No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ALFREDO GODOY-MACHUCA, AKA ALFREDO GODOY,
AKA ALFREDO MACHUCA GODY,

Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT APPEALS FOR THE NINTH
CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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DATE SENT VIA UPS Overnight Delivery: January 16, 2020

QUESTIONS PRESENTED

A. Whether the Ninth Circuit Court of Appeals erred in, at least implicitly, concluding that material affirmative misdavice given by defense counsel to his client regarding the *collateral* consequences of a conviction arising out of a plea agreement can not undermine the voluntary and knowing nature of an appeal waiver or constitute prejudicial ineffective assistance of counsel.

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption. The petitioner is not a corporation.

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TABLE OF AUTHORITIES

The Petitioner, Alfredo Godoy-Machuca ("Godoy"), respectfully requests that this petition for a writ of certiorari be granted, the judgment of the Ninth Circuit Court of Appeals be vacated, and the case be remanded for further proceedings consistent with petitioner's positions asserted in this brief.

OPINION BELOW

The underlying conviction and sentence was entered on January 23, 2018. (Appendix A, hereto)

The Ninth Circuit Court of Appeals denied relief in its Memorandum decision dated June 19, 2019. (Appendix B, hereto) The Court of Appeals denied Petitioner's Petition for Panel Rehearing/En Banc Hearing in its order dated November 4, 2019. (Appendix C, hereto) The district court's minutes and orders are unreported.

JURISDICTION

The Memorandum decision of the United States Court of Appeals for the Ninth Circuit denying relief was entered on June 19, 2019, and its Order denying Petitioner's Petition for Panel Rehearing/En Banc Hearing was entered on November 4, 2019. That Court had jurisdiction pursuant to 28 U.S.C. §1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the States and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.

Rule 11(d), Federal Rules of Criminal Procedure:

> (d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty of nolo contendere:
>
> (1) before the court accepts the plea, for any reason or no reason; or
>
> (2) after the court accepts the plea, but before it

imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

STATEMENT OF THE CASE

On December 13, 2016, an indictment was filed in the United States District Court, District of Arizona, charging Alfredo Godoy-Machuca ("Godoy") with one count of Reentry of Removed Alien, in violation of 8 U.S.C. §1326(a) and (b)(1). (CR 1, ER VOL. II, p. 104) [1]

On October 31, 2017, Godoy pled guilty to the indictment pursuant to a "Modified Fast Track" plea agreement. (CR 35; ER VOL. II, pp. 91-99)

Godoy was sentenced on January 22, 2018. He appealed his conviction and sentence, and the Ninth Circuit Court of Appeals denied relief.

In his appeal, Godoy claimed, *inter alia*, that prior to his change of plea proceeding, his attorney erroneously advised him that his sentence under the then-pending plea agreement would be ordered to run concurrently with a 4.5-year state court sentence Godoy was then serving. He further claimed that prior to the sentencing proceeding, and while he could still withdraw his guilty plea, his attorney erroneously advised him that the government was recommending, in its sentencing memorandum, that Godoy's federal sentence in the instant case run concurrently with

[1] The abbreviation "CR" refers to the (District Court) Clerk's Record, and will be followed by the event number designated in the Clerk's file. The abbreviation "ER" refers to the Excerpts of the Record, and will be followed by the relevant page number referenced in Appellant's Excerpts of Record. The abbreviation "PSR" refers to the Presentence Investigation Report and will be followed by the relevant page and paragraph numbers of that report. "R.T." refers to the Court Reporter's Transcript, and will be followed by the relevant date and page number of the transcript.

the state-court sentence. Apparently, Godoy's attorney's advice regarding the government's anticipated position on concurrency was based on the attorney's incomplete reading of the government's sentencing memorandum, which, itself, constituted ineffective assistance of counsel ("IAC"). Those errors, together, fatally undermined the voluntary and knowing nature of Godoy's plea agreement, including the appeal waiver therein, as the plea agreement did not require concurrency, and the district court ultimately imposed a consecutive sentence. Godoy further argued that, but for that erroneous advice, he would never have entered into the plea agreement, and/or would have timely withdrawn his guilty plea under Rule 11(d)(1), Fed.R.Crim.Proc., and that the panel needed no further development of the record on those points to grant relief.

On June 19, 2019, the panel denied relief. The panel's memorandum decision is attached hereto as Appendix "B".

