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## United States v. Reeves: The Struggle to Save the Direct/Collateral Consequences Test After Padilla

### Cover Page Footnote

J.D. Candidate, May 2014, The Catholic University of America, Columbus School of Law; B.A., 2009, SungKyunKwan University. The author would like to thank Professor Leah Wortham and the members of Catholic University Law Review for their exceptional help and support in the writing and publication process. The author would also like to thank her family—Chansik, Sunok, Suryeon, Suzi, Mr. Byun, Gunoo, Yebbi, and Jacob—for their unfailing love and support.

# **UNITED STATES V. REEVES: THE STRUGGLE TO SAVE THE DIRECT/COLLATERAL CONSEQUENCES TEST AFTER *PADILLA***

*Soojin Kim*<sup>+</sup>

Unlike the stereotypical Hollywood portrayal of a criminal conviction characterized by a trial complete with rigorous prosecution, passionate defense, and neatly concluded by a jury verdict, the reality is that more than ninety-five percent of criminal convictions are the result of a guilty plea rather than a trial.<sup>1</sup> Because most defendants are unaware of the potential consequences of entering a guilty plea,<sup>2</sup> defense attorneys are required to advise their clients of the possible consequences beforehand.<sup>3</sup> A defense attorney's failure to advise a client of these consequences could constitute ineffective assistance of counsel, thus rendering the client's plea decision unknowing and involuntary.<sup>4</sup> When a defendant is prejudiced by an unknowing and involuntary guilty plea, the defendant may seek various types of post-conviction relief, such as vacating the conviction or correcting the sentence.<sup>5</sup>

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1. See David A. Perez, *Deal or No Deal? Remediating Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1539 (2011) (emphasizing the importance of providing effective assistance of counsel in plea bargaining).

2. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1143 (2011) (explaining that many criminal defendants are uneducated and tend to rely on experts to correct the incorrect information defendants often possess).

3. See Yolanda Vázquez, *Realizing Padilla's Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 39 FORDHAM URB. L.J. 169, 173 (2011) (noting that the scope of Sixth Amendment-mandated advice by counsel is still developing).

4. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (explaining that the validity of a guilty plea is predicated on whether the plea was voluntary and intelligent and that voluntariness depends on the attorney's competency).

5. See *Bousley v. United States*, 523 U.S. 614, 618 (1998) (“A plea of guilty is constitutionally valid only to the extent it is ‘voluntary’ and ‘intelligent.’” (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970))); *Custis v. United States*, 511 U.S. 485, 495 (1994) (citing *Burgett v. Texas*, 389 U.S. 109, 114–15 (1967)) (providing an example of a past situation where the Court found that a prior conviction could not be used as the basis for sentence enhancement in a subsequent action because the prior conviction was void due to the presumption that the defendant had been denied his right to counsel); BLACK'S LAW DICTIONARY 1285 (9th ed. 2009) (defining “post-conviction relief proceedings” as “a state or federal procedure for a

Within this context, the question is: to what extent must counsel advise clients about the possible consequences of a guilty plea?<sup>6</sup> Clearly, a defense attorney cannot predict every possible consequence of pleading guilty; there are simply too many to list, and some may require specific knowledge of a field of law unrelated to the criminal matter at hand.<sup>7</sup> *United States v. Reeves* presents an example of a case in which the defendant's counsel failed to inform his client, who was charged with a drug offense, that if he pleaded guilty in the current action and later committed another drug-related crime, the later-imposed sentence could be enhanced.<sup>8</sup> In *Reeves*, the U.S. Court of Appeals for the Seventh Circuit reviewed whether the attorney's failure to advise his client of the potential for a future sentence enhancement constituted ineffective assistance of counsel, thus rendering the guilty plea constitutionally deficient, and, therefore, unavailable as the basis for sentence enhancement in the later drug offense action.<sup>9</sup>

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prisoner to request a court to vacate or correct a conviction or sentence.”); JOHN M. BURKOFF & NANCY M. BURKOFF, *INEFFECTIVE ASSISTANCE OF COUNSEL*, § 1:2 at 3 (2012) (explaining that effective assistance of counsel is an established constitutional right); Colleen A. Connolly, *Sliding Down the Slippery Slope of the Sixth Amendment: Arguments for Interpreting Padilla v. Kentucky Narrowly and Limiting the Burden It Places on the Criminal Justice System*, 77 BROOK. L. REV. 745, 751–52 (2012) (explaining that the Supreme Court has held that a guilty plea must be a voluntary choice).

6. See *Roe v. Flores-Ortega*, 528 U.S. 470, 477–79 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)) (rejecting a bright-line rule and explaining that the Supreme Court's decision in *Strickland* adopted a circumstance-specific reasonableness requirement); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 712 (2002) (arguing that Supreme Court precedent mandates a case-by-case analysis of counsel's effectiveness); Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 132 (2009) (finding that the Supreme Court has not created a right to be informed of collateral consequences prior to entering a guilty plea).

7. See Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 688 (2011) (explaining that there are thousands of possible consequences for every conviction and a defense attorney cannot possibly advise on all of them); Dinesh Shenoy & Salima Oines Khakoo, *One Strike and You're Out! The Crumbling Distinction Between the Criminal and the Civil for Immigrants in the Twenty-First Century*, 35 WM. MITCHELL L. REV. 135, 145 (2008) (arguing that criminal cases would never be completely settled if guilty pleas could be overturned because a defendant was not advised of all collateral consequences); McGregor Smyth, *From “Collateral” to “Integral”: The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 835 (2011) (“No one can know all of these penalties, but we can understand their structure and engage in one of the first lawyering skills attorneys learn—issue-spotting.”).

8. 695 F.3d 637, 639 (7th Cir. 2012); see also 21 U.S.C. § 841(b) (2006) (providing for a twenty-year mandatory minimum sentence enhancement for a second felony drug conviction); 21 U.S.C. § 851(a)(1) (2006) (requiring the United States attorney to file an information detailing the prior conviction upon which the enhancement is based as a predicate to seeking increased punishment).

9. *Reeves*, 695 F.3d at 639–40 (stating that if Mario Reeves's improperly advised guilty plea in the prior criminal action constituted a Sixth Amendment violation, it could not be the basis

The Sixth Amendment mandates a criminal defendant's right to counsel.<sup>10</sup> In *McMann v. Richardson*, the Supreme Court interpreted this guarantee as mandating not only the right to counsel, but also the right to *effective assistance* of counsel.<sup>11</sup> Although the scope of what constitutes effective assistance by an attorney is quite broad, this Note will only address the narrow issue of the extent of counsel's duty to advise clients of the possible consequences of a guilty plea.

Because the Supreme Court did not provide specific guidance on this issue in *McMann*, in its wake, lower federal courts developed the "collateral/direct consequences" test to fill the void.<sup>12</sup> This categorical rule essentially provides that an attorney has a duty to advise only of the direct and automatic consequences of conviction, but not of its collateral consequences.<sup>13</sup> Thus, under the test, an attorney's assistance is constitutionally effective as long as the attorney advises a client on the direct consequences of conviction.<sup>14</sup>

Later, in *Strickland v. Washington*, the Supreme Court introduced a two-prong test for determining whether an attorney's assistance was ineffective: (1) whether the "counsel's representation fell below an objective standard of reasonableness;" and (2) whether the counsel's "deficient

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for a future sentence enhancement); *see also* 21 U.S.C. § 851(c)(2) (allowing a criminal defendant to claim that his or her prior conviction was established in violation of the Constitution).

10. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); *see* *Romero v. United States*, 459 U.S. 926, 926 (1982) (White, J., dissenting) (stating that the Sixth Amendment requires that criminal defendants have the right to effective counsel).

11. 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel." (citations omitted)); *see* *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) ("Our decisions make clear that inadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the States through the Fourteenth Amendment. A guilty plea is open to attack on the ground that counsel did not provide the defendant with 'reasonably competent advice.'" (quoting *McMann*, 397 U.S. at 771)); SUSAN R. MARTYN & LAWRENCE J. FOX, *TRAVERSING THE ETHICAL MINEFIELD* 114 (2004) ("[T]he Supreme Court has always recognized that the Sixth Amendment requirement of counsel presupposed *effective* assistance of counsel.").

