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Padilla's "Truly Clear" Test: A Case for a Broader Application in Minnesota

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**PADILLA’S “TRULY CLEAR” TEST: A CASE FOR A
BROADER APPLICATION IN MINNESOTA**

Joanna Woolman[†]

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I. INTRODUCTION

On March 31, 2010, the United States Supreme Court decided *Padilla v. Kentucky*.¹ This decision forever alters criminal defense attorneys’ duty to advise their clients about the deportation consequences of a guilty plea. The Court held that when deportation consequences are “truly clear,” a criminal defense lawyer’s duty to give correct advice is equally clear.²

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1. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). Justice Stevens wrote for the majority, joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor. Justice Alito wrote a concurrence joined by Chief Justice Roberts. Justice Scalia wrote a dissent, joined by Justice Thomas.

2. *Id.* at 1483.

Never before has the Court held that there is a duty to advise clients about a “collateral” consequence to a plea.³ The duty it creates to provide accurate and client-centered representation around the issue of deportation is a huge step forward because it greatly expands the responsibilities of a criminal defense attorney—it is now a violation of the Sixth Amendment right to counsel not to advise about a collateral sanction.

The *Padilla* opinion is a wake-up call—that in order to provide effective representation in this day and age, where the number of collateral consequences is rapidly growing—it is not enough to simply advise clients about the direct criminal sanctions of their conviction in the context of deportation. The reason is because other collateral consequences exist that are just as clear and just as dire. This article argues that *Padilla* must be applied to these other circumstances where statutory civil consequences that stem from a criminal conviction are “truly clear,”⁴ meaning direct, and “most difficult”⁵ to divorce from the conviction, meaning dire.

Collateral consequences are routinely discussed before a plea, and many defense attorneys try to advise their clients about as many of them as they can. Clients often have no idea what other issues may await them after their conviction, so it is a defense attorney’s job to tell them.⁶

Ideally, criminal defense attorneys would inform their clients about every collateral consequence that results from a plea. However, that may be impossible given that in Minnesota alone, more than two hundred collateral consequences exist.⁷ These consequences range in type and severity, including restrictions on

3. *Id.* at 1481 (citations omitted) (defining “collateral” consequence as a matter not within the sentencing authority of the state trial court).

4. *Id.* at 1483. The court noted that when a collateral “consequence is ‘truly clear’ . . . the duty to give correct advice is equally clear.” *Id.*

5. *Id.* at 1481. The court intimated that when the collateral consequence is hard to divorce from the conviction, there is an even stronger need for counsel to advise regarding the collateral consequence. *Id.*

6. The author has worked as a public defender in Minnesota for five years, during which time she has advised hundreds of clients prior to a plea. She has worked as a public defender in Isanti County, and most recently in Anoka County. Both counties are in the Tenth Judicial District of Minnesota. The author, like many attorneys, tries to advise her clients of as many collateral consequences as she can.

7. *Expunging Criminal Records*, THE RIGHTS STUFF (Minn. Dep’t of Hum. Rts., St. Paul, Minn.), April 2009, at 13, available at http://www.humanrights.state.mn.us/education/articles/rs_pdf/rs09_sprin0g.pdf [hereinafter *Expunging Criminal Records*].

driving privileges, hunting rights, voting rights, and public housing.⁸ This article argues that there are three particular collateral consequences in Minnesota that clearly fall under the *Padilla* standard. For these particular sanctions, defense attorneys must provide their clients clear and accurate information about them prior to a plea.

In Section II, this article analyzes the *Padilla* case and argues that it has created a two-prong test for determining when a collateral consequence is direct and dire enough to require an attorney to clearly advise a criminal defendant about it prior to trial. In Section III, this article provides examples of the support for a broader application of *Padilla* in the legal community. In Section IV, this article argues that *Padilla* should control three particular collateral consequences in Minnesota because they are also direct and dire. These three sanctions include child custody, disqualification for licensing by the Department of Health and Human Services (DHHS), and registration as a sex offender.

