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SUPREME COURT CRIMINAL LAW JURISPRUDENCE: FAIR TRIALS, CRUEL PUNISHMENT, AND ETHICAL LAWYERING—OCTOBER 2009 TERM

*Richard Klein**

The last Term of the Supreme Court included important issues regarding the constitutional rights of criminal defendants. In *Skilling v. United States*,¹ the Court considered a claim by a criminal defendant that the venue of his trial should have been changed because of the extensive publicity surrounding the case.² The Court in *Padilla v. Kentucky*³ evaluated a claim of ineffective assistance of counsel based on the defense attorney's affirmative misadvice regarding deportation.⁴ In *Graham v. Florida*,⁵ the Court considered the issue of the Eighth Amendment's prohibition of cruel and unusual punishment as applied to a juvenile sentenced to life imprisonment without the possibility of parole.⁶ *United States v. Comstock*⁷ presented the Court with an opportunity to expound on the breadth of the Necessary and Proper Clause regarding a Congressional statute allowing the federal government to civilly commit "sexually dangerous" convicts after their sentences ended.⁸ Finally, *Holland v. Florida*⁹ allowed the Court to clarify a circuit split regarding equitable tolling

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¹ 130 S. Ct. 2896 (2010).

² *Id.* at 2907.

³ 130 S. Ct. 1473 (2010).

⁴ *Id.* at 1478.

⁵ 130 S. Ct. 2011 (2010).

⁶ *Id.* at 2020.

⁷ 130 S. Ct. 1949 (2010).

⁸ *Id.* at 1954.

⁹ 130 S. Ct. 2549 (2010).

under the Anti-Terrorism and Effective Death Penalty Act of 1996.¹⁰

I. *SKILLING V. UNITED STATES*: PUBLICITY, PARTIALITY, AND PROSPECTIVE JURORS

*Skilling v. United States*¹¹ concerns a criminal defendant's Sixth Amendment¹² right to a trial by an impartial jury.¹³ Jeffrey Skilling was the Chief Executive Officer of the now-defunct Texas-based corporation, Enron.¹⁴ As a result of his dealings with the former energy giant, Skilling was charged with "conspiracy, securities fraud, making false representations to auditors, and insider trading."¹⁵

At the time that Skilling was working for Enron, the corporation was the seventh highest revenue-grossing company in the United States.¹⁶ *Fortune* rated Enron as the most innovative large company in America in the year 2000.¹⁷ That same year, the company's stock price soared to over \$83 per share.¹⁸ In 2001, while Enron was flourishing, Skilling resigned as CEO for personal reasons and was replaced by his future co-defendant, Kenneth Lay.¹⁹ Within four months, Enron collapsed into bankruptcy.²⁰ In those four months, internal communications expressed concerns relating to the company's accounting procedures.²¹ A closer look into the accounting showed massive bookkeeping and financial maneuvers which concealed

¹⁰ *Id.* at 2560.

¹¹ 130 S. Ct. 2896 (2010).

¹² U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." (emphasis added)).

¹³ *Skilling*, 130 S. Ct. at 2907.

¹⁴ *Id.* See also ENRON, <http://www.enron.com> (last visited Feb. 20, 2011) (describing Enron's collapse as "one of the largest and most complex bankruptcies in U.S. history").

¹⁵ *United States v. Skilling (Skilling I)*, 554 F.3d 529, 534 (5th Cir. 2009). "The indictment charged Skilling with one count of conspiracy to commit securities and wire fraud, fourteen counts of securities fraud, four counts of wire fraud, six counts of making false representations to auditors, and ten counts of insider trading." *Id.* at 542.

¹⁶ *Skilling*, 130 S. Ct. at 2907.

¹⁷ Paul M. Healy & Krishna G. Palepu, *The Fall of Enron*, 17 J. ECON. PERSP. 3, 3 (2003).

¹⁸ *Id.* at 3. This was an eighty-seven percent increase over the year. *Id.*

¹⁹ *Skilling*, 130 S. Ct. at 2907; Healy & Palepu, *supra* note 17, at 4 exhibit 1.

²⁰ *Skilling*, 130 S. Ct. at 2907.

²¹ Healy & Palepu, *supra* note 17, at 4 exhibit 1.

Enron's truly poor performance at the same time that the executive board was attempting to "hype" Enron's stock to unsustainable levels.²² As a result of this information becoming public, major credit rating agencies downgraded Enron's stock, resulting in the former "innovative company of the year" filing for bankruptcy.²³ Consequently in late 2001, the stock was worth just pennies per share.²⁴ The failure of Enron was subsequently linked to the actions of its executive board.²⁵

The city which was the hardest hit as a result of Enron's collapse was Houston, Texas.²⁶ This catastrophic decline wiped out many people's life savings that were tied up in Enron's stock.²⁷ Not only did individuals lose massive amounts of personal investments, but employees of the former energy giant also lost their jobs.²⁸ Many of these former employees lived in Houston.²⁹ A media survey in Houston was conducted before any trial began and revealed that residents perceived Jeffrey Skilling as a crook, money grubber, thief, swindler, slimy rat, backstabber, terrorist, the devil, and the equivalent of an axe murderer.³⁰ These disparaging comments were typical of the responses throughout the Houston community.³¹

Skilling was alarmed that he would not be able to receive a fair trial, and made a motion for a change of venue due to Enron's location in Houston where the trial was set to occur.³² In his motion, he "contended that hostility toward him in Houston, coupled with ex-

²² *Skilling*, 130 S. Ct. at 2907.

²³ Healy & Palepu, *supra* note 17, at 4 exhibit 1.

²⁴ *Skilling*, 130 S. Ct. at 2907.

²⁵ *Id.* In 2004, a grand jury indicted Enron's founder, Kenneth Lay, Jeffrey Skilling, and Enron's former chief accounting officer, Richard Causey. *Id.* at 2907. The indictment read that each "engaged in a wide-ranging scheme to deceive the investing public, including Enron's shareholders, . . . about the true performance of Enron's businesses by: (a) manipulating Enron's publicly reported financial results; and (b) making public statements and representations about Enron's financial performance and results that were false and misleading." *Id.* at 2908.

²⁶ *Id.* at 2942 (Sotomayor, J., dissenting).

²⁷ *Skilling I*, 554 F.3d at 560.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Joint App. Vol. 1 at 378a-79a, 416a, *Skilling*, 130 S. Ct. 2896 (No. 08-1394), 2009 WL 4825147.

³¹ *Id.*; *Skilling*, 130 S. Ct. at 2954 ("Houstonians compared Skilling to, among other things, a rapist, an axe murderer, and an Al Qaeda terrorist.").

³² *Skilling*, 130 S. Ct. at 2908.

tensive pretrial publicity, had poisoned potential jurors.”³³ Attached to his motion was the independent media survey which showed that the people in Houston were nine times more likely to have prejudged the guilt of Jeffrey Skilling than those in the not-so-far-away city of Phoenix, Arizona.³⁴ Respondents to the surveys from Houston were asked, “What words come to mind when you hear the name Jeffrey Skilling?”, and close to one-third of all responders used negative and/or prejudicial words to describe him.³⁵ However, the trial court, in accord with judges in two other Enron related cases, denied a change of venue motion.³⁶

Each member of the potential jury pool, which was comprised of several hundred persons, received a questionnaire.³⁷ The questionnaire consisted of a fourteen-page document with seventy-seven questions for the purpose of weeding out biased individuals.³⁸ As a result, the jury pool was reduced significantly.³⁹ However, three weeks before voir dire was about to begin, one of Skilling’s co-defendants, Richard Causey, entered a guilty plea.⁴⁰ News of the plea was the front-page headline in the Houston Chronicle: “Causey’s plea wreaks havoc for Lay, Skilling.”⁴¹ The headline and accompanying article imparted even more negative publicity about Skilling than had previously existed.⁴² In fact, there had been over 4,000 ar-

³³ *Id.*

³⁴ *Id.*; Joint App. Vol. 1, *supra* note 30, at 378a.

³⁵ Joint App. Vol. 1, *supra* note 30, at 401-02a. For a complete list of responses, see Joint App. Vol. 1, *supra* note 30, at 416a.

³⁶ *Skilling*, 130 S. Ct. at 2908 n.2. See *United States v. Howard*, et al., No. 4:03-CR-00093 (S.D. Tex. Nov. 24, 2004); *United States v. Fastow*, 292 F. Supp. 2d 914, 918 (S.D. Tex. 2003). Therefore, “[t]hree judges residing in the [Houston] area . . . independently found that defendants in Enron-related cases could obtain a fair trial in Houston.” *Skilling*, 130 S. Ct. at 2908 n.2.

³⁷ *Skilling*, 130 S. Ct. at 2909.

³⁸ *Id.* The questionnaires asked a variety of questions such as: “Do you know anyone [] who has been negatively affected or hurt in any way by what happened at Enron? . . . Do you have an opinion about the cause of the collapse of Enron? . . . Are you angry about what happened with Enron? . . . Do you have an opinion [] about [] Jeffrey Skilling[?]” *Id.* at n.4 (internal quotation marks omitted).

³⁹ *Id.* at 2909.

⁴⁰ *Id.* However, as a result of Causey’s plea, the government dropped several counts against Skilling that involved Skilling and Causey’s relationship. *Skilling I*, 554 F.3d at 542.

⁴¹ *Skilling*, 130 S. Ct. at 2945-46 (citation omitted) (internal quotation marks omitted); John C. Roper et al., *Causey’s plea wreaks havoc for Lay, Skilling*, HOUS. CHRON., Dec. 28, 2005, available at <http://www.chron.com/dispatch/story.mpl/special/enron/3553372.html>.

⁴² *Skilling*, 130 S. Ct. at 2910, 2945.

ticles in the Houston Chronicle from the beginning of the Enron collapse in 2000 until the trial was about to commence in the year 2006.⁴³ After the news coverage of Causey's plea, Skilling renewed his motion for a change of venue.⁴⁴ In his motion, Skilling maintained that "[i]f Houston remained the trial venue, . . . jurors need to be questioned individually by both the Court *and* counsel concerning their opinions of Enron and 'publicity issues.'"⁴⁵ The defendant's position in his motions was clear; the juror questionnaire was unreliable. The fact that a juror checks a box that states "I can be fair" is not dispositive of the issue of fairness.⁴⁶ Jurors have the ability to lie, and certainly can act subconsciously and be influenced by factors that they may not be aware of.

The trial judge again denied Skilling's motion to change venue.⁴⁷ In the federal system, it is up to the judge whether voir dire is conducted by the attorneys representing each party or by the judge himself.⁴⁸ The trial court judge denied Skilling's request for counseled voir dire.⁴⁹ The judge explained that,

I've found . . . I get more forthcoming responses from potential jurors than the lawyers on either side. I don't know whether people are suspicious of lawyers—but I think if I ask a person a question, I will get a candid response much easier than if a lawyer asks the question.⁵⁰

However, to ease counsel's concerns, the trial court promised to give both sides the opportunity to ask potential jurors follow-up questions.⁵¹

A second issue raised in Skilling's motions was the potential difficulty for any juror who may find Jeffrey Skilling to be "not guilty," to communicate that decision to the juror's friends who

⁴³ *Id.* at 2943 (Sotomayor, J., dissenting).

⁴⁴ *Id.* at 2910.

⁴⁵ *Id.*

⁴⁶ *Id.* at 2918.

⁴⁷ *Skilling*, 130 S. Ct. at 2910.

⁴⁸ See FED. R. CRIM. P. 24 ("The court may examine prospective jurors or may permit the attorneys for the parties to do so.").

⁴⁹ *Skilling*, 130 S. Ct. at 2910.

⁵⁰ *Id.*

⁵¹ *Id.*

might have lost their jobs or who might have lost their fortunes.⁵² Essentially, Skilling maintained that jurors would feel community as well as personal pressures to convict Jeffrey Skilling.

The trial judge, however, determined that a five hour time period in which to pick all the jurors was sufficient.⁵³ The trial lasted approximately four months and after deliberating for five days, the jury convicted Skilling on nineteen of the twenty-eight counts.⁵⁴ Subsequently, Skilling was sentenced to twenty-four years incarceration.⁵⁵

In 2009, the Fifth Circuit Court of Appeals granted review of Skilling's conviction.⁵⁶ Among other things, Skilling contended "that the community's acrimony was so vitriolic that [the court] should presume that it was impossible for him to receive a fair trial in Houston. Second, he asserts that actual prejudice contaminated the jury box."⁵⁷ Reviewing the facts *de novo*, the court, in analyzing "actual prejudice," afforded great deference to the district court.⁵⁸ Deference was required because "the determination of whether the seated jury could remain impartial in the face of negative pretrial publicity, and the measures that may be taken to ensure such impartiality, lay squarely within the domain of the trial court."⁵⁹

However, the court acknowledged its duty to review the district court's ruling as to whether the jury may have been biased and, therefore, it would have constituted a manifest abuse of discretion for the trial judge to allow the trial to occur.⁶⁰ The court determined that there was a presumption of prejudice due to the volume of publicity coupled with "the negative tone of media coverage generated by Enron's collapse."⁶¹ The Fifth Circuit further noted the prejudicial effects of Causey's guilty plea and Enron's devastating effect on the

⁵² *Id.* at 2957 (Sotomayor, J., dissenting).

⁵³ *Skilling*, 130 S. Ct. at 2947.

⁵⁴ *Skilling I*, 554 F.3d at 542. Skilling was convicted of conspiracy, securities fraud, making false statements, and insider trading. *Id.*

⁵⁵ *Id.*

⁵⁶ *Skilling I*, 554 F.3d 529.

⁵⁷ *Id.* at 557.

