

# PROGRAM

- 8:00 a.m. to 8:30 a.m.      **Registration**
- 8:30 a.m. to 9:00 a.m.      **Odds and Ends**  
*Nick Drees*  
Federal Public Defender
- 9:00 a.m. to 10:00 a.m.      **Supreme Court & Eighth Circuit Update**  
*John Messina*  
Research & Writing Attorney  
Federal Public Defender's Office
- 10:00 a.m. to 10:15 a.m.      **Break**
- 10:15 a.m. to 11:45 a.m.      **A Discussion with Our New U.S. Attorneys**  
*Stephanie Rose*, U.S. Attorney for the Northern District of Iowa  
*Nick Klinefeldt*, U.S. Attorney for the Southern District of Iowa
- 11:45 p.m. to 1:00 p.m.      **Lunch (On your own)**
- 1:00 p.m. to 1:30 p.m.      **Immigration Consequences and the *Padilla* Case**  
*Angela Campbell*  
CJA Panel Representative  
*Michael Piper*  
2<sup>nd</sup> Chair Panel Attorney  
Des Moines, Iowa
- 1:30 p.m. to 2:00 p.m.      **To Proffer or Not to Proffer**  
*Dean Stowers*  
CJA Panel Attorney  
West Des Moines, Iowa
- 2:00 p.m. to 2:30 p.m.      **CJA Voucher Updates**  
*Valarie Gall*  
Panel Administrator  
*Nancy Lanoue*  
Assistant Panel Administrator
- 2:30 p.m. to 3:00 p.m.      **2254/2255 Procedure**  
*Rena Angeroth*  
*Kay Bartolo*  
*Patty Trom-Bird*  
Staff Attorneys for U.S. District Court, Southern District of Iowa
- 3:00 p.m. to 3:15 p.m.      **Break**
- 3:15 p.m. to 4:15 p.m.      **Everyday Ethics Issues for Criminal Defense Lawyers**  
*Jane Kelly, Bob Wichser, Diane Zitzner & Nick Drees*  
Federal Defender's Office

**RENAE ANGEROTH**

EDUCATION: J.D., University of Iowa (1987); B.A., Northwest Missouri State University (1984)

PROFESSIONAL: Staff Attorney, U.S. District Court Southern District of Iowa (1995-present); Law Clerk, Honorable Ronald E. Longstaff (1992-1995 and 1988-1990); Law Clerk, Honorable William C. Hanson (1990-1992); Legal Services Corporation of Iowa (1987-1988)

**KAY BARTOLO**

EDUCATION: J.D., University of Iowa (1993); B.A. Marquette University (1987)

PROFESSIONAL: Staff Attorney, U.S. District Court Southern District of Iowa (1995-present); Adjunct Professor, Drake University (2009-present); Law Clerk, Southern District of Iowa & 8<sup>th</sup> Circuit, Honorable Charles R. Wolle and Honorable George G. Fagg (1993-1995)

**ANGELA CAMPBELL**

EDUCATION: J.D., Boston College Law School (2002); B.A., Yale University

PROFESSIONAL: Dickey & Campbell Law Firm (2007-Present); Drake Law School Adjunct Faculty (2007-Present); Federal Public Defender's Office (2003-2007); Law Clerk Honorable C. Arlen Beam, 8<sup>th</sup> Circuit Court of Appeals (2002-2003)

**NICK DREES**

EDUCATION: J.D., University of Chicago Law School (1989); B.A., Harvard College (1985)

PROFESSIONAL: Federal Public Defender, Northern and Southern Districts of Iowa (1999-Present); Assistant Federal Public Defender, Southern District of Iowa (1994-1999); Assistant Public Defender, Polk County Public Defender's Office (1991-1994); Law Clerk for the Honorable Donald E. O'Brien, U.S. District Court for Northern Iowa (1989-1991).

## VALARIE GALL

EDUCATION: 2 yrs. Indian Hills Community College

PROFESSIONAL: Panel Administrator, Federal Defender's Office (2009-Present); Sr. Legal Secretary, Federal Defender's Office (2006-Present); Hearn Law Office (2003-2006); Rosenberg, Stowers & Morse (1999-2003).

## JANE KELLY

EDUCATION: J.D., Harvard Law School (1991); A.B., Duke University, (1987)

PROFESSIONAL: Assistant Federal Public Defender, Northern District of Iowa (1994-Present); Visiting Instructor, University of Illinois College of Law (1993-1994); Law Clerk to the Honorable David R. Hansen, U.S. Circuit Judge, Eighth Circuit Court of Appeals (1992-1993); Law Clerk to the Honorable Donald J. Porter, U.S. District Judge, District of South Dakota (1991-1992)

## NICK KLINEFELDT

EDUCATION: J.D., University of Iowa (2000) (with distinction); B.A., University of Iowa (1995) (with honors)

PROFESSIONAL: On September 25, 2009, President Barack Obama nominated Nicholas A. Klinefeldt to be the United States Attorney for the Southern District of Iowa. The United States Senate unanimously confirmed Nick's nomination on November 21, 2009, and Nick was sworn into office on November 25, 2009.

Prior to his appointment, Nick practiced civil and criminal law at the Des Moines law firm Ahlers & Cooney, P.C. and practiced complex criminal litigation in Boston, Massachusetts at the law firm LibbyHoopes, P.C. He clerked for U.S. District Court Judge Robert W. Pratt of the Southern District of Iowa and Chief Justice Christopher J. Armstrong and Justice Benjamin Kaplan of the Massachusetts Appeals Court.

## NANCY LANOUE

EDUCATION: A.A., Kirkwood Community College, Cedar Rapids, Iowa (1991).

PROFESSIONAL: Secretary to Federal Defender and Asst. Panel Administrator, Federal Defender's Office (2006-Present); Legal Assistant, Alfred E. Willett (1995-2005); Legal Assistant, Shuttleworth & Ingersoll (1992-1994); Legal Assistant, Amana Refrigeration (1991-1992).

## **JOHN MESSINA**

**EDUCATION:** J.D., Drake University Law School (1979); B.A., Drake University (1975).

**PROFESSIONAL:** Research and Writing Attorney, Federal Public Defender's Office, Southern District of Iowa (2001-Present); Assistant State Appellate Defender, Iowa State Appellate's Office (1996-2001 and 1984-1988); Assistant Attorney General in the Criminal Appeals and Research Division (1980-1984).

## **MICHAEL PIPER**

**EDUCATION:** J.D., Drake University Law School (2007); B.A., University of Northern Iowa (1983); M.A., University of Northern Iowa (Spanish) (1984); M.L., El Colegio de Mexico (Linguistics) (1992).

**PROFESSIONAL:** Dickey & Campbell Law Firm (2007 - Present); Federal Public Defender Internship (2007); DMACC Interpretation & Translation Program Chair (2006-Present); Court Interpreter, Southern District of Iowa (2003-2005).

## **STEPHANIE ROSE**

**EDUCATION:** J.D., The University of Iowa (1996)(High Distinction) *Order of the Coif*, B.A., The University of Iowa (1994)

**PROFESSIONAL:** United States Attorney (N.D. Iowa) (2009-Present); Deputy Criminal Chief, U.S. Attorney's Office (N.D. Iowa) (2008-2009); Assistant U.S. Attorney, U.S. Attorney's Office (N.D. Iowa) (1999-2008); Special Assistant U.S. Attorney, U.S. Attorney's Office (N.D. Iowa) (1997-1999); Law Clerk, U.S. Attorney's Office (N.D. Iowa) (1996); Law Clerk, Bradley & Riley, P.C. (Cedar Rapids, Iowa) (1996)

**AWARDS & RECOGNITION:** U.S. Department of Justice Director's Award for Superior Performance by an Assistant U.S. Attorney (2009, 2001); National Organized Crime Drug Enforcement Task Force (OCDETF) Award: Outstanding Innovative Pharmaceutical Investigation (2009); Fellow, Iowa Academy of Trial Lawyers (2008-2009); U.S. Department of Justice Certificates of Appreciation (1997-2009); U.S. Department of Justice Certificate of Commendation (2006); Citation for Outstanding Appellate Litigation (2004); U.S. Department of Justice Special Achievement Award (2004); West Central OCDETF Regional Meritorious Achievement Awards (2002, 2003, 2009); U.S. Department of Justice Director's Award for Superior Performance by an Assistant United States Attorney (2001); Drug Enforcement Administration Certificate of Appreciation (1999); U.S. Department of Justice Employee Volunteer Service Award (1999); Governor's Volunteer Award (1997)

## **DEAN STOWERS**

EDUCATION: J.D., Drake University Law School (1989); B.A., University of Wisconsin-Madison (1986)

PROFESSIONAL: United States Sentencing Commission (1989-1990), Washington, D.C. Admitted before U.S. Supreme Court, 8<sup>th</sup> Circuit and 1<sup>st</sup> Circuit. Argued over 40 appeals and obtained favorable outcomes in 20% of those. Have tried dozens of federal and state criminal cases and have secured acquittals more than two-thirds of the time, including four federal acquittals in a row.

## **PATTY TROM-BIRD**

EDUCATION: J.D., University of Iowa (1987); B.A., University of Iowa (1987)

PROFESSIONAL: Staff Attorney, United States District Court for the Southern District of Iowa (2000-present); Law Clerk for The Honorable W.C. Stuart (1987-1990)

## **BOB WICHSER**

EDUCATION: J.D., University South Dakota (1974); B.A., Morningside College, (1971)

PROFESSIONAL: Assistant Federal Public Defender, Northern District of Iowa (2003-Present); Assistant County Attorney, Pottawattamie County (2001-2003); Attorney with Sodow, Daly & Sodow, Omaha, NE (1985-2000); Attorney with Hirschbach & Wichser, Sioux City, IA (1976-1985); Assistant Attorney General, State of South Dakota (1974-1976)

## **DIANE ZITZNER**

EDUCATION: J.D., University of Iowa (1994); Graduate of University of Wisconsin-Madison (1990)

PROFESSIONAL: Assistant Federal Public Defender, Southern District of Iowa (2007 - Present); Assistant Public Defender, Wisconsin State Public Defender Agency (1995-2007)

# **ODDS AND ENDS**

**PRESENTED BY**

***NICK DREES***

**FEDERAL PUBLIC DEFENDER**

# SUMMARY OF THE SENTENCING COMMISSION'S PROPOSED GUIDELINE AMENDMENTS FOR 2010

Prepared by the Federal Defenders' National Sentencing Resource Counsel Project

In April 2010, the United States Sentencing Commission voted to promulgate amendments that eliminate recency points in the criminal history calculation, expand the availability of alternatives to incarceration, and address the relevance of certain offender characteristics. This document is only a partial analysis of the amendments slated for submission to Congress in May 2009. If not disapproved by Congress, these amendments will formally go into effect on November 1, 2010. This does not mean, however, that courts must continue applying the current guidelines. The sentencing court remains free under 18 U.S.C. § 3553(a) and Supreme Court precedent to disagree with any part of the guidelines on policy grounds. The Commission's own conclusion that the guidelines should be amended provides a firm basis for a court to disagree with existing guidelines.

For a fuller history, see the proposed amendments and public hearing testimony of the Federal Public and Community Defenders and other witnesses.

For the language of the proposed amendments, -go to [fd.org](http://fd.org).

For the written testimony of the defenders, go to [fd.org](http://fd.org):

[http://www.fd.org/pdf\\_lib/FPD\\_Testimony%20of%20Meyers%20and%20Mariano\\_FINAL.pdf](http://www.fd.org/pdf_lib/FPD_Testimony%20of%20Meyers%20and%20Mariano_FINAL.pdf)

For a transcript of the public hearing on these amendments and written statements of all witnesses, go to <http://www.usc.gov/AGENDAS/20090317/Agenda.htm>

## RECENCY POINTS

On April 6, 2010, the Commission voted to delete from the guidelines USSG §4A1.1 (e) (recency points). In a press release, the Commission stated that it deleted the amendment, "in part, because when combined with other guideline calculations for firearms or unlawful reentry (immigration) offenses, the addition of recency "points" may result in a single criminal history event having excessive weight in the determination of the applicable guideline range. The Commission further determined that deletion of the provision did not detract from the overall ability of the criminal history score (resulting from the guidelines calculation) to predict an offender's likelihood of recidivism." See <http://www.usc.gov/PRESS/rel20100419.htm>.

## ALTERNATIVES TO INCARCERATION

The Commission voted to increase Zones B and C by one level in each criminal history category. Clients with ranges of 8-14 months (CHC's I-IV) -and 9-15 months (CHC V-VI) will fall within Zone B rather than C; clients in a range of 12-18 months (all CHC's) will fall within Zone C rather than D.

The Commission also voted to amend USSG § 5C1.1 to provide for a treatment departure from Zone C to Zone B. The amendment clarifies 5C1.1 n. 6 by giving examples of when a treatment alternative departure from Zone C to Zone B may be appropriate for drug and alcohol abusers as well as those who suffer from "significant mental illness." Under the terms of the guideline, the court must find (A) "that the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness," and (B) "the defendant's criminality must be related to the treatment

problems to be addressed before a departure is warranted." The court should also consider "the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant." Finally, the amendment contains a new application note that advises courts to consider the effectiveness of residential treatment programs in deciding to impose a condition of community confinement.

**Clients in CH III or above.** The guidelines continue to recommend against the use of substitutes for imprisonment for "most defendants with a criminal history category of III or above." USSC 5C1.1, n.7. The Commission, however, voted to remove the statement that "such defendants have failed to reform despite the use of such alternatives." Removal of that language should permit arguments that your client is an exception to the general rule because he or she has not received treatment or that prior treatment was not adequate to meet the client's needs. It would also give you an opportunity to educate your judge about how relapse is common among drug/alcohol abusers and that mentally ill defendants often lack insight into their illness, which impedes their treatment and medication compliance.

**Recognizing pretrial community confinement or home detention.** –Clients should be able to get "credit" toward a condition that requires community confinement or home detention for any time they spent in such confinement or detention pretrial so that they spend the least amount of post-sentencing time in community confinement, home detention, or imprisonment (for Class a and B felonies where a minimal term of imprisonment is statutorily required).

No statute prohibits a court from deciding that a defendant has already satisfied a condition of probation or supervised release. Take for example, a defendant in a 12-18 month range who receives a sentence of probation with twelve months intermittent confinement, community confinement or home detention. If before sentencing, the defendant already has completed a 60 day residential treatment program and remained on home detention for an additional 2 months, the court may find that the defendant has already satisfied 4 months of the condition that he spend time in community confinement or home detention. *See also* 18 U.S.C. 3564(a) ("term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court") (emphasis added). The same reasoning applies to defendants sentenced to terms of imprisonment with supervised release. 18 U.S.C. 3583(a) provides that a *term* of supervised release commences after imprisonment, but nothing in the statute precludes a court from finding that a *condition* of supervised release has already been satisfied.

The general rule that a defendant's presentencing confinement in community confinement or home detention cannot be credited toward the term of imprisonment, *Reno v. Koray*, 515 U.S. 50 (1995); 18 U.S.C. § 3583(b), should not preclude the court from crediting a pretrial condition toward a condition of probation or supervised release.

#### **BOP placement in community confinement for the minimal term of imprisonment.**

Go to [http://www.famm.org/Repository/Files/2nd\\_Chance\\_Act\\_-\\_RRC\\_Placements\\_04-14-08%5B1%5D.pdf](http://www.famm.org/Repository/Files/2nd_Chance_Act_-_RRC_Placements_04-14-08%5B1%5D.pdf) for the BOP memo regarding front-end designations to community confinement. Keep this in mind when structuring sentences and be sure to ask the court to recommend that BOP designate a RRC placement.

## DEPARTURE FOR CULTURAL ASSIMILATION

The Commission also voted in favor of an amendment permitting a downward departure for illegal reentry cases under USSG § 2L1.2 where the defendant has established cultural ties to the United States from childhood and those ties provided the primary motivation for the reentry or continued presence in the United States. The proposed new amendment is at application note 8 to § 2L1.2.

## SPECIFIC OFFENDER CHARACTERISTICS

The Commission also voted to amend USSG §§ 5H1.1, 5H1.3, 5H1.4 and 5H1.11 to state that age, mental and emotional conditions, physical condition (including physique), and military service “may be relevant in determining whether a departure is warranted, if [the factor], individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.”

It also amended USSG § 5H1.4 to state that “drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure,” when previously it stated that this factor “is not a reason for a downward departure.” In other words, drug and alcohol dependence or abuse has been changed from a “prohibited factor” to a “discouraged” factor for departure purposes. It also added language stating that “[i]n certain cases, a downward departure may be appropriate to accomplish a specific treatment purpose,” citing newly-revised Application Note 6 to § 5C1.1 (setting forth a departure to accomplish a treatment purpose with various restrictions and conditions). It added identical language to § 5H1.3 regarding mental and emotional conditions: “In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* § 5C1.1, Application Note 6.”

With these changes, the Commission has opened a narrow window for a small category of downward departures based on offender characteristics. The Commission placed as a condition on departure that the particular factor be “present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.” In effect, the Commission has merely transformed a few “discouraged” factors requiring presence to an “exceptional” or “extraordinary” degree for a departure, *see* USSG § 5K2.0(a)(4), into “encouraged” factors that must be present to “an unusual degree.”

The requirement that a factor “distinguishes the case from the typical cases covered by the guidelines” is odd and seemingly irrelevant because the guideline rules do not take account of any of these factors. Take age, for example. A defendant’s age is not taken into account by the guideline rules. Thus, any issue related to age distinguishes the case from typical cases covered by the guidelines. What the Commission means for age to be present “to an unusual degree” is not clear. One interpretation is that age is present “to an unusual degree” whenever it can be linked to a reduced risk of recidivism or is relevant to the defendant’s culpability, vulnerability to abuse in prison, rehabilitative potential, or some other § 3553(a) consideration. Another interpretation, however, is that age is simply not relevant most of the time, which is how the courts interpreted “to an unusual degree” before *Booker*.

Rather than get bogged down in questions that are not relevant or helpful, it seems the better course in most courtrooms is to ask the judge to consider offender characteristics as required by the statutory framework and to vary from the guideline range. *See* 18 U.S.C. § 3553(a)(1) (must consider characteristics of the offender), (a)(2) (must impose a sentence that is sufficient but not greater than necessary to satisfy sentencing purposes in light of those characteristics and any other relevant factors).

Under § 3553(a), the question is whether the defendant's age is relevant to the purpose of sentencing. Is the defendant's age relevant to his culpability? To his potential for rehabilitation? To his risk of recidivism? To his vulnerability to abuse in prison? Regarding substance abuse, is it relevant to his culpability? To the need for effective treatment? Would treatment reduce the defendant's risk of recidivism more than a prison term? If it seems helpful given the particular judge and circumstances, move for both a departure and a variance.

Fortunately, by their terms, each of the policy statements applies to "departures" only. Thus, the conditions placed on consideration of these factors for departure purposes do not apply to the court's consideration of offender characteristics under § 3553(a).

Nonetheless, the amended Introduction to Chapter 5, Part H clearly seeks to cabin judges' consideration of offender characteristics under § 3553(a). The Introduction repeatedly describes its policy statements as applying to "sentences outside the applicable guideline range." It claims that the guidelines take offender characteristics into account "in several ways," though, other than acceptance of responsibility, it cites only aggravating factors used to increase the guideline range. Then it states: "Although the court must consider 'the history and characteristics of the defendant' among other factors, see 18 U.S.C. § 3553(a), in order to avoid unwarranted sentencing disparities the court **should not give them excessive weight.**" (Emphasis added.) Then: "Generally, the most appropriate use of specific offender characteristics is to consider them **not as a reason for a sentence outside the applicable guideline range but for other reasons, such as determining the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone.**" (Emphasis added.) The "purpose of this Part is to provide ... a framework addressing specific offender characteristics in a **reasonably consistent manner,**" to be used "in a uniform manner," to "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." (Emphasis added.)

In other words, according to this Introduction, judges should use the aggravating factors to calculate the guideline range and use mitigating factors only within the guideline range. Excepted from this general principle are a *few* mitigating factors that judges are invited to consider for purposes of departure, which are circumscribed by the requirements that they be present to "an unusual degree" and that they "distinguish the case from the typical cases covered by the guidelines," with the *added* instruction that offender characteristics – including offender characteristics that were not the subject of this amendment (or the subject of a policy statement at all) – are not to be given "excessive weight." Further, just as when the guidelines were mandatory, and when they were still being treated as mandatory after *Booker* and before *Gall*, *Kimbrough*, *Spears* and *Nelson*, the Commission claims that individualized sentencing equals unwarranted disparity. This is wrong. As the Supreme Court and even the Commission have recognized, sentencing different offenders the same must be avoided, as unwarranted uniformity is just another form of unwarranted disparity. *See Gall*, 552 U.S. at 55 (approving judge's consideration of the "need to avoid unwarranted *similarities*") (emphasis in original); USSC, Fifteen Year Review at 113 ("Unwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing.") (emphasis in original).

The Introduction also refers to certain factors listed in 28 U.S.C. § 994(e) (education, vocational skills, employment record, family ties and responsibilities, and community ties), which the policy statements still describe as "not ordinarily relevant," as "discouraged factors." For years, the Defenders

and others (including the Commission's own staff) have explained that the Commission's interpretation and labeling of these factors as "discouraged" is wrong. The plain language and the legislative history show that Congress expected those factors to be considered and that they would be mitigating. Even if the Commission's interpretation were correct, this directive is to the Commission, not to the courts. Yet, there now appears in the Manual a reference to these factors as "discouraged" without acknowledgement of Congress's well-known intent.

In sum, it appears that the Commission made a few tweaks to individual policy statements the significance of which remains to be seen, but at the same time sought to constrain the discretion of judges by suggesting that its policy statements apply to variances under § 3553(a). None of this language was proposed for public comment.

### APPLICATION INSTRUCTIONS

The Commission voted to amend § 1B1.1 (Application Instructions) to set forth a "three-step process" for arriving at the appropriate sentence. This guideline will now instruct courts as follows:

- (1) "The court shall determine the kinds of sentences and the guideline range" by following eight detailed steps and considering the relevant provisions as "appropriate" or "applicable";
- (2) "The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence"; and
- (3) "The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole."

This instruction appears to misstate the sentencing process set forth by the Supreme Court in its decisions, as well as the sentencing framework set forth in § 3553(a).

To the extent it can be read to instruct judges to consider policy statements regarding departures or offender characteristics even if a departure is not raised by a party, it does not accurately state the law. In *Rita*, the Supreme Court in no way suggested that judges must always examine policy statements. On the page cited by the Commission in its synopsis of the amendment and elsewhere in the opinion, the Court said that judges may consider a departure *or* a variance *or* both *if* raised by a party.<sup>1</sup> It stated that the district court, after calculating the applicable guideline range, "may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the 'heartland' to which the Commission intends individual Guidelines to apply, USSG § 5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different

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<sup>1</sup> In its synopsis of the proposed amendment, the Commission indicates that the Supreme Court set forth this "three-step" process, citing *Rita*, 551 U.S. at 351, and that the majority of circuits have adopted it. While most courts of appeals urge (if not require) district courts to consider departures and variances separately if both are raised, and if so to consider departures first, we have not found any appeals court decision that requires a district court to consider a policy statement when a departure *has not been raised*. Unlike its instructions for determining the applicable guideline range, and unlike the appeals court cases it cites in support of the three-step process in its synopsis, amended § 1B1.1 does not instruct judges that policy statements are to be considered only if "appropriate" or "applicable."

sentence regardless.” See *Rita v. United States*, 551 U.S. 338, 351 (2007). The only arguments the sentencing judge is required to address are the nonfrivolous arguments *raised* by the parties. *Id.* at 357. See also *Gall v. United States*, 552 U.S. 38, 49-50 (2007). Calculating the “guideline range” does not include consideration of policy statements regarding possible grounds for departure. Indeed, in *Gall*, the Court made no mention of the Commission’s policy statements regarding departure, although it upheld a probationary sentence based on factors that are prohibited or deemed not ordinarily relevant by those policy statements. Thus, to suggest that policy statements on departure must be consulted as a second step in sentencing when not raised is wrong.

As to the third step, there is nothing in 18 U.S.C. § 3553(a) or the Supreme Court’s cases that says anything about “factors . . . taken as a whole.” Instead, it requires a sentence that is sufficient but not greater than necessary to achieve the purposes of sentencing. 18 U.S.C. § 3553(a); *Rita*, 551 U.S. at 348; *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). This overarching principle does appear in revised § 1B1.1, although it is mentioned in new background commentary.

Although in practice, this amendment may not have any real impact in most courtrooms (since it is rarely consulted), it should be monitored and challenged in the event it causes judges to return to an incorrect and more restrictive view of the sentencing framework and process set forth in § 3553(a) and the Supreme Court’s decisions.

#### **PRACTICE NOTE ON HOW TO PREVENT THE 1B1.1 AND CHAPTER 5, PART H AMENDMENTS FROM UNDERMINING THE ADVISORY NATURE OF THE GUIDELINES**

If you are in a variance-friendly court, in most cases, you should continue to skip departures and move for a variance. If you are in one of the few departures-only courts, you can argue that the new policy statements must mean a broadening of the departure power, and, to protect the record, move for both a departure and a variance.

A brand new judge or probation officer or one who longs for harsh sentences or the comfort of mandatory guidelines could read these amendments as follows: “The application instructions tell me to consider the policy statements in every case. You have requested a variance based on the defendant’s mental and emotional condition. The Introduction to the Commission’s policy statements tells me not to give any offender characteristic, except the aggravating characteristics in the guideline calculation, excessive weight, and not to consider such factors to sentence outside the guideline range. In that way, I avoid “unwarranted sentencing disparities” as required by § 3553(a)(6). Furthermore, the Commission’s policy statement on mental and emotional condition tells me that this is relevant only if it is present to an unusual degree and if it distinguishes the case from the typical case covered by the guidelines. I therefore sentence the defendant to the bottom of the guideline range, and your motion for variance is DENIED.”

In other words, exactly like the days before *Gall* in some circuits that did not want to accept *Booker*. If anything remotely like this occurs in the district court or the court of appeals, you should object in your objections to the PSR, and on the record at sentencing, on appeal, and in petitions for certiorari that these provisions themselves, as well as the judge’s compliance with them, violate the Supreme Court’s decisions in *Booker*, *Rita*, *Gall*, *Nelson*, and *Kimbrough* and *Spears* for good measure. If this does begin to occur, please let SRC know.

**A DISCUSSION WITH  
OUR NEW  
U.S. ATTORNEYS**

**PRESENTED BY**

***STEPHANIE ROSE,*  
U.S. ATTORNEY**

**NORTHERN DISTRICT OF IOWA**

**AND**

***NICHOLAS KLINEFELDT,*  
U.S. ATTORNEY**

**SOUTHERN DISTRICT OF IOWA**

**Federal Rules of Criminal Procedures, Rule 12**  
**Pleadings and Pretrial Motions**

**(a) Pleadings.** The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

**(b) Pretrial Motions.**

**(1) In General.** Rule 47 applies to a pretrial motion.

**(2) Motions That May Be Made Before Trial.** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

**(3) Motions That Must Be Made Before Trial.** The following must be raised before trial:

**(A)** a motion alleging a defect in instituting the prosecution;

**(B)** a motion alleging a defect in the indictment or information--but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;

**(C)** a motion to suppress evidence;

**(D)** a Rule 14 motion to sever charges or defendants; and

**(E)** a Rule 16 motion for discovery.

**(4) Notice of the Government's Intent to Use Evidence.**

**(A) At the Government's Discretion.** At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

**(B) At the Defendant's Request.** At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

**(c) Motion Deadline.** The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

**(d) Ruling on a Motion.** The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

**(e) Waiver of a Defense, Objection, or Request.** A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.

**(f) Recording the Proceedings.** All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

**(g) Defendant's Continued Custody or Release Status.** If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.

**(h) Producing Statements at a Suppression Hearing.** Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.

## Rule 12.1. Notice of an Alibi Defense

### (a) Government's Request for Notice and Defendant's Response.

**(1) Government's Request.** An attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense.

**(2) Defendant's Response.** Within 14 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

**(A)** each specific place where the defendant claims to have been at the time of the alleged offense; and

**(B)** the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

### (b) Disclosing Government Witnesses.

#### (1) Disclosure.

**(A) In General.** If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

**(i)** the name of each witness--and the address and telephone number of each witness other than a victim--that the government intends to rely on to establish that the defendant was present at the scene of the alleged offense; and

**(ii)** each government rebuttal witness to the defendant's alibi defense.

**(B) Victim's Address and Telephone Number.** If the government intends to rely on a victim's testimony to establish that the defendant was present at the scene of the alleged offense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows preparation of the defense and also protects the victim's interests.

**(2) Time to Disclose.** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 14 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 14 days before trial.

**(c) Continuing Duty to Disclose.**

**(1) In General.** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness--and the address and telephone number of each additional witness other than a victim--if:

(A) the disclosing party learns of the witness before or during trial; and

(B) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

**(2) Address and Telephone Number of an Additional Victim Witness.** The address and telephone number of an additional victim witness must not be disclosed except as provided in Rule 12.1(b)(1)(B).

**(d) Exceptions.** For good cause, the court may grant an exception to any requirement of Rule 12.1(a)--(c).

**(e) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.

**(f) Inadmissibility of Withdrawn Intention.** Evidence of an intention to rely on an alibi defense, later withdrawn, or of a statement made in connection with that intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

## Rule 12.2. Notice of an Insanity Defense; Mental Examination

**(a) Notice of an Insanity Defense.** A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

**(b) Notice of Expert Evidence of a Mental Condition.** If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must--within the time provided for filing a pretrial motion or at any later time the court sets--notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

### **(c) Mental Examination.**

#### **(1) Authority to Order an Examination; Procedures.**

**(A)** The court may order the defendant to submit to a competency examination under 18 U.S.C. § 4241.

**(B)** If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined under 18 U.S.C. § 4242. If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court.

**(2) Disclosing Results and Reports of Capital Sentencing Examination.** The results and reports of any examination conducted solely under Rule 12.2(c)(1) after notice under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition.

**(3) Disclosing Results and Reports of the Defendant's Expert Examination.** After disclosure under Rule 12.2(c)(2) of the results and reports of the government's examination, the defendant must disclose to the government the results and reports of any

examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence.

**(4) Inadmissibility of a Defendant's Statements.** No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant:

(A) has introduced evidence of incompetency or evidence requiring notice under Rule 12.2(a) or (b)(1), or

(B) has introduced expert evidence in a capital sentencing proceeding requiring notice under Rule 12.2(b)(2).

**(d) Failure to Comply.**

**(1) Failure to Give Notice or to Submit to Examination.** The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case if the defendant fails to:

(A) give notice under Rule 12.2(b); or

(B) submit to an examination when ordered under Rule 12.2(c).

**(2) Failure to Disclose.** The court may exclude any expert evidence for which the defendant has failed to comply with the disclosure requirement of Rule 12.2(c)(3).

**(e) Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

### **Rule 12.3. Notice of a Public-Authority Defense**

#### **(a) Notice of the Defense and Disclosure of Witnesses.**

**(1) Notice in General.** If a defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the defendant must so notify an attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pretrial motion, or at any later time the court sets. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency as the source of public authority.

**(2) Contents of Notice.** The notice must contain the following information:

**(A)** the law enforcement agency or federal intelligence agency involved;

**(B)** the agency member on whose behalf the defendant claims to have acted; and

**(C)** the time during which the defendant claims to have acted with public authority.

**(3) Response to the Notice.** An attorney for the government must serve a written response on the defendant or the defendant's attorney within 14 days after receiving the defendant's notice, but no later than 21 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

#### **(4) Disclosing Witnesses.**

**(A) Government's Request.** An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than 21 days before trial.

**(B) Defendant's Response.** Within 14 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address, and telephone number of each witness.

**(C) Government's Reply.** Within 14 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, address, and telephone number of each witness the government intends to rely on to oppose the defendant's public-authority defense.

**(5) Additional Time.** The court may, for good cause, allow a party additional time to comply with this rule.

**(b) Continuing Duty to Disclose.** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name, address, and telephone number of any additional witness if:

**(1)** the disclosing party learns of the witness before or during trial; and

**(2)** the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

**(c) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the public-authority defense. This rule does not limit the defendant's right to testify.

**(d) Protective Procedures Unaffected.** This rule does not limit the court's authority to issue appropriate protective orders or to order that any filings be under seal.

**(e) Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under Rule 12.3(a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

## Rule 12.4. Disclosure Statement

### (a) Who Must File.

**(1) Nongovernmental Corporate Party.** Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

**(2) Organizational Victim.** If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

### (b) Time for Filing; Supplemental Filing. A party must:

**(1)** file the Rule 12.4(a) statement upon the defendant's initial appearance; and

**(2)** promptly file a supplemental statement upon any change in the information that the statement requires.

**Federal Rules of Criminal Procedures, Rule 16  
Discovery and Inspection**

**(a) Government's Disclosure.**

**(1) Information Subject to Disclosure.**

**(A) Defendant's Oral Statement.** Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

**(B) Defendant's Written or Recorded Statement.** Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

**(i)** any relevant written or recorded statement by the defendant if:

- the statement is within the government's possession, custody, or control; and
- the attorney for the government knows--or through due diligence could know--that the statement exists;

**(ii)** the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

**(iii)** the defendant's recorded testimony before a grand jury relating to the charged offense.

**(C) Organizational Defendant.** Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

- (i)** was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

**(D) Defendant's Prior Record.** Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows--or through due diligence could know--that the record exists.

**(E) Documents and Objects.** Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

**(F) Reports of Examinations and Tests.** Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows--or through due diligence could know--that the item exists; and

(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

**(G) Expert witnesses.**--At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of

Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

**(2) Information Not Subject to Disclosure.** Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

**(3) Grand Jury Transcripts.** This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.

**(b) Defendant's Disclosure.**

**(1) Information Subject to Disclosure.**

**(A) Documents and Objects.** If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

**(i)** the item is within the defendant's possession, custody, or control; and

**(ii)** the defendant intends to use the item in the defendant's case-in-chief at trial.

**(B) Reports of Examinations and Tests.** If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

**(i)** the item is within the defendant's possession, custody, or control; and

**(ii)** the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

**(C) Expert witnesses.**--The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if--

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

**(2) Information Not Subject to Disclosure.** Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

**(c) Continuing Duty to Disclose.** A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

(1) the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered, its production.

**(d) Regulating Discovery.**

**(1) Protective and Modifying Orders.** At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex

parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

**(2) Failure to Comply.** If a party fails to comply with this rule, the court may:

**(A)** order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

**(B)** grant a continuance;

**(C)** prohibit that party from introducing the undisclosed evidence; or

**(D)** enter any other order that is just under the circumstances.

**Federal Rules of Criminal Procedures, Rule 26.2**  
**Producing a Witness's Statement**

**(a) Motion to Produce.** After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

**(b) Producing the Entire Statement.** If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.

**(c) Producing a Redacted Statement.** If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any privileged or unrelated portions, the court must order delivery of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.

**(d) Recess to Examine a Statement.** The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.

**(e) Sanction for Failure to Produce or Deliver a Statement.** If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If an attorney for the government disobeys the order, the court must declare a mistrial if justice so requires.

**(f) "Statement" Defined.** As used in this rule, a witness's "statement" means:

- (1) a written statement that the witness makes and signs, or otherwise adopts or approves;
- (2) a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or
- (3) the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.

**(g) Scope.** This rule applies at trial, at a suppression hearing under Rule 12, and to the extent

specified in the following rules:

- (1) Rule 5.1(h) (preliminary hearing);**
- (2) Rule 32(i)(2) (sentencing);**
- (3) Rule 32.1(e) (hearing to revoke or modify probation or supervised release);**
- (4) Rule 46(j) (detention hearing); and**
- (5) Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255.**

## Title 18, United States Code, Section 3500

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

**(d)** If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

**(e)** The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means--

**(1)** a written statement made by said witness and signed or otherwise adopted or approved by him;

**(2)** a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

**(3)** a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

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2008 WLNR 26286550

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August 20, 2008

Section: Metro Iowa

Schofield guilty of double murder

August 20, 2008 By JEFF ECKHOFF

jeckhoff@dmreg.com

Staff

Today is the first day of the rest of Dennis "D.J." Schofield's three lifetime sentences behind bars.

Polk County jurors deliberated for less than four hours Tuesday before finding Schofield, 28, guilty of the first-degree murders of Terry and Lisa Dilks in 2004. The verdicts, which carry mandatory sentences of life without parole, come on top of Schofield's roughly 202-year sentence for his role in a May 2005 shootout with police.

"It's good to know that they got the guy that did it," said Dustin Dilks, Terry and Lisa's 18-year-old son, outside the courtroom. "But at the same time, it's kind of sour" because Schofield won't pay any additional price for their deaths.

Schofield's attorney declined to comment.

Prosecutors alleged during the weeklong trial that Schofield killed the Dilkses, a pair of low-level Urbandale methamphetamine dealers, to prevent them from testifying against his sister, Lisa Schofield, in an upcoming drug case.

Jurors heard repeated testimony about Schofield's hatred for snitches, from the poetry posted on a MySpace Web page to snippets from a handwritten journal encouraging its reader to "kill the birdies before they sing."

Jeff Jones, Schofield's drug-dealing associate and former best friend, gave this account based on what he said was Schofield's confession during a day spent disposing of clothing and .40-caliber gun:

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Schofield entered the Dilks home through a sliding glass door shortly after 4 a.m. on Aug. 24, 2004, and followed the sound of running water to find Lisa Dilks preparing for a bath. Schofield forced her to the basement, where Terry Dilks sat in front of a computer. Schofield shot Lisa once in the back of the head using a pillow as a silencer, according to Jones, then turned the gun on her husband.

Concerned co-workers of Lisa's found both bodies the next day. Each had one gunshot wound to the head and two to the torso.

Public defender Matthew Sheeley spent much of the past week pointing out discrepancies in Jones' account, including the fact that the Dilks house had no working hot water. Jones, who described years of "harassment" by police about the murders, could have simply told investigators what they wanted to hear, Sheeley insisted.

Prosecutor Dan Voogt countered, however, that Jones had information that only the killer would know.

Jurors, who began deliberating about 9 a.m. Tuesday, apparently decided shortly after lunch that they agreed with Voogt.

Schofield is scheduled to be sentenced on Sept. 29.

Dustin Dilks, who now lives in Wisconsin, has decided he'd won't sacrifice school to return.

"Justice was served," he said. "But it won't bring them back."

Photo By: Justin Hayworth/The Register

Dustin Dilks, flanked by his aunt, Debbie Lovelace, talks about the guilty verdict received Tuesday by Dennis "D.J." Schofield for the murders of his parents, Terry and Lisa Dilks.

Photo: Schofield

---- INDEX REFERENCES ----

NEWS SUBJECT: (Social Issues (ISO05); Violent Crime (1VI27); Crime (1CR87))

Language: EN

OTHER INDEXING: (DILKS; DILKS HOUSE; DUSTIN DILKS; LISA; LISA DILKS; LISA SCHOFIELD; MYSPACE WEB; TERRY; TERRY AND LISA DILKS; TERRY DILKS) (Debbie Lovelace; JEFF ECKHOFF; Jeff Jones; Jones; Justice; Matthew Sheeley; Photo; Polk County; Prosecutor Dan Voogt; Schofield; Sheeley; Voogt)

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2005 WLNR 26713470

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February 24, 2005

Section: Metro Iowa

Headline: Polk jurors hear testimony in Wright murder trial

February 24, 2005 By JEFF ECKHOFF

REGISTER STAFF WRITER

Everyone agrees that Ollie Talton Jr. had become worrisome to Des Moines drug dealers by late spring of 2000.

By May 4, word was out that Talton, an admitted crack cocaine dealer, had passed information to federal authorities to bargain down his upcoming 20-year prison sentence.

Everyone agrees that Talton, 38, was a threat. Everyone agrees that there were three people waiting on May 4 when Talton excused himself from banter with a bartender and walked into a restroom at the Hickman Pub.

The question for Polk County jurors is who fired the shots that killed him.

Testimony began Tuesday in the first-degree murder trial of James Wright Jr., a 33-year-old drug dealer who allegedly shot Talton three times -either to save his own skin or someone else's.

Polk County prosecutor Dan Voogt told jurors that Wright -who was sentenced in October 2001 to almost 22 years in prison after pleading guilty of drug trafficking -either shot Talton to help other drug dealers or because "he thought he was going to be the next domino to fall."

Voogt said testimony from two federal prison inmates will show that Wright, also known as "Big Valley," admitted during a night of behind-bars drinking and drug use in a Memphis prison that he had shot a federal informant.

Wright's attorney, public defender John Wellman, insists that that remark came after Wright's former prison buddies had mocked the weak criminal environment in Des Moines and that they did not take the boast seriously.

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Wellman said it was Thomas Gowdy and Ronald "Uzi" Buchanan who lured Wright into the Hickman Pub restroom. Buchanan wanted Wright to take Talton outside the bar so he could be dealt with, Wellman said. When Talton suddenly walked into the restroom, Wellman told jurors, Buchanan fired the gun.

"It's a coincidence that Ollie Talton arrived while Mr. Wright was trying to talk him out of this foolish scheme," Wellman said.

Authorities say Talton, shot in the head, died later at a hospital.

Cheryl Kaiser, the bartender that night, testified Tuesday that she was one of the first people to see the body.

"I just opened the door, and there was blood everywhere," Kaiser said. "I think he was already gone by the time I opened the door."

Reporter Jeff Eckhoff can be reached at (515) 284-8271 or jeckhoff@dmreg.com

Photo: Talton

--- INDEX REFERENCES ---

NEWS SUBJECT: (Social Issues (1SO05); Violent Crime (1VI27); Crime (1CR87))

REGION: (Iowa (1IO85); North America (1NO39); Americas (1AM92); USA (1US73))

Language: EN

OTHER INDEXING: (HICKMAN PUB; OLLIE TALTON; REGISTER; TALTON) (Buchanan; Cheryl Kaiser; Dan Voogt; James Wright Jr.; JEFF ECKHOFF; John Wellman; Kaiser; Ollie Talton Jr.; Thomas Gowdy; Voogt; Wellman; Wright)

Word Count: 469

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**IMMIGRATION  
CONSEQUENCES  
AND  
THE *PADILLA* CASE**

**PRESENTED BY**

**ANGELA CAMPBELL  
CJA PANEL REPRESENTATIVE**

**AND**

**MICHAEL PIPER  
2<sup>ND</sup> CHAIR PANEL ATTORNEY**

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

## Syllabus

PADILLA *v.* KENTUCKY

## CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 08–651. Argued October 13, 2009—Decided March 31, 2010

Petitioner Padilla, a lawful permanent resident of the United States for over 40 years, faces deportation after pleading guilty to drug-distribution charges in Kentucky. In postconviction proceedings, he claims that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived in this country so long. He alleges that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla postconviction relief on the ground that the Sixth Amendment’s effective-assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a “collateral” consequence of a conviction.

*Held:* Because counsel must inform a client whether his plea carries a risk of deportation, Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether he is entitled to relief depends on whether he has been prejudiced, a matter not addressed here. Pp. 2–18.

(a) Changes to immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms have expanded the class of deportable offenses and limited judges’ authority to alleviate deportation’s harsh consequences. Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important. Thus, as a matter of federal law, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. Pp. 2–6.

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(b) *Strickland v. Washington*, 466 U. S. 668, applies to Padilla's claim. 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. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about deportation concerned only collateral matters. However, this Court has never distinguished between direct and collateral consequences in defining the scope of constitutionally "reasonable professional assistance" required under *Strickland*, 466 U. S., at 689. The question whether that distinction is appropriate need not be considered in this case because of the unique nature of deportation. Although removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence. Because that distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation, advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Pp. 7–9.

