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APPLYING *PADILLA* IN MISSOURI IN THE MIDST OF THE PUBLIC DEFENDER CRISIS

*Occasionally, the heinousness of a crime, the seeming certainty of the same result if the case is remanded, and the delay occasioned by remand tempt one to wink at procedural defects. Nevertheless, the cornerstone of any civilized system of justice is that the rules are applied evenly to everyone, no matter how despicable the crime.*¹

INTRODUCTION

The Sixth Amendment of the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, guarantees many important procedural protections for an accused facing criminal prosecution. Perhaps chief among these protections is the guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defense.”² Without a properly trained and well-prepared advocate standing in the breach, an accused defendant may unknowingly be stripped of the remainder of his or her rights. Consequently, the United States Supreme Court has held that the Sixth Amendment right to counsel guarantees more than mere presence.³ In a criminal prosecution, a “defendant’s due process right to the assistance of counsel includes the guaranty that such assistance be adequate, competent, and effective,” regardless of “whether [the] attorney is one of [the] defendant’s choosing or court-appointed.”⁴

Guilty pleas currently account for as much as ninety-five percent of all convictions.⁵ Without such a high percentage of pleas, the time and costs of

1. *State v. Nunley*, 923 S.W.2d 911, 927 (Mo. 1996) (Holstein, C.J., dissenting). Ironically, Nunley and Taylor were accomplices.

2. U.S. CONST. amend. VI.

3. 16C C.J.S. *Constitutional Law* § 1604 (2005) (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980)).

4. *Id.* (citing *Reece v. Georgia*, 350 U.S. 85 (1955); *Fitzgerald v. Beto*, 479 F.2d 420 (5th Cir. 1973)).

5. John E.D. Larkin, *A Proposed Framework for Evaluating Effectiveness of Counsel Under Padilla v. Kentucky*, 34 AM. J. TRIAL ADVOC. 565, 566 (2011); *see also Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”); U.S. DEP’T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *Sourcebook of Criminal Justice Statistics Online*, tbl.5.22.2009, <http://www.albany.edu/sourcebook/pdf/t5222009.pdf> (all internet materials as visited Mar. 1,

trial would likely overwhelm the criminal justice system in many, if not most, jurisdictions.⁶ Criminal defendants' guilty pleas come at a high cost, resulting in the waiver of many constitutional rights in addition to a stipulation of their guilt.⁷ In an attempt to prevent defendants from giving up rights as a result of undue pressure:

[C]ourts and legislatures have surrounded guilty pleas in layers of protections: guilty pleas must be knowing, intelligent, and voluntary; there must be a factual basis for each guilty plea; defendants are entitled to the assistance of counsel prior to the entry of a guilty plea; and defendants must be informed of [at least] the direct consequences of their plea.⁸

These protections may suffice in theory, but the reality of the current system casts doubt upon the ability of the criminal justice system to adequately safeguard the constitutional rights of defendants, particularly those who rely upon court-appointed public defenders. The public defender system in this country is in peril.⁹ Unsustainable caseload levels and chronic underfunding seriously threaten the ability of public defenders to provide the effective assistance guaranteed by the Sixth Amendment.¹⁰ Without effective assistance of counsel, the remaining constitutional rights of the most vulnerable defendants are endangered.

In 2010, the United States Supreme Court took a great step towards safeguarding criminal defendants' right to effective assistance of counsel in *Padilla v. Kentucky*.¹¹ The Court held that to be considered constitutionally effective, counsel must provide affirmative advice to clients of the deportation consequences of a guilty plea.¹² Many hope *Padilla* "may mark the beginning of a change in constitutional law to account for the current realities" of a system whose "criminal procedure as a whole has failed to adjust to meet the imperatives of a system in which almost all convictions are obtained by plea rather than through a trial."¹³ However, *Padilla* left many questions

2012, and available in Clerk of Court's case file); S. Rosenmerkel, M. Durose, & D. Farole, U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *Felony Sentences in State Courts*, 2006–Statistical Tables, p. 1 (NCJ226846, rev. Nov. 2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf>.

6. Larkin, *supra* note 5, at 565.

7. *Id.* (citing *Brady v. United States*, 397 U.S. 742, 748 (1970)).

8. *Id.* at 566 (internal citations omitted).

9. *See infra* note 175 and accompanying text.

10. *Id.*

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

12. *Id.* at 1486.

13. *See, e.g.*, Gabriel J. Chin, *Taking Plea Bargaining Seriously: Reforming Pre-Sentence Reports After Padilla v. Kentucky*, 31 ST. LOUIS U. PUB. L. REV. (forthcoming 2011) (citing several articles from Stephanos Bibas, including Stephanos Bibas, *Regulating the Plea-*

unanswered—including whether its decision is retroactive, the continued viability, if any, of a distinction between the direct and collateral consequences of a plea, and most significantly, whether its holding requires counsel to provide affirmative advice on other consequences beyond deportation—generating significant confusion in state and federal courts.¹⁴ Additionally, it is difficult to see based on the Court's opinion alone how its holding can be effectively implemented in the current criminal justice system.

While it is no longer novel to cite *Padilla v. Kentucky*'s potential to alter the legal landscape, the question of whether and how to extend *Padilla*'s holding continues to be profoundly relevant.¹⁵ Missouri has not yet had the opportunity to rule on whether *Padilla* applies to consequences beyond deportation, however other courts have already begun applying its holding to include an affirmative duty to provide advice regarding a myriad of potential problems:¹⁶ post-release commitment hearings,¹⁷ loss of pension,¹⁸ sex offender registration requirements,¹⁹ parole eligibility,²⁰ and eligibility for early release from prison for good behavior.²¹ Following the lead of the concurring opinion in *Webb v. State*, this Article argues that Missouri should apply *Padilla*'s holding to include affirmative advice regarding the sentencing consequences resulting from a defendant's choice to plead guilty, particularly in the capital sentencing context.²² In addition to faithfully carrying out the necessary implications of *Padilla*'s holding, the principle benefit of such an application is that it represents another step towards meaningful enforcement of criminal defendants' Sixth Amendment rights. Absent such application, the overwhelming majority of criminal defendants, especially those who plead based on incomplete or erroneous advice from their attorneys, may ignorantly

Bargaining Market: From Caveat Emptor to Consumer Protection, 99 CALIF. L. REV. 1117 (2011), discussed below).

14. Larkin, *supra* note 5, at 567.

15. As of, but not including, January 14, 2012, *Padilla* was 654 days old. At that time the case had 2,344 citing references on Westlaw Next. That is approximately 3.6 citations each day since the case was handed down.

16. See Travis Sterns, *Intimately Related to the Criminal Process: Examining the Consequences of a Conviction After Padilla v. Kentucky and State v. Sandoval*, 9 SEATTLE J. FOR SOC. JUST. 855, 856 (2011) (citing the examples listed in notes 17-21 below).

17. *Id.* (citing *Bauder v. Dep't of Corr. State of Fla.*, 619 F.3d 1272 (11th Cir. 2010)).

18. *Id.* (citing *Commonwealth v. Abraham*, 996 A.2d 1090 (Pa. 2010)).

19. *Id.* (citing *Taylor v. State*, 698 S.E.2d 384 (Ga. Ct. App. 2010)).

20. *Id.* (citing *Webb v. State*, 334 S.W.3d 126 (Mo. 2011) (en banc) (holding based on state law, but concurring opinion, discussed below, advocates extending *Padilla*); *Frost v. State*, No. CR-09-1037, 2011 WL 2094777 (Ala. Crim. App. May 27, 2011); *Pridham v. Commonwealth*, 2008-CA-002190-MR, 2010 WL 4668961 (Ky. Ct. App. Nov. 19, 2010)).

21. *Id.* (citing *Stith v. State*, No. CR-09-0754, 2011 WL 1604934 (Ala. Crim. App. Apr. 29, 2011)).

22. *Webb*, 334 S.W.3d at 139 (Wolff, J., concurring).

and inadvertently deny themselves a remedy for the violation of their constitutional rights when they enter a guilty plea.

To that end, this Article proceeds in four Parts. Part I briefly examines the Supreme Court's holding in *Padilla v. Kentucky*, clarifying what constitutionally effective assistance of counsel entails. Part II considers a proposal to apply *Padilla*'s holding in Missouri to cover sentencing consequences generally. Part III illustrates the persuasiveness of that proposed application, especially in capital cases, through an examination of the case of Michael Anthony Taylor. Having advocated for this application, Part IV considers the impact of the added burden of such application on the public defender system, proposes changes to the plea system to alleviate that burden, envisions how these proposals could be unified in a reform framework, and concludes with a hypothetical description of how such reforms would have applied in Taylor's case. The underlying goal of this Article is to help prevent situations like Taylor's, who, due to his attorneys' omission, pleaded guilty based on incomplete and incorrect knowledge of his sentencing options.²³ For more than twenty years, despite confessing to his underlying guilt, Taylor has continued to challenge the validity of his alleged waiver²⁴ and the effectiveness of his counsel.²⁵ Those twenty years, representing a continual violation of Taylor's constitutional rights, a lack of closure for his victim's family, and a phenomenal waste of judicial resources, could have and should have been prevented. The proposed application of *Padilla* and corresponding reforms to accommodate that application would accomplish those goals.

I. REDEFINING CONSTITUTIONALLY EFFECTIVE COUNSEL

Jose Padilla was a lawful permanent resident of the United States for over forty years when he was charged with felony drug distribution charges in Kentucky.²⁶ Padilla's counsel failed to advise him of the nearly inevitable consequences of a guilty plea, telling him not to worry about deportation since he "had been in the country so long."²⁷ Based on this omission and further misadvice, Padilla pleaded guilty to felony charges that "made his deportation virtually mandatory."²⁸ Padilla insisted he would not have pleaded on those terms but for the incorrect advice of his counsel.²⁹ The Court agreed with

23. State ex rel. Taylor v. Steele, 341 S.W.3d 634, 653–54 (Mo. 2011) (en banc).

24. *Id.* at 634 (holding Taylor, despite his ignorance of its availability, waived jury sentencing).

25. Taylor v. Bowersox, 329 F.3d 963, 972 (8th Cir. 2003) (holding Taylor's ineffective assistance of counsel claim failed to meet the *Strickland* standard).

26. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1477 (2010).

27. *Id.* at 1478.

