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Nicholas D. Thornton

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THE FAILING PROMISE OF *PADILLA*: HOW *PADILLA V. KENTUCKY* SHOULD HAVE CHANGED THE GAME IN NORTH DAKOTA, BUT DID NOT

NICHOLAS D. THORNTON*

*“The U.S. Government expects to deport a record number of people this year [Homeland Security will focus on deporting] more convicted criminals, recent border-crossers, egregious immigration law violators and immigration fugitives”*¹

—Janet Napolitano, Secretary of United States Homeland Security

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1. *Napolitano: Record Number of Deportations Expected in 2011*, CNN.COM (Oct. 5, 2011), <http://www.cnn.com/2011/10/05/politics/napolitano-immigration/index.html>.

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I. INTRODUCTION

In March 2010, in *Padilla v. Kentucky*,² the United States Supreme Court dramatically altered the constitutional duties of criminal defense lawyers in holding the Sixth Amendment requires counsel to accurately and affirmatively advise a client of adverse immigration consequences like deportation. The reasoning the Court utilized in *Padilla*, however, has the promise of a much broader impact. *Padilla* paves the way for courts to require counsel to accurately advise clients concerning reasonably foreseeable consequences flowing from a criminal conviction during the course of the representation. In other words, *Padilla* is a shot across the bow for defense attorneys. Counsel can no longer afford to ignore consequences that would be important to the client simply because the consequence is collateral to the criminal case.

When other consequences of a criminal conviction are subjected to a careful analysis using the factors outlined in *Padilla*, counsel can and should have an affirmative duty to investigate, explain, and advise clients about these consequences. Courts around the country have applied *Padilla* to a number of consequences outside of the immigration law context, including misadvice about whether the client would be subject to civil commitment as a sexually violent predator,³ misadvice concerning whether a no-contest plea would prohibit a subsequent challenge to the elements of the crime in a civil lawsuit arising from the criminal conduct,⁴ counsel's failure to advise a defendant of the requirement to register as a sexual offender,⁵ misadvice concerning the applicability of a parole eligibility

2. 130 S. Ct. 1473 (2010).

3. *Bauder v. Dep't of Corr.*, 619 F.3d 1272, 1275 (11th Cir. 2010). *But see* *Brown v. Goodwin*, No. 09-211, 2010 WL 1930574, at *13 (D.N.J. May 11, 2010) (declining to extend *Padilla* to advice concerning civil commitment as a sexually violent predator).

4. *Wilson v. State*, 244 P.3d 535, 539 (Alaska Ct. App. 2010).

5. *See, e.g.*, *Taylor v. State*, 698 S.E.2d 384, 388 (Ga. Ct. App. 2010). *But see* *Maxwell v. Larkins*, No. 4:08 CV 1896 DDN, 2010 WL 2680333, at *10 (E.D. Mo. July 1, 2010) (declining to extend *Padilla* to sex offender registration).

requirement,⁶ and counsel's failure to advise the defendant of the automatic forfeiture of a teacher's pension as a result of a guilty plea to a sex crime that occurred within the scope of his employment.⁷ However, recent indications from North Dakota courts indicate a strong reluctance to abandon the traditional pre-*Padilla* collateral consequences doctrine.⁸

This article advocates for a broad application of *Padilla* to all reasonably foreseeable consequences likely to flow from a criminal conviction, such as immigration, sex offender registration, civil forfeiture, civil commitment, application of parole eligibility statutes, loss of the right to own or possess firearms, loss of public benefits such as housing assistance, and loss of professional licensure. The list of collateral consequences keeps growing, which means the obligations of defense counsel keep expanding. *Padilla* is the roadmap, but now we must convince North Dakota courts to follow it. Even if North Dakota courts decline the invitation, I suggest counsel practice above the bar that the courts seem reticent to raise.

This article outlines how *Padilla* has changed the landscape for criminal defense attorneys. The second section details the Supreme Court's decision in *Padilla* and it includes a discussion of the facts, the majority's reasoning and holding, the concurrence's reasoning, and a discussion of the dissenters' position. The third section outlines how *Padilla* impacts North Dakota criminal defense practice. Specifically, it includes a discussion of the prevailing professional norms in North Dakota, *Padilla*'s abrogation of three North Dakota cases, a table of North Dakota crimes with "clear-ish" immigration consequences, counsel's potential duty to advise clients of other reasonably foreseeable consequences flowing from a criminal conviction, and a discussion of North Dakota cases involving other consequences since *Padilla* was decided.

6. See generally *Pridham v. Commonwealth*, No. 2008-CA-002190-MR (Ky. Ct. App. Nov. 19, 2010), http://apps.courts.ky.gov/supreme/sc_opinions.shtm (applying *Padilla*'s reasoning to gross misadvice concerning the application of a parole eligibility requirement). The court of appeals noted "the factors relied upon in the deportation context apply with equal vigor to the circumstances of gross misadvice about parole eligibility. Parole eligibility involves a foreseeable, material consequence of the guilty plea that is 'intimately related to the criminal process' and is an 'automatic result' following certain criminal convictions." *Id.* at 5-6 (quoting *Padilla*, 130 S. Ct. at 1478, 1486).

7. *Commonwealth v. Abraham*, 996 A.2d 1090, 1094-95 (Pa. Super. Ct. 2010).

8. See *Interest of L.T.*, 2011 ND 120, ¶¶ 20-22, 798 N.W.2d 657, 663 (declining to require the court to advise the child or respondent-parent of the requirement to register as a sexual offender before accepting an admission of guilt to an offense requiring the juvenile to register); see also *Order Denying Motion to Amend Sentence* at 3, *State v. Richardson*, No: 09-2011-CR-00156 (N.D. Dist. Ct. July 18, 2011) (declining any requirement of court or the defendant's counsel to advise the defendant of the requirement to register as a sex offender).

II. *PADILLA V. KENTUCKY*

A. FACTS

Jose Padilla was born in Honduras.⁹ He immigrated to the United States in the 1960s and became a lawful permanent resident.¹⁰ Padilla also served in the United States military during the Vietnam War and received an honorable discharge.¹¹ In September 2001, Padilla, a commercial truck driver, was indicted in Kentucky for misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia, felony trafficking of marijuana, and failing to have a weight and distance tax number on his semi-truck.¹² Authorities found more than a thousand pounds of marijuana in the tractor-trailer of his semi-truck.¹³

Padilla pleaded not guilty to all counts and was released on bond.¹⁴ Shortly after his release, the Immigration and Naturalization Service lodged an immigration detainer against him to investigate his immigration status.¹⁵ Based on the detainer, the trial court revoked his bond, apparently believing he was an illegal alien.¹⁶

Padilla remained in pretrial confinement for almost a year despite his lawful permanent resident status.¹⁷ Padilla then pleaded guilty to the misdemeanor drug and paraphernalia possession and felony marijuana trafficking counts.¹⁸ The felony trafficking count involved the transportation of five or more pounds of marijuana.¹⁹ The citation for the weight and distance tax number violation was dismissed.²⁰ The felony drug trafficking count was considered a deportable, aggravated felony offense under the Immigration and Nationality Act.²¹ Padilla's plea agreement recom-

9. Brief for Petitioner at 8, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651).

10. *Padilla*, 130 S. Ct. 1473, 1477 (2010).

11. *Id.*

12. *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008).

13. Brief for Respondent at 3, *Padilla*, 130 S. Ct. 1473 (2010) (No. 08-651).

14. Brief for Petitioner, *supra* note 10, at 8.

15. *Id.*

16. *Id.*

17. *Id.* at 8-9.

18. *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008).

19. Brief for Respondent, *supra* note 14, at 4; *see also* KY. REV. STAT. ANN. §§ 218A.1421(1), 218A.1421(4)(a), 532.050(2)(c) (West 2006) (providing the state's operative criminal statute, gradation statute, and penalty statute).

20. *See Padilla*, 253 S.W.3d at 483 (noting that Padilla pled guilty to the drug related charges and the remaining count was dismissed).

21. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1477 n.1 (2010); *see also* 8 U.S.C. § 1227(a)(2)(B)(i) (2006) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title

mended a sentence of ten years, first to serve five years with the balance suspended for five years of probation.²² The court accepted Padilla's plea and sentenced him accordingly on October 4, 2002.²³

B. PROCEDURAL POSTURE

On August 18, 2004, almost at the end of his prison sentence, Padilla filed a pro se post-conviction relief petition.²⁴ Padilla alleged his counsel told him that he “did not have to worry about [his] immigration status since he had been in the country so long.”²⁵ His petition also asserted his attorney's incorrect advice induced him to plead guilty,²⁶ and Padilla claimed his attorney was ineffective in violation of his Sixth Amendment rights when he provided him with incorrect advice concerning the immigration consequences of his pleas.²⁷

The trial court denied Padilla's post-conviction relief petition without an evidentiary hearing, noting a valid guilty plea does not require the defendant to be advised of every possible consequence before the acceptance of the plea.²⁸ The trial court further noted “Padilla's counsel does not make a deportation decision and neither does this Court.”²⁹

Padilla appealed to the Kentucky Court of Appeals.³⁰ The court of appeals reversed the trial court's decision and remanded the case for an evidentiary hearing, reasoning that while immigration was a collateral consequence outside of the scope of the Sixth Amendment, “an affirmative act of ‘gross misadvice’ relating to collateral matters can justify post-conviction relief.”³¹

The Commonwealth of Kentucky sought discretionary review from its supreme court.³² The Kentucky Supreme Court reasoned immigration

21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.”); 8 U.S.C. § 1101(a)(43)(B) (“The term ‘aggravated felony’ means . . . illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18).”).

22. *Padilla*, 253 S.W.3d at 483.

23. *See id.*; *see also* Brief for Petitioner, *supra* note 10, at 9. Padilla was given credit for the 365 days he spent in custody before the date of sentencing.

24. *Padilla*, 253 S.W.3d at 483.

25. *Padilla*, 130 S. Ct. at 1478 (quoting *Padilla*, 253 S.W.3d at 483).

26. *Padilla*, 253 S.W.3d at 484.

27. *Padilla*, 130 S. Ct. at 1478.

28. *Padilla*, 253 S.W.3d at 483; *see also* Brief for Petitioner, *supra* note 10, at 12.

29. *Padilla*, 253 S.W.3d at 483.

30. *Id.*

31. *Id.* at 483-84.

32. *Id.* at 483.

concerns were collateral to the criminal case.³³ Because immigration was collateral to the criminal case, the court further determined:

As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise [Padilla] of such collateral issue or his act of advising [Padilla] incorrectly provides no basis for relief. In neither instance is the matter required to be addressed by counsel, and so an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*.³⁴

The Kentucky Supreme Court reversed its court of appeals and reinstated the trial court's denial of post-conviction relief.³⁵

Padilla filed a petition for rehearing, which was summarily denied.³⁶ Padilla then appealed to the United States Supreme Court.³⁷ The Supreme Court granted certiorari³⁸ "to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from the country."³⁹ The Supreme Court reversed, concluding the traditional distinction between direct and collateral consequences was inapplicable with respect to harsh immigration consequences like deportation⁴⁰ and that constitutionally competent counsel would have correctly advised Padilla of the mandatory deportation consequences associated with his guilty pleas to the drug trafficking count.⁴¹ The Supreme Court did not address the prejudice prong of *Strickland*, whether Padilla would not have pled guilty and would have insisted on going to trial but for the errors of counsel.⁴² The Supreme Court reversed the Kentucky Supreme Court and remanded the matter for a determination of whether Padilla can satisfy *Strickland*'s prejudice prong.⁴³

33. *See id.*

34. *Id.* at 485.

35. *Id.*

36. Petition for Writ of Certiorari at 7, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651).

37. *Id.*

38. *Padilla v. Kentucky*, 129 S. Ct. 1317, 1317 (2009) (granting certiorari).

39. *Padilla*, 130 S. Ct. at 1478.

40. *Id.* at 1482.

41. *Id.* at 1487-88 (Alito, J., concurring).

42. *Id.* at 1492.

43. *Id.* at 1487 (majority opinion).

C. THE MAJORITY OPINION

The majority opinion, authored by Justice Stevens, was joined by Justices Kennedy, Ginsberg, Breyer, and Sotomayor.⁴⁴ The Court held the Sixth Amendment generally requires counsel to provide affirmative advice concerning the potential risks of deportation as a result of the criminal case.⁴⁵

1. *Holding*

For criminal defense counsel to satisfy *Strickland's* objective performance prong, counsel must provide accurate, competent advice concerning the immigration consequences flowing from a criminal conviction when those consequences are clear.⁴⁶ When the immigration consequences are not clear, defense counsel must inform the client that there *may* be immigration consequences and should advise the client to seek advice from an immigration attorney.⁴⁷ Misadvice and silence concerning immigration consequences falls below the objective standard of reasonableness for counsel's performance.⁴⁸

2. *Reasoning*

The majority supported its holding in a number of ways. First, the Court explained the historical developments of the intersection between immigration and criminal law.⁴⁹ Second, the Court determined the traditional distinction between direct and collateral consequences is inapplicable in light of the enmeshed nature and severity of immigration consequences.⁵⁰ Third, the Court applied the *Strickland v. Washington*⁵¹ analytical framework to Padilla's situation, assuming in light of the procedural posture of the case that Padilla's assertions are factually true.⁵² Fourth, the Court addressed what would constitute an objectively reasonable performance concerning advice about immigration consequences.⁵³ Fifth, the Court addressed and discarded the floodgates concern of allowing defendants to challenge guilty pleas based on inadequate advice

44. *Id.* at 1477.

