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ARE THERE STILL COLLATERAL CONSEQUENCES IN NEW YORK AFTER *PADILLA*?

*Hon. John H. Wilson**

I. INTRODUCTION

In *Padilla v. Kentucky*,¹ the United States Supreme Court ruled that the failure of a criminal defense attorney to properly advise a defendant of the immigration consequences of a guilty plea was a violation of the defendant's Sixth Amendment right to counsel.² Significantly, the Supreme Court stated: "We . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance.'"³

In New York, the majority of cases to address *Padilla* have focused on whether a defendant's guilty plea has unforeseen and unanticipated immigration consequences.⁴ This article will discuss these consequences, as well as the enhanced obligation imposed on defense counsel by *Padilla* to ensure that the client is fully informed of all the consequences of a guilty plea, whether they are direct or collateral. It will also discuss whether a defendant may seek to with-

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¹ 130 S. Ct. 1473 (2010).

² *Id.* at 1478.

³ *Id.* at 1481.

⁴ *See, e.g.,* *People v. McDonald*, 802 N.E.2d 131 (N.Y. 2003) ("This appeal raises the question whether, under certain circumstances, a defense counsel's incorrect advice as to deportation consequences of a plea may constitute ineffective assistance of counsel. We answer in the affirmative but conclude that in the instant case—where defendant has failed to make the requisite showing of prejudice due to counsel's incorrect advice—defendant was not deprived of the effective assistance of counsel under the Federal Constitution."); *People v. Ford*, 657 N.E.2d 265, 266-67 (N.Y. 1995) (analyzing whether or not "Trial Judges or defense counsel are under a duty to warn defendants of the possible deportation consequences before entering a guilty plea[,] and "conclud[ing] that there is no such duty").

draw a guilty plea for other collateral consequences.

The article will then go beyond a discussion of the effect of *Padilla* on defense counsel's obligations to investigate whether the Supreme Court's ruling in *Padilla* affects one of the basic precepts of New York's jurisprudence—that some consequences of a guilty plea are collateral results that are not within the control of a court. In particular, it shall discuss whether post-*Padilla*, the Court has any enhanced obligation to warn a defendant of the collateral consequences of a guilty plea.

At the conclusion of this article, it is this author's hope that the reader will have an enhanced understanding of the far-reaching impact of *Padilla* and the effect this decision will exert in the future.

II. OBLIGATION OF COUNSEL UNDER *PADILLA*

A. The *Strickland* Standard in New York

In *Padilla*, the United States Supreme Court based its ruling on the first prong of the two-prong test for effective assistance of counsel enunciated in *Strickland v. Washington*.⁵ The first prong is an analysis of whether or not “counsel’s representation ‘fell below an objective standard of reasonableness.’”⁶ In *Padilla*, the Supreme Court made very clear that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation” before a guilty plea will be accepted as knowing and voluntary.⁷

The New York Court of Appeals has not directly adopted *Padilla*, and in fact, in the case of *People v. McDonald*,⁸ the *Strickland* test was only adopted where the defendant relied “solely on federal constitutional law.”⁹ For claims of ineffective assistance under the New York State Constitution, the Court of Appeals has held to the standard announced in *People v. Baldi*:¹⁰ “So long as the evidence, the law, and the circumstances of a particular case, viewed in totality

⁵ 466 U.S. 668, 688 (1984).

⁶ *Padilla*, 130 S. Ct. at 1482 (quoting *Strickland*, 466 U.S. at 688).

⁷ *Id.*

⁸ 802 N.E.2d 131 (N.Y. 2003).

⁹ *Id.* at 134.

¹⁰ 429 N.E.2d 400 (N.Y. 1981).

and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met.”¹¹ This standard of review under the New York State Constitution has been upheld repeatedly by the Court of Appeals.¹² However, “[t]he Second Circuit, in dicta, has questioned whether the New York ineffective assistance of counsel standard is ‘contrary to’ federal law as set forth in *Strickland*.”¹³

In *McDonald*, the court ruled that an attorney’s failure to properly advise a defendant of the immigration consequences of his guilty plea “falls below an objective standard of reasonableness,” and could be the basis for a claim of ineffective assistance of counsel.¹⁴ The court based its ruling on the affirmative nature of the attorney’s statement regarding the immigration consequences of a guilty plea.¹⁵

Following its earlier ruling in *People v. Ford*,¹⁶ the *McDonald* court stated that the mere “failure to advise a defendant of the possibility of deportation does not constitute ineffective assistance of counsel.”¹⁷ However, one of the effects of the Supreme Court’s ruling in *Padilla* is to abrogate this aspect of the *Ford* ruling.¹⁸ As stated in *Padilla*: “[T]here is no relevant difference ‘between an act of commission and an act of omission’ in this context.”¹⁹

So far, many of the decisions in New York have centered on whether or not *Padilla* should be applied retroactively. In *People v. Kabre*,²⁰ for instance, the court held that “*Padilla* . . . announced a new rule of criminal procedure rather than applied settled law to a new set of facts and that the *Padilla* rule is not a ‘watershed’ change

¹¹ *Id.* at 405.

¹² See *People v. Caban*, 833 N.E.2d 213 (N.Y. 2005); *People v. Stultz*, 810 N.E.2d 883 (N.Y. 2004); *People v. Berroa*, 782 N.E.2d 1148 (N.Y. 2002); *People v. Henry*, 744 N.E.2d 112 (N.Y. 2000); *People v. Benevento*, 697 N.E.2d 584 (N.Y. 1998).

¹³ See *Scott v. Phillips*, No. 05-CV-0142 (CBA), 2007 WL 2746905, at *8 n.1 (E.D.N.Y. Sept. 19, 2007) (citing *Henry v. Poole*, 409 F.3d 48, 54-55, 70 (2d Cir. 2005)).

¹⁴ *McDonald*, 802 N.E.2d at 135.

¹⁵ *Id.*

¹⁶ 657 N.E.2d 265 (N.Y. 1995).

¹⁷ *Id.* at 268.

¹⁸ See *People v. Garcia*, No. 4902/02, 2011 WL 3569329, at *2 (N.Y. Sup. Ct. July 26, 2011) (“The law in New York State at the time of the defendant’s guilty plea was governed by *People v. Ford*. However, *Padilla v. Kentucky*, while not retroactive in the classical sense, does govern guilty pleas entered into at the time of the defendant’s plea of guilty.”) (citations omitted).

¹⁹ *Padilla*, 130 S. Ct. at 1484 (quoting Brief for Respondent at 30, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010)).

