No. 11-2328

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	) Appeal from the United States
	) District Court for the Northern
Plaintiff-Appellee,	) District of Illinois, Eastern Division
v.	)
	) Case No. 07-CR-614-2
MARIO REEVES,	)
Defendant-Appellant.	) Hon. Judge Joan Gottschall

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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v.

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Defendant-Appellant.

DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, Mario Reeves, furnish the following list in compliance with FED. R. APP. P. 26.1 and CIR. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: MARIO REEVES.

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court: Sarah O. Schrup (attorney of record) of the Bluhm Legal Clinic at the Northwestern University School of Law. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

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FEDERAL RULE OF APPELLATE PROCEDURE 35 STATEMENT OF REASONS FOR REHEARING

Rehearing in this case is warranted for three reasons. First, the panel erroneously used the direct/collateral test for ineffective-assistance claims, which cannot survive the Supreme Court's decision in *Padilla v. Kentucky*. Second, the panel erroneously cabined *Padilla*'s reach to deportation cases and ignored the fundamental similarities between the possibility of deportation and the possibility of recidivist sentencing enhancements. Finally, the panel erred in ignoring prevailing professional norms governing warnings to defendants in the plea context, and the panel's policy rationale failed to consider the deterrent effect of a warning on the commission of subsequent offenses.

I. Background

On October 27, 2007, Appellant Mario Reeves was arrested for his role in a heroin distribution organization operating in Chicago. Reeves was indicted under 21 U.S.C. § 841(a)(1), § 843(b), § 846 and 18 U.S.C. § 2. Because of a prior criminal conviction, the government informed Reeves it intended to seek a sentencing enhancement under 21 U.S.C. § 841 if he was convicted.

Previously, in 2004, Reeves had pled guilty in Illinois state court to violating 720 ILCS 570/401(d) and 402(c) for possession of less than two grams of cocaine and for the sale of less than one gram of cocaine. He was sentenced to three years of imprisonment on one count and one year on the other. These sentences were served concurrently. Prior to accepting this plea agreement, Reeves was not informed of

the possibility that his plea could serve as the basis for an enhanced sentence if he recidivated.

Upon receiving notice of the Government's intent to seek an enhanced sentence under 21 U.S.C. § 851, Reeves objected to the use of the state law convictions because he was not informed that his plea in the Illinois case could serve as the basis for a federal sentencing enhancement. The district court rejected his argument, concluding that Reeves's Sixth Amendment right to effective assistance of counsel did not include the right to be warned about the possibility of a sentencing enhancement. Reeves was convicted at trial and sentenced to 25 years in prison. At sentencing, the district court stated that the twenty-year mandatory minimum under 21 U.S.C. § 841 was "responsible for a lot of [his] sentence." (Sentencing Tr. 275, May 20, 2011.)

Reeves appealed his conviction, arguing that his Illinois convictions could not serve as the basis for the federal sentencing enhancement because his Sixth Amendment rights were violated by counsel's failure to inform him of the possibility of mandatory sentencing enhancements. Reeves argued that the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which holds that defense counsel must advise clients of the potential immigration consequences of a plea agreement, applies to other consequences of plea agreements that are comparably severe, including his mandatory sentencing enhancement.

This Court rejected this argument, concluding that *Padilla* applied exclusively to immigration cases and not to other comparably severe consequences of plea agreements. *United States v. Reeves*, No. 11-2328, 2012 WL 3553301, at *5–6 (7th Cir. 2012). Outside of cases involving deportation, the panel elected to continue to analyze whether a warning about potential consequences of a plea agreement by determining whether the consequence is "direct" (in which case defense counsel is obligated to warn his client of the consequence) or "collateral" (in which case there is no constitutional obligation). *Id.* at *5. The panel reaffirmed the validity of this test despite the fact that the Supreme Court expressly refused to apply it to the circumstances in *Padilla*. 130 S. Ct. at 1481–82. Concluding that the sentence enhancement at issue was "collateral" because it could not take effect absent a conviction for a future crime, the panel found that the performance of Reeves's counsel in the state case was not constitutionally deficient and therefore upheld Reeves's federal sentencing enhancement. *Reeves*, 2012 WL 3553301, at *7. Noting that a rule warning of future sentence enhancements would "represent unattractive public policy" because it would create a constitutional duty "to advise the client as to how he might best continue his criminal activity while minimizing his risk of future punishment," the panel further concluded that such a rule finds "no support in precedent." *Reeves*, 2012 WL 3553301, at *6.

