

No.

In the Supreme Court of the United States

JOHN SCOTT CRAMER, PETITIONER

v.

STATE OF MISSOURI

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment protects criminal defendants who rely on defective advice from counsel regarding critical, non-deportation collateral consequences of a conviction, such as ineligibility for parole from a “life” sentence.

RELATED PROCEEDINGS

This case arises from the following proceedings:

Missouri Circuit Court (Mo. Cir. Ct.):

- *State v. Cramer*, No. 10CM-CR02002-01, Circuit Court of Camden County, Missouri. Judgment entered on July 28, 2014.
- *Cramer v. State*, No. 15CM-CC00215 (June 10, 2020).

Missouri Court of Appeals (Mo. App.):

- *State v. Cramer*, No. SD33468, Missouri Court of Appeals, Southern District. Judgment entered on July 13, 2015.
- *Cramer v. State*, No. SD36760, Missouri Court of Appeals, Southern District. Judgment entered on June 21, 2021.

Missouri Supreme Court (Mo.) (en banc):

- *Cramer v. State*, No. SC99075, Supreme Court of Missouri. Discretionary review denied June 29, 2021.

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PETITION FOR A WRIT OF CERTIORARI

John Scott Cramer respectfully petitions this Court for a writ of certiorari to review the judgment of the Missouri Court of Appeals, Southern District, in this case.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals is not published in the Southwest Reporter. The order of the Missouri Supreme Court denying transfer is unreported. The circuit court's judgment is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2021. An application for transfer to the Missouri Supreme Court was denied on June 26, 2021. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part that:

In all criminal prosecutions, the accused shall enjoy the right [...] to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part that:

No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Subsection one of section 558.011, Revised Statutes of Missouri, provides in relevant part:

(1) For a class A felony, a term of years not less than ten years and not to exceed thirty years, or life imprisonment;

Mo. Rev. Stat. § 558.011(1) (2003).¹

Subsections four and five of section 558.019, Revised Statutes of Missouri, provides in relevant part:

4. For the purpose of determining the minimum prison term to be served, the following calculations shall apply:

(1) A sentence of life shall be calculated to be thirty years;

(2) Any sentence either alone or in the aggregate with other consecutive sentences for crimes committed at or near the same time which is over seventy-five years shall be calculated to be seventy-five years.

5. For purposes of this section, the term “minimum prison term” shall mean time required to be served by the offender before he or she is eligible for parole, conditional release or other early release by the department of corrections.

Mo. Rev. Stat. § 558.019 *et seq.* (2003).

Section 566.067, Revised Statutes of Missouri, provides in relevant part:

1. A person commits the crime of child molestation in the first degree if he or she subjects another person who is less than fourteen years of age to sexual contact.

2. Child molestation in the first degree is a class B felony unless:

(2) The victim is a child less than twelve years of age and:

(a) The actor has previously been convicted of an offense under this chapter [...]

¹ The 2003 iteration of this statute was in effect at the time of the conduct. Some filings have referenced the 2013 or 2016 version of that statute, but there are no relevant differences between the versions. *See, e.g.*, App. A-C, *infra*.

[...] in which case, the crime is a class A felony and such person shall serve his or her term of imprisonment without eligibility for probation or parole.

Mo. Rev. Stat. § 566.067 (2006).

INTRODUCTION

An intolerable conflict among state and federal courts has brewed for decades. Whether counsel has a duty to competently advise criminal defendants of serious collateral consequences is a question that divided an *en banc* Eighth Circuit almost forty years ago. At its core, the still unresolved question seems straightforward: whether deficient advice from counsel on certain “collateral” matters, like a defendant’s eligibility for parole, implicates the Sixth Amendment. Yet, and despite three opinions from this Court on the topic, the underlying question actively confounds many state and federal courts.

In this case, petitioner fatally relied on counsel’s deficient advice related to his eligibility for parole. Put gravely—petitioner will die in prison because he got bad advice from the one person tasked with providing competent counsel. Worse, petitioner’s case is hardly a one-off. Each day, an incomprehensible number of criminal defendants make life-changing decisions without fully understanding, for instance, how much time they will *actually* spend in prison, or whether they might be eternally committed as a sexual predator, to give another example. Absent intervention by this

Court, state and federal courts will continue to struggle in finding the boundaries of the Sixth Amendment as it relates to ‘collateral’ consequences.

STATEMENT OF THE CASE

One early morning in a rural Ozarks home, petitioner’s wife was using the bathroom and noticed petitioner coming out of his niece’s bedroom. App. 5a-6a. She confronted petitioner and accused him of molesting the niece. *Id.* After some shoving and heated tempers between petitioner, his wife, and his brother, petitioner turned himself into local law enforcement and was ultimately charged with one count of child molestation. *Id.* That charge carried a sentence of ten-to-thirty years or life imprisonment. App. 4a, n. 1-2; Mo. Rev. Stat. § 566.067 (2006). Petitioner’s chance at trial looked grim: the state was armed with a confession, eyewitness and victim testimony, and rudimentary DNA evidence linking petitioner to the niece’s underwear. App. 5a-6a. Before trial, the state made an offer to petitioner: they agreed to recommend a sentence of twenty-two years of imprisonment in exchange for petitioner’s plea of guilty. App. 6a.

