No. 14-171

In The Supreme Court of the United States

KENNETH TROTTER,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

On Petition For A Writ Of Certiorari To The Utah Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a criminal defendant receive ineffective assistance of counsel under the Sixth Amendment when his attorney does not advise him that the offense to which he is pleading guilty will require him to register as a sex offender?

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The opinion of the Utah Supreme Court is reported at 2014 UT 17, 330 P.3d 1267 (Utah 2014). (Pet. App. 1-27). The order of the state district court where the question presented was first decided is not published. (Pet. App. 36-41).

JURISDICTION

The opinion of the Utah Supreme Court was entered on May 20, 2014. Petitioner filed his petition on August 12, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a) (1988).

STATEMENT OF THE CASE

1. *Guilty plea.* In 2007, Petitioner was charged with having sexual intercourse with two minor girls between the ages of fourteen and sixteen: one count was charged as a third degree felony and the other as a class B misdemeanor. R1-2. Petitioner was also charged with theft, a class A misdemeanor. R1-2. The charges were supported by the victims' report of the criminal conduct and Petitioner's confession to the conduct. R3-5. After waiving his *Miranda* rights, Petitioner admitted to the police that he had sexual intercourse with both minor girls, took cash from his employer, and charged to the company's account automobile parts for his girlfriend's car. *See* R4.

In a plea deal, Petitioner pled guilty to the felony count of unlawful sexual activity with a minor and to a reduced charge of theft, a class B misdemeanor. *See* R52-64. In exchange, the State dismissed the misdemeanor count of unlawful sexual activity with a minor and agreed not to object to a motion to reduce the felony count to a class A misdemeanor upon Petitioner's successful completion of probation. R60.

In pleading guilty, Petitioner admitted to the trial court to having sexual intercourse with a minor girl who was more than four years his junior. R56. He also admitted that he had obtained or exercised unauthorized control over the property of another. R56. After a thorough colloquy regarding Petitioner's constitutional rights, the trial court found that Petitioner's pleas were knowingly and voluntarily made and it accepted Petitioner's guilty pleas. *See* R64; R66.

2. *Motion to withdraw plea*. Before sentencing, Petitioner moved to withdraw his guilty pleas on the ground that neither the trial court nor his attorney advised him that he would be required to register as a sex offender as a result of his plea. R81-84. Petitioner argued (1) that the trial court's failure to so advise him rendered his plea unknowing and involuntary, and (2) that his attorney's failure to so advise him constituted ineffective assistance of counsel. R158-66, 236-39. The State responded that Petitioner's court-appointed counsel did inform him "of the sex offender registration requirements as is his customary practice in these types of cases." R138. The

State argued that in any event, registration is a collateral consequence of the plea and thus does not undermine the validity of the plea nor implicate Petitioner's Sixth Amendment right to effective assistance of counsel. *See* R139-43.

The trial court denied the motion, ruling that sex offender registration is a collateral, not direct, consequence of a plea. Pet. App. 36-42. The court thus ruled that (1) the plea was knowing and voluntary, and (2) counsel was not ineffective for not advising Petitioner of the registration requirements. Pet. App. 39-41.

3. *Sentence*. Petitioner was sentenced to a suspended prison term of zero to five years and placed on probation for 36 months, a condition of which included that Petitioner serve 90 days in jail. Pet. App. 28-35. Petitioner timely appealed. R302-04.

4. *Appeal*. On appeal, the Utah Supreme Court affirmed. The court held that sex offender registration is a collateral consequence of a guilty plea, "because, although automatic in effect, it is unrelated to the range of the defendant's punishments." *Trotter*, 2014 UT 17, ¶ 30, 330 P.2d at 1276. The court thus held that neither the trial court nor counsel were constitutionally required to inform Petitioner of the registration consequences before he pled guilty. *Id*. at ¶¶ 33-35, 330 P.3d at 1277.

Citing *Brady v. United States*, 397 U.S. 742, 755 (1970), the Utah Supreme Court held that before accepting Petitioner's guilty plea, the trial court was required to inform Petitioner of only the plea's direct

consequences, not its collateral consequences. *Trotter*, 2014 UT 17, ¶ 34, 330 P.2d at 1277. The court thus held that the trial court's failure to inform Petitioner of the sex offender registration requirements did not render his plea unknowing or involuntary. *Id*. at ¶ 35, 330 P.3d at 277.

