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The Proper Borders of Padilla: Courts Must Avoid Over-Expansion of Sixth Amendment Claims

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THE PROPER BORDERS OF *PADILLA*: COURTS MUST AVOID OVER-EXPANSION OF SIXTH AMENDMENT CLAIMS

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INTRODUCTION

You have nothing to worry about. Relying on his attorney's advice, Jose Padilla decided to plead guilty to felony drug trafficking in Hardin County Circuit Court, in Hardin County, Kentucky.[1] As recommended in his plea agreement, Padilla was sentenced to serve a five-year prison term, followed by five years on probation.[2] Padilla elected to take the certainty of the bargained-for sentence, rather than take his chances in front of a jury.[3]

You've been in the country so long, you won't get deported. Jose Padilla came to the United States in the 1960s after being born in Honduras in 1950.[4] He became a lawful permanent

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[1] Brief for Petitioner at 2, Padilla v. Kentucky, 559 U.S. 356 (2010) (No. 08-651).

[2] *Id.* at 9.

[3] The brief for the petitioner describes this as only a "meager benefit." *Id.* at 10. The brief goes on to describe the possible consequences had Padilla decided to go to trial:

> Had Padilla gone to trial, he would not only have forced the Commonwealth to its proof of guilt by a reasonable doubt, but he also would have been entitled to request jury sentencing (and to present mitigating sentencing evidence). He may have received a substantially lower sentence than ten years, perhaps the minimum of five years. In any event, he would have been parole eligible after serving 20% of his sentence. Thus, even if he had gone to trial and received the maximum sentence of ten years, he would have been eligible for parole within approximately a year from conviction (given his credit of 365 days for time served). Padilla nonetheless chose to accept the certainty of a five year term of imprisonment with five years probated.

Id. (citations omitted).

[4] *Id.* at 8.

resident and served honorably in Vietnam.[5] At the time of his arrest in 2001, he lived with his family in California and worked as a licensed commercial truck driver.[6]

But Padilla did have something to worry about. He could—and almost certainly would—get deported. Under federal immigration law, "*Any alien* who . . . has been convicted of a violation of . . . any law . . . relating to a controlled substance . . . is deportable."[7] As discussed below, the development of immigration law in the last half century has made deportation a near-automatic result for aliens convicted of felonies.[8] This is especially true when the conviction is for a drug crime.[9] Padilla's only remaining avenue for relief was to seek to vacate his guilty plea through a claim of ineffective assistance of counsel, for his attorney's failure to warn him about deportation consequences. This laid the groundwork for the Supreme Court to re-evaluate its existing ineffective assistance doctrine as well as the application of that doctrine in the lower state and federal courts.

Ultimately, the Supreme Court held that Padilla's attorney had failed to render effective assistance of counsel by misadvising Padilla about the deportation consequences of his guilty plea.[10] Explicitly, the Court's holding was narrow: A criminal defense attorney has the duty to provide accurate advice regarding deportation to a noncitizen client.[11] Implicitly, however, the Court caused a major shake-up in Sixth Amendment jurisprudence by undermining the longstanding direct-collateral consequences doctrine followed by lower courts.[12] With the longstanding doctrine seemingly marginalized, courts hearing ineffective assistance claims were thrust into a state of flux. Though it was clear that a criminal defense attorney now had to advise his client about deportation, there were no clear directives for when guilty pleas were challenged based on failed advice regarding other "collateral" consequences.

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[5] *Id.*

[6] *Id.*

[7] 8 U.S.C. § 1227(a)(2)(B)(i) (2012) (emphasis added).

[8] *See infra* notes 78–83 and accompanying text.

[9] *See Padilla*, 559 U.S. at 362–63 nn.4–5.

[10] *Id.* at 368–69.

[11] *Id.* at 364.

[12] The Court noted that it had never endorsed the direct-collateral doctrine as a part of Sixth Amendment analysis. *Id.* at 364 n.8, 365.

This Note proposes a new method of Sixth Amendment analysis. This analysis is consistent with the Court's decision in *Padilla v. Kentucky* and its other Sixth Amendment precedent. It also responds to concerns that criminal defendants are treated fairly, on the one hand, and that the criminal justice system is not overburdened by an undermined plea system, on the other. This Note argues that the focus of the "competence prong" of the ineffective assistance test must be focused on the attorney's knowledge and his action in relation to that knowledge. When an attorney knows—or reasonably should know—that a collateral consequence is looming over his client's conviction, the Supreme Court, this Note, and common sense demand that the attorney advise his client on the matter.

Part I of the Note reviews the development of Sixth Amendment doctrine that established the right of an indigent defendant to be provided with counsel at trial, as well as at other stages of a criminal proceeding where his rights could be substantially affected. Part I next notes the Court's recognition that the Sixth Amendment not only protects a defendant's right to have counsel present, but also requires that the counsel be *effective*. This Part then looks at the current doctrine for claims of ineffective assistance of counsel, which are governed by the 1972 Supreme Court case, *Strickland v. Washington*. This section reviews the two-pronged test established by the *Strickland* Court for resolving defendants' motions for post-conviction relief. Part I concludes with a review of the direct and collateral consequences doctrine, which has been created and employed by lower courts to determine the applicability of *Strickland* in cases where the advice of counsel—or lack thereof—is at issue.

Part II of this Note identifies the traditional problems with the direct-collateral doctrine and will argue that lower courts applying *Padilla* have not cured these defects in Sixth Amendment law. Part II.A discusses the problems inherent in defining "direct" and "collateral" consequences. Part II.B then discusses the policy considerations at stake in Sixth Amendment cases. Finally, Part II.C reviews the three basic applications of *Padilla* to the direct-collateral doctrine and will argue that none of these approaches are satisfactory.

This Note concludes in Part III by proposing a new method of Sixth Amendment analysis that focuses on attorney knowledge. This proposed method is consistent with the Supreme Court's holdings in *Padilla* and *Strickland* and addresses the competing public policy concerns over fairness to criminal defendants and the institutional "floodgates" concern.

First, Part III, using language from *Padilla*, identifies which consequences, like deportation, are "not categorically removed" from Sixth Amendment relief.[13] This section argues that certain consequences, like deportation and the traditional "direct" consequences are "not categorically removed," and thus are always subject to ineffective assistance claims. This section also argues that, though there are other consequences which may also fall in this category, courts should be hesitant to expand this category too far.

Part III next identifies circumstances in which *any* consequence—direct or collateral—should be subject to claims for ineffective assistance. All of these circumstances have, at their foundation, a basis to conclude that the attorney had some knowledge of the consequence and yet failed to act as an effective advocate. The first, and clearest, circumstance is affirmative misadvice. The next circumstance, which is harder to prove, is when the attorney fails to give any advice, but where there is evidence that the attorney knew—or should have known—that the consequence was in play. This section of the Note will identify potential sources of evidence to show what an attorney knew or should have known.

I. ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT

A. The Right to Assistance of Counsel

The Sixth Amendment guarantees certain rights to those who stand accused in criminal prosecutions. Among these guaranteed rights is the accused's right to "Assistance of Counsel."[14] Though this seems to be a straightforward

[13] *Id.* at 366 ("We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.").

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

proposition, the exact requirements of the Sixth Amendment's right to counsel have been subject to much uncertainty and development throughout this country's history.

