34 Am. J. Trial Advoc. 565

American Journal of Trial Advocacy
Spring, 2011

Article

A PROPOSED FRAMEWORK FOR EVALUATING EFFECTIVENESS OF COUNSEL UNDER PADILLA v. KENTUCKY

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Abstract

The Supreme Court decision in Padilla provides long-awaited relief to defendants facing deportation following their guilty pleas, but it also raises questions. This Article relies on Padilla and related precedent to propose a new framework for guilty plea colloquies. It examines the class of defendants who are denied relief under Padilla because of their procedural posture, and concludes that such denial is inequitable. It also maintains that the distinction between direct and collateral consequences should not be disturbed.

I. Introduction

Criminal trials showcase many of our most cherished rights. The right against self-incrimination,[1] the right against unwarranted searches and seizures,[2] and the right to trial by jury,[3] for instance, are each called into play, almost exclusively, when a defendant undergoes trial. When they plead guilty, however, criminal defendants not only stipulate to their guilt, they also waive a large subset of their constitutional rights.[4]

In spite of this heavy price, guilty pleas account for as much as ninety-five percent of all convictions.[5] Without defendants' cooperation, the time and cost of trials would, in many jurisdictions, quickly overwhelm prosecutors' ability to keep up.[6] In order to prevent prosecutors from exerting undue pressure on defendants to give up their rights, courts and legislatures have surrounded guilty pleas in layers of protections: guilty pleas must be knowing, intelligent, and voluntary;[7] there must be a factual basis for each guilty plea;[8] defendants are entitled to the assistance of counsel prior to the entry of a guilty plea;[9] and defendants must be informed of the direct consequences of their plea, including the maximum potential sentence they will face.[10]

The majority rule, however, has been that defendants need not be informed of the collateral consequences of their guilty pleas.[11] Collateral consequences include, inter alia, registration as a sex offender,[12] loss of employment[13] or professional licenses,[14] drivers' license suspension,[15] loss of the right to vote,[16] loss of eligibility for parole,[17] and until recently, deportation.[18] In 2010, however, in Padilla v. Kentucky, the Supreme Court of the United States held that defendants must be informed of the immigration consequences of a conviction prior to entering a guilty plea.[19]

This decision has generated significant confusion. Lower courts have been ambiguous about whether the decision is retroactive,[20] and whether it eliminated the

distinction between direct and collateral consequences.[21] Moreover, the lower courts are split as to the level of specificity with which defense attorneys are required to advise their clients of the collateral consequences of their guilty pleas.[22]

The majority of scholarship to date has singled out immigration and sex-offender registration as examples of particularly severe collateral consequences, and has argued against the distinction between direct and collateral consequences generally.[23] Many authors would justify expanding the Padilla decision because "[t]he number and severity of collateral consequences . . . have greatly expanded in recent years."[24] Others contend that because giving "up one's right to a trial is a significant waiver of a constitutional right," defendants are entitled to be informed of the collateral consequences of their guilty pleas as a matter of equity.[25] Gabriel Chin and Richard Holmes, on the other hand, argue that "encouraging counsel to consider collateral consequences would help make sentences more consistent and fair."[26] The academy's role in this area has been particularly important, because many of the arguments advanced by the authors cited above were adopted, virtually verbatim, by the Padilla majority.[27]

The oft-cited flaw in these arguments, however, is that the possible collateral consequences of a conviction are limitless.[28] Certainly, the decision to plead guilty is often the most important decision a defendant will ever make. And, therefore, as counselors, defense attorneys should, wherever possible, inform their clients not just of the immigration consequences of a guilty plea, but also of the effect a conviction will have on their jobs, their education, and their family and personal lives.[29] Requiring defense attorneys to predict and explain all the ways in which their clients will be affected by a conviction, however, is simply unreasonable.

This Article addresses the three largest ambiguities generated by the Padilla decision: (1) the specificity with which defendants must be advised, (2) the retroactive effect of the new rule, and (3) the continued vitality of the distinction between direct and collateral consequences. In considering these issues, the Article proceeds in four sections. The first section examines the state of plea law prior to the Padilla decision. The second section considers the Padilla decision itself. The third section details the confusion that the decision has created in the lower courts. The fourth section proposes a framework for incorporating the Padilla decision into future guilty pleas without vitiating the principles that support existing law.

II. Background

It is well-settled that guilty pleas must be knowing, intelligent, and voluntary.[30] In the federal system, courts are required to advise defendants that (1) they have the right to plead not guilty, (2) they have the right to a trial by jury, (3) they have the right to be represented by counsel at trial and at every subsequent stage of the proceeding, (4) they have the right to confront and cross examine adverse witnesses, and (5) they will waive these rights if they plead guilty.[31] Federal courts must also advise defendants of the

nature of the charges to which they are pleading guilty, the maximum penalties for the charges as well as any applicable mandatory minimum penalties, and the sentencing procedure that will be followed.[32]

In determining whether the trial court has fulfilled its obligation to advise the defendant of the foregoing, the Supreme Court of the United States has distinguished between consequences that are "direct," and consequences that are "collateral" to the guilty plea.[33] Defendants must be aware of direct consequences that will follow their conviction prior to entering a knowing, intelligent, and voluntary guilty plea;[34] until recently, it was generally held that ignorance of a collateral consequence would not vitiate an otherwise knowing, intelligent, and voluntary guilty plea.[35] Reviewing courts examine the adequacy of a trial court's warning to the defendant by considering the purpose of the consequence in question: direct consequences are usually imposed by the trial court as a punitive sanction. "Collateral consequences, by contrast, are not part of the explicit punishment handed down by the court; they stem from the fact of conviction rather than from the sentence of the court."[36] The Fourth Circuit's explanation of the difference between direct and collateral consequences, which has been called the "most widely cited,"[37] is that "[t]he distinction . . . turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment."[38]

In addition to this advice from the trial court, defendants are entitled to the effective assistance of counsel prior to entering a guilty plea.[39] In evaluating whether counsel has rendered effective assistance under the Sixth Amendment, the Supreme Court applies the familiar test from Strickland v. Washington, which inquires first whether counsel's representation "fell below an objective standard of reasonableness,"[40] and then whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[41] When alleging ineffectiveness in the context of a guilty plea, courts also require a showing that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have instead insisted on going to trial."[42]

Additionally, where a defendant seeks to withdraw his guilty plea, whether as a result of ineffectiveness or not, he is faced with a two tiered standard of review.[43] Prior to sentencing, he need only show "a fair and just reason" for withdrawal of his guilty plea.[44] Federal courts determine whether a reason is "fair and just" under a four prong test: "(1) whether defendant established a fair and just reason to withdraw his plea; (2) whether defendant asserts his legal innocence of the charge; (3) the length of time between the guilty plea and the motion to withdraw; and (4) if the defendant established a fair and just reason for withdrawal, whether the government would be prejudiced."[45] Of these factors, "the most critical is the defendant's declaration of innocence. In fact, failing to assert the defendant's innocence will result in the automatic denial of the motion."[46]

Where a defendant seeks to withdraw a guilty plea after sentencing, he was--until 1983--required to demonstrate that failure to permit withdrawal would constitute a "manifest injustice."[47] This higher standard is necessary in order to prevent the accused

from pleading "guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe."[48] This standard and its rationale continue to be followed in many state courts.[49] The federal courts, however, have abandoned the "manifest injustice standard" in favor of the standard applicable to habeas motions generally, and require that a defendant show that failure to permit withdrawal would be a "fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure."[50]

Until 2010, the majority of jurisdictions had expanded the direct/collateral consequences distinction applicable to judicial warnings to advice given by counsel prior to the entry of a guilty plea.[51] Thus, where a defendant sought to withdraw his guilty plea based on a claim that either the trial judge or trial counsel had failed to inform him of a collateral consequence of his conviction, relief would be denied.[52] The continued vitality of that rule, however, is no longer clear.[53]

III. The Padilla Decision

Jose R. Padilla was a native of Honduras who lived in the United States for over forty years.[54] He served in the Army and received an honorable discharge after service in the Vietnam War.[55]

On October 31, 2001, after he was discovered driving a truck filled with more than 500 pounds of marijuana,[56] Padilla was charged with possession of marijuana, possession of drug paraphernalia, trafficking more than five pounds of marijuana, and operating a truck without a weight and distance tax number.[57] While he was awaiting trial, Padilla was released on $25,000 bond.[58] Later, however, Padilla was informed that his bail had been revoked, allegedly because he was "believed to be an illegal alien and . . . awaiting deportation by the Federal authorities."[59] On August 22, 2002, Padilla entered a negotiated plea of guilty to the drug charges, and the vehicular violation was dropped.[60] On October 4, 2002, in accordance with his agreement with Kentucky, Padilla was sentenced to a term of imprisonment of five years, followed by an additional five years probation.[61] Although--he claims--he was not aware of it at the time, the drug crimes to which Padilla pleaded guilty were deportable offenses.[62]

Almost two years later, on August 18, 2004, Padilla filed a pro se motion to vacate his sentence.[63] He alleged that his plea counsel both (1) failed to "investigate the possible immigration consequences" of his guilty plea, and (2) affirmatively misadvised him that he "did not have to worry about immigration status since he had been in the country so long."[64] In responding to Padilla's motion, the trial court noted that

Padilla's counsel does not make a deportation decision, and neither does this Court. This record indicates that Padilla was aware of the possibility that he could be deported. Padilla cannot show ineffective assistance of counsel merely because of a statement of opinion on whether the Immigration and Naturalization Service would choose to deport Padilla given his length of time in the United States.[65]

On this basis, the trial court dismissed Padilla's motion without either

appointing counsel or holding a hearing.[66] Padilla appealed.[67]

The Kentucky Court of Appeals opined that the misinformation Padilla alleged could have caused him to enter an involuntary guilty plea.[68] Nevertheless, because the trial court had not held a hearing to make that determination, the court of appeals concluded that the record was insufficiently developed to make a final determination.[69] The court therefore remanded the matter for an evidentiary hearing.[70] A single judge dissented and would have held, inter alia, that because (1) Padilla knew he was not a United States citizen, and (2) he was informed prior to trial that he was "believed to be an illegal alien and ... awaiting deportation by the Federal authorities,"[71] he "cannot make a credible claim that he did not know that his immigration status could be affected by his criminal charges."[72]