The court observed that when a Sixth Amendment claim of ineffective assistance of counsel rests on an attorney's failure to inform the defendant of a particular consequence of a guilty plea, it must first decide whether the constitutional right "applies at all." *Id*. at ¶ 13, 330 P.3d at 1271. Following the vast majority of other courts to address the issue, the Utah court held that the Sixth Amendment right applies only to advice about the direct consequences of a guilty plea. *Id.* The court thus held that the Sixth Amendment right to effective assistance did not encompass counsel's failure to advise Petitioner about the registration requirements. *Id*. at ¶ 33, 330 P.3d at 1277.

The Utah Supreme Court recognized that in *Padilla v. Kentucky*, 559 U.S. 356 (2010), this Court carved out an exception to the collateral-direct distinction: the Sixth Amendment requires counsel to advise noncitizen defendants about the risks of deportation, which is widely considered a collateral consequence. *Trotter*, 2014 UT 17, ¶ 16, 330 P.3d at 1272. The court then considered "whether Utah's sex offender registration requirement is sufficiently akin to deportation" to bring it within the reach of *Padilla*.

Id. at ¶ 15, 330 P.3d at 1272. It concluded that it is not. *Id*. at ¶¶ 16-27, 330 P.3d at 1272-75.

5. *Petition for writ of certiorari*. In seeking certiorari, Petitioner asks this Court to review only the Utah court's decision rejecting Petitioner's claim of ineffective assistance of counsel.

ARGUMENT

Petitioner contends that certiorari review is warranted to settle a split of authority as to (1) whether *Padilla v. Kentucky*, 559 U.S. 356 (2010), is necessarily confined to advice on the risks of deportation, (2) whether the *Padilla* rationale should be extended to advice on sex offender registration, or (3) whether sex offender registration is a direct or collateral consequence of a guilty plea. But certiorari review is not warranted because the claimed splits of authority are either non-existent or have yet to materialize in any substantial way. In any event, the Utah Supreme Court's holding is correct.

A. Except for deportation advice, *Padilla* did not disturb the widely-accepted rule that the Sixth Amendment right to effective assistance of counsel applies only to advice on the direct consequences of a guilty plea.

Under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), a criminal defendant's Sixth Amendment right to counsel is infringed if (1) counsel's performance

falls below an objective standard of reasonableness, and (2) the deficient performance results in prejudice. But in the context of what legal advice need be given in connection with a guilty plea, courts must answer a threshold question before applying the *Strickland* analysis – whether the Sixth Amendment "applies at all." *See Chaidez v. United States*, ___ U.S. ___, 133 S.Ct. 1103, 1110 (2013). If not, the inquiry ends.

As *Chaidez* explains, the vast majority of courts – federal and state – have concluded that *Strickland* applies to advice on the direct consequences of a guilty plea, but not on the plea's collateral consequences. *Id*. at 1109. In *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010), this Court held that the direct-collateral distinction is "ill-suited" for evaluating whether *Strickland* applies to advice on the risks of deportation – a consequence widely regarded as collateral. The Court held that because deportation is "a particularly severe 'penalty'" that is "nearly . . . automatic" for many noncitizen offenders, advice about the deportation risks of a guilty plea is nevertheless subject to Sixth Amendment scrutiny under *Strickland*. *Id*. at 365-66.

Petitioner argues that *Padilla* has raised doubt among lower courts "as to whether the direct versus collateral distinction . . . survived *Padilla*." Cert. Pet. 10, 12, 15, 22. But in *Chaidez*, this Court clarified that *Padilla* "did not eschew the direct-collateral divide across the board." 133 S.Ct. at 1111-12. *Padilla* merely held that advice on deportation risks is subject to the Sixth Amendment right because of "the

special 'nature of deportation' – the severity of the penalty and the 'automatic' way it follows from conviction." *Id*. at 1112 (quoting *Padilla*, 559 U.S. at 365-66). Accordingly, *Chaidez* removed any doubt on the matter: except in the case of advice on deportation risks, *Padilla* left undisturbed the direct-collateral approach for determining the applicability of the Sixth Amendment right to effective assistance.

