Printed in U.S.A.
Vol. 106, No. 1

"NO LOGICAL STOPPING-POINT": THE CONSEQUENCES OF *PADILLA V. KENTUCKY*'S INEVITABLE EXPANSION

Derek Wikstrom

ABSTRACT—In *Padilla v. Kentucky*, the Supreme Court held that criminal defense attorneys must warn their noncitizen clients of the adverse immigration consequences that may result from a guilty plea. Lower federal courts will inevitably expand the rule from *Padilla* to apply to other so-called "collateral consequences" of guilty pleas. Although the extension of *Padilla* to more (or all) collateral consequences of guilty pleas might theoretically raise the standard of defense attorney effectiveness and thus benefit criminal defendants, the reality is that the cost of extension will outweigh the benefits, because the provision of effective assistance will become prohibitively costly. If "*Padilla* warnings" are ultimately required for all collateral consequences of a guilty plea, criminal lawyers will have a difficult time effectively assisting their clients.

AUTHOR—J.D., Northwestern University School of Law, 2012; B.A., Political Science, The City College of New York, 2009. I am grateful to John Meixner, Nassim Nazemi, Yosef Schwartz, Peter Siegal, Lindsey Sullivan, Stan Wash, and David Wikstrom for helpful comments and editorial suggestions.

INTRODUCTION

Jose Padilla, a Honduran national but a forty-year permanent resident of the United States, pleaded guilty to possession of marijuana in the state of Kentucky.[1] Under United States law, almost all drug-related offenses, including marijuana possession, render non-United States citizens who commit them "deportable."[2] However, Padilla's attorney, who advised him to plead guilty, did not inform him of the risk of deportation.[3] Instead, he incorrectly advised Padilla that he "did not have to worry about immigration status since he had been in the country so long."[4]

Six days after entry of judgment, Padilla's correctional facility notified the Immigration and Naturalization Service (INS) that it had lodged a detainer against Padilla as a precursor to deportation.[5] He then filed a motion for postconviction relief in which he alleged that his attorney

[1] Padilla v. Kentucky, 130 S. Ct. 1473, 1477 (2010).

[2] 8 U.S.C. § 1227(a)(2)(B)(i) (2006) (rendering "deportable" any alien who is convicted of a violation of any law or regulation—state, federal, or foreign—relating to a controlled substance, with the exception of "a single offense involving possession for one's own use of 30 grams or less of marijuana").

[3] *Padilla*, 130 S. Ct. at 1478.

[4] *Id.* (quoting Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008)) (internal quotation marks omitted).

[5] Brief for Petitioner at 10 n.3, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2009 WL 1497552, at *10 n.3.

provided ineffective assistance of counsel.[6] Following conflicting decisions at the trial and appellate levels—the trial court denying postconviction relief and the appellate court granting it—the Kentucky Supreme Court denied Padilla's motion.[7] The court found that the possibility of deportation was a collateral consequence[8] of a guilty plea and held that neither affirmative misadvice about nor failure to advise of a collateral consequence constituted a violation of a person's Sixth Amendment right to assistance of counsel.[9]

The United States Supreme Court granted certiorari and reversed.[10] The Court held that "constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation."[11] Since Padilla's counsel failed to so advise him, Padilla would, on remand, be able to argue that his attorney had been ineffective.[12]

Some commentators have called the *Padilla* decision a boon for both criminal defendants and the criminal defense bar.[13] To some extent, it was: the decision was certainly favorable to Jose Padilla himself, and the requirement that criminal defense lawyers learn the basics of immigration law in order to provide "*Padilla* warnings"[14] to their clients might similarly assist other noncitizen criminal defendants. As a result of the decision, those defendants—if they did not receive *Padilla* warnings—may be able to obtain postconviction relief in the form of withdrawn guilty pleas, new trials, or both.

---

[6] *Commonwealth v. Padilla*, 253 S.W.3d at 483.

[7] *Id.* at 485.

[8] A collateral consequence is one that is not a "definite, immediate, and largely automatic" result of a criminal conviction. 21 AM. JUR. 2D *Criminal Law* § 620 (2008).

[9] *Commonwealth v. Padilla*, 253 S.W.3d at 485 ("As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief.").

[10] *Padilla*, 130 S. Ct. at 1478.

[11] *Id.*

[12] *Id.* Padilla would still have to show that he was prejudiced by this ineffective assistance, an issue the Supreme Court declined to reach. Note also that Padilla's attorney affirmatively provided him with inaccurate advice rather than merely failing to adequately advise him. The Court dismissed this distinction. *Id.* at 1484 ("A holding limited to affirmative misadvice would invite . . . absurd results."). However, the Court's failure to distinguish between affirmative misadvice and failure to advise arguably renders the holding unnecessarily broad insofar as it applies to failure-to-advise situations, which will be discussed later in this Note. *See infra* Part II.A.

[13] *See, e.g.*, Eric T. Berkman, *Case on Collateral Attacks Could Empower Defense Bar*, MASS. LAW. WKLY., Oct. 26, 2009, at 1.

[14] This phrase was coined by Justice Scalia in his dissenting opinion in *Padilla*. *See Padilla*, 130 S. Ct. at 1496 (Scalia, J., dissenting). Although it does not seem to have been adopted yet by federal courts applying *Padilla*, it is used in this Note to refer to the warnings of potential immigration consequences (or other collateral consequences) that attorneys are required to give their clients after *Padilla*.

This Note argues that while the decision in *Padilla* was a win for Jose Padilla and similarly situated noncitizen criminal defendants, it poses significant problems for criminal defendants, their lawyers, and the entire criminal justice system. The majority's opinion purported to limit itself to immigration consequences[15] and it justified that limitation by pointing to the "severity" of deportation.[16] However, guilty pleas can have innumerable collateral consequences other than deportation, and their relative severities are in the eye of the beholder.[17] For this reason, Justice Scalia, in dissent, expressed an ominous concern that there was "no logical stopping-point" between requiring *Padilla* warnings for immigration and requiring such warnings for other—or even all—collateral consequences.[18]

Mere months after the *Padilla* decision was handed down, Justice Scalia's fear was shown prescient as federal courts began to expand *Padilla* to apply to nondeportation collateral consequences. In September 2010, in *Bauder v. Department of Corrections*,[19] the Eleventh Circuit Court of Appeals upheld an ineffectiveness claim in a case in which an attorney provided inaccurate advice about the possibility of civil confinement.[20] This decision could be an anomaly, but it could just as easily be the first in a series of decisions extending *Padilla*. Some legal scholars argued, even before *Padilla* was decided, that attorneys should have to warn their clients of the collateral consequences of guilty pleas.[21] While *Padilla* and *Bauder* may be the first steps in granting that wish, requiring warnings for all collateral consequences of guilty pleas will give rise to unintended and undesirable consequences.

Although the extension of *Padilla* to more (or all) collateral consequences of guilty pleas would theoretically raise the standard of attorney effectiveness and thus benefit criminal defendants, the reality is that the costs of extension will likely outweigh the benefits. Requiring *Padilla* warnings for every collateral consequence will, in fact, have the exact opposite effect from the one that is intended: it will make the provision of effective assistance prohibitively costly. If *Padilla* warnings

---

[15] *See Padilla*, 130 S. Ct. at 1486 ("[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation.").

[16] *Id.* ("The severity of deportation—'the equivalent of banishment or exile[]'—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation." (quoting Delgadillo v. Carmichael, 332 U.S. 388, 390–91 (1947)) (citation omitted)).