II. Discussion

A. The panel erroneously applied the direct/collateral test for ineffective-assistance claims, which as a practical matter can no longer survive the *Padilla* decision.

Applying the direct/collateral test to the question of whether counsel has a Sixth Amendment duty to warn clients of the consequences of a plea agreement conflicts with the normative analysis of professional standards called for by the first prong of the *Strickland* test. *Chaidez v. United States,* 655 F.3d 684, 698 (7th Cir. 2011), *cert granted*, 132 S. Ct. 2101 (2012) (Williams, J. Dissenting) (citing Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 699, 703 (2002)) (observing that "[t]he collateral consequences rule is remarkable because it has apparently been embraced by every jurisdiction that has considered it, yet it is inconsistent with the ABA standards and the practices of good lawyers as described by the Supreme Court and other authoritative sources.") In *Padilla*, the Supreme Court resolved this tension in favor of *Strickland*'s normative analysis by expressly considering prevailing professional norms while declining to engage in any analysis of whether removal proceedings were direct or collateral consequences of a criminal plea. 130 S. Ct. at 1481–82. The *Padilla* court had good reason to do so: the direct/collateral distinction originated in the Fifth-Amendment "knowing and voluntary" plea context, which invokes different concerns and underlying rationales. *See* Danielle M. Lang, *Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful Padilla Claims*, 121 Yale L. J. 944, 953 (2012) (outlining

differences between the Fifth Amendment and Sixth Amendment protections and noting that "the goal of the Sixth Amendment is broad in scope; it serves to protect not only individual defendants, but also the integrity of the entire criminal justice system by ensuring that imbalances of power do not subvert the adversarial process on which our system relies."). Thus, the Sixth Amendment protection is broader because a defendant cannot adequately evaluate a plea or negotiate on an even playing field without knowing the important consequences arising from his plea. *See* (Br. of Appellant at 25; Reply Br. of Appellant at 7.) The direct/collateral test does not satisfy this goal because it is predicated on a formalistic distinction that does not take into account the extent to which criminal law has become intertwined with other areas of law.

What is more, the direct/collateral distinction was no model of clarity prior to *Padilla*. *See, e.g.*, *Padilla,* 130 S. Ct. at 1481 n.8 (noting the disagreement in the lower courts over how to distinguish between direct and collateral consequences); *Virsnieks v. Smith,* 521 F.3d 707, 716 (7th Cir. 2008) (concluding that the issue of whether sex offender registration is a direct or collateral consequence of a plea is not sufficiently clear to constitute clearly established federal law under AEDPA). Indeed, courts routinely supplemented the direct/collateral test with other normative considerations. *See, e.g., United States v. Kwan*, 407 F.3d 1005, 1015-1017 (9th Cir. 2005) (adopting distinction between failure to advise and affirmative misadvice for evaluating counsel's performance); *United States v. Couto*, 311 F.3d 179 188 (2d Cir. 2002) (same); *United States v. Masoud*, No. 03-CR-46, 2012 WL

32385, at *3 (E.D. Wis. Jan. 5, 2012) (concluding that issue of whether incorrect immigration advice as opposed to failure to advise constituted ineffective assistance of counsel was an open question in the Seventh Circuit prior to *Padilla*). In short, the direct/collateral test simply fails to provide a meaningful legal standard to guide criminal defendants and their attorneys. *Compare United States v. George*, 869 F.2d 333, 337 (7th Cir. 1989) (concluding that deportation is a collateral consequence of a plea agreement because it is not "part of or enmeshed in" the criminal proceeding giving rise to the plea) *with Padilla*, 130 S. Ct. at 1481 ("Our law has enmeshed criminal convictions and the penalty of deportations for nearly a century . . . .").

