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

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**A GAME CHANGER? THE IMPACT OF PADILLA
V. KENTUCKY ON THE COLLATERAL
CONSEQUENCES RULE AND INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIMS**

*Joanna Rosenberg**

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*,¹ 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.² 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.³ 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.⁴ Pursuant to the collateral consequences rule, attorneys are constitutionally required to warn their clients about direct consequences of a guilty plea, which typically

1. 559 U.S. 356 (2010).

2. *Id.* at 360.

3. *Id.* at 373–75.

4. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 706–08 (2002).

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 *Padilla*, was traditionally considered a collateral consequence of a guilty plea because it is a civil, not a criminal, consequence.⁷ Therefore, prior to *Padilla*, counsel was not constitutionally required to advise a criminal defendant of the deportation consequences of a guilty plea in most jurisdictions. However, the *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 *Padilla*’s impact on the collateral consequences rule.¹⁰ Some courts, referred to in this Note as “no impact” courts, have held that *Padilla* is an outlier decision that has no impact on the traditional distinction between direct and collateral consequences.¹¹ These courts interpret *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 *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 *Padilla*, some traditional collateral consequences must be considered direct under the existing collateral consequences rule.¹⁵

This Note examines *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

5. See Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 678, 694 (2008).

6. See *id.* at 678, 694.

7. See, e.g., *United States v. Gonzalez*, 202 F.3d 20 (1st Cir. 2000), *abrogated by Padilla*, 559 U.S. at 356; *United States v. Del Rosario*, 902 F.2d 55 (D.C. Cir. 1990), *abrogated by Padilla*, 559 U.S. at 356; *United States v. Yearwood*, 863 F.2d 6 (4th Cir. 1988), *abrogated by Padilla*, 559 U.S. at 356.

8. *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 *Padilla*’s impact on the direct versus collateral distinction when evaluating an ineffective assistance of counsel claim based upon a

and constitutional requirements for a valid guilty plea. After a brief explanation of the collateral consequences rule and a historical summary of relevant immigration law, Part I also describes the Supreme Court's opinion in *Padilla*, noting in particular the Court's consideration of deportation as a harm warranting not only a duty to avoid giving incorrect advice, but also an affirmative duty to warn. Part II presents the emerging split among lower courts regarding the impact of *Padilla* on the direct versus collateral distinction. Finally, in Part III, this Note assesses the continued viability of the collateral consequences rule, and the relevance of *Padilla* to the ineffective assistance of counsel context. This Note concludes that while the no impact courts are correct that *Padilla* did not eliminate the collateral consequences rule, decisions of the innovator courts suggest a better result: in light of the "unique nature of deportation" discussed in *Padilla*, courts should redefine the scope of direct consequences.

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*.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.

17. 559 U.S. 356 (2010).

summarizes the subsequent Kentucky Court of Appeals opinion on remand.¹⁸

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,¹⁹ and the defendant must receive effective assistance of counsel when deciding whether to accept the plea.²⁰ 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.²¹ 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.”²² In *Brady v. United States*,²³ the Supreme Court clarified the meaning of the “voluntariness” standard with respect to a guilty plea.²⁴ 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.²⁵ 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

18. *Padilla v. Commonwealth*, 381 S.W.3d 322 (Ky. Ct. App. 2012).

19. *Brady v. United States*, 397 U.S. 742, 748 (1970).

20. *Hill v. Lockhart*, 474 U.S. 52, 56–57 (1985).

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.

22. See STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE ADJUDICATIVE: CASES AND COMMENTARY 1043 (8th ed. 2007) (discussing the “voluntary and knowing” requirements set out by the Supreme Court in *McCarthy v. United States*, 394 U.S. 459 (1969), and *Boykin v. Alabama*, 395 U.S. 238 (1969)).

23. *Brady*, 397 U.S. at 748.

24. *Id.* at 748.

25. *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.²⁶ This interpretation of *Brady* has been termed the “collateral consequences rule.”²⁷

While the Supreme Court has never expressly validated the rule,²⁸ it is widely recognized by lower courts in the context of evaluating the validity of a guilty plea.²⁹ Still, courts differ on how to define the distinction between direct and collateral consequences.³⁰ The prevailing definition of a direct consequence³¹ is a consequence that is “definite, immediate, and largely automatic.”³² However, other courts distinguish direct consequences from collateral ones based on whether the particular consequence is punitive or nonpunitive in nature.³³ A third definition limits the scope of direct consequences to those that remain within the control and responsibility of the sentencing court.³⁴ 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.³⁵

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.³⁶ 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.³⁷ On the other hand, typical collateral consequences include, inter alia, mandatory sex offender registration,³⁸ loss

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.”).

33. *Mitschke v. State*, 129 S.W.3d 130, 136 (Tex. Crim. App. 2004) (holding that a trial court’s failure to warn of direct, but nonpunitive consequences of a guilty plea does not “violate due process or render [the] plea involuntary”).

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., *Virnsnieks v. Smith*, 521 F.3d 707, 715–16 (7th Cir. 2008).

of the right to vote,³⁹ loss of the right to own a gun,⁴⁰ revocation of a driver's license,⁴¹ and civil commitment as a sexually violent predator.⁴² Additionally, prior to the Supreme Court's ruling in *Padilla*,⁴³ twelve circuits considered deportation a collateral consequence.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.⁴⁵

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.⁴⁶ This requirement originated from the Sixth Amendment right to counsel.⁴⁷

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."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.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.⁵⁰ Two veins of ineffective assistance of

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).