²⁰ 905 N.Y.S.2d 887 (Crim. Ct. 2010).

that must be applied retroactively to cases on collateral review.”²¹ The majority of New York courts, however, have ruled that “*Padilla* did not announce a new constitutional rule, but merely applied the well-settled rule in *Strickland* to a particular set of facts.”²²

So far, the highest court to directly rule on this issue is the Appellate Term of the 9th and 10th Judicial Districts, in *People v. Nunez*.²³ There, the court ruled that “[i]n *Padilla*, the Supreme Court merely applied the well-established *Strickland* standard[,] . . . a well-established old rule.”²⁴ However, as recently as February of 2012, in *Medina v. United States*,²⁵ the Southern District ruled that the retroactive applicability of *Padilla* “is an open question in this Circuit.”²⁶

The question of whether or not *Padilla* has a retroactive application has reached the United States Supreme Court’s October calendar.²⁷ In *Chaidez v. United States*,²⁸ the Seventh Circuit found that “*Padilla* effectively changed the law in the nine circuit courts . . . that had previously addressed the issue.”²⁹ As such, it is a new rule without retroactive effect.³⁰ The Seventh Circuit’s approach has been

²¹ *Id.* at 311; *see also* *People v. Ramirez*, No. 4676/1996, 2012 WL 1193762, at *3 (N.Y. Sup. Ct. Apr. 11, 2012) (“*Padilla* does not apply retroactively to cases on collateral review.”); *People v. Andrews*, No. 1903-2008, 2011 WL 1827891 (N.Y. Sup. Ct. Apr. 22, 2011) (“Like the *Kabre* court, this Court finds that the scope of *Padilla* does not extend to cases in which immigration consequences are not clear and succinct, and therefore should not be applied retroactively . . .”).

²² *People v. Bennett*, 903 N.Y.S.2d 696, 699 (Crim. Ct. 2010); *see also* *People v. Castillo*, No. 1690-03, 2012 WL 1570975 (N.Y. Sup. Ct. May 7, 2012); *People v. Coles*, No. 8532/1994, 2011 WL 1991980 (N.Y. Sup. Ct. May 4, 2011); *People v. Garcia-Hernandez*, No. 02556/2008, 2011 WL 846231, at *4 (N.Y. Cnty. Ct. Feb. 24, 2011) (finding that *Padilla* did not set-forth a new rule).

²³ 917 N.Y.S.2d 806, 809 (App. Term 2010); *see generally* *People v. Oouch*, 948 N.Y.S.2d 453 (App. Div. 2012) (showing that recently the Third Department applied *Padilla* retroactively, but without any statement to that effect).

²⁴ *Nunez*, 917 N.Y.S.2d at 809.

²⁵ Nos. 12 Civ. 238(JPO), 86 Crim. 238(WK), 2012 WL 742076 (S.D.N.Y. Feb. 21, 2012).

²⁶ *Id.* at *4.

²⁷ *See* *Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011), *cert. granted*, 132 S. Ct. 2101 (2012).

²⁸ 655 F.3d 684 (7th Cir. 2011).

²⁹ *Id.* at 690 (quoting *Commonwealth v. Clarke*, 949 N.E.2d 892, 898 (Mass. 2011), *abrogated by* *Chaidez v. United States*, 133 S. Ct. 1103 (2013)) (internal quotation marks omitted).

³⁰ *Id.* at 688 (“Under *Teague*, a constitutional rule of criminal procedure applies to all cases on direct and collateral review if it is not a new rule, but rather an old rule applied to new facts. A new rule applies only to cases that still are on direct review, unless one of two exceptions applies. In particular, a new rule applies retroactively on collateral review if (1) it is substantive or (2) it is a ‘watershed rul[e] of criminal procedure’ implicating the fundamental

adopted by the Tenth Circuit,³¹ but rejected by the Third Circuit.³² Thus, the United States Supreme Court agreed to hear *Chaidez*, presumably to put to rest whether or not *Padilla* has a retroactive effect.³³

Shortly before publication of this issue of the *Touro Law Review*, the United States Supreme Court handed down their ruling in *Chaidez*.³⁴ There, in a majority opinion by Justice Kagan, the Court held that *Padilla* is not retroactive.³⁵ In applying the standards for retroactivity announced in *Teague v. Lane*,³⁶ the Court stated that to apply the *Strickland* standards to a historically collateral issue, it had to first ask “whether the *Strickland* test applied . . . the Court’s answer (‘Yes, *Strickland* governs here’) required a new rule.”³⁷ The high court cited the Seventh Circuit’s reasoning with approval; “Before *Padilla* . . . the [Supreme] Court had never held that the Sixth Amendment requires a criminal defense attorney to provide advice about matters not directly related to [a] client’s criminal prosecution.”³⁸

The dissent by Justice Sotomayor followed the reasoning applied by the majority of New York Courts when considering this issue; “*Padilla* did nothing more than apply the existing rule of *Strickland v. Washington*.”³⁹ In fact, the dissent criticized the majority’s claim that *Padilla* broke any new ground. “*Padilla* declined to embrace the very distinction between collateral and direct consequences of a criminal conviction that the majority says it did. In fact, the

fairness and accuracy of the criminal proceeding.”) (alteration in original) (citations omitted). A ruling is a watershed, if it is “‘necessary to prevent an impermissibly large risk of an inaccurate conviction,’ and ‘must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.’” *Ramirez*, 2012 WL 1193762, at *3 (quoting *Whorton v. Bockting*, 549 U.S. 406, 418 (2007)). “[T]he Supreme Court has offered as an example its decision in *Gideon v. Wainwright*. . . . ‘*Padilla* is not *Gideon*.’” *Id.* (citations omitted) (quoting *United States v. Hong*, 671 F.3d 1147, 1158 (10th Cir. 2011)).

³¹ *United States v. Hong*, 671 F.3d 1147, 1155 n.9 (10th Cir. 2011).

³² *United States v. Orocio*, 645 F.3d 630, 641 (3d Cir. 2011), *abrogated by* *Chaidez v. United States*, 133 S. Ct. 1103 (“*Padilla* followed directly from *Strickland* and long-established professional norms, it is an ‘old rule’ for *Teague* purposes and is retroactively applicable on collateral review.” (footnote omitted)).

³³ *Chaidez*, 132 S. Ct. 2101.

³⁴ *Chaidez v. United States*, 133 S. Ct. 1103.

³⁵ *Id.* at 1107.

³⁶ 489 U.S. 288 (1989).

³⁷ *Chaidez*, 133 S. Ct. at 1108.

³⁸ *Id.* at 1106 (alteration in original) (quoting *Chaidez*, 655 F.3d. at 693).

³⁹ *Id.* at 1114 (Sotomayor, J., dissenting).

Court stated very clearly that it found the distinction”⁴⁰

Thus, on the federal level, the issue of *Padilla*’s retroactivity has been decided. However, because New York State can apply the standard for ineffective assistance claims announced by the Court of Appeals in *Baldi* to applications made under the State Constitution, it is unlikely that New York courts will see the limiting effect of *Chaidez* any time soon.

