

3. *Sixth Amendment — Effective Assistance of Counsel.* — The Sixth Amendment right to counsel has long been recognized as the right to be represented by “effective” counsel.<sup>1</sup> In *Strickland v. Washington*,<sup>2</sup> the Supreme Court clarified that counsel is ineffective if two requirements — constitutional deficiency and prejudice — are met.<sup>3</sup> Federal and state courts have held, in near unanimity, that the right to effective assistance of counsel extends only to direct consequences of a conviction, not to so-called collateral consequences,<sup>4</sup> even though “the imposition of collateral consequences has become an increasingly central purpose of the modern criminal process.”<sup>5</sup> Last Term, in *Padilla v. Kentucky*,<sup>6</sup> the Supreme Court held that criminal defense counsel have an affirmative duty to provide accurate information regarding the deportation consequences of a guilty plea when those consequences are “clear.”<sup>7</sup> In extending *Strickland* to ineffective assistance claims regarding deportation, the Court stated that deportation is unique and difficult to classify as either a direct or a collateral consequence of conviction.<sup>8</sup> The Court implicitly rejected the current approaches to determining *Strickland*’s reach and created a new category of covered topics that cannot reasonably be restricted to the deportation consequence alone. Lower courts will likely struggle over which other consequences — previously excluded from *Strickland*’s coverage — are similarly “unique.”

Jose Padilla has resided in the United States as a lawful permanent resident for over forty years.<sup>9</sup> Padilla pleaded guilty to three drug-related charges after he was indicted in Hardin County, Kentucky.<sup>10</sup> Padilla claimed that he entered his guilty plea in reliance upon his attorney’s advice that he “did not have to worry about immigration status since he had been in the country so long.”<sup>11</sup> In fact, however, his conviction resulted in nearly automatic deportation.<sup>12</sup> Padilla filed for

<sup>1</sup> See *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”).

<sup>2</sup> 466 U.S. 668 (1984).

<sup>3</sup> *Id.* at 687.

<sup>4</sup> See, e.g., *United States v. Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000); see also 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).

<sup>5</sup> Chin & Holmes, *supra* note 4, at 699.

<sup>6</sup> 130 S. Ct. 1473 (2010).

<sup>7</sup> *Id.* at 1483. When the consequences are not “clear,” counsel need only advise the defendant that his plea may carry a risk of adverse immigration consequences. *Id.*

<sup>8</sup> *Id.* at 1481–82.

<sup>9</sup> *Id.* at 1477.

<sup>10</sup> *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008).

<sup>11</sup> *Padilla*, 130 S. Ct. at 1478 (quoting *Padilla*, 253 S.W.3d at 483) (internal quotation marks omitted).

<sup>12</sup> See *id.* at 1480.

post-conviction relief on the basis of ineffective assistance of counsel, claiming that he would have proceeded to trial if not for the incorrect advice of his attorney.<sup>13</sup>

The Kentucky trial court denied Padilla's motion, reasoning that deportation was a collateral consequence of a conviction and thus beyond the scope of the right to counsel.<sup>14</sup> The Kentucky Court of Appeals reversed, holding that while collateral consequences such as deportation are generally outside the scope of representation required by the Sixth Amendment, affirmative "'gross misadvice' relating to collateral matters can justify post-conviction relief."<sup>15</sup>

The Kentucky Supreme Court reversed.<sup>16</sup> Relying on its own decision in *Commonwealth v. Fuartado*,<sup>17</sup> the court held that an attorney has no duty to advise his client about the immigration consequences of a guilty plea.<sup>18</sup> The court acknowledged that many courts have distinguished between a failure to advise and affirmative misadvice, but concluded that the distinction is immaterial since collateral consequences are wholly outside the scope of the right to counsel.<sup>19</sup> Two justices dissented, arguing that misadvice regarding deportation violates the Sixth Amendment right to counsel, because "[c]ounsel who gives erroneous advice . . . is worse than no lawyer at all."<sup>20</sup>