On July 31, 2019, Godoy filed a petition for panel rehearing and rehearing *en banc*, arguing, *inter alia*, that while an attorney's failure to advise his client of the *collateral* consequences of a conviction arising out of a plea agreement does not, in most cases, constitute ineffective assistance of counsel, affirmative *misadvice* regarding such consequences *can* constitute prejudicial ineffective assistance of counsel, and, in the instant case, did constitute prejudicial ineffective assistance of counsel depriving Godoy of his procedural right to withdraw his guilty plea prior to

its acceptance by the court, and his Sixth Amendment right to the effective assistance of counsel. The panel, again, denied relief. The panel's order denying the petition for panel rehearing and rehearing *en banc* is attached hereto as Appendix "C".

CASE HISTORY

On October 31, 2017, Godoy pleaded guilty to the single charge in the indictment pursuant to a "Modified Fast Track" plea agreement. (CR 35; ER VOL. II, pp. 91-99)

The plea agreement contained the following waiver of defenses and appeal rights:

> The defendant waives (1) any and all motions, defenses, probable cause determinations, and objections that the defendant could assert to the indictment or information; and (2) any right to file an appeal, any collateral attack, and any other writ or motion that challenges the conviction, an order of restitution or forfeiture, the entry of judgment against the defendant, or any aspect of the defendant's sentence, including the manner in which the sentence is determined, including, but not limited to any appeals under 18 U.S.C. § 3742 (sentencing appeals) and motions under 28 U.S.C. §§ 2241 and 2255 (habeas petitions), and any right to file a motion for modification of sentence, including under 18 U.S.C. § 3582(c). This waiver shall result in the dismissal of any appeal, collateral attack, or other motion the defendant might file challenging the conviction, order of restitution or forfeiture, or sentence in this case. *This waiver shall not be construed to bar an otherwise-preserved claim of ineffective assistance of counsel* or "prosecutorial misconduct" (as that term is defined by Section II.B of Ariz. Ethics Op. 15-01 (2015))

(CR 35; ER VOL. II, pp. 3-4)

The plea agreement also contained the following provision:

> I agree that this written plea agreement contains all the terms and conditions of my plea. I further agree that promises, including any predictions as to the Sentencing Guidelines range or to any Sentencing Guideline factors that will apply, made by anyone (including my attorney) that are not contained within this written plea agreement are null and void and have no force and effect.

(CR 35; ER VOL. II, pp. 96-97)

The written plea agreement was silent on the issue of whether Godoy's federal sentence would run concurrent with, or consecutive to, a 4.5-year state-court sentence he was then serving. (CR 35; ER VOL. II, pp. 91-99)

During the change of plea proceeding, Godoy avowed that he was not promised any particular sentencing outcome by anyone. (CR 61; R.T. 10/31/17, p. 17; ER VOL. I, p. 43)

The change of plea proceeding included the following colloquy:

> THE COURT: Okay. You get benefits from your agreement but one thing you're giving up is your right to appeal. From pages three to four there's a section labeled Waiver of Defenses and Appeal Rights. I'm glad you're following along I see you have a copy there. You have a right to appeal your case to a higher court. Or you could file motions in this court attacking your conviction and sentence; but as part of the deal you make with the Government, you're giving up those rights.

> Did you review this whole paragraph with Ms. Verdura?
>
> THE DEFENDANT: Yes, I did.
>
> THE COURT: Let me give you just one example. The guideline range calculation, if your judge follows the stipulations in your agreement, you will not be allowed to appeal or attack your decisions about your offense level or history category. Do you understand the example?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Do you agree to give up your appeal rights under the terms listed here?
>
> THE DEFENDANT: I don't understand that. What?
>
> THE COURT: It is part of your agreement you're giving up your appeal rights under these terms. Do you agree to do that?
>
> THE DEFENDANT: Yes.

(CR 61; R.T. 10/31/17, pp. 9-0; ER VOL. I, pp. 35-36)

At no point during the change of plea proceeding did the Court or parties discuss, on the record, whether Godoy's federal prison sentence would run concurrently with, or consecutive to, his state-court prison sentence. The sentencing proceeding was set for January 22, 2018.