The right to retain private defense counsel has never been subject to debate, but the extension of the Sixth Amendment beyond this basic right has been continually developing in the last eighty years.[15] The first major development in the Sixth Amendment right to counsel came in the Court's decision in *Powell v. Alabama*.[16] Relying on the Due Process Clause, the Court held in *Powell* that the defendant's right to a fair trial required that an indigent defendant be appointed counsel.[17] Though the *Powell* decision was grounded in due process considerations, six years after *Powell*, the Court held in *Johnson v. Zerbst*[18] that the right to appointed counsel, like the right to privately retained counsel, was properly found in the guarantees of the Sixth Amendment.[19] Though *Powell* and *Johnson* were originally held not to apply to state cases, absent some special circumstances,[20] the guarantee of counsel was eventually extended to all indigent defendants, regardless of the charges they faced.[21]

Though the *Powell* decision is grounded in concerns that the defendant receive a fair *trial*, the Court has held that the guarantees of the Sixth Amendment extend to other phases of a criminal prosecution. In *Evitts v. Lucey*,[22] the Court extended Sixth Amendment protection to a defendant taking a first appeal from a criminal conviction.[23] The Supreme Court has held that the Sixth Amendment right to counsel extends to any part of a criminal proceeding where the defendant's rights are substantially at risk,[24] which includes the plea-bargaining phase of the prosecution.[25]

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[15] Randy J. Sutton, Annotation, *Construction and Application of Sixth Amendment Right to Counsel—Supreme Court Cases*, 33 A.L.R. FED. 2d 1 (2009).

[16] 287 U.S. 45 (1932).

[17] *Id.* at 73.

[18] 304 U.S. 458 (1938).

[19] *Id.* at 462–63.

[20] *See* Betts v. Brady, 316 U.S. 455, 473 (1942).

[21] Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

[22] 469 U.S. 387 (1985).

[23] *Id.* at 393–94.

[24] Mempa v. Rhay, 389 U.S. 128, 134 (1967).

[25] Hill v. Lockhart, 474 U.S. 52, 57 (1985).

B. The Right to Effective Assistance of Counsel

The due process requirement for a fair trial, according to the Court in *Powell*, was not satisfied when "circumstances . . . preclude[d] the giving of *effective* aid" from counsel.[26] This requirement of effective aid was read into the Sixth Amendment guarantee of assistance of counsel ten years after *Powell*, in *Glasser v. United States*.[27] However, neither *Powell* nor *Glasser* established what, if anything, would render the assistance of counsel, appointed or privately retained, ineffective.

In certain circumstances, the Court has recognized a strong presumption of ineffectiveness of counsel, establishing what some commentators describe as a per se rule.[28] One such circumstance occurs where the state in some way interferes with counsel's ability to effectively serve his client.[29] The Court has recognized several different types of state interference as a denial of the defendant's Sixth Amendment right to effective counsel.[30]

The other circumstance in which the Court has recognized a strong presumption of ineffectiveness is where an attorney's performance is rendered ineffective by some conflict of interest.[31] The presumption of ineffectiveness is not quite as strong in this circumstance as it is when state interference is involved.[32] Only when an attorney "actively represent[s] conflicting interests," and such conflict hampers the attorney's representation of the defendant, is ineffectiveness presumed.[33]

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[26] Powell v. Alabama, 287 U.S. 45, 71 (1932) (emphasis added).

[27] Glasser v. United States, 315 U.S. 60, 76 (1942).

[28] *See* 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.7(d) (3d ed. 2011).

[29] *See id.* § 11.8(a).

[30] *See* Geders v. United States, 425 U.S. 80, 91 (1976) (holding that a court order that an attorney not consult his client during an overnight recess constituted state interference); Herring v. New York, 422 U.S. 853, 865 (1975) (holding that a statute prohibiting closing argument at a bench trial violated the Sixth Amendment); Brooks v. Tennessee, 406 U.S. 605, 613 (1972) (holding that a statute requiring the defendant, if he testified, to be the first defense witness was unconstitutional); Ferguson v. Georgia, 365 U.S. 570, 596 (1961) (holding, on Fifth Amendment grounds, that prohibiting direct examination of a defendant who had made an unsworn statement violated due process).

[31] *See* LAFAVE ET AL., *supra* note 28, § 11.9(a).

[32] Strickland v. Washington, 466 U.S. 668, 692 (1984).

[33] *Id.* (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)) (internal quotation marks omitted).

C. Ineffective Assistance of Counsel After Strickland v. Washington

The Supreme Court did not consider any questions concerning "actual ineffectiveness"—not including a conflict of interest[34]—until 1984.[35] In *Strickland*, the Court held that a defendant could prevail on a claim of actual ineffectiveness only by satisfying a two-pronged standard.[36] To satisfy *Strickland*'s first prong, a defendant must "show that counsel's performance was deficient."[37] A court applying this prong may use "prevailing professional norms," such as American Bar Association standards, as "guides" in evaluating an attorney's representation of his client.[38] The Supreme Court cautioned, however, that such standards and norms "are only guides" and courts should be "highly deferential" when scrutinizing an attorney's strategic decisions.[39]

To satisfy *Strickland*'s second prong, "the defendant must show that the deficient performance [of counsel] prejudiced the defense."[40] An error by counsel will not be set aside if the error did not impact the result of the criminal proceeding.[41] The defendant must also satisfy this second prong, which requires an affirmative showing that there is a "reasonable probability"[42] that the proceeding would have been more favorable to the defendant without counsel's errors.[43]

The focus of the inquiry into the effectiveness of counsel should be "whether . . . the result of the particular proceeding is unreliable because of a breakdown in the adversarial process."[44] It is from counsel's primary role as an advocate for the defendant in the adversary system that all other duties arise.[45] In *United*

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[34] *See* Cuyler v. Sullivan, 446 U.S. 335, 350 (1980).

[35] *Strickland*, 466 U.S. at 692.

[36] *Id.* at 687.

[37] *Id.*

[38] *Id.* at 688.

[39] *Id.* at 688–89.

[40] *Id.* at 687.

[41] *Id.* at 691.

[42] *Id.* at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome [of the adversarial proceeding].").

[43] *Id.* The Court noted that the governing legal standard in the proceeding—generally, "beyond a reasonable doubt" in a criminal proceeding—serves a "critical role" in establishing prejudice. *Id.* at 682, 695.

[44] *Id.* at 696.

[45] United States v. Cronic, 466 U.S. 648, 655–56 (1984).

States v. Cronic, a companion case to *Strickland*, the Court emphasized the importance that counsel act as the defendant's advocate, holding that "if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."[46] The Court, in both *Strickland* and *Cronic*, used its emphasis on the adversarial process to dissuade subsequent decision-makers from turning ineffective assistance claims into attorney performance reviews.[47]

D. Direct and Collateral Consequences

In applying *Strickland*, both federal and state courts have imported a doctrine used in a related area of law. Under *Brady v. United States*,[48] a trial court is required to inform a defendant pleading guilty of the direct consequences of the plea and resulting sentence.[49] By implication, then, due process did not require that a pleading defendant be advised of consequences that were merely "collateral" to the pled-to crime.

Though the direct-collateral distinction was created in a Fifth Amendment case, both federal and state courts began applying the direct-collateral distinction to Sixth Amendment cases soon after *Brady*.[50] Despite its widespread use, the Supreme Court did not consider whether the direct-collateral distinction was properly being applied to Sixth Amendment cases until more than forty years after the distinction was created in *Brady*.[51]

When the question finally came before the Court in *Padilla v. Kentucky*, the Court's holding on the matter was very limited. The Court noted that it had "never applied a distinction between direct and collateral consequences" in Sixth Amendment assistance of counsel cases.[52] The Court, however, did not take this opportunity to decide whether the distinction was generally relevant to Sixth Amendment inquiries.[53] Instead, the Court

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[46] *Id.* at 656–57.

[47] *Strickland*, 466 U.S. at 686; *Cronic*, 466 U.S. at 656–57.

[48] 397 U.S. 742 (1970).

[49] *Id.* at 755.

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

[51] *See* Padilla v. Kentucky, 559 U.S. 356, 364 (2010).

[52] *Id.* at 365.

