A Game Changer? The Impact of Padilla v. Kentucky on the Collateral Consequences Rule and Ineffective Assistance of Counsel Claims

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The Sixth Amendment entitles a criminal defendant to effective assistance of counsel when deciding whether to plead guilty. Defense counsel, therefore, must ensure that his client understands the direct consequences of the plea: the nature of the criminal charge and the sentence. However, pursuant to the traditional collateral consequences rule employed by most courts, counsel has no Sixth Amendment obligation to warn that criminal defendant of so-called collateral consequences, such as mandatory sex offender registration, civil commitment, or ineligibility for parole. Prior to 2010, deportation was also considered a collateral consequence of a guilty plea in most jurisdictions.

In Padilla v. Kentucky, the U.S. Supreme Court made deportation an exception to the collateral consequences rule, and held for the first time that counsel’s failure to advise a criminal defendant of the deportation consequences of a guilty plea constitutes ineffective assistance of counsel. Lower courts have differed on whether to interpret Padilla as effecting a change to the collateral consequences rule, and more specifically, how to define direct consequences, in the context of an ineffective assistance of counsel claim. This Note examines the conflict, and concludes that courts should redefine the scope of direct consequences in light of the factors considered by the Court in Padilla.

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INTRODUCTION

Imagine that you are a noncitizen charged with a criminal offense. The prosecution presents a plea bargain: you plead guilty in exchange for a reduced prison sentence. Your case does not look promising, and the plea bargain seems like a great offer. But is there a catch? An overwhelming number of criminal offenses result in the deportation of noncitizens like you. Would you want your lawyer to tell you if accepting the guilty plea would cause you to be deported? Almost certainly yes. But does your lawyer have a constitutional duty to do this?

Until a few years ago, the answer was probably not. However, in *Padilla v. Kentucky*, the U.S. Supreme Court held that an attorney’s failure to warn his client that pleading guilty to a criminal drug charge would result in his deportation constituted ineffective assistance of counsel in violation of the Sixth Amendment. Recognizing the severity of a deportation consequence, the Court determined that Padilla’s counsel failed to give him the constitutionally adequate assistance required under the Sixth Amendment’s Counsel Clause. This decision by the *Padilla* Court has the potential to effect a sea change in ineffective assistance of counsel jurisprudence.

The distinction between the direct and collateral consequences of a guilty plea runs throughout both state and federal jurisprudence. Pursuant to the collateral consequences rule, attorneys are constitutionally required to warn their clients about direct consequences of a guilty plea, which typically

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2. Id. at 360.
3. Id. at 373–75.
relate to the nature of the criminal charge and sentencing.\(^5\) By contrast, attorneys are not required to warn their clients about collateral consequences, which are usually noncriminal in nature.\(^6\) Deportation, the consequence at issue in \textit{Padilla}, was traditionally considered a collateral consequence of a guilty plea because it is a civil, not a criminal, consequence.\(^7\) Therefore, prior to \textit{Padilla}, counsel was not constitutionally required to advise a criminal defendant of the deportation consequences of a guilty plea in most jurisdictions. However, the \textit{Padilla} Court created a categorical exception to the traditional rule: in order to provide effective assistance of counsel, attorneys must warn criminal defendants when a guilty plea could result in deportation.\(^8\) To reach this conclusion, however, the Supreme Court refused to categorize deportation as either a direct or collateral consequence. Instead, the Court focused on several features of immigration law that render it “intimately related to the criminal process.”\(^9\)

Lower courts have split regarding \textit{Padilla}’s impact on the collateral consequences rule.\(^10\) Some courts, referred to in this Note as “no impact” courts, have held that \textit{Padilla} is an outlier decision that has no impact on the traditional distinction between direct and collateral consequences.\(^11\) These courts interpret \textit{Padilla}’s holding to be limited to deportation.\(^12\) As a result, these no impact courts deny ineffective assistance of counsel claims based on counsel’s failure to warn of consequences traditionally considered to be collateral.\(^13\) However, other courts, referred to in this Note as “innovator” courts, have held that \textit{Padilla} shifted the understanding of the direct and collateral consequences of a guilty plea for the purpose of an ineffective assistance of counsel claim.\(^14\) Innovator courts have held that, after \textit{Padilla}, some traditional collateral consequences must be considered direct under the existing collateral consequences rule.\(^15\)

This Note examines \textit{Padilla} and the split it has caused in the lower courts where a defendant asserts an ineffective assistance of counsel claim based upon a traditional collateral consequence that stems automatically from a guilty plea, like deportation.\(^16\) Part I of this Note discusses the due process


\(^6\) See id. at 678, 694.


\(^8\) \textit{Padilla}, 559 U.S. at 374.

\(^9\) Id. at 365–66.

\(^10\) See infra Part II.

\(^11\) See infra Part II.A.

\(^12\) See infra Part II.A.

\(^13\) See infra Part II.A.

\(^14\) See infra Part II.B.

\(^15\) See infra Part II.B.

\(^16\) Courts have also considered \textit{Padilla}’s impact on the direct versus collateral distinction when evaluating an ineffective assistance of counsel claim based upon a
I. Padilla in Context: Ineffective Assistance of Counsel, Guilty Pleas, and the Collateral Consequences Rule

Part I begins by providing an overview of the way in which courts evaluate the validity of a guilty plea. It tracks the development of the collateral consequences rule, and the importation of that rule into the context of an ineffective assistance of counsel claim. Next, this Part surveys the immigration law landscape leading up to, and providing the foundation for, the Supreme Court’s opinion in Padilla v. Kentucky.\textsuperscript{17} Finally, this part presents the Supreme Court opinion in Padilla, and briefly

Traditional collateral consequence that, unlike deportation, does not stem automatically from a guilty plea. See, e.g., Bauder v. Dep’t of Corr., 619 F.3d 1272 (11th Cir. 2010) (evaluating an ineffective assistance of counsel claim based upon failure to warn of the possibility of civil commitment); Maxwell v. Larkins, No. 4:08 CV 1896, 2010 WL 2680333 (E.D. Mo. July 1, 2010) (same); Brown v. Goodwin, Civil No. 09-211, 2010 WL 1930574 (D.N.J. May 11, 2010) (same); People v. Hughes, 953 N.E.2d 1017 (Ill. App. Ct. 2011) (same); State v. Carter, No. 12-1938, 2013 WL 4769414 (Iowa Ct. App. Sept. 5, 2013) (same); Whipple v. State, No. A12-1713, 2013 WL 2372168 (Minn. Ct. App. June 3, 2013) (same); Thomas v. State, 365 S.W.3d 537 (Tex. Ct. App. 2012) (same); see also People v. Floyd, No. 94K053487, 2012 WL 1414943 (N.Y. City Crim. Ct. Apr. 13, 2012) (evaluating an ineffective assistance of counsel claim based upon failure to warn of ineligibility for citizenship). These decisions are outside the scope of this Note. The consequences at issue in those cases present an additional variable—they operate differently than deportation. In the context of civil commitment, for example, additional proceedings are warranted before a defendant is civilly committed because of his guilty plea. See, e.g., Brown, 2010 WL 1930574, at *13 (“[Civil commitment] necessarily requires an individualized assessment of each person that might—but not must—be civilly committed upon expiration of his prison term . . . .”). Therefore, in order to isolate the Padilla effect, this Note focuses only on traditional collateral consequences stemming automatically from a guilty plea, like deportation. Furthermore, this Note is not intended to be a survey of all post-Padilla collateral consequences cases. Discussion is limited to cases that provide an insightful analysis of the Padilla decision.

\textsuperscript{17} 559 U.S. 356 (2010).
summarizes the subsequent Kentucky Court of Appeals opinion on remand.  

A. Guilty Pleas, Due Process, and Effective Assistance of Counsel

In order for a guilty plea to be valid, the defendant must enter the plea voluntarily and knowingly, and the defendant must receive effective assistance of counsel when deciding whether to accept the plea. This section discusses both requirements in order to demonstrate how courts imported the limiting test for a voluntary plea into the effective assistance of counsel context. Part I.A.1 explains the origins of the “voluntary and knowing” requirement, and how judicial interpretation of that requirement led to the development of the collateral consequences rule. Part I.A.2 tracks the incorporation of the collateral consequences rule into ineffective assistance of counsel jurisprudence.

1. Voluntary and Knowing: The Development of the Collateral Consequences Rule

When a defendant pleads guilty, he does more than admit he committed the offense—he also waives his Sixth Amendment right to a trial before a judge and jury. Therefore, in order for this waiver of rights to be valid under the Due Process Clause, the Supreme Court requires that the presiding judge ensure that the guilty plea is “voluntary” and “knowing.” In Brady v. United States, the Supreme Court clarified the meaning of the “voluntariness” standard with respect to a guilty plea. In Brady, the Supreme Court held that a defendant makes a voluntary, and therefore valid, guilty plea if he is “fully aware of the direct consequences” of that plea. Lower courts have interpreted this language from Brady to require a judge to inform a defendant of the direct consequences of a guilty plea, but

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21. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .”); Brady, 397 U.S. at 748.
23. Brady, 397 U.S. at 748.
24. Id. at 755 (“[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes).” (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957), rev’d on other grounds, 356 U.S. 26 (1958))).
not the collateral consequences. This interpretation of Brady has been termed the “collateral consequences rule.”

While the Supreme Court has never expressly validated the rule, it is widely recognized by lower courts in the context of evaluating the validity of a guilty plea. Still, courts differ on how to define the distinction between direct and collateral consequences. The prevailing definition of a direct consequence is a consequence that is “direct, immediate, and largely automatic.” However, other courts distinguish direct consequences from collateral ones based on whether the particular consequence is punitive or nonpunitive in nature. A third definition limits the scope of direct consequences to those that remain within the control and responsibility of the sentencing court. Based on these three definitions, direct consequences typically relate to the nature of the charge and sentencing, whereas collateral consequences are usually noncriminal in nature.

Due to the narrow definition of direct consequences, very few are widely recognized. The most commonly accepted direct consequences are prison terms, fines, and other criminal punishments imposed by the sentencing judge. If a presiding judge fails to warn a defendant of these consequences prior to the entry of a guilty plea, that plea is considered involuntary and unknowing. On the other hand, typical collateral consequences include, inter alia, mandatory sex offender registration, loss

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26. See, e.g., United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971) (“We presume that the Supreme Court meant what it said when it used the word ‘direct’; by doing so, it excluded collateral consequences.”); see also Jenny Roberts, Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, 95 Iowa L. Rev. 119, 124 (2009) (“Lower federal and state courts have created the collateral consequences rule, stating that an individual’s guilty plea is constitutionally valid even if that person was unaware of his conviction’s ‘collateral’ consequences.”).