Petitioner cites three intermediate appellate court decisions that have questioned whether the direct-collateral distinction remains viable after *Padilla*. Cert. Pet. 12. But all three cases cited preceded *Chaidez's* clarification. *See Taylor v. State*, 698 S.E.2d 384 (Ga. Ct. App. 2010); *Blaise v. State*, 801 N.W.2d 627 (Iowa Ct. App. 2011); *Sames v. State*, 805 N.W.2d 565 (Minn. Ct. App. 2011). The other case cited by Petitioner, Cert. Pet. 14 – *United States v. Tuakalau*, No. 12-4052, 2014 WL 1303295 (10th Cir. Apr. 2, 2014), is an unpublished decision and does not address *Chaidez*.

B. No split of authority exists as to whether the *Padilla* rationale is necessarily confined to advice on deportation risks.

Petitioner contends that a split of authority now exists as to whether "*Padilla* applies to consequences other than deportation." Cert. Pet. 10. He argues that while some courts have read *Padilla* as encompassing other collateral consequences, others – Utah included – "seek to confine *Padilla's* holding to deportation"

only. *See* Cert. Pet. 11-12. There is no such divide. None of the cases Petitioner cites stand for the proposition that the rationale of "*Padilla* applies exclusively to deportation." *See* Cert. Pet. 12-13.

In *United States v. Reeves*, 695 F.3d 637 (7th Cir. 2012), the Seventh Circuit Court was asked to extend *Padilla's* rationale to advice that a plea could be used to enhance a subsequent conviction. In rejecting that argument, the circuit court made the unremarkable observation that "*Padilla* is rife with indications that [this Court] meant to limit its scope to the context of deportation only." *Id.* at 640; *see Padilla*, 559 U.S. at 365 ("Whether [the direct-collateral] distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation."). But the circuit court went on to consider whether *Padilla* should be extended by comparing deportation with "the possibility of an enhanced sentence for future criminal conduct." *Reeves*, 695 F.3d at 640. Only after doing so did the court refuse to extend *Padilla*, reasoning that because "enhancement depends on the defendant's deciding to commit future crimes," it does not automatically result from a guilty plea. *Id.* (quotation marks and citation omitted).[1]

[1] And contrary to Petitioner's claim, Cert. Pet. 18-19, *Reeves* and *People v. Hughes*, 983 N.E.2d 439 (Ill. 2012), do not represent disagreement between a federal circuit and a state court with-in that circuit. *Reeves* addressed specific application of *Padilla* to advice on enhancement consequences; *Hughes*

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Commonwealth v. Abraham, 62 A.3d 343 (Pa. 2012), engaged in a similar analysis. To determine whether *Padilla* should be extended, it compared the special nature of deportation – as explained in *Padilla* – with Pennsylvania's pension forfeiture provisions for public officials convicted of certain crimes. *Id.* at 348-50. The court concluded that the collateral consequence at issue was not sufficiently similar to deportation so as to fall within *Padilla's* exception to the direct-collateral distinction. *Id.* at 350.

The remaining cases Petitioner cites also do not suggest that *Padilla's* rationale cannot be extended to advice on other collateral consequences. When faced with the question in *Sames v. State*, 805 N.W.2d 565, 570 (Minn. Ct. App. 2011), the Minnesota court of appeals merely held that the authority to extend *Padilla* rested with the state supreme court, not the State's intermediate appellate court. And in *Steele v. State*, 291 P.3d 466, 470 (Idaho Ct. App. 2012), Idaho's intermediate appellate court merely rejected the defendant's argument that *Padilla* abrogated the direct-collateral distinction. The defendant did not argue that *Padilla* should be extended to the collateral consequence at issue there. *See id*.

