INTRODUCTION

Over 90 percent of all criminal cases are resolved with a guilty plea.¹ With this volume of criminal cases bypassing jury trials, plea bargaining has assumed a critical role in our modern criminal justice system.² In pleading guilty, a defendant admits to the conduct charged and, therefore, “stands as a witness against himself,” even though the Fifth Amendment protects him from being compelled to do so.³ The acceptance of a plea bargain involves more than admitting the commitment of an offense; it is also a defendant’s “waiver of his right to [a] trial before a jury or a judge.”⁴ Because of the forfeiture of these critical constitutional rights, the Supreme Court has held that a defendant’s guilty plea must be “voluntary” and “knowing.”⁵

Surprisingly, in spite of the constitutional protection that a plea be “voluntary and knowing,” trial courts are not required to ensure that defendants are informed of all the consequences of a conviction. Current case law only requires a trial court to ensure that a defendant is informed of the

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¹ See Brady v. United States, 397 U.S. 742, 752 n.10 (1970) (“It has been estimated that about 90%, and perhaps 95%, of all criminal convictions are by pleas of guilty; between 70% and 85% of all felony convictions are estimated to be by guilty plea.”); Stephen A. Saltzburg & Daniel J. Capra, American Criminal Procedure 1038 (8th ed. 2007) (“Last year 95 percent of criminal cases adjudicated in federal courts ended with pleas of guilty or no contest.”); Joseph A. Colquitt, Ad Hoc Plea Bargaining, 75 Tul. L. Rev. 695, 700 (2001) (“Despite the fact that there is no right to a negotiated plea, most—if not virtually all—criminal cases result in a guilty plea or dismissal.”) (footnote omitted).
² Colquitt, supra note 1, at 700. For a discussion of the origin and early history of plea bargaining in the United States, see generally Mary E. Vogel, Coercion to Compromise: Plea Bargaining, the Courts and the Making of Political Authority (2007).
³ Brady, 397 U.S. at 748 (“He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice.”); see also Saltzburg & Capra, supra note 1, at 1043.
⁴ Brady, 397 U.S. at 748.
⁵ Id.; see also Saltzburg & Capra, supra note 1, at 1043 (discussing the “voluntary and knowing” requirements as set out by the Supreme Court in McCarthy v. United States, 394 U.S. 459 (1969), and Boykin v. Alabama, 395 U.S. 238 (1969)).
“direct” consequences of a guilty plea. A defendant is not required to be informed of consequences that are considered “collateral” in order for a plea to be “valid.” Collateral consequences are the consequences of a plea that do not derive from the punishment handed down from the court. Some examples of collateral consequences are ineligibility for public benefits, possible deportation, ineligibility to possess and own a firearm, loss of a business license, mandatory sex offender registration, civil commitment, and sentence enhancement in later convictions.

This Comment explores the importance of collateral consequences during the plea negotiation process and critiques the current standard used to ensure that defendants have adequate information in entering guilty pleas. Because guilty pleas are essential to the modern criminal justice sys-

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6 See Brady, 397 U.S. at 755 (internal quotation marks omitted). A consequence is considered “direct” “where it has a definite, immediate, and largely automatic effect on the range of punishment.” 21 AM. JUR. 2D Criminal Law § 620, at 720 (2008) (citing United States v. Kikuyama, 109 F.3d 536, 537 (9th Cir. 1997), United States v. Salerno, 66 F.3d 544, 550 (2d Cir. 1995), People v. Ford, 657 N.E.2d 265, 267-68 (N.Y. 1995), and State v. Barton, 609 P.2d 1353, 1356 (Wash. 1980)) (first internal quotation marks omitted). The “range of punishment” refers to the formal sentence handed down by the court and does not include hidden civil penalties regardless of if they are an automatic result of the conviction. See infra Part I.B.

7 A consequence is considered collateral when it is within the discretion of the court whether to impose the consequence and when the imposition of the consequence is controlled by another government agency. 21 AM. JUR. 2D, supra note 6, § 620, at 720 (citing United States v. Kikuyama, 109 F.3d 536, 536 (9th Cir. 1997), and Beagen v. State, 705 A.2d 173, 175 (R.I. 1998)); see also Christopher Mele & Teresa A. Miller, Introduction, in Civil Penalties, Social Consequences 1, 1 (Christopher Mele & Teresa A. Miller eds., 2005) (defining “collateral civil penalties” as penalties which “differ from the standard forms of punishment for criminal behavior, such as a prison sentence, probation, or parole, that are meted out by the criminal justice system” (first emphasis omitted)).


9 Id. at 635. But see 2-3B CRIMINAL LAW ADVOCACY § 3.10B n.11 (2010) (citing United States v. Littlejohn, 224 F.3d 960, 969 (9th Cir. 2000), which held that permanent ineligibility for federal benefits is a direct consequence).

10 2-3B CRIMINAL LAW ADVOCACY, supra note 9, § 3.10B n.9 (citing United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003), El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002), and United States v. Amador-Leal, 276 F.3d 511, 516-17 (9th Cir. 2002)).


13 People v. Gravino, 928 N.E.2d 1048, 1055 (N.Y. 2010).


15 Gabriel J. Chin, Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction, in Civil Penalties, Social Consequences 27, 34 (Christopher Mele & Teresa A. Miller eds., 2005).
tem, a defendant should be informed of the most important and automatic consequences of a conviction, regardless of whether the consequences are technically a part of the trial court’s sentence. The increasing number of civil sanctions for criminal convictions is a recent development, which heightens the need for more information for defendants during the plea negotiations process. Often, the sentence a defendant receives from the court may be insignificant in comparison to the collateral consequences that are civilly imposed following the conviction.

Part I of this Comment provides background information concerning the requirements for a valid plea. The jurisprudential development of the collateral consequences rule in the lower courts is the focus of Part II. This development demonstrates a tendency of the lower courts to narrow the definition of direct consequences in order to limit the information to which defendants are entitled. Part III discusses the Supreme Court’s recent departure from the collateral consequences rule in the context of deportation for ineffective assistance of counsel claims. Although the Court recognized that defendants should be informed of particularly harsh collateral consequences, this ignores the greater flaws of the current standard and rules narrowly on the facts. Finally, Part IV proposes a revised collateral consequences rule that would ensure that defendants are informed of the most important penalties of their pleas regardless of whether these consequences are technically penal or civil in nature. This change to the rule will also align the minimum responsibilities of defense counsel with the duties of trial courts.

I. BACKGROUND—PLEA BARGAINING AND COLLATERAL CONSEQUENCES

Plea bargaining is a widely accepted practice that typically involves the accused agreeing to plead guilty in exchange for a reduction in charges or sentence. Guilty pleas are useful to the criminal justice system, because

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17 Chin, supra note 15, at 27.

18 See id. at 28.

19 Id. at 27-28.

20 In Padilla v. Kentucky, the Supreme Court held that defense counsel is required to inform a defendant of the possible immigration consequences of his guilty plea even though deportation may be considered a collateral consequence. 130 S. Ct. 1473, 1478, 1486 (2010). The Court refused to hold on the validity of the collateral consequences rule but held that the rule does not apply to deportation for ineffective assistance of counsel claims. Id. at 1481.

21 Id. at 1478, 1482.

22 Colquitt, supra note 1, at 701.
they allow courts and parties to avoid the costs and risks associated with jury trials.\textsuperscript{23} In order for a plea to be valid, defendants must make an informed decision to plead guilty.\textsuperscript{24} This Part discusses the requirements for a valid plea that protects the defendant’s right to make an informed decision. This Part also discusses courts’ use of the collateral consequences rule to determine what consequences a defendant must be informed of before he or she enters a plea.\textsuperscript{25}

A. Requirements for a Valid Plea

Although there is no constitutional right to plead guilty in a criminal case, the Supreme Court recognizes the need to provide procedural protections to defendants who choose to plead guilty.\textsuperscript{26} The Supreme Court provides two basic and independent requirements for a valid plea.\textsuperscript{27} First, due process requires that a plea be intelligently and voluntarily made.\textsuperscript{28} Second, under the Sixth Amendment, the defendant has a right to effective assistance of counsel.\textsuperscript{29}

