No. 08-651

IN THE
Supreme Court of the United States

JOSE PADILLA,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

REPLY BRIEF

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REPLY BRIEF

Respondent's opposition underscores the need for this Court's review. Respondent (like the court below) acknowledges that the federal and state courts are deeply riven by conflict over the proper Sixth Amendment standard to apply to ineffective-assistance claims regarding advice on the deportation consequences of guilty pleas. This Court's review is all the more imperative because the categorical rule Respondent defends – that advice on collateral consequences of a conviction is not within the scope of the Sixth Amendment – directly conflicts with *Hill v. Lockhart*, 474 U.S. 52 (1985), which held that ineffective-assistance claims regarding advice on the collateral consequence of parole eligibility must be analyzed under the two-prong standard of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, the objective reasonableness of attorney performance is determined by "[p]revailing norms of practice as reflected in American Bar Association standards and the like," *id.* at 688, and those standards clearly enjoin defense counsel to advise immigrant defendants of the deportation consequences of guilty pleas. Respondent does not deny the importance of this recurring issue, given the massive numbers of immigrants facing mandatory deportation for a broad array of felony convictions under the amended federal immigration laws. Nor does Respondent contest that this is an

ideal vehicle for resolving the conflict. This Court should grant review.

1. As demonstrated by the petition and the *amici curiae* brief of the criminal and immigration law professors and immigrant-rights organizations, the lower courts are deeply divided on the questions presented. Pet. 10-16; Amici Br. 10-15. Indeed, the Kentucky Supreme Court acknowledged that its decision conflicted with "a number of jurisdictions." Pet. App. 23 nn.6 & 7.

On the first question, at least 27 federal courts of appeals and state supreme courts (including Kentucky's) hold that criminal defense counsel have no Sixth Amendment duty to advise immigrant defendants of the deportation consequences of a guilty plea because it is "collateral" to the conviction. Amici Br. 11-12 (listing cases). On the other side of the divide, three state supreme courts and one state appellate court reject the collateral consequences doctrine as a categorical rule of exclusion under the Sixth Amendment in favor of the two-part *Strickland* test, and three of them have held that at least in some circumstances counsel's failure to advise the defendant of collateral immigration consequences violates the Sixth Amendment. *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, 1174 (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, 525-26 (Colo. 1987); *State v. Creary*, No. 82767, 2004 WL 351878, at *2 (Ohio Ct. App. Feb. 26, 2004). Respondent contends that all the *federal* circuits uniformly embrace the collateral consequences rule, Opp. 6, but does not address the split of authority with these state supreme courts.

Respondent does acknowledge the stark split of authority on the second question presented: "While petitioner is correct that several circuits have in fact held that 'gross misadvice' with regard to a collateral consequence may give rise to an ineffective assistance of counsel claim, those decision[s] are fatally flawed." Opp. 12-13. Indeed, there is now an entrenched 17-2 split among the circuits, with Kentucky now joining the D.C. Circuit as the lone courts holding that even affirmative misadvice about the collateral consequence of deportation cannot give rise to an ineffective-assistance claim under the Sixth Amendment. *See United States v. Sambro*, 454 F.2d 918, 926-27 (D.C. Cir. 1971) (affirming refusal to allow withdrawal of a defendant's guilty plea where defendant was misadvised about possible deportation); Pet. 11-14 (also citing jurisdictions allowing ineffective-assistance claims for misadvice about other collateral consequences); Amici Br. 13-15. Thus, Respondent's acknowledgment that a large

and mature split exists, coupled with its contention that the majority rule on this recurring constitutional issue is "fatally flawed," Opp. 12-13, effectively concedes that review is warranted.