40. *See, e.g.,* *Ruelas*, 580 F.3d at 408.

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

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

43. For a discussion of the Supreme Court's characterization of deportation in *Padilla*, see *infra* Part I.C.2.

44. *See, e.g.,* *Broomes v. Ashcroft*, 358 F.3d 1251, 1257 (10th Cir. 2004), *abrogated by* *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), *abrogated by* *Padilla*, 559 U.S. at 356; *United States v. Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000), *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), *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 States v. Sambro*, 454 F.2d 918, 922–23 (D.C. Cir. 1971).

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

46. *Hill v. Lockhart*, 474 U.S. 52 (1985).

47. *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984).

48. U.S. CONST. amend. VI.

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).

50. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

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 *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

b. Creation and Extension of the Strickland Test

In order to advance a successful ineffective assistance of counsel claim, the *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 *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 *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. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

54. *Id.* at 687.

55. *Id.* The proceeding at issue in *Strickland* was a capital sentencing proceeding, but the Court declared that of little import. The same principles of ensuring a fair trial and producing a just result applied to a capital sentencing proceeding just as they applied to a bench trial. *Id.*

56. *Id.*

57. *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).

58. *Id.*

59. *Id.* at 690.

60. Chin & Holmes, *supra* note 4, at 711.

61. *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*.⁶² The Court held that “the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.”⁶³ 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.⁶⁴ 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.”⁶⁵

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.⁶⁶ 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.⁶⁷ By contrast, an attorney can provide constitutionally adequate assistance without warning a defendant about collateral consequences of a guilty plea.⁶⁸

effective assistance of counsel context as running contrary to the Supreme Court’s decision in *Strickland*. See Chin & Holmes, *supra* note 4, at 709–12.

62. 474 U.S. 52 (1985).

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.

69. Chin & Holmes, *supra* note 4, at 706. For a discussion of the varying versions of the collateral consequences rule applied to immigration consequences prior to *Padilla*, see Maurice Hew, Jr., *Under the Circumstances: Padilla v. Kentucky Still Excuses Fundamental Fairness and Leaves Professional Responsibility Lost*, 32 B.C. J.L. & SOC. JUST. 31, 38–40 (2012).

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.

76. Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1337 (2011).

77. *Padilla v. Kentucky*, 559 U.S. 356, 360–61 (2010).

concluded that “these changes . . . have dramatically raised the stakes of a noncitizen’s criminal conviction.”⁷⁸ 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.⁷⁹ Grounds for deportation were limited under these laws, and typically included conditions existing at or prior to entry into the United States.⁸⁰

The Immigration and Nationality Act of 1917⁸¹ (1917 Act) “radically changed prior law”⁸² and linked criminal law to deportation for the first time.⁸³ The 1917 Act, which solidified restrictive immigration policy,⁸⁴ was the first congressional act to make classes of aliens deportable based on criminal conduct committed in the United States.⁸⁵ However, the 1917 Act did not call for automatic deportation of aliens guilty of certain offenses.⁸⁶ Instead, it allowed judges the discretion to issue a judicial recommendation against deportation (JRAD), which bound the executive branch to prevent deportation.⁸⁷ 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.⁸⁸ In the years after the 1917 Act,

78. *Id.* at 364.

79. Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1712 (2009). Prior to 1875, regulation of immigration was left largely to the states. *See generally* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993) (reviewing state immigration laws between 1776 and 1875). In 1875, Congress enacted the first immigration legislation. *See* Immigration Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (repealed 1974) (excluding “convict[s], lunatic[s], idiot[s], or any person unable to take care of himself or herself”); *see also* Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943) (prohibiting, inter alia, Chinese laborers from entering the United States). This legislation dealt largely with excluding aliens but not with deportation of aliens already admitted to the United States.

80. Stumpf, *supra* note 79, at 1712. Unlawful entry was the primary ground for deportation under these provisions. Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 514 (2009).

81. Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 (repealed 1952).

82. DANIEL KANSTROOM, DEPORTATION NATION 133 (2007).

83. *Id.* at 133–34.

84. STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 15 (5th ed. 2009).

85. S. REP. NO. 81-1515, at 54–55 (1950). Under the 1917 Act, advocating anarchy and crimes of “moral turpitude” made an alien eligible for deportation. Act of Feb. 5, 1917, ch. 29, 39 Stat. at 889.

86. *See* 6 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 71.05[1][e][ii] (2012).

87. Act of Feb. 5, 1917, ch. 29, 39 Stat. at 889–90; *see* 6 GORDON & MAILMAN, *supra* note 86, § 71.05[1][e][ii].

88. *See, e.g., In re L*, 1 I. & N. Dec. 1, 2 (BIA 1940).

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.

90. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

91. Keith Aoki & John Shuford, *Welcome to Amerizona—Immigrants Out!: Assessing “Dystopian Dreams” and “Usable Futures” of Immigration Reform, and Considering Whether “Immigration Regionalism” Is an Idea Whose Time Has Come*, 38 FORDHAM URB. L.J. 1, 60 (2010).