In reviewing the offer with her client, petitioner’s attorney weighed the surety of a plea against the gamble of a trial. She noted the range of punishment for petitioner’s charge was either a fixed-sentence term of imprisonment for ten-to-thirty years or “life.” In Missouri, “life” is calculated at “thirty years” for the purposes of parole eligibility, meaning an offender would typically be paroled after serving thirty years of

a life sentence.² App. 4a, n. 1-2; Mo. Rev. Stat. § 558.019 (2003). Based on this advice, petitioner believed that, if convicted at trial, the worst he could get was a *de facto* sentence of thirty years in prison, only eight more than the offer. Weighing the gamble, petitioner rejected the plea and proceeded to trial, ultimately being found guilty by a jury.

At sentencing, the prosecutor asked the court to sentence petitioner to “life,” and reminded the court that the sentence would be served with no chance of parole. Trial Tr. 367 (App. D). Petitioner’s counsel disagreed, telling the sentencing court the same thing she had told her client: that petitioner would be eligible for parole after serving thirty years of a life sentence. Trial Tr. 367 (App. D). As it turned out, though, petitioner’s counsel had it all wrong. She had overlooked a statutory modifier that made petitioner’s sentence ineligible for parole. Trial Tr. 367 (App. D). Because of this modifier, petitioner would not be eligible for the *de facto* release after serving thirty years—he was functionally sentenced to life *without the possibility of parole*. App. G.

Petitioner filed for state postconviction relief after his conviction was affirmed on unrelated grounds. Petitioner’s postconviction motion alleged petitioner’s trial counsel was ineffective for failing to inform petitioner that he would not be eligible for parole upon conviction. App. 7a. The motion court denied postconviction relief and

² There is only one “life” sentence in Missouri. The distinction between ‘life with’ and ‘life without,’ referring to parole eligibility, is not pronounced at sentencing but is determined by Missouri Department of Corrections according to the statute under which a person is convicted.

petitioner appealed to the Missouri Court of Appeals, Southern District. The appellate court also denied relief, taking issue with how the claim was raised on appeal. App. 7a-8a. The appellate court ruled the claim brought on appeal was phrased as a *mis-advice* claim—something functionally different than the *non-advice* claim raised before the motion court. App. 7a-8a. The court held a “claim that counsel provided misinformation is materially different from a claim that he or she failed to provide information” and never met the claim on the merits. App. 9a. The Missouri Court of Appeals denied petitioner’s appeal and the Missouri Supreme Court rejected discretionary review on June 26, 2021. App. F.

REASONS FOR GRANTING THIS PETITION

Few courts seem to know whether the Sixth Amendment is concerned with bad advice rendered on “collateral” matters. Following this Court’s holding in *Padilla v. Kentucky*, 559 U.S. 356 (2010), some jurisdictions have extended the Sixth Amendment umbrella to cover bad advice on all ‘collateral’ consequences to a conviction. Others have held the Sixth Amendment only protects criminal defendants from bad advice rendered on deportation matters. Others, still, might consider the merits of an ineffectiveness claim on those topics, but only if the bad advice was affirmative *mis-advice*, and not the failure to give necessary advice, at all. Indeed, whether to apply a Sixth Amendment analysis to critical, non-deportation collateral consequences baffles most every jurisdiction.

In *Padilla*, an immigrant defendant faced adverse deportation consequences after being convicted of a crime. *Id.* The defendant’s attorney never told the immigrant that he could face deportation upon pleading guilty, and this Court held that the failure of counsel to give even so much as a warning about that consequence amounted to the ineffective assistance of counsel. *Id.* Importantly, in reaching that conclusion, this Court reinforced that it has “never applied a distinction between direct and collateral consequences” to a criminal conviction, defined as “those matters not within the sentencing authority of the state trial court,” as it relates to defining what is constitutionally sufficient representation. 559 U.S. at 364. Consequently, this Court left one question looming in the air: whether a ‘*Padilla* protection’ can be extended to critical, non-deportation collateral consequences.

Where some hoped *Padilla* would be ameliorative to the litany of cases in which ineffectiveness hinged on collateral consequence advice, *Padilla* was more a schism than a band-aid. To this day, courts continue to wonder whether *Padilla* protections should be extended to cover critical, non-deportation related collateral consequences, or whether the Sixth Amendment is concerned *only* with immigration related collateral consequences. The tea leaves of one court, for example, consider that “*Padilla* is

rife with indications that [this Court] meant to limit its scope to the context of deportation only.” *United States v. Reeves*, 695 F.3d 637, 640 (7th Cir. 2012).³ Some courts have gone even further, parsing collateral consequence advice into the camps of either affirmative mis-advice or non-affirmative non-advice, granting relief only to the former. Others, still, flatly reject any difference between the two and simply address bad advice in any form. Put simply—few courts know precisely what kind of bad advice implicates the Sixth Amendment.

