering deportation. AAJC Br. 14-18 (giving examples of unknowing probation pleas to deportable offenses).[2] Counsel cannot render effective assistance wearing blinders, and the Sixth Amendment does not permit a rule that distorts the defense function.

Moreover, Respondent and the United States do not suggest that many immigrant defendants can afford a second lawyer to advise on the immigration consequences of conviction, or can navigate the federal immigration laws on their own in order to identify and mitigate those consequences in the criminal prosecution. The collateral-consequences rule is a prescription for guilty pleas entered out of ignorance, which conflicts with the Sixth Amendment.[3]

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[2] *Cf. Alabama v. Shelton*, 535 U.S. 654, 673-74 (2002) (probation with suspended sentences triggers Sixth Amendment right to counsel). Suspended sentences can make a conviction the basis of deportation. *See* 8 U.S.C. § 1101(a)(48)(B) (references to a term of imprisonment in defining a deportable offense includes suspended sentences); *id.* § 1101(a)(43)(F) & (G) (aggravated felonies defined based on sentences to a specified term of imprisonment); *id.* § 1227(a)(2)(A)(i) & (iii) (defining aggravated felonies and certain crimes of moral turpitude as deportable offenses).

[3] The United States claims that immigrant defendants know the immigration consequences of conviction and therefore are

(continued...)

3. The line that the United States and Respondent would draw between criminal and collateral consequences of conviction (particularly immigration consequences) is fictional. As Petitioner and *amici* show, immigration status and consequences affect every stage of the criminal process. Petr. Br. 44-50; NACDL Br. 4-9; ABA Br. 15-25. Neither Respondent nor the United States confronts this analysis. Investigation of immigration consequences is often strategically necessary to reduce the defendant's *criminal* liability or punishment. Petr. Br. 44-49; AAJC Br. 25-27 (detailing examples where defense counsel successfully negotiated pleas to lesser offenses or obtained lower sentences to avoid deportation); ABA Br. 22-25 (same). Similarly, it may be in the client's interest for defense counsel to negotiate a plea to a greater offense or a higher sentence in order to avoid dramatically adverse immigration consequences. Petr. Br. 47. Finally, awareness of immigration consequences might cause defense counsel to avoid strategies that are generally thought to be beneficial to defendants. For example, even where the prosecutor would agree to (or the court would impose)

(...continued)

inherently not prejudiced. U.S. Br. 17. But many immigrants have no idea, and many more will not understand which offenses are aggravated felonies or otherwise deportable, much less strategies for avoiding mandatory deportation. That is why "competent defense counsel" are expected to address immigration consequences. *St. Cyr*, 533 U.S. at 322-23 & n.50. Equally unfounded is Respondent's claim that "[t]he client and the lawyer both know that the scope of representation" in the criminal prosecution "is limited to the criminal charge." Resp. Br. 9. The Model Rules presume the opposite. Petr. Br. 36-38.

a sentence of less than a year, defense counsel may seek an *increased* sentence of a year and a day to allow eligibility for early release for good behavior. *See* 18 U.S.C. § 3624(b). Defense counsel cannot justify that strategy if a one-year term of imprisonment is the trigger for mandatory deportation. Petr. Br. 48.

Indeed, the United States concedes that defense counsel may have a Sixth Amendment duty to investigate deportation consequences to advocate a reduced sentence. U.S. Br. 16 n.5. But because a predictive judgment about the likely sentence is necessary to assess the plea's advantages, this means counsel must account for deportation consequences in advising the client to plead guilty. The United States further concedes that the Sixth Amendment requires defense counsel to evaluate deportation consequences if the government offers a reduced sentence, probation, or supervised release in return for a stipulation to deportation. *Id.* at 15-16. But plea bargaining is a two-way street, and the defense attorney cannot passively await government proposals. If such terms are potentially advantageous in resolving the criminal charges, defense counsel has a Sixth Amendment duty to investigate and advise the client of alternatives, and (with the client's approval) to pursue them with the prosecution. Moreover, the United States acknowledges that federal prosecutors may, at any time before entry of the guilty plea, make a motion for a district court to order judicial removal upon conviction. 8 U.S.C. § 1228(c)(1)-(2). These concessions expose the error of the Kentucky rule: collateral consequences cannot be categorically excluded from the Sixth Amendment.