It is important to emphasize that even when a defendant can establish that his counsel’s performance was insufficient, the defendant must still satisfy the second prong of the *Strickland* standard—that is, whether that defendant suffered actual prejudice as a result of counsel’s deficiencies.⁴¹ In fact, Mr. Padilla himself did not satisfy this prong,⁴² and the Supreme Court remanded his case for a determination of whether or not that defendant had been prejudiced by the incorrect advice he received from his attorney.⁴³

Prejudice is a showing “that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial,”⁴⁴ or, as the Court in *Padilla* put it, “a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.”⁴⁵ In fact, even when the defendant has met the first prong of *Strickland*, withdrawal of a plea of guilty has been denied based upon the second prong of *Strickland*.⁴⁶ The federal standards of review under *Strickland*, and New York’s application of the *Baldi* standard to the issue of prejudice are different. Under *Strickland*, there is a two stage review of claims of ineffective counsel, with a showing of prejudice being a separate analysis, secondary to the initial finding regarding counsel’s effectiveness.⁴⁷

Under the *Baldi* standard, “a court must examine whether counsel’s acts or omissions ‘prejudice[d] the defense or defendant’s right to a fair trial.’”⁴⁸ Eschewing *Strickland*’s two stage analysis,

⁴⁰ *Id.* at 1117.

⁴¹ *Strickland*, 466 U.S. at 687.

⁴² *Padilla*, 130 S. Ct. at 1485 n.12.

⁴³ *Id.* at 1487.

⁴⁴ See *McDonald*, 802 N.E.2d at 134 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)) (internal quotation marks omitted).

⁴⁵ *Padilla*, 130 S. Ct. at 1485 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000)).

⁴⁶ See *People v. Valestil*, 911 N.Y.S.2d 695 (Crim. Ct. 2010).

⁴⁷ *Henry*, 744 N.E.2d at 113.

⁴⁸ *Benevento*, 697 N.E.2d at 588 (alteration in original) (quoting *People v. Hobot*, 646

the Court of Appeals has called its approach “flexible,” and “ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case. In that regard, we have refused to apply the harmless error doctrine in cases involving substantiated claims of ineffective assistance.”⁴⁹

The difference between the *Strickland* and *Baldi* standards has led to some confusion. In *People v. Bautista*,⁵⁰ the Court held that a “defendant is not required to ‘fully satisfy the prejudice test of *Strickland*’ ” since “the ‘prejudice’ prong of *Strickland* is effectively redundant.”⁵¹ However, the Court of Appeals has stated: “We continue to regard a defendant’s showing of prejudice as a significant but not indispensable element in assessing meaningful representation. Our focus is on the fairness of the proceedings as a whole.”⁵²

Under either standard, establishing prejudice is a heavy burden. Even where the court has held a hearing to investigate a defendant’s allegations of prejudice, a review of the defendant’s motives for accepting a plea bargain, including the desire to avoid a jail sentence, have resulted in a finding of no prejudice.⁵³ In *Bautista*, the Court still found that “there can be no prejudice as a result of counsel’s alleged misadvice since [defendant] would nevertheless be facing deportation” whether he plead guilty, or was convicted after trial.⁵⁴ Recently, in *People v. Hernandez*,⁵⁵ while applying the *Strickland* standard, the First Department held that the “defendant did not establish that he was prejudiced by his counsel’s inadequate advice on the deportation consequences of his guilty plea,”⁵⁶ because the “defendant decided to accept the plea . . . because pleading guilty was the course most advantageous to him.”⁵⁷

N.E.2d 1102, 1004 (N.Y. 1995)).

⁴⁹ *Id.*

⁵⁰ No. 2450-2002, 2011 WL 4907774 (N.Y. Sup. Ct. Oct. 12, 2011).

⁵¹ *Id.* at *4.

⁵² *Stultz*, 810 N.E.2d at 887.

⁵³ See *People v. Robles-Mejia*, No. 2430/01, 2010 WL 1855762, at *1 (N.Y. Sup. Ct. Apr. 16, 2010) (“[D]efendant was not ‘prejudiced’ by his attorney’s alleged shortcomings. Rather, defendant was solely motivated to plead guilty in order to avoid—at all cost—a . . . prison term.”).

⁵⁴ *Bautista*, 2011 WL 4907774, at *5; see also *People v. Alonso*, No. 7280-88, 2012 WL 5456386 (N.Y. Sup. Ct. Nov. 7, 2012) (applying the New York standard and finding defendant received effective assistance of counsel).

⁵⁵ 950 N.Y.S.2d 268 (App. Div. 2012).

⁵⁶ *Id.* (Sweeny, J., concurring).

⁵⁷ *Id.* at 269.

B. Defense Counsel's Obligation to Warn of Immigration Consequences After *Padilla*

The additional duties for defense counsel under *Padilla* are obvious. In *Padilla*, defense counsel “not only failed to advise him of this consequence prior to his entering the plea, but also told him that he ‘did not have to worry about immigration status since he had been in the country so long.’”⁵⁸ Since defense counsel had clearly misadvised the defendant, “[t]he Solicitor General ha[d] urged [the court] to conclude that *Strickland* applies to *Padilla*’s claim only to the extent that he ha[d] alleged affirmative misadvice.”⁵⁹

The Supreme Court saved its strongest language in *Padilla* to address this contention, stating that “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.”⁶⁰ Thus, defense counsel is not only obligated to give “correct advice,” counsel must speak up and warn defendant of the immigration consequences of the plea, even if counsel has not been asked for advice in this regard.⁶¹

Stating that “there is no relevant difference ‘between an act of commission and an act of omission’ in this context,” the Supreme Court held, in no uncertain terms, that “[w]hen attorneys know that their clients face possible exile from this country and separation from their families, [counsel] should not be encouraged to say nothing at all.”⁶² “It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so ‘clearly satisfies the first prong of the *Strickland* analysis.’”⁶³

The Supreme Court’s concern that the defendant be properly advised on such a drastic consequence explains the Court’s “blurring of the line” between direct and collateral consequences in this context. This is made clear in the high court’s assertion that “[t]he direct/collateral distinction has no bearing on the disposition of this case because . . . counsel must, at the very least, advise a noncitizen

⁵⁸ *Padilla*, 130 S. Ct. at 1478 (quoting *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008), *rev’d*, *Padilla*, 130 S. Ct. 1473) (internal quotation marks omitted).

⁵⁹ *Id.* at 1484.

⁶⁰ *Id.* at 1483 (alteration in original) (quoting *INS. v. St. Cyr*, 533 U.S. 289, 322 (2001)).

⁶¹ *Id.*

⁶² *Padilla*, 130 S. Ct. at 1484 (quoting Brief for Respondent at 30, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010)).