Nor did the Utah Supreme Court in this case seek "to confine *Padilla's* holding to deportation," as Petitioner argues. Cert. Pet. 12. It allowed for the

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addressed application of *Padilla* to advice on civil commitment consequences. 983 N.E.2d at 455.

possibility that the *Padilla* exception may be extended to advice on other collateral consequences. Like the courts in *Reeves* and *Abraham*, the Utah court compared the collateral consequence at issue with deportation by asking "whether Utah's sex offender registration requirement is sufficiently akin to deportation such that the direct-collateral divide is 'ill-suited'" to deciding *Strickland's* applicability in a sexual abuse case. *Trotter*, 2014 UT 17, ¶ 15, 330 P.3d at 1272. After engaging in that comparison, the court simply concluded that although automatic, the consequences of sex offender registration "are not akin to the restrictions and consequences faced by deportees." *Id.* at ¶¶ 20-22, 330 P.3d at 1273-74.

In sum, there is no split of authority as to whether *Padilla's* rationale might be extended to other collateral consequences. Courts have universally recognized – if not expressly, implicitly – that it might. When asked to consider whether *Padilla* should be extended to a particular collateral consequence, courts have examined the nature of the consequence at issue to determine whether extension of *Padilla* is warranted. For some collateral consequences, courts have concluded that it does, and for other consequences, courts have concluded that it does not. This case is not the proper vehicle to decide the expanse of *Padilla's* reach.

C. Any split of authority as to whether *Padilla* should be extended to advice on sex offender registration is insubstantial and may not even materialize.

Petitioner also argues that a deep split of authority exists as to whether *Padilla's* rationale extends to advice on sex offender registration. Cert. Pet. 9. But this question is in its infancy. As a result, courts have not had an adequate opportunity to weigh in on the issue. Thus, the need for review by this Court has not matured.

Only a handful of courts have addressed whether the *Padilla* exception to the direct-collateral distinction should be extended to advice on sex offender registration. Four courts have concluded that the *Padilla* rationale extends to advice on sex offender registration. *See Taylor v. State*, 698 S.E.2d 384, 388 (Ga. App. Ct. 2010); *People v. Dodds*, 7 N.E.3d 83, 97 (Ill. App. Ct. 2014); *People v. Fonville*, 804 N.W.2d 878, 894-95 (Mich. Ct. App. 2011); *State v. Edwards*, 157 P.3d 56, 61-65 (N.M. Ct. App. 2007) (decided before *Padilla* but applying the same rationale).[2] Utah is the

[2] Petitioner also cites *United States v. Riley*, 72 M.J. 115 (C.A.A.F. 2013), as extending *Padilla* to advice on sex offender registration. Cert. Pet. 14. But reliance on that case is misplaced. As noted in that opinion, the military justice system imposes stricter standards with respect to guilty pleas than those imposed in the federal system. *Riley*, 72 M.J. at 121. And the court specifically held that the importance of being informed of sex offender registration requirements " 'springs from the unique

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fifth state to address the issue, and the only state to conclude that *Padilla* does not extend to advice on sex offender registration. That said, the Utah decision represents the only case decided by a state's highest appellate court. The decisions in Georgia, Illinois, Michigan, and New Mexico were decided by intermediate appellate courts; their highest courts have yet to weigh in on the matter.

In sum, only a few courts have weighed in on the question presented here. And the Utah decision is the only case decided by a state's highest appellate court. Moreover, no federal circuit court of appeal has addressed the issue. Simply put, the fracture in opinion has only recently emerged, and it may very well mend itself once the other states' highest courts, and the federal circuit courts, weigh in on the issue. Certiorari review at this point is thus premature. It is also unwarranted because the Utah Supreme Court correctly held that the consequences of sex offender registration are not sufficiently akin to deportation so as to fall under the *Padilla* exception.

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circumstances of the military justice system.'" *Id.* (quoting *United States v. Miller*, 63 M.J. 452, 459 (C.A.A.F. 2006)).

D. In any event, the Utah court correctly analyzed the nature of sex offender registration in holding that *Padilla* should not be extended to registration advice.

In *Chaidez*, this Court explained that in disregarding the direct-collateral distinction for advice on deportation risks, *Padilla* "relied on the special 'nature of deportation' – [1] the severity of the penalty and [2] the 'automatic' way it follows from conviction." 133 S.Ct. at 1111-12. Consistent with that analysis, the Utah Supreme Court considered both "the automatic nature and severity of the registration consequence" to determine whether *Padilla* should be extended to advice on sex offender registration. *Trotter*, 2014 UT 17, ¶ 20, 330 P.3d at 1273.