Such is the circumstance facing petitioner. In the most basic sense, here, petitioner fatally relied on counsel’s guidance to make a once-in-a-lifetime decision. But his subsequent postconviction action became a victim of the tenuous *mis-advice/non-advice* distinctions at issue. And petitioner is far from being the only postconviction litigant facing the onslaught of misguided applications of *Padilla* and the Sixth Amendment. It should be a simple premise that bad advice is bad advice, regardless of whether it is packaged as affirmative mis-advice, non-advice, incomplete advice, imperfect advice, or insufficient advice. But answering that question has proven difficult, if not impossible, because of the needlessly complex tapestry of doctrines related to the providing of deficient advice on collateral consequences. This case presents a

But see Daramola v. State, 430 P.3d 201, 206 n. 2 (Or. App. 2018) (“Whether other ‘collateral’ consequences of criminal conviction also fall under the Sixth Amendment is an issue *Padilla* expressly left unresolved.”)

clear vehicle to finally distill what has become an overgrown entanglement of Sixth Amendment law.

A. The decision below implicates a conflict among both state and federal courts.

Indeed, it should not seem controversial to say that attorneys should provide competent counsel on matters of law that materially impact the trajectory of a criminal case. Whether or not a sentencing or registration statute applies to the specific facts of a defendant's case would seem squarely within the scope of representation. It would be logical, then, to presume the Sixth Amendment would protect criminal defendants that find themselves at the business end of deficient advice given by their attorneys. But some jurisdictions have rejected that notion, finding that, on a technical level, matters that are not *directly* a result of the criminal case at hand are beyond the Sixth Amendment's reach.

1. Distinguishing collateral from direct consequences traces to the 1970s when this Court first distinguished the two. In *Brady v. United States*, this Court held a criminal plea could only be considered 'knowing' if the defendant was "fully aware of the direct consequences" that were involved. *Brady v. United States*, 397 U.S. 742, 755 (1970). A "divided panel" of the Eighth Circuit carried that torch on, holding that "parole eligibility is a collateral rather than a direct consequence of a guilty plea," and that a defendant being unaware of that consequence does not invalidate a plea.

Hill v. Lockhart, 474 U.S. 52, 53 (1985). This Court looked at an overlapping question in *Chaidez v. United States* but was ambivalent as to whether Sixth Amendment protection protects advice surrounding collateral consequences. 568 U.S. 342 (2013). The *Hill*, *Padilla*, and *Chaidez* trinity have become read in unison, causing courts to grapple with the question of whether the Sixth Amendment imposes a duty on counsel to accurately counsel a criminal defendant on matters considered collateral to a criminal conviction.

Of the three, *Padilla* has had the most impact on ineffective assistance analyses with regard to collateral consequences. In some jurisdictions, it is the devastating nature of deportation, and the complexity of immigration law, though, that seems to keep *Padilla* protections from reaching other, non-deportation consequences, like parole eligibility or sex offender registration. Indeed, *Padilla* highlights that the “severity of deportation—the equivalent of banishment or exile—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.” 559 U.S. at 364 (internal citations and quotation marks omitted). That deportation is especially harsh has emboldened some courts to contain hold the Sixth Amendment is implicated in *only* the narrow set of cases in which counsel’s bad advice is on the topic of immigration, and other, non-deportation related consequences are beyond the Sixth Amendment’s reach.

2. When first decided, some jurists feared *Padilla*'s ruling would constitute "a major upheaval in Sixth Amendment law." 559 U.S. at 381 (Alito, J., concurring). But, such did not necessarily pan out, and many courts rejected calls to apply a *Padilla*-like ineffectiveness analysis to non-deportation collateral consequences. The Seventh Circuit, for instance, declined to extend Sixth Amendment protection to collateral consequence advice related to punishment enhancement. In *United States v. Reeves*, 695 F.3d 637 (7th Cir. 2012), a federal judge enhanced a defendant's sentence because of a prior, unrelated drug conviction from 2004. The defendant sought *habeas* relief, alleging his 2004 attorney was ineffective for failing to advise him that a conviction could be used to enhance ensuing criminal convictions. *Id.* The *Reeves* Court rejected any insinuation that this Court's holding in *Padilla* should extend to collateral consequences of a conviction, such as future sentencing enhancement. *Id.* The *Reeves* Court believed "*Padilla* is rife with indications that [this Court] meant to limit its scope to the context of deportation only." 695 F.3d at 640. Any application of *Padilla* to non-deportation consequences would be absurd, the *Reeves* Court noted, and would require that counsel "advise the client as to how he might best continue his criminal activity while minimizing his risk of future punishment." *Id.*

