**IN THE UNITED STATE COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| United States,<br>Appellant<br>v.<br><br>Airman Basic (E-1)<br>Brandon T. Rose, USAF,<br>Appellee. | ) | BRIEF OF *AMICUS CURIAE*<br>IN SUPPORT OF APPELLEE<br><br><br><br>Crim. App. Dkt. 36508<br><br>USCA Dkt. 09-5003/AF |


Cherlyn Walden
Law Student
Gonzaga University School of Law
721 N. Cincinnati Street
Spokane, WA 99202
cwalden@lawschool.gonzaga.edu

Danielle Purcell
Law Student
Gonzaga University School of Law
721 N. Cincinnati Street
Spokane, WA 99202
dpurcell@lawschool.gonzaga.edu

Brooks Holland
CAAF Bar No. 35616
Supervising Attorney of Record
Gonzaga University School of Law
721 N. Cincinnati Street
Spokane, WA 99202
(509) 313-6120
bholland@lawschool.gonzaga.edu

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## STATEMENT OF THE FACTS

In accordance with U.S.C.A.A.F. Rule 24, *Amici* adopt Appellee's statement of the facts as set forth in Appellee's Brief. Additional facts will be added where appropriate.

## INTRODUCTION AND SUMMARY OF ARGUMENT

*Amici*, Cherlyn Walden and Danielle Purcell, are currently third year law students at Gonzaga University School of Law. Ms. Walden and Ms. Purcell appear as friends to this Court to aid it in the decision of whether the Court of Appeals for the Air Force erred in finding Appellee Airman Basic Brandon T. Rose (hereinafter "Rose") met his burden of proof for an ineffective assistance claim, and setting aside the findings of guilty to specifications 1-3 of charge V.

First, *Amici* address whether Rose received ineffective representation in connection with his guilty plea. In coming to the conclusion that Rose did receive ineffective assistance from his defense counsel, *Amici* initially discuss *Strickland v. Washington*, 466 U.S. 664 (1984), and the Court's first prong of the two-prong analysis: whether counsel's performance fell below an objective standard of reasonableness. Under an objective standard of reasonableness, defense counsel must be a diligent and conscientious advocate and have open communication with his or her client. *Id.* at 694.

Historically, defendants have had difficulty proving ineffective assistance if the consequence for which the defendant sought advice was considered a collateral consequence as opposed to a direct consequence. However, the United States Supreme Court in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), held some consequences, such as deportation, were unfit to be labeled as either a direct or collateral consequence. Since *Padilla's* holding, other courts have extended *Padilla's* rationale and found that other consequences, such as sex offender registration, cannot be strictly labeled as collateral and are within the realm of what a defense attorney should be advising his clients about prior to a defendant entering a guilty plea. Consistent with *Padilla*, a consequence so integral to a criminal penalty as sex offender registration falls within the attorney's duty of affective representation.

Accordingly, this Court should extend the duty of effective representation under *Padilla* to sex offender registration consequences. Furthermore, the record supports the conclusion that defense counsel did provide ineffective assistance to Rose because he misrepresented the law and failed even to try to obtain the necessary information to address Rose's concern regarding sex offender registration prior to Rose entering his guilty plea.

Second, *Amici* address whether defense counsel's deficient performance resulted in prejudice to Rose. The test for prejudice is whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of proceeding would have been different." *Strickland v. Washington,* 466 U.S. at 664, 694 (1984). In analyzing this prong of *Strickland*, *Amici* examine the *Hill v. Lockhart*, 474 U.S. 52 (1985), "trial-outcome" prejudice test and conclude it has been applied too narrowly because it presumes that the only alternative to rejecting a plea offer is going to trial. This approach thus focuses too much on courts predicting the success of a trial that did not take place. Instead, *Padilla*'s "rational under the circumstances" inquiry is more appropriate because it moves away from a trial-outcome analysis towards an inquiry that reflects the realities of the plea bargaining process. This broader, context-specific approach acknowledges that insisting on trial is not the only alternative to rejecting a plea agreement or the only way to show a different outcome.

"Different outcome" in the context of plea bargaining therefore should reference whether the defendant would have pled guilty had he received effective assistance of counsel. The prejudice test proposed largely is an adoption of the proposed prejudice approach outlined in Professor Jenny

Roberts' article, *Proving Prejudice, Post Padilla,* 54 How. L.J. 693 (2011). In this case, this Court should ask whether it is reasonably probable that a rational person in the Rose's position would have rejected the plea had he known that registration was mandatory. In assessing this question, the Court should examine the record for evidentiary factors relevant to the guilty plea process. Considering the totality of the plea bargaining process in this case, *Amici* contend that both questions should be answered in the affirmative and the lower court's finding of prejudice should be affirmed.

