

In The
Supreme Court of the United States

—◆—
KENNETH TROTTER,

Petitioner,

v.

STATE OF UTAH,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Utah**

—◆—
REPLY BRIEF
—◆—

TROY L. BOOHER
ZIMMERMAN JONES
BOOHER LLC
136 S. Main Street
Suite 721
Salt Lake City, UT 84101

MATTHEW D. CARLING
51 E. 400 North
Cedar City, UT 84720

MICHAEL J. TETER
Counsel of Record
UNIVERSITY OF UTAH,
S.J. QUINNEY
COLLEGE OF LAW
332 S. 1400 East
Salt Lake City, UT 84112
(801) 585-1863
michael.teter@law.utah.edu
*Counsel for Petitioner
Kenneth Trotter*

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. The Deep and Growing Divide Over <i>Padilla's</i> Reach Can Only Be Resolved By This Court.....	1
II. Though Courts Are Divided Over the Question, the Sixth Amendment Requires Counsel to Advise About the Sex Offender Registration Consequences of a Guilty Plea	4
III. This Case Presents An Ideal Vehicle For Resolving Questions of Pressing National Importance.....	9
CONCLUSION.....	10

TABLE OF AUTHORITIES

	Page
CASES	
<i>Calvert v. State</i> , 342 S.W.3d 477 (Tenn. 2011).....	3
<i>Carpenter v. Commonwealth</i> , 231 S.W.3d 134 (Ky. App. 2007).....	6
<i>Chaidez v. United States</i> , 133 S.Ct. 1103 (2013).....	2, 3, 4, 8
<i>Commonwealth v. Pridham</i> , 394 S.W.3d 867 (Ky. 2012)	3
<i>In re Birch</i> , 515 P.2d 12 (Cal. 1973).....	6
<i>Missouri v. Frye</i> , 132 S.Ct. 1399 (2012).....	4
<i>People v. Dodds</i> , 7 N.E.3d 83 (Ill. App. Ct. 1st Dist. 2014)	7
<i>People v. Fonville</i> , 804 N.W.2d 878 (Mich. Ct. App. 2011)	7
<i>People v. Hughes</i> , 983 N.E.2d 439 (Ill. 2012).....	3
<i>People v. McClellan</i> , 862 P.2d 739 (Cal. 1993)	6, 7
<i>Ramsey v. State</i> , 182 S.W.3d 655 (Mo. App. 2005)	6
<i>Ray v. State</i> , 982 P.2d 931 (Idaho 1999).....	6
<i>Rodriguez-Moreno v. State</i> , 145 P.3d 256 (Or. Ct. App. 2006)	6
<i>State v. Bollig</i> , 605 N.W.2d 199 (Wis. 2000).....	8
<i>State v. Edwards</i> , 157 P.3d 56 (N.M. 2007).....	5, 6, 7
<i>State v. Moore</i> , 86 P.3d 635 (N.M. App. 2004).....	7

TABLE OF AUTHORITIES – Continued

	Page
<i>State v. Trotter</i> , 2014 UT 17, 330 P.3d 1267 (2014).....	6
<i>Taylor v. State</i> , 698 S.E.2d 384 (Ga. Ct. App. 2010)	7
<i>United States v. Reeves</i> , 695 F.3d 637 (7th Cir. 2012)	3
<i>Williams v. State</i> , 662 S.E.2d 615 (S.C. Ct. App. 2008)	6

CONSTITUTIONAL PROVISIONS

Sixth Amendment.....	1, 4, 5, 6, 7
----------------------	---------------

OTHER AUTHORITIES

Gabriel J. Chin & Richard W. Holmes, Jr., <i>Effective Assistance of Counsel and the Consequences of Guilty Pleas</i> , 87 Cornell L. Rev. 697, 732 (2002).....	5, 8
---	------

INTRODUCTION

Every year, approximately 20,500 individuals plead guilty to an offense that requires sex offender registration. Whether the Sixth Amendment commands that counsel advise those defendants of the registration consequences of conviction raises considerable constitutional and practical concerns. Nor will the issues presented to this Court in Mr. Trotter's petition go away. And despite the State's effort to paper over the divide that currently runs through our nation's judicial system, the split exists and will only widen. The decision below squarely conflicts with the holdings of other state courts of last resort on both the question of *Padilla's* reach, as well as whether the Sixth Amendment requires counsel to advise about the sex offender registration consequences of pleading guilty.