[17] For instance, reasonable people could differ as to whether being forced to return to one's country of citizenship is more severe than being subjected to indefinite civil confinement.

[18] *Id.* at 1496 (Scalia, J., dissenting).

[19] 619 F.3d 1272 (11th Cir. 2010) (per curiam).

[20] *Id.* at 1273, 1275.

[21] *See, e.g.*, Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002); Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119 (2009).

are ultimately required for all collateral consequences of a guilty plea, criminal lawyers will have a difficult time effectively assisting any of their clients.

The remainder of this Note proceeds as follows. Part I briefly provides a general background on ineffective assistance of counsel and describes the standard for ineffective assistance of counsel that prevailed prior to *Padilla*. Part II describes the effect of the *Padilla* decision on ineffective assistance of counsel claims. More specifically, Part II examines the narrow effect that the majority expected the case to have. Part III discusses the concern voiced by Justice Scalia's dissenting opinion in *Padilla* and discusses the Eleventh Circuit's decision in *Bauder*, which may very well be the first in a series of circuit court decisions that bear out Justice Scalia's fears. Part IV discusses the practical problems that will attend the expansion of *Padilla* to collateral consequences other than deportation. Part V recommends that courts interpret *Padilla* narrowly to prevent its expansion.

I. INEFFECTIVE ASSISTANCE GENERALLY

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defense."[22] This guarantee does more than merely protect a criminal defendant's right to hire counsel.[23] In 1938, the Supreme Court interpreted the Sixth Amendment to require that a criminal defendant could not be convicted unless he was represented by counsel or waived his right to representation, effectively guaranteeing that federal criminal defendants who could not afford a lawyer would be provided one.[24] In 1963, the Court expanded the guarantee of counsel at government expense to indigent criminal defendants in state courts.[25]

The Supreme Court further expanded its reading of the Sixth Amendment's assistance of counsel guarantee in *McMann v. Richardson*,[26] holding that "the right to counsel is the right to the *effective assistance* of counsel."[27] Thus, the Court wrote in the landmark case *Strickland v. Washington*[28] that it is not sufficient "[t]hat a person who happens to be a lawyer is present at trial alongside the accused."[29] Rather, "[a]n accused is

---

[22] U.S. CONST. amend. VI.

[23] This was not always the case. Courts formerly interpreted the Sixth Amendment to guarantee merely the right to procure counsel if a defendant chose and could afford to do so. *See* United States v. Van Duzee, 140 U.S. 169, 173 (1891) ("There is . . . no general obligation on the part of the government . . . [to] retain counsel for defendants or prisoners.").

[24] *See* Johnson v. Zerbst, 304 U.S. 458, 467–68 (1938).

[25] *See* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

[26] 397 U.S. 759 (1970).

[27] *Id.* at 771 n.14 (emphasis added) (citing cases).

[28] 466 U.S. 668 (1984).

[29] *Id.* at 685.

entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."[30] To determine whether an attorney has been effective, federal courts use the two-pronged test that the Supreme Court established in *Strickland*. The first question is whether a criminal defendant's attorney rendered counsel that was "deficient."[31] If a defendant received constitutionally deficient counsel, courts move on to the second prong and consider whether the defendant was "prejudiced" by the deficient performance.[32] The two parts of the *Strickland* test are discussed in turn.

In order to satisfy the first prong and show that an attorney provided constitutionally deficient assistance, a criminal defendant must demonstrate that his attorney's performance fell below an "objective standard of reasonableness."[33] The *Strickland* Court, declining to define the standard by reference to particular conduct, wrote that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[34] As benchmarks of reasonableness, the Court suggested "[p]revailing norms of practice as reflected in American Bar Association standards and the like."[35]

If a criminal defendant's attorney fails to render performance consistent with prevailing professional norms and thus does not meet the objective standard of reasonableness, courts move on to the second inquiry: whether the ineffective assistance prejudiced the defense.[36] In order to show prejudice, a defendant must show that his attorney's deficient performance had an "adverse effect" on his defense.[37] More specifically, a defendant asserting an ineffective assistance claim "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[38]

The defendant in *Strickland* claimed that he had received ineffective assistance in a capital sentencing proceeding, but the Court declined to

---

[30] *Id.*

[31] *Id.* at 687 ("This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.").

[32] *Id.* ("This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.").

[33] *Id.* at 687–88. Courts presume that counsel acted reasonably, so the onus is on the defendant to satisfy the first prong. *Id.* at 690 ("[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.").

[34] *Id.* at 688 ("More specific guidelines are not appropriate.").

[35] *Id.* Note that the court did not go so far as to say that reasonableness and compliance with professional norms are the same thing—such norms are "only guides." *Id.*

[36] *Id.* at 693.

[37] *Id.*

[38] *Id.* at 694. The Court went on to define "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id.*

distinguish between such a proceeding and a typical trial.[39] And in *Hill v. Lockhart*,[40] the Court further expanded *Strickland* by applying it to the plea process.[41] In that case, the Court explained that in applying the *Strickland* test to the plea process, courts should leave the first prong unchanged but interpret the second prong to require a criminal defendant contesting a plea to 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."[42]

The decision in *Hill* expanded *Strickland*'s reach considerably. Roughly 95% of all criminal convictions result from guilty pleas rather than trials.[43] Thus, at its advent, the *Strickland* test was the standard for ineffective assistance claims asserted by perhaps 5% of all convicts. After *Hill*, the other 95% of convicted criminal defendants would also have to meet the *Strickland* standard in order to show ineffective assistance.[44]

II. THE EFFECT OF *PADILLA* ON INEFFECTIVE ASSISTANCE

The *Padilla* Court held that in order to meet the *Strickland* test's "objective standard of reasonableness," an attorney must apprise his noncitizen criminal defendant client of the possibility of deportation as a collateral consequence of a guilty plea.[45] The Court remanded to the Kentucky Supreme Court for consideration of the prejudice question in light of this new rule.[46]

In the most straightforward sense, *Padilla* may not mark a particularly significant departure from the Court's ineffective assistance of counsel jurisprudence. Justice Stevens's opinion for the majority makes clear that the Court was simply applying the *Strickland* test to a guilty plea as *Hill* requires.[47] Thus, in the narrowest terms, the Court was merely following *Strickland* and finding that in the particular circumstances before it, Padilla's attorney had failed to meet the requisite objective standard of reasonableness.

---

[39] *Id.* at 686–87.

[40] 474 U.S. 52 (1985).

[41] *See id.* at 58 ("We hold . . . that the two-part *Strickland* v. *Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.").

[42] *Id.* at 59.

[43] Padilla v. Kentucky, 130 S. Ct. 1473, 1485 n.13 (2010) (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 418 tbl.5.17, 450 tbl.5.46 (2005) [hereinafter DOJ SOURCEBOOK]).

[44] Note that these numbers are potentially inaccurate (but are nevertheless illustrative) because the 95% figure cited in *Padilla* was based on statistics from 2000 and 2001, and the decision in *Hill* was handed down fifteen years earlier. *See* DOJ SOURCEBOOK, *supra* note 43.

[45] *Padilla*, 130 S. Ct. at 1482.

[46] *Id.* at 1487.

[47] *Id.* at 1485 n.12 ("Whether *Strickland* applies to Padilla's claim follows from *Hill* . . . .").