The Utah Supreme Court recognized that "Utah's registration requirement is automatically triggered if a person is convicted of certain crimes." *Id*. (citing Utah Code Ann. §§ 77-41-106, 105(3)(a) (2013)). But as the Utah court aptly noted, "the automatic nature of registration [upon a conviction] cannot alone render the consequence identical to deportation; otherwise, other civil deprivations such as losing one's right to vote or carry a weapon would suffice to remove the consequence from the direct versus collateral dichotomy, which they do not." *Id*. (citing, *inter alia*, *Spencer v. Kemma*, 523 U.S. 1, 8 (1998) (discussing number of civil deprivations that are collateral consequences)).

Moreover, if the automatic nature of a collateral consequence were sufficient to remove it from the direct-collateral distinction, *Padilla* would have ended its analysis there, but it did not. It also relied on the punitive nature of deportation in concluding that advice thereon is subject to the *Strickland* inquiry. The Utah Supreme Court thus correctly held that "any rationale for extending *Padilla's* reasoning to other contexts, such as registration as a sex offender, must be rooted in both of these justifications." *Id*. at ¶ 17, 330 P.3d at 1272.

In finding the deportation consequence unique among collateral consequences, *Padilla* emphasized that deportation is a "particularly severe penalty," though "not, in a strict sense, a criminal sanction." 559 U.S. at 365 (quotation marks and citation omitted). The Court observed that deportation is a "'drastic measure'" – removal from the country and separation of families. *Id*. at 360, 370 (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). The Court thus concluded that "[t]he severity of deportation – 'the equivalent of banishment or exile' – only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation." *Id*. at 373 (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91 (1947)).

Cuing in on these concerns, the Utah Supreme Court examined "whether sex offender registration rises to the same level of severity as the consequence of deportation." *Trotter*, 2014 UT 17, ¶ 22, 330 P.2d at 1273. The court correctly held that it does not.

The Utah court acknowledged the "serious social stigmas" attached to those who must register as sex offenders. *Id*. But these social stigmas do not arise from one's obligation to register; they arise from the fact that one has been adjudicated guilty of a sex offense. And an offender's criminal conviction is already a matter of public record, as is the other information posted on the state website registry. *Id*. at ¶ 27, 330 P.3d at 1275. Accordingly, a citizen's visit to the web-based sex offender registry "is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible bandage of past criminality." *Smith v. Doe*, 538 U.S. 84, 99 (2003) (concluding that retroactive application of Alaska's sex offender registration law did not violate ex post facto bar because law was remedial, not punitive).

The Utah Supreme Court also observed that under Utah law, a registered sex offender may not be in any "protected area," i.e., "day care and preschool facilities, public swimming pools, primary and secondary schools, public parks, public playgrounds, and other areas designed for children to engage in recreational activity." *Id*. at ¶ 23, 330 P.3d at 1274 (citing Utah Code Ann. § 77-27-21.7 (2013)). But it is not clear whether these restrictions are part and parcel of the sex offender registration law itself. The registration requirements are found in chapter 41 of title 77, which creates the "Sex and Kidnap Offender Registry. Utah Code Ann. § 77-41-101 (2013). "Protected area" restrictions for sex offenders are found in chapter 27

of title 77, which governs pardons and parole. *See* Utah Code Ann. §§ 77-27-1 to -31 (2013).

In any event, the restrictions are "narrowly tailored" to protect children from past offenders and include a number of exceptions that allow offenders to fulfill parental responsibilities and enter schools to attend functions that are not school-related. *Trotter*, 2014 UT 17, ¶ 25, 330 P.2d at 1275. A sex offender's freedom of movement is otherwise uninhibited by registration – "[t]he offender may go to work, to school, to the gym, to the grocery store, to the movie theater, to the post office, and to a restaurant without violating any of the conditions set out by the registry laws." *Id*. And "rather than permanently interfering with familial relationships in the way that deportation does, the registry allows offenders to continue to live with their families despite registration." *Id*. at ¶ 26, 330 P.3d at 1275.