⁵⁸ *Id.* at 557-58.

⁵⁹ *Id.* at 558 (quoting *United States v. McVeigh*, 153 F.3d 1166, 1179 (10th Cir. 1998)).

⁶⁰ *Id.*

⁶¹ *Skilling*, 130 S. Ct. at 2911. See *Skilling I*, 554 F.3d at 558 (stating "[i]t would not have been imprudent for the court to have granted Skilling's transfer motion").

Houston community.⁶² However, the court found that it was possible to have overcome the potential prejudice.⁶³ “Although there is sufficient evidence here to raise a presumption of prejudice, the ‘presumption is rebuttable, . . . and the government may demonstrate from the voir dire that an impartial jury was actually impanelled in appellant’s case. If the government succeeds in doing so, the conviction will stand’ ”⁶⁴ After examining the process of voir dire conducted by the trial court, the court found that it was “proper and thorough.”⁶⁵

Skilling immediately appealed the Fifth Circuit’s decision and the Supreme Court granted certiorari.⁶⁶ During oral arguments, Skilling claimed that “[t]he voir dire that the trial judge conducted was essentially an ordinary voir dire for ordinary circumstances.”⁶⁷ Due to the undeniable effect that Enron’s failure had on the Houston community, the defense maintained that this process was surely deficient in both time and scope.⁶⁸ Skilling emphasized that “the entire voir dire process in this [highly publicized] case [merely] took [five] hours.”⁶⁹ Skilling compared the tragedy of the Oklahoma City bombing case against Timothy McVeigh, which was transferred from Oklahoma City to Denver, “but even after the transfer, the trial judge conducted an [eighteen]-day voir dire.”⁷⁰ During oral argument, Justice Ginsberg differentiated Enron from Oklahoma City, stating that life and limb was not involved in the downfall or a result of Enron.⁷¹

⁶² *Skilling I*, 554 F.3d at 559-60.

⁶³ *Id.* at 558.

⁶⁴ *Id.* at 561 (quoting *United States v. Chagra*, 669 F.2d 241, 250 (5th Cir. 1982)).

⁶⁵ *Id.* at 562.

The district court here conducted an exemplary voir dire. After pre-screening veniremembers based upon their responses to a fourteen-page questionnaire, the parties mutually agreed to excuse 119 of them. The court summoned the remaining veniremembers and explained the importance of an impartial jury. The court then asked whether “any of you have doubts about your ability to conscientiously and fairly follow these very important rules.”

Id. (emphasis omitted).

⁶⁶ *Skilling v. United States*, 130 S. Ct. 393 (2009) (writ of certiorari).

⁶⁷ Transcript of Oral Argument at 6, *Skilling*, 130 S. Ct. 2896 (No. 08-1394), 2010 WL 710521.

⁶⁸ *Id.*

⁶⁹ *Id.* at 7.

⁷⁰ *Id.* at 8-9. See *United States v. McVeigh*, 918 F. Supp. 1467, 1475 (W.D. Okla. 1996) (venue moved).

⁷¹ Transcript of Oral Argument, *supra* note 67, at 9.

Skilling maintained that the pretrial publicity had not only augmented the passion and prejudice in the community, but was actually a symptom of that prejudice as well.⁷² “[I]n conditions where you have the level of passion and prejudice that permeated the Houston community, there’s too great a risk that the process of voir dire and particularly the ordinary process of voir dire wouldn’t be successful” in finding twelve unbiased jurors.⁷³ Essentially, the defense maintained that Houston surely could have jurors who would not be biased, but the likelihood of that was sharply diminished when the voir dire is limited in time and scope.⁷⁴ Justice Sotomayor, forecasting her position during the oral argument which was ultimately exhibited in her dissenting opinion, asked the government: “With such a truncated voir dire and one in which the judge basically said to the lawyers, I’m not giving you much leeway at all, how can we be satisfied that there was a fair and impartial jury picked . . . ?”⁷⁵ The oral argument ended shortly after, and both parties awaited the Court’s ultimate holding as to whether the pretrial publicity regarding the Enron scandal obstructed Skilling’s Sixth Amendment right to a fair and impartial jury.

The issues confronting the Court were “First, did the District Court err by failing to move the trial to a different venue based on a presumption of prejudice? Second, did actual prejudice contaminate Skilling’s jury?”⁷⁶ In an opinion authored by Justice Ginsburg, the Court upheld Skilling’s conviction, and further upheld the denial of each of the defendant’s motions for a change of venue.⁷⁷ “The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury. By constitutional design, that trial occurs ‘in the State where the . . . [c]rimes . . . have been committed.’ ”⁷⁸ The Court noted that “The Constitution’s place-of-trial prescriptions, however, do not impede transfer of the proceeding to a different district at the defendant’s request if extraordinary local prejudice will prevent a fair trial—a ‘basic requirement of due process.’ ”⁷⁹

⁷² *Id.* at 10.

⁷³ *Id.* at 12.

⁷⁴ *Id.*

⁷⁵ *Id.* at 33.

⁷⁶ *Skilling*, 130 S. Ct. at 2912.

⁷⁷ *Id.* at 2935.

⁷⁸ *Id.* at 2912-13 (quoting U.S. CONST. art. III, § 2, cl. 3).

⁷⁹ *Id.* at 2913 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

The Court began its discussion where the Fifth Circuit's analysis ended, the presumption of prejudice.⁸⁰ The Court found that there was no need to have changed the venue and that the jurors' familiarity with the case and their knowledge about the matter does not mean that they are, in fact, impartial.⁸¹ The Court stated that "[O]ur decisions, . . . 'cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process.'"⁸² The Court responded to Skilling's contentions regarding publicity and stated that it does not automatically result in an unfair trial.⁸³

The Court analyzed prior cases in which it had reversed a criminal defendant's conviction due to the "utter corrupt[ion] by press coverage."⁸⁴ However, the Court distinguished those cases from *Skilling* and provided four major explanations to counter Skil-

⁸⁰ *Id.*

⁸¹ *Skilling*, 130 S. Ct. at 2914-15 ("Prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*.").

⁸² *Id.* at 2914 (quoting *Murphy v. Florida*, 421 U.S. 794, 799 (1975)).

⁸³ *Id.* at 2916 (stating that "although news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"). Furthermore, the Court stated, "Although the widespread community impact necessitated careful identification and inspection of prospective jurors' connections to Enron, the extensive screening questionnaire and follow-up voir dire were well suited to that task." *Id.* at 2917 (emphasis omitted).

⁸⁴ *See id.* at 2913-15; *see also Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966) ("From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. *But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.* In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." (emphasis added)); *Estes v. Texas*, 381 U.S. 532, 535 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963).

ling's contention of presumed juror prejudice.⁸⁵ First, Houston has over 4.5 million eligible veniremen, which surely meant that the possibility of finding twelve impartial jurors was feasible.⁸⁶ Secondly, "although news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight."⁸⁷ Thirdly, four years had passed between Enron's meltdown and Skilling's prosecution.⁸⁸ The final point, "and of prime significance," was that Skilling had been in-fact acquitted on nine charges brought against him.⁸⁹ The acquittal of those charges, in essence, indicated to the majority that the jurors were not so biased as to preclude a fair trial.⁹⁰ As a result, the Court held that "news stories about Enron did not present the kind of *vivid, unforgettable information* we have recognized as particularly likely to produce prejudice, and Houston's size and diversity diluted the media's impact."⁹¹

The Court did give consideration to the possible impact of Richard Causey's plea.⁹² The plea may have caused some possible juror prejudice, but the district court took the appropriate steps to reduce that risk.⁹³ The Court had delayed Skilling's trial by two weeks, and inquired of the prospective jurors as to their knowledge of the plea.⁹⁴ "Although publicity about a co[-]defendant's guilty plea calls for inquiry to guard against actual prejudice, it does not ordinarily—and . . . it did not here—warrant an automatic presumption of prejudice."⁹⁵

As to actual prejudice, the Court analyzed the issue of whether the voir dire was sufficient to narrow down the pool to jurors who

⁸⁵ *Skilling*, 130 S. Ct. at 2915-16.

⁸⁶ *Id.* at 2915.

⁸⁷ *Id.* at 2916.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Skilling*, 130 S. Ct. at 2916. (" 'The jury's ability to discern a failure of proof of guilt of some of the alleged crimes indicates a fair minded consideration of the issues and reinforces our belief and conclusion that the media coverage did not lead to the deprivation of [the] right to an impartial trial.' " (quoting *United States v. Arzola-Amaya*, 867 F.2d 1504, 1514 (5th Cir. 1989))).

⁹¹ *Id.* (emphasis added).

⁹² *Id.* at 2917.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Skilling*, 130 S. Ct. at 2917.

could be fair and objective.⁹⁶ The Court emphasized that there should be great deference to the trial judge in jury selection.⁹⁷ There is “[n]o hard-and-fast formula dictat[ing] the necessary depth or breadth of voir dire.”⁹⁸ The trial judge is able to look at the jurors face-to-face when they are being questioned, and if that trial judge makes the determination that those jurors can be fair and impartial, then that decision should be one which receives deference by an appellate court.⁹⁹ The Court held that *Skilling* failed to show how the voir dire fell short of the constitutional requirements guaranteed to him under the Sixth Amendment.¹⁰⁰

In sum, *Skilling* failed to establish that a presumption of prejudice arose or that actual bias infected the jury that tried him. Jurors, the trial court correctly comprehended, need not enter the box with empty heads in order to determine the facts impartially. “It is sufficient if the juror[s] can lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court.”¹⁰¹

In a vigorous dissent, Justice Sotomayor, the only member of the bench who had served as a trial judge, characterized the voir dire in *Skilling* as superficial and relying too much on the potential jurors’ assurances that they could be impartial.¹⁰² She further opined that one cannot conclude that the jurors were free of the deep-seated animosity which had been affecting many of the people who lived in Houston.¹⁰³ Sotomayor stated that the more intense the antipathy that exists in a certain community towards a defendant, the more thorough the voir dire process must be.¹⁰⁴ In *Skilling*, it was necessary for voir

⁹⁶ *Id.*

⁹⁷ *Id.* (stating “[j]ury selection, we have repeatedly emphasized, is particularly within the province of the trial judge” (quoting *Ristaino v. Ross*, 424 U.S. 589, 594-95 (1976) (internal quotation marks omitted))).

⁹⁸ *Id.* at 2917 (emphasis omitted).

⁹⁹ *Id.* at 2918. “We conclude, in common with the Court of Appeals, that *Skilling*’s fair-trial argument fails; *Skilling*, we hold, did not establish that a presumption of juror prejudice arose or that actual bias infected the jury that tried him.” *Skilling*, 130 S. Ct. at 2907.

¹⁰⁰ *Id.* at 2923.

¹⁰¹ *Id.* at 2925 (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)).

¹⁰² *Id.* at 2942 (Sotomayor, J., dissenting).

¹⁰³ *Id.*

¹⁰⁴ *Skilling*, 130 S. Ct. at 2942 (Sotomayor, J., dissenting).

dire to be completed with exceptional care.¹⁰⁵ The voir dire should have been probing instead of cursory; “it was critical for the District Court to take ‘strong measures’ to ensure the selection of ‘an impartial jury free from outside influences.’ ”¹⁰⁶ Additionally, in regards to the issue of Richard Causey’s plea that had taken place shortly prior to the commencement of the voir dire, Sotomayor concluded that there was not sufficient questioning of the jurors as to their reactions to the fact that one of Jeffrey Skilling’s co-defendants had pled guilty so shortly before the trial was to begin.¹⁰⁷ Lastly, in regards to the majority’s focus on the jury acquitting Skilling on nine charges, Sotomayor points out that those charges dealt with somewhat of a peripheral matter.¹⁰⁸ She stated that the prosecutor for the government knew that these charges were weak and he, in fact, did not even focus on these counts during his summation.¹⁰⁹ As a result, Sotomayor disagreed with the majority that just because the jurors did acquit on those charges, it led to an inference that they were not biased on the nineteen counts for which they had actually convicted Jeffrey Skilling.¹¹⁰

Skilling has made it clear that a change of venue is difficult for a defendant to obtain. The trial judge is granted great deference in determining whether a jury has the ability to be impartial. When the publicity has focused more on an event than on the specific defendant’s involvement, the chances of attaining a venue change are diminished.¹¹¹ The Court’s determination, that the pretrial publicity about Enron lacked “the kind of vivid, unforgettable information” required for a change in venue, is surely likely to be cited in the fu-

¹⁰⁵ *Id.* at 2953.

¹⁰⁶ *Id.* at 2956 (quoting *Sheppard*, 384 U.S. at 362).

¹⁰⁷ *Id.* at 2957.

¹⁰⁸ *Id.* at 2963.

¹⁰⁹ *Skilling*, 130 S. Ct. at 2963 (Sotomayor, J., dissenting).

¹¹⁰ *Id.*

This argument, however, mistakes partiality with bad faith or blind vindictiveness. Jurors who act in good faith and sincerely believe in their own fairness may nevertheless harbor disqualifying prejudices. Such jurors may well acquit where evidence is wholly lacking, while subconsciously resolving closer calls against the defendant rather than giving him the benefit of the doubt.

Id.