(c) To satisfy *Strickland's* two-prong inquiry, counsel's representation must fall "below an objective standard of reasonableness," 466 U. S., at 688, and there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694. The first, constitutional deficiency, is necessarily linked to the legal community's practice and expectations. *Id.*, at 688. The weight of prevailing professional norms supports the view that counsel must advise her client regarding the deportation risk. And this Court has recognized the importance to the client of "[p]reserving the . . . right to remain in the United States'" and "preserving the possibility of" discretionary relief from deportation. *INS v. St. Cyr*, 533 U. S. 289, 323. Thus, this is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect. There will, however, undoubtedly be numerous situations in which the deportation consequences of a plea are unclear. In those cases, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear. Accepting Padilla's allegations as true, he has sufficiently alleged constitutional deficiency to satisfy *Strickland's* first prong. Whether he can satisfy the second prong, prejudice, is left for the Kentucky courts to consider in the first instance. Pp. 9–12.

(d) The Solicitor General's proposed rule—that *Strickland* should

## Syllabus

be applied to Padilla's claim only to the extent that he has alleged affirmative misadvice—is unpersuasive. And though this Court must be careful about recognizing new grounds for attacking the validity of guilty pleas, the 25 years since *Strickland* was first applied to ineffective-assistance claims at the plea stage have shown that pleas are less frequently the subject of collateral challenges than convictions after a trial. Also, informed consideration of possible deportation can benefit both the State and noncitizen defendants, who may be able to reach agreements that better satisfy the interests of both parties. This decision will not open the floodgates to challenges of convictions obtained through plea bargains. Cf. *Hill v. Lockhart*, 474 U. S. 52, 58. Pp. 12–16.

253 S. W. 3d 482, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

No. 08–651

**JOSE PADILLA, PETITIONER *v.* KENTUCKY**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
KENTUCKY**

[March 31, 2010]

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U. S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.<sup>1</sup>

In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he “did not have to worry about immigration status since he had been in the country so long.” 253 S. W. 3d 482, 483 (Ky. 2008). Padilla relied on his counsel’s erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme

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<sup>1</sup>Padilla’s crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U. S. C. §1227(a)(2)(B)(i).

## Opinion of the Court

Court of Kentucky denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a "collateral" consequence of his conviction. *Id.*, at 485. In its view, neither counsel's failure to advise petitioner about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief.

We granted certiorari, 555 U. S. \_\_\_ (2009), to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

## I

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal, *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10 (1948), is now virtually inevitable for a vast number of noncitizens convicted of crimes.

The Nation's first 100 years was "a period of unimpeded immigration." C. Gordon & H. Rosenfield, *Immigration Law and Procedure* §1.(2)(a), p. 5 (1959). An early effort to empower the President to order the deportation of those

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immigrants he “judge[d] dangerous to the peace and safety of the United States,” Act of June 25, 1798, ch. 58, 1 Stat. 571, was short lived and unpopular. Gordon §1.2, at 5. It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country, Act of Mar. 3, 1875, ch. 141, 18 Stat. 477. Gordon §1.2b, at 6. In 1891, Congress added to the list of excludable persons those “who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.” Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.<sup>2</sup>

The Immigration and Nationality Act of 1917 (1917 Act) brought “radical changes” to our law. S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 54–55 (1950). For the first time in our history, Congress made classes of noncitizens deportable based on conduct committed on American soil. *Id.*, at 55. Section 19 of the 1917 Act authorized the deportation of “any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States . . .” 39 Stat. 889. And §19 also rendered deportable noncitizen recidivists who commit two or more crimes of moral turpitude at any time after entry. *Ibid.* Congress did not, however, define the term “moral turpitude.”

While the 1917 Act was “radical” because it authorized deportation as a consequence of certain convictions, the Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation “that such alien

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<sup>2</sup>In 1907, Congress expanded the class of excluded persons to include individuals who “admit” to having committed a crime of moral turpitude. Act of Feb. 20, 1907, ch. 1134, 34 Stat. 899.

## Opinion of the Court

shall not be deported.” *Id.*, at 890.<sup>3</sup> This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was “consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation,” *Janvier v. United States*, 793 F. 2d 449, 452 (CA2 1986). Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.

Although narcotics offenses—such as the offense at issue in this case—provided a distinct basis for deportation as early as 1922,<sup>4</sup> the JRAD procedure was generally

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<sup>3</sup>As enacted, the statute provided:

“That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, . . . make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act.” 1917 Act, 39 Stat. 889–890.

This provision was codified in 8 U. S. C. §1251(b) (1994 ed.) (transferred to §1227 (2006 ed.)). The judge’s nondeportation recommendation was binding on the Secretary of Labor and, later, the Attorney General after control of immigration removal matters was transferred from the former to the latter. See *Janvier v. United States*, 793 F. 2d 449, 452 (CA2 1986).

<sup>4</sup>Congress first identified narcotics offenses as a special category of crimes triggering deportation in the 1922 Narcotic Drug Act. Act of May 26, 1922, ch. 202, 42 Stat. 596. After the 1922 Act took effect, there was some initial confusion over whether a narcotics offense also had to be a crime of moral turpitude for an individual to be deportable. See *Weedin v. Moy Fat*, 8 F. 2d 488, 489 (CA9 1925) (holding that an individual who committed narcotics offense was not deportable because offense did not involve moral turpitude). However, lower courts eventually agreed that the narcotics offense provision was “special,” *Chung*

## Opinion of the Court

available to avoid deportation in narcotics convictions. See *United States v. O'Rourke*, 213 F. 2d 759, 762 (CA8 1954). Except for “technical, inadvertent and insignificant violations of the laws relating to narcotics,” *ibid.*, it appears that courts treated narcotics offenses as crimes involving moral turpitude for purposes of the 1917 Act’s broad JRAD provision. See *ibid.* (recognizing that until 1952 a JRAD in a narcotics case “was effective to prevent deportation” (citing *Dang Nam v. Bryan*, 74 F. 2d 379, 380–381 (CA9 1934))).

In light of both the steady expansion of deportable offenses and the significant ameliorative effect of a JRAD, it is unsurprising that, in the wake of *Strickland v. Washington*, 466 U. S. 668 (1984), the Second Circuit held that the Sixth Amendment right to effective assistance of counsel applies to a JRAD request or lack thereof, see *Janvier*, 793 F. 2d 449. See also *United States v. Castro*, 26 F. 3d 557 (CA5 1994). In its view, seeking a JRAD was “part of the sentencing” process, *Janvier*, 793 F. 2d, at 452, even if deportation itself is a civil action. Under the Second Circuit’s reasoning, the impact of a conviction on a noncitizen’s ability to remain in the country was a central issue to be resolved during the sentencing process—not merely a collateral matter outside the scope of counsel’s duty to provide effective representation.

However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA),<sup>5</sup> and in

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*Que Fong v. Nagle*, 15 F. 2d 789, 790 (CA9 1926); thus, a narcotics offense did not need also to be a crime of moral turpitude (or to satisfy other requirements of the 1917 Act) to trigger deportation. See *United States ex rel. Grimaldi v. Ebey*, 12 F. 2d 922, 923 (CA7 1926); *Todaro v. Munster*, 62 F. 2d 963, 964 (CA10 1933).

<sup>5</sup>The Act separately codified the moral turpitude offense provision and the narcotics offense provision within 8 U. S. C. §1251(a) (1994 ed.) under subsections (a)(4) and (a)(11), respectively. See 66 Stat. 201, 204,

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1990 Congress entirely eliminated it, 104 Stat. 5050. In 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation, 110 Stat. 3009–596, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996, *INS v. St. Cyr*, 533 U. S. 289, 296 (2001). Under contemporary law, if a non-citizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses.<sup>6</sup> See 8 U. S. C. §1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. See §1101(a)(43)(B); §1228.

These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part<sup>7</sup>—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

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206. The JRAD procedure, codified in 8 U. S. C. §1251(b) (1994 ed.), applied only to the “provisions of subsection (a)(4),” the crimes-of-moral-turpitude provision. 66 Stat. 208; see *United States v. O'Rourke*, 213 F. 2d 759, 762 (CA8 1954) (recognizing that, under the 1952 Act, narcotics offenses were no longer eligible for JRADs).

<sup>6</sup>The changes to our immigration law have also involved a change in nomenclature; the statutory text now uses the term “removal” rather than “deportation.” See *Calcano-Martinez v. INS*, 533 U. S. 348, 350, n. 1 (2001).

<sup>7</sup>See Brief for Asian American Justice Center et al. as *Amici Curiae* 12–27 (providing real-world examples).

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## II

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 (1970); *Strickland*, 466 U. S., at 686. The Supreme Court of Kentucky rejected Padilla’s ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, *i.e.*, those matters not within the sentencing authority of the state trial court.<sup>8</sup> 253 S. W. 3d, at 483–484 (citing *Commonwealth v. Fuardado*, 170 S. W. 3d 384 (2005)). In its view, “collateral consequences are outside the scope of representation required by the Sixth Amendment,” and, therefore, the “failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel.” 253 S. W. 3d, at 483. The Kentucky high court is far from alone in this view.<sup>9</sup>

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<sup>8</sup>There is some disagreement among the courts over how to distinguish between direct and collateral consequences. See Roberts, Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, 95 Iowa L. Rev. 119, 124, n. 15 (2009). The disagreement over how to apply the direct/collateral distinction has no bearing on the disposition of this case because, as even JUSTICE ALITO agrees, counsel must, at the very least, advise a noncitizen “defendant that a criminal conviction may have adverse immigration consequences,” *post*, at 1 (opinion concurring in judgment). See also *post*, at 14 (“I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation”). In his concurring opinion, JUSTICE ALITO has thus departed from the strict rule applied by the Supreme Court of Kentucky and in the two federal cases that he cites, *post*, at 2.

<sup>9</sup>See, *e.g.*, *United States v. Gonzalez*, 202 F. 3d 20 (CA1 2000); *United States v. Del Rosario*, 902 F. 2d 55 (CADC 1990); *United States v. Yearwood*, 863 F. 2d 6 (CA4 1988); *Santos-Sanchez v. United States*, 548 F. 3d 327 (CA5 2008); *Broomes v. Ashcroft*, 358 F. 3d 1251 (CA10 2004); *United States v. Campbell*, 778 F. 2d 764 (CA11 1985); *Oyekoya v. State*, 558 So. 2d 990 (Ala. Ct. Crim. App. 1989); *State v. Rosas*, 183

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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. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that deportation is a particularly severe “penalty,” *Fong Yue Ting v. United States*, 149 U. S. 698, 740 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see *INS v. Lopez-Mendoza*, 468 U. S. 1032, 1038 (1984), deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, see Part I, *supra*, at 2–7. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context. *United States v. Russell*, 686 F. 2d 35, 38 (CAD 1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See *St. Cyr*, 533 U. S., at 322 (“There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions”).

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction

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Ariz. 421, 904 P. 2d 1245 (App. 1995); *State v. Montalban*, 2000–2739 (La. 2/26/02), 810 So. 2d 1106; *Commonwealth v. Frometa*, 520 Pa. 552, 555 A. 2d 92 (1989).

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is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim.

## III

Under *Strickland*, we first determine whether counsel's representation "fell below an objective standard of reasonableness." 466 U. S., at 688. Then we ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*, at 688. We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . ." *Ibid.*; *Bobby v. Van Hook*, 558 U. S. \_\_\_, \_\_\_ (2009) (*per curiam*) (slip op., at 3); *Florida v. Nixon*, 543 U. S. 175, 191, and n. 6 (2004); *Wiggins v. Smith*, 539 U. S. 510, 524 (2003); *Williams v. Taylor*, 529 U. S. 362, 396 (2000). Although they are "only guides," *Strickland*, 466 U. S., at 688, and not "inexorable commands," *Bobby*, 558 U. S., at \_\_\_ (slip op., at 5), these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. National Legal Aid and Defender Assn., Performance Guidelines for Criminal Representation §6.2 (1995); G. Herman, Plea Bargaining §3.03,

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pp. 20–21 (1997); Chin & Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 *Cornell L. Rev.* 697, 713–718 (2002); A. Campbell, *Law of Sentencing* §13:23, pp. 555, 560 (3d ed. 2004); Dept. of Justice, Office of Justice Programs, 2 *Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance*, pp. D10, H8–H9, J8 (2000) (providing survey of guidelines across multiple jurisdictions); ABA *Standards for Criminal Justice, Prosecution Function and Defense Function* 4–5.1(a), p. 197 (3d ed. 1993); ABA *Standards for Criminal Justice, Pleas of Guilty* 14–3.2(f), p. 116 (3d ed. 1999). “[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients . . . .” Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12–14 (footnotes omitted) (citing, *inter alia*, National Legal Aid and Defender Assn., *Guidelines, supra*, §§6.2–6.4 (1997); S. Bratton & E. Kelley, *Practice Points: Representing a Noncitizen in a Criminal Case*, 31 *The Champion* 61 (Jan./Feb. 2007); N. Tooby, *Criminal Defense of Immigrants* §1.3 (3d ed. 2003); 2 *Criminal Practice Manual* §§45:3, 45:15 (2009)).

We too have previously recognized that “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *St. Cyr*, 533 U. S., at 323 (quoting 3 *Criminal Defense Techniques* §§60A.01, 60A.02[2] (1999)). Likewise, we have recognized that “preserving the possibility of” discretionary relief from deportation under §212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, “would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.” *St. Cyr*, 533 U. S., at 323. We

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expected that counsel who were unaware of the discretionary relief measures would “follo[w] the advice of numerous practice guides” to advise themselves of the importance of this particular form of discretionary relief. *Ibid.*, n. 50.

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla’s conviction. See 8 U. S. C. §1227(a)(2)(B)(i) (“Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable”). Padilla’s counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla’s counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios

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posited by JUSTICE ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.<sup>10</sup> But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.

## IV

The Solicitor General has urged us to conclude that *Strickland* applies to Padilla's claim only to the extent that he has alleged affirmative misadvice. In the United States' view, "counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case . . .," though counsel is required to provide accurate advice if she chooses to discuss these matters. Brief for United States as *Amicus Curiae* 10.

Respondent and Padilla both find the Solicitor General's proposed rule unpersuasive, although it has support among the lower courts. See, e.g., *United States v. Couto*, 311 F. 3d 179, 188 (CA2 2002); *United States v. Kwan*, 407 F. 3d 1005 (CA9 2005); *Sparks v. Sowders*, 852 F. 2d 882 (CA6 1988); *United States v. Russell*, 686 F. 2d 35 (CA10 1982); *State v. Rojas-Martinez*, 2005 UT 86, 125 P. 3d 930, 935; *In re Resendiz*, 25 Cal. 4th 230, 19 P. 3d 1171 (2001). Kentucky describes these decisions isolating an affirmative misadvice claim as "result-driven, incestuous . . .

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<sup>10</sup> As JUSTICE ALITO explains at length, deportation consequences are often unclear. Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice.

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[,and] completely lacking in legal or rational bases.” Brief for Respondent 31. We do not share that view, but we agree that there is no relevant difference “between an act of commission and an act of omission” in this context. *Id.*, at 30; *Strickland*, 466 U. S., at 690 (“The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance”); see also *State v. Paredes*, 2004–NMSC–036, 136 N. M. 533, 538–539.

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of “the advantages and disadvantages of a plea agreement.” *Libretti v. United States*, 516 U. S. 29, 50–51 (1995). When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.<sup>11</sup> Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so “clearly satisfies the first prong of the *Strickland* analysis.” *Hill v. Lockhart*, 474 U. S. 52, 62 (1985) (White, J.,

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<sup>11</sup>As the Commonwealth conceded at oral argument, were a defendant’s lawyer to know that a particular offense would result in the client’s deportation and that, upon deportation, the client and his family might well be killed due to circumstances in the client’s home country, any decent attorney would inform the client of the consequences of his plea. Tr. of Oral Arg. 37–38. We think the same result should follow when the stakes are not life and death but merely “banishment or exile,” *Delgado v. Carmichael*, 332 U. S. 388, 390–391 (1947).

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concurring in judgment).

We have given serious consideration to the concerns that the Solicitor General, respondent, and *amici* have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar “floodgates” concern in *Hill*, see *id.*, at 58, but nevertheless applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.<sup>12</sup>

A flood did not follow in that decision’s wake. Surmounting *Strickland*’s high bar is never an easy task. See, e.g., 466 U. S., at 689 (“Judicial scrutiny of counsel’s performance must be highly deferential”); *id.*, at 693 (observing that “[a]ttorney errors . . . are as likely to be utterly harmless in a particular case as they are to be prejudicial”). Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. See *Roe v. Flores-Ortega*, 528 U. S. 470, 480, 486 (2000). There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to

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<sup>12</sup>However, we concluded that, even though *Strickland* applied to petitioner’s claim, he had not sufficiently alleged prejudice to satisfy *Strickland*’s second prong. *Hill*, 474 U. S., at 59–60. This disposition further underscores the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*’s prejudice prong.

JUSTICE ALITO believes that the Court misreads *Hill*, *post*, at 10–11. In *Hill*, the Court recognized—for the first time—that *Strickland* applies to advice respecting a guilty plea. 474 U. S., at 58 (“We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel”). It is true that *Hill* does not control the question before us. But its import is nevertheless clear. Whether *Strickland* applies to Padilla’s claim follows from *Hill*, regardless of the fact that the *Hill* Court did not resolve the particular question respecting misadvice that was before it.

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separate specious claims from those with substantial merit.

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. See, *supra*, at 11–13. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty. *Strickland*, 466 U. S., at 689.

Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions.<sup>13</sup> But they account for only approximately 30% of the habeas petitions filed.<sup>14</sup> The nature of relief secured by a successful collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs whether it is wise to challenge a

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<sup>13</sup>See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2003, p. 418 (31st ed. 2005) (Table 5.17) (only approximately 5%, or 8,612 out of 68,533, of federal criminal prosecutions go to trial); *id.*, at 450 (Table 5.46) (only approximately 5% of all state felony criminal prosecutions go to trial).

<sup>14</sup>See V. Flango, National Center for State Courts, Habeas Corpus in State and Federal Courts 36–38 (1994) (demonstrating that 5% of defendants whose conviction was the result of a trial account for approximately 70% of the habeas petitions filed).

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guilty plea in a habeas proceeding because, ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. *Hill*, 474 U. S., at 57; see also *Richardson*, 397 U. S., at 770–771. The severity of deportation—“the equivalent of banishment or exile,” *Delgadillo v. Carmichael*, 332 U. S. 388, 390–391 (1947)—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.<sup>15</sup>

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<sup>15</sup>To this end, we find it significant that the plea form currently used in Kentucky courts provides notice of possible immigration conse-

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## V

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the “mercies of incompetent counsel.” *Richardson*, 397 U. S., at 771. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Taking as true the basis for his motion for postconviction relief, we have little difficulty concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below. See *Verizon Communications Inc. v. FCC*, 535 U. S. 467, 530 (2002).

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quences. Ky. Admin. Office of Courts, Motion to Enter Guilty Plea, Form AOC-491 (Rev. 2/2003), <http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf> (as visited Mar. 29, 2010, and available in Clerk of Court’s case file). Further, many States require trial courts to advise defendants of possible immigration consequences. See, e.g., Alaska Rule Crim. Proc. 11(c)(3)(C) (2009–2010); Cal. Penal Code Ann. §1016.5 (West 2008); Conn. Gen. Stat. §54-1j (2009); D. C. Code §16-713 (2001); Fla. Rule Crim. Proc. 3.172(c)(8) (Supp. 2010); Ga. Code Ann. §17-7-93(c) (1997); Haw. Rev. Stat. Ann. §802E-2 (2007); Iowa Rule Crim. Proc. 2.8(2)(b)(3) (Supp. 2009); Md. Rule 4-242 (Lexis 2009); Mass. Gen. Laws, ch. 278, §29D (2009); Minn. Rule Crim. Proc. 15.01 (2009); Mont. Code Ann. §46-12-210 (2009); N. M. Rule Crim. Form 9-406 (2009); N. Y. Crim. Proc. Law Ann. §220.50(7) (West Supp. 2009); N. C. Gen. Stat. Ann. §15A-1022 (Lexis 2007); Ohio Rev. Code Ann. §2943.031 (West 2006); Ore. Rev. Stat. §135.385 (2007); R. I. Gen. Laws §12-12-22 (Lexis Supp. 2008); Tex. Code Ann. Crim. Proc., Art. 26.13(a)(4) (Vernon Supp. 2009); Vt. Stat. Ann., Tit. 13, §6565(c)(1) (Supp. 2009); Wash. Rev. Code §10.40.200 (2008); Wis. Stat. §971.08 (2005–2006).

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The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

ALITO, J., concurring in judgment

**SUPREME COURT OF THE UNITED STATES**

No. 08–651

JOSE PADILLA, PETITIONER *v.* KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
KENTUCKY

[March 31, 2010]

JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland v. Washington*, 466 U. S. 668 (1984), if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney. I do not agree with the Court that the attorney must attempt to explain what those consequences may be. As the Court concedes, “[i]mmigration law can be complex”; “it is a legal specialty of its own”; and “[s]ome members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it.” *Ante*, at 11. The Court nevertheless holds that a criminal defense attorney must provide advice in this specialized area in those cases in which the law is “succinct and straightforward”—but not, perhaps, in other situations. *Ante*, at 11–12. This vague, halfway test will lead to much confusion and needless litigation.

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## I

Under *Strickland*, an attorney provides ineffective assistance if the attorney's representation does not meet reasonable professional standards. 466 U.S., at 688. Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction. See, e.g., *United States v. Gonzalez*, 202 F. 3d 20, 28 (CA1 2000) (ineffective-assistance-of-counsel claim fails if "based on an attorney's failure to advise a client of his plea's immigration consequences"); *United States v. Banda*, 1 F. 3d 354, 355 (CA5 1993) (holding that "an attorney's failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel"); see generally Chin & Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 699 (2002) (hereinafter Chin & Holmes) (noting that "virtually all jurisdictions"—including "eleven federal circuits, more than thirty states, and the District of Columbia"—"hold that defense counsel need not discuss with their clients the collateral consequences of a conviction," including deportation). While the line between "direct" and "collateral" consequences is not always clear, see *ante*, at 7, n. 8, the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess fire-

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arms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. *Chin & Holmes* 705–706. A criminal conviction may also severely damage a defendant’s reputation and thus impair the defendant’s ability to obtain future employment or business opportunities. All of those consequences are “seriou[s],” see *ante*, at 17, but this Court has never held that a criminal defense attorney’s Sixth Amendment duties extend to providing advice about such matters.

The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations. See *ante*, at 9 (“The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation”). However, ascertaining the level of professional competence required by the Sixth Amendment is ultimately a task for the courts. *E.g.*, *Roe v. Flores-Ortega*, 528 U. S. 470, 477 (2000). Although we may appropriately consult standards promulgated by private bar groups, we cannot delegate to these groups our task of determining what the Constitution commands. See *Strickland, supra*, at 688 (explaining that “[p]revailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable, but they are only guides”). And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.

Even if the only relevant consideration were “prevailing professional norms,” it is hard to see how those norms can support the duty the Court today imposes on defense counsel. Because many criminal defense attorneys have little understanding of immigration law, see *ante*, at 11, it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms. But the Court’s opinion would not just require defense counsel to warn the client

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of a general *risk* of removal; it would also require counsel in at least some cases, to specify what the removal *consequences* of a conviction would be. See *ante*, at 11–12.

The Court’s new approach is particularly problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex. “Most crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as *crimes involving moral turpitude* or *aggravated felonies*.” M. Garcia & L. Eig, CRS Report for Congress, Immigration Consequences of Criminal Activity (Sept. 20, 2006) (summary) (emphasis in original). As has been widely acknowledged, determining whether a particular crime is an “aggravated felony” or a “crime involving moral turpitude [(CIMT)]” is not an easy task. See R. McWhirter, ABA, The Criminal Lawyer’s Guide to Immigration Law: Questions and Answers 128 (2d ed. 2006) (hereinafter ABA Guidebook) (“Because of the increased complexity of aggravated felony law, this edition devotes a new [30-page] chapter to the subject”); *id.*, §5.2, at 146 (stating that the aggravated felony list at 8 U. S. C. §1101(a)(43) is not clear with respect to several of the listed categories, that “the term ‘aggravated felonies’ can include misdemeanors,” and that the determination of whether a crime is an “aggravated felony” is made “even more difficult” because “several agencies and courts interpret the statute,” including Immigration and Customs Enforcement, the Board of Immigration Appeals (BIA), and Federal Circuit and district courts considering immigration-law and criminal-law issues); ABA Guidebook §4.65, at 130 (“Because nothing is ever simple with immigration law, the terms ‘conviction,’ ‘moral turpitude,’ and ‘single scheme of criminal misconduct’ are terms of art”); *id.*, §4.67, at 130 (“[T]he term ‘moral turpitude’ evades precise definition”).

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Defense counsel who consults a guidebook on whether a particular crime is an “aggravated felony” will often find that the answer is not “easily ascertained.” For example, the ABA Guidebook answers the question “Does simple possession count as an aggravated felony?” as follows: “Yes, *at least in the Ninth Circuit.*” §5.35, at 160 (emphasis added). After a dizzying paragraph that attempts to explain the evolution of the Ninth Circuit’s view, the ABA Guidebook continues: “Adding to the confusion, however, is that the Ninth Circuit has conflicting opinions depending on the context on whether simple drug possession constitutes an aggravated felony under 8 U. S. C. §1101(a)(43).” *Id.*, §5.35, at 161 (citing cases distinguishing between whether a simple possession offense is an aggravated felony “for immigration purposes” or for “sentencing purposes”). The ABA Guidebook then proceeds to explain that “*attempted possession,*” *id.*, §5.36, at 161 (emphasis added), of a controlled substance *is* an aggravated felony, while “[c]onviction under the federal *accessory after the fact* statute is *probably not* an aggravated felony, but a conviction for accessory after the fact to the manufacture of methamphetamine *is* an aggravated felony,” *id.*, §5.37, at 161 (emphasis added). Conspiracy or attempt to commit drug trafficking are aggravated felonies, but “[s]olicitation is not a drug-trafficking offense because a generic solicitation offense is not an offense related to a controlled substance and therefore not an aggravated felony.” *Id.*, §5.41, at 162.

Determining whether a particular crime is one involving moral turpitude is no easier. See *id.*, at 134 (“Writing bad checks *may or may not* be a CIMT” (emphasis added)); *ibid.* (“[R]eckless assault coupled with an element of injury, but not serious injury, is *probably not* a CIMT” (emphasis added)); *id.*, at 135 (misdemeanor driving under the influence is generally not a CIMT, but may be a CIMT if the DUI results in injury or if the driver knew that his

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license had been suspended or revoked); *id.*, at 136 (“If there is no element of actual injury, the endangerment offense *may* not be a CIMT” (emphasis added)); *ibid.* (“Whether [a child abuse] conviction involves moral turpitude *may* depend on the subsection under which the individual is convicted. Child abuse done with criminal negligence *probably* is not a CIMT” (emphasis added)).

Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law. To take just a few examples, it may be hard, in some cases, for defense counsel even to determine whether a client is an alien,<sup>1</sup> or whether a particular state disposition will result in a “conviction” for purposes of federal immigration law.<sup>2</sup> The task of offering advice about the immigration consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with

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<sup>1</sup>Citizens are not deportable, but “[q]uestions of citizenship are not always simple.” ABA Guidebook §4.20, at 113 (explaining that U.S. citizenship conferred by blood is “derivative,” and that “[d]erivative citizenship depends on a number of confusing factors, including whether the citizen parent was the mother or father, the immigration laws in effect at the time of the parents’ and/or defendant’s birth, and the parents’ marital status”).

<sup>2</sup>“A disposition that is not a ‘conviction,’ under state law may still be a ‘conviction’ for immigration purposes.” *Id.*, §4.32, at 117 (citing *Matter of Salazar*, 23 I. & N. Dec. 223, 231 (BIA 2002) (en banc)). For example, state law may define the term “conviction” not to include a deferred adjudication, but such an adjudication would be deemed a conviction for purposes of federal immigration law. See ABA Guidebook §4.37; accord, D. Kesselbrenner & L. Rosenberg, *Immigration Law and Crimes* §2:1, p. 2–2 (2008) (hereinafter *Immigration Law and Crimes*) (“A practitioner or respondent will not even know whether the Department of Homeland Security (DHS) or the Executive Office for Immigration Review (EOIR) will treat a particular state disposition as a conviction for immigration purposes. In fact, the [BIA] treats certain state criminal dispositions as convictions even though the state treats the same disposition as a dismissal”).

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which immigration law changes; different rules governing the immigration consequences of juvenile, first-offender, and foreign convictions; and the relationship between the “length and type of sentence” and the determination “whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen,” Immigration Law and Crimes §2:1, at 2–2 to 2–3.

In short, the professional organizations and guidebooks on which the Court so heavily relies are right to say that “nothing is ever simple with immigration law”—including the determination whether immigration law clearly makes a particular offense removable. ABA Guidebook §4.65, at 130; Immigration Law and Crimes §2:1. I therefore cannot agree with the Court’s apparent view that the Sixth Amendment requires criminal defense attorneys to provide immigration advice.

The Court tries to downplay the severity of the burden it imposes on defense counsel by suggesting that the scope of counsel’s duty to offer advice concerning deportation consequences may turn on how hard it is to determine those consequences. Where “the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[s]” of a conviction, the Court says, counsel has an affirmative duty to advise the client that he will be subject to deportation as a result of the plea. *Ante*, at 11. But “[w]hen the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” *Ante*, at 11–12. This approach is problematic for at least four reasons.

First, it will not always be easy to tell whether a particular statutory provision is “succinct, clear, and explicit.” How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in

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isolation? What if the application of the provision to a particular case is not clear but a cursory examination of case law or administrative decisions would provide a definitive answer? See Immigration Law and Crimes §2:1, at 2–2 (“Unfortunately, a practitioner or respondent cannot tell easily whether a conviction is for a removable offense. . . . [T]he cautious practitioner or apprehensive respondent will not know conclusively the future immigration consequences of a guilty plea”).

Second, if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable. If an alien charged with such an offense is advised only that pleading guilty to such an offense will not result in removal, the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States if the alien returns to his or her home country for any reason, such as to visit an elderly parent or to attend a funeral. See ABA Guidebook §4.14, at 111 (“Often the alien is both *excludable* and *removable*. At times, however, the lists are different. Thus, the oddity of an alien that is inadmissible but not deportable. This alien should not leave the United States because the government will not let him back in” (emphasis in original)). Incomplete legal advice may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.

Third, the Court’s rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem—such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences. As *amici* point out, “28 states and the

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District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas.” Brief for State of Louisiana et al. 25; accord, Chin & Holmes 708 (“A growing number of states require advice about deportation by statute or court rule”). A nonconstitutional rule requiring trial judges to inform defendants on the record of the risk of adverse immigration consequences can ensure that a defendant receives needed information without putting a large number of criminal convictions at risk; and because such a warning would be given on the record, courts would not later have to determine whether the defendant was misrepresenting the advice of counsel. Likewise, flexible statutory procedures for withdrawing guilty pleas might give courts appropriate discretion to determine whether the interests of justice would be served by allowing a particular defendant to withdraw a plea entered into on the basis of incomplete information. Cf. *United States v. Russell*, 686 F. 2d 35, 39–40 (CA DC 1982) (explaining that a district court’s discretion to set aside a guilty plea under the Federal Rules of Criminal Procedure should be guided by, among other considerations, “the possible existence of prejudice to the government’s case as a result of the defendant’s untimely request to stand trial” and “the strength of the defendant’s reason for withdrawing the plea, including whether the defendant asserts his innocence of the charge”).

Fourth, the Court’s decision marks a major upheaval in Sixth Amendment law. This Court decided *Strickland* in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel’s failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant’s Sixth Amendment right to counsel. As noted above, the Court’s view has been rejected by every Federal Court

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of Appeals to have considered the issue thus far. See, e.g., *Gonzalez*, 202 F. 3d, at 28; *Banda*, 1 F. 3d, at 355; Chin & Holmes 697, 699. The majority appropriately acknowledges that the lower courts are “now quite experienced with applying *Strickland*,” *ante*, at 14, but it casually dismisses the longstanding and unanimous position of the lower federal courts with respect to the scope of criminal defense counsel’s duty to advise on collateral consequences.

The majority seeks to downplay its dramatic expansion of the scope of criminal defense counsel’s duties under the Sixth Amendment by claiming that this Court in *Hill v. Lockhart*, 474 U. S. 52 (1985), similarly “applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.” *Ante*, at 14. That characterization of *Hill* obscures much more than it reveals. The issue in *Hill* was whether a criminal defendant’s Sixth Amendment right to counsel was violated where counsel misinformed the client about his eligibility for parole. The Court found it “unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner’s allegations are insufficient to satisfy the *Strickland v. Washington* requirement of ‘prejudice.’” 474 U. S., at 60. Given that *Hill* expressly and unambiguously refused to decide whether criminal defense counsel must *avoid misinforming* his or her client as to *one* consequence of a criminal conviction (parole eligibility), that case plainly provides no support whatsoever for the proposition that counsel must *affirmatively advise* his or her client as to *another* collateral consequence (removal). By the Court’s strange logic, *Hill* would support its decision here even if the Court had held that misadvice concerning parole eligibility does *not* make counsel’s performance

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objectively unreasonable. After all, the Court still would have “applied *Strickland*” to the facts of the case at hand.

## II

While mastery of immigration law is not required by *Strickland*, several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.

First, a rule prohibiting affirmative misadvice regarding a matter as crucial to the defendant’s plea decision as deportation appears faithful to the scope and nature of the Sixth Amendment duty this Court has recognized in its past cases. In particular, we have explained that “a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not ‘a reasonably competent attorney’ and the advice was not ‘within the range of competence demanded of attorneys *in criminal cases.*’” *Strickland*, 466 U. S., at 687 (quoting *McMann v. Richardson*, 397 U. S. 759, 770, 771 (1970); emphasis added). As the Court appears to acknowledge, thorough understanding of the intricacies of immigration law is not “within the range of competence demanded of attorneys *in criminal cases.*” See *ante*, at 11 (“Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it”). By contrast, reasonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar. Candor concerning the limits of one’s professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases. As the dissenting judge on the Kentucky Supreme Court put it, “I do not believe it is too much of a burden to place

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on our defense bar the duty to say, ‘I do not know.’” 253 S. W. 3d 482, 485 (2008).

Second, incompetent advice distorts the defendant’s decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question. See *Strickland*, 466 U. S., at 686 (“In giving meaning to the requirement [of effective assistance of counsel], we must take its purpose—to ensure a fair trial—as the guide”). When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea, the defendant can fairly be said to assume the risk that the conviction may carry indirect consequences of which he or she is not aware. That is not the case when a defendant bases the decision to plead guilty on counsel’s express misrepresentation that the defendant will not be removable. In the latter case, it seems hard to say that the plea was entered with the advice of constitutionally competent counsel—or that it embodies a voluntary and intelligent decision to forsake constitutional rights. See *ibid.* (“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result”).

Third, a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences.

Finally, the conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court’s approach, not require any upheaval in the law. As the Solicitor General points out, “[t]he vast majority of the

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lower courts considering claims of ineffective assistance in the plea context have [distinguished] between defense counsel who remain silent and defense counsel who give affirmative misadvice.” Brief for United States as *Amicus Curiae* 8 (citing cases). At least three Courts of Appeals have held that affirmative misadvice on immigration matters can give rise to ineffective assistance of counsel, at least in some circumstances.<sup>3</sup> And several other Circuits have held that affirmative misadvice concerning nonimmigration consequences of a conviction can violate the Sixth Amendment even if those consequences might be deemed “collateral.”<sup>4</sup> By contrast, it appears that no court of appeals holds that affirmative misadvice concerning collateral consequences in general and removal in particular can *never* give rise to ineffective assistance. In short,

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<sup>3</sup>See *United States v. Kwan*, 407 F. 3d 1005, 1015–1017 (CA9 2005); *United States v. Couto*, 311 F. 3d 179, 188 (CA2 2002); *Downs-Morgan v. United States*, 765 F. 2d 1534, 1540–1541 (CA11 1985) (limiting holding to the facts of the case); see also *Santos-Sanchez v. United States*, 548 F. 3d 327, 333–334 (CA5 2008) (concluding that counsel’s advice was not objectively unreasonable where counsel did not purport to answer questions about immigration law, did not claim any expertise in immigration law, and simply warned of “possible” deportation consequence; use of the word “possible” was not an affirmative misrepresentation, even though it could indicate that deportation was not a certain consequence).

<sup>4</sup>See *Hill v. Lockhart*, 894 F. 2d 1009, 1010 (CA8 1990) (en banc) (“[T]he erroneous parole-eligibility advice given to Mr. Hill was ineffective assistance of counsel under *Strickland v. Washington*”); *Sparks v. Sowders*, 852 F. 2d 882, 885 (CA6 1988) (“[G]ross misadvice concerning parole eligibility can amount to ineffective assistance of counsel”); *id.*, at 886 (Kennedy, J., concurring) (“When the maximum possible exposure is overstated, the defendant might well be influenced to accept a plea agreement he would otherwise reject”); *Strader v. Garrison*, 611 F. 2d 61, 65 (CA4 1979) (“[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel”).

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the considered and thus far unanimous view of the lower federal courts charged with administering *Strickland* clearly supports the conclusion that that Kentucky Supreme Court's position goes too far.

In concluding that affirmative misadvice regarding the removal consequences of a criminal conviction may constitute ineffective assistance, I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation. When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.

### III

In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel's duty to assist the client. Instead, an alien defendant's Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.

SCALIA, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 08–651

JOSE PADILLA, PETITIONER *v.* KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
KENTUCKY

[March 31, 2010]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.

The Sixth Amendment guarantees the accused a lawyer “for his defense” against a “criminal prosecutio[n]”—not for sound advice about the collateral consequences of conviction. For that reason, and for the practical reasons set forth in Part I of JUSTICE ALITO’s concurrence, I dissent from the Court’s conclusion that the Sixth Amendment requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about those consequences renders an attorney’s assistance in defending against the prosecution constitutionally inadequate; or that the Sixth Amendment requires counsel to warn immigrant defendants that a conviction may render them removable. Statutory provisions can remedy these concerns in a more targeted fashion, and without producing

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permanent, and legislatively irreparable, overkill.

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The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel. See, *United States v. Van Duzee*, 140 U. S. 169, 173 (1891); W. Beaney, *Right to Counsel in American Courts* 21, 28–29 (1955). We have held, however, that the Sixth Amendment requires the provision of counsel to indigent defendants at government expense, *Gideon v. Wainwright*, 372 U. S. 335, 344–345 (1963), and that the right to “the assistance of counsel” includes the right to *effective* assistance, *Strickland v. Washington*, 466 U. S. 668, 686 (1984). Even assuming the validity of these holdings, I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create. We have until today at least retained the Sixth Amendment’s textual limitation to criminal prosecutions. “[W]e have held that ‘defence’ means defense at trial, not defense in relation to other objectives that may be important to the accused.” *Rothgery v. Gillespie County*, 554 U. S. \_\_\_, \_\_\_ (2008) (ALITO, J., concurring) (slip op., at 4) (summarizing cases). We have limited the Sixth Amendment to legal advice directly related to defense against prosecution of the charged offense—advice at trial, of course, but also advice at postindictment interrogations and lineups, *Massiah v. United States*, 377 U. S. 201, 205–206 (1964); *United States v. Wade*, 388 U. S. 218, 236–238 (1967), and in general advice at all phases of the prosecution where the defendant would be at a disadvantage when pitted alone against the legally trained agents of the state, see *Moran v. Burbine*, 475 U. S. 412, 430 (1986). Not only have we not required advice of counsel regarding consequences collateral to prosecution, we have not even required counsel appointed to defend against one prosecution to be

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present when the defendant is interrogated in connection with another possible prosecution arising from the same event. *Texas v. Cobb*, 532 U. S. 162, 164 (2001).

There is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand—to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction. Such matters fall within “the range of competence demanded of attorneys in criminal cases,” *McMann v. Richardson*, 397 U. S. 759, 771 (1970). See *id.*, at 769–770 (describing the matters counsel and client must consider in connection with a contemplated guilty plea). We have never held, as the logic of the Court’s opinion assumes, that once counsel is appointed all professional responsibilities of counsel—even those extending beyond defense against the prosecution—become constitutional commands. Cf. *Cobb, supra*, at 171, n. 2; *Moran, supra*, at 430. Because the subject of the misadvice here was not the prosecution for which Jose Padilla was entitled to effective assistance of counsel, the Sixth Amendment has no application.

Adding to counsel’s duties an obligation to advise about a conviction’s collateral consequences has no logical stopping-point. As the concurrence observes,

“[A] criminal convictio[n] can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. . . . All of those consequences are ‘serious,’ . . .” *Ante*, at 2–3 (ALITO, J., concurring in judgment).

But it seems to me that the concurrence suffers from the

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same defect. The same indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice. And the concurrence's suggestion that counsel must warn defendants of potential removal consequences, see *ante*, at 14–15—what would come to be known as the “*Padilla* warning”—cannot be limited to those consequences except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act, 18 U. S. C. §924(e). We could expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar's devising of ever-expanding categories of plea-invalidating misadvice and failures to warn—not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given.

The concurrence's treatment of misadvice seems driven by concern about the voluntariness of Padilla's guilty plea. See *ante*, at 12. But that concern properly relates to the Due Process Clauses of the Fifth and Fourteenth Amendments, not to the Sixth Amendment. See *McCarthy v. United States*, 394 U. S. 459, 466 (1969); *Brady v. United States*, 397 U. S. 742, 748 (1970). Padilla has not argued before us that his guilty plea was not knowing and voluntary. If that is, however, the true substance of his claim (and if he has properly preserved it) the state court can address it on remand.<sup>1</sup> But we should not smuggle the

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<sup>1</sup>I do not mean to suggest that the Due Process Clause would surely provide relief. We have indicated that awareness of “direct consequences” suffices for the validity of a guilty plea. See *Brady*, 397 U. S., at 755 (internal quotation marks omitted). And the required colloquy between a federal district court and a defendant required by Federal Rule of Criminal Procedure 11(b) (formerly Rule 11(c)), which we have said approximates the due process requirements for a valid plea, see *Libretti v. United States*, 516 U. S. 29, 49–50 (1995), does not mention

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claim into the Sixth Amendment.

The Court's holding prevents legislation that could solve the problems addressed by today's opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given.<sup>2</sup> Moreover, legislation could provide consequences for the misadvice, nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses and evidence needed for retrial have disappeared. Federal immigration law might provide, for example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel's misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today's sledge hammer.

In sum, the Sixth Amendment guarantees adequate assistance of counsel in defending against a pending criminal prosecution. We should limit both the constitutional obligation to provide advice and the consequences of bad advice to that well defined area.

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collateral consequences. Whatever the outcome, however, the effect of misadvice regarding such consequences upon the validity of a guilty plea should be analyzed under the Due Process Clause.

<sup>2</sup>As the Court's opinion notes, *ante*, at 16–17, n. 15, many States—including Kentucky—already require that criminal defendants be warned of potential removal consequences.



**A Defending Immigrants Partnership Practice Advisory\***  
**DUTY OF CRIMINAL DEFENSE COUNSEL REPRESENTING**  
**AN IMMIGRANT DEFENDANT AFTER PADILLA V. KENTUCKY**  
April 6, 2010

On March 31, the Supreme Court issued its momentous Sixth Amendment right to counsel decision in *Padilla v. Kentucky*, 599 U.S. \_\_\_ (2010). The Court held that, in light of the unique severity of deportation and the reality that immigration consequences of criminal convictions are inextricably linked to the criminal proceedings, **the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel.**

**Some Key Padilla Take-Away Points for Criminal Defense Lawyers**

- **Deportation is a “penalty,” not a “collateral consequence,” of the criminal proceeding.** The Court held that deportation is a “particularly severe penalty” and made clear that the “direct vs. collateral” distinction does not apply to immigration consequences and does not preclude ineffective assistance of counsel (IAC) claims based upon failure to provide correct advice about immigration consequences.
- **Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel.** In support of its decision, the Court relied on professional standards that generally require counsel to **determine citizenship/immigration status** of their clients and to **investigate and advise** a noncitizen client about the immigration consequences of alternative dispositions of the criminal case.
- **The Sixth Amendment requires affirmative, competent advice regarding immigration consequences; non-advice (silence) is insufficient (ineffective).** In reaching its holding, the Court expressly rejected limiting immigration-related IAC claims to cases involving misadvice. It thus made clear that a defense lawyer’s silence regarding immigration consequences of a guilty plea constitutes IAC. Even where the deportation consequences of a particular plea are unclear or uncertain, a criminal defense attorney must still advise a noncitizen client regarding the possibility of adverse immigration consequences.
- **The Court endorsed “informed consideration” of deportation consequences by both the defense and the prosecution during plea-bargaining.** The Court specifically highlighted the benefits and appropriateness of the defense and the prosecution factoring immigration consequences into plea negotiations in order to craft a conviction and sentence that reduce the likelihood of deportation while promoting the interests of justice.