28. *Id.*

29. *Id.*

Padilla that his counsel was ineffective and held that “constitutionally competent counsel would have advised him that his [plea] made him subject to automatic deportation.”³⁰

The Court based its decision on two key rationales. First, for that class of defendants—noncitizens—deportation is perhaps the most important part of the punishment.³¹ Second, the unique nature of deportation is that it is a “particularly severe ‘penalty’” that is a nearly automatic consequence of—and thus “intimately related” to—the sentencing process.³² In light of these key rationales, the Court held that the Sixth Amendment right to effective counsel outlined in *Strickland v. Washington* applied to Padilla’s claim.³³

Before applying *Strickland*, the Court emphasized that “[t]he first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: ‘The proper measure of attorney performance [is] reasonableness under prevailing professional norms.’”³⁴ The Court found that prevailing professional norms universally required attorneys to advise of the risk of deportation.³⁵ The failure to inform in Padilla’s case was particularly egregious because the terms of the relevant statute were “succinct, clear, and explicit” such that the essentially mandatory plea consequences could easily have been determined “simply from reading the text of the statute.”³⁶ Arguably envisioning a wider application, the Court ruled in more general terms:

When the law is not succinct and straightforward . . . a[n] . . . attorney need [only] advise a noncitizen client [of the] risk of adverse immigration

30. *Id.* (holding this satisfied the first prong of the *Strickland* ineffective assistance of counsel test, but refusing to address the second prejudice prong).

31. *Padilla*, 130 S. Ct at 1480.

32. *Id.* Due to its designation of deportation as “unique” in nature, the Court declined to consider the propriety of the direct versus collateral consequence distinction utilized by most courts prior to *Padilla*. *Id.* In addition to exempting such severe penalties, the Court took the extra step to emphasize that it has never employed such a distinction in its *Strickland* cases. *Id.* This Article assumes the consequences of error in capital sentencing cases, of greater severity than deportation, would similarly be considered unique in nature and exempted from the direct versus collateral distinction.

33. *Id.* at 1482. *Strickland*’s ineffective assistance of counsel test requires two steps. *Strickland v. Washington*, 466 U.S. 668 (1984). The test first requires a determination that representation “fell below an objective standard of reasonableness.” *Id.* at 688. If the answer is yes, it must be determined whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

34. *Padilla*, 130 S. Ct at 1482 (citing “American Bar Association standards and the like” as guides for determining reasonableness).

35. *Id.*

36. *Id.* at 1483.

consequences[,] [b]ut when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.³⁷

In announcing this rule, the Court refused to limit its holding to affirmative misadvice, seeing no difference in this context between acts of commission (affirmative misadvice) and omission (silence).³⁸ This decision was motivated by two concerns. First, a contrary decision would create an incentive for attorneys to remain silent contrary to their duty to advise their clients of the advantages and disadvantages of a guilty plea.³⁹

Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. 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.”⁴⁰

The Court concluded that its Sixth Amendment precedents and the “seriousness of deportation as a consequence of a criminal plea” demanded that counsel must inform a client “whether his plea carries a risk of deportation.”⁴¹ Having held that Padilla met *Strickland*’s first prong, the Court then remanded his case for determination of whether Padilla suffered prejudice as a result.⁴² It is significant that the Court prefaced its holding with a reaffirmation of its constitutional responsibility: “to ensure that no criminal defendant . . . is left to the ‘mercies of incompetent counsel.’”⁴³

II. A PRELIMINARY PROPOSAL FOR APPLYING *PADILLA* IN MISSOURI

In Missouri, the debate over the scope and consequences of *Padilla* has just begun.⁴⁴ Although it is unknown how Missouri will ultimately interpret *Padilla*, the concurring opinion in a recent Missouri Supreme Court case, *Webb v. State*, offers a compelling argument that *Padilla* should be applied to

37. *Id.*

38. *Id.* at 1484.

39. *Padilla*, 130 S. Ct at 1484.

40. *Id.*

41. *Id.* at 1486.

42. *Id.* at 1487.

43. *Id.* at 1486 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

44. So far, only three Missouri appellate cases (as of the date of this writing) cite *Padilla*: *Webb v. State*, 334 S.W.3d 126 (Mo. 2011) (discussed below); *Smith v. State*, 353 S.W.3d 1 (Mo. Ct. App. E.D. 2011) (rejecting an ineffective assistance claim based on counsel’s failure to advise the defendant of the sentencing consequences of his guilty plea, noting *Webb* discussed *Padilla*’s potential impact on sentencing consequences but deciding the case on other grounds); and *State v. Rasheed*, 340 S.W.3d 280 (Mo. Ct. App. E.D. 2011) (acknowledging in a footnote that in Missouri *Padilla*’s holding has not been applied beyond deportation).

the sentencing consequences of a guilty plea.⁴⁵ Eric Webb pleaded guilty based on his attorney's affirmative misadvice that he would not be subject to a mandatory minimum sentencing law requiring him to serve eighty-five percent of his sentence prior to parole eligibility.⁴⁶ His attorney was incorrect and Webb immediately filed an ineffective assistance of counsel claim.⁴⁷ In a per curiam opinion, the court held that "where counsel misinforms the client as to the effects of the client's plea, the counsel has rendered ineffective representation."⁴⁸ Because this conclusion was supported by Missouri caselaw,⁴⁹ the court did not reach the question of "whether *Padilla* applies to other consequences such as parole eligibility."⁵⁰

Judge Michael A. Wolff⁵¹ addressed that question in a concurring opinion in *Webb*, concluding that a faithful reading of *Padilla* inevitably has broader implications beyond deportation consequences for what constitutes effective assistance of counsel.⁵² Wolff argued that *Padilla* requires a professional obligation to inform clients of the truly clear consequences of guilty pleas; court recognition that "reciting the usual no-threats-no-promises litany at sentencing does not necessarily ensure that the plea is voluntary;" and reassessment of whether a plea can truly be considered voluntary if a defendant is "not informed of the other inevitable consequences of his plea."⁵³ "[H]ow," Wolff cites as an example, "can Webb be satisfied with his attorney's legal services⁵⁴ if he did not know that his attorney misinformed or failed to inform him that he would be required to spend at least 85 percent of his sentence behind bars?"⁵⁵

45. *Webb*, 334 S.W.3d at 140 (Wolff, J., concurring). This Article assumes, following *Webb* and others that *Padilla* applies retroactively based on the Court's rejection of the "floodgates" arguments. See *Padilla*, 130 S. Ct. at 1485; see also, e.g., *Webb*, 334 S.W.3d at 136, 136 n.8; Larkin, *supra* note 5, at 567, 567 n.20.

46. *Webb*, 334 S.W.3d at 126–27.

47. *Id.* at 127.

48. *Id.*

49. The court's precedent states "the failure to inform a client about parole eligibility does not render the attorney's representation ineffective." *Id.* at 127 (citing *Reynolds v. State*, 994 S.W.2d 944, 946 (Mo.1999)). However, that same precedent indicates that "a plea may be considered involuntary if counsel misinforms the client as to the effects of the plea" and the appellate courts' practice has been to hold that "counsel's misinformation renders the representation ineffective." *Id.* The court adopted this position and found Webb was entitled to an evidentiary hearing. *Id.*

50. *Id.* at 131 n.8.

51. Judge Wolff, now retired from the bench, has resumed teaching full-time at Saint Louis University School of Law.

52. *Webb*, 334 S.W.3d at 131, 134 (Wolff, J., concurring; Teitleman & Stith, JJ., joining).

53. *Id.*

54. Part of the standard plea litany the court uses to confirm the validity of a plea. *Id.*

55. *Id.*

Following this logic, Wolff argues that misinforming or failing to inform a defendant of the sentencing consequences of a guilty plea, including minimum prison terms and parole eligibility, should be considered a constitutionally deficient performance in light of *Padilla*.⁵⁶ Wolff bases this argument, in part, on the “similar characteristics” of deportation and such sentencing consequences.⁵⁷ While deportation is “practically inevitable” for defendants like Padilla, minimum prison terms are required in Missouri if a defendant pleads guilty to certain offenses.⁵⁸ Both parole eligibility and deportation are “severe results that are intimately related to the criminal process.”⁵⁹ Misinforming or failing to inform a client regarding both consequences violates the practice expectations of the legal community as outlined by prevailing professional norms.⁶⁰ In particular, Wolff cites the National Legal Aid and Defender Association’s (NLADA) Compendium of Standards for Indigent Defense Systems requirement 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.”⁶¹ Based on these parallels, Wolff concludes that like deportation in *Padilla*, “counsel has a duty to inform—not just a duty to avoid misleading the client” and that this duty should include the truly clear sentencing consequences of a guilty plea as well.⁶² Consequently, the failure to inform a client of the sentencing consequences of a guilty plea constitutes ineffective assistance of counsel, satisfying *Strickland*’s first prong.⁶³

III. BUILDING ON *WEBB*: ILLUSTRATING THE PERSUASIVENESS OF APPLYING *PADILLA*

The *Webb* concurrence focused on parole eligibility and mandatory minimum sentences because, for defendants like Webb who will become eligible for parole, those and other post-release consequences are likely the most important sentencing consequences of their guilty pleas. Defendants considering guilty pleas in capital cases in Missouri have different concerns since they will be sentenced to life imprisonment without the possibility of

56. *Id.* at 136.

57. *Webb*, 334 S.W.3d. at 136.

58. *Id.* at 136–37.

59. *Id.*

60. *Id.* at 137.

61. *Id.* (citing to 2 NAT’L LEGAL AID AND DEFENDER’S ASS’N, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS, STANDARDS FOR ATTORNEY PERFORMANCE (2000), <http://www.mynlada.org/defender/DOJ/standardsv2/v2h.htm> [hereinafter NLADA, COMPENDIUM OF STANDARDS]).

62. *Webb*, 334 S.W.3d. at 138.

63. *Id.* (remanding for a hearing to determining whether Webb suffered prejudiced as a result).

parole or death. For these defendants—those who are not eligible for parole or release—the most important “sentencing consequences” of a guilty plea are the procedural consequences of who will hear their case and impose their sentence. As such, this Article considers both consequences to be “sentencing consequences.” The Sixth Amendment right to counsel applies to both sets of defendants, and following *Padilla* and *Webb*, constitutionally effective counsel should include affirmative advice regarding the sentencing consequences most important to each class of defendants. The case of Michael Anthony Taylor illustrates the persuasiveness of this position.

A. *The Case of Michael Anthony Taylor: Background and Procedural History*

Michael Anthony Taylor confessed on video to the 1989 kidnap, rape, and murder of a fifteen-year-old girl.⁶⁴ Taylor reaffirmed this, under oath in open court, in 1991 when he pleaded guilty to charges including first-degree murder, knowing the State was seeking the death penalty.⁶⁵ In Missouri, then, as now, the sentencing scheme for a first-degree murder case where the death penalty is not waived provides for a bifurcated trial conducted in two stages before the same trier-of-fact.⁶⁶ In the first stage, the trier-of-fact decides only whether the defendant is guilty or not guilty of the charged offense.⁶⁷ If the defendant is found guilty in the first stage, then the trier-of-fact proceeds to the second stage “at which the only issue shall be the punishment to be assessed and declared.”⁶⁸ At the penalty phase, in order to impose the death penalty, the trier-of-fact must: (1) find the presence of statutory and non-statutory aggravating circumstances; (2) determine these circumstances warrant death; (3) consider whether mitigating circumstances exist and find, if they do exist,

64. *State v. Taylor*, 929 S.W.2d 209, 214 (Mo.1996).