2. Resolution of this split is especially necessary because in a number of states the state supreme court's rule conflicts with that of the federal court of appeals with jurisdiction in that state. The Kentucky Supreme Court's decision conflicts with the Sixth Circuit's rule. *See Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988) (gross misadvice regarding the collateral consequence of parole eligibility "can amount to ineffective assistance of counsel"). Similar problems occur in Colorado, New Mexico, Ohio, and California.[1]

Not only will the criminal defense bar in those states be subject to conflicting rules, but it is also untenable for state courts and federal courts in habeas proceedings to apply conflicting constitutional rules to the *same* conviction. It undermines the exhaustion policy of federal habeas

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[1] *Compare Pozo*, 746 P.2d at 526-29 *and State v. Paredez*, 101 P.3d 799, 805 (N.M. 2004), *with Broomes v. Ashcroft*, 358 F.3d 1251, 1257 (10th Cir. 2004). *Compare Creary*, 2004 WL 351878, at *2 (Ohio Ct. App. Feb. 26, 2004), *with El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002). *Compare Resendiz*, 19 P.3d at 1181, *with United States v. Kwan*, 407 F.3d 1005, 1015-16 (9th Cir. 2005).

law if the federal court applies different federal constitutional rules to overturn a state-court conviction. Moreover, many prisoners with short sentences will not have the opportunity to secure federal habeas relief from an unconstitutional state-court conviction, since AEDPA requires them to be "in custody." 28 U.S.C. § 2254(a); *Maleng v. Cook*, 490 U.S. 488, 492 (1989). They will continue to be convicted felons even if the federal court of appeals in that state would have granted them relief. This Court should not tolerate conflicting federal constitutional rules in the federal court of appeals and state supreme court within the same state.

3. The adoption by a majority of courts (including the court below) of the collateral consequences doctrine as a rule of exclusion from the Sixth Amendment directly contradicts the precedents of this Court. Even as to so-called "collateral consequences" of a plea, this Court has held that ineffective-assistance claims must be determined under the two-part *Strickland* test of whether the attorney's failure was objectively unreasonable by professional standards and prejudicial. *Hill v. Lockhart,* 474 U.S. 52, 58-59 (1985). This Court should grant review to vindicate its precedent.

A court has a due process obligation to ensure that a defendant's guilty plea is voluntary, knowing and intelligent. *Kercheval v. United States*, 274 U.S.

220, 223 (1927). Accordingly, Federal Rule of Criminal Procedure 11, as originally promulgated in 1944, forbade federal courts to "accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge." Fed. R. Crim. P. 11 (1944). Courts interpreted Rule 11 to "mean that the defendant should understand the 'consequences of the plea,'" *Trujillo v. United States*, 377 F.2d 266, 268 (5th Cir. 1967, and indeed Rule 11 was amended in 1966 to add the phrase "'and the consequences of the plea' to state what clearly is the law." Fed. R. Crim. P. 11 advisory committee's note (1966).

Courts, however, rejected the notion that courts could not accept a guilty plea under Rule 11 without advising the defendant "of every 'but for' consequence which follows from a plea of guilty." *Trujillo*, 377 F.2d at 268. The rule emerged that so long as the court advised the defendant of the direct consequences of conviction (such as maximum or mandatory sentences), it "need not instruct an accused on all possible legal disadvantages and collateral consequences of his conviction on the charges in an indictment." *United States v. Washington*, 341 F.2d 277, 286 (3d Cir. 1965); *Durant v. United States*, 410 F.2d 689, 692 (1st Cir. 1969). Thus, Rule 11 did not require that the court at the allocution stage advise the defendant of consequences collateral to the conviction such as loss

of passport, deportation, loss of voting privileges, undesirable discharge from the armed services, or (in some jurisdictions) eligibility for parole. *Trujillo*, 377 F.2d at 268-69; *Durant*, 410 F.2d at 692.

