

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

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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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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Kinnaird.

ORAL ARGUMENT OF STEPHEN B. KINNAIRD

ON BEHALF OF THE PETITIONER

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

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

The narrowest ground on which this Court may reverse the Kentucky Supreme Court is to hold that mis-advice claims are cognizable under the Sixth Amendment.

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

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

7 MR. KINNAIRD: I think, for mis-advice, 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 --

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 a 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 prejudiced 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 narrower ground, mis-
2 advice. 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 of -- 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 that it would be
20 material.

21 JUSTICE SCALIA: Sure. Sure.

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

25 JUSTICE KENNEDY: If we were in, if we were

1 in the contract, civil contract situation, and there was
2 a mistake, the usual rule, Restatement of Contracts, is
3 that the -- the question is whether or not it's
4 reasonable to have the party who made the mistake bear
5 the risk.

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

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

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

22 JUSTICE KENNEDY: Well, then there is no way
23 the government or the court can protect itself against
24 the -- these consequences, and there are any number of
25 them. Suppose he doesn't advise that there is going to

1 be civil liability in tort once he pleads guilty,
2 because then that's a fact that's concluded and it's
3 just a question of damages. And as Justice Scalia
4 indicated, there are many, many instances.

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

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

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

25 MR. KINNAIRD: Yes, it certainly matters,

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

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

22 How are those cases going to be handled?

23 MR. KINNAIRD: Well, I think that, Your
24 Honor, that is no different than any Strickland claim
25 that would be brought in the same time frame. There are

1 -- remember that ineffective assistance claims are
2 almost always brought as collateral attacks and there
3 are many Federal and State strict ures on bringing those
4 claims, including timeliness. So I don't think there is
5 anything categorically different from the ordinary
6 Strickland claim in your case.

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

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

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

9 MR. KINNAIRD: No, Your Honor, it would not.
10 That's a due process inquiry that is implemented by Rule
11 11 in the Federal court.

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

22 MR. KINNAIRD: I don't think that's true,
23 Your Honor. And the reason is that there are all manner
24 of strategic types of advice that counsel give that are
25 no province of the district court.

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

11 MR. KINNAIRD: It would not. It would be --
12 it would probably be a salutary practice in about half
13 the States.

14 JUSTICE KENNEDY: The judge would not be
15 exceeding his -- his commission, his authority, to
16 determine just whether this is knowing and voluntary in
17 the sense of knowing -- knowing the criminal
18 consequences in the criminal system itself?

19 MR. KINNAIRD: No, Your Honor. My only
20 point is it would not be required under Rule 11 or
21 required under the due process clause.

22 JUSTICE KENNEDY: But it seems to me a
23 careful district judge would have to do this if you
24 prevail.

25 MR. KINNAIRD: It would be a beneficial

1 practice, but if the attorneys live up to their
2 obligations to properly apprise the clients, then that
3 is unnecessary, because the Brady voluntariness standard
4 is predicated on an assumption that the defendant has
5 been competently advised by his counsel.

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

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

19 CHIEF JUSTICE ROBERTS: No, but that's -- I
20 don't see why that doesn't apply to the more fundamental
21 question about whether the district court has to inquire
22 into the plea circumstances in any event. I thought --
23 your answer to Justice Scalia that, oh, well, all sorts
24 of things can come up at trial and the district judge
25 doesn't have to inquire into those, I think proves too

1 much. It goes to -- and it departs from your focus on
2 the guilty plea. That's all the judge is inquiring
3 about. And I don't know why that obligation doesn't
4 extend to a fundamental piece of information that
5 would -- that would under your theory make acceptance of
6 the plea involuntary.