## SPECIFIED ISSUE

**WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN FINDING INEFFECTIVE ASSISTANCE OF COUNSEL IN THIS CASE.**

## ARGUMENT

### I. THE AFCCA DID NOT ERR IN FINDING INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAILED TO ADVISE ROSE COMPETENTLY ABOUT SEX OFFENDER REGISTRATION CONSEQUENCES TO PLEADING GUILTY TO THREE SPECIFICATIONS OF CHARGE V, AND COUNSEL'S INEFFECTIVENESS PREJUDICED ROSE.

#### A. Standard of Review.

"Issues involving ineffective assistance of counsel involve mixed questions of law and fact. This Court reviews factual findings under a clearly erroneous standard, but looks at the questions of deficient performance and prejudice de novo." *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008) (internal citations omitted); *see also United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005).

#### B. The AFCCA Properly Found That Rose Received Ineffective Assistance of Counsel When Rose Pleaded Guilty to Three Specifications of Charge V.

##### 1. Rose was entitled to effective assistance of counsel in connection to his guilty plea

This Court has "interpreted the military accused's right to representation by counsel, as guaranteed by Article 27(a), UCMJ, 10 U.S.C. § 827(a), to entail the right to 'the *effective* assistance of counsel.'" *United States v. Jefferson*, 13 M.J. 1, 5-6 (C.M.A. 1982) (citing *United States v. Rivas*, 3

M.J. 282, 287 (C.M.A.1977); *United States v. Walker*, 45 C.M.R. 150, 152 (1972)). Moreover, this Court analyzes whether an attorney provided effective assistance under the two-prong test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *See United States v. Gutierrez*, 66 M.J. 329, 331 (C.A.A.F. 2008); *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010); *Loving v. United States*, 68 M.J. 1, 6 (C.A.A.F. 2009). Under *Strickland*, the first prong of an ineffective assistance claim examines "whether counsel's performance fell below an objective standard of reasonableness." *Gutierrez*, 66 M.J. at 331. (internal citations omitted). The second prong assesses "whether, but for the deficiency, the result would have been different." *Id.* Both right to effective assistance and *Strickland's* ineffective assistance analysis apply to guilty pleas. *See Hill v. Lockhart*, 474 U.S. 52, 57 (1985); *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970); *United States v. Bradley*, 71 M.J. 13 (C.A.A.F. 2012), 2012 CAAF Lexis 205 (C.A.A.F. February 29, 2012).

In the guilty plea context, *Strickland's* "standard of reasonableness" for prong one is properly measured under "prevailing professional norms." *Strickland*, 466 U.S. at 688; *see also Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010). Although there are no specific guidelines for what constitute

"professional norms," defense counsel does have an "overarching duty to advocate the defendant's cause and . . . to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."[1] *Strickland*, 466 U.S. at 688. (internal citations omitted). Defense counsel also has an obligation to "reasonably investigate" or to reasonably decide that investigations are unwarranted. *Id*. at 691.

Moreover, while this Court has observed there is no "hard and fast rule . . . to test the sufficiency of the discharge of counsel's responsibilities[,]" a "single action can [still] be sufficient to show ineffective representation" *Rivas*, 3 M.J. at 287 (internal citations omitted). This Court in *Rivas* explained:

> [T]he accused is entitled to the assistance of an attorney of reasonable competence and [we, the Court] have expressed the expectation that the attorney will 'exercise . . . the customary skill and knowledge which normally prevails . . . within the range of competence demanded of attorneys in criminal cases.' We believe that to exercise the skill and knowledge which normally prevails within

[1] "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (internal citations omitted); *see also United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009).

> the range of competence demanded of attorneys in criminal cases requires that the attorney act as a *diligent and conscientious* advocate on behalf of his client.

*Id*. at 288(emphasis added)(internal citations omitted).

**2. Counsel's duty of effective assistance extended to advice about sex offender registration consequences, because sex offender registration constitutes an integral part of the penalty that attached to charge V**

In the past, some courts have limited the right to effective representation to the scope of "direct" consequences of a criminal conviction.[2] *See generally* Gabriel J. Chin & Margaret Colgate Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, 25-Fall CRIM. JUST. 21, 22 (Fall 2010). In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), however, The Supreme Court held that some consequences to a criminal conviction are "ill-suited" for the collateral versus direct consequence distinction. *See Padilla*, 130 S. Ct. at 1481-82. On the contrary, some consequences to a conviction, such as deportation, are so "intimately related to the criminal process" that these consequences are "uniquely difficult" to