[53] *Id.* ("Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.").

restrained itself, holding only that "[t]he collateral versus direct distinction is . . . ill-suited to . . . the specific risk of deportation."[54]

The Supreme Court's holding that deportation was not a "collateral" consequence was not a complete departure from the lower courts; to the extent that lower courts realized an exception to the direct-collateral consequences rule, that exception was deportation. State courts in Colorado, Indiana, Ohio, Oregon, and California have all recognized, to some degree, that a noncitizen defendant may be entitled to the advice of counsel on the matter.[55] An increasing number of state statutes and court rules have allowed for a deportation exception to the direct-collateral consequences rule.[56] This exception likely stems from the formerly recognized duty of an attorney to advise his client as to the availability of a Judicial Recommendation Against Deportation ("JRAD")—a procedure which was eliminated by statute in 1990.[57]

The direct-collateral doctrine has been sharply criticized. Many commentators see collateral consequences as a "secret sentence."[58] These commentators see the direct-collateral doctrine as an effective denial of counsel with regard to this "sentence."[59] Proponents of the distinction, meanwhile, have their concerns voiced in Justice Scalia's dissenting opinion in *Padilla*. In his dissent, Justice Scalia argued that "[a]dding to counsel's duties an obligation to advise about a conviction's collateral consequences has *no logical stopping-point*."[60] The fear on this side of the debate is that the inclusion of collateral consequences into an attorney's duties to advise will overburden attorneys and courts.[61] They also fear that the inclusion will

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[54] *Id.* at 366.

[55] Chin & Holmes, *supra* note 50, at 708 (noting that some decisions may have relied on state law, rather than constitutional, grounds).

[56] *Id.*

[57] *Padilla*, 559 U.S. at 363.

[58] Chin & Holmes, *supra* note 50, at 700.

[59] *Id.*

[60] *Padilla*, 559 U.S. at 390 (Scalia, J., dissenting) (emphasis added).

[61] *See* Derek Wikstrom, Note, *"No Logical Stopping-Point": The Consequences of* Padilla v. Kentucky*'s Inevitable Expansion*, 106 NW. U. L. REV. 351, 367–68 (2012).

severely erode the reliability and finality of guilty pleas, upon which much of the efficient and orderly operation of the criminal justice system relies.[62]

II. *PADILLA* HAS ADDED TO THE EXISTING CONFUSION SURROUNDING SIXTH AMENDMENT CLAIMS BASED ON ATTORNEY ADVICE

The direct-collateral doctrine, even before the Court's decision in *Padilla v. Kentucky*, suffered from two major problems. First, application of the doctrine was very uncertain. The definition of "direct" and "collateral" varied from jurisdiction to jurisdiction.[63] Further, there were some consequences, such as deportation, which were neither definitively direct nor definitively collateral.[64] Second, both liberal and strict interpretations of the doctrine posed significant policy concerns. A liberal application of the direct-collateral doctrine raised institutional concerns. Courts and commentators rejecting a liberal application cite the "floodgates concern"—that liberal application of the direct-collateral doctrine would put almost all guilty pleas in danger of being vacated on *Strickland* claims.[65] Even if these pleas would not ultimately be vacated, the need to hold a *Strickland* hearing would put a tremendous burden on the criminal justice system.[66] Those favoring a liberal approach, however, argue that any institutional concerns created by the liberal application are far outweighed by concerns for the defendant who pled guilty based on his attorney's incompetence.[67] These courts and commentators argue that the allure of quick and efficient resolution of cases by plea bargain can induce defense lawyers, prosecutors, and even judges to ignore "collateral" consequences that may be of utmost

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[62] *Padilla*, 559 U.S. at 371.

[63] *See* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 MINN. L. REV. 670, 689–93 (2008).

[64] *See* Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 124–125 (2009) (stating that while courts considered "direct" consequences to be those that were penal sanctions, some consequences were labeled as "collateral" even though they were severe).

[65] *See* Chin & Holmes, *supra* note 50, at 736.

[66] *See id.* at 736–37.

[67] *See* Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOW. L.J. 693, 743 (2011).

importance to the defendant.[68] The Sixth Amendment, the argument continues, is the only way to ensure that every defendant will have access to information about the potentially life-altering consequences of his or her plea.[69]

The *Padilla* decision has contributed to confusion in this area. The Court spoke definitively only on deportation; the extension of its holding was left to speculation and interpretation by lower courts. Courts applying *Padilla* have generally followed one of three different methods. Some courts have read *Padilla* as obliterating the distinction between direct and collateral consequences.[70] Others have read *Padilla* as leaving the direct-collateral doctrine untouched, except for a new carve-out for deportation.[71] A third approach that is taken by some courts is to apply the old direct-collateral doctrine for the time being, holding that *Padilla* does not apply retroactively to pleas taken before the decision was handed down.[72]

This Part identifies and details the problems inherent in the direct-collateral doctrine and argues that none of the three readings of *Padilla* currently employed by lower courts adequately address these problems. First, Part II.A discusses the inconsistent application of the direct-collateral doctrine before *Padilla*. Then, Part II.B discusses the policy considerations underlying the application of the direct-collateral doctrine, and argues that the pre-*Padilla* application failed to strike a proper balance. Finally, Part II.C demonstrates that the *Padilla* decision, as well as its application in subsequent lower court decisions, failed to correct—and in some cases made worse—these issues.

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[68] Paisly Bender, Comment, *Exposing the Hidden Penalties of Pleading Guilty: A Revision of the Collateral Consequences Rule*, 19 GEO. MASON L. REV. 291, 305 (2011).

[69] *See id.* at 304–05.

[70] *See, e.g.*, Malia Brink, *A Gauntlet Thrown: The Transformative Potential of* Padilla v. Kentucky, 39 FORDHAM URB. L.J. 39, 42 (2011).

[71] *See, e.g.*, People v. Bennett, 28 Misc. 3d 575, 579, 903 N.Y.S.2d 696, 699 (N.Y.C. Crim. Ct. Bronx Cnty. 2010).

[72] *See, e.g.*, Barrios-Cruz v. State, 63 So. 3d 868, 873 (Fla. Dist. Ct. App. 2011).

*A. Major Problem with the Direct-Collateral Doctrine Pre-*Padilla *Was Its Inconsistent Application*

The first problem with the direct-collateral doctrine is inherent in the doctrine itself. The terms "direct" and "collateral" have seemingly no certain definitions and there is often significant overlap between the two categories. One of the few certainties in this area is that the prison sentence and fine attached to a conviction are "direct" consequences.[73] Beyond these two rather obvious examples, however, there is significant discrepancy as to what is direct and what is collateral. The D.C. Circuit acknowledged this problem by noting that "[t]he distinction between a collateral and a direct consequence of a criminal conviction, like many of the lines drawn in legal analysis, is obvious at the extremes and often subtle at the margin."[74]

The problem with the traditional distinction between "direct" and "collateral" consequences is that the definitions of the two terms are not perfectly complementary. "Direct" consequences typically involve only those consequences that concern the "nature of the sentence" imposed for a crime.[75] "Collateral" consequences, on the other hand, are described as "stem[ming] from the *fact of conviction* rather than from the *sentence of the court*."[76] Where exactly direct consequences end and collateral consequences begin varies from jurisdiction to jurisdiction.[77] The two definitions are best illustrated as a pair of circles in a Venn diagram. When the definitions are strictly applied, there is no intersection of the circles, and some consequences will fall into the void between the circles. When the definitions are liberally applied, the circles intersect too much, leaving very few consequences that are purely direct or purely collateral.

Before *Padilla*, deportation was particularly difficult to classify as direct or collateral.[78] Though most states held that deportation was merely a collateral consequence, removed from Sixth Amendment protection, there were several state courts

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[73] Chin & Holmes, *supra* note 50, at 699.
[74] United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982).
[75] LAFAVE ET AL., *supra* note 28, § 21.4(d).
[76] Roberts, *supra* note 63, at 678 (emphasis added).
[77] *Id.* at 679–80.
[78] *See* Chin & Holmes, *supra* note 50, at 708.

that had held that a noncitizen defendant had a right to advice about the deportation consequences of his guilty plea.[79] Other states imposed this right by statute or court rule.[80]

Part of the difficulty in classifying deportation as collateral lies in the unique development of deportation law over the course of the twentieth century. The key development in this area was the elimination of the JRAD.[81] Once available as a means to mitigate the potential for deportation based on a conviction, several federal circuits held that a noncitizen defendant who was not informed about JRAD was entitled to a Sixth Amendment claim.[82] The elimination of JRAD in the early 1990s made deportation a near-automatic consequence for noncitizen defendants convicted of a wide range of crimes.[83] This change in the law took deportation entirely out of a judge's—even a federal judge's—hands, which arguably made deportation more "collateral" than "direct" for the purposes of the Sixth Amendment.[84] However, it was difficult to rationalize eliminating the protection of the Sixth Amendment when the change in the law had made the possibility of deportation not only harsher, but also more predictable.