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

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

20 MR. KINNAIRD: No, Your Honor. I think that
21 the touchstone for the attorney's advice is whether it's
22 in the interest of the client. And his duty is to
23 inform the client -- and this is true of all
24 lawyering -- to inform the client of the legal risk of
25 the recommended course of action. And if the law

1 happens to attach the most dramatic and severe
2 consequence under a civil law, but to attach them to a
3 conviction, and that consequence can only be averted in
4 the criminal prosecution, I believe it is the duty of
5 the criminal lawyer to advise. But --

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

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

22 JUSTICE SCALIA: Well --

23 JUSTICE STEVENS: May I ask this question:
24 What do you think -- if there is deficient advice by
25 counsel under Strickland, what do you think you have to

1 prove in order to get relief under Strickland? Assume
2 that advice is inadequate -- to prove prejudice.

3 MR. KINNAIRD: First of all, what you would
4 have to prove on the competency prong is that the mis-
5 advice was about an issue that was material to the
6 strategic decision to plead guilty.

7 JUSTICE STEVENS: Right.

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

15 JUSTICE GINSBURG: And that would be what in
16 this case?

17 MR. KINNAIRD: In this case it would be
18 knowledge. And Kentucky has a special rule that does
19 not permit willful blindness. You have to show actual
20 knowledge that it was marijuana in his truck. And here
21 you have a commercial truck driver who was found with
22 Styrofoam boxes and wrapped brown cardboard boxes.

23 CHIEF JUSTICE ROBERTS: Oh, and also drug
24 paraphernalia in the cab. And was there some marijuana
25 in the cab, too?

1 MR. KINNAIRD: There was, yes, Your Honor.
2 The --

3 JUSTICE SCALIA: I thought he was asked what
4 was in the -- what was in the containers and he said
5 marijuana.

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

15 CHIEF JUSTICE ROBERTS: But your point is an
16 important one. We don't have the defense case.

17 MR. KINNAIRD: Exactly.

18 CHIEF JUSTICE ROBERTS: But you don't have
19 the prosecution case either. You don't know exactly
20 what witnesses they are going to call, what the strength
21 of it is. So you don't know whether there is going to
22 be prejudice or not. When you see -- it seems to me you
23 have to make quite a prediction about what the case is
24 going to look like to decide if there is prejudice, to
25 decide if the fellow's going to take the plea or not.

1 And I'm just wondering how you do that.

2 MR. KINNAIRD: Well, Your Honor, I think in
3 these kinds of claims prejudice is generally going to
4 require an evidentiary hearing and that is why the
5 Kentucky Court of Appeals sent this back for an
6 evidentiary hearing.

7 CHIEF JUSTICE ROBERTS: It's -- it's going
8 to require, I guess, kind of a mini-trial to decide if
9 the person would have taken the plea, you've got to know
10 what the case -- his case looked like, what the
11 prosecutor's case looked like, to see if it's something
12 he would have made -- that would have made sense for him
13 to go to trial or not.

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

17 I would like to point out, though, that this
18 was not an issue raised to the State Supreme Court. And
19 in cases arising from State courts, this Court applies
20 the same rule to Respondents who bring forth an
21 alternative ground in support of the judgment that it
22 does to Petitioners. It will not reach a question not
23 passed on or presented below. The only question here is
24 the legal standard.

25 Your Honors, if there are no more questions,

1 I would like to reserve the remainder of my time for
2 rebuttal.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Dreeben.

5 ORAL ARGUMENT OF MICHAEL R. DREEBEN

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

7 SUPPORTING AFFIRMANCE

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

10 There is a fundamental difference between
11 Petitioner's claim that defense counsel has a duty to
12 advise his client about all of the myriad collateral
13 consequences that may stem from a criminal conviction,
14 which the government does not think that a defense
15 counsel has under the Sixth Amendment, and the claim
16 that is focused more precisely on mis-advice given by
17 defense counsel on a material collateral consequence to
18 a defendant.

19 CHIEF JUSTICE ROBERTS: Mr. Dreeben, we
20 learn in the first year of law school that the line
21 between an affirmative act and failure to act is a
22 difficult one to draw. What if the lawyer says, you're
23 going to face 5 years, and the defendant says, is that
24 all that's going to happen to me? And the lawyer says
25 yes. Is that a failure to advise or is that an

1 affirmative misrepresentation?

