RIGHT TO BE COUNSELED: THE EFFECT OF COLLATERAL CONSEQUENCES ON THE *STRICKLAND* STANDARD

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INTRODUCTION

If life, liberty, and the pursuit of happiness are the pinnacle of the American Dream, then the ability to defend oneself from wrongful conviction and incarceration is a vital component to protecting the dream. The Sixth Amendment's promise of the right to counsel in criminal defense is essential to protecting Americans' liberties. But increasingly, the Sixth Amendment is necessary as an instrument of protection from non-incarcerative punishments—the ever-broadening world of collateral consequences.

"Collateral consequence" refers to any of the thousands of rights that can be revoked alongside a criminal conviction[1]—from eligibility for elected office in Alabama[2] to the ability to form a nonprofit cooperative agriculture or livestock association in Wyoming.[3] Specific defendants can face varied levels of punishment based on the charges they face—an immigrant may face jail time followed by automatic deportation while a citizen faces only jail time for the same crime.[4] The essential definition of collateral versus direct consequences stems from the source of the punishment—whether civil or penal enforcement.[5]

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1 A recent survey, the National Inventory of Collateral Consequences of Conviction, estimates nearly fifty thousand statutory collateral consequences throughout the United States' federal and state systems. *See Search*, JUST. CTR., https://niccc.csgjusticecenter.org/search/ (last visited Dec. 31, 2017) (indicating that the project has compiled 48,229 collateral state and federal law collateral consequences in its database); *see also Project Description*, JUST. CTR., https://niccc.csgjusticecenter.org/description/ (last visited Dec. 31, 2017) (describing the National Inventory of Collateral Consequences of Conviction).

2 ALA. CODE § 17-17-41 (West 2017) (declaring a candidate ineligible following a conviction of bribery or wrongfully attempting to influence a voter).

3 WYO. STAT. ANN. § 17-10-103 (West 2017).

4 8 C.F.R. § 214.1(g) (2017).

5 Collateral consequences take effect through civil enforcement, not as a direct criminal punishment. Deportation, therefore, is a collateral consequence. *See* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15–16 (Mark Mauer & Meda Chesney-Lind eds., 2002) [hereinafter INVISIBLE PUNISHMENT] (identifying collateral consequences as a

Following the Supreme Court's recognition that the Sixth Amendment includes the right to *effective* counsel in *Strickland v. Washington*,[6] the Court has produced a long line of opinions defining the constitutional standard for adequate representations for criminal defendants.[7] In producing these opinions, the Court seems to have acknowledged a pragmatic—and perhaps moralist—reality that the requirements of effective counsel are directly proportional to the extent of the crime's punishment. While the Court has in-depth discussion regarding the requirements of counsel for death penalty defendants, it has largely left counsel for misdemeanants without any effective standards.

With the proliferation of collateral consequences, the effective level of harm from a misdemeanor conviction can steeply rise based on the defendant's circumstances. By factoring in these collateral harms, the *Strickland* requirement of effective counsel demands a higher level of interaction between client and attorney. While the Court has not articulated tangible standards for effective counsel in light of collateral punishment mechanisms, the implications of collateral consequences likely necessitate that—at a minimum—effective attorneys communicate with their clients about both the possible collateral harms of a guilty plea and the client's concerns regarding non-incarcerative punishments.

I. THE SLIDING SCALE OF THE *STRICKLAND* STANDARD

The origins of the right to counsel demonstrate the effect of the level of crime on the required amount of representation by a defense attorney. The earliest recognition of a right to a defense attorney came from the most dire circumstances—stranded, illiterate black men sentenced for group rape in a racially-charged and mob-threatened courtroom within only days of indictment.[8] Slowly the recognition of the right to counsel spread outward from there, beginning with felonies before protecting misdemeanants. As it stands, all criminal defendants within the United States that face incarceration for a criminal offense have a right to counsel, regardless of the level of crime.[9]

The right to counsel, of course, means more than just having a licensed attorney stand by the defendant when physically in court. The Supreme Court recognized a *functional* requirement of the Sixth Amendment in *Strick-*

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type of "punishment" even though they are defined as "civil" rather than criminal).

6 466 U.S. 668, 687 (1984).

7 *See infra* Part II.A.