65. *State ex rel. Taylor v. Steele*, 341 S.W.3d 634, 636–37 (Mo. 2011); Brief of Respondent Troy Steele at 6, *State ex rel. Taylor v. Steele*, 341 S.W.3d 634, 636 (Mo 2011) (No. SC90925), 2010 WL 5570079 (Mo.).

66. *State ex rel. Taylor*, 341 S.W.3d at 637; MO. REV. STAT. § 565.030 (1986). The only update to the statute is the disallowance of independent judicial fact-finding in the event of jury deadlock as unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (holding the Sixth Amendment requires that “[c]apital defendants . . . [are entitled] to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”). *State v. Whitfield*, 107 S.W.3d 253, 256 (Mo. 2003).

67. MO. REV. STAT. § 565.030.2 (1986).

68. *Id.* at 565.030.4. This sentencing phase can be understood as answering two questions: (1) Based on the laws of this jurisdiction, *could* this defendant be sentenced to death [eligibility decision]; and (2) Based on the laws of this jurisdiction, *should* this defendant be sentenced to death [selection decision]. LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 43 (2004).

that they do not outweigh the aggravating circumstances;⁶⁹ and (4) decide under all of the circumstances to impose the death sentence.⁷⁰ The decision under the statute is thus a “weighing” procedure where, if the mitigating circumstances outweigh the aggravating circumstances, the trier-of-fact cannot impose the death penalty but must instead sentence the defendant to life imprisonment without parole.⁷¹ However, even if the aggravating circumstances are found to outweigh the mitigating circumstances, a trier-of-fact need not impose the death penalty; the fourth step of the statutory scheme allows a trier-of-fact to elect to impose life imprisonment rather than the death penalty.⁷² The trier-of-fact is therefore free to choose mercy regardless of the findings in the weighing process.⁷³ If tried by a jury, the verdict must be unanimous in order to recommend a sentence of death to the judge who ultimately imposes the sentence.⁷⁴ In Missouri, a defendant has one further opportunity to receive mercy. Once the jury recommends a sentence the judge has discretionary power to reduce that sentence within the statutory guidelines, for instance, from death to life imprisonment.⁷⁵

Then, as now, a defendant charged with homicide, facing a capital trial in Missouri has three sentencing options: (1) they can face a jury for both phases; (2) they can waive their Sixth Amendment rights and agree to submit all issues (i.e. the bifurcated stages of guilt and punishment) to a judge as trier-of-fact; or (3) they can elect to plead guilty to a judge and—with state permission—face a jury for the punishment phase trial.⁷⁶

Given the taped confession, Taylor and his two attorneys were concerned about appearing to contest his guilt in the first phase, potentially inflaming the trier-of-fact in advance of the punishment phase.⁷⁷ Consequently, Taylor was

69. See MO. REV. STAT. § 565.032 (1986) (outlining the statutory aggravating and mitigating circumstances that must be considered).

70. *Whitfield*, 107 S.W.3d at 256 (outlining the process required by section 565.030.4 (1994)).

71. CARTER & KREITZBERG, *supra* note 68, at 53 (2004); *State ex rel. Taylor*, 341 S.W.3d at 643–44.

72. CARTER & KREITZBERG, *supra* note 68, at 53–54; *State ex rel. Taylor*, 341 S.W.3d at 643–44. This step allows a trier-of-fact to exercise mercy.

73. CARTER & KREITZBERG, *supra* note 68, at 53–54; *State ex rel. Taylor*, 341 S.W.3d at 643–44.

74. *State ex rel. Taylor*, 341 S.W.3d at 642. A defendant thus has twelve chances to receive mercy.

75. *State v. Anderson*, 384 S.W.2d 591, 610 (Mo. 1964); see also *Witherspoon v. State of Ill.*, 391 U.S. 510, 525 n.2 (1968) (“In most of these States, a jury decision of death is binding on the court. In a few States [such as Missouri], however, the judge may overrule the jury and impose a life sentence.”) (citing *State v. Anderson* as an example of the minority position).

76. MO. REV. STAT. § 565.006 (1986).

77. *State ex rel. Taylor*, 341 S.W.3d at 645.

counseled to avoid the first phase entirely by pleading guilty.⁷⁸ Based on this advice, Taylor chose to waive his right to a jury trial, electing to plead his guilt before a judge.⁷⁹ A judge accepted Taylor's waiver and guilty plea, and then conducted a three-day punishment phase hearing.⁸⁰ Pursuant to sections 565.030 and 565.032, Taylor was sentenced to death for first-degree murder after the judge found the aggravating circumstances outweighed the mitigating circumstances.⁸¹

Both before and during his plea hearing, Taylor was informed of many things.⁸² He was informed of most of the process and procedure described above, he was informed of many of his rights, and he was informed that his guilty plea would result in the waiver of his right to trial by jury and thus result in one person, a judge, deciding whether to impose life imprisonment without parole or the death sentence in the punishment phase.⁸³ But what Taylor was not informed of is of much greater significance. Taylor was only informed of two of his three possible sentencing options.⁸⁴ Taylor's two attorneys failed to inform him that he could plead guilty and seek a jury for sentencing pursuant to section 565.006.2; one attorney was unaware the third option existed, and the other, while allegedly aware of the statute, never thought to mention it.⁸⁵ After receiving the death sentence, Taylor immediately filed a post-conviction relief (PCR) action alleging his plea was involuntary because his counsel had been ineffective.⁸⁶ Taylor's challenges to the effectiveness of his counsel and corresponding validity of his plea have been repeatedly denied, resulting in over twenty years and counting of litigation.⁸⁷

Objectively, Taylor was denied one-third of his sentencing options. In reality, given his concern over the impact of the taped confession, Taylor was denied one-half of his sentencing options, leaving him only one choice if he

78. *Id.* at 644.

79. *Id.*

80. Brief of Respondent Troy Steele, *supra* note 65, at 7.

81. *State v. Taylor*, 929 S.W.2d 209, 214–15 (Mo.1996).

82. *See State ex rel. Taylor*, 341 S.W.3d at 641–45 (citing extensively from Taylor's original plea hearing transcript).

83. *Id.*

84. *See id.* at 655–57 (Stith, J., dissenting) (both of Taylor's attorneys testified to Taylor's ignorance).

85. *Id.* at 657. Whether or not the state would have granted permission, as required by the statute, is moot at this juncture. The failure to inform alone warrants consideration under *Padilla* and *Webb*'s ineffective assistance analysis. Moreover, the failure severely undermines the validity of Taylor's alleged waiver.

86. *Taylor v. Bowersox*, 329 F.3d 963, 966 (8th Cir. 2003)

87. Counting from his initial plea in 1991 through the 2011 Missouri Supreme Court opinion and the federal habeas claim that is currently in process. Telephone Interview with Robert W. Lundt, Attorney, Mo. Public Defender's Office (Nov. 11, 2011) (confirming that the Federal Public Defender's Office was preparing an appeal).

wanted to plead guilty to avoid appearing to contest his guilt. Intuitively, it simply seems wrong to deny an individual facing a possible death sentence full disclosure of their sentencing options. The following section calls for a reexamination of Taylor's ineffective assistance of counsel claim in light of *Padilla* and *Webb*.

B. *The Case of Michael Anthony Taylor: Taylor's Strickland Claim Pre-Padilla*

In 2003, the Eighth Circuit Court of Appeals reviewed Taylor's ineffective assistance of counsel claim.⁸⁸ Despite acknowledging serious concerns, the court found Taylor's claim was procedurally barred.⁸⁹ The court stated the following concerns: a "clearly wrong" ruling by a state PCR judge who refused to allow Taylor to assert his ineffective assistance claim;⁹⁰ contradictory and disingenuous arguments from the state;⁹¹ the State's reneging on an apparent agreement to waive future procedural objections;⁹² and the subsequent failure of Taylor's counsel to appeal the claim further in state court.⁹³ The court indicated these concerns may be sufficient to show cause for—and prejudice from—the procedural failure sufficient to excuse Taylor's procedural default.⁹⁴ However, at that time, Taylor had not met the requirements of the exhaustion doctrine which requires "that a claim for ineffective assistance of counsel be initially 'presented to the state courts as an independent claim before it may be used to establish cause for a procedural default'" in a federal habeas

88. *Bowersox*, 329 F.3d at 969.

89. *Id.* at 971.

90. *Id.* at 970. The first PCR judge found Taylor's plea counsel was not ineffective, but this judgment was vacated by a 1993 Missouri Supreme Court order. *Id.* (citing *Taylor v. Missouri*, Nos. CV91-20562, CV91-20638, 64 (Mo. Cir. Ct. July 1, 1992)). After Taylor was again sentenced to death by a judge, Taylor reiterated his ineffective assistance claim in a second PCR motion. *Id.* The judge, relying in error on the first PCR judge's vacated ruling, declined to consider the claim. *Id.* (citing *Taylor v. Missouri*, No. Civ. 94-19962 (Mo. Cir. Ct. June 19, 1995)).

91. *Id.* In the second PCR hearing the state argued Taylor's ineffective assistance claim had been rejected by the 1993 Missouri Supreme Court order even though the order made no mention of the claim. *Id.* Now, "the state argues, for the first time in federal court, that [the second PCR judge] was wrong and that Taylor . . . had a duty to appeal this erroneous ruling to the Missouri Supreme Court. At best, the state's arguments appear to be disingenuous." *Id.*

92. *Id.* In the second penalty proceeding where, after asking the judge to take judicial notice of and preserve all previous issues for appeal, Taylor's counsel asked the state "if it 'would not object procedurally in the [state] or the federal courts to all [that the judge] took judicial notice of.'" *Id.* The court then quotes from the transcript, which indicates that the state appeared to agree. *Id.* The state now argues it did not waive future procedural objections and the court, indicating its disapproval of the state's conduct, was forced to conclude the state's stipulation was not specific enough to support Taylor's claim. *Id.*

93. *Bowersox*, 329 F.3d at 969–71.

