

University of Nevada, Reno

Padilla vs. Kentucky – Collateral Damage Control: The “Rest of the Story...”

From the Trial Court Judge

A thesis submitted in partial fulfillment of the
requirements for the degree of Master of Judicial Studies

by

Kelly Mark Easton

Dr. Elizabeth Francis/Thesis Advisor

December, 2022

Copyright by Kelly M. Easton 2022

All Rights Reserved



THE GRADUATE SCHOOL

We recommend that the thesis
prepared under our supervision by

KELLY EASTON

entitled

**Padilla vs. Kentucky – Collateral Damage Control: The
"Rest of the Story..." from the Trial Court Judge**

be accepted in partial fulfillment of the
requirements for the degree of

MASTER OF JUDICIAL STUDIES

Elizabeth Francis, Ph.D.
Advisor

Shawn C. Marsh, Ph.D.
Committee Member

Nicole Garlic, J.D., LL.M.
Graduate School Representative

Markus Kemmelmeier, Ph.D., Dean
Graduate School

December, 2022

Abstract

Despite the number of years involved, one state court trial judge presided in Jose Padilla's case from its inception, through proceedings with the United States Supreme Court, subsequent hearing and appeal about ineffective assistance of counsel, and the final completion of the case. Then that same judge presided over two important published cases developing the law established in Padilla v. Kentucky. The author developed the concept of the presiding judge writing an article about this experience. This would enable a presentation of circumstances not usually presented in appellate opinions, such as what happened to the attorneys and the litigants after the case came back to the trial court (twice). In addition to this "rest of the story" approach, the article provides an in-depth analysis of Kentucky's experience with Padilla v. Kentucky and how it changed Kentucky law as well as national law. Ultimately, this thesis shows how the collateral consequences rule, which has important public policy benefits for the criminal justice system, could be salvaged without violence to the rule announced in Padilla. Practical options are offered to avoid guilty pleas without a defendant's opportunity to understand and discuss important collateral consequences. Finally, the article submits the result of Jose Padilla's case was just. Punishment for a crime was imposed, but deportation did not occur.

Table of Contents

Abstract	i
How Did We Get Here?	4
<i>The Rest of the Padilla Story</i>	6
The Intent of Padilla	9
An Introduction To Kentucky Parole Eligibility	12
Pre-Padilla Parole Cases	15
<i>The Affirmative Mis-advice Exception</i>	17
<i>Post-Padilla Parole Cases</i>	19
<i>“Sex Offender” Registration and the Thompson Extension</i>	28
<i>Relaxation of the Prejudice Requirement</i>	34
Practical Approach to Avoid Problems	38

Padilla vs. Kentucky – Collateral Damage Control: The “Rest of the Story...”¹

From the Trial Court Judge²

Jose Padilla left Honduras as a teenager. He came to the United States legally and resided here as a legal resident alien. Padilla joined the United States Army during the Vietnam War. He served honorably, earning the Bronze Star. After his military service, Padilla worked and supported his family. He bought his own truck to be an over-the-road driver. One day, as Padilla drove his truck with a load from California through Kentucky, he was stopped for an inspection. When officers found 1000 pounds of marijuana in the trailer, one journey ended, and another began. Perhaps the most significant Sixth Amendment case in a generation ultimately resulted in Padilla remaining in the United States rather than being deported.

Cases like Padilla³ are subject to extensive commentary. Others have written about Padilla's significant impact, including its application to “collateral consequences” of a felony conviction.⁴ This article offers the perspective of the trial court judge in Padilla together with a review of subsequent Kentucky cases.⁵ As Kentucky courts

1 The “Rest of the Story” was a radio program hosted by Paul Harvey for over fifty years. The popularity of this program adding the phrase to American slang.

2 This thesis is a version of an article accepted for publication in the Northern Kentucky Law Review published by the Salmon P. Chase College of Law of Northern Kentucky University and submitted in partial fulfillment of the Master in Judicial Studies at the University of Nevada, Reno.

3 Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010).

4 See e.g. McGregor Smyth, from “Collateral” to “Integral”: The Seismic evolution of Padilla v. Kentucky and its Impact on Penalties beyond Deportation, 54 HOWLJ 795 (2011).

5 The author is a former circuit court judge in Kentucky and now a judge on the Kentucky Court of Appeals. The circuit court is the court of general jurisdiction in the Kentucky court system. All felony charges are determined in the circuit court. As a circuit court judge, the author is required to follow the precedents of Kentucky's appellate courts. Kentucky Supreme Court Rule 1.040(5). It is also the duty of every Kentucky judge not to make public pronouncements of how he or she would rule on any issue. Nothing in this article is intended to be any such pronouncement by the author. As a judge, the author is committed to make decisions based on the law and facts of each case presented to him.

applied Padilla in contexts other than immigration, the same trial court judge presided in the two seminal Kentucky cases⁶ which expanded Padilla to non-immigration contexts.

Lesser-known personal consequences of watershed cases are often left untold. Few may know Ernesto Miranda was again convicted without his tainted confession.⁷ Miranda was known to sell autographed cards of “his” rights for \$1.50 when he was not in prison.⁸ Miranda died in a bar stabbing.⁹ The suspects in Miranda’s stabbing were read their Miranda rights, remained silent, and were never prosecuted.¹⁰

Padilla is no exception. The resulting impact of Padilla on Padilla and his attorney remains untold. The author will provide missing information and contend that the ultimate result in Padilla was just. Padilla was not deported,¹¹ but he served time for the crime he admitted to committing and sustained a substantial financial loss by forfeiture applied to his commercial vehicle.¹²

In addition to providing missing information, the author will submit that Padilla was not intended as an attack on the collateral consequences rule. This rule has been perhaps unnecessarily endangered by post-Padilla cases. The author will further contend Padilla has led to a diminishing of the prejudice requirement for ineffective assistance of counsel (IAC) claims.

6 Commonwealth v. Pridham, 394 S.W.3d 867 (Ky. 2012); Commonwealth v. Thompson, 548 S.W.3d 881(Ky. 2018).

7 Jack Kelly, The Miranda Decision – 51 Years Later, American Heritage (Posted 6-13-2017 and Retrieved 6-5-2021).

8 Ibid.

9 Ibid.

10 Ibid.

11 Even after the resolution of the Kentucky case, Padilla went through immigration proceedings in California before the attempt at deportation was abandoned. Interview with Padilla’s post-conviction counsel.

12 By order entered Padilla was able to reclaim his truck from forfeiture with a payment of \$10,000. Commonwealth v. Padilla, Hardin Circuit Court. .

Focusing on the Kentucky experience, the author submits that cases decided after Padilla do not necessarily expand Padilla as an implicit rejection of the collateral consequences rule. Rather, the consequences addressed in later cases to which Padilla has been applied may provide a broader and better delineation of direct consequences in the context of the Sixth Amendment. The author maintains the preservation of the collateral consequences rule is important, as is the preservation of an objective standard for prejudice under Strickland/Hill.¹³ To weaken the collateral consequences rule would result in harm to the important policy favoring finality of judgments in criminal cases, especially in the context of guilty pleas, which represent 95% of the resolutions of criminal charges.¹⁴ To reduce the required prejudice prong of Strickland/Hill to a purely subjective rational choice will also endanger finality of judgments.

Finally, this article will offer practical steps attorneys and judges may take to improve the process and prevent later challenges arising from collateral consequences. Brief additions may be made to the Boykin¹⁵ plea colloquy to address collateral consequences at the time of the plea. Such practices will make a better record for later review of collateral consequences IAC claims. They will also ensure defendants are given the opportunity to raise collateral consequences, which may be of particular importance to them before entering a guilty plea. The trial courts will be in a better position to document decisions to proceed with a guilty plea after the disclosure of

¹³ See Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203, 54 USLW 4006 (1985)

¹⁴ Bureau of Justice Statistics (2005). State Court Sentencing of Convicted Felons. Washington, DC: U.S. Department of Justice

pertinent collateral consequences and thus ensure that such consequences are addressed and considered as part of the plea.

