

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOSE PADILLA, :

4 Petitioner :

5 v. : No. 08-651

6 KENTUCKY. :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, October 13, 2009

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:04 a.m.

14 APPEARANCES:

15 STEPHEN B. KINNAIRD, ESQ., Washington, D.C.; on behalf
16 of the Petitioner.

17 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the United States, as amicus curiae, supporting
20 affirmance.

21 WM. ROBERT LONG, JR., ESQ., Assistant Attorney General,
22 Frankfurt, Ky.; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 08-651, Padilla v.
5 Kentucky.

6 Mr. Kinnaird.

7 ORAL ARGUMENT OF STEPHEN B. KINNAIRD

8 ON BEHALF OF THE PETITIONER

9 MR. KINNAIRD: Mr. Chief Justice, and may it
10 please the Court:

11 The Kentucky Supreme Court announced a
12 categorical rule so restrictive of the Sixth Amendment
13 that the United States Government disavows it. The
14 court held that the Sixth Amendment never provides a
15 remedy to a defendant who pleads guilty to a crime on
16 the false advice of his attorney that he would not be
17 deported as a result.

18 The narrowest ground on which this Court may
19 reverse the Kentucky Supreme Court is to hold that
20 misadvice claims are cognizable under the Sixth
21 Amendment.

22 Any advice that a lawyer actually gives to a
23 defendant on whether to plead guilty is advice affecting
24 criminal liability. Such advice must meet Sixth
25 Amendment competency standards.

1 CHIEF JUSTICE ROBERTS: Well, other advice
2 -- for example, advice about whether to take the stand
3 --that can have significant collateral consequences -
4 you know, he might lose his job or lose government
5 contracts based on what he says, is that the sort of
6 advice that would be covered in -- under your position?

7 MR. KINNAIRD: I think, for misadvice, the
8 test would be whether it's a material misrepresentation
9 that would be material to a reasonable defendant in
10 deciding whether to plead guilty, so it would --

11 CHIEF JUSTICE ROBERTS: Only plead guilty?
12 Not, for example, whether it would be material to the
13 defendant in deciding whether or not to take the stand?

14 MR. KINNAIRD: I think to plead guilty is
15 the key strategic decision that is in the -- in the
16 client's sole duty and prerogative, to make that
17 decision.

18 JUSTICE ALITO: Why would it be limited to a
19 decision to plead guilty? What if a decision to plead
20 guilty would have lesser immigration consequences than a
21 guilty verdict after -- after going to trial? Wouldn't
22 you have the same situation there?

23 MR. KINNAIRD: I'm not aware of any
24 consequences that would depend on whether the conviction
25 was based on a guilty plea or trial.

1 JUSTICE ALITO: Well, what if -- what if an
2 offer is made for a plea to an offense that would have
3 lesser immigration consequences than the offense for
4 which the person might be convicted if the person goes
5 to trial?

6 MR. KINNAIRD: Well, that would be
7 subject --

8 JUSTICE ALITO: And the -- and the attorney
9 doesn't fully apprise the client of the situation?

10 MR. KINNAIRD: And he goes to trial?

11 JUSTICE ALITO: Right.

12 MR. KINNAIRD: I think that -- that would
13 only be a Strickland claim if this Court were prepared
14 to rule that going to trial is ever prejudice under
15 Strickland, and there is a circuit split on that.

16 But the concern of the Sixth Amendment --

17 JUSTICE ALITO: But do you see a difference
18 in principle between the two situations with respect to
19 the issue that is before us here?

20 MR. KINNAIRD: I'm not sure that there would
21 be. Provided the Court would recognize that as
22 prejudice, I think they would all be under Strickland
23 claims.

24 JUSTICE GINSBURG: How do you decide which
25 of the many consequences your rule would cover? I mean,

1 you are now talking about a narrow ground, misadvice.
2 But you are also urging that when the lawyer is
3 silent on a matter that he should inform the defendant,
4 that, too, is covered.

5 But whichever way you do it, how do you --
6 you say certainly deportation is a consequence that the
7 defendant should be told about.

8 What about -- how do you distinguish that
9 from, say, you'll lose your driver's license, you'll
10 lose your right to vote? How do we distinguish the
11 consequences that count and those that don't?

12 MR. KINNAIRD: Your Honor, the issue here is
13 simply the legal standard that applies to any -- any
14 of these claims, and it would be the same two-part
15 standard under Strickland v. Washington. So there --
16 there is no need to draw lines.

17 If this Court is troubled by a broad rule
18 and is inclined not to issue a general rule, it may
19 simply recognize deportation as among the few collateral
20 consequences that is so severe and so material in a high
21 number of cases in which it applies that the Strickland
22 claim should be allowed to go forward.

23 And it can leave for another day whether
24 there are other consequences that are too burdensome for
25 the system to recognize.

1 JUSTICE SCALIA: Well, we can't leave that
2 for another day. I mean, we -- we have to decide
3 whether we are opening a Pandora's box here, whether
4 there is any sensible way to restrict it to -- to
5 deportation.

6 What about advice on whether pleading guilty
7 would -- would cause him to lose custody of his
8 children? That's -- that's pretty serious.

9 What if pleading guilty will -- will affect
10 whether he can keep his truck, which is his main means
11 of livelihood, or whether -- whether it would be seized
12 by the government as the instrument of his crime?

13 There are so many pieces of advice which
14 involve legal issues that -- that counsel can provide
15 advice on.

16 MR. KINNAIRD: Your Honor, I think that is
17 precisely why we have the contextual inquiry of
18 Strickland. And, certainly, parental termination may in
19 a given case be so severe a consequence --

20 JUSTICE SCALIA: Sure.

21 MR. KINNAIRD: -- that it would be
22 material.

23 JUSTICE SCALIA: Sure.

24 MR. KINNAIRD: But that -- most of these
25 failure to advise claims will be very difficult to plead

1 and to prove --

2 JUSTICE KENNEDY: If we were in -- if we
3 were in the contract, civil contract situation, and
4 there's a mistake, the usual rule -- Restatement of
5 Contracts -- is that the -- the question is whether or
6 not it's reasonable to have the party who made the
7 mistake bear the risk.

8 Suppose we just had an instruction, Rule 11
9 -- I recognize this is a State case -- but we had a Rule
10 11 instruction, which said the only thing the court is
11 going to inquire about and the only thing that was of
12 relevance to your plea are criminal consequences.

13 You take the risk of any misadvice, any
14 misunderstanding, with respect to collateral conduct.
15 That's your risk, and it's part of the guilty plea. If
16 we said that, would that foreclose this kind of argument
17 in your case?

18 MR. KINNAIRD: No, Your Honor, because the
19 Sixth Amendment is a source of independent rights, and
20 the question is: What is the -- the lawyer's duty as
21 distinct from the court? And the lawyer has the
22 distinct duty to assess the advantages and disadvantages
23 of the plea --

24 JUSTICE KENNEDY: Well, then there's no way
25 the government or the court can protect itself against

1 the -- these consequences, and there are any number of
2 them. Suppose he doesn't advise that there's going to
3 be civil liability in tort once he pleads guilty,
4 because then that's a fact that's concluded and it's
5 just a question of damages. And as Justice Scalia
6 indicated, there are many, many instances.

7 I just see no way for the courts to protect
8 themselves against -- against this. And -- and if the
9 client, or the accused, is told that he accepts these
10 risks, he can say, well, you know, there may be some
11 risks I don't know about, I'll go to trial. He just
12 accepts the risks.