12. *See, e.g.*, *United States v. Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000) (holding that the failure to advise on the potential deportation does not constitute ineffective assistance of counsel because deportation is a collateral consequence of a guilty plea), *abrogated by* *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010); *United States v. Del Rosario*, 902 F.2d 55, 59 (D.C. Cir. 1990) (holding that deportation is a collateral consequence), *abrogated by* *Padilla*, 130 S.Ct. at 1481; *see also* WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 21.4(d), at 1047 (5th ed. 1992 & Supp. 2011) (explaining the basic difference between the direct and collateral consequences of a guilty plea).

13. *See* *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973) (distinguishing between direct and collateral consequences by examining whether the consequence was a "definite, immediate and largely automatic effect on the range of the defendant's punishment").

14. *Id.*; *see* *Hutchison v. United States*, 450 F.2d 930, 931 (10th Cir. 1971) (*per curiam*) (holding that the defense attorney's failure to advise on an administrative punishment, in addition to the criminal punishment, did not constitute ineffective assistance because it was not a "definite practical consequence of the plea").

performance prejudiced the defense.”<sup>15</sup> The following year, the Court in *Hill v. Lockhart* held that the same test also applies to guilty pleas.<sup>16</sup> Although *Strickland*'s case-by-case approach to determine the reasonableness of an attorney's performance seemed inconsistent with the bright-line direct/collateral consequences test,<sup>17</sup> lower courts continued to apply the direct/collateral consequences test.<sup>18</sup>

The Supreme Court's 2010 decision in *Padilla v. Kentucky* cast additional doubt on the direct/collateral consequences test, holding that an attorney's failure to advise a non-citizen defendant of the near-certain possibility of deportation following a guilty plea constituted ineffective performance and thus a violation of the Sixth Amendment.<sup>19</sup> Although the Court declined to determine the test's validity, the majority opinion pointedly stated that the Court has never adopted the direct/collateral consequences test and that such a test is “ill-suited” in the context of deportation.<sup>20</sup> Instead, the Court relied on the prevailing professional standards and norms in the legal field to conclude that a reasonably effective counsel must advise his or her client of the near-certain chance of deportation resulting from a guilty plea.<sup>21</sup>

Despite the Supreme Court's decision not to apply the direct/collateral consequences test in *Padilla*, the Seventh Circuit nevertheless applied the test in *Reeves* and held that the attorney's failure to advise of the possibility of sentence enhancement of a subsequent drug-related conviction did not render the attorney's counsel constitutionally ineffective because the potential for a future sentence enhancement was a collateral consequence of the guilty plea.<sup>22</sup> Rather than perform a comprehensive assessment of the case's particular circumstances, the *Reeves* court resorted to the direct/collateral

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15. 466 U.S. 668, 687–88 (1984).

16. 474 U.S. 52, 57 (1985) (applying the *Strickland* test to the guilty plea process).

17. Sarah Keefe Molina, Comment, *Rejecting the Collateral Consequences Doctrine: Silence About Deportation May or May Not Violate Strickland's Performance Prong*, 51 ST. LOUIS U. L.J. 267, 284 (2006) (criticizing the direct/collateral consequences test as an “illegitimate” replacement of the case-by-case performance analysis required by *Strickland*).

18. Chin & Holmes, *supra* note 6, at 699 (noting that “eleven federal circuits, more than thirty states, and the District of Columbia” still apply the direct/collateral consequences test).

19. *Padilla*, 130 S. Ct. at 1481 (stating that the Court has not distinguished between direct and collateral consequences for purposes of determining whether counsel provided effective assistance in the past); see also Paisly Bender, *Exposing the Hidden Penalties of Pleading Guilty: A Revision of the Collateral Consequences Rule*, 19 GEO. MASON L. REV. 291, 298 (2011) (“[The *Padilla*] decision casts doubt on the use of the collateral consequences rule in determining what defense counsel must inform a defendant of and may also have implications for the rule as it applies to due process.”).

20. *Padilla*, 130 S. Ct. at 1481.

21. *Id.* at 1481–82.

22. *United States v. Reeves*, 695 F.3d 637, 640 (7th Cir. 2012) (confining the U.S. Supreme Court's *Padilla* decision to deportation cases and holding that a lawyer does not have a duty to explain the consequences of hypothetical future convictions).

consequences test.<sup>23</sup> Because the Seventh Circuit found that the direct/collateral consequences test was satisfied, it did not need to proceed beyond the reasonableness prong of the *Strickland* two-part test for determining ineffective assistance of counsel.<sup>24</sup>

This Note will argue that the Seventh Circuit in *Reeves* deviated from the Supreme Court's guidance in *Padilla* by adhering to the direct/collateral consequences test without considering the particular circumstances of the case. Part I provides an overview of the scope of ineffective assistance of counsel under the Sixth Amendment by reviewing seminal Supreme Court cases, including *Padilla*, and by tracing the lower federal courts' development of the direct/collateral consequences test to deal with ineffective assistance of counsel claims in the absence of clear Supreme Court guidance. Part II discusses in detail the Seventh Circuit's *Reeves* decision and its reasoning for adhering to the direct/collateral consequences test post-*Padilla*. Part III then analyzes *Reeves* in light of *Padilla* and argues that although the *Reeves* court distinguished the two cases, it failed to explain why the attorney's failure to advise of a possible sentence enhancement for future crimes did not violate the Sixth Amendment. Finally, this Note argues that the *Reeves* court erred by not considering the *Padilla* factors or applying them to situations other than those in which deportation is a direct consequence of a guilty plea.

## I. THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

### A. *Strickland's Reasonableness Standard for Assessing Ineffective Assistance of Counsel*

The Sixth Amendment mandates that criminal defendants have the right to assistance of counsel.<sup>25</sup> Early on, the Supreme Court recognized that under the Sixth Amendment's mandate, convictions rendered without effective assistance may be reversed.<sup>26</sup> But it was not until the Court decided *Strickland v. Washington* that it provided an in-depth framework for analyzing what constitutes ineffective assistance of counsel.<sup>27</sup>

In 1984, the Supreme Court in *Strickland* articulated a two-prong test for determining whether a counsel's assistance was constitutionally ineffective: (1) whether the "counsel's performance was deficient;" and (2) whether "the deficient performance prejudiced the defense [so] as to deprive the defendant

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23. *Id.*

24. *Id.* at 640–41. As the Court noted in *Hill v. Lockhart*, the *Strickland* test is conjunctive, meaning that both prongs must be satisfied, thus if one fails the Court need not reach the other. See *Hill v. Lockhart*, 474 U.S. 52, 60 (1985).

25. U.S. CONST. amend. VI.

26. MARTYN & FOX, *supra* note 11, at 114–15.

27. See *id.*; see also BURKOFF & BURKOFF, *supra* note 5, § 1:2, at 3 (acknowledging that it is difficult to determine what constitutes ineffective assistance of counsel).

of a fair trial.”<sup>28</sup> For the first prong, the Court specifically considered whether the “counsel’s representation fell below an objective standard of reasonableness.”<sup>29</sup>

In *Strickland*, the defendant was charged with three murders and sentenced to death.<sup>30</sup> The defendant sought post-conviction relief by arguing that the defense attorney had provided ineffective assistance when he failed to present evidence of the defendant’s good character and emotional status, which he argued might have lessened his sentence.<sup>31</sup> The Court held that the attorney’s representation was sufficiently reasonable because his decision not to present the evidence was motivated by a need to deny the prosecution the opportunity to introduce rebuttal evidence related to the defendant’s prior convictions.<sup>32</sup> The Court found that this decision was the proper strategy under the circumstances based on objectively reasonable professional judgment.<sup>33</sup>

When considering the second prong, the Court evaluated whether the defendant could show that “there [was] a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>34</sup> Because both the performance and prejudice prongs must be met, the Court noted that it is not necessary to consider whether a defendant is prejudiced if he or she has already found that his or her counsel was not constitutionally deficient.<sup>35</sup> But, even assuming that the defense attorney’s assistance was unreasonable, the Court found no prejudice.<sup>36</sup> The Court noted that offering character and emotional distress evidence would have opened the door for the prosecution to present more aggravating evidence, thus increasing the likelihood of a harsher sentence.<sup>37</sup> Therefore, the Court found that the defendant was not prejudiced by the attorney’s conduct.<sup>38</sup>

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28. *Strickland v. Washington*, 466 U.S. 668, 685, 687 (1984) (stating that defense counsel play “a role that is critical to the ability of the adversarial system to produce just results”).