8 Powell v. Alabama, 287 U.S. 45, 51 (1932).

9 Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding that the Sixth Amendment's guarantee of counsel applies to state as well as federal proceedings).

land v. Washington, holding that the Sixth Amendment demands that all criminal defendants have "reasonably effective assistance" from their attorneys.[10] *Gideon*'s and *Strickland*'s progeny establish the requirements of reasonable counsel as a sort of sliding scale—with more severe punishments meriting more significant time and effort from criminal defense attorneys.[11]

A review of the origins of the right to counsel and the different encompassed duties provides a useful context for why the right to effective counsel is directly related to the level of criminality. The Supreme Court's reliance on professional norms and on pragmatic impacts of a reasonableness standard further cement the real-world application of the *Strickland* sliding scale. Furthermore, this model suggests that consideration of collateral consequences may blur or abolish the distinction between required services for misdemeanor and felony defenses.

A. The Origins of the Right to Counsel

The right to counsel was, itself, born out of the Court's dealings with capital crimes and death penalty cases. In *Powell v. Alabama*, the Court recognized that the deplorable conditions under which the "Scottsboro boys" faced trial constituted a violation of the Sixth Amendment.[12] The Scottsboro boys were nine young black men charged with rape of two white women, while traveling through Scottsboro, Alabama.[13] The *Powell* Court ruled narrowly in light of the egregious circumstances and partially applied the right to counsel to state courts when the courts sees something as exceptional as a "dumb, illiterate, and feeble-minded" defendant, sentenced to death, that cannot afford counsel.[14]

The Court followed this line of protection in *Betts v. Brady* in 1942, which affirmed that state courts must appoint counsel for indigent defendants, but only when the defendant is "incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like."[15] Again, the Court limited its opinion to the most offensive of circumstances—facing a capital sentence without the protection of counsel. Although the Court would later expand the protections of *Powell* and *Betts* to the point of near-

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10 466 U.S. at 687.

11 *See infra* notes 12–16.

12 *Powell*, 287 U.S. at 59.

13 *Id.* at 51; *id.* at 74 (Butler, J., dissenting) ("[N]ine defendants . . . were accused . . . .").

14 *Id.* at 72. The Court did not wholly incorporate the Sixth Amendment to state courts for decades to come. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (guaranteeing the right to trial in state courts for non-petty crimes); Parker v. Gladden, 385 U.S. 363, 364 (1966) (noting that the "Sixth Amendment [is] made applicable to the States through the Due Process Clause of the Fourteenth Amendment").

15 Betts v. Brady, 316 U.S. 455, 463–64 (1942).

redundancy, the origins of the nationwide right to counsel nonetheless demonstrate the Court's high premium on protections of counsel when a defendant faces a more exacting punishment for the crime.[16]

The right to counsel truly came of age with *Gideon v. Wainwright*, when the Court affirmed the Sixth Amendment's reach into both state and federal court systems and expanded the right to counsel to noncapital crimes.[17] In *Gideon*, the Court rejected its previous standard from *Betts* and read the Sixth Amendment to protect the right to counsel for all criminal defendants, regardless of severity of the crime or the defendant's level of education.[18] In the unanimous opinion of the Court, Justice Black wrote that "certain fundamental rights" from the Bill of Rights apply equally to state and federal protections through the Fourteenth Amendment, "among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."[19] Justice Black's opinion managed to make no reference to any distinction between felonies, misdemeanors, or capital crimes in its holding.[20] As a result, the right to counsel outlined in *Gideon* expanded from *Powell* and *Betts* by including protection in all criminal proceedings, regardless of the level of punishment or whether charged in a federal or state court.[21]

B. Effective Counsel—Strickland *and the Modern Sixth Amendment*

The *Gideon* Court declined to answer whether the Sixth Amendment protects only the formalist right of a defendant to have an attorney's nominal availability or if there was a meaningful standard to what representation had to entail for someone facing criminal conviction. In *Strickland*, the Court decided on the latter standard, holding that the Sixth Amendment provided for

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16 *Cf. Duncan*, 391 U.S. at 159–60 (holding that the right to trial by jury in a state court applies to all non-petty crimes but refusing to mandate the protection for lesser crimes).

17 Gideon v. Wainwright, 372 U.S. 335, 342 (1963). The right to counsel for criminal defendants already existed in the federal court system for decades. *Johnston v. Zerbst*, 304 U.S. 458 (1938), recognized this protection only six years after *Powell* and four years before *Betts*. *See id.* at 463 ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." (footnote omitted)).

18 *See Gideon*, 372 U.S. at 342–44 (rejecting the logic of *Betts* in favor of broader Sixth Amendment protection).

19 *Id.* at 343 (quoting Grosjean v. Am. Press Co., 297 U.S. 233, 243–44 (1936)).