Thus, the Court should grant the petition because of the pressing issues raised, the divide among lower courts, the Utah Supreme Court's erroneous conclusions of law, and the case's ideal presentation of the questions.

I. The Deep and Growing Divide Over *Padilla's* Reach Can Only Be Resolved By This Court

1. The State's opposition to granting certiorari boils down to this: all courts examining the issue have expressed uncertainty about *Padilla's* reach and, therefore, no split of authority exists. Indeed, the

State's brief itself evidences this confusion throughout. Its very first argument is that, "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." Opp. Br. at 5. Then, after supporting that contention by mischaracterizing this Court's holding in *Chaidez v. United States*, 133 S.Ct. 1103 (2013), the State contradicts itself and argues that "no split of authority exists" regarding whether *Padilla* extends beyond deportation because none of the cases cited by Mr. Trotter "suggest that *Padilla's* rationale cannot be extended to advice on other collateral consequences." Opp. Br. at 7, 9. In other words, what the State seeks to take away with one hand, it gives back with the other. Later, the State suggests that no split exists over whether *Padilla* extends to sex offender registration. It does so by ignoring lower court holdings, as well as state supreme court rulings that extend *Padilla* to areas quite similar in nature to sex offender registration.

The fact is, however, that rather than serving as a basis for denying the writ of certiorari, the confusion over *Padilla's* reach justifies granting Mr. Trotter's petition. Moreover, the uncertainty has led lower courts to reach different conclusions about *Padilla's* limits, so the divide discussed in Mr. Trotter's petition is quite real.

2. The State suggests that the Utah Supreme Court, the Pennsylvania Supreme Court, the Seventh

Circuit, and various lower state courts have left open the possibility that *Padilla* can extend beyond deportation. Opp. Br. at 8-10. Only a flawed parsing of the cases can lead to that conclusion. The courts in those cases made as clear as possible – within acceptable judicial practice of only deciding the matter before them – that they do not believe that *Padilla* extends beyond deportation. As the Seventh Circuit stated, “*Padilla* is rife with indications that the Supreme Court meant to limit its scope to the context of deportation only.” *United States v. Reeves*, 695 F.3d 637, 640 (7th Cir. 2012). And the Utah Supreme Court said that *Padilla* “merely carved out a special exception for advising defendants about the risk of deportation associated with a guilty plea.” Pet. App. 12.

That logic stands in sharp contrast to the approach developed by various courts of last resort that apply *Padilla* to matters other than deportation. *See, e.g., Commonwealth v. Pridham*, 394 S.W.3d 867, 870 (Ky. 2012) (refusing to read *Padilla* as applying only to deportation); *People v. Hughes*, 983 N.E.2d 439, 455 (Ill. 2012) (applying *Padilla* to involuntary civil commitment for sex offenses); *Calvert v. State*, 342 S.W.3d 477, 490 (Tenn. 2011) (relying on *Padilla* when faced with issue of mandatory lifetime community supervision). In addition, over ten other courts have reached similar conclusions or, at least, questioned *Padilla*’s reach. *See* Pet. 12-14.

3. In addition to attempting to ignore the divide, the State’s effort to reconceive the split as one that will be resolved as lower courts apply *Chaidez*

also misses the mark. *Chaidez* did not clarify *Padilla*'s reach, despite what the State suggests. The Court's statement in *Chaidez* that *Padilla*'s approach did not apply "across the board," *Chaidez*, at, 1111, was already widely recognized by lower courts. But that is not the question here. The issue is whether *Padilla* ever applies beyond deportation. And on that point, as discussed above and in the petition, courts divide.