¹¹¹ *Id.* at 2916 n.17 (citing *United States v. Hueftle*, 687 F.2d 1305, 1310 (10th Cir. 1982)).

ture.¹¹²

II. *PADILLA V. KENTUCKY*: INEFFECTIVE ASSISTANCE OF COUNSEL AND THE POSSIBILITY OF PROVING PREJUDICE

“[T]here is no right more essential than the right to the assistance of counsel.”¹¹³ The right to counsel is a precondition of a fair trial, guaranteed by the Sixth Amendment.¹¹⁴ Therefore, “the active participation of defense counsel in the entire criminal process is crucial for the functioning and fairness of the adversary system. If the criminal process loses its adversarial character, the constitutional guarantee is violated.”¹¹⁵ “It is [the Court’s] responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the mercies of incompetent counsel.”¹¹⁶ In *Padilla v. Kentucky*,¹¹⁷ the issue was whether the failure of an attorney to advise his client of deportation constitutes a Sixth Amendment violation.¹¹⁸

Padilla is a case which has, perhaps, not had as much impact on a defendant’s right to the effective assistance of counsel as some might have thought it would have had.¹¹⁹ However, it is a crucial de-

¹¹² See *supra* note 91 and accompanying text.

¹¹³ *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978).

¹¹⁴ See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). The Court further expanded the Sixth Amendment right to counsel when it held that no defendant could be incarcerated, even for a misdemeanor conviction, unless he had been provided counsel to assist in his defense. *Id.*

¹¹⁵ Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 627 (1986) (citations omitted).

¹¹⁶ *Padilla*, 130 S. Ct. at 1486 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (internal quotation marks omitted)).

¹¹⁷ 130 S. Ct. 1473.

¹¹⁸ *Id.* at 1478.

¹¹⁹ See Margaret Colgate Love & Gabriel J. Chin, *Padilla v. Kentucky: The Right To Counsel and the Collateral Consequences of Conviction*, 34 CHAMPION 18, 19 (2010) (“*Padilla* may turn out to be the most important right to counsel case since *Gideon*”). For further analysis on *Gideon*, see Klein, *supra* note 115. See also Evangeline Pittman, *Padilla v. Kentucky: Immigration Consequences Due to the Ineffective Assistance of Counsel*, 5 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 93, 103 (2009); Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 124, 194 (2009). In no way does this statement detract from the import of this decision. It is merely taking into account the cases post-*Padilla* where most courts have refused to extend *Padilla*’s holding to other collateral consequences. See *infra* note 219 and accompanying text.

cision which requires criminal defense attorneys to take certain precautions when representing a defendant.¹²⁰

Jose Padilla is an immigrant from Honduras who lived in the United States of America as a lawful resident for over forty years.¹²¹ Mr. Padilla had served in the United States Armed Forces during the years of the Vietnam War and eventually received an honorable discharge.¹²² In 2001, Padilla was arrested and charged with transporting more than one thousand pounds of marijuana in a tractor-trailer.¹²³ Padilla soon conferred with his court-appointed attorney, and after learning of a plea offer, Padilla asked his attorney what the consequences of pleading guilty would be.¹²⁴ Padilla's lawyer assured him that he "did not have to worry about immigration status since he had been in the country so long."¹²⁵ Subsequently, Padilla, with the assistance of his defense attorney, pled guilty and received a sentence of five years incarceration.¹²⁶ Unbeknownst to Padilla, under the Immigration and Nationalization Act, the transport of marijuana is considered an "aggravated felony."¹²⁷ Due to this plea and the mandatory provisions of the Immigration and Nationalization Act, Padilla faced deportation.¹²⁸

When it comes to the mandatory deportation of someone who enters a guilty plea to drug possession in federal court, the law is not

¹²⁰ See *infra* note 179 and accompanying text.

¹²¹ *Padilla*, 130 S. Ct. at 1477.

¹²² *Id.*; *Padilla v. Commonwealth*, No. 2004-CA-001981-MR, 2006 Ky. App. LEXIS 98, at *2 (Ky. Ct. App. Mar. 31, 2006).

¹²³ Brief for the United States as Amicus Curiae Supporting Affirmance at 31, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2009 WL 2509223.

¹²⁴ *Padilla*, 2006 Ky. App. LEXIS 98, at *2-3.

¹²⁵ *Padilla*, 130 S. Ct. at 1478 (quoting *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008) (internal quotation marks omitted)).

¹²⁶ *Id.*; *Padilla*, 253 S.W.3d at 483.

¹²⁷ *Padilla*, 130 S. Ct. at 1477 n.1. See 8 U.S.C.A. § 1227 (a)(2)(B)(i) (West 2010), which states in relevant part:

Any alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is . . . [a]ny 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 [thirty] grams or less of marijuana, is deportable.

¹²⁸ *Padilla*, 130 S. Ct. at 1478.

complex.¹²⁹ Deportation occurs—with the exception of some minor marijuana cases—automatically.¹³⁰ Padilla’s lawyer would not have had to spend an extensive amount of time determining what the immigration statutes and regulations were; it was an easy, clear-cut matter.¹³¹

On appeal, Padilla argued ineffective assistance of counsel.¹³² Padilla claimed two different prongs in which a court should have found that his attorney lacked effectiveness.¹³³ First, Padilla’s lawyer never told him that he could be deported as a result of his guilty plea, and certainly never informed him that such deportation was *mandatory* once he entered this plea.¹³⁴ Secondly, not only did his lawyer not tell him that he would be deported, but his lawyer engaged in what is termed “affirmative misadvice.”¹³⁵ Padilla insisted that because of his attorney’s nonfeasance, he pleaded guilty to the drug charges; if he had known of the mandatory consequences, he would have insisted on proceeding to trial.¹³⁶ The Court of Appeals of Kentucky held that a hearing was mandated which required further analysis into whether Padilla’s “counsel’s wrong advice regarding deportation could constitute ineffective assistance of counsel.”¹³⁷

However, when the state appealed the court of appeal’s decision, the Supreme Court of Kentucky denied Padilla’s claim, concluding that “the Sixth Amendment’s guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a ‘collateral’ consequence of his conviction.”¹³⁸ As a result, Padilla filed a writ requesting the Supreme Court resolve the issue.¹³⁹

¹²⁹ *Id.* at 1483. Since 1922, narcotics offenses have provided a distinct-basis for deportation. *Id.* at 1479 n.4; *Chung Que Fong v. Nagle*, 15 F.2d 789, 789-90 (9th Cir. 1926) (stating that narcotics offenses can trigger deportation).

¹³⁰ *Padilla*, 130 S. Ct. at 1477 n.1.

¹³¹ *Id.* at 1483.

¹³² *Padilla*, 2006 Ky. App. LEXIS 98, at *1.

¹³³ *Id.* at *2-3.

¹³⁴ *Id.* at *3.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Padilla*, 2006 Ky. App. LEXIS 98, at *9.

¹³⁸ *Padilla*, 130 S. Ct. at 1478 (quoting *Padilla*, 253 S.W.3d at 485).

¹³⁹ See Petition for Writ of Certiorari, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2008 WL 4933628.

The Supreme Court granted certiorari.¹⁴⁰ During oral argument, Padilla's counsel claimed that any misadvice given by a defendant's attorney should be governed by the Sixth Amendment right to effective assistance.¹⁴¹ Concerned that the position may encompass all consequences of misadvice, the Justices became cautious as to the extent that the defendant was maintaining that the Sixth Amendment protection applied.¹⁴² In fact, Justice Scalia summed up the issue, which turned out to be the most controversial matter post-*Padilla*, stating: "[W]e have to decide whether we are opening a Pandora's box here, whether there is any sensible way to restrict it . . . to deportation."¹⁴³ As the oral argument proceeded, the government reminded the Court that in *Brady v. United States*,¹⁴⁴ the Court defined a "voluntary plea as a plea entered by one possessing full knowledge of direct consequences."¹⁴⁵ The government explained that a problem exists when you take the definition of "voluntary" from *Brady* and insert a claim of misadvice.¹⁴⁶ The government argued that some court decisions "fail to focus again on 'voluntary,' . . . meaning full knowledge of direct consequences, and instead reached out to these kind of results-driven opinions that are kind of fueled by this feeling . . . of unfairness" for the defendant not to know of the immigration consequences.¹⁴⁷

Shifting to the matter of what comprises a collateral or a direct consequence, the Justices inquired as to where the line between the two is drawn, and when something is so important that the defendant must know of it before any plea is entered.¹⁴⁸ The government

¹⁴⁰ *Padilla v. Kentucky*, 129 S. Ct. 1317 (2009).

¹⁴¹ Transcript of Oral Argument at 3, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2009 WL 3268429.

¹⁴² *Id.* at 4.

¹⁴³ *Id.* at 7.

¹⁴⁴ 397 U.S. 742 (1970).

¹⁴⁵ Transcript of Oral Argument, *supra* note 141, at 35, 42. See also *Brady*, 397 U.S. at 755.

¹⁴⁶ Transcript of Oral Argument, *supra* note 141, at 42.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 45. Courts have held that certain consequences of conviction categorized as "collateral" include:

effects on custody such as revocation of parole or probation, ineligibility for parole, civil commitment, civil forfeiture, consecutive rather than concurrent sentencing, higher penalties based on repeat offender laws, and registration requirements. Also usually deemed collateral are effects on civil status such as disenfranchisement, ineligibility to serve on a

defined a collateral consequence as a consequence that “falls under the discretion or power of the sentencing court.”¹⁴⁹ In regards to Padilla, should deportation, even if a collateral consequence, be treated differently due to the importance to the defendant?¹⁵⁰ Recognizing this quandary, Justice Ginsburg stated that “ultimately, there is a potential problem in treating deportation differently than other collateral consequences.”¹⁵¹ Furthermore, she looked at Padilla’s argument and stated:

But that is to suggest that it’s so important in all situations and it is more important than collateral consequence[s] that may affect citizens. Citizens will lose the right to vote. They will lose their right to jury service, perhaps lose custody of their children. And there’s no principled reason to really treat deportation differently. If the reason to treat it differently because it is viewed as so severe, it’s truly then a subjective inquiry as what collateral consequence is severe to this client. And it ultimately, prefers a class of citizens—those who are non-citizens—over citizens who may have just as much importance placed on collateral consequences they face.¹⁵²

In the final question of oral argument, Justice Alito asked Padilla’s counsel to clarify where the line should be drawn in regards to the Sixth Amendment encompassing other collateral consequences.¹⁵³ In his response, the counselor reminded the Court of Padilla’s position that no lines should be drawn; the Sixth Amendment should be

jury, disqualification from public benefits, and ineligibility to possess firearms. The same is true for deprivations with tremendous practical consequences, such as deportation, dishonorable discharge from the armed services, and loss of business or professional licenses.

Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 705-06 (2002).

¹⁴⁹ Transcript of Oral Argument, *supra* note 141, at 45.

¹⁵⁰ *Id.* at 6.

¹⁵¹ *Id.* at 49.

¹⁵² *Id.* at 49-50.

¹⁵³ *Id.* at 54 (“Which, if any, of the following would you not put in the same category as advice about immigration consequences: advice about consequences for a conviction for a sex offense, the loss of professional licensing or future employment opportunities, civil liability, tax liability, right to vote, right to bear arms[?]”).

applied to all claims of ineffective assistance of counsel on a case-by-case basis.¹⁵⁴

In an opinion delivered by Justice Stevens, the Court traced its history of analyzing the effectiveness of counsel that began with *McMann v. Richardson*.¹⁵⁵ In *McMann*, the Court held that the assistance of counsel meant there had to be “effective” assistance of counsel.¹⁵⁶ Additionally, in *Hill v. Lockhart*,¹⁵⁷ the Court applied the effective assistance of counsel to the plea process.¹⁵⁸ In *Hill*, a criminal defendant claimed that due to his attorney misadvising him as to the effect his plea would have on his parole eligibility, the plea was improper and a violation of his Sixth Amendment right had therefore occurred.¹⁵⁹ However, the Court had concluded that Mr. Hill had not shown how the attorney’s actions prejudiced the defendant to a point where his constitutional rights were violated.¹⁶⁰ Therefore, as a result of *Hill*, a lawyer for the defendant had to be effective at the time the accused was entering a plea in regards to direct consequences.¹⁶¹ In *Padilla*, however, the Court for the first time applied the criteria which arose from *Strickland v. Washington*¹⁶² to the issue of whether misadvice by an attorney on an uncategorized consequence of a guilty plea could be the genesis of a Sixth Amendment violation.¹⁶³ Generally, when a defendant claims that his attorney’s ineffective assistance of counsel led him to plead guilty, the defendant must then satisfy the *Strickland* test.¹⁶⁴

The Court in *Strickland* had held that even if the defense counsel was lacking in performance and the errors that were made were so serious that counsel’s action departed from the guarantee of the Sixth Amendment, “a conviction should not be reversed unless the defendant shows ‘there is a reasonable probability that, but for

¹⁵⁴ Transcript of Oral Argument, *supra* note 141, at 54 (“[O]ur principal position is that the Court should not draw lines, that that’s the whole purpose of *Strickland*.”).

¹⁵⁵ *Padilla*, 130 S. Ct. at 1477, 1480-81; *Richardson*, 397 U.S. 759.

¹⁵⁶ *Richardson*, 397 U.S. at 771.

¹⁵⁷ 474 U.S. 52 (1985).

¹⁵⁸ *Id.* at 58.

¹⁵⁹ *Id.* at 53-55.

¹⁶⁰ *Id.* at 60.

¹⁶¹ *Id.*

¹⁶² 466 U.S. 668 (1984).

¹⁶³ *Padilla*, 130 S. Ct. at 1482. *See also Strickland*, 466 U.S. 668.