27. See, e.g., Roberts, supra note 26, at 124.

28. Id. at 132.

29. Chin & Holmes, supra note 4, at 730. But see Roberts, supra note 5, at 689 (questioning the soundness of the presumption that the Supreme Court intended such a distinction).

30. See Roberts, supra note 5, at 689–93.

31. Id. at 689.

32. Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973) (“The distinction between ‘direct’ and ‘collateral’ consequences of a plea . . . turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.”).


34. El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002) (“A collateral consequence is one that ‘remains beyond the control and responsibility of the district court in which that conviction was entered.’” (quoting United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000))).

35. See Roberts, supra note 5, at 678.

36. See id. at 672.

37. See Chin & Holmes, supra note 4, at 727.

38. See, e.g., Virsnieks v. Smith, 521 F.3d 707, 715–16 (7th Cir. 2008).
of the right to vote,\textsuperscript{39} loss of the right to own a gun,\textsuperscript{40} revocation of a
driver’s license,\textsuperscript{41} and civil commitment as a sexually violent predator.\textsuperscript{42}
Additionally, prior to the Supreme Court’s ruling in \textit{Padilla},\textsuperscript{43} twelve
circuits considered deportation a collateral consequence.\textsuperscript{44} Pursuant to the
collateral consequences rule, a defendant’s plea remains knowing and voluntary—and, therefore, valid—even when a trial court fails to advise a
criminal defendant of these consequences.\textsuperscript{45}

\section*{2. Adoption of the Collateral Consequences Rule into the Realm of
Ineffective Assistance of Counsel Jurisprudence}

In addition to the due process requirement of a voluntary and knowing plea, a defendant must also have had the effective assistance of counsel in
deciding to enter the guilty plea.\textsuperscript{46} This requirement originated from the
Sixth Amendment right to counsel.\textsuperscript{47}

\subsection*{a. The Sixth Amendment Right to Effective Assistance of Counsel}

The Sixth Amendment’s Assistance of Counsel Clause provides, “In all
criminal prosecutions, the accused shall enjoy the right to . . . have the
Assistance of Counsel for his defence.”\textsuperscript{48} In a long line of cases, the
Supreme Court has established that a criminal defendant’s right to counsel
is fundamentally important to a fair trial.\textsuperscript{49} The Court considered this right
so important that it further held that the right to counsel includes the right to
effective assistance of counsel.\textsuperscript{50} Two veins of ineffective assistance of

\textsuperscript{39} See, e.g., Ruelas v. Wolfenbarger, 580 F.3d 403, 408 (6th Cir. 2009); Meaton v.
United States, 328 F.2d 379, 381 (5th Cir. 1964).

\textsuperscript{40} See, e.g., \textit{Ruelas}, 580 F.3d at 408.

\textsuperscript{41} See, e.g., Moore v. Hinton, 513 F.2d 781, 782 (5th Cir. 1975).

\textsuperscript{42} See, e.g., George v. Black, 732 F.2d 108, 110 (8th Cir. 1984).

\textsuperscript{43} For a discussion of the Supreme Court’s characterization of deportation in \textit{Padilla},
see infra Part I.C.2.

\textsuperscript{44} See, e.g., Broomes v. Ashcroft, 358 F.3d 1251, 1257 (10th Cir. 2004), \textit{abrogated by}
\textit{Padilla} v. Kentucky, 559 U.S. 356 (2010); El-Nobani v. United States, 287 F.3d 417, 421
(6th Cir. 2002); United States v. Amador-Leal, 276 F.3d 511, 517 (9th Cir. 2002), \textit{abrogated by}
\textit{Padilla}, 559 U.S. at 356; United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir. 2000),
\textit{abrogated by Padilla}, 559 U.S. at 356; United States v. Osiemi, 980 F.2d 344, 349 (5th Cir.
1993); Kandiel v. United States, 964 F.2d 794, 796 (8th Cir. 1992); United States v.
Montoya, 891 F.2d 1273, 1292–93 (7th Cir. 1989); United States v. Romero-Vilca, 850 F.2d
177, 179 (3d Cir. 1988); United States v. Campbell, 778 F.2d 764, 767 (11th Cir. 1985),
\textit{abrogated by Padilla}, 559 U.S. at 356; Michel v. United States, 507 F.2d 461, 464–66 (2d
Cir. 1974); Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973); United

\textsuperscript{45} See, e.g., Warren v. Richland Cnty. Ct., 223 F.3d 454, 458 (7th Cir. 2000);
Brown v. Perini, 718 F.2d 784, 784 (6th Cir. 1983).

\textsuperscript{46} Hill v. Lockhart, 474 U.S. 52 (1985).


\textsuperscript{48} U.S. Const. amend. VI.

\textsuperscript{49} Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458
(1938); Powell v. Alabama, 287 U.S. 45 (1932).

counsel exist. The first vein concerns government interference with the way counsel conducts his defense.\(^{51}\) The second vein concerns defense counsel’s actual ineffectiveness by failing to provide “adequate legal assistance.”\(^{52}\) This Note—and the direct and collateral distinction—is concerned with the latter vein.

Until 1984, the Supreme Court had not fully articulated a constitutional standard regarding the actual effectiveness required of counsel’s assistance.\(^{53}\) With its decision in \textit{Strickland v. Washington}, the Supreme Court articulated a two-part test that has since been used to evaluate whether a counsel’s actual assistance in a criminal case satisfies the Sixth Amendment.\(^{54}\) This two-part test is meant to ensure a fair trial.\(^{55}\)

\textit{b. Creation and Extension of the Strickland Test}

In order to advance a successful ineffective assistance of counsel claim, the \textit{Strickland} test requires that a defendant show first that “counsel’s performance was deficient,” and second that “the deficient performance prejudiced the defense.”\(^{56}\) The \textit{Strickland} Court provided numerous examples of attorney behavior that could qualify as ineffective assistance.\(^{57}\) However, the Court made clear that “these basic duties neither exhaustively define[d] the obligations of counsel nor form[ed] a checklist for judicial evaluation of attorney performance.”\(^{58}\) Instead, “[r]easonable professional judgment” remained the overarching standard.\(^{59}\) The \textit{Strickland} Court stressed that bright-line rules for ineffective assistance of counsel claims were inappropriate,\(^{60}\) and indicated that courts should evaluate ineffective assistance of counsel claims on a case-by-case basis.\(^{61}\)

\(^{51}\) See, e.g., Geders v. United States, 425 U.S. 80 (1976) (barring attorney-client consultation); Herring v. New York, 422 U.S. 853 (1975) (barring defense counsel’s summation at trial). This type of ineffective assistance of counsel is beyond the scope of this Note.

\(^{52}\) See, e.g., Cuyler v. Sullivan, 446 U.S. 335, 344 (1980). For the purposes of this Note, discussion of ineffective assistance of counsel refers to the second vein—an attorney’s failure to provide “adequate legal assistance.”

\(^{53}\) \textit{Id.} at 687.

\(^{54}\) \textit{Id.} at 668, 686 (1984).

\(^{55}\) \textit{Id.} at 687.

\(^{56}\) \textit{Id.} at 688 (finding that counsel has a duty of loyalty, to avoid conflicts of interest, to advocate the defendant’s cause, to help the defendant make important decisions, to keep defendant informed of developments in his case, and to use skill and knowledge to produce a reliable trial).

\(^{57}\) \textit{Id.} at 690.

\(^{58}\) \textit{Id.} at 690.

\(^{59}\) Chin & Holmes, \textit{supra} note 4, at 711.

\(^{60}\) \textit{Strickland}, 466 U.S. at 688, 693 (noting that “[m]ore specific guidelines are not appropriate” because “[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another”). This language prompted Chin and Holmes to criticize the lower courts’ adoption of the collateral consequences rule in the
Just one year after *Strickland*, the Supreme Court extended application of the *Strickland* test to pretrial proceedings in *Hill v. Lockhart*. The Court held that “the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” For purposes of proving ineffective assistance of counsel in the plea context, the first prong of *Strickland* remained identical to the standard that applied in the trial or sentencing context. However, in order to satisfy the “prejudice” prong of *Strickland* in the plea context, defendants must “show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”

c. Adoption of the Collateral Consequences Rule into the *Strickland* Analysis

The *Strickland* standard of “reasonable professional assistance” did not provide a bright-line rule for lower courts to apply when facing an ineffective assistance of counsel claim. However, lower courts needed a way to define the scope of “reasonable professional assistance” in the context of a guilty plea. Therefore, these courts imported the distinction between direct and collateral consequences from the due process context. The general rule is that an attorney’s performance is considered constitutionally deficient if he fails to advise a defendant of the direct consequences of entering a guilty plea. By contrast, an attorney can provide constitutionally adequate assistance without warning a defendant about collateral consequences of a guilty plea.

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63. Id. at 58.
64. Id.
65. Id. at 59.
66. See Roberts, supra note 26, at 124.
67. See id.
68. Roberts, supra note 5, at 694. Some jurisdictions recognize an exception to this rule, where defense counsel provides affirmative misadvice regarding a collateral consequence of a guilty plea. See, e.g., Sparks v. Sowders, 852 F.2d 882, 885 (6th Cir. 1988) (“[G]ross misadvice concerning [a collateral consequence] can amount to ineffective assistance of counsel.”); Strader v. Garrison, 611 F.2d 61, 65 (4th Cir. 1979) (“[W]hen [a defendant] is grossly misinformed about [a collateral consequence] by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel.”). A circuit court has never held that affirmative misadvice concerning a collateral consequence of a guilty plea cannot result in ineffective assistance under any circumstances. Padilla v. Kentucky, 559 U.S. 356, 386–87 (Alito, J., concurring). But see Commonwealth v. Padilla, 253 S.W.3d 482, 485 (Ky. 2008), rev’d, 559 U.S. at 356 (holding that the defense counsel’s mistaken advice to his client about the potential deportation consequences of a guilty plea provided no basis for vacating the defendant’s sentence); but see also Padilla, 559 U.S. at 388–89 (Scalia, J., dissenting) (“[A]ffirmative misadvice [does not] render[] an attorney’s assistance in defending against the prosecution constitutionally inadequate.”). One major issue with the affirmative misadvice exception is that it creates a “perverse incentive . . . [to] say nothing at
Almost every lower court uses the collateral consequences rule to evaluate an ineffective assistance of counsel claim.69 Three versions of the rule have emerged.70 At one extreme, the Kentucky approach, used by the Supreme Court of Kentucky in Padilla, finds both collateral consequences and affirmative misadvice regarding those collateral consequences outside the scope of the Sixth Amendment right to effective assistance of counsel.71 Under this approach, counsel’s performance is constitutionally adequate whether he fails to advise or misadvises the defendant of collateral consequences of a proffered guilty plea.