4. Finally, the importance of resolving the issue of *Padilla*'s reach extends far beyond sex offender registration. Plea bargains constitute ninety-four percent of all criminal convictions. *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012) (citing Dept. of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006-Statistical Tables 1* (2009)). Courts, prosecutors, and defense attorneys need to know whether or not *Padilla*'s approach to Sixth Amendment analysis applies beyond the deportation context.

II. Though Courts Are Divided Over the Question, the Sixth Amendment Requires Counsel to Advise About the Sex Offender Registration Consequences of a Guilty Plea

1. The State contends that courts across the country uniformly treat sex offender registration as a collateral consequence of conviction. Opp. Br. at 17-20. That is untrue. Further, in its opposition, the

State improperly focused on what the due process clause requires of a trial court. The correct question instead deals with the degree to which the Sixth Amendment protects defendants pleading guilty to offenses that will carry mandatory sex offender registration consequences. On that issue, courts split.

2. Most of the cases cited by the State involve the due process clause, deciding whether a trial court's failure to inform a defendant of certain plea consequences rendered those pleas less than knowing and voluntary. *See* Opp. Br. at 18-20. In fact, of the twenty-nine cases cited by the State, only seven specifically held that defense counsel renders constitutionally acceptable performance despite failing to advise about sex offender registration requirements. The remaining twenty-two focused on the due process clause. But the issue before this Court is what the Sixth Amendment requires of defense counsel, and whether failure to inform about registration requirements violates *Strickland*. The Sixth Amendment places a greater responsibility on defense counsel when gauging effectiveness than the due process clause imposes on courts for a plea to be knowing and voluntary. *See, e.g., State v. Edwards*, 157 P.3d 56, 62 (N.M. 2007) (“[E]ven where the district court has no duty to inform a defendant of the collateral consequences of his plea, defense counsel may have such an obligation”); *see also* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 732 (2002). Therefore, the twenty-two cases cited by

the State do not undercut the split in authority over whether failure to counsel a defendant about sex offender registration violates *Strickland*.

3. The State's inapposite string-cite notwithstanding, a fairly obvious and even split exists over whether the Sixth Amendment requires defense counsel to advise defendants about registration. The State correctly points out, as did Mr. Trotter in his petition, that some states have held the Sixth Amendment does not require defense counsel to advise a defendant about sex offender registration consequences. *Ray v. State*, 982 P.2d 931 (Idaho 1999); *Carpenter v. Commonwealth*, 231 S.W.3d 134 (Ky. App. 2007); *Ramsey v. State*, 182 S.W.3d 655 (Mo. App. 2005); *Rodriguez-Moreno v. State*, 145 P.3d 256 (Or. Ct. App. 2006); *Williams v. State*, 662 S.E.2d 615 (S.C. Ct. App. 2008); *State v. Trotter*, 2014 UT 17, 330 P.3d 1267 (2014).

However, the State does not acknowledge that several other appellate courts have held that failure to inform a defendant of registration consequences constitutes deficient performance under *Strickland*. Specifically, at least two states have recognized, even pre-*Padilla*, that sex offender registration consequences flow directly from conviction, and thus merit Sixth Amendment protection. *People v. McClellan*, 862 P.2d 739 (Cal. 1993); *In re Birch*, 515 P.2d 12 (Cal. 1973); *State v. Edwards*, 157 P.3d 56 (N.M. Ct. App. 2007). Although the State attempts to cast doubt on California's treatment of sex offender registration consequences as direct, California reaffirmed *Birch* in

1993, referring to sex offender consequences as among those “direct” consequences that must be told to a criminal defendant for a plea to be knowing and voluntary. *McClellan*, 862 P.2d at 745.

Further, the State lists New Mexico among the states that do not consider sex offender registration requirements to be direct consequences, citing *State v. Moore*, 86 P.3d 635, 643 (N.M. App. 2004). However, *Edwards* came later and distinguished *Moore* as decided in the context of a due process challenge to a trial court’s failure to inform about registration consequences. *Edwards*, 157 P.3d at 63. The *Edwards* court specifically held that defense counsel violated *Strickland* by failing to inform the defendant of the registration consequences of his plea. *See id.*, at 66.