The Sixth Circuit also held non-deportation related collateral consequences as not under the ambit of counsel's duty to advise. In *Parrino v. United States*, 655 F. App'x 399 (6th Cir. 2016), a pharmacist entered a guilty plea to a federal misdemeanor. The

guilty plea carried the collateral consequence of effectively prohibiting the pharmacist from continuing to work as one, and he filed for postconviction relief. *Id.* He alleged his trial attorney was ineffective for failing to advise him of the collateral consequence related to his employment as a pharmacist, and argued *Padilla* favored a finding of ineffectiveness. *Id.* The Sixth Circuit rejected that argument, finding *Padilla* was based narrowly “upon a long tradition that placed deportation in close connection to the criminal process, which made deportation uniquely difficult to classify as either a direct or a collateral consequence.” *Parrino v. United States*, 655 F. App'x at 403. The Sixth Circuit found the Sixth Amendment did not require trial counsel to warn the pharmacist of the collateral employment consequence of the plea. *Id.*

But, even before *Padilla*, some jurisdictions were skeptical in extending Sixth Amendment protections to bad advice claims. The First Circuit, for instance, addressed ineffectiveness claims on collateral consequences both pre-and-post-*Padilla*. In *Cepulonis v. Ponte*, 699 F.2d 573 (1st Cir. 1983), a Massachusetts *habeas* petitioner sought relief after receiving the ineffective assistance of counsel. The petitioner claimed his trial attorney affirmatively misrepresented how much time the petitioner would serve before being eligible for parole. *Id.* The *Cepulonis* Court held the Sixth Amendment does not protect such bad advice because parole eligibility is not a ‘direct’ consequence of a plea. 699 F.2d at 577. After *Padilla*, the First Circuit incorporated *Cepulonis* when whether this Court’s holding in *Padilla* created a ‘new rule’ of law

related to ineffectiveness claims. In *United States v. Castro-Tavera*, 841 F.3d 34 (1st Cir. 2016), the First Circuit noted that, historically, it “did not recognize the uniqueness of deportation consequences or otherwise find them unsuited to the collateral-direct framework. To the contrary, the collateral bar appears to have been very much alive in [the First] circuit with respect to immigration matters before 2003, at least when it concerned a failure-to-advise claim.” 841 F.3d at 47. *Castro-Tavera* illustrates the sometimes-complex interaction *Padilla* has on applying *Strickland*⁴ analyses in some circuits.⁵ Though limited to a ‘new rule’ analysis, *Castro-Tavera* seems to reinforce that *Padilla* was not as curative as many might have thought.⁶

The First Circuit is not the only federal jurisdiction to struggle in knowing what to make of collateral consequence claims prior to *Padilla*. The Fourth Circuit, for instance, rejected a postconviction litigant’s challenge to a guilty plea where he alleged trial counsel failed to advise him of parole eligibility. In *Bustos v. White*, 521 F.3d 321 (4th Cir. 2008), the petitioner claimed he received ineffective assistance of counsel when trial counsel failed to inform him of a readily-appreciable parole requirement, and the District Court agreed, vacating his underlying conviction. The Fourth Circuit

⁴ *Strickland v. Washington*, 466 U.S. 668 (1984)

⁵ While the issue before the *Castro-Tavera* Court was immigration in the context of retroactivity, that Court addressed the mis-advice doctrine with a parole eligibility case.

⁶ See, e.g., *Chaidez v. United States*, 568 U.S. 342 (2013); *United States v. Mathur*, 685 F.3d 396 (4th Cir. 2012); *United States v. Amer*, 681 F.3d 211 (5th Cir. 2012); *Barajas v. United States*, 877 F.3d 378 (8th Cir. 2017); *United States v. Chan*, 792 F.3d 1151 (9th Cir. 2015); *United States v. Chang Hong*, 671 F.3d 1147 (10th Cir. 2011); *Chapa v. United States*, 514 F. App’x 837, 838 (11th Cir. 2013).

reversed the lower court's ruling, though, holding "no Supreme Court precedent establishes that parole ineligibility constitutes a direct, rather than a collateral, consequence of a guilty plea[.]" *Id.* at 325. The Fourth Circuit cited a string of cases the lent credibility to their finding, and, in doing so, shaped that court's trajectory of non-advice claims on what are considered 'collateral' consequences of a conviction. The Second, Third, Sixth, and Eleventh circuits issued similar opinions.⁷

3. State courts have also wondered whether they should extend *Padilla* protections to non-deportation consequences. In *State v. Trotter*, 330 P.3d 1267 (Utah 2014), a defendant moved to withdraw a guilty plea after learning that he would be subject to sex offender registration. The defendant argued that *Padilla* imposed Sixth Amendment standards on counsel's advice about sex offender registration because of the severity of the consequence. *Id.* But the *Trotter* Court rejected that contention, finding instead that the stigma of sex offender registration did not rise to the severity of deportation so as to implicate the Sixth Amendment. *Id.* The *Trotter* Court also held that, because sex offender registration is a technically separate, civil, collateral consequence, that trial counsel has no Sixth Amendment duty to advise of it. *Id.*

⁷ *Aeid v. Bennett*, 296 F.3d 58 (2d Cir. 2002), *Scarborough v. Johnson*, 300 F.3d 302 (3d Cir. 2002), *Meyers v. Gillis*, 93 F.3d 1147 (3d Cir. 1996); *King v. Dutton*, 17 F.3d 151 (6th Cir. 1994); *Armstrong v. Egeler*, 563 F.2d 796 (6th Cir. 1977); *Pickard v. Thompson*, 170 F. App'x 86 (11th Cir. 2006); *Chrisman v. Mullins*, 213 F. App'x 683 (10th Cir. 2007).