94. *Id.* at 971.

proceeding.⁹⁵ This Article proceeds to the substance of Taylor's ineffective assistance claim on the assumption that Taylor is capable of meeting these procedural requirements, especially in state court.⁹⁶

Taylor alleged his plea counsel constituted ineffective assistance for failing to inform him of section 565.006.2, which would have allowed Taylor to plead guilty and, with state permission, face a jury for sentencing.⁹⁷ Although it held the claim was procedurally barred at the time, the Eighth Circuit unnecessarily went on to reject Taylor's ineffective assistance claim under *Strickland*.⁹⁸ Recognizing Taylor's plea counsel failed to inform him of section 565.006.2, the court nonetheless found "no evidence of constitutionally defective lawyering."⁹⁹ Instead, it agreed with the vacated conclusions of Taylor's first PCR judge that, despite being fired by the public defender's office in the midst of her representation and being subsequently appointed by the court to continue representing Taylor, Leslie Delk "performed well within the bounds of professional competence."¹⁰⁰ The court also found Taylor suffered "no prejudice [in] not being advised of Mo. Rev. Stat. § 565.006.2, because," in the court's opinion, "there is no showing it would have affected his decision to plead guilty."¹⁰¹ The court reasoned, in light of Taylor's plea testimony, that he wanted to avoid a jury and there was no credible showing that knowing of section 565.006.2 "would have affected his decision to be sentenced by a judge."¹⁰² Additionally, the court emphasized that section 565.006.2 did not grant a substantive right but required state permission, which was unlikely in this case.¹⁰³ Having found "no evidence of constitutionally deficient

95. *Id.* (citing *Murry v. Carrier*, 477 U.S. 478, 488 (1986)).

96. See Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 VAL. U. L. REV. 421, 431–33 (2004) (citing *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546–48 (Mo. 2003) (recognizing Missouri Courts' authority to grant habeas relief more broadly than federal courts)).

97. *Taylor v. Bowersox*, 329 F.3d 963, 972 (8th Cir. 2003). Taylor alleged ineffective assistance on several grounds, but the focus of this Article is Taylor's plea counsels' failure to inform him of his third sentencing option contained in Mo. Rev. Stat. § 565.006.2 (1986). *Id.*

98. *Id.* at 973; *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012) (internal citations omitted) ("It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The 'Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings.' Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.").

99. *Bowersox*, 329 F.3d at 973.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* In light of *Ring*, this characterization of section 565.006.2 is erroneous. The Sixth Amendment guarantees both the right to jury trial on guilt and to jury fact-finding on all of the elements necessary to impose a sentence. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

lawyering,” the court concluded, “there can be no prejudice in upholding the procedural default of Taylor’s ineffective assistance of plea counsel claim.”¹⁰⁴

C. The Case of Michael Anthony Taylor: Applying Padilla to Capital Sentencing Consequences

The reviewing court on Taylor’s next appeal should extend *Padilla*’s holding to include, at least, failing to inform or misinforming a defendant of sentencing consequences in capital cases, and remand Taylor’s ineffective assistance claim in light of *Padilla* and *Webb*.¹⁰⁵

The *Webb* concurrence, far from alone in this line of thinking,¹⁰⁶ convincingly argues that a faithful reading of *Padilla* requires its holding to be applied to sentencing consequences generally.¹⁰⁷ The case for applying *Padilla* in the capital sentencing context is even more persuasive. First, death is the original “different.”¹⁰⁸ By its recognition that *Padilla* represented a unique “class of adjudications” that require heightened procedural protections, the Court in *Padilla* “endorsed the argument that ‘deportation is different.’”¹⁰⁹ This of course echoes the Court’s now famous declaration that “death . . . is different.”¹¹⁰ The greater difference in both severity and finality that led the Court to set death penalty cases apart “as a unique category of adjudications that require a set of rules all their own” exceeds deportation consequences in both respects.¹¹¹ Second, while *Padilla* held the importance of the procedural protection for deportation consequences trumped the government’s “floodgates” arguments,¹¹² the more severe and final consequences and small number of defendants lessens the force of the “floodgates” argument even further in the capital sentencing context. A total of 7,879 people were sentenced to death between 1977 and 2010.¹¹³ Just 3,158 inmates were held

104. *Bowersox*, 329 F.3d at 973.

105. Assuming, as mentioned above, Taylor can overcome the procedural bar. *Bowersox*, 329 F.3d at 971.

106. See *supra* notes 16–21 and accompanying text.

107. *Webb v. State*, 334 S.W.3d 126, 134 (Mo. 2011) (Wolff, J., concurring).

108. *Gardner v. Florida*, 430 U.S. 349, 357–58 (1977).

109. Peter L. Markowitz, *Deportation is Different*, 13 U. Pa. J. Const. L. 1299, 1300–01 (2011) (citing Brief of Petitioner at 54, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 1497552); see also *Padilla*, 130 S. Ct. at 1482 (“Deportation 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.”).

110. Markowitz, *supra* note 109, at 1300 (citing *Gardner v. Florida*, 430 U.S. 349, 357–58 (1977)).

111. *Id.*

112. See *Padilla*, 130 S. Ct. at 1485.

113. TRACY L. SNELL, CAPITAL PUNISHMENT, 2010—STATISTICAL TABLES, U.S. DEP’T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS 1 (Dec. 2011, NCJ 236510), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2236>.

under sentence of death in thirty-six states and the federal prison system at the end of 2010.¹¹⁴ Only 104 inmates were received under the sentence of death in 2010, “representing the smallest number of admissions since 1973.”¹¹⁵ “This represents the tenth consecutive year that the number of inmates under sentence of death has decreased.”¹¹⁶ Taylor’s case presents a compelling example of the need to apply *Padilla* to include sentencing consequences in capital cases.

The facts surrounding Taylor’s plea are illustrative. Due to the heinous nature of the crime and his videotaped confession, both of Taylor’s attorneys, erroneously believing he could only face the same trier-of-fact at both phases, counseled him to plead guilty because insisting on a guilt phase trial might “inflare the fact-finder” for the punishment phase if Taylor was perceived as trying to back out of his confession.¹¹⁷ This was, at best, misadvice based on Taylor’s attorneys’ failure to become familiar with all three of Taylor’s sentencing options.¹¹⁸ Mr. McLain, who left the public defender’s office for a position in Florida prior to the plea, testified he was entirely unaware section 565.006.2 provided a third sentencing option.¹¹⁹ Taylor’s other counsel, Ms. Delk, was terminated from her position as a Missouri Public Defender just after the plea but prior to sentencing.¹²⁰ She later testified that she was aware of the statute but for some reason never discussed it with Taylor or Mr. McLain.¹²¹ Ms. Delk further testified that by her omission she “failed in her obligation to advise [Taylor] of all of his options.”¹²² Based on the incomplete and incorrect advice of his attorneys, Taylor pleaded guilty.¹²³ Because he was unaware he could, and thus did not, request jury sentencing, judicial sentencing was an essentially automatic consequence of his guilty plea. After a hearing, Taylor was sentenced to death by a judge.¹²⁴ Upon learning of section 565.006.2, Taylor immediately filed a PCR action alleging his plea was involuntary and that he would not have made the same decision but for the ineffectiveness of his plea counsel.¹²⁵

114. *Id.*

115. *Id.*

116. *Id.*

117. State ex rel. Taylor v. Steele, 341 S.W.3d 634, 672 (Mo. 2011) (Stith, J., dissenting).

118. *Id.*

119. *Id.* at 657.

120. *Id.*

121. *Id.*

122. State ex rel. Taylor, 341 S.W.3d. at 657.

123. *Id.* at 637.

124. *Id.*

125. Taylor v. Bowersox, 329 F.3d 963, 966 (8th Cir. 2003).

Once found guilty, the sentencing options in Missouri are life imprisonment without parole or the death penalty.¹²⁶ It is not an overstatement to say that at this stage of a capital case the consequences of every decision are life or death, particularly with regard to deciding whether one judge or twelve unanimous jurors will impose that sentence. The United States Supreme Court has held that the Sixth Amendment entitles capital defendants to a jury determination of all of the facts on which eligibility for the death sentence is predicated, including aggravating circumstances.¹²⁷ Missouri has retroactively applied that right in the case of defendants who chose jury sentencing but were sentenced to death by a judge after the jury deadlocked.¹²⁸ Because Taylor was never informed of section 565.006.2, he was effectively and automatically denied that right when he pleaded guilty. Taylor should have had the choice or, at least, the chance to request permission to plead guilty to a judge and be sentenced by a jury in accordance with his Sixth Amendment right.

At least equal to or exceeding the sentencing consequences discussed in *Webb*,¹²⁹ the consequences of Taylor's uninformed guilty plea share similar characteristics with deportation. For defendants like Padilla deportation was "practically inevitable."¹³⁰ Because Taylor was never informed of section 565.006.2, it too was a practically inevitable consequence of Taylor's plea that he would be denied jury sentencing and have to face judicial sentencing.¹³¹ While it was deportation in *Padilla*, for Taylor's class of defendants—those facing death penalty sentencing—the choice between judge or jury sentencing is one of, if not the most, important considerations in whether or not to plead guilty.¹³² This is particularly true in a state like Missouri that allows each trier-of-fact to elect mercy after the weighing process.¹³³ Indeed, the unique nature of deportation as a "particularly severe penalty" is perhaps only trumped by the severity of being denied the right to jury sentencing in a capital case as a result

126. See *supra* notes 65–73 and accompanying text.

127. *State v. Whitfield*, 107 S.W.3d 253, 256–58 (Mo. 2003) (applying *Ring v. Arizona*, 536 U.S. 584 (2002), retroactively in Missouri).

128. *Id.* at 268–69. Taylor claims he is similarly situated to the class of defendants in *Whitfield* and is entitled to retroactive application of *Ring* as well. *State ex rel. Taylor*, 341 S.W.3d at 653 (Stith, J., dissenting). The Missouri Supreme Court recently rejected that claim based on Taylor's alleged waiver of jury sentencing. *Id.* at 652. The dissent makes a more persuasive case that Taylor did not waive a right to jury sentencing he never knew he had and is entitled to relief under *Whitfield*. *Id.* at 653–73 (Stith, J., dissenting).

129. *Webb v. State*, 334 S.W.3d 126, 136 (Mo. 2011) (Wolff, J., concurring).

130. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010).

131. *State ex rel. Taylor*, 341 S.W.3d at 654 (Stith, J., dissenting) ("The guilty plea transcript shows merely that he knew that by pleading guilty he would not be afforded a jury trial on punishment, not that he affirmatively wanted to avoid a jury trial on punishment or knew that he could have requested a jury trial on punishment.").

132. *Padilla*, 130 S. Ct. at 1480.