13 MR. KINNAIRD: That may be true for a due
14 process claim, Your Honor, but the lawyer still has an
15 obligation to competently represent him, competently
16 assess the legal risks, and advise the client. Those
17 are fundamental to lawyering. And Strickland --

18 JUSTICE GINSBURG: But even -- even if we
19 accept that, wouldn't a competent counsel, after telling
20 him the deportation consequences, then say: But this is
21 a case where the evidence is so strong against you, I
22 advise you to take the plea rather than go to trial. If
23 you go to trial, you are likely to lose and you will get
24 a longer sentence. So does it matter in the end if
25 competent counsel would have said, this is a good plea,

1 take it?

2 MR. KINNAIRD: Yes, it certainly matters,
3 because that goes to the question of prejudice at an
4 evidentiary hearing. The prejudice standard is
5 subjective in the sense that it must account for the
6 subjective risk preferences of the defendant as between
7 incarceration and deportation. But at an evidentiary
8 hearing the defendant must be able to prove that he has
9 a triable case, that a rational jury could find beyond a
10 reasonable doubt -- or could find reasonable doubt,
11 rather, as to at least one element of -- of the offense.

12 JUSTICE ALITO: Your argument has -- has an
13 appeal because removal is such a harsh consequence,
14 particularly for someone like your client who had been
15 in the United States for a long time. But what troubles
16 me about it is the situation in which the defendant
17 claims -- you know, let's say 5 years after entering a
18 guilty plea or after the passage of some time -- that
19 misadvice was given, and the -- the attorney on the
20 other side is a busy public defender who by that time
21 has handled 500 cases and is unable to remember what, if
22 anything, was said about the immigration consequences of
23 the case; there is nothing in the file. I mean, how are
24 those cases going to be handled?

25 MR. KINNAIRD: Well, I think that, Your

1 Honor, that's no different than any Strickland claim
2 that would be brought in the same time frame. And there
3 are -- remember that ineffective assistance claims are
4 almost always brought as collateral attacks, and there
5 are many Federal and State strictures on bringing those
6 claims, including time limits. So I don't think there's
7 anything categorically different from the ordinary
8 Strickland claim in your case.

9 JUSTICE ALITO: Well, isn't there -- isn't
10 it different in that the ordinary Strickland claim
11 concerns things that happen at trial and relate to
12 strategy in a criminal case, as to which the public
13 defender or other defense attorney is presumably -- has
14 expertise? But what's -- what's the answer to this
15 question: The defendant takes the stand and says: My
16 attorney said that, don't worry about it, you are not
17 going to get removed. And the lawyer says: Well, here's
18 my file; I have nothing in this whatsoever about having
19 said anything about removal, and I can't remember the
20 particulars of every single conversation I had with this
21 attorney 5 -- with this client, 5 years ago.

22 MR. KINNAIRD: Your Honor, I think witness
23 recollection arises in any number of Strickland claims.
24 And certainly I think that the courts can resolve that
25 as to whether they found -- find that he proved by a

1 preponderance of the evidence that -- that that
2 statement was made.

3 CHIEF JUSTICE ROBERTS: Counsel, I suppose
4 -- before a guilty plea is accepted, the district court
5 judge is obligated to go through a colloquy to make sure
6 the defendant knows the consequences of accepting the
7 plea. I would suppose if you prevail that that colloquy
8 would have to be expanded to include something like: Do
9 you understand the deportation consequences, if any, of
10 pleading guilty?

11 MR. KINNAIRD: No, Your Honor, it would not.
12 The -- that's a due process inquiry that is implemented
13 by Rule 11 in the Federal courts.

14 JUSTICE SCALIA: But that's -- that's --
15 with due respect, that's ridiculous. If it's important
16 enough to be required to be told to the defendant by his
17 counsel, surely it's important enough to be advised to
18 the defendant by the court before the guilty plea is
19 accepted as -- as voluntary, which includes knowing --
20 knowing the consequences. It's a very strange line you
21 draw between what we are going to hold counsel to and
22 what we are going to require the defendant to be advised
23 of by the court.

24 MR. KINNAIRD: I don't think that's true,
25 Your Honor, and the reason is that there are all manner

1 of strategic types of advice that counsel give that are
2 no province of the district court.

3 JUSTICE KENNEDY: Well, do you think it
4 would be wrong for a district court to say, now, I want
5 to be very careful, and I'm going to add -- let's take
6 Rule 11 as the standard. It's a Federal case. I'm
7 going to add to Rule 11. I'm going to say, in addition
8 to the Rule 11 questions that you've all answered, I
9 want to make sure: Have you been advised about
10 immigration? Have you been advised about other
11 collateral consequences?

12 Do you think that would be error for the --
13 or inappropriate for a district judge to do?

14 MR. KINNAIRD: It would not. It would be --
15 it would probably be a salutary practice, and in about
16 half the States, there is --

17 JUSTICE KENNEDY: The -- the judge would not
18 be exceeding his -- his commission, his authority, to
19 determine just whether this is knowing and voluntary in
20 the sense of knowing -- knowing the criminal
21 consequences of -- I mean, in the criminal system
22 itself?

23 MR. KINNAIRD: No, Your Honor. My only
24 point is it would not be required under Rule 11 or
25 required under the Due Process Clause.

1 JUSTICE KENNEDY: But it seems to me a
2 careful district judge would have to do this if you
3 prevail.

4 MR. KINNAIRD: It -- it would be a
5 beneficial practice, but if the attorneys live up to
6 their obligations to properly apprise the clients, then
7 that is unnecessary, because the Brady voluntariness
8 standard is predicated on an assumption that the
9 defendant has been competently advised by his counsel.

10 JUSTICE GINSBURG: You were about to say
11 that in many States the trial judge does inform a
12 defendant who is an alien of immigration consequences.

13 MR. KINNAIRD: It's -- it's a much more
14 limited advisement. What they tend to advise is that
15 you may be subject to immigration consequences. But
16 they don't actually make any determination. And, again,
17 that goes to the difference between the function of the
18 counsel and a court. The court is not aware of the
19 defendant's circumstances. It does no investigation of
20 the case. Counsel does, and counsel is the only one
21 that actually advises you whether to accept the plea or
22 not. And that's the key distinction between a court --

23 CHIEF JUSTICE ROBERTS: No, but that's -- I
24 don't see why that doesn't apply to the more fundamental
25 question about whether the district court has to inquire

1 into the plea circumstances in any event. I thought --
2 your answer to Justice Scalia that, oh, well, all sorts
3 of things can come up at trial and the district judge
4 doesn't have to inquire into those, I think proves too
5 much. It goes to -- and it departs from your focus on
6 the guilty plea. That's all the judge is inquiring
7 about. And I don't know why that obligation doesn't
8 extend to a fundamental piece of information that
9 would -- that would, under your theory, make acceptance
10 of the plea involuntary.

11 MR. KINNAIRD: Your Honor, I am not
12 departing from the focus on the guilty plea. The
13 distinction is that the counsel has a duty to recommend
14 whether the defendant accepts the plea or not. And he
15 cannot do that by simply focusing on -- in isolation, on
16 the criminal consequences.

17 CHIEF JUSTICE ROBERTS: Well, but what
18 you're saying is he has got to tell him all the stuff
19 that's necessary to make the decision to accept the plea
20 knowing and intelligent, voluntary. And I thought that
21 was pretty much what the district court was doing when
22 they have the colloquy. That district judge wants to
23 make sure the defendant knows what he is agreeing to.