2 MR. DREEBEN: Well, I think it's certainly
3 not an affirmative misrepresentation. In context, what
4 the defense lawyer's purpose is is to counter the
5 government's criminal case. That is what the Sixth
6 Amendment provides a lawyer to do. A government appears
7 through its expert adversary. The Sixth Amendment
8 provides a counterweight to that in the form of a lawyer
9 to deal with the criminal aspects of the case.

10 JUSTICE KENNEDY: Well, then you are saying
11 that the more the defense counsel strays from his only
12 professional responsibility, the more at risk the
13 government is. That seems odd.

14 MR. DREEBEN: What we think, Justice
15 Kennedy, is that the defense lawyer has two relevant
16 duties here. One is to counter the government's case,
17 which means to provide advice to the defendant about his
18 rights, the nature of the charges, the evidence, and the
19 affirmative defenses that may exist. And that is a task
20 that is somewhat broader than the Court has in
21 conducting a Rule 11 colloquy. The Court does not go
22 into strategic matters in a criminal case with the
23 defendant. Defense counsel must.

24 CHIEF JUSTICE ROBERTS: I think when we --
25 when we decide there's no right to counsel, like on

1 collateral review, we don't even look at what happened,
2 right? We don't look and see whether the advice was
3 ineffective, how bad the lawyer was. The idea is if you
4 don't have the right at all, you don't have the right to
5 an effective lawyer.

6 MR. DREEBEN: That's right.

7 CHIEF JUSTICE ROBERTS: Isn't that right?
8 Okay. Well, these -- when you are talking about
9 collateral consequences, you don't have a right to
10 counsel on -- with respect to those collateral
11 consequences. I assume there's -- maybe there is -- is
12 there a right to counsel when you are facing a
13 deportation proceeding?

14 MR. DREEBEN: Certainly not by virtue --

15 CHIEF JUSTICE ROBERTS: Okay.

16 MR. DREEBEN: -- of the Sixth Amendment,
17 Mr. Chief Justice. And --

18 CHIEF JUSTICE ROBERTS: Well, then, if there
19 is no right to counsel, why do we get into whether there
20 is an affirmative representation or not? Just like in a
21 collateral -- habeas context, we don't care whether
22 there is an affirmative misrepresentation --
23 misrepresentation, because there is no right to counsel
24 in the first place.

25 MR. DREEBEN: I think it's because the

1 lawyer has an additional duty in the context of advising
2 his client whether to take a guilty plea, and that is
3 the duty to respect that the decision whether to plead
4 guilty belongs to the defendant personally. It's not a
5 decision that can be exercised by proxy by the lawyer.
6 And the lawyer's duty to respect that, whatever advice
7 he gives, the defendant must be able to make his own
8 personal decision, imposes a concomitant duty not to
9 interfere with or undermine the defendant's ability to
10 make an intelligent decision with the information he
11 has.

12 So if a lawyer chooses when asked about
13 collateral consequences, as many aliens will do: Will I
14 get deported? The lawyer is perfectly free to say: I
15 am not your immigration counsel. You need a lawyer to
16 advise you about immigration. I am your criminal
17 lawyer.

18 And that's perfectly fine. But if a lawyer
19 goes beyond that and says: Don't worry about it.
20 You've been in the country so long, you are not going to
21 get deported, with the understanding and the backdrop
22 that this is an important factor in whether this
23 defendant is going to decide to take a guilty plea or to
24 go to trial, then the lawyer has used his professional
25 skills to undermine a personal decision that belongs to

1 the defendant alone.

2 JUSTICE SCALIA: What -- what about
3 mis-advice as to whether he will lose custody of his
4 children, or mis-advice as to whether his truck which he
5 owns will be confiscated by the government?

