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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 misadvice 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  
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. A government appears  
14 through its expert adversary. The Sixth Amendment  
15 provides a counterweight to that in the form of a lawyer  
16 to deal with the criminal aspects of the case.

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

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

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

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

13 MR. DREEBEN: That's right.

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

21 MR. DREEBEN: Certainly not by virtue --

22 CHIEF JUSTICE ROBERTS: Okay.

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

25 CHIEF JUSTICE ROBERTS: Well, then, if there

1 is no right to counsel, why do we get into whether there  
2 is an affirmative misrepresentation or not?

3 MR. DREEBEN: Because --

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

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

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

1 lawyer.

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

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

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

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

25                   MR. DREEBEN: Well, objective in the sense

1 that --

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

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

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

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

24 MR. DREEBEN: No, I'm don't --

25 CHIEF JUSTICE ROBERTS: -- as opposed to

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

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

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

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

23 I thought the government's view normally was  
24 the same as we -- what's the exact words -- did the  
25 conduct of the lawyer meet professional -- prevailing

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

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

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

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

20 JUSTICE BREYER: No, no. But it's easy -- I  
21 mean, you know one thing we are very good at here is  
22 making up hypotheticals. So I imagine it wouldn't be  
23 that tough for me to think of a hypothetical where  
24 everyone knows this 90-year-old individual who has  
25 actually never set foot in the country that he came

1 from, and everyone knows that if he pleads guilty to  
2 this chewing gum offense where they have virtually no  
3 evidence, he will be sent back, at age 90, to that  
4 country.

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

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

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

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

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

25 JUSTICE BREYER: No, no, they are not asking

1 us to have a rule. What he is saying is, look to the  
2 individual case and ask in this case, did the -- at  
3 least that's what I heard him; he's in charge of his own  
4 case. But I heard him say, look to this case, and in  
5 this case, it falls below prevailing norms for a lot of  
6 reasons.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 MR. DREEBEN: Well, the former part is  
24 certainly something that the Court could in its  
25 rulemaking capacity do. The latter part is a Sixth

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

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

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

21 CHIEF JUSTICE ROBERTS: How do we know that?

22 JUSTICE ALITO: What about the situation  
23 where the attorney says nothing about -- I mean, removal  
24 is -- is out there as -- as a real possibility, but it  
25 just doesn't occur to the -- the defendant, and the

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

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

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

22 JUSTICE GINSBURG: How do you -- how do you  
23 know that? In this case, Mr. Kinnaird told us the  
24 defendant might have preferred to go to trial because he  
25 had this defense that he didn't know what was in the

1 packages.

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

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

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

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

21 Mr. Long.

22 ORAL ARGUMENT OF WM. ROBERT LONG, JR.

23 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

23           MR. LONG: Well, I think under this Court's  
24 precedent, the informed right is to know what those  
25 rights are, what is the weight of the evidence against

1 you, and to make those strategic decisions. But that --

2 JUSTICE SOTOMAYOR: But how do you do that?

3 I mean, your adversary's argument is, in their

4 particular case -- and I know that you dispute this --

5 there is a defense that could win at trial. And the

6 defendant comes in and says: Okay, what are my choices?

7 I go to trial and I may serve a longer sentence, but I

8 don't go to trial, I may serve that -- I do go to trial

9 and I serve that longer sentence, but it's here in the

10 U.S. and not in my home country, where I might starve to

11 death. I think I'll stay here and take that risk.

12 You're -- you're sort of ignoring that

13 component of information in terms of informing the

14 strategic choice of whether to take the risk and go to

15 trial.

16 MR. LONG: Well, we are not particularly

17 ignoring it. We are saying ultimately under the Sixth

18 Amendment what is prudent or appropriate may not

19 necessarily be what the inquiry is, but what is

20 constitutional mandated. And what is constitutionally

21 mandated here is to provide the adversary to waive

22 the -- put the Commonwealth's or the State's proof -- to

23 weigh it, to advise about it.

24 JUSTICE SOTOMAYOR: Well, then that - that

25 goes to the Solicitor General's position, which is: You

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

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

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

23 JUSTICE BREYER: Suppose a -- a client comes  
24 in. You are a criminal lawyer and you learn the facts  
25 of the case, and it turns out that, after listening to

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

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

9 JUSTICE BREYER: Yes.

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

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

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

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

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

25 JUSTICE BREYER: No. Okay. Then why have

1 you -- in this case, if they didn't tell him, why has  
2 not such a lawyer failed to meet prevailing professional  
3 norms in my hypothetical?

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

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

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

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

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

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

5 (Laughter.)

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

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

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

22 MR. LONG: Well, Your Honor, I would have to  
23 disagree a little bit. I believe Strickland is not  
24 quite that expansive. Strickland talks with regard to  
25 professional norms and ethical standards as guides in

1 determining competent counsel, and does not set them as  
2 hard, fast rules. And in --

3 JUSTICE SCALIA: Well, I thought the point  
4 is that -- I thought your point was that -- that  
5 Strickland does require professional norms to be  
6 observed, but it is professional norms regarding  
7 advising a defendant as to the trial consequences of his  
8 plea, as to those matters that are involved in the  
9 prosecution, and not as to collateral matters. Isn't  
10 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 -- we 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 JUSTICE SCALIA: -- on immigration law. And  
6 in reliance on that faulty advice, the defendant pleads  
7 guilty and finds 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, may be -- I'm not  
14 a 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 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 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: But I'm not sure the parole  
14 eligibility could qualify as a collateral consequence.

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

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

23 MR. KINNAIRD: Well, under Rule 11, at least  
24 prior to the abolition of parole, there was no  
25 advisement in the district courts -- the Federal

1 district courts on that.

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

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

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

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

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

1 Strickland --

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

13 CHIEF JUSTICE ROBERTS: So you can make a  
14 claim when the lawyer disavows 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 consequences --

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, that  
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's 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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