¹⁶⁴ *Strickland*, 466 U.S. at 687; Klein, *supra* note 115, at 640.

counsel's unprofessional errors, the result of the proceeding would have been different.' ”¹⁶⁵ For a defendant to successfully bring an ineffective assistance of counsel claim, the Court instituted a test.¹⁶⁶ Under this two-prong approach, the defendant must prove: (1) deficient performance by the trial attorney, (2) which resulted in sufficient prejudice to the defendant.¹⁶⁷ Furthermore, since *Strickland*'s inception, this test has been seen as an extremely high burden for petitioners to show that they have received ineffective assistance of counsel.¹⁶⁸

The Court, in discussing the first prong of the required two-prong test, sent a clear message to lower courts that there is a strong presumption that counsel's conduct was constitutionally adequate.¹⁶⁹ However, the Court did not apply the distinction between collateral and direct consequences and only stated that “[b]ecause of the difficulties inherent in making the evaluation [of ineffective assistance of counsel], a court must indulge a strong presumption that counsel's conduct falls within the wide range of *reasonable professional assistance*.”¹⁷⁰ In fact, until the *Padilla* decision, “the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the direct consequences of a criminal conviction.”¹⁷¹

The Court in *Padilla* did not categorize the deportation consequences of the plea as either direct or collateral.¹⁷² It was the first time that the Court had looked at *Strickland* and whether ineffective assistance of counsel applied to a matter outside the parameters of the prosecution or actual sentence, in this instance one that would automatically result from the judge's sentencing.¹⁷³ “We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to

¹⁶⁵ Klein, *supra* note 115, at 640 (quoting *Strickland*, 466 U.S. at 694 (internal quotation marks omitted)).

¹⁶⁶ *Strickland*, 466 U.S. at 687. See Klein, *supra* note 115, at 640.

¹⁶⁷ *Id.*

¹⁶⁸ *Strickland*, 466 U.S. at 689 (“Judicial scrutiny of counsel's performance must be *highly deferential*.” (emphasis added)).

¹⁶⁹ See *id.*

¹⁷⁰ *Id.* at 689 (emphasis added).

¹⁷¹ *Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring).

¹⁷² *Id.* at 1481.

¹⁷³ See Love & Chin, *supra* note 119, at 18.

Padilla's claim."¹⁷⁴

Because the Court had determined to apply *Strickland*, the issue necessary to resolve was whether the lawyer acted reasonably under prevailing professional norms.¹⁷⁵ The Supreme Court referred to the American Bar Association and the National Legal Aid and Defender Association for the requirements and obligations of a defense attorney.¹⁷⁶ Furthermore, the Court cited a law professor's amicus brief: "[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients"¹⁷⁷

It was clear to the Court that under these standards, a lawyer has an obligation to inform his or her non-citizen clients about the risk of deportation.¹⁷⁸ Additionally, the Court stated that the Immigration and Nationalization Act was "succinct, clear, and explicit in defining the removal consequence for Padilla's conviction."¹⁷⁹ As a result, the Court stated that Padilla's counsel could have easily determined that the consequence of pleading guilty would lead to Padil-

¹⁷⁴ *Padilla*, 130 S. Ct. at 1482.

¹⁷⁵ *Id.* See also *Strickland*, 466 U.S. at 687.

¹⁷⁶ *Padilla*, 130 S. Ct. at 1482 ("We long have recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable.' " (alteration in original) (quoting *Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009))). But see Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1146 (1999) (showing the complete turnaround from the time of *Strickland*'s decision, where the Court outright refused to adhere to the ABA Criminal Justice Standards). "Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . are guides to determining what is reasonable, but they are only guides." *Strickland*, 466 U.S. at 688.

¹⁷⁷ *Padilla*, 130 S. Ct. at 1482 (alteration in original) (quoting Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as Amici Curiae in Support of Petitioner at 12-14, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2009 WL 1556546).

¹⁷⁸ *Id.* at 1483. Additionally it is clear to defender services across the country:

The Court may be concerned that if defense counsel must advise their clients about immigration consequences of convictions, such a ruling would impose an undue burden on those attorneys—straining resources or detracting from other essential duties. *Amici* are as sensitive as anyone to the concerns that arise when new obligations are added to those we already have undertaken. Yet we are united in our belief that these obligations are not only appropriate, but essential.

Brief of the National Association of Criminal Defense Lawyers, et al. at 22, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2009 WL 1567356 (2009).

¹⁷⁹ *Padilla*, 130 S. Ct. at 1483. See 8 U.S.C.A. § 1227(a)(2)(b)(i).

la's deportation, and that "his counsel's advice was incorrect."¹⁸⁰ "[W]hen the deportation consequence is truly clear, as it was in this case" there is such an obligation that a constitutionally competent lawyer must tell non-citizen clients about the risk of deportation.¹⁸¹

The Supreme Court did not find it necessary to distinguish between a direct and collateral consequence.¹⁸² In fact, the Court noted that it had "never applied a distinction . . . to define the scope of constitutionally reasonable professional assistance under *Strickland*."¹⁸³ What was of significance was that the Court considered the deportation consequence to be of a "unique nature,"¹⁸⁴ and as "intimately related to the criminal process" and "nearly an automatic result" following certain criminal convictions or pleas.¹⁸⁵

In order for a plea to be assumed as completely voluntary, one ought to have knowledge of the consequences of that plea.¹⁸⁶ A lawyer has the obligation to advise his or her client of the desirability of the plea.¹⁸⁷ This obligation requires that the lawyer understand the ramifications of the plea, as well as the ability to explain to the lawyer's client the implications of the plea.¹⁸⁸ The Court in *Padilla* stated that a holding limited to Padilla's affirmative misadvice claim would invite untenable results.¹⁸⁹ First, the Court stated that "it would give counsel an incentive to remain silent on matters of great importance," and secondly, "it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available."¹⁹⁰ The Court noted that *Strickland*'s test applies to all of Padilla's claims.¹⁹¹ Furthermore, the Court stated that "professional norms have generally imposed an obligation on counsel to provide advice on the deportation conse-

¹⁸⁰ *Padilla*, 130 S. Ct. at 1483.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1481.

¹⁸³ *Id.* (quoting *Strickland*, 466 U.S. at 689 (internal quotation marks omitted)).

¹⁸⁴ *Id.* "We have long recognized that deportation is a particularly severe penalty." *Padilla*, 130 S. Ct. at 1481 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (internal quotation marks omitted)).

¹⁸⁵ *Padilla*, 130 S. Ct. at 1481.

¹⁸⁶ *Brady*, 397 U.S. at 755.

¹⁸⁷ Klein, *supra* note 115, at 669-72.

¹⁸⁸ *Id.*

¹⁸⁹ *Padilla*, 130 S. Ct. at 1484.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1482.

quences of a client's plea. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty."¹⁹²

In sum, the Court applied the test of *Strickland* to *Padilla*, acknowledging the importance and critical nature of the plea bargain and negotiation process under the Sixth Amendment's constitutional guarantee of effective assistance of counsel. "The severity of deportation—the equivalent of banishment or exile,—only underscores how critical it is for counsel to inform her non[-]citizen client that he faces a risk of deportation."¹⁹³ In its final paragraphs of the opinion the Court stated:

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel." . . . [W]e now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Taking as true the basis for his motion for post-conviction relief, we have little difficulty concluding that *Padilla* has sufficiently alleged that his counsel was constitutionally deficient. Whether *Padilla* is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do

¹⁹² *Id.* at 1485 (citing *Strickland*, 466 U.S. at 689).

¹⁹³ *Id.* at 1486 (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)). In regards to the changes to immigration laws over the years the Court stated its position on the effect of removal consequences:

The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, 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.

Padilla, 130 S. Ct. at 1480. See Brief for Amici Curiae Asian American Justice Center et al. at 12-27, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2009 WL 1567358, for real world examples of the high significance and importance of facing deportation.

not reach because it was not passed on below.¹⁹⁴

The Court in *Padilla*, therefore, only applied the first prong of the *Strickland* test;¹⁹⁵ the second prong of the analysis would be to determine whether there was prejudice.¹⁹⁶ In the context of *Padilla*, this meant that the defendant would *not* have entered the plea of guilty had he known that he would be automatically deported by entering the plea. “[T]o obtain relief [on a claim that an attorney provided ineffective assistance by failing to properly advise a defendant on the consequences of a guilty plea], a petitioner must convince the court that a decision to reject the plea bargain would have *been rational under the circumstances*.”¹⁹⁷ This question was remanded to the Kentucky courts for further review.¹⁹⁸

In a concurring opinion, Justice Alito and Chief Justice Roberts focused on the clear affirmative misadvice by Padilla’s lawyer when the lawyer told Padilla that he “did not have to worry about immigration status since he had been in the country so long.”¹⁹⁹ Both Justices agreed that this constituted ineffective assistance of counsel.²⁰⁰ However, they concluded that Padilla’s lawyer’s lack of knowledge of the immigration consequences of the plea, was not, in and of itself, ineffective.²⁰¹

In somewhat of an “I do not know nothing” kind of advice, Justice Alito and Chief Justice Roberts agreed that an attorney should therefore mention to the clients that there *might* be immigration consequences.²⁰² “[I]f the alien wants advice on this issue [of deportation], the alien should consult an immigration attorney. I do not agree with the Court that the attorney must attempt to explain what those consequences may be.”²⁰³ The basis for this concern is that criminal defense attorneys’ expertise is not immigration law, and the

¹⁹⁴ *Padilla*, 130 S. Ct. at 1486-87 (quoting *Richardson*, 397 U.S. at 771).

¹⁹⁵ *Id.* at 1483.

¹⁹⁶ *Id.* at 1483-84.

¹⁹⁷ *Id.* at 1485 (emphasis added).

¹⁹⁸ *Id.* at 1483-84.

¹⁹⁹ *Padilla*, 130 S. Ct. at 1487-88 (Alito, J., concurring) (citations omitted).

²⁰⁰ *Id.* at 1487.

²⁰¹ *Id.* at 1487, 1494 (“In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney’s expertise.”).

²⁰² *Id.* at 1494.

²⁰³ *Id.* at 1487.

Court's holding is unrealistically asking them—and furthermore expecting them—to provide sufficient advice in an area of law in which they likely have limited experience.²⁰⁴ Justice Alito cautions the Court that this “vague, halfway test” will surely lead to confusion amongst the courts and cause widespread litigation.²⁰⁵ “This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing”²⁰⁶ These other 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.”²⁰⁷ In conclusion to the concurrence, both Justices agree, “When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws.”²⁰⁸ However, the attorney should tell the client that if you want a clear answer on this collateral issue, you should speak with an immigration lawyer to get the complete ramifications of any guilty plea.²⁰⁹

In their dissent, Justice Scalia and Justice Thomas concluded that in a perfect world, a lawyer would understand and explain to his or her client the consequences of the plea, but that the Constitution is not the tool to create the “best of all possible worlds.”²¹⁰ Furthermore, both Justices stated that there is no Sixth Amendment right to counsel on a collateral issue such as is raised in *Padilla*.²¹¹ Justices Thomas and Scalia refer to the point that Justice Alito opined in his concurrence, “A criminal conviction can carry a wide variety of consequences other than conviction and sentencing”²¹² As a result of the Court’s holding in *Padilla*, Thomas and Scalia express concern that there is “no logical stopping-point” to adding obligations for

²⁰⁴ *Padilla*, 130 S. Ct. at 1487-88 (Alito, J., concurring).

²⁰⁵ *Id.* at 1487.

²⁰⁶ *Id.* at 1488.

²⁰⁷ *Id.* at 1488. See *supra* note 148 for a list of collateral consequences.

²⁰⁸ *Padilla*, 130 S. Ct. at 1494 (Alito, J., concurring).

²⁰⁹ *Id.* at 1487, 1494.

²¹⁰ *Id.* at 1494 (Scalia, J., dissenting). “The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.” *Id.*

²¹¹ *Id.* at 1494.

²¹² *Padilla*, 130 S. Ct. at 1496 (quoting Justice Alito).

which a defense attorney must provide advice.²¹³

In its conclusion, the dissent maintained that the correct way to handle the problems raised in the *Padilla* case would have been through the legislature.²¹⁴ “Statutory provisions can remedy these concerns in a more targeted fashion, and without producing permanent, and legislatively irreparable, overkill.”²¹⁵ However, due to the majority’s holding, this form of relief “has been precluded in favor of [the Court’s] sledge hammer.”²¹⁶

The holding in *Padilla* is an exceptional one in that a finding by appellate courts that trial counsel has been ineffective is rare indeed.²¹⁷ However, courts for the most part have declined to extend *Padilla* beyond the scope of immigration consequences.²¹⁸ Additionally, these courts seem to be stating that *Padilla* determined that immigration consequences were in fact, direct consequences, as opposed to being merely collateral, or at least in a new category somewhere between the two.²¹⁹ Essentially, courts are finding that immigration consequences are so closely tied to criminal convictions that they require higher consideration than other collateral consequences such as sex offender registration or DMV consequences.²²⁰

²¹³ *Id.*

²¹⁴ *Id.* at 1496-97.

²¹⁵ *Id.* at 1495.

²¹⁶ *Id.* at 1497.

²¹⁷ Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, *supra* note 176, at 1446.

²¹⁸ See *Cox v. Commonwealth*, No. 2008-CA-000176-MR, 2010 WL 3927704, at *6 (Ky. Ct. App. Oct. 8, 2010). But cf. *Taylor v. State*, 698 S.E.2d 384, 389 (Ga. Ct. App. 2010) (“[W]e conclude that the failure to advise a client that pleading guilty will require him to register as a sex offender is constitutionally deficient performance, and the trial court erred in holding otherwise.”); *Pridham v. Commonwealth*, No. 2008-CA-002190-MR, 2010 WL 4668961, at *3 (Ky. Ct. App. Nov. 19, 2010) (“In light of the decision in *Padilla*, we conclude that gross misadvice concerning parole eligibility may amount to ineffective assistance of counsel worthy of post-conviction relief.”).