On December 25, 2017, the defendant filed a sentencing memorandum

requesting that the district court impose a 24-month prison sentence to run concurrently with Godoy's state-court sentence. (CR 41; ER VOL. II, pp. 75-90) [2]

On January 17, 2018, the government filed a response to Godoy's sentencing memorandum. (CR 43; ER VOL. II, pp. 62-74) In that response, the government argued for a 63-month prison sentence, to be followed by a three-year term of supervised release. On page three of the response, the government requested that the federal prison sentence run *concurrently* with the state-court prison sentence. Then, on page four of that response, the government requested that it run *consecutive to* the state-court prison sentence. (CR 43; ER VOL. II, pp. 64-65) [3]

On January 22, 2018, the defendant appeared before district court judge, Diane J. Humetewa, for sentencing. At the sentencing proceeding, the judge orally adopted the "findings" set forth in the Magistrate Judge's written findings and recommendations, and accepted Godoy's guilty plea and the plea agreement. (CR 59; R.T. 1/22/18, pp. 2-18; ER VOL. I, pp. 6-23)

After counsel for the parties and Godoy had orally addressed the court regarding sentencing, the sentencing judge recited the 18 U.S.C. § 3553(a) factors

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[2] The record suggests that Godoy did not receive or review that sentencing memorandum prior to the sentencing proceeding. (CR 59; R.T. 1/22/18, pp. 5-6; ER VOL. I, pp. 9-10)

[3] The record clearly reflects that Godoy did not receive a copy of the government's sentencing memorandum. Rather, Godoy's attorney "reviewed" it with Godoy, and told Godoy that in that memorandum, the government was recommending a *concurrent* sentence. (CR 59; R.T. 1/22/18, pp. 16-17; ER VOL. I, pp. 20-21)

that she must consider in sentencing the defendant. She then went on to discuss some of those factors, and, later acknowledged that she had considered them all. The judge then imposed a prison sentence of 63 months, to be followed by a three-year term of supervised release. The judge also imposed the mandatory $100.00 special assessment.

The discussion eventually turned to whether the 63-month prison sentence would run concurrently with, or consecutive to, Godoy's state-court prison sentence. The following colloquy ensued:

> MS. VERDURA: Your Honor, I would simply ask that the matter run concurrent to his state matter.
>
> This Court was silent as to that.
>
> THE COURT: Mr. Goldstein.
>
> MR. GOLDSTEIN: Your Honor, we, in our sentencing memorandum, we addressed it. We were asking for a consecutive sentence of 63 months. One of the reasons why, obviously the taking the identity of another conviction is unrelated to his illegal entry as well as the other 3553(a) factors. We felt that a 63-month sentence to run consecutive would be appropriate under the circumstances.
>
> THE COURT: Ms. Verdura – and I'll inquire of our probation officer as well – is the state sentence one of these cases that he qualifies for a half-time deport?
>
> MS. VERDURA: As far as I know, no, Your Honor. I'll also defer to probation if they have more information on that.

PROBATION OFFICER ROCHELLE COLLINS: Your Honor, Rochelle Collins with probation. It is my understanding that because he is a deportable alien, that he does qualify for the half-term deport. And also as to whether the sentence should run concurrent or consecutive, it is my understanding that the Bureau of Prisons will not give him credit for the time that has already been served, and it would have to be given in a departure, the credit that he has spent in state custody.

THE COURT: And what is the time that he has spent so far in state custody?

THE DEFENDANT: Almost three years.

THE COURT: If I fashion an order that says "less time spent in state custody", is that sufficient, or does there have to be a precise calculation?

PROBATION OFFICER ROCHELLE COLLINS: No. I think that would be sufficient.

THE COURT: Based on the presentence investigation report and for all of the reasons I've stated, if there were any other circumstances, I would agree that a concurrent state sentence or federal sentence that runs concurrent to the state sentence would be appropriate. And so I'm going to submit that it run consecutively for all the reasons that I've stated.

THE DEFENDANT: Could I –

THE COURT: That was a separate offense. That's a separate, distinct state offense. And so because he is here on his reentry violation and because of all of the information that is before me in the presentence investigative report, the deterrence here is, for me, paramount. And Mr. Godoy-Machuca has to understand that at some point these violations matter.

And so I'm going to order that the sentence run consecutively to the state sentence.

Ms. Verdura, did you wish to –

(The defendant and his counsel confer off the record.)

THE DEFENDANT: *I had accepted it with the concurrent*.