Though the most "diversity of opinion" regarding the application of the direct-collateral doctrine came in cases concerning deportation, there were many other consequences where the doctrine was far from uniform. Consequences which could significantly impact the length or manner of imprisonment were deemed collateral by some courts because the trial court had minimal power over the consequence.[85] Other courts, however, saw these consequences as affecting the "nature" of the

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[79] *Id.*

[80] *Id.*

[81] Adonia R. Simpson, Note, *Judicial Recommendations Against Removal: A Solution to the Problem of Deportation for Statutory Rape*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 489, 502 (2009).

[82] *See* Janvier v. United States, 793 F.2d 449, 455 (2d Cir. 1986) (requiring a noncitizen defendant to be advised as to the availability of JRAD procedures).

[83] *See* Padilla v. Kentucky, 559 U.S. 356, 363–64 (2010).

[84] *See id.* at 364–65.

[85] *See* Holmes v. United States, 876 F.2d 1545, 1548–49 (l1th Cir. 1989) (holding ineligibility for parole is a collateral consequence); United States v. Rubalcaba, 811 F.2d 491, 494 (9th Cir. 1987) (holding that a defendant need not be advised that he was to serve his prison sentences consecutively, rather than concurrently); State v. Barton, 609 P.2d 1353, 1356 (Wash. 1980) (en banc) (holding that a defendant need not be advised that he would receive a heightened sentence because he was a repeat offender).

sentence, and thus were "direct."[86] This category of consequences acutely exposes the shortcoming of the traditional distinction between direct and collateral consequences. Though they are technically closest to the "collateral" definition, they can have an immediate and severe impact on the "direct" sentence for the crime.

Another area where courts have differed as to the availability of Sixth Amendment relief is when the consequences may have a more profound impact on the defendant's life than his sentence might. Deportation may fit in this category, but as a very extreme example. Similar, if less severe, consequences include disqualification from public benefits and loss of professional licenses.[87] Many courts held that these consequences were collateral, as they were both outside the purview of the criminal court and only tenuously connected to the "direct" consequences of conviction.[88] Other courts have focused on the fact that these consequences may outweigh the direct consequences for certain defendants and have held that, in these circumstances, the defendant should be protected by the Sixth Amendment.[89]

Though the direct-collateral doctrine was one of the "most widely accepted" doctrines among lower courts before *Padilla*,[90] each jurisdiction accepted the doctrine only on its own terms. Courts struggling to define and distinguish "direct" and "collateral" doctrines would reach disparate results because they emphasized different aspects of the doctrine.[91] Thus, a court focused on the unique development of immigration law would provide Sixth Amendment relief for deportation.[92] Meanwhile, a

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[86] *See* Ashley v. State, 614 So. 2d 486, 490 (Fla. 1993) (requiring advice about repeat offender laws); People v. Flannigan, 267 N.E.2d 739, 744 (Ill. App. Ct. 1971) (requiring advice that sentences would be served consecutively); State v. Smith, 513 So. 2d 544, 547–49 (La. Ct. App. 1987) (requiring that a defendant be advised about unavailability of parole).

[87] Chin & Holmes, *supra* note 50, at 705–06.

[88] *Id.* at 704–05.

[89] *See id.* at 705–06.

[90] *See id.* at 699.

[91] *Compare* People v. Soriano, 240 Cal. Rptr. 328, 336 (Ct. App. 1987) (holding that defendant had been deprived of effective assistance of counsel when his attorney failed to advise him of immigration consequences), *with* State v. Smith, 513 So. 2d 544, 547–49 (La. Ct. App. 1987) (finding ineligibility for parole was a direct consequence).

[92] *See Soriano*, 240 Cal. Rptr. at 336.

jurisdiction more concerned with the true impact of direct consequences would likely protect a defendant who was uninformed about the unavailability of parole, mandatory consecutive sentencing, or heightened sentencing for repeat offenders.[93] Other courts, finding that the relative impact of the "collateral" consequences was greater than that of the "direct" consequences, could grant relief for those subject to loss of public benefits or professional licenses.[94] At least one of these considerations was likely to play a role in any court's resolution of an ineffective assistance of counsel claim, making the "widely accepted" direct-collateral doctrine diverse and unpredictable across jurisdictions.

B. The Direct-Collateral Doctrine Failed To Strike the Proper Balance Between Institutional Concerns for the Criminal Justice System and Fairness Considerations for Individual Defendants

Analysis of Sixth Amendment claims takes on added significance in the context of guilty pleas. The criminal justice system relies on guilty pleas to resolve the vast majority of disputes in the system. Without guilty pleas, there would be almost no feasible way to handle the tremendous caseload coming through courthouses in nearly every jurisdiction in the United States. A liberal application of the Sixth Amendment in this context potentially subjects all guilty pleas to being overturned in collateral proceedings.[95] If defense attorneys, prosecutors, and judges could not rely on the finality of pleas given in open court, the entire system would be crippled. This would not only hurt the court system, but it would also hurt defendants seeking to plead guilty. Often, defendants use guilty pleas to secure favorable dispositions, to avoid having evidence of their wrongdoing put before a jury, and to ensure a quick resolution to their encounter with law enforcement.[96] However, if

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[93] *See Smith*, 513 So. 2d at 547–49.

[94] *See, e.g.*, United States v. Littlejohn, 224 F.3d 960, 966–67 (9th Cir. 2000) (finding that defendant's disqualification from public benefits following his conviction is a direct consequence); *see also* Barkley v. State, 724 A.2d 558, 560–61 (Del. 1999) (holding that automatic revocation of a driver's license is a direct consequence).

[95] Chin & Holmes, *supra* note 50, at 702.

[96] Jerold H. Israel, *Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom*, 48 FLA. L. REV. 761, 774–75 (1996).

institutional concerns over protecting the finality of guilty pleas are given too much weight, the pleading defendant is put at significant risk of being blindsided by "collateral" consequences that would have significantly altered their decision to plead.

1. Institutional Concerns at Risk in the Guilty Plea Context

Though a jury trial is often thought to be the identifying characteristic of the American criminal system, the truth is that criminal trials are becoming increasingly rare. According to the Department of Justice, over ninety percent of convictions come as a result of a guilty plea.[97] Recognizing the mounting importance of the plea-bargain regime, the Supreme Court granted certiorari for a significant number of cases defining the plea process.[98]

In its decisions on ineffective assistance claims, the Court has recognized some concerns specific to plea bargains. In *Premo v. Moore*,[99] the Court noted that the plea bargain system relied on stability.[100] The availability of Sixth Amendment relief injected instability into this system by subjecting bargained-for dispositions to judicial second-guessing. If a court failed to "accord the latitude" granted to counsel under *Strickland*'s competence prong, prosecutors could lose faith in the finality of bargained pleas, leading them to withhold plea offers—"a result favorable to no one."[101] This instability poses a threat not only to cases where a guilty plea is ultimately taken, but also to any case where a guilty plea is offered; this uncertainty would affect nearly every case that came through the criminal justice system.[102]

Extending Sixth Amendment protection to "collateral" consequences is particularly scary for attorneys and judges in the criminal system because they will have little, if any, control over the ultimate resolution of the proceeding producing the consequence. The Illinois Supreme Court was unsettled by this prospect, stating that "a criminal court is in no position to advise

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[97] BRIAN A. REAVES, U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 22, 24 tbl.21 (2013), *available at* http://www.bjs.gov/content/pub/pdf/fdluc09.pdf.