An Alabama court, similarly, looked at whether the Sixth Amendment covers collateral consequence advice. In *Eller v. State*, 187 So. 3d 1184 (Ala. App. 2014), a defendant filed for postconviction relief and alleged trial counsel was ineffective for failing to warn him of sex offender registration requirements. The *Eller* Court considered whether sex offender registration was a direct consequence that would trigger counsel, or a collateral consequence of which counsel had no duty to inform, holding the latter. *Id.* Other state courts similarly exclude collateral consequences from the umbrella of the Sixth Amendment.⁸

4. But keeping bad advice claims from the crosshairs of the Sixth Amendment is a declining trend, and courts continue to articulate a premise most practitioners know: it is unfair to penalize lay defendants who rely on the defective advice of trained attorneys. In *Bauder v. Dept. of Corrections State of Florida*, 619 F.3d 1272 (11th Cir. 2010), for example, a *habeas* petitioner alleged his trial counsel was ineffective for failing to inform him that he could be civilly committed following a plea to a charge of aggravated stalking of a minor. The Eleventh Circuit held *Padilla* required that “a criminal defense attorney must advise his client that the pending criminal charges may carry a risk of adverse collateral consequences.” 619 F.3d at 1275.

⁸ See, e.g., *Velos v. State*, 487 P.3d 835 (Nev. App. 2021); *State v. Ellison*, 189 A.3d 367 (N.J. App. 2018); *State v. Patrick*, 66 N.E.3d 169 (Ohio App. 2016); *Ramos v. Warden, New Hampshire State Prison*, 155 A.3d 969 (N.H. 2017); *People v. Carromero*, 16 N.Y.S.3d 708 (N.Y. Sup. Ct. 2015).

Despite civil commitment being a non-deportation collateral consequence, the *Bauder* Court found trial counsel ineffective.

Similarly, Georgia held counsel ineffective for failing to inform a criminal defendant of serious and known parole consequences related to a criminal plea. In *Alexander v. State*, 772 S.E.2d 655 (Ga. 2015), a criminal defendant entered a ‘blind’ plea to charges of child molestation and received a sentence of thirty years. *Id.* Alexander filed for postconviction relief and claimed that his trial counsel never told him that his status as a prior “recidivist” would make him ineligible for parole. *Id.* In reviewing both *Hill* and *Padilla*, the *Alexander* court found counsel’s “failure to inform his or her client that he or she would be ineligible for parole as a recidivist for the entirety of a lengthy prison sentence is constitutionally deficient performance.” *Id.* at 660.

The *Alexander* Court followed almost identically the *Padilla* playbook. First, the court looked to the statute that categorized the defendant as a ‘recidivist’ under Georgia law. Because ‘recidivist’ was clearly statutorily defined, and because the governing statute was “succinct, clear and explicit,” *Alexander*, 772 S.E.2d at 660, defense counsel would have no reason *not* to inform the defendant that he was subject to the ineligibility. *Id.* Second, the court took issue with the severity of parole ineligibility—being denied parole is just too substantial a penalty for a criminal defense attorney to simply neglect to discuss. *Id.* Indeed, parole ineligibility is “a prominent feature of

our criminal justice system—anyone who is subject to it should be informed accurately about its consequences.” *Id.* Lastly, the *Alexander* court looked to whether the “law imposing the consequence [was] succinct, clear and explicit.” *Alexander*, 772 S.E.2d at 660 (citing *Padilla*, 559 U.S. 356).

Just as in *Alexander*, a Texas court extended *Padilla* protections to a postconviction claim of defective advice. In *Ex Parte Moussazadeh*, 361 S.W.3d 684 (Tex. App. 2012), the Texas Court of Appeals evaluated a state *habeas* claim stemming from counsel’s advice about parole eligibility. In *Moussazadeh*, a *habeas* petitioner alleged his trial counsel never told him that his sentence would be ineligible for parole, and that his ‘blind’ plea to murder, and ensuing 75-year sentence, should be vacated. *Id.* The *Moussazadeh* court found trial counsel ineffective for failing to inform Moussazadeh about parole ineligibility, and that “the terms of the relevant parole-eligibility statute are succinct and clear with respect to the consequences of a guilty plea[.]” *Id.* at 691. Just like the *Alexander* court did, the *Moussazadeh* court hinged their ineffectiveness finding on whether the parole ineligibility consequence could be inferred from a prominent statute. *Id.* While the *Moussazadeh* court stopped short of expressly applying *Padilla*, it borrowed heavily from *Padilla*’s focus on statutorily-foreseeable consequences of a conviction. *Id.*