24 MR. KINNAIRD: No, Your Honor. I think that
25 the -- the touchstone for the attorney's advice is

1 whether it's in the interests of the client. And his
2 duty is to inform the client -- and this is true of all
3 lawyering -- to inform the client of the legal risks of
4 the recommended course of action. And if the law
5 happens to attach the most dramatic and severe
6 consequences under a civil law, but to attach them to a
7 conviction, then -- and that consequence can only be
8 averted in the criminal prosecution, I believe it is the
9 duty of the criminal lawyer to advise. But at a --

10 JUSTICE SCALIA: I would think that the duty
11 of the criminal lawyer is to make sure that the
12 defendant's guilty plea is informed, it is an informed
13 guilty plea. That is the same obligation of the court
14 in the colloquy, to be sure that it's an informed plea.
15 And if you say it's uninformed for counsel not to go
16 into the myriad collateral consequences, then I assume
17 it's -- it's improper for the court not to go into those
18 consequences. They both pertain to whether the guilty
19 plea is informed. That's counsel's responsibility.

20 MR. KINNAIRD: Your Honor, I believe that
21 counsel's responsibility is to ensure that he makes an
22 informed strategic decision whether to plead guilty.
23 That is no business of the court's, and I think that is
24 the distinction.

25 JUSTICE SCALIA: Well --

1 JUSTICE STEVENS: May I ask this question:
2 What do you think -- if there is deficient advice by
3 counsel under Strickland, what do you think you have to
4 prove in order to get relief under Strickland?

5 MR. KINNAIRD: For a misadvice claim?

6 JUSTICE STEVENS: No, assume that advice is
7 inadequate -- to prove prejudice.

8 MR. KINNAIRD: First of all, what you would
9 have to prove on the competency prong is that the
10 misadvice was about an issue that was material to the
11 strategic decision to plead guilty.

12 JUSTICE STEVENS: Right.

13 MR. KINNAIRD: At the prejudice prong, you
14 would you have to prove that this defendant -- and this
15 is at the evidentiary hearing -- would have gone to
16 trial. And in order to prove that, you have to show
17 that a rational jury could have found beyond a -- could
18 have found reasonable doubt as to at least one element
19 of the offense.

20 JUSTICE GINSBURG: And that would be what in
21 this case?

22 MR. KINNAIRD: In this case, it would be
23 knowledge. And Kentucky has a special rule that does
24 not permit willful blindness. You have to show actual
25 knowledge that it was marijuana in his truck. And here

1 you have a commercial truck driver who was found with
2 Styrofoam boxes and wrapped brown cardboard boxes.

3 CHIEF JUSTICE ROBERTS: Oh, and also drug
4 paraphernalia in the cab. And I -- was there some
5 marijuana in the cab, too?

6 MR. KINNAIRD: There was, yes, Your Honor.

7 The --

8 JUSTICE SCALIA: I thought -- I thought he
9 was asked what was in the -- what was in the containers
10 and he said marijuana.

11 MR. KINNAIRD: No, Your Honor. What the
12 officer testified -- and a key caveat here is that all
13 we have is the prosecution's charging facts and the
14 officer's testimony from a suppression hearing. We
15 don't have the full record. We don't have the defense
16 case. We don't have the defense version of events. But
17 what he testified was he was at -- the officer said,
18 when Mr. Padilla was asked what was in the boxes, he
19 shrugged his shoulders and he said, "Maybe drugs." And
20 that --

21 CHIEF JUSTICE ROBERTS: So you -- but your
22 point is an important one. We don't have the defense
23 case.

24 MR. KINNAIRD: Exactly.

25 CHIEF JUSTICE ROBERTS: But you don't have

1 the prosecution case either. You don't know exactly
2 what witnesses they are going to call, what the strength
3 of it is. So you don't know whether there is going to
4 be prejudice or not. When you see -- it seems to me you
5 have to make quite a prediction about what the case is
6 going to look like to decide if there's prejudice, to
7 decide if the fellow is going to take the plea or not.
8 And I'm just wondering how you do that.

9 MR. KINNAIRD: Well, Your Honor, I think in
10 these kinds of claims prejudice is generally going to
11 require an evidentiary hearing. And that's why the
12 Kentucky Court of Appeals sent this back for an
13 evidentiary hearing. But this --

14 CHIEF JUSTICE ROBERTS: It's -- it's going
15 to require, I guess, kind of a mini-trial to decide if
16 the person would have taken the plea. You've got to
17 know what the case -- his case looked like, what the
18 prosecutor's case looked like, to see if it's something
19 he would have made -- it would have made sense for him
20 to go to trial or not.

21 MR. KINNAIRD: I don't think it would
22 necessarily require a mini-trial, but that would be in
23 the trial court's discretion.

24 I would like to point out, though, that this
25 was not an issue raised to the State supreme court. And

1 in cases arising from State courts, this Court applies
2 the same rule to respondents who bring forth an
3 alternative ground in support of the judgment that it
4 does to petitioners. It will not reach a question not
5 passed on or presented below. The only question here is
6 the legal standard.

7 Your Honors, if there are no more questions,
8 I'd like to reserve the remainder of my time for
9 rebuttal.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Dreeben.

12 ORAL ARGUMENT OF MICHAEL R. DREEBEN

13 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

14 SUPPORTING AFFIRMANCE

15 MR. DREEBEN: Thank you, Mr. Chief Justice,
16 and may it please the Court:

17 There is a fundamental difference between
18 Petitioner's claim that defense counsel has a duty to
19 advise his client about all of the myriad collateral
20 consequences that may stem from a criminal conviction,
21 which the government does not think that a defense
22 counsel has under the Sixth Amendment, and the claim
23 that is focused more precisely on misadvice given by
24 defense counsel on a material collateral consequence to
25 a defendant.

1 CHIEF JUSTICE ROBERTS: Mr. Dreeben, we
2 learn in the first year of law school that the line
3 between an affirmative act and failure to act is a
4 difficult one to draw. What if the lawyer says, you're
5 going to face 5 years, and the defendant says, is that
6 all that's going to happen to me? And the lawyer says
7 yes. Is that a failure to advise or is that an
8 affirmative misrepresentation?

9 MR. DREEBEN: Well, I think it's certainly
10 not an affirmative misrepresentation. In context, what
11 the defense lawyer's purpose is, is to counter the
12 government's criminal case. That's what the Sixth
13 Amendment provides a lawyer to do. The government
14 appears through its expert adversary. The Sixth
15 Amendment provides a counterweight to that in the form
16 of a lawyer to deal with the criminal aspects of
17 the case.

18 JUSTICE KENNEDY: Well, then you are saying
19 that the more the defense counsel strays from his only
20 professional responsibility, the more at risk the
21 government is. That seems odd.

22 MR. DREEBEN: What we think, Justice
23 Kennedy, is that the defense lawyer has two relevant
24 duties here: One is to counter the government's case,
25 which means to provide advice to the defendant about his

1 rights, the nature of the charges, the evidence, and the
2 affirmative defenses that may exist. And that is a task
3 that is somewhat broader than the court has in
4 conducting a Rule 11 colloquy. The court does not go
5 into strategic matters in a criminal case with the
6 defendant. Defense counsel must.