How Did We Get Here?

The Sixth Amendment to the United States Constitution guarantees the right to assistance of counsel to defend against criminal prosecutions.¹⁶ This protection became federal law on December 15, 1791.¹⁷ For over 175 years, despite the ratification of the 14th Amendment in 1868,¹⁸ only the federal government was subject to this requirement. While states developed their own rules about right to counsel, the federal constitutional mandate of counsel for indigent defendants prosecuted by the states¹⁹ was not fully recognized until Gideon, decided in 1963.²⁰

Just seven years later, the source of the direct/collateral consequences dichotomy appeared in Brady.²¹ The court in Brady established that only “direct” consequences need be addressed for a valid plea consistent with due process guarantees.²² For forty years, federal and state courts further developed this rule, distinguishing direct from collateral consequences and extended the rule to Sixth Amendment IAC claims.²³

In 1985, as the direct versus collateral consequences distinction was being developed, the U.S. Supreme Court established that the Sixth Amendment right to

15 Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)

16 U.S. Const. amend. VI.

17 *Ibid.*

18 U.S. Const. amend XIV.

19 Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527 (1932)

20 Gideon v. Wainwright, 372 U.S. 335, 345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)

21 Brady v. U.S., 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)

22 *Ibid.* at 755

counsel meant more than just a body standing with the defendant. In Strickland, the court established the two-step process of showing IAC - errors so serious counsel was not functioning as counsel and prejudice.²⁴ Hill²⁵ subsequently extended Strickland to guilty pleas, offering a different analysis of prejudice. The prejudice component in a guilty plea case is the answer to the question of whether there is a reasonable probability the defendant would not have pled guilty and insisted on going to trial. This determination was clearly meant to be objective, rather than the defendant's subjective standpoint.

When the U.S. Supreme Court decided Padilla, the federal circuits agreed on the direct/collateral approach under Brady, even in the context of an attorney's duty to advise about deportation in the process of a guilty plea: an attorney had no duty to advise about collateral consequences, including deportation.²⁶ Failure to advise about collateral consequences did not support an IAC claim under Strickland/Hill. The definition of direct consequences was by then well-established as only those having to do with punishment for a crime directly within the control of the trial court. Since deportation does not fit within this definition, it was a collateral consequence.

When the U.S Supreme Court reviewed Padilla, they saw something that just did not "fit" under the Sixth Amendment if the collateral consequences rule was applied. While deportation was not part of the penalty imposed by the trial court as a direct result of the conviction, it was certainly punitive in effect, as was the sentence directly imposed

23 Infra Notes

24 Strickland, 466 U.S. at 687

25 Hill, 474 U.S. at 58-59

26 Padilla, 599 U.S. at 374

by the trial court. The U.S. Supreme Court in Padilla sought to reach a fair result outside the perceived confines of the direct/collateral binary system.

The Rest of the Padilla Story

Failure to advise of automatic deportation may support an IAC violation of the Sixth Amendment under Strickland/Hill. The recounting of the background of Padilla's case by the U.S. Supreme Court in Padilla is more than sufficient to understand the basis for the new rule announced and the justice behind that ruling. But before commenting on the intent of Padilla, the rest of the Padilla story needs to be told.

There had been no evidentiary hearing before the U. S. Supreme Court made its decision in Padilla. The failure to advise was an allegation to be proven as was the prejudice from any such failure. The Kentucky Supreme Court remanded the case to the trial court for the required evidentiary hearing.²⁷ The evidentiary hearing took place on November 10, 2010.²⁸

Quinn Pearl, Jr., Padilla's attorney, advised Padilla to enter the guilty plea. Pearl was a graduate of the United States Military Academy at West Point. He had practiced as an attorney for over thirty years before Padilla retained him for this case.

The record of the hearing reveals Pearl initially thought Padilla was an "illegal alien" rather than the legal permanent resident he in fact was. A fellow veteran, Pearl had difficulty accepting the notion that Padilla could be deported. Pearl attended a seminar to educate himself about immigration law in preparation for Padilla's case. Pearl also

²⁷ Remand order entered June 8, 2012, Kentucky Supreme Court 2006-SC-0321.

consulted an attorney with immigration expertise on Padilla's behalf. At the hearing, Pearl testified he told Padilla he would "probably" be deported. Under Padilla, that was not sufficient. Pearl was required to have told Padilla that he would be automatically deported, not that deportation was probable or possible.

The rest of the story includes the fallacy of automatic deportation. We should recognize there is nothing "automatic" about deportation. The U.S. Supreme Court spent much of its Padilla opinion recounting the history of the ability of courts to ameliorate the consequence of deportation. The Supreme Court considered the idea of automatic deportation as harsh. In 1996, Congress decided to make deportation automatic, without court discretion, for a broad range of crimes.²⁹ This decision was within Congress' constitutional prerogative. Still, there is nothing automatic about deportation. Numerous non-citizens wait years for deportation.³⁰ Padilla's own experience and the finality of his Kentucky case, to be discussed later, certainly was not automatic.

Yet, given the applicability of automatic deportation, Padilla satisfied the first prong of his IAC claim in Padilla II.³¹ The focus then shifted to the evaluation of prejudice. Evidence about prejudice included Padilla's statements during the hearing. In its opinion in Padilla II, the Kentucky Court of Appeals mentioned only one statement made by Padilla. Padilla described and compared the certainty of deportation as the

28 Commonwealth v. Jose Padilla, Hardin Circuit Court

29 See Antiterrorism and Effective Death Penalty Act (AEDPA) Section 440(e), amending INA Section 101(a)(43), 1996; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Section 321(a)(3), 1996.

30 How Long Does Deportation Take? Marin Rapid Response Network at www.marinrrn.org

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

equivalent of “putting a gun” to his head. Finding the required prejudice, the Kentucky Court of Appeals returned the case to the trial court.

Important additional statements from the evidentiary hearing were not mentioned by the appellate court in Padilla II. Padilla understood Pearl’s opinion that the evidence was “very strongly” against him. Padilla responded, saying: “I had no doubt I could beat this regardless of the evidence.” The prosecutor then asked the direct question: “Do you think that is a very rational opinion or a very rational analysis of the evidence?” Padilla spoke of facing odds and risks as he had in Vietnam fighting for the United States. Padilla said he was not thinking of odds and commented further on the decision to go to trial: “I’ll take that any time, and that was my determination.”³²

When the case again returned to the trial court, an additional unreported Padilla III story developed and remains to be told. Given intervening events, the prosecutor agreed to a one-year term of unsupervised conditional discharge. Padilla had no difficulty successfully completing this discharge, and the author signed an order dismissing the case with prejudice.

For attorney Pearl, this case proved to be a career ending event. Given the importance of the case, an ethics complaint was filed against him. While he was not disciplined for any conduct, Pearl promptly retired from his law practice.

It is unfortunate the career of this attorney and truly decent person, as well as an honorable veteran, would end in part because of this case. Pearl died on April 30, 2013, because of injuries sustained in a motor vehicle accident. He did not live to see the result

of Padilla's case. The author would like to think Pearl would have ultimately been relieved to learn Padilla was not deported. As Pearl thought all along, it arguably should be unthinkable that a veteran like Padilla, who served the United States in combat, would be "automatically" deported.