Finally, as a practical matter, *Padilla* undermined the direct/collateral test by placing what courts had previously deemed the quintessential collateral consequence—deportation—within the scope of the Sixth Amendment. Before *Padilla* lower courts routinely found deportation to be a bedrock collateral consequence and thus outside counsel's duty to advise. *See, e.g.*, *Santos–Sanchez v. United States*, 548 F.3d 327, 336 (5th Cir. 2008), *vacated by* 130 S. Ct. 2340 (2010) (holding that failure to advise a defendant of deportation as a collateral consequence of pleading guilty is legally insufficient ground for ineffective assistance); *Broomes v. Ashcroft*, 358 F.3d 1251, 1257 (10th Cir. 2004) (same); *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003) (same); *United States v. Gonzalez*, 202 F.3d 20, 26, 28 (1st Cir. 2000) (same); *United States v. Del Rosario*, 902 F.2d 55, 59 (D.C. Cir. 1989) (same); *United States v. George*, 869 F.2d 333, 338

(7th Cir. 1989) (same); *United States v. Yearwood*, 863 F.2d 6, 7-8 (4th Cir. 1988) (same); *United States v. Campbell*, 778 F.2d 764, 767 (11th Cir. 1985) (same). But *Padilla* employed its own test that shifted deportation from outside to inside the purview of the Sixth Amendment. *Padilla*, 130 S. Ct. at 1482 ("We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."). After *Padilla* several courts have applied its reasoning to historically "collateral" consequences, thus undermining the viability of that test. *See, e.g.*, *Bauder v. Dep't of Corr. State of Fla.,* 619 F.3d 1272, 1275 (11th Cir. 2010) (holding that a defense attorney should have advised the client about the risk of civil commitment); *Commonwealth v. Abraham,* 996 A.2d 1090, 1094–95 (Pa. Super. Ct. 2010), *appeal granted in part*, 9 A.3d 1133 (Pa. 2010) (applying the *Padilla* reasoning to a loss of pension and finding the defense attorney had an obligation to describe the consequences); *Taylor v. State,* 698 S.E.2d 384, 387–89 (Ga. Ct. App. 2010) (holding that "criminal defendants facing the serious consequence of registration as a sex offender be properly informed" during the plea agreement); *see also United States v. Youngs*, 687 F.3d 56, 63 (2d. Cir. 2012) (noting, in a Fifth Amendment case, the uncertainty as to the future viability of the direct/collateral test in the Sixth Amendment context post-*Padilla*). Thus, the panel erred in re-affirming the viability of the direct/collateral test in the wake of *Padilla*.

B. Like the sentencing enhancement at issue here, immigration consequences requiring a *Padilla* warning may manifest themselves only after the commission of a subsequent offense.