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

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

94. *See* Padilla v. Kentucky, 559 U.S. 356, 362–63 (2010); *see also* United States v. O’Rourke, 213 F.2d 759, 762 (8th Cir. 1954) (recognizing that aliens who had committed a narcotics offense were no longer eligible for a JRAD under the 1952 Act). In 1990, Congress retroactively eliminated the JRAD form of relief in its entirety. Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050 (codified at 8 U.S.C. § 1251(b) (1990)) (current version at 8 U.S.C. § 1227 (2006)); *see also* KANSTROOM, *supra* note 82, at 228.

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.⁹⁸ The Antiterrorism and Effective Death Penalty Act of 1996⁹⁹ (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996¹⁰⁰ (IIRIRA) broadened the scope of deportable offenses¹⁰¹ and narrowed the scope of judicial review¹⁰² 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.¹⁰³ Section 304(b) of IIRIRA repealed section 212(c) of the INA,¹⁰⁴ replacing it with the more narrow cancellation of removal provision.¹⁰⁵

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.¹⁰⁶ It was, therefore, left to the Supreme Court to articulate such a source of power.¹⁰⁷ The Court first did so in 1889 with the creation of the plenary powers doctrine in the context of exclusion.¹⁰⁸ The plenary powers doctrine left aliens largely at the mercy of the executive and

allow the Attorney General broad discretion in deportation matters as well. *See In re Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976).

98. 5 GORDON & MAILMAN, *supra* note 86, § 64.01[1]; 1 *id.* § 2.04[14][b].

99. Pub. L. No. 104-132, 110 Stat. 1214; *see also* LEGOMSKY & RODRIGUEZ, *supra* note 84, at 21.

100. 110 Stat. at 3009-546. IIRIRA consolidated exclusion and deportation proceedings into “removal” proceedings. 8 U.S.C. § 1229a(a)(3) (2006). IIRIRA also further restricted the availability of discretionary relief from deportation and purported to exempt certain immigration decisions from judicial review. LEGOMSKY & RODRIGUEZ, *supra* note 84, at 22.

101. *See* 1 GORDON & MAILMAN, *supra* note 86, § 2.04[14][b][vi], [14][c].

102. *See* KANSTROOM, *supra* note 82, at 229.

103. Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1277 (amending 8 U.S.C. § 1182(c)).

104. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. at 3009-597; *see also supra* note 97 and accompanying text.

105. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. at 3009-594 (creating 8 U.S.C. § 1229b). This provision gives the Attorney General discretion to cancel removal for only a narrow class of aliens. Those excluded were any aliens previously “convicted of any aggravated felony.” *Id.*

106. Cox & Rodriguez, *supra* note 80, at 466.

107. *Id.*

108. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). Prior to 1996, exclusion referred to the refusal to allow a noncitizen entry into the United States. *See* 8 U.S.C. § 1252(b) (repealed 1996); *see also* Markowitz, *supra* note 76, at 1307 n.31. By contrast, deportation referred to the removal of a noncitizen who has entered the United States, legally or illegally. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 693 (6th ed. 2008). Currently, the distinction between deportation and exclusion (now referred to as inadmissibility) turns on whether the noncitizen is seeking admission to the United States or has already been legally admitted. *Id.* at 508.

Congress.¹⁰⁹ The Supreme Court also found that inherent sovereign power existed over exclusion.¹¹⁰ Therefore, the constitutional protections afforded to criminal proceedings were not available in exclusion proceedings.¹¹¹ Four years later, the Supreme Court applied the plenary powers doctrine in the context of deportation.¹¹² 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.¹¹³ The Court also characterized deportation as a civil matter for the first time.¹¹⁴ This label is significant because “civil” matters do not merit the same thorough procedural review as criminal matters.¹¹⁵ 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.¹¹⁶

Under the classic plenary powers doctrine, judicial review is narrowly circumscribed in the immigration context.¹¹⁷ While certain cases prove this to be true,¹¹⁸ scholars have observed that beginning in the 1940s, courts began to circumvent the classic doctrine through techniques of statutory interpretation.¹¹⁹ Courts taking this approach often noted the harshness of

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.

116. *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903).

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”).

118. *See, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

119. *See Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 567–74 (1990). Motomura describes this phenomenon as “phantom norm decisionmaking.” *Id.* at 567.

the deportation consequence.¹²⁰ Dissenters from opinions adhering to the classic plenary powers doctrine argued that deportation really constituted a punishment.¹²¹

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,¹²² coupled with judicial concern about the harshness of the consequences of deportation,¹²³ laid the foundation for the Supreme Court's decision in *Padilla v. Kentucky*.¹²⁴ 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.¹²⁵ While in the United States, Padilla served in the armed forces with honor during the Vietnam War.¹²⁶ Prior to his conviction, Padilla resided in California with his wife, three children,

120. See, e.g., *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (“[D]eportation is a drastic measure and at times the equivalent of banishment or exile.”); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (“Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual”); see also *INS v. St. Cyr*, 533 U.S. 289, 300, 304 (2001) (refusing to interpret a statute in a manner that would entirely preclude judicial review because of the “difficult and significant” constitutional questions such an interpretation would raise); Markowitz, *supra* note 76, at 1301–02 (noting the “gravity of the liberty deprivation at issue” in deportation proceedings and providing examples of the harsh consequences of deportation).