7 CHIEF JUSTICE ROBERTS: I think when we --
8 when we decide there's no right to counsel, like on
9 collateral review, we don't even look at what happened,
10 right? We don't look and see whether the advice was
11 ineffective, how bad the lawyer was. The idea is if you
12 don't have the right at all, you don't have the right to
13 an effective lawyer.

14 MR. DREEBEN: That's right.

15 CHIEF JUSTICE ROBERTS: Is that right?
16 Okay. Well, these -- when you are talking about
17 collateral consequences, you don't have a right to
18 counsel on -- with respect to those collateral
19 consequences. I assume there's -- maybe there is -- is
20 there a right to counsel when you are facing a
21 deportation proceeding?

22 MR. DREEBEN: Certainly not by virtue --

23 CHIEF JUSTICE ROBERTS: Okay.

24 MR. DREEBEN: -- of the Sixth Amendment,
25 Mr. Chief Justice. And --

1 CHIEF JUSTICE ROBERTS: Well, then, if there
2 is no right to counsel, why do we get into whether there
3 is an affirmative misrepresentation or not?

4 MR. DREEBEN: Because --

5 CHIEF JUSTICE ROBERTS: Just like in a
6 collateral -- habeas context, we don't care whether
7 there's an affirmative misreputation --
8 misrepresentation, because there's no right to counsel
9 in the first place.

10 MR. DREEBEN: I think it's because the
11 lawyer has an additional duty in the context of advising
12 his client whether to take a guilty plea, and that is
13 the duty to respect that the decision whether to plead
14 guilty belongs to the defendant personally. It's not a
15 decision that can be exercised by proxy by the lawyer.
16 And the lawyer's duty to respect that, whatever advice
17 he gives, the defendant must be able to make his own
18 personal decision, imposes a concomitant duty not to
19 interfere with or undermine the defendant's ability to
20 make an intelligent decision with the information he
21 has.

22 So if a lawyer chooses, when asked about
23 collateral consequences, as many aliens will do -- will
24 I get deported? -- the lawyer is perfectly free to say:
25 I am not your immigration counsel. You need a lawyer to

1 advise you about immigration. I am your criminal
2 lawyer.

3 And that's perfectly fine. But if a lawyer
4 goes beyond that and says, don't worry about it; you've
5 been in the country so long; you are not going to get
6 deported -- with the understanding and the backdrop
7 that this is an important factor in whether this
8 defendant is going to decide to take a guilty plea or to
9 go to trial -- then the lawyer has used his professional
10 skills to undermine a personal decision that belongs to
11 the defendant alone.

12 JUSTICE SCALIA: What -- what about
13 misadvice as to whether he will lose custody of his
14 children, or misadvice as to whether his -- his truck
15 which he owns will be confiscated by the government?

16 MR. DREEBEN: I would put them, Justice
17 Scalia, all in the same general basket, which is to say,
18 misadvice on a legal matter of importance to the
19 defendant that could skew his decision to plead guilty
20 may be deficient representation under Strickland. I
21 think what was --

22 CHIEF JUSTICE ROBERTS: Not the defendant,
23 but a defendant? In other words, I assume it's an
24 objective inquiry you would make rather than a
25 subjective one?

1 MR. DREEBEN: Well, objective in the sense
2 that --

3 CHIEF JUSTICE ROBERTS: We assume, for
4 example, that someone who is going to lose the custody
5 of their children would regard that as important. You
6 don't want testimony about this guy doesn't care about
7 the children, so it's not a big deal to him.

8 MR. DREEBEN: I actually think that would be
9 quite relevant, because if any misadvice did not cause
10 the defendant to plead guilty because it was irrelevant
11 to him, then the defendant should not be able to get in
12 the door with an ineffective assistance claim.

13 And I also think if the defendant hasn't
14 manifested in some way that the particular collateral
15 consequence is important to that defendant, then the
16 lawyer certainly has no obligation even under
17 professional standards --

18 CHIEF JUSTICE ROBERTS: Won't -- won't your
19 test result in a net loss to defendants? I assume, if
20 this is adopted as a rule, the affirmative
21 misrepresentation rule, then every lawyer is going to
22 say what you said they should say: I'm here for the
23 criminal case; I'm not telling you anything about
24 anything else --

25 MR. DREEBEN: No, I don't --

1 CHIEF JUSTICE ROBERTS: -- as opposed to
2 saying -- sitting down and saying: Here's what you need
3 to know. And in most cases we expect the lawyer to do a
4 professional job. If you have got an alien, he is going
5 to tell him: Well, what -- you know, this will cause
6 you to be deported. Instead, every lawyer now is going
7 to say: I'm not giving you any advice about anything
8 else.

9 MR. DREEBEN: No, I don't think that it will
10 lead to sort of defensive malpractice type of counseling
11 where lawyers do not do the job that they feel that they
12 should do, and experience tends to support that.

13 The rule right now in 10 Federal circuits
14 is there's no duty to advise about collateral
15 consequences. Seven Federal circuits have a rule that
16 affirmative misadvice about collateral consequences can
17 support a claim.

18 JUSTICE BREYER: Why -- why do you have a
19 rule? I mean, I thought -- I've looked up six cases,
20 and they all say, Strickland cases in this Court, that
21 you look at all the circumstances. Now, what I think is
22 radical on your part -- but tell me it isn't -- is not
23 what the rule is, but that you want one.

24 I thought the government's view normally was
25 the same as we -- what's the exact words -- did the

1 conduct of the lawyer meet professional -- prevailing
2 professional norms? And then we look to see, if it did
3 not, whether that led to a situation where he would not
4 have pleaded guilty but for the failure. Okay?

5 Now, the world is filled with 42 billion
6 circumstances. If we agree with you, we will have set
7 in motion the great legal rule machine. And there's
8 nothing better than lawyers spinning off rules. And we
9 will be here from now until -- good, we won't have any
10 docket problem, because what we'll be doing is reviewing
11 rule after rule after rule after rule.

12 So why has the government -- I think for the
13 first time, maybe not -- told us to abandon Strickland's
14 approach and start spinning off rules?

15 MR. DREEBEN: Justice Breyer, we have not
16 abandoned Strickland's approach. What we have focused
17 on is, what is the Sixth Amendment right in the first
18 place? The Sixth Amendment right is not a right to have
19 a State-provided lawyer who will advise you about child
20 custody or about deportation or about --

21 JUSTICE BREYER: No, no. But it's easy -- I
22 mean, you know one thing we are very good at here is
23 making up hypotheticals. So I imagine it wouldn't be
24 that tough for me to think of a hypothetical where
25 everyone knows this 90-year-old individual who has

1 actually never set foot in the country that he came
2 from, and everyone knows that if he pleads guilty to
3 this chewing gum offense where they have virtually no
4 evidence, he will be sent back, at age 90, to that
5 country.

6 I would say any lawyer would say, be
7 careful, because if we plead guilty, back you go, on the
8 stretcher since you can no longer walk. See, all I did
9 was spin out a hypothetical.