⁶³ *Id.* (quoting *Lockhart*, 474 U.S. at 62 (White, J., concurring)).

‘defendant that a criminal conviction may have adverse immigration consequences.’⁶⁴

The Supreme Court did acknowledge that “[i]mmigration law can be complex, and . . . [t]here will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of [counsel] in such cases is more limited.”⁶⁵ In such instances “a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”⁶⁶ Nevertheless, “when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.”⁶⁷

Thus, before *Padilla* an attorney’s affirmative misstatements regarding the collateral consequences of a guilty plea would constitute a violation of the first prong of *Strickland*. Post-*Padilla*, the attorney’s mere failure to advise the defendant of the collateral consequences of the plea will also constitute a violation of the first prong of the *Strickland* standard.

C. Counsel’s Duty to Warn of Other Consequences

To date, the decisions in New York that discuss this issue have been restricted to reviews of the immigration consequences of a guilty plea.⁶⁸ However, what if the defendant is facing other collateral consequences, such as the loss of a firearm permit, or a loss of housing? To date, there is only one trial court decision, rendered five years before *Padilla*, which may be instructive in this context.⁶⁹

In *People v. Becker*,⁷⁰ the defendant sought to withdraw his guilty plea to the violation of disorderly conduct,⁷¹ asserting that his “prior counsel provided incorrect advice . . . regarding the effect that his guilty plea may have on his then-pending Housing Court proceed-

⁶⁴ *Id.* at 1481 n.8, 1487 (Alito, J., concurring).

⁶⁵ *Id.* at 1483.

⁶⁶ *Id.*

⁶⁷ *Padilla*, 130 S. Ct. at 1483.

⁶⁸ See *McDonald*, 802 N.E.2d at 132 (finding that in certain instances, incorrect advice given by counsel regarding the deportation consequences of a guilty plea “may constitute ineffective assistance of counsel”); *Ford*, 657 N.E.2d at 265 (questioning whether counsel is under an obligation to warn defendants of the consequences of entering a guilty plea).

⁶⁹ See generally *People v. Becker*, 800 N.Y.S.2d 499 (Crim. Ct. 2005) (discussing the collateral consequence of losing housing).

⁷⁰ 800 N.Y.S.2d 499 (Crim. Ct. 2005).

⁷¹ N.Y. PENAL LAW § 240.20 (McKinney 2011).

ing.”⁷²

The cooperative housing corporation in which defendant owned “shares of stock in a cooperative apartment . . . was attempting to evict him based at least in part upon the allegations in the Criminal Court complaint.”⁷³ These allegations included the Class A misdemeanor of Assault in the Third Degree.⁷⁴ Five months after defendant pled guilty to the lesser violation, and was sentenced to a Conditional Discharge (with a requirement that he perform five days of community service), defendant sought to withdraw his guilty plea, alleging that when he asked his prior attorney “how such a plea would affect his . . . right to his apartment . . . [h]is prior attorney . . . advise[d] defendant ‘that the plea . . . could not be used against [him] in any way regarding his apartment.’”⁷⁵ However, after his plea of guilty, “the co-op commenced an ejectment action in Supreme Court.”⁷⁶ That action included, as a basis for ejectment, defendant’s guilty plea to disorderly conduct.⁷⁷

Relying upon *Ford*, the *Becker* court noted that “[t]he Court [of Appeals] left open the question . . . of whether an attorney’s affirmative misstatements . . . may constitute ineffective assistance of counsel.”⁷⁸ Citing *McDonald*, the *Becker* court stated that “erroneous advise [sic] . . . may constitute ineffective assistance of counsel where there is a reasonable probability that, but for counsel’s mistake, the defendant would not have pled guilty.”⁷⁹

Though *Ford* and *McDonald* both applied these rules to the immigration consequences of a guilty plea, the *Becker* court reasoned that “the holding and rationale of *McDonald* applies”⁸⁰ to counsel’s incorrect advice “regarding other collateral consequences, such as loss of housing.”⁸¹ In language which was to be echoed in *Padilla*, the *Becker* court stated as follows:

Although it may be objectively unreasonable to require an attorney to be familiar with all of the various

⁷² *Becker*, 800 N.Y.S.2d at 500.

⁷³ *Id.*

⁷⁴ *Id.*; N.Y. PENAL LAW § 120.00 (McKinney 2011).

⁷⁵ *Becker*, 800 N.Y.S.2d at 501.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 503 (citing *Ford*, 657 N.E.2d at 268).

⁷⁹ *Id.* (citing *McDonald*, 802 N.E.2d at 135).

⁸⁰ *Becker*, 800 N.Y.S.2d at 503.

⁸¹ *Id.*

possible collateral consequences which may emanate from a particular guilty plea, it is not objectively unreasonable to require an attorney to consult with an expert or complete relevant research to help the attorney accurately and properly advise a defendant regarding potential collateral consequences⁸²

Thus, the *Becker* court found that “under the first prong [deficient performance] of *Strickland*, an attorney’s incorrect advice regarding a housing collateral consequence is just as ‘deficient’ as an attorney’s incorrect advice regarding a deportation collateral consequence.”⁸³

The *Becker* court also found that the allegation made by defendant, that “had counsel correctly advised him regarding the collateral consequences of his plea, he would not have pled guilty and would have proceeded to trial” and that this “would [have] be[en] sufficient to satisfy . . . the prejudice prong of *Strickland*.”⁸⁴ However, the court did not grant the motion outright.⁸⁵ Instead, the court ordered a hearing “[i]nasmuch as the defendant’s allegations are controverted by the People.”⁸⁶

Since *Becker* was decided under New York law pre-*Padilla*, the case examines counsel’s obligation to avoid providing misinformation regarding the additional collateral consequences of a guilty plea.⁸⁷ In this context, *Becker* is important since its holding is not restricted to the immigration consequences of a guilty plea.

What is actually more significant about the case is its post-*Padilla* effect. While *Becker* applied to a situation involving an attorney who provided misinformation to the client, post-*Padilla*, counsel’s failure to warn a defendant of other collateral consequences may also result in a finding of deficient representation.

To date, *Becker* is the only reported case in New York involving counsel’s failure to warn of collateral consequences other than immigration penalties.⁸⁸ However, in other states, the analysis of counsel’s performance has moved to the post-*Padilla* phase of in-

⁸² *Id.* at 504.

⁸³ *Id.* at 505 (alteration in original) (citation omitted) (quoting *Strickland*, 466 U.S. at 687-88).

⁸⁴ *Id.* at 502, 505.

⁸⁵ *Becker*, 800 N.Y.S.2d at 505.

⁸⁶ *Id.*

⁸⁷ *Id.* at 503.