**What is Covered in this Practice Advisory**

This advisory provides initial guidance on the duty of criminal defense counsel representing an immigrant defendant after *Padilla*. The Defending Immigrants Partnership will later provide guidance on issues not covered here, including the ability to attack a *past* conviction based on ineffective assistance under *Padilla*.

- I. **Summary & Key Points of the Padilla Decision for Defense Lawyers** (pp. 2-4)
- II. **Brief Review of Select Defense Lawyer Professional Standards Cited by the Court** (pp. 4-6)
  - Duty to inquire about citizenship/immigration status at initial interview stage
  - Duty to investigate and advise about immigration consequences of plea alternatives
  - Duty to investigate and advise about immigration consequences of sentencing alternatives

Appendix A – **Immigration Consequences of Criminal Convictions Summary Checklist** (starting point for inquiry)

Appendix B – **Resources for Criminal Defense Lawyers** (more extensive national, regional and state resources)

## I. Summary & Key Points of the *Padilla* Decision for Defense Lawyers

### A. Summary

**Background.** In *Padilla v. Kentucky*, the petitioner was a lawful permanent resident immigrant who faced deportation after pleading guilty in a Kentucky court to the transportation of a large amount of marijuana in his tractor-trailer. In a post-conviction proceeding, Mr. Padilla claimed that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he “did not have to worry about immigration status since he had been in the country so long.” Mr. Padilla stated that he relied on his counsel’s erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory.

**The Kentucky Supreme Court’s Ruling.** The Kentucky Supreme Court denied Mr. Padilla post-conviction relief based on a holding that the Sixth Amendment’s guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a “collateral” consequence of his conviction.<sup>1</sup>

**The U.S. Supreme Court’s Response.** The U.S. Supreme Court disagreed with the Kentucky Supreme Court and agreed with Mr. Padilla that “constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.” *Padilla*, slip op. at 2. The Court observed that “[t]he landscape of federal immigration law has changed dramatically over the last 90 years.” *Id.* at 2. The Court stated:

While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.

*Id.* at 2 (citations omitted).

Based on these changes, the Court concluded that “accurate legal advice for noncitizens accused of crimes has never been more important” and that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Id.* at 6.

In Mr. Padilla’s case, the Court found that the removal consequences for his conviction were clear, and that he had sufficiently alleged constitutional deficiency to satisfy the first prong of the *Strickland* test – that his representation had fallen below an “objective standard of reasonableness.”<sup>2</sup>

**The Supreme Court’s Holding in *Padilla*: Sixth Amendment Requires Immigration Advice.** The Court held that, for Sixth Amendment purposes, defense counsel must inform a noncitizen client whether his or her plea carries a risk of deportation. The Court stated: “Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.” *Id.* at 17.

### B. Key Points For Defense Lawyers

#### 1. Deportation is a “penalty”, not a “collateral consequence”, of the criminal proceeding.

With respect to the distinction drawn by the Kentucky Supreme Court between direct and collateral consequences of a criminal conviction, the Court noted that it has never applied such a distinction to define the scope of the constitutionally “reasonable professional assistance” required under *Strickland v. Washington*, 466

U.S. 668 (1984). *Padilla*, slip op. at 8. It found, however, that it need not decide whether the direct/collateral distinction is appropriate in general because of the unique nature of deportation, which it classified as a "particularly severe penalty" that is intimately related to the criminal process. *Id.* The Court stated:

Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century . . . And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. . . . Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. . . . Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence.

*Id.* (citations omitted).

## **2. Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel.**

In assessing whether the counsel's representation in the *Padilla* case fell below the familiar *Strickland* "objective standard of reasonableness," the Court relied on prevailing professional norms, which it stated supported the view that defense counsel must advise noncitizen clients regarding the risk of deportation:

We long have recognized that that "[p]revailing norms of practice as reflected in the American Bar Association standards and the like . . . are guides to determining what is reasonable . . . ." . . . [T]hese standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law. . . . Authorities of every stripe—including the American Bar Association, criminal defense and public defender organization, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients.

*Padilla* at 9-10 (citations omitted).

## **3. The Sixth Amendment requires affirmative and competent advice regarding immigration consequences; non-advice (silence) is insufficient (ineffective).**

Finding that the "weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation," *id.* at 9, the Court concluded that counsel's misadvice in the *Padilla* case fell below the familiar *Strickland* "objective standard of reasonableness." The Court further noted that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Id.* at 10 (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)).

The Court, though, did not stop there: it found that the Sixth Amendment requires affirmative advice regarding immigration consequences. It made this clear by rejecting the position of amicus United States that *Strickland* only applies to claims of misadvice, stating that "there is no relevant difference 'between an act of commission and an act of omission' in this context." *Id.* at 13 (citing *Strickland*, 466 U.S. at 690). The Court explained:

A holding limited to affirmative misadvice . . . would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." . . . When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.

*Id.* (citations omitted).

The Court acknowledged that immigration law can be complex, and that there will be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The Court stated that, when the deportation consequences of a particular plea are unclear or uncertain, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* at 11-12. But the Court then went on to say that "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id.* at 12. Whether or not the consequences are clear or unclear, however, the Court made clear that the governing test is the *Strickland* test of whether counsel's representation "fell below an objective standard of reasonableness," and that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 9 (quoting *Strickland*, 466 U.S. at 688). Under those norms, "[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'" *Id.* at 14 (citation omitted).

#### **4. The Court endorsed "informed consideration" of deportation consequences by both the defense and the prosecution during plea-bargaining.**

The Court recognized that "informed consideration" of immigration consequences are a legitimate part of the plea-bargaining process, both on the part of the defense and the prosecution. The Court stated:

[I]nformed consideration of possible deportation can only benefit both the State and the noncitizen defendants during the plea bargaining process. . . . By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. . . . Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation . . . . At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty . . . .

*Id.* at 16.

## **II. Brief Review of Select Defense Lawyer Professional Standards Cited by the Court**

In support of its holding that defense counsel's failure to inform a noncitizen client that his or her plea carries a risk of deportation constitutes ineffective assistance of counsel for Sixth Amendment purposes, the Court cited professional standards that it described as "valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law." *Padilla*, slip op. at 9. The Court cited, among such standards, the National Legal Aid and Defender Association (NLADA) Performance Guidelines for Criminal Representation (1995) (hereinafter, "NLADA Guidelines"), and the American Bar Association (ABA) Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999) (hereinafter, "ABA Pleas of Guilty Standards").

In order to assist defense counsel seeking guidance on how to comply with their legal and ethical duties to noncitizen defendants, this section of the Practice Advisory will highlight some of the NLADA and ABA standards recognized by the Supreme Court as reflecting the prevailing professional norms for defense lawyer representation of noncitizen clients. While these standards provide that competent defense counsel must take immigration consequences into account at all stages of the process, this section will focus in particular on defense lawyer responsibilities at the plea bargaining stage, the stage of representation at issue in the *Padilla* case.

### **Duty to inquire about citizenship/immigration status at initial interview stage:**

Defense lawyer professional standards generally recognize that proper representation begins with a firm understanding of the client's individual situation and overall objectives, including with respect to immigration status. For example, the ABA Pleas of Guilty Standards commentary urges counsel to "interview the client to

determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces." *Id.* cmt. at 127. It then notes that "it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction." *Id.*

In order to comply with a defense lawyer's professional responsibilities, counsel should determine the immigration status of every client at the *initial* interview. See NLADA Guideline 2.2(b)(2)(A). Without knowledge that the client is a noncitizen, the lawyer obviously cannot fulfill his or her responsibilities—recognized by the Supreme Court and these professional standards (see "Duty to investigate and advise about immigration consequences of plea alternatives" and "Duty to investigate and advise about immigration consequences of sentencing alternatives" below)—to advise about immigration consequences. Moreover, merely knowing that your client is a noncitizen may not be enough: while the degree of certainty of the advice may vary depending on how settled the consequences are under immigration law, it is often not possible to know whether the consequences will be certain or uncertain without knowing a client's *specific* immigration status. Thus, it is necessary to identify a client's specific status (whether lawful permanent resident, refugee or asylee, temporary visitor, undocumented, etc.) in order to ensure the ability to provide correct advice later about the immigration consequences of a particular plea/sentence. See *State v. Paredez*, 136 N.M. 533, 539 (2004) ("criminal defense attorneys are obligated to determine the immigration status of their clients").

#### **Duty to investigate and advise about immigration consequences of plea alternatives:**

At the plea bargaining stage, NLADA Guideline 6.2(a) specifies that as part of an "overall negotiation plan" prior to plea discussions, counsel should make sure the client is fully aware of not only the maximum term of imprisonment but also a number of additional possible consequences of conviction, including "deportation"; Guideline 6.3(a) requires that counsel explain to the client "the full content" of any "agreement," including "the advantages and disadvantages and potential consequences"; and Guideline 6.4(a) requires that prior to entry of the plea, counsel make certain the client "fully and completely" understands "the maximum punishment, sanctions, and other consequences" of the plea. Again, while the advice may vary depending on the certainty of the consequences, investigation based on the client's specific immigration status is necessary in order to be able to provide correct advice about the certainty of the immigration consequences of a plea.

The ABA Standards set forth similar responsibilities. ABA Pleas of Guilty Standard 14-3.2(f) provides: "To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." With respect specifically to immigration consequences, the ABA emphasizes that "counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client." *Id.* cmt. at 127. The commentary urges counsel to be "active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant." *Id.* cmt. at 126-27.

The fact that many states<sup>3</sup> require court advisals regarding potential immigration consequences of a guilty plea does not obviate the need for defense counsel to investigate and advise the defendant. The ABA's commentary to ABA Pleas of Guilty Standard 14-3.2 states that the court's "inquiry is not, of course, any substitute for advice by counsel," because:

The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations which will not be covered by the judge in his or her admonition. A defendant needs to know, for example, the probability of conviction in the event of trial. Because this requires a careful evaluation of problems of proof and of possible defenses, few defendants can make this appraisal without the aid of counsel.

*Id.* See also ABA Pleas of Guilty Standard 14-3.2(f) cmt. at 126 ("[O]nly defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case.").

Defense counsel should be aware that prosecutors also have a responsibility to consider deportation and other so-called "collateral" consequences in plea negotiations. Prosecutors are not charged merely with the obligation to seek the maximum punishment in all cases, but with the broader obligation to "see that justice is

accomplished." National District Attorneys Association, *National Prosecution Standards* § 1.1 (2d ed. 1991). Prosecutors are thus trained to take these collateral consequences into account during the course of plea bargaining. E.g. U.S. Dep't of Justice, *United States Attorneys Manual, Principles of Federal Prosecution*, § 9-27.420(A) (1997) (in determining whether to enter into a plea agreement, "the attorney for the government should weigh *all relevant considerations*, including . . . [t]he probable sentence or *other consequences* if the defendant is convicted") (emphasis added). These prosecutor responsibilities can be cited whenever a prosecutor claims that he or she cannot consider immigration consequences because to do so would give an unfair advantage to noncitizen defendants.

**Duty to investigate and advise about immigration consequences of sentencing alternatives:**

At the sentencing stage, NLADA Guideline 8.2(b) requires that counsel be "familiar with direct and collateral consequences of the sentence and judgment, including . . . deportation"; and *id.* 8.3(a) requires the client be informed of "the likely and possible consequences of sentencing alternatives." For example, some immigration consequences are triggered by the length of any prison sentence. In some cases, reducing a prison sentence by one day can make a huge difference in the immigration consequences triggered.

***For resources for defense lawyers on the immigration consequences of criminal cases, see attached Appendices:***

**Appendix A – Immigration Consequences of Criminal Convictions Summary Checklist (starting point for inquiry)**

**Appendix B – Resources for Criminal Defense Lawyers (more extensive national, regional and state resources for defense lawyers)**

**ENDNOTES:**

\* This advisory was authored by Manuel D. Vargas of the Immigrant Defense Project for the Defending Immigrants Partnership with the input and collaboration of the Immigrant Legal Resource Center, the National Immigration Project of the National Lawyers Guild, and the Washington Defender Association's Immigration Project.

<sup>1</sup> Over the years, a number of courts have dismissed ineffective assistance of counsel claims based on failure to give advice on immigration consequences under the "collateral consequences" rule. See, e.g., *People v. Ford*, 86 N.Y.2d 397 (1995). Other courts — particularly since the harsh immigration law amendments of 1996 — have rejected this rule. See, e.g., *State v. Nunez-Valdez*, 200 N.J. 129, 138 (2009) ("[T]he traditional dichotomy that turns on whether consequences of a plea are penal or collateral is not relevant to our decision here.").

<sup>2</sup> The Court remanded Mr. Padilla's case to the Kentucky courts for further proceedings on whether he can satisfy *Strickland's* second prong—prejudice as a result of his constitutionally deficient counsel.

<sup>3</sup> Thirty jurisdictions including the District of Columbia and Puerto Rico have statutes, rules, or standard plea forms that require a defendant to receive notice of potential immigration consequences before the court will accept his guilty plea.

## Appendix A

### Immigrant Defense Project

#### Immigration Consequences of Convictions Summary Checklist\*

<b>GROUND OF DEPORTABILITY</b> (apply to lawfully admitted noncitizens, such as a lawful permanent resident (LPR)—greencard holder)	<b>GROUND OF INADMISSIBILITY</b> (apply to noncitizens seeking lawful admission including LPRs who travel out of US)	<b>INELIGIBILITY FOR US CITIZENSHIP</b>
<p><b>Aggravated Felony Conviction</b></p> <ul style="list-style-type: none"> <li>➤ <i>Consequences</i> (in addition to deportability):                             <ul style="list-style-type: none"> <li>◆ Ineligibility for most waivers of removal</li> <li>◆ Ineligibility for voluntary departure</li> <li>◆ Permanent inadmissibility after removal</li> <li>◆ Subjects client to up to 20 years of prison if s/he illegally reenters the US after removal</li> </ul> </li> <li>➤ <i>Crimes covered</i> (possibly even if not a felony):                             <ul style="list-style-type: none"> <li>◆ Murder</li> <li>◆ Rape</li> <li>◆ Sexual Abuse of a Minor</li> <li>◆ Drug Trafficking (may include, whether felony or misdemeanor, any sale or intent to sell offense, second or subsequent possession offense, or possession of more than 5 grams of crack or any amount of flunitrazepam)</li> <li>◆ Firearm Trafficking</li> <li>◆ Crime of Violence + 1 year sentence**</li> <li>◆ Theft or Burglary + 1 year sentence**</li> <li>◆ Fraud or tax evasion + loss to victim(s) &gt; \$10,000</li> <li>◆ Prostitution business offenses</li> <li>◆ Commercial bribery, counterfeiting, or forgery + 1 year sentence**</li> <li>◆ Obstruction of justice or perjury + 1 year sentence**</li> <li>◆ Certain bail-jumping offenses</li> <li>◆ Various federal offenses and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.)</li> <li>◆ Attempt or conspiracy to commit any of the above</li> </ul> </li> </ul>	<p>Conviction or <i>admitted commission</i> of a <b>Controlled Substance Offense</b>, or DHS has reason to believe individual is a drug trafficker</p> <ul style="list-style-type: none"> <li>➤ No 212(h) waiver possibility (except for a single offense of simple possession of 30g or less of marijuana)</li> </ul> <hr/> <p>Conviction or <i>admitted commission</i> of a <b>Crime Involving Moral Turpitude (CIMT)</b></p> <ul style="list-style-type: none"> <li>➤ Crimes in this category cover a broad range of crimes, including:                             <ul style="list-style-type: none"> <li>◆ Crimes with an <i>intent to steal or defraud</i> as an element (e.g., theft, forgery)</li> <li>◆ Crimes in which <i>bodily harm</i> is caused or threatened by an intentional act, or <i>serious bodily harm</i> is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)</li> <li>◆ Most sex offenses</li> </ul> </li> <li>➤ <i>Petty Offense Exception</i>—for one CIMT if the client has no other CIMT + the offense is not punishable &gt; 1 year (e.g., in New York can't be a felony) + does not involve a prison sentence &gt; 6 months</li> </ul>	<p>Conviction or admission of the following crimes bars a finding of good moral character for up to 5 years:</p> <ul style="list-style-type: none"> <li>➤ <b>Controlled Substance Offense</b> (unless single offense of simple possession of 30g or less of marijuana)</li> <li>➤ <b>Crime Involving Moral Turpitude</b> (unless single CIMT and the offense is not punishable &gt; 1 year (e.g., in New York, not a felony) + does not involve a prison sentence &gt; 6 months)</li> <li>➤ <b>2 or more offenses</b> of any type + <b>aggregate prison sentence of 5 years</b></li> <li>➤ <b>2 gambling offenses</b></li> <li>➤ <b>Confinement</b> to a jail for an aggregate period of 180 days</li> </ul>
<p><b>Controlled Substance Conviction</b></p> <ul style="list-style-type: none"> <li>➤ EXCEPT a single offense of simple possession of 30g or less of marijuana</li> </ul>	<p><b>Prostitution and Commercialized Vice</b></p> <p>Conviction of <b>2 or more offenses</b> of any type + <b>aggregate prison sentence of 5 years</b></p>	<p><b>Aggravated felony conviction on or after Nov. 29, 1990 (and murder conviction at any time) permanently bars a finding of moral character and thus citizenship eligibility</b></p>
<b>CONVICTION DEFINED</b>		
<p><b>Crime Involving Moral Turpitude (CIMT) Conviction</b></p> <ul style="list-style-type: none"> <li>➤ For crimes included, see Grounds of Inadmissibility</li> <li>➤ One CIMT committed within 5 years of admission into the US and for which a sentence of 1 year or longer may be imposed (e.g., in New York, may be a Class A misdemeanor)</li> <li>➤ Two CIMTs committed at any time "not arising out of a single scheme"</li> </ul>	<p>A formal judgment of guilt of the noncitizen entered by a court or, if adjudication of guilt has been withheld, where:</p> <ul style="list-style-type: none"> <li>(i) a judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, AND</li> <li>(ii) the judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty to be imposed.</li> </ul> <p><b>THUS:</b></p> <ul style="list-style-type: none"> <li>➤ A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated)</li> <li>➤ A deferred adjudication disposition without a guilty plea (e.g., NY ACD) is NOT a conviction</li> <li>➤ A youthful offender adjudication (e.g., NY YO) is NOT a conviction</li> </ul>	
<p><b>Firearm or Destructive Device Conviction</b></p>		
<p><b>Domestic Violence Conviction</b> or other domestic offenses, including:</p> <ul style="list-style-type: none"> <li>➤ Crime of Domestic Violence</li> <li>➤ Stalking</li> <li>➤ Child abuse, neglect or abandonment</li> <li>➤ Violation of order of protection (criminal or civil)</li> </ul>		
<b>INELIGIBILITY FOR LPR CANCELLATION OF REMOVAL</b>		
<ul style="list-style-type: none"> <li>➤ Aggravated felony conviction</li> <li>➤ Offense covered under Ground of Inadmissibility when committed within the first 7 years of residence after admission in the United States</li> </ul>		
<b>INELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BASED ON THREAT TO LIFE OR FREEDOM IN COUNTRY OF REMOVAL</b>		
<p><b>"Particularly serious crimes"</b> make noncitizens ineligible for asylum and withholding. They include:</p> <ul style="list-style-type: none"> <li>➤ Aggravated felonies                             <ul style="list-style-type: none"> <li>◆ All will bar asylum</li> <li>◆ Aggravated felonies with aggregate 5 year sentence of imprisonment will bar withholding</li> <li>◆ Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding</li> </ul> </li> <li>➤ Other serious crimes—no statutory definition (for sample case law determination, see Appendix F)</li> </ul>		

\*For the most up-to-date version of this checklist, please visit us at <http://www.immigrantdefenseproject.org>.

\*\*The 1-year requirement refers to an actual or suspended prison sentence of 1 year or more. [A New York straight probation or conditional discharge without a suspended sentence is not considered a part of the prison sentence for immigration purposes.]

## Immigrant Defense Project

### Suggested Approaches for Representing a Noncitizen in a Criminal Case\*

Below are suggested approaches for criminal defense lawyers in planning a negotiating strategy to avoid negative immigration consequences for their noncitizen clients. The selected approach may depend very much on the particular immigration status of the particular client. For further information on how to determine your client's immigration status, refer to Chapter 2 of our manual, *Representing Noncitizen Criminal Defendants in New York* (4th ed., 2006).

For ideas on how to accomplish any of the below goals, see Chapter 5 of our manual, which includes specific strategies relating to charges of the following offenses:

- ◆ Drug offense (§5.4)
- ◆ Violent offense, including murder, rape, or other sex offense, assault, criminal mischief or robbery (§5.5)
- ◆ Property offense, including theft, burglary or fraud offense (§5.6)
- ◆ Firearm offense (§5.7)

#### 1. If your client is a **LAWFUL PERMANENT RESIDENT**:

- First and foremost, try to avoid a disposition that triggers deportability (§3.2.B)
- Second, try to avoid a disposition that triggers inadmissibility if your client was arrested returning from a trip abroad or if your client may travel abroad in the future (§§3.2.C and E(1)).
- If you cannot avoid deportability or inadmissibility, but your client has resided in the United States for more than seven years (or, in some cases, will have seven years before being placed in removal proceedings), try at least to avoid conviction of an "aggravated felony." This may preserve possible eligibility for either the relief of cancellation of removal or the so-called 212(h) waiver of inadmissibility (§§3.2.D(1) and (2)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" in order to preserve possible eligibility for the relief of withholding of removal (§3.4.C(2)).
- If your client will be able to avoid removal, your client may also wish that you seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship (§3.2.E(2)).

#### 2. If your client is a **REFUGEE** or **PERSON GRANTED ASYLUM**:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§§3.3.B and D(1)).
- If you cannot do that, but your client has been physically present in the United States for at least one year, try at least to avoid a disposition relating to illicit trafficking in drugs or a violent or dangerous crime in order to preserve eligibility for a special waiver of inadmissibility for refugees and asylees (§3.3.D(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid a conviction of a "particularly serious crime" in order to preserve eligibility for the relief of withholding of removal (§3.3.D(2)).

#### 3. If your client is **ANY OTHER NONCITIZEN** who might be eligible now or in the future for LPR status, asylum, or other relief:

**If your client has some prospect of becoming a lawful permanent resident** based on having a U.S. citizen or lawful permanent resident spouse, parent, or child, or having an employer sponsor; being in foster care status; or being a national of a certain designated country:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§3.4.B(1)).
- If you cannot do that, but your client may be able to show extreme hardship to a citizen or lawful resident spouse, parent, or child, try at least to avoid a controlled substance disposition to preserve possible eligibility for the so-called 212(h) waiver of inadmissibility (§§3.4.B(2),(3) and(4)).
- If you cannot avoid inadmissibility but your client happens to be a national of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam and eligible for special relief for certain such nationals, try to avoid a disposition as an illicit trafficker in drugs in order to preserve possible eligibility for a special waiver of inadmissibility for such individuals (§3.4.B(5)).

**If your client has a fear of persecution** in the country of removal, or is a national of a certain designated country to which the United States has a temporary policy (TPS) of not removing individuals based on conditions in that country:

- First and foremost, try to avoid any disposition that might constitute conviction of a "particularly serious crime" (deemed here to include any aggravated felony), or a violent or dangerous crime, in order to preserve eligibility for asylum (§3.4.C(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" (deemed here to include an aggravated felony with a prison sentence of at least five years), or an aggravated felony involving unlawful trafficking in a controlled substance (regardless of sentence), in order to preserve eligibility for the relief of withholding of removal (§3.4.C(2)).
- In addition, if your client is a national of any country for which the United States has a temporary policy of not removing individuals based on conditions in that country, try to avoid a disposition that causes ineligibility for such temporary protection (TPS) from removal (§§3.4.C(4) and (5)).

\*References above are to sections of our manual.

## Appendix B – Resources for Criminal Defense Lawyers

This Appendix lists and describes some of the resources available to assist defense lawyers in complying with their ethical duties to investigate and give correct advice on the immigration consequences of criminal convictions. This section will cover the following resources:

1. Protocol "how-to" guide for public defense offices seeking to develop an in-house immigrant service plan;
2. Outside expert training and consultation services available to other defense provider offices and attorneys;
3. National books and practice aids;
4. Federal system, regional, or state-specific resources.

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### 1. Protocol "how-to" guide for public defense offices seeking to develop an in-house immigrant service plan

Many public defender organizations have established immigrant service plans in order to comply with their professional responsibilities towards their non-citizen defendant clients. Some defender offices maintain in-house immigration expertise with attorneys on staff trained as immigration experts. For example, The Legal Aid Society of the City of New York, which oversees public defender services in four of New York City's five boroughs, has an immigration unit that counsels attorneys in the organization's criminal division. Other public defender organizations consult with outside experts. For example, several county public defender offices in California contract with the Immigrant Legal Resource Center to provide expert assistance to public defenders in their county offices. Other public defender organizations have found yet other ways to address this need.

For guidance on how a public defender office can get started implementing an immigration service plan, and how an office with limited resources can phase in such a plan under realistic financial constraints, defender offices may refer to *Protocol for the Development of a Public Defender Immigration Service Plan* (May 2009), written by Cardozo Law School Assistant Clinical Law Professor Peter L. Markowitz and published by the Immigrant Defense Project (IDP) and the New York State Defenders Association (NYSDA). (*This is available at <http://www.immigrantdefenseproject.org/webPages/crimJustice.htm>*).

This publication surveys the various approaches that defender organizations have taken, discusses considerations distinguishing those approaches, provides contact information for key people in each organization surveyed to consult with on the different approaches adopted, and includes the following appendices:

- Sample immigration consultation referral form
- Sample pre-plea advisal and advocacy documents
- Sample post-plea advisal and advocacy letters
- Sample criminal-immigration practice updates
- Sample follow-up immigration interview sheet
- Sample new attorney training outline
- Sample language access policy

## 2. Outside expert training and consultation services available to other defense provider offices and attorneys

For those criminal defense offices and individual practitioners who do not have access to in-house immigration experts, a wide array of organizations and networks has emerged in the past two decades to provide training and immigration assistance to public and private criminal defense attorneys regarding the immigration consequences of criminal convictions.

Some of the principal national immigration organizations with expertise on criminal/immigration issues (see organizations listed below) have worked together along with the National Legal Aid and Defender Association in a collaboration called the **Defending Immigrants Partnership** ([www.defendingimmigrants.org](http://www.defendingimmigrants.org)), which coordinates on a national level the necessary collaboration between public defense counsel and immigration law experts to ensure that indigent non-citizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions.

In addition to its national-level coordination activities, the Partnership offers many other services. For example, the Partnership coordinates and participates in trainings at both the national and the regional levels — including, since 2002, some 220 training sessions for about 10,500 people. In addition, the Partnership provides free resources directly to criminal defense attorneys through its website at [www.defendingimmigrants.org](http://www.defendingimmigrants.org). That website contains an extensive resource library of materials, including a free national training manual for the representation of non-citizen criminal defendants, see *Defending Immigrants Partnership, Representing Noncitizen Defendants: A National Guide* (2008), as well as jurisdiction-specific guides for Arizona, California, Connecticut, Florida, Illinois, Indiana, Maryland, Massachusetts, Nevada, New Jersey, New York, New Mexico, North Carolina, Oregon, Texas, Vermont, Virginia, and Washington. The website also contains various quick-reference guides, charts, and outlines, national training powerpoint presentations, several taped webcastings, a list of upcoming trainings, and relevant news items and reports. **Website: [www.defendingimmigrants.org](http://www.defendingimmigrants.org).**

- DIP partner **Immigrant Defense Project (IDP)** is a New York-based immigrant advocacy organization that provides criminal defense lawyers with training, legal support and guidance on criminal/immigration law issues, including a free nationally-available hotline. IDP also has trained dozens of in-house immigrant defense experts at local defender organizations in New York, New Jersey, Pennsylvania, and other states. In addition, IDP maintains an extensive series of publications aimed at criminal defense practitioners. For example, visitors to the IDP's online resource page can find a free two-page reference guide summarizing criminal offenses with immigration consequences (see Appendix A attached). The IDP website also contains free publications focusing on other aspects of immigration law relevant to criminal defenders, such as aggravated felony and other crime-related immigration relief bars. In addition, IDP publishes a treatise aimed specifically at New York practitioners, *Representing Immigrant Defendants in New York* (4th ed. 2006). **Telephone: 212-725-6422. Website: [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).**
- DIP partner **Immigrant Legal Resource Center (ILRC)** is a San Francisco-based immigrant advocacy organization that provides legal trainings, educational materials, and a nationwide service called "Attorney of the Day" that offers consultations on immigration law to attorneys, non-profit organizations, criminal defenders, and others assisting immigrants, including consultation on the immigration consequences of criminal convictions. ILRC's consultation services are available for a fee (reduced for public defenders), which can be in the form of an hourly rate or via an ongoing contract. ILRC provides in house trainings for California public defender offices, and many offices contract with the ILRC to answer their questions on the immigration consequences of crimes. ILRC also provides immigration technical assistance on California Public Defender Association's statewide listserve, with about 5000 members, and maintains its own list serve of over 50 in-house immigration experts in defender offices throughout California to provide ongoing support, updates, and technical assistance. In addition, ILRC provides support to in-house experts in Arizona, Nevada, and Oregon. ILRC writes criminal immigration related practice advisories and reference guides for defenders which are posted on its website and widely disseminated, and is the author of a widely-used treatise for defense attorneys, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. 2009). **Telephone: 415-255-9499. Website: [www.ilrc.org](http://www.ilrc.org).**

- DIP partner **National Immigration Project** of the National Lawyers Guild (NIP/NLG) is a national immigrant advocacy membership organization with offices in Boston, Massachusetts that provides many types of assistance to criminal defense practitioners, including direct technical assistance to practitioners who need advice with respect to a particular case. These services are available free of charge and may be used by practitioners anywhere in the nation. NIP/NLG also provide trainings in the form of CLE seminars for defense lawyers, and is also responsible for publishing *Immigration Law and Crimes* (2009), the leading treatise on the relationship between immigration law and the criminal justice system, which is updated twice yearly and is also available on Westlaw. **Telephone: 617-227-9727. Website: [www.nationalimmigrationproject.org](http://www.nationalimmigrationproject.org).**

For other organizations and networks that provide training and consultation services in specific states or regions of the country, see section (4) below entitled "Federal System, Regional, or State-Specific Resources."

### 3. National Books and Practice Aids

- ***Immigration Consequences of Convictions Checklist*** (Immigrant Defense Project, 2008), 2-page summary, attached to this practice advisory, that many criminal defenders find useful as an in-court quick reference guide to spot problems requiring further investigation.
- ***Representing Noncitizen Criminal Defendants: A National Guide*** (Defending Immigrants Partnership, 2008), available for free downloading at <http://defendingimmigrationlaw.com>.
- ***Aggravated Felonies: Instant Access to All Cases Defining Aggravated Felonies*** (2006), by Norton Tooby & Joseph J. Rollin, available for order at <http://criminalandimmigrationlaw.com>.
- ***Criminal Defense of Immigrants*** (4<sup>th</sup> ed., 2007, updated monthly online), by Norton Tooby & Joseph J. Rollin, available for order at <http://www.criminalandimmigrationlaw.com>.
- ***The Criminal Lawyer's Guide to Immigration Law: Questions and Answers*** (American Bar Association, 2001), by Robert James McWhirter, available for order at <http://www.abanet.org>.
- ***Immigration Consequences of Criminal Activity*** (4<sup>th</sup> ed., 2009), by Mary E. Kramer, available for order at <http://www.aialpubs.org>.
- ***Immigration Consequences of Criminal Convictions***, by Tova Indritz and Jorge Baron, in ***Cultural Issues in Criminal Defense*** (Linda Friedman Ramirez ed., 2d ed., 2007), available for order at <http://www.jurispub.com>.
- ***Immigration Law and Crimes*** (2009), by Dan Kesselbrenner and Lory Rosenberg, available for order at: <http://west.thompson.com>.
- ***Practice Advisory: Recent Developments on the Categorical Approach: Tips for Criminal Defense Lawyers*** (2009), by Isaac Wheeler and Heidi Altman, available for free downloading at <http://www.immigrantdefenseproject.org/webPages/practiceTips.htm>.
- ***Safe Havens: How to Identify and Construct Non-Deportable Offenses*** (2005), by Norton Tooby & Joseph J. Rollin, available for order at <http://www.criminalandimmigrationlaw.com>.
- ***Tips on How to Work With an Immigration Lawyer to Best Protect Your Non-Citizen Defendant Client*** (2004), by Manuel D. Vargas, available for free downloading at <http://www.immigrantdefenseproject.org/webPages/crimJustice.htm>.
- ***Tooby's Crimes of Moral Turpitude: The Complete Guide*** (2008), by Norton Tooby, Jennifer Foster, & Joseph J. Rollin, available for order at <http://www.criminalandimmigrationlaw.com>.
- ***Tooby's Guide to Criminal Immigration Law: How Criminal and Immigration Counsel Can Work Together to Protect Immigration Status in Criminal Cases*** (2008), by Norton Tooby, available for free downloading at <http://www.criminalandimmigrationlaw.com>.

## 4. Federal system, regional, or state-specific resources

### Federal System:

- Dan Kesselbrenner & Sandy Lin, *Selected Immigration Consequences of Certain Federal Offenses* (National Immigration Project, 2010), available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org).

### Regional resources:

#### **Ninth Circuit Court of Appeals region**

- Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at [www.ilrc.org](http://www.ilrc.org).

#### **Seventh Circuit Court of Appeals region**

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at [www.immigrantjustice.org](http://www.immigrantjustice.org).

### State-Specific Resources:

#### **Arizona**

- In 2007, the Arizona Defending Immigrants Partnership was launched to provide information and written resources to Arizona criminal defense attorneys on the immigration consequences of criminal convictions. Housed at the Florence Immigrant and Refugee Rights Project (FIRRP) and funded by the Arizona Foundation for Legal Services and Education, the partnership is run by Legal Director Kara Hartzler, who provides support, individual consultations, and training to Arizona criminal defense attorneys and other key court officials in their representation of noncitizens. Telephone: (520) 868-0191.
- Kathy Brady, Kara Hartzler, *et al.*, *Quick Reference Chart & Annotations for Determining Immigration Consequences of Selected Arizona Offenses* (2009), available at [www.ilrc.org](http://www.ilrc.org) and [www.defendingimmigrants.org](http://www.defendingimmigrants.org).
- Kara Hartzler, *Immigration Consequences of Your Client's Criminal Case* (2008), Powerpoint presentation available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org).
- Brady *et al.*, *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at [www.ilrc.org](http://www.ilrc.org).

#### **California**

- The ILRC coordinates the California Defending Immigrants Partnership to provide public defenders in California with the critical resources and training they need on the immigration consequences of crimes. In particular, the ILRC provides mentorship of in-house experts in defender offices across the state, coordination and monitoring of a statewide interactive listserv of in-house defender experts, technical assistance on immigration related questions posted on California Public Defender Association's Claranet statewide listserv, ongoing training of county public defender offices, and written resources. The ILRC also provides technical assistance to several county defender offices by contract. A comprehensive list and description of these and other criminal immigration law resources for criminal defenders in California is provided at [www.ilrc.org](http://www.ilrc.org).
- Brady *et al.*, *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at [www.ilrc.org](http://www.ilrc.org).
- Katherine Brady, *Quick Reference Chart to Determining Selected Immigration Consequences to Select*

*California Offenses* (2010), available at [www.ilrc.org](http://www.ilrc.org).

- Katherine Brady, *Effect of Selected Drug Pleas After Lopez v. Gonzales*, a quick reference chart on the immigration consequences of drug pleas for criminal defenders in the Ninth Circuit (2007), available at [www.ilrc.org](http://www.ilrc.org).
- *Immigration Criminal Law Resources for California Criminal Defenders*, available at [www.ilrc.org](http://www.ilrc.org).
- *Tooby's California Post-Conviction Relief for Immigrants* (2009), available for order at <http://www.criminalandimmigrationlaw.com>.
- The Immigrant Rights Clinic at the University of California at Davis Law School provides limited, but free consultation to public defender offices that have limited immigration related resources. Contact Raha Jorjani at [rjorjani@ucdavis.edu](mailto:rjorjani@ucdavis.edu).
- In Los Angeles, the office of the Los Angeles Public Defender offers free consultation through Deputy Public Defender Graciela Martinez. She also regularly presents trainings on this issue to indigent defenders and works with in-house defender experts in the Southern California region. She can be reached at [gmartinez@lacopubdef.org](mailto:gmartinez@lacopubdef.org).

### **Colorado**

- Hans Meyer, *Plea & Sentencing Strategy Sheets for Colorado Felony Offenses & Misdemeanor Offenses* (Colo. State Public Defender 2009). Contact Hans Meyer at [hans@coloradoimmigrant.org](mailto:hans@coloradoimmigrant.org).

### **Connecticut**

- Jorge L. Baron, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Connecticut* (2007), available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org) or [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).
- Elisa L. Villa, *Immigration Issues in State Criminal Court: Effectively Dealing with Judges, Prosecutors, and Others* (Conn. Bar Inst., Inc., 2007).

### **District of Columbia**

- Gwendolyn Washington, *PDS Immigrant Defense Project's Quick Reference Sheet* (Public Def. Serv., 2008).

### **Florida**

- *Quick Reference Guide to the Basic Immigration Consequences of Select Florida Crimes* (Fla. Imm. Advocacy Ctr. 2003), available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org).

### **Illinois**

- The Heartland Alliance's National Immigrant Justice Center (NIJC) offers no-cost trainings and consultation to criminal defense attorneys representing non-citizens, and also publishes manuals designed for criminal defense attorneys who defend non-citizens in criminal proceedings.
- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at [www.immigrantjustice.org](http://www.immigrantjustice.org).
- *Selected Immigration Consequences of Certain Illinois Offenses* (National Immigration Project, 2003), available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org).

### **Indiana**

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at [www.immigrantjustice.org](http://www.immigrantjustice.org).
- *Immigration Consequences of Criminal Convictions* (Indiana Public Defender Council, 2007), available at <http://www.in.gov/ipdc/general/manuals.html>.

## **Iowa**

- Tom Goodman, *Immigration Consequences of Iowa Criminal Convictions Reference Chart*.

## **Maryland**

- *Abbreviated Chart for Criminal Defense Practitioners of the Immigration Consequences of Criminal Convictions Under Maryland State Law* (Maryland Office of the Public Defender & University of Maryland School of Law Clinical Office, 2008).

## **Massachusetts**

- Dan Kesselbrenner & Wendy Wayne, *Selected Immigration Consequences of Certain Massachusetts Offenses* (National Immigration Project, 2006), available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org).
- Wendy Wayne, *Five Things You Must Know When Representing Immigrant Clients* (2008).

## **Michigan**

- David Koelsch, *Immigration Consequences of Criminal Convictions (Michigan Offenses)*, U. Det. Mercy School of Law (2008), available at <http://www.michiganlegalaid.org>.

## **Minnesota**

- Maria Baldini-Potermin, *Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases*, 17 Law & Ineq. 567 (1999).

## **Nevada**

- The ILRC and University of Nevada, Las Vegas Thomas & Mack Legal Clinic, William S. Boyd School of Law (UNLV) provide written resources, training, limited consultation, and support of in-house defender experts in Nevada public defense offices.
- The ILRC and UNLV are finalizing in 2010 portions of *Immigration Consequences of Crime: A Guide to Representing Non-Citizen Criminal Defendants in Nevada*, including a practice advisory on the immigration consequences and defense arguments to pleas to Nevada sexual offenses and the immigration consequences of Nevada drug offenses. They will be posted at [www.ilrc.org](http://www.ilrc.org) and [www.defendingimmigrants.org](http://www.defendingimmigrants.org).

## **New Jersey**

- The IDP, Legal Services of New Jersey, Rutgers Law School-Camden and the Camden Center for Social Justice collaborate with the New Jersey Office of Public Defender to provide written resources, trainings and consultations to New Jersey criminal defense lawyers who represent non-citizens.
- Joanne Gottesman, *Quick Reference Chart for Determining the Immigration Consequences of Selected New Jersey Criminal Offenses* (2008), available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org) or [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).

## **New Mexico**

- The New Mexico Criminal Defense Lawyers Association (NMCDLA) assists defenders in that state concerning immigration issues and has presented several continuing legal education programs in various locations of the state on the immigration consequences of criminal convictions and the duty of criminal defense lawyers when the client is not a U.S. citizen. NMCDLA regularly publishes a newsletter in which one ongoing column in each issue is dedicated to immigration consequences.
- Jacqueline Cooper, *Reference Chart for Determining Immigration Consequences of Selected New Mexico Criminal Offenses*, New Mexico Criminal Defense Lawyers Association (July 2005), available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org).

## **New York**

- The IDP and the New York State Defenders Association Criminal Defense Immigration Project collaborate with New York City indigent criminal defense service providers and upstate New York public defender offices to provide written resources, trainings and consultations to New York criminal defense lawyers who represent non-citizens. Additional information on IDP's services and written resources is available at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).
- Manuel D. Vargas, *Representing Immigrant Defendants in New York* (4<sup>th</sup> ed. 2006), available at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).
- *Quick Reference Chart for New York Offenses* (Immigrant Defense Project, 2006), available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org) or [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).

## **North Carolina**

- Sejal Zota & John Rubin, *Immigration Consequences of a Criminal Conviction in North Carolina* (Office of Indigent Defense Services, 2008).

## **Oregon**

- Steve Manning, *Wikipedia Practice Advisories on the Immigration Consequences of Oregon Criminal Offenses* (Oregon Chapter of American Immigration Lawyers Association and Oregon Criminal Defense Lawyers Association, 2009), available at <http://www.aialaoregon.com>.

## **Pennsylvania**

- *A Brief Guide to Representing Noncitizen Criminal Defendants in Pennsylvania*, (Defender Association of Philadelphia, 2010), soon to be available at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).

## **Tennessee**

- Michael C. Holley, *Guide to the Basic Immigration Consequences of Select Tennessee Offenses* (2008).
- Michael C. Holley, *Immigration Consequences: How to Advise Your Client* (Tennessee Association of Criminal Defense Law).

## **Texas**

- *Immigration Consequences of Selected Texas Offenses: A Quick Reference Chart* (2004-2006), available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org).

## **Vermont**

- Rebecca Turner, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Vermont* (2005)
- Rebecca Turner, *Immigration Consequences of Select Vermont Criminal Offenses Reference Chart* (2006), available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org).

## **Virginia**

- Mary Holper, *Reference Guide and Chart for Immigration Consequences of Select Virginia Criminal Offenses* (2007), available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org).

## **Washington**

- The Washington Defender Organization (WDA) Immigration Project provides written resources and offers case-by-case technical assistance and ongoing training and education to criminal defenders, prosecutors, judges and other entities within the criminal justice system. Go to: [www.defensenet.org/immigration-project](http://www.defensenet.org/immigration-project)

- Ann Benson and Jonathan Moore, *Quick Reference Chart for Determining Immigration Consequences of Selected Washington State Offenses* (Washington Defender Association's Immigration Project, 2009), available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org) and <http://www.defensenet.org/immigration-project/immigration-resources>.
- *Representing Immigrant Defendants: A Quick Reference Guide to Key Concepts and Strategies* (WDA Immigration Project, 2008), available at <http://www.defensenet.org/immigration-project/immigration-resources>.
- Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws (formerly California Criminal Law and Immigration)* (2009), available at [www.ilrc.org](http://www.ilrc.org).