29. *Id.* at 688 (explaining that the reasonableness determination is based on the legal profession’s maintenance of standards).

30. *Id.* at 675.

31. *Id.* at 675–76 (noting several challenges brought by the defendant against his attorney’s assistance).

32. *Id.* at 699.

33. *Id.* (reasoning that just because the defense attorney’s strategy was unsuccessful does not mean that his assistance was ineffective).

34. *Id.* at 687. To claim an unfair trial and a Sixth Amendment violation, a defendant must demonstrate prejudice. *See Perez, supra* note 1, at 1541.

35. *Strickland*, 466 U.S. at 700 (finding that neither deficient performance nor sufficient prejudice were shown to overcome the defendant’s ineffectiveness claim).

36. *Id.*

37. *Id.* (“Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.”).

38. *Id.*



One year after the *Strickland* decision, the Supreme Court held in *Hill v. Lockhart* that the *Strickland* two-prong test for ineffective assistance of counsel also applies to the plea bargaining process.<sup>39</sup> In *Hill*, the defendant pleaded guilty to murder and theft and was sentenced to forty-five years in prison.<sup>40</sup> Later, the defendant sought post-conviction relief, arguing that his attorney had provided ineffective assistance by failing to advise him that he would not be eligible for parole until he had served half of his sentence.<sup>41</sup> The Court declined to analyze *Strickland*'s first prong because the defendant failed to show the second prong, thereby failing the conjunctive test.<sup>42</sup> The *Hill* decision considerably expanded the number and scope of ineffective assistance of counsel claims in criminal proceedings because of the high rate at which defendants enter plea bargains.<sup>43</sup>

### B. *The Advent of the Direct/Collateral Consequences Test*

#### 1. *The Brady Decision and Lower Federal Courts' Extension of the Rule*

The Supreme Court's 1970 decision in *McMann v. Richardson*, which allowed defendants to challenge guilty pleas on the grounds of deficient counsel, left little guidance for lower courts about the scope of what constitutes ineffective assistance of counsel.<sup>44</sup> Fortunately, the Supreme Court's decision in *Brady v. United States*, which was rendered the same day as *McMann*, provided some needed guidance for lower courts.<sup>45</sup> In *Brady*, the defendant received a fifty-year sentence after pleading guilty to kidnapping.<sup>46</sup> After his conviction, the defendant argued that his guilty plea was involuntary and unknowing because he pleaded guilty only to avoid the death penalty, which

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39. 474 U.S. 52, 57 (1985) (holding that the *Strickland* standard should also apply to the plea process despite the difference in context as *Strickland* stemmed from a capital sentencing proceeding).

40. *Id.* at 53–54 (citing evidence that the defendant stated during his allocution that he was aware of its contents, that he understood his rights, and that he was admitting to the charges filed against him).

41. *Id.* at 53.

42. *Id.* at 60 (arguing that the petitioner did not establish any prejudice). The Court noted that the defendant did not allege that he would have altered his guilty plea if counsel had correctly advised him on his eligibility of parole and, therefore, it was unnecessary to address the prejudice prong. *Id.*

43. Perez, *supra* note 1, at 1539.

44. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (stating that criminal defendants are entitled to effective assistance of counsel, but failing to articulate the scope of such effectiveness); Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 418–19 (1988) (discussing the development of the *Strickland* standard).

45. 397 U.S. 742, 755 (1970) (rejecting the defendant's claim that his guilty plea was involuntary); see also Connolly, *supra* note 5, at 752 (discussing the guidance provided by the *Brady* Court requiring the defendant to be made aware of the "direct consequences of his plea").

46. *Brady*, 397 U.S. at 743–44.

was a possible penalty for the defendant under a relevant statute.<sup>47</sup> But, after sentencing, a subsequent judicial interpretation of the statute prevented a jury from imposing the death penalty in this type of case.<sup>48</sup> The defendant argued that his guilty plea was based on a false premise about the statute, and was therefore unknowing and involuntary.<sup>49</sup> The Court rejected his argument, finding instead that the plea was voluntary and valid because he was aware of the direct consequences of his plea.<sup>50</sup>

Even though the *Brady* decision concerned a judge's responsibility to ensure that a guilty plea is voluntary, lower courts applied this rule to the scope of defense counsel's constitutional duty to provide effective assistance, requiring defense counsel to advise the defendant about the direct consequences of conviction, but not the collateral consequences.<sup>51</sup> Although some scholars contend that *Strickland* rejected the direct/collateral consequences test, lower courts continued to use this test when applying the first prong of reasonableness under *Strickland*.<sup>52</sup>

## 2. Examples of Direct/Collateral Consequences

Although there are some variations in the way jurisdictions apply the direct/collateral consequences test,<sup>53</sup> it is generally accepted that direct

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47. *Id.*

48. *Id.* at 756 (providing that, although counsel's advice to the defendant explaining that a jury could impose the death penalty under Section 1201(a) was true at the time, the Court later held in *United States v. Jackson* that the death penalty could not be imposed by a jury when "there was a plea of guilty").

49. *Id.* at 744, 754–57.

50. *Id.* at 755 ("[A] plea of guilty entered by one fully aware of the direct consequences . . . must stand unless induced by threats . . .").

51. See, e.g., *United States v. Campbell*, 778 F.2d 764, 768 (11th Cir. 1985) (citing *Wofford v. Wainwright*, 748 F.2d 1505, 1508 (11th Cir. 1984) and *Edwards v. State*, 393 So. 2d 597, 601 (Fla. Dist. Ct. App. 1981) (Hubbart, J., dissenting)); *Moore v. Hinton*, 513 F.2d 781, 782–83 (5th Cir. 1975) (holding that a defense attorney did not have to inform the defendant that a guilty plea to a driving-while-intoxicated charge would suspend the defendant's driver's license as a collateral consequence, which was not directly brought by the court); *Barajas v. State*, 991 P.2d 474, 475–76 (Nev. 1999) (explaining that the attorney's failure to inform the defendant of a collateral consequence did not result in counsel's behavior falling short of an objective standard of reasonableness); Chin, *supra* note 7, at 703–04, 727 (noting that lower courts have adopted a test distinguishing direct and collateral consequences and criticizing lower courts' application of the *Brady* decision to ineffective counsel cases and explaining that an attorney has a broader duty to the criminal defendant than a court).

52. See *Molina*, *supra* note 17, at 268, 283–84 (criticizing the lower courts' use of the direct/collateral consequences test as part of the analysis under the *Strickland* reasonable performance inquiry); see also BURKOFF & BURKOFF, *supra* note 5, at 26 (stating that the *Strickland* decision "expressly rejected" the direct/collateral consequences test's categorical approach).

53. See Priscilla Budeiri, Comment, *Collateral Consequences of Guilty Pleas in the Federal Criminal Justice System*, 16 HARV. C.R.-C.L. L. REV. 157, 168 (1981) (noting that although all

consequences are the “definite, immediate and largely automatic effect on the range of the defendant’s punishment.”<sup>54</sup> Practically, this means that the consequences that would be deemed direct by lower courts are very narrow.<sup>55</sup> The most common examples of direct consequences are maximum penalties, including imprisonment, fines, and terms of supervised release.<sup>56</sup>

On the other hand, collateral consequences of conviction extend to results that are not automatic or easily foreseeable.<sup>57</sup> Examples of collateral consequences include ineligibility for parole,<sup>58</sup> civil commitment,<sup>59</sup> consecutive sentencing,<sup>60</sup> registration requirements,<sup>61</sup> ineligibility to serve on a

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lower federal courts distinguish between direct and collateral consequences, they have not always interpreted these terms consistently).

54. Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973); *see also* United States v. Rivera-Maldonado, 560 F.3d 16, 21–22 (1st Cir. 2009) (holding that failing to advise the defendant that he or she may face a life term of supervised release—a direct consequence of a guilty plea—constituted reversible error); Bender, *supra* note 19, at 292 (defining collateral consequences as “those consequences that do not follow directly from the sentence imposed by the court”); Steve Colella, “*Guilty, Your Honor*”: *The Direct and Collateral Consequences of Guilty Pleas and the Courts that Inconsistently Interpret Them*, 26 WHITTIER L. REV. 305, 308 (2004) (“The determination that a particular consequence is collateral has, in many cases, turned on whether the consequence was in the hands of another government agency or under the control of the defendant himself.”).

55. Chin, *supra* note 7, at 704 (acknowledging that the Third Circuit has found that the maximum prison term and fine are the only direct consequences for any particular offense).

56. *See* United States v. Salmon, 944 F.2d 1106, 1130 (3d Cir. 1991) (“The only consequences considered direct are the maximum prison term and fine for the offense charged.”); *see also* Barbee v. Ruth, 678 F.2d 634, 635 (5th Cir. 1982) (explaining that only the charged offense’s maximum prison term and fine are considered direct consequences); LAFAVE ET AL., *supra* note 12, § 21.4(d), at 1046–47 (explaining that case law has traditionally emphasized that the defendant should be advised of both the minimum and maximum penalties available for an offense); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators”*, 93 MINN. L. REV. 670, 679 (2008) (“Direct consequences appear limited to the penal sanction that will be imposed as a result of a plea of guilty.”).

57. *See* Foo v. State, 102 P.3d 346, 357 (Haw. 2004) (explaining that collateral consequences are unique to each individual defendant and usually result from third-party actions); Derek Wikstrom, “*No Logical Stopping-Point*”: *The Consequences of Padilla v. Kentucky’s Inevitable Expansion*, 106 NW. U. L. REV. 351, 361–62 (2012) (“If a judge can impose a penalty for a guilty plea but doing so is discretionary, the penalty is collateral. 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.”).

58. *See* Holmes v. United States, 876 F.2d 1545, 1548–49 (11th Cir. 1989).

59. *See* Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973).

60. United States v. Rubalcaba, 811 F.2d 491, 494 (9th Cir. 1987); Budeiri, *supra* note 53, at 178.

61. Kaiser v. State, 621 N.W.2d 49, 53–54 (Minn. Ct. App. 2001), *aff’d*, 641 N.W.2d 900 (Minn. 2002), *superseded by statute as stated in* State v. Jones, 729 N.W.2d 1 (Minn. 2007).

jury,<sup>62</sup> and ineligibility to possess firearms.<sup>63</sup> For example, in *Cuthrell v. Director, Patuxent Institute*, the U.S. Court of Appeals for the Fourth Circuit held that a civil commitment is a collateral consequence of a guilty plea because the plea did not automatically confine the defendant to an institution.<sup>64</sup> Rather, a trained expert must first examine the defendant and decide whether confinement is appropriate, and if so, a jury must then find the defendant delinquent in a civil trial.<sup>65</sup> Therefore, as a general rule, under the direct/collateral consequences test, any consequences other than the length of sentence and the amount of fine tend to be deemed collateral.<sup>66</sup>

### 3. Criticism of the Direct/Collateral Consequences Test

Although lower courts frequently apply the direct/collateral consequences test, many scholars criticize its use.<sup>67</sup> Among the stronger criticisms is that Supreme Court precedent does not support the test's rationale.<sup>68</sup> For example, the *Brady* decision, which many courts look to as the origin of the direct/collateral consequences test, stated that the court's duty is to ensure that a criminal defendant's guilty plea is informed and voluntary.<sup>69</sup> Scholars have argued that lower courts err when they simply overlay the *Brady* analysis onto

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62. *State v. Vasquez*, 889 S.W.2d 588, 590 (Tex. App. 1994) (citing *United States v. Banda*, 1 F.3d 354 (5th Cir. 1993)); *see also* Chin, *supra* note 7, at 705.

63. Chin, *supra* note 7, at 705; *see generally* LAFAVE ET AL., *supra* note 12, § 21.4(d), at 1046–47 (providing examples of direct and collateral consequences of a conviction).

64. *Cuthrell*, 475 F.2d at 1366 (explaining that since there were intermediate steps, including evaluation by experts and a subsequent civil trial, which must occur between conviction and commitment to an institution, commitment was not a direct consequence of the defendant's guilty plea).

65. *Id.*

66. *See supra* notes 53–62 and accompanying text.

67. *See* LAFAVE ET AL., *supra* note 12, § 21.4(d), at 1047 (advocating for a system that notifies defendants that repeat offenders may serve higher penalties for later offenses if the law so provides); Chin, *supra* note 7, at 723 (“[The direct/collateral consequences test] undermines the values underlying the Sixth Amendment because it encourages defense lawyers to disregard what, in a category of cases, will be the most promising source of aid for their clients’ position.”); Rodger Citron, (*Un*)Luckey v. Miller: *The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 493–94 (1991) (discussing the systemic claims).

68. *See* Chin, *supra* note 7, at 699; Roberts, *supra* note 6, at 123 (arguing that the distinction between direct and collateral consequences is “artificial [and] ill-conceived,” and thus courts should adopt a rule requiring counsel to notify defendants of any severe consequence of a criminal conviction for an offense charged); McGregor Smyth, “*Collateral*” No More: *The Practical Imperative for Holistic Defense in a Post-Padilla World . . . Or, How to Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139, 159 (2011) (“A focus on collateral sanctions sets the bar far too low, ignoring the true life impact important to clients. It also squanders many critical opportunities for leveraging better results.”).

69. *See* *Brady v. United States*, 397 U.S. 742, 748 (1969) (holding that guilty pleas, like all waivers of constitutional rights, must be voluntary, knowing, and intelligent); Chin, *supra* note 7, at 728 (explaining that *Brady* speaks to the plea court's obligations, which even if completed, do not mean that the plea is automatically valid because there may be independent constitutional violations that invalidate the plea).

the over-arching standard for ineffective assistance of counsel because the defense counsel's duty must be broader than the court's.<sup>70</sup>

Some scholars have gone further by suggesting that the direct/collateral consequences test is actually inconsistent with Supreme Court precedent.<sup>71</sup> These critics argue that *Strickland* specifically emphasized a case-by-case analysis, thus rejecting a bright-line rule like the direct/collateral consequences test.<sup>72</sup> In other words, the *Strickland* Court looked to the American Bar Association (ABA) standards,<sup>73</sup> which requires defense attorneys to advise their clients of many collateral consequences.<sup>74</sup> Therefore, the Supreme Court's use of the ABA standard, which is inconsistent with the direct/collateral consequences test, may indicate that the test is inconsistent with *Strickland*.<sup>75</sup> Despite the criticism, however, many courts continue to follow the direct/collateral consequences test.<sup>76</sup>

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70. Eric Beckemeier, *The Surprise Appearance of Padilla v. Kentucky: Practical Implications for Criminal Defense Attorneys and Possibilities for Expansion*, 80 UMKC L. REV. 437, 437 (2011) (proposing that collateral consequences that would alter a defendant's choice to plead guilty should be disclosed); Bibas, *supra* note 2, at 1143 (arguing that defense attorneys have broader responsibilities for criminal defendants considering guilty pleas because the attorneys have a better understanding of the detailed facts and circumstances of the case than the judges do); Chin, *supra* note 7, at 682 (arguing that a defense counsel's duty to achieve a better plea bargain for his or her client should lead counsel to consider and advise the defendant on some of the collateral consequences of the guilty plea); Christopher Gowen & Erin Magary, *Collateral Consequences: How Reliable Data and Resources Can Change the Way Law is Practiced*, 39 FORDHAM URB. L.J. 65, 86 (2011) (explaining that collateral consequences can be more severe than direct consequences); Roberts, *supra* note 56, at 693 ("[M]any courts have improperly imported due process standards into decisions analyzing ineffective assistance so that the trial judge and defense counsel are held to the same low standard as information providers in the guilty plea process.").

