Incorporating Collateral Consequences into Sentencing Guidelines and Recommendations Post-Padilla

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INTRODUCTION

Padilla v. Kentucky startled the world of negotiated pleas with the requirement that counsel inform the defendant of the deportation consequences of pleading guilty to a criminal conviction.1 The question reverberating from this opinion is whether those consequences go beyond the immigration context, and if so, how far. The question I address is related: What role, if any, do sentencing commissions have in providing additional information under the Padilla framework?

I. THE PADILLA FRAMEWORK

The Supreme Court set out the standard for ineffective assistance of counsel in Strickland v. Washington.2 Strickland clarified that the Sixth Amendment3 guarantees a criminal defendant the right to effective assistance of counsel.4 “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”5

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1. 130 S. Ct. 1473, 1486 (2010).
3. The Sixth Amendment says, “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 this defense.” U.S. CONST. amend. VI; see also Strickland, 466 U.S. at 684–85.
5. Id.
The Court set a basic two-step framework for evaluating ineffective assistance of counsel claims. First, counsel’s assistance must be, in fact, ineffective. Counsel is effective if his or her assistance was “reasonable considering all the circumstances” so that the defendant received a fair trial. The Court declined to give much guidance as to what constitutes “reasonable,” holding that the American Bar Association guidelines were instructive but not determinative, and stating that the purpose of the Sixth Amendment was not to improve the quality of the legal system but “to ensure that criminal defendants receive a fair trial.”

The second step of the Strickland analysis is whether the defendant has been prejudiced by counsel’s ineffectiveness. A defendant has been prejudiced if “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”

The Strickland analysis gives courts flexibility in determining what constitutes ineffective assistance of counsel. The flipside of this flexibility is disparate interpretations of Strickland’s impact on the ineffective assistance of counsel analysis, as courts try to draw the line at what actions are egregious enough to be “ineffective” and what, if anything, actually prejudices the defendant. Nowhere is this uncertainty clearer than in courts’ struggles with ineffective assistance of counsel in plea bargains. In an attempt to clarify the Strickland analysis, lower courts have distinguished between direct and collateral consequences of entering into a plea—counsel must advise defendants of the direct consequences of plea-bargaining but not the collateral

6. Id. at 687.
7. Id.
8. Id. at 688.
9. Id. at 688–89.
10. Strickland, 466 U.S. at 687.
11. Id. at 694.
12. See id. at 707 (Marshall, J., dissenting) (“Today, for the first time, this Court attempts to synthesize and clarify [ineffective assistance of counsel] standards. For the most part, the majority’s efforts are unhelpful. Neither of its two principal holdings seems ... likely to improve the adjudication of Sixth Amendment claims.”).
There has been great variation, however, in how courts have delineated between direct and collateral consequences.\textsuperscript{13} Padilla v. Kentucky perhaps can be considered an attempt to clarify the ineffective assistance of counsel analysis. The Padilla defendant had pleaded guilty to the transportation of marijuana, a deportable offense.\textsuperscript{15} The defendant said that his counsel told him that “he did not have to worry about immigration status since he had been in the country so long.”\textsuperscript{16} His counsel was incorrect—the charges that he pleaded guilty to made deportation “virtually mandatory.”\textsuperscript{17}

The Court held that Padilla’s counsel was ineffective.\textsuperscript{18} Yet, in doing so, the Court declined to apply the direct versus collateral consequences approach: “Whether the distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.”\textsuperscript{19} Instead, the Court reviewed “the practice[s] and expectations of the legal community.”\textsuperscript{20} The Court considered various ethical guidelines, such as the American Bar Association’s, which all provide that counsel should advise defendants of the deportation consequences of their decisions.\textsuperscript{21} The Court concluded that, given the clarity of the law and the ease of determining that this was a deportable offense, counsel was ineffective.\textsuperscript{22} Under this analysis, silence of defense counsel is no longer sufficient to ensure that counsel is effectively representing his or her client; instead, counsel has an affirmative duty to speak up and advise his or her client of the deportation consequences of the guilty plea.\textsuperscript{23}

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At this time, it is unclear whether *Padilla*’s analysis will extend beyond deportation to encompass other consequences of pleading guilty. Nonetheless, it is clear that sentencing commissions may have the opportunity to assist counsel in advising clients of the consequences of pleading guilty, thus furthering *Padilla* and *Strickland*’s goal of ensuring fairness in the judicial process.