But *Padilla* did more than this. The Court may have been applying the *Strickland* test to the facts before it, but it was also creating a rule for courts to follow in the future. The *Padilla* opinion and the rule it established suffer from three shortcomings that are further discussed in this Part: (1) the rule is broader than the facts of *Padilla* demanded, creating ambiguity about how to apply *Padilla* in future cases, (2) the opinion established a bright-line rule (which is unusual in this area of law), and (3) lower federal courts will disagree as to whether and how to apply the *Padilla* rule retroactively.

A. Padilla*'s Two Possible Rules*

The reach of the rule the Court announced in *Padilla* will depend on whether courts opt to follow the holding as set forth by the majority or interpret the case more narrowly. The majority's stated rule could be read as dictum because Padilla's attorney did not simply fail to inform him that he would be deported as a result of his plea deal. Rather, the attorney affirmatively told Padilla that he would not be deported.[48] Thus, any portion of the opinion that would require defense attorneys to affirmatively provide warnings about deportation, instead of simply requiring them *not* to misinform their clients about deportation risks, was unnecessarily broad.

As a result of the opinion's broad language, there are two different ways in which future courts might apply *Padilla*. The narrower possible rule is that if a criminal defendant's attorney incorrectly advises him that his guilty plea will not cause him to be deported, that misadvice constitutes deficient performance. The broader possible rule, the one that the Court *said* it was imposing,[49] is that attorneys must warn their noncitizen criminal defendant clients of the immigration consequences that may attend a guilty plea.

B. Padilla *as a Bright-Line Rule*[50]

The *Padilla* decision creates a bright-line rule by establishing an entire category of cases that, regardless of the specific circumstances of each individual case, constitute per se deficient performance of counsel. The creation of such a rule is an anomaly among the cases following *Strickland.* The Court in *Strickland* explicitly refused to set out specific guidelines to define reasonableness.[51] In later cases applying *Strickland*, the Court has continuously rejected per se rules that obviated the need to examine the

---

[48] *Id.* at 1478.

[49] *Id.* at 1486.

[50] The Court sets out its holding in *Padilla* as if it is a bright-line rule: "[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation." *Id.* Accordingly, this Note assumes that the Court did, in fact, mean to establish such a rule.

[51] Strickland v. Washington, 466 U.S. 668, 688 (1984) (instructing courts to consider the specific facts of each case and decide "whether counsel's assistance was reasonable considering all the circumstances").

specific facts of a case to consider whether counsel acted reasonably.[52] In *Roe v. Flores-Ortega*, the Court reversed, as inconsistent with *Strickland*, a number of decisions that had created a per se rule requiring counsel to file a notice of appeal unless specifically instructed by their clients not to.[53] The Court reasoned that *Strickland* required a "circumstance-specific reasonableness inquiry" and that, therefore, the affirmative obligation that the lower courts had imposed could not hold up.[54] But the *Padilla* Court has now established the very type of bright-line rule—one imposing an affirmative obligation on counsel—that it previously struck down in *Flores-Ortega*.

C. Retroactivity

There is not yet a general consensus as to whether *Padilla* applies retroactively.[55] Some courts have applied *Padilla* retroactively,[56] while others have declined to do so.[57]

The landmark Supreme Court retroactivity case, and the starting point for questions of retroactivity, is *Teague v. Lane*.[58] In that case, the Court held that as a general rule, new constitutional rules of criminal procedure do not apply retroactively to cases that are already final.[59] Under *Teague*, the question is whether *Padilla* created a "new constitutional rule of criminal procedure."[60] A California court considering the retroactivity of *Padilla* (and finding it retroactive) explained: "When the Supreme Court applies a well-established rule of law in a new way based on the specific facts of a particular case, it does not generally establish a new rule."[61] There is no question that the *Strickland* ineffective assistance of counsel standard is a

---

[52] *See* Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000) ("We reject this *per se* rule as inconsistent with *Strickland*'s holding . . . . The Court of Appeals failed to engage in the circumstance-specific reasonableness inquiry required by *Strickland*, and that alone mandates vacatur and remand.").

[53] *Id.*

[54] *Id.*

[55] In other words, it is not clear whether *Padilla* would be applicable to cases in which direct review (trial and noncollateral-review appeals) had already concluded at the time it was handed down.

[56] *See, e.g.*, United States v. Orocio, 645 F.3d 630, 640–41 (3d Cir. 2011) (holding that *Padilla* did not announce a new rule, but rather that it applied the rule from *Strickland* to new facts, such that it was retroactively applicable).

[57] *See, e.g.*, Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. 2011) (holding that *Padilla* announced a new rule and was not subject to either of the exceptions from *Teague* that would render it retroactively applicable).

[58] 489 U.S. 288 (1989).

[59] *Id.* at 310 ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."). "Final," in this context, means that direct appeals have been exhausted.

[60] *Id.* at 316.

[61] United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *5 (E.D. Cal. July 1, 2010) (citing Stringer v. Black, 503 U.S. 222, 228–29 (1992); Turner v. Williams, 35 F.3d 872, 885 (4th Cir. 1994)).

"well-established rule of law," so the turning point for courts deciding *Padilla*'s retroactivity is the question whether the *Padilla* Court was merely applying *Strickland* or was creating a new and separate rule of constitutional criminal procedure. This question could go either way—as evidenced by conflicting federal district court rulings on the subject—but the majority opinion in *Padilla* does explicitly state that it is applying *Strickland* rather than ignoring *Strickland* and creating a separate rule.[62] While it is unlikely that all of the federal circuits (to say nothing of the district courts) will agree on the issue of retroactivity, some states and federal districts will presumably apply *Padilla* retroactively.

III. EXTENDING *PADILLA*

There are two primary ways of looking at deportation as a collateral consequence, and courts' selection among these two views will determine the breadth of the *Padilla* rule in the coming years. These two views can be seen in the majority and dissent in *Padilla*. The majority assumes that immigration consequences are unique,[63] while the dissent argues that deportation is merely one of many similar collateral consequences.[64]

In his majority opinion, Justice Stevens took the position that deportation is fundamentally different from other collateral consequences. Over fifty years ago, the Court described deportation as "the equivalent of banishment or exile."[65] The *Padilla* majority echoed this, noting the "seriousness of deportation" and its "concomitant impact . . . on families living lawfully in this country."[66] In fact, the *Padilla* Court wrote that "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[67] By describing deportation as "integral" to the sentencing process, the Court attempted to differentiate deportation from other consequences that are collateral to the plea itself. If, as the majority suggests, deportation is unique, and uniquely serious, as a collateral consequence, the logic in *Padilla* ought not extend to other consequences.

Justice Scalia's dissent in *Padilla* took the opposite view. He warned that there was "no logical stopping-point" that would limit the majority's holding to deportation.[68] Justice Scalia argued that there is no logical difference between immigration consequences of a guilty plea and other

---

[62] Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010) ("*Strickland* applies to Padilla's claim.").

[63] *Id.* at 1486.

[64] *Id.* at 1496 (Scalia, J., dissenting).

[65] Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947).

[66] *Padilla*, 130 S. Ct. at 1486.

[67] *Id.* at 1480 (footnote omitted).

[68] *Id.* at 1496 (Scalia, J., dissenting).

collateral consequences. If deportation cannot be distinguished from other collateral consequences on the basis of its relative seriousness or severity,[69] or its relatedness to the penalties imposed by a criminal sentence, it will be difficult for courts to limit *Padilla* to the context in which it was decided.

Extension of *Padilla* is no longer speculative—it has already occurred. The following subparts first discuss some collateral consequences that may tempt courts to extend *Padilla* and then analyze the first federal appellate case to extend the requirement of *Padilla* warnings to a non-immigration collateral consequence.