45. *See id.*

46. *Id.* at 1483.

47. *Id.*

48. *Id.* at 1483-85.

49. *Id.* at 1478-80.

50. *Id.* at 1482.

51. 466 U.S. 668 (1984).

52. *Padilla*, 130 S. Ct. at 1480-82.

53. *Id.* at 1484-86.

concerning immigration consequences.⁵⁴ Finally, the Court noted the consideration of immigration consequences in the criminal process would benefit the criminal justice system as a whole.⁵⁵

a. Historical Developments

Over the last ninety years, federal immigration law has drastically changed.⁵⁶ In its infancy, there were relatively few, narrow classes of criminal offenses that would result in deportation.⁵⁷ Moreover, the Court noted judges had wide discretion to avoid deportation consequences.⁵⁸

In 1917, with the passage of the Immigration and Nationality Act, law significantly changed.⁵⁹ The Act declared wide classes of noncitizens deportable for committing crimes or other acts in the United States.⁶⁰ Specifically, felons,⁶¹ those who commit crimes involving moral turpitude within five years of their entry into the United States or those who commit more than two crimes involving moral turpitude at any time after entry, were declared “deportable.”⁶² While the Act declared a broad number of noncitizens deportable, it also gave judges the ability to recommend against deportation.⁶³ Thus, while there were wide categories of “deportable” offenses, judges were given the discretion to prevent deportation in unjust circumstances.⁶⁴

Congress, however, eliminated the ability of sentencing judges to recommend against deportation proceedings.⁶⁵ “In 1996, Congress also eliminated the Attorney General’s authority to grant discretionary relief from deportation . . . an authority that had been exercised to prevent the

54. *Id.*

55. *Id.* at 1486.

56. *Id.* at 1478.

57. *Id.*

58. *Id.*

59. *Id.* at 1478-79.

60. *Id.* at 1479.

61. Note that the Act defined “felons” differently than at common law. That is, the Act declared those sentenced to a “year or more” as felons, whereas the traditional definition of felony was an offense punishable by more than a year, or one year and one day. Immigration and Nationality Act, 8 U.S.C. § 1227 (2006); *see* BLACK’S LAW DICTIONARY 694 (9th ed. 2009) (defining felony as “[a] serious crime usually punishable by imprisonment for more than one year or by death”).

62. *Padilla*, 130 S. Ct. at 1479.

63. *Id.*

64. *Id.*

65. *Id.* at 1480 (“[t]he [Judicial Recommendation Against Deportation] procedure is no longer part of our law. Congress first circumscribed the . . . provision in the 1952 Immigration and Nationality Act (INA), and in 1990 Congress entirely eliminated it . . .”).

deportation of over 10,000 noncitizens during the [five]-year period prior to 1996”⁶⁶

b. Inapplicability of Direct/Collateral
Consequences Distinction

The Supreme Court has never distinguished between “direct” and “collateral” consequences of a criminal conviction when considering the Sixth Amendment right to effective assistance of counsel.⁶⁷ Because deportation is a particularly severe penalty that is “intimately related” and “enmeshed” with the criminal process,⁶⁸ the Court held that clear immigration consequences are within the range of information a defense attorney must communicate in order to provide objectively reasonable representation.⁶⁹

The Court traced the history of deportation consequences from past immigration law, which left deportation largely to the discretion of judges, to current immigration law, which leaves little to no room for judicial discretion.⁷⁰ In other words, the majority of the Court was very concerned that deportation has largely become an *automatic* result for noncitizens convicted of certain offenses.⁷¹ The Court used this shift as evidence that the stakes of a criminal conviction for noncitizens have dramatically risen.⁷² Thus, as the Court noted, “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.”⁷³

c. Applying *Strickland* to Advice Concerning
Immigration Consequences

Because the Court decided advice regarding immigration consequences falls within the “ambit of the Sixth Amendment right to counsel,” it applied the *Strickland* framework to Padilla’s claim.⁷⁴ The two-prong *Strickland*

66. *Id.*

67. *Id.* at 1481.

68. *Id.*

69. *Id.* at 1483.

70. *See id.* at 1478-80.

71. *See id.* at 1480.

72. *Id.*

73. *Id.*

74. *Id.* at 1482. The Court did not address both prongs of the *Strickland* test in Padilla’s case. After concluding Padilla’s counsel was objectively deficient, the Court determined the Kentucky courts did not address *Strickland*’s second, “prejudice” prong. *Id.* at 1483-84. The Court remanded the case for a determination of whether Padilla was prejudiced by his counsel’s deficient performance. *Id.*

test asks first whether counsel's performance "fell below an objective standard of reasonableness."⁷⁵ The attorney's performance is measured considering the prevailing professional norms without the benefit of hindsight.⁷⁶ If the representation was objectively unreasonable, the court must then ask "whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"⁷⁷ In guilty plea situations, the prejudice prong can be satisfied when there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty and insisted on going to trial.⁷⁸

Applying *Strickland* to Padilla's case, the Court first turned to prevailing professional norms of practice.⁷⁹ The Court reasoned that the American Bar Association and other professional organizations' practice standards are guides to determining reasonable attorney performance.⁸⁰ The Court specifically recognized standards promulgated by the American Bar Association, National Legal Aid and Defender Association, and the Department of Justice's Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance.⁸¹ Based on these resources, the Court found "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."⁸²

In Padilla's case, the Court noted that the deportation consequences were succinct, clear, and explicit.⁸³ In the majority's opinion, Padilla's counsel could have easily determined deportation was essentially mandatory by just looking to 8 U.S.C. § 1227, relating to which crimes are deportable.⁸⁴ The Court had no trouble determining that Padilla's counsel was constitutionally deficient.⁸⁵

75. *Id.* at 1482 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

76. *See id.*

77. *Id.* (quoting *Strickland*, 466 U.S. at 694).

78. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

79. *Padilla*, 130 S. Ct. at 1482.

80. *Id.* at 1482-83.

81. *Id.*

82. *Id.* at 1482.

83. *Id.* at 1483.

84. *Id.* (citing 8 U.S.C. § 1227(a)(2)(B)(i) (2006) ("Any alien who at any time after admission has been convicted of a violation of (or an conspiracy or attempt to violate) any law or regulation . . . relating to a controlled substance . . . other than a single offense involving the possession for one's own use of 30 grams or less of marijuana, is deportable")).

85. *Id.*

d. The Reasonableness of Counsel's Performance

In analyzing Padilla's claim, the Court provided some insight into what constitutes "reasonable" performance of counsel with respect to giving immigration advice in criminal matters. Specifically, the Court analyzed four situations: (1) counsel's misadvice; (2) counsel's silence on immigration matters; (3) the duty to advise clients of immigration consequences when the immigration consequences are clear; and (4) the duty to advise clients of immigration consequences that are unclear. Ultimately, the Court held that for counsel to be constitutionally competent, he or she must provide accurate advice concerning the immigration consequences flowing from a criminal conviction when those consequences are clear.⁸⁶ When the immigration consequences are not clear, defense counsel must inform the client that there may be immigration consequences and should advise the client to seek advice from an immigration attorney.⁸⁷ Misadvice and silence concerning immigration consequences falls below the objective standard of reasonableness for counsel's performance. Each of these situations is analyzed further below.

i. Misadvice

Under *Strickland*, the attorney's inaccurate advice to Padilla was clearly deficient.⁸⁸ The Court reasoned "Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute"⁸⁹ The statute specifically requires removal for all drug offense convictions except for those involving simple possession of less than thirty grams of marijuana.⁹⁰ Instead of providing him accurate legal advice concerning the mandatory nature of removal if Padilla was convicted of trafficking marijuana, Padilla's counsel provided him false assurances that he would not be deported if he pled guilty.⁹¹ The Court held "[t]his is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*; see also 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

91. *Padilla*, 130 S.Ct. at 1483.

removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect."⁹²

Next, the Court addressed the Solicitor General's position that the Sixth Amendment should only cover counsel's misadvice.⁹³ That is, the Solicitor General argued "'counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case . . .,' though counsel is required to provide accurate advice if she chooses to discuss these matters."⁹⁴ After determining misadvice is constitutionally deficient, the Court rejected the Solicitor General's argument, reasoning that a constitutional rule limiting the effective assistance of counsel to situations where counsel provides misadvice would lead to two absurd results.⁹⁵

First, counsel would then have an incentive to remain silent and choose not to advise clients on extraordinarily important matters.⁹⁶ The Court noted a client must be made aware of the advantages and disadvantages of a plea agreement.⁹⁷ Second, the Court reasoned the Solicitor General's position would deny clients least able to represent themselves even rudimentary advice concerning immigration consequences, even when that advice can be readily obtained.⁹⁸ The Court believed noncitizen defendants are likely to be indigent and have no way to hire private immigration counsel.⁹⁹ In other words, noncitizen clients deserve *some* advice concerning how a criminal conviction will impact their status in the United States.¹⁰⁰

ii. Silence

The Court did not stop when it determined misadvice is constitutionally deficient performance, satisfying the first prong of the *Strickland* test for ineffective assistance of counsel.¹⁰¹ The Court next held defense counsel's silence concerning immigration penalties is also constitutionally deficient.¹⁰² Specifically, the Court reasoned there was no functional

92. *Id.*

93. *Id.* at 1484.

94. *Id.* (quoting Brief for the United States as Amicus Curiae Supporting Respondents at 10, *Padilla*, 130 S. Ct. 1473 (2010) (No. 08-651)).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.*

100. *See id.*

101. *Id.*

102. *Id.*

difference between providing misadvice and “‘an act of omission’ in this context.”¹⁰³ The Court stated:

Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement. When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.¹⁰⁴

Silence and misadvice are constitutionally deficient, which means there is *some* affirmative duty to advise a client of immigration consequences. The question, however, becomes how much and what kind of advice is required for counsel to be found constitutionally effective.

iii. The Affirmative Duty to Advise Client of “Clear” Immigration Consequences

In situations where the immigration consequences are “succinct, clear, and explicit,” counsel has an affirmative duty to correctly and competently advise clients of the immigration consequences of a criminal conviction.¹⁰⁵ The Court explained that Padilla’s counsel could have easily determined Padilla was removable by merely looking to the statute.¹⁰⁶ The statute in question was not broad or confusing; it reads in pertinent part:

Any alien who at any time after admission has been convicted of a violation of (or conspiracy or attempt to violate) any law or regulation . . . relating to a controlled substance . . . , other than a single offense involving possession for one’s own use of [thirty] grams or less of marijuana, is deportable.¹⁰⁷

Having concluded counsel has an affirmative duty to provide accurate, competent advice about immigration consequences when those consequences are clear, the Court then addressed what advice defense counsel must give to a noncitizen client when the immigration consequences are unclear.¹⁰⁸

103. *Id.*

104. *Id.* (internal citation omitted).

105. *Id.* at 1483.

106. *Id.*

107. 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

108. *Padilla*, 130 S. Ct. at 1483.

iv. The Affirmative Duty to Advise Client of “Unclear” Immigration Consequences

Not all immigration statutes are clear.¹⁰⁹ In fact, the Court recognized immigration law can be a very complex legal specialty.¹¹⁰ The Court further acknowledged criminal defense lawyers may not be well-versed in immigration law.¹¹¹ Thus, where the law is not succinct and clear, a criminal defense attorney must “advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences” such as deportation.¹¹² In the case of unclear immigration concerns, the Court noted the scope and nature of a criminal defense attorney’s advice would be limited, which implicitly suggests the client should seek counsel from an immigration attorney.¹¹³

e. Addressing the Floodgates Concern

Finally, the Court addressed the “floodgates” concern that expanding *Strickland* to apply to consideration of immigration consequences would substantially affect the finality of criminal convictions obtained via guilty pleas.¹¹⁴ The Court noted a similar argument was addressed and discarded in *Hill v. Lockhart*,¹¹⁵ which expanded *Strickland* and opened the door to challenging guilty pleas with ineffective assistance of counsel claims.¹¹⁶ However, because there was not a flood of ineffective assistance of counsel claims after *Hill*, the Court reasoned it is not likely a flood of claims will result from the Court’s decision in *Padilla*.¹¹⁷ The Court further reasoned this situation was unlikely to result in a flood of post-conviction relief petitions because the nature of the relief—the withdrawal of a guilty plea and proceeding to trial—carries with it its own limiting principle: defendants “who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result the plea.”¹¹⁸ Consequently, the Court discarded the floodgates concern as an unlikely result of its decision.¹¹⁹

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *See id.* at 1483 n.10.