10 And the reason I can spin those out and why
11 we have the Strickland rule is pretty clearly that you
12 shouldn't have sub-rules here because life is more
13 complicated than rules tell us. Just look to see
14 prevailing norm and did it cause the harm. And that's
15 why I am back to my question: Isn't this the first time
16 the government has asked us to adopt rules under
17 Strickland rather than what it says --

18 MR. DREEBEN: I think, Justice Breyer --

19 JUSTICE BREYER: -- which is "case by case,"
20 underlined, italics, repeated in the cases?

21 MR. DREEBEN: Justice Breyer, I think that
22 the fundamental point is that this is the first time
23 that the Court has been asked to adopt a rule under
24 Strickland that would require a lawyer, pursuant to
25 Sixth Amendment norms, to give advice that pertains --

1 JUSTICE BREYER: No, no, they are not asking
2 us to have a rule. What he is saying is, look to the
3 individual case and ask in this case, did the -- at
4 least that's what I heard him; he's in charge of his own
5 case. But I heard him say, look to this case, and in
6 this case, it falls below prevailing norms for a lot of
7 reasons.

8 MR. DREEBEN: Well, Justice Breyer, the --
9 the lower courts that have looked at this I think have
10 correctly recognized that there's a distinction between
11 saying that Strickland is a case-by-case inquiry into
12 lawyer competence and saying that Strickland requires
13 the lawyer to provide advice about collateral
14 consequences that are not the criminal case --

15 JUSTICE ALITO: But what are you going to do
16 in the situation where the defendant is concerned about
17 removal -- the removal consequences? And this is --
18 let's say this is a case out in some rural jurisdiction,
19 you have got a public defender or a retained attorney,
20 and the -- the attorney is -- you know, provides
21 advice based on the criminal law consequences and the
22 client says: Well, I'm also concerned about the
23 immigration consequences. And the lawyer says: Well,
24 immigration law is very complicated, and I'm not an
25 expert on this and I'm not going to tell you. And so

1 the client says -- and the lawyer says: If you want to
2 know about that you've got to get a deportation --
3 you've got to get an immigration lawyer. And the alien
4 defendant says: Well, I have no money; that's why you
5 were appointed to represent me. How am I going to get
6 advice on the immigration law issue? And the lawyer
7 says: Well, that's just too bad for you.

8 And that's the line you want us to draw?

9 MR. DREEBEN: Well, Justice Alito, I don't
10 think that he has a right under the Sixth Amendment to a
11 lawyer who will counsel him about the potential
12 immigration consequences of a guilty plea. That's not
13 what the Sixth Amendment was designed for.

14 JUSTICE SCALIA: What are the consequences
15 to the lawyer? I mean, let's assume you are a public
16 defender, and you are confronted with this situation.
17 Is it -- how -- how much skin is it off your teeth if
18 you provide the advice, even though you are uncertain,
19 and the advice turns out to be wrong? What happens to
20 the lawyer?

21 MR. DREEBEN: I don't know that anything
22 happens to the lawyer, Justice Scalia.

23 JUSTICE SCALIA: So, what incentive is there
24 to withhold uncertain advice? Is there any incentive at
25 all?

1 MR. DREEBEN: Well, I think that --

2 JUSTICE SCALIA: I mean, the worst that can
3 happen is your client will get off.

4 MR. DREEBEN: There's the professional --

5 JUSTICE SCALIA: He'll make a guilty plea,
6 and afterwards it will be set aside.

7 MR. DREEBEN: There is a professional
8 incentive to provide advice where you are competent to
9 provide advice and not to provide it where you are not
10 competent. And I think that the focus on immigration
11 consequences illustrates two things:

12 One is this is an extraordinarily
13 complicated area of the law, where it is very difficult
14 to give advice. And for a lawyer to be expected to
15 master not only the criminal aspects of the case but
16 also the immigration aspects of the case will only tend
17 to divert attention from what the lawyer is really there
18 to do, advise --

19 JUSTICE KENNEDY: Well, why shouldn't we
20 just adopt an amendment to Rule 11 in which the judge
21 says, any collateral consequences with respect to your
22 plea are not the concern of this court and will not be
23 grounds for setting aside this -- this plea?

24 MR. DREEBEN: Well, the former part is
25 certainly something that the Court could in its

1 rulemaking capacity do. The latter part is a Sixth
2 Amendment question. And I think it's highly notable
3 that the rules committee for the criminal rules has
4 twice considered whether to amend Rule 11, and is going
5 to consider it again contemporaneously with this case,
6 to require the judge to say to an alien defendant, you
7 may want to take into account removal consequences of a
8 criminal conviction.

9 In other words, there are rule-based ways to
10 address some of the concerns that Justice Alito raised
11 without constitutionalizing a new area of collateral
12 consequences that would impose new duties that actually
13 would divert the lawyer from his criminal law function,
14 whereas the misadvice line has not created those
15 problems.

16 And as I started to say earlier, the fact
17 that 10 Federal circuits have said no duty to advise on
18 collateral consequences, while 7 have recognized that
19 misadvice on collateral consequences can provide
20 relief, has not led to a series of difficult Strickland
21 hearings that are unmanageable. Justice Alito --

22 CHIEF JUSTICE ROBERTS: How do we know that?

23 JUSTICE ALITO: What about the situation
24 where the attorney says nothing about -- I mean, removal
25 is -- is out there as -- as a real possibility, but it

1 just doesn't occur to the -- the defendant, and the
2 attorney doesn't even mention, you know, you might --
3 you might want to think about the removal consequences
4 of this?

5 MR. DREEBEN: Then the client does not get
6 relief for two reasons: One is because we believe
7 there's no duty to give that advice. But even if the
8 Court disagreed with me on that, such a defendant could
9 hardly show prejudice because he knew that he went into
10 his guilty plea with uncertainty, at best, about
11 removal.

12 And I think it would be very difficult to
13 show what he should have to show to establish prejudice:
14 First, that subjectively he would not have pleaded
15 guilty had he been given correct immigration advice;
16 and, second, that a reasonable defendant would have had
17 a basis not to plead guilty, because if the defendant is
18 going to be convicted after a trial in any event, the
19 same collateral consequence is going to ensue. The
20 defendant will not evade the collateral consequences of
21 removal if the defendant was going to be convicted at a
22 trial anyway. And perhaps --

23 JUSTICE GINSBURG: How do you -- how do you
24 know that? In this case, Mr. Kinnaird told us the
25 defendant might have preferred to go to trial because he

1 had this defense that he didn't know what was in the
2 packages.

3 MR. DREEBEN: Well, I think courts will
4 evaluate that kind of a claim just the way they evaluate
5 any other Strickland claim and decide whether there was
6 any reasonable probability that such a defense could have
7 prevailed.

8 JUSTICE SCALIA: After -- after a
9 mini-trial, which deprives the government of -- of its
10 whole benefit from the guilty plea. Governments accept
11 guilty pleas in order to avoid the time and expense of
12 going to -- to a trial. And here you have to go back
13 and find out what the evidence would have been, so that
14 the court can make the decision you say is so easy.

15 MR. DREEBEN: This is the typical regime
16 that the Court has dictated under Strickland, and it has
17 not proved unmanageable in the courts that have adopted
18 the limited misadvice rule that the government
19 supports.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Dreeben.

22 Mr. Long.

23 ORAL ARGUMENT OF WM. ROBERT LONG, JR.

24 ON BEHALF OF THE RESPONDENT

25 MR. LONG: Mr. Chief Justice, may it please

1 the Court:

2 In Hill v. Lockhart, this Court again
3 focused on voluntariness and said that voluntariness of
4 the plea depends on counsel's advice and whether that
5 counsel advice is in the range of competence of the
6 attorneys in a criminal proceeding.