### **Wisconsin**

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at [www.immigrantjustice.org](http://www.immigrantjustice.org).
- Wisconsin State Public Defender, *Quick Reference Chart – Immigration Consequences of Select Wisconsin Criminal Statutes*.

**TO PROFFER  
OR  
NOT TO PROFFER**

**PRESENTED BY**

**DEAN STOWERS**

**CJA ATTORNEY**

**STOWERS LAW FIRM**

**WEST DES MOINES, IOWA**

**To Proffer or Not; That is the Question.**

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I. What is a proffer?

- A. A full confession given by the Defendant to law enforcement and the prosecution upon advice of counsel.
- B. An offer or tender by the Defendant of information of interest to law enforcement and the prosecution in pursuit of persons involved in criminal activity.

II. What a proffer is not.

- A. A proffer is not a plea agreement or other assurance of leniency by Government.
- B. A proffer agreement is generally not an agreement to provide immunity from prosecution (a/k/a transactional immunity).
- C. A proffer agreement is generally not co-extensive with a grant of immunity sufficient to overcome a claim of the privilege against self-incrimination.
  - 1. Generally, proffer agreements provide only limited "use" immunity.
  - 2. Generally, proffer agreements provide no "derivative use" immunity.
  - 3. Generally, proffer agreements expressly waive Kastigar hearing procedures.
  - 4. Contrast grant of judicial immunity pursuant to 18 U.S.C. Section 6002 and limited "use" immunity of typical proffer.

III. Reason to proffer

- A. Safety Valve. U.S.S.G. Section 5C1.2.

- B. Client is a "Gold Mine" of information.
- C. Clarify client's role in offense to secure better plea.

IV. Reasons not to proffer.

- A. No 1B1.8 protection and client would receive higher guideline sentence if he fully proffered and likely substantial assistance reduction would not result in lower sentence without a proffer.
- B. Client won't proffer at all, or wants to tell B.S. story.
- C. Proffer agreement does not adequately protect client from prosecution for other offenses, including crimes of violence.
- D. A favorable plea agreement can be reached without a proffer first. Generally, this is preferable to a proffer without a plea agreement.
- E. Client knows nothing of value and Government is offering no likely benefit from proffer.

Westlaw.

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▽

Supreme Court of the United States  
 Charles Joseph KASTIGAR and Michael Gorean  
 Stewart, Petitioners,  
 v.  
 UNITED STATES.  
 No. 70-117.

Argued Jan. 11, 1972.  
 Decided May 22, 1972.  
 Rehearing Denied June 26, 1972.

See 408 U.S. 931, 92 S.Ct. 2478.

Petitioners were ordered to appear before a grand jury and to answer questions under grant of immunity and, on refusal of the petitioners to answer questions, after asserting their privilege against compulsory self-incrimination, the United States District Court for the Central District of California adjudged petitioners to be in civil contempt and ordered them confined. The Court of Appeals, Ninth Circuit, affirmed, 440 F.2d 954. The Supreme Court granted certiorari, and, speaking through Mr. Justice Powell, held that although a grant of immunity must afford protection commensurate with that afforded by the privilege against compulsory self-incrimination, it need not be broader, and immunity from use and derivative use is coextensive with the scope of the privilege and is sufficient to compel testimony over claim of privilege. The Court also held that in any subsequent criminal prosecution of a person who has been granted immunity to testify, the prosecution has the burden of proving affirmatively that evidence proposed to be used is derived from a legitimate source wholly independent of compelled testimony.

Affirmed.

Mr. Justice Douglas and Mr. Justice Marshall dissented and filed opinions.

Mr. Justice Brennan and Mr. Justice Rehnquist took

no part in consideration or decision.

West Headnotes

[1] Criminal Law 110 ⚡393(1)

110 Criminal Law  
 110XVII Evidence  
 110XVII(I) Competency in General  
 110k393 Compelling Self-Incrimination  
 110k393(1) k. In General. Most Cited

Cases

Fifth Amendment privilege against compulsory self-incrimination can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. U.S.C.A.Const. Amend. 5.

[2] Criminal Law 110 ⚡393(1)

110 Criminal Law  
 110XVII Evidence  
 110XVII(I) Competency in General  
 110k393 Compelling Self-Incrimination  
 110k393(1) k. In General. Most Cited

Cases

Fifth Amendment privilege against compulsory self-incrimination protects against any disclosures which witness reasonably believes could be used in criminal prosecution or could lead to other evidence which might be so used. U.S.C.A.Const. Amend. 5.

[3] Criminal Law 110 ⚡393(1)

110 Criminal Law  
 110XVII Evidence  
 110XVII(I) Competency in General  
 110k393 Compelling Self-Incrimination  
 110k393(1) k. In General. Most Cited

Cases

Fifth Amendment privilege against compulsory self-incrimination does not deprive Congress of power to enact properly drawn laws that compel self-incrimination through grant of immunity from prosecution. U.S.C.A.Const. Amends. 5, 6; 18

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U.S.C.A. §§ 6001-6005, 6002, 6003.

[4] Witnesses 410 ↪ 304(3)

410 Witnesses

410III Examination

410III(D) Privilege of Witness

410k304 Effect of Statutory Protection of  
 Witness from Use of Evidence Against Himself

410k304(3) k. Sufficiency of Statutory  
 Protection. Most Cited Cases

Grant of immunity, to supplant privilege against  
 compulsory self-incrimination, must be coextensive  
 with scope of privilege. U.S.C.A.Const. Amend. 5;  
 18 U.S.C.A. §§ 6001-6005, 6002, 6003; 49  
 U.S.C.A. § 46.

[5] Witnesses 410 ↪ 304(3)

410 Witnesses

410III Examination

410III(D) Privilege of Witness

410k304 Effect of Statutory Protection of  
 Witness from Use of Evidence Against Himself

410k304(3) k. Sufficiency of Statutory  
 Protection. Most Cited Cases

Though grant of immunity must afford protection  
 commensurate with that afforded by privilege  
 against compulsory self-incrimination, it need not  
 be broader, and immunity from use and derivative  
 use is coextensive with scope of privilege and is  
 sufficient to compel testimony over claim of priv-  
 ilege; transactional immunity is not required.  
 U.S.C.A.Const. Amend. 5; 18 U.S.C.A. §§  
 6001-6005, 6002, 6003; 49 U.S.C.A. § 46.

[6] Courts 106 ↪ 92

106 Courts

106II Establishment, Organization, and Proced-  
 ure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling  
 or as Precedents

106k92 k. Dicta. Most Cited Cases  
 Broad language of opinion which was unnecessary

to court's decision could not be considered binding  
 authority.

[7] Criminal Law 110 ↪ 327

110 Criminal Law

110XVII Evidence

110XVII(C) Burden of Proof

110k326 Burden of Proof

110k327 k. Extent of Burden on Pro-  
 secution. Most Cited Cases

In subsequent criminal prosecution of person who  
 has been compelled to testify under grant of im-  
 munity, prosecution has burden of proving affirma-  
 tively that evidence proposed to be used is derived  
 from legitimate source wholly independent of com-  
 pelled testimony. U.S.C.A.Const. Amend. 5; 18  
 U.S.C.A. §§ 6001-6005, 6002, 6003.

\*\*1654 \*441 Syllabus<sup>FN\*</sup>

FN\* The syllabus constitutes no part of the  
 opinion of the Court but has been prepared  
 by the Reporter of Decisions for the con-  
 venience of the reader. See *United States*  
*v. Detroit, Timber & Lumber Co.*, 200 U.S.  
 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The United States can compel testimony from an  
 unwilling witness who invokes the Fifth Amend-  
 ment privilege against compulsory self-  
 incrimination by conferring immunity, as provided  
 by 18 U.S.C. s 6002, from use of the compelled  
 testimony and evidence derived therefrom in sub-  
 sequent criminal proceedings, as such immunity  
 from use and derivative use is coextensive with the  
 scope of the privilege and is sufficient to compel  
 testimony over a claim of the privilege. Transac-  
 tional immunity would afford broader protection  
 than the Fifth Amendment privilege, and is not con-  
 stitutionally required. In a subsequent criminal pro-  
 secution, the prosecution has the burden of proving  
 affirmatively that evidence proposed to be used is  
 derived from a legitimate source wholly independ-  
 ent of the compelled testimony. Pp. 1655-1666.

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440 F.2d 954, affirmed.

**\*\*1655** Hugh R. Manes, Los Angeles, Cal., for petitioners.

Sol. Gen. Erwin N. Griswold, for respondent.

**\*442** Mr. Justice POWELL delivered the opinion of the Court.

This case presents the question whether the United States Government may compel testimony from an unwilling witness, who invokes the Fifth Amendment privilege against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from the testimony.

Petitioners were subpoenaed to appear before a United States grand jury in the Central District of California on February 4, 1971. The Government believed that petitioners were likely to assert their Fifth Amendment privilege. Prior to the scheduled appearances, the Government applied to the District Court for an order directing petitioners to answer questions and produce evidence before the grand jury under a grant of immunity conferred pursuant to 18 U.S.C. ss 6002, 6003. Petitioners opposed issuance of the order, contending primarily that the scope of the immunity provided by the statute was not coextensive with the scope of the privilege against self-incrimination, and therefore was not sufficient to supplant the privilege and compel their testimony. The District Court rejected this contention, and ordered petitioners to appear before the grand jury and answer its questions under the grant of immunity.

Petitioners appeared but refused to answer questions, asserting their privilege against compulsory self-incrimination. They were brought before the District Court, and each persisted in his refusal to answer the grand jury's questions, notwithstanding the grant of immunity. The court found both in contempt, and committed them to the custody of the

Attorney General until either they answered the grand jury's questions or the term of the grand jury expired.<sup>FN1</sup> The Court of **\*443** Appeals for the Ninth Circuit affirmed. *Stewart v. United States*, 440 F.2d 954 (CA9 1971). This Court granted certiorari to resolve the important question whether testimony may be compelled by granting immunity from the use of compelled testimony and evidence derived therefrom ('use and derivative use' immunity), or whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates ('transactional' immunity). 402 U.S. 971, 91 S.Ct. 1668, 29 L.Ed.2d 135 (1971).

FN1. The contempt order was issued pursuant to 28 U.S.C. s 1826.

## I

The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence.<sup>FN2</sup> The power with respect to courts was established by statute in England as early as 1562,<sup>FN3</sup> and Lord Bacon observed in 1612 that all subjects owed the King their 'knowledge and discovery.'<sup>FN4</sup> While it is not clear when grand juries first resorted to compulsory process to secure the attendance and testimony of witnesses, the general common-law principle that 'the public has a right to every man's evidence' was considered an 'indubitable certainty' that 'cannot be denied' by 1742.<sup>FN5</sup> The **\*\*1656** power to compel testimony, and the corresponding duty to testify, are recognized in the Sixth Amendment<sup>\*444</sup> requirements that an accused be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor. The first Congress recognized the testimonial duty in the Judiciary Act of 1789, which provided for compulsory attendance of witnesses in the federal courts.<sup>FN6</sup> Mr. Justice White noted the importance of this essential power of government in his concurring opinion in *Murphy v. Waterfront Comm'n*, 378 U.S.

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52, 93-94, 84 S.Ct. 1594, 1611, 12 L.Ed.2d 678  
 (1964):

FN2. For a concise history of testimonial compulsion prior to the adoption of our Constitution, see 8 J. Wigmore, *Evidence* s 2190 (J. McNaughton rev. 1961). See *Ullmann v. United States*, 350 U.S. 422, 439 n. 15, 76 S.Ct. 497, 507, 100 L.Ed. 511 (1956); *Blair v. United States*, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1919).

FN3. Statute of Elizabeth, 5 Eliz. 1, c. 9, s 12 (1562).

FN4. Countess of Shrewsbury's Case, 2 How.St.Tr. 769, 778 (1612).

FN5. See the parliamentary debate on the Bill to Indemnify Evidence, particularly the remarks of the Duke of Argyle and Lord Chancellor Hardwicke, reported in 12 T. Hansard, *Parliamentary History of England* 675, 693 (1812). See also *Piemonte v. United States*, 367 U.S. 556, 559 n. 2, 81 S.Ct. 1720, 1722, 6 L.Ed.2d 1028 (1961); *Ullmann v. United States*, supra, 350 U.S., at 439 n. 15, 76 S.Ct., at 507; *Brown v. Walker*, 161 U.S. 591, 600, 16 S.Ct. 644, 648, 40 L.Ed. 819 (1896).

FN6. 1 Stat. 73, 88-89.

'Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies. See *Blair v. United States*, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979. Such testimony constitutes one of the Government's primary sources of information.'

[1][2] But the power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty,<sup>FN7</sup> the most important of which is the Fifth Amendment privilege against compul-

ory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations,<sup>FN8</sup> and marks an important advance in the development of our liberty.<sup>FN9</sup> It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory;<sup>FN10</sup> and it \*445 protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.<sup>FN11</sup> This Court has been zealous to safeguard the values which underlie the privilege.<sup>FN12</sup>

FN7. See *Blair v. United States*, supra, 250 U.S., at 281, 39 S.Ct., at 471; 8 Wigmore, supra, n. 2, ss 2192, 2197.

FN8. See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596, 12 L.Ed.2d 678 (1964).

FN9. See *Ullmann v. United States*, 350 U.S., at 426, 76 S.Ct., at 500; E. Griswold, *The Fifth Amendment Today* 7 (1955).

FN10. *Murphy v. Waterfront Comm'n*, supra, 378 U.S., at 94, 84 S.Ct., at 1611 (White, J., concurring); *McCarthy v. Arndstein*, 266 U.S. 34, 40, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924); *United States v. Saline Bank*, 1 Pet. 100, 7 L.Ed. 69 (1828); cf. *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968).

FN11. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951); *Blau v. United States*, 340 U.S. 159, 71 S.Ct. 223, 95 L.Ed. 170 (1950); *Mason v. United States*, 244 U.S. 362, 365, 37 S.Ct. 621, 622, 61 L.Ed. 1198 (1917).

FN12. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 443-444, 86 S.Ct. 1602, 1611-1612, 16 L.Ed.2d 694 (1966); *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 534, 29 L.Ed. 746 (1886).

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Immunity statutes, which have historical roots deep in Anglo-American jurisprudence,<sup>FN13</sup> are not incompatible \*446 with \*\*1657 these values. Rather, they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. Indeed, their origins were in the context of such offenses,<sup>FN14</sup> \*447 and their primary use has been to investigate such offenses.<sup>FN15</sup> Congress included immunity statutes in many of the regulatory measures adopted in the first half of this century.<sup>FN16</sup> Indeed, prior to the enactment of the statute under consideration in \*\*1658 this case, there were in force over 50 federal immunity statutes.<sup>FN17</sup> In addition, every State in the Union, as well as the District of Columbia and Puerto Rico, has one or more such statutes.<sup>FN18</sup> The commentators,<sup>FN19</sup> and this Court on several occasions,<sup>FN20</sup> have characterized immunity statutes as essential to the effective enforcement of various criminal statutes. As Mr. Justice Frankfurter observed, speaking for the Court in *Ullmann v. United States*, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956), such statutes have 'become part of our constitutional fabric.'<sup>FN21</sup> *Id.*, at 438, 76 S.Ct., at 506.

FN13. Soon after the privilege against compulsory self-incrimination became firmly established in law, it was recognized that the privilege did not apply when immunity, or 'indemnity,' in the English usage, had been granted. See L. Levy, *Origins of the Fifth Amendment* 328, 495 (1968). Parliament enacted an immunity statute in 1710 directed against illegal gambling, 9 Anne, c. 14, ss 3-4, which became the model for an identical immunity statute enacted in 1774 by the Colonial Legislature of New York. Law of Mar. 9, 1774, c. 1651, 5 Colonial Laws of New York 621, 623 (1894). These statutes

provided that the loser could sue the winner, who was compelled to answer the loser's charges. After the winner responded and returned his illgotten gains, he was 'acquitted, indemnified (immunized) and discharged from any further or other Punishment, Forfeiture or Penalty, which he . . . may have incurred by the playing for, and winning such Money . . . ' 9 Anne, c. 14, s 4 (1710); Law of Mar. 9, 1774, c. 1651, 5 Colonial Laws of New York, at 623.

Another notable instance of the early use of immunity legislation is the 1725 impeachment trial of Lord Chancellor Macclesfield. The Lord Chancellor was accused by the House of Commons of the sale of public offices and appointments. In order to compel the testimony of Masters in Chancery who had allegedly purchased their offices from the Lord Chancellor, and who could incriminate themselves by so testifying. Parliament enacted a statute granting immunity to persons then holding office as Masters in Chancery. Lord Chancellor Macclesfield's Trial, 16 How.St.Tr. 767, 1147 (1725). See 8 Wigmore, *supra*, n. 2, s 2281, at 492. See also Bishop Atterbury's Trial, 16 How.St.Tr. 323, 604-605 (1723). The legislatures in colonial Pennsylvania and New York enacted immunity legislation in the 18th century. See, e.g., Resolution of Jan. 6, 1758, in *Votes and Proceedings of the House of Representatives of the Province of Pennsylvania (1682-1776)*, 6 Pennsylvania Archives (8th series) 4679 (C. Hoban ed. 1935); Law of Mar. 24, 1772, c. 1542, 5 Colonial Laws of New York 351, 353-354; Law of Mar. 9, 1774, c. 1651, *id.*, at 621, 623; Law of Mar. 9, 1774, c. 1655, *id.*, at 639, 641-642. See generally L. Levy, *Origins of the Fifth Amendment* 359, 384-385, 389, 402-403 (1968). Federal immunity statutes have existed since 1857. Act of Jan. 24, 1857, 11

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Stat. 155. For a history of the various federal immunity statutes, see Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 Yale L.J. 1568 (1963); Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 St. Louis U.L.Rev. 327 (1966); and National Commission on Reform of Federal Criminal Laws, *Working Papers*, 1406-1411 (1970).

FN14. See, e.g., Resolution of Jan. 6, 1758, n. 13, *supra*, 6 Pennsylvania Archives (8th series) 4679 (C. Hoban ed. 1935); Law of Mar. 24, 1772, c. 1542, 5 Colonial Laws of New York 351, 354; Law of Mar. 9, 1774, c. 1655, *id.*, at 639, 642. Bishop Atterbury's Trial, *supra*, for which the House of Commons passed immunity legislation, was a prosecution for treasonable conspiracy. See *id.*, at 604-605; 8 Wigmore, *supra*, n. 2, s 2281, at 492 n. 2. *supra*, n. 2, s 2281, at 492 n. 2. for which Parliament passed immunity legislation, was a prosecution for political bribery involving the sale of public offices and appointments. See *id.*, at 1147. The first federal immunity statute was enacted to facilitate an investigation of charges of corruption and vote buying in the House of Representatives. See Comment, n. 13, *supra*, 72 Yale L.J., at 1571.

FN15. See 8 Wigmore, *supra*, n. 2, s 2281, at 492. Mr. Justice White noted in his concurring opinion in *Murphy v. Waterfront Comm'n*, 378 U.S., at 92, 84 S.Ct., at 1610, that immunity statutes 'have for more than a century been resorted to for the investigation of many offenses, chiefly those whose proof and punishment were otherwise impracticable, such as political bribery, extortion, gambling, consumer

frauds, liquor violations, commercial larceny, and various forms of racketeering.' *Id.*, at 94-95, 84 S.Ct., at 1611. See n. 14, *supra*.

FN16. See Comment, n. 13, *supra*, 72 Yale L.J., at 1576.

FN17. For a listing of these statutes, see National Commission on Reform of Federal Criminal Laws, *Working Papers*, 1444-1445 (1970).

FN18. For a listing of these statutes, see 8 Wigmore, *supra*, n. 2, s 2281, at 495 n. 11.

FN19. See, e.g., 8 J. Wigmore, *Evidence* s 2281, at 501 (3d ed. 1940); 8 Wigmore, *supra*, n. 2 s 2281, at 496.

FN20. See *Hale v. Henkel*, 201 U.S. 43, 70, 26 S.Ct. 370, 377, 50 L.Ed. 652 (1906); *Brown v. Walker*, 161 U.S., at 610, 16 S.Ct., at 652.

FN21. This statement was made with specific reference to the Compulsory Testimony Act of 1893, 27 Stat. 443, the model for almost all federal immunity statutes prior to the enactment of the statute under consideration in this case. See *Murphy v. Waterfront Comm'n*, 378 U.S., at 95, 84 S.Ct., at 1612 (White, J., concurring).

\*448 II

[3] Petitioners contend, first, that the Fifth Amendment's privilege against compulsory self-incrimination, which is that '(n)o person ... shall be compelled in any criminal case to be a witness against himself,' deprives Congress of power to enact laws that compel self-incrimination, even if complete immunity from prosecution is granted prior to the compulsion of the incriminatory testimony. In other words, petitioners assert that no immunity statute, however drawn, can afford a lawful

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basis for compelling incriminatory testimony. They ask us to reconsider and overrule *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896), and *Ullmann v. United States*, supra, decisions that uphold the constitutionality of immunity statutes.<sup>FN22</sup>

FN22. Accord, *Gardner v. Broderick*, 392 U.S., at 276, 88 S.Ct., at 1915; *Murphy v. Waterfront Comm'n*, supra; *McCarthy v. Armdstein*, 266 U.S., at 42, 45 S.Ct., at 17 (Brandeis, J.); *Heike v. United States*, 227 U.S. 131, 142, 33 S.Ct. 226, 228, 57 L.Ed. 450 (1913) (Holmes, J.).

We find no merit to this contention and reaffirm the decisions in *Brown* and *Ullmann*.

### III

[4] Petitioners' second contention is that the scope of immunity provided by the federal witness immunity statute, 18 U.S.C. s 6002, is not coextensive with the scope of the Fifth Amendment privilege against compulsory self-incrimination, and therefore is not sufficient to supplant the privilege and compel testimony over a claim of the privilege. The statute provides that when a witness is compelled by district court order to testify over a claim of the privilege:

'the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information \*449 directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.'<sup>FN23</sup> 18 U.S.C. s 6002.

FN23. For other provisions of the 1970 Act relative to immunity of witnesses, see 18 U.S.C. ss 6001-6005.

**\*\*1659** The constitutional inquiry, rooted in logic and history, as well as in the decisions of this Court, is whether the immunity granted under this statute is coextensive with the scope of the privilege.<sup>FN24</sup> If so, petitioners' refusals to answer based on the privilege were unjustified, and the judgments of contempt were proper, for the grant of immunity has removed the dangers against which the privilege protects. *Brown v. Walker*, supra. If, on the other hand, the immunity granted is not as comprehensive as the protection afforded by the privilege, petitioners were justified in refusing to answer, and the judgments of contempt must be vacated. *McCarthy v. Armdstein*, 266 U.S. 34, 42, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924).

FN24. See, e.g., *Murphy v. Waterfront Comm'n*, supra, 378 U.S. at 54, 78, 84 S.Ct., at 1596, 1609, 12 L.Ed.2d 678; *Counselman v. Hitchcock*, 142 U.S. 547, 585, 12 S.Ct. 195, 206, 35 L.Ed. 1110 (1892).

Petitioners draw a distinction between statutes that provide transactional immunity and those that provide, as does the statute before us, immunity from use and derivative use.<sup>FN25</sup> They contend that a statute must at a minimum grant full transactional immunity in order to be coextensive with the scope of the privilege. In support of this contention, they rely on *Counselman v. Hitchcock*, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892), the first case in which this Court considered a constitutional challenge to an immunity statute. The statute, a reenactment of the Immunity Act of 1868,<sup>FN26</sup> provided that no 'evidence obtained from a party or witness by means of a judicial \*450 proceeding . . . shall be given in evidence, or in any manner used against him . . . in any court of the United States . . .' <sup>FN27</sup> Notwithstanding a grant of immunity and order to testify under the revised 1868 Act, the witness, asserting his privilege against compulsory self-incrimination, refused to testify before a federal grand jury. He was consequently adjudged in contempt of court.<sup>FN28</sup> On appeal, this Court con-

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strued the statute as affording a witness protection only against the use of the specific testimony compelled from him under the grant of immunity. This construction meant that the statute 'could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him.'<sup>FN29</sup> Since the revised 1868 Act, as construed by the Court, would permit the use against the immunized witness of evidence derived from his compelled testimony, it did not protect the witness to the same extent that a claim of the privilege would protect him. Accordingly, under the principle that a grant of immunity cannot supplant the privilege, and is not sufficient to compel testimony over a claim of the privilege, unless the scope of the grant of immunity is coextensive with the scope of the privilege,<sup>FN30</sup> the witness' refusal to testify was held proper. In the course of its opinion, the Court made the following statement, on which petitioners heavily rely:

FN25. See *Piccirillo v. New York*, 400 U.S. 548, 91 S.Ct. 520, 27 L.Ed.2d 596 (1971).

FN26. 15 Stat. 37.

FN27. See *Counselman v. Hitchcock*, supra, 142 U.S., at 560, 12 S.Ct., at 197.

FN28. *In re Counselman*, 44 F. 268 (CCND Ill. 1890).

FN29. *Counselman v. Hitchcock*, supra, 142 U.S., at 564, 12 S.Ct., at 198-199.

FN30. Precisely, the Court held 'that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply (sic) one, at least unless it is so broad as to have the same extent in scope and effect.' *Id.*, at 585, 12 S.Ct., at 206. See *Murphy v. Waterfront Comm'n*, supra, 378 U.S., at 54, 78, 81 S.Ct., at 1596, 1609.

'We are clearly of opinion that no statute which leaves the party or witness\*\*1660 subject to pro-

secution \*451 after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. (The immunity statute under consideration) does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates.' 142 U.S., at 585-586, 12 S.Ct., at 206.

Sixteen days after the Counselman decision, a new immunity bill was introduced by Senator Cullom,<sup>FN31</sup> who urged that enforcement of the Interstate Commerce Act would be impossible in the absence of an effective immunity statute.<sup>FN32</sup> The bill, which became the Compulsory Testimony Act of 1893,<sup>FN33</sup> was drafted specifically to meet the broad language in Counselman set forth above.<sup>FN34</sup> The new Act removed the privilege against self-incrimination in hearings before the Interstate Commerce Commission and provided that:

FN31. Counselman was decided Jan. 11, 1892. Senator Cullom introduced the new bill on Jan. 27, 1892. 23 Cong.Rec. 573.

FN32. 23 Cong.Rec. 6333.

FN33. Act of February 11, 1893, 27 Stat. 443, repealed by the Organized Crime Control Act of 1970, Pub.L.No. 91-452, s 245, 84 Stat. 931.

FN34. See the remarks of Senator Cullom, 23 Cong.Rec. 573, 6333, and Congressman Wise, who introduced the bill in the House. 24 Cong.Rec. 503. See *Shapiro v. United States*, 335 U.S. 1, 28-29 and n. 36, 68 S.Ct. 1375, 1389-1390, 92 L.Ed. 1787 (1948).

'no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any trans-

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action, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise . . . ' Act of Feb. 11, 1893, 27 Stat. 444.

\*452 This transactional immunity statute became the basic form for the numerous federal immunity statutes<sup>FN35</sup> until 1970, when, after re-examining applicable constitutional principles and the adequacy of existing law, Congress enacted the statute here under consideration.<sup>FN36</sup> The \*\*1661 new statute, which does not 'afford (the) absolute immunity against future prosecution' referred to in *Counselman*, was drafted to meet what Congress judged to be the conceptual basis of *Counselman*, as elaborated in subsequent decisions of the Court, namely, that immunity from the \*453 use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege.<sup>FN37</sup>

FN35. *Ullmann v. United States*, 350 U.S., at 438, 76 S.Ct., at 506; *Shapiro v. United States*, supra, 335 U.S., at 6, 68 S.Ct., at 1378. There was one minor exception. See *Piccirillo v. New York*, 400 U.S., at 571 and n. 11, 91 S.Ct., at 532 (Brennan, J., dissenting); *Arndstein v. McCarthy*, 254 U.S. 71, 73, 41 S.Ct. 26, 27, 65 L.Ed. 138 (1920).

FN36. The statute is a product of careful study and consideration by the National Commission on Reform of Federal Criminal Laws, as well as by Congress. The Commission recommended legislation to reform the federal immunity laws. The recommendation served as the model for this statute. In commenting on its proposal in a special report to the President, the Commission said:

'We are satisfied that our substitution of immunity from use for immunity from prosecution meets constitutional requirements for overcoming the claim of privilege. Immunity from use is the only consequence flowing from a violation of the individual's constitutional right to be protected from

unreasonable searches and seizures, his constitutional right to counsel, and his constitutional right not to be coerced into confessing. The proposed immunity is thus of the same scope as that frequently, even though unintentionally, conferred as the result of constitutional violations by law enforcement officers.' Second Interim Report of the National Commission on Reform of Federal Criminal Laws, Mar. 17, 1969, Working Papers of the Commission, 1446 (1970).

The Commission's recommendation was based in large part on a comprehensive study of immunity and the relevant decisions of this Court prepared for the Commission by Prof. Robert G. Dixon, Jr., of the George Washington University Law Center, and transmitted to the President with the recommendations of the Commission. See National Commission on Reform of Federal Criminal Laws, Working Papers, 1405-1444 (1970).

FN37. See S.Rep.No.91-617, pp. 51-56, 145 (1969); H.R.Rep.No.91-1549, p. 42 (1970).

[5] The statute's explicit proscription of the use in any criminal case of 'testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)' is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been

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construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'<sup>FN38</sup> Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

FN38. *Ullmann v. United States*, 350 U.S., at 438-439, 76 S.Ct., at 507, quoting *Boyd v. United States*, 116 U.S., at 634, 6 S.Ct., at 534. See *Knapp v. Schweitzer*, 357 U.S. 371, 380, 78 S.Ct. 1302, 1308, 2 L.Ed.2d 1393 (1958).

[6] Our holding is consistent with the conceptual basis of Counselman. The Counselman statute, as construed by the Court, was plainly deficient in its failure to \*454 prohibit the use against the immunized witness of evidence derived from his compelled testimony. The Court repeatedly emphasized this deficiency, noting that the statute:

'could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding . . . ' 142 U.S., at 564, 12 S.Ct., at 198-199;

that it:

'could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted,' *ibid.*;

and that it:

'affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources

of information which may supply other means of convicting the witness or party.' 142 U.S., at 586, 12 S.Ct., at 206.

The basis of the Court's decision was recognized in *Ullmann v. United States*, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956), in which the Court reiterated \*\*1662 that the Counselman statute was insufficient:

'because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony.' *Id.*, at 437, 76 S.Ct., at 506. (Emphasis supplied.)

See also *Arndstein v. McCarthy*, 254 U.S. 71, 73, 41 S.Ct. 26, 27, 65 L.Ed. 138 (1920). The broad language in *Counselman* relied upon by petitioners\*455 was unnecessary to the Court's decision, and cannot be considered binding authority.<sup>FN39</sup>

FN39. Cf. *The Supreme Court*, 1963 Term, 78 Harv.L.Rev. 179, 230 (1964). Language similar to the *Counselman* dictum can be found in *Brown v. Walker*, 161 U.S., at 594-595, 16 S.Ct., at 645-646, and *Hale v. Henkel*, 201 U.S., at 67, 26 S.Ct., at 376. *Brown* and *Hale*, however, involved statutes that were clearly sufficient to supplant the privilege against self-incrimination, as they provided full immunity from prosecution 'for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence . . . ' 161 U.S., at 594, 16 S.Ct., at 645; 201 U.S., at 66, 26 S.Ct., at 375. The same is true of *Smith v. United States*, 337 U.S. 137, 141, 146, 69 S.Ct. 1000, 1002, 1005, 93 L.Ed. 1264 (1949), and *United States v. Monia*, 317 U.S. 424, 425, 428, 63 S.Ct. 409, 410, 411, 87 L.Ed. 376 (1943). In *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965),

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some of the Counselman language urged upon us by petitioners was again quoted. But Albertson, like Counselman, involved an immunity statute that was held insufficient for failure to prohibit the use of evidence derived from compelled admissions and the use of compelled admissions as an 'investigatory lead.' *Id.*, at 80, 86 S.Ct., at 199.

In *Adams v. Maryland*, 347 U.S. 179, 182, 74 S.Ct. 442, 445, 98 L.Ed. 608 (1954), and in *United States v. Murdock*, 284 U.S. 141, 149, 52 S.Ct. 63, 64, 76 L.Ed. 210 (1931), the Counselman dictum was referred to as the principle of Counselman. The references were in the context of ancillary points not essential to the decisions of the Court. The Adams Court did note, however, that the Fifth Amendment privilege prohibits the 'use' of compelled self-incriminatory testimony. 347 U.S., at 181, 74 S.Ct., at 445. In any event, the Court in *Ullmann v. United States*, 350 U.S., at 436-437, 76 S.Ct., at 505-506, recognized that the rationale of Counselman was that the Counselman statute was insufficient for failure to prohibit the use of evidence derived from compelled testimony. See also *Arndstein v. McCarthy*, 254 U.S., at 73, 41 S.Ct., at 27.

In *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964), the Court carefully considered immunity from use of compelled testimony and evidence derived therefrom. The Murphy petitioners were subpoenaed to testify at a hearing conducted by the Waterfront Commission of New York Harbor. After refusing to answer certain questions on the ground that the answers might tend to incriminate them, petitioners were granted immunity\*456 from prosecution under the laws of New Jersey and New York.<sup>FN40</sup> They continued to refuse to testify, however, on the ground that their answers might tend to incriminate them under

federal law, to which the immunity did not purport to extend. They were adjudged in civil contempt, and that judgment was affirmed by the New Jersey Supreme Court.<sup>FN41</sup>

FN40. The Waterfront Commission of New York Harbor is a bistate body established under an interstate compact approved by Congress. 67 Stat. 541.

FN41. *In re Application of Waterfront Comm'n of N. Y. Harbor*, 39 N.J. 436, 189 A.2d 36 (1963).

The issue before the Court in *Murphy* was whether New Jersey and New York could compel the witnesses, whom these States had immunized from prosecution under their laws, to give testimony that might then be used to convict them of a federal crime. Since New Jersey and New York had not purported to confer immunity from federal prosecution, the Court was faced with the question what \*\*1663 limitations the Fifth Amendment privilege imposed on the prosecutorial powers of the Federal Government, a nonimmunizing sovereign. After undertaking an examination of the policies and purposes of the privilege, the Court overturned the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction.<sup>FN42</sup> The Court held that the privilege protects state witnesses against incrimination under federal as well as state law, and federal witnesses against incrimination\*457 under state as well as federal law. Applying this principle to the state immunity legislation before it, the Court held the constitutional rule to be that:

FN42. Reconsideration of the rule that the Fifth Amendment privilege does not protect a witness in one jurisdiction against being compelled to give testimony that could be used to convict him in another jurisdiction was made necessary by the decision in *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), in

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which the Court held the Fifth Amendment privilege applicable to the States through the Fourteenth Amendment. *Murphy v. Waterfront Comm'n*, 378 U.S., at 57, 84 S.Ct., at 1597.

'(A) state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Government in investigating and prosecuting crime, the Federal Governments must be prohibited from making any such use of compelled testimony and its fruits.' <sup>FN43</sup> 378 U.S., at 79, 84 S.Ct., at 1609.

FN43. At this point the Court added the following note: 'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' *Id.*, at 79 n. 18, 84 S.Ct., at 1609. If transactional immunity had been deemed to be the 'constitutional rule' there could be no federal prosecution.'

The Court emphasized that this rule left the state witness and the Federal Government, against which the witness had immunity only from the use of the compelled testimony and evidence derived therefrom, 'in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.' *Id.*, at 79, 84 S.Ct., at 1610.

It is true that in *Murphy* the Court was not presented with the precise question presented by this case, whether a jurisdiction seeking to compel testimony may do so by granting only use and derivative-use

immunity, for New Jersey and New York had granted petitioners transactional immunity. The Court heretofore has not \*458 squarely confronted this question,<sup>FN44</sup> because post-Counselman immunity statutes reaching the Court either have followed the pattern of the 1893 Act in providing transactional immunity,<sup>FN45</sup> or have been found deficient for failure to prohibit the use of all evidence derived from compelled testimony. \*\*1664 <sup>FN46</sup> But both the reasoning of the Court in *Murphy* and the result reached compel the conclusion that use and derivative-use immunity is constitutionally sufficient to compel testimony over a claim of the privilege. Since the privilege is fully applicable and its scope is the same whether invoked in a state or in a federal jurisdiction,<sup>FN47</sup> the *Murphy* conclusion that a prohibition on use and derivative use secures a witness' Fifth Amendment privilege against infringement by the Federal Government demonstrates that immunity from use and derivative use is coextensive with the scope of the privilege. As the *Murphy* Court noted, immunity from use and derivative use 'leaves the witness and the Federal Government in substantially the same position \*459 as if the witness had claimed his privilege'<sup>FN48</sup> in the absence of a grant of immunity. The *Murphy* Court was concerned solely with the danger of incrimination under federal law, and held that immunity from use and derivative use was sufficient to displace the danger. This protection coextensive with the privilege is the degree of protection that the Constitution requires, and is all that the Constitution requires even against the jurisdiction compelling testimony by granting immunity.<sup>FN49</sup>

FN44. See, e.g., *California v. Byers*, 402 U.S. 424, 442, n. 3, 91 S.Ct. 1535, 1545, 29 L.Ed.2d 9 (1971) (Harlan, J., concurring in judgment); *United States v. Freed*, 401 U.S. 601, 606 n. 11, 91 S.Ct. 1112, 1116, 28 L.Ed.2d 356 (1971); *Piccirillo v. New York*, 400 U.S. 548, 91 S.Ct. 520, 27 L.Ed.2d 596 (1971); *Stevens v. Marks*, 383 U.S. 234, 244-245, 86 S.Ct. 788, 793-794 (1966).

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FN45. E.g., *Murphy v. Waterfront Comm'n*, supra; *Ullmann v. United States*, supra; *Smith v. United States*, 337 U.S. 137, 69 S.Ct. 1000, 93 L.Ed. 1264 (1949); *United States v. Monia*, 317 U.S. 424, 63 S.Ct. 409, 87 L.Ed. 376 (1943); *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906); *Jack v. Kansas*, 199 U.S. 372, 26 S.Ct. 73, 50 L.Ed. 234 (1905); *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896). See also n. 35, supra.

FN46. E.g., *Albertson v. Subversive Activities Control Board*, 382 U.S., at 80, 86 S.Ct., at 199; *Arndstein v. McCarthy*, 254 U.S., at 73, 41 S.Ct., at 27.

FN47. In *Malloy v. Hogan*, 378 U.S., at 10-11, 84 S.Ct., at 1494-1495 the Court held that the same standards would determine the extent or scope of the privilege in state and in federal proceedings, because the same substantive guarantee of the Bill of Rights is involved. The *Murphy* Court emphasized that the scope of the privilege is the same in state and in federal proceedings. *Murphy v. Waterfront Comm'n*, 378 U.S., at 79, 84 S.Ct., at 1609-1610.

FN48. *Ibid.*

FN49. As the Court noted in *Gardner v. Broderick*, 392 U.S., at 276, 88 S.Ct., at 1915, '(a)nswers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying.'

#### IV

Although an analysis of prior decisions and the purpose of the Fifth Amendment privilege indicates that use and derivative-use immunity is coextensive

with the privilege, we must consider additional arguments advanced by petitioners against the sufficiency of such immunity. We start from the premise, repeatedly affirmed by this Court, that an appropriately broad immunity grant is compatible with the Constitution.

Petitioners argue that use and derivative-use immunity will not adequately protect a witness from various possible incriminating uses of the compelled testimony: for example, the prosecutor or other law enforcement officials may obtain leads, names of witnesses, or other information not otherwise available that might result in a prosecution. It will be difficult and perhaps impossible, the argument goes, to identify, by testimony or cross-examination, the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting the immunity.

This argument presupposes that the statute's prohibition\*460 will prove impossible to enforce. The statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom:

'(N)o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . ' 18 U.S.C. s 6002.

This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory\*\*1665 lead,'<sup>FN50</sup> and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.

FN50. See, e.g., *Albertson v. Subversive Activities Control Board*, 382 U.S., at 80, 86 S.Ct., at 199.

[7] A person accorded this immunity under 18 U.S.C. s 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon

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the integrity and good faith of the prosecuting authorities. As stated in *Murphy*:

'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' 378 U.S., at 79 n. 18, 84 S.Ct., at 1609.

This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

\*461 This is very substantial protection,<sup>FN51</sup> commensurate with that resulting from invoking the privilege itself. The privilege assures that a citizen is not compelled to incriminate himself by his own testimony. It usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer. This statute, which operates after a witness has given incriminatory testimony, affords the same protection by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties. The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources.

FN51. See *Murphy v. Waterfront Comm'n*, 378 U.S., at 102-104, 84 S.Ct., at 1615-1617 (White, J., concurring).

The statutory proscription is analogous to the Fifth Amendment requirement in cases of coerced confessions.<sup>FN52</sup> A coerced confession, as revealing of leads as testimony given in exchange for immunity,<sup>FN53</sup> is inadmissible in a criminal trial, but it does not bar prosecution.<sup>FN54</sup> Moreover, a defendant against whom incriminating evidence has been obtained through a grant of immunity may be

in a stronger position at trial than a defendant who asserts a Fifth Amendment coerced-confession claim. One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from \*462 legitimate independent sources.<sup>FN55</sup> On the other hand, a defendant raising a coerced-confession claim under the Fifth Amendment must first prevail in a voluntariness hearing before his confession and evidence derived from it become inadmissible.<sup>FN56</sup>

FN52. *Adams v. Maryland*, 347 U.S., at 181, 74 S.Ct., at 444; *Bram v. United States*, 168 U.S. 532, 542, 18 S.Ct. 183, 186, 42 L.Ed. 568 (1897).

FN53. As Mr. Justice White, concurring in *Murphy*, pointed out:

'A coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed is excluded in part because it is compelled incrimination in violation of the privilege. *Malloy v. Hogan* (378 U.S. 1, 7-8, 84 S.Ct. 1489, at 1493-1494, 12 L.Ed.2d 653); *Spano v. New York*, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265; *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568.' 378 U.S., at 103, 84 S.Ct., at 1616.

FN54. *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

FN55. See *supra*, at 1664; *Brief the United States* 37; *Cf. Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

FN56. *Jackson v. Denno*, *supra*.

\*\*1666 There can be no justification in reason or policy for holding that the Constitution requires an amnesty grant where, acting pursuant to statute and accompanying safeguards, testimony is compelled

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in exchange for immunity from use and derivative use when no such amnesty is required where the government, acting without colorable right, coerces a defendant into incriminating himself.

We conclude that the immunity provided by 18 U.S.C. s 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it. The judgment of the Court of Appeals for the Ninth Circuit accordingly is

Affirmed.

Mr. Justice BRENNAN and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS, dissenting.

The Self-Incrimination Clause says: 'No person . . . shall be compelled in any criminal case to be a witness against himself.' I see no answer to the proposition that he is such a witness when only 'use' immunity is granted.

My views on the question of the scope of immunity that is necessary to force a witness to give up his guarantee\*463 against self-incrimination contained in the Fifth Amendment are so well known, see *Ullmann v. United States*, 350 U.S. 422, 440, 76 S.Ct. 497, 507, 100 L.Ed. 51 (dissenting), and *Piccirillo v. New York*, 400 U.S. 548, 549, 91 S.Ct. 520, 521, 27 L.Ed.2d 596 (dissenting), that I need not write at length.