The Supreme Court of Kentucky also applied *Padilla* protections to parole eligibility questions, holding counsel ineffective for failing to advise a defendant of a violent offender statute that modified his parole eligibility dates. *Com. v. Pridham*, 394 S.W.3d 867 (Ky. 2012). Indeed, the *Pridham* court expressly likened counsel's duty to warn in that case to this Court's holding in *Padilla*. *Pridham*, 394 S.W.3d at 878. Other courts have extended *Padilla*-like protections to parole ineligibility questions, even pre-*Padilla* itself. California, for instance, absolved trial courts from non-advice related to parole eligibility but did not automatically grant the same leeway to counsel, recognizing the complexities of sentencing schemes that may require more thoughtful representation by defense counsel. *People v. Barella*, 975 P.2d 37 (Cal. 1999). These courts all agree that defense counsel has a duty to interpret relevant statutes to lay defendants and will hold them ineffective in failing to do so.⁹ These courts embrace the growing recognition that there are some 'collateral' consequences that are simply too important for a defense attorney to gloss over.

5. Other jurisdictions extend *Padilla* protections only to *some* defective advice claims. These courts typically apply Sixth Amendment protections to affirmative misadvice, but not to plain old non-advice. First established in *Holmes v. United States*, 876 F.2d 1545 (11th Cir. 1989), what can be collectively referred to as the 'gross mis-

⁹ See also *Martin v. State*, 460 S.W.3d 289 (Ark. 2015); *Frost v. State*, 76 So. 3d 862 (Ala. App. 2011); *Stith v. State*, 76 So. 3d 286 (Ala. App. 2011); *Denson v. United States*, 918 A.2d 1193 (D.C. App. 2006);

advice’ test both predates and survives *Padilla* depending on the jurisdiction. *See, e.g.*, 792 F.3d 1151 (9th Cir. 2015). In short, counsel can only be held ineffective if he or she affirmatively gives mis-advice, but not if he or she simply remains silent—even on matters of serious import. In crude terms, counsel can be found ineffective for being wrong but not for being silent.

A Connecticut court, to illustrate, addressed this nuance between a mis-advice and non-advice analysis. In *Hall v. Comm'r of Correction*, 6 A.3d 827 (Conn. 2010), a petitioner brought a *habeas* claim alleging his trial counsel never told him about severe parole consequences to his guilty plea. The *Hall* court rejected the petitioner’s claim and noted that his trial attorney testified to not having any parole-related discussion. 6 A.3d at 830-831. Because the attorney never rendered *inaccurate* advice—rather, no advice at all—the court reasoned, the petitioner’s claim was not cognizable. *Id.* After all, “[t]he failure to inform a defendant as to all possible indirect and collateral consequences does not render a plea unintelligent or involuntary in a constitutional sense.” *Hall*, 6 A.3d at 831.

Pennsylvania joined this reasoning. In denying relief to a postconviction litigant, a Pennsylvania court found their “holding hinges upon the precept that the direct versus collateral consequence distinction does not alleviate counsel’s obligation to render only accurate advice to his client about whatever collateral consequences of a guilty plea he chooses to address. In short, when it comes to collateral consequences

of a guilty plea, counsel's sins of omission must be treated differently than his sins of commission." *Com. v. Barndt*, 74 A.3d 185, 201 (Pa. 2013). Other state jurisdictions have started applying this hypertechnical approach.¹⁰ The *kind* of mistake made by counsel, it seems, is the only real issue before these courts.

6. Considering the never-resolved Eighth Circuit split coming from *Hill*, it is unsurprising that petitioner's jurisdiction is unsettled when it comes to deficient advice claims. In Missouri, "courts have repeatedly held that plea counsel has no constitutional obligation to advise a defendant about parole eligibility." *Johnson v. State*, 398 S.W.3d 513, 516 (Mo. App. 2013). "Eligibility for parole is considered to be a collateral consequence of the plea[]" the Missouri Supreme Court holds, and counsel has no duty to affirmatively advise a criminal defendant of parole consequences. *Reynolds v. State*, 994 S.W.2d 944, 946 (Mo. 1999); *see also Cranford v. State*, 575 S.W.3d 791 (Mo. App. 2019). But not all Missouri courts are persuaded, and at least one district of the Missouri Court of Appeals is open to extending *Padilla* to parole consequences and dispensing with the collateral/non-direct divide, the answer to which was "left unanswered" by the Missouri Supreme Court. *Smith v. State*, 353 S.W.3d 1, 5 (Mo. App. 2011).

¹⁰ *Robert v. State*, 782 So.2d 919 (Fla. 2nd DCA 2001); *Goodall v. United States*, 759 A.2d 1077 (D.C. 2000); *State v. Vieira*, 760 A.2d 840 (N.J. 2000); *People v. Ping Cheung*, 718 N.Y.S.2d 578 (N.Y. Sup. Ct. 2000); *State v. Goforth*, 503 S.E.2d 676 (N.C. 1998); *People v. Garcia*, 815 P.2d 937 (Colo. 1991); *Hinson v. State*, 377 S.E.2d 338 (S.C. 1989); *Matter of Peters*, 750 P.2d 643 (Wash. App. 1988); *Meier v. State*, 337 N.W.2d 204 (Iowa 1983).