[2] Although *Padilla* largely rejects the direct versus collateral consequence distinction, historically, direct consequences were considered to be a part of the judgment of conviction, such as the length of a sentence or imposed fines. Chin & Love, supra at 22. Collateral consequences are considered legally separate from a conviction, such as those consequences that are assigned automatically upon a conviction because of the stated law and are therefore said to be outside the attorney's obligation to inform the defendant. *Padilla*, 130 S. Ct. at 1476; *see also* Jenny Roberts, *Collateral Consequences: Who Really Pays the Price for Criminal "Justice"?*, 54 How. L.J. 693, 696 (Spring 2011).

categorize strictly as either a direct or a collateral consequence. *Id.* at 1481. What controls the scope of a lawyer's duty of effective representation is whether the consequence is "intimately related" to or an "integral part" of a criminal conviction. *Id.* at 1480-81. If a consequence proves to be integral to the penalty, the duty of effective representation includes a duty to advise the defendant competently about such important consequences before the defendant decides whether to plead guilty. *Id.* at 1480-81.

In *Padilla,* the Supreme Court extended the right to effective representation to deportation consequences of a guilty plea. *See Padilla*, 130 S. Ct. at 1486-87. Following *Padilla*, lower courts extended *Padilla's* rationale to other collateral consequences, such as sex offender registration. See Margaret Colgate Love, *Collateral Consequences after Padilla v. Kentucky: From Punishment to Regulation*, St. Louis U. Pub. L. Rev., Vol. 30 (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883809. Courts extended attorney's advice obligations in these cases because such collateral sanctions can "impact almost every aspect" of a defendant's life. Hanh H. Le, *The "Padilla Advisory" and Its Implications Beyond The Immigration Context*, 20 Wm. & Mary Bill Rts. J. 589, 592-93 (2011) (internal citations omitted).

In *People v. Fonville*, 804 N.W.2d 878 (2011), for example, the Michigan Court of Appeals used *Padilla's* reasoning to find there was a "significant parallel" between sex offender registration and deportation. *Id.* at 894. The *Fonville* court further explained:

> Similar to the risk of deportation, sex offender registration 'as a consequence of a criminal conviction is, because of its close connection to the criminal process, . . . difficult to classify as either a direct or a collateral consequence' and that therefore '[t]he collateral versus direct distinction is . . . ill-suited to evaluat[e] a *Strickland* claim' concerning the sex-offender-registration requirement.
>
> Like the consequence of deportation, sex offender registration is not a criminal sanction, but it is a particularly severe penalty. In addition to the typical stigma that convicted criminals are subject to upon release from imprisonment, sexual offenders are subject to unique ramifications, including, for example, residency-reporting requirements and place-of-domicile restrictions. Moreover, sex offender registration is 'intimately related to the criminal process.' The 'automatic result' of sex offender registration for certain defendants makes it difficult 'to divorce the penalty from the conviction . . . .'

*Fonville*, 804 N.W.2d at 894 (quoting *Padilla*, 130 S. Ct. at 1473).[3]

[3] Additionally, because Michigan had a sex offender registration statute that was "'succinct, clear, and explicit[,]'" in requiring the defendant to register after his conviction, the *Fonville* court ultimately held "defense counsel's duty to give correct advice is likewise clear." *Fonville*, 291 Mich. App. at 392, 804 N.W.2d at 894 (quoting *Padilla*, 130 S. Ct. at 1473).

Prior to *Padilla*, this Court similarly identified the importance of competent advice regarding the collateral consequence of sex offender registration. *United States v. Miller*, 63 M.J. 452, 459 (C.A.A.F. 2006). *Miller* required that for any case tried ninety days after its opinion, defense attorneys "should inform" defendants whether a charged crime would require sex offender registration upon conviction. *Id.* Although this Court explained that failing to advise of such consequences was "not per se ineffective assistance of counsel, it will be one circumstance this Court will carefully consider in evaluating allegations of ineffective assistance of counsel." *Id.* The *Miller* court thus recognized the "significant impact" that the collateral consequence of sex offender registration can have for defendants,[4] and accordingly prospectively required that defense counsel inform

[4] The *Miller* court relied on the military statute, DoD Instr. 1325.7, the federal statutes, the Wetterling Act and Megan's Law, and different state laws to determine that defense counsel had a "plethora" of laws to enable him to accurately advise his client of sex offender registration consequences stemming from a conviction. *Miller*, 63 M.J. at 459. DoD Instr. 1325.7 identifies those offenses that trigger mandatory sex offender registration. The Wetterling Act was initially enacted in 1994 and "conditioned availability of federal crime prevention funds upon a state's creation of a sex offender registration and community notification program." *Id.* at 458. The Wetterling Act was subsequently amended on May 17, 1996, by Megan's Law, "which removed the original requirement that the registry information be private and added a mandatory community notification provision to the existing requirements." *Id.* (citing Megan's Law, Pub.L. No. 104-145, 110 Stat. 1345 (1996) (codified at 42 U.S.C. § 14071(d)). Additionally, there is now a version of "Megan's Law" in every state. *Id.* at 459.