⁸⁸ *Id.* at 501.

quiry.⁸⁹

In *State v. Agathis*,⁹⁰ the New Jersey Supreme Court faced the situation where, “defendant argue[d] he received ineffective assistance of counsel when his attorney incorrectly informed him that he could regain his firearms identification card after completing his term of probation.”⁹¹ This advice was incorrect—under New Jersey law, the defendant was permanently barred from ownership of firearms as a result of his conviction.⁹²

Holding that “counsel’s performance fell below the standard expected of an attorney licensed to practice law,”⁹³ the court “adopted an approach that ensures that a defendant considering whether or not to plead guilty to an offense receives correct information concerning all of the relevant material consequences.”⁹⁴

In view of *Becker*, *Padilla*, and *Agathis*, it would not be surprising if New York courts are soon called upon to address similar applications based upon the failure of counsel to advise a defendant of other and sundry collateral consequences.

D. Conclusions Regarding Counsel’s Obligations After *Padilla*

So far, this article has discussed consequences that traditionally have been considered collateral in New York—that is, “a result peculiar to the individual’s personal circumstances and one not within the control of the court system,”⁹⁵ as opposed to “[a] direct consequence . . . which has a definite, immediate and largely automatic effect on defendant’s punishment.”⁹⁶

It has long been the view of many criminal justice advocates that a defendant should be fully informed of every consequence, both direct as well as collateral, prior to any guilty plea being entered.⁹⁷

⁸⁹ See *State v. Agathis*, 34 A.3d 1266 (N.J. Super. Ct. App. Div. 2012).

⁹⁰ 34 A.3d 1266 (N.J. Super. Ct. App. Div. 2012).

⁹¹ *Id.* at 1267.

⁹² *Id.* at 1268.

⁹³ *Id.* at 1270.

⁹⁴ *Id.*

⁹⁵ *Ford*, 657 N.E.2d at 268.

⁹⁶ *Id.* at 267.

⁹⁷ See Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty Plea Process*, 95 IOWA L. REV. 119, 124 (2009) (“The

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The *Padilla* decision has validated the view of these advocates; the attorney must now advise the client of all consequences of any guilty plea, the direct as well as the collateral.⁹⁸

Further, while the cases in New York have centered on immigration consequences, after *Padilla*, other collateral issues, such as the housing issue discussed in *Becker*, may be the subject of future litigation.⁹⁹ The attorney's failure to advise the client of other collateral matters, such as the ability to apply for a firearms license, have already become the basis for the reversal of a conviction in New Jersey, as in the *Agathis* case cited above.¹⁰⁰

As has also been discussed, the United States Supreme Court asserted that "the direct/collateral distinction has no bearing on the disposition of this case because . . . counsel must, at the very least, advise a noncitizen 'defendant that a criminal conviction may have adverse immigration consequences.'" ¹⁰¹ In so stating, the Court made clear that regardless of whether or not the consequences be direct or collateral, counsel's failure to properly advise the client will be a violation of the first prong of *Strickland*.

It is now time to discuss whether, in light of the Supreme Court's refusal to differentiate between direct and collateral conse-

Court should reject the artificial, ill-conceived divide between collateral and direct consequences and find that only a rule of full information about any severe consequences of a criminal conviction can adequately protect the constitutional values surrounding guilty pleas . . .").

⁹⁸ For a full discussion of counsel's "[d]uty to [i]nvestigate and [r]esearch," and counsel's "[d]uty to [a]dvise on [c]onsequences of [p]lea and to [s]eek [a]lternatives," see McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54. HOW. L.J. 795, 812 (2011). It should be noted that citation to this article is not an endorsement of the views expressed by the author of said article, except in his advocacy of better preparation and investigation by counsel; see also Paul Bennett Marrow, *Limitations on the Duty to Advise: Knowing When it's Time to Say More, Not Less*, 83 N.Y. ST. B.J. 33 (2011).

⁹⁹ For a discussion of the collateral effect of any conviction, even for a violation such as Disorderly Conduct (N.Y. PENAL LAW § 240.20), see Michael S. Kelton, *Collateral Consequences of Criminal Convictions of Physicians*, 19 N.Y. ST. ASS'N CRIM. DEF. LAW. 3 (2006), available at http://www.keltonlawfirm.com/pdf/Kelton_Collateral_Consequences.pdf; see also Jeremy H. Temkin, *Supreme Court Clarifies Collateral Consequences of Tax Convictions*, N.Y.L.J. (Mar. 8, 2012), http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202544708089&Supreme_Court_Clarifies_Collateral_Consequences_of_Tax_Convictions&slreturn=20130320173640 (discussing the impact of *Kawashima v. Holder*, 132 S. Ct. 1166 (2012)).

¹⁰⁰ See *Agathis*, 34 A.3d at 1271 (reversing a case where "defendant's conviction rendered him permanently ineligible to obtain a firearms identification card" and who was consequently found to not have been properly served by counsel).

¹⁰¹ *Padilla*, 130 S. Ct. at 1481 n.8, 1487 (Alito, J., concurring).

quences, the trial court has any duty to warn a defendant of the collateral consequences of a guilty plea.

III. THE COURT'S OBLIGATION AFTER *PADILLA*

A. Direct and Collateral Consequences

In *Ford*, the Court of Appeals considered the question of whether the trial court “or defense counsel are under a duty to warn defendants of the possible deportation consequences . . . [of] a guilty plea.”¹⁰² In discussing the court’s “constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences,”¹⁰³ the court made a very important distinction between direct consequences—“consequences of which the defendant must be advised,” and collateral consequences—“those of which the defendant need not be advised.”¹⁰⁴

“A direct consequence is one which has a definite, immediate and largely automatic effect on defendant’s punishment.”¹⁰⁵ However, a collateral consequence is “a result peculiar to the individual’s personal circumstances and one not within the control of the court system.”¹⁰⁶ Based upon this distinction, the *Ford* court ruled that “[d]eportation is a collateral consequence of conviction . . . [t]herefore . . . the trial court need not, before accepting a plea of guilty, advise a defendant of the possibility of deportation.”¹⁰⁷

Since deportation was a collateral consequence, the court also ruled that under the *Strickland* standard, “the failure of counsel to warn defendant of the possibility of deportation [did not] constitute ineffective assistance of counsel.”¹⁰⁸ The court noted that “some federal courts have held that affirmative misstatements by defense counsel, may, under certain circumstances,” constitute ineffective assis-

¹⁰² *Ford*, 657 N.E.2d at 266-67.

¹⁰³ *Id.* at 267.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 268. The *Ford* opinion includes a series of examples of collateral consequences, such as the “loss of the right to vote or travel abroad,” “loss of civil service employment,” “loss of the right to possess firearms, or an undesirable discharge from the Armed Services.” *Ford*, 657 N.E.2d at 267-68 (citations omitted).

¹⁰⁷ *Id.* at 268.