²¹⁹ See *State v. Salazar*, No. 2 CA-CR 2010-0296-PR, 2011 WL 285554, at *2 (Ariz. Ct. App. Jan. 19, 2011) (“[*Padilla*’s] holding related only to claims of ineffective assistance of counsel.”); *People v. Duffy*, 902 N.Y.S.2d 805, 808 (N.Y. Sup. Ct. 2010) (“The Supreme Court of the United States has not distinguished between direct and collateral consequences in defining the scope of ineffective assistance of counsel. The Supreme Court stated in *Padilla* . . . [that] it is uniquely difficult to classify [deportation] as either a direct or collateral consequence.”).

²²⁰ See *Cox*, 2010 WL 3927704, at *6 (“Hence, even though the holding in *Padilla* specifically refers to deportation measures, which are unique because they are so intimately related to the underlying criminal conviction, it apparently does not extend to other collateral consequences.”); *Duffy*, 902 N.Y.S.2d at 808.

Some jurisdictions, however, have used language which seems to indicate that there may be room to extend *Padilla* to these other collateral consequences.²²¹ In *People v. Gravino*,²²² for example, the court stated “there may be cases in which a defendant can show that he pleaded guilty in ignorance of a consequence that, although collateral for purposes of due process, was of such great importance to him that he would have made a different decision had that consequence been disclosed” by his attorney.²²³

There certainly has been at least one very significant ramification of the *Padilla* holding: the creation of CLE programs to train criminal defense counsel in the fundamentals of immigration law.²²⁴ Some public defender offices have hired lawyers with extensive immigration experience to handle cases for those defendants who are not United States citizens.²²⁵ But some prosecutors’ offices have responded by requiring defendants to waive their rights to know the specific consequences of a possible plea.²²⁶ The District of Arizona, for example, has incorporated the following language into the fast track plea agreement:

Defendant recognizes that pleading guilty may have consequences with respect to the defendant’s immigration status if the defendant is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offense(s) to which defendant is pleading guilty. Removal and oth-

²²¹ See *People v. Gravino*, 928 N.E.2d 1048, 1056 (N.Y. 2010).

²²² *Id.* at 1048.

²²³ *Id.* at 1056.

²²⁴ See, e.g., *Padilla v. Kentucky: Immigration Consequences of Criminal Convictions*, LAWLINE.COM, <http://www.lawline.com/cle/course-details.php?i=1242> (last visited Feb. 19, 2011); *Padilla v. Kentucky: The Challenge to Georgia Criminal Defense Attorneys*, COBB COUNTY BAR ASSOCIATION, CRIMINAL DEFENSE SECTION 2010 CLE PROGRAM, <http://www.padillacentral.com/home/wp-content/uploads/2010/11/PadillaCLE012811.pdf> (last visited Mar. 15, 2011); *Padilla v. Kentucky: Immigration Consequences of Criminal Convictions*, CITY BAR CENTER CLE, https://www.nycbar.org/CLE/pdf/10_10/100410_web.pdf (last visited Mar. 15, 2011).

²²⁵ See NACDL, *Supreme Court Upholds Integrity of Criminal Justice System for Immigrants*, Mar. 31, 2010, <http://www.nacdl.org/public.nsf/NewsReleases/2010mn08?OpenDocument>.

²²⁶ See Norman L. Reimer, *The Padilla Decision: Was 2010 the Year Marking a Paradigm Shift in the Role of Defense Counsel—or Just More Business as Usual?*, 34 CHAMPION 7, 7 (2010).

er immigration consequences are subject to a separate proceeding. However, defendant understands that no one, including the defendant's attorney or the district court, can predict to a certainty the effect of the defendant's conviction on the defendant's immigration status. Defendant nevertheless affirms that the defendant wants to plead guilty regardless of any immigration consequences that the defendant's plea may entail, even if the consequence is the defendant's automatic removal from the United States.²²⁷

And in what is a particularly noteworthy event, the Judicial Function Committee of the American Bar Association's Criminal Justice Section recognized that lower level courts may have an obligation to act as a result of *Padilla*.²²⁸ The Committee's goal as stated in August 2010 is as follows: "[W]e wish to explore a court's obligation in light of *Padilla v. Kentucky*. Specifically, we will explore what inquiry, if any, should be made of defense counsel and/or the defendant at the time the plea is entered, to ensure that counsel has fulfilled his or her obligation under *Padilla*."²²⁹

The author of this Article wrote twenty-five years ago of the need, in light of the Court's holding in *Strickland*, for greater specificity in the requirements for competent representation.²³⁰

In light of the difficulties for a defendant who was represented by an ineffective counsel in obtaining appellate relief, it is crucial that substantial efforts be made to insure that counsel act effectively and competently at the trial level. If reviewing courts are going to presume competency, then the profession must clearly indicate to counsel what indeed must be done to provide competent representation.²³¹

The holding in *Padilla* has been responsive to this concern.

²²⁷ *Id.*

²²⁸ See *Judicial Function Committee*, AMERICAN BAR ASSOCIATION—CRIMINAL JUSTICE SECTION, <http://www2.americanbar.org/sections/criminaljustice/CR190000/Pages/default.aspx> (last visited Feb. 28, 2011).

²²⁹ *Id.* (emphasis added)

²³⁰ See Klein, *supra* note 115, at 650.

²³¹ *Id.*

Although there has yet to be a significant expansion of the lawyer's obligation to instruct the client on the proliferating collateral issues resulting from a plea, it will surely be most interesting to observe the possible application of the Sixth Amendment to future cases concerning the substantial disabilities that may be found to "intimately relate[]" to the . . . [underlying] criminal conviction[]." ²³²

III. CRUEL AND UNUSUAL PUNISHMENT

a. Background: Two Disproportionate Sentences and the Eighth Amendment, *Andrade* and *Ewing*

Two Ninth Circuit cases, *Lockyer v. Andrade*²³³ and *Ewing v. California*,²³⁴ decided by the Supreme Court on the same day in 2003,²³⁵ illustrated an unwillingness of the Court to interfere with the rights of individual states to determine appropriate punishments for crimes. In both *Andrade* and *Ewing*, the defendants challenged the constitutionality of California's "three strikes" law,²³⁶ which effectively imposed a sentence of twenty-five years to life for any defendant pursuant to his or her committing a third felony. Both Andrade and Ewing, receiving life sentences rendered under the California statute for petty thefts, sought relief claiming that their convictions violated the Eighth Amendment as cruel and unusual punishments.²³⁷

²³² See *supra* note 185 and accompanying text.

²³³ 538 U.S. 63 (2003).

²³⁴ 538 U.S. 11 (2003).

²³⁵ The Supreme Court decided both cases on March 5, 2003. See *Andrade*, 538 U.S. 63; *Ewing*, 538 U.S. 11.

²³⁶ In 1994, "California [] became the second State[, behind Washington,] to enact [the] three strikes law." *Ewing*, 538 U.S. at 15. Under the "three strikes" statutory scheme:

If a defendant has two or more prior felony convictions . . . that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: (i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions; (ii) Imprisonment in the state prison for [twenty-five] years.

CAL. PENAL CODE § 667(e)(2)(A) (West 2003).

²³⁷ In *Andrade*, the defendant, on two dates in November 1995, stole videotapes from two K-Mart stores worth, respectively \$84.70 and \$68.84. *Andrade*, 538 U.S. at 66. Among his long list of offenses for which Andrade served jail time were three counts of first-degree residential burglary and a state court conviction for petty theft. *Id.* at 66-67. Andrade was charged pursuant to the K-Mart thefts, with two counts of petty theft with a prior conviction,

The Court, in both cases, held for the state of California.²³⁸ In *Ewing*, Justice O'Connor's majority opinion emphasized the Court's longstanding deference to state legislatures concerning the area of punishment.²³⁹ O'Connor stated, "[The Court's] traditional deference to legislative policy choices finds a corollary in the principle that the Constitution 'does not mandate adoption of any one penological theory.'"²⁴⁰

Justice Souter, in his dissent in *Andrade*, sharply criticized the Court for failing to recognize that cases like *Andrade* and *Ewing* demonstrate the application of precedent set forth in *Solem v. Helm*.²⁴¹ Expressing sharp disagreement with the majority's holding that the sentence against Andrade was not disproportionate, Souter emphatically stated, "If Andrade's sentence is not grossly disproportionate, the principle has no meaning."²⁴²

which counts as a "wobbler"—essentially, the prosecutor may charge a "wobbler" as either a misdemeanor or a felony. *Id.* at 67. Here, the prosecutor chose to charge Andrade's petty theft with prior convictions as a felony, and, together with Andrade's prior residential burglary felonies, led the judge to sentence him to two consecutive terms of life in imprisonment pursuant to the "three strikes" law. *Id.* at 67-68. In *Ewing*, the defendant, on parole in 2000, stole three golf clubs from a pro shop worth almost \$1200. *Ewing*, 538 U.S. at 17-18. Because, like Andrade, Ewing had a string of serious felonies on his record, the judge decided to allow the golf club burglary ("wobbler") to count as a felony for which Ewing was sentenced to 25 years in prison. *Id.* at 18-20.

²³⁸ *Andrade*, 538 U.S. at 77 (rejecting Andrade's reliance on settled law from *Harmelin v. Michigan*, 501 U.S. 957 (1991), *Solem v. Helm*, 463 U.S. 277 (1983), and *Rummel v. Estelle*, 445 U.S. 263 (1980), arguing that his sentence was grossly disproportionate under the Eighth Amendment; instead, the Court held that Andrade's was not an "extraordinary" case for those precedents to apply); *Ewing*, 538 U.S. at 30 (holding that Ewing's sentence of twenty-five years to life, "imposed for the offense of felony grand theft under the three strikes law, [was] not grossly disproportionate and therefore [did] not violate the Eighth Amendment[as a] prohibition [against] cruel and unusual punishment"). *Id.* at 30-31.

²³⁹ *Ewing*, 538 U.S. at 24-28 (referring to California's legitimate interest in deterring crime).

²⁴⁰ *Id.* at 25 (quoting *Harmelin*, 501 U.S. at 999).

²⁴¹ *Andrade*, 538 U.S. at 77 (Souter, J., dissenting). In *Solem*, the Court held that a sentence of life without the possibility of parole was grossly disproportionate to the crime of \$100 check fraud, even though the defendant had committed several prior felonies. 463 U.S. at 279-81, 303. The Court in *Solem* developed an "objective proportionality test" to determine if a sentence is out of proportion to the crime, and, therefore in violation of the Eighth Amendment's prohibition of cruel and unusual punishment. *Id.* at 290-92.

²⁴² *Andrade*, 538 U.S. at 83.

b. *Graham v. Florida*: Application of Cruel and Unusual to Juvenile Offenders

Andrade and *Ewing* provide two examples in which the Court decided cases regarding sentences that, at first blush, seemed grossly disproportionate to the offenses that the defendants committed. Yet, the Court held that each of these cases was not a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.²⁴³ Last Term, the Court decided *Graham v. Florida*,²⁴⁴ in which the defendant faced the possibility of life in prison. The defendant in *Graham* was distinguishable from the defendants in both *Andrade* and *Ewing*; Terrance Jamar Graham was sixteen when a Florida judge originally sentenced him as an adult.²⁴⁵

Under Florida law, a prosecutor has the discretion to charge felony offenders age sixteen and seventeen as adults.²⁴⁶ In July 2003, at the age of sixteen, Terrance Jamar Graham, with other teenagers, engaged in a failed attempt to burglarize a restaurant during which the restaurant manager was struck in the head with a metal instrument; Graham was subsequently arrested.²⁴⁷ Graham's prosecutor, pursuant to Florida statute, charged Graham as an adult with two felonies, one carrying the maximum penalty of life imprisonment.²⁴⁸ Graham entered into a plea agreement and was sentenced to concurrent three year terms of probation; a twelve-month requirement to serve in the county jail was set aside for time served awaiting trial.²⁴⁹

Graham's promise to the sentencing court to "turn [his] life around" was short-lived.²⁵⁰ Shortly after his release, and shortly be-

²⁴³ The Eighth Amendment to the Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. See Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 679-81 (2005) (underscoring the "conceptual confusion over the meaning of proportionality," especially in light of the *Ewing* decision).

²⁴⁴ 130 S. Ct. 2011 (2010).

²⁴⁵ *Id.* at 2018.

²⁴⁶ See FLA. STAT. § 985.227(1)(b) (2003) (current version FLA. STAT. § 985.557(1)(b) (2010)).

²⁴⁷ *Graham*, 130 S. Ct. at 2018.

²⁴⁸ *Id.* ("The charges against Graham were armed burglary with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole, [] and attempted armed-robbery, a second-degree felony carrying a maximum of [fifteen] years' imprisonment.").

²⁴⁹ *Id.*

²⁵⁰ *Id.*

fore his eighteenth birthday, Graham was again arrested and charged with felony robbery.²⁵¹ A trial court subsequently found that Graham violated his probation by engaging in further crimes while on probation.²⁵² At a subsequent sentencing hearing, Graham's attorney requested five years of imprisonment, the Florida Department of Corrections recommended four years, and the prosecutor asked the court to impose a sentence of thirty years.²⁵³ The trial court found Graham guilty of the earlier charges which had occurred when he was sixteen, admonished Graham for choosing a criminal path in life, and refused to consider any further juvenile sanctions.²⁵⁴ Graham was sentenced to life in prison, and, because Florida has no parole, Graham had no possibility of release.²⁵⁵

Graham's initial Eighth Amendment challenges to his sentence failed, and, eventually, the Florida Supreme Court ultimately denied review.²⁵⁶ The Supreme Court granted certiorari.²⁵⁷

Graham presented a case of first impression for the Court regarding the Eighth Amendment and cruel and unusual punishment—a categorical challenge to a term-of-years sentence.²⁵⁸ Previously, the Court had tackled categorical challenges in death penalty cases, and determined that a certain sentence was inappropriate for all the members of a class of people.²⁵⁹

²⁵¹ *Id.* at 2018-19.