their clients of the "unique collateral circumstance that may affect the plea decisions." *Id.*

Consistent with *Padilla*, a consequence so integral to a criminal penalty as sex offender registration falls within the attorney's duty of affective representation. Accordingly, the United States Court of Appeals for the Air Force correctly adopted *Miller's* "implicit[] recogni[tion] [of] the significant impact" that sex offender registration can have on a defendant's decision whether to plead guilty. *United States v. Rose*, 67 M.J. 630, 634 (A.F. Ct. Crim. App. 2009). This Court also should extend the duty of effective representation under *Padilla* to sex offender registration consequences.

**3. The record establishes that counsel did not represent Rose effectively when he pleaded guilty to charge V.**

*Padilla* does not distinguish between "'act[s] of commission and . . . [acts] of omission'" in the duty of effective representation. *Padilla*, 130 S. Ct. at 1484 (quoting *Strickland*, 466 U.S. at 690). Thus, whether defense counsel "affirmatively misadvises" a defendant or does not give advice at all does not matter, and to hold otherwise would "invite absurd results." *Padilla*, 130 S. Ct. at 1484.

For instance, the *Padilla* Court explains that a holding requiring that defense counsel must affirmatively misadvise a client to meet the first prong in *Strickland* 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. . . .' [T]hey should not be encouraged to say nothing at all. It is quintessentially the duty of counsel to provide her client with available advice about an issue . . . and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'

*Id.* (quoting *Liberetti v. United States*, 516 U.S. 29, 50-51 (1995); *Lockhart*, 474 U.S. at 62).

The factual record proves civilian counsel's ineffectiveness as Rose's civilian defense counsel never diligently investigated sex offender registration consequences, even after Rose affirmatively inquired about such consequences. Counsel thus did not serve as a conscientious advocate on behalf of Rose. *See Padilla*, 130 S. Ct. at 1434; *see also Rivas*, 3 M.J. at 288. Counsel provided Rose with misleading and inaccurate advice regarding consequences that would stem from pleading guilty to Charge V. Counsel told Rose he did not *think* Rose would have to register as a sex offender if he pleaded guilty, because counsel believed the assault charges were "minute." Joint Appendix (hereinafter JA) at 89 (*Dubay* Hearing Transcript, 12:1-4). Furthermore, Rose's civilian counsel told Rose that he would "'look into it further[,]'" and yet although he admittedly

never did, he *still* advised Rose that he saw "'no reason why . . . [Rose would] have to [register] with these charges . . . [and] to go ahead and sign the PTA.'" JA at 92 (*Dubay* Hearing Transcript, 15:11-13; 16:1-4).

As the AFCCA noted in its decision, civilian counsel never explicitly told Rose he would not have to register. Nevertheless, the lower court held, correctly, that "the totality of . . . [the] attorney's responses, and the manner in which those responses were conveyed, effectively amounted to an affirmative misrepresentation as to whether sex offender registration would be required." *Rose*, 67 M.J. at 633; *see also Strickland*, 466 U.S. at 688-89 (reasonableness of an attorney's conduct/advice is looked at in light of all of the circumstances, and the prevailing professional norms at the time of the alleged error). Additionally, although, as stated in *United States v. Walker*, 21 U.S.C.M.A. 376 (1972), that "strategic or tactical decisions" will not be second-guessed by the Court, a defense attorney cannot also simply "remain silent where there is no realistic strategic or tactical decision to make . . . ." *Walker*, 21 U.S.C.M.A. at 378.

Therefore, it follows that such misrepresentation of the law and failure *to even try* to obtain information regarding significant consequences stemming from Rose's guilty plea,

amounts to constitutionally deficient performance within *Strickland*.

### C. Counsel's Ineffective Representation Prejudiced Rose Because a Reasonable Probability Exists That Rose Would Not Have Pleaded Guilty on Charge V Absent Counsel's Ineffective Advice about Sex Offender Registration Consequences.

The second prong of the *Strickland* test requires the defendant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of proceeding would have been different." *Strickland,* 466 U.S. at 694. The Supreme Court in *Hill v. Lockhart,* 474 U.S. 52, extended the two-part ineffective assistance of counsel test to apply to challenges to guilty pleas. *Id. at* 58. The *Hill* court restated the prejudice standard as "whether the counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 59. Because Rose received ineffective assistance of counsel in connection with his guilty plea, *Amici* contend that Rose's claim of prejudice under *Hill* should be measured in the context of a plea process.