¹⁰⁸ *Id.*

tance.¹⁰⁹ However, in *Ford*, “[d]efendant ha[d] not alleged . . . that counsel incorrectly advised him about the risk of deportation or that counsel’s advice, if any, induced him to plead guilty.”¹¹⁰

As previously discussed, *Padilla* has abrogated the distinction between an affirmative misstatement by counsel and the failure to warn. However, the entire framework of collateral versus direct consequences has been thrown into doubt by this language in *Padilla*:

The Supreme Court of Kentucky rejected Padilla’s ineffectiveness claims on the ground that the advice he sought about the risk of deportation concerned only collateral matters, i.e., those matters not within the sentencing authority of the state trial court.

• • • •

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally “reasonable professional assistance” required under *Strickland*.¹¹¹

Suddenly, it seems that there is no difference between a direct and collateral consequence, and as discussed in Part I, this has affected defense counsel’s obligations to fully apprise the client of all effects a guilty plea may have, whether they be collateral or direct.

But what effect does *Padilla* have on the Court’s obligations to the defendant?

B. The Trial Court’s Obligation to Warn After *Padilla*

In *People v. Gravino*,¹¹² the New York Court of Appeals had occasion to take up the issue of the collateral and direct consequences for a guilty plea in a different context. There, the question was whether or not registration under the Sex Offender Registration Act (“SORA”) was a collateral consequence of defendant’s guilty plea.¹¹³ The court held that SORA registration and the “terms and conditions of probation” are “collateral rather than direct consequences of a guilty plea” since the “conditions of probation are not subjects that a

¹⁰⁹ *Id.* at 269.

¹¹⁰ *Id.*

¹¹¹ *Padilla*, 130 S. Ct. at 1481 (footnotes omitted) (citations omitted) (quoting *Strickland*, 466 U.S. at 689).

¹¹² 928 N.E.2d 1048 (N.Y. 2010).

¹¹³ *Id.* at 1054.

trial court must address at the plea hearing.”¹¹⁴

Defendant Gravino had argued that SORA registration was similar to post-release supervision, and as such, was a direct consequence of a guilty plea.¹¹⁵ In support of her position, defendant cited *People v. Catu*,¹¹⁶ where the same court had held that “the failure of a court to advise of postrelease supervision requires reversal of the conviction.”¹¹⁷

Citing *Ford’s* definition of a direct consequence as “ ‘one which has a definite, immediate and largely automatic effect on defendant’s punishment,’ ”¹¹⁸ the court in *Catu* concluded that “[p]ostrelease supervision is a direct consequence of a criminal conviction.”¹¹⁹ This is due to the elimination of parole for all violent felony offenders, making “the imposition of supervision . . . mandatory.”¹²⁰ This was the case, even though “the term of supervision to be imposed may vary depending on the degree of the crime and the defendant’s criminal record.”¹²¹

In *Gravino*, the court distinguished its holding from that in *Catu*: “[Post release] supervision . . . is, by statute, a component element of a sentence, which is why a judge must pronounce the period of postrelease supervision at sentencing; . . . it is thus an integral part of the punishment meted out upon a defendant’s conviction of a crime.”¹²² “[A] SORA risk-level determination is not part of a defendant’s sentence[;] . . . it is a collateral consequence of a conviction for a sex offense designed not to punish, but rather to protect the public.”¹²³ As such, “[t]hese consequences are not known at the time a court accepts a guilty plea, and therefore cannot have a ‘definite, immediate and largely automatic effect on [a] defendant’s punishment.’ ”¹²⁴

In a footnote, the Court of Appeals made clear that in this re-

¹¹⁴ *Id.* at 1049.

¹¹⁵ *Id.* at 1054.

¹¹⁶ 825 N.E.2d 1081 (N.Y. 2005).

¹¹⁷ *Id.* at 1082.

¹¹⁸ *Id.* (quoting *Ford*, 657 N.E.2d at 267).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Catu*, 825 N.E.2d at 1082.

¹²² *Gravino*, 928 N.E.2d at 1054 (citations omitted).

¹²³ *Id.* (alteration in original) (quoting *People v. Windham*, 886 N.E.2d 179 (2008)) (internal quotation marks omitted).

¹²⁴ *Id.* (alteration in original) (quoting *Catu*, 825 N.E.2d at 1082).

spect, the decision in *Padilla* did not abrogate *Ford*.¹²⁵ In fact, the Court of Appeals noted:

[I]n *Ford* . . . “[t]he failure to warn of . . . collateral consequences will not warrant vacating a plea because they are peculiar to the individual and generally result from the actions taken by agencies the court does not control. . . .” Specifically, we concluded that the trial court was under no duty to warn the defendant of the possibility of deportation before accepting his guilty plea because “[d]eportation [was] a collateral consequence of conviction . . . peculiar to the individual’s personal circumstances and one not within the control of the court system. . . .”

. . . .

[T]he failure of the defendant’s attorney to warn him of the possibility of deportation as a result of his guilty plea did not state grounds for the ineffective assistance of counsel under *Strickland*, . . . although we left open the possibility that affirmative misstatements by counsel might have done so.¹²⁶

Citing *Padilla*, the Court of Appeals noted that the Supreme Court:

[H]ad “never applied a distinction between direct and collateral consequences” . . . however, “[w]hether that distinction [was] appropriate [was] a question” that the Court decided that it “need not consider” in *Padilla* since deportation had been “long recognized . . . [as] a particularly severe “penalty,” . . . “uniquely difficult to classify as either a direct or a collateral consequence.”¹²⁷

On this basis, the Court of Appeals distinguished Justice Ciperick’s dissent in *Gravino* for “treat[ing] all consequences of conviction as punishment . . . thus obliterating the distinction between direct and collateral consequences.”¹²⁸ Thus, the obligation of the trial court remains the same; the court must advise a defendant of the di-

¹²⁵ *Id.* at 1052 n.4.

¹²⁶ *Id.* (alterations in original) (quoting *Ford*, 657 N.E.2d at 268).

¹²⁷ *Gravino*, 928 N.E.2d at 1052 n.4 (quoting *Padilla*, 130 S. Ct. at 1481).

¹²⁸ *Id.* at 1054 n.5.

rect consequences of his or her plea, but has no obligation to advise a defendant of any of the collateral consequences of that plea.¹²⁹ This would, at present, seem to include the immigration consequences of the plea.