6 MR. DREEBEN: I would put them, Justice
7 Scalia, all in the same general basket, which is to say,
8 mis-advice on a legal matter of importance to the
9 defendant that could skew his decision to plead guilty
10 may be deficient representation under Strickland. I
11 think what --

12 CHIEF JUSTICE ROBERTS: Not the defendant,
13 but a defendant? In other words, I assume it's an
14 objective inquiry you would make rather than a
15 subjective one?

16 MR. DREEBEN: Well, objective in the sense
17 that --

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

23 MR. DREEBEN: I actually think that would be
24 quite relevant, because if any mis- advice did not cause
25 the defendant to plead guilty because it was irrelevant

1 to him, then the defendant should not be able to get in
2 the door with an ineffective assistance claim.

3 And I also think if the defendant hasn't
4 manifested in some way that the particular collateral
5 consequence is important to that defendant, then the
6 lawyer certainly has no obligation even under
7 professional standards --

8 CHIEF JUSTICE ROBERTS: Won't -- won't your
9 test result in a net loss to defendants? I assume if
10 this is adopted as a rule, the affirmative
11 misrepresentation rule, then every lawyer is going to
12 say what you said they should say: I'm here for the
13 criminal case; I'm not telling you anything about
14 anything else, as opposed to saying, sitting down and
15 saying: Here's what you need to know. And in most
16 cases we expect the lawyer to do a professional job. If
17 you have got an alien, he is going to tell him: Well,
18 what -- you know, this will cause you to be deported.
19 Instead, every lawyer now is going to say: I'm not
20 giving you any advice about anything else.

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

25 The rule right now in ten Federal circuits

1 is there is no duty to advise about collateral
2 consequences. Seven Federal circuits have a rule that
3 affirmative mis-advice about collateral consequences can
4 support a claim.

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

11 I thought the government's view normally was
12 the same as we -- what's the exact words -- did the
13 conduct of the lawyer meet professional -- prevailing
14 professional norms? And then we look to see, if it did
15 not, whether that led to a situation where he would not
16 have pleaded guilty but for the failure. Okay?

17 Now, the world is filled with 42 billion
18 circumstances. If we agree with you, we will have set
19 in motion the great legal rule machine. And there's
20 nothing better than lawyers spitting off rules. And we
21 will be here from now until -- good, we won't have any
22 docket problem, because what we'll be doing is reviewing
23 rule after rule after rule after rule.

24 So why has the government, I think for the
25 first time, maybe not, told us to abandon Strickland's

1 approach and start spinning off rules?

2 MR. DREEBEN: Justice Breyer, we have not
3 abandoned Strickland's approach. What we have focused
4 on is, what is the Sixth Amendment right in the first
5 place? The Sixth Amendment right is not a right to have
6 a State-provided lawyer who will advise you about child
7 custody or about deportation or about --

8 JUSTICE BREYER: No, no. But it's easy -- I
9 mean, you know, one thing we are very good at here is
10 making up hypotheticals. So I imagine it wouldn't be
11 that tough for me to think of a hypothetical where
12 everyone knows this 90-year-old individual who has
13 actually never set foot in the country that he came
14 from, and everyone knows that if he pleads guilty to
15 this chewing gum offense where they have virtually no
16 evidence, he will be sent back, at age 90, to that
17 country.

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

22 And the reason I can spin those out and why
23 we have the Strickland rule is pretty clearly that you
24 shouldn't have sub rules here because life is more
25 complicated than rules tell us. Just look to see

1 prevailing norm and did it cause the harm. And that's
2 why I am back to my question: Isn't this the first time
3 the government has asked us to adopt rules under
4 Strickland rather than what it says --

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

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

8 MR. DREEBEN: Justice Breyer, I think that
9 the fundamental point is that this is the first time
10 that the Court has been asked to adopt a rule under
11 Strickland that would require a lawyer pursuant to Sixth
12 Amendment norms to give advice that pertains --

13 JUSTICE BREYER: No, no, they are not asking
14 us to have a rule. What he is saying is, look to the
15 individual case and ask in this case, did the -- at
16 least that's what I heard him; he's in charge of his own
17 case. But I heard him say, look to this case, and in
18 this case it falls below prevailing norms for a lot of
19 reasons.