At the opposite end of the spectrum, the New Mexico approach imposes an affirmative duty of accurate advice regarding direct and some collateral consequences.72 New Mexico courts require an attorney to accurately advise a client about a guilty plea consequence when it would be unreasonable to withhold that advice.73

Finally, the majority approach, standing on middle ground, accepts the traditional collateral consequences rule and the affirmative misadvice exception.74 Under this approach, counsel’s performance is constitutionally adequate where he fails to advise the defendant of the collateral consequences of a guilty plea, but falls short of the constitutional standard where he provides affirmative misadvice regarding a collateral consequence.75 The Supreme Court has never approved any version of the collateral consequences rule in the ineffective assistance of counsel context.76

B. The Immigration Foundations of Padilla v. Kentucky: The Criminalization of Immigration Law

The Supreme Court began its decision in Padilla with an overview of the changes in immigration law over the last ninety years.77 The Court all about ‘collateral’ matters.” Roberts, supra note 26, at 119. “Judicial decisions that incorporate the collateral-consequences rule and affirmative-misadvice exception deliver the following message to lawyers and judges: it is better to say nothing than take the risk of saying something wrong . . . .” Id. at 140.


70. Roberts, supra note 26, at 177.

71. Id. at 177; see also Hew, supra note 69, at 40.

72. Roberts, supra note 26, at 177.

73. Id.; see, e.g., State v. Paredez, 101 P.3d 799, 804 (N.M. 2004).

74. Roberts, supra note 26, at 177. This approach was used by the Kentucky Court of Appeals in Padilla. Hew, supra note 69, at 40.

75. Roberts, supra note 26, at 177.


concluded that “these changes . . . have dramatically raised the stakes of a noncitizen’s criminal conviction.”

This section surveys relevant changes in federal immigration law to introduce the immigration concerns underlying the *Padilla* decision.

1. Statutorily Raising the Stakes of Deportation

The first federal laws governing deportation of aliens did not appear until the late 1880s. Grounds for deportation were limited under these laws, and typically included conditions existing at or prior to entry into the United States.

The Immigration and Nationality Act of 1917 (1917 Act) “radically changed prior law” and linked criminal law to deportation for the first time. The 1917 Act, which solidified restrictive immigration policy, was the first congressional act to make classes of aliens deportable based on criminal conduct committed in the United States. However, the 1917 Act did not call for automatic deportation of aliens guilty of certain offenses. Instead, it allowed judges the discretion to issue a judicial recommendation against deportation (JRAD), which bound the executive branch to prevent deportation. Additionally, the Immigration and Naturalization Service (INS) held that section 3 of the 1917 Act permitted relief in deportation proceedings for aliens who had departed and returned to the United States after the grounds for deportation arose. In the years after the 1917 Act,
Congress continued to broaden the scope of criminal offenses triggering deportation.89

The Immigration and Nationality Act of 195290 (INA) was the next major overhaul of federal immigration legislation, and is considered the “backbone of contemporary immigration law.”91 The INA consolidated prior immigration legislation92 and further solidified the link between immigration and criminal law by again expanding the categories of criminal offenses triggering deportation.93 The INA also eliminated the availability of JRAD discretionary relief for aliens who had committed narcotics offenses.94 However, aliens could obtain relief through suspension of deportation, voluntary departure, adjustment of status, or stay of deportation.95 Aliens commonly invoked these defenses as a basis for remaining in the United States.96 Further, prior to 1996, section 212 of the INA allowed the Attorney General broad discretion to grant deportation waivers.97

89. See, e.g., Act of Mar. 4, 1929, ch. 690, 45 Stat. 1551 (repealed 1952). The 1929 Act subjected aliens convicted of any offense and sentenced to two or more years in prison to deportation. Stumpf, supra note 79, at 1717; see also Alien Registration Act of 1940, ch. 439, § 23, 54 Stat. 670, 673 (repealed 1952). This Act made deportation the leading immigration sanction and further linked criminal law to immigration by expanding the grounds for deportation to additional classes of offenses. Stumpf, supra note 79, at 1716–17. However, the 1940 Act still provided aliens an avenue of relief, bestowing discretion upon the Attorney General to suspend deportation for aliens of good moral character when deportation would cause an economic hardship to the noncitizen’s family. Alien Registration Act of 1940, ch. 439, sec. 20, § 19(c), 54 Stat. at 672.


92. LEGOMSKY & RODRIGUEZ, supra note 84, at 17.

93. Cox & Rodriguez, supra note 80, at 515.


95. Immigration and Nationality Act of 1952, §§ 244–245, 66 Stat. at 214–17; see also 1 GORDON & MAILMAN, supra note 86, § 2.03[2][g]. In 1996, Congress replaced these avenues of relief with cancellation of removal. See 1 GORDON & MAILMAN, supra note 86, § 2.04[14][c].

96. See, e.g., Akram v. Holder, 721 F.3d 853, 856–57 (7th Cir. 2013).

97. That section of the INA provided: “Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General.” 8 U.S.C. § 1182(c) (1994), repealed by Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-597. Although this provision expressly applied only to exclusion proceedings, the Board of Immigration Appeals interpreted it to
In 1996, Congress made another significant contribution to existing immigration legislation. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) broadened the scope of deportable offenses and narrowed the scope of judicial review of deportation matters. The AEDPA and IIRIRA also curtailed the availability of deportation waivers from the Attorney General. Section 440(d) of the AEDPA identified a broad set of offenses for which convictions would make an alien ineligible for discretionary waiver relief. Section 304(b) of IIRIRA repealed section 212(c) of the INA, replacing it with the more narrow cancellation of removal provision.

2. Judicial Action in the Realm of Immigration Law

The text of the U.S. Constitution does not provide Congress the power to regulate immigration. It was, therefore, left to the Supreme Court to articulate such a source of power. The Court first did so in 1889 with the creation of the plenary powers doctrine in the context of exclusion. The plenary powers doctrine left aliens largely at the mercy of the executive and
The Supreme Court also found that inherent sovereign power existed over exclusion. Therefore, the constitutional protections afforded to criminal proceedings were not available in exclusion proceedings. Four years later, the Supreme Court applied the plenary powers doctrine in the context of deportation. Using the same reasoning employed in the context of exclusion, the Court held that the constitutional safeguards of criminal law are not applicable to deportation proceedings. The Court also characterized deportation as a civil matter for the first time. This label is significant because “civil” matters do not merit the same thorough procedural review as criminal matters. In 1903, however, the Court extended some protections to immigration matters, holding that an alien is entitled to due process of law in deportation proceedings.

Under the classic plenary powers doctrine, judicial review is narrowly circumscribed in the immigration context. While certain cases prove this to be true, scholars have observed that beginning in the 1940s, courts began to circumvent the classic doctrine through techniques of statutory interpretation. Courts taking this approach often noted the harshness of

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109. The doctrine bestows upon Congress and the executive broad and largely exclusive authority on immigration matters. See Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (asserting that the power to deport is “an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare”).
110. Chae Chan Ping, 130 U.S. at 609.
111. See id. at 606. The Court’s decision was unclear as to whether this holding would also apply to deportation. Markowitz, supra note 76, at 1311.
112. Fong Yue Ting, 149 U.S. at 730.
113. Id.
114. Id. In 1913, the Supreme Court explicitly determined that deportation was not a criminal punishment. Bugajewitz v. Adams, 228 U.S. 585, 591 (1913). Courts continued to label deportation as “civil,” but expressed discomfort with that label because of the severity of the consequence. See, e.g., Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) (questioning, but refusing to reconsider, the “civil” label of deportation); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (noting that deportation is a “drastic measure”); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) (emphasizing the “high and momentous” stakes in deportation proceedings); Bridges v. Wixon, 326 U.S. 135, 154 (1945) (referring to the impact of a deportation order as a “great hardship”).
115. See Hiroshi Motomura, The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights, 92 COLUM. L. REV. 1625, 1632 (1992). However, scholars have suggested that immigration is no longer properly classified as completely civil or completely criminal. See generally Kris Kobach, The Quintessential Force Multiplier: The Inherent Authority of Local Police To Make Immigration Arrests, 69 ALB. L. REV. 179, 223 (2005) (“The overlap between civil and criminal provisions of immigration law is also demonstrated by the many actions in the immigration arena that trigger both civil and criminal penalties.”); Markowitz, supra note 76.
117. See, e.g., United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (finding that Knauff’s exclusion without a hearing was “reasonable” as required by the 1941 Act because “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned”).
the deportation consequence. Dissenters from opinions adhering to the classic plenary powers doctrine argued that deportation really constituted a punishment.

These cases and the statutes discussed in the prior section demonstrate the dialogue between Congress and the Supreme Court regarding immigration law, specifically deportation. The increasing availability of deportation as a consequence for criminal activity, coupled with judicial concern about the harshness of the consequences of deportation, laid the foundation for the Supreme Court’s decision in Padilla v. Kentucky. The next section provides a discussion of the majority, concurring, and dissenting opinions in Padilla.

C. Padilla v. Kentucky: A Change in the Landscape of Collateral Consequences

The U.S. Supreme Court held in Padilla v. Kentucky that defense counsel’s inaccurate advice regarding the deportation consequences of the defendant’s guilty plea constituted ineffective assistance of counsel. This section describes the Supreme Court’s majority decision in Padilla, the concurring and dissenting opinions in Padilla, and briefly mentions the subsequent decision of the Kentucky Court of Appeals on remand.