71. See Malia Brink, *A Gauntlet Thrown: The Transformative Potential of Padilla v. Kentucky*, 39 FORDHAM URB. L.J. 39, 50 (2011) ("The limitation on the scope of representation that the collateral consequence doctrine created was fundamentally inconsistent with the role of the defense lawyer."); see also Molina, *supra* note 17, at 288–89 (criticizing the direct/collateral consequences rule as inconsistent with the Supreme Court's decision in *Strickland* to apply industry standards).

72. See *Strickland v. Washington*, 466 U.S. 668, 688–69 (1984); see also Molina, *supra* note 17, at 288–89.

73. *Strickland*, 466 U.S. at 687–91.

74. See ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, 14–3.2(f) (3d ed. 1999) ("To the extent possible, defense 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.").

75. Molina, *supra* note 17, at 288.

76. See, e.g., *Chaidez v. United States*, 655 F.3d 684, 690 (7th Cir. 2011) (observing that at least nine federal circuits applied the collateral/direct consequences test before the Supreme Court decided *Padilla*); *Bustos v. White*, 521 F.3d 321, 325 (4th Cir. 2008) (analyzing parole eligibility under the direct/collateral consequences test).

C. *Padilla and the Future of the Direct/Collateral Consequences Test*

Recently, the Supreme Court held in *Padilla v. Kentucky* that a criminal defense attorney's failure to advise a client about the possibility of deportation constituted ineffective assistance of counsel under the Sixth Amendment.<sup>77</sup> This decision abrogated a considerable number of lower court decisions that held that the failure to advise about the risk of deportation did not constitute ineffective assistance of counsel because deportation is a collateral consequence of a guilty plea.<sup>78</sup>

In *Padilla*, a lawful permanent resident of the United States discovered, after he pleaded guilty to a drug-related charge, that he faced deportation as a consequence of his plea.<sup>79</sup> He moved for post-conviction relief, contending that his decision to plead guilty was based on ineffective assistance of counsel because his attorney failed to inform him of the potential for deportation.<sup>80</sup> In reaching the conclusion that counsel's failure to advise about deportation amounted to constitutionally defective assistance, the Court looked to prevailing professional norms for guidance as to what the reasonable standard for effective assistance should be.<sup>81</sup>

First, the Court reviewed persuasive authority including the American Bar Association Standards for Criminal Justice for guidance in determining what the objective reasonableness standard should be for effective representation.<sup>82</sup> The Court held that failure to advise about the deportation fell below the reasonableness standard because ““authorities of every stripe—including the

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77. 130 S. Ct. 1473, 1486 (2010) (finding that precedent, the severity of the consequence, and the impact on families demanded notification of the possibility of deportation as a potential consequence of a guilty plea).

78. See, e.g., *United States v. George*, 869 F.2d 333, 338 (7th Cir. 1989), *abrogated by Padilla*, 130 S. Ct. at 1486; *United States v. Campbell*, 778 F.2d 764, 767 (11th Cir. 1985), *abrogated by Padilla*, 130 S. Ct. at 1486. See generally Gregory G. Sarno, *Annotation, Ineffective Assistance of Counsel: Misrepresentation, or Failure to Advise, of Immigration Consequences of Guilty Plea—State Cases*, 65 A.L.R.4TH 719 (1988) (providing examples of state cases finding effective counsel despite the attorney's failure to inform the client of the possibility of consequential deportation).

79. *Padilla*, 130 S. Ct. at 1477.

80. *Id.* at 1478 (noting that the defendant also claimed that his attorney told him that deportation was not likely to result from his conviction because the defendant had been in the country for a long time).

81. *Id.* at 1481.

82. *Id.* at 1482 (citing NATIONAL LEGAL AID AND DEFENDER ASSN., PERFORMANCE GUIDELINES FOR CRIMINAL REPRESENTATION § 6.2, at 77 (1995)); G. HERMAN, PLEA BARGAINING § 3.03, at 20–21 (1997); Chin & Holmes, *supra* note 6, at 713–18; ARTHUR CAMPBELL, LAW OF SENTENCING § 13:23, at 555, 560 (3d ed. 2004); Dep't of Justice, Office of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, at D10, H8–H9, J8 (2000) (providing a survey of guidelines for effective assistance across multiple jurisdictions); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4–5.1(a), at 197 (3d ed. 1993); ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 14–3.2(f), at 116 (3d ed. 1999).

American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients.”<sup>83</sup> Second, the Court took into consideration the clarity and brevity of the statute in question.<sup>84</sup> The Court reasoned that although a criminal attorney is not expected to understand the complex details of immigration law, the statute in question was clear enough for the court to expect a criminal attorney to understand the strong possibility of consequential deportation and inform his client of this particular consequence.<sup>85</sup> Third, the Court considered the harshness of the consequence of conviction.<sup>86</sup> The Court reasoned that deportation is a “drastic measure” that is harsh enough to be characterized as exile.<sup>87</sup> The Court held that, considering the harshness of the consequence, the defense counsel should have advised the defendant about the possibility of deportation.<sup>88</sup> The last factor the Court considered was the likelihood that the consequence would result from a conviction following a guilty plea.<sup>89</sup> The Court found that, under the relevant statute, deportation was an automatic result of a guilty plea and, therefore, defense counsel should have advised on the potential risk of facing that consequence.<sup>90</sup>

In considering these factors, the Court cast doubt on the direct/collateral consequences test, stating that the Supreme Court has “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under

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83. *Padilla*, 130 S. Ct. at 1482 (quoting Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* Supporting Petitioner at 12–14, *Padilla*, 130 S. Ct. 1473 (2010) (No. 08-651)).

84. *Id.* at 1483 (reasoning that when a law is not straightforward, defense counsel need only notify the client that deportation may be possible). The Court further stated that if the immigration consequences of a statute are clear, counsel has a duty to correctly advise the defendant. *Id.*

85. *Id.* The statute provides:

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable. 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

86. *Padilla*, 130 S. Ct. at 1478 (noting that the class of deportable offenses has expanded while judicial authority to mitigate consequences of deportation has been limited).

87. *Id.* (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

88. *Id.* at 1486 (“The severity of deportation . . . only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.” (footnote omitted)).

89. *Id.* at 1481 (stating that deportation is now a near-automatic result for many crimes committed by noncitizens).

90. *Id.* at 1483 (concluding that counsel’s error in failing to inform her client of the possibility of deportation constituted ineffective assistance of counsel).

*Strickland*.”<sup>91</sup> Rather, the *Padilla* Court utilized a case-by-case approach in applying the *Strickland* factors to determine whether objectively reasonable assistance was rendered.<sup>92</sup> Although Justice Samuel Alito’s concurring opinion described the majority’s formula as a “vague, halfway test” that constituted a “dramatic departure from precedent,”<sup>93</sup> at least one scholar has nonetheless championed the decision “as an important step toward imposing constitutional discipline” in the important realm of guilty pleas.<sup>94</sup>

## II. REEVES: THE STRUGGLE TO ADHERE TO THE DIRECT/COLLATERAL CONSEQUENCES TEST

### A. Failure to Warn About Sentence Enhancement: Ineffective or Not?

In the wake of the Supreme Court’s decision in *Padilla*, which the concurring Justices called “a major upheaval in Sixth Amendment law,”<sup>95</sup> *United States v. Reeves* presented a perfect opportunity for the Seventh Circuit to address whether a defense counsel’s failure to advise a criminal defendant of the potential to receive a sentence enhancement in a subsequent criminal action as a consequence of pleading guilty constituted ineffective assistance of counsel.<sup>96</sup> In 2004, the defendant Mario Reeves pleaded guilty to possession and sale of cocaine.<sup>97</sup> Three years later, Reeves was indicted and convicted of heroin distribution.<sup>98</sup> In the latter action, the government pursued sentence enhancement under 21 U.S.C. § 851,<sup>99</sup> which allows the government to seek to enhance a convicted criminal defendant’s sentence if the defendant has a prior drug conviction on his or her record.<sup>100</sup> Because Reeves pleaded guilty to the

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91. *Id.* at 1481. The Court suggested that deportation is “uniquely difficult to classify as either a direct or a collateral consequence.” *Id.* at 1482. The majority further argued that the direct/collateral consequence test is inappropriate when reviewing a *Strickland* claim concerning the specific risk of deportation. *Id.* But the Court concluded “that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.” *Id.*

92. *See generally id.* at 1482–83.