Guilty pleas are the backbone of the criminal justice system, but only because the Sixth Amendment ensures that a defendant does not make this decision "of signal significance in a criminal proceeding" without competent assistance of counsel. *Florida v. Nixon*, 543 U.S. 175, 187 (2004). For guilty pleas, as for other aspects of criminal defense, what constitutes effective assistance is too variegated for mechanical rules. *Strickland*'s case-by-case approach preserves core Sixth Amendment values, even as professional standards or substantive laws evolve, such as the sea change in federal immigration laws, or the recent shift to increasingly severe collateral consequences for criminal offenses.[4]

4. The United States and Respondent both raise practical concerns with applying *Strickland* in this context, but such concerns have no place in Sixth Amendment analysis. *Kimmelman v. Morrison*, 477 U.S. 365, 377-79 (1986); Petr. Br. 49-50. Regardless, they overstate the concerns.

First, *Strickland* adds no burdens upon defense counsel that they do not currently have under ethical rules or professional standards. ABA Br. 5-25; NACDL Br. 10-17.

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[4] *See*, *e.g.*, *Sex Laws: Unjust and Ineffective*, The Economist, Aug. 8, 2009, at 21-23 (explaining that some states require lifetime registration laws for even minor, non-violent sexual offenses); Human Rights Watch, *No Easy Answers, Sex Offender Registration Laws in the US*, Sept. 2007, *available at* http://www.hrw.org/en/reports/2007/09/11/no-easy-answers.

Second, collateral consequences are limited to legal disabilities that follow upon conviction, ABA Br. 8 n.7, and do not extend to "every possible aspect of the client's future," Resp. Br. 9.

Third, while federal and state laws impose many collateral consequences, nothing in *Strickland* requires defense counsel to develop encyclopedic foreknowledge of collateral consequences or immigration law. Most collateral consequences fall into certain categories: (1) immigration consequences; (2) incarceration-related consequences, like parole eligibility or good-time credits; (3) consequences related to government licensure, procurement, employment, privileges, program participation, and benefits; (4) consequences related to highly regulated or high-risk private employment; and (5) consequences resulting from conviction of violent, sexual, fraud-related, or drug-related offenses. [5] Counsel are reasonably expected to be aware of the most deleterious collateral consequences, and also of the types of offenses and defendants for which other collateral consequences might be material. If necessary, inquiry into specific collateral consequences entails straightforward legal research. Professors' Br. 33-34. Moreover, new legislative initiatives are making compilations of collateral consequences systematically available, as well as requiring that notice of criminal charges include

[5] *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 738 (2002); ABA, Internal Exile: Collateral Consequences of Conviction In Federal Laws and Regulations (2009), *available at* http://www.abanet.org/cecs/internalexile.pdf.

possible collateral consequences, which highlights their interrelationship with the criminal defense function.[6] It demeans the American bar to say that defense lawyers cannot be expected to identify legal problems and research the law.

The ABA and NACDL *amici* briefs refute the claim that their members will be overwhelmed if held to *Strickland* standards. There are broadly available resources to help lawyers investigate immigration consequences and develop strategies within the criminal case to mitigate them, and competent lawyers are doing so. Criminal lawyers are not expected to master immigration law, but can resolve most problems with recourse to practice aids or free consultation services. ABA Br. 26-28; NACDL Br. 22-39. While some immigration issues may be difficult, most (such as identifying the drug-trafficking offense here as an aggravated felony) are not. There is no reason to shape constitutional law to accommodate the practices of the incompetent. *Tollett,* 411 U.S. at 268.