20 MR. DREEBEN: Well, Justice Breyer, the --
21 the lower courts that have looked at this I think have
22 correctly recognized that there is a distinction between
23 saying that Strickland is a case-by-case inquiry into
24 lawyer competence and saying that Strickland requires
25 the lawyer to provide advice about collateral

1 consequences that are not the criminal --

2 JUSTICE ALITO: But what are you going to do
3 in a situation where the defendant is concerned about
4 removal -- the removal consequences? And this is --
5 let's say this is a case out in some rural jurisdiction,
6 you have got a public defender or a retained attorney,
7 and the -- the -- the attorney is -- you know, provides
8 advice based on the criminal law consequences and the
9 client says: Well, I'm also concerned about the
10 immigration consequences. And the lawyer says, well,
11 immigration law is very complicated and I'm not an
12 expert on this and I'm not going to tell you. And so
13 the client says -- and the lawyer says, if you want to
14 know about that you've got to get a deportation -- you
15 have got to get an immigration lawyer. And the alien
16 defendant says: Well, I have no money; that's why you
17 were appointed to represent me. How am I going to get
18 advice on the immigration law issue? And the lawyer
19 says: Well, that's just too bad for you.

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

21 MR. DREEBEN: Well, Justice Alito, I don't
22 think that he has a right under the Sixth Amendment to a
23 lawyer who will counsel him about the potential
24 immigration consequences of a guilty plea. That is not
25 what the Sixth Amendment was designed for.

1 JUSTICE SCALIA: What are the consequences
2 to the lawyer? I mean, let's assume you are a public
3 defender, and you are confronted with this situation.
4 Is it -- how -- how much skin is it off your teeth if
5 you provide the advice, even though you are uncertain,
6 and the advice turns out to be wrong? What happens to
7 the lawyer?

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

10 JUSTICE SCALIA: So, what incentive is there
11 to withhold uncertain advice? Is there any incentive at
12 all?

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

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

16 MR. DREEBEN: There is the --

17 JUSTICE SCALIA: He will make a guilty plea
18 and afterwards it will be set aside.

19 MR. DREEBEN: There is a professional
20 incentive to provide advice where you are competent to
21 provide advice and not to provide it where you are not
22 competent. And I think that the focus on immigration
23 consequences illustrates two things:

24 One is this is an extraordinarily
25 complicated area of the law, where it is very difficult

1 to give advice. And for a lawyer to be expected to
2 master not only the criminal aspects of the case but
3 also the immigration aspects of the case will only tend
4 to divert attention from what the lawyer is really there
5 to do, advise --

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

11 MR. DREEBEN: Well, the former part is
12 certainly something that the Court could in its
13 rulemaking capacity do. The latter part is a Sixth
14 Amendment question. And I think it's highly notable
15 that the rules committee for the criminal rules has
16 twice considered whether to amend Rule 11 and is going
17 to consider it again contemporaneously with this case,
18 to require the judge to say to an alien defendant, you
19 may want to take into account removal consequences of a
20 criminal conviction.

21 In other words, there are rule-based ways to
22 address some of the concerns that Justice Alito raised
23 without constitutionalizing a new area of collateral
24 consequences that would impose new duties that actually
25 would divert the lawyer from his criminal law function,

1 whereas the mis-advice line has not created those
2 problems.

3 And as I started to say earlier, the fact
4 that ten Federal circuits have said no duty to advise on
5 collateral consequences while seven have recognized that
6 mis-advice on collateral consequences can provide
7 relief, has not led to a series of difficult Strickland
8 hearings that are unmanageable. Justice Alito --

9 CHIEF JUSTICE ROBERTS: How do we know that?

10 JUSTICE ALITO: What about the situation
11 where the attorney says nothing about -- I mean, removal
12 is -- is out there as -- as a real possibility, but it
13 just doesn't occur to the -- the defendant and the
14 attorney doesn't even mention, you know, you might --
15 you might want to think about the removal consequences
16 of this?