Kentucky sought discretionary review in the state's supreme court, which was granted.[73] That court, without additional analysis, unequivocally held that "collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel," and that "counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief."[74] Justices Cunningham and Schroder dissented, and would have held that counsel "who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all."[75]

On November 14, 2008, Padilla filed a petition for writ of certiorari to the United States Supreme Court, which was granted on February 23, 2009.[76]

The Supreme Court began its analysis by noting that "immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation."[77] Because these reforms make deportation "practically inevitable" for "noncitizens convicted of particular classes of offenses," the Court found that deportation has become "an integral part--indeed, sometimes the most important part--of the penalty that may be imposed on noncitizen defendants who plead guilty."[78]

Although the state trial and supreme courts held that deportation--however integral to Padilla's penalty--was collateral to his guilty plea, the Supreme Court replied that it had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance.'"[79] Without reaching the question of whether such a distinction was constitutionally valid, the Court concluded that it is "'most difficult' to divorce the penalty from the conviction in the deportation context," and that Strickland v. Washington therefore applied to Padilla's claim.[80]

On this basis, the Court went on to consider whether either misadvice by counsel or his failure to advise Padilla of the consequences of his guilty plea would rise to the level of ineffective assistance.[81] The majority rejected the Solicitor General's suggestion that only misadvice should violate the Sixth Amendment.[82] Instead, the majority announced a new, three-pronged test to determine ineffectiveness in the deportation

context.[83] First, where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequences for... conviction," the failure to advise the client of the specific, correct, immigration consequences will be ineffective assistance of counsel.[84] Second, when "the law is not succinct and straightforward... a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."[85] In addition to these two prongs, however, the majority preserved the prejudice prong of the Strickland test by requiring that, in order to obtain relief, "a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."[86]

Justices Alito and Roberts concurred in the judgment, but only inasmuch as an attorney should "(1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney."[87] The concurrence, moreover, explicitly endorsed the distinction between direct and collateral consequences of a guilty plea.[88]

Justices Scalia and Thomas dissented, and would have held that the Sixth Amendment imposes no duty on attorneys with respect to advice on collateral matters, including misadvice.[89] Insofar as the concurrence was "driven by concern about the voluntariness of Padilla's plea," the dissent would have considered the matter under the Due Process Clauses of the Fifth and Fourteenth Amendments.[90]

IV. The Aftermath

Lingering doubts remain about the full implications of the Padilla decision. For instance, although the majority of the Court treated the distinction between direct and collateral consequences with disfavor, it also refused to abrogate the existing rule altogether.[91] The ongoing vitality of the distinction is made even less certain by the apparent necessity of an argument in its favor by both the concurrence and the dissent.[92]

Similarly, the Court implied that its decision would be retroactive by referring to its effect on "convictions already obtained as the result of plea bargains."[93] Nevertheless, the Court refused to make its decision expressly retroactive.[94] This decision has important timeliness ramifications for petitions for post-conviction relief.[95] The Court's refusal to squarely address these and other issues have led to splits between jurisdictions, which are addressed below.

A. Is a Conditional Warning Sufficient Under Padilla?

For "at least the past 15 years," many trial courts and professional associations have suggested that generic warnings about the immigration consequences of a conviction be given to defendants prior to pleading guilty.[96] Because these warnings are read to every defendant who pleads guilty, however, they do not state with specificity the immigration consequences that will occur for any particular defendant. Padilla

suggests that this is insufficient, however, and subsequent decisions in the district courts reach conflicting conclusions.[97]

For instance, in Ellington v. United States, the defendant entered a negotiated guilty plea to unlawful possession of a firearm after a prior felony conviction.[98] Just over a year later, an immigration judge found the conviction to be an aggravated felony, and ordered the defendant's deportation.[99] The defendant then filed a petition to vacate his guilty plea, alleging that "due to his reading disability, he was unaware that a guilty plea would lead to his deportation."[100] The district court held that the defendant's petition failed to show prejudice, because the defendant was asked if he understood that his "plea of guilty to the offense outlined in the indictment may affect [his] ability to remain within the United States."[101] Having failed to demonstrate prejudice, the defendant's petition for relief under Strickland v. Washington was denied.[102]

On the other hand, in Boakye v. United States, the defendant entered a negotiated guilty plea to two drug offenses.[103] Later--he claimed--he became aware that his conviction would result in his automatic deportation to Ghana at the conclusion of his sentence.[104] The defendant filed a motion to withdraw his guilty plea in which he alleged that his trial counsel rendered ineffective assistance by failing to inform him that deportation would be automatic.[105]

As in Ellington,[106] the district court noted that Boakye had been told at his guilty plea hearing that "another possible consequence of your plea here is that you might be deported."[107] As in Ellington, moreover, the district court analyzed Boakye's claim under what it understood to be the Padilla analysis.[108] Unlike in Ellington, however, the district court concluded that the "use of the words 'possible' and 'might' misled the Petitioner, where the Petitioner was actually subject to 'automatic' deportation."[109]

On the one hand, Ellington's willingness to accept boilerplate conditional warnings as sufficient under Padilla comports with the majority's conclusion that existing "professional norms" will prevent the decision from having a "significant effect on those convictions already obtained as the result of plea bargains."[110] On the other hand, the majority's opinion in Padilla explicitly distinguishes between trial counsel's duty to "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences" and the duty to "give correct advice."[111] On its face, this distinction seems to give some support to the district court's conclusion in Boakye. The decision itself is thus ambiguous.

B. Who Can Obtain Relief Under Padilla?

Another question that was not explicitly reached by the majority is whether the decision is intended to have retroactive effect.[112] This question hinges on the interpretation of the Padilla decision in light of Teague v. Lane and the modern retroactivity doctrine.[113]

In the federal courts, it is well settled that decisions which do not announce "new"[114] rules of law are applied retroactively on both direct and collateral appeals, but will not toll the habeas statute's time-bar.[115] Holdings that do announce new rules of law, however, are only applied retroactively to cases which are then "pending on direct review or not yet final."[116] Defendants seeking retroactive application of a new rule of law on collateral review, finally, must demonstrate that the rule either (1) forbids "criminal punishment of certain primary conduct [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense,"[117] or (2) is a watershed rule of criminal procedure "implicating the fundamental fairness and accuracy of the criminal proceeding."[118]

Thus far, the consensus among reviewing courts appears to be that trial counsel's obligation to inform defendants of the immigration consequences of a guilty plea is not a "newly recognized right." Thus, the holding of Padilla is retroactive on direct review, but it does not toll the habeas statute's time-bar.[119] This conclusion has led to starkly different results based on the individual defendant's procedural posture, and has created a class of diligent defendants whose collateral appeal rights are nevertheless waived.[120]

For instance, in Gacko v. United States, the defendant pleaded guilty to conspiracy to commit mail fraud and healthcare fraud.[121] He was thereafter placed in the custody of the Bureau of Immigrations and Customs Enforcement, and filed a facially untimely petition for writ of habeas corpus.[122] The district court noted that, if Padilla created a "newly recognized right," it would toll the statute of limitations, which otherwise precluded consideration of the defendant's petition.[123] Ultimately, the court concluded that Padilla "clarified the obligation of counsel under Strickland [v. Washington]," but did not create a "'newly recognized' right that was made retroactively applicable to cases on collateral review as required by the statute."[124] Having so found, the court held that the defendant's claim was procedurally defaulted, and dismissed his petition.[125]

Similarly, in United States v. Millan, the defendant pleaded guilty to conspiracy to possess cocaine with intent to distribute.[126] He was thereafter ordered to be deported, and filed an out-of-time petition for writ of habeas corpus.[127] As in Gacko, the district court concluded that the holding in Padilla had not created "a 'newly recognized' right. Rather, the seminal case of Strickland v. Washington provides the underlying constitutional basis for the court's decision."[128] On this basis, as in Gacko, the district court found the claim to be untimely and dismissed the defendant's petition.[129]

On the other hand, in People v. Bennett, the defendant pleaded guilty to possession of marijuana in exchange for a conditional discharge and seven days of community service.[130] As a result of his conviction, the defendant was deemed deportable by the Bureau of Immigrations and Customs Enforcement.[131] Four years later, long after his release and after the time for appeal had elapsed, the defendant filed a petition for post-conviction collateral relief alleging ineffective assistance of counsel pursuant to Padilla.[132]

As in Gacko and Millan, the New York Criminal Court analyzed whether Padilla announced a new right or rule that mandated its retroactive application under Teague v. Lane.[133] As in Gacko and Millan, moreover, the court concluded that "Padilla did not announce a new constitutional rule, but merely applied the well-settled rule in Strickland to a particular set of facts."[134]

Unlike in Gacko and Millan, however, the court went on to consider the language of the Padilla decision referring its effect on "convictions already obtained as the result of plea bargains."[135] The New York court concluded that, "if the Supreme Court did not intend for Padilla to be retroactively applied, that would render meaningless the majority's lengthy discussion about concerns that Padilla would open the 'floodgates' of challenges to guilty pleas."[136] Because "Padilla does not create a new constitutional rule, [the Court concluded,] it must be retroactively applied."[137]

At first blush, the Bennett, Gacko, and Millan decisions seem to fit well within the existing federal retroactivity framework: in habeas corpus matters, out-of-time petitioners must demonstrate the creation of a new right in order to toll the Antiterrorism and Effective Death Penalty Act's one year statute of limitations;[138] timely petitioners, on the other hand, need only show that the right they claim was violated existed at the time of their conviction, or was made retroactive thereafter.[139] As is explored in the next section, however, this well-settled distinction, as applied to the Padilla decision, creates a loophole that excludes a class of defendants who seem equitably entitled to retroactive relief under Padilla, but are procedurally barred from obtaining it.[140]

C. Has Padilla Abrogated the Distinction Between Direct and Collateral Consequences Under the Sixth Amendment?

Padilla explicitly makes counsel's advice regarding the deportation consequences of a guilty plea mandatory under the Sixth Amendment.[141] An important question unresolved by the text of the decision, however, is whether other collateral matters fall into the same category.[142] As with the sufficiency of conditional language, the lower courts have been split.

