

## — The Champion —(forthcoming)

# Padilla v. Kentucky:

## The Right to Counsel and the Collateral Consequences of Conviction

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On March 31, 2010, the Supreme Court handed down a 7-2 decision in *Padilla v. Kentucky*,<sup>1</sup> surprising even those who had been following the case closely. In an extraordinary expansion of the Sixth Amendment rights of criminal defendants, the Court held that a defense lawyer failed to provide his noncitizen client effective assistance of counsel under *Strickland v. Washington*<sup>2</sup> when he did not warn him that he was almost certain to be deported if he pled guilty. It is the first time that the Court has applied the 1984 *Strickland* standard to a lawyer's failure to advise a client about a consequence of conviction that is not part of the sentence imposed by the court.

While *Padilla*'s implications for cases involving deportation are clear, it may also require lawyers to consider many other legal implications of the plea.

Justice Stevens, writing for the five-Justice majority, began his opinion by explaining that Jose Padilla, a native of Honduras, had been a lawful permanent resident of the United States for more than 40 years, and had served with honor as a member of the U.S. Armed Forces during the Vietnam War. Padilla faced deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky. His state felony drug-trafficking crime was clearly a deportable offense. The problem was that Padilla claimed his lawyer had advised him to plead guilty after reassuring him that he "did not have to worry about immigration status since he had been in the country for so long." Padilla lodged a state post-conviction petition, claiming that he would have refused the plea and insisted on going to trial if he had been correctly advised about its consequences for his immigration status. As relief, he sought vacatur of the conviction and withdrawal of his plea. The Supreme Court of Kentucky refused his request, holding that the Sixth Amendment's guarantee of effective assistance of counsel affords no protection against a lawyer's erroneous advice about a

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\* Ms. Love and Professor Chin worked on the ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, on the Uniform Collateral Consequences of Conviction Act, and on an ABA amicus brief in *Padilla v. Kentucky*. They would like to thank Richard Cassidy and Peter Goldberger for their comments on an earlier draft of this article.

<sup>1</sup> 559 U.S. \_\_\_\_ (March 31, 2010).

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

“collateral” consequence of conviction, which it defined as one that is not within the sentencing authority of the trial court.

Seven Justices of the Supreme Court ruled that his lawyer’s incompetent advice violated Mr. Padilla’s right to counsel. While two concurring Justices thought the case should have turned on the fact that the advice was incorrect, all seven agreed that lawyers for non-citizen defendants who are considering a guilty plea have an affirmative obligation at least to warn their clients that they may be deported as a result. Even the two dissenters expressed sympathy with Mr. Padilla’s situation, suggesting that he might have secured their vote if he had based his claim on the Due Process Clause rather than the Sixth Amendment.

The *Padilla* decision clearly governs cases where a noncitizen is threatened with deportation on the basis of conviction. But if that were all, it would not “mark a major upheaval in Sixth Amendment law,” as the concurring Justices warned. While *Padilla*’s effects will be felt most immediately in the tens of thousands of criminal cases involving noncitizen defendants, defense lawyers must now concern themselves more generally with the broader legal effects of a criminal conviction on their clients. The systemic impact of this new obligation cannot be underestimated. *Padilla* may turn out to be the most important right to counsel case since *Gideon*, and the “*Padilla* advisory” may become as familiar a fixture of a criminal case as the *Miranda* warning.

### *I. Decoding the Padilla Decision*

*Padilla*’s five-Justice majority traced the historical relationship between alienage and criminal prosecution, concluding that recent changes in immigration laws “have dramatically raised the stakes of a noncitizen’s criminal conviction.” It then observed that “Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important.” Likening deportation to banishment or exile, the majority held that deportation is “an integral part – indeed, sometimes the most important part -- of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” Citing the ABA Criminal Justice Standards as well as various other performance guidelines promulgated by public defender and other professional organizations, the Court found that prevailing professional norms of effective representation require counsel in every case to advise a non-citizen client “regarding the risk of deportation.” Competent representation in Mr. Padilla’s case required more than simply a warning about risk, however, because “the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequences for Padilla’s conviction.”

In this case, because the indirect consequences of a guilty plea were both critically important to the client and “truly clear,” Padilla’s lawyer had an affirmative “duty to give correct advice.” As evidence of the “critical” importance of advice about deportation in the plea context, the Court

noted that more than half the states – including Kentucky itself - already require the trial court to alert defendants to possible immigration consequences. Accordingly, the lawyer’s failure to give Mr. Padilla correct advice fell below an objective standard of reasonableness in violation of Strickland’s first (“competence”) prong.