17 MR. DREEBEN: Then the client does not get
18 relief for two reasons. One is because we believe there
19 is no duty to give that advice. But even if the Court
20 disagreed with me on that, such a defendant could hardly
21 show prejudice because he knew that he went into his
22 guilty plea with an uncertainty, at best, about removal.
23 And I think it would be very difficult to show what he
24 should have to show to establish prejudice: First, that
25 subjectively he would not have pleaded guilty had he

1 been given correct immigration advice; and second, that
2 a reasonable defendant would have had a basis not to
3 plead guilty, because if the defendant is going to be
4 convicted after a trial in any event the same collateral
5 consequence is going to ensue. The defendant will not
6 evade the collateral consequences of removal if the
7 defendant was going to be convicted at a trial anyway.

8 JUSTICE GINSBURG: How do you -- how do you
9 know that? In this case, Mr. Kinnaird told us the
10 defendant might have preferred to go to trial because he
11 had this defense that he didn't know what was in the
12 packages.

13 MR. DREEBEN: Well, I think courts will
14 evaluate kind of a claim just the way they evaluate any
15 other Strickland claim and decide whether there was any
16 reasonable probability that such a defense could have
17 prevailed.

18 JUSTICE SCALIA: After -- after a
19 mini-trial, which deprives the government of -- of its
20 whole benefit from the guilty plea. Governments accept
21 guilty pleas in order to avoid the time and expense of
22 going to -- to a trial. And here you have to go back
23 and find out what the evidence would have been, so that
24 the court can make the decision you say is so easy.

25 MR. DREEBEN: This is the typical regime

1 that the Court has dictated under Strickland, and it has
2 not proved unmanageable in the courts that have adopted
3 the limited mis-advice rule that the government
4 supports.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Dreeben.

7 Mr. Long.

8 ORAL ARGUMENT OF WM. ROBERT LONG, JR.

9 ON BEHALF OF THE RESPONDENT

10 MR. LONG: Mr. Chief Justice, may it please
11 the Court:

12 In Hill v. Lockhart this Court again focused
13 on voluntariness and said that voluntariness of the plea
14 depends on counsel's advice and whether that counsel
15 advice is in the range of competence of the attorneys in
16 a criminal proceeding.

17 Again, the focus was on voluntary. And in
18 Brady, this Court described a voluntary plea as "a plea
19 entered by one possessing full knowledge of direct
20 consequences." Thus, reading the cases together, it
21 would appear that the defendant need to have only
22 knowledge -- full knowledge of direct consequences, and
23 advice of counsel is just a tool to ensure that.

24 JUSTICE SOTOMAYOR: Counsel, a plea is
25 something more than: I'm guilty. It is a strategic

1 decision not to put the government to its burden of
2 proof. Your definition of voluntariness suggests that
3 there is only one component to it, do I know what my
4 rights are, as opposed to, do I know what they are and
5 making an informed decision to waive those rights.

6 Your articulation of the rule leaves out the
7 second component: Am I making an informed decision to
8 waive those rights?

9 MR. LONG: Well, I think under this Court's
10 precedent the informed right is to know what those
11 rights are, what is the weight of the evidence against
12 you, and to make those strategic decisions. But that --

13 JUSTICE SOTOMAYOR: But how do you do that?
14 I mean, your adversary's argument is in their particular
15 case -- and I know that you dispute this -- there is a
16 defense that could win at trial. And the defendant
17 comes in and says: Okay, what are my choices? I go to
18 trial and I may serve a longer sentence, but I don't go
19 to trial, I may serve that -- I do go to trial and I
20 serve that longer sentence, but it's here in the U.S.
21 and not in my home country, where I might starve to
22 death. I think I will stay here and take that risk.

23 You're -- you're sort of ignoring that
24 component of information in terms of informing the
25 strategic choice of whether to take the risk and go to

1 trial.