II. PADILLA'S NEW "TRULY CLEAR" STANDARD

José Padilla, a native of Honduras and a Vietnam veteran, has been a permanent resident of the United States for more than forty years.⁹ After pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in Kentucky, he faced deportation.¹⁰ Padilla filed a claim for post-conviction relief alleging ineffective assistance of counsel. Padilla claimed his attorney not only failed to advise of this consequence prior to his entering a plea, but also told him that he "did not have to worry about immigration status since he had been in the country so long."¹¹ Padilla relied on his attorney's incorrect advice when he made the decision to enter a plea of guilty to drug charges that made his deportation virtually mandatory.¹² The Court, in an opinion written by Justice Stevens,¹³ found that when a criminal defense attorney gives incorrect advice or omits advice to clients of their "truly clear" potential for deportation upon a guilty plea, the defense attorney is not providing adequate assistance of counsel

8. *Id.*

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

10. *Id.*

11. *Id.* at 1478.

12. *Id.*

13. *Id.* at 1473.

pursuant to the Sixth Amendment as laid out by the Court in *Strickland v. Washington*.¹⁴ The Court found that the relevant terms of the immigration statute were clear, and that the consequence was sufficiently direct.¹⁵ Further, the Court agreed with Mr. Padilla that “constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.”¹⁶

The Court found that the civil consequence of being deported is a “particularly severe ‘penalty,’ but it is not, in a strict sense, a criminal sanction.”¹⁷ This civil consequence is “intimately related to the criminal process,” and the penalty of deportation is “most difficult” to divorce from the conviction.¹⁸ The Court found that in many cases, preserving a client’s right to remain in the United States may be “more important to the client than any potential jail sentence.”¹⁹ The Court declined to comment on whether that distinction is appropriate in other circumstances because it focused on deportation.

The Court rejected the trial court’s assertion that there is no duty to advise about collateral matters—i.e., those matters not within the sentencing authority of the state trial court.²⁰ Arguably, the Court left open whether this holding could be applied to other indirect consequences of a plea when it stated that it has never applied a distinction between direct and collateral consequences to define the scope of reasonable professional assistance required by the Constitution under *Strickland*.²¹ The Court cited to the overwhelming support for its decision among the defense bar.²² It pointed directly to the “weight of prevailing professional norms”

14. *Id.* In *Strickland v. Washington*, the Court defined a two-part test to determine whether a defendant had a valid ineffective assistance of counsel claim within the meaning of the Sixth Amendment. *Strickland*, 466 U.S. 668, 668 (1984). To satisfy this two-part test, an attorney’s representation must fall below “an objective standard of reasonableness” and there must be a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would be different. *Id.* at 688.

15. *Padilla*, 130 S. Ct. at 1481 (finding the penalty of deportation “nearly an automatic result”).

16. *Id.* at 1478 (declining to rule on the second prong of *Strickland* and remanding the analysis to the trial court for further review).

17. *Id.* at 1481.

18. *Id.*

19. *Id.* at 1483.

20. *Id.* at 1481.

21. *Id.*

22. *Id.* at 1482.

that support the view that counsel must advise a client about the risk of deportation.²³ The Court pointed out that “authorities of every stripe—including the 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”²⁴ The Court did not discuss whether prevailing professional norms would support a wider application of this standard to other collateral consequences that were as direct and dire.

The *Padilla* Court seems to have established a two-prong test to find that deportation requires a duty for defense attorneys to advise their clients. First, *Padilla* established that deportation is a “truly clear” or nearly automatic consequence of certain criminal convictions.²⁵ Second, the Court defined a collateral consequence as something that can be as punitive or dire as the conviction itself.²⁶ The Court found that the penalty of deportation is “most difficult” to divorce from the conviction.²⁷ Thus, the Court found that deportation was direct and dire, and that these two factors warranted an affirmative duty for criminal defense attorneys to advise their clients about this specific collateral consequence.²⁸

III. SOURCES WITHIN THE LEGAL COMMUNITY THAT SUPPORT *PADILLA*'S HOLDING

An amicus brief was filed in this case, affirming that many members of the legal community support a broader application of *Padilla*.²⁹ This brief was signed by more than twenty criminal defense organizations.³⁰ This large and diverse group found that

23. *Id.*

24. *Id.*

25. *Id.* at 1483.