II. SENTENCING COMMISSIONS

There are approximately twenty-one states that have sentencing commissions, each with varying powers and responsibilities. The National Center for State Courts has ranked them on a continuum that ranges from highly prescriptive (mandatory) to merely descriptive (voluntary). Most sentencing commissions set forth recommended or prescribed punishments for


25. The National Center for State Courts (hereinafter “NCSC”) has compiled information from published and unpublished sources to provide the most accurate information on each state Sentencing Commission. NEAL B. KAUNDER & BRIAN J. OSTROM, NAT’L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM (2008), available at http://www.ncsconline.org/csi/PEW-Profiles-v12-online.pdf. The primary goal of this NCSC report is to provide comparative information on how alternative guideline systems are currently working. Id. at 4. Further, by building on an earlier NCSC report, which was produced in 1997, the NCSC has provided an updated and more comprehensive look into the field of structured sentencing. Id. at 3 (citing NEAL B. KAUNDER ET . AL ., NAT’L CTR. FOR STATE COURTS, SENTENCING COMMISSION PROFILES: STATE SENTENCING POLICY AND PRACTICE RESEARCH IN ACTION PARTNERSHIP (1997), available at http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/criminal&CISOPTR=72).

26. Each state guideline system is given a rank based on its answers to a series of six questions concerning its basic organizational structure. KAUNDER & OSTROM, supra note 25, at 5. The questions range from whether there are “compelling and substantial reasons required for departures” to whether there is “appellate review of defendant-based challenges related to sentencing guidelines.” Id. The questions shed light on which state sentencing systems are more voluntary and which systems are more mandatory. Id. “For each question, a state is awarded 0 points for a ‘no or unlikely’ position, 1 point for a ‘possible or moderate’ position, and 2 points for a ‘yes or likely’ position.” Id. States with more voluntary systems, such as Ohio and Wisconsin, receive a lower point total; states with more mandatory systems, such as North Carolina, receive higher total sums. Id.

27. For example, Ohio has a highly voluntary sentencing paradigm: judges are not required to complete guideline worksheets; there is no statewide data regarding sentencing patterns or practices; judges are allowed to depart from the guidelines for any reasons; sentencing departures are not subject to appeal. Id. at 20. North Carolina, on the other hand, has a much more mandatory sentencing paradigm: judges must impose a sentence within certain parameters; judges are required to complete the sentencing judgment form; there are regular reports on the sentencing commission; written justification is required if the court selects a minimum sentence from the aggravates or mitigated sentence range. Id. at 19.
felony offenses—the severity of the punishment is dependent on the offender’s prior criminal history and the severity of the offense.28

Because the overwhelming majority of felony charges are disposed of after plea negotiations, the sentencing commission prescriptions or recommendations can play an important role in those negotiations.29 Currently, sentencing commissions only prescribe or recommend sentences to be imposed; they do not deal with indirect or collateral consequences of those sentences.30

I sent an e-mail question to most of the active sentencing commissions asking whether the commission had taken any steps to accommodate the principles set forth in Padilla v. Kentucky. None have done so. Nor have I been able to find any reference on the Internet or in the periodic literature to any such actions.

Missouri, where I served for seven years as chair of the sentencing advisory commission, emphasizes the advisory nature of the commission’s work; the commission recommends but does not prescribe punishments. It is an information-based system, and it is ultimately up to the sentencing judge to fashion a punishment within the statutory limits prescribed by law.31 By contrast, states like North Carolina, Minnesota, and Washington are much more prescriptive in their guidelines.32 But regardless of structure and role, all such commissions serve as sources of information in the plea negotiation context.