For instance, in Maxwell v. Larkins, the defendant pleaded guilty to sexual abuse.[143] His conviction required him to register following his sentence as a sex offender, and exposed him to potentially indefinite commitment under Missouri's Sexually Violent Predator Act.[144] The defendant filed a petition for post-conviction collateral relief alleging that his trial counsel was ineffective by failing to inform him of the consequences of his guilty plea.[145] The state trial court dismissed his petition, and the appellate court affirmed.[146] He then presented his claims on habeas review to the district court for the Eastern District of Missouri.[147]

The district court examined the issue in the light of the Supreme Court's then-recent decision in Padilla and analyzed whether either registration as a sex offender

or the possibility of indefinite civil confinement was "intimately related to the criminal process."[148] Ultimately, the court held that "registration as a sex offender is not punitive."[149] It also held that commitment, as a sexually violent predator, is insufficiently automatic to trigger the same concerns that deportation did in Padilla.[150] On this basis, the district court rejected the defendant's claims and refused to expand the holding of Padilla.[151]

On the other hand, in Taylor v. State, the defendant entered a negotiated guilty plea to two counts of child molestation.[152] He was sentenced, served a one-year term of confinement, and was thereafter required to register as a sex offender.[153] Taylor filed a motion to withdraw his guilty plea on the grounds that "trial counsel had never advised him that he would be subject to the requirements of the sex offender registry ... as part of his negotiated plea."[154] The trial court denied the defendant's motion, and he appealed.[155]

As in Larkins, the Georgia Court of Appeals considered the case in light of Padilla.[156] However, the Georgia court concluded that "like deportation, registration as a sex offender is 'intimately related to the criminal process' in that it is an 'automatic result' following certain convictions."[157]

It is likewise true that registration as a sex offender, like deportation, is a "drastic measure" (albeit a totally understandable one) with severe ramifications for a convicted criminal. An individual who falls within the ambit of the registry is subject to lifetime registration and to the public dissemination of his name and other information identifying him as a registered sexual offender. Registrants also must provide, to the sheriff of the county in which the registrant resides, all of the information required by [Georgia Code] § 42-1-12(a)(16), as well as updates to that information within 72 hours of any change. Failure of a registrant to comply with the requirements of the statute constitutes a felony offense. And, while sex offender registration is not the equivalent of banishment or exile, there is no denying that registrants face extensive restrictions on where they can live, work, and volunteer. Indeed, certain registrants are subject to electronic monitoring for the remainder of their lives.[158]

Having determined that the terms of the sex offender registry statute were "succinct, clear, and explicit,"[159] the court of appeals concluded that Padilla was applicable to registration as a sex offender.[160]

In Commonwealth v. Abraham,[161] the Pennsylvania Superior Court granted relief on an issue even further removed from deportation. There, the defendant school teacher entered a negotiated guilty plea to corruption of minors and indecent assault and was sentenced to three years of probation.[162] The defendant then filed a timely petition for post-conviction collateral relief, alleging that his trial counsel was ineffective for failing to inform him that by pleading guilty he would forfeit his pension.[163] The trial court rejected the defendant's argument on the grounds that, as a collateral issue, pension benefits do not "need to be explained to a defendant and failure to explain a collateral issue is irrelevant to whether a guilty plea was knowing and voluntary."[164] Abraham then appealed to the Pennsylvania Superior Court.[165]

The superior court analyzed the case in light of Padilla and noted that

Commonwealth v. Frometa[166]--the case on which the trial court had relied below--had been cited with disapproval by the Supreme Court in Padilla.[167] The Abraham court went on to explain that "it is unclear if the direct/collateral analysis is still viable. That analysis might be useful if the nature of the action is not as 'intimately connected' to the criminal process as deportation."[168]

Rather than apply the "direct/collateral analysis," however, the court simply concluded that pension forfeiture served the goals of "retribution and deterrence" and held that,

in the light of Padilla, the loss of the pension is automatic and inevitable, the stakes are high and the consequences are succinct, clear, and distinct. Because of the automatic nature of forfeiture, the punitive nature of the consequence, and the fact that only criminal behavior triggers forfeiture, the application of. . . [the Public Employee Pension Forfeiture Act] is, like deportation, intimately connected to the criminal process. Therefore, counsel was obliged to warn his client of the loss of pension as a consequence to pleading guilty.[169]

Thus, just a few months after Padilla was announced, its holding has already been expanded in some jurisdictions to include sex-offender registration and the loss of pension benefits.[170] Although not expressly vitiated by the Supreme Court, the distinction between the direct and collateral consequences of a guilty plea is now clearly viewed with skepticism by many courts.[171]

V. A Proposed Framework for Padilla's Consistent Application

Splits in the lower courts as to the scope of the majority's holding and the specificity with which defendant's must be advised of the collateral consequences of their convictions have led to inconsistent application of the Padilla decision. The retroactive effect of the decision, although seemingly settled, has created an inequitable result. To resolve these tensions, lower courts should (1) apply a lenient standard in evaluating the specificity with which defendants are informed of the immigration consequences of their guilty pleas, (2) grant defendants retroactive review under Padilla--regardless of their procedural posture--and (3) decline to expand the scope of the Padilla decision beyond immigration, absent specific authorization from the legislature.

A. Applying a Lenient Standard to Specificity When Notifying Defendants of Immigration Consequences of Guilty Pleas

In Padilla, the four concurring and dissenting justices agreed that immigration law was sufficiently complicated that it would be unreasonable to require defense attorneys to provide any advice as to the immigration consequences of a guilty plea.[172] The question of whether such advice is necessary under the Sixth Amendment is now settled, but the specificity with which defense attorneys must advise their clients remains unclear.[173] The Padilla majority contemplates deportation as an "automatic" consequence of many criminal convictions.[174] If this were true, it would be simple for

defense attorneys to provide succinct, complete, and accurate advice. In reality, however, as the concurring and dissenting judges recognized, the deportation process is more complex.[175]

For instance, in Worrell v. Ashcroft, the defendant came to the United States from Barbados as an illegal immigrant in 1984.[176] In 1991 he pleaded guilty to weapons charges, and was sentenced to five years of probation.[177] He continued to live and work in the United States for another seven years before the Immigration and Naturalization Service (INS) contacted him and began removal proceedings.[178] Worrell, moreover, is not the only technically removable defendant to go unmolested by the INS for months or years.[179]

On the other hand, a vacated conviction or an acquittal will not necessarily prevent a defendant from being deported.[180] For instance, in Renteria-Gonzalez v. I.N.S., the defendant pleaded guilty to transporting illegal aliens.[181] In spite of a judicial recommendation against deportation, the INS thereafter commenced deportation proceedings against him.[182] In light of the INS's decision to ignore the district court's recommendation, the defendant successfully petitioned the court to vacate his conviction.[183] The INS continued deportation proceedings regardless of the district court's order, and the defendant appealed.[184] The Fifth Circuit Court of Appeals, however, held that the defendant's original guilty plea, regardless of the fact that it was later vacated, was sufficient to support deportation:

No court has addressed the precise question posed by this case, i.e., whether a vacated federal conviction remains valid ... as a deportable offense .... Although it may seem counterintuitive, the text, structure and history of the INA suggest that a vacated federal conviction does remain valid for purposes of the immigration laws. Moreover, several circuits, including this court, have held that a vacated state conviction remains valid ... their persuasive reasoning applies with equal force to a vacated federal conviction.[185]

Similarly, in Alarcon-Serano v. I.N.S., the defendant "was detained by immigration officers upon attempting to cross the border at Calexico, California, while driving a car carrying eighty-six pounds of marijuana concealed in a secret compartment."[186] Although the defendant was neither charged nor convicted of a crime in connection with his arrest, the INS nevertheless began exclusion and deportation proceedings against him.[187] On appeal, the Ninth Circuit Court of Appeals concluded that this procedure was valid because the statute under which the defendant was excluded only required that an immigration officer have "reason to believe that Alarcon-Serrano knowingly engaged in drug trafficking."[188] The Ninth Circuit's holding in Alarcon-Serano has subsequently been used to justify similar deportations.[189]

The lower courts are now grappling with the level of specificity with which defense attorneys must advise their clients regarding the immigration consequences of a guilty plea.[190] As Renteria-Gonzalez and Alarcon-Serano demonstrate, however, defense

attorneys cannot always predict the precise effect that a conviction will have on any given defendant's immigration status: some clients will be deported immediately following their conviction and sentence; others will be ignored for almost a decade; still others may be deported regardless of their conviction or acquittal.[191] This ambiguity is exacerbated by the fact that many defendants are uncomfortable with frank discussions of their immigration status, especially with government-employed public defenders.[192] In the face of this reality, conditional language such as "you may be deported or face other immigration related consequences as a result of your guilty plea" should be deemed sufficient to satisfy the requirements of the Sixth Amendment and Padilla v. Kentucky.[193]

B. Padilla Relief Should Be Available Regardless of a Defendant's Procedural Posture

The details of Padilla's retroactive application are problematic. As noted above, Padilla has been held to have retroactive application as a pre-existing constitutional rule but will not toll the habeas statute's time-bar.[194] This distinction is inequitable because it creates a class of defendants who would seem to be entitled to relief under Padilla but who have already exhausted their state court remedies and whose federal habeas rights have lapsed.