The panel largely based its holding on the conclusion that non-citizens may become subject to removal proceedings as a consequence of a the plea agreement itself, whereas mandatory sentence enhancements only take effect upon the conviction for a subsequent criminal offense. *Reeves*, 2012 WL 3553301, at *6. This distinction, however, is arbitrary and inapposite because there are many circumstances under which individuals become deportable only after multiple criminal convictions. *See* 8 U.S.C. § 1182(a)(2)(A)(ii) (providing that an alien is not inadmissible if he or she is convicted of a single crime for which the maximum term of imprisonment is less than one year and the actual term of imprisonment is less than six months); 8 U.S.C. § 1182(a)(2)(B) (providing that an alien is inadmissible if convicted of two or more offenses for which the aggregate sentence is five years or more of imprisonment). Accordingly, in cases governed by these statutory provisions, the immigration consequences of an alien's guilty plea may not manifest themselves unless the alien is convicted of a subsequent criminal offense. Yet the *Padilla* court's holding extends to any "deportation consequences of a client's plea." *See, e.g.*, *Padilla,* 130 S. Ct. at 1485. This broad language does not distinguish between situations in which the conviction itself renders the alien deportable or when an alien's deportability is triggered by a subsequent conviction. Because the requirement that a subsequent conviction may be necessary to render an alien inadmissible is immaterial in determining whether a *Padilla* warning is required, this distinction is also immaterial in the instant case.

Rather than concluding that deportation is so unique that it requires a completely different Sixth Amendment analysis than is applied to other comparably serious collateral consequences of plea agreements,[1] the panel should have applied the Supreme Court's reasoning in *Padilla* to the case at bar. *Padilla* turned on three criteria: the severity of the consequence; the extent to which the consequence is intertwined with the criminal justice system; and the extent to which the imposition of the collateral consequence is subject to judicial discretion. *Padilla*, 130 S. Ct. at 1480–81. In the context of mandatory sentencing enhancements, all three criteria are satisfied. The first criterion is satisfied because mandatory sentencing enhancements, which may add decades to a defendant's sentence, are arguably as severe as deportation. The second criterion is satisfied because sentencing enhancements are imposed exclusively via the criminal justice system. Finally, the third criterion is satisfied because mandatory sentencing enhancements are available at the government's discretion and are not subject to the discretion of the judiciary. The panel erred when it did not apply *Padilla's* reasoning to Reeves's case.

[1] Notably, this Court previously rejected any Sixth Amendment distinction between deportation and sentencing enhancements. *See Lewis v. United States*, 902 F.2d 576 (7th Cir. 1989) (Posner, J.) ("[D]efense counsel does not violate his constitutional duty of minimally adequate representation when he fails to warn the defendant that one possible consequence of a guilty plea is a more severe sentence for a future crime. Our conclusion here follows *a fortiori* from our holding in *Santos v. Kolb,* 880 F.2d 941 (7th Cir. 1989), that counsel is not required to warn his client that conviction may lead to deportation upon completion of the sentence.") (other internal citations omitted).

C. The panel endorsed a policy rationale contrary to the prevailing norms governing a lawyer's duty to her client

Rather than determine whether Reeves's attorney failed to abide by the prevailing norms of an attorney's duty to his client, *see Strickland v. Washington*, 466 U.S. 668 (1984), the panel instead tethered its decision to a policy rationale that is ultimately inconsistent with *Strickland* and its focus on the prevailing norms of attorney conduct. *Reeves*, 2012 WL 3553301, at *6–7. Under the deficient-performance prong of *Strickland*, courts use an objective reasonableness standard. *Strickland*, 466 U.S. at 688. Courts often look to the American Bar Association ("ABA") standards to make such a reasonableness determination because they are "valuable measures of the prevailing professional norms of effective representation." *Padilla*, 130 S. Ct. at 1482 (internal quotations omitted); *see also Wiggins v. Smith*, 539 U.S. 510 (2003) (using the ABA Standards for Criminal Justice as a guide when determining whether the defense attorney exercised reasonable professional judgment); *Williams v. Taylor*, 529 U.S. 362 (2000) (using the ABA Standards for Criminal Justice to determine that the attorney violated his professional responsibility when he did not present mitigating evidence during a sentencing hearing); *Strickland*, 466 U.S. at 688 (using the ABA standards to establish the two-pronged test reasonableness test). Indeed, this Court has used the ABA Standards for Criminal Justice as the primary rationale for finding a defendant's attorney was ineffective because the attorney did not advise the defendant about his right to allocution during sentencing. *Canaan v. McBride*, 395 F.3d 376, 385–86 (7th Cir. 2005).