Padilla's journey did not end with the completion of the Kentucky case. Upon his return to California, Padilla had to continue his fight against deportation. Ultimately, he won that fight. Padilla was able to stay with his family in California after all, able to work to support himself and his family. Based upon the last contact with his counsel, Padilla has not been back to Honduras, and does not plan to visit there. A person in Padilla's place might be justified in claiming that what Padilla ultimately had to go through in order to stay in the United States was worse than the maximum penalty he could have received in the Kentucky criminal case.

The Intent of Padilla

The majority opinion in Padilla³³ noted the federal circuits and states which had decided deportation was a collateral consequence not within the protection provided by the Sixth Amendment right to counsel. The court then stated: "We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland* (citation omitted). Whether that distinction is appropriate is a question we need not consider in

³² Commonwealth v. Padilla, Hardin Circuit Court

³³ Padilla Footnote 9

this case because of the unique nature of deportation.”³⁴ Was this statement intended as a suggestion the collateral consequences rule was subject to imminent rejection by the court?

Padilla’s counsel specifically argued in his brief the direct/collateral distinction should be eliminated. This argument was essentially the Strickland/Hill analysis should be contextual with consideration of all circumstances in any given case. There should be no Sixth Amendment hurdle of direct versus collateral consequences. In its brief, Kentucky argued for a strict application of the collateral consequences rule with no exception for mandatory deportation. A hybrid position also was offered to permit Strickland/Hill claims when an attorney provides affirmative misadvice about an identified collateral consequence, which was of importance to the defendant as evidenced by the fact the defendant raised the issue pre-trial or pre-plea and actually addressed it with an attorney. The Court in Padilla rejected all these options.

A review of the oral arguments in Padilla provides insight into why the court chose this course and further supports the conclusion the court had no intention of abandoning the collateral consequences rule developed after Brady. First, the court had the opportunity to do so and clearly did not. The U.S. Supreme Court side-stepped this issue, avoiding analysis of Brady and the general direct/collateral dichotomy, which remains. A careful review of the U.S. Supreme Court proceedings suggests the reason for this approach.

³⁴ Padilla at 365

During the oral arguments, the justices mentioned a wide variety of collateral consequences. Chief Justice Roberts started the discussion with loss of job or government contracts.³⁵ Justice Ginsburg added loss of driver's license and the right to vote.³⁶ Justice Scalia mentioned child custody and forfeiture of property.³⁷ Justice Kennedy mentioned civil liability in tort.³⁸ Justice Stevens brought up sex offender registration and the right to bear arms.³⁹ Justice Alito reviewed this list and added professional licensing and tax liabilities.⁴⁰

These brief mentions by the justices are the tip of an iceberg. The Kentucky Department of Public Advocacy dedicated an entire issue of its publication to the dozens of identifiable collateral consequences of a criminal conviction in Kentucky alone. Just a sampling of some of these consequences not mentioned by the justices include eligibility for public benefits and the right to serve on a jury.⁴¹ A duty to advise about collateral consequences places defense counsel in a field of landmines.⁴²

Had the US Supreme Court decided to invalidate the direct/collateral distinction for Sixth Amendment purposes, the resulting broadened avenue for attacks on guilty pleas would seriously undermine the criminal justice process of final guilty pleas to an

35 Padilla Oral arguments at 4

36 Ibid. at 6

37 Ibid. at 7

38 Ibid. at 9

39 Ibid. at 44-45

40 Ibid. at 53

41 Collateral Consequences of Criminal Convictions in Kentucky, *The Advocate* (June 2013)

42 Troy B. Daniels, et al., *Kentucky's Statutory Collateral Consequences Arising from Felony Convictions: A Practitioner's Guide*, 35 N. Ky. L. Rev. 413 (2008)

unacceptable degree. The court in Padilla chose not to disturb this developed area of the law. The mere mention by the court of not having adopted the distinction under Strickland did not sub silentio abandon or even question the unanimity of the ten circuits which had held collateral consequences, at least generally, are outside of the scope of the Sixth Amendment duty.

The court in Padilla made this clear when it simply stated the distinction did not prove helpful in deciding the “unique” consequence of deportation. Unique has not lost its meaning. Padilla was meant to apply only to the consequence of automatic deportation for a criminal conviction. Even so, Kentucky courts have applied Padilla to consequences other than deportation.

An examination of Kentucky cases since Padilla will lead to the formulation of a rule which does no violence to the direct/collateral dichotomy developed after Brady or to the ruling in Padilla. This rule essentially requires a broader understanding of the direct aspect of the Brady rule. We start this journey with the subject of the cases most-often addressed in Kentucky after Padilla – parole eligibility.

An Introduction To Kentucky Parole Eligibility

In Kentucky, sentences are determined or “fixed” by juries.⁴³ The jury recommends whether multiple sentences are to be served concurrently or consecutively.

⁴⁴ Aside from the discretion the judge enjoys in accepting or rejecting the jury’s concurrent/consecutive recommendation, the judge has limited discretion to sentence

⁴³ KRS 532.030.

⁴⁴ KRS 532.055(2).

differently from what the jury has fixed. The judge may provide some relief from what is deemed too harsh a sentence.⁴⁵

The parties fix the sentence by plea agreement. The judge either accepts or rejects the plea agreement. If the plea agreement is rejected, the defendant (a) has the option to proceed with the guilty plea, having no promise of where the sentence will lie within the legal range, or (b) may withdraw the rejected guilty plea and proceed to trial or negotiate a different plea agreement.⁴⁶

Kentucky uses a classification system for felony sentences.⁴⁷ Each class of felony has a range of penalty.⁴⁸ The sentence cannot be the range itself but must be a set term within a range. The classification system begins with the lowest level felony called a Class D felony. The sentencing range for a Class D felony is one to five years. The range is reduced to one to three years for most drug possession felonies. Class C felonies have a range of five to ten years. Class B felonies have a range of ten to twenty years. Class A felonies may be punished with a term of between twenty and fifty years, or a life sentence. The maximum number of years for a sentence regardless of the number of crimes is seventy. Kentucky has the death penalty as well as options for life without parole for twenty-five years, or life without parole.⁴⁹

Parole of a sentence imposed by a court is managed under the authority of the Kentucky Parole Board, an agency of the executive branch of the state government.⁵⁰

⁴⁵ KRS 532.070.

⁴⁶ RCr 8.10.

⁴⁷ KRS 532.010.

⁴⁸ KRS 532.020

⁴⁹ KRS 532.025.

⁵⁰ KRS 439.300 et seq.

The Parole Board exercises discretion in deciding when a prisoner serving a felony sentence may be paroled. This discretion is limited by statute to certain minimum times to serve. Minimums are measured by a percentage of the sentence which must be served before parole may be granted. Generally, parole eligibility in Kentucky is twenty percent of the original sentence. For most Class D felonies, this percentage is lowered to fifteen percent.⁵¹ Certain crimes, such as heroin trafficking, have a fifty percent service requirement.⁵²

One complicating factor for parole eligibility is Kentucky's violent offender statute.⁵³ For violent offender crimes, the minimum service prior to parole is eighty-five percent of a sentence. Another complicating factor for parole can be Kentucky's persistent felony offender ("PFO") status enhancement. The status of a PFO in the second degree (one prior felony conviction) increases a penalty from the original range to the next highest range.⁵⁴ The penalty for a Class D felony of one to five years may be increased to five to ten years, for example. A PFO second-degree enhancement does not usually impact parole eligibility greatly. For example, it can make a 15% case become a 20% case.

By contrast, a PFO in the first degree (two prior felonies) can have a dramatic effect on parole eligibility. A PFO in the first-degree may "bump up" the sentence twice.⁵⁵ Thus, a class "D" felony range can be increased from one to five years to ten to

⁵¹ KRS 439.340.

⁵² KRS 218A.1412.

⁵³ KRS 439.3401.

⁵⁴ KRS 532.080.