[98] Stephanos Bibas, Essay, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1118–19 (2011).

[99] 131 S. Ct. 733 (2011).

[100] *Id.* at 741–42.

[101] *Id.* at 742.

[102] *See* Chin & Holmes, *supra* note 50, at 736.

on all the ramifications of a guilty plea personal to a defendant."[103] The Illinois Supreme Court was concerned that overstating the protection of the Sixth Amendment would leave the guilty pleas taken in the court system subject to being vacated by any one of the "numerous" and "logically unforeseeable" collateral consequences following the conviction.[104]

2. Concerns for Fairness to the Defendant Taking the Plea.

Though the plea bargaining system, in theory, should bestow equal benefits on the state and the defendant, there are circumstances where an incompetent defense counsel may take away this "mutuality of advantage."[105] The direct-collateral doctrine was an attempt to account for this scenario. However, this distinction rested on the simplistic and sometimes faulty premise that the "direct" consequences of a conviction were the most serious for a criminal defendant.[106]

Whether or not the direct consequences of a conviction outweigh the collateral consequences is generally a fact-sensitive inquiry. The relative importance can only be ascertained on a case-by-case basis, taking into account the unique features of the defendant. For a noncitizen, the prospect of deportation will almost always outweigh the connected prison term, especially if the defendant has a family in the United States or has been in this country so long that he no longer has a home in his native country.[107] In the case of almost any defendant, the difference between consecutive and concurrent sentencing, or the date for potential parole, can have a tremendous impact on the decision to plead. These consequences, sometimes deemed "collateral," can greatly impact the length of imprisonment—the key "direct" consequences.[108]

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[103] People v. Williams, 721 N.E.2d 539, 544 (Ill. 1999).

[104] *Id.* (internal quotation marks ommited).

[105] Bibas, *supra* note 98, at 1125 (internal quotation marks ommited).

[106] *See id.* at 1131.

[107] *See* INS v. St. Cyr, 533 U.S. 289, 322 n.48 (2001).

[108] Chin & Holmes, *supra* note 50, at 700 ("[S]ome courts hold that counsel has no obligation to advise his client that prison sentences may be served consecutively rather than concurrently, even if that means, for example, that the client will serve forty rather than twenty years.").

Critics of the direct-collateral doctrine point to the Court's language in *Strickland* to support the argument that this case-by-case approach is true to Sixth Amendment precedent.[109] In *Strickland*, the Court explicitly stated that a Sixth Amendment inquiry is an inherently fact-sensitive inquiry that is not compatible with bright-line rules.[110] The direct-collateral distinction, thus, seems wholly incompatible with *Strickland*.

C. The Current Application of Padilla in Lower Courts Does Not Fix the Existing Problems with Sixth Amendment Analysis

Though the *Padilla* opinion was expressly limited to deportation, other parts of the Court's opinion have provided a basis for lower courts to depart from the traditional direct-collateral doctrine. As a practical matter, the Court's attempt to limit *Padilla* to deportation has not limited the *extension* of the opinion to other collateral consequences, but rather has limited the *guidance* which the opinion gives to other courts that are abandoning the direct-collateral doctrine.[111] With this lack of guidance, courts have taken a variety of approaches to analyzing ineffective assistance claims based on attorney advice. However, none of these new methods solve the issues present in the existing direct-collateral doctrine.

1. The "Direct Plus Deportation" Approach

The most conservative approach taken by lower courts in applying *Padilla* has been to simply adhere to the old direct-collateral distinction, simply using deportation as an add-on to the direct category.[112] These courts focus on the limiting

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[109] *Id.* at 712; *see* Roberts, *supra* note 63, at 694.

[110] *See* Strickland v. Washington, 466 U.S. 668, 688 (1984) ("In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.").

[111] *See* Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

[112] *See, e.g.*, Miller v. State, 11 A.3d 340, 352 (Md. Ct. Spec. App. 2010), *vacated*, 32 A.3d 1 (Md. 2011); People v. Kabre, 29 Misc. 3d 307, 321–22, 905 N.Y.S.2d 887, 899 (N.Y.C. Crim. Ct. N.Y. Cnty. 2010). These two lower state court decisions uphold the direct-collateral doctrine by holding that *Padilla* does not apply retroactively to pleas taken before the decision was handed down. This approach has been criticized as an attempt to punt the issue, withholding the inevitable judgment for a later date. *See* McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 815–16 (2011). The retroactivity of the *Padilla* decision depends on whether the decision announced a new rule of constitutional law or merely applied an old rule.

language in the *Padilla* decision and generally hold that the direct-collateral doctrine continues to apply in full force.[113] Courts justify such a holding by referencing the Supreme Court's explicit limitation of *Padilla*.[114] The Court went to great lengths to demonstrate the uniqueness of deportation,[115] noting that the direct-collateral distinction was "ill-suited . . . [for] the *specific* risk of deportation,"[116] and expressly declined to rule on the general applicability of the direct-collateral doctrine in other circumstances.[117]

The problem with this approach is that it is too conservative. Construing *Padilla* in this way does almost nothing to address the problems with the direct-collateral doctrine.[118] In jurisdictions where deportation was already afforded Sixth Amendment protection, this approach changes literally nothing. In other jurisdictions, it reduces the uncertainty inherent in the distinction only to the extent that deportation is unquestionably included among direct consequences. Aside from the inclusion of deportation, the definition of "direct" and "collateral" are no clearer after *Padilla* than they were before the decision came down.

2. The "Enmeshed Consequences" Approach

Some courts and commentators have used the language in the *Padilla* decision that focuses on the close connection between a criminal conviction and deportation. These courts see a similar connection between other traditionally collateral consequences and hold that these consequences are entitled to Sixth Amendment protection.[119] These decisions seek to establish a clearer and more workable definition of direct consequences.

See Consequences of Convictions After Padilla v. Kentucky*: Retroactivity*, CRIM. PRAC. GUIDE, July/Aug. 2011, at 3.

[113] *See Miller*, 11 A.3d at 352.

[114] *See id.* at 341.

[115] *See Padilla*, 559 U.S. at 360.

[116] *Id.* at 357 (emphasis added).

[117] *Id.* at 365.

[118] *See supra* notes 103–09 and accompanying text.

[119] *See* Bauder v. Dep't of Corr., 619 F.3d 1272, 1275 (11th Cir. 2010) (holding that an attorney must advise his or her client of the potential of civil commitment upon pleading guilty).

These courts also recognize that, though the Court withheld any general judgment on the direct-collateral doctrine, the doctrine is on shaky ground after the *Padilla* decision.[120]

The chief danger in this approach is that of over-expansion. It is this approach that Justice Scalia was concerned about in his dissent, when he stated that the majority's opinion has "no logical stopping-point."[121] All "consequences" of a criminal conviction, whether direct or collateral, bear some relation to the criminal conviction by their definition as consequences.[122] This approach causes significant institutional concerns, as it can lead toward a slippery slope, opening the floodgates to Sixth Amendment litigation.

This approach also marginalizes the limiting language of the Court in *Padilla*. This is inappropriate. The limits of the Court's decision should not be read as a mere exercise of judicial restraint. Such a reading ignores that the Court went to great length to establish the uniqueness of deportation.[123] Especially significant in the Court's opinion is the development of immigration law—from a largely discretionary system to a regime of near-automatic deportation—and the former treatment of JRAD proceedings as a direct consequence.[124] These courts also fail to recognize that the Court's application of *Strickland* to deportation was not an especially radical decision; to the extent that an exception to the direct-collateral distinction existed before *Padilla*, that exception was deportation.[125]

3. The "Important Consequences" Approach

The Court in *Padilla*, in holding that *Strickland* applied, noted that deportation was particularly severe and likely of great importance to a noncitizen defendant.[126] Other courts have picked up on this language and have replaced the direct-collateral doctrine with an analysis focused primarily on the

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[120] *Padilla*, 559 U.S. at 372.