The myriad criminal defense guidelines pertaining to plea deals have coalesced around the common idea that the defense counsel should describe possible consequences to the defendant, especially those that are reasonably foreseeable. *See, e.g.*, *ABA Standards for Criminal Justice: Responsibilities of Defense Counsel* § 14-3.2(f) (3d ed. 1999); National Legal Aid and Defender Association, *Performance Guidelines for Criminal Representation* § 6.2(a) (1995) (a defense attorney should make sure the client is fully aware of "other consequences of conviction" and "any possible and likely sentencing enhancements"); G. Nicholas Herman, Plea Bargaining 23 (3d ed. 2012) ("Throughout the plea bargaining process, defense counsel should advise the defendant of the following: . . . (5) All of the consequences and ramifications of a particular plea, including possible sentences and effects on probation, parole, eligibility, immigration status, and the like . . . ."); *see also ABA Standards for Criminal Justice: Responsibilities of Defense Counsel* § 14-1.4(c) (suggesting that the court to advise the defendant as to the additional consequences of entering a guilty plea, including "enhanced punishment if the defendant is convicted of another crime in the future"). Specifically, the *ABA Standards* point to controlled substance crimes as an "obvious" category of crime in which the defendant would need special advice "because convictions for such offense conduct are, under existing statutory schemes, the most likely to carry with them serious and wide-ranging collateral consequences." *ABA Standards for Criminal Justice: Responsibilities of Defense Counsel* § 14-3.2(f) cmt.

In the present case, Reeves received no such advice. The panel ignored, however, the immense weight of these standards—viewed favorably by courts and practitioners alike—in favor of an unsupported policy rationale: warnings about recidivist sentencing enhancements would simply counsel a defendant on how to "best continue his criminal activity while minimizing his risk of future punishment." *Reeves*, 2012 WL 3553301, at *6. This conclusion is at odds with the Congress's hope that the knowledge of the severity of the sentencing enhancements would deter the commission of future crimes. *Tanzer v. United States*, 278 F.2d 137, 141 (9th Cir. 1960) (noting that one purpose of Congress in enacting multiple offender penalties in narcotics laws was "to deter the criminal who engages in illicit drug traffic"); *see also* H.R. Rep. No. 82-635 (1951); S. Rep. No. 82-1051 (1951). The panel's conclusion that "attractive public policy" favors leaving defendants uninformed about the possible sentencing enhancements triggered by their plea agreements undermines Congressional intent because defendants who are unaware that they are subject to severe sentencing enhancements will not be deterred from the commission of crimes.

Furthermore, as discussed above, the Panel's conclusion is inconsistent with the Supreme Court's frequent admonitions that the plea bargaining process works best when criminal defendants are fully informed of the consequences of their plea so that they are capable of reaching an agreement with the government which is mutually beneficial to the parties. *Cf. Padilla*, 130 S. Ct. at 1486 ("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."); *see also* *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (finding defense counsel's failure to inform his client of a plea offer constitutes ineffective assistance of counsel).

III. Conclusion

For the foregoing reasons, Reeves respectfully requests that this Court grant rehearing or rehearing en banc in this case.

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Defendant-Appellant.	) Presiding Judge

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a) and 40 and SEVENTH CIRCUIT RULES 32 and 40

1. This petition complies with the type-volume limitation of Fed. R. App. 40(b) and Circuit Rule 40 because:

X this petition contains 13 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7(B)(iii).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 because:

X this petition has been prepared in a proportionally-spaced typeface using Microsoft Word 2010, in 12-point Century Schoolbook font with footnotes in 11-point Century Schoolbook font.

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	)

CERTIFICATE OF SERVICE

I certify that I served electronically this petition for rehearing through the Court's electronic filing system on October 3, 2012, which will provide notice of the filing to the person listed below.

Respectfully submitted,

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