133. See *supra* notes 65–73 and accompanying text.

of a guilty plea.¹³⁴ Like deportation in *Padilla* and parole eligibility in *Webb*, the severe consequence for Taylor (denial of his right to jury sentencing with his life on the line) was “intimately related” to and “most difficult to divorce the penalty from the [plea] in [this] context.”¹³⁵ Because the consequences of Taylor’s uninformed plea—denial of the right to jury sentencing in a capital case—equal or exceed the characteristics of deportation consequences in *Padilla*, advice regarding both should “not [be] categorically removed from the ambit of the Sixth Amendment right to counsel.”¹³⁶ Following *Padilla*, *Strickland* should apply to Taylor’s claim.¹³⁷

D. The Case of Michael Anthony Taylor: Reexamining Taylor’s Strickland Claim Post-Padilla

“Under *Strickland*, we first determine whether counsel’s representation ‘fell below an objective standard of reasonableness.’”¹³⁸ “Then we ask whether ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’”¹³⁹ The Court in *Padilla* emphasized that “[t]he first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: ‘The proper measure [being] simple reasonableness under prevailing professional norms.’”¹⁴⁰

As *Webb* makes clear, misinforming or failing to inform a client of the sentencing consequences of a plea violates practice expectations as outlined by prevailing professional norms.¹⁴¹ For example, NLADA’s Compendium of Standards for Indigent Defense Systems requires 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.”¹⁴² While no violation of professional norms should be taken lightly, the failure to advise a client of one-third of his or her sentencing options in a capital case is undoubtedly a more grievous violation than misadvice regarding either parole eligibility or deportation. This is particularly true when, as a result of the omission, the defendant loses an important constitutional procedural protection like the right to jury sentencing as a consequence of the misadvised plea. Simple reasonableness allows no other conclusion. Finally,

134. *Padilla*, 130 S. Ct. at 1481.

135. *Id.*

136. *Id.* at 1482.

137. *Id.*

138. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)).

139. *Padilla*, 130 S. Ct. at 1482 (quoting *Strickland*, 466 U.S. at 694).

140. *Id.* (quoting *Strickland*, 466 U.S. at 688).

141. *Id.* at 1482–83; *Webb v. State*, 334 S.W.3d 126, 137 (Mo. 2011) (Wolff, J., concurring).

142. *Webb*, 334 S.W.3d at 137 (Wolff, J., concurring) (citing NLADA, COMPENDIUM OF STANDARDS, *supra* note 61).

just as in *Padilla*, here “the terms of the relevant [sentencing] statute are succinct, clear, and explicit” and Taylor’s “counsel could easily have determined [his plea options and the presumptively mandatory consequences] simply from reading the text of the statute.”¹⁴³ Section 565.006.2 squarely addresses the precise situation Taylor’s attorneys’ were contemplating: when a homicide defendant is permitted to waive a jury trial.¹⁴⁴ The sentencing consequences were truly clear and following *Padilla*, Taylor’s counsel had an equally clear duty to correctly inform and advise their client.¹⁴⁵ Thus, Taylor’s claim should, like Padilla’s, be deemed to have “sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*.”¹⁴⁶ While it is admirable that Ms. Delk continued representing Taylor after her termination, was “very professional,” and “displayed commendable loyalty to Taylor’s interests,” nonetheless, the Eighth Circuit erred in its conclusion that such “professional loyalty” amounts to “no evidence of constitutionally defective lawyering.”¹⁴⁷

Although the Court remanded Padilla’s *Strickland* prejudice inquiry, this Article will briefly address whether Taylor suffered prejudice sufficient to satisfy *Strickland*’s second prong in order to show the viability of Taylor’s claim. Two recent Supreme Court cases have strengthened Taylor’s prejudice claim. *Missouri v. Frye* and *Lafler v. Cooper* were both handed down March 21, 2012, and address *Strickland* prejudice claims in the plea context.¹⁴⁸ The Court recognized “that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.”¹⁴⁹ The Court also indicated that the prejudice determination in the plea context is fact-sensitive and needs to be resolved on a case-by-case basis.¹⁵⁰ These cases, taken together with *Padilla*,

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

144. “No defendant who pleads guilty to a homicide offense or who is found guilty of a homicide offense after trial to the court without a jury shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement of the state.” MO. REV. STAT. § 565.006.2 (1986)

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

146. *Id.*

147. *Taylor v. Bowersox*, 329 F.3d 963, 973 (8th Cir. 2003).

148. *Missouri v. Frye*, 132 S. Ct. 1399, 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376, 1376 (2012).

149. *Frye*, 132 S. Ct. at 1407.

150. Both cases make extensive use of distinguishing language (italicized below) that indicates a case by case approach:

This application of *Strickland* to the instances of an uncommunicated, lapsed plea does nothing to alter the standard laid out in *Hill* [v. Lockhart, 474 U.S. 52 (1985)]. *In cases where* a defendant complains that ineffective assistance led him to accept a plea

indicate the Court's movement towards serious enforcement of Sixth Amendment protections in the plea process and the necessity of analyzing the *Strickland* prejudice prong on a case-by-case basis.

Traditionally, courts inquire "whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"¹⁵¹ In death penalty cases, that inquiry would normally require a reasonable probability that the outcome of the sentence would be different (i.e., life without parole rather than death) but for counsel's errors.¹⁵² The Eighth Circuit did not focus on the ultimate sentence, but rather concluded Taylor suffered no prejudice because the record indicated Taylor wanted to plead guilty and there was "no showing" that knowledge of section 565.006.2 "would have affected his decision to [plead guilty and] be sentenced by a judge."¹⁵³ However, Taylor's motivation to plead guilty centered on the desire to avoid the appearance of contesting his guilt, given his taped confession, and thereby inflaming the same trier-of-fact which would sentence him.¹⁵⁴ Not wanting to be sentenced by a jury who believes you are trying to contest a self-confessed kidnap, rape, and murder of a young girl does not equal wanting to be sentenced by a judge. Thus, the proper question was not whether knowledge

offer as opposed to proceeding to trial, the defendant will have to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* was correctly decided and *applies in the context in which it arose. Hill does not, however, provide the sole means for demonstrating prejudice* arising from the deficient performance of counsel during plea negotiations.

Frye, 132 S. Ct. at 1409–10 (emphasis added) (internal citations omitted).

In *Frye*, defense counsel did not inform the defendant of the plea offer; and after the offer lapsed the defendant still pleaded guilty, but on more severe terms. Here, the favorable plea offer was reported to the client but, on advice of counsel, was rejected. In *Frye* there was a later guilty plea. Here, after the plea offer had been rejected, there was a full and fair trial before a jury.

Lafler, 132 S. Ct. at 1383.

In contrast to Hill, here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. *In these circumstances a defendant must show* that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 132 S. Ct. at 1385 (emphasis added).

151. *Padilla*, 130 S. Ct. at 1482 (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)).

152. *Strickland*, 466 U.S. at 699–700.

153. *Bowersox*, 329 F.3d at 973.

154. *State ex rel. Taylor v. Steele*, 341 S.W.3d 634, 671–73 (Mo. 2011) (Stith, J., dissenting) (citing Taylor's PCR testimony: Q. "Why did you decide to plead in front of a Judge? Why did you decide to plead in front of Judge Meyers?" A. "Because of my videotaped statement.").

of section 565.006.2 would have caused Taylor to change his guilty plea, but rather, whether knowledge of that section would have caused Taylor to request jury sentencing following his guilty plea. Given Taylor and his counsels' concerns, it appears reasonably probable that, had Taylor known, he would have pleaded guilty and requested jury sentencing.¹⁵⁵ It is reasonably probable because, in Missouri, the requirement of a unanimous verdict and ability for jurors to exercise mercy even if the mitigating circumstances do not outweigh the aggravating circumstances would have given Taylor twelve chances to receive mercy rather than one chance before a judge.¹⁵⁶ This error alone warrants a reexamination of the Eighth Circuit's holding. Similar considerations would apply if a reviewing court, based on *Strickland*'s application in capital cases, considered whether being sentenced by twelve jurors rather than one judge would have resulted in the "reasonable probability" Taylor would be sentenced to life imprisonment rather than to death under Missouri's capital sentencing scheme.¹⁵⁷ Is it reasonably probable that, under a statute that allows a trier-of-fact the freedom to show mercy, a different sentence would result if Taylor had twelve chances to receive that mercy rather than one?

Beyond the two issues addressed in the preceding paragraph, the failure of Taylor's attorneys to inform him of section 565.006.2 caused Taylor to suffer prejudice in at least one additional respect. Taylor's ignorance of the option left him believing he was unable to request jury sentencing.¹⁵⁸ His resulting failure to even request jury sentencing prejudiced Taylor's equal protection claim in his most recent Missouri Supreme Court case.¹⁵⁹ In that case, the court considered whether its retroactive application of the Sixth Amendment right for a jury to find all the facts necessary for the imposition of the death penalty included Taylor's situation: where a defendant pleaded guilty and faced judicial sentencing based on incorrect and incomplete knowledge of the sentencing scheme.¹⁶⁰ In *State v. Whitfield* the court retroactively applied this Sixth Amendment right to defendants seeking collateral review where the defendant requested jury sentencing but "the jury was unable to reach a verdict [i.e., deadlocked] and the judge made the required factual determinations and imposed the death penalty."¹⁶¹ The court in that case recalled its mandate

155. *Id.* at 665–66.

156. *See supra* notes 65–74 and accompanying text.

157. *Strickland*, 466 U.S. at 699–700.

158. *State ex rel Taylor*, 341 S.W.3d at 654.

159. *Id.* at 652.

160. *Id.* at 634, 649 n.18.

161. *State v. Whitfield*, 107 S.W.3d 253, 268–69 (Mo. 2003) (applying *Ring v. Arizona*, 536 U.S. 584 (2002)). *Ring* held the following: "Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment [e.g., aggravating circumstances]." *Ring*, 536 U.S. at 589.

affirming Whitfield's conviction and death sentence, resentencing him to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor."¹⁶² Taylor contended he was similarly situated to the class of defendants identified in *Whitfield*, but the court both refused to include him within its existing retroactive application and refused to expand its reading.¹⁶³ The court reasoned Taylor's original plea and waiver—although given without full knowledge of the sentencing scheme and before the Sixth Amendment right was recognized by the United States Supreme Court¹⁶⁴—effectively differentiated Taylor from those defendants to whom the court had granted retroactive application.¹⁶⁵ However, had Taylor's counsel informed him of section 565.006.2 and had Taylor requested but been denied jury sentencing, it is reasonably probable he would be considered similarly situated to the jury-deadlock defendants covered by *Whitfield*.¹⁶⁶ It is therefore reasonably

It should be noted that *Ring* and its progeny did not address whether the Sixth Amendment right to jury fact-finding all the facts necessary for sentencing applied retroactively to those on death row awaiting capital punishment. Daren S. Koudele, Comment, *Unraveling Ring v. Arizona: Balancing Judicial Sentencing Enhancements with the Sixth Amendment in Capital Punishment Schemes*, 106 W. VA. L. REV. 843, 874–75 (2004). This resulted in varying interpretations of *Ring*'s retroactive application in the wake of that decision. *See id.* at 875 (citing a split between the 11th and 9th Circuits as an example). The Supreme Court addressed the issue in *Schriro v. Summerlin* using the *Teague* retroactivity test and concluded that, for federal courts, "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (citing *Teague v. Lane*, 489 U.S. 288, 311–13 (1989)).