2 MR. LONG: Well, we are not particularly
3 ignoring it. We are saying ultimately under the Sixth
4 Amendment what is prudent or appropriate may not
5 necessarily be what the inquiry is, but what is
6 constitutional mandated. And what is constitutionally
7 mandated here is to provide the adversary to waive
8 the -- put the Commonwealth's or the State's proof -- to
9 weigh it, to advise about it.

10 JUSTICE SOTOMAYOR: Well, then that goes to
11 the Solicitor General's position, which is: You may be
12 right, an attorney doesn't have to give more information
13 than what's necessary, but doesn't the calculus change
14 when the defendant says, this is important to me; give
15 me accurate advice, if you are going to give me advice?

16 MR. LONG: Well, the calculus may change
17 ever so slightly, but I think the difference is, is that
18 mis-advice is still -- is not materially different than
19 the failure to advise. Ultimately the -- the defendant
20 still is left to operate under a misapprehension.

21 And the States are more than able to police
22 this kind of conduct and in fact the States have. I
23 think it's approximately 27 States that do add to their,
24 quote, unquote, "Rule 11" and -- and require some sort
25 of inquiry by -- by the courts. And ultimately, it's

1 the States or the individual courts through their
2 rulemaking process or through legislative prerogative
3 whereby this could better, best be addressed, rather
4 than constitutionalizing mis-advice and trying to draw
5 this really hard distinction between no duty and the
6 duty to advise.

7 JUSTICE BREYER: Suppose a -- a client comes
8 in. You are a criminal lawyer and you learn the facts
9 of the case, and it turns out that, after listening to
10 the facts, you think he is being charged with a fairly
11 minor offense, a year maybe max, and he tells you: You
12 know, I have a family here, I've -- I've -- you know, he
13 tells you this story where it is quite apparent to you
14 that if he pleads guilty back he goes, where he might be
15 killed and so might his family. Just sit there and say
16 nothing? What would you do?

17 MR. LONG: Your Honor, my -- my personal --
18 personal obligation at that point would be to try to
19 answer the question. But again --

20 JUSTICE BREYER: What would you do? I'm
21 asking you, would you tell him? He doesn't know about
22 the immigration law. He thinks it's just a year. You
23 yourself have learned that he probably will be killed,
24 as will his family, if he pleads guilty. Would you tell
25 him that?

1 MR. LONG: If I possessed that knowledge,
2 yes, Your Honor.

3 JUSTICE BREYER: Of course you would. And
4 do you think of any -- can you think of any decent
5 lawyer who wouldn't?

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

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

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

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

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

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

4 MR. LONG: Pardon me, but it's a question of
5 morals here to decide whether or not to offer that
6 advice. Now --

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

11 (Laughter.)

12 MR. LONG: Yes, Your Honor. And in fact
13 it's really unclear what advice was given because, as my
14 opponent has mentioned, there was not an evidentiary
15 hearing, so what was actually said is unclear. But I
16 feel like the -- that mis-advice distinction made by the
17 Solicitor General's office does --

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

1 Now what is wrong with what I just said?

2 MR. LONG: Well, Your Honor, I would have to
3 disagree a little bit. I believe Strickland is not
4 quite that expansive. Strickland talks with regard to
5 professional norms and ethical standards as guides in
6 determining competent counsel, and does not set them as
7 hard, fast rules. And in --

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

15 MR. LONG: Yes, Your Honor.

16 JUSTICE SCALIA: Those are the only norms
17 that are relevant, what norms oblige counsel to advise a
18 defendant regarding trial matters.

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

22 JUSTICE KENNEDY: Well, everyone at the
23 counsel table I assume agrees that the plea has to be
24 voluntary. But voluntary has various meanings: number
25 one it is not coerced or forced. Would -- isn't your

1 argument that voluntary does not include being fully
2 informed?