The Supreme Court reversed and remanded.<sup>21</sup> Writing for the Court, Justice Stevens<sup>22</sup> surveyed the evolution of the deportation remedy: while initially only a narrow class of deportable offenses existed, with judges holding broad discretion, the class has expanded and deportation has become virtually automatic for many noncitizens convicted of crimes.<sup>23</sup> Justice Stevens concluded that the changes have "dramatically raised the stakes of a noncitizen's criminal conviction," and that "deportation is an integral part — indeed, sometimes the most

<sup>13</sup> *Id.* at 1478.

<sup>14</sup> See *Padilla*, 253 S.W.3d at 483 ("Padilla's counsel does not make a deportation decision and neither does this Court." (quoting unpublished trial court opinion) (internal quotation marks omitted)).

<sup>15</sup> *Id.* at 483–84 (quoting unpublished Court of Appeals opinion).

<sup>16</sup> *Id.* at 485.

<sup>17</sup> 170 S.W.3d 384 (Ky. 2005).

<sup>18</sup> *Padilla*, 253 S.W.3d at 485.

<sup>19</sup> *Id.* at 484–85. The Kentucky Supreme Court is apparently the only court to have held that misadvice regarding deportation, as opposed to silence, cannot constitute constitutionally deficient representation. See Petition for a Writ of Certiorari at 15, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2008 WL 4933628, at \*15.

<sup>20</sup> *Padilla*, 253 S.W.3d at 485 (Cunningham, J., dissenting).

<sup>21</sup> *Padilla*, 130 S. Ct. at 1487.

<sup>22</sup> Justice Stevens was joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor.

<sup>23</sup> *Padilla*, 130 S. Ct. at 1478–80.

important part — of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”<sup>24</sup>

Justice Stevens noted that while many lower courts have distinguished between direct and collateral consequences in defining the scope of the Sixth Amendment right to counsel, the Court has never done so.<sup>25</sup> However, because of the “unique nature of deportation,” the Court decided that it did not need to resolve the merit of the collateral versus direct distinction.<sup>26</sup> The Court offered two reasons in support of this conclusion. First, deportation is “a particularly severe ‘penalty.’”<sup>27</sup> Second, it is “intimately related to the criminal process,” making it “‘most difficult’ to divorce the penalty from the conviction in the deportation context.”<sup>28</sup> In this respect, the Court considered it “important[]” that removal is “nearly an automatic result for a broad class of noncitizen offenders.”<sup>29</sup> Because of this close connection between deportation and the criminal process, the majority reasoned, the collateral versus direct distinction is “ill-suited to evaluating” an ineffectiveness of counsel claim regarding deportation.<sup>30</sup>

Justice Stevens concluded that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel,” and therefore applied *Strickland* to Padilla’s claim.<sup>31</sup> He then explained that under the first prong of the *Strickland* analysis — constitutional deficiency — the inquiry is whether the attorney’s performance was reasonable under prevailing norms.<sup>32</sup> He found that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”<sup>33</sup>

Justice Stevens then set out a test for determining the type of advice to which a noncitizen defendant is entitled. Padilla was entitled to “correct advice” because the terms of the immigration statute governing his drug charges were “succinct, clear, and explicit in defining the removal consequence for Padilla’s conviction.”<sup>34</sup> However, Justice Stevens acknowledged that some defense attorneys are not well versed

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<sup>24</sup> *Id.* at 1480 (citation omitted).

<sup>25</sup> *Id.* at 1481.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting)).

<sup>28</sup> *Id.* (quoting *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982)).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1482.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

<sup>33</sup> *Id.* The Court’s decision in *INS v. St. Cyr*, 533 U.S. 289, 322 (2001), recognizing the extreme importance to a defendant of the right to remain in the United States, supported this prevailing view. See *Padilla*, 130 S. Ct. at 1483.