The Court could have decided the case in Padilla’s favor on the narrower ground that he had been given incorrect advice, as urged by the Solicitor General, a rule that it conceded “has support among the lower courts.” That path would, however, “invite two absurd results.” First, finding constitutional incompetence in misadvice alone would “give counsel an incentive to remain silent on matters of great importance, even when answers are readily available.” Second, silence “would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available.” The Court emphasized that “[i]t is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the ‘mercies of incompetent counsel,’” *citing McMann v. Richardson*.<sup>3</sup>

The Court gave a practice-oriented demonstration of how “informed consideration” of immigration consequences in the plea bargaining process “can only benefit both the State and noncitizen defendants:”

By bringing deportation consequences into [the plea-bargaining] process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to 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. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

Justice Alito, joined by Chief Justice Roberts, concurred with the majority’s conclusion that Mr. Padilla had received constitutionally incompetent representation. However, he thought the specific defect in Padilla’s lawyer’s performance was in “unreasonably providing incorrect advice” about the likelihood of his client’s deportation, not in failing to provide him accurate advice in the first instance (an issue that the case arguably did not present). At the same time, Justice Alito also held that it is part of a lawyer’s constitutional duty in representing a noncitizen to “advise the defendant that a criminal conviction may have adverse immigration consequences.” Though he later criticized the majority for its “dramatic departure” from the “longstanding and unanimous” opinion of the lower federal courts that a lawyer need only avoid giving misadvice, he himself appears to have joined in this dramatic departure by declaring that a lawyer may not stand mute when his noncitizen client is considering a plea: In light of “the

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<sup>3</sup> 397 U. S. 759, 771 (1970).

extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea. . . . , silence alone is not enough to satisfy counsel's duty to assist the client." Again, the lawyer must "put[] the client on notice of the danger of removal" so as to "significantly reduce the chance that the client would plead guilty under a mistaken premise."

Once the lawyer has advised about the "general risk" of deportation, however, Justice Alito would impose no other duty than to advise the client to "consult an immigration attorney." The source of Justice Alito's reluctance to impose a duty of explanation on defense counsel (the only way in which his opinion differs from the majority) lies in the arcane and uncertain intricacies of immigration law, which he illustrated in sometimes-amusing detail from the ABA Criminal Lawyer's Guide to Immigration Law: Questions and Answers, by Robert McWhirter. Because of the complexity and ambiguity of immigration law, "it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms."

As a theoretical matter, Justice Alito's formulation of the applicable Sixth Amendment "competence" standard is a little hard to distinguish from Justice Stevens' for the Court. Both reject the rule proposed by the Solicitor General that a noncitizen defendant should prevail on his constitutional claim only if he was misadvised, but not if he received no advice at all. Both agree that a lawyer cannot be silent where her client is in jeopardy of deportation. If Justice Alito's reluctance to go as far as the majority is only because of the uncertainties of immigration law, there may be little or no difference between them in a situation where the law is not "truly clear."

In light of Justice Alito's detailed justification for a "misadvice" rule, however, and his partial concession to its doctrinal inconsistency in embracing a duty to warn, it is tempting to speculate that he had at one point been assigned by the Chief Justice to write for the Court. The fact that Justice Scalia directs most of his criticism to the concurrence reinforces the impression that it began as a plurality opinion. What may have persuaded two Justices to join Justice Stevens' opinion is the likely real-world effect of limiting defense counsel's obligation to a warning: Indigent defendants represented by appointed counsel or public defenders cannot hire specialized immigration counsel, so that a warning would likely have almost the same result as silence in most common plea bargaining scenarios involving noncitizens. Accordingly, encouraging a defender to fob off her own advice-giving duties on other lawyers would result in the client being essentially uncounseled on an issue of momentous importance, and without an effective advocate at the bargaining table. Thus the majority opinion responds to the practical needs of non-citizens caught up in the criminal justice system, in insisting that criminal defense lawyers familiarize themselves with issues that have historically been "intimately related to the criminal process" and an "integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."

It is remarkable that even the two dissenting Justices thought the law should provide relief to someone in Mr. Padilla's situation. Justice Scalia, writing for himself and Justice Thomas, began his opinion by stating that "[i]n the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction." He was unwilling to extend the constitutional right to counsel beyond advice directly related to defense against prosecution of the charged offense, however, on the theory that "[s]tatutory provisions can remedy these concerns in a more targeted fashion, and without producing permanent, and legislatively irreparable overkill."