[121] *Id.* at 390 (Scalia, J., dissenting).

[122] A "consequence" is "something produced by a cause or necessarily following from a set of conditions." *"Consequence" Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/consequence (last visited Jan. 25, 2014).

[123] *Padilla*, 559 U.S. at 360–64 (majority opinion).

[124] *Id.*

[125] *See* Chin & Holmes, *supra* note 50, at 708.

[126] *See Padilla*, 559 U.S. at 365–66 (citing INS v. St. Cyr, 533 U.S. 289, 322 (2001)).

importance of the consequence to the defendant. One such court was the New York Court of Appeals in *People v. Graviano*, which held that a defendant is entitled to Sixth Amendment protection for any consequence which he can show is "of such great importance to him that he would have made a different decision had that consequence been disclosed."[127] This approach is readily compatible with *Strickland*'s requirement that bright line rules be avoided in Sixth Amendment claims.

However, this approach has significant problems. First, this approach conflates the competence and prejudice prongs of *Strickland*. The competence prong is focused on attorney behavior, not fairness to the defendant.[128] By mandating that attorneys advise their clients about any and all "sufficiently important" consequences, this approach shifts the focus of *Strickland*'s first prong to the mindset of the defendant.[129] In doing so, this approach practically eliminates the competence prong; it would be hard to imagine a scenario where the defendant would satisfy the prejudice prong of *Strickland* but would fail to show that the consequence which caused the prejudice was not "sufficiently important" to him. There is no rational reading of *Padilla* which would support this elimination of the competence prong.

A second problem with this approach is that it handcuffs defense counsel, taking away the wide latitude given by *Strickland*'s first prong. As the Court recognized in *Premo v. Moore*, a quick guilty plea can often be in the best interest of a defendant.[130] In many criminal proceedings, the prosecution's case is weakest at the outset of the plea bargaining stage, which often begins before the state has had much time to build a case against the defendant.[131] At this critical point, defense counsel may have the opportunity to extract the most favorable disposition for his or her client.[132] If defense attorneys are constitutionally mandated to investigate all "sufficiently important" consequences, as this approach requires, many defendants may miss their chance at the most favorable

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[127] People v. Gravino, 14 N.Y.3d 546, 559, 928 N.E.2d 1048, 1056, 902 N.Y.S.2d 851, 859 (2010).

[128] *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

[129] *Gravino*, 14 N.Y.3d at 559, 928 N.E.2d at 1056, 902 N.Y.S.2d at 859.

[130] *See* Premo v. Moore, 131 S. Ct. 733, 741 (2011).

[131] *Id.*

[132] *Id.*

disposition. In this circumstance, it will be the time taken by the attorney to prod for any potentially important collateral consequence that will prejudice the defendant.

III. THE COMPETENCE PRONG AFTER *PADILLA*

Though some commentators have read *Padilla* as a "seismic" shift in Sixth Amendment jurisprudence,[133] such an interpretation ignores the great lengths the Court went to highlight the uniqueness of deportation. Nowhere is this more apparent than in Section I of the opinion where, before the Sixth Amendment is mentioned, the Court detailed the unique evolution of immigration and deportation in this country.[134] Further, the seismic shift reading of *Padilla* blatantly disregards the Court's holding that "[t]he collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the *specific risk of deportation*."[135] Finally, the seismic shift reading accounts for neither the decisions in lower state and federal courts around the country,[136] nor the court rules and statutes in force in many jurisdictions,[137] which have all treated deportation differently than other collateral consequences of conviction.

The uniqueness of deportation, however, should also give pause to anyone who reads *Padilla* as the Court's endorsement of the direct-collateral doctrine in all cases not involving deportation. The Court went as far as it could to distance itself from the direct-collateral doctrine without striking it down.[138] The Court acknowledged the use of the doctrine in state and lower federal courts,[139] but refused to strictly apply the doctrine in finding that deportation is "not categorically removed from the ambit of the Sixth Amendment."[140]

This Part argues that *Padilla* did not radically change or expand the requirements of the Sixth Amendment. Rather, the decision made only minor changes to existing Sixth Amendment

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[133] *See* Smyth, *supra* note 112, at 798.

[134] *See* Padilla v. Kentucky, 559 U.S. 356, 360–64 (2010).

[135] *Id.* at 366 (emphasis added).

[136] *See* Chin & Holmes, *supra* note 50, at 708.

[137] *See id.*

[138] *See Padilla*, 559 U.S. at 365 ("We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*.").

[139] *Id.*

[140] *Id.* at 366.

doctrine. This Part argues that a proper reading of *Padilla* creates a two-pronged inquiry into claims for Sixth Amendment relief that must be satisfied before the *Strickland* standard can be applied. First, a court should determine whether the particular consequence is "categorically removed" from Sixth Amendment relief. If not, the court should analyze the claim under *Strickland*. If the consequence is categorically removed, however, a Sixth Amendment claim may proceed to the *Strickland* test if it falls within one of two exceptions.

A. What Consequences Are "Not Categorically Removed" from Sixth Amendment Relief?

The Court's analysis in *Padilla* makes clear that, though the *Strickland* test is at the heart of a Sixth Amendment claim, it is not the starting point of the analysis. Before the Court began its *Strickland* analysis of Padilla's claim, it first devoted a significant portion of its opinion to determining whether *Strickland* applied at all.[141] The Court ultimately held that *Strickland* did apply to Padilla's claim, because deportation is "not categorically removed" from Sixth Amendment relief.[142]

The Court's holding in this section, that *Strickland* applies when a consequence is "not categorically removed" from Sixth Amendment relief, implies two things. First, the Court implies that there are consequences of a guilty plea that are categorically removed from "the ambit of the Sixth Amendment."[143] Second, the Court implies that, if *Strickland* generally applies to consequences which are "not categorically removed," then, by negative inference, *Strickland* generally does not apply to consequences that *are* categorically removed. The question then becomes: What consequences, like deportation, are "not categorically removed" from Sixth Amendment protection?

1. Traditional Direct Consequences and Deportation Are "Not Categorically Removed" from Sixth Amendment Protection

It is uncontroversial that the traditional "direct" consequences—the sentence and fine stemming from a criminal conviction[144]—are not categorically removed from Sixth

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[141] *Id.* at 365–66.
[142] *Id.* at 366.
[143] *Id.*
[144] *See* LAFAVE ET AL., *supra* note 28, § 21.4(d).

Amendment protection. *Padilla* did not question the existing Sixth Amendment protection afforded to direct consequences; it *expanded* that protection to deportation, a consequence not traditionally thought of as "direct."[145] It is equally uncontroversial that deportation is not categorically removed from Sixth Amendment protection; *Padilla* explicitly held as much.[146]

The Court found that deportation was akin to traditional direct consequences in a number of ways, which made it difficult to classify it as a collateral consequence.[147] Though deportation was a civil, not criminal, sanction, the Court was convinced that a defendant was protected from deportation consequences by the Sixth Amendment because deportation was "particularly severe" and "intimately related to the criminal process."[148] The entanglement of deportation and criminal convictions was the key consideration that led the Court to apply *Strickland* to Padilla's claim.

2. Other Consequences of Conviction Which May Be "Not Categorically Removed" from Sixth Amendment Protection

Padilla broadened the category of consequences to which the *Strickland* test applied, but the question is by how much. While the jail sentence, the fine, and now, the deportation consequences of conviction are clearly subject to the protection of the Sixth Amendment, it is unclear to what else these protections apply. This line-drawing problem was often encountered by courts trying to apply the traditional direct-collateral doctrine.[149] What is clear, though, is that *Padilla* requires a line to be drawn somewhere.[150] The Court gives some guidance as to where that

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[145] *See Padilla*, 559 U.S. at 366.