1. Jose Padilla’s Path to the Supreme Court

Jose Padilla, a Honduras native, had been a lawful permanent resident of the United States for over forty years. While in the United States, Padilla served in the armed forces with honor during the Vietnam War. Prior to his conviction, Padilla resided in California with his wife, three children, and...
and an elderly mother-in-law. Padilla worked as a “self-employed tractor-trailer owner.” While driving a truck route from California to Illinois and Michigan, Padilla stopped at a weigh station in Kentucky. While at the weigh station, Padilla consented to a search of his truck cab. This search revealed a substantial amount of marijuana. Padilla’s case was prosecuted in Kentucky state court. Although he testified that he did not know that he was transporting marijuana until the search, Padilla pled guilty to “various marijuana-related charges, including trafficking in more than five pounds of marijuana.” This offense is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i). However, Padilla relied upon his counsel’s advice that he “did not have to worry about immigration status since he had been in the country so long.” Padilla was sentenced to five years in prison with five years probation. While in prison, Padilla was served with an immigration detainer, which meant that after his release from prison, Padilla faced “virtually mandatory” deportation. Padilla appealed to the Kentucky Supreme Court for postconviction relief. He asserted that he would have gone to trial had his lawyer warned him of the deportation consequences of his guilty plea. The Kentucky Supreme Court held that the Sixth Amendment guarantee of effective assistance of counsel did not protect Padilla from erroneous advice about deportation, because it was merely a collateral consequence of his conviction. Thus, the Kentucky Supreme Court denied relief without an evidentiary hearing. Padilla appealed to the U.S. Supreme Court. The Court granted certiorari to decide “whether, as a matter of federal law, Padilla’s counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country.”

The Supreme Court reversed Padilla’s conviction in a seven-to-two vote. Justice Stevens delivered the majority opinion. Justice Alito authored a concurring opinion in which Chief Justice Roberts joined, and Justice Scalia, joined by Justice Thomas, dissented. The next sections review each opinion.

128. Id. at 327.
129. Id.
130. Id.
131. Id. at 324.
134. Padilla, 381 S.W.3d at 483.
135. Id.
136. Padilla, 559 U.S. at 359.
137. Id.
138. Id.
139. Id.
140. Id. at 359–60.
2. The Supreme Court Majority

After an exegesis on immigration law, the Court embarked on a doctrinal discussion of Padilla’s ineffective assistance of counsel claim. The Court acknowledged the collateral consequences rule used by lower courts, including the Kentucky Supreme Court, to evaluate a \textit{Strickland} claim. However, the Court noted that it had never applied the collateral consequences rule, and explicitly refused to do so in \textit{Padilla}. The Court also acknowledged that removal proceedings are “civil in nature.” However, the Court noted that it was difficult to classify as a direct or collateral consequence. The Court pointed to several factors to support this conclusion. First, although deportation proceedings are civil in nature, deportation is a “particularly severe ‘penalty’” with a nearly automatic result. Further, the deportation penalty is so intimately related to the criminal conviction that it is “difficult” to divorce the penalty from the conviction in the deportation context. Finally, the Court noted the particular severity of deportation. Based on these factors, the Supreme Court concluded that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. \textit{Strickland} applies to Padilla’s claim.”

Having determined that advice regarding the deportation consequences of a guilty plea falls within the Sixth Amendment right to effective assistance of counsel, the Court applied the \textit{Strickland} test. The Court determined that the “weight of prevailing professional norms,” along with the clarity of the immigration statute mandating deportation, supports the conclusion that Padilla’s counsel was constitutionally deficient in misadvising him of the deportation consequences of his guilty plea. The Supreme Court therefore held that, in order to provide effective assistance of counsel, an attorney is required to advise his client of the immigration consequences of

\begin{enumerate}
\item Id. at 364.
\item Id. at 364–65.
\item Id. at 365.
\item Id.
\item Id.
\item Id. at 365–66.
\item Id.
\item Id. The Court noted that this is due to the “recent changes in . . . immigration law [that] have made removal nearly an automatic result for a broad class of noncitizen offenders.” Id. at 366. For an overview of these recent changes, see \textit{supra} Part I.B.1.
\item Padilla, 559 U.S. at 365 (citing Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).
\item Id. at 366.
\item Id. at 367. For situations where the law is not as clear or succinct as the removal statute at issue in \textit{Padilla}, the Supreme Court limited counsel’s duty to merely providing notice of a potential adverse consequence of a guilty plea. Id. at 369 & n.10.
\item Id. at 366–69.
\end{enumerate}
a guilty plea,\textsuperscript{153} or, where it is unclear whether a guilty plea will result in deportation, give notice to his client of the potential for immigration consequences.\textsuperscript{154}

The Supreme Court did not limit the holding of \textit{Padilla} to instances of inaccurate advice. The Court further held that \textit{Strickland} would apply to Padilla’s claim whether he received incorrect advice or no advice at all regarding the deportation consequences of his plea.\textsuperscript{155} Having established that Padilla’s counsel provided constitutionally deficient assistance, the U.S. Supreme Court reversed the Kentucky Supreme Court and remanded the case for a determination of whether Padilla suffered prejudice under the second prong of \textit{Strickland}.\textsuperscript{156} On remand, the Kentucky Court of Appeals found that Padilla had demonstrated prejudice under \textit{Strickland},\textsuperscript{157} and remanded the case to the Hardin Circuit Court to vacate Padilla’s judgment and conviction.\textsuperscript{158}

3. The Concurring Opinion of Justice Alito

Justice Alito, joined by Chief Justice Roberts, concurred in the result but wrote separately to address concerns that the majority’s opinion “marks a major upheaval in Sixth Amendment law.”\textsuperscript{159} Contrary to the majority’s opinion, Justice Alito would have affirmed the collateral consequences rule,\textsuperscript{160} and limited Sixth Amendment protections to situations involving inaccurate advice.\textsuperscript{161} Justice Alito concurred in the result because, in his view, Padilla’s case fell under the affirmative misadvice exception—Padilla’s counsel erroneously advised him that he did not have to worry about deportation consequences when pleading guilty.\textsuperscript{162} Justice Alito pointed out that to hold otherwise would be to hold contrary to every federal court of appeals that had considered the issue.\textsuperscript{163}

Still, for Justice Alito, silence alone would not be enough to satisfy a counsel’s duty to provide effective assistance.\textsuperscript{164} Notice of potential

\begin{footnotes}
\footnotetext{153}{Id. at 368. This requirement is sometimes referred to as the “\textit{Padilla} advisory.” Margaret Colgate Love & Gabriel J. Chin, \textit{Padilla} v. Kentucky: The Right to Counsel and the Collateral Consequences of Conviction, CHAMPION, May 2010, at 18, 19. Justice Scalia also referred to a “\textit{Padilla} warning” in dissent. \textit{Padilla}, 559 U.S. at 1496 (Scalia, J., dissenting).}

\footnotetext{154}{\textit{Padilla}, 559 U.S. at 369.}

\footnotetext{155}{Id. at 370 (“[T]here is no relevant difference between an act of commission and an act of omission.” (internal quotation marks omitted) (citing \textit{Strickland} v. Washington, 466 U.S. 668, 690 (1984))).}

\footnotetext{156}{Id. at 374–75.}


\footnotetext{158}{Id. at 330–31.}

\footnotetext{159}{Id. at 383 (Alito, J., concurring).}

\footnotetext{160}{Id. For a discussion of the justifications of the collateral consequences rule provided by Justice Alito, see infra Part I.D.}

\footnotetext{161}{\textit{Padilla}, 559 U.S. at 375–76. This follows most closely the majority approach to the collateral consequences rule. \textit{See supra} notes 74–75 and accompanying text.}

\footnotetext{162}{\textit{See Padilla}, 559 U.S. at 375–76.}

\footnotetext{163}{Id. at 383.}

\footnotetext{164}{Id. at 387–88.}
\end{footnotes}
consequences must also be provided. Justice Alito advocated a bright-line rule requiring a defense attorney who is aware that his client is an alien to “(1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney.” Justice Alito provided two justifications for this rule. First, immigration is a “specialized field” in which criminal defense attorneys do not have expertise and should not be doling out misinformed advice. Second, by putting a client on notice that he may be subject to deportation, a defense attorney reduces the risk that a client would enter an uninformed or misinformed guilty plea.

The principle of stare decisis drove Justice Alito’s concurrence. However, the requirement of some form of notice of a potential collateral consequence, such as deportation, still does not fall squarely within one of the three commonly accepted versions of the collateral consequences rule. It does, however, address concerns that the collateral consequences rule provides a perverse incentive for attorneys to remain silent on collateral consequences.

4. Justice Scalia’s Dissent

Justice Scalia, joined by Justice Thomas, dissented, accusing the majority of “swinging a sledge where a tack hammer is needed.” Justice Scalia would have preserved the traditional collateral consequences rule. Unlike the concurrence, however, Justice Scalia would have also excluded inaccurate advice regarding collateral consequences from Sixth Amendment protections. Accordingly, Justice Scalia would have held that Padilla’s Sixth Amendment challenge had no merit because he only received inaccurate advice about a collateral consequence of his guilty plea. Under a proper textual reading, Justice Scalia reasoned, no other result could be reached.

165. Id.
166. Id. at 375. Justice Alito found the majority’s distinction between clear and unclear consequences unworkable because it would result in confusion among attorneys. Id. For a discussion of the majority’s distinction between clear and unclear consequences, see supra note 151 and accompanying text.
167. Padilla, 559 U.S. at 388.
168. Id.
169. See id. at 382–84.
170. See supra Part I.A.2.c.
171. See supra note 68.
172. Padilla, 559 U.S. at 388 (Scalia, J., dissenting).
173. Id. at 388–89.
174. Id. at 387–88. This stance aligns the dissent with the Kentucky approach to the collateral consequences rule. See supra Part I.A.2.c.
176. See id. at 389–90.
Justice Scalia joined the concurrence’s adherence to the collateral consequences rule based on the principle of stare decisis, and on a textual reading of the Constitution. However, he departs from Justice Alito’s reasoning with respect to instances of affirmative misadvice regarding a collateral consequence. Instead, Justice Scalia stresses that the same floodgates issue that prompts the concurrence to advocate retaining the collateral consequences rule also warrants elimination of the affirmative misadvice exception and the notice requirement for deportation consequences. Instead, Justice Scalia suggests that a statutory solution would be most appropriate. He envisions legislation that “could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant’s attention, and what warnings must be given.”