20 Black's only mentions of "felony" or "misdemeanor" come from his summary of the case's facts and reference to *Betts*. *See id.* at 336–37, 339. The opinion does not mention "capital crimes," and that term is used only once in Justice Clark's opinion concurring in the result, referring to *Betts*. *See id.* at 348 (Clark, J., concurring in the result). None of these terms are mentioned in Black's reasoning.

21 *See* Argersinger v. Hamlin, 407 U.S. 25, 32 (1972) ("Both *Powell* and *Gideon* involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty. *Powell* and *Gideon* suggest that there are certain fundamental rights applicable to all such criminal prosecutions . . . .").

more than just an attorney's presence, but also some degree of *effective* representation—asking "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[22] To make a successful *Strickland* claim, therefore, a convicted claimant must show both (1) unreasonably ineffective representation by counsel and (2) that counsel's incompetency prejudiced the court against the claimant.[23] While recognizing that the Sixth Amendment guarantees meaningful representation, Justice O'Connor's opinion left the true standard of the right to effective counsel vague, continuing the Fifth Circuit's reliance on "reasonably effective assistance" under the "totality of the circumstances."[24] Despite her reference to attorney performance balanced against "prevailing professional norms,"[25] the *Strickland* Court continued to give large amounts of deference to attorneys' decisions, including those of failing to investigate significant information, as within their strategic discretion.[26]

C. "Reasonably Effective Assistance"—Strickland*'s Sliding Scale*

The modern implications of *Strickland*, as they apply to non-felony representation, rely on a substantial amount of speculation without definitive guidance by the Supreme Court. Without reservation, the Court has confirmed that the right to effective counsel and the logic of *Strickland* apply to any criminal defense case where there is a risk of criminal incarceration: "Both *Powell* and *Gideon* involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty."[27] In unambiguous language in *Argersinger*, Justice Douglas described access to effective counsel as a constitutional prerequisite before incarceration: "[N]o imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel."[28]

The Court's determination that the right to counsel applies to all incarcerative charges is grounded in pragmatic concerns—that an individual can lose his or her liberty as a result of the complications of the legal system—rather than formalism regarding the conviction. For example, in *Alabama v. Shelton*, the Court affirmed the Alabama court's determination that the right to counsel applies even in the case of suspended sentencing, when the incarceration is "not immediate or inevitable."[29]

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22 Strickland v. Washington, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to the effective assistance of counsel." (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970))).

23 *Id.* at 687.

24 *Id.* at 680 (quoting Washington v. Strickland, 693 F.2d 1243, 1250 (5th Cir. 1982)).

25 *Id.* at 688.

26 *Id.* at 691.

27 Argersinger v. Hamlin, 407 U.S. 25, 32 (1972).

28 *Id.* at 40.

29 Alabama v. Shelton, 535 U.S. 654, 659, 674 (2002).

The Court's continued reliance on pragmatic concerns, a reasonableness standard, prevailing professional norms, and totality of circumstances in the *Strickland* analysis suggests that *Strickland*'s standards vary based on the possible extent of punishment for the defendant. Accordingly, a defense attorney must meet the most demanding levels of representation for a client facing capital punishment, but the bar of "reasonably effective counsel" is much lower for minor sentences.[30]

Although the right to counsel attaches to capital, felony, and misdemeanor cases, the Court has taken significantly more opportunities to address the right to effective counsel in capital cases, with fewer cases addressing felonies and almost never speaking to requirements in misdemeanor defense. Based on its history, the Court has implicitly demonstrated that the most significant *Strickland* violations occur in capital crimes, where *Strickland*'s requirements are highest, but the sliding scale of "reasonably effective counsel" creates a lesser bar in lower risk crimes like misdemeanors.

1. *Death Penalty Defense*

The highest threshold for criminal defense attorneys occurs in counsel's representation of clients facing the death penalty. Even before the Court firmly established the right to counsel in *Gideon*, the right to counsel was borne out of *Powell*, a capital case.[31] The *Powell* Court required adequate representation for the Scottsboro boys, which included the attorney's ability to investigate circumstances around the client's arrest and time to prepare an adequate defense.[32] Several other previously mentioned foundational Sixth Amendment cases, including *Strickland*, likewise pushed forward the protections from inadequate or nonexistent defense representation in death penalty cases.[33]

The Court upheld the need to perform some threshold of investigation for death penalty defendants with *Wiggins v. Smith*[34] and *Rompilla v. Beard*.[35] In *Wiggins*, the Court restated its reasonableness standard to the requirements of investigation,[36] and it relied on specified professional requirements of effective

30 While the Court has never expressly accepted that *Strickland*'s reasonableness standard is actually a variable formula, a combination of reliance on variable professional norms, pragmatic concessions, and trends in the Court's analysis demonstrate a real-world application of a variable formula.