In Boykin v. Alabama,\textsuperscript{30} the Supreme Court noted that “a plea of guilty is more than an admission of conduct; it is a conviction.”\textsuperscript{31} In Boykin, there was nothing in the trial record concerning the voluntariness and intelligence of the defendant’s guilty plea.\textsuperscript{32} The Court reversed the defendant’s conviction finding that an affirmative showing of voluntariness in the record was necessary to show that he waived his constitutional rights.\textsuperscript{33} This expanded on the Supreme Court’s decision earlier that year, in McCarthy v. United States,\textsuperscript{34} which required that a plea be voluntarily and intelligently made.\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{23} Id. at 705.
\item \textsuperscript{24} See infra Part I.A.
\item \textsuperscript{25} See infra Part I.B-C.
\item \textsuperscript{26} 42 A.M. JUR. Trials \& 3, at 533-35 (1991); Kristen M. Hall, Casebrief, Ignorance Is Not Necessarily Bliss: The Third Circuit Expands the Requirements for a Knowing and Voluntary Plea in Jamison v. Klem, 54 VILL. L. REV. 753, 753-54 (2009).
\item \textsuperscript{27} Gabriel J. Chin & Richard W. Holmes Jr., Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 CORNELL L. REV. 697, 729-30 (2002).
\item \textsuperscript{29} Chin & Holmes, supra note 27, at 698.
\item \textsuperscript{30} 395 U.S. 238 (1969).
\item \textsuperscript{31} Id. at 242.
\item \textsuperscript{32} Id. at 239.
\item \textsuperscript{33} Id. at 244.
\item \textsuperscript{34} 394 U.S. 459 (1969). In McCarthy, the Supreme Court held that a defendant “is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided in Rule 11.” Id. at 463-64. In response to McCarthy, Rule 11 was amended in 1983 to add the “Harmless Error” exception, which provides that “[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights.” FED. R. CRIM. P. 11(b).
\end{itemize}
The Boykin Court emphasized that the potentially high stakes of a plea bargain require “the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure that he has a full understanding of what the plea connotes and of its consequence.”36 In McCarthy and Boykin, the Supreme Court recognized the need for procedural protections of plea bargaining and, therefore, brought pleading guilty under the protection of due process.37

The seminal case for ineffective assistance of counsel claims is Strickland v. Washington.38 Strickland provides a two-prong test that a defendant must meet to justify reversal of a conviction for ineffective assistance of counsel.39 The first prong of Strickland requires that the defendant show defense counsel’s performance “fell below an objective standard of reasonableness.”40 What is considered reasonable under this first prong is determined based on “prevailing professional norms.”41 The Supreme Court considers standards created by bar groups, such as the American Bar Association, useful for determining “prevailing professional norms.”42 Under the second prong of Strickland, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”43 The Strickland test is very difficult for defendants to meet and is designed to permit reversal only if the defense “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”44

In Hill v. Lockhart,45 the Supreme Court held that the two-prong Strickland test applies to ineffective assistance of counsel claims in the context of plea bargaining.46 In Hill, the defendant challenged the voluntariness of his guilty plea by alleging ineffective assistance of counsel.47 The defendant’s attorney did not inform him that he would be required to serve half

35 McCarthy, 394 U.S. at 466.
36 Boykin, 395 U.S. at 243-44.
37 Hall, supra note 26, at 759-60.
39 SALTZBURG & CAPRA, supra note 1, at 1296. In Powell v. Alabama, 287 U.S. 45 (1932), the Supreme Court held that the right to counsel means the right to “reasonably effective counsel.” SALTZBURG & CAPRA, supra note 1, at 1296. Strickland provided a standard for determining whether defense counsel fell below this standard of reasonably effective counsel required by Powell. Id.
41 Id. (quoting Strickland, 466 U.S. at 688) (internal quotation marks omitted).
42 Id.
43 Id. (quoting Strickland, 466 U.S. at 694) (internal quotation marks omitted).
44 Strickland, 466 U.S. at 686.
46 Padilla, 130 S. Ct. at 1485 n.12; Hill, 474 U.S. at 58.
47 Hill, 474 U.S. at 54-55.
of his sentence before becoming parole eligible.\textsuperscript{48} The Hill Court found that the first prong of the Strickland test was satisfied because defense counsel’s erroneous advice was unreasonable.\textsuperscript{49} The Court did not reverse the defendant’s conviction, however, because he did not satisfy the second prong of Strickland.\textsuperscript{50} The Court explained that under Strickland a defendant must show that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”\textsuperscript{51} Thus, an argument that a defendant would have sought a more favorable plea will never succeed under Hill and Strickland.

B. The Collateral Consequences Rule

A criminal conviction often leads to numerous consequences for a defendant.\textsuperscript{52} Despite due process protections, courts have limited the amount of information a defendant must be informed of in order for his plea to be considered voluntary and knowing. Generally, due process only requires that a defendant be informed of the direct consequences of his guilty plea.\textsuperscript{53} Direct consequences usually include the duration of a prison sentence, parole eligibility, or fines.\textsuperscript{54} Collateral consequences, on the other hand, result from the conviction but are not a part of the actual sentence that is handed down by the court.\textsuperscript{55} These collateral consequences, which sometimes may be the most significant penalties associated with a conviction, result from statutes that impose civil penalties on criminal offenders.\textsuperscript{56}

The collateral consequences rule is a creation of the federal circuit courts and state courts,\textsuperscript{57} which have used the rule to uphold the validity of

\textsuperscript{48} Id. at 53.
\textsuperscript{49} Id. at 56-57.
\textsuperscript{50} Id. at 60.
\textsuperscript{51} Id. at 59.
\textsuperscript{52} Chin & Holmes, supra note 27, at 704.
\textsuperscript{54} Pinard, supra note 8, at 634.
\textsuperscript{55} Id. Although the definition of a collateral consequence is a legal issue which different jurisdictions vary on, a basic definition is a penalty for committing a crime that is not a part of the criminal sentence. BLACK’S LAW DICTIONARY 278 (8th ed. 2004).
\textsuperscript{56} Chin, supra note 15, at 27-28.
\textsuperscript{57} Jenny Roberts, Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, 95 IOWA L. REV. 119, 124 (2009) (“Lower federal and state courts have created [the collateral consequences] rule, stating that an individual’s guilty plea is constitutionally valid even if that person was unaware of his conviction’s ‘collateral’ consequences.”).
guilty pleas by limiting the definition of direct consequences. Although the Supreme Court has never expressly defined the distinction between direct and collateral consequences, this distinction is known to be derived from the Supreme Court’s decision in *Brady v. United States*. In *Brady*, the defendant argued that his plea was involuntary, because he was coerced by the penalty structure of the statute under which he was charged. In rejecting his argument, the Supreme Court reasoned that a guilty plea entered after being informed of the direct consequences of the plea “must stand unless induced by threats . . . misrepresentation . . . or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business.”

Following *Brady*, the collateral consequences rule developed as a standard for determining the quantum of information due process requires a defendant to be informed of in order for the defendant’s plea to be valid. Although there is some variation among jurisdictions, the primary definition of “direct consequence” originated in the Fourth Circuit and defined “direct consequence” as having a “definite, immediate and largely automatic effect on the range of the defendant’s punishment.” Thus:

> [When a defendant is sentenced under a guilty plea to the crime of escape, it is not required that the Court advise the defendant, before accepting the plea, that he is subject to the loss of his "good time" credit... even though] the loss will increase the period of his actual confinement, [because] it is not "a definite, practical consequence of the plea" but is discretionary with the prison authorities... 

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58 See Hall, supra note 26, at 762 (“The majority of circuit courts, confronted with defendants challenging their pleas’ validity, have upheld guilty pleas by expanding the definition of collateral consequences and narrowing the definition of direct consequences.”).

59 397 U.S. 742 (1970); see Chin & Holmes, supra note 27, at 729.

60 *Brady*, 397 U.S. at 744, 749; see discussion infra Part II.A.

61 *Brady*, 397 U.S. at 755 (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), rev’d on other grounds, 356 U.S. 26 (1958)) (internal quotation marks omitted).

62 See, e.g., El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002) (holding that a district court does not need to inform a defendant that deportation will result from a guilty plea, because it is a “collateral” consequence); State v. Paredes, 101 P.3d 799, 802-04 (N.M. 2004) (holding that a trial court is not obligated to inform a defendant of the immigration consequences of pleading guilty because it is a “collateral” consequence); Page v. State, 615 S.E.2d 740, 742 (S.C. 2005) (holding that a defendant need not be informed of his potential for civil commitment as a result of his guilty plea, because civil commitment is a “collateral” consequence); see also Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 MINN. L. REV. 670, 689-93 (2008) (discussing the primary definitions of “direct” consequences).