In *Counselman v. Hitchcock*, 142 U.S. 547, 586, 12 S.Ct. 195, 206, 35 L.Ed. 1110, the Court adopted the transactional immunity test: 'In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.' *Id.*, at 586, 12 S.Ct., at 206. In *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819, a case involving another federal prosecution, the immunity statute provided that the witness would

be protected 'on account of any transaction . . . concerning which he may testify.' *Id.*, at 594, 16 S.Ct., at 645. The Court held that the immunity offered was coterminous with the privilege and that the witness could therefore be compelled to testify, a ruling that made 'transactional immunity' part of the fabric of our constitutional law. *Ullmann v. United States*, supra, 350 U.S., at 438, 76 S.Ct., at 50.

This Court, however, apparently believes that *Counselman* and its progeny were overruled sub silentio in *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678, *Murphy* involved state witnesses, granted transactional immunity under state law, who refused to testify for fear of subsequent federal prosecution. We held that the testimony in question could be compelled, but that the Federal Government would be barred from using any of the testimony, or its fruits, in a subsequent federal prosecution.

*Murphy* overruled, not *Counselman*, but *Feldman v. United States*, 322 U.S. 487, 64 S.Ct. 1082, 88 L.Ed. 1408, which had held 'that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction.' *Murphy v. Waterfront Comm'n*, supra, 378 U.S., at 77, 84 S.Ct., at 1608. But *Counselman*, \*464 as the *Murphy* Court recognized, 'said nothing about the problem of incrimination under the law of another sovereign.' *Id.*, at 72, 84 S.Ct., at 1606. That problem is one of federalism, as to require transactional immunity between jurisdictions might

'deprive a state of the right to prosecute a violation of its criminal law on the basis of another state's grant of immunity (a result which) would be gravely in derogation of its sovereignty and obstructive of its administration\*\*1667 of justice.' *United States ex rel. Catena v. Elias*, 449 F.2d 40, 44 (CA3 1971).

Moreover, as Mr. Justice Brennan has pointed out, the threat of future prosecution



U.S. Department of Justice

United States Attorney  
Southern District of Iowa

Criminal Division

U.S. Courthouse Annex, Suite 286  
110 East Court Avenue  
Des Moines, Iowa 50309-2053

(515) 473-9300  
FAX (515) 473-9292

July 22, 2009

Dean Stowers  
West Glen Town Center  
The Hub Building, Suite 130  
650 South Prairie View Drive  
West Des Moines, Iowa 50266

Re: Proffer of [REDACTED]

Dear Mr. Stowers:

You have indicated that your client is willing to provide information to the government which may be of assistance to law enforcement in the Southern District of Iowa. This letter sets forth the ground rules covering any proffer of information by your client to the government.

1. **Purpose:** The purpose of your client making a proffer is to provide the government with an opportunity to assess the value, extent, and truthfulness of your client's information about potential criminal activity in the Southern District of Iowa and elsewhere; and/or to determine whether a plea agreement can be reached to address the charges now pending against your client.
2. **Truth:** Your client's proffer must be completely truthful with no material misstatements or omissions of fact.
3. **Recording:** At the government's option, the proffer interview may be tape-recorded, videotaped, or recorded through an agent's or government attorney's handwritten notes.
4. **Polygraph:** If requested by the government, your client agrees to submit to polygraph examinations by a polygraph examiner selected by the government.
5. **No Promises:** While your client hopes to receive some benefit by cooperating with the government, your client understands that the government is making no promise or assurances other than as set forth in this letter.
6. **No Direct Use:** The government agrees that statements or information contained in your client's proffer may not be used in the government's case-in-chief against your client.

July 22, 2009  
Dean Stowers  
Page Two

should a trial be held.

**7. Impeachment:** If your client should testify materially contrary to the substance of the proffer, or otherwise present in an legal proceeding a position materially inconsistent with the proffer, the proffer may be used against your client as impeachment or rebuttal evidence, or as the basis for a prosecution for perjury or false statement.

**8. Derivative Use:** The government may make derivative use of, and may pursue investigative leads suggested by, any statements or information provided by your client's proffer. This provision is necessary to eliminate the necessity of a Kastigar<sup>1</sup> hearing wherein the government would have had to prove that the evidence it sought to introduce at trial or in a related legal proceeding is derived from "a legitimate source wholly independent" of statements or information from the proffer.

**9. Crimes of Violence and Subsequent Criminal Conduct:** The government may make use of any statements or information provided by your client's proffer, without limitation, in any prosecution or investigation concerning any crime of violence or any crime that occurs after the date of this letter.

**10. Sentencing Information:** Your client understands that if your client either pleads guilty or is convicted at trial, the government, pursuant to 18 U.S.C. § 3661, must provide to the client's sentencing judge the contents of the proffer. Pursuant to U.S.S.G. § 1B1.8, however, the proffer may not be used to determine the appropriate guideline sentence, except as stated in the "Impeachment" paragraph above.

**11. Brady Discovery:** Your client understands that Brady v. Maryland<sup>2</sup> and its progeny require that the government provide any other indicted defendant all information known to the government which tends to mitigate or negate such defendant's guilt. Should your client's proffer contain Brady material, the government will be required to disclose this information to the appropriate defendant(s).

**12. Other Statements:** The terms of this agreement do not apply to any other statement made by your client at any other time, including any statements previously made to law enforcement.

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<sup>1</sup> *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

<sup>2</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

July 22, 2009  
Dean Stowers  
Page Three

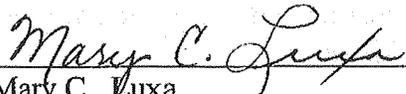
**13. Scope:** This agreement is between your client and the United States Attorney's Office for the Southern District of Iowa, and it does not bind any other federal, state, or local authority. However, the government agrees that it will not disclose information provided by your client pursuant to this agreement to other law enforcement authorities for the purpose of prosecuting your client unless those authorities agree to be bound by the limitations set forth in this agreement.

**14. Full Agreement:** This document constitutes the full and complete agreement of the parties. It applies only to the proffer session that will be scheduled for . It will not apply to any other interview or legal proceeding unless specifically agreed by the government in writing.

Very truly yours,

Matthew G. Whitaker  
United States Attorney

By:

  
\_\_\_\_\_  
Mary C. Luxa  
Assistant United States Attorney

I have read this proffer agreement carefully and reviewed every part of it with my attorney. I understand and voluntarily agree to it.

8-4-09  
Date

  
\_\_\_\_\_  
Defendant

I represent as legal counsel. I have carefully reviewed every part of this proffer agreement with my client. To my knowledge, the decision to make this proffer agreement is informed and voluntary.

8/4/09  
Date

  
\_\_\_\_\_  
Dean Stowers  
Attorney for Defendant

## ARRAIGNMENT

## Rule 11

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) **Withdrawing a Guilty or Nolo Contendere Plea.** A defendant may withdraw a plea of guilty or 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.

(e) **Finality of a Guilty or Nolo Contendere Plea.** After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) **Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.** The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) **Recording the Proceedings.** The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) **Harmless Error.** A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(5)-(10), 89 Stat. 371, 372; Apr. 30, 1979, eff. Aug. 1, 1979, and Dec. 1, 1980; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7076, 102 Stat. 4406; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 29, 1999, eff. Dec. 1, 1999; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007.)

## ADVISORY COMMITTEE NOTES

## 1944 Adoption

1. This rule is substantially a restatement of existing law and practice, 18 U.S.C. § 564 (Standing mute); *Fogus v. United States*, 34 F.2d 97, C.C.A.4th, (duty of court to

ascertain that plea of guilty is intelligently and voluntarily made):

2. The plea of nolo contendere has always existed in the Federal courts. *Hudson v. United States*, 47 S.Ct. 127, 272 U.S. 451, 71 L.Ed. 347; *United States v. Norris*, 50 S.Ct. 424, 281 U.S. 619, 74 L.Ed. 1076. The use of the plea is recognized by the Probation Act, 18 U.S.C. former (now § 3651) 724. While at times criticized as theoretically lacking in logical basis, experience has shown that it performs a useful function from a practical standpoint.

## 1966 Amendments

The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small number go to trial. See United States Attorneys Statistical Report, Fiscal Year 1964, p. 1. The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts.

Three changes are made in the second sentence. The first change makes it clear that before accepting either a plea of guilty or nolo contendere the court must determine that the plea is made voluntarily with understanding of the nature of the charge. The second change expressly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge. The reported cases reflect some confusion over this matter. Compare *United States v. Diggs*, 304 F.2d 929 (6th Cir.1962); *Domenica v. United States*, 292 F.2d 483 (1st Cir.1961); *Gundlach v. United States*, 262 F.2d 72 (4th Cir.1958), cert. den., 360 U.S. 904 (1959); and *Jubian v. United States*, 236 F.2d 155 (6th Cir.1956), which contain the implication that personal interrogation of the defendant is the better practice even when he is represented by counsel, with *Meeks v. United States*, 298 F.2d 204 (5th Cir.1962); *Numley v. United States*, 294 F.2d 579 (10th Cir.1961), cert. den., 368 U.S. 991 (1962); and *United States v. Von der Heide*, 169 F.Supp. 560 (D.D.C. 1959).

The third change in the second sentence adds the words "and the consequences of his plea" to state what clearly is the law. See, e.g., *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948); *Kerchevel v. United States*, 274 U.S. 220, 223 (1927); *Munich v. United States*, 337 F.2d 356 (9th Cir.1964); *Pilkington v. United States*, 315 F.2d 204 (4th Cir.1963); *Smith v. United States*, 324 F.2d 436 (D.C.Cir.1963); but cf. *Marvel v. United States*, 335 F.2d 101 (5th Cir.1964).

A new sentence is added at the end of the rule to impose a duty on the court in cases where the defendant pleads guilty to satisfy itself that there is a factual basis for the plea before entering judgment. The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. For a similar requirement see Mich.Stat. Ann. § 28.1058 (1954); Mich.Supp. Ct.Rule 35A; *In re Valle*, 364 Mich. 471, 110 N.W.2d 673, (1961); *People v. Barrows*, 358 Mich. 267, 99 N.W.2d 347.

Complete Annotation Materials, see Title 18 U.S.C.A.

**§1B1.8. Use of Certain Information**

(a) Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

(b) The provisions of subsection (a) shall not be applied to restrict the use of information:

(1) known to the government prior to entering into the cooperation agreement;

(2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender);

(3) in a prosecution for perjury or giving a false statement;

(4) in the event there is a breach of the cooperation agreement by the defendant; or

(5) in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities).

Commentary

Application Notes:

1. This provision does not authorize the government to withhold information from the court but provides that self-incriminating information obtained under a cooperation agreement is not to be used to determine the defendant's guideline range. Under this provision, for example, if a defendant is arrested in possession of a kilogram of cocaine and, pursuant to an agreement to provide information concerning the unlawful activities of co-conspirators, admits that he assisted in the importation of an additional three kilograms of cocaine, a fact not previously known to the government, this admission would not be used to increase his applicable guideline range, except to the extent provided in the agreement. Although the guideline itself affects only the determination of the guideline range, the policy of the Commission, as a corollary, is that information prohibited from being used to determine the applicable guideline range shall not be used to depart upward. In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, and to what extent, a downward departure is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities); e.g., a court may refuse to depart downward on the basis of such information.
2. Subsection (b)(2) prohibits any cooperation agreement from restricting the use of information as to the existence of prior convictions and sentences in determining adjustments under §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender). The Probation Service generally will secure information relevant to the defendant's criminal history independent of information the defendant provides as part of his cooperation agreement.

3. *On occasion the defendant will provide incriminating information to the government during plea negotiation sessions before a cooperation agreement has been reached. In the event no agreement is reached, use of such information in a sentencing proceeding is restricted by Rule 11(e)(6) (Inadmissibility of Pleas, Plea Discussions, and Related Statements) of the Federal Rules of Criminal Procedure and Rule 410 (Inadmissibility of Pleas, Plea Discussions, and Related Statements) of the Rules of Evidence.*
4. *As with the statutory provisions governing use immunity, 18 U.S.C. § 6002, this guideline does not apply to information used against the defendant in a prosecution for perjury, giving a false statement, or in the event the defendant otherwise fails to comply with the cooperation agreement.*
5. *This guideline limits the use of certain incriminating information furnished by a defendant in the context of a defendant-government agreement for the defendant to provide information concerning the unlawful activities of other persons. The guideline operates as a limitation on the use of such incriminating information in determining the applicable guideline range, and not merely as a restriction of the government's presentation of such information (e.g., where the defendant, subsequent to having entered into a cooperation agreement, provides such information to the probation officer preparing the presentence report, the use of such information remains protected by this section).*
6. *Unless the cooperation agreement relates to the provision of information concerning the unlawful activities of others, this guideline does not apply (i.e., an agreement by the defendant simply to detail the extent of his own unlawful activities, not involving an agreement to provide information concerning the unlawful activity of another person, is not covered by this guideline).*

Historical Note: Effective June 15, 1988 (see Appendix C, amendment 5). Amended effective November 1, 1990 (see Appendix C, amendment 308); November 1, 1991 (see Appendix C, amendment 390); November 1, 1992 (see Appendix C, amendment 441); November 1, 2004 (see Appendix C, amendment 674).

course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933; Pub.L. 94-149, § 1(9), Dec. 12, 1975, 89 Stat. 805; Apr. 30, 1979, eff. Dec. 1, 1980.)

#### ADVISORY COMMITTEE NOTES

##### 1972 Proposed Rules

Withdrawn pleas of guilty were held inadmissible in federal prosecutions in *Kercheval v. United States*, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927). The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in *People v. Spitaleri*, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961), reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in *Kercheval*, which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., 86 A.L.R.2d 326.

Pleas of *nolo contendere* are recognized by Rule 11 of the Rules of Criminal Procedure, although the law of numerous States is to the contrary. The present rule gives effect to the principal traditional characteristic of the *nolo* plea, i.e. avoiding the admission of guilt which is inherent in pleas of guilty. This position is consistent with the construction of Section 5 of the Clayton Act, 15 U.S.C. § 16(a), recognizing the inconclusive and compromise nature of judgments based on *nolo* pleas. *General Electric Co. v. City of San Antonio*, 334 F.2d 480 (5th Cir.1964); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 323 F.2d 412 (7th Cir.1963), cert. denied 376 U.S. 939, 84 S.Ct. 794, 11 L.Ed.2d 659; *Armco Steel Corp. v. North Dakota*, 376 F.2d 206 (8th Cir.1967); *City of Burbank v. General Electric Co.*, 329 F.2d 825 (9th Cir.1964). See also state court decisions in Annot., 18 A.L.R.2d 1287, 1314.

Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise. As pointed out in McCormick § 251, p. 543.

"Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises."

See also *People v. Hamilton*, 60 Cal.2d 105, 32 Cal.Rptr. 4, 383 P.2d 412 (1963), discussing legislation designed to achieve this result. As with compromise offers generally, Rule 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.

Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use for or against other persons will not impair the effectiveness of withdrawing pleas or the freedom of discus-

#### Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of *nolo contendere*;
- (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the

sion which the rule is designed to foster. See A.B.A. Standards Relating to Pleas of Guilty § 2.2 (1968). See also the narrower provisions of New Jersey Evidence Rule 52(2) and the unlimited exclusion provided in California Evidence Code § 1153.

#### 1974 Enactment

The Committee added the phrase "Except as otherwise provided by Act of Congress" to Rule 410 as submitted by the Court in order to preserve particular congressional policy judgments as to the effect of a plea of guilty or of *nolo contendere*. See 15 U.S.C. 16(a). The Committee intends that its amendment refers to both present statutes and statutes subsequently enacted. House Report No. 93-650.

As adopted by the House, rule 410 would make inadmissible pleas of guilty or *nolo contendere* subsequently withdrawn as well as offers to make such pleas. Such a rule is clearly justified as a means of encouraging pleading. However, the House rule would then go on to render inadmissible for any purpose statements made in connection with these pleas or offers as well.

The committee finds this aspect of the House rule unjustified. Of course, in certain circumstances such statements should be excluded. If, for example, a plea is vitiated because of coercion, statements made in connection with the plea may also have been coerced and should be inadmissible on that basis. In other cases, however, voluntary statements of an accused made in court on the record, in connection with a plea, and determined by a court to be reliable should be admissible even though the plea is subsequently withdrawn. This is particularly true in those cases where, if the House rule were in effect, a defendant would be able to contradict his previous statements and thereby lie with impunity [See *Harris v. New York*, 401 U.S. 222 (1971)]. To prevent such an injustice, the rule has been modified to permit the use of such statements for the limited purposes of impeachment and in subsequent perjury or false statement prosecutions. Senate Report No. 93-1277.

The House bill provides that evidence of a guilty or *nolo contendere* plea, of an offer of either plea, or of statements made in connection with such pleas or offers of such pleas, is inadmissible in any civil or criminal action, case or proceeding against the person making such plea or offer. The Senate amendment makes the rule inapplicable to a voluntary and reliable statement made in court on the record where the statement is offered in a subsequent prosecution of the declarant for perjury or false statement.

The issues raised by Rule 410 are also raised by proposed Rule 11(e)(6) of the Federal Rules of Criminal Procedure presently pending before Congress. This proposed rule, which deals with the admissibility of pleas of guilty or *nolo contendere*, offers to make such pleas, and statements made in connection with such pleas, was promulgated by the Supreme Court on April 22, 1974, and in the absence of congressional action will become effective on August 1, 1975. The conferees intend to make no change in the presently-existing case law until that date, leaving the courts free to develop rules in this area on a case-by-case basis.

The Conferees further determined that the issues presented by the use of guilty and *nolo contendere* pleas, offers of such pleas, and statements made in connection with such pleas or offers, can be explored in greater detail during

Congressional consideration of Rule 11(e)(6) of the Federal Rules of Criminal Procedure. The Conferees believe, therefore, that it is best to defer its effective date until August 1, 1975. The Conferees intend that Rule 410 would be superseded by any subsequent Federal Rule of Criminal Procedure or act of Congress with which it is inconsistent, if the Federal Rule of Criminal Procedure or Act of Congress takes effect or becomes law after the date of the enactment of the act establishing the rules of evidence.

The conference adopts the Senate amendment with an amendment that expresses the above intentions. House Report No. 93-1597.

#### 1979 Amendments

Present rule 410 conforms to rule 11(e)(6) of the Federal Rules of Criminal Procedure. A proposed amendment to rule 11(e)(6) would clarify the circumstances in which plea discussions and related statements are inadmissible in evidence: see Advisory Committee Note thereto. The amendment proposed above would make comparable changes in rule 410.

#### HISTORICAL NOTES

##### References in Text

Rule 11 of the Federal Rules of Criminal Procedure referred to in par. (3), is classified to Title 18, Federal Rules of Criminal Procedure.

### § 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or
- (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. (Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927, and amended Pub.L. 103-322, Title XXXIII, § 330013(4), Sept. 13, 1994, 108 Stat. 2146.)

### § 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

(Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927, and amended Pub.L. 100-690, Title VII, § 7020(e), Nov. 18, 1988, 102 Stat. 4396; Pub.L. 103-322, Title XXXIII, § 330013(4), Sept. 13, 1994, 108 Stat. 2146.)

**2254/2255  
PROCEDURE**

**PRESENTED BY**

**RANAE ANGEROTH, KAY BARTOLO  
& PATTY TROM-BIRD  
STAFF ATTORNEYS**

**FOR**

**U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF IOWA**

FPD and IACDL  
Spring 2010 Seminar  
**Habeas Corpus Practice Tips**  
2241/2254/2255  
Staff Attorneys S.D. Iowa

**The Who, *Who Are You?, on Who Are You* (Polydor Records 1978)**

28 U.S.C. § 2254 - by a state prisoner seeking release from custody

28 U.S.C. § 2255 - by a federal prisoner seeking release from custody

28 U.S.C. § 2241 - federal prisoner regarding conditions of confinement, execution of sentence

**REM, *Stand in the place where you live*, on Green Album (Warner Bros. 1988)**

2254 - file in the district of the conviction (SD or ND of Iowa)

2255 - file in the district of the conviction; same judge

2241 - file in the district of confinement (rarely in Iowa unless federal witness, pretrial detainee)

**Spit Enz, *One Step Ahead*, on Waiata (Mushroom Records 1981)**

General Habeas Procedure: IRO/Answer//Expansion of record-Discovery/Briefs/Submitted

**Carole King, *Sometimes You Win, Sometimes You Lose*, on Greatest Hits: Songs of Long Ago (Ode/Epic/Legacy 1978)**

- AEDPA Standard: District Court may grant a writ of habeas corpus only where the relevant state court decision was either “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).



*“I’ll work on the appeal. You try to escape.”*

- Tough to win. E.g., *Morales v. Ault*, 476 F.3d 545 (8th Cir. 2007) (conflict of interest between prosecutor and medical examiner) (attached)

- Essential to preserve federal claim while in state court. See e.g. Wyldes v. Hundley, 69 F.3d 247, 252 (8th Cir. 1995) (P didn't alert state court to federal juror misconduct claim that was more defendant friendly than the Iowa law); cf. Hardin v. Iowa, No. 4:05-cv-196-HDV (S.D. Iowa Oct. 10, 2008) (no relief granted but observes that Iowa does not specifically provide for ex parte funding for an Ake expert in criminal cases and the federal rules do).

### Examples of Successful Habeas

#### \*2255

- Ineffective assistance of counsel for failing to file an appeal when counsel was directed to do so, or counsel should have inquired. Five granted in S.D. of Iowa in last year.



*"My incompetence will become  
the basis of your appeal."*

- NOTE: Remedy is new date for appeal not new sentence.

**BEST PRACTICE:** Have client sign a waiver of appeal and keep in file. See Baughman v. United States, Nos. 407CV191, 407CR130, 2008 WL 3861991 (S.D. Ga. Aug. 18, 2008) (attached with suggested form to use with client).

- Booker error. Ineffective assistance of counsel for failing to understand current state of law. E.g., Bravo Espinosa v. U.S., No. 4:08-cv-116-JEG (S.D. Iowa Feb. 5, 2010) (Clerk's No. 35) (attached); Harris v. U.S., No. 4:08-cv-164-RP (S.D. Iowa Mar. 31, 2010) (Clerk's No. 33) (attached).
- Application of Begay v. United States, 553 U.S. 137 (2008) (excluding certain offenses as crimes of violence). E.g., Goff v. United States, 4:08-cv-00331-HDV (S.D. Iowa Nov. 4, 2008) (where claim was preserved at sentencing, on appeal, rehearing, rehearing en banc, and Supreme Court review, district court found that claim not precluded; government withdrew § 2255 appeal) (attached); but see Wells v. United States, No. 4:08-cv-00057-JEG (S.D. Iowa Jan. 28, 2010) (Begay not applicable even where defendant raised issue at sentencing, on appeal, and in first § 2255 motion).

\*2254

- Reed v. Thalacker, 198 F.3d 1058, 1063 (8th Cir. 1999) (hearsay evidence impermissible in conviction of sexual abuse of child) (attached).
- Huss v. Graves, 252 F.3d 952, 957-58 (8th Cir. 2001) (mistrial prejudiced Huss, who initially asked for finding of not guilty by reason of insanity).

**Johnny Cash, *I Walk the Line* (Sun Records 1956)**

**Responsibility of Counsel**

- Court appoints counsel liberally, not necessarily because a valid claim exists.
- Where there are no nonfrivolous claims, draft brief asserting that these are Petitioners' arguments, and move to withdraw.
- No habeas counsel has been given Rule 11 sanctions in the past 20 years for bringing frivolous claim.
- Especially encourage amendments to glean out frivolous arguments. Most petitions/motions need amending. Judges liberally grant motions to amend but SOL can bar new claims.

**CAUTION:** An order extending the time to amend does NOT necessarily extend the statute of limitations to raise a new claim. It must relate back under Fed. R. Civ. P. 15. A general claim for ineffective assistance of counsel is not an umbrella to all ineffective of assistance claims.

- Extensions of Time (to amend, file brief, examine materials, etc) are granted liberally.  
**BEST PRACTICE:** Ask for more time in one motion rather than shorter time frames in multiple motions.
- Requests for Evidentiary Hearing
  - 2255 - Required where client directed counsel to appeal.
  - 2254 - Rare

**B. John Burns, *I'd Love to Hear My Own Advice*, (unknown album, record label or date of original release)**

**General Tips**

- Focus on issues that matter
- Focus on analysis (irAc not iRac)

**“Do Good.”**

---The Honorable Harold D. Vietor, April 22, 2010  
(In answer to what advice he had for attorneys practicing criminal law).

## Selected Habeas Corpus Resources

Federal Habeas Corpus Update, compiled mostly by Keir Weyble, and available at [http://www.capdefnet.org/hat/contents/fhc\\_update/update.htm](http://www.capdefnet.org/hat/contents/fhc_update/update.htm). It provides a summary of the generally applicable law, issues, and a list of successful habeas cases in district courts and courts of appeals.

Habeas Corpus Training Materials, Revised 3d ed., 2003. Marc Falkoff, then Special Master for the E.D.N.Y., available at [http://www.nyed.uscourts.gov/K\\_Manual.pdf](http://www.nyed.uscourts.gov/K_Manual.pdf). It provides a summary of the generally applicable law and issues, with special attention to New York law.

Federal Habeas Corpus Practice and Procedure, 5th ed., 2005. Liebman & Hertz.

## Music To Defend To Playlist (abridged)

In addition to the works cited previously, anything by B. John Burns and particularly something off his new album, "High Adventure on the Road"

- "I Shall Be Released," Bob Dylan
- "Folsom Prison Blues," Johnny Cash
- "Fish in the Jailhouse," Tom Waits & Kathleen Brennan
- "Riot Van," Arctic Monkeys
- "Ain't Nobody's Business if I Do," Porter Grainger & Everett Robbins
- "Star Witness," Neko Case
- "It's Too Late," Carole King
- "The Stone," Dave Matthews
- "No More, My Lord," Prison holler
- "Tie a Yellow Ribbon," Tony Orlando
- "Indiana Wants Me," R. Dean Taylor
- "Miss Otis Regrets," Cole Porter"
- "Snitch," Akon
- "Prison Song," System of a Down
- "'Tis of Thee," Ani DiFranco
- "Renegade," Styx
- "Bohemian Rhapsody," Queen

If I could stop here,  
the rules would be complicated, but still  
comprehensible. . . .

I concede that this system of rules has a certain logic,  
indeed an attractive power for those who like  
difficult puzzles.

Edwards v. Carpenter, 529 U.S. 446, 454-59 (2000) (Breyer, J., concurring).

Westlaw

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476 F.3d 545  
(Cite as: 476 F.3d 545)

**H**

United States Court of Appeals,  
Eighth Circuit.  
Byron MORALES, Appellant,  
v.  
John F. AULT, Appellee.  
No. 05-4021.

Submitted: May 17, 2006.  
Filed: Feb. 7, 2007.

**Background:** Following affirmance of state conviction for first-degree murder, petition for writ of habeas corpus was filed. The United States District Court for the Southern District of Iowa, James E. Gritzner, J., denied the petition. Petitioner appealed.

**Holdings:** The Court of Appeals, Bowman, Circuit Judge, held that:

- (1) state court's determination that overwhelming evidence of petitioner's guilt overcame defense counsel's alleged defects was not an unreasonable application of federal law, and
- (2) state court's determination that no *Brady* violations existed was not an unreasonable application of federal law.

Affirmed.

Bright, Circuit Judge, filed opinion dissenting.

#### West Headnotes

#### [1] Habeas Corpus 197 ↪765.1

197 Habeas Corpus  
197III Jurisdiction, Proceedings, and Relief  
197III(C) Proceedings  
197III(C)4 Conclusiveness of Prior Determinations  
197k765 State Determinations in Federal Court

197k765.1 k. In General. Most

Cited Cases

Pursuant to the Anti-Terrorism and Effective Death Penalty Act (AEDPA), when a state prisoner files a petition for writ of habeas corpus in federal court the Court of Appeals is directed to undertake only a limited and deferential review of the underlying state court decisions. 28 U.S.C.A. § 2254(d).

#### [2] Habeas Corpus 197 ↪452

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k452 k. Federal or Constitutional Questions. Most Cited Cases

A state court decision is contrary to clearly established Supreme Court precedent, for purposes of a habeas claim under the Antiterrorism and Effective Death Penalty Act (AEDPA), if it applies a rule that contradicts the governing law set forth in the Court's cases or if it confronts a set of facts that are materially indistinguishable from a decision of the Court and nevertheless arrives at a result different from the Court's precedent. 28 U.S.C.A. § 2254(d).

#### [3] Habeas Corpus 197 ↪450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In General. Most Cited Cases

A state court decision is an unreasonable application of clearly established Supreme Court precedent, for purposes of a habeas claim under the Antiterrorism and Effective Death Penalty Act (AEDPA), if it correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case. 28 U.S.C.A. § 2254(d).

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[4] Habeas Corpus 197 ↪450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In General. Most Cited Cases

A federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly; rather, that application must also be unreasonable.

[5] Criminal Law 110 ↪1967

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues

110k1966 Appeal

110k1967 k. In General. Most Cited Cases

(Formerly 110k641.13(7))

A criminal defendant is constitutionally entitled to the effective assistance of counsel on direct appeal, as well as at trial. U.S.C.A. Const.Amend. 6.

[6] Habeas Corpus 197 ↪486(4)

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(B) Particular Defects and Authority for Detention in General

197k482 Counsel

197k486 Adequacy and Effectiveness of Counsel

197k486(4) k. Evidence; Procurement, Presentation, and Objection. Most Cited Cases  
State court's determination that overwhelming evidence of petitioner's guilt overcame defense counsel's alleged defects in first-degree murder prosecution of failing to investigate and failing introduce

certain evidence was not an unreasonable application of federal law, and thus did not warrant habeas relief since, given the overwhelming evidence of petitioner's guilt, it would be impossible for him to demonstrate prejudice under *Strickland*; no less than seven doctors testified that son's injuries were not consistent with fall down stairs as claimed by defense, petitioner's own expert doctor confirmed much of what was found by prosecution's doctors, and petitioner's accounts of events were inconsistent and frequently implausible. U.S.C.A. Const.Amend. 6.

[7] Habeas Corpus 197 ↪480

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(B) Particular Defects and Authority for Detention in General

197k480 k. Discovery and Disclosure. Most Cited Cases

State court's determination that no *Brady* violations existed during first-degree murder prosecution was not an unreasonable application of federal law, and thus did not warrant habeas relief since petitioner could not establish prejudice; even if state failed to turn over medical records before date of second autopsy, physician performing second autopsy stated his post-autopsy review of records did not change his opinion, microscopic autopsy slides were made available to defense counsel, and after defense expert reviewed slides he concurred with state expert's autopsy findings.

[8] Criminal Law 110 ↪1992

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)2 Disclosure of Information

110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases

(Formerly 110k700(4), 110k700(2.1))

There are three components of a true *Brady* violation: (1) the evidence at issue must be favorable to

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the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued.

[9] Criminal Law 110 ↪ 1992

110 Criminal Law  
110XXXI Counsel  
110XXXI(D) Duties and Obligations of Prosecuting Attorneys  
110XXXI(D)2 Disclosure of Information  
110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases  
(Formerly 110k700(2.1))

Prejudice cannot be shown, as required to support a *Brady* violation claim, unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.

[10] Criminal Law 110 ↪ 1992

110 Criminal Law  
110XXXI Counsel  
110XXXI(D) Duties and Obligations of Prosecuting Attorneys  
110XXXI(D)2 Disclosure of Information  
110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases  
(Formerly 110k700(2.1))

In determining whether confidence in the verdict has been undermined for an alleged *Brady* violation, the Court of Appeals considers the items of suppressed evidence collectively, rather than individually.

[11] Constitutional Law 92 ↪ 4594(8)

92 Constitutional Law  
92XXVII Due Process  
92XXVII(H) Criminal Law  
92XXVII(H)4 Proceedings and Trial  
92k4592 Disclosure and Discovery  
92k4594 Evidence  
92k4594(8) k. Duty to Preserve.

Most Cited Cases

(Formerly 92k268(5))

To establish a due-process violation when a state destroys evidence that is potentially useful to a criminal defendant, the defendant must show that the state acted in bad faith. U.S.C.A. Const.Amend. 5.

\*547 David J. Dutton, argued, Waterloo, IA (Erin Patrick Lyons, Dutton & Braun, on the brief), for appellant.

Thomas William Andrews, argued, Asst. U.S. Atty. Gen., Des Moines, IA, for appellee.

Before WOLLMAN, BRIGHT, and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

Byron Morales petitions the Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (2000). He challenges his 1997 Iowa state court conviction for first-degree murder, which was upheld by the Iowa Court of Appeals on direct appeal and in post-conviction proceedings. Morales asserts two grounds for habeas relief: (1) he received ineffective assistance of trial counsel in violation of the Sixth Amendment to the United States Constitution and (2) the state failed to disclose potentially exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The District Court <sup>FN1</sup> denied the petition and Morales now appeals. We affirm.

FN1. The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa.

I.

Shortly after 1:00 p.m. on November 10, 1995, Byron Morales made an emergency call to 911 and reported that his two-year-old son <sup>FN2</sup> Kevin was unresponsive. When paramedics arrived, Morales

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told them that Kevin had fallen down the stairs leading to the basement. Morales said that after the fall he put Kevin to bed but called for an ambulance when Kevin began having difficulty breathing. The paramedics took Kevin by ambulance to a local hospital. Upon arrival at the hospital, Kevin was unresponsive, had a low heart rate, and was having trouble breathing. The right side of his head was swollen, and a large pool of blood could be felt under his scalp. A CT scan revealed a skull fracture and a large hematoma on Kevin's brain. Dr. Thomas Carlstrom, a neurosurgeon, operated on Kevin to remove the hematoma. Kevin died during the surgery. Dr. Carlstrom, along with Dr. Donald Moorman, who was the surgeon leading the trauma team, and Dr. Dominic Frecentese, who was the radiologist that interpreted the CT scan, initially agreed that Kevin's death was caused by an existing, or chronic, hematoma on his brain that was re-injured by some event that day.

FN2. Kevin was born to Morales's wife and adopted by Morales.

On November 11, 1995, Dr. Thomas Bennett, then the Iowa State Medical Examiner, performed an autopsy of Kevin's body. Dr. Bennett concluded that Kevin's brain injuries were acute, not chronic. He based his opinion in part on an examination of microscopic slides taken during the \*548 autopsy. In Dr. Bennett's view, the slides conclusively established that there had been no preexisting hematoma and that Kevin's injuries were all inflicted on the day of his death. Dr. Bennett reported the probable cause of death as "Blunt traumatic head injuries from blow to head, due to Shaken-Slammed Baby Syndrome." J.A. at 967. A police investigation ensued, and on November 12, 1995, Morales was arrested and charged with Murder in the First Degree.

Subsequent to Morales's arrest, his first attorney, James Benzoni, requested that a second autopsy be performed. He hired Dr. Michael Berkland, then the Deputy Medical Examiner in Kansas City, Missouri, to conduct the second autopsy. In conducting his autopsy, Dr. Berkland had access to Dr. Ben-

nett's autopsy report, the microscopic slides, and Kevin's body. Because prosecutor Melodee Hanes had given instructions not to release Kevin's medical records to the defense team, however, Dr. Berkland did not at that time have the medical reports of the emergency-room physicians who diagnosed the hematoma as chronic in nature. Dr. Berkland concurred with Dr. Bennett that the injuries to Kevin's brain were acute.

In December 1995, the county prosecutor's office arranged a meeting at Dr. Carlstrom's office that was attended by four prosecutors and Doctors Bennett, Carlstrom, and Moorman. Morales's attorneys were not notified about the meeting. During the meeting, Dr. Bennett reported that the microscopic autopsy slides showed that Kevin's brain hematoma was acute, not chronic. As a result of Dr. Bennett's conclusions and without examining the slides themselves, Doctors Carlstrom and Moorman changed their opinions to align with Dr. Bennett's opinion that the injury was acute.

A jury trial was held in December 1996 in the Iowa District Court for Polk County. Morales was represented by Rodney Ryan and John Spellman. His theory of defense was that Kevin fell down a flight of eight stairs on November 10, 1995, thereby aggravating a preexisting hematoma and leading to his death. The jury found Morales guilty of first-degree murder, and the trial court sentenced him to life in prison. The Iowa Court of Appeals affirmed the conviction. Morales then sought post-conviction relief, which the Iowa courts denied. Thereafter, he filed his federal petition for writ of habeas corpus, which the District Court denied. Morales now appeals the denial of the writ.

## II.

This is a sad and difficult case. A young boy is dead, while his father's conviction for the death rests on judicial proceedings that have raised multiple questions of fairness and just prosecution. Every court that has reviewed this case has been

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struck by certain aspects of the trial and actions of prosecutors that violate the fundamental notions of fair play on which our legal system is based. For example, the Iowa District Court for Polk County, addressing Morales's application for post-conviction relief, found prosecutor Hanes's instruction to withhold medical records from the defense team prior to the second autopsy "suspicious at best" and the prosecution-arranged meeting at which Kevin's treating physicians changed their opinions about the nature of Kevin's brain injury "questionable." *Morales v. Iowa*, No. PCCE 37829, slip op. at 3, 19 (Iowa District Court for Polk County Apr. 30, 2001). The Iowa Court of Appeals, while affirming the denial of post-conviction relief, "agree[d] with Morales that certain questionable activities and practices, which became known after his trial, cast a level of doubt on some evidence used to convict Morales in the death of his son." \*549 *Morales v. Iowa*, No. 2-520/01-1328, 2002 WL 31529176, \*10 (Iowa Ct.App. Nov. 15, 2002). The District Court reviewing Morales's habeas corpus petition aptly observed that the "pretrial and trial process [in Morales's case] at best falls short of our expectations for so serious an endeavor." *Morales v. Ault*, No. 4:03-cv-40347, 2005 WL 5166197, 1 (S.D.Iowa Sept. 28, 2005). The District Court summarized the most egregious errors as follows:

A prosecutor instructed that evidence be withheld. Prosecutors arranged a meeting between the Medical Examiner and treating physicians, arguably to impact their trial testimony to be more consistent with that of the Medical Examiner. Important microscopic slide evidence, relied upon by the Medical Examiner, was not pursued by defense counsel or produced by the prosecution during the trial, and the slides were destroyed while the case was on appeal. Similar opinions by this Medical Examiner, often based upon such slides, have arguably been discredited in other cases. The treating surgeon has now recanted his trial testimony, at least to the extent of placing any reliance on the opinions of the Medical Examiner. Defense counsel failed to pursue the

slides, failed to interview treating physicians before their trial testimony, failed to investigate the Medical Examiner even by simply networking with other defense lawyers, failed to pursue the meeting between the Medical Examiner and other physicians in relation to their apparent change in position at trial from their prior reports, failed to make objections necessary to preserving a record for appeal, and failed to make an adequate offer of proof regarding the romantic relationship between a prosecutor and the Medical Examiner.

*Id.* at 2-3.

Like the courts preceding us, we are troubled by these incidents and add our condemnation of such practices. That said, however, we conclude that Morales's petition for habeas relief must be denied. Quite simply, our decision in this case hinges on the standard of review that Congress has given us to apply.

[1][2][3][4] Pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), when a state prisoner files a petition for writ of habeas corpus in federal court we are directed to undertake only a "limited and deferential review of [the] underlying state court decisions." *Lomholt v. Iowa*, 327 F.3d 748, 751 (8th Cir.2003), *cert. denied*, 540 U.S. 1059, 124 S.Ct. 833, 157 L.Ed.2d 716 (2003). We may not grant a writ of habeas corpus unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). A state court decision is "contrary to" clearly established Supreme Court precedent if it "applies a rule that contradicts the governing law set forth in [the Court's] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [the Court's] precedent." *Williams v. Taylor*, 529 U.S.

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362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court decision is an “unreasonable application of” clearly established Supreme Court precedent if it “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case.” *Id.* at 407-08, 120 S.Ct. 1495. “[A] federal habeas court may not issue the writ simply because that court concludes in \*550 its independent judgment that the relevant state-court decision applied clearly established federal law *erroneously* or *incorrectly*.” *Id.* at 411, 120 S.Ct. 1495 (emphasis added). “Rather, that application must also be *unreasonable*.” *Id.* (emphasis added). Finally, a state court decision involves “an unreasonable determination of the facts in light of the evidence presented in the state court proceedings” only if it is shown that the state court’s presumptively correct factual findings are rebutted by “clear and convincing evidence” and do not enjoy support in the record. 28 U.S.C. § 2254(d)(2), (e)(1); *see also Jones v. Luebbers*, 359 F.3d 1005, 1011 (8th Cir.2004), *cert. denied*, 543 U.S. 1027, 125 S.Ct. 670, 160 L.Ed.2d 507 (2004).

Perhaps we would have reached a result different from the result reached by the Iowa courts, but we cannot deem the state courts’ application of the law unreasonable or its factual findings clearly rebutted. Like the District Court, we find support for the state courts’ determination that the overwhelming evidence of Morales’s guilt overcame the defects in his criminal proceedings. We therefore affirm the District Court’s denial of the habeas petition.<sup>FN3</sup>

FN3. We review the District Court’s factual findings for clear error and its legal conclusions de novo. *See Johnston v. Luebbers*, 288 F.3d 1048, 1051 (8th Cir.2002), *cert. denied*, 537 U.S. 1166, 123 S.Ct. 983, 154 L.Ed.2d 904 (2003).

### III.

As his first ground for habeas relief, Morales asserts that his Sixth Amendment rights were violated

because his trial attorneys were ineffective.

[5] “A criminal defendant is constitutionally entitled to the effective assistance of counsel on direct appeal, as well as at trial.” *Bear Stops v. United States*, 339 F.3d 777, 780 (8th Cir.) (citing *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)), *cert. denied*, 540 U.S. 1094, 124 S.Ct. 970, 157 L.Ed.2d 803 (2003). To establish a claim of ineffective assistance of counsel, a movant must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, under the “performance” component, the movant must show that his counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed [him] by the Sixth Amendment.” *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Second, under the “prejudice” component, the movant must demonstrate that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694, 104 S.Ct. 2052. “It is not sufficient for a defendant to show that the error had some ‘conceivable effect’ on the result of the proceeding because not every error that influences a proceeding undermines the reliability of the outcome of the proceeding.” *Odum v. Hopkins*, 382 F.3d 846, 851 (8th Cir.2004) (quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052).

[6] Morales sets forth a number of errors allegedly committed by his trial counsel. First, he argues that his counsel “breached their duty to investigate” by failing to discover the microscopic autopsy slides of Kevin’s hematoma and by failing to understand the slides’ significance, particularly their influence on the opinions of Doctors Carlstrom and Moorman. Appellant’s Br. at 23. Second, Morales criticizes counsel’s treatment of Dr. Bennett, the Iowa Medical Examiner. Morales asserts that counsel failed to uncover readily available “impeachment material” about Dr. Bennett, *id.* at 25, and ineffectively used the impeachment material that they did have by making only a professional statement,\*551

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rather than an offer of proof, to show that Dr. Bennett was romantically involved with prosecutor Hanes. Morales further argues that counsel erred by not objecting to Dr. Bennett's inflammatory testimony analogizing the force necessary to cause Kevin's injuries to a "40-foot fall onto a flat surface," "a 35-mile-an-hour car crash into a ... concrete barrier," and "a blow with a baseball bat from like a home-run swing." J.A. at 557-58. Third, Morales claims that his trial counsel was deficient in their decision not to introduce certain evidence at trial. Morales asserts that counsel should have introduced the orthopedic shoes worn by Kevin and should have called a biomechanical engineer who was prepared to testify that Kevin's brain hematoma could have developed when Kevin fell down stairs two months before his death.