⁵⁵ Ibid.

twenty years. The law provides a “cap” of twenty years for any number of Class D and Class C felonies in a single case, even with PFO enhancement.⁵⁶ A more dramatic impact occurs with just one underlying Class C felony (five to ten years) increased by a PFO 1st degree enhancement. In such a case, enhancement of the penalty includes a rule of a “ten-flat” minimum to serve prior to parole eligibility.⁵⁷ This “ten-flat” applies whether the sentence is ten years long, twenty years long or anything in between.

Yet another parole issue arises when a defendant is required to complete a sex offender treatment program (“SOTP”). In such cases, parole eligibility for the underlying crime may be twenty percent, even though many sex offenses are Class A and B felonies subject to the eighty-five percent parole minimum under the violent offender category. Even for the twenty percent cases, the law requires that defendants complete the SOTP before being released on parole.⁵⁸ Completion of SOTP may require a period longer than the twenty percent minimum.

Pre-Padilla Parole Cases

Before Padilla, Kentucky placed parole eligibility in the collateral consequence category. As stated previously, parole is governed by the Parole Board within the executive branch. The court simply imposes the number of years a given defendant will serve. Since parole eligibility is not a promise of early release, a defendant should assume he or she could serve the entire number of years the court decrees. Minimum parole eligibility remains outside the attorney’s purview to advise.

⁵⁶ KRS 532.110.

⁵⁷ KRS 532.080(7).

⁵⁸ KRS 439.340(11).

The leading pre-Padilla case determining parole eligibility and collateral consequences for that matter was Turner.⁵⁹ The defendant in Turner made a claim under Kentucky’s Rule of Criminal Procedure (“RCr”) 11.42, which is usually used to allege ineffective assistance of counsel. Specifically, Turner complained his attorney did not tell him that the ten-year sentence he received was subject to the “ten-flat” rule because of his PFO 1st status.⁶⁰ There was no factual dispute about the matter; Turner’s lawyer did not advise his client about the “ten-flat” rule. The Court in Turner did not discuss this failure under the Sixth Amendment. Turner predated Strickland. Rather, the Court analyzed Turner under due process, which requires a voluntary, knowing, and intelligent decision to enter a guilty plea. The defendant in Turner was given proper Boykin information for his guilty plea. Parole was not a constitutional right, which needed to be addressed under Boykin. The Court in Turner found no basis to invalidate the guilty plea because of the attorney’s non-advice about ineligibility for parole.⁶¹

In deciding Turner, the court created a collateral consequences approach which would be applied to IAC claims in other cases.⁶² This standard would be followed by Kentucky courts until Padilla. For example, in Centers,⁶³ the court followed Turner, holding that non-advice about mandatory consecutive sentencing, which clearly resulted in more minimum time to be served, was a collateral consequence and no ground for invalidating a guilty plea based on IAC.

59 Turner v. Commonwealth, 647 S.W.2d 500 (Ky. App. 1982)

60 Ibid. at 500

61 Ibid. at 502

62 Ibid.

63 Centers v. Commonwealth, 799 S.W.2d 51, 55 (Ky. App. 1990)

Essentially, a defendant had no right to know about “every possible consequence and aspect of the guilty plea.”⁶⁴ To expect this was described as “absurd.” The author of Turner offered specific, unimpressive collateral consequences: “For example, a defendant could allege if he had known he could have received a change of venue or had the right to call his mother as a character witness, he would not have plead guilty. Likewise, he could assert if he knew prison food would be bad or his cell would be small, he wouldn't have made such a plea.”⁶⁵

The Affirmative Mis-advice Exception

Under Turner, Kentucky courts drew a distinction between non-advice and mis-advice. This body of law developed from the Sixth Circuit decision in Sparks.⁶⁶ In Sparks, the federal court granted habeas relief to a Kentucky defendant who had pled guilty to murder. The basis for this relief was mis-advice by the attorney about parole eligibility. Sparks was told he could receive a life sentence without the possibility of parole if the jury convicted him. This was contrary to Kentucky law at the time. Sparks actually could not be denied the opportunity for parole, beginning after serving eight years.⁶⁷

Unlike Turner, Sparks was decided after Strickland. The court in Sparks recognized the collateral nature of parole eligibility. Then the court held affirmative mis-

64 Ibid. citing Turner 647 S.W.2d at 500-501

65 Turner at 501

66 Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988)

67 Ibid. at 885

advice about parole eligibility could sustain an ineffective assistance of counsel claim.⁶⁸ The concurring opinion by Chief Judge Kennedy is worth noting and will be revisited. Judge Kennedy argued parole eligibility in the context of a life sentence is not collateral but rather “an essential and critical portion of the penalty.”⁶⁹

Prior to Padilla, the Kentucky Supreme Court mentioned Sparks only once, finding it distinguishable to the case.⁷⁰ By contrast, the Kentucky Court of Appeals applied Sparks in dozens of cases, primarily in the parole eligibility context, developing an affirmative mis-advice exception to the Turner collateral consequences rule. One series of cases established a Strickland/Hill claim when the defendant is told by his attorney that his or her parole eligibility is lower than the actual 85% imposed for violent offenses. Another series of cases recognized a Strickland claim when the defendant’s counsel advised a parole eligibility less than the “ten-flat” rule which applied.

Two additional cases applied Sparks to other contexts. In one case, a defendant was told by his counsel he would have to serve a minimum of 30 to 35 years when in fact parole was first possible at twenty years. In another case, the defendant was told by his counsel he could not be granted probation when in fact he was eligible for probation with an alternate sentence. In both cases, regardless of the collateral nature of the promises made by counsel, the court determined the pleas would not be set aside because the defendants could not satisfy the prejudice prong of Strickland/Hill.

68 Ibid.

69 Ibid at 886

70 Fulkerson v. Commonwealth, 2004 WL 2128560 (Ky. 2004)

Post-Padilla Parole Cases

After Padilla became final, defendants began to challenge other supposed collateral consequences, specifically connected to parole eligibility. This first avenue for extension should not be surprising considering Hill, which expanded Strickland to guilty pleas, involved mis-advice about minimum parole eligibility. The court in Hill did not actually hold such mis-advice was ineffective assistance of counsel. Rather, the court found the defendant could not satisfy the prejudice prong, even if there were mis-advice.

If deportation, because of its punitive nature, required affirmative and correct advice by counsel, it would seem obvious that the minimum amount of time to be served was no less punitive. Would the collateral nature of minimum parole eligibility survive Padilla? The Kentucky Court of Appeals began with conflicting cases. Almost simultaneously in 2011, two panels of the Court of Appeals reached diametrically opposite conclusions.

In the first case,⁷¹ Steven Jacobi entered a guilty plea to manufacturing methamphetamine and drug trafficking. Because of a gun enhancement to the penalty, the manufacturing charges were Class “A” felonies. He agreed to a sentence of forty years. Contrary to the law, the parties agreed, and the trial court granted, probation. After Jacobi violated that probation, the trial court revoked Jacobi’s probation. Jacobi later learned his sentence was subject to the eighty-five percent minimum for parole. He and everyone else involved in the plea bargain apparently thought the eighty-five percent rule did not apply.

Mentioning Sparks, the Court in Jacobi then recognized the change brought about by Padilla. Borrowing language from Padilla, the court described parole eligibility as “intimately related to the criminal process” and an “automatic result” of the guilty plea. The result is a “succinct, clear and explicit” legal provision. It did not matter whether the attorney gave mis-advice or no advice; Padilla required reversal. The court in Jacobi never mentioned Turner.