26. *See id.* at 1481–82.

27. *Id.* at 1481.

28. *Id.* at 1486–87.

29. *See* Brief of the National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 1567356 [hereinafter *Padilla* Amicus Brief].

30. *See id.* The signing organizations as Amici Curiae in Support of Petitioner are as follows: National Association of Criminal Defense Lawyers, National Legal Aid & Defender Association, Kentucky Association of Criminal Defense Lawyers, Colorado Criminal Defense Bar, Immigration Impact Unit of the Massachusetts Committee for Public Counsel Services, New Mexico Criminal Defense Lawyers Association, New York State Defenders Association, Oregon Criminal Defense Lawyers Association, Texas Criminal Defense Lawyers Association, Washington

the criminal defense function includes advising the client of *every important consequence of a plea*.³¹ They concluded “A defense attorney who negotiates a plea resulting in the defendant’s effective exile, without so much as investigating that possibility or asking whether it matters to the defendant, has not fulfilled that attorney’s duty to the bar, to the Constitution, or, most of all, to the client.”³² They found that the fundamental client-centered approach at the heart of a defense counsel’s role demands that the attorney conduct a thorough “exploration with the client of all important consequences of a client’s decision to plead, regardless of whether those consequences are labeled ‘direct’ or ‘collateral.’”³³

The *Padilla* amicus brief did not suggest that this duty is not without logistical concerns. They addressed specifically whether this duty would create an undue burden on defense counsel.³⁴ The amici curiae ultimately concluded it would not, and that “these obligations are not only appropriate, but essential.”³⁵ They relied on the overwhelming amount of information available to defense attorneys regarding deportation, including hundreds of training sessions, free websites containing specific information about deportation, and many national publications devoted to the issue of deportation as a result of a conviction.³⁶ Accurate and easily accessible information about the consequences of immigration is easy to find and learn about for any attorney in criminal practice and is free of charge in many cases.³⁷

Defender Association, Legal Aid Society of the City of New York, Neighborhood Defender Service of Harlem, Defender Association of Philadelphia, Florence Immigrant and Refugee Rights Project, Immigrant Defense Project, Immigrant Legal Resource Center, and National Immigration Project of the National Lawyers Guild. *See id.*

31. *Padilla* Amicus Brief, *supra* note 29, at *2.

32. *Id.*

33. *Id.* at *14.

34. *Id.* at *22. The *Padilla* court also noted that attorneys in all practice areas must advise clients about consequences outside of their area of expertise, and that the requirement to do so in *Padilla* is not too big a burden on attorneys. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1492–93 (2010).

35. *Padilla* Amicus Brief, *supra* note 29, at *16.

36. *Id.* at *28.

37. *See* NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, <http://www.nationalimmigrationproject.org> (last visited Oct. 25, 2010) (providing online resources and direct counseling to attorneys on the phone); IMMIGRATION DEFENSE PROJECT, <http://www.immigrantdefenseproject.org> (last visited Oct. 26, 2010) (providing a hotline for attorneys advertised on the webpage).

Beyond these many resources relating to the specific issue of deportation as a civil sanction, there has also been a national movement focused on educating the bench and bar about collateral consequences. In 2009, The Uniform Collateral Consequences of a Conviction Act (UCCCA) was established by the Uniform Law Commission, a national law reform group.³⁸ The Uniform Law Commission was concerned about the increase and severity of collateral consequences, due in large part to the overwhelming increase in convictions in the United States.³⁹

The UCCCA was created to help attorneys and judges in different jurisdictions to impose some discipline on the process by which collateral consequences are enacted and enforced.⁴⁰ A broad goal of the UCCCA is to help defense attorneys include consideration of collateral consequences prior to a plea by compiling and publishing them in an organized way—state by state.⁴¹ This register of consequences, once completed, can be an asset to attorneys who can look to one resource for a comprehensive list of collateral sanctions. The UCCCA also contains provisions mandating that defendants be told at an early point in their case that certain collateral consequences may attach to their conviction.⁴² This reform act illustrates a national consensus that collateral consequences must be addressed by attorneys and the courts.