93. *Id.* at 1487–88 (Alito, J., concurring) (noting that the majority’s departure from precedent would result in needless litigation and confusion).

94. Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. L. PUB. REV. 87, 89 (2011) (describing guilty pleas as “a typically hidden and frequently one-sided process of negotiation that has become the norm for disposing of criminal cases”).

95. *Padilla*, 130 S. Ct. at 1491–92 (Alito, J., concurring) (characterizing the majority opinion as a “dramatic expansion” of defense counsel’s duties under the Sixth Amendment).

96. 695 F.3d 637, 639 (7th Cir. 2012) (“Here, we are presented with a pure legal question: whether federal law requires an attorney to advise his client that a guilty plea may expose the client to potential sentencing enhancements for any future convictions.”).

97. *Id.* at 638.

98. *Id.*

99. *Id.*

100. 21 U.S.C. § 851(a)(a) (2006) (highlighting the procedures the U.S. Attorney General must follow to show that the defendant has a predicate prior conviction); 21 U.S.C. § 851 (d)(1)



2004 drug offense, the government was able to pursue a sentence enhancement in the subsequent action, possibly doubling the sentence he may have otherwise received.<sup>101</sup>

Reeves objected to the sentence enhancement, arguing that his prior guilty plea was made without effective assistance of counsel and therefore should not serve as the basis for a sentence enhancement.<sup>102</sup> The district court enhanced the sentence over Reeves' objection, and Reeves appealed.<sup>103</sup>

### *B. Distinguishing Padilla*

The Seventh Circuit first distinguished *Reeves* from *Padilla* by holding that the defense counsel's failure to advise about the possibility of sentence enhancement for a future conviction does not make the counsel's assistance unconstitutionally ineffective.<sup>104</sup> In response to Reeves' contention that the *Padilla* decision effectively mandates that counsel advise criminal clients about a broad range of possible consequences, such as the possibility of sentence enhancement in the present case, the Seventh Circuit held that *Padilla*'s reasoning cannot be applied to Reeves because *Padilla* dealt with a very specific and distinguishable consequence of conviction—deportation.<sup>105</sup> The Seventh Circuit reasoned that *Padilla* should be limited to the context of deportation as a consequence, and, therefore, it did not affect the Seventh Circuit's ability to apply the direct/collateral consequences test.<sup>106</sup>

### *C. Adhering to the Direct/Collateral Consequences Test*

After distinguishing *Reeves* from *Padilla* on the facts, the Seventh Circuit held that it would follow past precedent in the Seventh Circuit on ineffective assistance of counsel cases for guilty plea proceedings.<sup>107</sup> In doing so, the

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(providing for a mandatory sentence enhancement when a person who has previously been convicted under § 841(b) commits a second offense covered under the same Part).

101. *Reeves*, 695 F.3d at 638.

102. *Id.* at 639 (noting that Reeves argued that his counsel was deficient because counsel failed to inform Reeves that a guilty plea might result in a sentence enhancement if he was convicted in a subsequent criminal action).

103. *Id.* at 638.

104. *Id.* at 640 (explaining that *Padilla* should be confined to the deportation context because deportation is such a unique risk).

105. *Id.* (explaining that the *Padilla* Court, recognizing the serious nature of deportation, confined its ruling to cases in which an ill-advised guilty plea is the direct cause of a non-citizen's deportation); *see also* *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (holding that "counsel must advise her client whether his plea carries the risk of deportation").

106. *Reeves*, 695 F.3d at 640 (citing *Lewis v. United States*, 902 F.2d 576, 577 (7th Cir. 1990)) (explaining that the court would adhere to its precedent in *Lewis* because the facts of the case dealt with the possibility of receiving a sentence enhancement for future criminal behavior and thus was not inconsistent with the *Padilla* Court's limited holding to the deportation context).

107. *Id.* (citing *Lewis*, 902 F.2d at 577) (relying on *Lewis* to uphold sentencing enhancements imposed on Reeves as a result of his prior felony drug conviction).

court relied in part on *Lewis v. United States*, in which the Seventh Circuit applied the direct/collateral consequences test and determined that a criminal defense counsel's assistance was not deficient when he failed to advise the defendant that a guilty plea might result in a sentence enhancement for a subsequent criminal conviction.<sup>108</sup>

In *Lewis*, the Seventh Circuit found that a defense counsel is not required to advise the defendant about a potential sentence enhancement for a possible future conviction because that consequence is contingent on the defendant committing another crime, thereby making the consequence indirect, i.e., collateral.<sup>109</sup> Relying on this rationale, the Seventh Circuit in *Reeves* held that the defense counsel's assistance was reasonable under *Strickland*'s first prong and therefore not constitutionally deficient.<sup>110</sup> Consistent with its prior decisions considering ineffective assistance of counsel claims, the Seventh Circuit applied the direct/collateral consequences test in *Reeves* despite the Supreme Court's refusal to follow it in *Padilla*.<sup>111</sup>

#### D. Public Policy: Encouraging Crimes

The Seventh Circuit also raised public policy considerations in *Reeves*.<sup>112</sup> In the court's view, a contrary ruling that would have required counsel to advise about the potential for future sentence enhancements would create an undesirable policy that was unsupported by precedent.<sup>113</sup> The court reasoned that requiring defense counsel to advise about the possibility of a sentence enhancement for a subsequent criminal conviction based on a previous guilty plea would lead to the absurd result of requiring a defense counsel to advise defendants on how to continue committing crimes while minimizing the risk of being subjected to longer sentences.<sup>114</sup> The court used this public policy

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108. See *Lewis*, 902 F.2d at 576 (holding that a defense counsel does not have a duty to inform his client about the possibility of receiving a sentence enhancement for a future crime); see also *United States v. George*, 869 F.2d 333, 338 (7th Cir. 1989).

109. *Lewis*, 902 F.2d at 576 (describing such a warning as "needless" because most defendants know as well as their attorneys that repeat offenders receive harsher sentences).

110. *Reeves*, 695 F.3d at 637, 640–41 (holding that defense counsel do not have a Sixth Amendment duty to advise clients of one conviction's effects on a future hypothetical conviction).

111. *Id.* at 640 (distinguishing deportation, which is a consequence of the immediate conviction, from a sentence enhancement, which is a collateral consequence contingent on a subsequent conviction).

112. *Id.*

113. *Id.*

114. *Id.* ("We pause for a moment to consider the absurd ramifications of the rule that *Reeves* asks us to create. Using *Padilla* as a springboard, we would be forced to hold that counsel has a constitutional duty to advise the client as to how he might best continue his criminal activity while minimizing his risk of future punishment.").

argument to further explain why the holding in *Padilla* should not be extended to requiring advice on future sentence enhancements.<sup>115</sup>

*Reeves* highlights the tension between the long-standing direct/collateral consequences test and the *Padilla* Court's alternative case-specific treatment. Particularly, it demonstrates the Seventh Circuit's desire to adhere to the bright-line direct/collateral consequences test despite the benefits inherent in a case-by-case analysis utilizing the factors set forth in *Padilla*.