**1. In guilty plea cases, the prejudice prong of Strickland-Hill should require a reasonable probability that the defendant would not have pleaded guilty, not that the defendant would have achieved a better outcome at trial.**

In *Hill,* the Supreme Court defined "outcome" in the guilty plea context to mean "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Id.* The *Hill* court reasoned that "in many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Id.* The Supreme Court cited three particular examples: the failure to investigate, the failure to discover potentially exculpatory evidence, and the failure to advise of a potential affirmative defense. *Id.* Thus, the Supreme Court indicated that in some guilty plea cases prejudice may depend on whether the defendant would have received a lesser sentence or been acquitted at trial. *Id. (citing Evans v. Meyer,* 742 F.2d 371, 375 (7th Cir. 1984)("It is inconceivable to us...that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would

nevertheless have been given a shorter sentence than he actually received")).

Yet, in a justice system where nearly 95% of convictions are a result of guilty pleas,[5] a pure "trial-outcome" based prejudice test is inappropriately narrow because it both presumes that the only alternative to rejecting a plea offer is going to trial and focuses too much on predicting the success of a trial that did not take place. *Padilla*, 130 S. Ct. at 1485 ("Pleas account for nearly 95% of all criminal convictions"); *see* Jenny Roberts, *Proving Prejudice, Post Padilla*, 54 How. L.J. 693, 696 (2011). In *Hill*, The Supreme Court acknowledged that the prejudice inquiry in all plea cases are not like challenges to convictions obtained through a trial. *Hill*, 474 U.S. at 59 (stating "in many guilty plea cases" prejudice inquiry resembles that of challenges to trial convictions). This view is further supported by the recent holding of the Missouri Supreme Court that the *Hill* test is not the only way to establish prejudice. *Missouri v. Frye*, 311 S.W. 3d 350, 356 (2010), cert. granted, 131 S. Ct. 856 (2011)

[5] Mark Motivans, Ph.D., Federal Justice Statistics, 2009, U S Department of Justice, Office of Justice Programs, Bureau of Statistics, available online: http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2208 provides that in 2009 97% of convictions in US District Court were the result of guilty pleas. Justice Department, Felony Sentences in State Courts, also provided that in 2000, ninety-five percent (95%) of felony convictions in state courts were the result of guilty pleas, available online: http://bjs.ojp.usdoj.gov/content/pub/ascii/Fssc00.txt

(No.10-444).[6] There, the Missouri Supreme Court asserted "*Hill's* template" for insisting on going to trial to establish prejudice "completely ignores *Strickland's* looser emphasis on whether a defendant can establish 'an adverse effect on the defense.'" *Frye,* 311 S.W. at 356.

While *Padilla* did not address the prejudice prong of the *Strickland* test, it did provide guidance on how prejudice should be addressed in cases where an attorney has misadvised or failed to warn his client of severe collateral consequences where the answer is "clear, succinct, and explicit." 130 S. Ct. 1473 (2010). Justice Stevens, for the majority, stated:

> 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*.

*Id.* at 1485 (emphasis added). Justice Stevens did not cite to *Strickland* or *Hill* for support of this test, but instead looked to *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000). *Id.*

In *Flores-Ortega*, The Supreme Court addressed an ineffective assistance claim based on the defense attorney's failure to file a notice of appeal without his client's consent. *Flores-Ortega*, 528 U.S. at 473. There, the court asked whether a rational defendant would have wanted to appeal

[6] In 2011-2012 Term, the Supreme Court will hear *Missouri v. Frye* and *Cooper v. Lafler,* 376 F. App'x 563 (6th Cir. 2010), cert. granted, 131 S. Ct. 856 (2011) (No. 10-209). Both are ineffective assistances cases where the Court will address the prejudice prong of the *Strickland* test.

or whether the particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Id.* at 480. In determining prejudice, the court held the defendant must demonstrate a reasonable probability that but for counsel's deficient conduct, he would have appealed. *Id.* at 484. In line with *Strickland*, those determinations "will turn on the facts of a particular case." *Id.* at 485; *see also Strickland*, 466 U.S. at 695. The proper analysis did not hinge on whether the defendant would have won his appeal, but instead looked to whether he was deprived of an appeal to which he was entitled and would have pursued absent to his attorney's deficient performance. *Id.* at 484.

*Padilla*'s analysis of a "rational under the circumstances" test moves away from a trial-outcome analysis towards an inquiry that recognizes the realities of the plea bargaining process. *See Roberts, supra* at 721-22. These realities include negotiations over both charges and sentence, and the effect of these negotiations on a defendant's decision-making process. *Id.; cf.* also A.B.A. Model Rule of Professional Conduct 1.2(a)(defendant decides whether to plead guilty in a criminal case). Ultimately if the question is whether the outcome of the plea process is affected by a defense counsel's ineffective performance, knowledge of a severe collateral consequence may and should factor into

defense counsel's negotiation or sentencing advocacy, and it clearly can play a significant role in a defendant's decision whether to plead guilty. *Hill*, 474 U.S. at 59*; see Padilla*, 130 S. Ct. at 1486. Justice Stevens in *Padilla* explained at length the different outcomes that may arise from accounting for such information:

> 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 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.