7 Again, the focus was on voluntary. And in
8 Brady, this Court described a voluntary plea as "a plea
9 entered by one possessing full knowledge of direct
10 consequences." Thus, reading the cases together, it
11 would appear that the defendant need to have only
12 knowledge -- full knowledge of direct consequences, and
13 advice of counsel is just a tool to ensure that.

14 JUSTICE SOTOMAYOR: Counsel, a plea is
15 something more than "I'm guilty." It is a strategic
16 decision not to put the government to its burden of
17 proof. Your definition of voluntariness suggests that
18 there is only one component to it, do I know what my
19 rights are, as opposed to, do I know what they are and
20 am making an informed decision to waive those rights.

21 Your articulation of the rule leaves out the
22 second component: Am I making an informed decision to
23 waive those rights?

24 MR. LONG: Well, I think under this Court's
25 precedent, the informed right is to know what those

1 rights are, what is the weight of the evidence against
2 you, and to make those strategic decisions. But that --

3 JUSTICE SOTOMAYOR: But how do you do that?

4 I mean, your adversary's argument is, in their
5 particular case -- and I know that you dispute this --
6 there is a defense that could win at trial. And the
7 defendant comes in and says: Okay, what are my choices?
8 I go to trial and I may serve a longer sentence, but I
9 don't go to trial, I may serve that -- I do go to trial
10 and I serve that longer sentence, but it's here in the
11 U.S. and not in my home country, where I might starve to
12 death. I think I'll stay here and take that risk.

13 You're -- you're sort of ignoring that
14 component of information in terms of informing the
15 strategic choice of whether to take the risk and go to
16 trial.

17 MR. LONG: Well, we are not particularly
18 ignoring it. We are saying ultimately under the Sixth
19 Amendment what is prudent or appropriate may not
20 necessarily be what the inquiry is, but what is
21 constitutional mandated. And what is constitutionally
22 mandated here is to provide the adversary to waive
23 the -- put the Commonwealth's or the State's proof -- to
24 weigh it, to advise about it.

25 JUSTICE SOTOMAYOR: Well, then that - that

1 goes to the Solicitor General's position, which is: You
2 may be right, an attorney doesn't have to give more
3 information than what's necessary. But doesn't the
4 calculus change when the defendant says, this is
5 important to me; give me accurate advice, if you are
6 going to give me advice?

7 MR. LONG: Well, the calculus may change
8 ever so slightly, but the -- I think the difference is,
9 is that misadvice is still -- is not materially
10 different than the failure to advise. Ultimately, the
11 -- the defendant still is left to -- to operate under a
12 misapprehension.

13 And the States are more than able to police
14 this kind of conduct, and in fact the States have. I
15 think it's approximately 27 States that do add to their,
16 quote, unquote, "Rule 11" and -- and require some sort
17 of inquiry by the -- the courts. And ultimately, it's
18 the States or the individual courts through their
19 rulemaking process or through legislative prerogative
20 whereby this could better -- best be addressed, rather
21 than constitutionalizing misadvice and trying to draw
22 this really hard distinction between no duty and the
23 duty to advise.

24 JUSTICE BREYER: Suppose a -- a client comes
25 in. You are a criminal lawyer and you learn the facts

1 of the case, and it turns out that, after listening to
2 the facts, you think he is being charged with a fairly
3 minor offense, a year maybe max, and he tells you: You
4 know, I have a family here, I've -- I've -- you know, he
5 tells you this story where it is quite apparent to you
6 that if he pleads guilty, back he goes, where he might
7 be killed and so might his family. Just sit there and
8 say nothing? What would you do?

9 MR. LONG: Your Honor, my -- my personal --

10 JUSTICE BREYER: Yes.

11 MR. LONG: -- personal obligation at that
12 point would be to try to answer the question. But,
13 again, the question --

14 JUSTICE BREYER: What would you do? I'm
15 asking you, would you tell him? He doesn't know about
16 the immigration law. He thinks it's just a year. You
17 yourself have learned that he probably will be killed,
18 as will his family, if he pleads guilty. Would you tell
19 him that?

20 MR. LONG: If I possessed that knowledge,
21 yes, Your Honor.

22 JUSTICE BREYER: Of course you would. And
23 do you think of any -- can you think of any decent
24 lawyer who wouldn't?

25 MR. LONG: No, Your Honor. But --

1 JUSTICE BREYER: No. Okay. Then why have
2 you -- in this case, if they didn't tell him, why has
3 not such a lawyer failed to meet prevailing professional
4 norms in my hypothetical?

5 MR. LONG: Well, Your Honor, the -- first of
6 all, the prevailing professional norm or ethical
7 obligations that have been enacted in Kentucky and in
8 most States provide very general obligations and they do
9 not actually speak to this kind of situation.

10 JUSTICE BREYER: Oh, I'm not saying whether
11 -- you have just told me that any lawyer worth his salt,
12 in my example, of course would tell the client, and -- in
13 my case. And so I just asked, then has a lawyer who has
14 failed to do so not met the prevailing professional
15 norm? That has nothing to do with ethics or not ethics;
16 it's how lawyers behave. I don't see how you avoid
17 answering that question "yes".

18 MR. LONG: Well, I don't know that it's
19 necessarily a prevailing norm. It's -- it's a question
20 of --

21 JUSTICE BREYER: You just told me everyone
22 would do it, everybody'd do it. I don't know what a
23 norm is otherwise.

24 MR. LONG: Pardon me, but it's a question of
25 morals here to decide whether or not to offer that

1 advice. Now --

2 JUSTICE SCALIA: Well, but assuming it's a
3 norm and that all lawyers do it, including those that
4 know diddly about immigration law, the norm is to give
5 bad advice. And -- and here the norm was met, right?

6 (Laughter.)

7 MR. LONG: Potentially yes, Your Honor. And
8 in fact it's really unclear what advice was given
9 because, as my opponent has mentioned, there was not an
10 evidentiary hearing, so what was actually said is
11 unclear. But I fear like -- that the misadvice
12 distinction made by the Solicitor General's Office does
13 --

14 JUSTICE BREYER: Before we get to the
15 misadvice, to put every -- dot every "i," every lawyer
16 would do it in my case; that's a professional norm. If
17 a lawyer fails to do it, he hasn't met the professional
18 norm. And a rule that's absolute would overturn
19 Strickland in that respect, because Strickland says if
20 you fail to meet professional norms, you are guilty of
21 inadequate assistance of counsel, okay? So Q.E.D.

22 Now, what's wrong with what I just said?

23 MR. LONG: Well, Your Honor, I would have to
24 disagree a little bit. I believe Strickland is not
25 quite that expansive. Strickland talks with regard to

1 professional norms and ethical standards as guides in
2 determining competent counsel, and does not set them as
3 hard, fast rules. And in --

4 JUSTICE SCALIA: I thought the point is
5 that -- I thought your point was that -- that Strickland
6 does require professional norms to be observed, but it
7 is professional norms regarding advising a defendant as
8 to the trial consequences of his plea, as to those
9 matters that are involved in the prosecution, and not as
10 to collateral matters. Isn't that your point?

11 MR. LONG: Yes, Your Honor. The --

12 JUSTICE SCALIA: Those are the only norms
13 that are relevant, what norms oblige counsel to advise a
14 defendant regarding trial matters.

15 MR. LONG: Correct. And under Strickland --
16 under the Sixth Amendment, criminal defense attorneys
17 must focus on issues of guilt and innocence and penalty.