Defendant complains that some residency restrictions in the nation impede an offender's ability to accompany his children to school activities, or "are so severe that they limit the area where an offender may legally reside to just seven percent of the jurisdiction." Cert. Pet. 28-29. But as explained, that is not the case here. And this case is not an appropriate vehicle to assess the nature of laws from other jurisdictions.

Simply put, the Utah Supreme Court got it right when it held that notwithstanding the automatic nature of registration, Utah's sex offender registration

requirements are "significantly removed from banishment or exile." *Id*. at ¶ 26, 330 P.3d at 1275. Deportation is a penalty, and a "particularly severe" one at that. *Padilla*, 559 U.S. at 365. In contrast, Utah's sex offender registration law is a civil remedy – designed to protect children and assist in the investigation and apprehension of sex offenders. *See Trotter*, 2014 UT 17, ¶¶ 31-32, 330 P.2d at 1276.

Where, as here, "a legislative restriction 'is an incident of the State's power to protect the health and safety of its citizens,' it will be considered 'as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.'" *Smith*, 538 U.S. at 93-94 (citation omitted) (rejecting ex post facto challenge to retroactive application to Alaska's sex offender registration law). The Utah Supreme Court thus correctly concluded that Utah's sex offender registration law is nothing like deportation, and that *Padilla* should not, therefore, be extended to advice on sex offender registration.

E. No split of authority exists as to whether sex offender registration is a collateral consequence of a conviction.

Petitioner maintains that "[e]ven if this Court declines to clarify *Padilla's* reach, it should resolve the entrenched split over the extent to which the Sixth Amendment requires counsel to advise defendants as to the sex offender registration requirements of conviction." Cert. Pet. 15. Specifically, he contends

that "courts are split over how to categorize sex offender registration" – as a collateral consequence or as a direct consequence. Cert. Pet. 15-19. But there is no such split.

Every court but one to address the question – either in the context of a challenge to the validity of a guilty plea or a claim of ineffective assistance of counsel – has concluded that sex offender registration is a collateral, not direct, consequence of a guilty plea. *See Robinson v. State*, 730 So.2d 252, 254 (Ala. Crim. App. 1998) (en banc) (holding sex offender registration is collateral consequence on which trial court need not advise defendant before taking guilty plea); *Peterson v. State*, 988 P.2d 109, 115 (Alaska App. 1999) (same); *State v. Young*, 542 P.2d 20, 22 (Ariz. 1975) (en banc) (same); *People v. Montaine*, 7 P.3d 1065, 1067 (Colo. App. 1999) (same); *State v. Partlow*, 840 So.2d 1040, 1043 (Fla. 2003) (same); *Foo v. State*, 102 P.3d 346, 358 (Haw. 2004) (same); *Ray v. State*, 982 P.2d 931, 937 (Idaho 1999) (holding trial counsel not constitutionally ineffective for failing to advise client of registration requirements because they constitute collateral consequences); *People v. Fredericks*, 14 N.E.3d 576, 587-88 (Ill. Ct. App. 2014) (holding sex offender registration is collateral consequence on which trial court need not advise defendant before taking guilty plea); *State v. Jefferson*, 759 N.W.2d 3 (Table), 2008 WL 4531454, at *3 (Iowa App. Oct. 1, 2008) (same); *State v. Legg*, 13 P.3d 355, 358 (Kan. App. 2000) (same); *Carpenter v. Commonwealth*, 231 S.W.3d 134, 136-37 (Ky. App. 2007) (holding sex offender