The rationale for excluding "collateral consequences" from Rule 11 turned on concerns that a duty to advise defendants of collateral consequences, which are often subject to manifold factual contingencies or the vagaries of state law, would "impose upon the judge an impractical burden out of all proportion to the essentials of fair and just administration of the criminal laws." *United States v. Cariola*, 323 F.2d 180, 186 (3d Cir. 1963). Indeed, when Rule 11 was subsequently amended to enumerate the consequences the court had to disclose, the Advisory Committee noted that "certain consequences of a plea of guilty, such as parole eligibility, may be so complicated that it is not feasible to expect a judge to clearly advise the defendant" at the allocution stage, and "[s]imilar complications exist with regard to other, particularly collateral consequences, of the plea." Fed. R. Crim. P. 11 advisory committee's note (1974).

This Court embraced the direct/collateral distinction in due process cases of the same vintage. In 1969, this Court held that, because a guilty plea was "itself a conviction," before accepting a plea the court had to make a "reliable determination" of

voluntariness on the record by "canvass[ing] the matter with the accused to make sure he has a full understanding of what the plea connotes and of *its consequence*." *Boykin v. Alabama*, 395 U.S. 238, 242, 243-44 (1969) (emphasis added). In 1970, in holding a plea would not be involuntary because of the coercive effect of the death penalty, this Court clarified that guilty pleas would be deemed voluntary if "entered by one fully aware of the *direct consequences* . . . unless induced by threats . . . misrepresentation . . . or perhaps promises that are, by their nature, improper . . . ." *Brady v. United States*, 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc)).

The Rule 11/*Brady* obligations of a court do not, however, define counsel's duties under the Sixth Amendment. Contemporaneously with *Boykin* and *Brady*, this Court held that a defendant is entitled to "effective assistance of counsel" in pleading guilty to a felony, and therefore "the constitutional standard" was whether the "advice was within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970).

Significantly, in *Hill v. Lockhart*, this Court clarified that the test for effective assistance was *not* the Rule 11/*Brady* test, but rather the context-

specific test of *McMann* and *Strickland*, which required that the advice regarding the guilty plea be objectively unreasonable and prejudicial. 474 U.S. at 58-59. Hill claimed that his plea was involuntary because his counsel supplied him with incorrect information about parole eligibility, widely recognized as a collateral consequence. *Id.* at 54-55; *see Trujillo*, 377 F.2d at 269. This Court observed that "[w]e have never held that the United States Constitution requires *the State* to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in the federal courts." *Hill*, 474 U.S. at 56 (citing Fed. R. Crim. P. 11(c); Fed. R. Crim. P. 11 advisory committee's note (1974) (explaining the exclusion of parole eligibility as a collateral consequence)) (emphasis added). However, this did not answer the ineffective-assistance question. The Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel," requiring a showing of objectively unreasonable performance under *McMann* and a prejudicial effect on the outcome of the plea process. *Id.* at 58-59.

Notwithstanding *Hill*'s express holding that courts must apply the two-part *Strickland* test to an

ineffective-assistance claim regarding attorney advice on the collateral consequence of parole eligibility, courts in a large number of jurisdictions have mechanically imported the Rule 11 collateral consequences doctrine into Sixth Amendment doctrine.

The direct conflict of large numbers of courts with *Hill* alone justifies this Court's review, but (as scholars have pointed out) "[t]he collateral consequences rule does not capture, even as a rule of thumb, . . . the concerns of competent lawyers or their clients, . . . and should be irrelevant to *Strickland* analysis." Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas,* 87 Cornell L. Rev. 697, 712 (2001-2002).

A Rule 11 doctrine reflecting the limited role and capacity of a court at the allocution stage is not suited to determining standards of attorney competence. "The judge is charged with ensuring that the plea is knowing, voluntary, and intelligent; counsel's job is to assist with the determination that a plea is a good idea, which encompasses a broader range of considerations." *Id.* at 727. Defense counsel has distinct, far-ranging duties under the Sixth Amendment (among other things) to investigate facts relevant to liability and sentencing, *Rompilla v. Beard*, 545 U.S. 374, 377 (2005); *Wiggins v. Smith*,