In other words, some classes of defendants have already pleaded guilty to a deportable offense without advice of counsel on the subject.[195] Thereafter, some of them have pursued post-conviction collateral relief in the lower federal courts or the state courts and have been denied relief based on the pre-Padilla rule that deportation is a collateral consequence of a guilty plea.[196] Knowing that only a tiny fraction of criminal cases are even heard by the Supreme Court of the United States and that the collateral consequences rule was well-settled in the lower courts, many of these defendants chose not to petition the Supreme Court for writ of certiorari; those who did, however, were denied a hearing.[197]

For instance, in Broomes v. Ashcroft, the defendant pleaded guilty to a drug-related criminal charge without, he alleged, advice of counsel as to the effect his plea would have on his immigration status.[198] Following the expiration of his sentence, he was placed in the custody of the INS, and ordered deported to Barbados.[199] He timely filed motions to withdraw his guilty plea in state court, and then timely sought habeas relief in the federal courts.[200]

Precisely as in Padilla, Broomes argued that "his attorney had a duty to advise him of the possible immigration consequences of pleading guilty."[201] He acknowledged that prior precedent held deportation to be a collateral consequence to a guilty plea, and thus irrelevant under the Sixth Amendment.[202] Nevertheless, as in Padilla, Broomes claimed that existing precedent was wrongly decided "for a variety of reasons, including misguided reliance on other circuit cases and failure to properly apply Strickland [v. Washington]."[203] Alternatively, he argued that even if the collateral consequence rule was appropriate at the time of its creation, "subsequent changes in immigration law have rendered the decision unsuitable today."[204] The Tenth Circuit Court of Appeals rejected

Broomes's argument and, in spite of the fact that the exact same arguments later became the basis of the Court's decision in Padilla, the Supreme Court denied certiorari.[205]

Now, six years later, Broomes's time to file a petition for writ of habeas corpus has expired.[206] Under the holdings of Gacko v. United States[207] and United States v. Millan,[208] the Padilla decision did not create a new rule of law, and thus did not toll the federal habeas statute's time-bar. Broomes, therefore--although he diligently pursued his collateral appeal in both the state and federal courts, and although he correctly identified the theory that the Supreme Court ultimately found persuasive in Padilla--is ineligible for relief.[209] Moreover, although it is obviously inequitable, Broomes's position is not unique.[210]

Reviewing courts have held the Padilla decision to be premised on existing constitutional precedent, and thus not a new rule of law.[211] Although this conclusion is defensible under Teague v. Lane,[212] it is in reality a legal fiction: defendants who alleged their attorney's ineffectiveness for failing to inform them of the immigration consequence of their guilty pleas were simply not eligible for relief until the Padilla decision changed the existing rule.[213] Even defendants who petitioned the Supreme Court for review on precisely the grounds ultimately found persuasive in Padilla were denied the opportunity to withdraw their guilty plea.[214] In the interest of equity of application, courts should treat Padilla as a newly announced constitutional right that has been made retroactive by the Supreme Court.

One possible response to this argument is that the government's legitimate interest in the finality of convictions precludes review of a decades old conviction.[215] Moreover, reopening long-closed cases can substantially prejudice the government when witnesses become unavailable and forensic evidence decays.[216] This concern, however, is at least partially addressed by the Padilla majority's insistence that defendants continue to bear the burden of proving they were prejudiced by their attorneys' alleged failures to advise them.[217] Thus, defendants who are given the opportunity to contest their guilty pleas years after they have been convicted are not entitled to automatic retrial, and only a small number will ultimately qualify for this form of relief.[218]

C. The Distinction Between Direct and Collateral Consequences Should Not Be Disturbed

Because of the sheer volume of collateral consequences that inevitably follow a criminal conviction, nearly every defendant who pleads guilty is able to allege that his attorney failed to advise him of some detriment that will follow his guilty plea.[219] In itself, the practical inability of trial counsel to predict every way in which a conviction will affect their clients gives continuing importance to the distinction between direct and collateral consequences; if defense attorneys were required to inform defendants of every collateral consequence of a conviction, guilty pleas would last for days.[220] Defense attorneys, moreover, would have to develop specialties in every legal field in order to anticipate the effect a conviction would have on a wide range of issues, from child

custody disputes to employment opportunities and access to the ballot. With the exception of deportation, therefore, the distinction between direct and collateral consequences of a guilty plea should be left in place.

Commonwealth v. Abraham[221] is a perfect example of the impracticality of expanding Padilla's scope beyond deportation, and the logical flaws in doing so. There, the defendant school teacher lost his pension benefits following a guilty plea.[222] The Pennsylvania Superior Court concluded that, under the logic of Padilla, the defendant should have been informed of this consequence.[223] The court never seems to have contemplated, however, whether the defendant's attorney had any familiarity with the relevant statute governing pension benefits, nor whether it was reasonable to expect him to.[224] This defect in the court's analysis is fatal.

In fact, reasonableness is the very touchstone of Strickland v. Washington.[225] It is unlikely that Abraham's trial counsel was unreasonable in failing to investigate the consequences a conviction would have on his client's pension benefits, since he never purported to be a labor attorney.[226] Moreover, there is no indication from the record that he was put on notice that Abraham even had pension benefits.[227]

Another flaw in Abraham's analysis is that, although the benefit of hindsight focused the court's attention on pension benefits, attorneys cannot predict ex ante which collateral consequence will follow a conviction. Nor is there time to review all the possible collateral consequences with their clients. Abraham might just as easily have complained about an inability to find work after his conviction, restrictions on his right to vote, or an unfavorable child custody decision. Listing all the consequences of pleading guilty is simply impractical in a criminal justice system where ninety-five percent of convictions are the result of guilty pleas.[228]

Abraham and Taylor v. State,[229] moreover, are only the beginning of Padilla's expansion, not the end. For instance, in Bloomgarden v. United States, the defendant pleaded guilty to interstate travel in aid of racketeering relating to marijuana trafficking, extortion, and receipt of stolen art in New York.[230] His attorney thereafter drafted an allocution that included, in essence, a confession to a double homicide that had occurred in California.[231] The defendant was then extradited to California, where he is now awaiting trial, and faces the death penalty.[232]

Bloomgarden now argues that he should be permitted to withdraw his New York guilty plea because "Padilla v. Kentucky established beyond any doubt that Bloomgarden was denied his constitutional right to the effective assistance of counsel when attorney Shargel gave him highly damaging incorrect advice on the 'collateral consequences' of his guilty plea in the Eastern District of New York."[233] In other words, Bloomgarden asked the New York District Court to expand Padilla to include subsequent and unrelated convictions that may result from testimony entered during a guilty plea.[234]

Similarly, in Commonwealth v. Rudegair,[235] the defendant accepted a negotiated guilty plea to unsworn falsification and stalking, and was sentenced to a term

of probation of five years.[236] Although the defendant was self-employed at the time of her plea, she had previously practiced and was still licensed as a nurse.[237] After entering her guilty plea, the defendant learned that Pennsylvania law prohibits persons convicted of stalking from working where there is a significant likelihood that they will be in regular contact with children.[238] As a result, although her nursing license had not been revoked, the defendant was barred from working in hospitals.[239] The defendant filed a post-conviction collateral appeal, arguing that even though she was not practicing as a nurse at the time of her plea, her counsel nevertheless rendered ineffective assistance under Padilla by failing to inform her that she would no longer be able to work in a hospital, and that she was therefore entitled to withdraw her guilty plea and go to trial.[240] Although her petition was ultimately denied, new and creative petitions from other defendants are being submitted daily.[241]

One response to this argument is that courts should consider each collateral consequence on a case-by-case basis, and only grant relief under Padilla where the consequence seems "particularly severe."[242] The problem with this procedure, however, is precisely that courts will be forced to determine, on an ad hoc basis, which collateral consequences are "particularly severe," "intimately related to the criminal process," and "'most difficult' to divorce" from the underlying conviction.[243] These issues often implicate social considerations and value judgments that are better suited to legislative debate than judicial review.[244]

Indeed, the legislatures of thirteen states have already specified the collateral consequences they are prepared to recognize as worthy of particular attention.[245] By creating statutorily required colloquies, moreover, they have removed the confusion over precisely what level of specificity is necessary to place a defendant on notice that his guilty plea may result in collateral consequences.

VI. Conclusion

Given the predominance of guilty pleas and plea bargains in criminal law, the importance of a well-settled plea procedure is difficult to understate.[246] The Supreme Court decision in Padilla v. Kentucky provides long-awaited relief to defendants unexpectedly facing deportation following their guilty pleas,[247] but it calls into question the continued vitality of the distinction between direct and collateral consequences. Moreover, the majority's ambiguous language raises new questions regarding the specificity with which pleas must be entered,[248] and the applicability of the decision to defendants who have already pleaded guilty.[249]

Boakye v. United States's[250] insistence on specific and accurate immigration advice creates a standard that is practically impossible to meet. Even if defense attorneys were sufficiently trained in immigration law to give specific and accurate advice, they simply cannot predict when or if their clients will be deported.[251] Instead, reviewing courts should find that conditional warnings that a guilty plea may have adverse immigration consequences, including possible deportation, meet the requirements of the

Sixth Amendment.

The pretention that Padilla has not created a new rule of law,[252] however, is a legal fiction, and it is inequitable.[253] Defendants should be permitted to take advantage of the new rule regardless of their procedural posture, so long as they can demonstrate that they would not have pleaded guilty if advised that deportation would follow. To hold otherwise unfairly penalizes defendants who diligently researched or raised the issue, but were denied relief in the state and lower federal courts.

Finally, the distinction between direct and collateral consequences should be maintained. Expecting defense attorneys to advise defendants on the literally limitless collateral consequences of their convictions is simply not practical.[254] Moreover, asking courts to determine which collateral consequences merit pre-conviction advice usurps the function of the legislature.[255] Immigration should be treated by the lower courts in the same way that it was treated by the United States Supreme Court: as a sui generis exception to the traditional direct/collateral division, and not as a wedge to abolish the distinction altogether.[256]

Footnotes

d1 B.A. (2006), Oberlin College; J.D. (2009), Villanova University School of Law. John Larkin is an Assistant District Attorney in the Appeals Division of the Montgomery County District Attorney's Office in Pennsylvania.

1 "The Fifth Amendment by its terms prevents a person from being 'compelled in any criminal case to be a witness against himself.'" Mitchell v. United States, 526 U.S. 314, 327, remanded to sub nom. United States v. Mitchell, 187 F.3d 311 (3d Cir. 1999).

2 "The history and development of the Fourth Amendment show that it guarantees the right of the individual to be secure in his person against unreasonable arrests, as well as against unreasonable searches of houses and seizure of papers and effects." United States ex rel. Potts v. Rabb, 141 F.2d 45, 46 n. 1 (3d Cir. 1944), supplemented, 147 F.2d 225 (3d Cir.), cert. denied, 324 U.S. 870 (1945).

3 "Trial by jury has been established by the Constitution as the 'normal and . . . preferable mode of disposing of issues of fact in criminal cases.'" Singer v. United States, 380 U.S. 24, 35 (1965) (citing Patton v. United States, 281 U.S. 276, 312, certifying questions to 42 F.2d 68 (8th Cir. 1930)).

4 See Brady v. United States, 397 U.S. 742, 748 (1970) ("[T]he plea is more than an

admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial-a waiver of his right to trial before a jury or a judge.").