²⁵² *Graham*, 130 S. Ct. at 2019.

²⁵³ *Id.*

²⁵⁴ *Id.* at 2020. The trial court judge stated, "Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions." *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Graham*, 130 S. Ct. at 2020. The Florida District Court of Appeal noted the seriousness of Graham's offenses, and stated, "[the offenses] were not committed by a pre-teen, but a seventeen-year-old who was ultimately sentenced at the age of nineteen." *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 2022. There are two categories of Eighth Amendment cases: (1) sentences involving disproportionality; and (2) cases using categorical rules. *Id.* at 2021-22. The Court acknowledged that it had "used categorical rules to define Eighth Amendment standards" before, but "[t]he previous cases in this classification involved the death penalty." *Graham*, 130 S. Ct. at 2022. Unlike cases in which "a gross proportionality challenge to a . . . defendant's sentence" is a suitable approach, here, "a sentencing practice itself is in question." *Id.*

²⁵⁹ See *Kennedy v. Louisiana*, 554 U.S. 407, 447 (2008) (holding that the death penalty for a non-homicidal crime is cruel and unusual); see also *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005) (holding that anyone under the age of eighteen at the time he or she committed the murder could not be sentenced to death); *Atkins v. Virginia*, 536 U.S. 304, 318

Historically, in adopting categorical rules, the Court has first looked to “objective indicia of national consensus.”²⁶⁰ Here, the Court looked to the states to determine the contemporary attitude toward the imposition of a life sentence for a juvenile offender.²⁶¹ Of the thirty-seven states that currently provide for a sentence of life without parole for juvenile offenders,²⁶² only eleven states have imposed such a sentence.²⁶³ After a detailed analysis of the practice of sentencing a juvenile to life without parole, the Court determined that, even though many states currently treat juveniles as adults under certain circumstances for the purposes of punishment, “[t]he sentencing practice . . . is exceedingly rare.”²⁶⁴ The Court cited its earlier holding in *Atkins v. Virginia*²⁶⁵ that “‘[I]t is fair to say that a national consensus has developed against it.’”²⁶⁶ However, “consensus [cannot stand alone as determining] whether a punishment is cruel and unusual.”²⁶⁷

The Court’s analysis continued by examining the penological justifications of sentencing non-homicidal juvenile offenders to life imprisonment without parole, and determined that “none of the goals of penal sanctions that have been recognized as legitimate—

(2002) (determining that the death sentence was inappropriate for someone who was mentally retarded at the time he or she committed the crime); *Hope v. Pelzer*, 536 U.S. 730, 748 (2002) (holding that the Cruel and Unusual Punishment Clause prohibits “barbaric” punishment); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (prohibiting the death penalty to anyone under the age of 16); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (overturning a Florida court death penalty sentence when the requisite mens rea of intent was not shown).

²⁶⁰ *Graham*, 130 S. Ct. at 2023.

²⁶¹ *Id.* The Court stated, “[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” *Id.* (quoting *Atkins*, 536 U.S. at 312).

²⁶² *Id.* at 2034-36 app.

²⁶³ *Id.* at 2024. “[T]here are 109 juvenile offenders serving sentences of life without parole . . .” *Graham*, 130 S. Ct. at 2023 (referring to a recent study by Paolo Annino, David W. Rasmussen, and Chelsea Boehme Rice, *Juvenile Life without Parole for Non-homicide Offenses: Florida Compared to Nation*, FSU COLL. OF LAW, PUB. LAW RESEARCH PAPER NO. 399, 2, 14 (2009). “A significant majority [of juveniles serving life sentences for non-homicide offenses], [seventy-seven] in total, are serving . . . in Florida.” *Graham*, 130 S. Ct. at 2024. “The [rest] are imprisoned in just ten states—California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia.” *Id.*

²⁶⁴ *Id.* at 2025-26 (stating that “the many states that allow life without parole for juvenile nonhomicide offenders but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate”).

²⁶⁵ 536 U.S. 304.

²⁶⁶ *Graham*, 130 S. Ct. at 2026 (quoting *Atkins*, 536 U.S. at 316).

²⁶⁷ *Id.*

retribution, deterrence, incapacitation, and rehabilitation—provide[d] an adequate justification.”²⁶⁸ Even though penological goals may be determined within the discretion of individual state legislatures, sentences that serve no legitimate penological goals are, by nature “disproportionate to the offense.”²⁶⁹ Retribution, with respect to a minor, has been held to be “‘not proportional if the law’s most severe penalty is imposed’ on the juvenile murderer.”²⁷⁰ It logically followed that imposing a sentence of life without parole for a non-homicide offense serves no legitimate goal of retribution. General deterrence, with respect to juveniles, failed to justify the desired effect compared with mature adults; “impetuous” juveniles lack “maturity and understanding,” and “are less likely to take a possible punishment into consideration when making decisions.”²⁷¹ The Court concluded that incapacitation, a legitimate reason to provide safety to the public by preventing recidivism, had no justification for juvenile offenders because juvenile offenders may change and learn from their mistakes.²⁷² Additionally, the Court concluded that rehabilitation, administered through a system of parole, had no basis in *Graham* because Florida rejected the possibility of parole, thereby rejecting rehabilitation as a penological goal.²⁷³

The Court determined that, based on its finding of no legitimate penological goal for imposing a sentence of life without parole

²⁶⁸ *Id.* at 2028. The Court, in deciding whether sentencing a juvenile to life without parole for a non-homicide offense, *Graham*, continually refers to *Roper*. In *Roper*, the defendant, at seventeen, committed murder and, following his eighteenth birthday, was sentenced to death. *Roper*, 543 U.S. at 555-56. The Missouri Supreme Court, establishing that the Constitution prohibits such a penalty, eventually set aside his death sentence and re-sentenced him to life without parole. *Id.* at 559-60. The Court granted certiorari and affirmed, holding that (1) as evidenced in sociological and scientific studies, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young; these qualities often result in impetuous and ill-considered actions and decisions”; (2) “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and (3) “the character of a juvenile is not as well formed as that of an adult.” *Id.* at 569-70 (citations omitted). The Court concluded that “These differences [between juveniles and adults] render suspect any conclusion that a juvenile falls among the worst offenders” subject to the harshest penalty—the sentence of death. *Id.* at 570.

²⁶⁹ *Graham*, 130 S. Ct. at 2028.

²⁷⁰ *Id.* (quoting *Roper*, 543 U.S. at 571).

²⁷¹ *Id.* at 2028-29 (stating that the “limited deterrent effect provided by life without parole is not enough to justify the sentence”).

²⁷² *Id.* at 2029 (making the comparison between adult offenders and juvenile offenders).

²⁷³ *Id.* at 2029-30.

on a juvenile for a non-homicide offense, Graham's sentence was cruel and unusual for the purposes of the Eighth Amendment.²⁷⁴ The Court held that juvenile offenders lacked sufficient culpability to deserve such a severe sentence.²⁷⁵ "A state is not *required* to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," but a State may not forbid those offenders from ever re-entering society.²⁷⁶

The Court in *Graham* concluded with its controversial practice of analyzing penological practices of other countries with respect to those of the United States.²⁷⁷ The Court stressed that, although international practice is by no means binding on the decisions of the United States Supreme Court, the judgments of our nation, when consistent with those of other nations, provide reasonable and justifiable support and respect for our decisions.²⁷⁸ Here, the Court found that, although eleven countries can sentence juvenile offenders to life without parole, only the United States and Israel actually sentence juveniles to life without parole.²⁷⁹ But even in Israel, the seven juvenile prisoners serving the sentence were convicted of either homicide or attempted homicide, revealing that Israel did not exercise the option for non-homicide offenses.²⁸⁰ Therefore, as a result of the Court's decision in *Graham*, the United States was in accord with in-

²⁷⁴ *Graham*, 130 S. Ct. at 2030.

²⁷⁵ *Id.*

²⁷⁶ *Id.* (emphasis added).

²⁷⁷ *Id.* at 2033-34. See *Roper*, 543 U.S. at 575-78; see also *Atkins*, 536 U.S. at 316 n.21; *Thompson*, 487 U.S. at 830-31; *Enmund*, 458 U.S. at 796 n.22; *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977); *Trop v. State of California*, 356 U.S. 86, 102-03 (1958); Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 64-65 (2007) (discussing that, although not a new practice, comparing international legal practices to constitutional principles has intensified in recent years, especially in light of controversial cases—*Roper*, *Lawrence v. Texas* (homosexual sodomy and privacy rights), and *Atkins* (mentally handicapped and the death penalty)); David T. Hutt & Lisa K. Parshall, *Divergent Views on the Use of International and Foreign Law: Congress and the Executive versus the Court*, 33 OHIO N.U.L. REV. 113, 115-16 (2007) (underscoring that the practice, although long recognized in American jurisprudence, has not received overwhelming support because it "might run the risk of overturning the American legal culture and American constitutionalism"); Julia Salvatore, Suparna Salil & Michael Whelan, *Sotomayor and the Future of International Law*, 45 TEX. INT'L L.J. 487, 487 (commenting that Justice Sotomayor, during her Senate confirmation hearings, fielded the significant question of her view on "how she would use, interpret, and apply international law if confirmed").

²⁷⁸ *Graham*, 130 S. Ct. at 2033-34.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

ternational custom.

Justices Thomas, Scalia, and Alito joined in the dissent, proclaiming an originalist view that the drafters' perception of cruel and unusual punishment was "originally understood as prohibiting tortuous methods of punishment."²⁸¹ The dissent claimed that the Constitution provided neither an indication that the Cruel and Unusual Punishments Clause "was understood to require proportionality in sentencing," nor an adoption of categorical proportionality rules.²⁸² The latter, the dissent stated, "[was] entirely the Court's creation," and the former "intrude[d] upon [the] areas that the Constitution reserves to other (state and federal) organs of government."²⁸³ According to the dissent, if the people of a state decide, through the actions of their elected officials, to impose a sentence of life without parole for juvenile offenders for non-homicide offenses, then the federal government should not prohibit such a sentence.²⁸⁴

Moreover, and perhaps as an indication of the dissent's strict adherence to the concepts of originalism, Justice Thomas responded to a concurring opinion of Justice Stevens that emphasized the Court's assertion that "evolving standards of decency" have played a crucial role in Eighth Amendment cases.²⁸⁵ Justice Stevens proclaimed, "Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes."²⁸⁶ Justice Thomas countered, "I agree with Justice Stevens that '[w]e learn . . . from our mistakes.' Perhaps one day the Court will learn from this one."²⁸⁷

²⁸¹ *Id.* at 2044 (Thomas, J., dissenting) (quoting *Harmelin*, 501 U.S. at 979) (internal citations omitted).

²⁸² *Id.* at 2044-45.

²⁸³ *Graham*, 130 S. Ct. 2044-45.

²⁸⁴ *Id.* at 2048-50 (claiming that it was "nothing short of stunning" that the majority ignored their own evidence that thirty-seven out of fifty states permit the practice of sentencing juveniles to life without parole, choosing instead to adopt other measures to arrive at its decision).

²⁸⁵ *Id.* at 2036 (Stevens, J., concurring).

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 2058.

IV. CIVIL DETENTION FOR THE SEXUALLY DANGEROUS AND MENTALLY ILL

a. *United States v. Comstock*: The Meaning of “Necessary and Proper”

Suppose a defendant, convicted of mail fraud, is sentenced to and serves five years in the federal penitentiary. Suppose further, that after the completion of the defendant’s sentence, the federal government petitions the court to declare the defendant sexually dangerous and the court makes such a determination. Can the federal court then, pursuant to a federal statute, civilly commit that person indefinitely as a sexually dangerous person? According to last Term’s opinion in *Comstock*,²⁸⁸ the answer is a definitive ‘yes.’²⁸⁹

Each of the five respondents in *Comstock* was convicted of crimes of a sexual nature.²⁹⁰ Solicitor General Elena Kagan, presenting the case for the United States, clearly stated that the responsibility to assure the appropriate care and custody of sexually violent and mentally ill people rests squarely with the government.²⁹¹ Kagan argued that if the government believes that a sexually violent or mentally ill person “will commit further offenses” after his or her release from custody, then Congress has the power under the Necessary and Proper Clause of the Constitution to enact legislation that allows the government to civilly commit this person.²⁹² The federal statute at issue refers to any person who is in federal custody pursuant to 18 U.S.C. § 4241(d).²⁹³ Therefore, anyone, regardless of the crime, is

²⁸⁸ 130 S. Ct. 1949.

²⁸⁹ See *id.* at 1965 (holding that the statute was constitutionally authorized by Congress).

²⁹⁰ See *infra* note 295 and accompanying text.

²⁹¹ See Transcript of Oral Argument at 6-8, *Comstock*, 130 S. Ct. 1949 (No. 08-1124), 2010 WL 97479.

²⁹² *Id.* at 11-12. Kagan argued that the Court in *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997), held that, “in order to invoke civil commitment statutes[,]” the Court required “that there be not only sexual dangerousness, but also mental illness.”