38. National Conference of Commissioners of Uniform State Laws, UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (2009), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucsada/2009_final.htm [hereinafter UCCCA].

39. National Conference of Commissioners of Uniform State Laws, UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (2008 Draft), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucsada/2008_amdraft.htm. This Act was amended in the summer of 2010, and the amendments can be found on the same site.

40. *See* UCCCA, *supra* note 38; *see also* A FEW FACTS ABOUT THE ... UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT, http://www.nccusl.com/Update/uniformact_factsheets/uniformacts-fs-uccca.asp (last visited Oct. 25, 2010) [hereinafter FACTS ABOUT THE UCCCA].

41. *See* UCCCA, *supra* note 38; *see also* FACTS ABOUT THE UCCCA, *supra* note 40.

42. UCCCA, *supra* note 38, at § 5.

IV. APPLYING THE *PADILLA* STANDARD MORE BROADLY IN MINNESOTA

The climate of practicing criminal defense is changing because increasingly more collateral consequences are triggered when a person pleads guilty. Nationally, estimates state that in some states more than seven hundred collateral sanctions are imposed, with nearly eighty percent of them affecting employment, nearly all of which last for life.⁴³ More people are affected by collateral consequences than ever before because more people than ever have been convicted of a crime—perhaps as many as one hundred million people.⁴⁴

In Minnesota, as is true nationally, the number and severity of collateral consequences is growing. Although data about the exact number of collateral consequences in Minnesota is hard to pinpoint, some estimates state that more than two hundred may be imposed by statutes and regulations in Minnesota.⁴⁵ The number of collateral sanctions has grown in the last decade, particularly in the area of sex offender registration. This trend may be due to several serious and well-publicized violent sex crimes.⁴⁶ Beyond the number of consequences, the number of individuals affected has grown in recent years, as Minnesota convicts and incarcerates more and more people. In Minnesota, in 1982, less than one percent of the population was under correctional supervision.⁴⁷ Twenty-five years later, this number has increased by 284%.⁴⁸

Collateral consequences for a conviction in Minnesota include many restrictions, such as revocation of driving privileges, suspension of a hunting license or right to possess a gun, ineligibility to vote, and disqualification from public benefits.⁴⁹

43. Richard T. Cassidy, *The Time to Reform our Law of Collateral Consequences has Arrived*, ON LAWYERING: NEWS AND COMMENTARY ON THE LAW AND CULTURE OF LAWYERS, June 10, 2010, <http://onlawyering.com/2010/06/the-time-to-reform-our-law-of-collateral-consequences-has-arrived/>.

44. *Id.*

45. *Expunging Criminal Records*, *supra* note 7, at 13.

46. See, e.g., Bob Reha, *Rodriguez guilty in Sjodin case*, Minn. Pub. Radio, Aug. 30, 2006, available at <http://minnesota.publicradio.org/display/web/2006/08/30/rodriguezverdict/>. The rape and murder of Drew Sjodin led to several significant changes in Minnesota law relating to sex offenders in 2003 and 2004 after the conviction of her killer. *Dru Sjodin National Sex Offender*, U.S. DEP'T OF JUSTICE, <http://www.nsopw.gov> (last visited Feb. 22, 2011).

47. *Expunging Criminal Records*, *supra* note 7, at 12.

48. *Id.*

49. MINN. STAT. § 609B.340–345 (2008) (providing for collateral sanctions)

These are just a few examples of many. While all collateral consequences negatively affect clients, three clear examples in Minnesota exist where the *Padilla* standard must be applied because the consequences are so direct and dire. In these situations, not advising clients prior to a plea constitutes a violation of the new *Padilla* test.⁵⁰ Such situations include: restrictions on custody, disqualification from licensing by the Minnesota Department of Health and Human Services, and all of the restrictions that accompany sex offender registration.⁵¹

In Minnesota, these three civil consequences are found in three particular state statutes and are accessible to all criminal defense attorneys who possess a general criminal handbook for the state.⁵² In addition, many helpful and free websites are available to provide information about collateral sanctions in Minnesota,⁵³ and regular CLE presentations and bar publications are available to help educate defense attorneys about the most serious consequences.⁵⁴ Because the issue of collateral sanctions has been increasing on the state and national radar as more individuals are affected by them in their post-conviction lives, more resources have become available to help clients and attorneys make informed decisions.