<sup>34</sup> *Padilla*, 130 S. Ct. at 1483 (“[W]hen the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.”).

in immigration law and that the deportation consequences of a plea will often be unclear.<sup>35</sup> Because of this complexity, when the law is “not succinct and straightforward,” counsel need “do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”<sup>36</sup>

Justice Stevens next rejected the proposal, supported by the Solicitor General and adopted by several lower courts,<sup>37</sup> that *Strickland* should apply only insofar as Padilla alleged “affirmative misadvice.”<sup>38</sup> Justice Stevens found that such a rule would encourage silence on matters of great importance and “deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available.”<sup>39</sup>

Justice Stevens dismissed concerns that the Court’s expansion of *Strickland* would open the “floodgates” to challenges of guilty pleas, noting that similar concerns were expressed but not realized after the *Hill v. Lockhart*<sup>40</sup> decision.<sup>41</sup> Guilty pleas are rarely challenged, he argued, because of the drawbacks of doing so for the defendant: if successful, the defendant proceeds to trial and loses whatever bargain he was able to strike.<sup>42</sup> Additionally, for those claims that are brought, *Strickland* is a high bar,<sup>43</sup> so the Court was confident that successful claims would be rare and therefore that the finality of prior pleas would not be in jeopardy.<sup>44</sup> The Court remanded for a determination of whether Padilla was prejudiced by his constitutionally deficient counsel, the second prong of *Strickland*.<sup>45</sup>

Justice Alito concurred.<sup>46</sup> He began by arguing that an attorney fails the *Strickland* test only if she misleads a noncitizen client regard-

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1484 (citing *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005); *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002); *Sparks v. Sowders*, 852 F.2d 882 (6th Cir. 1988); *United States v. Russell*, 686 F.2d 35 (D.C. Cir. 1982); *In re Resendiz*, 19 P.3d 1171 (Cal. 2001); *State v. Rojas-Martinez*, 125 P.3d 930, 935 (Utah 2005)).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> 474 U.S. 52 (1985) (extending *Strickland* to the guilty plea context).

<sup>41</sup> *Padilla*, 130 S. Ct. at 1484–86.

<sup>42</sup> *Id.* at 1485–86. Despite accounting for nearly ninety-five percent of criminal convictions, guilty pleas are the target of only thirty percent of habeas petitions. *Id.* at 1485.

<sup>43</sup> A defendant must show that the decision to reject the plea bargain would have been rational under the circumstances. *Id.* at 1485 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486 (2000)).

<sup>44</sup> *Id.* The expansion of *Strickland* also allows the State and noncitizen defendants to benefit from knowledge of the deportation consequences during plea bargaining. *Id.* at 1486. The Court also found it significant that many states already require trial courts to advise defendants of possible immigration consequences before accepting a plea. *Id.* at 1486 n.15.

<sup>45</sup> *Id.* at 1487.

<sup>46</sup> Chief Justice Roberts joined the concurring opinion.

ing deportation consequences.<sup>47</sup> He believed this rule would be more in line with prevailing norms,<sup>48</sup> would more directly address fairness concerns,<sup>49</sup> and would leave the door open for the political branches to resolve the “difficult problem” of defendants who plead guilty with no knowledge of important collateral consequences.<sup>50</sup>

Justice Alito criticized the majority’s requirement to give accurate advice as overly complex and burdensome for defense attorneys. He catalogued the complexities in determining the immigration consequences of a conviction,<sup>51</sup> and argued that the Court’s “vague, half-way test,”<sup>52</sup> which makes counsel’s duties depend on whether the consequences are “succinct and straightforward,” is undesirable and unrealistic.<sup>53</sup>

Justice Alito also criticized the Court for upsetting the “longstanding and unanimous position of the federal courts . . . that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction.”<sup>54</sup> However, he departed from that precedent himself by saying that silence regarding deportation consequences would not be sufficient.<sup>55</sup> He proposed requiring attorneys not only to refrain from giving incorrect advice, but also to advise defendants that a conviction may have adverse immigration consequences and that they consult an immigration specialist.<sup>56</sup>