121. See, e.g., *Marcello v. Bonds*, 349 U.S. 302, 320 (1955) (Douglas, J., dissenting) (“Deportation may be as severe a punishment as loss of livelihood.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting) (“Banishment [by deportation] is punishment in the practical sense.”); *United States v. Ju Toy*, 198 U.S. 253, 269 (1905) (Brewer, J., dissenting) (“[D]eportation . . . is always considered a punishment.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) (“Deportation is punishment.”).

122. See *supra* Part I.B.1.

123. See *supra* note 120 and accompanying text.

124. 559 U.S. 356 (2010) (holding that a noncitizen has the right to effective assistance of counsel when entering a guilty plea and that that right requires defense counsel to warn a noncitizen of the deportation consequences of the plea).

125. *Id.* at 359.

126. *Id.*

and an elderly mother-in-law.¹²⁷ Padilla worked as a “self-employed tractor-trailer owner.”¹²⁸ While driving a truck route from California to Illinois and Michigan, Padilla stopped at a weigh station in Kentucky.¹²⁹ While at the weigh station, Padilla consented to a search of his truck cab. This search revealed a substantial amount of marijuana.¹³⁰ 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.”¹³¹ This offense is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i).¹³² 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.”¹³³ Padilla was sentenced to five years in prison with five years probation.¹³⁴ While in prison, Padilla was served with an immigration detainer,¹³⁵ which meant that after his release from prison, Padilla faced “virtually mandatory” deportation.¹³⁶

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.¹³⁷ 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.¹³⁸ Thus, the Kentucky Supreme Court denied relief without an evidentiary hearing.¹³⁹ 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.”¹⁴⁰

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.

127. *Padilla v. Commonwealth*, 381 S.W.3d 322, 324 (Ky. Ct. App. 2012).

128. *Id.* at 327.

129. *Id.*

130. *Id.*

131. *Id.* at 324.

132. *Padilla v. Kentucky*, 559 U.S. 356, 359 n.1 (2010).

133. *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008), *rev’d*, 559 U.S. at 356.

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.¹⁴¹ The Court acknowledged the collateral consequences rule used by lower courts, including the Kentucky Supreme Court, to evaluate a *Strickland* claim.¹⁴² The Court also acknowledged that removal proceedings are "civil in nature."¹⁴³ However, the Court noted that it had never applied the collateral consequences rule, and explicitly refused to do so in *Padilla*.¹⁴⁴ The Court also did not discuss whether the rule was appropriate in the context of ineffective assistance of counsel claims.¹⁴⁵ Instead, the Court focused on the "unique nature of deportation," which made it difficult to classify as either a direct or collateral consequence.¹⁴⁶ 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.¹⁴⁷ 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."¹⁴⁸ Finally, the Court noted the particular severity of deportation.¹⁴⁹ 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. *Strickland* applies to Padilla's claim."¹⁵⁰

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 *Strickland* test. The Court determined that the "weight of prevailing professional norms," along with the clarity of the immigration statute mandating deportation,¹⁵¹ supports the conclusion that Padilla's counsel was constitutionally deficient in misadvising him of the deportation consequences of his guilty plea.¹⁵² 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

141. *Id.* at 364.

142. *Id.* at 364–65.

143. *Id.* at 365.

144. *Id.*

145. *Id.*

146. *Id.* at 365–66.

147. *Id.*

148. *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 *supra* Part I.B.1.

149. *Padilla*, 559 U.S. at 365 (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

150. *Id.* at 366.

151. *Id.* at 367. For situations where the law is not as clear or succinct as the removal statute at issue in *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.

152. *Id.* at 366–69.

a guilty plea,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.¹⁵⁴

The Supreme Court did not limit the holding of *Padilla* to instances of inaccurate advice. The Court further held that *Strickland* would apply to Padilla's claim whether he received incorrect advice or no advice at all regarding the deportation consequences of his plea.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 *Strickland*.¹⁵⁶ On remand, the Kentucky Court of Appeals found that Padilla had demonstrated prejudice under *Strickland*,¹⁵⁷ and remanded the case to the Hardin Circuit Court to vacate Padilla's judgment and conviction.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."¹⁵⁹ Contrary to the majority's opinion, Justice Alito would have affirmed the collateral consequences rule,¹⁶⁰ and limited Sixth Amendment protections to situations involving inaccurate advice.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.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.¹⁶³

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

153. *Id.* at 368. This requirement is sometimes referred to as the "*Padilla* advisory." Margaret Colgate Love & Gabriel J. Chin, *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 "*Padilla* warning" in dissent. *Padilla*, 559 U.S. at 1496 (Scalia, J., dissenting).

154. *Padilla*, 559 U.S. at 369.

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 *Strickland v. Washington*, 466 U.S. 668, 690 (1984))).

156. *Id.* at 374–75.

157. *Padilla v. Commonwealth*, 381 S.W.3d 322, 330 (Ky. Ct. App. 2012).

158. *Id.* at 330–31.

159. *Padilla*, 559 U.S. at 383 (Alito, J., concurring).

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

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

162. See *Padilla*, 559 U.S. at 375–76.

163. *Id.* at 383.