It should be noted that some lower courts in New York have begun to voluntarily assume the obligation to warn criminal defendants of the immigration consequences of their pleas. In *People v. Latalski*,¹³⁰ the court denied the defendant's application to withdraw his guilty plea based upon the court's own warning to defendant at the time he entered his plea, "that if, 'as a result of these convictions, should the Immigration Service decide to deport you,' it would not be accepted later as a basis for plea withdrawal and the defendant acknowledged that he understood."¹³¹

The court emphasized that it "had no duty to give warnings for a misdemeanor [because] [t]he Court's role clearly differ[ed] from that of defense counsel,"¹³² and, "[g]iven the court's warning about deportation, the defendant is hard pressed to show that the silence of counsel actually prejudiced his defense."¹³³

No analysis of this point can be complete without reference to New York Criminal Procedure Law Section 220.50(7).¹³⁴ That section requires:

Prior to accepting a defendant's plea of guilty to a count or counts of an indictment or a superior court information charging a felony offense, the court must advise the defendant on the record, that if the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States.¹³⁵

¹²⁹ See *People v. Pierre*, 913 N.Y.S.2d 655, 655 (App. Div. 2011) ("In accepting a guilty plea, the court is only obligated to advise a defendant of direct rather than collateral consequences. . . . Here, an enhanced sentence was a collateral consequence, at most.") (citation omitted).

¹³⁰ No. 2003RI005021, 2012 WL 1606310 (N.Y. Crim. Ct. 2012)

¹³¹ *Id.* at *1.

¹³² *Id.* at *3.

¹³³ *Id.*

¹³⁴ N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2004).

¹³⁵ *Id.*

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There are other states that have similar specific statutes requiring the court to inform the defendant of the immigration consequences of their guilty plea. For instance, Minnesota's Rule of Criminal Procedure 15.02(1) states:

Before the court accepts a plea of guilty to any misdemeanor offense . . . the plea agreement must be explained in open court. The defendant must then be questioned by the court or counsel as to whether the defendant: . . . (3) Understands that, if the defendant is not a citizen of the United States, a guilty plea may result in deportation¹³⁶

In New York, however, the statute is specifically limited by the following provision: "The failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction"¹³⁷

As is so often the case, in *Gravino*, the Court of Appeals left the door open to a further review of the trial court's obligation to inquire as to collateral matters during the entry of a guilty plea.

[I]t may occasionally happen that a defendant, moving to withdraw his plea . . . can convincingly show that . . . newly discovered information, if known at the time of the plea, would have caused a change of heart. Where this is true, the motion to withdraw the plea will not be defeated simply by labeling a consequence "collateral."¹³⁸

The first test of this caveat came in *People v. Harnett*.¹³⁹ There, the Court of Appeals ruled that further confinement of the defendant under the Sex Offender Management and Treatment Act ("SOMTA") was a collateral consequence of a defendant's plea, and the failure to warn a defendant that "he may be subject to ["SOMTA"] does not automatically invalidate the guilty plea."¹⁴⁰

¹³⁶ MINN. STAT. ANN. § 15.02(1)(3) (West 2010); see also *Minnesota v. Lopez*, 794 N.W.2d 379, 381 (Minn. 2011) (showing that the Minnesota Court of Appeals allowed a pro se defendant to withdraw his plea of guilty where the trial court failed to inform the defendant of the immigration consequences of his plea).

¹³⁷ See N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2004).

¹³⁸ *Gravino*, 928 N.E.2d at 1056.

¹³⁹ 945 N.E.2d 439 (2011).

¹⁴⁰ *Id.* at 440.

The court in *Harnett* reaffirmed its commitment to the distinction between collateral and direct consequences;¹⁴¹ however, “[a]s we made clear in *Gravino*, where [the] collateral consequences of a plea [is] an issue, claims that a nondisclosure rendered the plea involuntary are best evaluated on a case by case basis.”¹⁴²

It is unclear from the dicta of the *Gravino* opinion, and from the language of the *Harnett* opinion, whether or not it is the trial court’s failure to warn a defendant of certain collateral consequences, which, “if known at the time of the plea, would have caused a change of heart,” that could lead to the invalidation of the plea.¹⁴³ In *Harnett*, the court rejected the defendant’s appeal reasoning that “[o]n this record, we do not know [] whether his lawyer told him about SOMTA . . . defendant has not made the factual showing that would justify plea withdrawal.”¹⁴⁴ Defendant’s failure to show what advice the attorney gave would appear to maintain the court’s obligation to only warn a defendant of the direct consequences of his plea, regardless of the collateral consequences.¹⁴⁵

As noted in Part I, there are criminal justice advocates who strongly believe that a defendant should be fully informed of every consequence, both direct as well as collateral, prior to any guilty plea being entered,¹⁴⁶ and that this obligation should be assumed by both the trial court as well as defense counsel. However, to date, no court in New York has held that the trial court has any obligation to warn a

¹⁴¹ *Id.* at 441.

¹⁴² *Harnett*, 945 N.E.2d at 442-43.

¹⁴³ *Gravino*, 928 N.E.2d at 1056.

¹⁴⁴ *Harnett*, 945 N.E.2d at 443.

¹⁴⁵ Justice Ciparick’s dissent in *Gravino* considered the SORA registration requirements as direct and not collateral consequences, and as such, would have held that the trial court must warn a defendant of these requirements. See *Gravino*, 928 N.E.2d at 1057-59 (Ciparick, J., dissenting); *Harnett*, 945 N.E.2d at 443-44. However, in *Harnett*, Justice Ciparick’s dissent stated a belief that subjecting a defendant to post-sentence confinement under SOMTA is “closer to a direct consequence than those traditionally considered collateral.” *Id.* at 444 (Ciparick, J., dissenting). As such, “defendant should be given an opportunity to put before County Court . . . the specifics which are lacking in this record. *Id.* at 445. Even this position does not dispute that “a court’s failure to warn a defendant of collateral consequences does not merit withdrawal of a plea.” *Id.* at 444. Yet, Justice Ciparick’s dissent does show a willingness to weaken this barrier. “I believe a defendant cannot be said to knowingly and voluntarily forgo his right to trial if he does not know the full extent of [the consequences] that might result from his conviction . . . fundamental fairness requires the defendant’s knowledge of that consequence.” *Id.*

¹⁴⁶ See Roberts, *supra* note 97; Smyth, *supra* note 98. As noted in Part I, citation to the latter article is not an endorsement of the views expressed by the author of said article, except in his advocacy of better preparation and investigation by counsel.

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defendant of the collateral consequences of their guilty plea, including the immigration consequences of the plea.¹⁴⁷

Though not stated clearly in the cases, the reason for this position is obvious: it is defense counsel, and not the court, who is required to discuss all options with a defendant, and provide that defendant with advice based upon the attorney's training and experience.¹⁴⁸ Were the court to undertake this obligation, the court would be substituting its expertise for that of defense counsel, thereby usurping the function of defense counsel.¹⁴⁹

In his dissent to the majority decision in *Padilla*, Justice Scalia stated that “[t]here is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand—to wit, the sentence that the plea will produce.”¹⁵⁰ To date, this is the same position maintained by the Courts of New York State.¹⁵¹

Other states have not maintained the same distinction between direct and collateral consequences.¹⁵² Even before *Padilla* was decided, in *State v. Nunez-Valdez*,¹⁵³ the New Jersey Supreme Court noted that “it is preferable that the trial court inquire directly of defendant regarding his knowledge of the deportation consequences of his plea.”¹⁵⁴

¹⁴⁷ See *Ford*, 657 N.E.2d at 269 (stating that the court does not have an obligation to inform a defendant of collateral consequences).