MS. VERDURA: *And I will just briefly note for the record when I did review the United States Attorney's sentencing memorandum with the defendant over the weekend, it does say concurrent. And so I think that's possibly part of his frustration at this point. He would like to withdraw from the plea*. I have advised him that that is not permissible at this point. [4]

THE COURT: Yes. You have already entered into your plea. I've already accepted it. You knew the sentencing provisions therein. And so at this juncture I'm not permitting you to get out of your plea agreement. All right. Is there anything further?

MR. GOLDSTEIN: Nothing from the government, Your Honor.

THE DEFENDANT: I'll appeal.

MS. VERDURA: Your welcome to file an appeal. Nothing from the defense, Your Honor, other than *I would simply note that perhaps he would have moved to withdraw from the plea prior to the Court's*

[4] Apparently, Godoy's attorney only conveyed the government's request for concurrency to Godoy, and not its subsequent request (in the same document) for a consecutive sentence. This would explain why Godoy waited until the sentencing proceeding to ask to withdraw from his guilty plea, rather than withdrawing prior to that proceeding under Rule 11(d), Fed.R.Crim.Proc. The district court did not accept the guilty plea and plea agreement until the sentencing proceeding.

acceptance had he known that the government was recommending a consecutive sentence. So the sentencing memorandum was in part -

THE DEFENDANT: *I was confused that it's not concurrent like you told me*.

MS. VERDURA: *On Page 3 I'm reading concurrent. Maybe I'm misunderstanding what's written*. Do you see that in your memorandum?

THE DEFENDANT: *Clearly that's what you told me. That's why –*

MS. VERDURA: Ultimately, nonetheless, the issue of concurrency and consecutive, that issue is in the discretion of the Court pursuant to the plea agreement.

THE COURT: Yes. And the plea agreement doesn't address the existing state sentence. It is separate and apart from that. And so there was no negotiated disposition, at least by my read of the plea agreement. Is that your understanding Mr. Goldstein?

MR. GOLDSTEIN: That's correct, Your Honor. And that – *The concurrent I wrote on Page 3 was error*. I put on 4 – on Page 4 that it should run consecutive. So I apologize for any confusion. But we were going forward obviously with making a recommendation for a consecutive sentence but that the plea explicitly provides that there's – I believe that there's no agreement as to whether it should run consecutive or concurrent.

THE COURT: Yes. Mr. Godoy-Machuca, you can go back and review your plea agreement, but it states nothing about whether or not this particular case has any bearing on any other matter in state or other courts. This is a separate and distinct matter. And the sentencing memorandum from the government is

> merely what they're asking the Court for. It's a recommendation. And I can accept it and I can reject it for any reason. That does not permit you to get out of your plea agreement. Your plea agreement was knowingly and voluntarily made.
>
> THE DEFENDANT: *Yeah, but I didn't quite understand it like the way – like what it says there. I wasn't – My understanding was it was going to run concurrent. That's why I accepted the plea*.
>
> MS. VERDURA: And if an appeal is filed, I'll address that with the appellate lawyer as to whether or not that's accurate.
>
> THE COURT: Yes. Thank you, Ms. Verdura.
>
> MS. VERDURA: Thank you, Judge.
>
> THE COURT: There being nothing further, this matter's adjourned.

(CR 59; R.T. 1/22/18, pp. 14-18; ER VOL. I, pp. 18-22)

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Court of Appeals appears to have, at least implicitly, adopted the government's position that the advise, even affirmative misadvice, of defense counsel to his client on a material *collateral* consequence of a conviction arising out of a plea agreement can not constitute ineffective assistance of counsel, or fatally undermine the voluntary and knowing nature of an appeal waiver in a plea agreement, as defense counsel is required only to advise his client regarding the *direct* consequences of the client's anticipated sentence.

In doing so, it decided an important question of federal law that has not been, but should be, settled by the Supreme Court, to wit: can defense counsel's affirmative *misadvice* to his client on a *collateral* consequence of a conviction arising out of a plea agreement ever constitute prejudicial ineffective assistance of counsel outside of the circumstances addressed by this Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010), or otherwise fatally undermine the voluntary and knowing nature of an appeal waiver in a plea agreement?

Given the breadth and importance of the *collateral* consequences attending felony convictions, generally, and the evolving case law largely relieving defense counsel of any obligation to advise clients of same, coupled with the natural desire of defendants to be advised of those consequences, the issue presented in this case is far reaching, and goes to the very core of the right to due process and the effective assistance of counsel in plea proceedings.