164. *Id.* at 387–88.

consequences must also be provided.¹⁶⁵ Specific to the immigration context, 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.”¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸

The principle of *stare decisis* drove Justice Alito’s concurrence.¹⁶⁹ 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.¹⁷⁰ It does, however, address concerns that the collateral consequences rule provides a perverse incentive for attorneys to remain silent on collateral consequences.¹⁷¹

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.”¹⁷² Justice Scalia would have preserved the traditional collateral consequences rule.¹⁷³ Unlike the concurrence, however, Justice Scalia would have also excluded inaccurate advice regarding collateral consequences from Sixth Amendment protections.¹⁷⁴ 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.¹⁷⁵ Under a proper textual reading, Justice Scalia reasoned, no other result could be reached.¹⁷⁶

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.

175. *Padilla*, 559 U.S. at 387–88.

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*,¹⁷⁷ and on a textual reading of the Constitution.¹⁷⁸ However, he departs from Justice Alito's reasoning with respect to instances of affirmative misadvice regarding a collateral consequence.¹⁷⁹ 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.¹⁸⁰ Instead, Justice Scalia suggests that a statutory solution would be most appropriate.¹⁸¹ 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."¹⁸²

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."¹⁸³ 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*.¹⁸⁴ 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.¹⁸⁵ Similarly, other

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.*

183. Roberts, *supra* note 26, at 171 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); see also Chin & Holmes, *supra* note 4, at 712.

184. Roberts, *supra* note 26, at 171–72.

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.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.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.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.¹⁸⁹ Additionally, Justice Scalia provides textual and doctrinal support for the rule in his dissenting opinion in *Padilla*.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.¹⁹¹ He also observes that the principle of stare decisis mandates adherence to the collateral consequences rule.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.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

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).

187. See Chin & Holmes, *supra* note 4, at 736.

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.

189. *Padilla*, 559 U.S. at 375–77.

190. *Id.* at 389–90 (Scalia, J., dissenting).

191. See *id.* at 389 ("We have limited the Sixth Amendment to legal advice directly related to defense against prosecution of the charged offense.").

192. See *id.* at 389–90.

193. See *id.* at 390.

narrowly defined direct consequences.¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶ 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,¹⁹⁷ lifetime predatory offender registration,¹⁹⁸ ineligibility for parole,¹⁹⁹ and mandatory forfeiture of a state pension.²⁰⁰ 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.

195. *Steele v. State*, 291 P.3d 466 (Idaho Ct. App. 2012); *Robinson v. State*, No. A11-550, 2012 WL 118259 (Minn. Ct. App. Mar. 28, 2012); *Sames v. State*, 805 N.W.2d 565 (Minn. Ct. App. 2011); *Commonwealth v. Abraham*, 62 A.3d 343 (Pa. 2012).

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.

198. *Robinson*, 2012 WL 118259, at *3.

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*,²⁰¹ defendant Thomas Robert Sames pled guilty to misdemeanor domestic assault under subdivision 1 of section 609.2242 of the *Minnesota Statutes*.²⁰² 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.²⁰³ Approximately one month later, after sentencing, Sames moved to withdraw his guilty plea on ineffective assistance of counsel grounds.²⁰⁴

Sames argued that his counsel failed to inform him that the plea could render him ineligible to possess a firearm.²⁰⁵ 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.²⁰⁶ The district court denied Sames's motion, and he appealed.²⁰⁷

In *Robinson v. State*,²⁰⁸ defendant Tony Terrell Robinson entered an *Alford* plea²⁰⁹ to one count of criminal sexual conduct in the first degree.²¹⁰ A person convicted of that offense is automatically subject to mandatory lifetime predatory offender registration.²¹¹ Robinson's counsel informed him of the registration requirement, but did not specify that it was a *lifetime* requirement.²¹²

After sentencing, Robinson moved to withdraw his guilty plea, asserting that it was invalid because he did not know about the lifetime registration requirement.²¹³ 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.²¹⁴

In *Steele v. State*,²¹⁵ defendant Earl Wayne Steele entered an *Alford* plea to one count of sexual abuse of a child under sixteen years of age.²¹⁶ A

201. *Sames*, 805 N.W.2d at 565.

202. *Id.* at 566.

203. MINN. STAT. ANN. § 609.2242 subdiv. 3 (West 2009).

204. *Sames*, 805 N.W.2d at 566.

205. *Id.*

206. *Id.*

207. *Id.*

208. No. A11-550, 2012 WL 118259 (Minn. Ct. App. Mar. 28, 2012).

209. The *Alford* plea was established in *North Carolina v. Alford*, 400 U.S. 25 (1970). By entering an *Alford* plea, the defendant accepts all ramifications of a guilty verdict without admitting to having committed the crime. *Id.* at 37.

210. *Robinson*, 2012 WL 118259, at *1; see also MINN. STAT. ANN. § 609.342 (West 2009).

211. MINN. STAT. ANN. § 243.166, subdiv. 1b(a)(1)(iii) (West 2010 & Supp. 2013).

212. *Robinson*, 2012 WL 118259, at *1.