registration is collateral consequence which implicates neither validity of plea nor counsel's effectiveness); *Commonwealth v. Ventura*, 987 N.E.2d 1266, 1271 (Mass. 2013) (holding sex offender registration is collateral consequence of conviction); *Kaiser v. State*, 641 N.W.2d 900, 907 (Minn. 2002) (holding sex offender registration is collateral consequence on which trial court need not advise defendant before taking guilty plea); *Magyar v. State*, 18 So.3d 807, 811-12 (Miss. 2008) (same); *Ramsey v. State*, 182 S.W.3d 655, 659-61 (Mo. App. 2005) (holding trial counsel not constitutionally ineffective for failing to advise client of registration requirements because they constitute collateral consequences); *State v. Schneider*, 640 N.W.2d 8, 13 (Neb. 2002) (holding sex offender registration is collateral consequence on which trial court need not advise defendant before taking guilty plea); *Nollette v. State*, 46 P.3d 87, 90-91 (Nev. 2002) (same); *State v. Moore*, 86 P.3d 635, 643 (N.M. App. 2004) (same); *People v. Gravino*, 928 N.E.2d 1048, 1052-55 (N.Y. 2010) (same); *Davenport v. State*, 620 N.W.2d 164, 166 (N.D. 2000) (same); *Rodriguez-Moreno v. State*, 145 P.3d 256, 259 (Ore. App. 2006) (holding trial counsel not constitutionally ineffective for failing to advise client of registration requirements because they constitute collateral consequences); *Commonwealth v. Leidig*, 956 A.2d 399, 406 (Pa. 2008) (holding sex offender registration is collateral consequence on which trial court need not advise defendant before taking guilty plea); *Williams v. State*, 662 S.E.2d 615, 617-18 (S.C. Ct. App. 2008) (holding trial counsel not constitutionally ineffective for failing to advise client

of registration requirements because they constitute collateral consequences); *State v. Timperley*, 599 N.W.2d 866, 869 (S.D. 1999) (holding sex offender registration is collateral consequence on which trial court need not advise defendant before taking guilty plea); *Ward v. State*, 315 S.W.3d 461, 469-72 & n.8 (Tenn. 2010) (same); *Anderson v. State*, 182 S.W.3d 914, 917-18 (Tex. Crim. App. 2006) (recognizing court need not inform defendant of registration requirements before taking plea under federal constitution, but holding such is required under state law); *Trotter*, 2014 UT 17, ¶¶ 33, 35, 330 P.3d at 1277 (holding sex offender registration is collateral consequence which implicates neither validity of plea nor counsel's effectiveness); *State v. Ward*, 869 P.2d 1062, 1075-76 (Wash. 1994) (holding sex offender registration is collateral consequence on which trial court need not advise defendant before taking guilty plea); *State v. Bollig*, 605 N.W.2d 199, 206 (Wis. 2000) (same).

California appears to be the only outlier. *See In re Birch*, 515 P.2d 12, 17 (Cal. 1973) (holding court has duty to inform unrepresented defendant of direct consequence of sex offender registration requirement before accepting plea). But without addressing *In re Birch*, the California Supreme Court more recently suggested that sex offender registration is a collateral consequence. *See People v. Picklesimer*, 226 P.3d 348, 354 (Cal. 2010) (observing sex offender "registration requirements and placement in the state sex

offender registry are not part of the judgment . . . but rather collateral consequences of that judgment").

Petitioner contends that courts in Maryland, Texas, and West Virginia also consider sex offender registration as a direct rather than collateral consequence. Cert. Pet. 16. But the cases cited do not stand for that proposition. *See Doe v. Dep't of Public Safety & Correction Services*, 62 A.3d 123 (Md. 2013) (holding retroactive application of sex offender registration requirements is an ex post facto law that violates state constitution); *Anderson*, 182 S.W.3d at 918 (recognizing court need not inform defendant of registration requirements before taking plea under federal constitution, but holding that such is required under state law); *State v. Whalen*, 588 S.E.2d 677, 680-81 (W.V. 2003) (holding defendant must be advised of possibility of statutory "sexual motivation" finding, which would require registration, before defendant pleads to, or goes to trial for, a non-sex offense).

Petitioner also cites the four cases which have extended *Padilla* to advice on sex offender registration: *Taylor* (Ga.), *Dodds* (Ill.), *Fonville* (Mich.), and *Edwards* (N.M.). Cert. Pet. 16. But those cases did not hold that sex offender registration is a direct consequence; as explained, they concluded that advice on sex offender registration is subject to the *Strickland* inquiry under *Padilla's* rationale, which does not depend on the direct-collateral distinction. *Supra*, at 11. And courts in both Illinois and New Mexico have held that sex offender registration is a collateral

consequence. *See Fredericks*, 14 N.E.3d at 587-88 (holding sex offender registration is collateral consequence on which trial court need not advise defendant before taking guilty plea); *Moore*, 86 P.3d at 643 (same).