28. See Julian V. Roberts, The Role of Criminal Record in the Sentencing Process, 22 CRIME & JUST. 303, 304 (1997) (“After the seriousness of the crime, the criminal history of the offender is the most important determinant of sentence severity in common-law jurisdictions.”).

29. In Missouri, statistics show that implementing the Commission’s sentencing recommendations based on risk assessment results in lower recidivism. The Honorable Michael A. Wolff, Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform, 83 N.Y.U. L. REV. 1389, 1412 (2008). This evidence-based sentencing works to reduce recidivism by evaluating the risk of each offender and the effectiveness of different treatments. Id. at 1408–11. The Commission’s recommendations are especially important to the prosecutors and defense attorneys who exercise judgment in negotiating plea bargains which “address the individual needs of offenders and minimize the risk to public safety in allowing them to serve their sentences in the community rather than in prison.” Id. at 1408–09.

30. See KAUDER & OSTROM, supra note 25.

31. Michael A. Wolff, Missouri’s Information-Based Discretionary Sentencing System, 4 OHIO ST. J. CRIM. L. 95, 97 (2006) (“In promulgating its system of recommendations, the Commission proclaimed: ‘Judicial discretion is the cornerstone of sentencing in Missouri courts.’ Missouri has a ‘fully voluntary system.’ The judge is free to impose any sentence within the punishments set by statute. There is no appellate review, except for a contention that a sentence is contrary to statute.” (footnotes omitted)).

32. KAUDER & OSTROM, supra note 25, at 17, 19, 26.
III. WHAT ARE THE INFORMATION NEEDS BEFORE SENTENCING?

If information is the coin of the realm, what information should be imparted? First, it is important to refer to the analytical framework of Padilla v. Kentucky. Padilla held that immigration consequences are “integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”33 Criteria for inclusion as “integral” are whether the consequences are virtually certain to occur and are “truly clear.”34 Second, we should try to ascertain what consequences fit these criteria.

The recently proposed Uniform Collateral Consequences of Conviction Act (hereinafter “Collateral Consequences Act”) makes some highly useful distinctions among the different types of consequences of pleading guilty.35 The Collateral Consequences Act uses the phrase “collateral sanction” to refer to a legal disability that occurs by operation of law because of the conviction but is not part of the sentence for the crime.36 It also proposes that certain consequences, in addition to deportation, should be disclosed prior to a guilty plea: being unable to get or keep some licenses, permits, or jobs; being unable to keep or get benefits such as public housing or education; receiving a harsher sentence if convicted of another offense in the future; having the government take the offender’s property; and being unable to vote or to possess a firearm.37

The practical problem that confronts defense counsel, sentencing commissions, and the uniform laws commissioners is that hardly anyone knows the full range of consequences of a conviction. “While some disabilities may be well known, such as disenfranchisement and the firearms prohibition, in most jurisdictions no judge, prosecutor, defense attorney, legislator, or agency staffer could identify all of the statutes that would be triggered by conviction of the various offenses in the criminal code.”38 The Supreme Court’s premise in Padilla is that a competent attorney—judged by the standards of the legal profession—would know and disclose the deportation consequences of a conviction.39

But do the standards of the profession require knowledge of a whole range of consequences? The Padilla opinion makes specific reference to the

33. 130 S. Ct. 1473, 1480 (2010).
34. Id. at 1483 ("[W]hen the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.").
35. See UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 2 (2010).
36. Id. § 2(2). The act also uses the term “disqualification” to mean “a penalty, disability, or disadvantage, however denominated, that an administrative agency, governmental official, or court in a civil proceeding is authorized, but not required, to impose on an individual on grounds relating to the individual’s conviction of an offense.” Id. § 2(5).
37. Id. § 5.
38. Id. § 4 cmt.
39. 130 S. Ct. at 1482.
National Legal Aid and Defender Association (hereinafter “NLADA”) Compendium of Standards for Indigent Defense Systems and the American Bar Association Standards for Criminal Justice.40 “The NLADA compendium states that ‘prior to the entry of the plea, counsel should . . . make certain that the client fully and completely understands . . . the consequences the accused will be exposed to by entering a plea.’”41 “[T]he ABA standards state that ‘[t]o the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.’”42