[146] *Id.* at 374.

[147] *Id.* at 365–66.

[148] *Id.* at 365. The Court found that deportation had been "enmeshed" with convictions for nearly a century and was a nearly automatic consequence for a noncitizen's conviction. This made deportation "most difficult" to separate from the conviction itself, both for the Court and especially for noncitizen defendants. *Id.* at 365–66 (internal quotation marks omitted) (citing INS v. St. Cyr, 533 U.S. 289, 322 (2001); United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982)).

[149] *See* United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982) ("The distinction between a collateral and a direct consequence of a criminal conviction, like many of the lines drawn in legal analysis, is obvious at the extremes and often subtle at the margin.").

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

line may be. To be deemed "not categorically removed" from Sixth Amendment protection, a consequence of criminal conviction need not technically be a "criminal sanction."[151] However, it must be so "intimately related to the criminal process" that it is "difficult to divorce the penalty from the conviction."[152]

Consequences resulting in prolonged civil or criminal custody may satisfy these elements. This category of consequences includes civil commitment, heightened sentencing requirements for repeat offenders, availability of concurrent rather than consecutive sentences, and timing and availability of parole.[153] These consequences have a significant impact on the length of time the defendant is confined.[154] The length of confinement will generally be the chief factor in a defendant's decision to plead guilty or challenge the charges against him.[155] Therefore, in order for the defendant to make a fully informed decision regarding his plea, common sense dictates that the defendant must be given an accurate picture regarding that confinement. Further, because the nature of this consequence—confinement against one's will—is so similar to the traditional direct consequences, it is difficult to rationalize requiring information about these direct consequences, but not about other methods of confinement.

3. Courts Should Be Hesitant To Expand the Realm of Consequences Which Are "Not Categorically Removed" from Sixth Amendment Protection

Though some of the consequences listed above—as well as some which are not listed—may appear to be "intimately related to the criminal process,"[156] courts should be careful in making any expansion of the "not categorically removed" consequences. This test must be very strictly applied because, since almost any consequence of a criminal conviction bears some relation to the

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[151] *Padilla*, 559 U.S. at 365–66.

[152] *Id.* (internal quotation marks omitted).

[153] *See* Chin & Holmes, *supra* note 50, at 705.

[154] Roberts, *supra* note 64, at 185–86 n.278.

[155] Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 440 (1971).

[156] *Padilla*, 559 U.S. at 365.

criminal process, a liberal use of this test will swallow the effort made by the Court to establish the uniqueness of deportation. The question is necessarily one of degree.

The *Padilla* Court was particularly influenced by the high degree to which deportation and criminal convictions had become entangled in the last one hundred years of the country's history. In Section I of the Court's opinion—before the Court even considered the Sixth Amendment—the Court detailed the long history of immigration and deportation in this country.[157] Particularly, the Court noted the existence and elimination of the JRAD.[158] JRAD was interpreted to give the trial judge "conclusive authority" over a convict's deportation status; a judge's recommendation bound the executive branch and prevented deportation.[159] The Court noted that lower courts deciding Sixth Amendment claims considered JRAD to be not merely "intimately related" to the conviction, but "part of the sentencing" itself.[160] It would make little sense for deportation to be a protected consequence when the possibility of judicial relief existed, but unprotected once that failsafe was taken away.

It is also noteworthy that to the extent that there was an exception to the direct-collateral rule before *Padilla*, that exception was deportation. Though some courts, like the Supreme Court of Kentucky, ruled that deportation was a "collateral" consequence and thus unprotected by the Sixth Amendment,[161] many other jurisdictions recognized a noncitizen's right to Sixth Amendment protection for possible deportation stemming from a criminal conviction.[162] This Sixth Amendment protection was recognized through state statutes,[163] court rules,[164] and case law.[165]

The unique development of deportation as a consequence of conviction as well as the existence of exceptions for deportation in some jurisdictions illustrate the special circumstances under which the Court wrote its decision. Though there are certainly

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[157] *Id.* at 360–64.
[158] *Id.* at 361–64.
[159] *Id.* at 362 (citing Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986)).
[160] *Id.* at 363–65.
[161] *See id.* at 365 n.9.
[162] *See* Chin & Holmes, *supra* note 50, at 708.
[163] *Id.* at 708 n.119.
[164] *Id.*
[165] *Id.* at 708.

other consequences that are "enmeshed" with criminal convictions, the question of whether these consequences should be deemed "not categorically removed" from *Strickland* analysis is necessarily one of degree.

B. When Are "Categorically Removed" Consequences Subject to the Strickland *Test?*

The harshness of the bright-line between categorically removed and not categorically removed consequences can be ameliorated through the use of two exceptions to the rule. The first exception, the affirmative misadvice exception, is already recognized in most jurisdictions and protects defendants when their attorneys misstate the law.[166] The second exception, attorney knowledge plus nonadvice, extends the misadvice protection to instances where attorneys actually or reasonably should know the law yet remain silent.[167] Further, the attorney knowledge plus nonadvice exception cures the concern over the incentives promoted by the affirmative misadvice exception.

1. Affirmative Misadvice

Some lower courts in the United States have developed an exception to the direct-collateral rule for "affirmative misadvice."[168] These courts disregard the direct-collateral distinction when an attorney gives his or her client "affirmative misadvice" and will allow the defendant to withdraw the guilty plea, or at least proceed to the prejudice prong of *Strickland*.[169] Though the affirmative misadvice exception generally entitles defendants to Sixth Amendment relief for collateral consequences, there is disagreement as to when exactly the exception applies.

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[166] *See, e.g.*, Commonwealth v. Padilla, 253 S.W.3d 482, 484–85 (Ky. 2008), *rev'd*, *Padilla*, 559 U.S. 356.

[167] *See, e.g.*, Hill v. Lockhart, 474 U.S. 52, 62 (1985) (White, J., concurring).

[168] *See, e.g.*, United States v. Kwan, 407 F.3d 1005, 1015 (9th Cir. 2005); United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002). Other courts, including the Supreme Court of Kentucky in *Padilla*, refused to acknowledge this exception and held fast to the direct-collateral distinction. *See Padilla*, 253 S.W.3d at 485.

[169] *See* Roberti v. State, 782 So. 2d 919, 920 (Fla. Dist. Ct. App. 2001) ("Affirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea.").

The affirmative misadvice exception is controversial because some scholars and courts see the exception as encouraging "incompetent"—or at least discouraging "competent"—attorney advice.[170] These courts and commentators point out that the affirmative misadvice exception incentivizes attorney silence.[171] This is because the attorney who makes an effort to advise his or her client but misstates the law in good faith will be subject to an ineffective assistance claim while the attorney who remains silent will not.[172] Compounding this disincentive, the argument continues, will be judges who, in the interest of ensuring the finality of pleas, will discourage attorney advice on collateral consequences to avoid any chance that incorrect advice would render a plea subject to withdrawal.

The Court in *Padilla* recognized these concerns with the affirmative misadvice exception. The Solicitor General, in an amicus brief, urged the Court to limit its holding to affirmative misadvice and not require defense counsel to provide advice on deportation.[173] The Court rejected this argument, saying that to limit its holding to apply to only affirmative misadvice on deportation would produce "absurd results."[174] The first absurd result cited by the court was the incentive for attorneys "to remain silent . . . even when answers are readily available."[175] The second absurd result was that such a limited holding would deny noncitizens the right to any advice on deportation, even the most basic advice available.[176] To avoid these absurd results, the Court held that, for consequences "like deportation," attorneys are required to provide their clients with available advice; the failure to do so violated the competence prong of *Strickland*.[177]

It should be noted that, like the Court's holding that *Strickland* applied to Padilla's claim, the holding regarding misadvice came with a significant limitation: Advice was only required for consequences "like deportation."[178] This duty to advise, therefore, should not be generally applied. However, the

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[170] *See* Roberts, *supra* note 64, at 140–42.
[171] *Id.*
[172] *See id.* at 142.
[173] Padilla v. Kentucky, 559 U.S. 356, 369 (2010).
[174] *Id.* at 369–70.
[175] *Id.* at 370.
[176] *Id.* at 370–71.
[177] *Id.*
[178] *Id.*

rest of the *Padilla* opinion shows that this category of consequences expands beyond those that are just "not categorically removed."[179]

2. Attorney Knowledge Plus Nonadvice Exception

Despite whatever extra protection the affirmative misadvice exception provides for defendants, the exception raises significant concerns over attorney incentives. These concerns can be adequately addressed by extending the affirmative misadvice exception to occurrences of attorney nonadvice, if it can be shown that the attorney knew, or should have known, that the consequence was looming over the plea. Though there may be concerns that a defendant, who is unlikely to record the happenings of meetings with his attorney, will have trouble proving actual knowledge of a consequence, Supreme Court precedent demonstrates two ways in which knowledge may be presumed.