Below, this article discusses the stories of three people who were not adequately advised of collateral consequences that meet the *Padilla* test⁵⁵ and how their lives have been altered by these collateral consequences. All of these people now say their decision

related to possession of firearms, explosives, and similar devices); MINN. STAT. § 609B.600, 609B.610–615 (2008) (providing for collateral sanctions related to civil rights and remedies); MINN. STAT. § 609B.400, 609B.405–465 (2008) (providing for collateral sanctions related to services and public benefits).

50. See *supra* Section II.

51. MINN. STAT. §§ 518.179, 245C.15, 243.166 (2008).

52. WEST'S MINNESOTA CRIMINAL LAW HANDBOOK, (West's Publishing ed., 2010 ed. 2009). This handbook is given to every public defender annually.

53. A cursory Google search yielded hundreds of websites dedicated to providing specific information about collateral sanctions in Minnesota. Many of these sites are sponsored by private attorneys and some are sponsored by local nonprofits. The entire list of collateral sanctions under Section 609B of the Minnesota code can be found on the Revisor of Statutes webpage. See 2010 Minnesota Statutes, Chapter 609B Collateral Sanctions, MINN. OFFICE OF THE REVISOR OF STATUTES, <https://www.revisor.mn.gov/statutes/?id=609B&view=chapter> (last visited Nov. 1, 2010).

54. See Thomas C. Plunkett, *Collateral Consequences and Expungement Update*, ELIMINATION OF BIAS CLE (Apr. 20, 2010), available at <http://www.clarionlegal.com/index.cfm?page=Replay%20List#collateralconsequences>.

55. See *supra* Section II.

to plead would certainly have been different if they had been advised of these consequences by their attorney. These stories, like many others, illustrate how important it is that defense attorneys in Minnesota begin advising their clients about these consequences immediately; the stakes are simply too high for clients to plead without this knowledge.

A. *Child Custody*

The first person is Tina, a woman who sought to regain custody of her children after being convicted of first-degree sexual conduct.⁵⁶ Tina was a mother of three children and resided with her family in a small community in central Minnesota. In 2006, Tina had a brief sexual relationship with her fifteen-year-old stepson who had recently moved into the family's home and was a mentally unstable, violent teenager. Shortly after this encounter, Tina became pregnant and had a daughter. After her daughter was born, someone tipped off the authorities that the child did not belong to Tina's husband, so Tina was arrested and charged with first-degree criminal sexual conduct. Tina was represented by a public defender and, in her words, was strongly urged to take a plea bargain in this case to ensure she would spend less time in prison than the maximum prison sentence for this crime.⁵⁷

Section 518.179 of the Minnesota Code prevents people charged with certain crimes from having custody of their children.⁵⁸ This statute changes the standard and shifts the burden for custody and parenting time for individuals convicted of approximately twenty different crimes.⁵⁹ Specifically, a person seeking child custody or parenting time, who has been convicted of one of these

56. The author met Tina two years ago in Minnesota through her work in the Reentry Clinic at William Mitchell College of Law. Tina requested assistance from the clinic to help her regain custody of her children after being released from prison. After two full years, and much litigation, the author is still working toward this goal for Tina. Tina has agreed to let the author use her story in this paper, although the author has changed her name.

57. The mandatory sentence for first-degree criminal sexual conduct in Minnesota is 144 months in prison. MINN. SENTENCING GUIDELINES COMM'N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY 59 (2010).