The Iowa Court of Appeals addressed each of these asserted errors and concluded that they did not prejudice the result of Morales's trial. We cannot say that this conclusion was unreasonable. Although the list of errors is disturbing, when we step back and consider all of the evidence pointing to Morales's guilt we have little difficulty concluding that the errors had no effect on the outcome of the trial. Morales cannot satisfy *Strickland's* prejudice prong. See *Reed v. Norris*, 195 F.3d 1004, 1006 (8th Cir.1999) (finding it impossible for the movant to establish prejudice where the evidence of his guilt was overwhelming).<sup>FN4</sup>

FN4. The Iowa Court of Appeals also rejected the notion that the performance of attorneys Spellman and Ryan fell outside the wide range of professional assistance deemed constitutionally acceptable. Because we conclude that the state courts' application of *Strickland's* prejudice prong was not unreasonable, however, we need not address its application of *Strickland's* performance prong. See *Blankenship v. United States*, 159 F.3d 336, 338 (8th Cir.1998) (recognizing that "we need not address the competency of counsel's per-

formance if the prejudice issue is dispositive"), *cert. denied*, 525 U.S. 1090, 119 S.Ct. 844, 142 L.Ed.2d 699 (1999). It is clear from Judge Bright's dissenting opinion addressing the performance of Morales's trial counsel that Judge Bright disagrees with our view that the evidence against Morales was overwhelming.

First, we note that no less than seven doctors testified that Kevin's injuries were not consistent with a fall down stairs-Morales's defense theory. For example, Dr. Christopher Ellerbroek, a pediatric radiologist, testified that Kevin suffered an acute, massive brain injury that could not be caused by a fall down a flight of stairs, even one with a concrete wall at the bottom. Dr. Ellerbroek opined that Kevin's head was either struck by an object or struck a fixed object while moving rapidly. Dr. Ellerbroek's conclusions were supported by Dr. Charles Jennissen, the pediatric physician who treated Kevin in the emergency room. Dr. Jennissen testified that Kevin's CT scan revealed a large scalp hematoma, bleeding in the subarachnoid and subdural spaces of the brain, and an extensive skull fracture. Dr. Jennissen opined that retinal hemorrhages discovered during the autopsy were "nearly pathognomonic of a non-accidental injury." J.A. at 311. Dr. Jennissen further opined that "serious injury from a fall down a stairs is extremely uncommon," *id.* at 314, and concluded that Kevin's injuries were consistent with being shaken and then slammed into an object.

Many of the testifying physicians attempted to quantify the amount of force that was necessary to cause Kevin's brain injury. Dr. Ellerbroek described the necessary force as "a massive amount of force that we see in very serious motor vehicle accidents ... the kind of force you would expect to see if a child were to fall from a third or fourth story window." *Id.* at 423. \*552 Dr. Jennissen testified that the injury only could have been caused by a blow of "extreme force." *Id.* at 318. Dr. Carlstrom described the necessary blow as a "very hard blow to the head," *id.* at 361, having a "large force," *id.* at

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356. Dr. Moorman testified that “[i]t would take a significant force to create this type of skull injury.” *Id.* at 371. The jury heard all of these descriptions prior to Dr. Bennett taking the stand. Thus, although Dr. Bennett’s descriptions of the force to Kevin’s head were quite graphic, we cannot say that the Iowa Court of Appeals was unreasonable in ruling that counsel’s failure to object to Dr. Bennett’s descriptions was not prejudicial.

The whole of Dr. Bennett’s testimony was cumulative of the testimony of the state’s other experts. Even if Dr. Bennett had been impeached at trial and his testimony completely discredited, therefore, the jury would likely have found Kevin’s injury to be the result of Shaken-Slammed Baby Syndrome, rather than a fall down the stairs.<sup>FN5</sup> While it is true that Dr. Bennett was the only person to testify about the microscopic autopsy slides of the hematoma, perhaps due in some part to Morales’s trial counsel’s failure to discover them, Morales could not have been prejudiced by that fact. As noted by the Iowa Court of Appeals, nothing in the record indicates that the slides contained exculpatory information. Although the slides were not produced to Spellman and Ryan, the slides were made available to Dr. Berkland and reviewed by Dr. Berkland in conjunction with his autopsy of Kevin. Despite Dr. Berkland’s incentive as a defense expert to make findings in Morales’s favor, Dr. Berkland did not find the slides to be exculpatory. Moreover, there is no evidence that Dr. Bennett somehow pressured or unduly influenced the treating physicians to change their opinions in light of the slides.<sup>FN6</sup> Thus, as stated by the Iowa Court of Appeals, “[a]ny claims an investigation would have uncovered a conspiracy or improper influence are pure conjecture.” *Morales v. Iowa*, No. 2-520/01-1328, 2002 WL 31529176 (Iowa Ct.App. Nov. 15, 2002).

FN5. We agree with the District Court that evidence of Dr. Bennett’s marriage to prosecutor Hanes should have been permitted at trial to imply bias. As the District Court

recognized, however,

such an attack on Dr. Bennett’s potential bias pales in comparison to the other evidence in the case that is consistent with Dr. Bennett’s opinion. It would have been preferable for counsel to demonstrate to the trial court and reviewing courts the nature of the relationship and its potential impact on Dr. Bennett’s testimony, but the issue was minimally preserved for appellate review. The Iowa courts found that the other evidence of guilt was so overwhelming that any error as to this evidence was not prejudicial, and that finding cannot be found unreasonable.

*Morales v. Ault*, No. 4:03-cv-40347, 2005 WL 5166197, n. 12 (S.D.Iowa Sept. 28, 2005).

FN6. We do not mean to exculpate the inappropriate meeting arranged by prosecutors presumably for the purpose of influencing the opinions of Kevin’s treating physicians based on Dr. Bennett’s interpretation of the microscopic slides. Rather, we are simply concluding that the state courts were not unreasonable in finding that this meeting, unrevealed to Morales’s trial counsel, did not prejudice Morales.

We also note that the jury was made aware that Dr. Frecentese changed his medical opinion about the nature of Kevin’s injuries (though it does not appear that Dr. Frecentese was at the secret meeting). Dr. Frecentese testified that while his initial interpretation of the x-rays was that Kevin suffered a chronic hematoma with an acute rebleed, after reviewing the medical literature he opined that the injury was acute, inflicted very close in time to the CT scan.

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Morales's own expert doctor confirmed much of what the state's doctors found. \*553 Dr. Jan Leestma, a neuropathologist, concluded that Kevin's injuries were acute. Although Dr. Leestma testified that Kevin's injuries could have been caused by a fall down a flight of stairs landing against a concrete wall, he also conceded that Kevin's injuries were classic signs of Shaken-Slammed Baby Syndrome. Additionally, Dr. Leestma admitted that he opined in a published book: "When vehicular and other forms of major accidental trauma can be ruled out, the child who's been said to have fallen in the home from a low height or down stairs, who sustains anything other than simple, narrow, linear, parietal skull fracture without significant neurological sequelae, should be considered a child-abuse victim until proven otherwise." J.A. at 618. While Morales claims that his retained biomechanical engineer was prepared to offer testimony indicating that Kevin's injuries could have been accidental, we cannot say that the addition of such testimony would have created a reasonable probability of acquittal in light of other evidence highly indicative of Morales's guilt. In any event, such testimony would have duplicated testimony from Dr. Leestma that Kevin's injuries could have been sustained in a fall down the stairs. Nor would the introduction of the orthopedic shoes worn by Kevin have had a significant effect. Because there was testimony at trial about Kevin's turned-in foot and the shoes and braces worn to correct the condition, the introduction of the shoes themselves would have been no more than cumulative evidence.

The non-medical evidence in the case also supports the Iowa Court of Appeals's finding of "overwhelming" evidence of Morales's guilt. *Morales v. Iowa*, No. 2-520/01-1328, 2002 WL 31529176 (Iowa Ct.App. Nov. 15, 2002). Morales's accounts of the events were inconsistent and frequently implausible. Morales told the paramedics that Kevin fell two hours before Morales called 911, but this was belied by evidence that Kevin was fine at 1:00 p.m. and that the ambulance was dispatched at 1:23 p.m. When interviewed by a doctor

at the emergency room, Morales stated that only five minutes had passed between the fall and the 911 call. Later, Morales told police officer Charles Lewis that Kevin spoke to him after the fall, saying that he was okay, and that Kevin later got out of bed and was standing. But almost all of the medical evidence introduced indicated that Kevin's injuries were too severe for these actions to have taken place. Morales told his wife and police investigators that Kevin fell in the course of taking his jacket to the basement, but the jacket was found in the living room upstairs. Moreover, at no time did Morales suggest that he heard anything more than what sounded like a fall from a few steps. This is inconsistent with his defense at trial that Kevin fell from the top of the stairs and landed against a cement wall. Paramedic Michael Herra testified that Morales was very nervous and vague when questioned about how the incident occurred. Morales later made untrue and minimizing statements to his wife about the incident. Finally, the record contains evidence of other possible abuse of Kevin while he was in Morales's care. For example, Kevin was treated at the hospital for allegedly accidental injuries on three occasions in the six months preceding his death.

After examining the record, we conclude that the ruling of the Iowa Court of Appeals did not involve an unreasonable application of federal law. The state court was reasonable in its determination that overwhelming evidence of Morales's guilt overcame any trial defects affected by Morales's counsel. The District Court did \*554 not err when it denied this claim.<sup>FN7</sup>

FN7. Having assumed that there was no procedural obstacle to Morales's claim of ineffective assistance of trial counsel, we have concluded that this claim was appropriately rejected. It is therefore not necessary for us to address the merits of whether Morales was procedurally barred from raising the claim. *See Odem v. Hopkins*, 382 F.3d 846, 852 (8th Cir.2004).

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#### IV.

[7][8][9][10] Morales's second claim is that the state failed to disclose potentially exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In *Brady*, the Supreme Court held that due process requires the government to disclose material, exculpatory evidence to the defendant. *Id.* at 87, 83 S.Ct. 1194. "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Prejudice cannot be shown "unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Id.* at 281, 119 S.Ct. 1936. In determining whether confidence in the verdict has been undermined, we consider the items of suppressed evidence collectively, rather than individually. *Liggins v. Burger*, 422 F.3d 642, 651-52 (8th Cir.2005), cert. denied, 546 U.S. 1182, 126 S.Ct. 1359, 164 L.Ed.2d 69 (2006).

Morales contends that the state committed three *Brady* violations: (1) the state did not release the medical records of Doctors Frecentese, Moorman, and Carlstrom prior to Dr. Berkland's autopsy of Kevin, (2) the state did not tender the microscopic autopsy slides to Morales's trial counsel, and (3) the state destroyed the microscopic autopsy slides while Morales's case was on direct appeal. After considering each of these assertions, the Iowa courts determined that no *Brady* violation exists to warrant a new trial. We cannot find that determination unreasonable or contrary to federal law.

Morales's first argument is that the state violated *Brady* by failing to turn over the medical records of Kevin's treating physicians on or before the date of the second autopsy. While Morales concedes that the state produced these medical records prior to

trial (the record shows that they were produced about a year in advance of trial and were used by the defense at trial), he argues that the records would have been exculpatory if received by Dr. Berkland prior to his autopsy of Kevin because they would have influenced Dr. Berkland "to conclude that Kevin's hematoma was an old injury with a 'rebleed,' " rather than an acute injury. Appellant's Br. at 35. The Iowa post-conviction district court rejected this argument based on Dr. Berkland's post-conviction testimony that his review of the medical records, albeit after the autopsy, did not change his opinion that Kevin's injury was acute or hyper-acute. Accordingly, the state court found that Morales could establish no prejudice from this potential *Brady* violation. We agree. Given Dr. Berkland's testimony to the contrary, Morales did not show a reasonable probability that the "suppressed" <sup>FN8</sup> evidence would have produced a different verdict.

FN8. We question whether the medical records were truly suppressed under *Brady*'s second prong given that the state produced them a year before trial. See *United States v. Almendares*, 397 F.3d 653, 664 (8th Cir.2005) ("Under the rule in our circuit *Brady* does not require pretrial disclosure, and due process is satisfied if the information is furnished before it is too late for the defendant to use it at trial."). The state court did not address this issue, however, and we need not reach it to determine that the state court's decision was in accordance with federal law.

\*555 Morales next argues that the state violated *Brady* by not giving the microscopic autopsy slides to his trial counsel. The Iowa courts rejected this argument on two grounds.<sup>FN9</sup> First, the state courts found that the slides were not suppressed—they were produced to Morales through his original attorney, Benzoni, and through his expert medical examiner, Dr. Berkland. The post-conviction district court stated:

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FN9. We reject Appellee's argument that this *Brady* claim was not preserved.

One of the fundamental tenets of *Brady* is that exculpatory evidence was actually suppressed. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The court notes that the microscopic slides were produced to Petitioner via his hired medical consultant, Dr. Berkland. *Testimony of Doctor Berkland*, Apr. 16, 2001. Additionally, the court does not find any evidence in the record that the microscopic slides were withheld at any point up to and through the original trial.

*Morales v. Iowa*, No. PCCE 37829, slip op. at 5 n. 3 (Iowa District Court for Polk County Apr. 30, 2001). The Iowa Court of Appeals similarly found that the "slides were made available to Morales's original counsel and defense expert." *Morales v. Iowa*, No. 2-520/01-1328, 2002 WL 31529176 (Iowa Ct.App. Nov. 15, 2002). Morales has not rebutted these presumptively correct factual findings with clear and convincing evidence, and we deem the findings reasonable.

The Iowa courts' second basis for rejecting this argument was the lack of "direct evidence that the microscopic slides were 'exculpatory.'" *Morales v. Iowa*, No. PCCE 37829, slip op. at 7 (Iowa District Court for Polk County Apr. 30, 2001). Again we find the state courts' determination reasonable. Dr. Berkland reviewed the slides and, despite having an incentive as a defense expert to make findings in Morales's favor, concurred with Dr. Bennett's autopsy findings. *See United States v. Rouse*, 410 F.3d 1005, 1010 (8th Cir.2005) (ruling that defendants cannot establish a *Brady* violation when "defendants can only speculate that the [suppressed evidence] might have contained material *exculpatory* information").

[11] Finally, Morales asserts that the state violated *Brady* by destroying the microscopic autopsy slides while his direct appeal was pending. Because Morales failed to demonstrate that the slides were suppressed and were exculpatory, as discussed above,

the Iowa courts rejected this argument. The state courts were reasonable in reaching this conclusion. The Iowa Court of Appeals also held that Morales failed to demonstrate that the state destroyed the slides in bad faith. To establish a due-process violation when a state destroys evidence that is potentially useful to a criminal defendant, the defendant must show that the state acted in bad faith. *Illinois v. Fisher* 540 U.S. 544, 547-48, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004) (per curiam); *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). We agree that Morales did not make this showing; the record indicates that the slides were destroyed as part of a blanket disposition of closed files at the Iowa Department of Criminal Investigation. While destroying this evidence during the pendency of Morales's direct appeal was certainly negligent, nothing in the \*556 record indicates that it was done in bad faith. The District Court appropriately denied relief on Morales's *Brady* claim.

V.

For the reasons discussed, the District Court's denial of Morales's petition for writ of habeas corpus is affirmed.

BRIGHT, Circuit Judge, dissenting.  
I respectfully dissent.

There is no overwhelming evidence of guilt in this case. The jury never heard the complete medical facts because counsel failed to interview the most important witnesses, Kevin's treating physicians.

As of the trial, Morales's counsel knew or should have known the following: (1) Doctors Carlstrom and Moorman treated Kevin on the night he died; (2) Doctors Carlstrom and Moorman concluded, at the time he was admitted to the hospital, that Kevin died as a result of a rebleed of a chronic subdural hematoma; (3) Kevin's medical records, the CT Scan, and Doctor Carlstrom's observations of Kevin's skull during surgery showed that the blood in

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Kevin's head displayed characteristics consistent with a rebleed of a chronic subdural hematoma; (4) Doctors Carlstrom and Moorman attended a meeting (along with another one of Kevin's treating physicians) orchestrated and attended by at least four county prosecutors and medical examiner Doctor Bennett, all of whom maintained that Kevin died from shaken-slammed baby syndrome; (5) one of the county prosecutors who attended the meeting assisted in a child death review team and was romantically involved with medical examiner Doctor Bennett; (6) after the meeting, Doctors Carlstrom and Moorman changed their opinions to be consistent with those of Doctor Bennett and the government that Kevin died from shaken-slammed baby syndrome; and (7) Doctors Carlstrom and Moorman would testify for the government at trial.

Yet, despite this knowledge, the record shows that trial counsel did not personally interview Doctor Carlstrom or Doctor Moorman. It is clearly established that "[defense] counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This court has explained that under *Strickland* "[r]easonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories." *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir.1993). Morales's counsel's failure to interview Doctors Carlstrom and Moorman to investigate the circumstances of their changed testimony fell below constitutional standards of competence in light of the doctors' changed opinions as to the cause of Kevin's death.

This deficient representation undoubtedly undermines any confidence in the verdict against Morales, see *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052, and the state court's determination to the contrary was unreasonable. The record establishes that the important medical evidence and opinions of the attending physicians could significantly impair the

government's theory that Kevin's death resulted from shaken-slammed baby syndrome and demonstrates that Kevin died from an old, chronic condition rather than a recent injury. Moreover, the record shows that prosecutors played a key role in presenting skewed medical opinion evidence from the physicians who treated Kevin on the day he died by hosting a meeting, not disclosed to or attended by defense counsel, and using the opinion of a possibly biased medical examiner to persuade the treating \*557 physicians to change their initial opinions. That meeting resulted in Doctor Carlstrom changing his opinion as to the cause of Kevin's death. All of this would have come to light if defense counsel did what any minimally competent lawyer would do: personally interview the important witnesses.<sup>FN10</sup>

FN10. As part of the record before us, I have examined two pages (which was all that was provided to this court) of deposition testimony of Doctor Carlstrom, apparently taken by Morales's former counsel prior to trial and which were available to Morales's trial counsel. Counsel's reliance on this deposition alone serves as inadequate investigation of the doctors' change in testimony. The deposition reveals that Doctor Carlstrom changed his original medical opinion, which he had based on his own personal observations, upon inducement by the medical examiner and not based on any objective medical evidence that Doctor Carlstrom had observed. The information gleaned from the deposition, at a minimum, required further investigation by competent counsel in preparation for trial.

Indeed, a number of the other bases on which Morales argues ineffective assistance of counsel, such as failure to investigate and impeach Doctor Bennett and failure to pursue the slides, are derivative of counsel's failure to interview

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Doctors Carlstrom and Moorman. These two interviews would have resulted in counsel's appreciation of the significance of the slides and Doctor Bennett's improper influence as avenues for Morales's defense. The slides, unfortunately, are no longer available as they have been destroyed by the State of Iowa.

Armed with the information counsel would have obtained by interviewing the physicians, Morales's trial would have been quite different. First, Doctor Carlstrom's testimony would have been less persuasive, if not entirely different. Judge Sackett of the Iowa Court of Appeals, writing separately in this case on direct appeal, explained that in determining that Kevin suffered from shaken-slammed baby syndrome he "look[ed] particularly to the testimony of Dr. Thomas Carlstrom, the neurosurgeon who operated on the victim[.]" If counsel had interviewed Doctor Carlstrom, a jury would have heard his original (and current) opinions as to the cause of Kevin's death: the blood in Kevin's skull was liquid, consistent with a rebleed of a chronic hematoma; the CT scan and other treating physicians confirmed this observation and diagnosis; the injury Doctor Carlstrom had observed was the type of injury that very little trauma could cause to rebleed; a fall down a flight of stairs, hitting a concrete wall at the bottom, could cause a linear fracture and, because of the presence of the chronic hematoma, could cause a rebleed and ultimately death.<sup>FN11</sup>

FN11. See App. at 660-663 (from Doctor Carlstrom's post-conviction testimony).

By way of example, of the information described above, the jury heard Doctor Carlstrom state, on direct examination, that the blood in Kevin's skull was liquid and that was "a bit unusual." On cross examination, Doctor Carlstrom surmised that Kevin's blood was probably unable to clot. Had counsel interviewed or made a complete investigation of Doctor Carlstrom prior to trial, counsel could have confidently inquired further and a jury would have

heard Doctor Carlstrom state, as he did in his post-conviction testimony:

Well, I think that the blood clot itself, when I saw it, what I saw at the time of surgery and on the CT scan, everything that I saw pointed to this blood clot being an old blood clot. I was quite certain it was. I have never seen a brand-new blood clot liquid like this one was. This would be the only case I have ever seen like that, and the only explanation for it could be that undeniable pathological identification would indicate that there was no-that this was not a \*558 chronic subdural hematoma. I still can't explain how one can have a blood clot hours old that was all liquid. That's a very difficult-a very difficult pathological-very difficult to occur.

App. at 660.

In addition, if counsel had investigated the *cause* of the doctors' changed opinions, they could have presented that information in court, discrediting not only Doctor Bennett, the state medical examiner,<sup>FN12</sup> but also the prosecution itself in this case. Although counsel attempted to make a professional statement about Doctor Bennett's romantic relationship with a county prosecutor, they failed to make an adequate offer of proof and failed to link it in a material way to the case. Had counsel interviewed Doctor Carlstrom and investigated the cause of his changed testimony (the improper meeting hosted by Doctor Bennett and the prosecutor's office), counsel would have been able to connect Doctor Bennett's alleged bias to the case and significantly impair the credibility of the state's witnesses in this case. Significantly, then Doctor Carlstrom himself might have begun to question the propriety of the meeting and Doctor Bennett's conclusions.<sup>FN13</sup>

FN12. Characterization of Doctor Bennett's testimony by the state courts as "cumulative" belittles the weight a jury would give a state medical examiner's testimony. See *Iowa v. Morales*, No. 8-074/97-152, slip op. at 6 (April 24,

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1998) (en banc).

FN13. Doctor Carlstrom has stated now that he no longer considers Doctor Bennett trustworthy, explaining: "I think that Dr. Bennett's testimony in other child abuse cases has come into question because I think he's just a bit overzealous in his opinion giving. I have disagreed with his opinions on a number of occasions." App. at 661.

If only Morales's counsel had fully investigated this case, Doctor Carlstrom's skepticism of Doctor Bennett would not have come so late.

Both the district court and my colleagues on this court have noted that every court that has reviewed this case has been troubled by issues of fairness it presents. Those issues represent substantial flaws in Morales's conviction. Those flaws should have bothered Morales's trial counsel enough to prompt them to fully prepare and investigate a case calling for a possible life sentence.

Accordingly, I dissent. Morales is entitled to relief and the writ of habeas corpus should have been ordered by the district court.

C.A.8 (Iowa),2007.  
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END OF DOCUMENT

Westlaw. What GA does to try to stem case alleging appeal. See form attached

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(Cite as: 2008 WL 3861991 (S.D.Ga.))

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Only the Westlaw citation is currently available.

S.Ct. 1595, 146 L.Ed.2d 542 (2000); *Gordon v. Sec'y Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir.2007).

United States District Court,  
S.D. Georgia,  
Savannah Division.  
John W. BAUGHMAN  
v.  
UNITED STATES.  
Nos. 407CV191, 407CR130.

Aug. 18, 2008.

Timothy M. O'Brien, Levin, Papantonio, Thomas,  
Mitchell Echsner & Proctor, PA, Pensacola, FL, for  
John W. Baughman.

James D. Durham, U.S. Attorney's Office, Savan-  
nah, GA, for United States of America.

**ORDER**

B. AVANT EDENFIELD, District Judge.

\*1 This Court recently denied defendant John Baughman's 28 U.S.C. § 2255 motion to vacate his conviction and sentence on the ground that his attorney provided him with ineffective assistance of counsel (IAC) by failing to file an appeal from his guilty-plea conviction for conspiracy to commit bank fraud. 407CV191, doc.15, 18, 20. Represented by new counsel, Baughman appeals that denial and applies for a Certificate of Appealability (COA).  
FNI Doc. # 25.

FNI. Movant's COA application can be denied if it presents no procedural issue debatable among jurists of reason, see *Henry v. Dep't of Corrections*, 197 F.3d 1361, 1364 (11th Cir.1999), or otherwise fails to make a substantial showing that he has been denied a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484, 120

Unhappy with his sentence, Baughman claims IAC based on, *inter alia*, the fact that he instructed his "guilty-plea" lawyer (Richard Darden) to file an appeal, yet none was taken. A Magistrate Judge (MJ) conducted an evidentiary hearing and, as is set forth in his (since adopted) Report and Recommendation (R & R), finds Baughman's claims (that Darden failed to properly advise him, act on his desire to appeal, etc.) *not* credible. The MJ thus advised this Court to deny Baughman's § 2255 motion, explaining:

Darden clearly acted in a professionally responsible manner under [established precedent]. Since Baughman was fully advised of his appeal rights, and since he knew that Darden thought that such an appeal would be futile and believed that Baughman shared this view, Darden did not err in failing to file a notice of appeal when his client never requested that he do so.

Doc. # 15 at 10.

Baughman's R & R Objection focused on *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) and *Thompson v. U.S.*, 504 F.3d 1203 (11th Cir.2007). *Thompson* held that a defense lawyer had a duty to consult with his client, who received a longer sentence than his two codefendants after pleading guilty to a drug charge, regarding his client's right to appeal the sentence. The client told counsel that he was unhappy with his sentence and asked about his right to appeal. Importantly, even though the *Thompson* court upheld as not clearly erroneous the lower court's finding that the client did not ask his attorney to file an appeal, it could *not* find that no rational defendant would have wanted to appeal the differential sentence. *Id.* at 1206-08.

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More importantly, said the Eleventh Circuit, counsel failed to “adequately consult” with the defendant regarding his right to appeal, even though counsel told his client after he was sentenced that he had a right to appeal, and that he did not think an appeal would be successful or worthwhile. *Id.* The problem was that counsel provided to his client no information from which one could have knowingly and intelligently either asserted or waived his right to an appeal. *Id.* Nor did counsel make a reasonable effort to discover his client’s informed wishes regarding an appeal. *Id.*

Thus, Darden could not simply state that **Baughman** expressed no desire to appeal, and that Darden himself told **Baughman** that he saw no grounds for an appeal. Something more was required. In that connection, *Thompson* may be said to illuminate two general rules: (1) where a defendant says he wants to appeal, it is IAC *per se* to fail to do so; and (2) where a defendant does *not* say either way that he wants to appeal, counsel must nevertheless uphold his “consultation” duty:

\*2 [W]here a defendant has not specifically instructed his attorney to file an appeal, we must still determine “whether counsel in fact consulted with the defendant about an appeal... [A]dequate consultation requires informing a client about his right to appeal, advising the client about the advantages and disadvantages of taking an appeal, and making a reasonable effort to determine whether the client wishes to pursue an appeal, regardless of the merits of such an appeal.

*Id.* at 1206 (quotes and cite omitted).<sup>FN2</sup>

FN2. An encyclopedist’s summary of this area of law blends in a special factor relevant to the instant case:

Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal; or (2) that this

particular defendant reasonably demonstrated to counsel that he or she was interested in appealing. In determining whether counsel has a constitutionally-imposed duty to consult with a defendant about an appeal, a highly relevant factor is whether the conviction follows a trial or a guilty plea. A guilty plea reduces the scope of potentially appealable issues and such a plea may indicate that the defendant seeks an end to the judicial proceedings.

22 C.J.S. *Criminal Law* § 417 (June 2008) (footnotes omitted); *see also McCutcheon v. U.S.*, 2008 WL2115223 at \*4 (M.D.Fla.5/19/08) (unpublished).

Section 2255 courts, in turn, must make a “consultation” inquiry where; such factors arise. *Id.* at 1207-08 (holding that defense counsel failed to “adequately consult” with his client; he failed to provide his client with the information needed to knowingly and intelligently either assert or waive his right to an appeal; nor did counsel make a reasonable effort to discover his client’s informed wishes regarding an appeal).

That is what the MJ did in this case. Doc. # 15 at 3-10; *see also* doc. # 17-2. But **Baughman**, in his F.R.Civ.P. 72(b), RR Objection, insisted that the MJ clearly erred <sup>FN3</sup> on the “consultation” component. Doc. # 17. That 6/26/08 Objection did not cite, however, *Devine v. U.S.*, 520 F.3d 1286 (11th Cir.2008), which applied *Thompson*’s “prejudice” prong (*i.e.*, even if counsel fails to follow *Thompson*’s mandate, there can be no § 2255 relief if the defendant fails to show prejudice). *Devine* concluded that a post-guilty-plea, post-sentencing defendant could not show prejudice where he had received a sentence in the bottom of the U.S. Sentencing Guideline range, was told he had no non-frivolous grounds for appeal, and did not reasonably demonstrate to counsel that he was interested in appealing. *Id.* at 1288-89; *see also* CRIM. PRO. HANDBOOKK § 3:41 (*Adequacy of counsel-App*

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peals ) (June 2008).

FN3. The MJ's factfindings are subject to the clearly erroneous standard. *See Berry v. U.S.*, 2008 WL 2447154 at \* 2 (11th Cir.6//19/08) (unpublished).

Yet Baughman received an *upper* guideline range sentence. And Darden, in 15-20 minutes spent discussing the merits of an appeal, only expressed to the defendant that he did not think the appeal would be successful ("bear fruit"); Darden did *not* tell Baughman-either explicitly or in substance-that he did not have any non-frivolous grounds on which to appeal. Doc. # 17-2 at 26-27. The MJ probed further:

THE COURT: Did you at any time discuss with [Baughman] what advantages or disadvantages might arise from taking an appeal?

[DARDEN]: Other than the obvious, *no*. I mean, the obvious advantage is if they send it back, remand it for resentencing, other than that, *no*.

THE COURT: What disadvantages can you envision that might have accrued from taking an appeal in this case?

[DARDEN]: I know of no disadvantages.

THE COURT: After discussing all that, did you ever specifically ask whether he, in light of your comments and assessment of the merits, did you ever specifically ask him, well, do you want me to take an appeal or not?

\*3 [DARDEN]: I can't say that I specifically worded [it to] that effect. I think what I expected [Baughman] to do was get back with me. But he never did.

Doc. # 17-2 at 27 (emphasis added).

Baughman correctly contends that this testimony brings his case reasonably close to *Thompson* (which *granted* IAC relief), thus placing it down

the COA-worthiness path (*e.g.*, Darden never flat-out asked his client if he wanted to appeal, and did not testify that he fully explained the advantages and disadvantages of an appeal, etc.). Again, however, Baughman must mind the prejudice prong:

[T]o show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed. [However, t]he defendant need *not* show the putative merits of such an appeal.

*Cuero v. U.S.*, 269 Fed.Appx. 893, 895 (11th Cir.2008) (emphasis added); *see also id.* ("Since a rational defendant would not have been interested in an appeal in this case and the record supports the district court's finding that Cuero never indicated any interest in an appeal, trial counsel did not have a constitutional duty to consult with Cuero about an appeal. Thus, even if trial counsel insufficiently consulted with Cuero, it did not amount to ineffective assistance of counsel").

Here it can be reasonably argued that Darden failed to sufficiently inform Baughman about his appellate rights so that he could knowingly and intelligently waive them, and also failed to affirmatively ask him if he wanted to appeal. Nor can it be said that, per the evidence adduced here (upper guideline range sentence), a rational defendant would not have wanted to appeal.

Hence, Baughman has made a substantial showing on both IAC prongs. And that, in turn, entitles him to a COA. Nevertheless, this is yet another layer of "IAC-law" that is troubling to say the least. Significantly, it in no small part turns on whether, many months after the fact, trial counsel can remember whether he "advis[ed] the client about the advantages and disadvantages of taking an appeal," *Thompson*, 504 F.3d at 1206-since in virtually every case a lawyer will easily remember whether he asked his client if he wanted to appeal and

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(Cite as: 2008 WL 3861991 (S.D.Ga.))

whether his client expressed an interest in doing so, or not.

Having encountered a spate of these IAC-based § 2255 motions lately, the Court has devised hand-out sheets (copy attached), to be delivered by its courtroom deputy, to each defense lawyer following his client's conviction. These sheets are designed to ensure compliance with *Thompson* and cut down on memory-eroded, § 2255 hearings on basic, simple measures that can and should be easily and timely undertaken after every conviction-measures that should curtail § 2255 motions of this sort.

Meanwhile, the Court reluctantly **GRANTS** defendant John **Baughman's** COA motion. Doc. # 21, as amended, doc. # 25.

## ATTACHMENT

### NOTICE OF COUNSEL'S POST-CONVICTION OBLIGATIONS

#### 1. Duty of Continuing Representation on Appeal:

*\*4 Retained Counsel:* I understand that under 11th Cir.R. 46-10(a), "[r]etained counsel for a criminal defendant has an obligation to continue to represent that defendant until successor counsel either enters an appearance or is appointed under the Criminal Justice Act, and may not abandon or cease representation of a defendant except upon order of the court." *Id.*

*Appointed Counsel:* I understand that under 11th Cir.R. 46-10(c), "Counsel appointed by the trial court shall not be relieved on appeal except in the event of incompatibility between attorney and client or other serious circumstances." *Id.*

#### 2. Duties Regarding The Filing of Direct Ap-

#### peals:

I understand that, whether I was retained or appointed to represent my client, I am obligated to fully advise my client about his direct appeal rights including: advising him about the advantages and disadvantages of pursuing an appeal, making a reasonable effort to discover his wishes in that regard, and filing a direct appeal if he so requests, irrespective of any perceived merits of the appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *Thompson v. U.S.*, 504 F.3d 1203 (11th Cir.2007) (counsel has a constitutional duty to adequately consult with his client about an appeal if: (1) any rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) this particular defendant reasonably demonstrated to counsel that he is interested in appealing). Furthermore, I understand that I should not rely upon the sentencing judge's instructions alone to satisfy my duty to consult with my client, and "[s]imply asserting the view that an appeal would not be successful does not constitute 'consultation' in any meaningful sense." *Thompson*, 504 F.3d at 1207. Rather, I must fully explain to my client the appellate process, the advantages and disadvantages of taking any appeal, and the fact that I am obligated to file an appeal if that is what my client requests, regardless of my recommendation. *Id.*

#### 3. Duty Regarding Frivolous Appeals:

If, after conscientious review of my client's appeal, I find that the appeal is without merit, I am aware of the option to move the appellate court for leave to withdraw from further representation of the appellant and file a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). *See, e.g., U.S. v. Dotson*, 2008 WL 1946785 (11th Cir.2008) (unpublished) (standard procedure for Anders briefs); *U.S. v. Hall*, 499 F.3d 152, 155-56 (2nd Cir.2007) (Anders brief substantive requirements).

Not Reported in F.Supp.2d, 2008 WL 3861991 (S.D.Ga.)  
(Cite as: 2008 WL 3861991 (S.D.Ga.))

**4. Duty to Provide Timely Notice of Decisions Impacting Client's Case:**

My duties as appellate counsel on direct appeal include my obligation to give the defendant timely notice of any court decision affecting his case. *Smith v. Ohio Dep't of Rehab., and Corr.*, 463 F.3d 426, 433 (6th Cir.2006); *see also id.* at 434 (failure of defendant's counsel to provide him with timely notice of decision of intermediate appellate court on direct appeal was constitutionally deficient performance).

**5. Suggested Filing:**

\*5 I understand that I am duty-bound to not only consult with my client following conviction and sentence, but also have him or her express, in writing, his or her decision whether or not to appeal.

Rec'd this \_\_\_ day of \_\_\_\_\_, 20\_\_.

Sign: \_\_\_\_\_ Print \_\_\_\_\_, Attorney for Defendant \_\_\_\_\_

**POST-CONVICTION CONSULTATION CERTIFICATION**

**TO BE COMPLETED AND FILED BY COUNSEL:**

I, \_\_\_\_\_ [print name], attorney for \_\_\_\_\_ [print name], certify that I this day met with my client, \_\_\_\_\_ [print name] and:

• I found him/her to be of sound mind, clear-headed, and able to comprehend all of what I advised him/her regarding his/her right to appeal from the conviction and sentence in this case.

• I have fully explained to him/her the appellate process, including that he/she

(a) has the right to a direct appeal to the Eleventh Circuit, with assistance of counsel, free of charge, if he/she is indigent, but to exercise that

right he/she

(b) must timely file a notice of appeal and

(c) comply with all appellate form-completion and briefing obligations;

• I have advised him/her about the advantages and disadvantages of pursuing an appeal;

• I have thoroughly inquired of him/her about his/her interest in appealing his/her conviction.

It is in that light that (check one):

\_\_\_\_\_ he/she has decided to file an appeal and thus has instructed me to file it for him/her.

\_\_\_\_\_ he/she has decided not to file an appeal, and I have explained to him/her the consequences of failing to do so. Those consequences include the waiver of his/her right to complain about the process that led up to his/her conviction, including in the future, should he/she decide to seek any form of habeas corpus, 28 U.S.C. § 2255, or other judicial relief from the conviction.

This \_\_\_ day of \_\_\_\_\_, 20\_\_.

Print: \_\_\_\_\_ name of attorney

Sign: \_\_\_\_\_ signature of attorney

Witnessed:

Print: \_\_\_\_\_ name of defendant

Sign: \_\_\_\_\_ signature of defendant

**TO BE COMPLETED BY THE DEFENDANT:**

I, \_\_\_\_\_ [print name], certify that I this day met with my attorney, \_\_\_\_\_ [print name] and:

• I am of sound mind, clear-headed, and able to comprehend all of what my attorney has advised me about my right to appeal my conviction and sentence in this case;

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(Cite as: 2008 WL 3861991 (S.D.Ga.))

• My attorney has fully explained to me the appellate process, including that I

(a) have the right to a direct appeal to the Eleventh Circuit, with assistance of counsel, free of charge, if I am indigent, but to exercise that right I

(b) must timely file a notice of appeal and

(c) comply with all appellate form-completion and briefing obligations;

• My attorney has advised me about the advantages and disadvantages of pursuing an appeal;

• My attorney has thoroughly inquired of me about my interest in appealing my conviction.

It is in that light that (check one):

\_\_\_\_\_ I have decided to file an appeal and thus have instructed my attorney to file it for me.

\*6 \_\_\_\_\_ I have decided not to file an appeal, and my attorney has explained to me the consequences of failing to do so. Those consequences include the waiver of my right to complain about the process that led up to my conviction, including in the future, should I decide to seek any form of habeas corpus, 28 U.S.C. § 2255, or other judicial relief from the conviction.

This \_\_\_ day of \_\_\_\_\_, 20\_\_.

Print: \_\_\_\_\_ name of defendant

Sign: \_\_\_\_\_ signature of defendant

Witnessed:

Print: \_\_\_\_\_ name of attorney

Sign: \_\_\_\_\_ signature of attorney

**FILING:** Counsel must file this form in the trial-court record of the defendant's case within ten business days following its completion. Attach this as the second page of a document bearing the caption

of your client's case with this title:  
"POST-CONVICTION CONSULTATION CERTIFICATION."

S.D.Ga.,2008.

Baughman v. U.S.

Not Reported in F.Supp.2d, 2008 WL 3861991 (S.D.Ga.)

END OF DOCUMENT

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

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ANTONIO BRAVO ESPINOSA,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

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No. 4:08-cv-00116-JEG

**ORDER**

Pursuant to 28 U.S.C. § 2255, Movant Antonio Bravo Espinosa has filed a Motion to Vacate, Set Aside, or Correct his Sentence. By Order of June 26, 2008, the Court dismissed his claim that his counsel was ineffective for failing to object at sentencing to drug amounts attributable to Bravo Espinosa, his citizenship, and his enhancement for being an organizer or leader. The remaining issue is whether Bravo Espinosa's trial counsel was ineffective for failing to file an appeal when he was instructed to do so. The Government resists the motion. The Court held an evidentiary hearing on the issue, and the matter is ready for ruling. For the following reasons, the Court concludes that Bravo Espinosa is entitled to section 2255 relief.

**I. BACKGROUND AND FACTUAL FINDINGS**

English is not Bravo Espinosa's native language, and he used an interpreter during the plea, sentencing, and the section 2255 evidentiary proceedings. On August 17, 2006, Bravo Espinosa pleaded guilty to one count of conspiracy to distribute methamphetamine. The Court takes judicial notice of the proceedings in that case, United States v. Antonio Bravo Espinosa, No. 4:03-cr-00168-JEG (S.D. Iowa). Bravo Espinosa stipulated that the amount of drugs involved or reasonably foreseeable to him was at least 1.5 kilograms of actual methamphetamine or 15 kilograms of a mixture or substance containing methamphetamine. As part of his plea agreement, Bravo Espinosa executed a limited waiver of his appeal and section 2255 rights; but he specifically did not waive appellate review of his sentence under 18 U.S.C. § 3742. His

waiver also contained an exception for ineffective assistance of counsel if the grounds were not known to him, or reasonably knowable, at the time of his plea. Based upon the exceptions to his waivers, Bravo Espinosa was advised by the Court that he may have the right to appeal the sentence and that his plea and plea agreement would waive the right to appeal all or part of the process other than the sentencing. He was further advised that the Sentencing Guidelines may ultimately suggest a range of 292-365 months, which was higher than the range at sentencing.

At sentencing on March 12, 2007, Bravo Espinosa faced a statutory mandatory minimum sentence of 240 months, and his Sentencing Guidelines range had ultimately been calculated at 262 to 327 months in prison.<sup>1</sup> Counsel argued that the Court should reduce the sentence below the guidelines range because Bravo Espinosa had provided substantial assistance to the Government in the investigation or prosecution of others, but the Government had not filed a motion for reduction.<sup>2</sup> See U.S.S.G. § 5K1.1. Although counsel initially argued for a departure, he later clarified he meant this to be a ground for variance from the Guidelines. No argument for reduction of sentence was offered on any other ground.

It was the prosecutor, rather than defense counsel, who initially pointed out that the Defendant's cooperation and assistance could be considered for purposes of a variance, even in the absence of a Government motion. Then, while arguing the Court should sentence within the guidelines range, the prosecutor also noted Bravo Espinosa was facing a heavy sentence, and the bottom of the range was sufficient.

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<sup>1</sup> Bravo Espinosa had a Base Offense Level 38 based upon the large quantity of drugs. After a four level enhancement for his role as an organizer or leader and a three level reduction for acceptance of responsibility, his Offense Level was 39, with a Criminal History Category I for the range of 262-327 months.

<sup>2</sup> Counsel conceded he had no basis to argue the Government had withheld a motion for reduction in bad faith or for any unconstitutional purpose.

In reaching the sentence, the Court considered the factors in 18 U.S.C. § 3553 and found the sentence most impacted by the seriousness of the offense and the quantity of methamphetamine involved. The Court noted it gave “serious consideration to the guideline range without regard to whether or not it is presumed to be reasonable.”<sup>3</sup> Sent. Tr. 9. It found the guidelines sentencing system adequately addressed the circumstances of the case, and it found that the guidelines range was reasonable. The Court then sentenced Bravo Espinosa to the bottom of the Sentencing Guidelines range at 262 months, followed by 10 years of supervised release.

Consistent with Bravo Espinosa’s plea, at the end of the sentencing proceeding, the Court informed Bravo Espinosa that he had a right to an appeal and would need to do so within ten days of the entry of the Judgment. Immediately after the sentencing hearing, while still in the courtroom, Bravo Espinosa told his counsel that he wanted to appeal the sentence. Counsel had a brief conversation with Bravo Espinosa before he was escorted from the courtroom by the marshals. During that conversation, counsel incorrectly told Bravo Espinosa he could not appeal because he had entered a Plea Agreement in which he waived his rights to appeal. Due to the short amount of time, counsel did not further explain. At the hearing on this motion, counsel further explained that he believed an appeal could be a breach of the Plea Agreement, because the limited exceptions to the waiver did not apply in this case. Counsel was also concerned that an appeal would interfere with continuing discussions regarding substantial assistance. Regarding the validity of an appeal, counsel opined that since this predated the case of Gall v. United States, 552 U.S. 38 (2007), an appeal would have been frivolous because the guidelines had been properly followed. Counsel said he had not been aware of the case of Mario Claiborne,

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<sup>3</sup> The Court was then sensitive to the controversy over whether a district court could employ a presumption of reasonableness to the guideline range, see, e.g., United States v. Ibarra, 220 Fed. App’x 454, 456 at n.2 (8th Cir. 2007) (unpublished per curiam), and expressly avoided the use of a presumption in this sentencing determination. Ultimately the use of such a presumption was reserved to the appellate courts. Rita v. United States, 551 U.S. 338, 347 (2007).

which was then before the United States Supreme Court from the Eighth Circuit Court of Appeals on the issue of the level of deference to be given to a sentencing judge in varying from the guideline range. United States v. Claiborne, 439 F.3d 479 (8th Cir. 2006), cert. granted, 549 U.S. 1016 (2006), vacated as moot, 551 U.S. 87 (2007).