5. Respondent's last claim is that this Court should presume that violations of professional standards are so rampant that applying *Strickland*

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[6] *See* Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Collateral Consequences of Conviction Act (approved Aug. 2009), http://www.law.upenn.edu/bll/archives/ulc/ucsada/2009am_approved.htm (last visited Sept. 7, 2009); Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534, 2543-44 (2008) (Director of the National Institute of Justice to identify collateral consequences in the constitutions, codes and administrative rules of the fifty states).

here would unsettle many criminal convictions. This argument ignores that the *Strickland* standard itself "serve[s] the fundamental interest in the finality of guilty pleas." *Hill*, 474 U.S. at 58. *United States v. Timmreck*, 441 U.S. 780 (1979), cited by Respondent, Resp. Br. 19, is not to the contrary. *Timmreck* simply refused to permit a collateral attack on a guilty plea where there was no constitutional error, only violations of the formal requirements of Federal Rule of Criminal Procedure 11. 441 U.S. at 783-84. It never questioned the adequacy of *Strickland* as a safeguard of finality. Indeed, ineffective-assistance claims rarely succeed. *See* Victor E. Flango, Habeas Corpus in State and Federal Courts 62 tbl.17 (Nat'l Ctr. for State Cts. 1994), *available at* http://contentdm.ncsconline.org/cgibin/showfile.exe?CISOROOT=/criminal&CISOPTR=0 (finding in an empirical study, that only 8% of state petitions and less than 1% of federal petitions claiming ineffective assistance of counsel were granted).

Few petitioners will satisfy *Strickland*'s first prong. "Most guilty pleas would be unaffected because lawyers often do discuss collateral consequences with their clients or there are no significant collateral consequences." Chin & Holmes, *supra* note 5, at 737. Under the *Flores-Ortega* framework, a failure to advise a defendant about collateral consequences is objectively unreasonable only if the defendant can prove at an evidentiary hearing that, under the totality of the circumstances, (1) counsel knew or should have known that "a rational defendant" would consider the collateral consequences material to the plea, *or* (2) "this particular defendant reasonably demonstrated to

counsel" that the collateral consequences would be a material factor in his plea decision. 528 U.S. at 480.

Moreover, incompetency is hard to prove. *Strickland* analysis is "highly deferential," for "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry,* 540 U.S. 1, 6, 8 (2003). The claim that *Strickland* standards would require a "dream team" of specialist lawyers is false. *Strickland* requires only that the defense lawyer act reasonably under professional norms. The complexity or obscurity of an immigration-law issue would factor into the objective reasonableness analysis.

Lastly, *Strickland*'s prejudice prong protects finality. *Hill*, 474 U.S. at 58. Many collateral consequences are too unimportant to cause prejudice, and few defendants who were spared significant incarceration by a plea bargain will succeed in proving that they would have gone to trial if properly advised of collateral consequences. Chin & Holmes, *supra* note 5, at 737; *see*, *e.g.*, *Blackwell v. State*, 736 A.2d 971, 973 (Del. 1999) (inmate subject to a fifteen-year imprisonment was not prejudiced and therefore could not withdraw his guilty plea because of ignorance of a two-year driver's license suspension). The only defendants likely to do so are those (like Padilla) for whom the collateral consequence is devastating and substantially disproportionate to the benefits of the plea bargain. Moreover, only lawfully admitted immigrants can plausibly allege prejudice from conviction of a deportable offense. Illegal aliens generally cannot, absent a colorable pending or future claim to legal immigration status, because

illegal presence is grounds for removal independent of the conviction. 8 U.S.C. § 1227(a)(1).

The United States agrees that widespread vacaturs of convictions are not a concern because few defendants can show prejudice. *See* U.S. Br. 16-17. Rather, it worries about "an influx of challenges to long-final [claims]" and the possibility of stale claims. *Id.* at 19. But state and federal statutes of limitation and rules of exhaustion and default are ample protections. Moreover, habeas challenges to guilty pleas are relatively uncommon, *see* Professors' Br. 28 n.17, no doubt in part because pleas generally benefit the defendant. Few will choose to expose themselves to increased jeopardy by undoing the plea and going to trial. Neither respondent nor the United States show that the four jurisdictions that reject the collateral-consequences rule [7] are overrun with attacks on guilty pleas. Moreover, there has been no flood of petitions in the vast majority of jurisdictions that apply *Strickland* to misadvice claims. Finality concerns should not weigh heavily in this case.