A. Other Collateral Consequences[70]

Relatively few of the possible detrimental effects of a guilty plea are actually considered "direct" consequences.[71] Direct consequences are those that have a "definite, immediate, and largely automatic effect on the range of punishment."[72] Collateral consequences, on the other hand, are those that are not direct consequences—they are not definite, immediate, and automatic.[73] Consequences are collateral, rather than direct, when they have "no effect whatsoever upon the length or nature" of the actual criminal sentence.[74] If a judge can impose a penalty for a guilty plea but doing so is discretionary, the penalty is collateral.[75] Similarly, a consequence is generally collateral if its imposition is contingent upon action by a governmental agency or another actor outside the control of the sentencing judge.[76] These are only some of the definitions or categories of collateral

---

[69] As both the concurrence and the dissent point out, guilty pleas can come with a variety of consequences that are collateral rather than direct, and many such consequences would be as severe as deportation. *See id.* at 1487–88 (Alito, J., concurring); *id.* at 1496 (Scalia, J., dissenting).

[70] The categorization of the consequences of guilty pleas as direct or collateral is relevant to two different inquiries: (1) Fifth and Fourteenth Amendment Due Process Clause issues presented by the question whether a criminal defendant pleaded guilty "voluntarily" and (2) Sixth Amendment issues like those presented in *Padilla* relating to effective assistance of counsel. Because the definitions of "direct" and "collateral" consequences are consistent across these two areas, due process cases dealing with collateral-consequence issues are often cited in this Part.

[71] *See, e.g.*, Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670, 672 (2008) (explaining that only prison, fines, and other criminal punishments imposed by the sentencing judge are considered direct consequences).

[72] 21 AM. JUR. 2D *Criminal Law* § 620 (2008); *see also* United States v. Kikuyama, 109 F.3d 536, 537 (9th Cir. 1997) (giving the same definition of direct consequences); United States v. U.S. Currency in the Amount of $228,536.00, 895 F.2d 908, 915–16 (2d Cir. 1990) (same).

[73] For a more in-depth critique of circuit courts' varying and arguably vague definitions of collateral versus direct consequences, see Roberts, *supra* note 71, at 689–93.

[74] United States v. Long, 852 F.2d 975, 979 (7th Cir. 1988) (quoting United States v. Ray, 828 F.2d 399, 418 (7th Cir. 1987) (per curiam)).

[75] *See, e.g.*, *Kikuyama*, 109 F.3d at 537 ("[T]he consequence is 'collateral' where it lies within the discretion of the court to impose it." (citing United States v. Wills, 881 F.2d 823, 825 (9th Cir. 1989))).

[76] *See* 21 AM. JUR. 2D *Criminal Law* § 620 (2008 & Supp. 2011); *see also* United States v. Littlejohn, 224 F.3d 960, 965 (9th Cir. 2000) ("[W]here the consequence is contingent upon action taken

consequences, and there is, as might be expected, variance in definitions across circuits.[77] The variance across circuits is not of tremendous importance here, and for the purposes of this Note it suffices to summarize collateral consequences as those that are unrelated to the actual penalties imposed at sentencing, are imposed at the discretion of the sentencing judge, or are outside of that judge's control.

Certain collateral consequences, particularly those that are of similar "seriousness" to the immigration consequences addressed in *Padilla*, bear specific enumeration and discussion here.[78]

Perhaps the single most pernicious potential consequence of a guilty plea that courts consider collateral is civil confinement. Certain categories of crimes can subject individuals who commit them to indefinite civil confinement at the conclusion of a prison sentence.[79] Even though civil confinement essentially amounts to additional prison time for a conviction for which a sentence was already imposed and served, courts consider civil confinement collateral to the plea.[80] Based on the reasoning that the statutory procedures for imposing civil confinement involve a number of steps and independent actors' determinations that do not "directly" follow from a guilty plea, courts have held such confinement to be collateral even where the criminal would be confined for life.[81]

Another collateral consequence is disenfranchisement. Historically, the right to vote has been considered one of the most important rights possessed by American citizens. The Supreme Court has long recognized that the right to vote is a "precious" and "fundamental" right[82] because it is "preservative of all rights."[83] However, states can nevertheless prohibit their citizens from voting based on criminal convictions. When they do so following a guilty plea, the disenfranchisement is a collateral consequence of the plea.[84]

---

by an individual or individuals other th[a]n the sentencing court—such as another governmental agency or the defendant himself—the consequence is generally 'collateral.'" (quoting *Kikuyama*, 109 F.3d at 537)).

[77] *See* Roberts, *supra* note 71, at 689–93.

[78] All of the circuit court decisions cited in this section were, as may be obvious, decided before *Padilla*.

[79] For instance, a "sexually dangerous person" can be civilly committed past the end of a prison sentence. *See* 18 U.S.C. § 4248 (2006); *see also* United States v. Comstock, 130 S. Ct. 1949, 1954 (2010) (sustaining such civil commitment against a constitutional challenge and noting the existence of similar state civil commitment laws).

[80] *See, e.g.*, George v. Black, 732 F.2d 108, 110–11 (8th Cir. 1984); Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1365–66 (4th Cir. 1973).

[81] *See, e.g.*, Steele v. Murphy, 365 F.3d 14, 17–18 (1st Cir. 2004).

[82] Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966).

[83] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[84] Waddy v. Davis, 445 F.2d 1, 3 (5th Cir. 1971) (referring to disenfranchisement as "an indirect or collateral consequence").

Even the possibility of imposition of additional criminal liability for the same act or event is considered a collateral consequence. Where an individual pleads guilty in state court, for instance, the possibility that a federal prosecutor will subsequently press federal charges for the acts and events underlying the state plea is collateral.[85] Thus, in *United States v. Ayala*,[86] a criminal defendant was not permitted to withdraw a guilty plea entered in state court where he had been informed neither by the trial court nor by his attorney that it was possible that the federal government would use the plea and its underlying facts to initiate a federal criminal prosecution against him.[87] The federal charges were considered collateral even though the state plea would be used as evidence against the defendant in the separate federal proceeding.[88]

Numerous other consequences of guilty pleas are "serious," and are potentially life changing, but are nevertheless considered collateral. Civil forfeiture, for instance, is a collateral consequence of a guilty plea.[89] So too is the loss of certain public benefits.[90] Government benefits that can become unavailable due to a criminal conviction include welfare benefits such as food stamps or coverage under the Temporary Assistance for Needy Families Act, federal student loans, and even the availability of public housing.[91] Courts have considered the loss of such federal benefits a collateral consequence.[92] Similarly, the loss of the ability to obtain a driver's license[93] or passport[94] due to a guilty plea has been ruled a collateral consequence.

---

[85] *See*, *e.g.*, United States v. Campusano, 947 F.2d 1, 4–5 (1st Cir. 1991) (holding that the use of a state court guilty plea in a federal court proceeding was collateral to the plea).

[86] 601 F.3d 256 (4th Cir. 2010).

[87] *Id.* at 270.

[88] *Id.*

[89] *See, e.g.*, United States v. U.S. Currency in the Amount of $228,536.00, 895 F.2d 908, 916 (2d Cir. 1990) (holding that civil forfeiture was collateral because the defendant's "criminal conviction was neither a necessary nor a sufficient condition precedent to forfeiture of the currency" and the plea did not "cause" the forfeiture).

[90] *See generally* Alicia Werning Truman, Note, *Unexpected Evictions: Why Drug Offenders Should Be Warned Others Could Lose Public Housing If They Plead Guilty*, 89 IOWA L. REV. 1753 (2004) (discussing the variety of public-benefits-related collateral consequences to guilty pleas).