However, the states are "free to provide greater protections in their criminal justice system[s] than the Federal Constitution requires." *Whitfield*, 107 S.W.3d at 267 (quoting *California v. Ramos*, 463 U.S. 992, 1014 (1983)). Consequently, *Teague* is not controlling, and the States may provide retroactive application of a new constitutional rule in a broader range of cases than in the federal system. *Id.* (noting *Teague* sets the minimum constitutional protections all states must follow). Following *Ring*, but prior to *Schriro*, in *State v. Whitfield* the Missouri Supreme Court chose to continue applying the *Linkletter-Stovall* test Missouri traditionally utilized rather than adopt the Supreme Court's *Teague* test for determining retroactivity and, as a result, "decided to offer greater retroactive application" of *Ring*. *Id.* at 266, 268 (citing *Linkletter v. Walker*, 381 U.S. 618 (1965), and *Stovall v. Denno*, 388 U.S. 293 (1967)).

162. *Whitfield*, 107 S.W.3d at 256.

163. *State ex rel. Taylor v. Steele*, 341 S.W.3d 634, 649–52 (Mo. 2011).

164. *See Halbert v. Michigan*, 545 U.S. 605, 623–24 (2005) (holding Halbert could not waive his unrecognized constitutional right to appellate counsel even though that was the automatic consequence of his guilty plea under Michigan law).

165. *See State ex rel. Taylor*, 341 S.W.3d at 641–45 (citing from Taylor's plea and PCR testimony as evidence of a valid waiver).

166. The majority opinion is correct that the State likely would have denied Taylor's request for jury sentencing under section 565.006.2. *State ex rel. Taylor*, 341 S.W.3d at 645–46. However, it is precisely that request and denial that would make Taylor similarly situated to the defendants in *Whitfield* and its progeny who requested but were denied jury sentencing due to

probable Taylor would have been entitled to retroactive application of the Sixth Amendment right for a jury to find all facts necessary to impose the death sentence, but for his counsels' failure to inform him of section 565.006.2. Thus, following Missouri precedent, Taylor would either face resentencing or receive an automatic life sentence without parole.¹⁶⁷ The Supreme Court's decisions in *Missouri v. Frye* and *Lafler v. Cooper* show that the prejudice inquiry must be conducted on a case-by-case basis; looking at the facts in Taylor's case in light of those cases, either outcome demonstrates that Taylor was prejudiced by his counsels' failure to affirmatively advise him of section 565.006.2.

The preceding sections have shown that *Padilla's* holding can and should be applied beyond deportation consequences.¹⁶⁸ The *Webb* concurrence presented a persuasive proposal for applying *Padilla* in Missouri to include sentencing consequences generally.¹⁶⁹ The strength of that proposal, especially in capital sentencing cases, has been illustrated by the case of Michael Anthony Taylor, whose ineffective assistance claim should be reversed in light of *Padilla* and *Webb*. The following section acknowledges the potentially insurmountable burden such an application would place on the public defender system and proposes a set of reforms, which, if taken together, would enable the criminal justice system to effectively mitigate this added burden.

IV. THE PROBLEM WITH APPLYING *PADILLA* AND A PROPOSED SOLUTION

Any serious discussion of *Padilla* must pause to consider how its holding can realistically be implemented in the current criminal justice system. Whether one views *Padilla* as a reaffirmation or an expansion of the duties of defense attorneys, even the lone duty to comprehend all potential immigration consequences and provide affirmative advice pertinent to each client's situation is a substantial burden to bear.¹⁷⁰ To simply say "competent counsel must do more" ignores the nationwide reality of excessive public defender workloads.¹⁷¹ Certainly then, any proposed application of *Padilla* beyond immigration consequences must appreciate and make provision for the additional burden such application will place upon defense attorneys. Recognizing that reality and building upon existing proposals, this Article

jury deadlock. See Amicus Brief in Support of Petitioner Michael A. Taylor, *State ex rel. Taylor v. Steele*, 341 S.W.3d 634 (Mo. 2011).

167. *State ex rel. Taylor*, 341 S.W.3d at 654 (Stith, J., dissenting); *Whitfield*, 107 S.W.3d at 256.

168. See *supra* notes 138–50 and accompany text.

169. *Id.*

170. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478, 1483–84 (2010).

171. See Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, CRIM. JUST., Summer 2011, at 24, 25.

contends Missouri should pursue unified reforms under a consumer protection regulation framework, including adopting an affirmative duty on the trial court to modify its existing plea colloquy and on sentencing commissions to provide pre-sentencing reports to defendants like Taylor. Absent these measures, given the public defender “crisis” in the state, it is unlikely defendants in Missouri courts will receive the constitutionally effective assistance of counsel required by the Sixth Amendment in light of *Padilla*.

Nationwide the majority of public defender offices have attorney caseloads that exceed nationally recognized minimum caseload standards endorsed by the American Bar Association as necessary to protect the Sixth Amendment right to the effective assistance of counsel.¹⁷² It is beyond the scope of this Article to provide an in-depth study of the state of the Missouri Public Defender System (“MSPD”). Fortunately, others better suited to the task have done so, conducting extensive research and analysis into the MSPD.¹⁷³ These scholars have concluded that the MSPD is confronting “a situation as urgent as it is dire.”¹⁷⁴ The “MSPD is confronting an overwhelming caseload crisis, one of the worst of its kind in the nation—a crisis so serious that it has pushed the entire criminal justice system in Missouri to the brink of collapse.”¹⁷⁵ High turnover resulted in a near one hundred percent cumulative turnover rate between 2001 and 2005.¹⁷⁶ As of 2008, Missouri ranked “dead last in the amount of per capita funding for its public defenders.”¹⁷⁷ “A study commissioned by the Missouri Bar concluded that the public defender system has deteriorated to the point where it often provides ‘nothing more than the illusion of a lawyer.’”¹⁷⁸

Padilla does not address this reality. When read alone, *Padilla* places the duty to provide affirmative advice squarely on the shoulders of defense attorneys.¹⁷⁹ However, *Padilla* alone, much less the application of *Padilla* proposed in this Article, may just be the straw that breaks the camel’s back for

172. *Id.* at 25 (citing AM. BAR ASS’N STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Feb. 2002), <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>).

173. See THE SPANGENBERG GROUP & THE CTR. FOR JUSTICE, LAW & SOC’Y, ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM 64 (Oct. 2009), <http://members.mobar.org/pdfs/public-defender/2009-report.pdf> [hereinafter ASSESSMENT OF THE MSPD SYSTEM]; and Sean D. O’Brien, *Missouri’s Public Defender Crisis: Shouldering the Burden Alone*, 75 MO. L. REV. 853 (2010).

174. O’Brien, *supra* note 173, at 865 (citing ASSESSMENT OF THE MSPD SYSTEM, *supra* note 173, at 66).

175. O’Brien, *supra* note 173, at 865.

176. *Id.* at 866 (citing ASSESSMENT OF THE MSPD SYSTEM *supra* note 173, at 66).

177. *Id.* at 865 (citing Laura Denvir Stith, *Chief Justice Laura Denvir Stith Addresses the Missouri Bar, Judicial Conference*, 64 J. MO. B. 280, 282 (2008)).

178. *Id.* (citing ASSESSMENT OF THE MSPD SYSTEM, *supra* note 173, at 66).

179. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478, 1483–84 (2010).

the MSPD and other public defender systems. In order to protect the constitutional rights of criminal defendants, absent substantial changes in the public defender system in Missouri, the burden imposed by *Padilla* must be shared by the state's trial courts and sentencing commission.

A. *Rethinking the Role of the Trial Court*

1. Judicial Warnings

Vivian Chang correctly asserts that the “altered legal duty of defense counsel post-*Padilla* necessarily calls for a re-examination of the legal duty of trial courts as well.”¹⁸⁰ Because of the “vast deference afforded to defense counsel” under the *Strickland* standard, Chang argues “mere policing of defense counsel’s duty” is insufficient and consequently “court instruction on [plea] consequences . . . is thus necessary in order to: (1) secure well-informed pleas . . . and (2) conserve the limited resources of the criminal justice system.”¹⁸¹ Chang thus proposes a judicial warning based on “model language for new criminal rules of procedure that would impose a [heightened] duty upon courts to inform all criminal defendants . . . at plea colloquy.”¹⁸² “Although *Padilla* does not mandate that trial courts re-assess the language of their [duties, including] plea colloquy warnings,” Chang rightly believes the “changed duty on the part of defense counsel will realistically lead to a changed duty on the part of trial courts.”¹⁸³

Focusing solely on immigration consequences, Chang’s proposed reform was drafted “so as to allow compatibility with any system” and results in a simple, two-sentence instruction to the court to: (1) directly advise the defendant of the immigration consequences of his or her guilty plea; (2) ensure the defendant understands those consequences; and (3) allow the court to provide a “reasonable amount of time to consider the appropriateness of the plea in light of the advisement.”¹⁸⁴ Recognizing that “[j]udicial warnings cannot substitute for the effective assistance of counsel,” Chang nonetheless concludes such warnings are an ideal vehicle for bolstering the reliability of a defendant’s plea.¹⁸⁵ Chang draws support for her position from the concurrence of Justice Alito (himself a former prosecutor) in *Padilla* who, in turn, notes that many states already require some form of judicial warning regarding immigration consequences during plea colloquy.¹⁸⁶ Although limited to

180. Vivian Chang, Note, *Where Do We Go From Here: Plea Colloquy Warnings and Immigration Consequences Post-*Padilla**, 45 U. MICH. J.L. REFORM 189, 191 (2011).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 208.

185. Chang, *supra* note 180, at 209.

186. *Id.* (citing *Padilla*, 130 S. Ct. at 1491 (Alito, J., concurring)).

immigration consequences, Chang's proposal correctly recognizes that defense counsel alone are incapable of safeguarding their clients' Sixth Amendment rights. Her proposal of enhanced judicial warnings could easily be expanded to include sentencing consequences. Imposing such a corresponding and concurrent duty upon the court receiving a defendant's plea in Missouri would be a positive step towards realistic protection of the Sixth Amendment right to counsel.