Missouri's apprehension in extending Sixth Amendment protections to some defendant advice ineffectiveness claims is a symptom of *Padilla*'s fallout. Petitioner, here, would have accepted a fixed-year plea offer but for his attorney's deficient advice. He would have the chance to be free again, one day, if only his attorney correctly advised him of something every reasonable attorney would know is crucial. None of this is in dispute. Petitioner was denied relief only because some courts do not believe counsel is required to advise a defendant that they might spend the rest of their life in prison, or that it only matters whether counsel affirmatively told him the wrong information but not that counsel simply never told him at all. Every reasonable defense attorney knows this is not the spirit of the Sixth Amendment—it is simply not right. And it will continue to happen unless this Court finally addresses a question that has boiled for decades.

B. This case exacerbates the ongoing identity crisis of the Sixth Amendment.

Each examination of the Sixth Amendment reveals its precarious mortality. The Sixth Amendment provides for specific protections that ensure criminal defendants are provided a fair trial, a right central to the identity of American law.¹¹ The right to counsel, enshrined in the last clause, is the fang through which the other protective

¹¹ Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487 (2009)

measures are given action.¹² This protection is not just a creature of statute, but a right created at our nation’s outset to stand in proud defiance against the unfair procedures found in English courts of the crown.¹³ Invariably, any analysis of the effectiveness of counsel is inseparable from an examination of what it means to have a fair trial and the very ethos of our laws. Fairness is the guiding standard.

To that end, our standards are satisfied only when the accused is afforded constitutionally sufficient counsel. Without the right to counsel, each criminal defendant would walk unarmed against the overpowering “prosecutorial forces of organized society[.]” *Maine v. Moulton*, 474 U.S. 159, 169 (1985). To be effective, counsel must competently serve as a “medium” between a criminal defendant and the state. *Id.* at 479. An evaluation of effective representation considers “all the circumstances.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

On account of this, the issue presented gives this Court a much-needed opportunity to outline the reach of the Sixth Amendment. As explained, a growing number of courts are aware of the disconnect between a hypertechnical collateral/direct/misadvice/non-advice test and the reality that many criminal defendants live. Courts know that, sometimes, a defendant’s choice related to trial direction “may not turn solely on the likelihood of conviction after trial.” *Lee v. United States*, 137 S. Ct. 1958,

¹² Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641 (1996).

¹³ Erica J. Hashimoto, *An Originalist Argument for A Sixth Amendment Right to Competent Counsel*, 99 IOWA L. REV. 1999 (2014).

1961 (2017) (incorporating *Hill v. Lockhart*, 474 U.S. 52 (1985)). Indeed, sometimes choices of trial autonomy hinge on the collateral consequences at issue that:

[...] may be so inextricably intertwined with the underlying criminal process, so severe, and so likely to result that notice of them must be included within the protective umbrella of the Sixth Amendment right to effective assistance counsel.

United States v. Johnson, 272 F. Supp. 3d 728, 732 (D. Md. 2017). Courts know the *actual* time spent in prison, or the decades of humiliation stemming from sex offender registration requirements, for instance, are matters that are *fundamentally material* to criminal defendants as they assess the course in which they take their case.

As the fetishization of plea bargaining continues,¹⁴ collateral consequences become an increasingly critical factor in defendant decisions related to case autonomy. Indeed, in a nation where less than a tenth of criminal cases are resolved through a trial,¹⁵ the decision of whether to take a case to trial or accept a plea sometimes resembles a cost-benefit analysis more commonly found in business transactions. Staggering trial taxes¹⁶ require criminal defendants to carefully weigh the risks of trial against the surety of a plea, in both pecuniary and attendant terms. Actual time spent in prison, for example, means less income a defendant can provide for their family.

¹⁴ See, e.g., Hessick, Carissa, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2020).

¹⁵ Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOF- STRA L. REV. 1349 (2004)

¹⁶ Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313 (2019)

Whether a plea will lead to sex offender registration determines whether a defendant must plan to find a new job, a new home, and, in all likelihood, a new circle of friends or family. What our courts have treated as secondary consequences, in reality, are sometimes the *only* things that truly matter to a person facing criminal charges.

It is also why calls to extend Sixth Amendment protections to some collateral consequences are abound. Federal courts are hinting that the time to finally address this issue is now. The Ninth Circuit has noted the *Chaidez*, *Padilla*, and *Hill* trilogy invites closure from this Court on whether the Sixth Amendment can cover ‘collateral’ consequences such as parole eligibility. *See Hernandez v. Grounds*, 628 F. App'x 541 (9th Cir. 2016). Courts are painfully aware that this Court’s decision in *Padilla* may have created more ambiguity than it resolved, and that this Court “left open whether advice about parole eligibility and other collateral consequences remains categorically removed from the scope of the Sixth Amendment.” *Plumaj v. Booker*, 53 F. Supp. 3d 1010, 1011–12 (E.D. Mich. 2014).¹⁷ Another court considers it:

[...] an “open question, therefore, under what circumstances, if any, the failure of counsel to advise a defendant prior to a plea of at least the critical non-deportation collateral consequences he or she faces, might rise to the level of an ineffective-assistance claim. But arguably the Supreme Court in *Padilla* has left the door open.