6. This Court also need decide no more than whether *Strickland* applies to deportation-advice claims. This is not because there are no other collateral consequences of great significance to other

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[7] *See State v. Paredez*, 101 P.3d 799, 804-05 (N.M. 2004) (finding duty to advise based on ABA standards); *In re Resendiz*, 19 P.3d 1171, 1179-88 (Cal. 2001) (rejecting collateral consequences doctrine as inappropriate to Sixth Amendment analysis and holding that misadvice was objectively unreasonable); *People v. Pozo*, 746 P.2d 523, 525-28 (Colo. 1987); *State v. Creary*, No. 82767, 2004 WL 351878, at *2 (Ohio Ct. App. Feb. 26, 2004).

defendants, but because this Court need only decide the issue as presented in this case. Deportation is different from most collateral consequences because it is effectively mandatory;[8] is historically closely linked with the criminal case; is comparable in severity to criminal sanctions and in many cases may exceed them; affects criminal strategy in every prosecution phase; and subjects the defendant to more onerous conditions of confinement and continuous custody after completion of the criminal sentence. Petr. Br. 50-55.

II. *STRICKLAND* GOVERNS MISADVICE CLAIMS.

Even if it were *per se* reasonable for defense counsel to disregard collateral consequences in giving guilty-plea advice, courts have almost uniformly ruled that *misadvice* can constitute ineffective assistance if unreasonable and prejudicial under *Strickland*. Petr. Br. 55 & n.16. As the United States argues, if defense counsel affirmatively undertakes to advise the defendant of such

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[8] Respondent states that "Padilla concedes on page 33 of his brief that even an aggravated felon may sometimes avoid deportation." Resp. Br. 38. Padilla actually pointed out that deportation can be avoided only in the rarest circumstance. Petr. Br. 33 (citing Norton Tooby & Joseph Rollin, *Criminal Defense of Immigrants* § 2.15 (4th ed. 2007)); *see also* AAJC Br. 7 n.9 (explaining "extraordinary circumstances" where a person convicted of an aggravated felony might gain the rarely granted relief of a temporary reprieve from deportation if she can prove she will be subject to torture if deported). Nor has Padilla "avoid[ed] deportation," Resp. Br. 38; his removal proceeding is stayed pending the outcome of this case.

consequences, "counsel has a duty to ensure that her advice is reasonably competent." U.S. Br. 6. "Counsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all. Common sense dictates that such deficient lawyering goes to effectiveness." Pet. App. 26 (Cunningham, J., dissenting).

Respondent attacks this line of cases as irrational and lacking "explicit, detailed reasoning." Resp. Br. 31, 35. But the decisions simply apply this Court's holding in *Hill* that the two-part *Strickland* test governs attorney misadvice on a collateral consequence (in *Hill*, parole eligibility). Applying the rule established by this Court is not irrational; the only doctrinal irrationality is the unexamined importation of the *Brady* standard into the Sixth Amendment context (an error Respondent repeats, Resp. Br. 28-29). Petr. Br. 26-30. Moreover, a number of decisions set forth the inducement rationale amplified in the United States' and Padilla's briefs. Petr. Br. 58; *see, e.g.*, *Strader v. Garrison,* 611 F.2d 61, 65 (4th Cir. 1979); *Mott v. State,* 407 N.W.2d 581, 583-84 (Iowa 1987); *People v. Correa,* 485 N.E.2d 307, 310 (Ill. 1985).

As the United States explains, the ultimate decision to plead guilty belongs to the defendant. U.S. Br. 6 (citing *Nixon*, 543 U.S. at 187). Even if *arguendo* the attorney has no duty to investigate and advise about collateral consequences, an attorney who steps forward to do so and misrepresents material facts or law skews the defendant's decision to plead guilty. If the attorney's advice can potentially induce the defendant to enter a guilty plea he would not otherwise enter, then the attorney

has a Sixth Amendment duty to deliver competent advice. An unreasonable misrepresentation that induces a prejudicial guilty plea – *i.e.*, prejudice in the criminal prosecution, not in a separate civil proceeding – is ineffective assistance of counsel. U.S. Br. 22-24; Petr. Br. 57-59.