2. Warding Off Complacency

Similarly emphasizing the role and duty of the plea judge, United States District Court Judge Robert Pratt has recently written that *Padilla* "serves as a reminder that the plea process and its implications should never be dismissed as routine, regardless of how commonplace it may be in American jurisprudence."¹⁸⁷ For Pratt, the "primary implication of *Padilla* in [his] work as a judge is in the plea process, since *Padilla* is, for all practical purposes, part and parcel of the *Strickland* standard."¹⁸⁸ Thus, Pratt emphasizes that "[t]rial judges must, as they always have, ensure that a defendant's plea is knowing, voluntary, and made only after full disclosure ha[s] been made concerning the consequences of the plea."¹⁸⁹ Noting how essential vast numbers of guilty pleas are to the criminal justice system, Pratt stresses that "courts and litigants must always be mindful of the serious consequences that result since "[d]efendants give up important constitutional rights when they opt to plead guilty."¹⁹⁰ Pratt exhorts his fellow judges that "[w]hile guilty pleas are the most common means to a conviction in our legal system, we must never forget that the effect of a guilty plea is precisely the same as [a jury verdict]."¹⁹¹ "For this reason," Pratt continues, "every guilty plea hearing must be conducted with no less respect or dignity than that accorded a jury trial, regardless of how many dozens or even hundreds of pleas the presiding judge has taken."¹⁹²

The duty of the trial judge in the plea process is paramount. "Ultimately," Pratt emphasizes, "the primary duty of a judge in a plea proceeding is to exercise his or her 'sound discretion,' in determining whether to accept or reject the guilty plea."¹⁹³ In the federal system a plea must meet the requirements of Federal Rule of Criminal Procedure 11, requiring a plea to be

187. Robert Pratt, J., *The Implications Of Padilla v. Kentucky On Practice In United States District Courts*, 31 ST. LOUIS U. PUB. L. REV 169, 190 (2011).

188. *Id.* at 179.

189. *Id.*

190. *Id.* at 171.

191. *Id.* at 172.

192. Pratt, *supra* note 187, at 172.

193. "Rule 11 gives the court discretion to accept or reject a plea agreement." *Id.* at 173, n.18 (citing FED. R. CRIM. P. 11(c)(3)(A), which states the following: "[T]he court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.")

knowing, voluntary, and intelligent in order to be accepted.¹⁹⁴ The requirements in Missouri for waiver of federal constitutional rights are equivalent.¹⁹⁵ In addition to these legal requirements, Pratt advises judges to be mindful of the “human element of pleas.”¹⁹⁶ The frequency of guilty pleas will often mean a judge is familiar with the attorneys on both sides and will “likely enter the hearing with a presumption that the plea should be accepted.”¹⁹⁷ Pratt cautions judges to a heightened level of “humility, seriousness, and clarity in the plea proceeding” since a judge “typically knows nothing, or very little, about the defendant” whose plea they must evaluate.¹⁹⁸

Of even greater consequence post-*Padilla* is the court’s inquiry “of both the defendant and the defendant’s counsel to determine whether the proposed plea is both ‘knowing’ and ‘voluntary,’ or if it is the product of coercion or lack of advice from the lawyer.”¹⁹⁹ In conducting the plea colloquy judges “cannot ignore the fact that the vast majority of defendants will look at their lawyers and say, ‘what should I do?’”²⁰⁰ To meet this standard post-*Padilla* “the judge must do more than just repeat a questionnaire from rote memory and listen for the ‘right’ answers.”²⁰¹ Pratt’s emphasis on the “human element” resurfaces here as he notes that “[t]he atmosphere of the proceeding and the demeanor evidence that a judge observes must be taken into account” in addition to “the advice the defendant does or does not receive from counsel.”²⁰²

Pratt prefaces his conclusion with a further word of warning arising from the frequency with which judges hear guilty pleas:

With so many guilty pleas taking place, it is far too easy for everyone involved to start believing that ‘everyone is guilty’ and that establishing guilt on the record is just a ‘formality.’ With such an attitude comes complacency and a lack of attention to the details of the plea proceeding.²⁰³

The article concludes with a powerful reminder that “due process is equally a requirement of convictions by guilty plea.”²⁰⁴ Missouri judges who heed

194. Pratt, *supra* note 187, at 179 (citing FED. R. CRIM. P. 11(b)(1); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)).

195. “The question of an effective waiver of a federal constitutional right in a proceeding is governed by federal standards.” *Boykin*, 395 U.S. at 243.

196. Pratt, *supra* note 187, at 175.

197. *Id.*

198. *Id.*

199. *Id.* at 176.

200. *Id.*

201. Pratt, *supra* note 187, at 177; *see also supra* notes 187, 192 and accompanying text.

202. Pratt, *supra* note 187, at 177–78.

203. *Id.* at 180.

204. *Id.* at 181.

Pratt's advice will take another positive step towards protecting constitutionally effective assistance of counsel.

B. Rethinking the Role of Sentencing Commissions

1. Sentencing Commissions as Pre-Plea Information Providers

In his *Webb* concurrence, Judge Wolff announced to the Missouri criminal justice system that “*Padilla* puts courts on notice that reciting the usual no-threats-no-promises litany at sentencing does not necessarily ensure that the plea is voluntary.”²⁰⁵ Beginning in that opinion, Wolff noted the assistance pre-plea sentencing reports could provide to overburdened public defenders in meeting their duties post-*Padilla*.²⁰⁶ Wolff builds upon that proposal in a recent article, discussing the role state sentencing commissions can play in providing such additional information post-*Padilla*.²⁰⁷ Contemplating *Padilla*'s premise that constitutionally competent counsel should “know and disclose” the consequences of a guilty plea, Wolff acknowledges that “[t]he practical problem . . . is that hardly anyone knows the full range of consequences.”²⁰⁸ Wolff continues, “in most jurisdictions no judge, prosecutor, defense attorney, legislator, or agency staffer could identify all of the statutes that would be triggered by [a guilty plea and] conviction of the various offenses in the criminal code.”²⁰⁹ Sentencing commissions are perhaps best positioned to fill this gap.

Approximately twenty-one states have sentencing commissions.²¹⁰ While their role and responsibility varies from state to state, all such commissions serve as a potential source of information in the plea context while most “set forth recommended or prescribed punishments for felony offenses.”²¹¹ In Missouri, “the commission recommends but does not prescribe punishments.”²¹² In this advisory capacity, the commission provides information to the sentencing judge who has the ultimate authority “to fashion

205. *Webb v. State*, 334 S.W.3d 126, 134 (Mo. 2011) (Wolff, J., concurring).

206. *Id.* at 140.

207. Michael A. Wolff, *Incorporating Collateral Consequences Into Sentencing Guidelines And Recommendations Post-Padilla*, 31 ST. LOUIS U. PUB. L. REV. 183 (2011).

208. *Id.* at 188.

209. *Id.* (citing UNIFY. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 4 CMT).

210. *Id.* at 186 (citing NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM (2008), <http://www.ncsc.org/csi/PEW-Profiles-v12-online.pdf>).

211. *Id.* at 186–87.

212. Wolff, *supra* note 207, at 187. Judge Wolff is well-acquainted with sentencing commissions in general, and Missouri's in particular, having served as chair of Missouri's sentencing advisory commission for seven years. *Id.*

a punishment within the statutory limits prescribed by law.”²¹³ There seems to be no impediment to providing such information prior to the plea hearing, but, despite the important role state sentencing commissions could play, as of the publication of Wolff’s article, none “had taken any steps to accommodate the principles set forth in *Padilla v. Kentucky*.”²¹⁴

Ideally, Wolff notes, “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.”²¹⁵ Perhaps in recognition that sentencing commissions are similarly over-burdened, Wolff backs away from such an individualized approach and instead endorses online publication and ready access to “lists of the consequences of a state’s twenty-five most frequently charged offenses.”²¹⁶ Wolff rightly concludes that even such a minimally enhanced role for state sentencing commissions “not only avoids post-conviction proceedings in which the offender claims that his attorney did not provide competent representation, but as importantly helps [sentencing] commissions to meet their goals of fairness and transparency.”²¹⁷

2. The Case for Individualized Pre-Plea Reports

Taking inspiration from “*Padilla*’s recognition that the current [plea] system offer[s] inadequate information,” Professor Gabriel Chin envisions a role for sentencing commissions similar to Wolff, but endorses utilizing individualized pre-sentence reports (PSRs) to fill the information-gap.²¹⁸ To accomplish this purpose, Chin recognizes the need for PSRs to be prepared before a guilty plea.²¹⁹ Having PSRs in hand prior to a plea hearing would benefit both the prosecution and defense since both would better understand the options and the actual sentencing range, and would thus be better equipped to “produce plea bargains which are more knowing and informed.”²²⁰ Indeed, Chin contends that “[t]he actual PSR . . . should be the basis of a plea.”²²¹ The absence of a pre-plea PSR “means that the most portentous decision in the criminal case—to accept a guilty plea . . . or to go to trial—is made without the benefit of some of the most important facts” since a plea typically binds a defendant to the findings of the sentencing court which are in turn based

213. *Id.*

214. *Id.* (confirming via email correspondence, periodic literature, and internet searches).

215. *Id.* at 190.

216. *Id.* at 191 (citing Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 686–87 (2011)).

217. Wolff, *supra* note 207, at 192.

218. Chin, *supra* note 13, at 61.

219. *Id.* at 62.

220. *Id.*

221. *Id.* at 70.

largely upon the contents of the PSR.²²² Chin notes that the lack of pre-plea PSRs is the result of “custom and choice,” not inability.²²³ While providing pre-plea PSRs may delay the plea hearing, the practice would inevitably shorten the time between the plea and sentencing, resulting in no significant overall delay in the process.²²⁴ Any costs incurred in instituting pre-plea PSRs would be minimal compared to the benefits of increased understanding and improving “the fairness and legitimacy of the criminal justice system.”²²⁵ Chin notes that this is especially true under our current system where defendants face severe sentencing consequences:

In *Boykin v. Alabama*, the Supreme Court explained further: “What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.”²²⁶

Incorporating Chin’s pre-plea PSR proposal, especially where the PSR forms the basis of the plea, would represent another safeguard for criminal defendants’ Sixth Amendment rights.

C. *Towards a Consumer Regulation Model*

Professor Stephanos Bibas’s proposal offers a model that effectively incorporates the preceding proposals into a unified reform framework to mitigate the burden imposed by *Padilla*.²²⁷ “To complete *Padilla*’s unfinished business,” Professor Bibas suggests, “the Court and legislatures should look to consumer protection law to regulate at least the process if not the substance of plea[s].”²²⁸ Given that in our current system the vast majority of adjudicated cases are resolved by guilty pleas rather than trials,²²⁹ Bibas commends *Padilla*

222. *Id.* at 63.

223. Chin, *supra* note 13, at 67.

224. *Id.* at 71.