In sum, there is virtually no split among the courts as to the nature of sex offender registration. All but perhaps California agree that sex offender registration is a collateral consequence of conviction. Accordingly, there is no reason for the Court to consider the matter on certiorari review.[3]

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[3] Petitioner also contends that the sex offender registration requirements in this case are not collateral because (1) in sentencing him, the trial court "mandated that [he] register as a sex offender"; and (2) to obtain relief from the registration requirements, Petitioner must go to "the trial court that entered the judgment of conviction." Cert. Pet. 33-34. Neither claim is persuasive. The trial court did not mandate that he register – that requirement arises by operation of statute. Utah Code Ann. § 77-41-105 (2013). The trial court merely ordered that, as a condition of his probation, he "[c]omply with [the] requirements of Utah Sex Offender Registration." Pet. App. 35. Compliance with the law is a standard probationary term. Moreover, the removal provision contemplates the filing of a civil petition, merely specifying the venue in which the petition should be filed. *See* Utah Code Ann. § 77-41-112(1) (2013) (providing that sex offender "may petition the court where the offender was convicted of the offense requiring registration for an order removing the offender" from the registry).

F. Even if advice on sex offender registration were subject to the *Strickland* inquiry, Petitioner has failed to surmount the high bar of demonstrating prejudice.

Even if *Strickland* applied to advice on the registration requirements, Petitioner has fallen well short of demonstrating ineffective assistance of counsel. Specifically, Petitioner has not made an adequate case of prejudice. As he did in the Utah Supreme Court below, Petitioner's claim of prejudice is limited to his self-serving allegation "that, if he had been informed by counsel that he would be required to register as a sex offender, he would not have pleaded guilty and instead would have insisted on going to trial." Cert. Pet. 37. To support that claim, he points only to the fact that he moved to withdraw his guilty plea before sentencing. Cert. Pet. 37. But under Utah law, a motion to withdraw *must* be filed before sentencing to be timely. *See* Utah Code Ann. § 77-13-6 (2013).

To prove prejudice, Petitioner must demonstrate that there is a "reasonable probability" he would have gone to trial but for counsel's failure to advise him of the registration consequences. *Strickland*, 466 U.S. at 694. But the mere allegation that he would have insisted on going to trial is not enough to prove prejudice. He also "must convince the court that a decision to reject the plea bargain *would have been rational* under the circumstances." *Padilla*, 559 U.S. at 372 (emphasis added). Petitioner has not even attempted to meet this requirement. *See* Cert. Pet. 37.

Petitioner was originally charged with violating three offenses: (1) unlawful sexual activity with a minor, a third degree felony; (2) unlawful sexual activity with a minor, a class B misdemeanor; and (3) theft, a class A misdemeanor. R1-2. Victim accounts supported these charges. *See* R3-5. But more significantly, Petitioner confessed to the crimes. After waiving his *Miranda* rights, Petitioner admitted to the police that he had sexual intercourse with both minor girls, took cash from his employer, and charged to the company's account automobile parts for his girlfriend's car. *See* R4. The case for conviction was thus very strong. *See Miller v. Champion*, 262 F.3d 1066, 1072 (10th Cir. 2001) (holding that "courts . . . will often review the strength of the prosecutor's case as the best evidence of whether a defendant in fact would have changed his plea and insisted on going to trial"), *cert. denied*, 534 U.S. 1140 (2002).

In the face of that evidence, Petitioner agreed to plead guilty to the felony count of unlawful sexual activity with a minor and a reduced count of theft. R60. Beyond reducing the theft charge to a class B misdemeanor, the State agreed to (1) dismiss the misdemeanor count of unlawful sexual activity with a minor, and (2) not object to a motion by Petitioner to reduce the severity of his felony offense to a class A misdemeanor upon successful completion of probation. *See* R60-61. Given these substantial benefits, and having done no more than allege that he would have gone to trial but for counsel's alleged deficient performance, Petitioner has not met his high burden

to establish that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372.

In sum, even if *Padilla* were to apply, Petitioner has failed to surmount "*Strickland's* high bar." *Id*. at 371.

CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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