ARGUMENT

A. The Ninth Circuit Court of Appeals erred in, at least implicitly, concluding that material affirmative misadvice given by defense counsel to his client regarding the *collateral* consequences of a conviction arising out of a plea agreement can not undermine the voluntary and knowing nature of an appeal waiver or constitute prejudicial ineffective assistance of counsel.

Prior to Godoy's guilty plea, Godoy's attorney advised Godoy that the prison sentence in the instant case would run concurrently with a 4.5-year state-court prison sentence he was then serving. Prior to Godoy's sentencing proceeding, Godoy's attorney told Godoy that the government was recommending concurrency.

The panel's finding that the record was not sufficiently developed to permit the review and determination of Godoy's claim that his guilty plea was rendered involuntary and unknowing by his attorneys ineffective assistance is puzzling, particularly with respect to Godoy's claim that his attorney erroneously told him the government would be recommending a *concurrent* sentence – a claim that Godoy's attorney essentially admitted at the sentencing proceeding. That error effectively deprived Godoy of his procedural and unqualified right, under Rule 11(d), Fed.R.Crim.Proc., to withdraw his guilty plea.

At the sentencing proceeding, Godoy's attorney did not challenge Godoy's insinuation that his attorney told him, prior to his change of plea proceeding, that his

two sentences would run concurrently. She went on to acknowledge that she, herself, had not noticed the government's request, in its sentencing memorandum, that the federal prison sentence run consecutively to Godoy's state-court prison sentence, and, by inference, failed to inform Godoy of same. Moreover, any ambiguity in the government's sentencing memorandum on that point should have prompted Godoy's counsel to immediately seek clarification from the government as to whether it was recommending a concurrent sentence. That clearly did not happen.

Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel". *McMann v. Richardson*, 397 U.S. 759, 771 (1969).

Under *Strickland v. Washington*, 466 U.S. 668, 688 (1984), for a defendant to succeed on an IAC claim, he must establish 1) that counsel's representation fell below an objective standard of reasonableness, and 2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 694.

Godoy's attorney's erroneous advice that Godoy would receive a concurrent prison sentence, and that the government was recommending same, was inexcusable, and clearly fell below the objective standard of reasonableness required under *Strickland*.

Godoy informed the sentencing judge at the sentencing proceeding that he pleaded guilty on the assumption that his two sentences would run concurrently with each other and tried to withdraw his guilty plea. His statements, supported by those of his lawyer at the sentencing proceeding, make clear that his attorney told him his sentences would run concurrently, and that the government was recommending same. That constituted a gross mischaracterization of what his effective federal prison sentence would be.[5] Godoy's statements, again, supported by those of his lawyer at the sentencing proceeding, make clear that he would never have pled guilty to begin with, and/or would have withdrawn his guilty plea prior to his sentencing proceeding had his attorney properly advised him of the possible sentencing outcomes, and the government's position regarding his sentence.

For these reasons, the Ninth Circuit Court of Appeals should have vacated the district court's judgment of guilt, sentence and guilty plea, and remanded the case for further proceedings.

Despite there being compelling evidence in the district court record that Godoy's attorney wrongly advised Godoy before his change of plea proceeding that his prison sentence would run concurrently with a sentence he was then serving in another case, and then wrongly advised Godoy, before his sentencing proceeding,

[5] Godoy was not scheduled to finish his state-court sentence until April 17, 2019. He was taken into federal custody on April 5, 2017. Thus, the difference between a concurrent and a consecutive federal prison sentence in terms of Godoy's overall period of incarceration was approximately two years.

and before it was too late to withdraw his guilty plea, that the government was recommending a concurrent sentence, the Ninth Circuit Court of Appeals failed to find that Godoy's attorney was prejudicially ineffective, or that the district court should have set aside Godoy's guilty plea on due process or right-to-counsel grounds. Rather, the Court of Appeals held that the misadvice on the *collateral* issue of concurrency did not undermine the voluntary and knowing nature of the appeal waiver in the plea agreement, and the record was not sufficiently developed to allow the Court to rule on Godoy's IAC claim challenging the voluntary and intelligent nature of his plea agreement.

In its responsive brief before the Ninth Circuit Court of Appeals, the government argued that because there was no requirement, under the Fifth or Sixth Amendments to the Constitution, that Godoy's attorney advise Godoy of the *collateral* consequences of his guilty plea, there could be no due process or right-to-counsel violations arising out of the alleged misadvice regarding concurrency. In other words, even affirmative misadvice regarding the *collateral* consequences of Godoy's guilty plea – in this case, whether his federal prison sentence would run concurrently with, or consecutive to, his state-court prison sentence – could not undermine the voluntary and intelligent nature of the appeal waiver, or constitute prejudicial ineffective assistance of counsel (which was not waived in the plea agreement).