114. *Id.* at 1484.

115. 474 U.S. 52 (1985).

116. *Padilla*, 130 S. Ct. at 1484-85; *see also Hill*, 474 U.S. at 58-60.

117. *Padilla*, 130 S. Ct. at 1485.

118. *Id.*

119. *Id.*

f. Informed Consideration of Immigration Consequences

Importantly, the Court noted the consideration of immigration consequences is not just for defense counsel.¹²⁰ The Court suggested both prosecutors and defense counsel should know about the potential and likely consequences and use them in the plea bargaining process.¹²¹ The Court explained that “informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process.”¹²² Justice Stevens argued that by bringing immigration consequences into the discussion, the parties could reach creative plea agreements “that better satisfy the interests of both parties.”¹²³ Therefore, in the Court’s view, an up-front, open discussion of immigration consequences in plea negotiations is a proper and appropriate consideration for both parties in a criminal case.¹²⁴

D. THE CONCURRING OPINION

Justice Alito and Chief Justice Roberts concurred with the majority, but wrote separately to address specific concerns with the majority’s opinion.¹²⁵ First, the concurrence would limit the extension of the Sixth Amendment to situations like Padilla’s involving misadvice and would merely require counsel to inform noncitizens that there *may* be adverse immigration consequences flowing from a conviction.¹²⁶ The concurrence advocates for a bright-line rule, stating a defense attorney must “(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.”¹²⁷ The concurrence believes the majority’s distinction between “clear” and “unclear” consequences is confusing, which will result in needless litigation and require defense attorneys to wade far into a field in which they have little expertise.¹²⁸

120. *See id.* at 1486.

121. *Id.*

122. *Id.*

123. *Id.*

124. *See id.*

125. *See id.* at 1487 (Alito, J., concurring).

126. *Id.*

127. *Id.*

128. *See id.*

1. *The Collateral Consequences Rule Serves Valid Purposes*

The concurrence began with a discussion of the distinction between direct and collateral consequences of a criminal plea.¹²⁹ Justice Alito noted the longstanding distinction required counsel only to advise clients concerning the *direct* consequences of a criminal conviction, not *collateral* consequences.¹³⁰ Within the discussion, the concurrence also implied immigration is a collateral consequence, one that need not specifically be discussed by reasonably competent defense counsel.¹³¹

Alito reasoned the purpose of the collateral consequences rule is important for one overriding reason:

Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.¹³²

The concurrence implies there may be a slippery slope concerning what advice defense counsel must give to his or her client.¹³³ That is, immigration consequences are but one serious, enmeshed consequence of a criminal case.¹³⁴ There are other important consequences of a criminal conviction that might include registration as a sexual offender or offender against children, administrative driver's license consequences, civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess a firearm, dishonorable or negative discharge from the Armed Forces, or the loss of a business or professional license.¹³⁵ Justice Alito and Chief Justice Roberts would reaffirm the collateral consequences rule, and would only hold counsel's performance deficient if he or she unreasonably provided incorrect advice or failed to

129. *Id.*

130. *Id.*

131. *See id.* (stating an “ineffective-assistance-of-counsel claim fails if ‘based on an attorney’s failure to advise a client of his plea’s immigration consequences’”) (quoting *United States v. Gonzalez*, 202 F.3d 20, 28 (1st Cir. 2000)); *United States v. Banda*, 1 F.3d 354, 355 (5th Cir. 1993) (holding that “an attorney’s failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel”). *See generally* Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002) (noting that virtually all jurisdictions, including “eleven federal circuits, more than thirty states, and the District of Columbia[, hold] that lawyers need not explain collateral consequences” of a conviction, including deportation, to their clients).

132. *Padilla*, 130 S. Ct. at 1487-88 (Alito, J., concurring).

133. *See id.* at 1488.

134. *See id.*

135. *Id.*

warn the client that the client should seek an expert in that particular area of the law.¹³⁶

2. *Limiting the Application of the Sixth Amendment to Affirmative Misadvice and Silence*

The concurrence would have held the Sixth Amendment only prohibits misadvice and silence concerning immigration consequences, and Justice Alito and Chief Justice Roberts supported the limitation by stating “thorough understanding of the intricacies of immigration law is not ‘within the range of competence demanded of attorneys *in criminal cases*.’”¹³⁷ Competent attorneys would also not “hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar.”¹³⁸ The concurrence agreed with Justice Bill Cunningham, the dissenting judge from the Kentucky Supreme Court when he wrote, “I do not believe it is too much of a burden to place on our defense bar the duty to say, ‘I do not know.’”¹³⁹

Additionally, the concurrence reasoned incompetent advice distorts the defendant’s ability to make rational decisions.¹⁴⁰ The advice may induce the defendant to take a deal that he otherwise would not have, such as the plea deal Padilla took unaware of the potential for deportation.¹⁴¹ The concurrence reasoned that limiting the application of the Sixth Amendment to affirmative misadvice and silence would not obstruct or frustrate other ways of providing noncitizens competent advice about the immigration consequences of criminal conviction.¹⁴² Indeed, Justice Alito argued the limitation would encourage noncitizens to seek advice about immigration consequences from *immigration* attorneys with a specialized knowledge base concerning a complex legal specialty.¹⁴³ The concurrence does not, however, address the majority’s concern that many indigent noncitizens will go without advice about immigration consequences because they cannot afford to hire a separate attorney.

Alito points out that deportation is just one of many consequences of being convicted of crime.¹⁴⁴ Other issues which he noted include “civil

136. *Id.* at 1494.

137. *Id.* at 1492 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

138. *Id.*

139. *Id.* at 1493 (quoting *Commonwealth v. Padilla*, 253 S.W.3d 482, 485 (Cunningham, J., dissenting)).

140. *Id.*

141. *See id.*

142. *Id.*

143. *Id.* at 1494.

144. *Id.* at 1488.

commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses.”¹⁴⁵ None of these consequences were directly addressed by the majority.

3. *The Clear/Unclear Analytical Framework is Unworkable*

The concurrence further notes immigration is an entirely separate branch of law from criminal law, and a particularly tricky one at that.¹⁴⁶ Thus, it will be difficult to distinguish between a clear and an unclear question of immigration law for *any* attorney, much less one who is not experienced in the area.¹⁴⁷ Justice Alito cites an immigration guidebook for criminal lawyers to make the point that “nothing is ever simple with immigration law” and to counter the majority’s argument that professional guidebooks support the majority’s holding.¹⁴⁸

Alito also points to several examples of how complicated determining whether conviction will lead to deportation can be. For instance, most deportable crimes fall within the categories of “crimes involving moral turpitude” (CIMT) or “aggravated felonies.”¹⁴⁹ What constitutes a CIMT or aggravated felony can vary by the court or agency interpreting the law.¹⁵⁰

4. *Additional Problems with the Majority Approach*

According to the concurrence, there are additional reasons why the Court’s holding could be problematic. First, Justice Alito warns that providing advice about just one of the collateral consequences of conviction could mislead a defendant to believe that the consequences she discusses with her attorney are all of the possible consequences.¹⁵¹ For example, a certain offense may not be a deportable offense, but it may render the noncitizen inadmissible, meaning that if the noncitizen leaves the country, he or she would not be allowed to return.¹⁵² This incomplete advice may discourage the noncitizen from seeking more competent advice from an

145. *Id.*

146. *See id.* at 1488-90.

147. *Id.* at 1490-91.

148. *Id.* at 1490 (quoting ROBERT JAMES MCWHIRTER, AM. BAR ASS’N, *THE CRIMINAL LAWYER’S GUIDE TO IMMIGRATION LAW* § 4.65, at 130 (2d ed. 2006)).

149. *Id.* at 1488.

150. *Id.* at 1489 (providing an example concerning whether simple possession is an aggravated felony under Ninth Circuit law).

151. *See id.* at 1491.

152. *Id.*

immigration attorney.¹⁵³ The concurrence does not, however, squarely address the majority's concern that indigent defendants may have virtually no access to this information if they do not receive it from their criminal defense counsel.¹⁵⁴ Instead, the concurrence notes that "[i]ncomplete legal advice may be worse than no advice at all."¹⁵⁵

Justice Alito contends there are better ways to address this problem, such as administrative or statutory reforms, that the constitutional rule announced by the majority could impede.¹⁵⁶ The concurrence describes the majority's decision as a "major upheaval in Sixth Amendment law," stating "the Court's view has been rejected by every Federal Court of Appeals to have considered the issue."¹⁵⁷

E. THE DISSENTING OPINION

Justice Scalia, joined by Justice Thomas, dissented.¹⁵⁸ The dissent argued that because Padilla had no constitutional right to receive advice about immigration consequences, Padilla's counsel could not be ineffective for providing inaccurate advice on that subject.¹⁵⁹ Scalia reasoned that in a perfect world, a criminal defendant would be well-informed about all of the direct and collateral consequences he or she faces as a result of conviction. However, the Constitution does not require advice on collateral matters.¹⁶⁰ Scalia argued, "[the Court has] never held . . . that once counsel is appointed all professional responsibilities of counsel—even those extending beyond defense against the prosecution—become constitutional commands."¹⁶¹ Therefore, he would draw a sharp line separating "defense at trial" from additional objectives, which may be important, but they are not directly related to the defense against the charge.¹⁶²

Scalia voiced skepticism of the idea that the State must provide counsel to indigent defendants, as well as the idea that counsel must be competent.¹⁶³ He opined that the Sixth Amendment originally meant that the State could not deny a defendant the right to hire an attorney to assist in

153. *Id.*

154. *See id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* (Scalia, J., dissenting).

159. *See id.* at 1494-95.

160. *Id.* at 1494.

161. *Id.* at 1495.

162. *Id.* (quoting *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 216 (2008)).

163. *See id.*

his or her defense.¹⁶⁴ Scalia was unwilling to extend the right to effective counsel to any collateral objectives.¹⁶⁵

The dissent would hold that since Padilla had no right to effective assistance of counsel regarding immigration consequences, even affirmative misadvice would not violate the Sixth Amendment's guarantee of effective assistance of counsel.¹⁶⁶ Scalia points out that adding to the duties of defense counsel has no logical stopping point.¹⁶⁷ According to Scalia, the concurrence's proposed bright line rule requiring counsel to merely advise of potential immigration consequences is defective because it too slides down a slippery slope.¹⁶⁸

To illustrate, Scalia points out there would likely have to be a warning about the subsequent application of the Armed Career Criminal Act.¹⁶⁹ "We could 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."¹⁷⁰ Like the concurrence, Scalia suggested legislation rather than a constitutional rule may be a more appropriate vehicle for addressing advice concerning immigration consequences.¹⁷¹

III. *PADILLA*'S IMPACT ON NORTH DAKOTA

After outlining *Padilla*, the question becomes how it applies to North Dakota. First, this section outlines the prevailing professional norms in North Dakota. Second, it addresses whether *Padilla* overrules or abrogates any existing North Dakota state law. Third, it outlines a non-exhaustive list of North Dakota crimes with relatively clear immigration consequences. Finally, it addresses whether *Padilla* requires counsel to advise clients of other consequences outside of the immigration context. Each of these issues will be addressed in turn.

164. *Id.*

165. *Id.*

166. *Id.* at 1494-95.

167. *Id.* at 1496.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

A. PREVAILING PROFESSIONAL NORMS IN NORTH DAKOTA

In finding Padilla's counsel's performance constitutionally deficient, the Court relied heavily upon performance guidelines promulgated by a number of national professional organizations.¹⁷² The Court noted the American Bar Association standards are guides to determining the reasonableness of counsel's performance.¹⁷³ Although the Court relied on the American Bar Association standards as a guide,¹⁷⁴ it also cited the performance standards from the National Legal Aid and Defender Association,¹⁷⁵ the Department of Justice,¹⁷⁶ and a number of law review articles, treatises, and practice aids as illustrative of counsel's expected conduct.¹⁷⁷ Based on these resources, it was clear to the Court "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."¹⁷⁸

In North Dakota, the Commission on Legal Counsel for Indigents has promulgated performance standards for public defenders and contract attorneys taking indigent defense cases in North Dakota. The Commission's performance standards are very similar, if not identical, to the professional standards discussed in *Padilla*.¹⁷⁹ In fact, the Commission's performance standards are, in large part, adapted from the performance standards cited by the Supreme Court.¹⁸⁰ The North Dakota performance standards require public defenders and contract attorneys to investigate, consider, use, and discuss reasonably foreseeable collateral

172. *See id.* at 1482-83 (majority opinion).

173. *Id.* at 1482.

174. *Id.* (citing STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 14-3.2(f) (3d ed. 1999); STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION & DEFENSE FUNCTION 4-5.1(a), (3d ed. 1993)).

175. *Id.* (citing NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 6.2 (1995)).

176. *Id.* (citing 2 U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS, STANDARDS FOR ATTORNEY PERFORMANCE, D10, H8-H9, J8 (2000), available at <http://www.mynlada.org/defender/DOJ/standardsv2/welcome.html>).