63 Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973); see also Roberts, supra note 62, at 689 (discussing *Cuthrell*). Roberts explains that the Fourth Circuit definition is probably the most widely cited definition of a direct consequence. *Id.*

64 Cuthrell, 475 F.2d at 1366.
Another distinction used to determine whether a consequence is direct or collateral is whether the penalty is civil in nature or punitive. A consequence is also often considered collateral when it lies beyond the discretion of the court to impose the penalty. The distinction between direct and collateral consequences is not always easily discernable and, as a result of this difficulty, there is disagreement among jurisdictions on how to characterize certain consequences. The application of the collateral consequences rule shows an effort on the part of the courts to narrowly construe direct consequences while expanding on the definition of collateral consequences.

C. Collateral Consequences and Effective Assistance of Counsel

In applying the Strickland two-prong test to plea bargaining, lower courts use the collateral consequences rule to limit the amount of information required for effective assistance of counsel. Some criticize the use of the collateral consequences rule for evaluating ineffective assistance of counsel claims, arguing that it is inconsistent with the Strickland standard of reasonableness. In the recent decision of Padilla v. Kentucky, the Supreme Court validated these concerns by holding that deportation is an exception to the collateral consequences rule for ineffective assistance of counsel claims. Although the Court refused to rule on the validity of the collateral consequences rule generally, the Court looked to professional guides as a standard for prevailing professional norms of reasonableness rather than to the collateral consequences rule used by the lower federal and

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65 Roberts, supra note 62, at 691-92.
66 21 AM. JUR. 2D, supra note 6, § 620, at 720; see also Chin & Holmes, supra note 27, at 704; Roberts, supra note 62, at 692-93 (discussing El-Nobani, 287 F.3d at 421). In El-Nobani, the Sixth Circuit considered deportation to be a collateral consequence even though it is of an "automatic nature." El-Nobani, 287 F.3d at 421. The Sixth Circuit reasoned that "it is clear that deportation is not within the control and responsibility of the district court, and hence, deportation is collateral to a conviction." Id. Penalties that lie outside of the court’s discretion are generally controlled by a government agency that enforces the penalty as a result of the pleading defendant’s status as an offender as a result of a conviction. 21 AM. JUR. 2D, supra note 6, § 620, at 720. However, another penalty that is considered collateral is the possibility that the conviction could be used to enhance a future sentence based on the pleading defendant’s status as a repeat offender or career offender. Id.; Chin, supra note 15, at 27.
67 Hall, supra note 26, at 762-63 (citing Chin & Holmes, supra note 27, at 703-12).
68 See supra Part II.B.
69 See Chin & Holmes, supra note 27, at 701; see also Commonwealth v. Padilla, 253 S.W.3d 482, 483-85 (Ky. 2008) (holding that defense counsel’s erroneous advice concerning deportation was not grounds for relief because deportation is a collateral consequence), rev’d sub nom. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).
70 Chin & Holmes, supra note 27, at 701.
71 130 S. Ct. 1473 (2010).
72 Id. at 1482.
state courts.\textsuperscript{73} This decision casts doubt on the use of the collateral consequences rule in determining what defense counsel must inform a defendant of and may also have implications for the rule as it applies to due process.\textsuperscript{74}

II. \textbf{UNINFORMED PLEAS UNDER THE COLLATERAL CONSEQUENCES RULE}

Due process requires that a plea be knowing, voluntary, and intelligent.\textsuperscript{75} The federal circuit and state courts developed the collateral consequences rule as a standard for determining what quantum of information due process requires a defendant to be informed of when entering a guilty plea. In discussing the origins of the collateral consequences rule, this Part will show that the rule is not grounded in Supreme Court doctrine, but rather, undermines the procedural protections the \textit{Brady} Court sought to provide to pleading defendants. Courts have limited the amount of information a defendant must be informed of by narrowing the definition of direct consequences while expanding the definition of collateral consequences.\textsuperscript{76}

This Part also discusses the use of the collateral consequences rule for ineffective assistance of counsel claims in addition to due process claims. This use has created a close relationship between the responsibilities of the trial court and the defense counsel. An alignment of the responsibilities of the trial court and the defense counsel provides a dual protection to ensure that defendants are informed of the most important consequences of a guilty plea. This Part argues that it is appropriate to align the standards for both defense counsels and trial courts even though they are distinct constitutional requirements.

A. \textit{The Duty to Warn Under \textit{Brady}}

It is understood that in \textit{Brady}, the Supreme Court accepted the distinction between direct and collateral consequences as an acceptable standard to determine the information a defendant must be informed of for his plea to be valid.\textsuperscript{77} \textit{Brady} is a surprising source for the collateral consequences rule, because \textit{Brady} did not address a challenge to a plea for lack of knowledge, but instead, involved a claim that a plea was coerced.\textsuperscript{78}

\textsuperscript{73} \textit{Id.} at 1481-82.
\textsuperscript{74} See supra Part III for a discussion of \textit{Padilla} and its implications.
\textsuperscript{76} See infra Part II.B.
\textsuperscript{78} See \textit{Brady}, 397 U.S. at 744.
The defendant in *Brady* was charged with kidnapping under 18 U.S.C. § 1201(a). The defendant later challenged the voluntariness of his plea, because Section 1201(a) only imposes the possibility of the death penalty if a defendant insists on going to trial. He argued that the statute violated the Fifth Amendment, because it was structured in a way as to coerce a defendant to plead guilty in order to avoid the possible imposition of the death penalty. In rejecting the defendant’s argument, the Supreme Court explained that a guilty plea is not necessarily compelled whenever a defendant accepts the certainty of a lesser penalty by pleading guilty rather than risk a wider range of possibilities at trial.

In *Brady*, the Court reasoned that the structure of the statute did not coerce the defendant to plead guilty because it operated in a similar manner as plea bargaining. The basis of plea bargaining involves forgoing the opportunity of a trial in order to ensure a certain level of certainty in sentencing. As a result of the bargaining process, guilty pleas are not considered coercive, and so a guilty plea that is induced by the structure of the statute was also not coerced. The Court adopted the standard of “voluntariness,” as defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business . . .

The Court mentions that the defendant must be informed of “direct consequences,” but the Court’s primary concern was not in defining the amount of information necessary for a plea to be entered knowing and intelligent-

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79 *Id.* at 743.
80 *Id.* at 743-44.
81 *Id.* at 750-51. Section 1201(a) operated to encourage guilty pleas by reserving the death penalty only for those defendants that were convicted by a jury trial. *Id.* at 745-46. In *United States v. Jackson*, 390 U.S. 570 (1968), the Supreme Court held that § 1201(a) was unconstitutional because “[t]he inevitable effect of the provision was said to be to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.” *Brady*, 397 U.S. at 746.
82 *Brady*, 397 U.S. at 751. The Court reasoned that it is not unconstitutional for a state to provide a benefit to pleading guilty when plea bargaining provides a mutually advantageous tool for both defendants and the government. *Id.* at 753.
83 *Id.* at 751-52.
84 *Id.*
85 *Id.* at 755 (alteration in original) (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), rev’d on other grounds, 356 U.S. 26 (1958)) (internal quotation marks omitted).
ly. Rather, the Court was concerned with defining voluntariness in such a way as to preserve the validity of plea bargaining.

The language quoted by the *Brady* Court comes from Judge Tuttle’s dissenting opinion in *Shelton v. United States.* Judge Tuttle’s analysis also does not support the formation of the collateral consequences rule. In *Shelton,* the Fifth Circuit invalidated a guilty plea for voluntariness because it was induced by the prosecutor’s promises. In forming his rule about the voluntariness standard, Judge Tuttle relied on cases in which the defendants were not aware of all of the consequences of their guilty pleas. All of these cases were challenged on the basis of voluntariness as a result of misrepresentations on the part of the prosecution, the police, the court, or defense counsel during the plea bargaining process. Judge Tuttle was not concerned with defining the amount of information for a plea to be entered into knowing and intelligently. Rather, like the *Brady* Court, Judge Tuttle sought to define the voluntariness standard in relationship to coercion.

In fashioning the collateral consequences rule, federal circuit and state courts seized on the *Brady* Court’s mention of “direct consequences.” This is problematic because the Supreme Court was not addressing the issue of what quantum of information was required for a plea to be “knowing” under due process standards. Additionally, the *Brady* Court did not define “direct consequence” and did not distinguish between direct and collateral consequences.

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86 Roberts, *supra* note 62, at 684-85 (arguing that the collateral consequences rule “rests on a doctrinally flawed analysis” because “[t]hese brief words in *Brady* did not result from careful reasoning about . . . the ‘knowledge’ requirement for guilty pleas”).