In its Memorandum decision, the Ninth Circuit appears, at least implicitly, to have adopted the government's position on those points.

To support its finding that Godoy's misunderstanding of "a potential *collateral* consequence" of his guilty plea did not undermine the voluntary and knowing nature of the appeal waiver, the panel alluded to a clause in Godoy's written plea agreement that disavowed any promises not contained in writing. However, it seems unlikely that the panel relied entirely, or even largely, on the written plea agreement's boilerplate disavowal of promises outside the plea agreement in arriving at its decision, given the aforementioned statements of Godoy and his attorney at the sentencing proceeding. Rather, the panel appears to have based its decision to deny relief on the *collateral* nature of the misadvice given by defense counsel.

This Court has ruled that in context of the potential immigration consequences of a criminal conviction, defense attorneys have at least a limited duty to advise their clients of the collateral consequences of a guilty plea. See *Padilla*, *supra*. In *Padilla*, this Court limited its holding to defense counsel's obligation to give affirmative and proper legal advice regarding whether the defendant's plea carries a risk of deportation. *Id*. at 374. This Court has yet to rule squarely on the issue of whether affirmative *misadvice* on the collateral consequences of a conviction, generally, can constitute prejudicial ineffective assistance of counsel, or

undermine the voluntary and knowing nature of an appeal waiver, except, perhaps, in the context of advice concerning the immigration consequences of a guilty plea.

In *Padilla*, this Court noted:

> We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Whether the distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

Padilla v. Kentucky, 559 U.S. at 365.

Given the breadth and importance of the *collateral* consequences attending felony convictions, and the evolving case law largely relieving defense counsel of any obligation to advise clients of same, coupled with the natural desire of defendants to be advised of those consequences, the issue presented in this case – whether affirmative misadvice by defense counsel regarding a material collateral consequence of a guilty plea can constitute ineffective assistance of counsel, or undermine the voluntary and knowing nature of a plea agreement, including an appeal waiver – is far reaching, and goes to the very core of the right of a defendant to due process and the effective assistance of counsel in plea proceedings.

CONCLUSION

The Ninth Circuit Court of Appeals erred in implicitly holding that affirmative misadvice given by defense counsel to his client regarding the *collateral*

consequences of a conviction following a guilty plea can not undermine the voluntary and knowing nature of a plea agreement or appeal waiver, or constitute prejudicial ineffective assistance of counsel.

Here, Godoy's attorney gave Godoy affirmative misadvice regarding a material *collateral* consequence of his guilty plea and eventual conviction – that his prison sentence in his federal case would run concurrently with a state-court prison sentence he was then-serving, and that the government was recommending a concurrent sentence – misadvice that caused him to waive his trial rights when the truth would have caused him to either negotiate a better plea agreement or go to trial.

The Court should grant this petition for a writ of certiorari, vacate the judgment of the Ninth Circuit Court of Appeals, and order the case remanded to the district court with instructions to vacate Godoy's conviction, sentence and guilty plea.

RESPECTFULLY SUBMITTED this 16th day of January, 2020 by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING—PROOF OF SERVICE

Michael J. Bresnehan, Attorney for Petitioner, declares under penalty of perjury that the following is true and correct:

In accordance with Sup.Ct.R. 29.2, I have on this 18th day of January, 2020, caused to be delivered by UPS overnight delivery the original and ten (10) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to the Clerk, Supreme Court of the United States, One 1st St. NE, Washington, D.C. 20543, within the period prescribed in Sup.Ct.R. 13.1; and

In accordance with Sup.Ct.R. 29.5, I have on this 16th day of January, 2020, caused two copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington DC 20530-0001, and caused one copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to Cassie Woo, Assistant United States Attorney, Two Renaissance Square, 40 North Central Avenue, Suite 1200, Phoenix, Arizona 85004, and caused one copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to the Petitioner, Alfredo Godoy-Machuca, Registration No. 42476-308, USP Victorville, United States

Penitentiary, Post Office Box 3900, Adelanto, California 92301.

EXECUTED this 16th day of January, 2020.

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Michael J. Bresnehan
Attorney for Petitioner