58. MINN. STAT. § 518.179, subdiv. 2 (2008).

59. *Id.* The crimes for which child custody may be affected include murder, manslaughter, assault (first- through third-degrees), kidnapping, depriving another of parenting rights, criminal sexual conduct (first- through third-degrees), solicitation of a child, incest, malicious punishment of a child, neglect of a child, terroristic threats, felony harassment, or stalking. *Id.*

offenses, has the burden to prove that custody or parenting time is in the best interests of the child.⁶⁰ This means a court must go above and beyond simply finding that a person has a right to be a parent. The court must determine that an individual is fit to see his or her children based on certain factors.⁶¹ A guardian ad litem must be appointed by the court in each case where the court finds it is not in the best interests of the child to be returned to the parent.⁶²

This statutory consequence is direct and dire for many people in Minnesota, and it clearly meets the *Padilla* test.⁶³ The consequence is "truly clear,"⁶⁴ meaning that it follows directly from one of twenty or so convictions. It is also dire because it is a penalty "most difficult"⁶⁵ to divorce from the conviction. As a practical matter, most people convicted of these offenses will not be able to regain custody of their children, or even secure regular visitation without the help of a lawyer. A lawyer is something that many of them cannot afford. The result is the loss of their family; for many women in particular, being a mother is the most important role of their lives.

At no time during meetings with her attorney, or when she entered a plea in front of a judge, did her attorney or the judge advise Tina that entering a plea of guilty to this offense would make her ability to have custody of her children virtually impossible after she was released from prison. She did not receive this information despite the fact that this consequence, stated in section 518.179 of the Minnesota Code, was truly clear.⁶⁶

60. *Id.* at subdiv. 1.

61. *Id.* The best interest factors are listed in section 518.17 of the Minnesota Code. These factors include: the wishes of the child's parent or parents; the reasonable preference of child (if child is of sufficient age); the child's primary caretaker; the intimacy of the relationship between each parent and child; the interaction and interrelationship of the child with a parent or parents, and siblings or others; the child's adjustment to home, school, and community; the length of time the child has lived in a stable environment and the desire to maintain this stability; the permanence as a family unit; and the mental and physical health of all individuals involved. MINN. STAT. § 518.17, subdiv. 1 (2008).

62. § 518.179, subdiv. 1.

63. *See supra* Section II.

64. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010).

65. *Id.* at 1481.

66. MINN. STAT. § 518.179, subdiv. 2 (2008).

For people like Tina, the penalty of losing custody of their children is nearly as impossible to “divorce” from the conviction as *Padilla* states about the penalty of deportation. Like deportation, the loss of child custody is a serious civil consequence. The conviction may prevent Tina from ever having custody of her children again. Like the federal deportation statutes in *Padilla*, this statute in Minnesota has been amended to include more crimes over time, thereby affecting a greater number of people.⁶⁷

Tina’s children are the most important part of her life. If Tina had known that this plea would affect her ability to be a mother when she was released from prison, specifically because of a statute in Minnesota that made this consequence clear, she would not have pleaded guilty. After three years, Tina only has limited and supervised visitation with her children and likely will never regain full custody of them.

B. Background Checks for Employment Requiring a DHHS License

The next person is Beth, a woman who had worked for more than fifteen years in a nursing home requiring a Minnesota Department of Health and Human Services (DHHS) license.⁶⁸ This woman was charged with domestic assault for hitting her boyfriend after he had shoved her into a wall during a fight. As a result of pleading guilty to fifth-degree domestic assault, for which she received the criminal sanction of a fifty dollar fine,⁶⁹ Beth has been prevented from making a living in the field in which she was trained because the DHHS revoked her license for seven years after the DHHS learned of her conviction.⁷⁰

Beth is a single mother with two children under the age of five. Although she received food support and state medical benefits, she did not receive any cash assistance from the state. Instead, she worked long hours to support her two children. At the time Beth’s

67. Section 518.179 of the Minnesota Code was created in 1997. MINN. STAT. § 518.179 (1997). The section has been amended three times since then. Prior to 1997, there were no defined convictions that affected custody. *See id.* § 518.179, subdiv. 2 (1998).

68. Beth is not the real name of the individual described above. The author has asked this woman’s permission to use her story in this article. The author, Joanna Woolman, was the attorney who represented Beth two years ago in the story described above.

69. A misdemeanor in Minnesota is punishable by up to ninety days in jail and a \$1000 fine. MINN. STAT. § 609.03 (2008).