87 *See Brady,* 397 U.S. at 753 ("A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained.").

88 242 F.2d 101 (5th Cir. 1957), *vacated,* 246 F.2d 571 (5th Cir. 1957) (en banc), *rev’d on other grounds,* 356 U.S. 26 (1958).

89 *Id.* at 113.

90 *Id.* at 114 (Tuttle, J., dissenting).

91 *Id.* at 114 & n.2.

92 *See Chin & Holmes,* *supra* note 27, at 726 ("The collateral consequences rule is based in large part on the *Brady* Court’s implication that a trial court need advise a defendant only of direct consequences to render a plea voluntary under the Due Process Clause."); Roberts, *supra* note 62, at 685 ("Whatever its force in the original opinion, the ‘direct consequences’ language from *Brady* has become the doctrinal cornerstone of the distinction between direct and collateral consequences.").

93 *See Roberts,* *supra* note 62, at 685 ("These brief words in *Brady* did not result from careful reasoning about exactly what type and quantum of information a defendant must have in order to meet the ‘knowledge’ requirement for guilty pleas.").
B. Expansion of the Collateral Consequences Rule

In *Brady*, the Court acknowledged that voluntariness was not the only requirement for a plea bargain to be valid: “Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”94 The federal circuit and state courts developed the collateral consequences rule to further limit the amount of information a defendant must be aware of for his plea to be intelligent and knowing.95 There are differing interpretations of the distinction between direct and collateral consequences.96

The Fourth Circuit was particularly influential in developing the collateral consequences rule and defining the distinction between direct and collateral consequences.97 In *Cuthrell v. Director, Patuxent Institution*,98 a defendant challenged the voluntariness of his plea, because he was not informed that, as a result of his guilty plea, he would be sent to an institution for evaluation and treatment.99 The court considered the required evaluation and treatment to be a collateral consequence because it was not an “automatic or immediate result of his plea.”100 The Fourth Circuit reasoned that for a guilty plea to be valid, the defendant must be informed of “the direct consequences of his plea.”101 In determining which consequences are considered “direct,” the court fashioned the “definite, immediate and largely automatic” test, relying on no legal authority.102 This definition for direct

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95 See Roberts, supra note 62, at 689 (“Although the Court in *Brady* did not define ‘direct consequences,’ a long line of (generally sparsely reasoned) lower federal and state court decisions following *Brady* have crafted a definition by omission.”).
96 Id.
97 See id. (discussing the Fourth Circuit’s definition of “direct consequence” as one of the most widely cited definitions (internal quotation marks omitted)).
98 475 F.2d 1364 (4th Cir. 1973).
99 Id. at 1365. Although the challenge to this plea was termed a voluntariness challenge, it was not claiming coercion as the defendant in *Brady* argued. See id. Instead, it was challenging the plea based on an argument that the plea was invalid because the defendant was not informed of a particular consequence of his guilty plea. See id.
100 Id. at 1366. The court characterized the consequence as tenuously related to his guilty plea because his plea only placed him into a class of offenders that may be committed after a separate civil proceeding. Id.
101 *Cuthrell*, 475 F.2d at 1365 (quoting *Wade v. Coiner*, 468 F.2d 1059, 1060 (4th Cir. 1972)) (internal quotation marks omitted). In *Wade v. Coiner*, the Fourth Circuit relies solely on *Brady* for the requirement that before pleading guilty a defendant must be “‘fully aware of the direct consequences’ of his plea.” *Wade*, 468 F.2d at 1060 (footnote omitted) (quoting *Brady* v. United States, 397 U.S. 742, 755 (1970)).
102 *Cuthrell*, 475 F.2d at 1366 (“The distinction between ‘direct’ and ‘collateral’ consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.”); Roberts, supra
consequences is widely accepted by courts in spite of its lack of apparent legal authority.\textsuperscript{103}

In addition to not citing legal authority for its standard, the Fourth Circuit also undermined its own definition within the \textit{Cuthrell} opinion by giving parole eligibility as the only example of a direct consequence.\textsuperscript{104} The court explained that “the right to parole has become so engrafted on the criminal sentence that such right is ‘assumed by the average defendant’ and is directly related in the defendant’s mind with the length of his sentence.”\textsuperscript{105} This rationale undercuts the court’s holding that civil commitment under a statute is a collateral consequence, rather than a direct consequence. Civil commitment is similar to parole eligibility in that both may alter the length of time a defendant is confined, and both consequences depend on the independent assessment of administrative officers.\textsuperscript{106}

Although the Fourth Circuit’s definition is widely accepted, courts have further narrowed this definition by distinguishing between consequences that are punitive and civil in nature.\textsuperscript{107} Under this standard, a defendant only has to be informed of the direct and punitive consequences of his plea.\textsuperscript{108} Thus, a criminal defendant pleading guilty to a sex offense does not need to be informed of required sex offender registration, even though it is a “definite, immediate, and largely automatic” consequence of a convic-
This distinction between punitive and civil consequences is not as clear cut as it seems because some consequences, such as deportation, are very difficult to classify as either penal or civil consequences.\footnote{Mitschke, 129 S.W.3d at 136; see also Roberts, supra note 62, at 691 (discussing the holding in Mitschke).}

Another way in which courts have further narrowed the definition of direct consequences is by limiting direct consequences to only those consequences that are under the “control and responsibility of the [sentencing] court.”\footnote{See Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (“We have long recognized that deportation is a particularly severe ‘penalty,’ . . . but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, . . . deportation is nevertheless intimately related to the criminal process.”).}

Whether a consequence is under the control and responsibility of the court depends on whether the consequence is included in the sentence of the court.\footnote{El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002) (quoting United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000)); see Roberts, supra note 62, at 692.} For example, under this rule, removal is considered a collateral consequence because deportation is imposed by another state agency over which the trial judge has no control over and responsibility for.\footnote{Gonzalez, 202 F.3d at 27.} This rule is also problematic because the court does not have complete control over sentencing and will often have to impose a mandatory minimum sentence in response to a given conviction. Additionally, courts themselves are not responsible for imposing direct consequences of a sentence. Courts are generally reliant on state agencies to impose the penalties associated with a conviction.\footnote{See, e.g., id.}

### C. Relationship Between Due Process Requirements and Effective Assistance of Counsel

The due process requirement of an intelligent, knowing, and voluntary plea is separate from a defendant’s right to effective assistance of counsel under the Sixth Amendment. Federal and state courts apply the collateral consequences rule to ineffective assistance of counsel claims, in addition to due process claims.\footnote{See United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003) (“We have yet to address directly the question of whether or not counsel performs deficiently by failing to advise a defendant of immigration consequences of a conviction. All other circuits to address the question have concluded that ‘deportation is a collateral consequence of the criminal process and hence the failure to advise does not amount to ineffective assistance of counsel.’” (quoting United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993))).} While the collateral consequences rule may be jurisprudentially flawed, it is logical that trial courts and defense counsel should have parallel constitutional responsibilities in ensuring that a defen-
dant is informed of the consequences of pleading guilty. This application of
the rule recognizes the expertise of criminal defense attorneys and the fre-
quent limitation on the resources of defendants and defense counsel.\textsuperscript{116}
Thus, the collateral consequences rule recognizes the complexities asso-
ciated with civil consequences and ensures that a disproportionate and un-
reasonable burden is not placed on defense counsel.