D. Justification for and Criticism of Application of the Collateral Consequences Rule to Ineffective Assistance of Counsel Claims

The varying treatment of the collateral consequences rule in the three Padilla opinions discussed above demonstrates that the state of the rule is in flux. This section presents existing criticisms of and justifications for the collateral consequences rule to frame the conflict among lower courts discussed in Part II, infra.

Borrowed from a different but related context, the collateral consequences rule has been subject to significant criticism. Critics have asserted that the rule is doctrinally flawed because, as a bright-line rule, it contradicts the Strickland mandate that ineffective assistance of counsel claims must be evaluated by an “objective standard of reasonableness.” Additionally, one fundamental purpose of the right to effective assistance of counsel is to ensure that a criminal defendant makes a voluntary and knowing plea under Brady. One critic points out that it is difficult to understand how a plea could be fully voluntary and knowing without knowledge of the collateral consequences of that plea. Similarly, other

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177. Id. at 390 (“[W]e [have never] required advice of counsel regarding consequences collateral to prosecution.”).
178. Id. (“There is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand—to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction.”).
179. Id. at 391. 
180. Id. at 390–91 (“[A]n obligation to advise about a conviction’s collateral consequences has no logical stopping-point. . . . [I]t seems . . . that the concurrence suffers from the same . . . indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice.”).
181. Id. at 392.
182. Id.
185. See Roberts, supra note 26, at 178.
critics note that lawyers cannot effectively advise clients, or effectively negotiate a plea bargain, without considering collateral consequences.\textsuperscript{186} Therefore, a rule that does not require an attorney to discuss these collateral consequences with his client conflicts with that attorney’s duty to advocate fiercely for his client.\textsuperscript{187}

Despite these criticisms, courts continue to adhere to the rule. The concurring and dissenting opinions in Padilla discuss several major justifications for this adherence. Justice Alito’s concurring opinion in Padilla reasons that the “collateral-consequences rule expresses an important truth” that criminal defense attorneys have expertise regarding criminal proceedings, but not regarding other areas of the law.\textsuperscript{188} Justice Alito also implicitly raises the “slippery slope” issue. He worries that abandoning the collateral consequences rule could result in attorneys having to warn their clients about every possible consequence of a conviction, which becomes unmanageable.\textsuperscript{189} Additionally, Justice Scalia provides textual and doctrinal support for the rule in his dissenting opinion in Padilla.\textsuperscript{190} He points out that the Sixth Amendment applies only to criminal prosecutions, and should have no application to collateral matters that are largely civil.\textsuperscript{191} He also observes that the principle of stare decisis mandates adherence to the collateral consequences rule.\textsuperscript{192} Finally, Justice Scalia echoes Justice Alito’s concerns that abandoning the collateral consequences rule would have “no logical stopping-point,” and would result in a floodgate of litigation surrounding counsel’s failure to warn of consequences of a guilty plea previously categorized as collateral.\textsuperscript{193}

II. COURTS CLASH ON THE MEANING OF Padilla v. Kentucky FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

This Part sets forth the split among courts regarding the impact of Padilla v. Kentucky on ineffective assistance of counsel jurisprudence. Specifically, courts disagree over whether Padilla upends the traditional collateral consequences rule. The “no impact” courts have found that Padilla simply named deportation as an isolated exception to the rule. No impact courts therefore continue to require defense counsel to warn defendants only of the

\textsuperscript{186} See Chin & Holmes, supra note 4, at 736; Margaret Colgate Love, Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation, 31 St. Louis U. Pub. L. Rev. 87, 114 (2011).

\textsuperscript{187} See Chin & Holmes, supra note 4, at 736.

\textsuperscript{188} Padilla v. Kentucky, 559 U.S. 356, 376 (2010) (Alito, J., concurring) (“[I]t is unrealistic to expect [criminal defense attorneys] to provide expert advice on matters that lie outside their area of training and experience.”). For a more complete discussion of Justice Alito’s concurrence in Padilla, see supra Part I.C.3.

\textsuperscript{189} Padilla, 559 U.S. at 375–77.

\textsuperscript{190} Id. at 389–90 (Scalia, J., dissenting).

\textsuperscript{191} See id. at 389 (“We have limited the Sixth Amendment to legal advice directly related to defense against prosecution of the charged offense.”).

\textsuperscript{192} See id. at 389–90.

\textsuperscript{193} See id. at 390.
narrowly defined direct consequences. Conversely, the “innovator” courts have begun to change their understanding of the consequences of a guilty plea based on the factors considered by the Padilla Court. These innovator courts have required defense counsel to warn defendants of consequences previously considered to be collateral, effectively broadening the scope of direct consequences.

Presented with traditional collateral consequences that stem automatically from a plea or a conviction, like the deportation consequence in Padilla, the no impact courts and the innovator courts have reached different results based upon their interpretations of the Supreme Court’s discussion of the collateral consequences rule and the deportation consequence in Padilla. The next two sections discuss these interpretations, found in state court opinions after Padilla.

A. No Impact Courts Find That Padilla’s Holding Is Limited to Deportation and Does Not Impact the Collateral Consequences Rule

This section addresses opinions from the no impact courts that treat Padilla as an isolated exception to the collateral consequences rule. These no impact courts have refused to interpret Padilla in a manner that upsets the traditional collateral consequences rule. As a result, in these jurisdictions, an attorney still has no duty to warn of traditional collateral consequences, even those stemming automatically from a guilty plea.

No impact courts considering ineffective assistance of counsel claims based upon defense counsel’s failure to warn of a traditional collateral consequence stemming automatically from a guilty plea have determined that Padilla has no impact on the direct-collateral distinction outside of the deportation context. This section examines opinions by four no impact courts facing ineffective assistance of counsel claims based on the failure to warn of ineligibility to possess a firearm, lifetime predatory offender registration, ineligibility for parole, and mandatory forfeiture of a state pension. First, the factual background of each case is introduced. Then, the courts’ interpretations and applications of Padilla is discussed.

194. See supra notes 31–37 and accompanying text.
196. Steele, 291 P.3d at 470–71; Robinson, 2012 WL 118259, at *1; Sames, 805 N.W.2d at 566.
197. Sames, 805 N.W.2d at 565–66.
199. Steele, 291 P.3d at 468.
200. Abraham, 62 A.3d at 344.
1. Just the Facts: The Factual Backdrop of the No Impact Cases

This section introduces the factual circumstances and procedural postures from which the no impact courts evaluated the ineffective assistance of counsel claims. Each of the four no impact cases is discussed in turn.

In *Sames v. State*, defendant Thomas Robert Sames pled guilty to misdemeanor domestic assault under subdivision 1 of section 609.2242 of the *Minnesota Statutes*. Pursuant to subdivision 3 of that section, a person convicted of a misdemeanor domestic assault involving a firearm automatically forfeits the right to possess that firearm. Approximately one month later, after sentencing, Sames moved to withdraw his guilty plea on ineffective assistance of counsel grounds.

Sames argued that his counsel failed to inform him that the plea could render him ineligible to possess a firearm. In his moving papers, Sames asserted that this consequence was particularly serious for him because he was an avid hunter, and he supplied much of his family’s food by hunting. The district court denied Sames’s motion, and he appealed.

In *Robinson v. State*, defendant Tony Terrell Robinson entered an *Alford* plea to one count of criminal sexual conduct in the first degree. A person convicted of that offense is automatically subject to mandatory lifetime predatory offender registration. Robinson’s counsel informed him of the registration requirement, but did not specify that it was a lifetime requirement.

After sentencing, Robinson moved to withdraw his guilty plea, asserting that it was invalid because he did not know about the lifetime registration requirement. The district court denied the motion, and Robinson appealed, asserting that he received ineffective assistance of counsel because his lawyer did not advise him that his plea required lifetime predatory offender registration.

In *Steele v. State*, defendant Earl Wayne Steele entered an *Alford* plea to one count of sexual abuse of a child under sixteen years of age. A
person convicted of that crime is subject to mandatory predatory offender registration.\textsuperscript{217} The district court sentenced Steele to fifteen years in prison.\textsuperscript{218} Steele filed a petition for postconviction relief.\textsuperscript{219} He asserted ineffective assistance of counsel because his attorney failed to warn him that his plea could render him ineligible for parole.\textsuperscript{220} The district court denied the petition, and Steele appealed.\textsuperscript{221}

Finally, in \textit{Commonwealth v. Abraham},\textsuperscript{222} defendant Joseph Abraham, a high school teacher, pled guilty to one count of corruption of a minor and one count of indecent assault.\textsuperscript{223} A conviction for indecent assault triggers the Public Employee Pension Forfeiture Act\textsuperscript{224} (PEPFA). Under the Act, no public employee can receive any retirement or other benefit if he pleads guilty to a crime related to public employment.\textsuperscript{225} Abraham filed a motion to withdraw his plea, which the trial court denied.\textsuperscript{226} He subsequently filed a petition for postconviction relief, asserting ineffective assistance of counsel because his lawyer failed to inform him that he would forfeit his pension upon pleading guilty.\textsuperscript{227}

The postconviction relief court denied the petition, finding that counsel was not ineffective.\textsuperscript{228} On appeal, the Superior Court reversed, holding that under Padilla, defense counsel was required to warn criminal defendants of “definite, immediate and automatic” consequences, such as pension forfeiture.\textsuperscript{229} The Commonwealth appealed, asking the Pennsylvania Supreme Court to determine “[w]hether, in light of Padilla \textit{v. Kentucky}, the distinction in Pennsylvania between direct and collateral consequences . . . is appropriate.”\textsuperscript{230}

2. The Interpretive Gloss: The No Impact Courts’ Assessment of Padilla

This section details the arguments asserted by the defendants in the no impact cases. It also tracks the courts’ responses to those arguments and the reasoning by which the courts concluded that Padilla has no impact on

\begin{footnotesize}
\textsuperscript{216} Id. at 468; see also \textsc{IDAHO CODE ANN.} § 18-1506 (2004 & Supp. 2013).
\textsuperscript{217} \textsc{IDAHO CODE ANN.} § 18-8304 (2004).
\textsuperscript{218} \textit{Steele}, 291 P.3d at 468.
\textsuperscript{219} \textit{Id.}
\textsuperscript{220} \textit{Id.} at 468–69.
\textsuperscript{221} \textit{Id.} at 469.
\textsuperscript{222} 62 A.3d 343 (Pa. 2012).
\textsuperscript{223} \textit{Id.} at 344.
\textsuperscript{224} \textsc{43 PA. CONS. STAT. ANN.} §§ 1311–1315 (West 2009); see also \textit{Abraham}, 62 A.3d at 344.
\textsuperscript{225} \textsc{43 PA. CONS. STAT. ANN.} §§ 1312–1313.
\textsuperscript{226} \textit{See Abraham}, 62 A.3d at 344.
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} \textit{Id.} at 345–46.
\textsuperscript{230} \textit{Id.} at 346 (citation omitted).
\end{footnotesize}
the direct-collateral consequences distinction for purposes of an ineffective assistance of counsel claim.