Material misrepresentation that induces a prejudicial guilty plea – whether by the court, the prosecutor, or the defense attorney – has long been a basis to attack the guilty plea, even if there was no duty to speak in the first place. *See Brady*, 397 U.S. at 755; *Santobello v. New York*, 404 U.S. 257, 262 (1971); *Libretti*, 516 U.S. at 50-51; see also *Denedo v. United States*, 66 M.J. 114, 129-30 (C.A.A.F. 2008) (remanding for consideration of whether misadvice about deportation consequences warranted coram nobis relief), *aff'd on jurisdictional grounds*, 129 S. Ct. 2213 (2009). As the D.C. Circuit stated in holding that a guilty plea could be withdrawn based on the prosecutor's negligent misrepresentation of the deportation consequences of a plea:

> Although it may be permissible for prosecutors to discuss deportation consequences with defendants when their understanding of the law is accurate, *see Bordenkircher v. Hayes,* 434 U.S. 357 (1978), the practice cannot be tolerated when the prosecution's advice is erroneous, no matter how well intended. The government may not be required to inform defendants of collateral plea consequences such as deportation, but it does have an obligation not to mislead them.

United States v. Russell, 686 F.2d 35, 41 (D.C. Cir. 1982).

That principle is well founded in law. A contract (including a plea agreement) may be voided at the election of the aggrieved party for material misrepresentation that induces the contract, regardless of whether the misrepresentation is intentional or negligent. *See* Restatement (Second) of Contracts §§ 159-167 (1981). Here, even though the defense attorney is not the agent of the state, the State is responsible for the attorney's performance, *Kimmelman*, 477 U.S. at 379, so attorney misrepresentation can be ineffective assistance. By contrast, under Respondent's conception, defense counsel (perhaps eager to work on a more profitable case) could even intentionally lie about collateral consequences to induce a plea, with impunity under the Sixth Amendment.

Respondent claims that any legal distinction between omission and commission is arbitrary. But Respondent supports that claim only by examples from contract or tort law pertaining to breach of an *existing* legal duty. Resp. Br. 30-31. By contrast, the law has always drawn a distinction between omission and commission in determining *when a duty arises*. Thus, one may have no duty to speak, but the action of speaking gives rise to a duty of care. *United States v. Neustadt*, 366 U.S. 696, 706 (1961) (negligent misrepresentations violate "the duty to use due care *in obtaining and communicating information* upon which that party may reasonably be expected to rely in the conduct of his economic affairs") (emphasis added). So too here.

Finally, Respondent does not claim that any practical burdens flow from retaining the current majority rule that misadvice claims are cognizable under *Strickland*. Simply asking an attorney to refrain from giving advice that he is incompetent to deliver does not burden the attorney. Furthermore, as to finality, there has been no deluge of petitions in the many jurisdictions that have long permitted misadvice claims. Finality concerns are not implicated where the legal rule has been in place for decades and "there is no clear evidence that this particular classification of habeas proceedings has burdened the dockets of the … courts." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 24 (1992) (Kennedy, J., dissenting). Thus, this Court should hold that misadvice claims are subject to *Strickland* regardless of its position on the collateral-consequences rule.

III. THE PREJUDICE QUESTION IS NOT PROPERLY DECIDED BY THIS COURT.

Respondent invites this Court to decide that, in light of the record, Padilla cannot show prejudice because there is no reasonable probability he would have gone to trial. Resp. Br. 41-45. That invitation is improper.

First, this Court does not decide issues outside the questions presented and not addressed by the court below. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Moreover, Respondent did not even *present* this prejudice argument to the Kentucky Supreme Court; it only made the mistaken (now abandoned) claim that Padilla was deportable as an illegal alien. Appellant Br. 5 (Ky. S. Ct. Nov. 15, 2006); JA 91-92.

Second, Respondent waived this argument by not including it in its brief in opposition to Padilla's petition for certiorari. *See* Sup. Ct. R. 15.2; *Aetna Health Inc. v. Davila*, 542 U.S. 200, 212 n.2 (2004); *S. Cent. Bell Tel. Co. v. Ala.*, 526 U.S. 160, 170-71 (1999).