On remand, the parties agreed to a plea without the gun enhancement and a reduced sentence totaling twenty years. As a result, Jacobi was eligible for parole at twenty percent. Given his years in custody, Jacobi was released immediately.⁷²

In the second case,⁷³ Jon Booker entered a guilty plea to murder and related charges. He shot Jermaine Smith during a home invasion. The trial court sentenced Booker to serve twenty years for the murder. This sentence was subject to the 85% parole eligibility rule. Booker later alleged he was misinformed about when he could seek parole. The court in Booker granted a hearing on other allegations of ineffective counsel (failure to investigate witnesses). The court rejected the parole eligibility argument, relying on Turner.⁷⁴ In a footnote, the court considered Padilla, stating: “we believe the recent decision of *Padilla, supra*, limited its holding to matters involving deportation and did not disturb the validity of *Turner*.”⁷⁵

71 Jacobi v. Commonwealth, 2011 WL 1706528 (Ky. App. 2011)

72 Records of the Kentucky Parole Board and Department of Corrections

73 Booker v. Commonwealth, 2011 WL 2731843 (Ky. App. 2011).

74 *Ibid.* at 4

75 *Ibid.* at 5

On remand, the trial court again denied Booker's motion after a hearing. That decision was also reversed and remanded. On the second remand, the trial court again denied Booker's motion. The last denial was ultimately upheld on appeal.⁷⁶ As of this writing, Booker is still in prison, having served more than the eighty-five percent minimum.

In two other cases decided in 2012, Kentucky's Court of Appeals addressed the other end of the parole eligibility spectrum, the SOTP requirement. In the first case,⁷⁷ the Court of Appeals succinctly summarized the argument over the extent of Padilla: "The Commonwealth argues that *Padilla* is limited in applicability to deportation consequences, while Appellant contends that *Padilla* should be read more broadly as rejecting the direct-or-collateral-consequence distinction in analyzing an ineffective-assistance-of-counsel claim."⁷⁸ The Court wrote that failure to advise about SOTP completion before parole did not constitute ineffective assistance, and ultimately found a lack of prejudice regardless of the non-advice.⁷⁹

In the other 2012 SOTP case, the Court of Appeals cited Turner, deciding that SOTP completion as a condition for parole was a collateral consequence. Mentioning Padilla, the court stated a broad interpretation of that case was "questionable." Again, a decision on the precise question of whether counsel's failure to advise about SOTP

76 Booker v. Commonwealth, 2016 WL 3226243 (Ky. App. 2016)

77 Sharer v. Commonwealth, 2012 WL 1556240 (Ky. App. 2012)

78 Ibid. at 4

79 Ibid. at 5-6; See also Woolen v. Commonwealth, 2012 WL 4854763 (Ky. App. 2012)

completion was deficient was seen as unnecessary because the defendant could not show prejudice.

Against this history, the Kentucky Supreme Court provided guidance in three cases rendered on the same day, October 25, 2012. One of these cases, Stiger,⁸⁰ focused on the prejudice formulation and will be discussed in detail later. The other two cases were decided in a joint opinion seeking to formulate how Padilla impacted the collateral source rule of Turner. The cases are cited jointly and will be discussed here as Pridham.⁸¹

Timothy Pridham was on parole for manufacturing methamphetamine. When arrested, he confessed to again being a meth “cook.” Pridham’s manufacturing became a Class A felony as a subsequent offender and subject to the 85% parole eligibility rule. As a result, Pridham was in the same position as Jacobi had been pre-Padilla. Pridham sought relief because his lawyer told him he could be paroled after six years (20%) when he actually had to serve a minimum of twenty years.

Starting with Brady, the court in Pridham recognized the limit of direct consequences. They did not include parole eligibility because that was not “within the direct sentencing authority of the sentencing court.”⁸² The court then found sufficient similarity to the punitive and severe effect of deportation to extend Padilla to Pridham’s situation, and remanded the case for a hearing on the prejudice question.⁸³ In the process, the court made several comments portending a weakening of the prejudice prong.

80 Stiger v. Commonwealth, 381 S.W.3d 230 (Ky. 2012)

81 Commonwealth v. Pridham, 394 S.W.3d 867 (2012)

82 Ibid. at 877

83 Ibid. at 877-878

Pridham “was caught red-handed and confessed.”⁸⁴ Also, “his chances for acquittal at trial were slim to none.”⁸⁵ Still the court stated: “Pridham might have concluded that he risked virtually nothing by going to trial.”⁸⁶

On remand, Pridham chose not to proceed with the RCr 11.42 hearing. Instead, the Commonwealth and Pridham reached a new agreement. Pridham still received a sentence of thirty years consecutive to his prior sentence, but the Commonwealth reduced the primary charge of meth manufacturing to a Class B felony by withdrawing the second offender enhancement. The result of the agreement was a twenty percent parole eligibility. After Pridham served just over ten years, the Parole Board released him. He remains under supervision until 2033.⁸⁷

Jason Cox was the other defendant addressed in Pridham. Cox pled guilty to sexual abuse of a child. He sought to withdraw his plea when he learned he was required to complete the SOTP requirement before parole eligibility, even though the eligibility was generally at twenty percent.⁸⁸ The uncertain period for this requirement as it might impact release with a twenty percent parole eligibility was not seen by the Court as similar enough to the severe, automatic, and punitive consequence of deportation. Thus, Cox did not have a right to claim ineffective assistance under Padilla.⁸⁹ Eventually, Cox was released from his incarceration only to commit later offenses, including escape and failure to comply with his sex offender registration. He was again placed on parole.

84 Ibid. at 880

85 Ibid.

86 Ibid.

87 Kentucky Department of Corrections, Kentucky Offender Search at kool.corrections.ky.gov.

88 Ibid. at 881

The Kentucky Court of Appeals had independently beaten the Kentucky Supreme Court to the punch on the SOTP question. Almost simultaneously (Opinion rendered October 12, 2012), the Court of Appeals refused relief on a claim of ignorance of the SOTP completion requirement. The Court called the extension of Padilla to this circumstance “questionable,” but avoided the question by finding no prejudice, stating rejection of the plea would have been “irrational.”⁹⁰

In another opinion,⁹¹ the Court of Appeals analyzed the rule announced in Pridham to further explain why the SOTP requirement prior to parole was outside the Padilla expansion, regardless of the additional time in prison which may be required to complete it. SOTP is not punitive but rehabilitative. It does not fit within the first element of Pridham, a punitive impact such as deportation.

These cases suggest a different way to look at parole eligibility under Padilla: minimum prison time. Like automatic deportation, the court does not control how long a defendant will serve until parole, but the sentence is subject to an automatic and minimum amount of prison time before parole is possible. Under the logic of Pridham, a defendant should be informed of this minimum penalty which results from the sentence imposed by the court. The SOTP requirement would not fit within this rule as the amount of time is uncertain and to some extent dependent on the progress made by the defendant while incarcerated.

89 Ibid.

90 Woolen v. Commonwealth, 2012 WL 4854763 (Ky. App. 2012)

91 Bell v. Commonwealth, 2016 WL 4410704 (Ky. App. 2016)

This rule could work well as a guideline for the Padilla expansion beyond deportation. After Pridham, other Kentucky cases fit within this rule. Failure to advise about the “ten-flat” rule satisfies the first prong of Hill.⁹² Another circumstance is a new minimum prison time parole eligibility when a defendant on probation or parole is required to serve a consecutive sentence. In these circumstances the defendant should be advised about the new minimum, based on total number of years he is required to serve.⁹³

But we run into a problem with only a minimum prison time approach to the Padilla expansion when other Kentucky cases are analyzed. A sex offender who faces a five-year period of post-incarceration supervision (previously referred to as Sex Offender Conditional Discharge (“SOCD”)) should be informed of this special type of parole, as it may lead to additional prison time as a direct result of the conviction.⁹⁴ Such a result could still be harmonized. It is not a minimum prison time matter

We could choose to stop there. Padilla should expand the duty of attorneys to advise of automatic and directly punitive results from the conviction, such as the minimum prison time which must be served prior to parole as well as being automatically subject to additional prison time for post-incarceration supervision.