70. *See* MINN. STAT. § 245C.15, subdiv. 4(b) (2008).

attorney represented her, the attorney was familiar with section 245C.15 of the Minnesota Code, and told Beth that this conviction may affect her ability to work in a nursing home. The attorney encouraged Beth to look into this issue, and left it at that. However, had the attorney taken a more careful look at section 245C.15 and the specific crimes and disqualification periods, the attorney would have realized that Beth's conviction would result in an automatic seven-year disqualification and virtually guarantee that she would lose her job.⁷¹ This penalty is exponentially more serious than the conviction and fifty dollar fine she received in the criminal case.

A person with a job or looking for a job that requires a DHHS license can have their career come to an abrupt end if they are convicted of certain crimes. Section 245C.15 of the Minnesota Code contains the list of disqualifying crimes or conduct for individuals who either have or need to seek a license from the DHHS for many types of employment.⁷²

Individuals can be disqualified from receiving a license for life, for fifteen years, for ten years, and for seven years.⁷³ For each period of disqualification, the statute lists the qualifying crimes.⁷⁴ Disqualification can occur based merely on an arrest.⁷⁵ Disqualification is a civil penalty, although directly related to a criminal conviction. To challenge disqualification, most individuals will need legal counsel to navigate the administrative process.

License disqualification under section 254C.15 of the Minnesota Code⁷⁶ meets the *Padilla* standard because the consequences of a conviction upon a DHHS license are "truly clear."⁷⁷ The statute states that the commissioner of the DHHS shall conduct a background check for each individual applying for a position listed in the first subdivision in the statute.⁷⁸ Therefore,

71. *See id.* at subdiv. 4(a)(2).

72. *Id.* Section 245C.04 of the Minnesota Code includes a list of each type of job for which a background check and license is required by the DHHS. MINN. STAT. § 245C.04 (2008). These jobs include: all licensing programs, state agencies, personal care providers, supplemental nursing agencies, personnel agencies, and educational agencies. *Id.*

73. *See* § 245C.15, subdiv. 1–4.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010).

78. § 254C.15, subdivs. 1–4.

if a person is employed in a job requiring a license, or plans to pursue a job requiring a license, a conviction listed in the statute will prevent that person from being considered because he or she cannot pass the regular background check.

When people lose their ability to work in the field in which they were trained, that is a dire consequence. If a person cannot earn a living, then that person is more likely to lose the stability in life that protects his or her family and wellbeing. In particular, if a disqualification of a license is for life, then this penalty certainly is as serious, often more serious, than the criminal sanction. Finally, while there are ways people may challenge this disqualification, realistically, not many people will be able to successfully challenge it without the assistance of an attorney—another reason this consequence is dire.

There may have been nothing that could have been done to prevent this disqualification because even arrest records can be used in some cases to disqualify.⁷⁹ But nevertheless, this client deserved to know the nearly automatic and “truly clear”⁸⁰ consequence of her plea. With a closer read of this statute, Beth’s attorney could have helped her understand the specific and serious consequences to her plea and the effect they would have on her ability to earn a living. For people like Beth, her defense attorney was realistically the only person who may have provided accurate and clear advice about the effects of her conviction upon her career.

C. *Sex Offender Registration*

The last person is John, a young man who as a thirteen-year-old boy, pleaded guilty to second-degree criminal sexual conduct.⁸¹ This charge had been amended down from first-degree criminal sexual conduct for inappropriately touching his two-year-old foster sister. John was himself molested as a child and, at the age of eleven, was removed from his home and placed into foster care. John pleaded guilty and was ordered to complete sex offender treatment, which he did at age thirteen. The results from a behavioral psychologist found that this boy was not a predatory

79. *See id.* (noting that each subdivision includes disqualification based on preponderance of the evidence).

80. *See Padilla*, 130 S. Ct. at 1483.

81. The author met this remarkable young man at a conference when he was twenty-one years old.

offender and was at a very low risk to reoffend.