Somewhat inconsistently, however, Justice Scalia suggested that Padilla might have been on surer constitutional ground if he had based his claim on the Due Process clause, arguing that his plea was not knowing and voluntary. This, too, if adopted, would go far beyond almost all prior case law, which takes the position that a defendant need only be made aware of the "direct" and not the "collateral" consequences of a guilty plea in order for that plea to be considered "knowing." And if Justices Scalia and Thomas are correct in their suggestion, then a new duty would fall not only on counsel (under the Sixth Amendment holding) but also on every court accepting a guilty plea to conduct the colloquy so as to ascertain the defendant's knowledge of the most important collateral consequences.

The Court remanded Mr. Padilla's case to the Kentucky courts for an assessment of whether, with correct advice, he would have been "rational" in insisting on going to trial on the charges he was facing, or might have sought and been able to negotiate a different plea. If he is thus unable to establish prejudice, *Strickland's* second prong, Mr. Padilla's plea will stand, along with its adverse implications for his immigration status. If he can establish prejudice and his plea is vacated, immigration authorities will have no further basis on which to remove him.<sup>4</sup> While Kentucky authorities might seek to retry him, that would seem anomalous since he has already fully served his sentence.

## ***II. Lawyering Implications of the Padilla Decision***

### ***A. Consideration of Deportation in Criminal Cases***

#### *1. Retroactivity*

The Court signaled that its holding will have some retroactive effect as an application of *Strickland*, as opposed to a "new rule" of constitutional law.<sup>5</sup> Evidently recognizing this, the

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<sup>4</sup> See *Matter of Adamiak*, 23 I&N dec. 878 (BIA 2006) (conviction vacated for failure advise about immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) ("We will . . . accord full faith and credit to this state court judgment [vacating a conviction under New York state law]").

<sup>5</sup> See *Padilla*, Slip opinion at note 12, suggesting that the decision follows directly from *Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985) (explaining how *Strickland* applies to guilty pleas). See also *Williams v. Taylor*, 529 U. S. 362,

Court predicted that its decision would not unsettle many convictions already obtained (“For at least the past 15 years, professional norms have required defense counsel to provide advice on the deportation consequences of a client’s plea”). It noted that in any event its decision in *Hill v. Lockhart*<sup>6</sup> had produced no flood of vacated pleas: “to obtain relief on this type of claim a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances,” citing *Roe v. Flores-Ortega*.<sup>7</sup> Moreover, as the Court wisely noted with respect to all pleas, withdrawing or overturning a plea means a client loses the benefit of the plea and may face trial which could lead to a more severe result: “The nature of relief secured by a successful collateral challenge to a guilty plea – an opportunity to withdraw the plea and proceed to trial – imposes its own significant limiting principle.”

The ability of noncitizens to challenge ineffectively counseled state court pleas in state court, as Mr. Padilla attempted to do, turns on the present availability of a state court procedural vehicle, both in terms of timeliness and in terms of possible of procedural default rules. Their ability to proceed through federal habeas corpus under 28 U.S.C. § 2254 depends first on exhaustion of state remedies, which vary widely around the Nation. Thus, relief for many *Padilla* violations may turn on the vagaries of state postconviction law, at least initially. Moreover, a *Padilla* challenger faces the same one-year AEDPA statute of limitations as any other petitioner.<sup>8</sup> Realistically, few will navigate this procedural minefield successfully. (Mr. Padilla himself would have been out of time to file for federal habeas corpus relief, had the Supreme Court not granted certiorari on appeal from denial of his state post-conviction petition.<sup>9</sup>)

As for federal convictions, a motion under 28 U.S.C. § 2255 would be available for one year after the conviction became final. (In the typical case where no appeal was taken after sentencing, this means one year after the time to appeal expired.) After that time has run out, however, the federally convicted noncitizen (unlike the noncitizen convicted in state court) may still have a coram nobis remedy under 28 U.S.C. § 1651, the all-writs act. In this connection, it is worth reviewing a little-noticed, recent Supreme Court case, *United States v. Denedo*.<sup>10</sup> In

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390-91 (2000) (applying *Strickland* to particular scenarios does not establish a “new rule” under *Teague v. Lane*, 489 U.S. 288 (1989)).

<sup>6</sup> See note 5, *supra*.

<sup>7</sup> 528 U.S. 470, 480, 486 (2000).

<sup>8</sup> See 28 U.S.C. § 2244(d).