177. *See id.* (citing 2 CRIMINAL PRACTICE MANUAL §§ 45:3, 45:15 (2009); G. NICHOLAS HERMAN, PLEA BARGAINING § 3.03, at 20-21 (1997); 1 NORTON TOOBY, CRIMINAL DEFENSE OF IMMIGRANTS § 1.3, at 12-13 (3d ed. 2003); Chin & Holmes, *supra* note 132, at 713-18; Scott E. Bratton, *Practice Points: Representing a Noncitizen in a Criminal Case*, 31 THE CHAMPION, Jan./Feb. 2007, at 61.

178. *Id.*

179. *See generally* COMM'N ON LEGAL COUNSEL FOR INDIGENTS, MINIMUM ATTORNEY PERFORMANCE STANDARDS FOR CRIMINAL MATTERS, available at <http://www.nd.gov/indigents/docs/performanceStandardsCriminal.pdf>.

180. *See generally id.*

consequences in all stages of the proceedings.¹⁸¹ For instance, in preparing and developing a plea negotiation strategy, defense counsel must be aware of and advise the defendant of a number of other “collateral consequences,” which may include immigration consequences, money, property, or professional license forfeiture, ineligibility for government assistance or programming like student loans, the loss of the right to possess a firearm, the loss of driving privileges, the inability to vote or hold public office, and sex offender registration requirements.¹⁸²

Before the entry of a plea, the standards dictate counsel should ensure the client “receives a full explanation of the conditions and limits of the plea agreement and the maximum punishment, sanctions, and collateral consequences the client will be exposed to by entering a plea.”¹⁸³ At sentencing, among counsel’s other duties, the standards require counsel to “ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, financial, and collateral implications” of the sentence.¹⁸⁴ Finally, the performance standards note that counsel should be familiar with and explain to the client the direct and collateral consequences of the sentence and judgment, including:

1. credit for pre-trial detention;
2. parole eligibility and applicable parole release ranges (if applicable);
3. place of confinement and level of security and classification criteria used by the North Dakota Department of Corrections and Rehabilitation;
4. eligibility for correctional and educational programs;
5. availability of drug rehabilitation programs, psychiatric treatment, health care, and other treatment programs;
6. the possibility of negative immigration consequences;
7. loss of civil rights;
8. impact of a fine or restitution and any resulting civil liability;

181. *See, e.g., id.* at 10.2 (Plea Negotiations—Negotiations); *id.* at 10.4 (Plea Negotiation—Entry of Plea before the Court); *id.* at 12.1 (Sentencing—Obligations of Counsel); *id.* at 12.2(B) (Sentencing—Options, Consequences and Procedures—Counsel’s Familiarity with Direct and Collateral Consequences of the Sentence).

182. *Id.* at 10.2(A)(3).

183. *Id.* at 10.4(2).

184. *Id.* at 12.1(1).

9. possible revocation of probation, possible revocation of first offender status, or possible revocation of parole status if client is serving a prior sentence on a parole status;

10. suspension of a motor vehicle operator's permit;

11. prohibition of carrying a firearm; and

12. other consequences of conviction including but not limited to, the forfeiture of professional licensure, the ineligibility for various government programs including student loans, registration as a sex offender, loss of public housing and the loss of the right to hold public office.¹⁸⁵

In light of these performance standards, public defenders and contract attorneys practicing in North Dakota already should have been *Padilla* compliant, but private defense counsel may or may not have been following these standards in their practice. Nevertheless, the Commission's performance standards are useful guides into the prevailing professional norms for the entire North Dakota criminal defense bar. *Padilla* serves as a reminder that "other" consequences like deportation and sex offender registration are often equally or more important to clients than a criminal conviction.

B. *PADILLA*'S EFFECT ON NORTH DAKOTA STATE LAW

The *Padilla* decision illustrates a constitutional paradigm shift in the law governing lawyers. As both the concurrence and dissent noted, the Supreme Court's longstanding Sixth Amendment jurisprudence required counsel only advise criminal defendants of the direct consequences of the criminal case, not collateral consequences. Direct consequences are typically defined as consequences that are a direct, immediate, and automatic result of the criminal case, whereas collateral consequences are matters outside of the sentencing court's control and for which the sentencing court has no responsibility.¹⁸⁶ Following this traditional approach, the North Dakota Supreme Court has repeatedly held a criminal defendant is not entitled to withdraw a guilty plea or obtain post-conviction relief when the trial court or defense counsel failed to advise a defendant

185. *Id.* at 12.2(B).

186. *See, e.g.*, *State v. Abdullahi*, 2000 ND 39, ¶¶ 9-18, 607 N.W.2d 561, 564-67 (discussing the direct versus collateral distinction). The North Dakota Supreme Court has held that direct consequences are those contained within North Dakota Rule of Criminal Procedure 11, while consequences outside of the mandates of Rule 11 are "collateral" in nature. *Id.* ¶ 18; 607 N.W.2d at 567 ("[W]e decline to extend a court's obligation to inform a defendant about the immigration consequences of a guilty plea beyond those direct consequences identified in [Rule] 11.").

about important collateral consequences.¹⁸⁷ Those consequences, for example, have included the application of the parole eligibility provision,¹⁸⁸ the failure to inform a defendant of sex offender registration requirements,¹⁸⁹ the immigration consequences resulting from a plea,¹⁹⁰ and penalty enhancements for subsequent offenses.¹⁹¹

The Supreme Court's holding in *Padilla*, however, abrogates three North Dakota cases: *State v. Abdullahi*,¹⁹² *Abdi v. State*,¹⁹³ and *State v. Dalman*.¹⁹⁴ In *Abdullahi*, the defendant was a noncitizen charged with gross sexual imposition.¹⁹⁵ At the initial appearance, the trial court advised Abdullahi that "[if he is] not a citizen of the United States and [he is] convicted of a crime either by pleading guilty or by a trial, [he] may be deported to another country."¹⁹⁶ At the preliminary hearing, Abdullahi was again advised that if he is not a citizen and is convicted, he may be deported.¹⁹⁷ Eventually, Abdullahi pled guilty to gross sexual imposition.¹⁹⁸ The court sentenced Abdullahi to one year in custody with all but six months suspended for two years.¹⁹⁹

Abdullahi's conviction for gross sexual imposition was an aggravated felony under 8 U.S.C. § 1101(43)(A), "which, according to him, included

187. *See, e.g.*, *State v. Raulston*, 2005 ND 212, ¶ 12, 701 N.W.2d 464, 468 (stating the court has no obligation to advise the defendant of the 85 percent parole eligibility rule because it is a collateral consequence); *Abdullahi*, ¶ 19, 607 N.W.2d at 567 (explaining immigration consequences are collateral and the court need not advise defendants of collateral consequences before accepting guilty pleas); *Davenport v. State*, 2000 ND 218, ¶ 10, 620 N.W.2d 164, 166 (refusing to allow a defendant to withdraw his plea when he was not advised of the sex offender registration requirements because sex offender registration was a collateral consequence); *State v. Burr*, 1999 ND 143, ¶ 36, 598 N.W.2d 147, 159 (determining sex offender registration is a collateral consequence); *State v. Magnuson*, 1997 ND 228, ¶ 21, 571 N.W.2d 642, 646 (stating eighty-five percent rule is a collateral consequence); *State v. Dalman*, 520 N.W.2d 860, 863 (N.D. 1994) (providing deportation is a collateral consequence and the court need not inform defendants of collateral consequences); *Houle v. State*, 482 N.W.2d 24, 28 (N.D. 1992) (stating eighty-five percent parole eligibility requirement is a collateral consequence).

188. *Raulston*, ¶ 12, 701 N.W.2d at 468; *Magnuson*, ¶ 21, 571 N.W.2d at 646; *Houle*, 482 N.W.2d at 28.

189. *Davenport*, ¶ 10, 620 N.W.2d at 468; *Burr*, ¶ 36, 598 N.W.2d at 159.

190. *Abdi v. State*, 2000 ND 64, ¶¶ 30-32, 608 N.W.2d 292, 301-02 (denying an ineffective assistance of counsel claim when the defendant alleged his counsel did not inform him of certain immigration consequences); *Abdullahi*, ¶ 19, 607 N.W.2d at 567; *Dalman*, 520 N.W.2d at 863.

191. *State v. Berger*, 1999 ND 46, ¶ 14, 590 N.W.2d 884, 888 (noting the possibility of a future sentence enhancement is a collateral consequence for which there is no obligation to inform the defendant).

192. 2000 ND 39, 607 N.W.2d 561.

193. 2000 ND 64, 608 N.W.2d 292.

194. 520 N.W.2d 860 (N.D. 1994).

195. *Abdullahi*, ¶ 2, 607 N.W.2d at 562.

196. *Id.*

197. *Id.* ¶ 3, 607 N.W.2d at 563.

198. *Id.* ¶ 5.

199. *Id.* at 564.

mandatory, indefinite detention and automatic deportation.”²⁰⁰ As a result, Abdullahi moved to withdraw his guilty plea.²⁰¹ The court denied his motion, finding there was no manifest injustice.²⁰² Abdullahi appealed to the North Dakota Supreme Court,²⁰³ where he argued he was not informed of a “direct” consequence of his plea, deportation, and a mandatory, indefinite detention automatically flowing from his “aggravated felony” conviction.²⁰⁴

While the North Dakota Supreme Court in *State v. Dalman* had already determined immigration consequences were collateral in 1994, Abdullahi argued a 1996 amendment to federal immigration law changed the consequences from “collateral” to “direct” because these penalties now were “definite, immediate, and automatic consequences of crimes that are classified as aggravated felonies under federal immigration law.”²⁰⁵ The supreme court disagreed, holding “a trial court is not required to advise a defendant about deportation and mandatory, indefinite detention before accepting a guilty plea to a state criminal charge.”²⁰⁶ The court reasoned that

[w]hat renders the plea’s immigration effects ‘collateral’ is not that they arise ‘virtually by operation of law,’ but the fact that deportation is ‘not the sentence of the court which accept[s] the plea of another agency over which the trial judge has no control and for which he has no responsibility.’²⁰⁷

Therefore, the trial court was not required to inform Abdullahi about the immigration consequences of a guilty plea to gross sexual imposition.²⁰⁸ “Although not required, the trial court advised Abdullahi that he ‘may be deported to another country’ if convicted of the crime, either by pleading guilty or by trial.”²⁰⁹ The supreme court concluded the trial court did not abuse its discretion in refusing to allow Abdullahi to withdraw his guilty plea.²¹⁰

200. *Id.* ¶ 6.

201. *Id.*

202. *See id.*

203. *Id.*

204. *Id.* ¶ 10, 607 N.W.2d at 565.

205. *Id.* ¶ 12.

206. *Id.* ¶ 14, 607 N.W.2d at 566.

207. *Id.* ¶ 18, 607 N.W.2d at 567 (quoting *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000)).

208. *Id.* ¶ 19.

209. *Id.*

210. *Id.*

Likewise, in *Abdi*, the North Dakota Supreme Court addressed counsel's failure to provide accurate immigration advice.²¹¹ *Abdi* was charged with two counts of aggravated assault for stabbing two people.²¹² The State filed an amended information, which reduced the charges from two class C felony aggravated assault counts to one class A misdemeanor assault count.²¹³ *Abdi* pled guilty, and the court sentenced him to one year in jail, with credit for the ninety-five days he already served in jail, and the balance of the one year suspended.²¹⁴

In light of the charge and the sentence imposed, the charge to which *Abdi* pled guilty had adverse immigration consequences.²¹⁵ *Abdi* applied for post-conviction relief. *Abdi* requested summary disposition of his claims without an evidentiary hearing.²¹⁶ Acting on *Abdi*'s motion, the trial court denied him post-conviction relief.²¹⁷

In determining *Abdi*'s plea was voluntary and not a result of the ineffective assistance of counsel, the North Dakota Supreme Court relied upon *Abdullahi*, noting immigration consequences were collateral to the criminal case.²¹⁸ The court also noted the record was not sufficient to adequately evaluate the ineffective assistance of counsel claim.²¹⁹ Nevertheless, due to the court's reliance on *Abdullahi* in other contexts, even if the record were complete, it appears as though the court was inclined to rule precisely as it did in *Abdullahi*.

The North Dakota Supreme Court addressed the same issue in 1994 in *State v. Dalman*.²²⁰ *Dalman* was a Canadian citizen.²²¹ She was charged with six counts of class B felony security violations in 1992.²²² *Dalman* pled guilty to two counts of class C felony theft, while the securities violations were dismissed.²²³ *Dalman* was given a three-year deferred

211. *Abdi v. State*, 2000 ND 64, ¶ 28, 608 N.W.2d 292, 301 (arguing *Abdi*'s trial counsel was, among other things, ineffective due to failing to "inform him of the 'certain' immigration consequences of his guilty plea").

212. *Id.* ¶ 2, 608 N.W.2d at 294.

213. *Id.* ¶ 5, 608 N.W.2d at 295.

214. *Id.* ¶ 6, 608 N.W.2d at 296.