213. *Id.*

214. *Id.*

215. 291 P.3d 466 (Idaho Ct. App. 2012).

person convicted of that crime is subject to mandatory predatory offender registration.²¹⁷ The district court sentenced Steele to fifteen years in prison.²¹⁸ Steele filed a petition for postconviction relief.²¹⁹ He asserted ineffective assistance of counsel because his attorney failed to warn him that his plea could render him ineligible for parole.²²⁰ The district court denied the petition, and Steele appealed.²²¹

Finally, in *Commonwealth v. Abraham*,²²² defendant Joseph Abraham, a high school teacher, pled guilty to one count of corruption of a minor and one count of indecent assault.²²³ A conviction for indecent assault triggers the Public Employee Pension Forfeiture Act²²⁴ (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.²²⁵ Abraham filed a motion to withdraw his plea, which the trial court denied.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.²²⁷

The postconviction relief court denied the petition, finding that counsel was not ineffective.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.²²⁹ The Commonwealth appealed, asking the Pennsylvania Supreme Court to determine “[w]hether, in light of *Padilla v. Kentucky*, the distinction in Pennsylvania between direct and collateral consequences . . . is appropriate.”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

216. *Id.* at 468; *see also* IDAHO CODE ANN. § 18-1506 (2004 & Supp. 2013).

217. IDAHO CODE ANN. § 18-8304 (2004).

218. *Steele*, 291 P.3d at 468.

219. *Id.*

220. *Id.* at 468–69.

221. *Id.* at 469.

222. 62 A.3d 343 (Pa. 2012).

223. *Id.* at 344.

224. 43 PA. CONS. STAT. ANN. §§ 1311–1315 (West 2009); *see also Abraham*, 62 A.3d at 344.

225. 43 PA. CONS. STAT. ANN. §§ 1312–1313.

226. *See Abraham*, 62 A.3d at 344.

227. *Id.*

228. *Id.*

229. *Id.* at 345–46.

230. *Id.* at 346 (citation omitted).

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,²³¹ create additional exceptions to it,²³² or find the consequence at issue to be a direct consequence.²³³

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 c]ourt to abandon the direct versus collateral consequence analysis.”²³⁴ 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.”²³⁵

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.”²³⁶ Defendant observed that the pension forfeiture was far more severe than the criminal sanction of three years’ probation.²³⁷

Furthermore, the defendant asserted that pension forfeiture under PEPFA is “inseparable from the criminal process.”²³⁸ 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.”²³⁹ 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.²⁴⁰

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

231. *Robinson v. State*, No. A11-550, 2012 WL 118259, at *4 (Minn. Ct. App. Jan. 17, 2012); Reply Brief of Appellant at 8, *Steele v. State*, 291 P.3d 466 (Idaho Ct. App. 2012) (No. 38794-2011) (“*Padilla* . . . holds that counsel must inform clients of consequences that will occur after sentencing even when they are not direct or even criminal law consequences.”).

232. *Sames v. State*, 805 N.W.2d 565, 566, 569 (Minn. Ct. App. 2011); Brief of the Appellee at 6, *Commonwealth v. Abraham*, 62 A.3d 343 (Pa. 2012) (No. 36 WAP 2010), 2011 WL 2646523.

233. Brief of the Appellee, *supra* note 232, at 7–14.

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,²⁴¹ 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.”²⁴² 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.²⁴³ 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.²⁴⁴ 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.²⁴⁵ Therefore, the no impact courts determined that *Padilla* had no relevance to the collateral consequences rule outside of the deportation context.²⁴⁶

Second, no impact courts placed importance upon the precedential value of the collateral consequences rule,²⁴⁷ which has traditionally been followed in some of the jurisdictions of the no impact courts.²⁴⁸ Likewise, the collateral consequences at issue were traditionally considered collateral

241. *Sames v. State*, 805 N.W.2d 565, 569 (Minn. Ct. App. 2011) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 365–66 (2010)) (internal quotation marks omitted); *see also* *Robinson v. State*, No. A11-550, 2012 WL 118259, at *4 (Minn. Ct. App. Mar. 28, 2012). *But see* *Commonwealth v. Abraham*, 62 A.3d 343, 348, 350 (Pa. 2012) (acknowledging that pension forfeiture resulted automatically from the defendant’s guilty plea, but finding that such a consequence is not so “enmeshed in the criminal process” as to render the collateral consequences rule inapplicable).

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 (“[T]he 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) (“[T]he 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 (“[T]he 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 (“[T]he 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.

248. *See, e.g.*, *Ray v. State*, 982 P.2d 931, 937 (Idaho 1999); *Alanis v. State*, 583 N.W.2d 573, 578 (Minn. 1998), *abrogated on other grounds by* *Padilla v. Kentucky*, 559 U.S. 356 (2010).

consequences in those jurisdictions.²⁴⁹ The *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 *Padilla* as effecting a sea change in the realm of ineffective assistance of counsel jurisprudence.²⁵⁰ For these courts, *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.

B. Innovator Courts Find That 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 *Padilla* as preserving the traditional collateral consequences rule,²⁵¹ innovator courts have construed *Padilla* as upsetting the traditional direct-collateral distinction in the context of an ineffective assistance of counsel claim. This section addresses decisions from innovator courts²⁵² that have reconsidered the definition of a direct consequence in light of the factors considered in the context of deportation in *Padilla*.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.²⁵⁴ Effectively, these innovator courts have recast certain collateral consequences stemming automatically from a guilty plea as direct consequences.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.

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); *Robinson*, 2012 WL 118259, at *2 (citing *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).

250. See *Sames*, 805 N.W.2d at 567–68.

251. See *supra* Part II.A.

252. *Taylor v. State*, 698 S.E.2d 384 (Ga. Ct. App. 2010); *Commonwealth v. Pridham*, 394 S.W.3d 867 (Ky. 2012); *People v. Fonville*, 804 N.W.2d 878 (Mich. Ct. App. 2011).