*Id.* This broader, context-specific approach acknowledges that insisting on trial is not the only alternative to rejecting a plea agreement or the only way to show a different outcome.

By definition, collateral consequences do not factor into the guilt or innocence phase of trial, making it nearly impossible for a defendant to establish a different outcome at

trial but for the attorney's misadvice or failure to warn. *See Adeyeye v. United States*, No. 00 CR 233, 2009 WL 3229585, at *6 (N.D. Ill. Oct. 1, 2009)(finding that the defendant was not prejudiced by his attorney's failure to warn about automatic deportation because he had "not demonstrated (nor could he) that the knowledge of this deportation possibly had any effect on his guilt or innocence."). This degree of prejudice cannot be what *Strickland* contemplated when it rejected a preponderance of the evidence burden of proof, opting instead for the lower reasonable probability standard. 466 U.S. at 696-97 ("We believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case … the standard is not quite appropriate"). Nor could it be what the *Padilla* court envisioned when holding the effectiveness prong of *Strickland* was met and remanding on the issue of prejudice. The principles established in *Strickland* were not meant to establish "mechanical rules." *Id.* Instead, fundamental fairness should be the ultimate focus. *Id.* at 696. In short, plea negotiations are different from trial, and fundamental fairness should compel courts to have ineffective assistance jurisprudence reflect those differences.

Some courts have appropriately incorporated such a context specific prejudice approach that accounts for

realities of the plea decision-making process. *See Hutchings v. United States*, 618 F.3d 693, 697 (7th Cir. 2010)(finding prejudice can be supported by the defendant's admission he would have rejected the plea combine with objective evidence such as a history of the plea discussion and the type of misinformation provided by counsel); *see also United States v. Bradley,* 2012 CAAF Lexis 205,*9-10 (Merely being entitled to relief on an erroneous motion is insufficient to prove prejudice, finding that appellant must also show it would be rational to not plead guilty if advised properly by counsel). One such example was cited by the lower court in this case, *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005). *United States v. Rose*, 67 M.J. 630, 633 (A.F. Ct. Crim. App. 2009).

In *Kwan*, the defendant claimed that had he known about the automatic deportation consequences of his guilty plea, he would have discussed with his lawyer the possibility of amending his plea agreement or would have requested a downward departure from the sentencing court. *Id.* at 1017. Kwan was potentially eligible for downward departure, and the court found that "[h]ad counsel and the court been aware that a nominally shorter sentence would enable [the defendant] to avoid deportation, there is a reasonable probability that the court would have imposed a sentence of less than one year." *Id*. The court recognized that upon rejecting the offered plea

the defendant "could have gone to trial or renegotiated his plea agreement to avoid deportation; he could have pled guilty to a lesser charge, or the parties could have stipulated that [he] would be sentenced to less than one year in prison." *Id.* at 1018. In the end, the defendant was able to prove the prejudice prong not by insisting on a trial, but instead by demonstrating the reasonable probability that being misinformed of certain deportability not only affected the defendants decision-making process to take the plea but also that it affected the plea process.

The *Strickland* court stated that the appropriate test for prejudice is whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," defining a reasonable probability as "a probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694. While the likely outcome at trial still may be a relevant factor to consider, in application, whether a given defendant has made the requisite showing of prejudice depends on the totality of the facts of a particular case. *Flores-Ortega,* 528 U.S. 470, 485 (citing *Strickland*, 466 U.S. at 695-96). Different outcome in the context of plea bargaining should simply mean whether the defendant would have pled guilty had he received effective counsel.

**2. In assessing a prejudice claim under Strickland-Hill, courts should examine the record for evidentiary factors relevant to the guilty plea process.**

The appropriate prejudice test in this case should ask whether it is reasonably probable that a rational person in the Rose's position would have rejected the plea had he known that registration was mandatory. *Roberts, supra,* at 698; *see also, Padilla,* 130 S. Ct. at 1485. In deciding this question, this Court must ask whether it is reasonably probable that there would have been a different outcome.[7] *Id.* The first question is essentially the "rational under the circumstances" test adopted in *Padilla*, while the second question asked is nearly the same as that of *Strickland*, but with the broader understanding of "different outcome" as explained above.