[91] *Id.* at 1756–58; *see also* 21 U.S.C. § 862 (2006) (providing for the denial of federal benefits to persons convicted of drug crimes).

[92] *See, e.g.*, United States v. Morse, 36 F.3d 1070, 1072 (11th Cir. 1994). *But see* United States v. Littlejohn, 224 F.3d 960, 966–67 (9th Cir. 2000) (holding that the loss of federal benefits after a guilty plea was a direct consequence because it was an automatic result of conviction).

[93] *See* Landry v. Hoepfner, 840 F.2d 1201, 1217 (5th Cir. 1988).

[94] *See* Meaton v. United States, 328 F.2d 379, 380–81 (5th Cir. 1964) (per curiam).

B. The First Extension of Padilla

The list of collateral consequences of pleading guilty to a crime is a long one. Many of the consequences discussed above are of comparable seriousness to deportation. However, the mere existence of collateral consequences to which *Padilla* could plausibly be extended will not automatically beget extension. If *Padilla* is to be extended, individual courts must do the legwork that the majority's opinion did not, and must make the "logical" leap Justice Scalia's dissent predicted they would,[95] by reading *Padilla*'s holding broadly enough to reach past immigration. Thus far, only one circuit court has made this leap: the Eleventh Circuit explained the central holding of *Padilla* as if it applied to collateral consequences in general.[96] Such a reading, if adopted in other circuits, would surely open the floodgates that the *Padilla* majority argued were of no concern.[97]

The facts of the Eleventh Circuit case are similar to those of *Padilla*. In 2002, Gary William Bauder was charged with aggravated stalking of a minor in violation of Florida state law.[98] He and his lawyer began plea negotiations, which ended in an agreement to a no-contest plea, in exchange for which Bauder would serve nine months in prison, one year of "community control," and five years of probation.[99] In 2006, following his release from prison, Bauder admitted to violations of the terms of his community control, for which he was placed back in prison in December of that year.[100] The day before his scheduled release from prison, the state of Florida successfully petitioned to have Bauder declared a "sexually violent predator."[101] As a result of that petition, Bauder was involuntarily civilly committed beginning at the conclusion of his prison term; Bauder was still committed as of the writing of the Eleventh Circuit's opinion in September 2010.[102]

Bauder filed a petition for a writ of habeas corpus in a federal district court in Florida, challenging his civil confinement. In his petition, he alleged that he had received ineffective assistance of counsel because his attorney had affirmatively misadvised him with regard to the possibility of

---

[95] Padilla v. Kentucky, 130 S. Ct. 1473, 1496 (Scalia, J., dissenting).

[96] *See* Bauder v. Dep't of Corr., 619 F.3d 1272, 1275 (11th Cir. 2010) (per curiam) ("[T]he Supreme Court has noted that when the law is unclear a criminal defense attorney must advise his client that the 'pending criminal charges may carry a risk of adverse [collateral] consequences.'" (second alteration in original) (quoting *Padilla*, 130 S. Ct. at 1483)).

[97] *Padilla*, 130 S. Ct. at 1484–85.

[98] *Bauder*, 619 F.3d at 1273.

[99] *Id.*

[100] *Id.* at 1273 n.2.

[101] *Id.*

[102] *Id.*

civil commitment.[103] The district court granted the petition, finding that Bauder's attorney misadvised him and holding that the misadvice constituted deficient performance and prejudiced him, thus satisfying both parts of the *Strickland* test.[104] On appeal, the state of Florida argued that Bauder's attorney had not rendered ineffective assistance because it was not clear whether the collateral consequence of civil commitment would be imposed on Bauder.[105] The court rejected this argument and cited *Padilla* for the proposition that where it is unclear whether a consequence will be imposed on a criminal defendant, the attorney must warn his client of the possible imposition of collateral consequences.[106] As a result, the Eleventh Circuit affirmed the lower court's decision.

The facts of *Bauder* were fairly similar to those of *Padilla* (both defendants were subjected to a collateral consequence due to a guilty plea and both received affirmative misadvice from counsel about the possible imposition of the consequence), but Bauder suffered a different collateral consequence. The Eleventh Circuit's holding in *Bauder* differed from *Padilla* in that the court seemed to rely upon counsel's misadvice, rather than counsel's failure to warn.[107] However, the Eleventh Circuit nevertheless cited *Padilla* as broadly requiring that "a criminal defense attorney *must* advise his client" that the plea may carry a risk of collateral consequences.[108] The *Bauder* court's restatement of *Padilla*, replacing "deportation consequences" with the much broader "collateral consequences," extends *Padilla* to its outer limit—a requirement of *Padilla* warnings for all criminal defendants about all collateral consequences.

It remains to be seen whether other circuits will apply the *Bauder* court's reading of *Padilla*. However, *Bauder* makes clear that an extension, to some or even all collateral consequences of guilty pleas, is quite plausible.

---

[103] *Id.* at 1274. The attorney apparently said to Bauder, both before and after the plea bargain was reached, that he "never believed that the facts [of Bauder's case] would be sufficient to trigger a [civil commitment] proceeding." *Id.* (alterations in original) (internal quotation mark omitted). The Court repeatedly referred to these statements as "misadvice," but it is not clear that statements to this effect are necessarily misadvice; in fact, that statement could arguably have provided notice to Bauder that such a proceeding was a possibility. *See id.*

[104] *Id.*

[105] *Id.* at 1274–75.

[106] *Id.* at 1275.

[107] *See Padilla*, 130 S. Ct. at 1484.

[108] *Bauder*, 619 F.3d at 1275 (emphasis added).

IV. THE PROBLEMS WITH *PADILLA* WARNINGS

A. Floodgates

The opinion for the Court in *Padilla* attempted to address the "floodgates concerns"—voiced by the respondent and by amici including the United States Government—that the Court's holding would create a flood of new ineffective assistance claims.[109] The majority wrote:

> We have given serious consideration to the concerns that the Solicitor General, respondent, and *amici* have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar "floodgates" concern in *Hill* but nevertheless applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.
>
> A flood did not follow in that decision's wake.[110]

The majority argued that even insofar as its holding increases the ease with which criminal defendants who pleaded guilty can show deficient performance of counsel, the prejudice prong of *Strickland* presents a "high bar" to prospective claimants.[111] Furthermore, the Court continued, for at least the preceding fifteen years, "professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea."[112] Thus, the Court predicted that lower courts would be able to "effectively and efficiently use [*Strickland*'s] framework to separate specious claims from those with substantial merit."[113] Even if this argument validly dispatches with the floodgates concerns it purports to answer,[114] the Court is addressing the wrong flood.

The Court's answer to the floodgates concerns of the respondent presumes that the flood of ineffective assistance claims would come only from those defendants who were subject to deportation, and the Court dismisses that category as being made up of defendants who (1) will already have received notification and (2) will have difficulty overcoming *Strickland*'s requirement of prejudice. However, the respondent's brief expresses a different and broader concern. The office of the Kentucky Attorney General, in its brief to the Court, argued that finding Padilla's counsel ineffective would create a flood of ineffective assistance claims from persons who suffered from *any* collateral consequence as a result of

---

[109] *Padilla*, 130 S. Ct. at 1484–85.

[110] *Id.* (footnote omitted) (citation omitted).

[111] *Id.* at 1485.