3 MR. LONG: Our point would be not be fully
4 informed about every possible consequence which would be
5 in -- in --

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

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

25 JUSTICE GINSBURG: Mr. Long, you said that

1 this is a collateral consequence. Therefore the lawyer
2 has no obligation to advise the client. But what was
3 remarkable about the case that you rely on, Hill v.
4 Lockwood, is the Eighth Circuit used the distinction
5 between direct and collateral. In this Court, the
6 opinion said nothing about direct or collateral; it just
7 asks the question under Strickland, and it held that
8 Strickland does apply to challenges to guilty pleas
9 based on ineffective assistance of counsel. But it --
10 staring the Court in the face was this direct versus
11 collateral, and the Court was totally silent on that.
12 It didn't consider it relevant to its determination.

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

20 JUSTICE ALITO: What about the situation
21 where the -- the defendant would have made sacrifices
22 and obtained competent immigration advice, were it not
23 for affirmative misrepresentations by criminal
24 defense -- by criminal defense attorneys? The criminal
25 defense attorney says don't worry about it, you are not

1 going to be removed. And the defendant says, you really
2 sure about that? Because if you are not, you know, my
3 relatives are getting a second mortgage on the house and
4 we are going to go hire an immigration lawyer so we can
5 be absolutely sure about that -- this. And the criminal
6 attorney says I'm an expert on this, I've just had --
7 you know, six hours of CLE on immigration law, and in
8 reliance on that faulty advice the defendant pleads
9 guilty and finds himself facing removal.

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

14 Counsel may, nonetheless, may be -- I'm not
15 a very good counsel in that situation. However, as it
16 was pointed out earlier, sometimes, criminal defendants
17 risk ordinary error with their representation, and in
18 fact, this Court has recognized 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 misapprehension with regard to the things that we most
23 often consider strategic, more direct obligations of the
24 trial.

25 They -- I think, in Brady, they

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

7 JUSTICE STEVENS: May I ask you 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 and reside and the like, would that be a
12 collateral consequence or a direct consequence the
13 advice on that?

14 MR. LONG: I believe, Your Honor, that would
15 be a fine line, that it would technically be a
16 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.

20 JUSTICE STEVENS: Even though the
21 consequence is something required by the law of the
22 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 could 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 would fall under the Sixth Amendment, but
5 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, it 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 at 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 is nothing mysterious about that.
3 There is 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.

17 It is to ensure the fair and just
18 determination of guilt, not to advise on collateral
19 matters, such as deportation, child custody, and the
20 like.

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

24 MR. LONG: Well, ultimately, in this Court,
25 it did not -- it didn't draw any line. It was silent on

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

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

8 And I think, ultimately, there is a
9 potential problem in treating deportation differently
10 than other collateral consequences.

11 To do so, I believe, at one point in
12 Mr. Kinnaird's argument, he does make the point that
13 deportation, because it is of such importance or that --
14 that it should be treated differently.

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

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

1 And it ultimately prefers a class of
2 citizens -- those who are non-citizens -- over citizens
3 who may have just as much important place on collateral
4 consequences they face.

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Kinnaird, you have four minutes
3 remaining.

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

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

11 And, secondly, Brady is predicated on an
12 assumption that there is competent advice on a strategic
13 decision --

14 JUSTICE SCALIA: But I'm not sure the parole
15 eligibility could qualify as a collateral consequence.

16 MR. KINNAIRD: It certainly would under the
17 Kentucky test, Your Honor, because it depends on such
18 factors as the actual sentence, the prior convictions of
19 the defendant. Those are not things that are known at
20 the pre-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, I emphasize as what we
8 have here, the forfeiture of a jury trial right. We are
9 not talking about prejudice outside of the criminal
10 prosecution.

11 And, finally -- well, 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? Where there has not been a revolution
18 or what? What -- how do you know?

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

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

1 any flood of mini-trials.

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

9 What happens there?

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

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

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

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

25 MR. KINNAIRD: He has to do whatever is

1 required by competent representation.

2 JUSTICE ALITO: Well, just to be --

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

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

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

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

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

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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The case is submitted.

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

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