### III. THE *PADILLA* REASONABLENESS FACTORS: THE ALTERNATIVE TO THE DIRECT/COLLATERAL CONSEQUENCES TEST

#### A. *Reeves: Deviation from Padilla*

##### 1. *The Padilla Decision Is Not Limited to Deportation Cases*

The Seventh Circuit in *Reeves* held that *Padilla* only applies to guilty plea cases with the direct consequence of deportation.<sup>116</sup> In the Seventh Circuit's view, the Supreme Court in *Padilla* found the counsel's assistance to be constitutionally ineffective solely because of the unique harshness of deportation.<sup>117</sup> The harshness of the consequence, however, is only one of several factors that the *Padilla* Court considered.<sup>118</sup> Rather, the Supreme Court questioned whether the counsel's assistance was reasonable under the circumstances—specifically, whether reasonably competent counsel would advise his or her client about deportation as a possible consequence.<sup>119</sup> In order to evaluate reasonableness, the Court considered several factors, such as the prevailing professional standards, the succinct language of the relevant statute, the harshness of the consequence, and the automatic nature of the consequence.<sup>120</sup>

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115. *Id.*

116. *Id.* at 641 (confining the Supreme Court's *Padilla* decision to deportation cases and holding that the court does not have a justification to find that the failure to advise on future sentence enhancement was unreasonable).

117. *Id.* at 632–42 (indicating that *Padilla*'s analysis emphasized deportation's severity and suggesting that the Court intended to limit its holding to the deportation context). The *Padilla* Court found deportation "uniquely difficult" to classify as either a direct or collateral consequence, but did note its near-automatic nature. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480, 1482–83 (2010).

118. See *Padilla*, 130 S. Ct. at 1482–83 (considering prevailing professional norms to determine whether the performance prong was met).

119. *Id.* at 1482 ("Under *Strickland*, we first determine whether counsel's representation 'fell below an objective standard of reasonableness.'" (citation omitted)).

120. *Id.* at 1481–83 ("We have long recognized that deportation is a particularly severe 'penalty.'" The Court noted that professional standards advocate disclosure to the client if the possibility of deportation exists. *Id.* at 1482. Furthermore, the statute was found to be "succinct, clear, and explicit in defining the removal consequence for *Padilla*'s conviction." *Id.* at 1483.

The Seventh Circuit erred by confining the *Padilla* decision to deportation cases and only considering the harshness of the consequence.<sup>121</sup> Instead, the court should have considered all of the *Padilla* factors, including the factors of the professional standard, the language of the statute, and the automatic nature of the consequence in light of guilty plea proceedings with the consequence of subsequent sentence enhancement.

## 2. *The Supreme Court Formulated the Alternative to the Direct/Collateral Consequences Test*

After limiting *Padilla* to deportation cases, the Seventh Circuit relied on the direct/collateral consequences test and held that the counsel's failure to advise his client about a potential for sentence enhancement was not constitutionally ineffective because no duty existed to inform the client about the collateral consequence of a guilty plea.<sup>122</sup> After *Strickland* and *Padilla*, however, it was inappropriate for the *Reeves* court to rely on this test.<sup>123</sup>

Specifically, the Supreme Court in *Padilla* declined to follow the direct/collateral consequences test, noting that the Court had "never distinguished between direct and collateral consequences in defining the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."<sup>124</sup> Although the Court declined to decide the test's appropriateness in contexts other than deportation, the Court's opinion likely signals a desire to move away from the bright-line test. In lieu of the direct/collateral consequences test, the Court emphasized the importance of evaluating reasonableness under *Strickland* by reviewing the specific circumstances on a case-by-case basis.<sup>125</sup> By rigidly distinguishing direct and collateral consequences and imposing a duty to inform of direct consequences only, the Seventh Circuit missed an opportunity to meaningfully analyze the

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121. See *Taylor v. State*, 698 S.E.2d 384, 389 (Ga. Ct. App. 2010) (expanding the *Padilla* decision to a sex-offender registration case and finding that registration as a sex offender is also a drastic measure much like deportation); see also Beckemeier, *supra* note 70, at 460 ("Padilla's holding should be extended to all serious collateral consequences of a criminal conviction.").

122. See *supra* note 116.

123. See Chin, *supra* note 7, at 699; see also Connolly, *supra* note 5, at 750 (noting that *Strickland* "actively rejects the idea that stringent guidelines should be set dictating the conduct of defense counsel"); Roberts, *supra* note 6, at 123 ("The Court should reject the artificial, ill-conceived divide between collateral and direct consequences and find that only a rule of full information about any severe consequences of a criminal conviction can adequately protect the constitutional values surrounding guilty pleas, including the right to an informed, voluntary process and the assistance of an effective lawyer.").

124. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1476 (2010).

125. See *id.* at 1481 (finding that the direct/collateral consequence distinction is improper for deportation cases); *Roe v. Flores-Ortega*, 528 U.S. 470, 477–82 (2000) (rejecting a bright-line *per se* rule and explaining that the Supreme Court's *Strickland* decision holds that the inquiry is "whether counsel's assistance was reasonable considering all the circumstances"); Chin, *supra* note 7, at 712 (arguing that Supreme Court precedent approaches ineffective assistance of counsel issues on a case-by-case basis).

reasonableness of an attorney's assistance in light of the unique circumstances of each case.<sup>126</sup> Therefore, the *Reeves* court erred in deciding the case based only on the direct/collateral consequences test on which the Supreme Court had cast doubt in *Padilla*.

### 3. *The Reeves Court's Public Policy Argument Is Without Merit*

In support of its holding, the *Reeves* court reasoned that a contrary holding would create an unattractive public policy.<sup>127</sup> In the court's view, advising a criminal defendant that his or her guilty plea might cause a sentence enhancement in a future criminal action is the same as advising the defendant about how to commit another crime and minimize the risk of imprisonment.<sup>128</sup> However, this public policy argument is without merit. Contrary to the court's reasoning, informing a criminal defendant that committing a future crime will cause a sentence enhancement creates a strong deterrent effect.<sup>129</sup> In fact, one purpose of enhancing the sentence of a recidivist is to deter the convicted criminal from committing another crime.<sup>130</sup>

## B. *Analyzing Reeves Under the Padilla Factors*

### 1. *Prevailing Professional Standard*

In evaluating the reasonableness of counsel's assistance, the Supreme Court in *Padilla* considered prevailing professional norms by reviewing the guidelines and standards of the ABA and the Department of Justice (DOJ), as well as standards noted in various legal journals.<sup>131</sup> In the Court's view, even though these sources are not "inexorable commands," they demonstrate the "practice and expectations of the legal community."<sup>132</sup>

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126. See *Reeves*, 695 F.3d at 640; Chin, *supra* note 7.

127. *Reeves*, 695 F.3d at 640; see *supra* notes 112–18 and accompanying text.

128. *Reeves*, 695 F.3d at 640.

129. See Michael M. O'Hear, *Seventh Circuit Rejects Effort to Extend Padilla Beyond Deportation Context*, MARQUETTE UNIV. SCH. FACULTY BLOG (Aug. 20, 2012), <http://law.marquette.edu/facultyblog/2012/08/20/seventh-circuit-rejects-effort-to-extend-padilla-beyond-deportation-context/> ("[W]hen *counsel* informs the defendant of what might happen if criminal activity continues after a proposed guilty plea, the transaction might more appropriately be thought of as a fair warning than as encouragement or facilitation of criminal activity.").

130. See *United States v. Foss*, 501 F.2d 522, 528 (1st Cir. 1974) (stating that deterrence is an appropriate consideration in drug offense cases); *State v. Jones*, 420 S.E.2d 736, 740 (W. Va. 1992) ("The teaching of our case law is that the primary purpose of the statute is to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses.").

131. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010); see also *supra* note 82 (citing a number of professional authorities referenced by the Supreme Court to determine the prevailing professional norms).

132. *Padilla*, 130 S. Ct. at 1482; see John H. Blume & Stacey D. Neumann, "It's Like *Deja Vu all over Again*": *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) *Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L.