¹⁷ See also *Com. v. Abraham*, 62 A.3d 343, 348 (Pa. 2012) (“The Superior Court held that *Padilla* made it unclear whether the direct versus collateral consequences analysis was still viable in assessing ineffectiveness claims involving the consequences of a plea.”)

United States v. Nesbeth, 188 F. Supp. 3d 179, 196 (E.D.N.Y. 2016). Indeed, as it stands now, this Court’s reticence to clarify the scope of the Sixth Amendment frustrates many courts examining postconviction claims where defendants fatally relied on deficient advice. Courts need clarity and guidance from this Court to resolve a slew of postconviction claims based on deficient advice on collateral matters.¹⁸

Legal scholars, too, are asking to end what has become a cannibalization of this Court’s holding in *Padilla*. They note the judicial landscape of claims stemming from defective advice are “flawed, cluttered, and contradictory[.]”¹⁹ They note that circuits seem to bounce back and forth in deciding whether something like parole eligibility should concern trial counsel, detailing that “the right to parole has become so en-

¹⁸ See, e.g., *Com. v. Barndt*, 74 A.3d 185 (Pa. 2013); *Kim v. Dir., Virginia Dep’t of Corr.*, 103 F. Supp. 3d 749, 755 (E.D. Va. 2015) (“[This Court] did not resolve the question of whether that distinction was appropriate in a context other than the unique nature of deportation.” (citations and internal quotation marks omitted)); *State v. Ellis-Strong*, 899 N.W.2d 531 (Minn. App. 2017); *Webb v. State*, 334 S.W.3d 126 (Mo. 2011) (en banc); *Kennedy v. Kohnle*, 810 S.E.2d 543 (Ga. 2018); *Stiger v. Com.*, 381 S.W.3d 230 (Ky. 2012); *United States v. Lee*, 2013 WL 8116841 (W.D. Tenn. Aug. 6, 2013), report and recommendation adopted in part, rejected in part, 2014 WL 1260388 (W.D. Tenn. Mar. 20, 2014), aff’d, 825 F.3d 311 (6th Cir. 2016), *rev’d* and remanded, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017), and vacated sub nom. *Jae Lee v. United States*, 869 F.3d 400 (6th Cir. 2017) (“Although *Sparks* was about parole eligibility and not about deportation, it nonetheless shows that the Sixth Circuit, before *Padilla*, was willing to recognize that affirmative misadvice concerning what might be deemed a collateral consequence of a conviction was, situationally, enough to support an ineffective-assistance-of-counsel claim.”); *Oliver v. Eckard*, 2018 WL 7502404 (E.D. Pa. June 26, 2018), report and recommendation adopted sub nom. *Oliver v. Tice*, 2019 WL 1003599 (E.D. Pa. Feb. 28, 2019); *Garcia v. State*, 425 S.W.3d 248 (Tenn. 2013); *Daramola v. State*, 430 P.3d 201 (Or. 2018).

¹⁹ Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 140 (2009). See also Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 736 (2002).

grafted on the criminal sentence that such right is ‘assumed by the average defendant’ and is directly related in the defendant’s mind with the length of his sentence.”²⁰ Others have been critical of courts that seem to contort themselves to uphold convictions, that “[s]ome of the most perverse decisions define as collateral certain penalties, such as consecutive versus concurrent sentences or parole eligibility, indisputably subject to the right to appointed counsel.”²¹ It is no surprise that “courts struggled with which side of the direct/collateral line to place incidents of the sentence like parole eligibility[.]”²² The academic realm, it seems, joins the caucus of courts that ask this Court for clarification on the extent of the Sixth Amendment to collateral consequences.

Put simply, courts are beginning to rethink what is a ‘collateral’ consequence to a conviction. This requires that we, too, must rethink whether the Sixth Amendment imposes duties on counsel to advise of consequences that any reasonable defendant would consider critical to their choice to accept or reject a plea. That is why it is time for this Court to finally address the question of whether the Sixth Amendment extends to critical non-deportation collateral consequences, just as many courts of called

²⁰ Paisly Bender, *Exposing the Hidden Penalties of Pleading Guilty: A Revision of the Collateral Consequences Rule*, 19 GEO. MASON L. REV. 291, 303 (2011) (examining *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364 (4th Cir. 1973))

²¹ McGregor Smyth, *From “Collateral” to “Integral”: The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 836 (2011)

²² Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 98 (2011)

for. Those courts have sent their invitations through the footnotes of opinions, and petitioner's case gives this Court the opportunity to pluck that question and give it the conclusiveness that so many are asking for.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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