IV. LISTING THE CONSEQUENCES

Beyond the list of collateral consequences that the Collateral Consequences Act would require to be disclosed—that is, licenses, permits, jobs, public benefits, harsher sentences in the future, confiscation of property, inability to vote or possess a firearm—the commissioners indicate that “advising a defendant of some collateral sanctions without addressing all of them may be misleading” because disclosing only a select few of the various collateral consequences may inevitably mislead the defendant to believe that what has been disclosed is all that is at stake.43 In order to provide comprehensive information, Section 4(a) of the Collateral Consequences Act would require “each state to create a collection with citations to and short descriptions of any provisions in the state constitution, statutes and administrative rules that create collateral sanctions and authorize disqualifications.”44 The goal, of course, is to provide “clear and accurate information” as to the legal effects of a conviction.45

40. Id. (citing PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 6.2 (Nat’l Legal Aid & Defender Ass’n 1994); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-5.1(a) (3d ed. 1993); ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.2(f) (3d ed. 1999)).


42. Id. at 138 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.2(f)).

43. UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 5 cmt. For instance, according to a comment published by the National Conference of Commissioners on Uniform State Laws, “it would be reasonable but incorrect for a defendant pleading guilty in Wyoming to assume that because the court advised that firearms privileges and ‘federal benefits’ might be lost, no state benefits, such as access to public housing, were at risk.” Id.

44. Id. § 4 cmt.

45. Id. § 5 cmt.
In trying to ascertain what information should be provided, it may be useful to consider what a reasonable defendant would want to know prior to pleading guilty and what information, if not disclosed until after the plea, would cause a reasonable defendant to want to withdraw the plea. This line of inquiry—which produces an analysis similar to the prejudice determination made under Strickland v. Washington\(^{46}\)—does not seem helpful because it is highly individualized to the circumstances of a particular offender and the offense, and therefore not readily adaptable to a list of consequences that might serve a more general purpose and a general population of offenders in plea negotiations and sentencing.

There are some consequences that are already the subject of disclosures required in some states under court rules and statutes. Even before Padilla, twenty-six states required notification as to deportation consequences, either by statute or rule.\(^{47}\) A number of other states require notification, by court or statute, as to other consequences, such as possessing firearms, losing public benefits, and registration as sex offenders.\(^{48}\) Only six states that have introduced the Collateral Consequences Act as recently amended, so the process of filling the need for accurate information has either not begun or is in very early stages in many states.\(^{49}\)

V. A USEFUL ROLE FOR SENTENCING COMMISSIONS

In states with sentencing commissions that have not adopted the Uniform Collateral Consequences of Convictions Act, the sentencing commission may find a useful role to play in listing and disclosing consequences of convictions that have heretofore been considered collateral.\(^{50}\)

\(^{46}\) 466 U.S. 668, 691–96 (1984). Pursuant to the Strickland analysis:

When a defendant challenges a death sentence, . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Id. at 695. In Strickland, the Supreme Court found “insufficient prejudice to warrant setting aside [the] death sentence” because the omitted evidence would not have likely changed the outcome of the sentence. Id. at 699.

\(^{47}\) UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 5 cmt.

\(^{48}\) Id.

\(^{49}\) In 2011, Colorado, Minnesota, Nevada, New Mexico, Vermont, and West Virginia introduced the amended Collateral Consequences of Conviction Act. Collateral Consequences of Conviction Act: Legislative Tracking, UNIF. LAW COMM’N, http://www.nccusl.org/Ac

\(^{50}\) “What the courts have done, prior to Padilla, is to label all consequences, other than the sentence itself, as ‘collateral’ as a way to remove them from the constitutional protection of the
In a highly useful article, Professor Chin, one of the symposium speakers, has made a series of helpful suggestions as to what should be included in the lists of consequences.51 However, there can be many consequences of a single conviction, so there is a need to simplify the list, because a complete list that is so long as to be incomprehensible is useless.52 Moreover, most states’ criminal statutes have hundreds of offenses, many of which are rarely charged.53 In this context, Professor Chin advocates publishing lists of the consequences of a state’s twenty-five most frequently charged offenses.54 Such lists would include:

- The immigration consequences of the twenty-five most common offenses of conviction.
- Other major collateral consequences of the twenty-five most common offenses of conviction.
- Crimes leading to loss of public benefits.
- Crimes leading to loss of parental or other family rights.
- Crimes leading to sex offender registration, notification, and incarceration.
- Crimes leading to the loss of the right to vote, serve on a jury, hold office or possess a firearm.
- Any available methods under state law for relieving collateral consequences.55

Sentencing commissions have websites that impart a great deal of information about proposed sentences.56 It would not be that difficult to include a listing of collateral consequences and disqualifications that flow from various kinds of felonies. It makes sense for a sentencing commission to do so because they are a significant provider of information to the plea negotiation process, which is precisely where the information as to collateral consequences

Sixth Amendment right to competent representation.” Webb v. State, 334 S.W.3d 126, 139 (Mo. 2011) (en banc) (Wolff, J., concurring) (citing Gabriel J. Chin & Richard W. Holmes, Jr., Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 CORNELL L. REV. 697, 700–01 (2002)). Now that Padilla has imposed a duty on defense counsel to inform defendants of consequences that are “truly clear,” sentencing commissions are in the best position to identify consequences of convictions of the various offenses in the criminal code. See id. at 134.


52. “[T]he more complete a dataset is, the less understandable, and hence useful, it will be, and vice versa.” Id. at 686.

53. See id.

54. Id. at 686–87.

55. Id.

is needed. Especially in states that have discretionary sentencing that is merely informed by recommendations of a sentencing commission, providing such additional information makes the commission helpful in the sentencing process and more likely to be consulted by counsel and the courts.

CONCLUSION

States that have sentencing commissions commonly express their goals as promoting fairness, consistency, and rationality in sentencing, as well as promoting public safety. When consequences ensue from convictions, they may affect offenders in vastly different ways—for some, a consequence may be deportation, and for others, the consequence may be loss of employment or educational opportunities. If reduction of disparities—a frequently stated goal of sentencing commissions—is intended, it seems natural that a sentencing commission would find a useful role in providing information about the consequences of convictions. Sentencing laws and their consequences can become so complicated that there are instances when it seems that no one—not the defense counsel, probation officer, or judge—knows the full impact of a sentence.

To the extent that sentencing commissions, through their publications and especially through the information made available on their websites, can provide this information, they can promote sentencing in which all participants are informed sufficiently to meet the effective assistance of counsel requirement. This not only avoids post-conviction proceedings in which the offender claims that his attorney did not provide competent representation, but as importantly helps commissions to meet their goals of fairness and transparency.

57. See Kauder & Ostrom, supra note 25, at 7–27.

58. See Webb v. State, 334 S.W.3d 126, 136 n.8 (Mo. 2011) (en banc) (Wolff, J., concurring) (citing cases from other jurisdictions decided since Padilla); see also Thomas v. United States, No. RWT-10-2274, No. PMD-06-4572, 2011 U.S. Dist. LEXIS 41537, at *10–11 (D. Md. Apr. 15, 2011) (declining to extend Padilla where defendant was not advised of potential employment-related consequences of a guilty plea because deportation is a much more severe consequence of a criminal conviction than being deprived of the ability to pursue one’s chosen profession); Blaise v. State, No. 10–0466, 2011 WL 2078091, at *4 (Iowa App. May 25, 2011) (affirming the denial of appellant’s application for post-conviction relief because trial counsel had no duty to inform appellant that he might be subject to civil commitment as a sexually violent predator in pleading guilty to first-degree harassment); Calvert v. State, 342 S.W.3d 477, 491–92 (Tenn. 2011) (finding that defense council’s performance was deficient when counsel did not advise defendant that his guilty plea would result in a mandatory sentence of community supervision for life).

59. See Webb, 334 S.W.3d at 140 (Wolff, J., concurring).