<sup>9</sup> Because Padilla had waited more than a year before filing his state-court petition, the federal (AEDPA) statute of limitations had run out before he even began to exhaust his remedies. Had he filed within the first year after his conviction became final, on the other hand, the state court post-conviction filing would have tolled the federal statute as of that date.

<sup>10</sup> 129 S. Ct. 2213 (2009).

*Denedo*, a Nigerian national serving in the U.S. Navy had pleaded guilty in military court to an offense after his attorney, like *Padilla*'s, assured him he would not be deported. Six years later, following his discharge from the service, he was put in deportation proceedings. Justice Kennedy writing for five Justices said that the plea could be challenged in an Article I military court under § 1651.<sup>11</sup>

## 2. *Advice and Advocacy Going Forward*

Most jurisdictions already require judicial advice about the possibility of deportation at the time of a plea. After *Padilla*, this advice is mandated by the Sixth Amendment as a part of every criminal case. Prosecutors and judges who want their pleas to hold up will almost certainly require confirmation, as part of a plea colloquy or plea agreements, that the defense attorney's *Padilla* advisory has taken place. That the *Padilla* holding rested squarely on the Sixth Amendment, however, makes clear that counsel's new duty extends to every criminal case – not just the 95% that result in guilty pleas, but also those that go to trial. A defendant can be adversely affected by ignorance or misunderstanding about immigration consequences as much in a case that goes to trial as one that ends in a guilty plea. Just as one better-informed defendant might choose to go to trial rather than plead, so another might choose to negotiate a plea rather than stand trial.

The Court's opinion, though, did not merely require advice about immigration consequences. In addition, it suggested that a defendant's immigration status can be an important bargaining chip for the defense in plea negotiations, as earlier described. The amicus brief filed by the ABA in the case describes how immigration status is taken into account in a number of pre-judgment contexts, including prosecutorial charging, bail, and sentencing decisions.<sup>12</sup> There is also evidence that prosecutors take the possibility of deportation and other collateral consequences into account in plea negotiations.<sup>13</sup> Accordingly, *Padilla* gives formal recognition to the principle that counsel must consider immigration status not just so the client knows her situation, but also to change or improve the plea.

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<sup>11</sup> See generally Defending Immigrants Partnership, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS: A NATIONAL GUIDE, Chapter 5, accessible at <http://defendingimmigrants.org/>.

<sup>12</sup> See Brief for the American Bar Association as amicus curiae, *Padilla v. Kentucky*, U.S. Supreme Court, No.08-651, [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-651\\_PetitionerAmCuABA.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-651_PetitionerAmCuABA.pdf).

<sup>13</sup> See Robert M.A. Johnson, *NDAA President's Letter: Collateral Consequences*, THE PROSECUTOR, May/June 2001) [www.ndaa.org/publications/ndaa/toc\\_may\\_june\\_2001.html](http://www.ndaa.org/publications/ndaa/toc_may_june_2001.html) ("Judges often consider the collateral consequences of a conviction, and prosecutors also must consider them if we are to see that justice is done."); 8 U.S.C. §1228(c)(5) (stipulation to deportability as part of plea bargain); *State v. Rodriguez*, 45 P.3d 541, 547 (Wash. 2002) (witness pleaded guilty because prosecutor agreed to recommend deportation instead of jail sentence); *People v. Bautista*, 8 Cal. Rptr. 3d 862, 870 & n.8 (Ct. App. 2004) (in ineffective assistance of counsel claim, court considered expert's declaration that techniques used to defend against adverse immigration consequences include pleading to different but related offense, 'pleading up' to a nonaggravated felony even if the penalty is stiffer, and obtaining disposition of 364 days instead of 365 days.").

The decision is also likely to encourage closer working relationships between the criminal defense and immigration bars, and a better understanding by defense lawyers of what is concededly a complex and uncertain area of the law. Hopefully, it may also lead to clarification and simplification of that body of law, and greater fairness in its administration. The inconsistencies and uncertainties revealed in the passages from the ABA Criminal Lawyer's Guide to Immigration Law quoted by Justice Alito would be hilarious if the subject matter were not so deadly serious. The recent changes in immigration law described by the Court's opinion have all been geared toward eliminating all possibility of discretionary leniency for noncitizens unfortunate enough to be caught at the intersection of the criminal and immigration systems. It is possible that the *Padilla* decision will eventually produce a climate in which some of those changes can be reconsidered.