253. See *supra* notes 146–50 and accompanying text.

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

255. *Taylor*, 698 S.E.2d at 387 (“*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 [*Padilla*]’s holding implicates no collateral consequence but deportation.”); *Fonville*, 804 N.W.2d at 893–95.

In *Taylor v. State*,²⁵⁶ defendant Curtis Lane Taylor pled guilty to two counts of child molestation.²⁵⁷ This offense is one of the specified offenses in the Georgia sex offender statute.²⁵⁸ Taylor was, therefore, subject to mandatory registration as a sex offender.²⁵⁹

After sentencing, Taylor met with his probation officer, who explained the sex offender registration requirement.²⁶⁰ After this initial meeting with the probation officer, Taylor filed a handwritten letter with the trial court asking to withdraw his guilty plea.²⁶¹ 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.²⁶²

The trial court denied Taylor's motion to withdraw the guilty plea, invoking the collateral consequences rule.²⁶³ 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.²⁶⁴ Taylor appealed, and the Georgia Court of Appeals reversed.²⁶⁵

In *People v. Fonville*,²⁶⁶ defendant Derek Fonville pled guilty to one count of child enticement.²⁶⁷ Child enticement is a listed offense in Michigan's sex offender registry act.²⁶⁸ By virtue of pleading guilty, therefore, Fonville was required to register as a sex offender.²⁶⁹

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.²⁷⁰ 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.²⁷¹ 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.²⁷²

After sentencing, Fonville moved once again to withdraw his guilty plea, but the trial court denied the motion.²⁷³ Fonville appealed this to the

256. 698 S.E.2d at 384.

257. *Id.* at 385.

258. GA. CODE ANN. § 42-1-12(a)(10)(B)(viii) (Supp. 2013).

259. *Id.* § 42-1-12(e)(2) ("Registration pursuant to this Code section shall be required by any individual who . . . [i]s convicted . . . of a dangerous sexual offense [such as child molestation].").

260. *Taylor*, 698 S.E.2d at 385–86.

261. *Id.* at 386.

262. *Id.* at 385–86.

263. *Id.* at 386.

264. *Id.* at 386, 389.

265. *Id.* at 389.

266. 804 N.W.2d 878 (Mich. Ct. App. 2011).

267. *Id.* at 882; *see also* MICH. COMP. LAWS ANN. § 750.350 (West Supp. 2013).

268. MICH. COMP. LAWS ANN. § 28.722(w)(iii) (West 2012).

269. *Id.* § 28.723.

270. *Fonville*, 804 N.W.2d at 882–83.

271. *See id.* at 883.

272. *See id.* at 884, 885.

273. *Id.* at 885.

Michigan Court of Appeals and the Supreme Court of Michigan.²⁷⁴ Both appeals were denied.²⁷⁵

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.²⁷⁶ The trial court denied the motion, invoking the collateral consequences rule.²⁷⁷ 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.²⁷⁸ Fonville appealed, and the Michigan Court of Appeals reversed.²⁷⁹

In *Commonwealth v. Pridham*,²⁸⁰ 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.²⁸¹ Under Kentucky's "violent offender" statute, convictions for these offenses automatically limit parole eligibility.²⁸² The trial court accepted Pridham's plea and sentenced him to thirty years in prison.²⁸³

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.²⁸⁴ The "violent offender" statute, however, rendered Pridham ineligible for parole for twenty years.²⁸⁵ Pridham argued that counsel's misadvice constituted ineffective assistance.²⁸⁶

The trial court denied Pridham's motion based on the collateral consequences rule.²⁸⁷ 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.²⁸⁸ Pridham appealed. While his appeal was pending,²⁸⁹ the U.S. Supreme Court decided *Padilla v. Kentucky*.²⁹⁰ 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

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 885.

279. *Id.* at 895–96.

280. 394 S.W.3d 867 (Ky. 2012).

281. *Id.* at 871; *see also* KY. REV. STAT. ANN. §§ 218A.1432, .1438, .1444 (LexisNexis 2007).

282. KY. REV. STAT. ANN. § 439.3401; *see also* *Pridham*, 394 S.W.3d at 871.

283. *Pridham*, 394 S.W.3d at 871.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* at 872.

288. *Id.*

289. *Id.*

290. 559 U.S. 356 (2010).

viable ineffective assistance of counsel claim.²⁹¹ The court of appeals therefore remanded to the trial court to determine whether defense counsel actually did misadvise Pridham.²⁹² The Commonwealth of Kentucky moved for discretionary review, asking the Kentucky Supreme Court to determine whether the court of appeals read *Padilla* too broadly.²⁹³

2. The Interpretive Gloss: Innovator Courts' Assessment of *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 *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 *Padilla*.²⁹⁴ The consequences at issue in each case were traditionally considered collateral consequences,²⁹⁵ but were also automatically triggered by a guilty plea.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 *Padilla*.²⁹⁷ One court explicitly agreed with the defendants,²⁹⁸ and two courts' holdings implicitly affirmed the defendants' arguments.²⁹⁹ Several considerations drove these courts to determine that *Padilla*'s holding requires certain collateral consequences stemming automatically from a guilty plea to be termed direct.