Robert Holmes and Professor Gabriel J. Chin argue that application of
the collateral consequences rule to ineffective assistance of counsel claims
is inconsistent with the Supreme Court’s two-prong test for determining
effective assistance of counsel.\textsuperscript{117} Chin and Holmes reason that the Supreme
Court’s two-prong test in \textit{Strickland} is meant to be a case-by-case analysis
of the competence of defense counsel, while the trial courts have instead
applied the “bright-line” collateral consequences rule.\textsuperscript{118} Chin and Holmes
argue that courts should instead look to American Bar Association stan-
dards as appropriate measures of professional behavior.\textsuperscript{119} They claim that
eliminating the collateral consequences rule for these claims would help
achieve more consistent and fair results in plea bargaining.\textsuperscript{120}

While Chin and Holmes may be correct that the collateral conse-
quences rule creates improper incentives for defense attorneys to ignore
collateral consequences while evaluating pleas, their argument ignores the
difficulty placed on defendants under the second prong of \textit{Strickland} by
\textit{Hill}.\textsuperscript{121} The second prong of the \textit{Strickland} test is very difficult for defen-
dants to meet when challenging the validity of a plea, because the second
prong requires a defendant to show that he would have insisted on going to
trial.\textsuperscript{122} In almost all cases, it will be impossible for a defendant to make
such a showing, particularly with a limited record, that he would have in-
sisted on a trial rather than pleading guilty.\textsuperscript{123} The difficulty in meeting the
requirement for effective assistance of counsel claims undermines Chin and
Holmes’s argument that proposed abandonment of the collateral conse-

\begin{footnotesize}
\textsuperscript{117} Chin & Holmes, supra note 27, at 712.
\textsuperscript{118} \textit{Id.} at 712 & n.68.
\textsuperscript{119} \textit{Id.} at 701.
\textsuperscript{120} \textit{Id.} at 703 (arguing that there is no reason why certain defendants should obtain better results
than others simply because their lawyers take into account collateral consequences when accepting a
plea).
\textsuperscript{121} \textit{Hill} requires a defendant to show that “there is a reasonable probability that, but for counsel’s
errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart,
\textsuperscript{122} \textit{Id.}
plea bargaining, the attorney’s role is virtually immune from scrutiny or control. The quality of attorney
performance is difficult for both clients and peers to assess; the formal obligations of effective assis-
tance do not, even in theory, require investigation of factual or legal defenses; and retrospective control
by suits for malpractice or ineffective assistance are precluded by nearly insuperable doctrinal hur-
dles.”).
\end{footnotesize}
quences rule for effective assistance of counsel claims would help achieve more consistent and fair results. This will not change the fact that some defense attorneys will achieve better bargains for their clients, because the standard is not based upon whether a defendant would have achieved a better result, but whether the defendant would have insisted on a trial.

Chin and Holmes also point out that “the imposition of collateral consequences has become an increasingly central purpose of the modern criminal process.” While this supports holding defense counsel to a higher standard, this also supports a general need to hold the courts to a higher standard as well during the plea bargaining process. Practical limitations on the resources of many defense attorneys, as well as the difficulty in proving ineffective assistance of counsel claims under Hill, require a heightened standard for trial courts in addition to defense counsel.

III. THE SUPREME COURT’S RECOGNITION OF COLLATERAL CONSEQUENCES IN PADILLA

The Supreme Court recently acknowledged that the collateral consequences rule is not always effective in determining the most important consequences of a defendant’s conviction. Recognizing that defendants should be afforded more information regarding the most important consequences of their pleas, the Court created an exception to the collateral consequences rule as applied to claims of ineffective assistance of counsel. The Court acknowledged that the collateral consequences rule did not adequately protect the interests of defendants; however, the ultimate ruling complicates Sixth Amendment jurisprudence and only marginally benefits criminal defendants.

This Part argues that the Padilla decision undermines the current application of the collateral consequences rule. First, while Padilla requires defense counsel to inform pleading criminal defendants of possible immigration consequences, Padilla also suggests that effective assistance of counsel may be held to a higher standard in the future, requiring defense counsel to inform pleading defendants of other important “collateral consequences.” Second, the creation of an exception to the rule may also have implications for due process. If courts continue to align the requirements of

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124 Chin & Holmes, supra note 27, at 699.
125 See Roberts, supra note 62, at 715 (proposing a reasonableness standard in place of the current due process approach to the required amount of information required in the plea bargain process).
127 But see Roberts, supra note 62, at 715 (“As a number of courts and commentators have noted, counsel is best situated to offer defendants information on collateral consequences.”).
128 Padilla, 130 S. Ct. at 1482 (majority opinion).
129 Id.
trial courts with that of defense counsel, then Padilla will also broaden the responsibilities of trial courts.

A. The Collateral Consequences Rule Does Not Apply to Deportation for Sixth Amendment Purposes

In Padilla, the Supreme Court held that under the Sixth Amendment’s requirement for effective assistance of counsel, defense attorneys are required to inform criminal defendants of the immigration consequences of pleading guilty. In making this determination, the Court ignored the collateral consequences rule. The Supreme Court pointed out that it has never applied the collateral consequences rule “to define the scope of constitutionally ‘reasonable professional assistance’ required under Strickland,” yet the Court refused to make a determination of whether the use of the rule for such claims is generally a constitutionally permissible practice. Instead, the Supreme Court determined that the collateral consequences rule was “ill-suited” as applied to deportation, because it is uniquely difficult to classify as either a direct or a collateral consequence. The Court reasoned that, even though deportation is a civil consequence of a guilty plea, it should not categorically be eliminated from a defense counsel’s duties, because it is “intimately related to the criminal process” and a “particularly severe ‘penalty.’”

The defendant in Padilla was a native of Honduras, but had lived in the United States for more than forty years as a lawful permanent resident. Padilla pled guilty to the transportation of marijuana in his tractor-trailer, which is a deportable offense, “like virtually every drug offense except for only the most insignificant marijuana offenses.” Padilla challenged the validity of his plea agreement on the ground that his attorney provided him with erroneous advice that his guilty plea would certainly not result in deportation. Padilla claimed that he would have insisted on a trial if he understood the deportation consequences of his guilty plea. The Supreme Court of Kentucky held that Padilla was not entitled to relief under Strickland, because advisement regarding deportation consequences fell

130 Id. at 1486.
131 Id. at 1481 (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).
132 Id. at 1482. But see supra note 115 and accompanying text.
133 Padilla, 130 S. Ct. at 1481 (quoting Fong Yee Ting v. United States, 149 U.S. 698, 740 (1893)).
134 Id. at 1477.
135 Id. at 1477 n.1 (citing 8 U.S.C. § 1227(a)(2)(B)(i) (2006)).
136 Id. at 1478.
137 Id.
“outside the scope of the guarantee of the Sixth Amendment right to counsel.”

After determining that Padilla’s claim was not automatically preempted by the civil nature of the consequence of deportation, the Supreme Court applied the first prong of the Strickland test to deportation. The Court held that Padilla sufficiently alleged constitutional deficiency to satisfy the first prong of Strickland. The Court reasoned that defense counsel was required to inform a defendant of potential deportation consequences based on “prevailing professional norms.” In determining the status of “prevailing professional norms” the Court looked to American Bar Association standards and other professional guides without considering the distinction between direct and collateral consequences.

B. Effective Assistance May Require Informing a Defendant of Collateral Consequences

By ignoring the collateral consequences rule in Padilla, the Supreme Court undermined settled Sixth Amendment law of the lower courts while creating an unclear and impractical standard for defense counsel. In his concurring opinion, Justice Alito expressed concern about the majority’s

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139 Padilla, 130 S. Ct. at 1482-84.
140 Id. at 1483.
141 Id. at 1482 (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)) (internal quotation marks omitted).
142 Id. at 1488 (Alito, J., concurring); see id. at 1482 (majority opinion) (citing Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as Amici Curiae at 12-14, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651); ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 14-3.2(f) (3d ed. 1999); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-5.1(a) (3d ed. 1993); ARTHUR W. CAMPBELL, LAW OF SENTENCING § 13:23 (3d ed. 2004); 2 CRIMINAL PRACTICE MANUAL §§ 45:3, 45:15 (2009); DEp’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, 2 COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS, STANDARDS FOR ATTORNEY PERFORMANCE D10, H8-H9, J8 (2000); G. NICHOLAS HERMAN, PLEA BARGAINING § 3.03 (1997); Nat’l Legal Aid & Defender Ass’n, PERFORMANCE GUIDELINES FOR CRIMINAL REPRESENTATION § 6.2 (1995); NORTON TOBY, CRIMINAL DEFENSE OF IMMIGRANTS § 1.3 (3d ed. 2003); Chin & Holmes, supra note 27, at 713-718; Scott E. Bratton, Practice Points: Representing a Noncitizen in a Criminal Case, CHAMPION, Jan./Feb. 2007, at 61).
143 See Padilla, 130 S. Ct. at 1488 (Alito, J., concurring) ("The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations."); id. at 1496 (Scalia, J., dissenting) ("Adding to counsel’s duties an obligation to advise about a conviction’s collateral consequences has no logical stopping-point."); John Castellano, Castellano on Padilla v. Kentucky, 2010 EMERGING ISSUES 4959 (Matthew Bender & Co. Apr. 13, 2010) ("The Court found a source for this obligation not in caselaw, but in bar association guidelines . . . ").
refusal to address the collateral consequences rule. In defense of the rule, he wrote:

While the line between ‘direct’ and ‘collateral’ consequences is not always clear, the collateral-consequences rule expresses an important truth: 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.