The defendants in the no impact cases asserted that similarities between deportation and the collateral consequence at issue in their cases should compel the court to dispose of the collateral consequences rule, create additional exceptions to it, or find the consequence at issue to be a direct consequence.

For example, in Abraham, the defendant put forth two alternative arguments urging the court to reconsider the collateral consequences rule in light of Padilla. First, the defendant argued that “Padilla [did] not require [the court] to abandon the direct versus collateral consequence analysis.” Instead, the defendant urged an interpretation of Padilla that “requires . . . the reviewing court [to] consider the severity of the consequences implicated by a plea, the real effect of the consequence on the defendant and the burden on counsel of providing advice as to the consequence.”

The defendant argued that pension forfeiture under PEPFA was a particularly severe consequence and was difficult to divorce from the conviction. Defendant pointed out that under PEPFA, he was required to forfeit his “primary source of income,” and that this forfeiture affected not only defendant, but also his wife, who would forfeit pension benefits “should Mr. Abraham predecease her.” Defendant observed that the pension forfeiture was far more severe than the criminal sanction of three years’ probation.

Furthermore, the defendant asserted that pension forfeiture under PEPFA is “inseparable from the criminal process.” The defendant concluded, therefore, that like deportation in Padilla, pension forfeiture under PEPFA “does not fall readily into the traditional direct versus collateral consequence analysis.” Given the severity of the pension forfeiture and its intimate relationship to the criminal charge, the defendant urged the court to hold that counsel was required to warn of that consequence.

While the no impact courts acknowledged that, like deportation, these collateral consequences could be seen as “intimately related to the criminal

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234. Id. at 8.

235. Id.

236. Id. at 12.

237. Id.

238. Id. at 19.

239. Id. at 12.

240. Id.
process” and were perhaps “nearly an automatic result” of a guilty plea, they did not consider these factors dispositive. Instead, several countervailing considerations prevailed, resulting in determinations that Padilla’s holding is limited to deportation.

First, the no impact courts emphasized the Supreme Court’s narrow focus on deportation in Padilla. The Supreme Court began the Padilla decision with a recitation of the history of immigration law designed to demonstrate the “unique nature of deportation.” The no impact courts noted that the Supreme Court explicitly declined to decide whether the direct-collateral distinction was appropriate in the ineffective assistance of counsel context. Further, the no impact courts observed that the Supreme Court failed to mention the myriad of other consequences that stem automatically from a guilty plea. Based on these observations, the no impact courts reasoned that only the “unique nature of deportation” justified disregarding the distinction between direct and collateral consequences. Therefore, the no impact courts determined that Padilla had no relevance to the collateral consequences rule outside of the deportation context.

Second, no impact courts placed importance upon the precedential value of the collateral consequences rule, which has traditionally been followed in some of the jurisdictions of the no impact courts. Likewise, the collateral consequences at issue were traditionally considered collateral


242. Robinson, 2012 WL 118259, at *4; Sames, 805 N.W.2d at 570; Abraham, 62 A.3d at 347.

243. Robinson, 2012 WL 118259, at *4 (quoting Sames, 805 N.W.2d at 570); Sames, 805 N.W.2d at 570 (“The Court did not clearly state that the direct-collateral distinction should not be applied in cases not involving the risk of deportation.”); see also Steele, 291 P.3d 466, 470 (Idaho Ct. App. 2012) (“The Court explicitly stated that it was not deciding whether the distinction between direct and collateral consequences defines the scope of effective assistance of counsel . . . .”); Abraham, 62 A.3d at 347 (“The Court declined to rule on the specific question . . . whether the direct versus collateral consequences analysis is appropriate in assessing a claim of ineffectiveness in connection with entry of a plea.”).

244. Robinson, 2012 WL 118259, at *4; Sames, 805 N.W.2d at 569–70.

245. Robinson, 2012 WL 118259, at *4; see also Steele, 291 P.3d at 470; Sames, 805 N.W.2d at 569–70; Abraham, 62 A.3d at 351 (“The loss of deferred compensation . . . cannot be said to be so onerous as to be on the same plane as incarceration or deportation.”).

246. Steele, 291 P.3d at 470; Robinson, 2012 WL 118259, at *1; Sames, 805 N.W.2d at 566; Abraham, 62 A.3d at 348–50.

247. See Steele, 291 P.3d at 469–70; Robinson, 2012 WL 118259, at *2; Sames, 805 N.W.2d at 567–69.

consequences in those jurisdictions.\textsuperscript{249} The \textit{Padilla} Court’s narrow focus on deportation, coupled with the well-established nature of the collateral consequences rule, was not enough for the no impact courts to interpret \textit{Padilla} as effecting a sea change in the realm of ineffective assistance of counsel jurisprudence.\textsuperscript{250} For these courts, \textit{Padilla} was simply an exception to a well-established and viable rule. Therefore, the no impact courts denied the defendants’ ineffective assistance of counsel claims based on traditional collateral consequences stemming automatically from a guilty plea.

\textbf{B. Innovator Courts Find That \textit{Padilla} Requires Defense Attorneys To Warn of Other Traditional Collateral Consequences That Stem Automatically from a Guilty Plea}

In conflict with the no impact courts, which interpreted \textit{Padilla} as preserving the traditional collateral consequences rule,\textsuperscript{251} innovator courts have construed \textit{Padilla} as upsetting the traditional direct-collateral distinction in the context of an ineffective assistance of counsel claim. This section addresses decisions from innovator courts\textsuperscript{252} that have reconsidered the definition of a direct consequence in light of the factors considered in the context of deportation in \textit{Padilla}.\textsuperscript{253} As a result, innovator courts have required defense counsel to warn their clients of certain collateral consequences that stem automatically from a guilty plea.\textsuperscript{254} Effectively, these innovator courts have recast certain collateral consequences stemming automatically from a guilty plea as direct consequences.\textsuperscript{255}

1. Just the Facts: The Factual Backdrop of the Innovator Cases

This section introduces the factual circumstances and procedural postures from which the innovator courts evaluated the ineffective assistance of counsel claims. Each of the three innovator cases is discussed in turn.

\textsuperscript{249} See, e.g., Brooks v. State, 702 P.2d 893, 896 (Idaho Ct. App. 1985) (finding that parole consequences are not direct consequences of a guilty plea); \textit{Robinson}, 2012 WL 118259, at *2 (citing \textit{Kaiser v. State}, 641 N.W.2d 900, 905, 907 (Minn. 2002)) (finding that mandatory predatory offender registration is a collateral consequence in Minnesota); State v. Rodriguez, 590 N.W.2d 823, 825 (Minn. Ct. App. 1999) (finding that loss of eligibility to possess a firearm is a collateral consequence of a guilty plea in Minnesota).

\textsuperscript{250} See \textit{Sames}, 805 N.W.2d at 567–68.

\textsuperscript{251} See supra Part II.A.


\textsuperscript{253} See supra notes 146–50 and accompanying text.

\textsuperscript{254} See Taylor, 698 S.E.2d at 389; Pridham, 394 S.W.3d at 878; Fonville, 804 N.W.2d at 895–96.

\textsuperscript{255} Taylor, 698 S.E.2d at 387 (“\textit{Padilla} . . . calls into question the application of the direct versus collateral consequences distinction in the context of ineffective assistance claims.”); see also Pridham, 394 S.W.3d at 879 (“[W]e cannot agree that [\textit{Padilla}’s] holding implicates no collateral consequence but deportation.”); Fonville, 804 N.W.2d at 893–95.
In *Taylor v. State*, defendant Curtis Lane Taylor pled guilty to two counts of child molestation. This offense is one of the specified offenses in the Georgia sex offender statute. Taylor was, therefore, subject to mandatory registration as a sex offender.

After sentencing, Taylor met with his probation officer, who explained the sex offender registration requirement. After this initial meeting with the probation officer, Taylor filed a handwritten letter with the trial court asking to withdraw his guilty plea. Taylor asserted ineffective assistance of counsel because his trial counsel failed to inform him of the sex offender registration requirement prior to entry of the guilty plea.

The trial court denied Taylor’s motion to withdraw the guilty plea, invoking the collateral consequences rule. The trial court found that because sex offender registry was a collateral consequence of a guilty plea, counsel was not required to advise Taylor of that consequence. Taylor appealed, and the Georgia Court of Appeals reversed.

In *People v. Fonville*, defendant Derek Fonville pled guilty to one count of child enticement. Child enticement is a listed offense in Michigan’s sex offender registry act. By virtue of pleading guilty, therefore, Fonville was required to register as a sex offender.

At the sentencing hearing, Fonville’s counsel informed the trial court that Fonville wished to withdraw his guilty plea, and Fonville stated that he wanted a jury trial. Fonville asserted that he did not believe he was guilty of child enticement, and that when he entered the plea, he was unaware that he would have to register as a sex offender. The trial court denied Fonville’s motion to withdraw the guilty plea, and sentenced him to a term of fifty-one months to twenty years in prison.

After sentencing, Fonville moved once again to withdraw his guilty plea, but the trial court denied the motion. Fonville appealed this to the
Michigan Court of Appeals and the Supreme Court of Michigan. Both appeals were denied.

Fonville subsequently filed a motion for relief from judgment in the trial court, asserting ineffective assistance of counsel because he was not informed of the sex offender registration requirement. The trial court denied the motion, invoking the collateral consequences rule. The court found that defense counsel’s failure to inform Fonville of the sex offender registration requirement, a collateral consequence of the plea, did not constitute ineffective assistance. Fonville appealed, and the Michigan Court of Appeals reversed.