[5] Id. at 752 n.10 ("It has been estimated that about 90%, and perhaps 95%, of all criminal convictions are by pleas of guilty; between 70% and 85% of all felony convictions are estimated to be by guilty plea.") (citing Donald J. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 3 n.1 (Frank J. Remington ed. 1966)).

[6] An attempt was made in Alaska during the 1970s and 1980s to ban plea bargains altogether. "Before the ban, prosecutors in Fairbanks refused to prosecute about 4% of the felonies referred to them by the police or other investigators. After the ban, the proportion of felonies that prosecutors declined to prosecute increased to about 44%." Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 Stan. L. Rev. 29, 44 (2002).

[7] Gonzales v. Grammer, 848 F.2d 894, 898 (8th Cir. 1988) ("[I]n order for a guilty plea to be valid it must be knowing, intelligent, and voluntary.") (citing Brady, 397 U.S. at 748).

[8] "Rule 11(b)(3) of the Federal Rules of Criminal Procedure, formerly Rule 11(f), requires that a guilty plea must have a factual basis." United States v. Brown, 331 F.3d 591, 594 (8th Cir. 2003).

[9] Iowa v. Tovar, 541 U.S. 77, 81 (2004), remanded to sub nom. State v. Tovar, No. 01-1558, 2004 WL 1110387, at *1 (Iowa 2004); McMann v. Richardson, 397 U.S. 759, 771 (1970), remanded to sub nom. United States ex rel Williams v. Follette, 453 F.2d 745 (2d Cir. 1971), remanded to sub nom. United States ex rel. Richardson v. McMann, 340 F. Supp. 136 (S.D.N.Y. 1971), aff'd, 458 F.2d 1406 (2d Cir. 1972).

[10] Fed. R. Crim. P. 11(b)(1).

[11] Gabriel J. Chin & Richard W. Holmes, Jr., Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 704 (2002) (citing N. Carolina v. Alford, 400 U.S. 25, 37 (1970)).

[12] Ward v. State, 315 S.W.3d 461, 469 (Tenn. 2010).

[13] Murphy v. State, 868 So. 2d 585, 586 (Fla. Dist. Ct. App. 2004).

[14] Nollette v. State, 46 P.3d 87, 91 (Nev. 2002).

[15] Commonwealth v. Duffey, 639 A.2d 1174, 1176 (Pa.), cert. denied, 513 U.S. 884 (1994).

[16] Cano v. State, 4 S.W.3d 356, 356 (Tex. Crim. App. 1999).

[17] Yoswick v. State, 700 A.2d 251, 257 (Md. 1997).

[18] Commonwealth v. Frometa, 555 A.2d 92, 93 (Pa. 1989).

[19] 130 S. Ct. 1473, 1486 (2010).

[20] United States v. Obonaga, No. 07-CR-402 (JS), 2010 WL 2629748, at *1 (E.D.N.Y. June 24, 2010) ("It is unclear if Padilla applies retroactively. Reasonable jurists have disagreed about whether Padilla has retroactive effect."). Compare Gacko v. United States, 09-CV-4938, 2010 WL 2076020, at *3 (E.D.N.Y. May 20, 2010) (stating that there is no retroactive effect), with People v. Bennett, 903 N.Y.S.2d 696, 700 (N.Y. Crim. Ct. 2010) (noting that "if the Supreme Court did not intend for Padilla to be retroactively applied, that would render meaningless the majority's lengthy discussion about concerns that Padilla would open the 'floodgates' of challenges to guilty pleas"), available at 2010 WL 2089266.

[21] Maxwell v. Larkins, No. 4:08 CV 1896 DNN, 2010 WL 2680333, at *10 (E.D. Mo. July 1, 2010); Taylor v. State, 698 S.E.2d 384, 387 (Ga. Ct. App. 2010).

[22] Compare Boakye v. United States, No. 09 Civ. 8217, 2010 WL 1645055, at *4-5 (S.D.N.Y. Apr. 22, 2010) (by implication) (If the "allegation as to [counsel's] advice on the immigration consequences of [Petitioner's] guilty plea . . . is true, it would amount to unreasonable conduct under Padilla. . . . Petitioner [alleged] that during his plea colloquy, when the Court advised him that 'another possible consequence of your plea here is that you might be deported,' the Court's use of the words 'possible' and 'might' misled the Petitioner, where the Petitioner was actually subject to 'automatic' deportation. [As a result, Petitioner] contended that his counsel was ineffective by 'remain[ing] silent when the defendant was being misinformed by the presiding judge,' and by 'mislead[ing] him to believe that by being married to an American and being convicted of a non-violent crime w[ere]

all factors that the immigration court would consider in his favor."') (alteration in original), with Ellington v. United States, No. 09 CIV 4539(HB), 2010 WL 1631497, at *3 (S.D.N.Y. Apr. 20, 2010) (Counsel's failure to inform the petitioner of the potential immigration consequences of the guilty plea, or to orally explain the consequences, considering the petitioner's literacy issues, is of no consequence since the judge explained the issue in open court).

[23] Alec C. Ewald & Marnie Smith, Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench, 29 Just. Sys. J. 145, 147 (2008) ("[W]hile a few authors have offered principled defenses of individual collateral consequences, scholarship has generally argued for reform.") (citations omitted).

[24] Jenny Roberts, The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators", 93 Minn. L. Rev. 670, 673 (2008) (footnote omitted).

[25] John J. Francis, Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?, 36 U. Mich. J.L. Reform 691, 735 (2003).

[26] Chin & Holmes, supra note 11, at 741.

[27] For example, John Francis begins his article with a history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Francis, supra note 25, at 697-705. The Padilla majority did the same. Padilla v. Kentucky, 130 S. Ct. 1473, 1478-79 (2010). Francis goes on to note that the ABA Defense Function Standards require that defense attorneys inform their clients of the collateral consequences of a guilty plea. Francis, supra note 25, at 722. The Padilla majority cited the same standards in support of the proposition that "the weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." Padilla, 130 S. Ct. at 1482.
Chin and Holmes, on the other hand, note that "explaining collateral consequences to the prosecutor or court may influence the decision to bring charges at all, the particular charges that are brought, the counts to which the court or prosecution accept a plea, and the direct consequences imposed by the court at sentencing." Chin & Holmes, supra note 11, at 718-19. The Padilla majority similarly suggested that attorneys "who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence." Padilla, 130 S. Ct. at 1486. Moreover, both the majority and the concurrence rely

extensively on the article by Chin and Holmes. Id. at 1482, 1487, 1488, 1491.

[28] "Because collateral consequences of a criminal conviction are often limitless, unforeseeable or personal to the defendant, requiring an advisement with respect to every conceivable collateral consequence 'would impose upon the trial court an impossible, unwarranted and unnecessary burden."' Nollette v. State, 46 P.3d 87, 89 (Nev. 2002) (quoting State v. Fournier, 385 A.2d 223, 224 (N.H. 1978)); see also Magyar v. State, 18 So. 3d 807, 811 (Miss. 2009), cert. denied, 130 S. Ct. 3274, reh'g denied, Magyar v. Mississippi, 131 S. Ct. 33 (2010).

[29] National Legal Aid & Defender Ass'n, Performance Guidelines for Criminal Defense Representation § 6.2(a)(3) ("In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of . . . other consequences of conviction such as deportation, and civil disabilities. . . .").

[30] Boykin v. Alabama, 395 U.S. 238, 242-43 (1969).

[31] Fed. R. Crim. P. 11(b)(1)(A)-(F).

[32] Fed. R. Crim. P. 11(b)(1)(G)-(I), (M).

[33] Chin & Holmes, supra note 11, at 704 (citing N. Carolina v. Alford, 400 U.S. 25, 37 (1970); Boykin, 395 U.S. at 243-44 & n.5).

[34] See Francis, supra note 25, at 709 ("The Criminal justice system clearly recognizes the necessity that people be informed of direct consequences likely to result from a conviction.") (citing Fed. R. Crim. P. 11(b)(1)).

[35] See id.

[36] See Michael Pinard, An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals, 86 B.U. L. Rev. 623, 634 (2006) (footnote omitted). Chin and Holmes note that courts have held revocation of parole, civil commitment, civil forfeiture, consecutive sentencing, sentencing enhancements, registration requirements, disenfranchisement, forfeiture of jury service, disqualification from public benefits, ineligibility to possess firearms, deportation, dishonorable discharge from the armed services, and the loss of business licenses are each collateral. Chin & Holmes, supra note 11, at 705-06.

[37] Roberts, supra note 24, at 689. Roberts underscores Texas's highest court for criminal appeals' criticism of this rule because the Fourth Circuit offers "no citation to statute or case law or any other legal authority; there is merely the assertion that it is so." Id. at 690 (citing Mitschke v. State, 129 S.W.3d 130, 132 (Tex. Crim. App. 2004)).

[38] Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir.), cert. denied, 414 U.S. 1005 (1973).

[39] Iowa v. Tovar, 541 U.S. 77, 81 (2004), remanded to sub nom. State v. Tovar, No. 01-1558, 2004 WL 1110387, at *1 (Iowa 2004); McMann v. Richardson, 397 U.S. 759, 771 (1970), remanded to sub nom. United States ex rel. Williams v. Follette, 453 F.2d 745 (2d Cir. 1971), remanded to sub nom. United States ex rel. Richardson v. McMann, 340 F. Supp. 136 (S.D.N.Y. 1971), aff'd, 458 F.2d 1406 (2d Cir. 1972).

[40] 466 U.S. 668, 688, reh'g denied, 467 U.S. 1267, remanded to 737 F.2d 894 (11th Cir. 1984).

[41] Strickland, 466 U.S. at 694.

[42] Francis, supra note 25, at 722 (citing Hill v. Lockart, 474 U.S. 52, 59 (1985)).

[43] Id. at 721.

[44] Kirke D. Weaver, A Change of Heart or a Change of Law? Withdrawing a Guilty Plea Under Federal Rule of Criminal Procedure 32(E), 92 J. Crim. L. & Criminology 273, 274-75 (2001-02) (citing Fed. R. Crim. P. 32(e)).