215. *See id.* ¶ 7.

216. *Id.*

217. *Id.*

218. *Id.* ¶¶ 23, 28, 33, 608 N.W.2d at 299-300, 302.

219. *Id.* ¶¶ 30-32, 608 N.W.2d at 301-02 (noting *Abdi* sought summary disposition without an evidentiary hearing, but did not obtain an affidavit from his trial counsel, so he was estopped from claiming error in not adequately developing the record).

220. *State v. Dalman*, 520 N.W.2d 860, 862 (N.D. 1994).

221. *Id.* at 861.

222. *Id.*

223. *Id.*

imposition of sentence.²²⁴ The next year, Dalman moved to withdraw her guilty pleas, arguing, among other things, “that the sentencing court failed to inform her of the possibility of being deported” and “that her attorneys also failed to inform her of the possibility of being deported.”²²⁵ The district court denied her motion to withdraw, and Dalman appealed.²²⁶

In addressing Dalman’s arguments, the supreme court reasoned North Dakota Rule of Criminal Procedure 11 did not require the sentencing court to advise her of a collateral matter.²²⁷ As for Dalman’s ineffective assistance claim, the court acknowledged Dalman’s argument was an issue of first impression.²²⁸ Consequently, the court relied heavily on other states’ decisions.²²⁹

Abdullahi, *Abdi*, and *Dalman* stand for the proposition that neither defense counsel nor the court must advise the defendant of potential immigration concerns because those issues are collateral consequences.²³⁰ *Padilla* abrogates *Abdullahi*, *Abdi*, and *Dalman*’s holdings. Now, counsel must provide competent advice concerning immigration when those consequences are clear and identify those issues when the consequences are not clear.²³¹ Where the consequences are not clear, counsel must inform the defendant that there may be adverse immigration consequences.

224. *Id.*

225. *Id.* at 862.

226. *Id.* at 861.

227. *Id.* at 862-63.

228. *Id.* at 863.

229. *See, e.g., Mott v. State*, 407 N.W.2d 581, 583 (Iowa 1987) (“failure to advise a defendant concerning collateral consequences, even serious ones, cannot provide a basis for a claim of ineffective assistance of counsel.”); *see also Oyekoya v. State*, 558 So. 2d 990, 990 (Ala. Crim. App.1989), (counsel’s failure to advise defendant of collateral consequences, such as deportation, is not ineffective assistance of counsel); *Tafoya v. State*, 500 P.2d 247, 252 (Alaska 1972) (failure of counsel to inform defendant of possible collateral consequence of deportation did not rise to level of ineffective assistance of counsel); *State v. Casseus*, 513 So. 2d 1045, 1045 (Fla. 1987) (counsel’s failure to advise client of collateral consequence of deportation did not constitute ineffective assistance of counsel); *State v. Chung*, 510 A.2d 72, 77 (N.J. Super. Ct. App. Div. 1986) (counsel did not render inefficient assistance of counsel by failing to inform defendant of possible collateral consequence of deportation); *People v. Dor*, 505 N.Y.S.2d 317, 320 (N.Y. Sup. Ct. 1986) (failure to discuss collateral consequence of deportation did not rise to ineffective assistance of counsel); *Commonwealth v. Frometa*, 555 A.2d 92, 93-94 (Pa. 1989) (counsel not required to advise defendant of collateral consequences of pleading guilty); *State v. Malik*, 680 P.2d 770, 772 (Wash. Ct. App. 1984), (“The possibility of deportation, being collateral, was not properly a concern of appointed counsel.”).

230. *See State v. Abdullahi*, 2000 ND 39, ¶¶ 8-18, 607 N.W.2d 561, 564-67; *Dalman*, 520 N.W.2d at 862-64.

231. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010).

C. NORTH DAKOTA CRIMES WITH “CLEAR-ISH”
IMMIGRATION CONSEQUENCES

The *Padilla* majority held that where the immigration consequences of a criminal case are “succinct, clear, and explicit,” counsel has an affirmative duty to correctly and competently advise clients of the immigration consequences of a criminal conviction.²³² Justice Stevens lamented that *Padilla*’s counsel could have *easily* determined *Padilla* was deportable by merely referring to the statute.²³³ The Court also acknowledged that immigration law is complex; not all situations are clear.²³⁴ When the immigration consequences are not clear, however, defense counsel “need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”²³⁵ Therefore, there is an important distinction to be made between “clear” and “unclear” cases. Post-*Padilla*, constitutionally competent counsel has an obligation to locate the immigration statutes and read them to determine whether the immigration consequences can be “easily determined.”²³⁶

As courts around the country are still sifting through this distinction, some legal commentators have argued “clear” cases are situations involving aggravated felony offenses described in 8 U.S.C. § 1101(a)(43), while “unclear” cases are those involving inadmissibility under 8 U.S.C. § 1182(a)(2)(A) and deportability under 8 U.S.C. § 1227(a)(2).²³⁷ Although aggravated felonies under § 1101(a)(43) almost always result in automatic deportation, several of the offenses covered in §§ 1182 and 1227 are “unclear” because they are subject to the application of certain waivers of inadmissibility or deportability.²³⁸ Additionally, as Justice Alito noted, many of the offenses are contained within undefined, broad categories of offenses such as CIMTs.²³⁹

The following Table A includes a non-exclusive compilation of North Dakota state crimes that may adversely affect a noncitizen’s immigration status.²⁴⁰ The table should be used as a guide and starting point for counsel to determine whether the immigration consequences are clear or unclear,

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *See id.*

237. *See, e.g.,* H. Raymond Fasano & Donald F. Madeo, *A Guide to Fulfilling Counsel’s Obligations Under Padilla to Advise Criminal Defendants of the Immigration Consequences of Criminal Dispositions*, INTERPRETER RELEASES, June 7, 2010, at 1117, 1119.

238. *Id.* at 1119-22.

239. *Padilla*, 130 S. Ct. at 1488-90.

240. *See infra* Table A.

rather than a substitute for legal research. If there is any doubt as to whether an offense has “clear” or “unclear” immigration consequences, a defense attorney should perform his or her own legal research, consult another attorney well-versed in immigration law, or direct the client to consult an immigration attorney.

As illustrated by Table A, there are a number of North Dakota crimes carrying adverse immigration consequences. Offenses such as murder, rape, and sexual abuse of a minor, for instance, clearly rebut in adverse immigration consequences.²⁴¹ These crimes are clearly defined as aggravated felonies, rendering the noncitizen deportable and inadmissible. Other classifications of offenses such as “crimes of violence,” “crimes of domestic violence,” or CIMTs are much more difficult to define as “clear” cases, largely because those offenses are typically defined on a case-by-case basis. Further complicating the matter is the fact that there are certain offenses for which immigration law provides some relief in terms of waivers of inadmissibility or waivers from deportation under 8 U.S.C. §§ 1182(a)(2) and 1227(a)(2).

Counsel’s awareness of immigration consequences is useful on contexts beyond providing misadvice to clients to meet effective counsel standards. For instance, Justice Stevens noted both parties benefit from “informed consideration” of immigration consequences when plea bargaining.²⁴² Justice Stevens quipped that this consideration will lead to creative plea bargains to reduce the likelihood of adverse immigration consequences.²⁴³ When counsel is fully aware of the potential consequences, counsel can properly advise the client and form a creative negotiation strategy consistent with the client’s interests.²⁴⁴ In other words, both parties should work diligently to craft creative plea agreements to avoid overly harsh consequences where possible in order to do what is right, just, and fair under the circumstances considering the totality of the punishment to be imposed.

241. See 8 U.S.C. § 1101(43)(A) (2006) (defining murder, rape, and sexual abuse of a minor as “aggravated felony” offenses); 8 U.S.C. § 1227(a)(2)(A)(iii) (determining that a person convicted of an aggravated felony is deportable).

242. *Padilla*, 130 S. Ct. at 1486.

243. *Id.*

244. See COMM’N ON LEGAL COUNSEL FOR INDIGENTS, *supra* note 179, at 10.2.

TABLE A

| SELECTED NORTH DAKOTA CRIMES WITH IMMIGRATION CONSEQUENCES | | |
|---|---|---|
| Crime | North Dakota Century Code (N.D. CENT. CODE) Reference | United States Code Reference (8 U.S.C.) |
| Murder | § 12.1-16-01 | § 1101(a)(43)(A) (including murder as an aggravated felony); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |
| Rape | § 12.1-20-03 (gross sexual imposition); § 12.1-20-04 (sexual imposition); § 12.1-20- 07 (sexual assault) | § 1101(a)(43)(A) (including rape as an aggravated felony); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |
| Sexual abuse of a minor | § 12.1-20-03.1 | § 1101(a)(43)(A) (including sexual abuse of a minor as an aggravated felony); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |
| Drug trafficking | § 19-03.1-23 (Supp. 2011) (prohibiting the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance) | § 1101(a)(43)(B) (including illicit controlled substance trafficking as an aggravated felony); § 1182(a)(2)(C) (stating the Attorney General or consular officer need only have “reason to believe” an alien is a trafficker); § 1227(a)(2)(A)(iii) (aliens convicted of aggravated felonies are deportable) |

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| Illicit trafficking in firearms, ammunition, or explosive materials | § 62.1-02-08 (2010) | § 1101(a)(43)(C) (including illicit trafficking of firearms, destructive devices, or explosive materials as an aggravated felony); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |
| Possession of certain explosive materials | § 62.1-05-01 (prohibiting possession and sale of dangerous weapons) | § 1101(a)(43)(E)(i) (including explosive materials offenses as aggravated felonies); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |
| Certain firearm offenses | chs. 62.1-01 to -05 (2010 & Supp. 2011) | § 1101(a)(43)(E)(ii) (defining a firearm offense as an aggravated felony); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable); § 1227(a)(2)(C) (allowing deportation of aliens convicted of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or attempting or conspiring to do the same, in violation of the law) |
| “Crime of violence” | Crimes of violence are determined on a case-by-case basis, but include “crime[s] in which force . . . or threat of force was used against the victim.” § 12.1-34-01(3). | § 1101(a)(43)(F) (including a crime of violence for which the term is one year imprisonment as an aggravated felony); § 1227(a)(2)(A)(iii) (stating aliens convicted of |

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| | <p>“Force” may be used in the following crimes: § 12.1-17-02 (aggravated assault); § 12.1-17-01.1 (assault); § 12.1-17-04 (terrorizing); § 12.1-17-05 (menacing); § 12.1-20-03 (gross sexual imposition); § 12.1-20-04 (sexual imposition); § 12.1-20-07 (sexual assault); § 12.1-21-05 (criminal mischief); § 12.1-21-01 (arson); § 12.1-31-02 (endangering by fire or explosion); § 12.1-21-06.1 (interference with telephone during emergency); § 12.1-22-01 (robbery); § 12.1-25-01 (inciting to riot)</p> | <p>aggravated felonies are deportable) 18 U.S.C. § 16 (defining “crime of violence” as “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or . . . any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense”)</p> |
| Theft | ch. 12.1-23 | § 1101(a)(43)(G) (including a theft offense for which the term of imprisonment is one year as an aggravated felony); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |
| Burglary | § 12.1-22-02 | § 1101(a)(43)(G) (including a burglary offense for which the term of imprisonment is one year as an aggravated felony); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |

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| Child pornography | § 12.1-27.2-04.1 | § 1101(a)(43)(I) (including child pornography offenses as aggravated felonies); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |
| Racketeer Influenced and Corrupt Organizations (RICO) | ch. 12.1-06.1 | § 1101(a)(43)(J) (including RICO offenses punishable for at least one year imprisonment as aggravated felonies); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |
| Felony business of gambling | § 12.1-28-02 | § 1101(a)(43)(J) (including gambling offenses punishable for one year imprisonment as aggravated felonies); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |
| Promoting or facilitating prostitution | §§ 12.1-29-01 to -02 | § 1101(a)(43)(K)(i) (including, as an aggravated felony, an offense that relates to “owning, controlling, managing, or supervising . . . a prostitution business”); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |

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| Human trafficking | § 12.1-40-01 | § 1101(a)(43)(K)(iii) (including “trafficking in persons” as an aggravated felony); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable); § 1227(a)(2)(F) (Supp. 2011) (stating an alien engaged in trafficking is deportable) |
| Treason | § 12.1-07-01; N.D. CONST. art. I, § 17 | § 1101(a)(43)(L)(i) (including an offense related to treason as an aggravated felony); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |
| Fraud | § 12.1-06.1-08 (prohibiting computer fraud; § 12.1-23-08 (prohibiting fraud against secured creditors); ch. 12.1-24 (prohibiting forgery and counterfeiting) | § 1101(a)(43)(M)(i) (including fraud with loss to a victim in excess of \$10,000 as an aggravated felony); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |
| Failure to appear after release/bail jumping | § 12.1-08-05 (stating that failure to appear for service of sentence if underlying offense is class C felony or greater) | § 1101(a)(43)(Q) (including “an offense to appear . . . for service of sentence if the underlying offense is punishable by imprisonment for [five] years or more” as an aggravated felony); § 1101(a)(43)(T) (including failure to appear |