While there may be many factors to take into consideration, the court should consider at least the following: (1) the severity of the attorney error, in context; (2) the strength of the evidence against the defendant and strength of potential affirmative defenses; and (3) the probability of a different plea offer, or different sentence. These factors are not a departure from the type of

[7] As the introduction outlines, the proposed prejudice test is an adoption of the test laid out by Professor Roberts in her article, "Proving Prejudice, Post Padilla," 54 How. L.J. 693.

analysis in which many courts are engaging to address ineffective assistance claims, particularly this court in *United States v. Bradley*, 2012 CAAF Lexis 205.

In *Bradley*, this court adopted a prejudice analysis that is very similar to the test proposed. While finding that the appellant did not suffer prejudice, the court took into account the severity of the attorney error. There the appellant alleged that counsel was ineffective for erroneously waiving a motion, however the court stated, "it makes sense to deny the claim if the appellant would not be entitled to relief on the erroneously waived motion, because the accused cannot show he was harmed by not preserving the issue." *Id.* at *9. Citing to *Padilla*, this court then established that in order to prevail on the prejudice prong the appellant would have to not only show he was entitled to relief on the erroneously waived motion, but that he must also show that "if he had been advised properly, then it would have been rational for him not to plead guilty." *Id.* at *9-10. The court went on to weigh the strength of the evidence against the appellant, the lack of affirmative defenses, and the failure of the appellant to show how the outcome would have been different. *Id.* at *10-11. Taking all of those factors into consideration, this court concluded that the "Appellant have not convinced us

that it would have been rational for him to have rejected the plea offer." *Id.* at 12.

While *Bradley* is not an ineffective assistance claim based upon a failure to warn or misadvise of a collateral consequence, the court's application of a prejudice analysis that incorporates more than a trial-outcome demonstrates that this broader analysis is a workable alternative. In cases such as the one before the court, it is important to acknowledge that "incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question." *Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring). For that reason, a more comprehensive prejudice analysis is important to help provide a remedy in these types of cases where a lack of knowledge or incorrect knowledge provided by counsel about severe collateral consequences might have caused a defendant to forfeit a judicial proceeding to which he was otherwise entitled.

### 3. The record establishes that Rose was prejudiced by his counsel's ineffective representation.

Consistent with the factors laid out above, this Court should consider whether it is reasonably probable that had Rose known sex offender registration was required, he would

have rejected the offer.[8] In examining this question, the Court would need to ask whether it is reasonably probable that defense counsel, using the information about offender registration in his negotiations, could have structured a different plea agreement to avoid that consequence, even if it meant a higher penal sentence. Alternatively, if negotiations do not lead to avoidance, the Court would ask if it is reasonably probable that the prosecutor or judge would have offered a lesser sentence to account for such a consequence. In addition, the Court should also determine in light of all the facts and circumstances of the charges as well as the consequence of offender registration, whether a rational person in Rose's situation would have taken his chances at trial.

In this case, the lower court stated "it is [] clear that the appellant was prejudiced by his counsel's erroneous advice" for two reasons. *Rose*, 67 M.J. at 635. First, the court was convinced that but for his counsel's advice, Rose would not have pled guilty to the indecent assault charges *Id.*

[8] The Appellant (Government) argues that Rose has not proven prejudice because he has not shown he is subject to sex offender registration nor that he has registered (Appellant's brief at 25), however Appellee's brief demonstrates under the state laws of Alabama and Florida that Rose would be required to register in those states(Appellee's brief at 15-19).

Second, based upon federal law, it was apparent that registration is required. *Id.*

Facts that the lower court took account of in support of such a conclusion included the *Dubay* hearing finding that sex offender registration was a "key concern" of Rose which was supported by the testimony of all hearing witnesses. *Id.* Rose testified that he was surprised when he was told by confinement personnel he would be required to register and that he would not have pled to the relevant charges had he known. *Id.* Additionally, his military counsel testified that even he was surprised to learn that Rose pled to the indecent assaults considering how important the registration issue was to Rose. Finally, Rose's civilian counsel acknowledged that had he known sex offender registration was required, he would not have advised Rose to plead guilty. *Id.*

The lower court's findings and the record support that the attorney error, in context, was quite severe. Rose testified that he asked both his military and civilian counsel whether he would be subject to registration, and neither provided an informed answer to the question. *See* JA at 89-93. Rose further testified, "If I'd have had to register, I definitely would not have pled guilty." JA at 90. This testimony was supported by the testimony of Rose's military counsel, "One thing he made clear to me, and this is the one

thing that sticks out is he wasn't going to plead to that indecent assault if he had to register as a sex offender, which is understandable." JA at 121. Rose's civilian counsel downplayed the charges calling them "fairly innocuous" and "just foolery." JA at 107. However of biggest concern is the gravity of sex offense registration, and civilian counsel's failure to conduct "[e]ven cursory research [which] would have disclosed that conviction of the indecent assaults carried a substantial risk" of registration consequences. JA at 181.