[112] *Id.*

[113] *Id.*

[114] It is not actually clear that the ability of lower courts to distinguish among specious and meritorious claims will prevent a flood. The concern is not, or ought not be, the possibility of a flood of *meritorious* ineffective assistance claims, but rather the possibility of a flood of claims the merits of which lower courts will be forced to devote time to deciding.

pleading guilty.[115] The argument that defendants will, by and large, already have been apprised of the possibility of deportation is not responsive to the broader concerns that the respondent and amici voiced.[116] In all likelihood, courts can expect a flood of litigation from criminal defendants who suffered a variety of collateral consequences as a result of a guilty plea. This flood will impose a significant burden on lower federal courts.

That burden may be further exacerbated by the possibility that *Padilla* will be applied retroactively.[117] The retroactivity of *Padilla* is limited, as a practical matter, because of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[118] which imposes a one-year statute of limitations on habeas petitions.[119] However, that statute of limitations, which typically begins to run upon entry of a final judgment, can be extended by Supreme Court recognition of a new right that is applied retroactively.[120]

Even though it is limited by the short statutory period in AEDPA, the retroactive application of *Padilla* could increase the number of criminal defendants with colorable habeas claims. Any defendant entitled to such a claim who was convicted *at any point* would have one year to file a petition. And, regardless of AEDPA, any defendant whose direct appeal has not been completed would be entitled to assert a newly discovered ineffective assistance claim in a direct appeal or as a collateral challenge. Thus, the statute of limitations imposed by AEDPA will not prevent a flood of new ineffective assistance claims.

B. Expertise Requirement

Criminal defense attorneys will pay a price as well if *Padilla* warnings for all collateral consequences become constitutionally required.[121] Criminal

---

[115] Brief of Respondent at 35–36, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2009 WL 2473880, at *35–36 ("The relative importance of a collateral consequence to a particular defendant does not create a constitutional right. To do so would open the floodgates wherein pleas are challenged based on incorrect advice regarding any and all types of consequences collateral to a valid plea.").

[116] Note that Solicitor General (now Justice) Kagan's amicus brief expressed a concern of similar breadth (not limited to the single collateral consequence of deportation) to that expressed by the commonwealth of Kentucky. *See* Brief for United States as Amicus Curiae Supporting Affirmance at 17–18, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2009 WL 2509223, at *17–18.

[117] *See supra* Part II.C.

[118] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

[119] *See* 28 U.S.C. § 2244(d)(1) (2006) (statute of limitations for habeas petitions by persons in custody pursuant to a judgment of state court); § 2255(f) (statute of limitations for habeas petitions by persons in custody pursuant to a judgment of federal court).

[120] *See* § 2255(f)(1), (3).

[121] Even if *Padilla* is not extended to reach other collateral consequences, criminal attorneys will face new and probably onerous expertise requirements, a concern that Justice Alito expressed in his concurrence:

> [T]he collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and

defense attorneys are expected to have expertise in their field—criminal law and trial practice. Defense attorneys may not, however, be experts in all of the other areas of law that can be implicated when a client pleads guilty. Defense attorneys are not necessarily experts in immigration law (though their clients may be subject to removal); civil procedure and trial practice (though their clients may be subject to forfeiture of assets or other forms of civil liability after a plea); civil rights law (though their clients may collaterally be deprived of constitutional rights, such as voting rights and Second Amendment rights); family law (though criminal convictions may beget collateral issues relating to adoption and parental rights); and so on.[122] However, if courts begin to require defense attorneys to provide *Padilla* warnings about any collateral consequence of pleading guilty, expertise in all of these areas and many more will become obligatory. Defense attorneys will risk findings by courts that they provided ineffective assistance if they do not adequately apprise their clients of the entire constellation of collateral consequences that may result from a guilty plea.

Imposing such a broad requirement of expertise—in areas in which criminal defense attorneys have no preexisting reason to be expert—is not in keeping with the first part of the *Strickland* test. In order to prevail in the first part of the *Strickland* test, a convicted defendant must demonstrate that his attorney was deficient—that the attorney's advice was not "within the range of competence demanded of attorneys in criminal cases."[123] This range of competence presumably does not include the ability to offer competent and knowledgeable legal advice in every area of law in which collateral consequences exist. The very reason there are tax lawyers, immigration lawyers, and criminal lawyers is that these areas of the law all require career-long specialization in order to amass expertise. By imposing an expertise requirement in an area of legal specialization outside the criminal defense attorney's own, the *Padilla* Court was either disregarding the "range of competence" language from multiple effective assistance cases,[124] or was drastically expanding the range in which attorneys are expected to be competent. Neither of these possibilities bodes well for defense attorneys in the future.

Furthermore, this is not a burden defense attorneys are necessarily best situated to bear. By deciding *Padilla* under the rubric of the Sixth Amendment, the Court placed the onus on defense lawyers, putting them in

---

> very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.

Padilla, 130 S. Ct. at 1487–88 (Alito, J., concurring).

[122] See *supra* Part III.A.

[123] Strickland v. Washington, 466 U.S. 668, 687 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970) (internal quotation marks omitted)).

[124] In a literal sense the Court was disregarding this language—the Court never mentioned "competence," even though both the concurrence and the dissent did. *See Padilla*, 130 S. Ct. at 1487–88 (Alito, J., concurring); *id.* at 1495 (Scalia, J., dissenting).

jeopardy of being found ineffective if they fail to provide adequate *Padilla* warnings. However, even if criminal defendants must be informed of the collateral consequences of a plea, defense attorneys may not be ideally positioned to provide that information.

Criminal defense attorneys are specialists, and as such they would have to acquire new, additional expertise in order to dispense adequate *Padilla* warnings.[125] Other actors involved in the guilty plea process are potentially better suited to inform criminal defendants of the collateral consequences of a plea. Prosecutors, for instance, might have expertise in a wider variety of areas of law that collateral consequences implicate.[126] Moreover, in plea-bargaining situations, which is to say the vast majority of criminal cases, the prosecutor plays an administrative, perhaps quasi-judicial role.[127] As now-Circuit Judge Gerard Lynch notes, in this role, the prosecutor often makes nonnegotiable plea offers based on his own perceptions of the case and his desired policy goals.[128] Thus, even if *Padilla* warnings serve a desirable function, they might be better coming from prosecutors (who by virtue of fully looking into the collateral consequences of a plea deal might alter the calculus before making a nonnegotiable offer) than from defense attorneys.

Judges might also be in a better position than criminal defense attorneys to inform criminal defendants of the collateral consequences of a plea. Judges are likely to be more knowledgeable about a broader cross-section of the law than defense attorneys. Thus, judges would experience lower costs than defense attorneys in gathering the information necessary to provide *Padilla* warnings. Additionally, the Federal Rules of Criminal Procedure already provide a process in which judges advise and question defendants who choose to plead guilty.[129] These Rule 11 colloquies are already obligatory—the Supreme Court has held that defendants are entitled to withdraw their plea if the sentencing federal district judge fails to fully

---

[125] *But see* Chin & Holmes, *supra* note 21, at 738 (arguing that with just three questions a defense attorney could accurately dispense advice about collateral consequences). The Chin and Holmes argument does not rebut the claim that *Padilla* warnings would require additional expertise. The questions they recommend would expose whether the client would be of the class of defendants subject to collateral consequences but would not actually provide the attorney with sufficient information to provide nuanced and expert legal advice.

[126] As one example of this expanded expertise, the United States Attorney's office in a given federal district will, in addition to trying the federal criminal cases in that district, try immigration cases, civil forfeiture cases, etc. For a list of the entire constellation of federal statutes to which the Criminal Division of the United States Attorney's office is assigned, see U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-4.000 (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/4mcrm.htm.