Third, and most fundamentally, this case arises from a *state court* post-conviction petition, and the question Respondent invites the court to decide is one of state law for a state court to decide on remand. Here, there is no dispute that Padilla alleged both elements of a *Strickland* claim, including the allegation missing in *Hill v. Lockhart* that he would have gone to trial if properly advised. *See* 474 U.S. at 60.[9] Respondent makes the different contention that, given the record evidence, Padilla could not ultimately show a reasonable probability that he would have gone to trial. Resp. Br. 42-43; U.S. Br. 29-30. Even where the substantive law is federal, however, the sufficiency of a *state* post-conviction petition in light of record evidence is a question of *state procedural law*. In Kentucky, a post-conviction petition may not be denied without an evidentiary hearing if it alleges a "material issue of fact that

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[9] In *Hill*, the question of federal law presented was whether the defendant's allegations in a *federal* habeas petition entitled him to an evidentiary hearing. Brief of Petitioner, *Hill v. Lockhart,* No. 84-1103, 1985 WL 669995 (U.S. filed May 30, 1985). In *Hill*, this Court found the petition defective because his allegations did not "satisfy the *Strickland v. Washington* requirement of 'prejudice'": *i.e.*, "Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial." 474 U.S. at 60.

cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001). This Court lacks the power to decide this state-law question. *Murdock v. City of Memphis*, 87 U.S. 590, 626 (1875).

Regardless, as the Kentucky Court of Appeals held, Pet. App. 36, Respondent is wrong on the merits. As an initial matter, Padilla does not bear the burden of stating in his petition the defenses he would have raised at trial. A *pro se* petitioner is not expected to show that his trial defenses "had merit before any advocate has ever reviewed the record." *Flores-Ortega*, 528 U.S. at 486 (federal petition alleging prejudicial denial of appeal); *Fraser,* 59 S.W.3d at 453 ("If an evidentiary hearing is required, counsel must be appointed to represent the movant . . . .").

Furthermore, a reviewing court cannot presume that a jury would accept beyond a reasonable doubt the untested prosecution evidence from a *suppression* hearing. *See* Resp. Br. 42; U.S. Br. 30. The only issue at a suppression hearing is whether the evidence was the product of an unlawful search. Order Denying Def's Mot. to Suppress, R. 32-34. The prosecution's evidence has not been subjected to adversarial testing as to its truth, and the defendant has not had the opportunity to present his own evidence on the charges.

On the merits, material issues of fact exist as to prejudice. The felony drug-trafficking offense at issue requires proof that the defendant "knowingly and unlawfully traffics in marijuana." Ky. Rev. Stat.

Ann. 218A.1421 (2002). The Commonwealth indicted Padilla on the theory that "he knowingly and unlawfully trafficked in marijuana, by possessing with the intent to sell or transfer approximately 1033 pounds of marijuana in a semi-tractor trailer at the weigh station on I-65, Elizabethtown, Kentucky." JA 48-49.

Mr. Padilla had at least two viable defenses to the felony indictment. First, he had a triable case that he did not know that he was transporting marijuana. Kentucky law defines "knowingly" to require actual knowledge that "his conduct is of that nature or that the circumstance exists," Ky. Rev. Stat. Ann. 501.020(2) (2002), which is stricter than the Model Penal Code requirement of actual knowledge and does not include willful blindness. *Martin v. Commonwealth*, 96 S.W.3d 38, 62 (Ky. 2003); *Love v. Commonwealth*, 55 S.W.3d 816, 825-26 (Ky. 2001). Padilla was a commercial truck driver who transported twenty-three wrapped Styrofoam boxes as part of a truckload of candy boxes. R. 5, 33. Respondent's purported proof of knowledge is the arresting officer's testimony that during the search Padilla responded "maybe drugs" to a query about the boxes' contents. *Id.* at 32-33. Not only is that testimony facially ambiguous as to knowledge, but it also has not been subjected to cross-examination for veracity, accuracy of recollection, or context. Nor does the record disclose Padilla's version of events. This limited record cannot conclusively prove that a jury would have found beyond a reasonable doubt from the totality of the evidence that Padilla had actual, direct knowledge that the boxes contained marijuana.

Second, Padilla could also defend against the trafficking charge on the ground that he did not possess the mental state required by the indictment. Respondent had to prove not only that Padilla knew that his cargo was marijuana, but that he knowingly trafficked in that drug. The term "traffic" means "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." Ky. Rev. Stat. Ann. 218A.010(28) (2002). There was no completed transaction in this case, so Padilla was indicted on the grounds that he possessed the marijuana with the specific intent to "sell or transfer" those drugs to another. JA 48-49.