[45] Id. at 274-75 (citing United States v. Fitzhugh, 78 F.3d 1326, 1328 (8th Cir. 1996); United States v. Gonzalez, 202 F.3d 20, 24 (1st Cir. 2000); United States v. Sanchez-Barreto, 93 F.3d 17, 23 (1st Cir. 1996)). Weaver notes that the first prong of the four-part balancing test merely restates the overarching standard, and thus "the true analysis for the Rule 32 standard currently focuses only on innocence, delay, and prejudice." Id. at 276.

[46] Id. at 276.

[47] Kadwell v. United States, 315 F.2d 667, 670 (9th Cir. 1963).

[48] Id. "As the decisions repeatedly emphasize, disappointment in the sentence imposed is no ground for withdrawal of a guilty plea." Id. at 670 n. 11 (citing Verdon v. United States, 296 F.2d 549, 553 (8th Cir. 1961); United States v. Parrino, 212 F.2d 919, 921 (2d Cir. 1954); Friedman v. United States, 200 F.2d 690, 696 (8th Cir. 1952)).

[49] See, e.g., Commonwealth v. Pantalion, 957 A.2d 1267, 1271 (Pa. Super. Ct. 2008) ("[A] defendant who attempts to withdraw a guilty plea after sentencing must demonstrate prejudice on the order of manifest injustice before withdrawal is justified."); Neidlinger v. State, 230 P.3d 306, 308 (Wyo. 2010) ("If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only to correct manifest injustice."); State v. Sappington, No. 09AP-988, slip op. at 1 (Ohio Apr. 20, 2010), available at 2010 WL 1633373 ("[Criminal Rule] 32.1 permits a motion to withdraw a guilty plea 'only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.'"); State v. Cason, No. M2008-02563-CCA-R3-CD, 2010 WL 1333143, at *1 (Tenn. Crim. App. Apr. 6, 2010) ("After the sentence has been imposed, but before judgment has become final, the trial court may set aside the judgment of conviction and allow a defendant to withdraw a guilty plea only to correct manifest injustice.").

[50] Hill v. United States, 368 U.S. 424, 428 (1962); see also Fed. R. Crim. P. 32 (comment).

By replacing the "manifest injustice" standard with a requirement that, in cases to which it applied, the defendant must (unless taking a direct appeal) proceed under 28 U.S.C. § 2255, the amendment avoids language which has been a cause of unnecessary confusion. Under the amendment, a defendant who proceeds too late to come under the more generous "fair and just reason" standard must seek relief under § 2255, meaning the applicable standard is that stated in Hill v. United States: "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure."

Fed. R. Crim. P. 32(d) (quoting Hill, 368 U.S. at 428).

[51] The rule had been accepted by the Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits, and by the Army Court of Military Review, as well as the courts of the District of Columbia, Alabama, Alaska, Arizona, California, Connecticut, Delaware, Florida, Georgia,

Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin. Chin & Holmes, supra note 11, at 706-09.

52 Commonwealth v. Frometa, 555 A.2d 92, 92 (Pa. 1989).

53 See Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

54 Id. at 1477.

55 Id.

56 Padilla v. Kentucky, 2004-CA-001981-MR, 2006 Ky. App. LEXIS 98, at *2 (Ky. Ct. App. Mar. 31 2006). Although this was not included in the opinions of the trial, appellate, or Supreme Courts, the weight of marijuana at issue was entered into the record at Padilla's video recorded guilty plea hearing.

57 Id.

58 Id. at 10.

59 Id.

60 Id. at 2.

61 Id.

62 8 U.S.C. § 1227(a)(2)(B)(i) (Supp. 2010).

63 Padilla, 2004-CA-001981-MR, at *2.

64 Id. at *2-3.

[65] Id. at *3-4 (quoting the district court).

[66] Id.

[67] Id.

[68] Id. at *8-9 (emphasis added).

[69] Id. at *9; see Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).

[70] Padilla, 2004-CA-001981-MR, at *9.

[71] Id. at *10 (quoting the district court).

[72] Id. at *10-11.

[73] Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008), rev'd & remanded, Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

[74] Id. at 485.

[75] Id. (Cunningham, J., dissenting).

[76] Padilla, 130 S. Ct. 1473.

[77] Id. at 1478.

[78] Id. at 1480.

[79] Id. at 1481 (citing Strickland v. Washington, 466 U.S. 668, 688, reh'g denied, 467 U.S. 1267 (1984)).

[80] Id. at 1481-82 (citing Strickland, 466 U.S. 668; United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982)).

[81] Id. at 1483-86.

[82] Id. at 1484. (emphasis added)

[83] Id. at 1483.

[84] Id.

[85] Id.

[86] Id. at 1485; see Strickland, 466 U.S. at 692.

[87] Padilla, 130 S. Ct. at 1487 (Alito, J., concurring).

[88] Id. at 1487-88.

[89] Id. at 1495-96 (Scalia, J., dissenting).

[90] Id. at 1496; see generally McCarthy v. United States, 394 U.S. 459, 466 (1969); Brady v. United States, 397 U.S. 742, 748 (1970).

[91] Padilla, 130 S. Ct. at 1481 ("We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under Strickland. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.") (citing Strickland, 466 U.S. at 689).

[92] Id. at 1487-88, 1494-95. By arguing in favor of the direct/collateral test in general, the concurrence and dissent tacitly imply that the majority has, in fact, abrogated the test altogether.

[93] Id. at 1485.

[94] See generally id.

[95] See generally id.

[96] Id.

[97] See infra Section IV.C.

[98] No. 09 CIV4539(HB), 2010 WL 1631497, at *1 (S.D.N.Y. Apr. 20, 2010).

[99] Ellington, 2010 WL 1631497, at *1.

[100] Id. at *3.

[101] Id. (quoting Plea Allocution).

[102] Id.; see Strickland v. Washington, 466 U.S. 668, 688, reh'g denied, 461 U.S. 1267 (1984).

[103] No. 09 Civ. 8217, 2010 WL 1645055, at *1 (S.D.N.Y. Apr. 22, 2010).

[104] Boakye, 2010 WL 1645055, at *3.

[105] Id.

[106] 2010 WL 1631497, at *3.

[107] Boakye, 2010 WL 1645055, at *5 (quoting plea transcript).

[108] Id.; see generally Padilla, 130 S. Ct. 1473; Ellington, 2010 WL 1631497, at *1.

[109] Boakye, 2010 WL 1645055, at *4 (quoting Brief for the Petitioner).

[110] Padilla, 130 S. Ct. at 1485.

[111] Id. at 1483 (emphasis added).

[112] See generally id.

[113] 489 U.S. 288, 310, reh'g denied, 490 U.S. 1031 (1989) ("We now adopt Justice Harlan's view of retroactivity for cases on collateral review. Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

[114] "A holding constitutes a 'new rule' within the meaning of Teague if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final."' O'Dell v. Netherland, 521 U.S. 151, 156 (1997) (quoting Teague, 489 U.S. at 301).

[115] John H. Blume III & William Pratt, Understanding Teague v. Lane, 18 N.Y.U. Rev. L. & Soc. Change 325, 326 (1991) ("The presumption that all decisional rules apply retroactively finds its roots in the Blackstonian idea that 'the duty of the court is not to 'pronounce a new law, but to maintain and expound the old one.'") (quoting Linkletter v. Washington, 381 U.S. 618, 622-23 (1965)); see also 1 William Blackstone, Commentaries on the Laws of England 69 (15th ed 1809).

[116] United States v. Buford, 623 F. Supp. 2d 923, 926 (M.D. Tenn. 2009) (quoting Griffith v. Kentucky, 479 U.S. 314, 328, remanded to United States v. Brown, 817 F.2d 674 (10th Cir. 1987)).

[117] Penry v. Lynaugh, 492 U.S. 302, 330, remanded to 882 F.2d 141 (5th Cir. 1989).

[118] Graham v. Collins, 506 U.S. 461, 478, reh'g denied, 507 U.S. 968 (1993) (citing Saffle v. Parks, 494 U.S. 484, 495, reh'g denied, 495 U.S. 924 (1990), remanded to Parks v. Saffle, 925 F.2d 366 (10th Cir.), cert. denied, 112 S. Ct. 213 (1991)).

[119] Gacko v. United States, No. 09-CV-4938 (ARR), 2010 WL 2076020, *3 (E.D.N.Y May 20, 2010); see Teague, 489 U.S. 288 (1989); see generally 28 U.S.C. § 2255(f)(3) (Supp. 2010).

[120] See, e.g., Gacko, 2010 WL 2076020, at *1; United States v. Millan, Nos. 3:06cr458/RV, 3:10cv165/RV/MD, 2010 WL 2557699, at *1 (N.D. Fla. May 24,

2010).

121 No. 09-CV-4938 (ARR), 2010 WL 2076020, at *1 (E.D.N.Y May 20, 2010).

122 Gacko, 2010 WL 2076020, at *2.

123 Id. at *3.

124 Id. (citing 28 U.S.C. § 2255(f)(3); Teague, 489 U.S. 288); see Strickland v. Washington, 466 U.S. 668, 688, reh'g denied, 467 U.S. 1267 (1984).

125 Gacko, 2010 WL 2076020, at *3.

126 Nos. 3:06cr458/RV, 3:10cv165/RV/MD, 2010 WL2557699, *1 (N.D. Fla. May 24, 2010).

127 Millan, 2010 WL 2557699, at *1.

128 Id. (citations omitted); see Strickland v. Washington, 466 U.S. 668, 688, reh'g denied, 461 U.S. 1267 (1984); United States v. Guzman-Garcia, No. CR F 06-0390 LJO, 2010 WL 1791247, at *2 (E.D. Cal. May 3, 2010).

129 Millan, 2010 WL 2557699, at *2.

130 903 N.Y.S.2d 696, 576 (N.Y. Crim. Ct. May 26, 2010).

131 Bennett, 903 N.Y.S.2d at 576.

132 Id.

133 Id.; see Teague v. Lane, 489 U.S. 288 (1989).

134 Bennett, 903 N.Y.S.2d at 699; see Strickland, 466 U.S. 668.

135 Bennett, 903 N.Y.S.2d at 700 (quoting Padilla, 130 S. Ct. at 1485).

136 Id.

137 Id.

138 28 U.S.C. § 2255 (2008).