[127] *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2129 (1988) ("The prosecutor, then, is making a determination of guilt or innocence (and . . . often also one of the appropriate punishment).").

[128] *Id.* at 2130 & n.10.

[129] FED. R. CRIM. P. 11(b).

adhere to the Rule 11 procedure.[130] Simply adding a discussion of collateral consequences into the Rule 11 colloquy that is already required of judges would provide the same benefits as *Padilla* warnings, but at a lower cost.[131]

C. Disclaimer Issues

Even if *Padilla* warnings could theoretically be beneficial, they may not in practice effectively notify defendants of the collateral consequences of guilty pleas. While the court system and criminal defense attorneys will face some burden even if *Padilla* is not extended, a requirement of *Padilla* warnings may, on balance, be a good thing for criminal defendants themselves. Indeed, providing more information about the consequences of pleading guilty is an admirable goal.[132] Criminal defendants as a group are presumably less knowledgeable and sophisticated than the state and federal prosecutors on the other side of the table during plea negotiations, and providing defendants with a full accounting of the ramifications of their guilty pleas might lead to increased bargaining power and an increased likelihood of actual voluntariness and informed consent. Warnings about the possibility of collateral consequences would, at the very least, create greater consistency across plea negotiations, since *all* defendants, and not just *some*, would know about which collateral consequences they faced.[133] But while *Padilla* creates some advantages for criminal defendants, those advantages come with corresponding costs.

It is not yet clear how much *Padilla* will be extended, or how *Padilla* and its extensions will be implemented. As of now, attorneys must somehow notify their clients of the possible deportation consequences of a plea. Future case law will undoubtedly provide further guidance as to the extent of the warnings (i.e., whether *Padilla* warnings will have to be tailored to a specific client or whether attorneys can simply say "just so you know, all guilty pleas carry the risk of collateral consequences, deportation, etc.").[134] Attorneys may begin to offer boilerplate *Padilla* warnings to their clients so as to provide notice, at least constructively, and avoid claims of ineffective assistance. The more general *Padilla* warnings get, and the more

---

[130] McCarthy v. United States, 394 U.S. 459, 463–64 (1969).

[131] This option was available to the Court in *Padilla*, which could have decided the case under the rubric of due process instead of assistance of counsel. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1496 & n.1 (2010) (Scalia, J., dissenting).

[132] *See*, *e.g.*, Chin & Holmes, *supra* note 21, at 703 (arguing that as a result of failure to apprise defendants of collateral consequences, "defendants may be misled into pleading g[u]ilty, which is unjust").

[133] *See id.* (arguing that notifying criminal defendants of the collateral consequences of a plea "would help achieve more consistent and fair results, in which the plea and sentence would be based more on the facts and circumstances").

[134] Presumably future case law will also instruct attorneys as to *how* they have to give warnings, whether written *Padilla* warnings are acceptable, and so on.

extensive the list of collateral consequences requiring warnings becomes, the less effective these warnings will be.

Padilla warnings that are ineffective will provide few or no benefits to criminal defendants.[135] The difficulties associated with fine print, form contracts, and other documents containing warnings or agreements in legal language are well documented.[136] As *Padilla* warnings become more widespread, they may be increasingly ignored or misunderstood. If this occurs, and if warnings become incomprehensible form documents or long disclaimers, *Padilla* will have been for naught, as the decision will have imposed a burden on attorneys and courts without producing the benefit of actual (as opposed to merely constructive) notice of collateral consequences for defendants.[137]

V. LIMITING *PADILLA*

The difficulty that courts will face is neither the sheer number of collateral consequences of guilty pleas nor the likely difficulty courts will have in line drawing. Rather, the real concern is the existence of a select few collateral consequences that are difficult to logically distinguish from deportation—consequences like civil commitment, civil forfeiture, disenfranchisement, and the loss of public benefits. These consequences—and perhaps others—present unique problems in the context of *Padilla*. Just as removal is often "automatic"[138] and especially severe,[139] so too are these particular collateral consequences. The extension of *Padilla* to cover this relatively small number of consequences is plausible, and perhaps even likely.[140] And as discussed above, these few consequences can apply to a

---

[135] Concededly, this is only an issue if attorneys begin to provide general, disclaimer-like *Padilla* warnings as a matter of course. If courts require attorneys to warn individual clients about whatever collateral consequences may affect them personally, without including extraneous information, there may not be any problem.

[136] For example, Professor Todd Rakoff, in an article about contracts of adhesion, noted that a variety of forms go unread even by very sophisticated individuals. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983). He wrote: "I have asked many lawyers and law professors over the past few years whether they ever read various form documents, such as their bank-card agreements; the great majority of even this highly sophisticated sample do not." *Id.* at 1179 n.22.

[137] Of course, this result—procedural criminal protections becoming ineffective for some criminal defendants—is one that the legal system has turned a blind eye to in other contexts. *See, e.g.*, Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 572 (2002) (noting that *Miranda* warnings are ineffective—that is, they provide constructive but not actual notice—for the mentally retarded and others of below-average intelligence).

[138] Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010).

[139] *Id.* at 1486.

[140] If the only concerns courts had were logic and fairness, extension would be practically obligatory. To create in noncitizen criminal defendants a right to know about the likelihood of deportation (enforced by creating an obligation on defense counsel to inform), but to fail to do so with, say, sexually predatory criminal defendants with regard to the likelihood of civil commitment, would be

wide swath of the population of criminal defendants pleading guilty. Thus, even with a "limited" extension of *Padilla* to the most severe or automatic consequences, a large proportion of the 95% of criminal defendants whose convictions result from guilty pleas would either have a new ground for a habeas petition or direct appeal (if they were already convicted and *Padilla* is found to be retroactive) or would become entitled to a *Padilla* warning from their defense attorneys if negotiations are ongoing. Insofar as such an extension is worth avoiding, there are a few different approaches by which lower courts could effectively cabin *Padilla*.

A. Limit Padilla *to Affirmative Misadvice*

One way that courts interpreting *Padilla* could reduce its scope is by limiting it to its specific facts.[141] The facts in *Padilla* did not present the Court with a defendant whose attorney had been silent on the issue of deportation, so the majority opinion did not have to decide that attorneys rendered constitutionally deficient performance if they remained silent on that issue.[142] Accordingly, courts could decline to extend *Padilla* to other collateral consequences *except* where attorneys affirmatively misadvised their clients.[143] This strategy has the unique advantage of cabining *Padilla* to avoid imposing the steep costs of an affirmative duty on defense counsel while also holding defense attorneys to a higher standard than the one to which they had previously been held.

This is arguably what the Eleventh Circuit did in *Bauder*.[144] There, the petitioner had been affirmatively misadvised about the possibility of civil commitment, and the court used that affirmative misadvice as its justification for affirming the lower court's grant of habeas corpus.[145] If courts choose (or feel logically compelled) to extend *Padilla* to other collateral consequences, they can do so in contexts similar to the one

unfair. Deportation may be "banishment or exile," *id.* (quoting Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947)), but deported individuals return to countries of which they are citizens and where they are at liberty upon arrival. That fate is inarguably less severe than indefinite civil commitment, which for some sex offenders turns any sentence into a lifetime of incarceration.

[141] *See supra* Part II.A.

[142] *Padilla*, 130 S. Ct. at 1484 ("Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'" (quoting Libretti v. United States, 516 U.S. 29, 50–51 (1995))).