A case rendered prior to Pridham supports such a limitation. In King,⁹⁵ the defendant complained he was not told his state court conviction would result in an enhanced federal court penalty. First, the court in King made a succinct statement about

92 See Garr v. Commonwealth, 2014 WL 811841 (Ky. App. 2014)

93 See Brown v. Commonwealth, 2019 WL 3367195 (Ky. App. 2019)

94 Belk v. Commonwealth, 2013 WL 1868020 (Ky. App. 2013)

95 King v. Commonwealth, 384 S.W.3d 193 (Ky. App. 2012)

Padilla, which, although correct at the time, is no longer the law in Kentucky: “*Padilla* is narrowly written to apply to the consequences of guilty pleas solely in the context of immigration, and we cannot extend its scope.”⁹⁶ The court rejected the defendant’s argument. The potential for a future sentence enhancement, which depends on a future separate criminal act by the defendant, simply is not something about which an attorney should have to advise her client.

All the cases discussed to this point fit within the framework announced in Pridham. Padilla applies to grave or severe, punitive consequences, bearing an “intimate relationship” to, or “enmeshed” with, the direct criminal penalties, and which may be easily determined from a statute.⁹⁷

We could have left the dividing line there. But before moving away from these cases, we see that they do not actually require an abandonment of the collateral consequences rule. Instead, we have previously proceeded from an inadequate formulation of the definition of a direct consequence. Returning to the Sparks case: Chief Judge Merrick was right in his concurrence. The minimum prison time a defendant must serve of the sentence imposed by the court is not a collateral consequence but a direct consequence and is “an essential and critical portion of the penalty.”⁹⁸

Chief Judge Merrick is not alone in this understanding. During oral arguments in Padilla, Padilla’s counsel summed up his position during the allowed rebuttal. He started by saying Hill had recognized minimum parole eligibility as a collateral consequence

⁹⁶ Ibid at 195

⁹⁷ Pridham (page 881-882, 886)

which may justify an IAC claim. First, that is incorrect. The court in Hill did not say that. The court in Hill found it unnecessary to make that call, because the defendant in Hill could not make a prejudice finding.

In response to this comment, Justice Scalia said: “I’m not sure the parole eligibility could qualify as a collateral consequence.” Scalia then added: “It goes to the sentence. It goes to what the sentence will be, which is certainly part of the trial.”⁹⁹ On this point, the author believes Scalia was right, as was Chief Judge Merrick.

The Brady collateral consequences rule can be salvaged with this new understanding of direct consequences. Counsel must advise a defendant of the minimum jail time that defendant must serve as a result solely of this criminal case, as well as additional time the defendant may be subjected to solely as a result of the case. A typical plea colloquy includes making sure the defendant has discussed with his counsel what penalties he or she is facing. Without this information, a defendant cannot adequately assess the merit of the offer made by the state. If a defendant should/must be properly advised of the penalty ranges for the charges he or she faces in the case, it stands to reason that defendant should/must also be told the potential for serving the post-incarceration supervision term as well as minimum prison time before any parole. These are questions of the punishment flowing directly from the conviction at issue.

⁹⁸ Ibid.

⁹⁹ Padilla oral arguments

“Sex Offender” Registration and the Thompson¹⁰⁰ Extension

If we recognize no need to expand Padilla to serve as the basis for this better understanding of direct consequences, we must still address the most recent Kentucky case to significantly erode the collateral consequences rule. Thompson will not fit under this proposed rule. It recognizes the clearly collateral and non-punitive requirement of post-conviction offender registration as justification for an IAC claim.

To assess the last of the three seminal cases in Kentucky after/post Padilla, we must review Kentucky’s registration requirements for certain offenders. Certain offenders must register with the state police and are subject to certain residence and other limitations because of their sex crimes or other crimes against minors.

The registry began with legislation passed in 1994.¹⁰¹ Originally, registration requirements applied only to sex offenders. Today registration is still often referred to as sex offender registration, even by appellate courts. The original statute has been expanded by at least ten amendments. The current version of the statute includes an ‘attempt to kidnap a minor’ as a crime requiring registration.

Before Padilla, Kentucky placed sex offender registration clearly in the collateral consequence category. In Carpenter,¹⁰² the defendant was not informed by anyone of the registration requirement when he entered a guilty plea to a sex abuse charge. The court rejected the defendant’s argument of a due process violation of an involuntary plea.

100 Thompson v. Commonwealth, 548 s.w.3d 881 (Ky. 2018)

101 KRS 17.510 became effective on July 15, 1994

102 Carpenter v. Commonwealth, 231 S.W.3d 134 (Ky. App. 2007)

After Padilla and its extension in Pridham, the Kentucky Court of Appeals addressed the registration question in at least three cases, the first being Embry In Embry¹⁰³ a defendant complained his attorney did not advise him of his lifetime registration requirement given his multiple sex offenses. The court applied Pridham: to merit Padilla application, a collateral consequence must be punitive, severe, intimately related to the direct criminal penalties of the case, and easily determined from a clear and explicit statute.¹⁰⁴ The court then rejected the claim because registration is non-punitive. It does not satisfy the first factor. A year after Embry, Phillips¹⁰⁵ followed Embry without mentioning Pridham.

Finally, Thompson followed Embry and Phillips. Thompson was twenty years old when he became enamored of a high school student. The young lady became alarmed when Thompson made Facebook postings of his detailed plans to kill her, her brother, and perhaps others. Thompson described the number and locations of the shots he planned to take to kill these people. Thompson's stepfather became so concerned he called 911 to let the police know Thompson was headed to North Hardin High School and was armed.

The police arrived shortly before school let out for the day. Thompson was arrested and disarmed. These details are available in an Order entered on a Motion to Suppress Evidence, which was denied. Thompson was originally charged with Criminal

¹⁰³ Embry v. Commonwealth, 476 S.W.3d 264 (2015)??

¹⁰⁴ Ibid at 270

¹⁰⁵ Phillips v. Commonwealth, 2016 WL 7175270 (Ky. App. 2015)

Attempt to Commit Murder, Criminal Attempt to Commit Kidnapping, Unlawful Possession of a Weapon on School Property, Third-Degree Terroristic Threatening, Carrying a Concealed Deadly Weapon, and Possession of Marijuana. The court ordered evaluation of Thompson's competency and responsibility. Thompson was found to be both competent and responsible. The findings included diagnosis of Personality Disorder with both Borderline and Anti-Social traits.

Thompson's attorney negotiated a plea agreement which resulted in an amendment of the attempted murder charge down to Second-Degree Terroristic Threatening. In effect Thompson was no longer charged with a Class B felony (10-20 years), but instead a Class D felony (1-5 years). Thompson received a three-year sentence to serve on this amended charge. On the attempted kidnapping charge, Thompson received the minimum sentence of five years, and that sentence was probated. Perhaps because the attorney was focused on achieving such favorable terms, he did not consider any applicability of "sex offender" registration for the attempted kidnapping. In fairness, this issue never crossed the mind of the prosecutor or the court during the process either. Thompson was sentenced on October 11, 2011. He was paroled less than six months later, on March 30, 2012. Only then did Thompson learn from the releasing authorities of his obligation to register.

Thompson failed to register, but he had other probation violations as well. Within a year of his parole and the beginning of his probation, he failed to submit to drug screens and eventually absconded from supervision. A warrant for Thompson's arrest was pending on June 3, 2014, when police received a report that Thompson was making threatening calls. During the investigation of this complaint, police found Thompson,

who then engaged in a high-speed motor vehicle chase. Thompson had three children (not his) in his vehicle as he drove.