139 See Teague, 489 U.S. at 289-91.

140 See Maxwell v. Larkins, No. 4:08 CV 1896 DNN, 2010 WL 2680333, at *3 (E.D. Mo. July 1, 2010).

141 See generally Padilla, 130 S. Ct. at 1466-67.

142 Id.

143 No. 4:08 CV 1896 DNN, 2010 WL 2680333, at *11 (E.D. Mo. July 1, 2010).

144 Larkins, 2010 WL 2680333, at *5.

145 Id. at *1.

146 Id.

147 Id. at *2.

148 Id. at *9. The district court considered whether registration and civil commitment were (1) intimately related to the criminal process, (2) long recognized as a penalty, and (3) can be the most important consequence of a guilty plea. Id.

149 Id. (citing R.W. v. Sanders, 168 S.W.3d 65, 69 (Mo. 2005)).

150 Id.

151 See id.

152 698 S.E.2d 384, 385 (Ga. Ct. App. 2010).

153 Taylor, 698 S.E.2d at 385. Taylor was also prohibited from interacting with minors, including his own children. Id.

154 Id. at 386.

155 Id.

156 Id. at 385.

157 Id. at 388 (citing Padilla, 130 S. Ct. at 1481).

158 Id. at 388-89 (citations omitted).

159 Id. at 389 (citing Padilla, 130 S. Ct. at 1483).

160 Id. ("In light of these combined factors, we conclude that the failure to advise a client that pleading guilty will require him to register as a sex offender is constitutionally deficient performance, and the trial court erred in holding otherwise.").

161 996 A.2d 1090 (Pa. Super. Ct), appeal granted in part, 9 A.3d 1133 (Pa. 2010).

162 Abraham, 996 A.2d at 1091.

163 Id. at 1092.

164 Id.

165 Id.

166 555 A.2d 92 (Pa. 1989).

167 See Abraham, 996 A.2d at 1092.

168 Id.

169 Id. at 1095.

170 See id.

171 But cf. Smith v. State, 697 S.E.2d 177, 180-81 (Ga. 2010) (refusing to expand the requirement that counsel inform defendants of immigration consequences of guilty plea to judges); State v. Romos, No. 09-0585, 2010 WL 2598630, at *2 (Iowa Ct. App. June 30, 2010) (holding immigration consequences beyond deportation are collateral and do not rise to the level of ineffective assistance).

172 Padilla, 130 S. Ct. at 1494, 1496-97.

173 Id. at 1477.

174 Id. at 1481 ("[R]ecent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.").

175 Indeed, this reality is recognized explicitly by the concurrence. Padilla, 130 S. Ct. at 1491 (Alito, J., & Roberts, C.J., concurring) ("[I]f defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable.").

176 207 F. Supp. 2d 61, 62 (W.D.N.Y. 2002).

177 Worrell, 207 F. Supp. 2d at 62.

178 Id. at 63 ("Although, as noted, petitioner committed the weapons offense in 1990,

and was convicted in 1991, the INS did not begin removal proceedings against him until September 8, 1998.").

179 See also, e.g., Ojehanon v. I.N.S., No. 92-5160, 1994 WL 93272, at *2 (5th Cir. Mar. 9, 1994) ("Ojehanon was not deported until months later, when satisfactory arrangements could be made.").

180 See Renteria-Gonzalez v. I.N.S., 322 F.3d 804 (5th Cir. 2002).

181 322 F.3d 804, 808 (5th Cir. 2002). This violated 8 U.S.C. § 1324(a)(1) (2005) and 18 U.S.C. § 2 (2005).

182 Renteria-Gonzalez, 322 F.3d at 808.

183 Id.

184 Id. at 809.

185 Id. at 812-13.

186 220 F.3d 1116, 1117 (9th Cir. 2000).

187 Alarcon-Serrano, 220 F.3d at 1117-18 n.3.

188 Id. at 1120.

189 See, e.g., Lopez-Molina v. Ashcroft, 368 F.3d 1206, 1209 (9th Cir. 2004) ("We applied these very provisions in Alarcon-Serrano, and did so under virtually identical circumstances, before concluding that we lack jurisdiction to review a final removal order that was premised upon the 'reason to believe' standard of § 1182(a)(2)(C)." (citing 8 U.S.C. § 1182(a)(2)(C) (2005); Alarcon-Serrano, 220 F.3d at 1120)).

190 Ellington v. United States, No. 09 CIV 4539 (HB), 2010 WL 1631497, at *2-3 (S.D.N.Y. Apr. 20, 2010) (finding conditional language sufficient under Padilla v. Kentucky, 130 S. Ct. 1473 (2010)); Boakye v. United States, No. 09 Civ. 8217, 2010

WL 1645055, at *4-5 (S.D.N.Y. Apr. 22, 2010) (finding conditional language insufficient under Padilla).

191 See Renteria-Gonzalez v. I.N.S., 322 F.3d 804, 808 (5th Cir. 2002); Alarcon-Serrano, 220 F.3d at 1117-18 n.3; Worrell v. Ashcroft, 207 F. Supp. 2d 61, 62-63 (W.D.N.Y. 2002).

192 See, e.g., Tanya Broder & Clara Luz Navarro, A Street Without an Exit: Excerpts from the Lives of Latinas in Post-187 California, 7 Hastings Women's L.J. 275, 289 (1996).

193 130 S. Ct. 1473 (2010).

194 See, e.g., Gacko v. United States, No. 09-CV-4938 (ARR), 2010 WL 2076020, at *3 (E.D.N.Y May 20, 2010); United States v. Millan, Nos. 3:06cr458/RV, 3:10cvl65/RV/MD, 2010 WL 2557699, at *1 (N.D. Fla. May 24, 2010).

195 See, e.g., United States v. Gonzalez, 202 F.3d 20 (1st Cir. 2000); United States v. Del Rosario, 902 F.2d 55 (D.C. Cir.), cert. denied, 498 U.S. 942 (1990); United States v. Yearwood, 863 F.2d 6 (4th Cir. 1988); Santos-Sanchez v. United States, 548 F.3d 327 (5th Cir. 2008), cert. granted, 130 S. Ct. 2340 (2010); Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir.), cert. denied, 543 U.S. 1034 (2004); United States v. Campbell, 778 F.2d 764 (11th Cir. 1985); Oyekoya v. State, 558 So. 2d 990 (Ala. Crim. App. 1989), cert. denied, 537 U.S. 1094 (1990); State v. Rosas, 904 P.2d 1245 (Ariz. Ct. App.), review denied, (1995); State v. Montalban, 810 So. 2d 1106 (La.), cert. denied, 537 U.S. 887 (2002); Commonwealth v. Frometa, 555 A.2d 92 (Pa. 1989).

196 See, e.g., cases cited supra note 195.

197 See, e.g., Del Rosario, 498 U.S. at 942.

198 358 F.3d 1251, 1255-56 (10th Cir.), cert. denied, 543 U.S. 1034 (2004).

199 Broomes, 358 F.3d at 1255.

200 Id.

[201] Id. at 1256.

[202] Id.

[203] Id. (citing Strickland v. Washington, 466 U.S. 668, 688, reh'g denied, 461 U.S. 1267 (1984)).

[204] Id.

[205] Id.

[206] 28 U.S.C. § 2255 (2002).

[207] No. 09-CV-4938 (ARR), 2010 WL 2076020, at *1 (E.D.N.Y. May 20, 2010).

[208] Nos. 3:06cr458/RV, 3:10cvl65/RV/MD, 2010 WL 2557699, at *1 (N.D. Fla. May 24, 2010).

[209] See 28 U.S.C. § 2255 (2002); Gacko, 2010 WL 2076020, at *3.

[210] For instance, the defendant in United States v. Del Rosario pleaded guilty to possession of cocaine with the intent to distribute. 902 F.2d 55, 56 (D.C. Cir. 1990). After serving a ten-month term of imprisonment, the INS moved to deport the defendant, who thereafter filed a motion to withdraw his guilty plea as involuntary because his counsel did not inform him of the deportation consequences it carried. Del Rosario, 902 F.2d at 56. The trial court dismissed the defendant's motion, holding that deportation was a collateral consequence of a guilty plea, and the D.C. Circuit affirmed. Id. at 59. Del Rosario petitioned for writ of certiorari to the Supreme Court and was denied. Del Rosario v. United States, 498 U.S. 942 (1990).

[211] See, e.g., Gacko, 2010 WL 2076020, at *3.

[212] 489 U.S. 288, reh'g denied, 490 U.S. 1031 (1989).

[213] Padilla v. Kentucky, 130 S. Ct. 1473, 1481 n.9 (2010).

214 See, e.g., People v. Kabre, 905 N.Y.S.2d 887, 891 (N.Y. Crim. Ct. 2010) (holding that "the Padilla rule is not a 'watershed' change that must be applied retroactively to cases on collateral review").

215 Indeed, Teague accords great weight to the importance of the finality of convictions. United States v. Martinez, 139 F.3d 412, 416 (4th Cir. 1998), cert. denied, 525 U.S. 1073 (1999) ("[O]ne of the two justifications for the Teague decision--and perhaps the central one--was concern for the finality of criminal convictions.") (citing Teague, 489 U.S. at 306-10).

216 For instance, in United States v. Nahodil, the defendant was charged with five weapons offenses, including two counts for possessing a firearm after a previous felony conviction, two counts of making false statements to acquire a firearm, and one count of carrying a firearm during and in relation to a drug trafficking crime. 776 F. Supp. 991, 992 (M.D. Pa. 1991), aff'd, 972 F.2d 1334 (3d Cir. 1992). In exchange for pleading guilty to carrying a firearm during and in relation to a drug trafficking crime, the Government dropped the remaining four charges. Id.

At Nahodil's plea colloquy, he admitted that he had brandished a rifle while orchestrating a cocaine transaction. Brief for the Appellee, United States v. Nahodil, No. 95-7208, 1995 WL 17169647, at *13 (3d Cir. Oct. 13, 1995). Nevertheless, the defendant maintained that he had not used the firearm in relation to a drug trafficking offense, but instead had merely held it as a "conversation piece." Id. at * 14. The trial court found this to be a sufficient factual basis for the defendant's conviction, and accepted his guilty plea as knowing, intelligent, and voluntary. Id. at *15-16. The Government's main witness then died, and thirteen months after the imposition of his sentence, the defendant moved to withdraw his guilty plea. Id. at *16.