Justice Scalia dissented.<sup>57</sup> He argued that, even if defendants would be provided complete and accurate information in “the best of all possible worlds,” collateral consequences are wholly outside the protection of the Sixth Amendment right to counsel.<sup>58</sup> He agreed with the practical concerns set forth by Justice Alito, but disagreed with the concurrence by stating that even affirmative misadvice regarding collateral consequences cannot render counsel constitutionally inadequate.<sup>59</sup> The purpose of the Sixth Amendment, Justice Scalia argued, is to guarantee the accused a lawyer for his defense against the charged offense, and since collateral consequences are not imposed in a

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<sup>47</sup> *Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring in the judgment).

<sup>48</sup> *Id.* at 1492–93 (citing *Commonwealth v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008) (Cunningham, J., dissenting)).

<sup>49</sup> *Id.* at 1493 (arguing that a defendant who pleads guilty without definitive information assumes the risk of deportation, while one who does so based on misleading information does not).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1488–90.

<sup>52</sup> *Id.* at 1487.

<sup>53</sup> *See id.* at 1490–92.

<sup>54</sup> *Id.* at 1487.

<sup>55</sup> *See id.* at 1494.

<sup>56</sup> *Id.*

<sup>57</sup> Justice Thomas joined the dissent.

<sup>58</sup> *Padilla*, 130 S. Ct. at 1494 (Scalia, J., dissenting).

<sup>59</sup> *Id.* at 1494–95.

criminal prosecution, the effectiveness of counsel should be analyzed without regard to any such consequences.<sup>60</sup> Justice Scalia also suggested that requiring counsel to “advise about a conviction’s collateral consequences has no logical stopping-point,” and he predicted that extensive litigation would be necessary to delineate the bounds of the new “*Padilla* warning.”<sup>61</sup> Characterizing the majority’s decision as “overkill,”<sup>62</sup> Justice Scalia argued that legislation would have been a better solution to the problem of misadvice or lack of knowledge about deportation and other ancillary matters.<sup>63</sup>

The *Padilla* decision gives criminal defendants, for the first time, a constitutional right to be advised by counsel of the deportation consequences of a guilty plea. While the decision is not inconsistent with the Court’s prior opinions,<sup>64</sup> it overturns nearly unanimous agreement among state and federal courts.<sup>65</sup> By holding that deportation cannot be classified as collateral and excluded from *Strickland*’s coverage on that basis, the Court has significantly redefined the scope of the right to counsel. Specifically, after *Padilla*, *Strickland* should also apply to any consequence that is “unique” in the same ways deportation is.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.”<sup>66</sup> The three *Padilla* opinions illustrate two fundamental inquiries that any ineffective assistance claim raises. The first question is whether the Sixth Amendment, and therefore *Strickland*, even apply to the type of consequence at issue in the first place. The majority and concurrence agreed that the Sixth Amendment applies to deportation consequences; the dissent, however, disagreed. The second question is: if *Strickland* does apply, what is the standard of care

<sup>60</sup> *Id.* at 1495.

<sup>61</sup> *Id.* at 1496.

<sup>62</sup> *Id.* at 1495.

<sup>63</sup> *Id.* at 1496–97.

<sup>64</sup> Despite Justice Scalia’s protestations, the majority is correct that the Court has never actually distinguished between direct and collateral consequences in the right to counsel context, even when it has been presented with the opportunity to do so. *See, e.g., Hill v. Lockhart*, 474 U.S. 52 (1985) (dismissing an ineffective assistance claim based on a collateral consequence because of the petitioner’s failure to establish prejudice under *Strickland*’s second prong, rather than creating a categorical rule excluding collateral consequences from the Sixth Amendment’s coverage).