While Justice Alito acknowledged that the collateral consequences rule is often difficult to use in practice, he argued that it demonstrates the lower court’s attempt to create a realistic standard for effective assistance of counsel. This standard is the result of state and federal courts interpretation of the Sixth Amendment and what is required for a minimum level of effective assistance of counsel. The first prong of Strickland is concerned with whether a defense counsel’s performance was “reasonable[] under prevailing professional norms.” As a practical matter, bar groups are more interested in setting high standards as suggestions for what defense counsel should aspire to achieve, rather than providing “an empirical assessment of actual practice.”

In relying on these standards, the Padilla decision undercuts the strong presumption that Strickland gave to the validity of defense counsel’s performance. This departure from the collateral consequences rule places a disproportionate burden on a defense counsel, as opposed to a trial court’s responsibility of ensuring that a plea is voluntary. It is uncertain whether it is proper to place this burden on defense counsel without also requiring trial courts to ensure a defendant is informed.

The Padilla decision did not grant the defendant relief for the constitutionally deficient assistance he received from his attorney. Instead, the case was reversed and remanded for the Kentucky courts to determine

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144 Padilla, 130 S. Ct. at 1487 (Alito, J., concurring).
145 Id. at 1487-88 (citation omitted).
146 Id.
148 Padilla, 130 S. Ct. at 1488 (Alito, J., concurring) (“And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.”).
149 Cliff Roberson, CONSTITUTIONAL LAW AND CRIMINAL JUSTICE 189-90 (2009) (noting that under Strickland, “a court must indulge in a strong presumption that the counsel’s performance falls within the wide range of reasonable professional assistance”).
150 See Padilla, 130 S. Ct. at 1496 n.1 (Scalia, J., dissenting) (“[T]he effect of misadvice regarding such consequences upon the validity of a guilty plea should be analyzed under the Due Process Clause.”); see also Roberts, supra note 62, at 715 (suggesting a reasonableness approach for due process standards which “would be a floor above which the norm for effective assistance . . . should rest”).
151 Padilla, 130 S. Ct. at 1486-87 (majority opinion).
whether Padilla could demonstrate prejudice as a result of the ineffective assistance of counsel.\textsuperscript{152} Defendants will likely still not be adequately protected because of the difficulty of meeting both prongs of \textit{Strickland}. Additionally, while the Padilla decision may increase the amount of information provided to a defendant by defense counsel concerning deportation, it does not ensure that defendants are being informed of other important collateral consequences of a conviction such as recidivist sentence enhancement for future convictions, mandatory sex offender registration, and civil commitment.\textsuperscript{153}

C. \textit{Are There Due Process Implications to Padilla?}

The Padilla decision questions the validity of the collateral consequences rule without overturning it or creating a new standard. Although the Court clarifies that “[t]he collateral versus direct distinction is . . . ill-suited to evaluating a \textit{Strickland} claim concerning the specific risk of deportation,”\textsuperscript{154} it is not clear whether the Padilla decision will also have implications for due process applications of the rule. The Padilla Court explained that the collateral consequences rule did not apply because “[d]eportation as a consequence of a criminal conviction is . . . uniquely difficult to classify as either a direct or a collateral consequence.”\textsuperscript{155} The Court explained that this is because of the close connection of deportation to the criminal process.\textsuperscript{156}

By focusing on the consequence of deportation, rather than ruling that the collateral consequences rule is ill-suited for all \textit{Strickland} claims, the Court made an exception to the collateral consequences rule. The Court could have abolished the rule completely or held that the collateral consequences rule does not apply to effective assistance of counsel claims. Instead, the Court created an exception that undercuts the reliability of the rule. It is unclear whether this exception applies solely to ineffective assistance of counsel claims. Presumably, if courts continue to apply the collateral consequences rule to both due process and ineffective assistance of counsel claims, trial courts may also be required to ensure that a defendant

\textsuperscript{152} \textit{Id.} at 1487. In order to show prejudice under the \textit{Strickland-Hill} test, Padilla will have to show that if he had not received the erroneous advice from his attorney, he would have insisted on going to trial. \textit{See} \textit{Hill} v. \textit{Lockhart}, 474 U.S. 52, 59 (1985).

\textsuperscript{153} Pinard, \textit{supra} note 8, at 679 (“Quite simply, if the attorney does not focus on the client’s needs then no one else will, unless the attorney’s failure to do so is so egregious that it abridges the client’s right to effective assistance of counsel.”); \textit{see also supra} notes 13-15.

\textsuperscript{154} \textit{Padilla}, 130 S. Ct. at 1482.

\textsuperscript{155} \textit{Id.}

\textsuperscript{156} \textit{Id.}
has been informed of the possibility of deportation under *Brady*. This would be the most coherent application of *Padilla* because separate exceptions for Sixth Amendment and due process claims would further confuse the application of the rule. The *Padilla* decision undermines the distinction between collateral and direct consequences if a collateral consequence can suddenly be placed into the ambit of direct consequences because of its “close connection to the criminal process.” Arguably, all collateral consequences are closely connected to the criminal process, because the imposition of these civil penalties relies on convictions from the criminal justice system. The *Padilla* decision does more than simply create a requirement that defense counsel inform a pleading criminal defendant of immigration consequences. It undermines the collateral consequences rule and the way in which trial courts view the requirements of defense counsel and courts in safeguarding the constitutional rights of criminal defendants. While it may be a step in the right direction to expand the amount of information provided to criminal defendants, a revised collateral consequences rule is necessary to restore reliability and coherence to protect the constitutional rights of criminal defendants in the plea-bargaining process.

IV. A REVISED RULE

As discussed above, the *Padilla* decision acknowledged that the collateral consequences rule does not always properly separate out all of the constitutionally required consequences a defendant should be informed of in entering a guilty plea. Although the Supreme Court did not directly address the validity of the collateral consequences rule, the Court recognized that in negotiating and entering guilty pleas, the amount of information a criminal defendant receives warrants certain constitutional protections. The Court in *Padilla* determined that deportation is a penalty even though it is technically civil.

The collateral consequences rule should be modified to include the analysis used by the majority in *Padilla* to determine that deportation should not be considered strictly collateral. Courts may still use the current rule; however, the rule should be modified to include the analysis used by the Court in *Padilla* as a second prong designed to determine whether a

157 Creating this exception will not lead to significant changes for defendants facing possible deportation, because many jurisdictions have already enacted legislation requiring courts to advise criminal defendants of the possible immigration consequences of a guilty plea. *See id.* at 1491 (Alito, J., concurring) (“28 states and the District of Columbia have already adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas.” (quoting Brief for State of La. et al. as Amici Curiae Supporting Respondent at 25, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651)) (internal quotation marks omitted)).
158 *See id.* at 1482 (majority opinion).
159 *Id.* at 1481.
collateral consequence is so essential to a defendant’s decision to plead guilty, that it should be treated as a direct consequence. This revision is desirable for two main reasons. First, courts may continue to apply the collateral consequences rule to both due process and ineffective assistance of counsel claims. Second, it will align the responsibilities of the trial court and the defense counsel.\footnote{Defense counsel should not be constitutionally required to inform defendants of a broader range of consequences than trial courts, because defense attorneys are hired for their expertise in criminal law, and \textit{Strickland} does not adequately deter ineffective assistance of counsel. \textit{See supra} Part II.C.} At a minimum, this will better ensure that defendants are informed of the most important consequences of a conviction.

This Part applies the revised rule to two consequences that are widely considered “collateral consequences.” In accordance with the majority’s analysis in \textit{Padilla}, recidivist sentencing and sex offender registration are penal consequences that should also be considered exceptions to the collateral consequences rule. In determining that defense counsel should be required to inform a defendant of the consequence of deportation, the Court found it relevant that deportation (1) is difficult to classify as either a direct or a collateral consequence; (2) is “intimately related to the criminal process”; and (3) is a “particularly severe ‘penalty.’”\footnote{\textit{Padilla}, 130 S. Ct. at 1481 (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)); \textit{see also supra} Part III.A.} This Part applies this analysis to the civil penalties of recidivist sentencing and mandatory sex offender registration.