²⁹³ Title 18, Section 4241(d) of the United States Code states, in pertinent part:

If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General.

subject to civil commitment if the government determines that he or she had previously engaged in child molestation or sexual violence and has the propensity to repeat the behavior, or is mentally ill or sexually dangerous.²⁹⁴

In *Comstock*, five defendants challenged 18 U.S.C. § 4248, a federal statute that effectively rendered “sexually dangerous” prisoners about to be released subject to civil commitment.²⁹⁵ All five defendants had either pled guilty to or had been charged with sex-related crimes.²⁹⁶ Each of the five defendants moved to dismiss the civil commitment proceeding prescribed by § 4248, claiming that the proceeding was criminal and violated the prohibition against double jeopardy, and violated their rights under both the Sixth and Eighth Amendments.²⁹⁷ The Court confined its analysis to the provisions of the Necessary and Proper Clause, stating that “the relevant inquiry is simply ‘whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power’ or under other powers that the Constitution grants Congress the authority to

²⁹⁴ See Transcript of Oral Argument, *supra* note 291, at 54. Alan DuBois, attorney for the Petitioners, claiming that the 18 U.S.C. § 4248 (West 2010) as written was unconstitutional, argued, “You can be in custody for any crime whatsoever. It doesn’t have to be sex-related, you can never have been convicted of a sex offense whatsoever. So it really is, there is almost a complete de-linking of the crime which brought you into federal custody and your subsequent commitment.” *Id.*

²⁹⁵ Title 18, Section 4248(a) and (d) of the United States Code states, in pertinent part:

(a) In relation to a person who is in the custody of the Bureau of Prisons, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person, the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person . . . [t]he court shall order a hearing to determine whether the person is a sexually dangerous person . . . (d) If, after the hearing, the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit the person to the custody of the Attorney General.

²⁹⁶ *Comstock*, 130 S. Ct. at 1955 (reporting that three of the five had pled guilty to possession of child pornography, one pled guilty to sexually abusing a minor, and one faced charges for aggravated sexual abuse of a minor).

²⁹⁷ *Id.* They claimed that the proceeding pursuant to the statute denied them substantive due process and equal protection, violated procedural due process because the statute provided a standard of proof by clear and convincing evidence as opposed to proof beyond a reasonable doubt, and the enactment of the statute exceeded Congress’ constitutionally enumerated powers under the Commerce Clause and the Necessary and Proper Clause. *Id.*

implement.”²⁹⁸ In finding for the government, the Court held that 18 U.S.C. § 4248 was

a “necessary and proper” means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.²⁹⁹

The holding for the government in *Comstock*, although narrow in scope, determined that Congress has broad authority under the Necessary and Proper Clause of the Constitution. The Court tailored its analysis of the challenge to § 4248 by focusing on Congress’s power under the Necessary and Proper Clause and developing a “five-consideration” test to determine whether that power is appropriately applied.³⁰⁰ Because Congress has “broad power” under the Clause to create federal crimes to further its enumerated powers and to ensure that these crimes are enforced—in *Comstock*, Congress enacted § 4248 to ensure the safety of those who may be affected by the release of “sexually dangerous” prisoners—Congress need only show that the statute is reasonably related to an enumerated power.³⁰¹ The following factors of the test when applied to the facts of *Coms-*

²⁹⁸ *Id.* at 1956 (reiterating its earlier point that “[the Court has] since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power” (citing *Sabri v. United States*, 541 U.S. 600, 605 (2004))).

²⁹⁹ *Id.* at 1965. The Court established five factors in concluding that the statute was an appropriate exercise of Congress’s power under the Necessary and Proper Clause:

[The factors are] (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena [in that Congress determined that the statute furthers a legitimate means], (3) the sound reasons for the statute’s enactment in light of the Government’s custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute’s accommodation of state interests, and (5) the statute’s narrow scope.

Comstock, 130 S. Ct. at 1965.

³⁰⁰ See *supra* note 299.

³⁰¹ *Comstock*, 130 S. Ct. at 1962. See also Anna Christenson, *Broad Authority Under the ‘Necessary and Proper Clause’ Allows Federal Commitment of Sexually Dangerous Individuals*, SCOTUSBLOG, (May 18, 2010 1:19 PM), <http://www.scotusblog.com/?p=20305>.

tock— (1) Congress’s long-standing history of enacting federal criminal statutes; (2) safety of the public serving as a sound reason for its enactment; (3) accommodation of state interests by not overriding state sovereignty through forcing the states to civilly commit the “sexually dangerous” offenders in state facilities; and (4) the narrowness of the statute in that it applies only to a small number of individuals—led to the Court’s decision. Further, the Court was careful to clearly indicate that the decision was narrowly tailored, stating that “We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution. Respondents are free to pursue those claims on remand, and any others they have preserved.”³⁰²

Congress enacted § 4248 in 2006 as part of the Adam Walsh Child Protection and Safety Act.³⁰³ Child molestation and sexual abuse stand among the most heinous crimes. Further, because each of the five respondents in *Comstock* committed sex-related offenses to warrant their involvement with the federal court system, it may appear that § 4248 would logically apply to *only* those imprisoned for sex-related offenses.

However, nearly twenty percent of individuals who have been civilly committed under § 4248 (as of the time of *Comstock*) had *not* been incarcerated for sexually related offenses.³⁰⁴ Section 4248 procedurally vests in the government the power to certify any currently incarcerated prisoner as “sexually dangerous,” allows the government to prove its claims by clear and convincing psychiatric evidence at a hearing, and, if proved, civilly commits the person to the custody of the Attorney General.³⁰⁵

³⁰² *Comstock*, 130 S. Ct. at 1965.

³⁰³ See Rodger Citron, *United States v. Comstock: Will the Supreme Court Uphold the Federal Government’s Power to Commit Sex Offenders, or Invoke Principles of Federalism*, FINDLAW (Feb. 8, 2010), http://writ.news.findlaw.com/commentary/20100208_citron.html; see also John Holland, *Adam Walsh, Case is Closed After 27 Years*, LATIMES.COM (Dec. 17, 2008), <http://articles.latimes.com-2008-dec-17-nation-na-adam17>. On July 27, 1981, six year old Adam Walsh disappeared from a shopping mall in Florida, and two weeks later, his mangled and abused body was discovered. *Id.* His parents, John and Reve Walsh, embarked on a three decade effort, lobbying Congress to enact the aforementioned legislation. *Id.*

³⁰⁴ *Comstock*, 130 S. Ct. at 1977 (Thomas, J., dissenting) (referring to a statistic for which the Government conceded).

³⁰⁵ *Id.* at 1954.

b. Background: *Kansas v. Hendricks*, Confinement and Double Jeopardy

Kansas v. Hendricks,³⁰⁶ like *Comstock*, involved issues of child sexual abuse, but dealt with a challenge regarding alleged violations of due process, double jeopardy and the enactment of ex post facto laws following the Respondent's civil commitment.³⁰⁷ Unlike the statute at issue in *Comstock*, the statute in *Hendricks* specifically applied to already incarcerated sexual predators. In *Hendricks*, the defendant was already serving a prison term in Kansas for molesting two thirteen-year-old boys and was nearing the end of his sentence.³⁰⁸ Pursuant to a Kansas statute, the Sexually Violent Predator Act of 1994,³⁰⁹ there was a civil commitment hearing at which *Hendricks* testified that he repeatedly sexually abused children whenever he was not confined.³¹⁰ The statute at issue provided a means for the state to confine "sexual predators" post-release from prison.³¹¹ At a trial to

³⁰⁶ 521 U.S. 346.

³⁰⁷ *Id.* at 356.

³⁰⁸ *Id.* at 353.

³⁰⁹ KAN. STAT. ANN. § 59-29a01 (1994). The Kansas Legislature enacted the statute to deal with the problem of managing repeat sexual offenders upon release. *Hendricks*, 521 U.S. at 351-52. The Legislature, in enacting § 59-29a01, explained:

A small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the general involuntary civil commitment statute In contrast to persons appropriate for civil commitment under the general involuntary civil commitment statute, sexually violent predators generally have anti-social personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the general involuntary civil commitment statute.

Id. at 351.

³¹⁰ *Id.* at 354-55.

³¹¹ KAN. STAT. ANN. § 59-29a02(a) (defining sexually violent predator as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the

determine whether Hendricks fit the profile of a sexual predator subject to civil commitment under the statute, a jury unanimously found beyond a reasonable doubt that Hendricks was, in fact, a sexually violent predator.³¹² After the Kansas Supreme Court held that Hendricks' substantive due process rights were violated, the Court granted certiorari.³¹³

The Court, when considering Hendricks' due process claim, determined that, although "freedom from physical restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action,"³¹⁴ Hendricks was appropriately found to be a pedophile under the procedures of the statute, and his admitted "mental abnormality" of dangerousness rendered him subject to civil commitment.³¹⁵ Therefore, the Court held that the diagnosis of Hendricks as a "pedophile" "plainly suffices for due process purposes."³¹⁶

The Court then determined whether the Act violated the constitutional prohibitions of double jeopardy or ex post facto legislation,

predatory acts of sexual violence").

The Act's civil commitment procedures pertain[] to: (1) a presently confined person who, like Hendricks, "has been convicted of a sexually violent offense" and is scheduled for release; (2) a person who has been "charged with a sexually violent offense" but has been found incompetent to stand trial; (3) a person who has been found "not guilty by reason of insanity of a sexually violent offense"; and (4) a person found "not guilty" of a sexually violent offense because of a mental disease or defect.

Hendricks, 521 U.S. at 352 (quoting KAN. STAT. ANN. §§ 22-3221, 59-29a03(a)).

³¹² *Id.* at 355.

³¹³ *Id.* at 356. The Kansas Supreme Court declared:

[I]n order to commit a person involuntarily in a civil proceeding, a State is required by "substantive" due process to prove by clear and convincing evidence that the person is both (1) mentally ill, and (2) a danger to himself or to others. The court then determined that the Act's definition of "mental abnormality" did not satisfy what it perceived to be this Court's "mental illness" requirement in the civil commitment context. As a result, the court held that "the Act violates Hendricks' substantive due process rights."

Id. (citations omitted)

³¹⁴ *Id.* (quoting *Foucha v. United States*, 504 U.S. 71, 80 (1992)).

³¹⁵ *Hendricks*, 521 U.S. at 360 (reiterating Hendricks' own testimony before the jury trial that "when he becomes 'stressed out,' he cannot 'control the urge' to molest children" as well as the plethora of psychiatric authority used to determine Hendricks' condition).

³¹⁶ *Id.*

two issues left unexamined by the Kansas Supreme Court.³¹⁷ Hendricks argued that the “newly enacted” punishment prescribed by the Act was based on past conduct for which he already served time, effectively violating the Double Jeopardy and Ex Post Facto Clauses.³¹⁸ Hendricks’ double jeopardy claim arose from his assertions that the confinement permitted by the Act was purely punitive due to its potential indefinite duration.³¹⁹ The Act also “failed to offer any ‘legitimate’ treatment,” and was procedurally criminal rather than civil.³²⁰ The Court disagreed with Hendricks and held that the commitment prescribed by the Act is not *indefinite* in that “Kansas [did] not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.”³²¹ And because the Kansas legislature took “great care to confine only a narrow class of particularly dangerous individuals [and met] the strictest procedural standards,” the proceeding cannot be held to be criminal.³²² Furthermore, even if the primary purpose of the Act was confinement of sexual predators, treatment, as an ancillary purpose, even where treatment does not yet exist, cannot be ruled out.³²³ The Court concluded that, because the Act was civil in nature, double jeopardy could not apply, and therefore, any ex post facto claim denying the defendant notice regarding a newly enacted statute must likewise fail.³²⁴ Therefore, under these

³¹⁷ *Id.* at 356.

³¹⁸ *Id.* at 361.

³¹⁹ *Id.* at 363.

³²⁰ *Hendricks*, 521 U.S. at 364-66. Hendricks’ assertion of the punitive nature of the Act was based on his assertion that the punishment was retribution for his past crime, for which he served. *Id.* at 361. Hendricks further relied on *Allen v. Illinois*, claiming that the “ ‘proceedings under the Act are accompanied by procedural safeguards usually found in criminal trials.’ ” *Id.* at 364 (quoting *Allen v. Illinois*, 478 U.S. 364, 371 (2008)).

³²¹ *Id.* Commitment under the Act is only *potentially* indefinite. *Id.* The maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year. *Hendricks*, 521 U.S. at 364. “If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement.” *Id.*

³²² *Id.* at 364-65 (countering Hendricks’ assertion that the proceedings were criminal in nature by clarifying Hendricks’ reading of *Allen* and quoting the case—“ ‘to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions’ ” (quoting *Allen*, 478 U.S. at 372)).

³²³ *Id.* at 366 (reasoning that “[t]o conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions”).

³²⁴ *Id.* at 369-70. The Court stated,

circumstances, a “sexually dangerous” individual may arguably be detained for the remainder of his or her life absent a finding that the individual is no longer mentally impaired or sexually dangerous.

Hendricks, predating *Comstock* by more than a decade,³²⁵ provided the precedent necessary to undermine any *Comstock* claims of double jeopardy or ex post facto violations regarding civil commitment of previously incarcerated sexual offenders. However, there are sharp distinctions between the two cases. The Kansas law at issue in *Hendricks* was a state legislative act; the law at issue in *Comstock* was one passed by the United States Congress.³²⁶ Justice Clarence Thomas authored the majority opinion in *Hendricks*; he authored the dissent in *Comstock*.³²⁷ Perhaps the sharpest distinction lies at the heart of the matter—the language of the statute at issue in each of the cases. In *Hendricks*, the Kansas legislature confined the civil commitment procedures to only those presently confined for acts of sexual violence and sexual molestation.³²⁸ The federal statute in *Comstock*, prescribing civil confinement for the “sexually dangerous,” failed to distinguish between people previously incarcerated for sexual offenses and those simply incarcerated for any federal offenses.³²⁹

Where the State has “disavowed any punitive intent”; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent. We therefore hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive. Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both *Hendricks*’ double jeopardy and ex post facto claims.