<sup>65</sup> *See, e.g., United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003) (“All other circuits to address the question have concluded that ‘deportation is a collateral consequence of the criminal process and hence the failure to advise does not amount to ineffective assistance of counsel.’” (quoting *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993))). A small number of state courts have held that a failure to advise regarding deportation can constitute ineffective assistance. *See People v. Pozo*, 712 P.2d 1044, 1046–47 (Colo. App. 1985), *rev’d on other grounds*, 746 P.2d 523 (Colo. 1987); *Williams v. State*, 641 N.E.2d 44, 48–49 (Ind. Ct. App. 1994); *State v. Paredes*, 101 P.3d 799, 803–05 (N.M. 2004).

<sup>66</sup> U.S. CONST. amend. VI.

placed upon counsel? This second front was where the majority and concurrence diverged: the majority concluded that correct advice is required if the deportation consequence is clear, while the concurrence argued that only a warning is required.

Prior to *Padilla*, courts had developed three general approaches for determining whether the Sixth Amendment applies to a particular consequence of a conviction. First is the view of Justice Scalia and the Kentucky Supreme Court in *Padilla*. Proponents of this view argue that the Sixth Amendment protects against prosecutions and that its protection extends only to direct criminal consequences of a conviction, not to collateral consequences.<sup>67</sup>

Second is the view at the opposite extreme: that the Sixth Amendment and *Strickland* apply to all consequences of a conviction, whether direct or collateral. This view is based on a more capacious reading of “for his defence” than that allowed by Justice Scalia: that the right to assistance applies to all counseling given in the course of a criminal prosecution, including counseling regarding information necessary to an informed plea decision.<sup>68</sup> Because a defendant making a plea decision bases that decision in part on collateral consequences, the right to assistance should cover those consequences.<sup>69</sup> This view would make the direct-collateral distinction irrelevant.<sup>70</sup>

Third is the view that had been widely adopted by the lower courts: that *Strickland* does not generally apply to collateral consequences,<sup>71</sup> but that it does apply to affirmative misrepresentations regarding those consequences.<sup>72</sup> These cases cannot mean what they claim to mean: if the Sixth Amendment and *Strickland* do not apply to collateral consequences, then making an affirmative misrepresentation could not render counsel deficient under *Strickland*’s first prong. A more coherent interpretation is that while *Strickland* applies to col-

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<sup>67</sup> See, e.g., *Commonwealth v. Fuartado*, 170 S.W.3d 384, 386 (Ky. 2005). Justice Scalia framed the Sixth Amendment as guaranteeing “the accused a lawyer ‘for his defense’ against a ‘criminal prosecutio[n],’” *Padilla*, 130 S. Ct. at 1494 (Scalia, J., dissenting) (alteration in original), and referenced cases that held that “‘defence’ means defense at trial, not defense in relation to other objectives that may be important to the accused,” *id.* at 1495 (quoting *Rothgery v. Gillespie Cnty.*, 128 S. Ct. 2578, 2594 (2008) (Alito, J., concurring) (internal quotation mark omitted)).

<sup>68</sup> See Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 170 (2009) (arguing that warning a client about collateral consequences should be regarded as providing assistance in the criminal case since the defendant will use those considerations in deciding whether to go to trial in the criminal case).

<sup>69</sup> See Chin & Holmes, *supra* note 4, at 735.

<sup>70</sup> At oral argument, Justice Breyer hinted that he would support this approach of using the same standard for all ineffective assistance claims. See Transcript of Oral Argument at 26–28, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2009 WL 3268429, at \*26–28.

<sup>71</sup> See, e.g., *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003).

<sup>72</sup> See Chin & Holmes, *supra* note 4, at 708 n.121 (collecting cases).

lateral consequences, the standard of care established by prevailing norms merely requires avoiding misrepresentations with respect to those consequences.<sup>73</sup>

Presented with these various alternatives, the Court chose “none of the above,” and instead decided to extend the Sixth Amendment to deportation and other “unique” consequences. Because every federal court to consider the question has regarded deportation as collateral, *Padilla* will inevitably affect lower courts’ existing approaches to the direct-collateral distinction.