[143] This is the result Justice Alito's concurrence advocated. *Id.* at 1491 (Alito, J., concurring).

[144] I say "arguably" because of the ambiguity of the Eleventh Circuit's holding in *Bauder*. On one hand, the *Bauder* court used language to the effect that attorneys "must advise." Bauder v. Dep't of Corr., 619 F.3d 1272, 1275 (11th Cir. 2010). On the other hand, the court indicated that it was affirming the lower court's grant of habeas corpus specifically because Bauder's attorney affirmatively misadvised him. *Id.* It is highly likely that the Eleventh Circuit valued the distinction between affirmative misadvice and silence, since a year before its decision was handed down it had heard Bauder's case and remanded because the court below had failed to distinguish between affirmative misadvice and silence. *See* Bauder v. Dep't of Corr., 333 F. App'x 422, 424 (11th Cir. 2009).

[145] *Bauder*, 619 F.3d at 1275.

presented in *Bauder*, in which the defendant received incorrect advice rather than none at all.[146]

The *Padilla* majority argued that differentiating between silence and misadvice would have the "absurd result[]" of incentivizing silence about important matters by defense counsel.[147] This result, however, is not so absurd. In fact, most jurisdictions *do* distinguish between silence and misadvice by considering only the latter to be ineffective assistance.[148] Moreover, the Court sold attorneys short when it said that a holding limited to misadvice would incentivize silence. On the contrary, such a holding would have *disincentivized* giving incorrect advice. It is disappointing that the Court seems to have based its holding on a fear that defense attorneys would do only what was constitutionally required of them to avoid ineffective assistance.

B. Limit Padilla *to Deportation*

A second way of reducing the reach of *Padilla* by declining to extend it would be to simply subscribe to the Court's argument that deportation is "unique."[149] Lower federal courts could apply *Padilla* as written to require criminal defense lawyers to warn their clients if they face deportation as a result of a plea, but refuse to extend it to other collateral consequences. Lower courts could rationalize this approach two different ways.[150]

First, the *Padilla* Court explained that professional norms already suggested that attorneys should warn their clients that they may be deported.[151] Since *Strickland* requires objectively reasonable performance that comports with professional norms,[152] and since there is a professional norm that dictates attorneys should warn their clients about immigration consequences of plea agreements, failure to warn could be considered

---

[146] Circuit courts, of course, do not select their cases like the Supreme Court does, but they could distinguish nonaffirmative-misadvice situations from *Padilla*, or they could rule that affirmative misadvice constitutes deficient performance under *Strickland* but silence does not.

[147] *Padilla*, 130 S. Ct. at 1484.

[148] *See* Roberts, *supra* note 21, at 125–26 (noting that most jurisdictions that have examined the issue have concluded that affirmative misadvice about collateral consequences, but not silence, can force courts to permit defendants to withdraw a guilty plea). Similarly, at least three circuit courts already had a policy of finding ineffective assistance where defense counsel affirmatively misrepresented the possibility of deportation. *See Padilla*, 130 S. Ct. at 1493 n.3 (Alito, J., concurring) (citing United States v. Kwan, 407 F.3d 1005, 1015–17 (9th Cir. 2005); United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002); Downs-Morgan v. United States, 765 F.2d 1534, 1540–41 (11th Cir. 1985)). *Padilla* abrogated all three circuit decisions.

[149] *Padilla*, 130 S. Ct. at 1481.

[150] These justifications gloss over the fact that *Padilla* cannot logically be confined to immigration on the stated bases of the Supreme Court's holding. They could nevertheless be employed by courts to prevent extension.

[151] *Padilla*, 130 S. Ct. at 1485.

[152] Strickland v. Washington, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice . . . are guides to determining what is reasonable, but they are only guides.").

deficient under the first prong of the *Strickland* test.[153] As long as lower courts do not find that professional norms similarly require warnings about other collateral consequences, *Padilla* can be limited to deportation simply by application of *Strickland*.[154]

Second, courts could simply decline to treat deportation as a collateral consequence altogether. The *Padilla* Court noted the difficulty in categorizing deportation as either direct or collateral to a plea.[155] Indeed, deportation could be framed as a direct consequence of a guilty plea, since it is "definite, immediate, and largely automatic."[156] Deportation may be imposed, as a technical matter, in a separate civil proceeding. However, it is, as a factual matter, a direct consequence of pleading guilty.[157] By treating immigration consequences as noncollateral, courts could limit *Padilla* to deportation.

CONCLUSION

The Supreme Court majority that decided *Padilla* did so with the difficulties that criminal defendants face in mind. In a world in which prosecutors wield an enormous bargaining advantage during the plea process, providing additional information to criminal defendants is an admirable aim.

Unfortunately, this additional information comes at too high a cost and with too much risk of extension to other collateral consequences. Even if *Padilla* has an eventual logical stopping-point, that point comes after extension to many other collateral consequences that are as serious as deportation. Because of *Padilla*, we may soon live in a legal system in which criminal defendants are not "effectively" assisted by counsel until they are warned of the many collateral consequences that may be imposed on them due to a guilty plea.

---

[153] More accurately, failure to warn about immigration consequences was arguably deficient before *Padilla* and is now per se deficient.

[154] This approach is undermined by the fact that the ABA Standards that the *Strickland* Court identified as a possible guide to professional norms "require defense lawyers to consider collateral consequences of conviction" in counseling their clients about guilty pleas. Chin & Holmes, *supra* note 21, at 701; *see also* AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, Standard 14-3.2(f) (3d ed. 1999) ("[D]efense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.").

[155] *Padilla*, 130 S. Ct. at 1482 ("Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence.").

[156] 21 AM. JUR. 2D *Criminal Law* § 620 (2008). The Court noted that deportation was "virtually inevitable for a vast number of noncitizens convicted of crimes." *Padilla*, 130 S. Ct. at 1478.

[157] *See Padilla*, 130 S. Ct. at 1480 ("Under contemporary law, if a noncitizen has committed a removable offense . . . his removal is practically inevitable . . . .").

These *Padilla* warnings will ask a great deal of defense attorneys by imposing significant expertise requirements on them. These warnings will require a great deal of courts, particularly in the near term, in the form of larger dockets. *Padilla* warnings could make defendants reluctant to plead guilty to crimes, which has for many years been the mode of disposition for almost all criminal cases.[158]

Even with all of these costs, it is not clear that *Padilla* will actually benefit criminal defendants at all. Will criminal defendants decide to take the risk of going to trial at a greater clip? The evidence against them is often overwhelming, and going to trial to avoid now-warned-about collateral consequences may cost them in the form of increased direct consequences such as longer prison sentences. For that matter, *Padilla* could have no effect at all. Jose Padilla himself was getting deported, plea agreement or not. He was arrested with a significant amount of marijuana in his possession, and he was going to be subject to essentially mandatory removal whether he lost at trial or pleaded guilty.[159] The Court's new rule, mandating warnings about deportation and providing ineffective assistance claims for those who are not warned, allows Padilla to stay in the country for a little longer as he continues to try his case, but that is all it does. For countless defendants in similar situations, the *Padilla* decision and the practically inevitable lower court decisions extending it will provide a new cause of action, but not actual relief.

That said, *Padilla* need not be overturned. Courts should simply refrain from extending it, and should opt instead to limit it to its specific facts. In doing so, lower courts will avoid imposing significant costs on our legal system for a questionable benefit.

---

[158] *See supra* note 43 and accompanying text.

[159] *Padilla*, 130 S. Ct. at 1477–78.