Although the trial court dismissed the defendant's petition out of hand, the Third Circuit Court of Appeals found there to be arguable merit to the defendant's allegations of ineffective assistance of counsel. United States v. Nahodil, 36 F.3d 323, 327 (3d Cir. 1994). The court noted that, although the Government was certainly prejudiced by the loss of its most important witness, this was "not dispositive of a motion to withdraw the guilty plea if the original acceptance of the plea was improper or improvident." Id. at 330 (citing United States v. De Cavalcante, 449 F.2d 139, 141 (3d Cir. 1971) (per curiam), cert. denied, 404 U.S. 1039 (1972)). Having found that a record of Nahodil's "reluctance" to enter a guilty plea supported his claims of actual innocence--in spite of the defendant's on-the-record admission of actual guilt--the court remanded the matter for a hearing to determine whether trial counsel had improperly advised the defendant to plead guilty. Id. at 326-27.

217 Padilla, 130 S. Ct. at 1485 (stating "a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances").

218 See id.

219 Id. at 1496 (Scalia, J., dissenting) ("Adding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping-point.").

220 Id.

221 996 A.2d 1090 (Pa. Super. Ct.), appeal granted in part, 9 A.3d 1133 (Pa. 2010).

222 Abraham, 996 A.2d at 1092.

223 Id. at 1095.

224 See generally id.

225 466 U.S. 668, 688-89, reh'g denied, 467 U.S. 1267 (1984), superseded by statute on other grounds, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), as recognized in United States v. Matthews, 68 M.J. 29 (C.A.A.F. 2009); see Frazer v. S. Carolina, 430 F.3d 696, 713 (4th Cir. 2005) (quoting Strickland, 446 U.S. at 690) ("Once again reasonableness is the touchstone. Strickland directs courts to 'judge the reasonableness of counsel's challenged conduct on the facts of the particular case."').

226 United States v. Salameh, 54 F. Supp. 2d 236, 250 (S.D.N.Y. 1999) ("[T]here is no basis for the assertion that an attorney's assistance is ineffective merely because he has no prior experience in a particular district or in a particular area of law."), aff'd, 16 F. App'x 73 (2d Cir. 2001), cert. denied sub nom. Abouhalima v. United States, 536 U.S. 967 (2002).

227 Cf. Mitchell v. Kemp, 762 F.2d 886, 888-89 (11th Cir.) ("The reasonableness of a decision on the scope of investigation will often depend upon what information the defendant communicates to the attorney."), reh'g denied, 768 F.2d 1353 (1985), and cert. denied, 483 U.S. 1026 (1987).

[228] Brady v. United States, 397 U.S. 742, 752 n.10 (1970) (citing Newman, supra note 5, at 3 & n.1.

[229] 698 S.E.2d 384 (Ga. Ct. App. 2010).

[230] Petition for Writ of Certiorari, Bloomgarden v. United States, No. 10-89, 2010 WL 2797539, at *3 (U.S. 2010).

[231] Id.

[232] Id. at *5.

[233] Id. at *10 (citations omitted).

[234] Id.

[235] No. 7633-08, at 1 (Pa. C. Crim. D. filed May 6, 2010).

[236] Memorandum in Support of Defendant's Petition for Post-Conviction Relief, at 1, Commonwealth v. Rudegair, No. 7633-08 (Pa. C. Crim. Div. filed May 6, 2010).

[237] Id. at 7.

[238] Id. at 6 (citing 23 Pa. Cons. Stat. §§ 6344, 6344.2 (2007)).

[239] See 23 Pa. Cons. Stat. § 6344.2 (2007).

[240] Memorandum in Support of Defendant's Petition for Post-Conviction Relief, at 6, Commonwealth v. Rudegair, No. 7633-08 (Pa. C. Crim. Div. filed May 6, 2010).

[241] See, e.g., Petition for Writ of Certiorari, Zalazar v. New Jersey, No. 10-162, 2010 WL 3028834 (2010) (seeking writ of certiorari and relief from involuntary civil commitment as a sexually violent predator).

[242] Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (citing Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893), overruled in part by Yamataya v. Fisher, 189 U.S. 86, 101 (1903), as recognized in Kim Mo Ha v. Ashcroft, 257 F.3d 1095 (9th Cir. 2001)).

[243] Id.; see also United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982), abrogated by Padilla, 130 S. Ct. at 1481.

[244] See Gore v. United States, 357 U.S. 386, 393, reh'g denied, 358 U.S. 858 (1958) (stating that, whatever one's views of the severity, efficacy or futility of a sentence, "these are peculiarly questions of legislative policy"); cf. State Real Estate Comm'n v. Roberts, 258 A.2d 526, 527 (Pa. Super. Ct. 1969) (per curiam), aff'd. State Real Estate Comm'n v. Roberts, 271 A.2d 246 (Pa. 1970), cert. denied, 402 U.S. 905 (1971)("This is particularly severe for the real estate broker who must depend upon the support of both for his continued existence. . . . [T]he severe sanction of license suspension and revocation should not be imposed lightly. The right to suspend must be based on the clear mandate of the legislature.").

[245] See Ariz. R. Crim. P. 17.2(f) (requiring the court to tell defendants "'pleading guilty or no contest to a crime may affect your immigration status . . . [or] prevent you from ever being able to get legal status in the United States"'); Cal. Penal Code § 1016.5(a) (West 2008) (requiring the court to caution defendants that their conviction "may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization"); Conn. Gen. Stat. Ann. § 54-1j(a) (West 2003) (stating a court cannot accept a guilty plea until it "first addresses the defendant personally and determines that the defendant fully understands that if the defendant is not a citizen of the United States, [their] conviction . . . may have the consequences of deportation or . . .exclusion from readmission"); Ga. Code Ann. § 17-7-93 (West 2008) ("[P]rior to acceptance of a plea of guilty, the court shall determine whether the defendant is freely entering the plea with an understanding that if he or she is not a citizen of the United States, then the plea may have an impact on his or her immigration status."); Haw. Rev. Stat. § 802E-2 (West 2007) (requiring the court to caution defendants that their conviction "may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization"); Mass. R. Crim. P. 12 (stating the court must "inform the defendant on the record . . . of any different or additional punishment based upon subsequent offense or sexually dangerous persons provisions of the General Laws, if applicable . . . and . . . if the defendant is not a citizen of the United States, the guilty plea, plea of nolo contendere or admission may have the consequence of deportation, exclusion of admission, or denial of naturalization"); Neb. Rev. Stat. § 29-1819.02 (2002) (requiring the court to tell defendants that their conviction "may have the consequences of removal from the United States, or denial of naturalization"); N.Y. Crim. Proc. Law § 220.50 (McKinney 2009)

(requiring the court to tell a defendant "the court's acceptance [of his guilty plea] may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization"); N.C. Gen. Stat. Ann. § 15A-1022 (West 2009) (stating a court cannot accept a guilty plea "without first addressing him personally and . . . [i]nforming him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization"); Or. Rev. Stat. Ann. § 135.385(c)-(d) (West 2008) ("The court shall inform the defendant . . . [w]hen the offense charged is one for which a different or additional penalty is authorized by reason of the fact that the defendant may be adjudged a dangerous offender, that this fact may be established after a plea in the present action, thereby subjecting the defendant to different or additional penalty . . . [and t]hat if the defendant is not a citizen of the United States conviction of a crime may result . . . in deportation, exclusion from admission to the United States or denial of naturalization."); R.I. Gen. Laws § 12-12-22 (West 2000) (requiring the court to tell a defendant that "a plea of guilty or nolo contendere may have immigration consequences, including deportation, exclusion of admission to the United States, or denial of naturalization"); Tex. Code Crim. Proc. Ann. art. 26.13 (West 2009) (requiring a court to caution that "a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law; and . . . that the defendant will be required to meet the registration requirements of Chapter 62, if the defendant is convicted of or placed on deferred adjudication for an offense for which a person is subject to registration under that chapter"); Vt. Stat. Ann. tit. 13, § 6565 (West 2005) (requiring the court to tell a defendant that "admitting to facts sufficient to warrant a finding of guilt or pleading guilty or nolo contendere to a crime may have the consequences of deportation or denial of United States citizenship").

246 Brady v. United States, 397 U.S. 742, 752 n.10 (1970) (quoting Newman, supra note 5, at 3 & n.1 ("It has been estimated that about 90%, and perhaps 95%, of all criminal convictions are by pleas of guilty; between 70% and 85% of all felony convictions are estimated to be by guilty plea.")).

247 130 S. Ct. 1473, 1481 (2010) (citing Strickland v. Washington, 466 U.S. 668, 668, reh'g denied, 467 U.S. 1267 (1984)).

248 Padilla, 130 S. Ct. at 1483 (distinguishing between trial counsel's duty to "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences," and the duty to "give correct advice") (emphasis added).

249 United States v. Obonaga, No. 07-CR-402 (JS), 2010 WL 2629748, at *1 (E.D.N.Y. June 24, 2010) ("Reasonable jurists have disagreed about whether Padilla has retroactive effect.").

250 No. 09 Civ. 8217, 2010 WL 1645055, at *4 (S.D.N.Y. Apr. 22, 2010) (finding the "use of the words 'possible' and 'might' misled the Petitioner, where the Petitioner was actually subject to 'automatic' deportation.").

251 See, e.g., Worrell v. Ashcroft, 207 F. Supp. 2d 61, 62-63 (W.D.N.Y. 2002).

252 See, e.g., Gacko v. United States, No. 09-CV-4938 (ARR), 2010 WL 2076020, at *3 (E.D.N.Y May 20, 2010).

253 See Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir.), cert. denied, 543 U.S. 1034 (2004) (diligently presenting an identical claim as presented by Padilla, and failing to obtain certiorari).

254 Padilla, 130 S. Ct. at 1496 (Scalia & Thomas, JJ., dissenting) ("Adding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping-point.").

255 See Gore v. United States, 357 U.S. 386, 393, reh'g denied, 358 U.S. 858 (1958) (stating that, whatever one's views of the severity, efficacy or futility of a sentence, "these are peculiarly questions of legislative policy").

256 Padilla, 130 S. Ct. at 1482 ("Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a Strickland claim concerning the specific risk of deportation.").