The lower courts have used a variety of approaches to define which consequences of a conviction are direct. The Kentucky Supreme Court appears to have used one common approach in *Padilla*, reasoning that direct consequences are those within the sentencing authority of the court.<sup>74</sup> Courts using this approach ask whether the consequence is “the sentence of the court which accept[s] the plea,” or whether it is the sentence of “another agency over which the trial judge has no control and for which he has no responsibility.”<sup>75</sup> Trial courts do not technically sentence defendants to deportation,<sup>76</sup> and thus, deportation is collateral. The other common approach is to define direct consequences as those that are “definite, immediate and largely automatic.”<sup>77</sup> However, courts employing such an approach have made the “automatic” language formal in a manner similar to the control and responsibility test.<sup>78</sup> Under either test, deportation is properly regarded as a collateral consequence.

The Court based its treatment of deportation as a “unique” consequence on two factors: severity and a close connection to the criminal process. First, the opinion is rife with language acknowledging the severity and harshness of the deportation remedy. Deportation is de-

<sup>73</sup> Some opinions get this subtle distinction right. See, e.g., *Kaiser v. State*, 621 N.W.2d 49, 54–55 (Minn. Ct. App. 2001) (applying *Strickland* and noting that “the failure to advise of the collateral consequences does not fall below an objective standard of reasonableness that constitutes ineffective assistance of counsel,” rather than reasoning that *Strickland* does not apply to such consequences at all), *aff’d*, 641 N.W.2d 900 (Minn. 2002).

<sup>74</sup> See *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008).

<sup>75</sup> *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000) (alteration in original) (quoting *Fruchtman v. Kenton*, 531 F.2d 946, 949 (9th Cir. 1976)) (internal quotation mark omitted).

<sup>76</sup> See Brief for the States of Louisiana et al. as Amici Curiae in Support of Respondent at 22–23, *Padilla*, 130 S. Ct. 1473 (No. 08–651), 2009 WL 2564713, at \*22–23 (“[D]eportation is the result of a civil proceeding carried out in federal administrative courts and subject to its own extensive review process . . .” *Id.* at 22.).

<sup>77</sup> See, e.g., *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973).

<sup>78</sup> See, e.g., *United States v. Littlejohn*, 224 F.3d 960, 965 (9th Cir. 2000) (holding a consequence not “automatic” if “the consequence is contingent upon action taken by an individual . . . other than the sentencing court — such as another governmental agency”); see also 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) (identifying three main tests used for the direct versus collateral determination).



scribed as a “drastic measure”<sup>79</sup> and “the equivalent of banishment or exile.”<sup>80</sup> Second, the Court emphasized the close connection between deportation and the criminal process.<sup>81</sup> Deportation is “intimately related” to the criminal process and “‘most difficult’ to divorce” from the conviction itself.<sup>82</sup> In reaching this conclusion, the Court found it important that changes in the law have made deportation “practically inevitable,”<sup>83</sup> “nearly an automatic result for a broad class of noncitizen offenders.”<sup>84</sup> The Court also hinted that the longstanding history of deportation is a factor that makes the connection close,<sup>85</sup> and that the inquiry should be undertaken from a defendant’s perspective.<sup>86</sup> Thus, if there are other consequences that defendants consider to be as severe and as closely related to a conviction as deportation is — in other words, if they pass the “*Padilla* test” — then they presumably merit similar treatment even if they are “collateral” consequences.