539 U.S. 510, 521-22 (2003), "to consult with the defendant on important decisions," *Strickland*, 466 U.S. at 688, to "discuss potential strategies with the defendant," *Florida v. Nixon*, 543 U.S. 175, 178 (2004), to make predictive judgments about the strength of the State's case and how it would be received by court or jury, *McMann*, 397 U.S. at 771, and to provide reasonably competent advice on whether to plead guilty, *id.* at 770; *see Resendiz*, 19 P.3d at 1181. Indeed, the allocution court's duties are limited under *Brady* precisely because the court may generally presume that defense counsel has competently advised the defendant regarding the plea. *Brady*, 397 U.S. at 748 n.6; *Libretti v. United States*, 516 U.S. 29, 50-51 (1995) (counsel, not the trial court, bears "the responsibility . . . to inform the defendant of the advantages and disadvantages of a plea agreement"); Chin & Holmes, *supra*, at 728-32.

Because the attorney's duties are so context-specific and multifaceted, "specific guidelines" like the collateral consequences rule "are inappropriate," and "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms . . . as reflected in the American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice," *Strickland*, 466 U.S. at 688.[2] Thus, the question should not be whether

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[2] *See Williams v. Taylor*, 529 U.S. 362, 396 (2000) (relying on the ABA Standards for Criminal Justice); *Roe v. Flores-Ortega*,

deportation advice is categorically excluded from the Sixth Amendment because it concerns collateral consequences, or whether there is another categorical exception for affirmative misadvice. Rather, the question under the first *Strickland* prong should be, in the context of a given representation, whether it was objectively unreasonable under professional norms for counsel to fail to determine whether the felony to which his immigrant client will plead will result in his mandatory deportation, and further to give wrong advice on this material point without researching the law.

Professional standards leave no doubt that competent counsel must take into account collateral consequences, and in particular deportation, in advising clients regarding felony pleas. ABA standards explicitly require defense counsel to "determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." ABA Standards for Criminal Justice 14-3.2(f). The commentary to that Standard emphasizes:

> [I]t may well be that many clients' greatest potential difficulty and greatest

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528 U.S. 470, 479 (2000) (same); *Wiggins*, 539 U.S. at 522 (same); *Rompilla*, 545 U.S. at 387 (same).

> priority, will be the immigration consequences of conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact advising the client.

Id. cmt.; *see* Amici Br. 16-17 (citing other standards and sources). Indeed, outside the Sixth Amendment context, this Court has recognized that "alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions," and, if not, "competent defense counsel, following the advice of numerous practice guides," would so advise them. *INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001).

Unlike the rigid collateral consequences doctrine, the *Strickland* test allows for the duties of counsel to evolve as the law evolves, such as the recent sea change in immigration law expanding the felonies that result in mandatory deportation. Pet. 8-10; Amici Br. 6-9. And *Strickland* allows for recognition that not all collateral consequences are the same. Deportation is "a savage penalty," *Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting), "the equivalent of banishment," *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), often

resulting in the "loss of both property or life, or of all that makes life worth living," *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Because mandatory deportation may be the most material conviction consequence to the defendant, it cannot be categorically excluded from counsel's Sixth Amendment duty of assistance.

4. This Court's review is imperative. The deep and entrenched conflicts among the lower courts require resolution. The prevailing collateral consequences doctrine (adopted and extended by the Kentucky Supreme Court) directly conflicts with this Court's decisions in *Strickland* and *Hill*. The issue is one of surpassing importance because of the sheer numbers of persons affected by the expanded mandatory-deportation provisions of federal immigration statutes; the immigrants deported every year for felony convictions resulting from guilty pleas (many of whom, like Petitioner, have lived most of their lives in the U.S., and have families with deep roots in this country) number in the high tens of thousands. Pet. 10; Amici Br. 15-16; Chin & Holmes, *supra*, at 697. Moreover, this is an ideal vehicle in which all relevant legal issues are clearly presented, a point respondent does not contest. Amici Br. 19-21.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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