It is not clear from the record how strong the evidence against Rose on the indecent assault charges is, but his civilian counsel thought the charges were "just foolery" and he "[a]bsolutely" thought there were mitigating circumstances. JA at 107-108. Civilian counsel testified that had he known Rose would have to register as a sex offender, he would not have advised him to plead guilty, because it was his "strong belief, from having gone through the Article 32…and [having] an opportunity to cross-examine the [witnesses/alleged victims]," that the charges were fairly innocuous. *Id.* at 107. He also suggested that the government supported this conclusion. *Id. (Dubay* Hearing Transcript, 30:13-20).

During pretrial negotiations, two different pretrial agreements were offered, and civilian counsel testified that this process was "pretty heavily negotiated." JA at 107, 164.

The first pretrial agreement offered by the defense did not include the three indecent assaults. JA at 164. That offer was rejected, and the second, accepted offer included them. *Id.* While sex offender registration was a "key concern" of Rose, he was also concerned about the length of his confinement. JA at 108, 164. With the defense and the government having already engaged in a back and forth during plea negotiations, it would follow that had counsel had knowledge of the registration consequence, he could have incorporated that information into his negotiating strategy to propose a third pretrial agreement. While civilian counsel did testify that the government was "very assertive" about requiring Rose to plead to all charges, including the indecent assault, this position was in exchange for time of confinement which could have been leveraged in the negotiation had counsel been effective. JA at 108.

In addressing the prejudice prong of the *Strickland* test, the court should consider: first, whether there is a reasonable probability that a rational person in Rose's position would have declined to plead guilty if he had received effective assistance from counsel; and in determining that question, whether there is a reasonable probability there would have been a different outcome had Rose not taken the plea.

What has been established in the record is that had Rose and his civilian counsel been aware of sex offender registration consequences, he would have been advised by counsel and chosen not to plead guilty to the second pretrial agreement. JA at 164-65; *see also Dubay* Hearing Transcript. Before Rose pled guilty, his civilian counsel did not tell him definitively that he would or would not have to register, however his question went unanswered. JA at 165. The military judge who presided over the *Dubay* hearing concluded that "AB Rose was given the impression that he would not have to register," and that "this impression was reasonable under the circumstances." *Id.*

Considering the totality of the plea bargaining process in this case, both questions should be answered in the affirmative. It is reasonably probable that civilian counsel, using the information about offender registration in his negotiations, could have structured a different plea agreement to avoid that consequence, even if it meant a higher sentence. It is reasonably probable that a rational person in AB Rose's position, with effective counsel, would have rejected the second plea offer, and likely would have sought to renegotiate another plea. Therefore, the court should find Rose has met the burden of the prejudice prong.

## Conclusion

For the foregoing reasons, *Amici* respectfully submit that the Court should affirm the lower court's finding of ineffective assistance of counsel.

Respectfully submitted this 20th day of March, 2012.

/s/ Cherlyn Walden
_____
Cherlyn Walden
cwalden@lawschool.gonzaga.edu

/s/ Danielle Purcell
_____
Danielle Purcell
dpurcell@lawschool.gonzaga.edu

/s/ Brooks Holland
_____

Brooks Holland
CAAF Bar No. 35616
Supervising Attorney of Record
Gonzaga University School of Law
721 N. Cincinnati Street
Spokane, WA 99202
(509)313-6120
bholland@lawschool.gonzaga.edu

**CERTIFICATE OF COMPLIANCE WITH RULES 24(d)**

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/s/ Cherlyn Walden

_____

Cherlyn Walden
cwalden@lawschool.gonzaga.edu

/s/ Danielle Purcell

_____

Danielle Purcell
dpurcell@lawschool.gonzaga.edu

/s/ Brooks Holland

_____

Brooks Holland
CAAF Bar No. 35616
Supervising Attorney of Record
Gonzaga University School of Law
721 N. Cincinnati Street
Spokane, WA 99202
(509)313-6120
bholland@lawschool.gonzaga.edu

**CERTIFICATE OF FILING AND SERVICE**

I certify that this Brief was filed electronically with the Court on March 20, 2012. I further certify that a copy of this Brief was delivered electronically to the following persons on March 20, 2012:

Dwight H. Sullivan, Esq.
Counsel for Appellee Brandon T. Rose
dwight.sullivan@pentagon.af.mil

Linelle A. Letendre, Lt. Col. USAF
Counsel for Appellant United States
linell.letendre@pentagon.af.mil

/s/ Brooks Holland

_____

Assistant Professor of Law
CAAF Bar No. 35616
Gonzaga University School of Law
721 N. Cincinnati Street
Spokane, WA 99202
509)313-6120
bholland@lawschool.gonzaga.edu