Hendricks, 521 U.S. at 368-69.

³²⁵ See *id.* at 346; see also *Comstock*, 130 S. Ct. at 1949.

³²⁶ *Hendricks*, 521 U.S. at 350; *Comstock*, 130 S. Ct. at 1954.

³²⁷ *Hendricks*, 521 U.S. at 350; *Comstock*, 130 S. Ct. at 1970 (Thomas, J., dissenting) (specifically bringing attention to the fact that only twenty percent of those presently civilly confined had been in prison for sexually related offenses).

³²⁸ See *Hendricks*, 521 U.S. at 352 (defining the parameters of the statute’s confinement procedures).

³²⁹ See *supra* note 294.

V. FOR WHOM THE AEDPA TOLLS: EXTREME LAWYER MISCONDUCT AND EQUITABLE TOLLING

“This Court should fashion a remedy that would avoid the shocking result that Petitioner should suffer the consequences of such extreme lawyer misconduct.”³³⁰ “The misconduct of Petitioner’s former counsel constitutes substantially more than ‘gross negligence’ and, under the law governing lawyers, represents intolerable, thoroughly unacceptable behavior.”³³¹ “The Court is also confronted with a lawyer who perpetrated a fraud on the lawyer’s client and at the same time abandoned the client’s cause without notice or court permission.”³³² These statements prepared for the *Brief of Legal Ethics Professors and Practitioners and the Stein Center for Law and Ethics as Amici Curiae in Support of Petitioner* represent the level of disdain for the conduct of the Petitioner’s counsel that became the focus of the Petitioner’s claim in *Holland v. Florida*.³³³

The issue in *Holland* was whether the one-year period of limitations prescribed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”)³³⁴ can be tolled for equitable reasons—in *Holland*, the Petitioner claimed that his counsel’s professional misconduct constituted “equitable reasons.”³³⁵ The AEDPA provides that “a [one]-year period of limitation shall apply to an application

³³⁰ Brief of Legal Ethics Professors and Practitioners and the Stein Center for Law and Ethics as Amici Curiae in Support of Petitioner at 9, *Holland*, 130 S. Ct. 2549 (No. 09-5327), 2009 WL 5177143 [hereinafter Brief for Petitioner].

³³¹ *Id.*

³³² *Id.* at 12. The Brief for Petitioner embodied an overtone of reprehensibility in regards to the conduct of the Petitioner’s counsel.

[C]ourts often view failure by a lawyer to fulfill that duty by a negligence standard—a garden variety failure to meet the standard of care—that would not give rise to an entitlement of the client to escape the damaging consequences of the lawyer’s conduct. Yet that is not what happened here. There was no mere lapse in the standard of care. Rather, this Court is presented with several fundamental breaches of the most sacred duties lawyers owe their clients, duties that long pre-date any lawyer codes, duties that courts have enshrined in the foundations of agency law (the roots of much of the law governing lawyers), duties that have been only strengthened over time as the courts have applied them to the lawyer-client relationship.

Id.

³³³ 130 S. Ct. 2549.

³³⁴ 28 U.S.C.A. § 2244(d) (West 2010).

³³⁵ *Holland*, 130 S. Ct. at 2554.

for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”³³⁶ It also provides that “the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.”³³⁷ In other words, once a Petitioner properly files an application for a writ of habeas corpus, the limitations clock is suspended, or tolled, and remains suspended, pending disposition of the petition.

Holland was convicted of first-degree murder and sentenced to death in 1997.³³⁸ After a series of appeals which were denied by the Supreme Court, the AEDPA limitation clock for Holland began; the date was October 1, 2001.³³⁹ On September 19, 2002 (twelve days before the limitations clock expired), state-appointed attorney Bradley Collins (appointed by Florida on November 7, 2001) filed a motion for post-conviction relief in the Florida courts.³⁴⁰ The clock then stopped, and for three years, Holland’s petition remained untouched.³⁴¹

At the time Collins eventually argued Holland’s case before the Florida Supreme Court in February 2005, the attorney-client relationship between Collins and Holland had begun to deteriorate.³⁴² Although Holland memorialized his complaints regarding Collins’s lack of communication in requests to have new counsel appointed, Holland’s requests were eventually denied.³⁴³ Further, Holland specifically wrote to Collins reminding the attorney that if the Florida Supreme Court denied his appeal, there were only *twelve days* remaining on the AEDPA limitation clock for filing in federal court.³⁴⁴ Collins never replied, the Supreme Court subsequently affirmed the lower court, and the limitations clock eventually expired; Holland was unaware of both the Florida Supreme Court’s ruling and the

³³⁶ 28 U.S.C.A. § 2244 (d)(1).

³³⁷ *Id.* § 2244(d)(2).

³³⁸ *Holland*, 130 S. Ct. at 2555.

³³⁹ *Id.*

³⁴⁰ *Id.* (recognizing that Collins was appointed by the State of Florida on November 7, 2001 to represent Holland in his appeal).

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Holland*, 130 S. Ct. at 2555-56.

³⁴⁴ *Id.* at 2256.

clock's running out.³⁴⁵

The timeline of events following the Florida Supreme Court's ruling form the basis for Holland's complaint (and Amicus Curiae's consternation³⁴⁶) regarding Collins's lack of professional ethics. When Holland learned of the Florida Supreme Court's decision, he immediately filed a pro se writ of habeas corpus in the Federal District Court for the Southern District of Florida.³⁴⁷ Collins finally responded to Holland, claiming that he intended to file a petition, but that the statute clock had run out six years prior when Holland's judgment and sentence were originally denied by the Florida state court *and* before Collins ever represented Holland; it turned out, Collins misinterpreted the law.³⁴⁸ Collins's response was his final communication with Holland, and, contrary to Collins's assertion, he had never filed a petition on Holland's behalf.³⁴⁹

The district court eventually dismissed *Collins*, appointed a new attorney, and proceedings ensued to determine whether the circumstances of Holland's case regarding Collins's representation warranted equitable tolling.³⁵⁰ The district court held that the facts did not necessitate such equitable tolling.³⁵¹ The Eleventh Circuit affirmed the district court's finding that Collins's performance constituted "pure negligence," but agreed with Holland that "equitable tolling can be applied to AEDPA's statutory deadline."³⁵² The Supreme

³⁴⁵ *Id.* at 2256-57.

³⁴⁶ See Brief for Petitioner, *supra* note 330, at 9.

³⁴⁷ *Holland*, 130 S. Ct. at 2557.

³⁴⁸ *Id.* at 2557-58. Holland responded to Collins's letter asserting that the AEDPA clock had run expressing his displeasure with Collins' representation and imploring Collins to file his habeas petition "at once." *Id.* at 2557-58.

³⁴⁹ *Id.* at 2559.

³⁵⁰ *Id.* Holland petitioned the federal court to determine whether Collins' actions warranted a valid reason to consider the limitations clock suspended while Collins represented him. *Holland*, 130 S. Ct. at 2559.

³⁵¹ *Id.*

³⁵² *Id.* at 2559-60. On the matter of Collins's performance, the Eleventh Circuit stated that "such behavior can never constitute an 'extraordinary circumstance' " to warrant equitable tolling. *Id.* at 2559. The court wrote:

We will assume that Collins's alleged conduct is negligent, even grossly negligent. But in our view, no allegation of lawyer negligence or of failure to meet a lawyer's standard of care—in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part—can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling.

Id. at 2559-60.

Court, seeking to resolve a circuit split on the “application of the equitable tolling doctrine to professional instances of conduct,” granted certiorari.³⁵³

The Court first determined whether “AEDPA’s statutory limitations period may be tolled for equitable reasons.”³⁵⁴ In concluding that the AEDPA is “subject to equitable tolling in appropriate cases,” the Court held that the statute “does not set forth ‘an inflexible rule requiring dismissal whenever’ its ‘clock has run,’ ”³⁵⁵ and is “normally subject to a ‘rebuttable presumption’ in favor of ‘equitable tolling.’ ”³⁵⁶ The Court further explained that although Congress incorporated no provision in the statute for *equitable tolling*, the fact that Congress included tolling in the statute only in reference to pending state claims does not indicate its intent to *preclude* equitable tolling.³⁵⁷ The Court also disagreed with the Respondent’s assertion that equitable tolling undermines the AEDPA’s basic purposes³⁵⁸ by stating that when Congress codified the statute, it did so with the intent to preserve the vital role that “the writ of habeas corpus plays . . . in protecting constitutional rights.”³⁵⁹

The Court then proceeded to determine whether the type of alleged attorney misconduct present in *Holland* warranted equitable tolling. The Court stated that “We have previously made clear that a ‘petitioner’ is ‘entitled to equitable tolling’ only if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraor-

³⁵³ *Holland*, 130 S. Ct. at 2560.

³⁵⁴ *Id.*

³⁵⁵ *Id.* (quoting *Day v. McDonough*, 547 U.S. 198, 205 (2006)).

³⁵⁶ *Id.* (quoting *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95-96 (1996)).

³⁵⁷ *Id.* (referring to and rejecting the maxim “*inclusio unius est exclusio alterius* (to include one item . . .) is to exclude other similar items”).

³⁵⁸ Transcript of Oral Argument at 43-45, *Holland*, 130 S. Ct. 2549 (No. 09-5327), 2010 WL 710522 (referring to a “pre-AEDPA mentality” that “there must be a remedy” and that “there must be some equity done,” but that it was not the intent of Congress in enacting the AEDPA to have cases linger in the system for years).

³⁵⁹ *Holland*, 130 S. Ct. at 2562. The Court, in finding that Congress, in enacting Section 2244, “did not seek to end every possible delay at all costs.” *Id.* at 2562.

The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, § 9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA’s statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open.

Id.

dinary circumstance stood in his way' and prevented timely filing."³⁶⁰ The Court examined the decisions by both the lower district court and the Eleventh Circuit Court of Appeals, disagreeing with both decisions, but for different reasons.³⁶¹ The district court based its ruling on whether Collins demonstrated a "lack of diligence," as opposed to the attorney's behavior meriting an "extraordinary circumstance,"³⁶² "the diligence required for equitable tolling purposes is " 'reasonable diligence.' "³⁶³ In *Holland*, the Court, in questioning the district court's finding, seemed to assert that Collins's professional conduct fell short of reasonable diligence.³⁶⁴ Then, examining the strict rule set forth by the Eleventh Circuit in determining whether a lawyer's misconduct rises to the level of an "extraordinary circumstance,"³⁶⁵ the Court reasoned that the circuit court's approach was "overly rigid";³⁶⁶ "several lower courts have . . . held that unprofessional attorney conduct may, in certain circumstances, prove 'egregious' and can be 'extraordinary' even though the conduct in question may not satisfy the Eleventh Circuit's [strict] rule."³⁶⁷

However, in the end, although the Court determined that equitable tolling is available under the AEDPA, it provided no clear indication regarding the disposition of *Holland*'s case.³⁶⁸ In the Court's view, the district court erred when it originally decided that Collins's alleged misconduct for the purposes of equitable tolling was based on the attorney's lack of diligence.³⁶⁹ The Court of Appeals standard was "overly rigid."³⁷⁰ The Court reversed the Eleventh Circuit decision and remanded the case, requiring the appeals court to conduct a possible "equitable, fact intensive" inquiry to determine whether the government should prevail.³⁷¹

³⁶⁰ *Id.*

³⁶¹ *See id.*

³⁶² *Holland*, 130 S. Ct. at 2565.

³⁶³ *Id.* (quoting *Lonchar v. Thomas*, 517 U.S. 314, 326 (2006)).

³⁶⁴ *See id.* (insinuating that the actions and inactions taken by Collins during his representation of *Holland* amounted to a lack of diligence).

³⁶⁵ *Id.* at 2563-64.

³⁶⁶ *Id.* at 2565.

³⁶⁷ *Holland*, 130 S. Ct. at 2563-64.

³⁶⁸ *Id.* at 2565.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

VI. CONCLUSION

The 2009-2010 Term of the Supreme Court presented several important issues regarding criminal matters and constitutional jurisprudence. *Skilling* revealed that a change of venue based on a claim of a “tainted jury pool,” even in one of the most publicized cases of the last several years, presents a difficult, if not impossible task, for a criminal defendant. Both *Padilla* and *Holland*, similar cases in that they examined issues involving ineffective assistance of counsel, were remanded to the lower courts for re-examination. The Court neither offered clarity regarding the meaning of prejudice in determining ineffective assistance of counsel nor provided an ascertainable definition of attorney misconduct. However, *Padilla* expanded the Sixth Amendment by specifically determining that deportation is a consequence unique in nature because of the substantial impact on the lives of non-citizens. Now, criminal defense attorneys bear the burden of being aware of immigration issues that might impact their clients. The question will surely arise as to whether *Padilla* strictly applies only to deportation or whether the Sixth Amendment will further expand to other criminal matters. *Holland* clearly determined that the time limitations imposed by Congress in the AEDPA are subject to equitable tolling. *Graham* held that a sentence of life in prison without the possibility of parole is cruel and unusual when the sentence is imposed on a minor for the commission of a non-homicidal offense. *Comstock* presented the Court with the opportunity to expound on the breadth of the Necessary and Proper Clause. The Court determined that Congress, under the Necessary and Proper Clause, had the authority to enact legislation to civilly commit sexually dangerous people. Overall, during the last Term, the Court left defense attorneys in awe of their newfound obligations, expanded the constitutional authority vested in Congress, settled circuit splits, provided defendants with constitutional remedies and protections, and clearly indicated that even a substantial amount of publicity *alone* surrounding a trial does not necessarily warrant a change of venue.