### ***B. Sex Offender Registration and Other Collateral Consequences***

The biggest question mark about *Padilla*, and its greatest potential for systemic impact beyond the immigration context, lies in its extension to indirect legal effects of a plea other than deportation. The opinion does not explicitly require notice of other "collateral" consequences of conviction, such as sex offender registration and residency requirements, loss of licenses, firearm possession bans, ineligibility for public housing or other benefits, or the right to adopt or maintain other family relationships. Yet, from their perspective, clients have an interest in learning of severe and certain legal consequences of the plea in non-immigration areas. In carrying out plea negotiations, avoiding a life-time registration requirement or loss of a professional license may be just as important a goal as avoiding deportation, and those collateral consequences may be just as useful as bargaining chips. In addition, a client informed about one category of consequences, those having to do with immigration status, may assume that those are the only important consequences, so that partial advice may be misleading. For all of these reasons, as a matter of competent lawyering, the client should know all significant and certain legal effects of the plea, and means of avoiding them through the structure of the plea should be explored. Any concessions warranted because of severe collateral effects should be requested from prosecutors and sentencing courts.

This seems to be the import of *Padilla*. And Justice Stevens' opinion specifically left open the possibility that its holding might extend to other indirect consequences of a plea, noting that the Court has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." At the same time, "whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation." That supposed "uniqueness" appears to derive principally from deportation's "intimate relationship" to the criminal process: "Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century." And again, a few lines later, "because of its close connection to the criminal process [deportation is] uniquely difficult to classify as either a direct or a collateral consequence." The opinion also mentions that deportation is "a particularly severe 'penalty'" and ("importantly") "nearly an

automatic result” as considerations making it “‘most difficult’ to divorce the penalty from the conviction.” The opinion works hard to conclude that “[t]he collateral versus direct distinction is . . . ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation.”

Both the concurring and dissenting Justices thought the Court had left that door open a good deal more than a crack. Justice Alito was not persuaded that deportation is all that “unique,” noting that conviction may carry other immigration consequences like excludability, about which a defendant might care just as much as initial removal. He listed other collateral consequences such as civil commitment, loss of public benefits, and discharge from the Armed Forces, which might be considered just as “serious” for those affected by them. Justice Scalia too thought the obligation placed on defense counsel by the Court had “no logical stopping-point.” He even suggested (presumably mischievously) that “[i]t is difficult to believe that the warning requirement would not be extended . . . to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act.”

We can expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar’s devising of ever-expanding categories of plea-invalidating misadvice and failures to warn – not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given.

Despite the Court’s efforts at containment, it seems likely that Justice Scalia’s prediction is closer to the mark, and that efforts will be made to expand the category of indirect consequences requiring a “Padilla advisory” (though it seems preposterous to suggest that any court would preclude a recidivist enhancement because the defendant had not been warned about this possibility in an earlier plea bargain). In recent years legislatures have enacted many statutory penalties that are “collateral” to the criminal case in the sense that they are not within the authority of the sentencing court. Many of these penalties are as severe and even more certain than deportation, and arguably just as “closely connected” to the criminal process, even if they cannot claim the same historical pedigree. Sex offender registration and residency requirements come to mind. Moreover, to the extent such penalties are easier for a defense lawyer to ascertain, Justice Alito’s objection to finding a duty of advisement would not pertain.

On balance, while there is room to argue that *Padilla* is a case about immigration and deportation, ultimately it is likely to have a broader application. In this regard it is significant that in New Mexico, one of the few states where effective assistance has extended to advice about the immigration consequences of a guilty plea,<sup>14</sup> defendants charged with sex offenses have been held constitutionally entitled to notice of residency and notification requirements and other related collateral consequences.<sup>15</sup>

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<sup>14</sup> See *State v. Paredes*, 136 N.M. 533 (2004).

<sup>15</sup> See *State v. Edwards*, 141 N.M. 491, 499 (2007) (“In light of the harsh and virtually certain consequences under SORNA that flow from a plea of guilty or no contest to a sex offense, we follow *Paredes* and conclude that defense

### *C. A Framework for Dealing with Collateral Consequences as Part of the Criminal Case*

The *Padilla* decision will greatly expand the responsibilities of defense lawyers in counseling and advocating for their clients, and give impetus to a trend toward “a more holistic and comprehensive model of representation.”<sup>16</sup> And as collateral consequences become the business of defenders, they also necessarily become the business of other actors in the process by which collateral consequences are imposed, like prosecutors and sentencing courts, and of the legislatures that enact them in the first place. This in turn suggests the desirability of developing a more comprehensive framework for dealing with collateral consequences as part of the criminal justice process. The 2003 ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons<sup>17</sup> anticipated this need in urging jurisdictions to collect and codify collateral sanctions, to provide for their consideration in the plea bargaining and sentencing process, and to allow for their modification and removal. The ABA, under a grant from the National Institute of Justice, is in the first year of a three year study intended to collect and categorize the collateral consequences imposed by state and federal law.