A. \textit{Plea Bargaining for Repeat Offenders}

An offender’s criminal record plays an integral role in the criminal justice system, and state and federal sentencing guidelines place great importance on a convicted defendant’s status as a repeat offender.\footnote{\textit{See generally} Julian V. Roberts, \textit{The Role of Criminal Record in the Sentencing Process}, 22 \textit{CRIME \& JUST.} 303 (1997).} The possibility that a conviction can be used to enhance a future sentence for a future conviction is often considered a collateral, rather than direct, consequence of a conviction.\footnote{21 AM. JUR. 2D, \textit{supra} note 6, § 620, at 720; Chin, \textit{supra} note 15, at 34 (“The Supreme Court has recognized that being subject to enhanced or recidivist sentencing in a future prosecution is a collateral consequence of conviction.” (citing Rutledge v. United States, 517 U.S. 292, 302 (1996), and United States v. Morgan, 346 U.S. 502, 512-13 (1954))).} The consequence of a defendant’s status as a career offender is analogous to the possible immigration consequences of a conviction for an alien.

Applying the analysis used by the Court in \textit{Padilla} shows that a pleading defendant’s criminal status should also be considered an exception to the collateral consequences rule. First, the \textit{Padilla} Court found it important
that removal proceedings are “intimately related to the criminal process.”\textsuperscript{164} The use of recidivist and enhancement sentencing is an important determinate of sentence severity in the criminal justice system. Criminal history is also used for other purposes “intimately related to the criminal process,” such as bail decisions, correctional classifications, disciplinary proceedings in prison, and parole eligibility dates.\textsuperscript{165}

Second, the Padilla court found it relevant that deportation is a “particularly severe ‘penalty.’”\textsuperscript{166} Just as a removal proceeding may result in a severe consequence such as deportation for a drug offense in Padilla, a defendant’s criminal status can also have harsh results. For example, the federal death-penalty statute considers a defendant’s criminal history as an aggravating factor justifying imposition of the death penalty if the defendant has two previous drug convictions punishable by more than one year in jail.\textsuperscript{167} This means that two relatively minor drug convictions may justify imposition of the death sentence for a later homicide conviction.\textsuperscript{168} Also, serious drug convictions on a defendant’s criminal record may later justify the imposition of the death sentence under the federal scheme.\textsuperscript{169}

One difference between deportation and criminal record status is that the administrative hearing determining deportation is not triggered by any further offense or action on the part of the defendant, while an enhanced criminal sentence is the result of a later conviction.\textsuperscript{170} Although the enhanced sentence does not occur immediately, a defendant’s status as a repeat or career offender may be immediate upon conviction. When a defendant pleads guilty to a crime that may be used in a later conviction to enhance his sentence, he accepts the possibility that he may be punished in a future conviction for the same behavior.\textsuperscript{171} His later enhanced sentence, therefore, directly flows from the original conviction. An example of this scenario is found in the Supreme Court decision of Rummel v. Estelle.\textsuperscript{172} In Rummel, the Supreme Court upheld a Texas recidivist statute that imposed a mandatory life sentence on a defendant who obtained $120.75 under false

\textsuperscript{164} Padilla, 130 S. Ct. at 1481.
\textsuperscript{165} Roberts, supra note 162, at 304.
\textsuperscript{166} Padilla, 130 S. Ct. at 1481 (quoting Fong Yue Ting, 149 U.S. at 740).
\textsuperscript{167} Chin, supra note 15, at 34 ("The federal death penalty statute deems it an aggravating factor if the defendant has two or more prior convictions for ‘State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.’” (quoting 18 U.S.C. § 3592(c)(10) (2000))).
\textsuperscript{168} Id.
\textsuperscript{169} Id. at 45 n.15 (noting that under 18 § U.S.C. 3582(d)(3) prior serious drug convictions are aggravating factors for drug offense death penalty).
\textsuperscript{170} See Padilla, 130 S. Ct. at 1490 n.2 (Alito, J., concurring).
\textsuperscript{171} See Roberts, supra note 162, at 304 (arguing that harsher penalty for a second conviction is punishment a second time for previous criminal conduct).
\textsuperscript{172} 445 U.S. 263 (1980).
pretenses. The defendant in *Rummel* accepted the money in exchange for his promise to repair an air conditioner. "The air conditioner was never repaired, and [he] was indicted for the felony offense . . . ." His two previous felony convictions, which made him eligible for the mandatory life sentence, were “fraudulent use of a credit card to obtain $80 worth of goods or services” and “passing a forged check in the amount of $28.36.”

The *Padilla* Court was willing to accept a certain level of uncertainty in the context of deportation because the collateral removal proceeding was still required, and there was a slim possibility that the removal would be cancelled. Although, there is greater uncertainty regarding the third triggering offense under a recidivist statute, recidivist statutes exist because of the high probability of repeat offenses. Furthermore, the defendant’s heightened criminal liability in *Rummel* was an immediate consequence of his second felony conviction.

The consequence of career offender status may also be considered an exception to the collateral consequences rule under the analysis employed by the court in *Padilla*. The future enhancement of a sentence based on recidivist sentencing is a part of the criminal process that can greatly penalize a defendant if convicted more than once. Although courts and defense attorneys may not be able to inform a defendant of the specifics of every state and federal recidivist enhancement statute, at a minimum, the defendant should understand that his or her previous conduct may be punished again in a future proceeding. Courts and defense attorneys are likely to already be familiar with their own jurisdiction’s recidivist statutes. Informing defendants of their enhanced criminal liability as a result of a conviction will not only lead to more informed pleas, but it will also help to achieve the deterrent goal of recidivist sentencing.

B. *Sex Offender Registration*

Another consequence that most courts consider collateral is the mandatory registration of sex offenders under sex offender registration statutes. Each state, including the District of Columbia, requires sex offend-

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173 *Id.* at 265-66.
174 *Id.* at 286 (Powell, J., dissenting).
175 *Id.*
176 *Id.* at 265 (majority opinion).
179 See supra notes 167-71 and accompanying text.
181 Roberts, *supra* note 62, at 724; see also *People v. Gravino*, 928 N.E.2d 1048, 1055 (N.Y. 2010) (explaining that the overwhelming majority of courts have considered sex offender registration a collateral consequence).
er registration and community notification. Federal law largely regulates sex offender registration and community notification requirements. These federal requirements were enacted in response to high recidivism rates among convicted sex offenders and to protect public safety. Under the Sex Offender Registration and Notification Act ("SORNA"), sex offenders are required to register with local authorities. Failure to comply with SORNA is a criminal offense that is punishable by at least one year imprisonment.

Mandatory registration for sex offenders is a particularly harsh consequence that is penal in nature, because the effects can be life-long and involve community notification. Access to an offender’s registration information is not limited to law enforcement efforts, but it is also open to public access. In addition to government registries that provide information concerning sex offenders, there are also private web registries.


See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071(a)(1) (2006) (authorizing the Attorney General to establish guidelines for state sex offender registration programs); see also Farley, supra note 182, at 475 ("[Under the 1994 Omnibus Crime] Bill, the states were required to adopt the Wetterling Act within three years or lose federal funding."

Farley, supra note 182, at 473.

42 U.S.C. § 16913(a); see also 18 U.S.C. § 2250(a) (2006) (requiring registration under SORNA and providing for fines and imprisonment for noncompliance). SORNA requires a convicted sex offender to register prior to completing a sentence of imprisonment for the sex offense or within 3 days of sentencing. 42 U.S.C. § 16913(b). A registered sex offender must keep his or her registration current, and in the event that his or her name, residence, employment, or student status changes, he or she must appear in person within three days of the status change. Id. § 16913(c). SORNA criminalizes failure to comply with the registration requirements and specifies that each state must provide a criminal penalty that includes a term of imprisonment greater than one year. Id. § 16913(e); see also United States v. Powers, 562 F.3d 1342, 1344 (11th Cir. 2009) (holding that the criminalization of failure to register under SORNA was within the scope of Congress’s power under the Commerce Clause).

42 U.S.C. § 16913(e); see also 18 U.S.C. § 2250(a)(2)-(3).

Although the understood purpose of sex offender registration is to protect the public and aid law enforcement in monitoring convicted sex offenders who have a high recidivism rate, it is difficult to ignore the shaming aspect of sex offender registration for the registrant. See 53 AM. JUR. 2D Mentally Impaired Persons § 126, at 633-34 (2006) (discussing sex offender registration and its purpose). Shaming punishments have been recognized “to create a situation in which the public exposure of defendant’s crime and the public exposure of defendant to the victims... will serve the purposes of “the rehabilitation of the defendant and the protection of the public.” United States v. Gementera, 379 F.3d 596, 602 (9th Cir. 2004) (first internal quotation marks omitted).

Roberts, supra note 62, at 725.