He veered into the path of young lady, struck her car and killed her (she was engaged to a soldier then stationed at Fort Knox and they were planning their wedding). All three children in the van Thompson used for the flight suffered serious injuries, as did Thompson. After a jury trial, Thompson was convicted of wanton murder and multiple counts of First-Degree Assault with respect to the children. The jury imposed the maximum sentence of life imprisonment. That conviction was affirmed by the Kentucky Supreme Court on direct appeal.¹⁰⁶ These subsequent developments were referenced in a paragraph in the later Thompson IAC case as having “no consequence” to the prejudice analysis for the earlier case, which was no doubt legally correct, but this perhaps a hard phrase for a layperson to accept.¹⁰⁷

It should be noted that Thompson was charged with failure to register only after his arrest for murder. Ironically, the failure to register charge was dismissed after Thompson was convicted of murder. Thompson did not serve any time for his failure to register.

As part of the initial denial of Thompson’s IAC claim, the trial court separately found no prejudice from the failure to advise Thompson of the registry requirement. Because the trial court couched its prejudice analysis in terms of assuming “arguendo” the ineffectiveness of the non-advice about registration, the Kentucky Supreme Court

¹⁰⁶ Thompson v. Commonwealth, 548 S.W.3d 881 (Ky. 2018)

¹⁰⁷ Ibid

decided a hearing about prejudice was required on remand. Two justices dissented from this conclusion. It may be noted that the U.S. Supreme Court decided no prejudice was shown in Hill without a remand for any further hearing.

On remand to the trial court, retained counsel represented Thompson. The court conducted an evidentiary hearing. At this point, Thompson was no longer focused on the registration issue. He now contended his victim had sent him messages by text or other electronic means inviting him to come to the school to talk and remedy their relationship. Thompson believed his attorney should have found evidence of the messages to support a defense related to Thompson's intent on the day of his crimes.

Thompson told his retained attorney of this new argument on the day of the hearing. In an abundance of caution, the court permitted two opportunities for Thompson to find and provide evidence about the purported messages. Thompson did not present any such evidence. His testimony about them did not fit in with messages about which there was evidence. The trial court again found no prejudice from any failure of the trial attorney. Thompson did not appeal the trial court's decision. He is now serving his life sentence, for his subsequent conviction.

This result may require us to stretch, perhaps too far, the direct consequences rule redefinition approach suggested by this article. Registration is not a punishment and so is not the same as jail time flowing solely from the case. Still, the registration requirement could lead to more jail time even if a convicted person's violations of the conditions were not themselves new criminal acts. It may fit within the reformulation in that way.

Another way to salvage the suggested approach is simply to recognize, as the U.S. Supreme Court did in Padilla itself, that no categorical approach can always apply, which

does not necessarily mean the entire category should be abandoned. Deportation was unique when compared to other “collateral” consequences. It required its own rule. One may creditably argue that registration, with all its residency limitations, although not as punitive as incarceration, is akin to a level of banishment. It includes appropriate and necessary liberty restrictions. And because of the length of time of the registration requirements (now twenty years or life), it too should lie in the limited Padilla exception to collateral consequences

Otherwise, the collateral consequences doctrine may remain without further erosion. Since Padilla, Kentucky courts have addressed collateral consequences in the civil context and declined to extend Padilla further in these circumstances. A further review of cases from a different perspective will precede the next subject, which is the prejudice reformulation after Padilla.

Before Padilla, a defendant attempted to set aside his guilty plea to wanton endangerment because his attorney gave him incorrect advice about how the criminal conviction could impact his position in civil suits arising from the same neighbor feud which had led to the wanton endangerment¹⁰⁸. The court denied the relief sought, holding that civil liability was a “purely collateral consequence of the guilty plea” and thus outside of the attorney’s responsibility to advise.

This conclusion held even after Padilla and Pridham. The defendant in Nunn¹⁰⁹ was a former state legislator who murdered his girlfriend. He later tried to withdraw his

108 Caudill v. Commonwealth, 2008 WL 4683071 (Ky. App. 2008)

109 Nunn v. Commonwealth, 2016 WL 3751993 (Ky. App. 2016)

guilty plea, claiming mis-advice by his attorney about the impact of that guilty plea on the wrongful death suit filed by his victim's family. Because of the conviction, a summary judgment had been granted on liability, and damages of over \$24 million were awarded. The court denied Nunn's IAC motion citing Pridham.

The Nunn case requires further comment. To the extent damages against Nunn were punitive damages, there is more of satisfaction of the first factor in Pridham than the registry requirement of Thompson. So why does Pridham not apply? Because the punishment is not directly related enough to the criminal process. Punitive damages also were not automatic pursuant to a statute governing criminal actions and sentencing. They are also not automatic in a civil case.

Relaxation of the Prejudice Requirement

Overcoming the prejudice prong of Strickland/Hill is "never an easy task."¹¹⁰ Not so true now. On the same day the Kentucky Supreme Court rendered Pridham, another case focused on the second element of an IAC claim, prejudice. In Stiger,¹¹¹ the court quoted the original prejudice formulation from Strickland: "a challenger must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' A reasonable probability is a probability sufficient to undermine confidence in the outcome¹¹². It is not enough 'to show that the errors had some conceivable effect on the outcome of the

110 Vincent v. Commonwealth, 584 S.W.3d 762 (Ky. 2019); Lee v. U.S., 137 S.Ct. 1958, 198 L.Ed.2d 476, 85 USLW 4412 (2017)

111 Stiger v. Commonwealth, 381 S.W.3d 320 (Ky. 2012)

112 [Strickland, 466 U.S.] at 694, 104 S.Ct. 2052.

proceeding.’¹¹³ Counsel's errors must be ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’¹¹⁴

The court then recognized the change in the formulation in Hill in the context of a guilty plea: a defendant must establish “a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial.”¹¹⁵ Further, “to obtain relief [on an ineffective assistance claim] a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.”¹¹⁶

The next paragraph in Hill states important guidelines for the prejudice analysis. The prejudice analysis will look like the review of a trial result. Would the proven failure of counsel, when examined in the full light of the evidence, support a rational decision to reject the plea and proceed to trial? The court in Hill suggests this assessment must be objective: “these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the ‘idiosyncrasies of the particular decisionmaker.’” While this comment may be seen as directing no consideration of a run-away or nullifying jury, the point is that something less than a preponderance standard of reasonable probability must be predominantly objective. In the guilty plea context, the defendant is the decision maker. In such circumstances, the rational

113 Id., at 693, 104 S.Ct. 2052.

114 Id., at 687, 104 S.Ct. 2052

115 Strickland, note 111.

116 Padilla, 599 US at 372.

component must be considered both objectively and subjectively, but objectivity is essential to a trustworthy result.¹¹⁷

In Stiger, the Kentucky Supreme Court reached its own conclusion about prejudice based on the existing record, although no evidentiary hearing had been conducted. In doing so, the Court rejected the notion of any right of a defendant to just say “I would have taken it to trial.” “If the prejudice prong of Strickland/Hill were satisfied by the movant simply saying he would not have taken the deal absent the misadvice, it would be rendered essentially meaningless. ‘Prejudice’ requires more than a simple self-serving statement by the movant.”¹¹⁸ The court in Stiger gave specific examples of bases for rational rejection of a plea: “*e.g.*, valid defenses, a pending suppression motion that could undermine the prosecution's case, or the realistic potential for a lower sentence.”¹¹⁹

A review of cases since Stiger and Padilla II, indicates that we may be much closer to a purely subjective rational choice than that contemplated in Stiger. These seeds were planted in Padilla II. The appellate court in Padilla II found prejudice, which the trial court had not found after an evidentiary hearing, based on a claim of a possible defense to knowingly possessing the 1000 pounds of marijuana.¹²⁰ The appellate court reached this conclusion despite some personal use marijuana found in the cab with Padilla and Padilla’s statement when asked what was in the containers in his trailer:

117 Green v. Commonwealth, 475 S.W.3d 626 (Ky. 2015)

118 Stiger at Footnote 3

119 Ibid at page 237.

120 Padilla II

“Maybe marijuana.” The testimony of Padilla himself recognizing when asked his decision would not have been rational was never mentioned by the court in Padilla II. Padilla said he wanted “to take his chances” anyway.