A jury could believe (or at least harbor reasonable doubt) that Padilla understood the transaction to be transporting the packages on behalf of a third party, and had no more intent to "sell" the contents of those packages than he did the candy-bar boxes that comprised the rest of his load. Even if Respondent alternatively proved that Padilla possessed marijuana with intent to "transfer" – defined as "dispos[ing] of a controlled substance to another person without consideration," Ky. Rev. Stat. Ann. 218A.010(29) (2002) – such proof would not support a trafficking conviction. *Commonwealth v. Rodefer*, 189 S.W.3d 550 (Ky. 2006) (holding that a completed transfer constitutes drug trafficking, but not possession with intent to transfer). Accordingly, Padilla could not have been found guilty of the underlying offense under the Commonwealth's theory.

Given his triable defense on these two issues, the record does not conclusively show that Padilla

cannot prove a reasonable probability that he would have gone to trial if properly advised. This standard is not, as Respondent claims, strictly objective. The assessment of trial defenses is objective, *Hill,* 474 U.S. at 59-60, but "the decision whether to plead guilty (*i.e.*, waive trial) rested with the defendant." *Flores-Ortega*, 528 U.S. at 485. Thus, the question is whether Padilla himself (if properly advised) would have decided to go to trial, in light of the objective circumstances of his trial defenses, any risks of greater criminal punishment, and the hardship of deportation to him. *Hill*, 474 U.S. at 59-60; *see United States v. Couto,* 311 F.3d 179, 182-84, 188 (2d Cir. 2002) (finding based on the totality of circumstances that the defendant would have gone to trial, even though the prosecution had a strong case with corroborative video evidence, and even though the plea deal had spared the defendant incarceration for a sentence with a maximum term of fifteen years imprisonment).

There are material issues of fact to be resolved at an evidentiary hearing under *Fraser*. Padilla's refusal to accept the plea agreement until the jury had already been seated (despite having been in pretrial custody for a year) evinces his willingness to go to trial. Moreover, the benefit Padilla derived from his plea to a partially probated maximum sentence was meager. By pleading guilty, Padilla forfeited his right to jury trial and to force the Commonwealth to prove his guilt by a reasonable doubt. He also forfeited his right to jury sentencing (and to present mitigating sentencing evidence to the jury). *See* Ky. Rev. Stat. Ann. 532.055(2) (2002). He may have received a substantially lower sentence

than ten years, perhaps the minimum of five years. In any event, he would have been parole eligible after serving 20% of his sentence. 501 Ky. Admin. Regs. 1:030 (2002). Thus, even if he had gone to trial and received the maximum sentence of ten years, he would have been eligible for parole within approximately a year from conviction (given his credit of 365 days for time served). Petr. Br. 10.

Respondent asks this Court to presume that Padilla would likely have received a substantially higher sentence if convicted at trial, but this limited record cannot conclusively show that. Padilla has not had the opportunity to submit contrary evidence, such as his mitigating evidence for the jury-sentencing phase (including cooperation with federal authorities and U.S. military service), and the relative leniency of Kentucky juries in sentencing for non-violent marijuana offenses. Certainly, a predictive judgment of the likely sentence to be imposed by a Kentucky jury (if Padilla were convicted) is for Kentucky courts, not this Court. So too is Padilla's reasonable expectation, even with a longer sentence of actual imprisonment, of imminent parole as a non-violent offender who cooperated with federal authorities and has a stable family situation.[10] Finally, Padilla, a lawful permanent resident for nearly 40 years with an American family,

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[10] *See* Kentucky Parole Board 2006 Annual Report, at 21-22, *available at* http://justice.ky.gov/NR/rdonlyres/0828EB8C-0E74-4F51-9F40-6B3BB7C1A4A4/0/WebreportforMrW.pdf (last visited Sept. 8, 2009) (vast majority of those who are considered eventually receive parole, and nearly half receive parole at their first opportunity).

would present evidence as to how deportation would devastate him and his family because of special circumstances. The barren record here does not conclusively show that it is not reasonably probable that Padilla (if properly advised) would have run the incremental risks of trial to avert this certain devastation.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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