In addition to New Mexico and California, several other state courts recognize that the Sixth Amendment extends to sex offender registration consequences. *Taylor v. State*, 698 S.E.2d 384 (Ga. Ct. App. 2010); *People v. Fonville*, 804 N.W.2d 878, 892 (Mich. Ct. App. 2011); *People v. Dodds*, 7 N.E.3d 83, 93 (Ill. App. Ct. 1st Dist. 2014). Consequently, there are nearly as many states that provide Sixth Amendment protection to sex offender registration consequences as states that have refused to do so – a real divide.

4. Moreover, the State does not respond to Mr. Trotter’s point that the potential for a wider split is likely because six states’ highest courts have held registration requirements punitive rather than

regulatory. Pet. at 16-17. Direct consequences are widely considered to be those that have an effect on the “range of [a] defendant’s punishment[s].” *State v. Bollig*, 605 N.W.2d 199, 203 (Wis. 2000). Because these states consider sex offender registration punitive, they would likely hold those requirements to be within the scope of punishments imposed by a defendant’s sentence, and, thus, direct consequences of conviction.

In short, a split of authority exists over whether the failure to advise a defendant regarding sex offender registration requirements violates *Strickland* and the Court should resolve the issue.

5. Even if there were no divide among courts about whether sex offender registration constitutes a direct or collateral consequence of conviction, this Court should still grant the petition. Prior to granting a writ of certiorari in *Padilla*, deportation was universally considered a collateral consequence of conviction, advice about which went unprotected by the Sixth Amendment. *See Chaidez*, 133 S.Ct. at 1104-1106; *see also* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 705 nn.50-57 (2002) (“Counsel, and not the court, has the obligation of advising a defendant of her particular position as a consequence of her plea”). As with deportation, the questions presented with regards to sex offender registration require the Court’s immediate attention.

III. This Case Presents An Ideal Vehicle For Resolving Questions of Pressing National Importance

1. The State raises no concerns about whether the case presents the questions squarely or about its procedural history. Instead, the State simply offers the conclusory statement, without explanation, that the petition “is not the proper vehicle to decide the expense of *Padilla*’s reach.” Opp. Br. at 10. But the State is wrong. The case is free of all of the limitations and complications that typically accompany such challenges. If the Court wishes to address the questions presented, this case serves as the perfect vehicle for doing so.

2. The Court should not pause long over the State’s objection that Mr. Trotter “has fallen well short of demonstrating ineffective assistance of counsel” because he “has not made an adequate case of prejudice.” Opp. Br. at 23. As in *Padilla*, where the Court remanded the matter to the Kentucky Supreme Court to consider the matter of prejudice in the first instance, the questions presented for review in the petition can be answered without reaching the prejudice issue. The Utah Supreme Court never weighed in on that topic and should Mr. Trotter prevail before this Court, remand may then be appropriate.

3. Moreover, the Court should give no credence to the State’s suggestion that the divide among courts on these issues is “in its infancy.” Opp. Br. at 11. First, as discussed in Mr. Trotter’s petition as well as

above, this is inaccurate. But more to the point, when addressing an issue of such constitutional importance, of national scope, and that has the potential to affect every plea-bargained conviction and certainly will affect over 20,000 defendants each year, the best time to resolve confusion is in its infancy.



CONCLUSION

The petition for a writ of certiorari should be granted.

TROY L. BOOHER
ZIMMERMAN JONES
BOOHER LLC
136 S. Main Street
Suite 721
Salt Lake City, UT 84101

MATTHEW D. CARLING
51 E. 400 North
Cedar City, UT 84720

Respectfully submitted,

MICHAEL J. TETER
Counsel of Record
UNIVERSITY OF UTAH,
S.J. QUINNEY
COLLEGE OF LAW
332 S. 1400 East
Salt Lake City, UT 84112
(801) 585-1863
michael.teter@law.utah.edu
Counsel for Petitioner
Kenneth Trotter