Bravo Espinosa returned to the jail, and, within the time limit to file an appeal, he had a letter written in English and sent to counsel in which he did not specifically reiterate his request for an appeal but referenced counsel's background as an appellate attorney and expressed his hope counsel could do something about the length of the sentence. Counsel received the letter from Bravo Espinosa and responded by letter, in English, not addressing the issue of an appeal. Counsel did not hear from Bravo Espinosa again until this section 2255 action.

## II. DISCUSSION

Generally, to prevail on a claim that trial counsel provided constitutionally ineffective assistance, a movant must show (1) counsel's representation was deficient, and (2) the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). There is a strong presumption that counsel's representation was within an objective standard of reasonableness and the Court is highly deferential to counsel's performance. Id. at 689. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690-91. To establish the first prong, a movant must show that counsel's performance fell below an objective standard of reasonableness. Id. at 687-88. Prejudice is demonstrated with "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. A court need not address both

components of the test if a movant makes an insufficient showing on one of the prongs. Id. at 697.

In the context of filing an appeal from a criminal conviction, an attorney who fails to file an appeal after being specifically instructed to do so by his client acts in a professionally unreasonable manner. See Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000); Holloway v. United States, 960 F.2d 1348, 1356-57 (8th Cir. 1992). Prejudice in such a case is presumed “because the defendant has forfeited his right to an appellate proceeding as a result of his counsel’s error[, and t]he court need not inquire whether the intended appeal would be meritorious or likely to succeed.” Watson v. United States, 493 F.3d 960, 963-64 (8th Cir. 2007) (citations omitted).

When a client does not specifically instruct counsel to appeal, however, counsel’s ineffectiveness turns on “whether counsel in fact consulted with the defendant about an appeal.” Flores-Ortega, 528 U.S. at 478. In this context, “consult” means “advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant’s wishes.” Id. If counsel has not consulted with his client, the court then asks whether the failure to consult, itself, constitutes deficient performance. Id. Counsel must consult with a defendant when counsel has reason to believe “either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” Id. at 480. The facts of the case now before the Court suggest addressing these factors in reverse.

In this case, Bravo Espinosa let counsel know immediately after sentencing that he wanted to appeal. Counsel responded with the incorrect advice that Bravo Espinosa could not appeal because of the waiver in the Plea Agreement. Counsel did not then, or at any subsequent time prior to the hearing on this motion, further advise Bravo Espinosa of his opinion that an appeal

would be frivolous and might undermine further efforts to obtain a reduction based upon substantial assistance. Bravo Espinosa promptly had a letter drafted in English and sent to counsel. While the letter from a non-English speaking client with limited knowledge of the legal system cannot be read to specifically repeat his request that an appeal be filed, the letter does seek help in his situation and references counsel's appellate experience. Based on the prior conversation with Bravo Espinosa and the general tone of the follow-up letter, counsel needed to advise Bravo Espinosa of the advantages and disadvantages of filing an appeal and make a reasonable effort to determine Bravo Espinosa's wishes. Id. at 478-79. Rather, counsel sent Bravo Espinosa a letter in English that does not correct the prior incorrect advice regarding the ability to appeal, does not advise his client of the validity of an appeal, and does not seek to precisely determine the client's wishes regarding taking an appeal. Counsel had no further contact with Bravo Espinosa and did not file an appeal. Under the circumstances, the Court cannot say Bravo Espinosa's counsel made a reasonable effort to ascertain his client's wishes and follow them. See id. at 478.

While the Flores-Ortega factors are disjunctive, the Court also finds that if fully advised of the state of the law then existing, a rational defendant in Bravo Espinosa's position may well have wanted to appeal. His Plea Agreement allowed an appeal; and, there is nothing in this record upon which to conclude that an appeal as allowed would impair further opportunity to provide substantial assistance.

Bravo Espinosa was dealing with a lengthy sentence under any circumstances, given the applicability of the mandatory minimum of 240 months, but had a rational interest in seeking a sentence below the 262 month bottom of the guideline range. At the time of this sentencing and the period for taking an appeal, it was generally known to defense counsel in federal courts that sentencing flexibility for a trial judge was in flux.

The Supreme Court had announced in United States v. Booker, 543 U.S. 220 (2005), that the Sentencing Guidelines were no longer mandatory, and sentences were reviewed for reasonableness. Booker, 543 U.S. at 260-62. In this circuit, a rule of proportionality had arisen in which the Court of Appeals required a justification that was “proportional to the extent of the difference between the advisory range and the sentence imposed.” United States v. Claiborne, 439 F.3d 479, 481 (8th Cir. 2006), quoting United States v. Johnson, 427 F.3d 423, 426-27 (7th Cir. 2005). At the time of the Bravo Espinosa sentencing, the Supreme Court had granted certiorari in Claiborne to address the validity of the proportionality rule, until the case was mooted by Claiborne’s death. Claiborne v. United States, 549 U.S. 1016 (2006), vacated as moot, 551 U.S. 87 (2007). The proportionality rule was later abolished by the Supreme Court in still another case from this circuit in favor of an abuse of discretion review with deference to the determination of the sentencing judge. Gall, 552 U.S. at 59-60. Bravo Espinosa could certainly have wished to pursue an appeal had he been advised (1) his Plea Agreement did not preclude an appeal of the sentence; (2) sentencing law was in flux and the issue of greater flexibility for sentencing judges was pending before the Supreme Court; and (3) a change in the law might cause his sentencing judge to be less prone to stay within the guidelines given the mandatory minimum was only 22 months lower; even though (4) the state of the law in this circuit at the time suggested an appeal would not be ultimately successful if the law remained the same. The Court must find the failure to provide something akin to this information is constitutionally deficient performance and thus ineffective assistance of counsel. On this record, the Court finds that if counsel had sufficiently consulted with Bravo Espinosa, there is a reasonable probability that Bravo Espinosa would have persisted in his request that counsel file an appeal. Counsel’s constitutionally deficient performance deprived Bravo Espinosa of an appeal that he otherwise would have taken; consequently, he has demonstrated a successful ineffective assistance of counsel claim entitling him to an appeal. Flores-Ortega, 528 U.S. at 484.

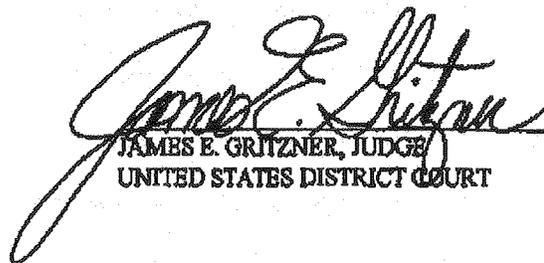
When a movant has shown ineffective assistance of counsel under these circumstances, the remedy is to allow him an opportunity to take a timely direct appeal. E.g., Estes v. United States, 883 F.2d 645, 649 (8th Cir. 1989) (“the prior judgment of conviction and sentence should be vacated and a new judgment entered which would enable Estes to appeal therefrom after such entry.”). The Court, therefore, will vacate the judgment in Bravo Espinosa’s criminal action and reimpose the same sentence, thus allowing Bravo Espinosa an opportunity to file a timely appeal.

### III. RULING

Antonio Bravo Espinosa’s motion to vacate, set aside, or correct his sentence, brought under 28 U.S.C. § 2255, must be **granted**. The judgment in United States v. Antonio Bravo Espinosa, No. 4:03-cr-00168-JEG (S.D. Iowa), filed on March 12, 2007 is hereby vacated. The Court will separately file an Amended Judgment containing the same terms and conditions but with the same date as this Order, which will restart the period in which the Defendant may seek an appeal. Pursuant to the provisions of Federal Rule of Appellate Procedure 4(b), Bravo Espinosa is advised he must file a Notice of Appeal within 10 days of the entry of the Amended Judgment.<sup>4</sup>

**IT IS SO ORDERED.**

Dated this 5th day of February, 2010.



JAMES E. GRITZNER, JUDGE  
UNITED STATES DISTRICT COURT

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<sup>4</sup> If Bravo Espinosa files a Notice of Appeal *pro se* as an inmate confined in an institution, the notice is timely filed if it is placed in the institution’s internal mail system on or before the last day allowed under the rule. Fed. R. App. P. 4(c)(1).

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

CRYSTAL ANTOINETTE HARRIS,

Movant/Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

4:08-cv-00164-RP

**ORDER**

Crystal Antoinette Harris moves to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. § 2255, and the court has taken judicial notice of the proceedings in her criminal case, United States v. Harris, 3:04-cr-00021-RP (S.D. Iowa). For the following reasons, the court grants the motion.

**BACKGROUND**

Harris originally was charged with distributing cocaine base on four occasions. The total amount of drugs identified in the four distributions was about 7.5 grams of cocaine base. In a superseding indictment filed in July 2004, the grand jury included special findings that Harris was responsible for 500 grams or more, but less than 1.5 kilograms, of cocaine base. Trial against her began on August 29, 2005, and a jury was chosen. Before opening statements were made, the court recessed trial so that Harris could discuss whether she wanted to continue with trial or plead guilty to the charges without a plea agreement. After 4:00 p.m. that day, Harris entered open guilty pleas to the four counts. As part of the plea proceeding, the government agreed to drop the special findings regarding drug amounts. Later, when the presentence

investigation report indicated she was responsible for 315.39 grams of cocaine base, she objected, arguing that her plea supported only about 7.5 grams, the amount attributable in the four distribution counts. (PSR Harris Obj. ¶ 5.) At sentencing, Harris again argued she could not be held responsible for any drug amounts beyond those she distributed according to the indictment. The court rejected the argument, finding her “relevant conduct” under the guidelines included at least 150 grams of cocaine base. The court sentenced her to 151<sup>1</sup> months in prison and 3 years of supervised release. Harris appealed, and the United States Court of Appeals for the Eighth Circuit affirmed. United States v. Harris, 233 Fed. Appx. 584 (8th Cir. 2007). This section 2255 motion followed.

The court rejected on initial review Harris’s § 2255 claim that she had a right to the same judge at sentencing as the one who took her guilty plea, and that her lawyer should have raised such an objection. Counsel was appointed to represent Harris and filed a brief in support of the motion on remaining claims that Harris’s trial counsel provided ineffective assistance by: (1) not knowing that witnesses could be called and cross-examined at sentencing, (2) not knowing that “relevant conduct” from a presentence report could be used at sentencing, and (3) failing to object to admission of the Jilisha Walton affidavit at sentencing. Harris further argued that her appellate counsel was ineffective for not raising these grounds and for not arguing that she was punished twice when a 2003 state charge was considered in her relevant conduct and in her criminal history.

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<sup>1</sup>The court subsequently reduced Harris’s imprisonment to 121 months pursuant to retroactive application of the “crack” cocaine guideline amendments. United States v. Harris, No. 3:04-cr-00021-RP (S.D. Iowa Oct. 1, 2008), Clerk’s No. 87.

On January 25, 2010, the court held a hearing on Harris's motion. In addition to the criminal case record, the court accepted Harris's testimony and evidence of Harris's Johnson County, Iowa, criminal proceedings in State v. Harris, No. FECR 065314 and State v. Harris, No. FECR 062783. The government intended to call Harris's former counsel as a witness, but her former counsel did not appear for the hearing. No testimony or offer of proof has been made as to what counsel would have said. The court now makes the following findings of fact and conclusions of law.

### FINDINGS OF FACT

The court finds credible Harris's testimony at the § 2255 hearing that she was offered an agreement to plead guilty to 100 grams of cocaine base in exchange for a 10-year sentence, but she rejected that offer because her lawyer said that she could instead plead to just the four counts charged in the indictment and be held responsible for only about 7.5 grams of cocaine base. Harris was willing to plead guilty to the approximately 7.5 grams of cocaine base. This unusual perspective stems from her lawyer's misunderstanding about the role of "relevant conduct" under the guidelines in determining her sentence. Counsel's statements at the plea demonstrate he did not understand this fundamental provision in the guidelines. Unfortunately, the court did not clarify this misunderstanding at the plea proceeding. Counsel's misunderstanding persisted, as evidenced by his objections to the presentence report, his comments at sentencing, and his arguments on direct appeal. By rejecting the offered agreement, Harris eventually was held responsible for at least 150 grams of cocaine base, and she was sentenced to 151 months in prison. If Harris had understood her full sentencing exposure when offered the agreement, the court is convinced she would have taken the plea offer and received a lesser sentence. The court

makes more detailed observations below.

### The Indictment

At the time the superseding indictment was delivered, in July 2004, courts were sensitive to the question whether, under the Sixth Amendment, juries were required to make all findings of fact regarding drug amounts.<sup>2</sup> It is not surprising, therefore, that the government sought to add special findings in the indictment. By the time of Harris's trial and the plea, in August 2005, the question had been decided, and the special findings in the indictment were no longer required under the Sixth Amendment.<sup>3</sup>

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<sup>2</sup>On June 24, 2004, the Supreme Court decided Blakely v. Washington, 542 U.S. 296, 303 (2004), which held, "the 'statutory maximum' for Apprendi [v. New Jersey, 530 U.S. 466 (2000)] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Just weeks later, the Seventh Circuit considered Booker and the issue spurred by Blakely. See United States v. Booker, 375 F.3d 508, 510 (7th Cir. 2004) (argued July 6, 2004, decided July 9, 2004) ("We have expedited our decision in an effort to provide some guidance to the district judges (and our own court's staff), who are faced with an avalanche of motions for resentencing in the light of [Blakely], which has cast a long shadow over the federal sentencing guidelines. We cannot of course provide definitive guidance; only the Court and Congress can do that; our hope is that an early opinion will help speed the issue to a definitive resolution."), cert. granted, 542 U.S. 956 (Aug. 2, 2004), aff'd and remanded, 543 U.S. 220 (2005).

<sup>3</sup>When United States v. Booker, 543 U.S. 220 (2005), was issued on January 12, 2005, the Supreme Court remedied the potential Sixth Amendment violations in a mandatory guidelines scheme by making the guidelines advisory. Id. at 259. The Court's ruling did not mandate that a jury find all drug amounts beyond a reasonable doubt or that a jury determine the drug amounts relevant to the guidelines. Id. Instead, as the Court of Appeals for the Eighth Circuit explained four months before Harris pleaded guilty, after Booker, district courts could determine sentence-enhancing facts under the advisory guidelines by only a preponderance of the evidence. United States v. Pirani, 406 F.3d 543, 551 n.4 (8th Cir. Apr. 29, 2005) (en banc), cert. denied, 546 U.S. 909 (2005); see also United States v. Haack, 403 F.3d 997, 1003 (8th Cir. 2005) ("In determining the appropriate guidelines sentencing range to be considered as a factor under [18 U.S.C.] § 3553(a), we see nothing in Booker that would require the court to determine the sentence in any manner other than the way the sentence would have been determined pre- Booker."). The district court's factfinding duty included "relevant conduct"

### The Plea Proceeding

By the time Harris pleaded guilty, drug amounts did not have to be alleged in the indictment and proved beyond a reasonable doubt unless they were to establish a sentence for her beyond the twenty-year statutory maximum. In determining her guideline sentence, the court needed to include “[t]ypes and quantities of drugs not specified in the count of conviction” if they were relevant conduct. See U.S.S.G. § 2D1.1(c) & comment. (n.12). “Relevant conduct” means “all acts and omissions [of the defendant] that were part of the same course of conduct or common scheme or plan as the offense of conviction.” U.S.S.G. § 1B1.3(a)(2) & comment. (backg'd.) Factors the court would consider in making this determination included the similarity, regularity, and temporal proximity of the charged and uncharged conduct. See U.S.S.G. § 1B1.3, comment. (n.9).

The statements by Harris’s counsel at the plea proceeding suggest that counsel did not understand the relevant maximum penalty and the operation of “relevant conduct” in the sentencing guidelines under Booker. Counsel tried to limit the evidence before the court to only that in the four counts in the indictment. For example, immediately after Harris entered her guilty pleas, counsel asked to strike the special findings at the end of the indictment. (Plea Tr. 4-5.) Of course, by then, the special findings were surplusage, and the court’s comment to the prosecutor reflects it, “I think you agreed those can be stricken in light of the present law?” (Plea Tr. 5.) In addition, when the prosecutor asked Harris questions to create a factual basis for the

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under U.S.S.G. § 1B1.3. Consequently, under the advisory sentencing scheme in place after Booker, it was no longer necessary to include special findings in the indictment and by the jury except for those that set the statutory maximum.

plea that involved payment on “previous drug debt” to that alleged in the indictment, Harris’s counsel objected to it as irrelevant. (Plea Tr. 8.) These statements, alone, may not be sufficient to demonstrate that counsel did not adequately advise Harris. They do, however, corroborate the misunderstanding that became evident at sentencing and on appeal.

Unfortunately, the court did not clarify the misunderstanding at the plea proceeding. The court did ensure that Harris knew there was no mandatory minimum and there was a twenty-year statutory maximum. (Plea Tr. 11.) The court also questioned Harris as to whether anyone promised her what the sentence would be or threatened or forced her to plead guilty. (Plea Tr. 15-17.) At the end of plea colloquy, the court stated:

Based on her responses to question of Court and counsel, I find that her plea is made voluntarily to all four counts. It is not the result of force, threats or promises. She’s aware of her maximum punishment. She’s also aware of her jury trial rights and voluntarily waives continuing with her trial, and there is a factual basis for her plea to each count. I therefore accept her plea of guilty to Counts I, II, III, and IV, and order the preparation of a presentence report.

(Plea Tr. 17.) What is missing from the colloquy, however, is the court’s discussion with Harris regarding its obligation to apply the sentencing guidelines and its discretion to depart from the guidelines under some circumstances. See Fed. R. Crim. P. 11(b)(1)(M). Under Rule 11, the court must inform the defendant and ensure she understands the court’s obligation to apply the guidelines. The court did not do so. The court also did not advise Harris she could receive a harsher sentence than she anticipated but would not be able to withdraw her plea in that event.

### **The PSR and Sentencing**

The objections Harris’s counsel made to the PSR also suggest counsel did not understand the application of “relevant conduct” under U.S.S.G. § 1B1.3. Counsel repeatedly objected to

incidents included in the PSR because they were not alleged in the indictment and therefore were not part of the “offense conduct.” (Def.’s Obj., Clerk’s No. 65 at 22-24.) The Probation Officer responded that the amounts were calculated as “relevant conduct” under § 1B1.3.

At sentencing, Harris’s counsel again took up the issue, stating, “we certainly had discussions all afternoon [on the day of the plea] about the matter and that the issue with respect to the quantity came up. I made a motion after those discussions, and it was restricted . . . .”

(Sent. Tr. 6.) The following discussion at sentencing then ensued:

MR. CRONK: What happened in this case is, Your Honor, the indictment came down before Booker in that window when we were indicting and including allegations that applied under the sentencing guidelines. So, for instance, I believe in this case there was a superseding indictment that alleged, as an aggravating factor, that this defendant was responsible for 500 grams or more of crack cocaine. At the time she pled, Mr. Reed moved to strike that, and, of course, Judge Longstaff did not require that she make admissions relevant to that aggravating factor. That, I don't think, was really a subject of negotiation. That was simply what the law is at the time.

THE COURT: Right. So the Government was trying to comply with Blakely at the time, which said you've got to prove up--or at least the Government's position was that they had to prove up an aggravating factor; i.e., drug amounts?

MR. CRONK: Yes.

THE COURT: Okay.

MR. CRONK: That's why the allegation of 500 grams was in the indictment.

(Sent. Tr. 6-7.) When the government attempted to present witnesses to support the amount of drugs attributable to Harris in the PSR, her counsel objected because “there is no fact-finder to find those issues beyond a reasonable doubt. I think that’s what the Booker case and the other cases require.” (Sent. Tr. 12.) The court responded:

THE COURT: Mr. Reed, here's the way I read the law, and then I'll talk about the facts here. My understanding is at sentencing the burden on the Government is only preponderance.

MR. REED: Your Honor, I believe Booker, because this sentence is an element of the offense, would require proof beyond a reasonable doubt as to those quantities.

I mean, I just got a case remanded from the Eighth Circuit on that same issue where the Judge based the quantity based upon an unproven amount. And the case was United States versus Roberson, out of the United States District Court in Minneapolis. Mr. Roberson went to trial. In the trial the only amounts proven were, quote, an amount in excess of 50 grams. At the time of sentencing, the Judge took into consideration a larger amount, and the case was remanded for sentencing based on that.

(Sent. Tr. 12-13.) In fact, the Court of Appeals in United States v. Roberson, 439 F.3d 934, 934 (8th Cir. 2006), did not remand case for sentencing based on only 50 grams of drugs. The Court of Appeals remanded the case because the district court mistakenly thought the guidelines were mandatory. Id. The court pointed this out to counsel later in the sentencing proceeding, and counsel persisted in his misunderstanding:

THE COURT: Mr. Reed, I found United States versus Roberson, 439 Federal 3d 934. Burden of proof at sentencing was not at issue in that case.

MR. REED: Your Honor, the case—one of the issues with respect to the appeal was the drug quantity, and, as you may see as you read, the Court sentenced him for 18—  
THE COURT: Right.

MR. REED: —ounces when the jury only made a determination as to the 50—

THE COURT: Right. It was remanded—The way I understand the facts, it was remanded because the District Court considered the guidelines mandatory. That's the holding of the case.

MR. REED: Well, in the other aspect of it would have to be— Well, I guess I read a little differently, Your Honor.

(Sent. Tr. 50.)<sup>4</sup> The court and the prosecutor were in agreement:

MR. CRONK: Well, I don't know the Roberson case. I would be very surprised if, in the last few days, the Eighth Circuit has overturned Booker. Booker says that guideline calculations are to be proven—aggravating specific offense characteristics, that type of information, has to be proved by a preponderance of the evidence. The

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<sup>4</sup>On further appeal after remand, the Court of Appeals rejected the defendant's argument that his sentence had to be based on only amounts found by the jury. United States v. Roberson, 517 F.3d 990, 993 (8th Cir. 2008). It held, "Under the now-advisory guidelines, a district court may still find its own facts that enhance the base offense level of the guidelines range, so long as the statutory maximum is not surpassed." Id.

mandatory minimum amounts, such as 50 grams, have to be proven to a jury beyond a reasonable doubt.

THE COURT: Right.

MR. CRONK: I don't think we're in any sort of constitutional violation if we go forward with the evidence and the Court finds, by a preponderance, those amounts.

THE COURT: Mr. Reed, in fact, my reading of the cases, there have been a number of times that defendants from District Courts have appealed in our circuit saying that the Judge had to make a beyond a reasonable doubt finding, and the Court of Appeals has consistently said in an advisory guideline system the burden on the Government is only preponderance. That's my reading of the cases, but you certainly have your error.

(Sent. Tr. 14.)

After presentation of evidence, the government asked the court to find Harris responsible for 500 grams or more of cocaine base. (Sent. Tr. 91.) Harris's counsel responded:

"[O]bviously, the relevant provision in this case is—I believe it's 1B1.3, relevant conduct. And for the life of me, I guess I could not find a provision that would be applicable that would allow the testimony that was offered here today to be considered by the Court in determining a sentence, and I will tell the Court why.

(Sent. Tr. 91.) Counsel went on to explain that the indictment alleged four distinct incidents on specific dates, not a conspiracy, and testimony presented at sentencing was irrelevant to those specific dates. Referring to his motion to strike the special findings in the indictment, he told the court:

I mean, this indictment alleges that there were acts that occurred on four specific dates, and during the course of the preparation for the trial, I was at a loss to find information related to 500 to 1.5 kilograms, and so I brought the motion, and the motion was granted because the State could not prove—the Government could not prove beyond a reasonable doubt that this case involved 500 to 1.5 kilograms. And now, after that language was stricken, the Government seeks to have this Court, I would argue, or maybe it's not a correct word, but back-door the defendant by once again adding language relevant to matters that have already been dismissed and to do—asking the Court to do so under 1B1.3(b), if I'm saying that correctly.

(Sent. Tr. 92.) Counsel reiterated, "Again this is not a conspiracy, and I would submit that

1B1.3, the language in that guideline provision, does not apply." (Sent. Tr. 93.) Counsel persisted:

[MR. REED:] I would ask that the Court, based upon 1B1.3, consider only the amounts for which Ms. Harris pleaded in the indictment.

THE COURT: Mr. Reed—

MR. REED: Yes.

THE COURT: —how quick do you think the Court of Appeals would reverse me if I did that?

Here's what it says: "All acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." My understanding of the law, and maybe I've missed it here, even acquitted conduct can be considered by the sentencing Court.

(Sent. Tr. 96.) The Court quoted to counsel applicable caselaw holding that relevant conduct can include conduct not alleged in the indictment, but counsel would not accept it:

[THE COURT:] Here's what I'm reading from the Court of Appeals.

MR. REED: Uh-huh.

THE COURT: "The District Court did not clearly err in finding that the 11 other transactions were relevant conduct under the U.S. Sentencing Guidelines manual 1B1.3(a) (1995). See *United States versus Ballew*," B-a-l-l-e-w, 40 Federal 3d 936, page 943, Eighth Circuit (standard of review) cert. denied, et cetera, et cetera. "The guidelines provide that the base offense level shall be determined on the basis of . . . all acts and omissions . . . that were part of the same course of conduct or common scheme or plan." This is absent an allegation or an indictment of conspiracy.

MR. REED: Well, I guess the key word is what you just read there, Your Honor, was "clearly" err, and so that tells me that had the Court gone the other way that at least the Court would have some discretion to do that. And if this Court found in all fairness—

THE COURT: No. Here's—I want to make sure that you have a sufficient record.

MR. REED: Uh-huh.

THE COURT: My record is I have to take into account all of the conduct that the defendant engaged in, not just the four specific allegations that are contained in the grand jury's indictment. And I'm sure if I'm wrong on that, counsel for the Government has an equal obligation, as you do, to tell me that I'm wrong on the law.

MR. REED: Well, Your Honor, I guess this—when you say consider the conduct, I mean, that's--the way the Court stated it is certainly broad and suggested that anything that the defendant ever did could be included, and I would submit that that's not what the law says.

(Sent. Tr. 98-99.)

Finally, counsel for Harris argued it would be unfair for the court to hold her responsible for additional quantities beyond the indictment, and he represented to the court that if they had known she would be held responsible for additional relevant conduct beyond the indictment, she might have gone to trial:

I mean, one of the reasons that we went ahead and entered a plea in this case was because we were pleading to the four charges and the one point—that last special finding was dismissed. And, now, you know, had we understood that prior conduct from nine months prior to could have been considered, then, you know, we might as well have gone and had a trial in front of a jury, let a jury make a determination of proof beyond a reasonable doubt on that subject.

(Sent. Tr. 100-01.) Based on the evidence presented, the court found Harris responsible for at least 150 grams of cocaine base by a preponderance of the evidence, and sentenced her at the bottom of the guideline range, 151 months. (Sent. Tr. 113, 116.) Harris appealed.

### **The Appeal**

The appellate opinion again demonstrates that her counsel still did not understand the application of Booker or the guidelines calculations. The Court of Appeals held:

Regarding the Booker-related arguments, counsel for Harris misconstrues the procedural framework for sentencing post-Booker. It is now well established that the court is to make factual findings necessary for advisory Guidelines calculations, these findings are to be made using the preponderance of the evidence standard, and the sentencing court is to use the advisory Guidelines range as one of the sentencing factors under 18 U.S.C. § 3553(a). . . . Counsel for Harris ignores the remedial provisions of the Court's Booker opinion and all of our precedent following Booker which establishes this framework. Counsel insists, instead, that Booker requires a jury to make all findings relevant to the Guidelines. Because we have repeatedly addressed this basic misconception and consistently rejected arguments similar to those raised by counsel, we need not address all of counsel's related arguments individually.

Harris, 233 Fed. Appx. at 586-87. The Court of Appeals also rejected counsel's argument that

dismissal of the special findings limited the relevant conduct that could be attributed to Harris. Id. at 587.

### **Harris Would Have Taken the Original Plea Offer**

Harris's counsel fundamentally misunderstood the applicable Supreme Court and lower court precedent regarding Booker as well as the relevant guidelines. Neither the probation officer nor this court could convince counsel of the flaws in his interpretation of the law. It is highly unlikely, therefore, that Harris would have received or gleaned a clear understanding of her potential sentencing exposure in the indictment based on her advice from counsel. When the government offered her a plea agreement to 100 grams of cocaine base, it was understandable, given the incorrect advice Harris received, that she would have believed she could receive a substantially lesser sentence by getting the special findings dismissed and pleading straight up to the distribution counts. In fact, that is what she attempted to do. Unfortunately, her decision was not based on an accurate understanding of Booker or the guidelines. If she had received accurate advice, this court is convinced by a reasonable probability that she would have accepted the initial plea offer and received a sentence based on 100 grams of cocaine base instead of 150 grams, and she would have received a lesser sentence than the 151 months she received. At the subsequent plea proceeding, the court did not clarify that the guidelines applied to her case, as required by Rule 11, and Harris's and her lawyer's misunderstanding carried through to the end of her direct appeal.

### **APPLICABLE LAW**

Harris did not challenge the plea process on direct appeal. She may, however, obtain review of her claim based on the ineffective assistance of her counsel and resulting prejudice to

her. Cf. Strickland v. Washington, 466 U.S. 668, 694 (1984) (ineffective assistance of counsel standard). A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. If a defendant fails to establish prejudice, the court need not consider whether counsel's actions were reasonable. Id. at 697.

Strickland applies to ineffective assistance claims arising out of the plea bargaining process. See Hill v. Lockhart, 474 U.S. 52, 58 (1985); see also United States v. Regenos, 405 F.3d 691, 693 (8th Cir. 2005) (citing Hill); Wanatee v. Ault, 259 F.3d 700, 703 (8th Cir. 2001) (same). Thus, a defendant may establish prejudice by demonstrating "that he would have accepted the plea but for counsel's [professionally deficient] advice, and that had he done so he would have received a lesser sentence." Wanatee, 259 F.3d at 703-04. The court concludes that Harris's counsel provided her professionally deficient advice regarding the role of "relevant conduct" in determining her exposure to criminal penalties. Counsel provided Harris with professionally deficient advice regarding the offer to plead guilty to 100 grams of cocaine base, and but for counsel's advice, Harris would have accept the offer. The court further concludes that the subsequent plea proceeding was not adequate to preclude a finding of prejudice because the plea proceeding did not clarify the fundamental misunderstanding counsel gave Harris about the court's ability to sentence within the statutory penalty range. Consequently, Harris is entitled to relief on her § 2255 motion. Because the court grants Harris relief on the issue related to counsel's advice regarding the plea, the court need not address Harris's other grounds for relief.

#### **Counsel's Performance Was Deficient**

The court first addresses counsel's performance. The correct guidelines range, post-Booker, "remains the critical starting point for the imposition of a [defendant's] sentence."

United States v. Mashek, 406 F.3d 1012, 1016 & n.4 (8th Cir. 2005). A defendant's role in the offense is measured by "relevant conduct" under § 1B1.3. United States v. Thurmon, 278 F.3d 790, 792 (8th Cir. 2002). "Relevant conduct" has been called the "cornerstone" of the guidelines, and it is also the crux of this § 2255 proceeding. See United States v. Galloway, 976 F.2d 414, 415 (8th Cir. 1992) (en banc) (including uncharged offenses as relevant conduct under the guidelines is authorized by statute and permitted by the Constitution), cert. denied, 507 U.S. 974 (1993). "Relevant conduct" includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," and in a case like Harris's, that requires grouping of multiple counts, relevant conduct includes "all acts and omissions [previously described] that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. §§ 1B1.3(a)(1)(A), 1B1.3(a)(2). In determining the offense conduct for which a defendant is responsible, uncharged conduct can be considered as relevant conduct. Galloway, 976 F.2d at 419; see also United States v. Radtke, 415 F.3d 826, 841 (8th Cir. 2005).

Harris's counsel, however, was working under the mistaken impression, based on his erroneous understanding of the Supreme Court's decision in Booker, Eighth Circuit precedent, and the guidelines, that § 1B1.3 did not apply to her and a jury needed to find beyond a reasonable doubt the amount of drugs attributable to her except for those amounts in the transactions specifically charged in the indictment. The state of the law was well-known when Harris received her offer.

When Harris received the offer to plead guilty to 100 grams of cocaine base and 120 months in prison, she was facing an indictment that alleged four distinct drug transactions

totaling about 7.5 grams of cocaine base and special findings in the indictment that she was responsible for 500 grams but less than 1.5 kilograms of cocaine base. Based on existing, well-known law, she could be held responsible for all acts that the government could prove by a preponderance of the evidence were part of the same course of conduct or common scheme or plan as her charges for distribution on the four separate dates. U.S.S.G. §§ 1B1.3, 3D1.1(a). According to Harris's counsel, however, when she received the plea offer, Harris's options<sup>5</sup> were:

- About 7.5 grams: Offense level 26, 70-87 months
- 100 grams: Base offense level 32, total level 31, taking into account adjustments for acceptance of responsibility, 120 months in prison
- At least 500 grams: Base offense level 36, plus other potential adjustments for role in the offense, at least 210-262 months

Based on that advice, Harris unsurprisingly decided she was better off going to trial and being found guilty on only the four charges. It was unreasonable, however, for counsel to suggest that Harris could be held responsible for only about 7.5 grams of cocaine base, even if she were acquitted at trial of the special findings. The court recognizes that counsel cannot be expected to predict the eventual sentence that a defendant will receive. Counsel should be expected, however, to advise a defendant on at least the fundamental provisions of the guidelines so that she can make an intelligent decision whether to accept or reject a plea. Given the critical importance of the guidelines in determining a sentence, and § 1B1.3 in particular, counsel's failure to advise Harris of the impact of § 1B1.1 on her sentence was professionally deficient.

**There Is a Reasonable Probability that the Outcome of the Plea Negotiation Process**

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<sup>5</sup>The offense level for cocaine base has subsequently been amended. Harris, No. 3:04-cr-00021-RP, Clerk's No. 87 (Oct. 1, 2008) (reducing sentence).

**Would Have Been Different but for Counsel's Deficient Performance**

Counsel's failure to advise Harris on the nature of "relevant conduct" and its role in determining the offense level caused her to forego the offer to plead to 100 grams of cocaine base. Based on Harris's statements during the § 2255 hearing, the court is convinced that she would have taken the agreement if she had been properly advised. The court bases its conclusion not just on Harris's testimony, but also on "credible, non-conclusory evidence" that she would have taken the plea if she had been properly advised. Cf. Engelen v. United States, 68 F.3d 238, 241 (8th Cir. 1995) (holding § 2255 movant failed to present sufficient evidence that he would have taken the plea instead of going to trial). Harris was willing to admit her guilt, but she was mistaken as to rudimentary application of the guidelines to her case because of counsel's advice. Counsel's misunderstanding was evident at the plea proceeding, when he moved to strike the special findings as soon as Harris pled guilty. When the prosecutor tried to create a factual basis for the plea, Harris's counsel objected as irrelevant to statements not directly connected to the four distribution counts. Counsel again objected to amounts in the presentence report that were not tied directly to the distribution charges. Perhaps most revealing were counsel's statements at the sentencing, in which he stated § 1B1.3 did not apply and, even after instruction from the court, he persisted in arguing an erroneous interpretation of the law. He persisted in his view on appeal.

If Harris had agreed to plead to 100 grams of cocaine base, she would have received a sentence of 120 months in prison. Under the guidelines, she would have had a base offense level 32, and after taking into account the same adjustments to her offense level that the court eventually applied, and her criminal history, she would have had a total offense level 31 and a

sentencing range of 121-151 months. Instead, she received a sentencing range of 151-188 months, and she was sentenced to 151 months in prison.

#### **Effect of the Plea Proceeding**

The government argues that Harris was not prejudiced because she entered a voluntary plea to the charges. The court disagrees. The Court of Appeals has held that a lawyer's misunderstanding as to the potential length of sentencing is insufficient to render a plea involuntary so long as the court informed the defendant of the maximum possible sentence "and the court's ability to sentence within that range." United States v. Quioroga, 554 F.3d 1150, 1155 (8th Cir. 2009). The court "is not required to inform a defendant of the applicable guideline range or the actual sentence he will receive." United States v. Thomas, 27 F.3d 321, 324 (8th Cir. 1994) (citations and quotations omitted).

Here, Harris was advised as to the maximum possible sentence. The problem is she was not clearly advised as to the court's ability to sentence within the range, as required in Quioroga. Likewise, Harris was not advised, as required by Federal Rule of Criminal Procedure 11, "that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances . . ." See Fed. R. Civ. P. 11(c)(1) (2005). The government acknowledged it would recommend a sentence at the bottom of the guidelines range, and Harris said no one had promised her what her sentence would be. (Plea Tr. 15-17.) Cases in which courts have found a defendant was adequately informed to plead guilty often involved a plea agreement, which the defendant had time to review, and the court advised the defendant that the sentencing guidelines would apply and, even if the sentence turned out to be greater than the defendant expected, the defendant would not be able to withdraw the guilty plea. E.g., United

States v. Gomez, 326 F.3d 971, 973 (8th Cir. 2003) (plea agreement indicated defendant could not withdraw plea if sentencing stipulations were not adopted); United States v. Spears, 235 F.3d 1150, 1152 (8th Cir. 2001) (court unwilling to accept, without further explanation, defendant's statement that he was confused as to "who the trier of fact was" when defendant had a lawyer and said he understood his right to a jury trial); United States v. Bond, 135 F.3d 1247, 1248 (8th Cir. 1998) (per curiam) (court complied with R. 11). This is not a case where a defendant simply underestimated the strength of the government's case or miscalculated her criminal history or role in the offense. The court is unwilling to assume from the statements at the plea proceeding, made without a plea agreement, during a recess from the first day of trial and during an incomplete plea colloquy, that Harris understood the role that the court's factfinding and the sentencing guidelines would play in her sentence. Counsel's misadvice regarding relevant conduct and the plea offer is sufficient to create a reasonable probability that but for counsel's misadvice, Harris would have taken the plea and is sufficient to undermine confidence in the outcome of the plea negotiations. But for counsel falling below an objective standard of reasonableness, Harris would have taken the plea offer, and the subsequent plea was not intelligently made. Therefore, she establishes cause and prejudice.

#### REMEDY

Having determined that Harris is entitled to relief, the court now considers what remedy is appropriate. The court has "broad and flexible power in correcting invalid convictions and sentences." Gardiner v. United States, 114 F.3d 734, 736 (8th Cir. 1997).<sup>6</sup> An appropriate

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<sup>6</sup>The court in United States v. Hernandez, 450 F Supp. 2d 950, 979 (N.D. Iowa 2006), provided a persuasive analysis for determining a post-Booker remedy in a § 2255 case, and this

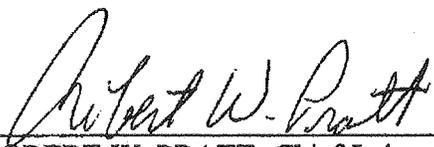
remedy in this case is to allow Harris to reconsider and accept the offer to plead to 100 grams of cocaine base. Cf. United States v. Harrison, 113 F.3d 135, 137 (8th Cir. 1997) (“A remedy that seems appropriate is to put § 2255 defendants in the same position as defendants on direct appeal by permitting resentencing, [] and to impose a sentence that would have been rendered but for the challenged error”) (citations omitted). The court further concludes that, upon resentencing, the court must treat the guidelines as advisory and determine a sentence in accordance with the guidelines and 18 U.S.C. § 3553(a). See Hernandez, 450 F. Supp. 2d at 983.

#### SUMMARY AND RULING

The court grants Crystal Antoinette Harris’s motion to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. § 2255. The court vacates Harris’s judgment and will set a date for further proceedings in the criminal case by separate order.

IT IS SO ORDERED.

Dated this \_\_\_31st\_\_\_ day of March, 2010.

  
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ROBERT W. PRATT, Chief Judge  
U.S. DISTRICT COURT

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court adopts it.

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

ROBERT CLARK GOFF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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CIVIL NO. 4-08-cv-00331

**RULING GRANTING SECTION  
2255 PETITION, AND ORDER**

In a telephone conference call on November 3, 2008, counsel for the parties agreed that this section 2255 habeas corpus case should now be decided on the record without further briefing, evidence, or oral argument.

I incorporate herein by reference, as fully as if set forth herein, the ruling filed October 22, 2008, denying motion to dismiss. I find and conclude, for the reasons articulated in petitioner's memorandum in support of petitioner's response to government's answer, that the 1995 and 1996 Blackhawk County, Iowa, convictions noted at paragraphs 48 and 49 of the presentence report, now relied on by the government as "crimes of violence," were not crimes of violence. Accordingly, I conclude that petitioner's petition for section 2255 relief should be, and it hereby is, **GRANTED**, and the 120 month sentence previously imposed on petitioner will be vacated and a corrected sentence imposed.

**IT IS ORDERED** that on or before November 12, 2008, counsel shall advise me of their positions in respect to the following options for resentencing petitioner:

(1) Impose a new sentence without petitioner's appearance personally or by telephone (in which case petitioner

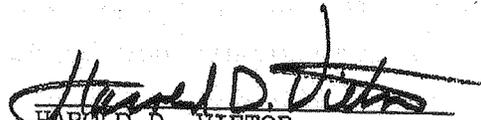
and his counsel, as well as the government, must waive petitioner's personal and telephone appearance).

(2) Impose a new sentence with petitioner appearing by telephone (in which case petitioner and his counsel, as well as the government, must waive petitioner's personal appearance).

(3) Impose a new sentence with petitioner personally appearing.

Counsel shall also advise me of their positions on whether the presentence investigation report should be supplemented.

DATED this 4th day of November, 2008.

  
HAROLD D. VIETOR  
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

ROBERT CLARK GOFF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

NO. 4:08-CV-00331 HDV  
(Criminal No. 05-40)

**RULING DENYING MOTION  
TO DISMISS AND ORDER  
FOR ANSWER**

Petitioner Robert Clark Goff's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is before the court. The Government moves to dismiss the motion, arguing that the motion is barred by the statute of limitations, and even if not barred, fails to state a claim recognized under section 2255. Petitioner resists the motion to dismiss. Oral argument on this matter was made by both parties, and the motion to dismiss is now fully submitted.

**I. Procedural Background**

Goff pleaded guilty to one count of possession of an unregistered firearm, a violation of 26 U.S.C. § 5861(d), 5871. His sentencing guideline range was between 130-162 months, in part because two prior felony convictions set his base offense level at 26. These convictions were for operating an automobile without the owner's consent. While reluctant to conclude that these offenses constituted violent felony convictions for the purpose of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), I was compelled to follow Eighth Circuit law which at the time held that such an offense was a felony crime of violence. See United States v. Goff, 4:05-cr-40,

Sentencing Transcript at 12 (S.D. Ia. November 9, 2005) (discussing United States v. Lindquist, 421 F.3d 751, 755 (8th Cir. 2005)).

Although the guideline range extended to 162 months, the statutory maximum for the crime was 120 months. Given his significant and lengthy criminal history, I sentenced Goff to 120 months in prison. Id. at 31. The Court of Appeals affirmed the conviction and sentence, specifically addressing the issue that Goff's prior convictions for operating a motor vehicle without the owner's consent was a crime of violence for purposes of sentencing. United States v. Goff, 449 F.3d 884, 886-87 (8th Cir. 2006) (per curiam) (applying U.S.S.G. § 2k2.1) (rehearing and rehearing en banc denied), cert. denied Goff v. United States, 127 S.Ct. 2095 (2007). In each proceeding, Goff raised the issue that operating without the owner's consent should not be considered a crime of violence.