18 JUSTICE KENNEDY: Well, everyone at the
19 counsel table I assume agrees that the plea has to be
20 voluntary. But "voluntary" has various meanings:
21 Number one, it is not coerced or forced. Would -- isn't
22 your argument that "voluntary" does not include being
23 fully informed?

24 MR. LONG: Our point -- would be not be
25 fully informed about every possible consequence which

1 would be in -- in -- completely --

2 JUSTICE KENNEDY: Well then, about important
3 collateral consequences. Is there -- are there any
4 cases that address this point one way or the other?
5 That is to say, the extent to which "voluntary" includes
6 the component of being informed about major
7 consequences, significant consequences of the plea? Can
8 I go anywhere to -- to read a discussion of this?

9 MR. LONG: Well, Your Honor, that's kind of
10 a problem, I believe. The cases that -- that do
11 address this issue seem to focus on voluntariness and
12 they focus upon the definition this Court espoused in
13 Brady, and they uniformly come up with the -- with the
14 conclusion that no affirmative duty is required. They
15 then jump from that position to the -- to a position
16 where misadvice somehow changes the inquiry. They fail
17 to focus again on "voluntary," where -- meaning full
18 knowledge of direct consequences, and instead reached
19 out to these kind of results-driven opinions that are
20 kind of fueled by this feeling of -- of unfairness.

21 JUSTICE GINSBURG: Mr. Long, you said that
22 this is a collateral consequence; therefore, the lawyer
23 has no obligation to advise the client. But what was
24 remarkable about the case that you rely on, Hill v.
25 Lockwood, is the Eighth Circuit used the distinction

1 between "direct" and "collateral." In this Court, the
2 opinion said nothing about "direct" or "collateral"; it
3 just asked the question under Strickland, and it held
4 that Strickland does apply to challenges to guilty pleas
5 based on ineffective assistance of counsel. But it --
6 staring the Court in the face was this direct versus
7 collateral, and the Court was totally silent on that.
8 It didn't consider it relevant to its determination.

9 MR. LONG: You're -- you are correct, Your
10 Honor. The -- and, again, that silence has then led the
11 circuits to develop a rule. And the predominant rule is
12 that a voluntary plea following this Court's other
13 decisions which it has -- where it has spoken, that the
14 plea need only be entered by one possessing full
15 knowledge of direct consequences. The --

16 JUSTICE ALITO: What about the situation
17 where the -- the defendant would have made sacrifices
18 and obtained competent immigration advice, were it not
19 for affirmative misrepresentations by criminal
20 defense -- by criminal defense attorneys? The criminal
21 defense attorney says: Don't worry about it, you are
22 not going to be removed. And the defendant says: You
23 really sure about that? Because, you know, if you're
24 not, my relatives are going to get a second mortgage on
25 the house and we are going to go hire an immigration

1 lawyer so we can be absolutely sure about that -- this.
2 And the criminal attorney says: I'm an expert on this.
3 I've just had, you know, six hours of CLE --

4 (Laughter.)

5 -- on immigration law. And in reliance on
6 that faulty advice, the defendant pleads guilty and finds
7 himself facing removal.

8 MR. LONG: Well, following the logic of this
9 -- of the circuits and of this Court's guidance in
10 Brady, again, the inquiry for voluntariness is on direct
11 consequences, so it would not rise to a Sixth Amendment
12 claim.

13 Counsel may, nonetheless, be -- I'm not a
14 very -- I'm not a very good counsel in that situation.
15 However, as it was pointed out earlier, sometimes,
16 criminal defendants risk ordinary error with their
17 representation, and in fact, this Court has recognized
18 that in numerous cases.

19 In U.S. v. Ruiz, this Court kind of compiled
20 a group of cases, including Brady, McMann, and Tollett,
21 in which the defendant did, in fact, operate under
22 misapprehensions with regard to things that we most
23 often consider strategic, more direct obligations of the
24 trial.

25 They -- I think it was in Brady -- they

1 misapprehended the quality of the evidence and the
2 penalties and such, and this Court ultimately found
3 that, in all those cases, there is a certain amount of
4 ordinary error that is risked when pleading guilty, that
5 you risk a certain amount -- that your counsel may not
6 have made the best strategic decision.

7 JUSTICE STEVENS: May I ask this
8 question: Supposing this wasn't a drug crime -- a
9 sexual abuse of a minor, which would lead to all sorts
10 of restrictions on where the defendant could live and
11 report to as a resident, and the like, would there be --
12 would that be a collateral consequence or a direct
13 consequence, in the advice on that?

14 MR. LONG: I believe, Your Honor, that it
15 would be a -- a fine line, that it would technically be
16 a collateral consequence under the classic definition of
17 collateral consequence, that being whether or not it
18 falls under the control or discretion of the sentencing
19 court. The --

20 JUSTICE STEVENS: Even though the
21 consequence is a -- is something required by the law of
22 the jurisdiction imposing the criminal penalty, it would
23 still be collateral?

24 MR. LONG: The popular definition -- or the
25 most common definition focuses on whether it falls under

1 the discretion or power of the sentencing court.

2 In those jurisdictions that have sexual
3 offender registries, it is not a -- something that is
4 discretionary with the court. It is through the
5 executive agency that that is enforced, just like
6 parole, also just like your right -- to lose your right
7 to vote -- losing your right to bear arms.

8 All of those things happen automatically by
9 action of law, yet they remain collateral because they
10 do not fall under -- with -- under the discretion and
11 power of the sentencing court.

12 If I could remind you all -- I apologize for
13 putting "you all" -- but -- my being from Kentucky is
14 showing a little.

15 (Laughter.)

16 MR. LONG: The modern rules of professional
17 conduct are very, very broad, and there's -- I don't
18 believe that it can be demonstrated that they were
19 actually violated here, even under the alleged conduct.
20 The prevailing norms that the ABA puts forth in its
21 brief or the criminal justice standards are
22 aspirational. They -- they focus more on what --

23 CHIEF JUSTICE ROBERTS: I thought you told
24 Justice Breyer that any good lawyer would give this
25 advice to a client?

1 MR. LONG: I said -- in response to Justice
2 Breyer, in the extreme circumstances, again, it would be
3 my opinion -- not necessarily the opinion of this Court
4 or necessarily it would fall under the Sixth Amendment,
5 but that, if you absolutely knew and that a -- a severe
6 collateral consequence is of great importance, you
7 should explore it.

8 The misadvice rule that the U.S. government
9 kind of puts forth as the hybrid position does -- I
10 do believe creates these collateral consequences as land
11 mines to be avoided.

12 I think it does, in fact, encourage criminal
13 defendants to be -- or criminal defense attorneys to be
14 silent in situations where they would otherwise be
15 more free in offering that advice.

16 And, again, offering the advice does not
17 necessarily raise it to Sixth Amendment purview because,
18 again, there are any number of things that are going to
19 come up in that attorney-client relationship.

20 JUSTICE GINSBURG: We are talking on a
21 highly general level, but what's facing us -- this case,
22 is there are certain crimes -- an increased number of
23 crimes that are classified as aggravated felonies, where
24 the rule is, if you are convicted of an aggravated
25 felony, you are out of the country after you serve your

1 time.

2 There's nothing mysterious about that.
3 There's nothing intricate about making that
4 determination. So why wouldn't a lawyer whose client is
5 an alien have an obligation, when there is an aggravated
6 felony as the charge, to say this will be the
7 consequence?