Following the Supreme Court's analysis, the *Reeves* court should have considered these sources as applied to guilty plea proceedings. First, ABA standards for Criminal Justice explicitly reject the direct/collateral consequences test, stating that defense counsel should advise clients of possible collateral consequences of entering a guilty plea.<sup>133</sup> Moreover, the standards set by the DOJ state that defense counsel should advise clients on "any possible and likely sentence enhancements in the present and in future cases."<sup>134</sup>

Considering that these standards come from highly regarded institutions comprised of legal practitioners, judges, and scholars, a strong foundation exists for courts to hold that a reasonable defense counsel must advise clients of the potential for sentence enhancement in a subsequent criminal action because of a previous guilty plea.<sup>135</sup> The *Reeves* court should have considered these professional standards, as the Supreme Court did in *Padilla*, and applied them to its determination of the reasonableness of counsel's assistance.

## 2. Succinct Language of the Relevant Statute

The Supreme Court in *Padilla* held that the succinct nature and clarity of the relevant immigration statute indicates that the counsel should have been aware of the possibility of deportation and, therefore, making his failure to advise unreasonable.<sup>136</sup> The relevant statute in *Padilla* stated, "Any alien

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127, 159 (2007) (stating that the adoption of the ABA standard as a determining factor for ineffective assistance of counsel claims is a positive trend because it will provide defense counsels with clearer and more specific guidelines).

133. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION §§ 4–5.1(a), at 197 (3d ed. 1993) ("After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome."); ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 14–3.2(f), at 116 (3d ed. 1999) ("To the extent possible, defense 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.").

134. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, 2 COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS, STANDARDS FOR ATTORNEY PERFORMANCE, Guideline 6.2(b)(5), at H6–H7 (2000) ("In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of . . . any possible and likely sentence enhancements in the present and in future cases or parole consequences."); NATIONAL LEGAL AID AND DEFENDER ASSN., PERFORMANCE GUIDELINES FOR CRIMINAL REPRESENTATION § 6.2(a)(4), at 77 (1995) ("In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of . . . any possible and likely sentence enhancements or parole consequences.").

135. Chin, *supra* note 7, at 716–17 (surveying various criminal law practitioners' manuals and concluding that a defense counsel has a duty to advise on some collateral consequences of a guilty plea, including sentence enhancement).

136. *Padilla*, 130 S. Ct. at 1483 ("When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration

who . . . has been convicted of a violation of . . . any law . . . relating to a controlled substance . . . is deportable.”<sup>137</sup>

Similarly, in *Reeves*, the relevant sentence enhancement statute states that, “[i]f any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment . . . .”<sup>138</sup> The provision explaining the procedure states that “[n]o person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court . . . .”<sup>139</sup> The statutory provision simply requires the prosecution to file information regarding the defendant’s prior conviction—or guilty plea—in order to provide the basis for sentence enhancement.<sup>140</sup> The language of the recidivist provision is clear and straightforward, and a competent defense attorney could easily determine that a guilty plea would provide the basis for a sentence enhancement in a subsequent criminal action.<sup>141</sup> Considering the succinct nature of the relevant sentence enhancement provision, a defense counsel’s failure to advise on the potential sentence enhancement would be unreasonable.

### 3. *Harshness of the Consequence*

The Supreme Court in *Padilla* held that, considering the harshness of the deportation, it was unreasonable for the defense counsel to fail to advise his client about the likelihood of deportation.<sup>142</sup> Although the Court emphasized the harshness of deportation by comparing it to exile, the Court did not necessarily restrict its holding to deportations as the only “harsh” consequence necessitating advisement by counsel.<sup>143</sup> Therefore, it is proper for courts to interpret *Padilla* as holding, broadly, that defense counsel should advise criminal clients on harsh consequences that are reasonably likely to stem from a guilty plea.<sup>144</sup> In fact, the Court of Appeals for the State of Georgia in *Taylor v. State* closely followed *Padilla* and held that a defense counsel’s failure to

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consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.”)

137. 8 U.S.C. § 1227 (a)(2)(B)(i)(2006).

138. 21 U.S.C. § 841(b) (2006).

139. 21 U.S.C. § 851(a)(1) (2006).

140. *Id.*

141. *Id.*; see also *supra* note 134 and accompanying text (outlining professional standards for competency).

142. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010) (stating that subsequent deportation of noncitizens “is now virtually inevitable” for a large number of crimes).

143. See *Taylor v. State*, 698 S.E.2d 384, 389 (Ga. Ct. Ap. 2010) (finding that registration as a sex offender is sufficiently harsh to fall under *Padilla*).

144. Smyth, *supra* note 7, at 801 (arguing that deportation is not the only harsh penalty and should not be unique to the Sixth Amendment analysis).

advise about the possibility of sex-offender registration was constitutionally ineffective, in part due to the harshness of the consequence.<sup>145</sup> The court reasoned that *Padilla* is not restricted to deportation cases only but, rather, applies to any case in which there is a risk of harsh consequences enmeshed with a guilty plea or conviction.<sup>146</sup>

The possibility of a sentence enhancement for a future crime is certainly a harsh consequence. Under 21 U.S.C. § 841(b), a convicted defendant with a prior drug-related conviction may face a prison term twice as long as a first-time offender.<sup>147</sup> Although a doubled sentence may not be as severe of a consequence as deportation, such a drastic increase on the restriction of personal liberty is worthy of notification. As the Court of Appeals of Georgia in *Taylor* noted, the convicted criminal faces “extensive restrictions” on his or her life, with a possibility of life imprisonment.<sup>148</sup> Even though the sentence enhancement in *Reeves* was conditioned on the defendant committing a future crime, the mere possibility of a double sentence creates a harsh consequence of which the defendant should have been informed.<sup>149</sup>

#### 4. Automatic Nature of the Consequence

The Supreme Court in *Padilla* held that because deportation was a nearly automatic consequence of the guilty plea, the defense counsel’s failure to advise rendered his representation constitutionally ineffective.<sup>150</sup> In a practical sense, under the relevant immigration statute, a convicted defendant does not have any legal remedy and automatically faces deportation.<sup>151</sup>

In comparison, the language of 21 U.S.C. § 841(b) also provides that a sentence enhancement for a defendant with a prior drug offense conviction is nearly an automatic result.<sup>152</sup> Therefore, considering the automatic nature of the consequence, the *Reeves* court should have found that the defense

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145. *Taylor*, 698 S.E.2d at 388–89 (“It is likewise true that registration as a sex offender, like deportation, is a ‘drastic measure’ (albeit a totally understandable one) with severe ramifications for a convicted criminal.” (citing *Padilla*, 130 S. Ct. at 1478)).

146. *Id.* at 389 (comparing sex-offender registration to deportation and elaborating on the severe ramifications for convicted sex offenders).

147. 21 U.S.C. § 841(b) (2006); see also Brad Henry, *21 U.S.C. 851: Doubling Your Sentence Under Federal Law*, BREEDING & LODATO, LLC (Mar. 14, 2012), <http://www.knoxvillecriminaldefenseblog.com/2012/03/21-usc-851-doubling-your-sentence-under-federal-law.shtml> (drawing attention to § 841’s doubled minimum mandatory).

148. *Taylor*, 698 S.E.2d at 389.

149. See *supra* note 134 and accompanying text.

150. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

151. See *id.* at 1478 (“We agree with *Padilla* that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.”).

152. § 841(b).



counsel's failure to advise on the potential sentence enhancement was constitutionally ineffective.

#### IV. CONCLUSION

*Reeves* deviated from Supreme Court precedent by relying on an incomplete analysis of *Padilla* and confining the seminal case to deportation cases only. Instead of continued reliance on the direct/collateral consequences test, the Seventh Circuit should have followed suit with the Supreme Court and analyzed the counsel's assistance in light of the fundamental question of reasonableness, which is better suited for the case-by-case analysis required under *Strickland*. Specifically, in analyzing reasonableness, the court should have considered the four factors used by the *Padilla* Court: prevailing professional standards, succinct language of the relevant statute, harshness of the consequence, and the automatic nature of the consequence. Although it is understandable that it would be difficult for lower courts to abandon the historical, easy-to-apply, and categorical direct/collateral consequences test, defendants' Sixth Amendment rights demand a fairer and more workable standard, such as the one outlined in *Padilla*. Without such a standard, future criminal defendants will have no legal recourse when their defense attorneys fail to inform them of the possible consequences of entering a guilty plea.