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| | | pursuant to a court order as an aggravated felony); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |
| Obstruction of justice | §§ 12.1-08-01 to -03 | § 1101(a)(43)(S) (including an offense related to obstruction of justice if punishable for one year imprisonment as an aggravated felony); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |
| Perjury or subornation of perjury | § 12.1-11-01 | § 1101(a)(43)(S) (including “an offense relating to . . . perjury or subordination of perjury” punishable for one year’s imprisonment as an aggravated felony); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |
| Tampering with witnesses & informants in proceedings | § 12.1-09-01 | § 1101(a)(43)(S) (including “bribery of a witness” if the offense is punishable for one year’s imprisonment as an aggravated felony); § 1227(a)(2)(A)(iii) (stating aliens convicted of aggravated felonies are deportable) |

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| Fleeing from law enforcement agency in a motor vehicle | § 39-10-71 | § 1227(a)(2)(A)(iv) (stating an alien convicted of a high speed flight from an immigration checkpoint is deportable) |
| Failure to register as a sex offender | § 12.1-32-15 | § 1227(a)(2)(A)(v) (failing to register is deportable) |
| Conviction for possession of drugs or controlled substances | § 19-03.1-23 (2009) (possession of controlled substances); § 19-03.4-03 (possession of drug paraphernalia) | § 1182(a)(2)(C)(i) (not allowing admission of aliens who are illicit traffickers); § 1227(a)(2)(B)(i) (allowing deportation of aliens convicted of controlled substances offenses other than single offenses “involving possession for one’s own use . . . [thirty] grams or less of marijuana”) |
| Drug use or addiction | ch. 19-03.1 (uniform controlled substances act); ch. 19-03.4 (drug paraphernalia) | § 1227(a)(2)(B)(ii) (allowing deportation of an alien who is or has been a drug user or addict) |
| Crimes of “domestic violence” | Crimes of domestic violence are determined on a case-by-case basis, but include misdemeanor offenses like simple assault/domestic violence (§ 12.1-17-01) where the victim is a household or family member. § 12.1-17-01 | § 1227(a)(2)(E)(i) (allowing deportation of aliens “convicted of a crime of domestic violence” which is “any crime of violence . . . against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an |

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| | | individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government") |
| Stalking | § 12.1-17-07.1 | § 1227(a)(2)(E)(i) (allowing deportation of an alien convicted of the "crime of stalking") |
| Child abuse and neglect or abandonment | § 14-09-22 | § 1227(a)(2)(E)(i) (allowing deportation of an alien convicted of child abuse, neglect, or abandonment) |
| Violation of protection order | §§ 14-07.1-02, -06 | § 1227(a)(2)(E)(ii) (allowing deportation of an alien who violates a protection order) |
| Crimes involving moral turpitude (CIMT): An alien who is convicted of a crime involving moral turpitude committed within five years after the date of | Crimes involving moral turpitude are determined on a case-by-case basis. Generally, CIMTs include "offenses involving fraud, theft, intent to commit serious bodily harm, lewdness, malice, or sometimes recklessness . . ." ²⁴⁵ CIMTs typically include one or more of the following factors: | § 1182(a)(2)(A)(i)(I) (allowing no admission to aliens convicted of a CIMT); § 1182(a)(2)(B) (allowing no admission to aliens convicted of multiple CIMTs); § 1227(a)(2)(A)(i)-(ii) (allowing deportation of an |

245. 2 Tooby, *supra* note 177, § 7.2 at 664.

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| admission, or two or more crimes involving moral turpitude not arising from a single scheme of criminal misconduct | <p>“1. an intent to defraud or steal is an element; 2. great bodily harm is caused or threatened by an intentional, willful, or reckless act; 3. ‘malice’ is an element; or 4. sex offenses in which some ‘lewd’ intent is an element.”²⁴⁶</p> <p>Even misdemeanor offenses can qualify as CIMTs. For example, B misdemeanor theft under sections 12.1-23-02 and 12.1-23-05 will likely qualify as a CIMT. Issuing checks with insufficient funds under section 6-08-16 may or may not be a CIMT. Issuing a check without an account under section 6-08-16.1 is likely a CIMT. Class A misdemeanor false information to law enforcement under section 12.1-11-03 is likely a CIMT.</p> | alien convicted of one or more CIMTs) |
| Prostitution and commercialized vice | § 12.1-29-03 | § 1182(a)(2)(D) (allowing no admission to an alien who has or is engaged in prostitution) |

246. *Id.* at 663.

D. DUTY TO ADVISE CLIENT OF OTHER CONSEQUENCES

In finding deportation was a unique and particularly severe penalty intimately related to the criminal case, the Supreme Court in *Padilla* determined the traditional collateral consequences rule—that constitutionally competent counsel need only inform the defendant of the direct consequences of the criminal case—did not apply.²⁴⁷ Justice Stevens noted that because of its integration with the criminal justice system, deportation is “uniquely difficult to classify as either a direct or collateral consequence.”²⁴⁸ Consequently, the majority decided the “collateral versus direct distinction is . . . ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation.”²⁴⁹ Justice Alito, however, noted:

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses A criminal conviction may also severely damage a defendant’s reputation and thus impair the defendant’s ability to obtain future employment or business opportunities. All of those consequences are “serious, . . .” but this Court has never held that a criminal defense attorney’s Sixth Amendment duties extend to providing advice about such matters.²⁵⁰

Justice Alito foreshadowed the million-dollar question: what makes immigration so special? Its seriousness or severity? The fact that it is closely related to the criminal process? The nearly automatic result? The concurrence recognized there are a number of other consequences to which *Padilla*’s reasoning could be applied,²⁵¹ which is precisely the issue playing out in courtrooms around the country.²⁵²

247. *Padilla*, 130 S. Ct. at 1481-82.

248. *Id.* at 1482.

249. *Id.*

250. *Id.* at 1488 (Alito, J., concurring).

251. *Id.*

252. *Id.*; see also Mark Walsh, *Weighing the Consequences: Task Force Probes Defense Lawyers’ Role after Padilla*, A.B.A. J., Apr. 2011, at 60, 61 (noting there have been more than one hundred lower court decisions citing *Padilla* since it was decided in March 2010).

1. *Cases Applying Padilla Outside of the Immigration Context*

Padilla's holding, which requires competent, affirmative advice, has been applied in cases involving misadvice concerning civil commitment as a sexually violent predator,²⁵³ and misadvice concerning whether a no-contest plea would prohibit a subsequent challenge to the elements of the crime in a civil lawsuit arising from the criminal conduct.²⁵⁴ Additionally, *Padilla*'s holding has been applied to failure to advise a defendant of the requirement to register as a sexual offender,²⁵⁵ misadvice concerning the applicability of a parole eligibility requirement,²⁵⁶ and the failure to advise the defendant of the automatic forfeiture of a teacher's pension as a result of a guilty plea to a sex crime in the scope of his employment.²⁵⁷

a. Civil Commitment as a Sexually Violent Predator

In *Bauder v. Department of Corrections*,²⁵⁸ a Florida state prisoner sought a writ of habeas corpus in federal court under 28 U.S.C. § 2254, claiming his counsel misadvised him about whether he would be civilly committed as a sexually violent predator if he entered a plea of no-contest to aggravated stalking of a minor.²⁵⁹ Bauder pled guilty to the charge in 2002,²⁶⁰ but shortly before trial, Bauder entered a plea of no-contest at which time the court ordered him to be civilly committed.²⁶¹ Bauder appealed, and the appellate court affirmed his conviction.²⁶² Bauder sought review from the Florida Supreme Court, which dismissed his petition for further review.²⁶³ Bauder then filed a state petition for post-conviction

253. *Bauder v. Dep't of Corr.*, 619 F.3d 1272, 1275 (11th Cir. 2010). *But see* *Brown v. Goodwin*, No. 09-211, 2010 WL 1930574, at *13 (D.N.J. May 11, 2010) (declining to extend *Padilla* to civil commitment as a sexually violent predator).

254. *Wilson v. State*, 244 P.3d 535, 539 (Alaska Ct. App. 2010).

255. *See, e.g., Taylor v. State*, 698 S.E.2d 384, 388 (Ga. Ct. App. 2010). *But see* *Maxwell v. Larkins*, No. 4:08 CV 1896 DDN, 2010 WL 2680333, at *10 (E.D. Mo. July 1, 2010) (declining to extend *Padilla* to sex offender registration).

256. *See generally* *Pridham v. Commonwealth*, No. 2008-CA-002190-MR (Ky. Ct. App. Nov. 19, 2010), http://apps.courts.ky.gov/supreme/sc_opinions.shtm (applying *Padilla*'s reasoning to gross misadvice concerning the application of a parole eligibility requirement). The court of appeals noted "the factors relied upon in the deportation context apply with equal vigor to the circumstances of gross misadvice about parole eligibility. Parole eligibility involves a foreseeable, material consequence of the guilty plea that is 'intimately related to the criminal process' and is an 'automatic result' following certain criminal convictions." *Id.* at 5-6 (quoting *Padilla*, 130 S. Ct. at 1478, 1486).

257. *Commonwealth v. Abraham*, 996 A.2d 1090, 1094-95 (Pa. Super. Ct. 2010).

258. 619 F.3d 1272 (11th Cir. 2010).

259. *Bauder*, 619 F.3d at 1273.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

relief, alleging his attorney “misadvised him by informing him, prior to his plea, that he could not face involuntary civil commitment under Florida law”²⁶⁴ The motion was summarily denied and upheld on appeal without opinion.²⁶⁵

Bauder then filed a petition for habeas corpus in federal district court in 2006, alleging his counsel was ineffective due to his erroneous advice.²⁶⁶ The district court denied the petition because it construed Bauder’s claim as one alleging Bauder’s counsel merely remained silent on the issue of civil commitment.²⁶⁷ Bauder appealed to the Eleventh Circuit, which reversed and remanded to the district court to consider whether Bauder’s counsel provided affirmative misadvice rather than merely remained silent.²⁶⁸ After the matter was briefed, the magistrate judge recommended to the district court that Bauder’s petition be granted.²⁶⁹ The district court granted Bauder’s petition, and Florida appealed.²⁷⁰

The State advanced two arguments on appeal: that the district court erred in ruling Bauder’s counsel misadvised him and that the issue whether Bauder would be civilly committed was being litigated at the time Bauder entered his plea, leaving the law ambiguous.²⁷¹ In affirming the habeas grant, the Eleventh Circuit held the district court’s factual findings that Bauder’s counsel affirmatively misadvised him were not clearly erroneous.²⁷² In briefly addressing the State’s second claim, the Eleventh Circuit cited *Padilla* for the proposition that even if the law was unclear, Bauder’s counsel had the obligation to advise his client that “pending criminal charges may carry a risk of adverse immigration [or collateral] consequences.”²⁷³ Stated differently, the Eleventh Circuit Court of Appeals interpreted *Padilla* to encompass other collateral consequences like civil commitment.²⁷⁴

264. *Id.* Before Bauder was released from incarceration, Florida successfully sought to civilly commit him as a sexually violent predator beyond the incarceration imposed for his criminal offense. *Id.* at 1273 n.2.

265. *Id.*

266. *Id.*

267. *See id.* at 1273-74.

268. *Id.* at 1274; *see also* Bauder v. Dep’t of Corr. of Fla., 333 F. App’x 422, 424 (11th Cir. 2009) (per curiam) (unpublished table opinion) (vacating and remanding for consideration of the affirmative misadvice issue).

269. *Bauder*, 619 F.3d at 1274.

270. *Id.*

271. *See id.* at 1274-75.

272. *Id.* at 1274.

273. *Id.* at 1275; *see also* *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010).

274. *See Bauder*, 619 F.3d at 1275.

b. Subsequent Use of No-Contest Plea in Civil Lawsuit

In *Wilson v. State*,²⁷⁵ Wilson pled no-contest to an assault charge. Wilson asserted he pled only after being assured by his lawyer that the plea could not be used against him in a civil lawsuit.²⁷⁶ When the assault victim sued Wilson, the trial court ruled that his no-contest plea collaterally estopped him from contesting the elements of the assault case.²⁷⁷ Wilson sought post-conviction relief to withdraw his plea, claiming he received ineffective assistance due to his counsel's misadvice.²⁷⁸ The trial court denied Wilson relief and dismissed his application.²⁷⁹ Wilson appealed, and the Alaska Court of Appeals favorably cited *Padilla*, noting its reasoning, if Wilson could prove the affirmative misadvice, would establish ineffective assistance of counsel.²⁸⁰

c. Sexual Offender Registration Requirements

In *Taylor v. State*,²⁸¹ Taylor pled guilty to two counts of child molestation.²⁸² He later sought to withdraw his guilty pleas, alleging he received ineffective assistance of counsel because his trial counsel failed to inform him that he would be required to register as a sexual offender and participate in a sex offender treatment program.²⁸³ The trial court held a hearing on Taylor's motion where Taylor's trial counsel testified he did not remember whether he had advised Taylor of the requirements to register as a sexual offender or the sex offender treatment program, but it was his normal practice to do so.²⁸⁴ The trial court denied Taylor's motion, reasoning that even if it assumed the veracity of his claims, sex offender registration and the treatment program were collateral matters.²⁸⁵

On appeal, the Court of Appeals of Georgia extensively discussed *Padilla*.²⁸⁶ The court asserted *Padilla*'s holding relied on prevailing professional norms, the fact that immigration was intimately related to the criminal offense, and deportation was a "drastic measure."²⁸⁷ The court

275. 244 P.3d 535 (Alaska Ct. App. 2010).