In Commonwealth v. Pridham, defendant Pridham pled guilty to one count of manufacturing methamphetamine (second offense), one count of complicity to commit unlawful distribution of methamphetamine, and one count of fourth-degree controlled substance endangerment to a child. Under Kentucky’s “violent offender” statute, convictions for these offenses automatically limit parole eligibility. The trial court accepted Pridham’s plea and sentenced him to thirty years in prison.

After sentencing, Pridham moved for relief from judgment. He asserted that defense counsel assured him that he would be eligible for parole after completing twenty percent, or six years, of his thirty-year sentence. The “violent offender” statute, however, rendered Pridham ineligible for parole for twenty years. Pridham argued that counsel’s misadvice constituted ineffective assistance.

The trial court denied Pridham’s motion based on the collateral consequences rule. Because parole eligibility was a collateral consequence, the court held that counsel’s misadvice regarding that consequence did not rise to the level of ineffective assistance. Pridham appealed. While his appeal was pending, the U.S. Supreme Court decided Padilla v. Kentucky. The Kentucky Court of Appeals found that adverse parole consequences were comparable to the deportation consequences in Padilla, and that Pridham’s motion for relief alleged a
viable ineffective assistance of counsel claim.\textsuperscript{291} The court of appeals therefore remanded to the trial court to determine whether defense counsel actually did misadvise Pridham.\textsuperscript{292} The Commonwealth of Kentucky moved for discretionary review, asking the Kentucky Supreme Court to determine whether the court of appeals read \textit{Padilla} too broadly.\textsuperscript{293}

2. The Interpretive Gloss: Innovator Courts’ Assessment of \textit{Padilla}

This part surveys the defendants’ arguments in the innovator cases. It also sets out the courts’ responses to those arguments and the reasoning by which the courts concluded that \textit{Padilla} required a change in the traditional direct-collateral consequences distinction for purposes of an ineffective assistance of counsel claim.

Each innovator court discussed above is located in a jurisdiction that subscribed to the collateral consequences rule prior to \textit{Padilla}.\textsuperscript{294} The consequences at issue in each case were traditionally considered collateral consequences,\textsuperscript{295} but were also automatically triggered by a guilty plea.\textsuperscript{296} The defendants in these cases asserted that these traditional collateral consequences they faced as a result of pleading guilty should be considered direct consequences in light of \textit{Padilla}.\textsuperscript{297} One court explicitly agreed with the defendants,\textsuperscript{298} and two courts’ holdings implicitly affirmed the defendants’ arguments.\textsuperscript{299} Several considerations drove these courts to determine that \textit{Padilla}’s holding requires certain collateral consequences stemming automatically from a guilty plea to be termed direct.

\textsuperscript{291} \textit{Pridham}, 394 S.W.3d at 872.
\textsuperscript{292} Id.
\textsuperscript{293} Id.
\textsuperscript{295} See, e.g., Smith v. State, 697 S.E.2d 177, 183 (Ga. 2010). This case concerned a trial court’s duty to a defendant under the Fifth Amendment. Further discussion of it is therefore outside the scope of this Note. \textit{See also} Edmonds v. Commonwealth, 189 S.W.3d 558, 567 (Ky. 2006); \textit{In re Lyons}, No. 217858, 2000 WL 33389824, at *1 (Mich. Ct. App. Dec. 19, 2000).
\textsuperscript{296} \textit{See supra} text accompanying note 254.
\textsuperscript{297} People v. Fonville, 804 N.W.2d 878, 892 (Mich. Ct. App. 2011) (“Fonville contends that registration as a sex offender is an immediate and absolute effect of his conviction.”).
\textsuperscript{298} Id. at 892–95 (rejecting the prosecution’s argument that mandatory sex offender registration is a collateral consequence of a guilty plea).
\textsuperscript{299} The Court of Appeals of Georgia, while not explicitly holding that sex offender registration is a direct consequence of a guilty plea, effectively did so by requiring defense counsel to warn of that consequence. Taylor v. State, 698 S.E.2d 384, 388–89 (Ga. Ct. App. 2010) (“[F]ailure to advise a client that his guilty plea will require registration [as a sex offender] is constitutionally deficient performance.”). The Kentucky Court of Appeals held to the same effect regarding parole ineligibility, but remanded for an evidentiary hearing to determine whether the misadvice or nonadvice occurred. \textit{See Commonwealth v. Pridham}, 394 S.W.3d 867, 879 (Ky. 2012) (concluding that trial counsel’s misadvice concerning parole eligibility, if proven, would amount to ineffective assistance of counsel under \textit{Padilla}).
First, instead of viewing *Padilla* as an outlier decision, these courts determined that *Padilla* called into question the precedential value of the collateral consequences rule in the context of ineffective assistance of counsel claims. 300 One court noted that deportation had been historically considered a collateral consequence in its jurisdiction. 301 Since *Padilla* abrogated that characterization and refused to employ the collateral consequences rule at all, 302 these courts reasoned that *Padilla* also cast doubt on existing direct-collateral characterizations of other consequences. 303 Therefore, these courts felt it was necessary to reassess those consequences in light of *Padilla*.

In contrast with the no impact courts, 304 the innovator courts did not interpret *Padilla* as focusing narrowly on deportation. Instead, these courts found that *Padilla* changed the inquiry about what constitutes a direct consequence for the purposes of an ineffective assistance of counsel claim. 305 Innovator courts used several factors articulated by the Supreme Court in *Padilla* 306 to reshape the definition of a direct consequence: prevailing professional norms, 307 the severity of the consequence, 308 whether the consequence is “intimately related to the criminal process,” 309 and whether the consequence is “nearly an automatic result” of the conviction or plea. 310 Abandoning the traditional definition of a direct consequence of a guilty plea, these courts determined that the *Padilla* factors now controlled the scope of direct consequences of a guilty plea. 311

Using these factors, the innovator courts determined that mandatory sex offender registration and ineligibility for parole qualified as direct consequences of a guilty plea. 312 One court noted that these determinations

300. See supra text accompanying note 297.
301. *Fonville*, 804 N.W.2d at 895 (“[W]e recognize that this Court held in *People v. Davidovich* that the possibility that a defendant would be deported was a collateral . . . consequence . . . .”).
303. See supra text accompanying note 297.
304. See supra Part II.A.
306. See supra notes 147–49 and accompanying text.
307. Taylor, 698 S.E.2d at 387–88; *Pridham*, 394 S.W.3d at 879; *Fonville*, 804 N.W.2d at 894.
308. Taylor, 698 S.E.2d at 387–88; *Pridham*, 394 S.W.3d at 878; *Fonville*, 804 N.W.2d at 893–94.
309. Taylor, 698 S.E.2d at 387–89 (detailing the “severe ramifications” of sex offender registration, including public dissemination of the individual’s name on the sex offender registry, and restrictions on where to “live, work, and volunteer”); *Pridham*, 394 S.W.3d at 872; *Fonville*, 804 N.W.2d at 893–94.
310. Taylor, 698 S.E.2d at 388; see also *Pridham*, 394 S.W.3d at 878; *Fonville*, 804 N.W.2d at 893–94.
311. Taylor, 698 S.E.2d at 387–88; *Fonville*, 804 N.W.2d at 893–94.
312. Taylor, 698 S.E.2d at 387–88 (“In light of these *Padilla* factors, . . . the failure to advise a client that pleading guilty will require him to register as a sex offender is constitutionally deficient performance.”); *Pridham*, 394 S.W.3d at 886 (“In sum, under
ran contrary to prior case law. However, the innovator courts found their conclusions necessary in light of the newly articulated ineffective assistance of counsel inquiry and standard in *Padilla*.

### III. Reshaping the Definition of Direct Consequences in Light of the Supreme Court’s Decision in *Padilla v. Kentucky*

This Part first assesses the viability of the collateral consequences rule for purposes of an ineffective assistance of counsel claim, and finds that the rule should be preserved because it serves a valid purpose. Next, this Part considers the immigration motivations for the *Padilla* Court’s decision, and finds that, despite the “unique” nature of deportation, courts should employ the *Padilla* advisory to redefine the scope of direct consequences for purposes of ineffective assistance of counsel jurisprudence. This Note concludes that lower courts should preserve the collateral consequences rule but abolish the current bright-line definition of direct consequences in light of the Supreme Court’s discussion of deportation in *Padilla*.

#### A. The Collateral Consequences Rule Serves an Important Purpose

The collateral consequences rule was not created for use in the context of ineffective assistance of counsel claims. Nevertheless, almost every lower court in the United States uses the rule. Therefore, the relevant question to ask is whether the collateral consequences rule serves a valid purpose in the context of ineffective assistance of counsel jurisprudence. Despite scathing criticism of the rule, the prudent discussions of the rule in *Padilla* in Justice Alito’s concurrence and Justice Scalia’s dissent and other practical considerations, suggest that the rule does serve a valid purpose.

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313. See, e.g., *Fonville*, 804 N.W.2d at 894–95 ("[A]pplying the *Padilla* rationale to this case supports a holding that defense counsel must advise a defendant that registration as a sexual offender is a consequence of the defendant’s guilty plea.").
315. *See supra* Part II.B.
316. *See supra* Part I.A.1–2.c.
317. *See supra* note 69 and accompanying text.
318. *See supra* notes 183–87 and accompanying text.
319. *See supra* notes 188–90, 192 and accompanying text.
As Justice Alito shrewdly observed, in the absence of the collateral consequences rule, attorneys may be obligated to warn clients about each and every possible potential consequence of a guilty plea. This scenario is unworkable from the standpoint of criminal defense attorneys, judges, and general practicality.

Criminal defense attorneys are, by definition, experts at navigating criminal proceedings—guilty pleas included. However, these attorneys do not possess that same level of expertise for other areas of the law, which may relate to collateral consequences of the criminal proceeding. It is unrealistic to expect criminal defense attorneys to quickly become experts in these areas in order to anticipate a vast array of potential consequences of a guilty plea for each client. The collateral consequences rule is an important benchmark upon which attorneys can rely in order to ensure that they are providing effective assistance of counsel.

From a judicial perspective, eliminating the collateral consequences rule would disrupt years of ineffective assistance of counsel jurisprudence. Courts would no longer have a reliable benchmark upon which to evaluate an ineffective assistance of counsel claim under *Strickland*. This raises judicial consistency and reliance concerns, although for different reasons than those articulated by Justice Scalia.