8 MR. LONG: Well, I think, in this case, we
9 are focusing on the obligation created by the Sixth
10 Amendment, and the Sixth Amendment obligation refers to
11 the criminal proceeding and the criminal prosecution and
12 then to aid in the defense.

13 Like the -- and we would agree with the
14 Solicitor General there, that the purpose for the
15 criminal attorney in that situation is to counteract the
16 expert of the Commonwealth or the State, is to ensure
17 the fair and just determination of guilt, not to advise
18 on collateral matters such as deportation, child
19 custody, and the like.

20 JUSTICE GINSBURG: You keep insisting on the
21 collateral, although you recognized that in Hill v.
22 Lockhart, the Court did not draw that line.

23 MR. LONG: Well, ultimately -- and this
24 Court did not -- didn't draw any line. It was silent on
25 that point. And given the -- the way the lower courts

1 have reacted in drawing the direct and collateral line,
2 I think that's kind of where we have to go.

3 That's what the rule is of the lower courts
4 and it's the rule that has -- has been applied
5 throughout the nation, and we are testing whether or not
6 that rule makes sense, essentially.

7 And I think, ultimately, there is a
8 potential problem in treating deportation differently
9 than other collateral consequences. To do so -- I
10 believe, at one point in Mr. Kinnaird's argument, he
11 does make the point that deportation, because it is of
12 such importance or that -- that it should be treated
13 differently.

14 But that is to suggest that it's so
15 important in all situations and it is more important
16 than collateral consequence that may affect citizens.
17 Citizens will lose the right to vote. They will lose
18 their right to jury service, perhaps lose custody of
19 their children.

20 And there's no principled reason to really
21 treat deportation differently. If the reason to treat
22 it differently because it is viewed as so severe, it's
23 truly then a subjective inquiry as what collateral
24 consequence is severe to this client.

25 And it ultimately prefers a class of

1 citizens -- those who are non-citizens -- over citizens
2 who may have just as much importance placed on
3 collateral consequences they face.

4 Moving real quickly, if I could just touch
5 briefly on the prejudice prong of Strickland. First,
6 I'm not -- well, I hesitate to say this a little bit,
7 but it's not completely apparent on the record that
8 counsel's performance was, in fact, deficient.

9 He did not misadvise with regard to any
10 direct consequence. Padilla does not allege that he
11 misunderstood any of the rights he was waiving, and at
12 least -- and up until his reply brief, he made no bones
13 about the fact that he was guilty.

14 And, in fact, that solemn and sworn
15 admission of guilt should not be lightly undone.

16 JUSTICE GINSBURG: Well, the defendant might
17 say: I have been in the United States for 40 years. I
18 have a family. I'd rather take my chances with a
19 jury and get put away for a longer time because at least
20 I'll be in prison where my children can visit me.

21 MR. LONG: Well, Your Honor, again, that is
22 a risk that is taken when asking questions to your
23 counsel. It would not necessarily fall under the Sixth
24 Amendment requirements.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Kinnaird, you have 4 minutes
2 remaining.

3 REBUTTAL ARGUMENT OF STEPHEN B. KINNAIRD
4 ON BEHALF OF THE PETITIONER

5 MR. KINNAIRD: Thank you, Your Honor.

6 Three quick points. In Hill, the Court did
7 expressly hold that Strickland applies to the collateral
8 consequence of parole eligibility, so it is not just
9 for -- for trial consequences.

10 And, secondly, Brady is predicated on an
11 assumption that there is competent advice on the
12 strategic decisions --

13 JUSTICE SCALIA: Excuse me, I'm not sure that
14 parole eligibility could qualify as a collateral
15 consequence.

16 MR. KINNAIRD: It certainly would under the
17 -- Kentucky's test, Your Honor, because it depends on
18 such factors as the actual sentence, the prior
19 convictions of the defendant. Those are not things that
20 are known at the plea colloquy --

21 JUSTICE SCALIA: It goes to the sentence.
22 It goes to what the sentence will be, which is certainly
23 part of the trial.

24 MR. KINNAIRD: Well, under Rule 11, at least
25 prior to the abolition of parole, there was no

1 advisement in the district courts -- the Federal
2 district courts on that.

3 The second point is that it is predicated on
4 competency, and so the standard is not voluntariness.
5 When you are in the Sixth Amendment, you go to the
6 Strickland standard of incompetency, and then prejudice
7 within the criminal prosecution. And I emphasize that
8 is what we have here, the forfeiture of a jury trial
9 right. We are not talking about prejudice outside the
10 criminal prosecution.

11 And, finally, while we agree with the
12 government that the misadvice rule has proven perfectly
13 manageable in the 30 or so jurisdictions in which it has
14 been endorsed, there also have been a handful of
15 jurisdictions --

16 JUSTICE SCALIA: Why do you say that? Why
17 do you say that? Or there has not been a revolution
18 or what? What -- how do you know?

19 MR. KINNAIRD: Well, Your Honor, I mean,
20 there's -- I think that there are something like 700
21 claims in over a decade or something like that.

22 So we don't know, but it's -- there has been
23 no evidence, that we are aware of, that the courts are
24 overly burdened by these, and there -- and even in the
25 jurisdictions that apply the broader rule, we, again,

1 are not aware of any flood of mini-trials. Many use the
2 Strickland --

3 CHIEF JUSTICE ROBERTS: What -- what is your
4 answer to the situation that I think has been
5 hypothesized, of the lawyer -- the defendant asks him,
6 what are the deportation consequences? And the lawyer
7 says: I don't know. I'm not a deportation lawyer. I'm
8 a criminal lawyer, but my best guess is that you are all
9 right.

10 What happens there?

11 MR. KINNAIRD: Well, Your Honor, I think
12 those would be adjudicated under Strickland, and,
13 remember, Strickland --

14 CHIEF JUSTICE ROBERTS: So you can make a
15 claim when the lawyer disavows knowledge on the
16 question? In other words, he is trying to be helpful,
17 but he also warns the defendant.

18 MR. KINNAIRD: Yes. Under the broader rule,
19 you would have a Strickland claim. It would be very
20 hard to prevail on that because you would have to show
21 that it was unreasonable for him not to investigate
22 the consequences --

23 CHIEF JUSTICE ROBERTS: "To investigate"?
24 So even if he doesn't know deportation and the client
25 asks him, he has to investigate that?

1 MR. KINNAIRD: He has to do whatever is
2 required by competent representation.

3 JUSTICE ALITO: Well, just to be --

4 MR. KINNAIRD: That's the limited standard.

5 JUSTICE ALITO: Just to be clear about the
6 scope of your argument -- maybe you could just clarify.
7 Which, if any, of the following would you not put in the
8 same category as advice about immigration consequences:
9 advice about consequences for a conviction for a sex
10 offense, the loss of professional licensing or future
11 employment opportunities, civil liability, tax
12 liability, right to vote, right to bear arms.

13 Are they all in the same category? Or do
14 you -- do you draw a line some place?

15 MR. KINNAIRD: Your Honor, our principal
16 position is that the Court should not draw lines, that
17 that's the whole purpose of Strickland.

18 I would say, in the vast majority of cases,
19 for example, with the right to vote, the chances that
20 that's going to be material to a plea decision by a
21 defendant, especially one facing significant
22 incarceration, are probably almost nil, but this should
23 be left to the -- to the traditional Strickland inquiry
24 on a case-by-case basis.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 (Whereupon, at 11:05 a.m., the case in the
4 above-entitled matter was submitted.)

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