291. *Pridham*, 394 S.W.3d at 872.

292. *Id.*

293. *Id.*

294. *See, e.g.*, *Williams v. Duffy*, 513 S.E.2d 212, 214 (Ga. 1999); *Commonwealth v. Fuartado*, 170 S.W.3d 384, 386 (Ky. 2005), *abrogated on other grounds by Padilla*, 559 U.S. at 356; *People v. Davidovich*, 606 N.W.2d 387, 390 (Mich. Ct. App. 1999).

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. *See also Edmonds v. Commonwealth*, 189 S.W.3d 558, 567 (Ky. 2006); *In re Lyons*, No. 217858, 2000 WL 33389824, at *1 (Mich. Ct. App. Dec. 19, 2000).

296. *See supra* text accompanying note 254.

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.").

298. *Id.* at 892–95 (rejecting the prosecution's argument that mandatory sex offender registration is a collateral consequence of a guilty plea).

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. *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 *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 . . .”).

302. See, e.g., *Pridham*, 394 S.W.3d at 877; see also *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

303. See *supra* text accompanying note 297.

304. See *supra* Part II.A.

305. *Taylor v. State*, 698 S.E.2d 384, 387–88 (Ga. Ct. App. 2010); *Pridham*, 394 S.W.3d at 878–79, 886; *Fonville*, 804 N.W.2d at 893–94.

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.³¹³ However, the innovator courts found their conclusions necessary in light of the newly articulated ineffective assistance of counsel inquiry and standard in *Padilla*.³¹⁴

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.³¹⁵ 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.³¹⁶ Nevertheless, almost every lower court in the United States uses the rule.³¹⁷ 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,³¹⁸ the prudent discussions of the rule in *Padilla* in Justice Alito's concurrence and Justice Scalia's dissent,³¹⁹ and other practical considerations, suggest that the rule does serve a valid purpose.

Padilla the collateral consequences rule must yield in those cases where a defendant's guilty plea was induced by his attorney's misadvice concerning a collateral consequence of the plea sufficiently punitive, grave, and enmeshed with the plea's direct consequences"); *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.”).

313. *See, e.g., Fonville*, 804 N.W.2d at 893 n.60 (“A direct consequence must affect the range of punishment in a definite, immediate, and largely automatic way. The registration requirement has absolutely no effect on the range of the defendant's punishment for the crime” (quoting *State v. Partlow*, 840 So. 2d 1040, 1043 (Fla. 2003)) (internal quotation marks omitted)).

314. *Taylor*, 698 S.E.2d at 388–89; *Pridham*, 394 S.W.3d at 878–79, 886; *Fonville*, 804 N.W.2d at 894–95.

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.³²⁰ 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 proceedings³²¹—guilty pleas included. However, these attorneys do not possess that same level of expertise for other areas of the law,³²² 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.³²³ 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.³²⁴ 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.³²⁵

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,”³²⁶ 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.³²⁷ Deportation is a unique consequence

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.³²⁸ 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.³²⁹ Therefore, courts should interpret *Padilla* as requiring that defense counsel advise criminal defendants of other traditional collateral consequences stemming automatically from a guilty plea.³³⁰

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.³³¹ Instead, the Court referenced the “severity” of the deportation consequence for noncitizens like Jose Padilla.³³² 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.³³³ This rhetoric, and the subsequent holding, harkens back to earlier immigration cases that cited similar concerns.³³⁴ *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.³³⁵

Deportation is a high-stakes consequence for noncitizens.³³⁶ 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.³³⁷ In recognition of this fact, the neat categorization of deportation as “civil” is slowly eroding.³³⁸ Over the past century, and especially over the past twenty years, immigration and criminal law have become enmeshed in an unprecedented way.³³⁹ Commentators have suggested that immigration no longer falls squarely into the civil or criminal category.³⁴⁰

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.

331. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010).

332. *See supra* note 149 and accompanying text.

333. *See supra* notes 150–52 and accompanying text.

334. *See supra* Part I.B.1.

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.

339. *See supra* Part I.B.2.

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

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.³⁵¹ 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.³⁵² However, the fact that a consequence is civil does not mean that it cannot have severe and debilitating effects on a defendant.³⁵³ 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.³⁵⁴

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,³⁵⁵ and the *Padilla* factors that the Supreme Court considered when exempting deportation from the traditional rule.³⁵⁶ *Strickland* mandates a case-by-case approach to ineffective assistance of counsel claims, rejecting application of a bright-line rule.³⁵⁷ 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.³⁵⁸

While criminal defense attorneys are certainly experts at navigating criminal proceedings,³⁵⁹ 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.³⁶⁰ 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.³⁶¹ 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.³⁶² This remains true even though the Court’s motivations stemmed primarily from concerns regarding immigration law.³⁶³

CONCLUSION

The U.S. Supreme Court held in *Padilla v. Kentucky*³⁶⁴ that a defense counsel must advise his client of the potential deportation consequences of a guilty plea.³⁶⁵ In so holding, the Court refused to validate the collateral consequences rule for the purposes of an ineffective assistance of counsel claim.³⁶⁶ Instead, the Court focused on the unique qualities of deportation, a traditional collateral consequence, that make it an exception to that rule.³⁶⁷

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.³⁶⁸ 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.³⁶⁹ 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.

364. 559 U.S. 356 (2010).

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.