276. *Wilson*, 244 P.3d at 536.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 538-39.

281. 698 S.E.2d 384 (Ga. Ct. App. 2010).

282. *Taylor*, 698 S.E.2d at 385.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 387-89.

287. *Id.* at 388.

also noted the penalty was “succinct, clear, and explicit.”²⁸⁸ Using the same factors discussed in *Padilla*, the court determined Taylor’s defense counsel had an affirmative duty to adequately inform Taylor of the sex offender registration requirements if he were to be convicted.²⁸⁹

Georgia is not alone in determining the failure to provide accurate, competent advice concerning the requirement to register as a sexual offender may render counsel’s performance constitutionally deficient. Like in *Taylor*, the Michigan Court of Appeals in *People v. Fonville*²⁹⁰ held that the failure to correctly advise a defendant of certain sex offender registration consequences results in the ineffective assistance of counsel.²⁹¹ An appellate court in New Jersey also relied on *Padilla* in determining a trial court should not have dismissed a juvenile’s petition to withdraw his or her admissions of guilt without an evidentiary hearing when the juvenile claimed his counsel failed to adequately advise a him and his parents of the sex offender registration requirements.²⁹²

d. Parole Eligibility/Truth in Sentencing Law

Padilla’s reasoning has been applied to enhanced parole eligibility statutes. In *Pridham v. Commonwealth*,²⁹³ the Kentucky Court of Appeals used the factors outlined in *Padilla* to determine that a lawyer’s misadvice concerning the application of a parole eligibility statute constituted ineffective assistance of counsel. The court held “the factors relied upon in the deportation context apply with equal vigor to the circumstances of gross misadvice about parole eligibility. Parole eligibility involves a foreseeable, material consequence of the guilty plea that is ‘intimately related to the criminal process’ and is an ‘automatic result’ following certain criminal convictions.”²⁹⁴ Consequently, the court determined Pridham’s counsel had an affirmative duty to correctly advise him of the application of the parole eligibility statute.

288. *Id.*

289. *See id.*

290. No. 294554, 2011 WL 222127 (Mich. Ct. App. Jan. 25, 2011).

291. *Fonville*, 2011 WL 222127, at *13.

292. In re C.P.H., No. FJ-03-1313-02, 2010 WL 2926541, at *6 (N.J. Super. Ct. App. Div. July 23, 2010).

293. No. 2008-CA-002190-MR (Ky. Ct. App. Nov. 19, 2010), http://apps.courts.ky.gov/supreme/sc_opinions.shtm.

294. *Pridham*, No. 2008-CA-002190-MR, at 5-6 (quoting *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478, 1486 (2010)).

e. Forfeiture of Government Pension

In *Commonwealth v. Abraham*,²⁹⁵ the defendant, a sixty-seven-year-old high school teacher, pled guilty to corruption of a minor and indecent assault for offering a student \$300.00 to have sex with him and grabbing the student's buttocks.²⁹⁶ After the incident was disclosed, Abraham was allowed to retire with his pension.²⁹⁷ Once he was convicted, however, he lost his vested pension rights under Pennsylvania's Public Employee Pension Forfeiture Act.²⁹⁸

Abraham filed a claim for post-conviction relief, claiming he was denied the effective assistance of counsel because his counsel did not tell him he would lose his pension.²⁹⁹ The trial court denied the motion without a hearing, determining the forfeiture was collateral to the criminal action.³⁰⁰ Utilizing *Padilla's* analytical framework on appeal, the Pennsylvania Superior Court held

“the loss of [Abraham's] pension is related to the nature of the sentence and the application of the measure has a definite, immediate and automatic effect on the range of punishment. As a result, the loss of pension rights is a direct consequence of the guilty plea and counsel was obliged to warn his client of the consequences of the plea.”³⁰¹

2. *Cases Limiting Padilla to Immigration Consequences*

Not all cases have applied the *Padilla* outside of the immigration context. In *Brown v. Goodwin*,³⁰² Brown pled guilty to aggravated sexual assault.³⁰³ Before entering his plea, Brown acknowledged he would be required to serve eighty-five percent of his imposed sentence before he would be eligible for release.³⁰⁴ Brown was also informed by the sentencing court and the prosecutor at the plea hearing of the possibility of involuntary civil commitment as a sexually violent predator “if the court

295. 996 A.2d 1090 (Pa. Super. Ct. 2010).

296. *Abraham*, 996 A.2d at 1091.

297. *Id.* Abraham pleaded guilty to indecent assault and the other charges were dismissed.
Id.

298. *Id.*; see also 43 PA. CONS. STAT. ANN. § 1311 (West 2009).

299. *Abraham*, 996 A.2d at 1092.

300. *Id.*

301. *Id.* at 1095.

302. No. 09-211, 2010 WL 1930574 (D.N.J. May 11, 2010).

303. *Brown*, 2010 WL 1930574, at *4.

304. *Id.*

finds, after a hearing, that [he is] a sexually violent predator”³⁰⁵ At sentencing, Brown further acknowledged he was subject to sex offender registration and DNA testing requirements.³⁰⁶ Finally, the sentencing judge asked Brown whether his attorney had explained everything in the plea agreement forms, to which Brown affirmatively responded.³⁰⁷

After he was sentenced, Brown appealed.³⁰⁸ However, the appeal was withdrawn because Brown’s counsel felt as though the issues Brown wanted to raise were better addressed as post-conviction relief claims.³⁰⁹ Brown subsequently filed a petition for post-conviction relief, claiming he received ineffective assistance in that he was not fully informed of the possibility of civil commitment as a sexually violent predator.³¹⁰ The trial court rejected Brown’s claims and denied him relief, noting Brown was adequately informed of the possibility of civil commitment.³¹¹

After being denied relief at the state trial and appellate levels, Brown sought habeas relief.³¹² The United States District Court of New Jersey stated it must afford state court factual findings considerable deference, and the factual findings will only be overcome by “clear and convincing evidence.”³¹³ The court then denied Brown habeas relief, noting the “state courts . . . made, not unreasonably indeed, factual finding that [Brown] was adequately informed of the possibility of civil commitment at the conclusion of his penal sentence. In contrast, [Brown] offers this Court no evidence whatsoever . . . , suggesting that this factual finding was erroneous.”³¹⁴

The district court, however, did not stop at simply determining Brown’s assertions were facially meritless. Instead, in dictum, it discussed the applicability of *Padilla* to non-immigration consequences.³¹⁵ The court reasoned that civil commitment as a sexually violent predator was different than deportation consequences because it involves an individualized assessment of whether civil commitment is appropriate in a particular case.³¹⁶ Because civil commitment is individualized in nature, not automatic, and

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at *12.

314. *Id.*

315. *Id.* at *13.

316. *Id.*

the penalty is not succinct, clear, or explicit, counsel does not have the constitutional duty to advise a client of unclear penalties.

In a similar case, *Maxwell v. Larkins*,³¹⁷ the United States District Court for the Eastern District of Missouri declined to grant habeas relief to a defendant on the basis that his attorney did not inform him, prior to his pleas to felony sexual abuse, that he would be required to register as a sex offender, he would be required to complete sex offender treatment before his release from incarceration, and he may be civilly committed as a sexually violent predator.³¹⁸ The court distinguished Maxwell's claims from the deportation consequences discussed in *Padilla*.³¹⁹ Specifically, sex offender registration was not punitive; therefore, it was not a "penalty" in the same sense as deportation.³²⁰ The court also distinguished sex offender registration on the basis that "[t]he registration requirements do not impose substantial physical or legal impediments upon a registrant's ability to conduct his or her daily affairs."³²¹

According to the court, the sex offender treatment program was also different from the deportation consequences at issue in *Padilla*.³²² The court noted the treatment condition is simply a condition precedent to parole eligibility where the offender must admit his guilt and show remorse.³²³ For the same reason discussed in *Brown v. Goodwin*, the court determined civil commitment as a sexually violent predator is not an automatic result, which distinguishes it from deportation.³²⁴ Finally, the court asserted there are no clearly established guidelines or prevailing professional norms because there was no specific mention of sex offender registries or civil commitment procedures.³²⁵

3. *North Dakota Appears to Limit Padilla to Immigration Consequences*

As these cases demonstrate, *Padilla*'s reasoning can and has been applied outside of the immigration context when the consequence is severe, is enmeshed or closely related to the criminal case, and is a near-automatic result of the criminal case. The question remains, however, how will North

317. No. 4:08 CV 1896 DDN, 2010 WL 2680333 (E.D. Mo. July 1, 2010).

318. *Maxwell*, 2010 WL 2680333, at *1.

319. *Id.* at **9-10.

320. *See id.*

321. *Id.* at *9 (quoting *R.W. v. Sanders*, 168 S.W.3d 65, 69 (Mo. 2005), a pre-*Padilla* case).

322. *Id.* at *10.

323. *Id.*

324. *Id.*

325. *See id.*

Dakota courts apply *Padilla*? As discussed above, North Dakota has a long history of following the collateral consequences rule.³²⁶ Nevertheless, *Padilla*'s reasoning could, and I argue should, be applied to all reasonably foreseeable consequences of a criminal plea in North Dakota. Specifically, North Dakota courts should apply *Padilla*'s reasoning to revisit counsel's obligations to discuss the application of the parole eligibility requirement for certain violent offenses,³²⁷ the requirement to register as a sexual offender,³²⁸ and the inability to possess a firearm.³²⁹ While certainly not an exhaustive list, these consequences are severe, intimately related to the criminal case, readily ascertainable, and reasonably foreseeable. Counsel should be advising his or her clients about these consequences in order for the client to make a knowing, voluntary, and intelligent decision about whether to plead guilty or go to trial. Unfortunately, it appears as though courts in North Dakota will likely read *Padilla* in its narrowest sense, limiting its application only to immigration consequences.

Since *Padilla* was issued, the North Dakota Supreme Court has had one opportunity to directly address its application beyond the immigration context. In *Interest of L.T.*,³³⁰ a juvenile was charged with the delinquent acts of gross sexual imposition and ingestion of a controlled substance.³³¹ L.T. appeared and was represented by appointed counsel at his pretrial conference.³³² His parents, however, were not separately represented.³³³

At this pretrial hearing, the gross sexual imposition allegation was amended to a lower gradation of felony, which allowed him to avoid prosecution in adult court.³³⁴ After the amendment, L.T. admitted to the

326. See discussion, *supra* accompanying notes 186-92.

327. *State v. Raulston*, 2005 ND 212, ¶¶ 12-15, 707 N.W.2d 464, 468 (stating the eighty-five percent parole eligibility provision is collateral, and even when the court misinforms the defendant of the application of the rule, it is inconsequential to the voluntariness of the guilty plea and counsel's alleged failure to advise defendant of the application of the eighty-five percent parole eligibility requirement is not ineffective assistance of counsel); see also *State v. Magnuson*, 1997 ND 228, ¶ 21, 571 N.W.2d 642, 646 (stating the eighty-five percent parole eligibility provision is a collateral consequence); *Houle v. State*, 482 N.W.2d 24, 30 (N.D. 1992) (holding counsel need not inform defendant of the applicability of the eighty-five percent parole eligibility provision).

328. *Davenport v. State*, 2000 ND 218, ¶¶ 9-10, 620 N.W.2d 164, 166 (stating "sex offender registration . . . is a collateral consequence" for which there is no obligation to advise the defendant); *State v. Burr*, 1999 ND 143, ¶ 36, 598 N.W.2d 147, 158-59 (stating "sex offender registration . . . is a collateral consequence").

329. *State v. Bucholz*, 2006 ND 227, ¶ 15, 723 N.W.2d 534, 540 (stating a prohibition on the ability to possess a firearm under North Dakota Century Code section 62.1-02-01(2) is a collateral consequence of a felony conviction).

330. 2011 ND 120, 798 N.W.2d 657.

331. *Interest of L.T.*, ¶ 2, 798 N.W.2d at 658.

332. *Id.* ¶ 3, 798 N.W.2d at 658-59.