More recently, the 2009 Uniform Collateral Consequences of Conviction Act<sup>18</sup> offers jurisdictions a way to impose some discipline on the process by which collateral consequences are enacted and imposed. The UCCCA would make it considerably easier for defense attorneys, courts, and government officials (including prosecutors) to incorporate consideration of collateral consequences into the criminal case, by providing for their compilation and publication. With advance knowledge of the collateral consequences likely to attach to certain convictions, prosecutors can shape their charges and defenders can prepare to bargain. The UCCCA also requires that defendants be notified early in a criminal case that collateral consequences may attach to conviction. (The UCCCA will likely be reassessed to determine whether it should be amended to specifically comply with *Padilla*’s new requirements.) The notice contemplated by the UCCCA will initiate a conversation about the issues between the

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counsel has an affirmative duty to advise a defendant charged with a sex offense that a plea of guilty or no contest will almost certainly subject the defendant to the registration requirements of SORNA.”). Significantly, the *Edwards* court noted that “the task of figuring out whether a defendant’s plea will expose him or her to SORNA’s registration requirements is far less complicated [than determining deportability].” *Id.* In most states a court has no obligation to advise a defendant about sex offender registration or residence requirements. *See* authorities collected at *Magyar v. State*, 18 So. 3d 807, ¶ 11, n. 5 (Miss. 2009). *But see* Tex. Code Crim. P. Ann. Art. 26.13 (requiring a court to notify of sex offender registration); Wash. Rev. Code Ann. § 10.01.200 (same).

<sup>16</sup> *See* Robin Steinberg, *Supreme Court Ruling Speaks of a New Kind of Criminal Defense*, Huffington Post, April 5, 2010, [http://www.huffingtonpost.com/robin-steinberg/supreme-court-ruling-spea\\_b\\_522044.html](http://www.huffingtonpost.com/robin-steinberg/supreme-court-ruling-spea_b_522044.html).

<sup>17</sup> <http://www.abanet.org/crimjust/standards/collateralsanctionwithcommentary.pdf>.

<sup>18</sup> [http://www.law.upenn.edu/bll/archives/ulc/ucsada/2009\\_final.htm](http://www.law.upenn.edu/bll/archives/ulc/ucsada/2009_final.htm).

defendant and his lawyer, and provide the lawyer with the information she needs to advise and advocate for her client, with the prosecutor and with the court. Even if every collateral consequence would not satisfy the high bar established for a constitutionally required “*Padilla* advisory,” the procedure specified in the UCCCA will resolve uncertainty about which collateral consequences apply to particular convictions and which do not, and help to forestall the “years of elaboration” in the courts that Justice Scalia predicted. The UCCCA contains other provisions to help participants in the criminal justice system deal with the collateral consequences of conviction, including those imposed by other jurisdictions, and establishes a two-step process by which convicted persons can obtain relief.

### ***Conclusion***

The *Padilla* decision promises to transform the landscape of criminal representation in this country by requiring consideration of collateral consequences at the front end of a criminal case. In that regard, it is surely a “major upheaval” in Sixth Amendment jurisprudence with broad systemic ramifications. The decision adds to the burdens of defense counsel at a time when defender budgets are already strained. It throws a monkey wrench into the plea bargaining process at a time when law enforcement depends upon efficient operation of assembly-line justice. And it places new obligations on courts when accepting pleas lest they see them undone because a defendant did not understand what was at stake.

At the same time, the *Padilla* decision gives defenders new tools with which to advocate for their clients, and introduces greater transparency and fairness into the plea process. If there is uncertainty about which collateral consequences may qualify for a *Padilla* advisory, all actors in the system – including prosecutors and judges as well as defenders -- will have an incentive to familiarize themselves with the array of laws and rules affecting people with a criminal record. This in time may lead to the development of more flexible relief mechanisms, such as those proposed by the Uniform Collateral Consequences of Conviction Act, thereby mitigating the very factors (severity and certainty) that required the assistance of counsel in the first place. If it is true that a shock is sometimes beneficial to the system, *Padilla v. Kentucky* may be exactly what is the doctor ordered.