Because John was charged originally with the offense of first-degree criminal sexual conduct, he must register as a sex offender in Minnesota, even though his offense was committed when he was thirteen. At no time did his public defender tell him about this registration requirement. When he entered his plea, he vaguely remembers the judge advising him about this requirement. However, at age thirteen, John did not understand what it really meant.⁸²

John succeeded in graduating from high school with honors. He was accepted to college at a state university and when he filled out his housing application for dorm placement he was denied access to any dorm on campus. The denial was not because of his criminal conviction, which is sealed because he was a minor, but because he has to register as a sex offender, even as an adult. After finding alternative housing at a huge financial cost, John graduated from college. John learned as he was searching for majors that almost any professional career, including the one he wanted in law enforcement, would not be an option because he had to register as a sex offender.

Section 243.166 of the Minnesota Code is something that every defense attorney should read and understand;⁸³ when an individual has to register as a sex offender as a result of a criminal conviction, that registration limits the individual's ability to succeed in almost every aspect of his or her life. Because of the registration, many basic necessities such as housing and employment are nearly impossible for clients to achieve.⁸⁴ Because the requirement to register and the severe consequences that flow as a direct result from a conviction are "truly clear,"⁸⁵ and because they have the

82. The fact that John did not understand what the judge told him highlights why defense attorneys are in the best position to discuss collateral sanctions with their clients. Attorneys are able to discuss the likely collateral consequences that stem from a plea at a time in the process when clients can take in this information and make an informed choice, rather than when they are standing before a court and already entering their plea.

83. MINN. STAT. § 243.166 (2008) (explaining the process of registration of predatory offenders).

84. *See id.* at subdiv. 1b. This section does not contain any particular restrictions to housing or employment, but it does establish the crimes for which a person has to register. *Id.* This requirement to register triggers a myriad of collateral sanctions, many of which are often unknown. Federal housing law prevents sex offenders from federal housing. *See* 42 U.S.C.A. § 13663(a) (2006).

85. *See Padilla*, 130 S. Ct. at 1483.

potential to permanently derail the future of an individual, they, more than any other consequence, meet the *Padilla* standard.⁸⁶

The specific registration requirements, including the convictions requiring registration and registration procedure, are clearly laid out in section 243.166 of the Minnesota Code.⁸⁷ For example, the crime of criminal sexual conduct in the first-degree, which is contained in the list of offenses requiring registration, requires individuals to register if they are merely *charged* with a first-degree offense, even if they plead to a much lesser charge, and even if they are a teenager and their conviction would not follow them into adulthood.⁸⁸ If a person fails to register as provided by this statute, then he or she has committed a new felony which could result in prison time.⁸⁹ If a person who is required to register is charged with a new crime and spends time in jail, then the registration period is automatically extended for ten years.⁹⁰

These consequences can be particularly harsh for juveniles who are convicted of sexual offenses, and who might be too young to understand the serious ramifications of registration after entering a plea as a teenager.

In this case, John's criminal conviction did not follow him into adulthood, but the collateral consequence of registration did. The collateral penalty was worse than the criminal sanction. John said that if he had been aware of the requirement to register for life as a direct result of his plea, then he would not have pleaded guilty. The *Padilla* Court's two-part test⁹¹ clearly applies to advising clients about registration, a penalty as direct and severe as deportation.

V. CONCLUSION

In *Padilla*, the Court found that there are serious civil consequences that are directly connected to a criminal conviction and that defendants should be told about these things at a point in the process when they are able to make informed decisions about their future with the most accurate information possible.⁹² *Padilla*

86. *See supra* Section II.

87. MINN. STAT. § 243.166, subdiv. 1b (listing offenses where registration is required).

88. *Id.* (emphasis added).

89. *Id.* at subdiv. 5 (explaining the criminal penalty for not registering).

90. *Id.* at subdiv. 4(d).

91. *See supra* Section II.

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

goes on to provide a test to determine when a collateral consequence is direct and dire enough to require attorneys to advise clients about it prior to a plea.⁹³

In Minnesota, hundreds of consequences to convictions exist. However, three stand out as ones that should meet the *Padilla* test. Defense attorneys must perform their duty by advising each client they represent about these collateral sanctions prior to their plea.

93. See *supra* Section II.