333. *Id.*

334. *Id.*

allegations.³³⁵ There was no discussion on the record about whether the amended offense would require L.T. to register as a sexual offender or an offender against children.³³⁶ The juvenile court ordered a disposition at a later date and directed L.T. to undergo a psychological and sexual behavior evaluation for purposes of potential registration as a sexual offender.³³⁷ At the dispositional hearing, L.T. and the juvenile's parents were represented by counsel.³³⁸ The juvenile court determined registration as a sexual offender was mandatory and ordered L.T. to register as a sexual offender.³³⁹

On appeal, B.T., L.T.'s father, argued the juvenile court erred by not informing him that L.T.'s admission to the gross sexual imposition allegation would result in mandatory registration as a sexual offender during the adjudicatory phase of the proceeding.³⁴⁰ Both parties extensively briefed the applicability of *Padilla* to advice regarding sex offender registration.³⁴¹ Surprisingly, the court made no effort to cite, discuss, or analyze *Padilla*.³⁴² In fact, despite the parties' substantial briefing and argument, the North Dakota Supreme Court did not so much as cite *Padilla* in its unanimous opinion. Instead, the court relied on pre-*Padilla* "collateral consequences" authority to quickly dismiss B.T.'s argument.³⁴³ The court held that a defendant must only be advised of the direct consequences of a guilty plea, not "collateral consequences" like sex offender registration.³⁴⁴

335. *Id.*

336. Brief for Appellant at 3-4, *Interest of L.T.*, 2011 ND 120, 798 N.W.2d 657 (No. 20100329), available at <http://www.ndcourts.gov/court/briefs/20100329.atb.htm>.

337. *Interest of L.T.*, ¶ 3, 798 N.W.2d at 658-59.

338. *Id.* ¶ 4, 798 N.W.2d at 659.

339. *Id.*

340. *Id.* ¶ 20, 798 N.W.2d at 663.

341. See Brief for Appellant, *supra* note 336, at 19-21; Brief for Appellee at 4-6, *Interest of L.T.*, 2011 ND 120, 798 N.W.2d 657 (No. 20100329), available at <http://www.ndcourts.gov/court/briefs/20100329.aeb.htm>; Reply Brief of Appellant at 2-4, *Interest of L.T.*, 2011 ND 120, 798 N.W.2d 657 (No. 20100329), available at <http://www.ndcourts.gov/court/briefs/20100329.ryb.htm>.

342. See generally *Interest of L.T.*, 2011 ND 120, 798 N.W.2d 657.

343. *Id.* ¶ 21, 798 N.W.2d at 663 (citing *Davenport v. State*, 2000 ND 218, ¶ 10, 620 N.W.2d 164, 166; *State v. Burr*, 1999 ND 143, ¶ 36, 598 N.W.2d 147, 158-59).

344. *Id.* The court held:

A defendant must be informed of all direct consequences of a guilty plea, but he need not be advised of collateral consequences. We have previously held that registration as a sexual offender is a collateral consequence of a guilty plea: The purpose of the registration requirement is protection of a legitimate public interest, which imposes a collateral consequence upon conviction, not added punishment. Accordingly, the judicial referee was not required to inform L.T. of the registration requirement. If the defendant himself is not required to be advised of the collateral consequences of an admission, then no such requirement exists for a parent of the defendant. L.T. himself does not claim he was prejudiced by the referee's initial confusion as to the registration requirement, and B.T. likewise cannot make out a credible claim on this issue.

The court reasoned that since there is no requirement to advise L.T. of sex offender registration, there was no requirement to advise L.T.'s father, B.T. of the registration consequence.³⁴⁵

Likewise, *Padilla's* applicability beyond immigration consequences has been raised and denied in the district court level at least once in North Dakota.³⁴⁶ In *State v. Richardson*,³⁴⁷ Richardson pled guilty to one count of class A misdemeanor indecent exposure. The offense to which he pled guilty required Richardson to register as a sex offender unless he qualified for a narrow exception to the registration requirement.³⁴⁸ However, prior to sentencing, Richardson was not informed he would be subject to sex offender registration if he pled guilty to indecent exposure.³⁴⁹ The sentencing court also did not inform Richardson of the sex offender registration requirement, nor was the sex offender registration condition included in the criminal judgment or any appendix to the criminal judgment.³⁵⁰ After learning that Richardson was not informed of the registration requirement, the State moved the court to correct or modify Richardson's sentence on his behalf.³⁵¹

While no additional moving papers were filed, the court treated the State's motion on Richardson's behalf as a request to reduce or modify a sentence under North Dakota Rule of Criminal Procedure 35(b).³⁵² Alternatively, the court treated the request as a motion to vacate his sentence and order a presentence investigation report and as a motion to withdraw his plea under North Dakota Rule of Criminal Procedure 11.³⁵³ Ultimately, the court determined the motion was not only untimely under Rule 35(b), but also that Rule 35(a) was inapplicable.³⁵⁴ Consequently, the

Id. (internal citations and quotations omitted).

345. *Id.*

346. See Order Denying Motion to Amend Sentence, *supra* note 9, at 3 (declining any requirement of court or the defendant's counsel to advise the defendant of the requirement to register as a sex offender).

347. No. 09-2011-CR-00156 (N.D. Dist. Ct. July 18, 2011).

348. See N.D. CENT. CODE § 12.1-20-12.1(1)(b) (Supp. 2011) (stating the offense of indecent exposure); see also *id.* § 12.1-32-15(2)(b) (requiring sex offender registration unless a certain exception to the registration requirement is met).

349. See Rule 35 Motion at 1, *Richardson*, No. 09-2011-CR-00156 (N.D. Dist. Ct. June 1, 2011).

350. See generally Criminal Judgment and Commitment, *Richardson*, No. 09-2011-CR-00156 (N.D. Dist. Ct. Feb. 17, 2011).

351. See Rule 35 Motion, *supra* note 349, at 1.

352. See Order Denying Motion to Amend Sentence, *supra* note 9, at 1 (describing Richardson's requested relief).

353. *Id.*

354. *Id.* at 2.

court concluded it was without jurisdiction to amend or vacate the sentence.³⁵⁵

The court then addressed relief under a motion to withdraw his guilty plea³⁵⁶ by following the traditional collateral consequences mantra.³⁵⁷ Specifically, the court noted Rule 11 sets forth the requirement for the court to address the direct consequences of a guilty plea, including the maximum and minimum penalties for the offense.³⁵⁸ The court, however, reasoned that the state supreme court in *Davenport v. State*³⁵⁹ had previously determined sex offender registration is a collateral consequence of a guilty plea.³⁶⁰ Despite Richardson's best effort to convince the court that *Padilla's* rationale should apply, the court found *Padilla's* holding to be inapposite without analysis.³⁶¹ The court further declined to follow the emerging case law from other jurisdictions requiring the defendant to be informed of sex offender registration requirements before entering a plea.³⁶² Because the court found the sex offender registration issue to be a collateral consequence, the court ruled there was no manifest injustice warranting withdrawal of Richardson's plea.³⁶³

IV. CONCLUSION

In *Padilla*, the United States Supreme Court formally recognized that the *real* implications of a criminal case on a particular defendant oftentimes far exceed just whether the defendant will go to jail or pay a fine. *Padilla* requires constitutionally competent counsel to affirmatively and accurately advise a noncitizen client of clear immigration consequences.³⁶⁴ When immigration consequences are not clear, *Padilla* requires counsel to inform

355. *Id.*

356. *Id.* at 3.

357. *Id.*

358. *Id.*; see also N.D. R. CRIM. P. 11(a).

359. 2000 ND 218, 620 N.W.2d 164.

360. *Davenport*, ¶ 7, 620 N.W.2d at 166; Order Denying Motion to Amend Sentence, *supra* note 9, at 3. *But see* N.D. CENT. CODE § 12.1-32-15(2) (Supp. 2011) (providing that “[t]he court shall require an individual to register by stating the requirement on the court records . . .”) (emphasis added). Nevertheless, the North Dakota Supreme Court has essentially erased the explicit mandate of the legislature by concluding that sexual offender registration is a collateral consequence, which means trial courts need not inform the defendant of the registration requirement before the entry of the plea. *See, e.g., Davenport*, ¶ 10, 620 N.W.2d at 166 (denying post-conviction relief petition requesting withdrawal of guilty plea because defendant was not informed of sex offender registration requirement before entry of plea); *State v. Burr*, 1999 ND 143, ¶ 36, 598 N.W.2d 147, 158 (same).

361. *See* Order Denying Motion to Amend Sentence, *supra* note 8, at 3.

362. *Id.*

363. *Id.*

364. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010).

the noncitizen defendant that there *may* be adverse immigration consequences.³⁶⁵

Courts around the country, however, are struggling with whether *Padilla* applies only to immigration consequences or whether it also applies to other enmeshed consequences of a criminal conviction. *Padilla*'s holding has been applied in cases involving misadvice regarding civil commitment as a sexually violent predator,³⁶⁶ misadvice concerning whether a no-contest plea would prohibit a subsequent challenge to the elements of the crime in a civil lawsuit arising from the criminal conduct,³⁶⁷ the failure to advise a defendant of the requirement to register as a sexual offender,³⁶⁸ misadvice concerning the applicability of a parole eligibility requirement,³⁶⁹ and the failure to advise the defendant of the automatic forfeiture of a teacher's pension as a result of a guilty plea to a sex crime in the scope of his employment.³⁷⁰ In applying *Padilla* in these situations, some courts have determined *Padilla* requires counsel to affirmatively advise clients of these consequences. Other courts have applied the traditional collateral consequences rule, reasoning *Padilla* applies only to immigration advice. To date, courts in North Dakota seem to fall within the latter category, limiting *Padilla* to immigration advice.

Despite North Dakota courts' reluctance to apply *Padilla* outside of the immigration context, there is no indication counsel should avoid discussing these matters with their clients. The Sixth Amendment establishes a *minimum* standard of competency, not the ideal. Under North Dakota's rules of professional conduct, defense counsel has an affirmative obligation to provide competent representation to a client, including the possession of the requisite legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.³⁷¹ Moreover, counsel has an

365. *Id.*

366. *Bauder v. Dep't of Corr.*, 619 F.3d 1272, 1275 (11th Cir. 2010). *But see* *Brown v. Goodwin*, No. 09-211, 2010 WL 1930574, at *13 (D.N.J. May 11, 2010) (declining to extend *Padilla* to advice concerning civil commitment as a sexually violent predator).

367. *Wilson v. State*, 244 P.3d 535, 539 (Alaska Ct. App. 2010).

368. *See, e.g., Taylor v. State*, 698 S.E.2d 384, 388 (Ga. Ct. App. 2010). *But see* *Maxwell v. Larkins*, No. 4:08 CV 1896 DDN, 2010 WL 2680333, at *10 (E.D. Mo. July 1, 2010) (declining to extend *Padilla* to sex offender registration).

369. *See generally* *Pridham v. Commonwealth*, No. 2008-CA-002190-MR (Ky. Ct. App. Nov. 19, 2010), http://apps.courts.ky.gov/supreme/sc_opinions.shtml (applying *Padilla*'s reasoning to gross misadvice concerning the application of a parole eligibility requirement). The court of appeals noted "the factors relied upon in the deportation context apply with equal vigor to the circumstances of gross misadvice about parole eligibility. Parole eligibility involves a foreseeable, material consequence of the guilty plea that is 'intimately related to the criminal process' and is an 'automatic result' following certain criminal convictions." *Id.* at 5-6 (quoting *Padilla*, 130 S. Ct. at 1478, 1486).

370. *Commonwealth v. Abraham*, 996 A.2d 1090, 1094-95 (Pa. Super. Ct. 2010).

371. N.D. R. PROF. CONDUCT 1.1 (2010).

affirmative duty to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”³⁷² The communication duty requires counsel to provide the client with sufficient information to participate intelligently in important decisions, especially decisions for which the client has exclusive authority like the decision whether to plead guilty or go to trial.³⁷³

How can criminal defense counsel get closer to the ideal? Some commentators, including myself, have argued defense counsel needs to approach the criminal defense cases in a comprehensive, holistic manner.³⁷⁴ Defense counsel should make an effort not only to focus on the X’s and O’s in the criminal defense playbook, but also to see the client as a person facing a critical juncture in their lives. Counsel should make an effort to learn about the client’s wants, needs, and interests not just in terms of jail, probation, or fines. After all, “[t]he list of collateral consequences has grown to include many that are life-altering and devastating to our clients.”³⁷⁵ To that end, and in the spirit of *Padilla*, counsel should research, investigate, and advise clients of all reasonably foreseeable consequences of a guilty plea so the client can make informed decisions about how to handle his or her case. Our clients deserve no less.

372. *Id.* R. 1.4(b).

373. *See id.* R 1.4(b) cmt. 1; *see also id.* at R. 1.2(a).

374. *See, e.g.,* Walsh, *supra* note 252, at 61 (“Some in the legal defense community call the more comprehensive approach holistic, with front-line defenders needing to be aware of the full range of consequences facing their clients, and sometimes calling on other attorneys with expertise in immigration, housing, or other areas.”); *see also* Kyung M. Lee, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367 (2004) (advocating for a holistic approach to indigent defense services); Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067 (2004) (describing some efforts of public defense services to provide holistic representation).

375. Walsh, *supra* note 252, at 61 (quoting Jusine Luongo, a supervising attorney for the Legal Aid Society of New York City and chair of the ABA Criminal Justice Section Task Force on Comprehensive Representation).