¹⁴⁸ Smyth, *supra* note 98, at 812-13.

¹⁴⁹ Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 678-79 (2006).

¹⁵⁰ *Padilla*, 130 S. Ct. at 1495-96 (“Adding to counsel’s duties an obligation to advise about a conviction’s collateral consequences has no logical stopping-point.”) (Scalia, J., dissenting).

¹⁵¹ See *People v. De Jesus*, 935 N.Y.S.2d 464 (Sup. Ct. 2011) (“[A] trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences. . . . This does not require ‘any particular litany when allocating the defendant, but due process requires that the record must be clear that the plea represents a voluntary and intelligent choice among the alternative[s]’”) (quoting *Ford*, 657 N.E.2d at 267) (internal quotation marks omitted).

¹⁵² *People v. Fonville*, 804 N.W.2d 878, 893-94 (Mich. 2011) (“[D]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence . . . [t]he collateral versus direct distinction is thus ill-suited to evaluating a . . . claim concerning the specific risk of deportation.” (third alteration in original) (quoting *Padilla*, 130 S. Ct. at 1482) (internal quotation marks omitted)).

¹⁵³ 975 A.2d 418 (N.J. 2009).

¹⁵⁴ *Id.* at 427.

In New Jersey, unlike New York, the trial court uses a written plea agreement form.¹⁵⁵ The *Nunez-Valdez* court was concerned that “question seventeen on the plea form may be misleading in its use of the phrase ‘may be deported,’”¹⁵⁶ and as a result, the court suggested that the form be amended to include stronger language, including advising defendants “of their right to seek legal advice regarding their immigration status.”¹⁵⁷

Thus, in New Jersey, the court had already undertaken some obligation to inquire as to the defendant’s knowledge of the effect a plea of guilty may have upon that defendant’s immigration status. Recently, this obligation has been expanded by Directive number 09-11 from the Administrative Office of the Courts of New Jersey.¹⁵⁸ Dated December 28, 2011, the Directive requires municipal court judges to address the concern expressed in *Nunez-Valdez* at three points: “(A) as part of the court’s opening statement for each court session; (B) at defendant’s first appearance; and (C) as part of the guilty plea colloquy.”¹⁵⁹

The New York Court of Appeals has not read *Padilla* to require the trial court to make any inquiry of the defendant regarding their awareness of any but the direct consequences of their plea. To date, in New York, the proper vehicle for addressing this issue is by a post conviction motion to vacate the plea, as having been made “in violation of a right of the defendant under the constitution of this state or of the United States.”¹⁶⁰

C. Conclusions Regarding the Court’s Obligations After *Padilla*

Though the courts of New York have drawn a line, and will

¹⁵⁵ Compare N.J. STAT. ANN. § 3:9-1 (West 2012) (“Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant’s attorney.”), with N.Y. CRIM. PROC. LAW §220.50 (McKinney 2004) (“A plea to an indictment, other than one against a corporation, must be entered orally by the defendant in the person; except that a plea to an indictment which does not charge a felony may, with the permission of the court, be entered by counsel upon submission by him of written authorization of the defendant.”).

¹⁵⁶ *Nunez-Valdez*, 975 A.2d at 420.

¹⁵⁷ *Id.*

¹⁵⁸ For the text of NJ Court Directive 09-11, see GLENN A. GRANT, INFORMING MUNICIPAL COURT DEFENDANTS OF THE IMMIGRATION CONSEQUENCES OF GUILTY PLEAS, N.J. Directives, Dir. 09-11 (2001).

¹⁵⁹ Grant, *supra* note 158, at 1.

¹⁶⁰ See N.Y. CRIM. PROC. LAW § 440.10(h) (McKinney 2012).

not undertake any obligation to warn a defendant of the collateral consequences of a guilty plea, even before *Padilla*, the same courts had been willing to review whether a defendant received adequate advice from their attorney regarding these same collateral consequences. Though to date these reviews have been largely restricted to discussions of the immigration consequences of a plea, there is precedent to review counsel's advice (or misadvice or lack of advice) regarding other collateral consequences. In every such analysis, even when the first prong of *Strickland* is met, and counsel is established to have provided deficient representation, the second prong, establishing prejudice, is much harder to attain.

In either instance, in New York, it is the obligation of counsel, and not the court, to provide advice to the defendant regarding all the consequences of a guilty plea. The court is only obliged to inform a defendant of the direct consequences of his or her plea. The court will only examine the effect that collateral consequences have on a plea in the context of a motion to withdraw the plea. To do otherwise would subvert the role of counsel for the defendant.

However, before concluding, one further aspect of the *Padilla* decision should be discussed, which has been proven incorrect. The United States Supreme Court denied that there would be a "flood" of requests for review of convictions as a result of the Court's decision in *Padilla*. In fact, the Court stated that "[i]t seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains."¹⁶¹ The Court stated that "pleas are less frequently the subject of collateral challenges than convictions,¹⁶² because "[t]hose who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea."¹⁶³

At last review, there are over one hundred citations to the *Padilla* decision reported on Westlaw.¹⁶⁴ These decisions range from the various state and federal trial courts, to intermediate courts of appeal, to the federal circuits. There are decisions which decline to extend *Padilla*, to those which distinguish *Padilla*, to those, which fol-

¹⁶¹ *Padilla*, 130 S. Ct. at 1485.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law & Crimes* § 4:4 (2012) (showing a comprehensive state by state listing of post *Padilla* decisions).

low.¹⁶⁵ This may not fit the Supreme Court’s definition of a floodgate, but the trial courts tasked with handling these post-conviction motions may disagree. But, at the same time that the Supreme Court’s view of what constitutes a “floodgate” is disputed, the overworked lower courts may take pride in the high court’s assessment of our abilities: “There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit.”¹⁶⁶

¹⁶⁵ *See id.* (“As courts have begun to interpret and apply *Padilla v. Kentucky* to motions to vacate guilty pleas and other forms of post-conviction relief, the courts have differed in their opinions.”); *see also* Maria Baldini-Potermin, *Padilla v. Kentucky One Year Later: Courts Split Over Interpretation and Application of the U.S. Supreme Court’s Constitutional Holdings*, 88 No. 23 Interpreter Releases 1449 (2011) (discussing the split in opinions among courts).

¹⁶⁶ *Padilla*, 130 S. Ct. at 1485.