Farley, supra note 182, at 484 ("[Federal law] authorizes a national sex offender registry that will incorporate the information from each state’s registry. Specifically, [it] establishes a national sex offender database and a national sex offender web site. The new database will compile information obtained through the states’ sex offender registration requirements and make the information available on the web site.” (footnotes omitted)).

See id.
example, the Family Watchdog website updates its data daily from multiple state sex offender registries, and “as soon as a convicted sex offender registers an address in [a user’s] area, [Watchdog] will alert” the user automatically.\footnote{191 About Us, FAM. WATCHDOG, http://www.familywatchdog.us/aboutus.asp (last visited Jan. 9, 2011); see also Farley, supra note 182, at 484.}

Similar to the inevitability of removal that troubled the Court in Padilla, SORNA registration is an unavoidable consequence of a conviction.\footnote{192 See Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010) (noting that a non-citizen’s removal after committing a removable offense is “practically inevitable”); Roberts, supra note 62, at 724-25 (discussing the immediacy of sex offender registration and deportation as consequences of conviction).} Under SORNA, an approved state registration program must inform the convicted sex offender of his or her duty to register “shortly before release . . . from custody, or, if . . . not in custody, immediately after the sentencing.”\footnote{193 42 U.S.C. § 16917(a) (2006); see also Farley, supra note 182, at 482-83.} Although the intended purpose of sex offender registration is to protect the public and to ensure those convicted of sex offenses are readily available for police surveillance,\footnote{194 53 AM. JUR. 2D, supra note 187, § 126, at 633-34.} the registration requirement is an inevitable consequence that may be harsher than the actual sentence handed down by the court.\footnote{195 Roberts, supra note 62, at 725 (“The penal sanction for the low-level misdemeanor conviction, which may be as minimal as the night already served in jail, is completely overshadowed by the prospect of automatic [sex offender] registration . . . .”).}

In fact, SORNA registration is even more automatic than deportation, because it does not require a separate civil proceeding similar to the removal proceeding. A sex offender’s duty to register attaches as a result of a qualifying conviction, and the state simply informs him or her of the requirement.\footnote{196 42 U.S.C. § 16917(a).} SORNA registration is also intimately related to the criminal process, because it is directly dependent on the criminal justice system in that it targets an automatic civil penalty at a certain class of criminal offenders. Under the analysis used by the court in Padilla, SORNA registration may be another exception to the collateral consequences rule because of the difficulty in “divor[ing] the penalty from the conviction.”\footnote{197 Padilla, 130 S. Ct. at 1481.}

The Court of Appeals of New York’s recent decision in People v. Gravino\footnote{198 928 N.E.2d 1048 (N.Y. 2010).} demonstrates the severity of sex offender registration as a collateral consequence. In Gravino, Tara Gravino, a 34 year-old mother of six, was charged with rape in the second degree and endangering the welfare of a child under New York Law.\footnote{199 Id. at 1049.} Gravino pled guilty to one count of third degree rape and during the plea colloquy, Gravino informed the court that

\begin{itemize}
  \item About Us, FAM. WATCHDOG, http://www.familywatchdog.us/aboutus.asp (last visited Jan. 9, 2011); see also Farley, supra note 182, at 484.
  \item See Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010) (noting that a non-citizen’s removal after committing a removable offense is “practically inevitable”); Roberts, supra note 62, at 724-25 (discussing the immediacy of sex offender registration and deportation as consequences of conviction).
  \item 42 U.S.C. § 16917(a) (2006); see also Farley, supra note 182, at 482-83.
  \item 53 AM. JUR. 2D, supra note 187, § 126, at 633-34.
  \item Roberts, supra note 62, at 725 (“The penal sanction for the low-level misdemeanor conviction, which may be as minimal as the night already served in jail, is completely overshadowed by the prospect of automatic [sex offender] registration . . . .”).
  \item 42 U.S.C. § 16917(a).
  \item Padilla, 130 S. Ct. at 1481.
  \item 928 N.E.2d 1048 (N.Y. 2010).
  \item Id. at 1049.
\end{itemize}
she was satisfied with her attorney. During sentencing, the judge imposed $1,050 in sex registration fees, and at the request of the prosecutor, the judge certified Gravino as a sex offender. Gravino later challenged her guilty plea, arguing that it was involuntary because the court did not inform her of the mandatory sex offender registration. The Court of Appeals of New York held that the trial court was not required to inform Gravino of the mandatory sex offender registration because it is a collateral rather than direct consequence. The court explained that collateral consequences “are peculiar to the individual and generally result from the actions taken by agencies the court does not control.” Sex offender registration is not peculiar to the individual, however, because it automatically applies to any qualifying conviction under the guidelines. The only “imposition” by a state agency is to inform the convicted sex offender of the requirement immediately before release from custody or following sentencing. 

*Gravino* demonstrates the severity of required sex offender registration, as well as its intimate relationship to the criminal justice system. The imposition of the fines seems to be a part of the sentencing proceeding and is imposed by the court immediately following the formal sentence. Furthermore, the prosecutor’s request to certify Gravino as a sex offender demonstrates the prosecutor’s awareness of the consequences and suggests that the prosecutor is achieving a state interest in ensuring sex offender registration. The New York court in *Gravino* relied on the distinction between a penal statute designed to punish crime and sex offender registration as “a remedial statute intended to prevent future crime.” The Supreme Court in *Padilla*, however, rejected this distinction in the context of deportation. Despite the exception provided for in *Padilla*, the court in *Gravino*

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200 Id. at 1050.
201 Id.
202 Id.
203 Id. at 1055.
204 *Gravino*, 928 N.E.2d at 1052 (quoting People v. Ford, 657 N.E.2d 265, 268 (N.Y. 1995)) (internal quotation marks omitted). In *People v. Ford*, the New York court faced the issue of whether trial judges and defense counsel had a duty to warn defendants of the possible deportation consequences before entering a guilty plea. *Ford*, 657 N.E.2d at 266-67. Relying on the collateral consequences rule, the court held trial courts and defense counsel were not required to inform a defendant of deportation consequences. *Id.* at 269.
206 *Id.* § 16917(a).
207 *See Gravino*, 928 N.E.2d at 1050 (recounting that the prosecutor asked the judge to certify Gravino as a sex offender after the judge imposed the sex offender registration fines).
208 *Id.* at 1054 (quoting North v. Bd. of Exam’rs of Sex Offenders of N.Y., 871 N.E.2d 1133, 1138 (N.Y. 2007)).
209 Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (noting that deportation is “intimately related to the criminal process” even though “it is not, in a strict sense, a criminal sanction”).
applied the collateral consequences rule without considering the analysis used to create an exception for immigration.\(^{210}\)

Similar to sex offender registration and recidivist sentencing, the civil commitment of sex offenders should also be considered a consequence that defendants must be informed of under this revised rule. Like sex offender registration, civil commitment of sex offenders is a severe consequence that is applied to a certain class of offenders.\(^{211}\) Although civil commitment is less certain than the imposition of SORNA,\(^{212}\) the defendant’s future evaluation for civil commitment is an inescapable result similar to enhanced criminal liability under recidivist sentencing statutes. Although these consequences may not be a part of the formal sentence handed down by the court, defendants cannot make an informed decision regarding a plea of guilty without an awareness of them.

CONCLUSION

The Supreme Court recognizes the importance of protecting defendants who choose to plead guilty and, as a result of pleading, waive their constitutional right to a jury trial.\(^{213}\) Although the Court recognizes the importance of protecting defendants, it has failed to set standards that adequately protect criminal defendants from entering uninformed guilty pleas. The collateral consequences rule may not have strong doctrinal grounds, but it nonetheless has developed into a useful tool that should not be entirely abandoned. Instead, the collateral consequences rule should be revised to expand the scope of consequences a defendant must be informed of by both trial courts and defense counsel. The analysis used by the Court in Padilla will aid trial courts in determining what the most important consequences of a guilty plea are. This will ensure that defendants are informed of particularly harsh civil penalties that are intimately related to the criminal justice system in addition to the consequences that have been traditionally considered “direct.”

\(^{210}\) The court in Gravino does, however, mention in a footnote that under Padilla defense attorneys are required to inform defendants of the deportation consequences of a guilty plea. Gravino, 928 N.E.2d at 1052 n.4.

\(^{211}\) Roberts, supra note 62, at 709 (“Although the number of people confined as sexually violent predators remains small, many of them will never be released.”).

\(^{212}\) See supra note 100 and accompanying text.