225. *Id.* at 74. Chin cites from a D.C. Circuit opinion noting the greater confidence a pre-plea PSR would have provided that court. *Id.* at 66 (citing *U.S. v. Horne*, 987 F.2d 833, 839 (D.C. Cir. 1993) (Buckley, J., concurring)). Chin adds that one of the judges lamented that “[the defendant’s] decision to forego the exercise of a constitutional right was not as informed as it could have been, hence not as voluntary as it might have been.” *Id.* at 68–69 (citing *Horne*, 987 F.2d at 840 (Buckley, J., concurring)).

226. Chin, *supra* note 13, at 74.

227. *See* Bibas, *supra* note 13.

228. *Id.* at 1117.

229. *Id.* at 1118–19 n.2 (“In 2004, of 582,480 felony convictions in state courts, 95 percent resulted from guilty pleas. Bureau of Justice Statistics, U.S. Dep’t of Justice, Sourcebook of Criminal Justice Statistics Online, tbl.5.46.2004, <http://www.albany.edu/sourcebook/pdf/t5462004.pdf>. In fiscal year 2009, of 86,798 criminal cases disposed of in federal district court by trial or plea (thus excluding dismissals), 96.4 percent were disposed of by pleas of guilty or nolo contendere. *Id.* at tbl.5.24.2009, <http://www.albany.edu/sourcebook/pdf/t5242009.pdf>. Though it

as the “first case to treat plea-bargaining as a subject worthy of constitutional regulation in its own right and on its own terms.”²³⁰

“It is astonishing,” Bibas opines, “that a \$100 credit-card purchase of a microwave oven is regulated more carefully than a guilty plea that results in years of imprisonment [or death].”²³¹ Bibas proposes extending to the plea process the U.S. model of consumer protection regulation, which is “designed to ensure that consumers understand and consider carefully the most important terms of their bargains.”²³² At a minimum, Bibas argues that regulation of “the contracting process procedurally to ensure a modicum of understanding” is necessary in the plea context.²³³ Bibas identifies various systemic problems within the plea system and proposes corresponding reforms drawn from consumer regulation, stressing that the “most basic and important reforms [should] focus on ensuring that defendants know what they are doing.”²³⁴ Improved comprehension is critical because most defendants are “unsophisticated laymen facing repeat-player prosecutors” who may feel pressured to make hurried decisions by defense attorneys who are “often overburdened, of varying ability and experience, and [who] may have incentives to plead cases out quickly.”²³⁵

In response to these systemic deficiencies, Bibas begins with the proposal that “all plea agreements should be in writing.”²³⁶ He further argues that all information contained in plea documents should be displayed as in consumer contracts, following standard best practices and psychological research, resulting in the following benefits: common-sense terminology, less required mathematical calculations and inferences, more visual displays, standard numerical formats, and phrasing risks in absolute terms.²³⁷ “Clear numbers,” he argues, “should be accompanied by clear language.”²³⁸ To accomplish this task, Bibas envisions a role for the American Law Institute or Uniform Law Commission in drafting such “plain English” summaries of common portions of plea documents.²³⁹ To counter the pressure to make a hasty plea, Bibas advocates generally “forbid[ding] guilty pleas at the initial appearance for

is impossible to be sure, most of these pleas probably resulted from plea bargains. “); *see supra* note 5 and accompanying text.

230. Bibas, *supra* note 13, at 1120.

231. *Id.* at 1153.

232. *Id.*

233. *Id.*

234. *Id.* at 1154.

235. Bibas, *supra* note 13, at 1153.

236. *Id.* at 1154.

237. *Id.* (“For example, . . . phras[ing] sentencing ranges not as 126 to 144 months but as 10 to 12 years.” *Id.*)

238. *Id.* at 1155.

239. *Id.*

serious felonies” and imposing a “cooling-off period for plea bargains authorizing five years’ imprisonment or more.”²⁴⁰ Under Bibas’ proposal, prosecutors would have to disclose the terms of the plea in writing and defense attorneys would have to provide advice regarding the plea a certain number of days prior to the plea hearing.²⁴¹ Bibas stresses that “cooling-off periods” are “most valuable when (1) people make a decision infrequently and are therefore inexperienced, and (2) the decision is an emotional one.”²⁴² Pleas made by a defendant facing serious felony charges meet both criteria.²⁴³

The imposition of a “cooling-off period” where a defendant would have an opportunity to reflect, ask questions, and receive advice about a clear and comprehensible plea summary is, perhaps, Bibas’ most persuasive proposal. However, even Bibas recognizes that to make his proposals effective, defense attorneys would require “training, guidance, and reminders” from outside sources such as bar associations, computer programs, and the like.²⁴⁴ If followed, Bibas’ reforms taken in conjunction with an enhanced role for sentencing commissions and trial courts would go a long way towards improving defendants’ comprehension of their pleas and corresponding protection of their constitutional rights.

D. *A Unified Vision of Reform*

The proposals outlined above could easily, and perhaps necessarily should, be enacted together. Under the consumer regulation model proposed by Bibas, and following his recommendations, sentencing commissions could provide individualized PSRs for defendants facing serious felony charges. With the assistance of the American Law Institute or Uniform Law Commission working in conjunction with state sentencing commissions much of the “boiler plate” of these reports could be prepared in advance and made publicly available. The courts and legislature could establish appropriate timelines for the process including: (1) when the parties should receive the reports; (2) how long from receipt until the defendant must have an official advisory meeting with his or her counsel regarding the report; and (3) how much time must elapse from the post-advisory meeting until the defendant may appear before the court for the plea hearing (i.e. the “cooling-off period”). At the plea hearing, heeding Pratt’s exhortations against complacency, the trial court would have an enhanced duty to give any additional judicial warnings required by the jurisdiction’s rules of criminal procedure. Since the PSR would form the

240. Bibas, *supra* note 13, at 1155.

241. *Id.*

242. *Id.* at 1156 (citing RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 250–51 (2008)).

243. *Id.*

244. *Id.* at 1158.

basis of the plea, the judge could inquire extensively into the contents of the PSR, the defendant's understanding of those contents, what advice was or was not given by the defendant's attorney, etc. If, at any point, the judge had reason to doubt the validity of the defendant's plea or the adequacy of his or her attorney's counsel, the judge could impose an additional advisory meeting and cooling-off period. If, on the other hand, the judge was satisfied by what he or she heard, the judge could instruct the defendant to enter his or her plea and ratify it by signing the document, effectively charging the defendant with knowledge of its contents. Taking these proposals together would not create a perfect system, but implementing these ideas into a modified colloquy would provide the plea judge with additional resources to ensure the defendant's plea was knowing, intelligent, and voluntary. Given the realities of the plea process in the current criminal justice system, it is unlikely we can maintain the procedural protections afforded to the accused by our Constitution without enacting similar unified reforms.

E. Illustration: Applying the Proposed Reforms to Taylor

It is not difficult to see how the proposals outlined above would apply in *Taylor*. After he was charged and indicted, if he preferred to plead guilty, Taylor would have been provided with a plain English document in advance of his plea hearing. This plea document would include a PSR provided by the Missouri Sentencing Commission, containing the charges against him, the mandatory minimum sentence for each charge, and the "truly clear" consequences of a guilty plea and conviction on each charge.²⁴⁵ Most importantly for Taylor and other defendants facing a possible death sentence, this pre-plea document would contain an overview and explanation of his sentencing options, including section 565.006.2 and the procedure for imposing the death penalty in Missouri. Taylor then would have a chance to review this document with his defense attorneys, ask questions of them about its provisions, and get their advice. Taylor would then have to wait the mandatory "cooling-off period," perhaps as short as seventy-two hours, before a plea hearing. During the plea hearing the judge would bear the enhanced duty of probing the validity of Taylor's plea and assessing what Taylor's counsel did and did not discuss with him, including his three sentencing options. The plea judge would also be responsible for administering any explicit judicial warnings and could provide for an additional cooling-off period if dissatisfied with the proceedings, paying close attention to the "human element" of the plea. Had these procedures been followed, it is reasonably probable that at

245. Currently, judges receive Sentencing Assessment Reports prepared by probation officers employed by the Missouri Board of Probation and Parole. Telephone Interview with Michael A. Wolff, Former Missouri Supreme Court Justice and Professor of Law at Saint Louis University School of Law (Apr. 6, 2012).

least one of the individuals involved—whether it was Taylor himself, one of his two attorneys, the prosecution, or the plea judge—would have noticed and mentioned the sentencing option provided by section 565.006.2. Even if it was not mentioned on record at the plea colloquy, the procedural reforms suggested above could be deemed sufficient to charge Taylor with knowledge of section 565.006.2. Taylor’s signature on the plea document would render it a permanent record of what he “knew” when he entered his plea. Either way, at least with respect to the effectiveness of his counsel and validity of his plea, Taylor’s sentence would have been resolved without twenty-plus years of litigation, safeguarding his constitutional rights while providing resolution to his victim’s family.

CONCLUSION

To the extent that *Padilla* signals the Court’s willingness to more vigorously enforce criminal defendants’ Sixth Amendment right to effective assistance of counsel, it represents a hopeful step towards meaningful constitutional protections in the plea process under which the vast majority of defendants in our criminal justice system are convicted. The opinion itself supports this hope. While it is currently uncertain how broadly its holding will be applied, recent decisions by state and federal courts across the country indicate we are just beginning to see the impact of *Padilla* on the plea process.

In Missouri, a persuasive case has been made for applying *Padilla* to sentencing consequences generally based in part on the similar characteristics such consequences share with deportation. The case of Michael Anthony Taylor offers further support for applying *Padilla* to sentencing consequences in Missouri and is particularly compelling with respect to such application in capital cases. Following the rationale of *Padilla* and *Webb*, the failure of Taylor’s attorneys to inform him of the truly clear consequences of his guilty plea should have amounted to ineffective assistance of counsel. It is reasonably probable Taylor suffered sufficient prejudice as a result of his attorneys’ deficient counsel to satisfy the *Strickland* standard. However, the deficiencies in Taylor’s representation that make it illustrative of the need to apply *Padilla* also illustrate the dilemma such application would pose for an already fragile public defender system.

This necessary application of constitutional protections faces a potentially insurmountable hurdle given the state of the public defender system in Missouri and across the nation. The system in its current form may simply be incapable of accommodating the added burden. However, this burden could be mitigated by reforming the plea process to accord a consumer protection model and to share the burden among state trial courts, sentencing commissions, and defense attorneys. The adoption of a unified reform effort, while not perfect, should enable the criminal justice system to better protect defendants’ constitutional rights, conserve judicial resources, and provide swifter

resolution to victims' families. In the case of Michael Anthony Taylor it would have accomplished all three tasks.

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