However, an even more pressing concern exists. Without the collateral consequences rule, judges have a higher level of discretion over which consequences a defense attorney must warn his client about. Different judges in the same jurisdiction may have differing views on what constitutes effective assistance, resulting in unpredictable ineffective assistance of counsel jurisprudence. Further, eliminating the collateral consequences rule would open the door to a myriad of new foundations for an ineffective assistance of counsel claim. If some of these claims are put forth in bad faith, or in an attempt to withdraw a guilty plea after a change of heart, judicial economy suffers.

**B. While Deportation Is “Different,” Padilla Should Prompt Lower Courts To Reshape the Definition of Direct Consequences**

The Supreme Court made clear that the motivations underlying the *Padilla* decision stemmed primarily from concerns regarding immigration law and the nature of deportation. Deportation is a unique consequence

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320. See supra note 189 and accompanying text.
321. See supra note 188 and accompanying text.
322. See supra note 188 and accompanying text.
323. See supra note 188 and accompanying text.
324. See supra note 69 and accompanying text.
325. See supra notes 191–93 and accompanying text. Justice Scalia was concerned that the Court cited no precedent upon which to support its mandate for defense counsel to warn of immigration consequences. See supra notes 191–93 and accompanying text.
326. Markowitz, supra note 76, at 1299.
327. See supra Part I.C.1; see also supra note 146 and accompanying text.
of a guilty plea. However, this does not mean that Padilla cannot have any implications for the collateral consequences rule in the broader context of ineffective assistance of counsel jurisprudence. Padilla raises an important point: while certain consequences of a guilty plea may have appeared quite distinct from the criminal conviction in the past, they are now so intimately linked that a rethinking of the definition of direct consequences is in order. Therefore, courts should interpret Padilla as requiring that defense counsel advise criminal defendants of other traditional collateral consequences stemming automatically from a guilty plea.

1. Deportation Really Is “Different”

In Padilla, the Supreme Court cited no precedent for its decision to require defense counsel to warn criminal defendants of the deportation consequences of a guilty plea. Instead, the Court referenced the “severity” of the deportation consequence for noncitizens like Jose Padilla. The Court proceeded to hold that Padilla’s counsel rendered ineffective assistance in failing to warn Padilla that pleading guilty would result in his deportation. This rhetoric, and the subsequent holding, harkens back to earlier immigration cases that cited similar concerns. Padilla is best situated in the context of these immigration cases, continuing a Supreme Court trend of affording additional (and in this case, constitutional) rights to aliens.

Deportation is a high-stakes consequence for noncitizens. Although certain other consequences of a criminal conviction can change the life of a defendant, none do so as drastically as automatic forcible removal from the country in which one resides. In recognition of this fact, the neat categorization of deportation as “civil” is slowly eroding. Over the past century, and especially over the past twenty years, immigration and criminal law have become enmeshed in an unprecedented way. Commentators have suggested that immigration no longer falls squarely into the civil or criminal category.

It appears that the Supreme Court has recognized this change in Padilla. While employing the traditional “civil” label to describe deportation, the

328. See infra Part III.B.1.
329. See supra Part II.B.
330. See supra Part II.B.
332. See supra note 149 and accompanying text.
333. See supra notes 150–52 and accompanying text.
335. See supra Part I.B.1.
336. See supra note 120 and accompanying text.
337. See supra note 245 and accompanying text.
338. See supra note 114 and accompanying text.
340. See supra note 114 and accompanying text.
Court also qualified that label, noting that deportation is “intimately related to the criminal process.”341 While courts have recognized that certain other traditional collateral consequences stemming automatically from a guilty plea are also intimately related to the criminal process,342 none of these consequences has the rich history that deportation does. Further, none of these consequences has been said to straddle the civil-criminal divide in the same way as immigration consequences.

Based on the unique nature of deportation, the Supreme Court in *Padilla* refused to employ the collateral consequences rule in its evaluation of Padilla’s ineffective assistance of counsel claim.343 However, it is important to note that the Court also did not expressly invalidate the rule.344 As previously discussed, the collateral consequences rule serves a valid purpose.345 Therefore, courts are correct to find that *Padilla* did not abrogate the rule.346 Nevertheless, the fact that the Supreme Court felt the need to depart from precedent in order to reach a just outcome suggests that the rule in its current form requires certain changes. Courts that treat *Padilla* as an outlier decision and interpret the opinion as leaving the collateral consequences rule completely intact have overlooked this important point.347

2. *Padilla v. Kentucky* Should Prompt Courts To Rethink the Definition of Direct Consequences for the Purposes of an Ineffective Assistance of Counsel Claim

While the operation of the collateral consequences rule in the ineffective assistance of counsel context serves valid purposes, the definition of direct consequences in that context need not necessarily mirror that used in Fifth Amendment due process jurisprudence. The language surrounding the Supreme Court’s discussion of the nature of a deportation consequence348 should prompt lower courts to redefine direct consequences for purposes of ineffective assistance of counsel claims.

Currently, the scope of the direct-collateral distinction follows the line separating civil consequences from criminal consequences.349 Even though some courts define direct consequences as those that are “definite, immediate and largely automatic,”350 the civil-criminal divide seems to be

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341. *See supra* note 143 and accompanying text.
342. *See supra* notes 241, 312 and accompanying text.
343. *See supra* text accompanying notes 144–46.
344. *See supra* text accompanying notes 144–46.
345. *See supra* Part III.A.
346. *See supra* Part II.A–B.
347. *See supra* Part II.A.
348. *See supra* note 146 and accompanying text.
349. *See supra* note 35 and accompanying text.
350. Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973); *see also supra* note 32 and accompanying text.
what truly drives the distinction. As some of the post-Padilla cases have demonstrated, consequences triggered automatically upon entry of a guilty plea or upon conviction, such as sex offender registration or forfeiture of a state pension, have nevertheless been considered collateral because they are civil, not criminal, in nature. However, the fact that a consequence is civil does not mean that it cannot have severe and debilitating effects on a defendant. Not requiring defense counsel to advise criminal defendants of collateral (in essence, civil) consequences of a guilty plea as a categorical matter draws an arbitrary and unfair line for viable ineffective assistance of counsel claims.

Instead, courts should employ a more functional definition of direct consequences. This definition would incorporate analysis from Strickland, the doctrinal foundation of ineffective assistance of counsel jurisprudence, and the Padilla factors that the Supreme Court considered when exempting deportation from the traditional rule. Strickland mandates a case-by-case approach to ineffective assistance of counsel claims, rejecting application of a bright-line rule. However, in the absence of any sort of rule, courts would have no baseline with which to evaluate an ineffective assistance of counsel claim. Therefore, while adhering to the collateral consequences rule, courts should adopt a case-by-case determination of what constitutes a direct consequence for each particular defendant. In doing so, courts should consider the factors focused on by the Padilla Court: the severity of the consequence for the particular defendant, whether the consequence results automatically from the conviction, and whether the consequence is so closely related to the conviction that it is difficult to separate the two.

While criminal defense attorneys are certainly experts at navigating criminal proceedings, they are also experts in another area—their clients. Therefore, although it may be unrealistic to expect criminal defense attorneys to become versed in any area of the law which may be implicated by a particular guilty plea, it is not overly burdensome to require attorneys to understand which potential consequences may be most important to their

351. See supra note 35 and accompanying text; see also supra note 241 and accompanying text.

352. See supra Part II.A.

353. See, e.g., Padilla v. Kentucky, 559 U.S. 356 (2010); see also supra notes 197, 309 and accompanying text.

354. One justification for this bright line has been that the Sixth Amendment assistance of counsel protections do not apply for civil proceedings. See supra note 191 and accompanying text. However, there is a difference between having the right to counsel in a civil proceeding and requiring criminal defense counsel to warn of potential civil consequences. Requiring a criminal defense counsel to warn a criminal defendant of severe civil consequences does not equate to affording the Sixth Amendment right to counsel in a civil proceeding.

355. See supra Part I.A.2.b.

356. Padilla, 559 U.S. at 364–65; see also supra note 146 and accompanying text.

357. See supra notes 60–61 and accompanying text.

358. Padilla, 559 U.S. at 365–66; see also supra note 146 and accompanying text.

359. See supra note 188 and accompanying text.
clients, and to advise their clients accordingly. This formulation of the rule avoids any potential “perverse incentives” for a defense attorney to decline to provide advice about “collateral consequences,” such as those involved with the affirmative misadvice exception employed by some lower courts. In fact, it creates positive incentives for criminal defense attorneys to ensure that their clients are informed of the potential consequences most important to them.

Padilla’s holding should prompt lower courts to reconsider the definition of direct consequences when applying the collateral consequences rule. The factors considered by the Supreme Court in Padilla provide an excellent foundation upon which to redefine the scope of “direct consequences” of a guilty plea. This remains true even though the Court’s motivations stemmed primarily from concerns regarding immigration law.

CONCLUSION

The U.S. Supreme Court held in Padilla v. Kentucky that a defense counsel must advise his client of the potential deportation consequences of a guilty plea. In so holding, the Court refused to validate the collateral consequences rule for the purposes of an ineffective assistance of counsel claim. Instead, the Court focused on the unique qualities of deportation, a traditional collateral consequence, that make it an exception to that rule.

Despite this Supreme Court decision, the collateral consequences rule has important application in the context of ineffective assistance of counsel claims. For practical and policy reasons, lower courts should not interpret Padilla as eradicating the collateral consequences rule. However, given the criteria invoked in the Supreme Court’s analysis of the deportation consequence in Padilla, and the Strickland mandate that an ineffective assistance of counsel claim be evaluated on a case-by-case basis, lower courts should redefine “direct consequence” for the purposes of an ineffective assistance of counsel claim so that other traditional collateral consequences that stem automatically from a guilty plea may properly be considered direct. Courts should employ the factors considered by the Supreme Court in Padilla, determining which consequences of a guilty plea are particularly severe for an individual defendant and labeling all other consequences collateral. This creates proper incentives for attorneys to

360. See supra note 68 and accompanying text.
361. See supra Part II.B.
362. See supra notes 305–11 and accompanying text.
363. See supra Part I.C.2; see also supra notes 146–49 and accompanying text.
365. See supra notes 153–54 and accompanying text.
366. See supra notes 142–44 and accompanying text.
367. See supra note 146 and accompanying text.
368. See supra Part III.A.
369. See supra Part II.B.
warn defendants of the consequences most important to them, and for defendants to bring an ineffective assistance of counsel claim only in good faith.