One consequence that might meet the *Padilla* test is registration requirements for sexual offenders.<sup>87</sup> Indeed, New Mexico, one of the few jurisdictions to have required advice about deportation under *Strickland*,<sup>88</sup> has already extended that duty to sex offender registration.<sup>89</sup> The New Mexico court used an approach quite similar to that adopted by the *Padilla* Court, focusing on the severity and automatic nature of registration requirements.<sup>90</sup> *Padilla* documented the severity and dangers of deportation, but registration is also severe: it can cause “employability problems, harassment, stigma[,] ostracism, humiliation,

<sup>79</sup> *Padilla*, 130 S. Ct. at 1478 (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

<sup>80</sup> *Id.* at 1486 (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)).

<sup>81</sup> *Id.* at 1482.

<sup>82</sup> *Id.* at 1481 (quoting *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982)).

<sup>83</sup> *Id.* at 1480.

<sup>84</sup> *Id.* at 1481.

<sup>85</sup> *Id.* (“Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century.” (citation omitted)). When the references to deportation’s “automatic” and “longstanding” imposition are viewed as components of the broader argument that deportation has an “intimate” relationship to the criminal process, it is conceivable that other consequences could be deemed “unique,” even if less automatic or longstanding than deportation, if they were nonetheless severe and closely related to convictions in some other sense. Also, while the longstanding nature of deportation provides rhetorical support for the *Padilla* holding, it is unclear why this factor should be relevant. The Sixth Amendment guarantees effective counsel for one’s defense; if a change in law means one’s defense requires new considerations, there is no reason why the law’s recent origination should preclude it from coverage.

<sup>86</sup> *See id.* at 1481–82.

<sup>87</sup> Registration requirements are viewed as collateral consequences. *See Magyar v. State*, 18 So. 3d 807, 812 (Miss. 2009) (noting that “virtually every other jurisdiction to address the question” also regards registration as collateral).

<sup>88</sup> *See State v. Paredes*, 101 P.3d 799, 801 (N.M. 2004).

<sup>89</sup> *See State v. Edwards*, 157 P.3d 56, 65 (N.M. Ct. App. 2007).

<sup>90</sup> *Id.* at 63–64; *see also Roberts*, *supra* note 68, at 176 (discussing *Paredes* and *Edwards*).

and physical harm.”<sup>91</sup> Additionally, under most state statutes, sex offender registration requirements follow automatically from a conviction<sup>92</sup> and are even more certain than deportation.<sup>93</sup> State registration requirements do not have as longstanding a history as federal deportation does, but as noted above,<sup>94</sup> it is not clear that this factor should be determinative.

The *Padilla* Court went on to justify treating deportation as unique by asserting that a flood of successful challenges to pleas would be unlikely. The Court’s rebuttal of the floodgates concern was based on the low incentives to challenge a plea and the difficulty of proving a successful claim;<sup>95</sup> this rationale will apply equally to other consequences such as registration. The Court also noted that having the deportation consequence plainly on the table in plea negotiations would benefit both the State and defendants.<sup>96</sup> If a registration requirement is as important to a defendant as deportation, then having it as a bargaining chip offers the same advantage. Depending on the particular circumstances, consequences such as child custody, excludability, or civil commitment could conceivably meet the *Padilla* test as well. There are many collateral consequences that defendants view as important.<sup>97</sup>

The *Padilla* Court intended to extend *Strickland*’s coverage beyond the existing direct-collateral distinction, but to do so in a way that would not require covering all collateral consequences. Despite that effort, *Padilla* redefines the scope of the Sixth Amendment and raises the possibility that other collateral consequences are now subject to *Strickland* as well.<sup>98</sup> The tenability of the attempt to limit the opin-

<sup>91</sup> *Edwards*, 157 P.3d at 63 (alteration in original) (quoting *State v. Druktenis*, 86 P.3d 1050, 1061 (N.M. Ct. App. 2004)).

<sup>92</sup> *E.g.*, *id.* at 59; *Mitschke v. State*, 129 S.W.3d 130, 133 (Tex. Crim. App. 2004) (noting that the registration requirement is “completely automatic”).