The first instance where attorney knowledge may be presumed is revealed in *Padilla*. In applying *Strickland*'s first prong, the Court looked at the deportation statute at hand,[180] which it noted was "succinct, clear, and explicit in defining the removal consequence[s]" that Padilla was subject to.[181] The clarity of the statute, the Court found, mandated that Padilla's attorney give his client detailed advice.[182] Because *Strickland* was already held to apply to Padilla's claim, the "succinct, clear, and explicit" nature of the statute only determined the level of advice an attorney was required to give his or her client.[183]

Though the Court in *Padilla* used the clarity of the relevant statute to determine the level of advice required, a similar test could be used to determine whether advice was required at all. Under this test, if a defendant can show that the statute from which the relevant consequence stems is "succinct, clear, and explicit" in its application to the defendant and the crime he or she is charged with, *Strickland* will apply to the defendant's claim.

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[179] *Id.* at 366.
[180] 8 U.S.C. § 1227(a)(2)(B)(i) (2012).
[181] *Padilla*, 559 U.S. at 368.
[182] *Id.* at 369.
[183] *Id.* at 368–69.

The second instance where attorney knowledge may be presumed is shown in Justice White's concurrence in *Hill v. Lockhart*. Though the majority decided this case under the prejudice prong of *Strickland*, thereby avoiding the issue of attorney advice,[184] Justice White analyzed the case under the competence prong, ultimately deciding that the ineffective assistance claim based on attorney's nonadvice in that instance failed the competence prong because the attorney had no knowledge that the consequence was looming.[185] Justice White determined that the attorney had no knowledge of the consequence by referring to a "plea statement."[186] Justice White reasoned that the plea statement, which the defendant had reviewed for accuracy, showed the attorney's lack of knowledge that the consequence—in this case "second offender status"—defeated the petitioner's ineffective assistance claim.[187] Without knowledge that this consequence loomed, the attorney's failure to advise could not be said to be unreasonable, thus the claim failed *Strickland*'s competence prong.[188]

Similar to what Justice White concluded in *Hill*, other defendants can show that their attorney knew or should have known that a consequence was looming. Indeed, the Court noted in *Padilla* that the plea form used by Kentucky criminal courts contained notice of the potential for deportation consequences.[189]

This second exception, based on attorney knowledge, cures the defects inherent to the affirmative misadvice exception. Rather than promoting attorney silence, this exception will encourage attorneys to make a reasonable investigation into the relevant law if they are interested in protecting the finality of

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[184] Hill v. Lockhart, 474 U.S. 52, 60 (1985).

[185] *Id.* at 60–62 (White, J., concurring).

[186] *Id.* at 61–62. The consequence at issue in *Hill* was heightened sentencing for a repeat felony offender. The defendant in the case filled out, or at least reviewed, a form in which "0" was written in the section for prior convictions. This, in the concurring Justices' eyes, provided proof that the defendant's attorney had no knowledge of the prior conviction, and thus his failure to inform the defendant of the heightened sentencing could not be incompetent under *Strickland*. *Id.*

[187] *Id.*

[188] *Id.* Also, the defendant did not claim that he had told his attorney otherwise or that he had indicated that the form had been filled out incorrectly. *Id.* at 61.

[189] Padilla v. Kentucky, 559 U.S. 356, 374 n.15 (2010). It is important to remember, though, that attorney nonadvice was not at issue in *Padilla*; Padilla's attorney had affirmatively advised his client that he was not at risk of deportation. *Id.* at 359. Padilla would therefore have fallen into the affirmative misadvice exception, even if a consequence other than deportation was at issue.

their guilty pleas. This is because a failure to advise about a consequence derived from a "succinct, clear, and explicit" statute will render the plea just as uncertain as affirmative misadvice. The judge presiding over the plea will share this incentive and can help to alert the defense attorney as to the consequences which may be looming for the attorney's client.

Incentivizing this initial investigation into the consequences of a plea has benefits beyond the incentive itself. First, this investigation and advice can lead to better guilty pleas. As many courts and commentators note, the consequences formerly deemed "collateral" may be of greater importance to a defendant than those deemed "direct."[190] Defense attorneys, prosecutors, and judges can use the importance of these consequences to the defendant to negotiate creative plea agreements, where stiffer "direct" punishments can be traded off for leniency in regard to collateral consequences.

This would avoid circumstances like that posited in Chin and Holmes's "hypothetical 'war story' ":

> I represented someone charged with DUI, and due to my excellent advocacy the prosecutor accepted a guilty plea with a one-day sentence instead of the three days imposed in almost every similar case. As an interesting aside, my client and his family were then deported based on the conviction; I have no idea whether I could have negotiated a deal resulting in conviction of a non-deportable offense; status as an alien does not affect the fine or length of incarceration, so I never considered it. The results of this case demonstrate my remarkable legal abilities.[191]

In this hypothetical, the attorney would make the initial investigation into deportation because if he did not, and the statute was "succinct, clear, and explicit" like in *Padilla*, he would risk having the plea invalidated in a collateral proceeding. After learning about the potential for deportation, he may have had the chance to negotiate an agreement with the prosecutor, where his client could offer to serve more time in prison—perhaps a week—if the prosecutor could change the charge to a nondeportable offense.

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[190] *See* Roberts, *supra* note 63, at 674.
[191] *See* Chin & Holmes, *supra* note 50, at 718.

CONCLUSION

The plea-bargaining stage is a critical point in any criminal proceeding.[192] The Supreme Court recognized this in 1985 when, in *Hill v. Lockhart*, it held that the protections of the Sixth Amendment extended to this stage.[193] In recent years, as the prevalence of guilty pleas has increased, the Court has begun to scrutinize this phase at an unprecedented depth.[194]

In evaluating attorney advice during plea bargaining, the Court came across an area rife with difficult line-drawing and policy problems. Compounding the problem was the widely accepted direct-collateral doctrine, which had significantly muddied the waters of Sixth Amendment law for plea bargains. Against this background, the Court opted to issue only a limited decision, holding only that the direct-collateral distinction was ill-suited for deportation. The limits on this decision must be respected and courts should be very hesitant to impose an overarching duty of correct affirmative advice beyond the traditionally direct consequences, which now includes deportation. Any extension of Sixth Amendment protection beyond these categories should focus on attorney knowledge, so that courts avoid conflating the competence prong of *Strickland* with its separate prejudice prong.

By focusing on attorney knowledge, rather than importance to the defendant, courts applying *Strickland* and *Padilla* can properly respond to concerns about both institutional burdens and fairness to individual defendants. This focus also properly centers the competence prong analysis on attorney action, and will incentivize diligent and efficient attorney behavior. To do otherwise would be to take individual discretion away from attorneys during plea bargaining—a stage when such discretion is most needed.

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[192] Bibas, *supra* note 98, at 1118–20.
[193] Hill v. Lockhart, 474 U.S. 52, 57 (1985).
[194] Bibas, *supra* note 98, at 1118–20.