For the most part, Kentucky cases since Padilla II have held to the predominance of the objective component for prejudice. Courts noted “very strong”¹²¹ or “overwhelming”¹²² evidence and “favorable” plea terms in concluding no prejudice shown. The nature of the charges (child molestation)¹²³ was considered in rejecting an argument any lower sentence was likely. These cases held to the Stiger standard for prejudice. The rationality of the decision to proceed to trial must be based on a valid defense or some other circumstance about the strength of the case itself. The Kentucky Court of Appeals regularly found no prejudice applying this standard.¹²⁴

The trend toward a “dice rolling” approach to rational choice started to appear from cases in other states analyzing Padilla II. Some states stuck with the balancing approach suggested in Padilla II, with the desire to stay in the country as one factor to be weighed against others.¹²⁵ Others started to veer away from this balance and began to focus almost exclusively on the first Padilla II factor.¹²⁶ Ultimately, some states concluded that the mere desire to stay longer in the United States was enough to

121 See *Zehnder v. Commonwealth*, 2016 WL 749557 (Ky. App. 2016)

122 See *Pierre v. Commonwealth*, 2014 WL 5064169 (Ky. App. 2014); *Cawl v. Commonwealth*, 2014 WL 5510795 (Ky. App. 2014)

123 *Ray v. Commonwealth*, 2016 WL 3155143 (Ky. App. 2016)

124 See *Young v. Commonwealth*, 2015 WL 4385623 (Ky. App. 2015); *Sebastian v. Commonwealth*, 2014 WL 1778402 (Ky. App. 2014)

125 *Bahtiraj v. State*, 840 N.W.2d 605 (2013); *Vogel v. Director*, 95 Va. Cir. 335 (Cir. Ct. 2017)

126 *Diaz v. State*, 896 N.W.2d 723 (Ia. 2017)

justify/denominate a rational decision.¹²⁷ To put it more bluntly, a defendant was entitled to “roll the dice.”¹²⁸

Ultimately, the U.S. Supreme Court leaned in the direction of rolling the dice.¹²⁹ The dissent in Lee, decided in 2017, and in one of the state court cases raise legitimate criticism of this lowering or even eliminating the bar to establishing prejudice. Even accepting the result in Lee, we must again recognize the “unique” status of deportation. The extension of this dice rolling standard to that limited circumstance should not necessarily mean an extension of the standard to other consequences, direct or collateral.

Practical Approach to Avoid Problems

What should lawyers and judges do to address collateral consequences?

Approach as a direct consequence anything about the case which could result in measurable minimum jail time just because of the conviction in that case and not requiring a new independent criminal act (such as sex offender post-incarceration supervision or registry requirements). Why? Because that’s what they are – direct consequences - in the context of the Sixth Amendment.

Comments in cases may be analyzed to understand what attorneys should do when presented with a potential collateral consequence. In Abernathy,¹³⁰ a teacher entered a guilty plea to sexual misconduct, receiving a conditionally discharged sentence. The teacher was concerned about how the plea would impact his employment and

127 *People v. Sifuentes*, 410 P.3d 730 (Co. App. 2017)

128 *State v. Nkiam*, 778 S.E.2d 863, 243 N.C.App.777 (NC App. 2015)

129 *Lee v. U.S.*, 137 S.Ct. 1958, 198 L.Ed.2d 476, 85 USLW 4412 (2017)

130 *Abernathy v. Commonwealth*, 2017 WL 1548197 (Ky. App. 2017)

retirement benefits. First, one must wonder how anyone would not understand that pleading guilty to sexually touching a minor would impact future employment as a teacher.

The attorney told the client to consult an expert about the law and policies governing school employment and retirement. The trial court denied the IAC claim. The Kentucky Court of Appeals affirmed. For what remains as a collateral consequence, an acceptable approach may be to say: “I don’t know.” If the disclosed issue is important to the defendant, the attorney may offer the client the option of getting an answer before entering the guilty plea, and the Court can make a record of how the question was answered or simply record the decision of the defendant to proceed without a definite answer.

One concern about Padilla is its absolute and no excuse directive. If it is important enough to know about an issue such as “automatic” deportation, then the attorney must inform the client. Silence is not golden here¹³¹. After Padilla, mis-advice is just one form of no advice. Remember, the mis-advice approach of Sparks was abrogated by Padilla.

Before Padilla, the Kentucky Court of Appeals suggested taking on the “minor burden”¹³² of adding deportation information to the plea colloquy. Addition of information has been suggested as a cure in non-deportation contexts as well.¹³³

131 See *Paxton v. Commonwealth*, 2014 WL 3026750 (Ky. App. 2014)

132 *Reyna v. Commonwealth*, 217 S.W.3d 274 (Ky. App. 2007)

133 See *Embry; Edmonds; Hart v. Commonwealth*, 2018 WL 2078031 (Ky. App. 2018); *Carson v. Commonwealth*, 2012; WL 4839020 (Ky. App. 2012)

Addition may cure any non-advice by the attorney when the defendant chooses to go forward with the plea armed with the correct information.

When going over plea agreements, courts should require disclosure in writing of minimum parole eligibility for the sentence imposed. When sex offender treatment may extend the minimum time, please make sure the defendant is told that fact, even though telling is not required under Pridham. The author has learned such lessons from experience. To those who object to adding a duty to the judge to inform defendants of these matters, experience shows that providing information does not add significantly to the plea colloquy. Enhancing finality for that case is well worth the time and effort.

In every plea, the author now not only requires discussion of minimum parole eligibility, but also adds questions to elicit any undiscussed collateral consequences, starting with deportation: “Are you a U.S. citizen? (If not, warn of deportation as result of a plea and make a record of attorney's advice).” Remember, it is not enough to tell a defendant he or she “might be deported” if deportation is automatic. When the defendant says they are not a citizen, open the books or the computer screen and do not complete the plea without being sure whether automatic deportation applies to your case.

Anticipating other possible collateral consequences, this court asks about satisfaction with the attorney’s work on the case, including a specific comment as part of that question: “Specifically, you are telling me there is nothing else out there you want any attorney to do that might have made changed your mind about your decision to enter this guilty plea.” This statement gives the defendant a chance to ask about some concern not fully addressed by the attorney. Rarely do defendants have any specific concern to

address, but, when they do, please make sure the question is answered before the plea becomes final.

Toward the end of the plea, the court directly asks about collateral consequences, offering examples and a reminder of the finality of the plea decision: “A guilty plea is a final decision. If you change your mind, you should not expect to easily withdraw this guilty plea for just any reason. You need to know there are many consequences of having the status of a felon. Felons are not able to vote or to possess a gun. Having a record as a felon can cause difficulty in getting or keeping certain jobs. Any number of other possible side effects or consequences may affect you, which are different for each person. Before agreeing to a plea you should have no unanswered questions about how this guilty plea could impact you or about anything else related to this case. Do you have any questions for me or your attorney (you can still speak privately with an attorney)?”

Taking such measures does not add even one minute to the colloquy. Rarely will defendants raise a question, but, when they do, addressing it before accepting the guilty plea adds to finality for the case. In the era after Padilla and its extension, making sure a defendant understands collateral consequences is a small price to pay in order to achieve increased finality.