<sup>93</sup> Deportation is subject to extensive review, and certain, albeit very limited, defenses are possible. See Brief for the States of Louisiana et al., *supra* note 76, at 22–23, 2009 WL 2564713, at \*22–23.

<sup>94</sup> See *supra* note 85.

<sup>95</sup> See *Padilla*, 130 S. Ct. at 1485–86.

<sup>96</sup> *Id.* at 1486.

<sup>97</sup> This analysis shows that *Padilla* comes rather close to the view that *Strickland* should be applied equally to all ineffectiveness claims. The severity and close relationship points essentially assess how important the consequence is to the defendant. If an issue is important to defendants, it is logically more likely that “prevailing professional norms” would require advice on that issue. This approach veers toward applying *Strickland* to all effects of a conviction, since it imports the second stage of an effectiveness analysis — what *Strickland* requires — into the first stage — whether *Strickland* applies.

<sup>98</sup> That *Padilla* places deportation within the ambit of *Strickland* reveals the odd state of limbo in which the decision has left Sixth Amendment doctrine. The law in most jurisdictions is now that *Strickland* covers direct consequences and deportation, but not collateral consequences (un-

ion's effect to the specific risk of deportation is the central issue left in *Padilla's* wake.

4. *Eighth Amendment — Juvenile Life Without Parole Sentences.* — The Supreme Court's Eighth Amendment jurisprudence has measured punishments by "the evolving standards of decency that mark the progress of a maturing society,"<sup>1</sup> establishing that a civilized people may come to recognize as unacceptable punishments that were once commonplace. Last Term, in *Graham v. Florida*,<sup>2</sup> the Court held that the Constitution no longer tolerates juvenile life-without-parole (JLWOP) sentences for nonhomicide crimes. This groundbreaking ruling has important implications for another class of cases: JLWOP sentences for *homicide* offenders. Applying *Graham's* logic, it is doubtful that such punishments could survive a constitutional challenge.

In 2003, sixteen-year-old Terrance Graham was arrested following a robbery attempt.<sup>3</sup> The prosecutor charged him as an adult, and Graham pled guilty to attempted armed robbery and armed burglary with assault or battery.<sup>4</sup> After writing a letter to the court begging for a second chance so that he could "do whatever it takes to get to the NFL,"<sup>5</sup> he was sentenced to concurrent three-year probation terms.<sup>6</sup> A few months later, Graham, then seventeen, and two accomplices participated in two armed robberies and a high speed chase.<sup>7</sup> Three handguns were recovered, and a member of the trio was shot.<sup>8</sup>

As a result, a trial court found that Graham had violated his probation.<sup>9</sup> Under Florida law, the minimum sentence Graham could receive was five years in prison; the maximum was life.<sup>10</sup> The State recommended thirty years on one count and fifteen on another; a presentence report recommended four years.<sup>11</sup> Judge Lance Day, however, took no pity on Graham, stating on behalf of the justice system that, "[W]e can't help you any further."<sup>12</sup> In Judge Day's mind, the State had given Graham "a great opportunity to do something with

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less an affirmative misrepresentation was made). As this comment has shown, deportation is collateral, so at least the foundations of the direct-collateral distinction have been threatened.

<sup>1</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

<sup>2</sup> 130 S. Ct. 2011 (2010).

<sup>3</sup> *Id.* at 2018.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2040 (Roberts, C.J., concurring in the judgment) (quoting Joint Appendix, Vol. II at 380, *Graham*, 130 S. Ct. 2011 (No. 08-7412), 2009 WL 2163260, at \*380) (internal quotation marks omitted).

<sup>6</sup> *Id.* at 2018 (majority opinion).

<sup>7</sup> *Id.* at 2018–19.

<sup>8</sup> *Id.* at 2019.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* Graham's attorney naturally requested the minimum sentence. *Id.*

<sup>12</sup> *Id.* at 2020 (quoting Joint Appendix, Vol. II, *supra* note 5, at 394).