In April 2008, the Supreme Court decided Begay v. United States, 128 S.Ct. 1581 (2008), holding that a felony drunk driving offense is not a violent felony within the meaning of the 18 U.S.C. § 924(e)(1). Id. at 1583. The Court distinguished between a violent felony and a crime of violence, holding that to be a crime of violence a crime must be both similar in degree of risk as well as similar in kind to the example crimes listed in the "otherwise" clause of § 924(e)(2)(B)(ii) (enhanced felonies for defendants with certain listed crimes (burglary, arson, extortion), crimes involving use of explosives, as well as crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another."). See id. at 1585-87.

Following Begay, the Eighth Circuit Court of Appeals held that other automobile crimes,

specifically auto theft and auto tampering also could not be considered a crime of violence. See United States v. Williams, 537 F.3d 969, 972 (8th Cir. 2008) (“To determine whether auto theft is similar in kind to the example crimes, we consider whether auto theft involves conduct that is similarly ‘purposeful, violent, and aggressive’ when compared to the conduct involved in auto theft’s closest analogue among the example crimes.”). In so holding, the Court of Appeals recognized that Williams was an abrogation of what had been the law in the Eighth Circuit. See id. at 975 (“Although one panel of this court ordinarily cannot overrule another panel, *this rule does not apply when the earlier panel decision is cast into doubt by a decision of the Supreme Court.*”) (quoting Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 838 (8th Cir. 1997) (emphasis added in Williams)).

Extending Williams to his own case, Goff argues that his state automobile convictions should not be considered crimes of violence. See United States v. Lindquist, 421 F.3d 751, 755 (8th Cir. 2005) (Missouri offense of tampering by operation and Iowa offense of operating motor vehicle without owner’s consent “proscribe same conduct and contain essentially same elements.”). Without these crimes of violence, Goff argues that his base offense level should be 20 rather than 27, resulting in a guideline advisory range between 77 and 96 months.

## II. Motion to Dismiss

The Government argues that defendant's § 2255 motion is barred by the applicable statute of limitations, that a change in guideline interpretation is not of the constitutional magnitude cognizable in a 2255 motion, and that Goff is precluded from raising this claim because it has already been raised and decided on direct appeal.

A. Statute of Limitations

A defendant has one year from the time his judgment of conviction is final in which to file a § 2255 motion. 28 U.S.C. § 2255. Goff does not dispute that his motion was filed outside of the one year statute of limitations. He argues, however, that his motion should be subject to equitable tolling. See United States v. Martin, 408 F.3d 1089, 1092 (8th Cir. 2005) (specifically recognizing that equitable tolling can apply to a § 2255 petition).

“[E]quitable tolling affords the otherwise time-barred petitioner an exceedingly narrow window of relief.” Jihad v. Hvass, 267 F.3d 803, 805 (8th Cir. 2001). It should only be used “when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time” or “when conduct of the defendant has lulled the plaintiff into inaction.” Id. (quoting Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000) (citations omitted), cert. denied, 534 U.S. 863 (2001); see also Anjulo-Lopez v. United States, 541 F.3d 814 (8th Cir. 2008) (§ 2255 case; to warrant equitable tolling of limitations period, defendant must show extraordinary circumstances and diligent pursuit of his claims).

While changes in the law do not usually constitute extraordinary circumstances, there are

exceptions. Riddle v. Kemna, 523 F.3d 850 (8th Cir. 2008) (en banc), recognizes one exception to that policy. Until Riddle, the Eighth Circuit tolled the statute of limitations during the time a §2254 petitioner could have sought a writ of certiorari before the Supreme Court. See Nichols v. Bowersox, 172 F.3d 1068 (8th Cir. 1999). In Riddle, however, an en banc court held that if a petitioner does not request discretionary review by a state's highest court, the petitioner would not be eligible to apply for certiorari before the United States Supreme Court. The Circuit reasoned that as such, the 90 days usually allowed to apply for a writ certiorari should not be tolled. Id. at 855.

Although Riddle's habeas petition was untimely, the Court of Appeals also recognized that “[t]he abrogation of an en banc precedent is an extraordinary circumstance, external to [the petitioner] and not attributable to him.” Id. at 857 (emphasis added). The case was remanded to the district court for determination of whether the petitioner had diligently pursued his rights so that equitable tolling was appropriate.<sup>1</sup>

The government argues that Riddle should be distinguished from the present case on the

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<sup>1</sup> As a direct result of Riddle, several other Missouri cases were remanded to the district court to determine whether in light of this extraordinary circumstance, the petitioner could show that he or she had “pursued his rights diligently but nonetheless was lulled into inaction, which might justify equitable tolling of the AEDPA statute of limitations.” Bishop v. Dormire, 526 F.3d 382, 384 (8th Cir. 2008) (remand to district court). See e.g. Stewart v. Roper, 2008 U.S. App. LEXIS 12395 (8th Cir. 2008) (remand to district court); Scott v. Rowley, 2008 U.S. App. LEXIS 11474 (8th Cir. 2008)(remand to district court); Pierson v. Dormire, 276 Fed. Appx. 541 (8th Cir. 2008)(remand to district court); c.f. Leonor v. Houston, 2008 U.S. Dist. LEXIS 30820 (Neb. 2008)(set for evidentiary hearing).

basis that Riddle was a change in how courts should measure the statute of limitations, not a change in substantive law. I find the distinction unpersuasive. In both cases, the Court of Appeals interpreted a rule incorrectly. District courts, in turn, were bound to apply the flawed interpretation. In neither case was there a change in the law itself, substantive or procedural. There was only a change in how that law was interpreted.

In Riddle, the litigant relied on the earlier interpretation to believe he had an additional 90 days to file his § 2254 petition. In this case, Goff relied on the earlier ruling of the Court of Appeals which already decided that an automobile burglary was a crime of violence, and a claim brought in a § 2255 action would be dismissed as having already been raised and addressed. See Bear Stops v. United States, 339 F.3d 777, 780 (8th Cir. 2003) (claims raised and decided on direct appeal cannot be relitigated in § 2255 motion).<sup>2</sup>

“Because this opinion stands in the way of Riddle's petition being timely, he has established, as a matter of law, an extraordinary circumstance.” Riddle, 523 F.3d at 857; see also E.J.R.E v. United States, 453 F.3d 1094, 1098 (8th Cir. 2006) (assuming arguendo that a later decision of this court could constitute an extraordinary circumstance justifying equitable tolling for a federal habeas petitioner under 28 U.S.C. § 2255). Similarly, the Lindquist

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<sup>2</sup> The court rejects the government's current argument that Goff is precluded from raising this issue in a § 2255 because it was already raised and decided on direct appeal. As noted by Goff, a Defendant is not barred from relitigating an issue where there has been an intervening change in the law. Davis v. United States, 417 U.S. 333, 342 (1974) (even though the legal issue raised in a § 2255 motion was decided against movant on the merits in a prior proceeding, the movant may be entitled to a new hearing upon showing an intervening change in the law, regardless of whether the prior determination was made on direct appeal or in an earlier § 2255).

decision (auto theft was a crime of violence) and the ruling in his direct appeal, were what kept Goff from filing a § 2255 action, and as such, was an extraordinary circumstance as a matter of law.

Extraordinary circumstance is only part of the showing a petitioner must make. To be entitled to equitable tolling, Goff must show that he is pursuing his rights diligently. Riddle, 523 F.3d at 857 (litigant seeking equitable tolling bears burden of establishing (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way); see also United States v. Hernandez, 436 F.3d 851, 858 (8th Cir.) (rehearing and rehearing en banc denied), cert. denied 547 U.S. 1172 (2006) (“Equitable tolling only applies when the circumstances that cause the delay in filing are ‘external to the plaintiff and not attributable to his actions.’”) (internal citations omitted); Maghee v. Ault, 410 F.3d 473, 476 (8th Cir. 2005) (extraordinary circumstance must not be attributable to petitioner); Kreutzer, 231 F.3d at 463 (extraordinary circumstances must be “beyond a prisoner's control”).

While an abrogation of earlier law is an extraordinary circumstance, it is also the rare defendant who is as diligent as Goff has been in this case. Goff raised his argument at sentencing, on appeal, on rehearing, and in an application for writ of certiorari before the United States Supreme Court. On August 11, 2008, the Court of Appeals decided Williams, the case which changed the interpretation that auto tampering is not a violent crime. Goff filed this § 2255 on August 25, 2008, two weeks later. The government does not, nor could it, argue on this record that Goff failed to diligently pursue his rights.

The change in law is an extraordinary circumstance, external to Goff. As such, equitable tolling of the statute of limitations is applicable to Goff's § 2255 action.

B. Cognizable § 2255 Claim

The government argues that even if equitable tolling applies, this is not the type of claim that can be raised in a § 2255 motion. It asserts that § 2255 relief is only available to attack claims of constitutional error and lack of jurisdiction.

“Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and, if uncorrected, would result in a complete miscarriage of justice.” United States v. Apfel, 97 F.3d 1074, 1076 (8th Cir. 1996). As noted by the government, issues of guideline interpretation do not constitute proper section 2255 claims unless they rise to the level of being a miscarriage of justice. Auman v. United States, 67 F.3d 157, 161 (8th Cir. 1995). Under United States v. Perales, 212 F.3d 1110, 1111-1112 (8th Cir. 2000), there are three exceptions to the rule that “ordinary questions of guideline interpretation not raised on direct appeal do not present cognizable § 2255 claims.” Id. at 1111. Those three exceptions are ineffective assistance of counsel, that the sentence exceeds the statutory maximum allowed, and that the claim rises to the level of a miscarriage of justice. Id.

First, defendant did raise his claim on direct appeal, so it is unclear whether he would have to meet any of these exceptions to have his claim heard by this court. Even if Perales does apply to Goff, this is not a “garden variety” type of sentencing mistake. The district court did

not misapply or make a calculation error, something that a defendant would be aware of at the time of the sentencing and could raise on appeal. He is not claiming that the guidelines have been amended since his sentencing and he is not asking to be resentenced under the new guidelines. Instead, Goff argues now as he did at his sentencing and on appeal, that the auto theft convictions should not have been considered crimes of violence. The government acknowledges that petitioner's argument was correct from the beginning, but because his case was not accepted by the United States Supreme Court, or because the Court of Appeals did not recognize his claim earlier, he is without remedy. Such a result would be a miscarriage of justice.

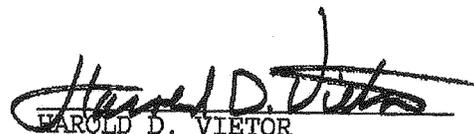
### III. Ruling and Conclusion

For the foregoing reasons,

**IT IS ORDERED** that the motion to dismiss the § 2255 motion as untimely or that it does not state a cognizable claim is denied.

**IT IS FURTHER ORDERED** that on or before **October 30, 2008**, the government shall file a substantive response to Defendant's petition.

Dated this 22nd day of October, 2008.

  
HAROLD D. VIETOR  
Senior U.S. District Judge

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Citation: 198 F.3d 1058, 1061

198 F.3d 1058, \*; 1999 U.S. App. LEXIS 34296, \*\*;  
53 Fed. R. Evid. Serv. (Callaghan) 329

Leonard Reed, Appellee, v. John Thalacker, Warden, and State of Iowa, Appellants.

No. 99-1313

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

198 F.3d 1058; 1999 U.S. App. LEXIS 34296; 53 Fed. R. Evid. Serv. (Callaghan) 329

October 20, 1999, Submitted  
December 30, 1999, Filed

**PRIOR HISTORY:** [\*\*1] Appeal from the United States District Court for the Southern District of Iowa. 4:97-CV-10281. Honorable Ronald E. Longstaff, District Judge.

**DISPOSITION:** Affirmed.

#### CASE SUMMARY

**PROCEDURAL POSTURE:** The State of Iowa appealed an order of the United States District Court for the Southern District of Iowa granting a writ of habeas corpus to appellee who was convicted in state court for second-degree sexual abuse and child endangerment.

**OVERVIEW:** At trial, the only evidence connecting appellee to alleged incidents of sexual abuse of a two-year-old was of the child's statements that her father (appellee) "hurt [her] down there," testified to by the child's mother, brother, and the examining physician. The state trial court admitted this evidence under the excited utterance exception to the hearsay rule. In a petition for habeas corpus, appellee alleged that the admission of the child's statement violated the Confrontation Clause of U.S. Const. amend. VI. The court held that the application of the excited utterance exception was improper. The court found that days or even months could have elapsed between the events in question and the child's alleged statement. This would have allowed for distortions of fact from coaching, confusion of fact and fantasy, or simple defects in memory to affect the trustworthiness of the statements necessary for admission as excited utterances.

**OUTCOME:** The court affirmed the lower court's grant of the writ of habeas corpus because the two-year-old child made statements about her father's alleged sexual abuse days or months after the event, allowing time for confusion or fabrication and affecting their trustworthiness so that their admission violated the Confrontation Clause.

**CORE TERMS:** doctor, excited, babysitter, hearsay, utterance, hearsay testimony, harmless, assault, weekend, declarant, fabricate, defense counsel, hurt, sexual abuse, hearsay statements, startling, elapsed, genital area, improperly admitted, inadmissible, hearsay rule, hearsay evidence, right of confrontation, stress of excitement, lapse of time, subject matter, standard of review, confrontation, self-interest, endangerment

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**HN1** A question of whether admission of hearsay evidence violates a defendant's U.S. Const. amend. VI right of confrontation is a mixed question of law and fact that an appellate court reviews de novo. [More Like This Headnote](#)

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**HN2** U.S. Const. amend. VI guarantees accused persons the right to be confronted with the witnesses against them. Although the admission of hearsay statements implicates the confrontation clause, it is satisfied where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the

hearsay rule. One such category of exempt statements is excited utterances, which are statements relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. Fed. R. Evid. 803(2). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN3** In the context of whether exceptions to the hearsay rule violate a criminal defendant's rights under U.S. Const. amend. VI: for the excited utterance exception to apply, the declarant's condition at the time of making the statement must be such that the statement was spontaneous, excited or impulsive rather than the product of reflection and deliberation. To determine whether a declarant was still under the stress of excitement when he or she made a statement, a court may consider the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN4** The state has the burden of demonstrating that a hearsay exception is applicable. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN5** The lapse of time between the startling event and the statement is not always dispositive in determining whether testimony should be admitted under the excited utterance exception. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN6** In most habeas corpus cases, a court reviews the record to decide whether an error had substantial and injurious effect or influence in determining the jury's verdict. [More Like This Headnote](#)

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**HN7** In the context of criminal trials: an error is harmless only if there could be no reasonable doubt that the error's admission failed to contribute to the jury's verdict. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

**COUNSEL:** Counsel who presented argument on behalf of the appellant was Sharon K. Hall, Assistant Attorney General, Des Moines, IA. Thomas J. Miller, Attorney General of Iowa, also appeared on appellant's brief.

Counsel who presented argument on behalf of the appellee was Philip B. Mears of Iowa City, Iowa.

**JUDGES:** Before McMILLIAN, HEANEY, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

**OPINION BY:** MORRIS SHEPPARD ARNOLD

## OPINION

**[\*1060]** MORRIS SHEPPARD ARNOLD, Circuit Judge.

Leonard Reed was convicted in state court of second-degree sexual abuse and child endangerment, and was sentenced to concurrent terms of twenty-five years and two years. The district court <sup>1</sup> granted Mr. Reed's petition under 28 U.S.C. § 2254(a), holding that the admission of hearsay evidence at his trial violated Mr. Reed's rights to confrontation and to due process, and that the admission of the evidence was not harmless. The state appeals. We affirm the district court's judgment.

## FOOTNOTES

<sup>1</sup> The Honorable Ronald E. Longstaff, United States District Judge for the Southern District of Iowa.

I.

Mr. Reed and Mary Reed are the parents of three children including VR, who was two years old at the time of the alleged assault. Mr. and Ms. Reed went through an acrimonious [**\*\*2**] divorce. Physical custody was awarded to Ms. Reed, and Mr. Reed had overnight visitation rights with the children every other weekend. Ms. Reed testified that on one occasion when VR returned from a weekend visit with Mr. Reed, VR was "jittery" and complained of pain in her genital area. Ms. Reed noticed that VR's genital area was red, irritated, and puffy. Ms. Reed testified that, while she was changing VR's diapers, VR said that "Daddy hurt me down there." VR's babysitter testified that VR made a similar statement to her later

that day.

VR spent another weekend with her father two weeks later, and again had an inflamed genital area when she returned home. VR again told Ms. Reed that her father had hurt her. After consulting with the babysitter, Ms. Reed took VR to the hospital, where VR was given a medical examination. During the course of this examination, VR refused to speak with the doctor, but Ms. Reed told the doctor that VR had said that her father hurt her.

At the subsequent criminal trial of Mr. Reed, the state prosecutor questioned Ms. Reed and the babysitter about the alleged statements made by VR, over the objection of defense counsel. The prosecutor also questioned **[\*\*3]** the doctor who examined VR about what Ms. Reed told him, and in particular about what she had heard from VR. The trial court again overruled defense counsel's hearsay objection, but cautioned the jury that the doctor's testimony regarding VR's statements to Ms. Reed were not being offered for their truth, but rather to show how the doctor arrived at the conclusion that VR had been sexually abused. After Mr. Reed's conviction, an evenly divided Iowa Court of Appeals affirmed the conviction without opinion. The Iowa Supreme Court declined further review.

**[\*1061]** II.

The state first argues that the district court erred in concluding that the admission of VR's statements to Ms. Reed and the babysitter violated Mr. Reed's sixth amendment right to confront his accusers. The state contends that these statements were within the excited utterance exception to the hearsay rule. <sup>HN1</sup> A question of "whether admission of hearsay evidence violated a defendant's Sixth Amendment right of confrontation is a mixed question of law and fact" that we review *de novo*. Gochicoa v. Johnson, 118 F.3d 440, 445 (5th Cir. 1997), *cert. denied*, 522 U.S. 1121, 118 S. Ct. 1063, 140 L. Ed. 2d 124 (1998). **[\*\*4]**

<sup>HN2</sup> The sixth amendment guarantees accused persons the right to be confronted with the witnesses against them. Although the admission of hearsay statements implicates the confrontation clause, it is satisfied "where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule." White v. Illinois, 502 U.S. 346, 356, 116 L. Ed. 2d 848, 112 S. Ct. 736 (1992). One such category of exempt statements is excited utterances, which are "statements relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Fed. R. Evid. 803(2). The rationale of the excited utterance exception is that "the stress of nervous excitement or physical shock "stills the reflective faculties, "thus removing an impediment to truthfulness." United States v. Sewell, 90 F.3d 326, 327 (8th Cir. 1996), *cert. denied*, 519 U.S. 1018, 136 L. Ed. 2d 417, 117 S. Ct. 532 (1996), quoting United States v. Elem, 845 F.2d 170, 174 (8th Cir. 1988), itself quoting 6 John Henry Wigmore, *Evidence* § 1747, at 195 (James H. Chadbourne **[\*\*5]** rev. 1976).

<sup>HN3</sup> For the excited utterance exception to apply, the declarant's condition at the time of making the statement must be such that "the statement was spontaneous, excited or impulsive rather than the product of reflection and deliberation." United States v. Iron Shell, 633 F.2d 77, 86 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001, 68 L. Ed. 2d 203, 101 S. Ct. 1709 (1981). We have held that to determine whether a declarant was still under the stress of excitement when he or she made a statement, we may consider the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement. United States v. Moses, 15 F.3d 774, 777-78 (8th Cir. 1994), *cert. denied*, 512 U.S. 1212, 129 L. Ed. 2d 822, 114 S. Ct. 2691 (1994). <sup>HN4</sup> The state has the burden of demonstrating that a hearsay exception is applicable. See Idaho v. Wright, 497 U.S. 805, 816, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990).

The difficulty **[\*\*6]** for the state in this case is that the record fails to establish that VR's statements to her mother and the babysitter occurred while VR was under the continuing stress of the alleged sexual assault. Most important, the record does not reveal how much time elapsed between the alleged sexual assault and VR's statements. On both weekends in question, VR stayed with her father for two full days before returning home. The alleged assault could have occurred at any time in the 48 hours prior to VR's statements. Indeed, the record shows that VR had been having difficulties with genital rashes for five months prior to the two weekends in question. The assault to which VR refers in her alleged statement could therefore have occurred months before the relevant weekends.

<sup>HN5</sup> We recognize that the lapse of time between the startling event and the statement is not always dispositive in determining whether testimony should be admitted under the excited utterance exception. See Iron Shell, 633 F.2d at 85. We are aware, too, that some state courts have found statements to be excited utterances **[\*1062]** even though the statements were made by young alleged victims of sexual abuse as much as two or **[\*\*7]** three days after the events at issue. See, e. g., State v. Smith, 909 P.2d 236, 241 (Utah 1995) (38 hours); State v. Plant, 236 Neb. 317, 461 N.W.2d 253, 264 (Neb. 1990) (two days); State v. Galvan, 297 N.W.2d 344, 347 (Iowa 1980) (two days); State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220, 226 (N. C. Ct. App. 1993), *cert. denied*, 511 U.S. 1008, 128 L. Ed. 2d 54, 114 S. Ct. 1378 (1994) (three days); and State v. Padilla, 110 Wis. 2d 414, 329 N.W.2d 263, 265, 267 (Wis. Ct. App. 1982) (three days).

These courts have emphasized that in the case of young children, the "lack of capacity to fabricate rather than the lack of time to fabricate," Plant, 461 N.W.2d at 264 (internal citations omitted), is the dispositive consideration in the application of the exception. It is supposed that children in their tender years are less likely to fabricate a claim of sexual abuse because of their unfamiliarity with the subject matter, and their limited capacity for conscious reflection motivated by self-interest. See, e. g., *id.* at 264-65.

Frankly, **[\*\*8]** we are not as sanguine as these courts about the incapacity of children to fabricate or "recall" imaginary

events. In any case, we believe that the days or even months that could have elapsed between the events in question and VR's alleged statement render the excited utterance exception inapplicable. Even if it were true that infants are less likely to utter a lie borne of self-interest, which we doubt, it seems to us that infants are also significantly more likely to deliver a distorted recollection. Such distortions can occur through deliberate coaching, inadvertent suggestion, confusion of fact and fantasy, or a simple defect in memory. See *Maryland v. Craig*, 497 U.S. 836, 868, 111 L. Ed. 2d 666, 110 S. Ct. 3157 (1990) (Scalia, J., dissenting); see also John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 Wash. L. Rev. 705, 709-11 (1987).

We cannot see how a two year-old's "excited" recollection of an event that happened days or even months earlier can be considered so inherently trustworthy that no opportunity for cross-examination is needed to satisfy the constitutional right [\*\*9] of confrontation. We therefore agree with the district court that, because the trial court admitted VR's statements into evidence without developing an adequate record regarding its trustworthiness, its decision was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," see 28 U.S.C. § 2254(d)(2).

### III.

Having found that the admission of the hearsay testimony of Ms. Reed and the babysitter was impermissible, we consider now whether Mr. Reed is entitled to any relief. <sup>HN6</sup> In most habeas corpus cases we review the record to decide "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict,'" *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 1722, 123 L. Ed. 2d 353 (1993), quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253, 90 L. Ed. 1557 (1946). In this case, however, because the state courts did not review the admission of the hearsay testimony for harmless error, we apply the more exacting standard of review set forth in *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). [\*\*10] See *Richardson v. Bowersox*, 188 F.3d 973, 978-79 (8th Cir. 1999); see also *Beets v. Iowa Department of Corrections Services*, 164 F.3d 1131, 1134-35 n. 3 (8th Cir. 1999), cert. denied, 120 S. Ct. 75 (1999). <sup>HN7</sup> Under *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828, an error is harmless only if there could be no reasonable doubt that the error's admission failed to contribute to the jury's verdict. We note, too, that the state acknowledges in its brief that *Chapman* is the appropriate standard of review.

Although the state presented medical evidence suggesting that VR was [\*\*1063] sexually abused, there was almost no evidence other than the hearsay statements discussed above that identified Mr. Reed as the abuser. Although the doctor's testimony included VR's statement to her mother, this testimony was not admitted for its truth, and thus can do nothing to make the improper admission of VR's statements harmless. We note, contrary to the state's suggestion, that the doctor's testimony could not have been admitted under the medical diagnosis exception. The testimony of the doctor contained double hearsay: the doctor was relating [\*\*11] what Ms. Reed told him about what VR told Ms. Reed. As the internal hearsay (what VR told Ms. Reed) was inadmissible, the doctor's testimony was also inadmissible, even if the medical diagnosis exception covers what Ms. Reed told the doctor (which is questionable, since Ms. Reed was not the doctor's patient).

The only direct evidence of Mr. Reed's guilt that we discern, other than the improperly admitted hearsay, is the testimony of Shane Reed, the son of Mr. Reed, that VR told Shane that her daddy had hurt her. Although defense counsel consistently objected to earlier attempts to introduce similar hearsay testimony through Ms. Reed, the babysitter, and the doctor, no objection was made to this particular testimony. It might be that defense counsel's continuous objections to similar hearsay testimony constituted a standing objection to the hearsay and preserved this issue for appeal. If so, we would conclude that Shane's hearsay testimony was inadmissible for the reasons given above.

Even assuming *arguendo*, however, that Shane's testimony may be considered in determining whether the admission of the other evidence was harmless, we do not believe it to be so strong that the improperly [\*\*12] admitted hearsay statements are merely cumulative to it. It seems to us that Shane's credibility was highly questionable. There is significant evidence that Shane had a contentious relationship with his father. Shane admitted to removing property from Mr. Reed's house without permission, and Mr. Reed had a confrontation with Shane which led to child endangerment charges being filed against Mr. Reed.

We note that even if Shane was perfectly reliable, moreover, the statement made to him by VR was not. There was no indication as to when VR made her statement to Shane, what her condition was at the time of making the statement, and how much time elapsed since any alleged assault when VR made her statement. It seems to us therefore that there was a reasonable possibility that the jury, even if allowed to consider Shane's testimony, would not have convicted Mr. Reed if it had not heard the improperly admitted hearsay. We conclude, accordingly, that the admission of the hearsay testimony of Ms. Reed and the babysitter was not harmless. Indeed, given the very damaging nature of the improper testimony in this case, we believe that even if the less exacting scrutiny of *Brecht* were the applicable [\*\*13] standard, reversal of Mr. Reed's conviction would still be appropriate.

IV. For the foregoing reasons the decision of the district court is affirmed.

Service: Get by LEXSEE®  
Citation: 198 F.3d 1058, 1061  
View: Full

Date/Time: Thursday, April 29, 2010 - 11:35 AM EDT

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**EVERYDAY ETHICS  
ISSUES FOR THE  
CRIMINAL DEFENSE  
LAWYERS**

**PRESENTED BY  
JANE KELLY, BOB WICHSER,  
DIANE ZITZNER & NICK DREES  
FEDERAL DEFENDER'S OFFICE**

# Everyday Ethics Issues for Criminal Defense Lawyers

## Federal Criminal Law and Procedure Spring 2010

Robert A. Wichser  
Assistant Federal Public Defender  
May 13, 2010

### Hypothetical

**Does defense counsel have an ethical duty to advise the trial judge at sentencing of a mistake or error in the presentence report that is advantageous to client's sentencing interest?**

### Discussion

In federal court, at sentencing the court generally must sentence a defendant after consideration of all of the sentencing factors in 18 U.S.C. § 3553(a), which includes consideration of the applicable guideline range. The guidelines establish the range based upon the crime and its circumstances and the defendant's prior criminal history. In this hypothetical, the probation department in its presentence report takes the position that the crime of possession with intent to distribute narcotics involved a quantity that raised the crime to a Level 32 offense. The probation department cited the applicable guideline section. When reading the report, defense counsel realizes that the probation department mis-applied the guidelines and the amount of cocaine (not in dispute) actually raises the crime to a Level 34 offense. What must defense counsel do at the sentencing hearing?

Since defense counsel did not create the mistake, he is not responsible for correcting it. Silence in such a situation is not unethical unless the court says something to indicate it believes the silence as an affirmation of the "fact." However, defense counsel is precluded by the Rules of Ethics from affirmatively arguing that this was a Level 32 offense. Once realizing the error, defense counsel is barred from arguing it to advantage, although defense counsel may not disclose the error as that disclosure would result in a lengthier sentence for the client. Similarly, defense counsel cannot ethically argue that the probation department's Level 32 calculation is correct. Moreover, counsel has no obligation to disclose the applicable guideline section; the probation department already did so. Defense counsel may argue that the court should

sentence the client to the most lenient sentence within the applicable range, without affirmatively arguing an offense level or range. Even if asked directly, defense counsel should not disclose the error. Since counsel cannot make a false statement, the path advised is to divert the inquiry by advising the court to go to another source or to excuse counsel from answering the question.

### Conclusion

Defense counsel has an ethical obligation not to affirmatively mislead or misadvise the trial court about controlling law. However, once the law is disclosed, defense counsel need not emphasize it, nor argue it. If the court has been presented the controlling law by the defense or the prosecution and has misunderstood or overlooked it in handling the case, then counsel has no ethical obligation to call it to the court's attention. Considerations of whether to do so are based on strategy and in maintaining credibility with the court. In summary, as with all ethical questions, if the problem is thought through and defense counsel feels that his position is defensible within the bounds of ethics, then the course of greatest possible benefit to the client should be followed. The problem should be analyzed with the best interests of the current client in mind and not future clients or future appearances before the court. A criminal defense attorney owes his absolute loyalty and best efforts to his client, a loyalty which should not be unduly compromised.

# Iowa Rules of Professional Conduct

## Rule 32:3.3: Candor Toward The Tribunal

- (a) A lawyer shall not knowingly:
  - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by rule 32:1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

# ABA Standards for Criminal Justice: Prosecution and Defense Function, 3d ed., 1993 American Bar Association

## Standard 4-1.2 – The Function of Defense Counsel

- (a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.
- (b) The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.
- (c) Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.
- (d) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the defense counsel's attention, he or she should stimulate efforts for remedial action.
- (e) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused which does not comport with law or such standards. Defense counsel is the professional representative of the accused, not the accused's alter ego.
- (f) Defense counsel should not intentionally misrepresent matters of fact or law to the court.
- (g) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.
- (h) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession applicable in defense counsel's jurisdiction. Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program.

## Hypothetical

You have been appointed to represent a client in federal court. At the arraignment, the client completed and signed a financial affidavit, which the court relied on to conclude he qualified for court-appointed counsel. He is detained in the county jail pending sentencing. After the guilty plea hearing, but before sentencing, the client sends you a letter, which your secretary opens and date stamps. In the letter, the client asks you to forward an enclosed letter to his brother. You read the letter. In the letter, the client tells his brother the following: *"It's where I told you it would be. Should be about 35 grand. Go get it. I worked hard for that, and I want you to have it. It won't do me any good in here. Looks like I am not going to get out of this one. I'll be gone for awhile. Have a drink for me. And none of that cheap rot-gut. It's the least you can do for me, given my contribution to your future well-being."*

1. Should you send the letter to the brother?
2. What if the letter to the brother was sealed, in an envelope? Should you open the letter before deciding whether to send it?
3. What, if anything, should you say to the client? If you tell the client to reveal the existence of the money or property, what should you do if the client refuses?
4. The information was in a letter to the client's brother. Was it provided to you in confidence? Would it be different if the client, in a letter addressed to you, simply asked you to pass this information to his brother?
5. What obligation do you have, if any, to report the fact that your client may not, in fact, be eligible for court-appointed counsel? What if the amount was only \$20,000? What if it was \$100,000?
6. Does it matter when you learned this information? Before a trial? After a lengthy, expensive trial? Shortly before sentencing?
7. What if the letter described exactly where the money was? Would this fact affect your obligation to report the matter to the court?
8. What if the letter described property, such as land, a house, or something else of significant re-sale value? Would this affect your decision-making process?
9. Is the fact that your client seems to have lied on his financial affidavit a completed crime? Or is it an ongoing fraud? An ongoing theft of services?
10. If you file a motion to withdraw, what reason should you give?
11. If you also engage in private practice (*i.e.* you are not a full-time public defender), is your decision on how to proceed affected by the fact that the client might, if he no longer qualifies for court-appointed counsel, hire you at your private rates? In other words, do you have a financial incentive to reveal the client's true financial status?
12. What responsibility, if any, do you have to confirm the existence of the money? To confirm the value of the property?

## **Model Rules of Professional Conduct**

### *Client-Lawyer Relationship*

#### **Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer**

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(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

## **Model Rules of Professional Conduct**

### *Client-Lawyer Relationship*

#### **Rule 1.6 Confidentiality Of Information**

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(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

## Model Rules of Professional Conduct

### *Advocate*

#### Rule 3.3 Candor Toward The Tribunal

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(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

# Iowa Rules of Professional Conduct

## Rule 32:1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent imminent death or substantial bodily harm.



# Criminal Justice Section Standards

## Providing Defense Services

### PROVIDING DEFENSE SERVICES

#### PART VII.

#### ELIGIBILITY FOR ASSISTANCE

##### Standard 5--7.2 Reimbursement, notice and imposition of contribution

(a) Reimbursement of counsel or the organization or the governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility.

(b) Persons required to contribute to the costs of counsel should be informed, prior to an offer of counsel, of the obligation to make contribution.

(c) Contribution should not be imposed unless satisfactory procedural safeguards are provided.

## HYPOTHETICAL CASE SCENARIOS

1. You represent a client currently charged with an Armed Bank Robbery offense. The government has charged her under 18 U.S.C. § 2, with aiding and abetting in the commission of the crime. Her alleged role in the offense involves entering the bank before that actual robbery in order to “stake out” the place. Shortly after she leaves, a masked gunman enters and robs the bank. The client says she is completely uninvolved and was just in the bank to get information about opening a new checking account. Her behavior in the bank is critical to your defense. You want to know if she acted suspicious in any way and what conversations she had with bank employees. You send your investigator to speak with the employees working that day. When he goes to speak with the teller who had the most reported contact with your client, the teller reports that he was advised not to speak with the defense.

What issues are presented and what should you do in the situation?

What if the teller more specifically explains he was told by the prosecutor, when preparing for his earlier grand jury testimony, that he should not talk to any defense attorneys or their investigators? What if it is a police officer that advises the teller?

2. You represent the same client described in the above Armed Bank Robbery case, but now, you are at the detention hearing. The client’s mother is present for the detention hearing and eager to act as a third party custodian for your client. As you are speaking with her before the hearing, she gratuitously blurts out how she warned her daughter that this would happen if she went through with “it”, but she never listens. You understand that to mean her mother tried to talk her out of committing the robbery before she committed it.

What issues does the mother’s statement present? What should you do in the situation?

The mother then asks you what she should do about the FBI, who keep calling her and demanding to interview her? What should you tell her? What if the FBI wants to interview her on the spot because, thanks to you, she is conveniently in the courthouse?

3. As you prepare for trial, the prosecutor gives you a copy of a memo he prepared for the file. The memo summarizes a statement he previously took from the teller as he was preparing for grand jury. The prosecutor decided not to use the teller as a witness in grand jury. You learn from the memo the teller initially told the prosecutor that your client acted the same as any other patron of the bank when entering on the day of the robbery. The teller described your client as calm, cool, collected and even friendly. However, when interviewed by the FBI later, the same teller tells the agent, he knew something was odd about your client when she first walked in. She looked nervous and her eyes kept shifting to the door. It was also really strange how she went out of her way not to touch anything.

What issues are raised by these conflicting statements? What should you do?

## REFERENCES TO APPLICABLE RULES OF PROFESSIONAL CONDUCT

1. **Scenario One:**

American Bar Association Rules of Professional Conduct:

Rules 3.4, 3.8, 4.3 and 5.3

Iowa Rules of Professional Conduct:

Rules 32:3.4, 32:3.8, 32:4.3 and 32:5.3

2. **Scenario Two:**

American Bar Association Rules of Professional Conduct:

Rules 3.4, 3.7 and 4.3

Iowa Rules of Professional Conduct:

Rules 32:3.4, 32:3.7 and 32:4.3

3. **Scenario Three:**

American Bar Association Rules of Professional Conduct:

Rules 3.7, 3.8 and 4.3

Iowa Rules of Professional Conduct:

Rules 32:3.7, 32:3.8 and 32:4.3

### **Iowa Rule 32:3.4; ABA Rule 3.4 Fairness to Opposing Party and Counsel**

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
  - (1) the person is a relative or an employee or other agent of a client; and
  - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

## **Iowa Rule 32:3.7; ABA Rule 3.7 Lawyer as Witness**

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule 32:1.7 (1.7) or rule 32:1.9 (1.9).

## **Iowa Rule 32:3.8; ABA Rule 3.8 Special Responsibilities of a Prosecutor**

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows or reasonably should know is not supported by probable cause;
- (b) make reasonable efforts to ensure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - (1) the information sought is not protected from disclosure by any applicable privilege;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 32:3.6 or this rule.

***ABA standard includes the following additional provisions not in the Iowa Rule:***

- (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
  - (1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose the evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted for an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

**Iowa Rule 32:4.3; ABA Rule 4.3 Dealing With Unrepresented Person**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

### **Iowa Rule 32:5.3; ABA Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the (Iowa) Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

## HYPOTHETICAL - THE CLIENT'S FILE

Your client has been convicted of a federal offense and is now serving his sentence in a B.O.P. facility. During the course of his court proceedings, you provided him with copies of all the pleadings in his case as they were filed. All of those documents, along with all the letters you sent to him, were taken from him and destroyed as he was transferred from the local jail to the B.O.P. facility. He writes to you and says he wants a copy of his entire file, including the following items:

- All of your notes on the case and any other “work product” you created;
- Presentence report;
- Judgment, including the “Statement of Reasons;”
- All discovery materials or the transcription of your dictated notes on discovery; and
- All other pleadings and correspondence.

Which of these items must you send? Which, if any, can you not send?

## AUTHORITIES

**Work Product - Iowa has adopted the “entire file” rule: with a few narrow exceptions, the client owns the entire file, including attorney work product. *Iowa Supreme Court Attorney Disciplinary Bd. v Gottschalk*, 729 NW2d 812 (IA 2007). In *Gottschalk*, the court said,**

D. Failure to return client file. Upon the Millers' request for their file, Gottschalk refused to provide them with his working papers, notes, and calculations regarding their bankruptcy, contending they were attorney work product and, as such, were not part of the client file. We have not yet addressed this issue and take the opportunity to do so now.

In general, there are two approaches for determining who owns the documents within a client's file—the “entire file” approach and the “end product” approach. See *Henry v. Swift, Currie, McGhee & Hiers, LLP*, 254 Ga.App. 817, 563 S.E.2d 899, 902 (2002). **The majority of jurisdictions that have addressed this issue conclude that a client owns his or her entire file, including attorney work product, subject to narrow exceptions.** *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30, 666 N.Y.S.2d 985, 689 N.E.2d 879, 881 (1997). This is the view adopted by the *Restatement (Third) of The Law Governing Lawyers* section 46(2) (2000): “On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.” Comment c further clarifies that “[a] client's right to his or her file]

extends to documents placed in the lawyer's possession as well as to documents produced by the lawyer." The *Restatement* provides a few narrow exceptions to a client's right to the file. A lawyer may deny a client's request to retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to another. Two such situations relevant here are described in the *Restatement*:

\*820 [A] lawyer may properly refuse for a client's own benefit to disclose documents to the client unless a tribunal has required disclosure....

A lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client.

*Restatement (Third) of The Law Governing Lawyers* § 46, cmt. c; see also *Sage Realty Corp.*, 689 N.E.2d at 883.

A minority of jurisdictions distinguish between documents that are the end product of an attorney's representation and those that are work product. The end product includes pleadings, correspondence, and "other papers 'exposed to public light by the attorney to further [the] client's interests'" and belong to the client. *Sage Realty Corp.*, 689 N.E.2d at 881 (quoting *Fed. Land Bank v. Fed. Intermediate Credit Bank*, 127 F.R.D. 473, 479 (S.D.Miss.1989)). The attorney's work product includes preliminary documents " 'used by the lawyer to reach the end result,' such as internal legal memoranda and preliminary drafts of pleadings and legal instruments" and belong to the attorney. *Id.* at 882 (quoting *Fed. Land Bank*, 127 F.R.D. at 479).

[12] [13] **We agree with the majority of jurisdictions and adopt the "entire file" approach to this issue.** Attorneys are in a fiduciary relationship with their clients requiring open and honest communication to ensure effective representation. "The relationship between a client and an attorney ... [is] one of '[t]he most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight.' " *Resolution Trust Corp. v. H---*, P.C., 128 F.R.D. 647, 648-49 (N.D.Tex.1989) (quoting *Texas v. Baker*, 539 S.W.2d 367, 374 (Tex.Civ.App.1976)). Allowing an attorney to unilaterally refuse to provide the client with documents created in the course of representation is contrary to this relationship. See *Sage Realty Corp.*, 689 N.E.2d at 882-83 ("That obligation of forthrightness of an attorney toward a client is not furthered by the attorney's ability to cull from the client's file documents generated through fully compensated representation, which the attorney unilaterally decides the client has no right to see."); *Resolution Trust Corp.*, 128 F.R.D. at 649-50 (" '[An attorney] has no right or ability to unilaterally cull or strip from the files created or amassed during his representation of that client documents which he determines the client is not entitled to see. The client is either entitled to all of the file or none of it.' " (quoting *In re Kaleidoscope, Inc.*, 15 B.R. 232 (Bankr.N.D.Ga.1981), rev'd on other grounds, 25 B.R. 729 (N.D.Ga.1982))).

In light of this holding, Gottschalk's failure to return the Millers' complete file is a violation DR 9-102(B)(4) (providing that a lawyer shall promptly deliver to the client property the client is entitled to receive). See *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Plumb*, 589 N.W.2d 746, 748 (Iowa 1999). The working papers, notes, and calculations Gottschalk made during his meetings with the Millers were clearly created for the Millers' benefit and do not fall within the exceptions outlined above.

*Gottschalk*, 729 NW2d at 819-821 (emphasis added).

The court found Gottschalk had violated DR 9-102(B)(4) of the now-superseded Code of Professional Responsibility. The current Rules of Professional Responsibility contain a parallel provision: "Except as stated in this rule or otherwise permitted by law

or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive . . .” Iowa Rules of Professional Conduct, 32:1.15(d).

**Presentence Report, Judgment and Statement of Reasons - Bureau of Prisons policy prohibits inmates from possessing their presentence report and statement of reasons while in BOP custody, though the policy does require reasonable opportunities for inmates to access and review these documents, which are kept in their BOP central file. Inmates can possess the rest of the judgment.**

BOP Program Statement No. 1351.05 on “Release of Information” says,

**Federal Presentence Reports (PSR) and Statements of Reasons (SOR) from Judgments in Criminal Cases. For safety and security reasons, inmates are prohibited from obtaining or possessing photocopies of their PSRs, SORs, or other equivalent non-U.S. Code sentencing documents (e.g., D.C., state, foreign, military, etc.). Inmates violating this provision are subject to disciplinary action.**

This prohibition applies only to the SOR portion of an inmate’s Judgment in a Criminal Case. The rest of the Judgment document remains releasable unless circumstances or policy dictate otherwise. PSRs and SORs received by mail will be treated as contraband, and handled according to the Mail Management Manual.

\* \* \*

Although prohibited from obtaining or possessing photocopies, federal inmates are entitled under the FOIA to access their own PSRs (see *United States Department of Justice v. Julian*, 486 U.S. 1 (1988)) and SORs. Inmates must be provided reasonable opportunities to access and review their PSRs, SORs, or other equivalent non-U.S. Code sentencing documents (e.g., D.C., state, foreign, military, etc.). Inmates are responsible for requesting an opportunity to access and review these records with unit staff in accordance with the Program Statement on Inmate Central File, Privacy Folder, and Parole Mini-Files. **To facilitate inmate access and review, PSRs and SORs should ordinarily be maintained in the disclosable portion of the central file unless significant safety and security concerns dictate otherwise.**

P.S. 1351.05(12)(a)(2)(d)(1) (emphasis in original).