31 Powell v. Alabama, 287 U.S. 45, 50, 73 (1932).

32 *Id.* at 58.

33 Strickland v. Washington, 466 U.S. 668, 673 (1984) (recounting defense counsel's arguments at death penalty sentencing hearing); *see also, e.g.*, *Argersinger*, 407 U.S. at 40; Duncan v. Louisiana, 391 U.S. 145, 159–60 (1968).

34 Wiggins v. Smith, 539 U.S. 510, 521 (2003).

35 Rompilla v. Beard, 545 U.S. 374, 383 (2005).

36 *Wiggins*, 539 U.S. at 521 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (quoting *Strickland*, 466 U.S. at 690–91)).

representation in capital defense cases.[37] Therefore, capital defense investigation requires, as a constitutional minimum, investigation into mitigation factors in the defendant's past, including "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences."[38]

Likewise, in *Rompilla*, the Court reiterated the high bar of investigation required for capital defense. A jury convicted Rompilla of a violent murder, in which the victim was "stabbed repeatedly and set on fire."[39] The attorney in *Rompilla* "failed to investigate 'pretty obvious signs'" of childhood trauma, mental illness, and alcoholism or even to search the publicly available files that the prosecution declared they would rely on.[40] *Rompilla* expanded *Wiggins*'s holding, requiring tangible efforts by criminal defense attorneys to investigate the defendant's past and criminal record when defending the justice system's most punitive cases.[41]

By recognizing these finite standards, the Court defined specific needs for death penalty defense attorneys to meet in any capital defense case, including sentencing hearings. While the Court rarely proclaims tangible requirements of effective counsel, *Wiggins* and *Rompilla* offer examples of a Court facing the possibility of underrepresentation in death penalty sentencing. Given the high stakes and high levels of punishment, the Court therefore was less reluctant to demand attorney actions than to allow condemning findings to stand. By recognizing these tangible requirements, the Court also implicitly noted that the right to counsel demands the highest levels of representation in capital defense cases.

2. *Felony Defense*

The right to effective counsel, of course, extends beyond death penalty sentencing. *Gideon* itself was a felony case.[42] However, the Court has not opted to put the same hard lines onto felony defense that *Rompilla* and *Wiggins* evinced,

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37 *Id.* at 524 (citing GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 11.4.1(C) (AM. BAR ASS'N 1989)).

38 *Id.* (emphasis omitted) (citing GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 11.8.6 (AM. BAR ASS'N 1989)).

39 *Rompilla*, 545 U.S. at 377.

40 *Id.* at 379.

41 *Id.* at 390. Although *Rompilla* still represents good law, it holds a peculiar position as one of the closest cases in the Court's history—Justice O'Connor wrote the opinion in *Rompilla*, and within one year she had resigned from the Court and been replaced by Justice Alito, the writer of the Third Circuit opinion that *Rompilla* overturned. *See* Rompilla v. Horn, 355 F.3d 233, 235 (3d Cir. 2004); David Stout, *Alito Resists Making Comparisons to O'Connor*, N.Y. TIMES (Jan. 12, 2006), http://www.nytimes.com/2006/01/12/politics/politicsspecial1/alito-resists-making-comparisons-to-oconnor.html.

42 Gideon v. Wainwright, 372 U.S. 335, 336–37 (1963).

suggesting that the "reasonably effective" advocacy is a lower standard when the death sentence is not on the line. Interestingly, the Supreme Court's felony cases require forms of representation that extend beyond mere advocacy in trial.[43]

While the "objective standard of reasonableness" still applies in felony defense cases,[44] the Court has not held the same level of requirement as in capital defense cases. Instead, the Court has deferred to the prevailing norms of the legal profession, as measured by professional organizations like the American Bar Association.[45]

Appellate courts have proliferated some finite requirements of the duty to investigate in non-capital felony cases. The Fourth Circuit, in *United States v. Mooney*, held that there was a Sixth Amendment violation when an attorney failed to investigate a viable affirmative defense to the client's felony charge of unlawful possession of a firearm.[46] The Ninth Circuit ruled in favor of the convicted felon when his attorney advised him to reject a plea deal for five years' incarceration[47]—advice which the court called "not only erroneous, but egregious," by failing to recognize that the defendant was subject to the "three strikes law" and therefore eligible for a life sentence.[48]

The courts' rulings in felony defense cases demonstrate continuing protections as a part of the reasonable performance of attorneys in felony defense cases, as proportional to the level of punishment sought by the prosecution. The reality that the Court does not go to the same efforts to protect alleged felons from ineffective representation as in capital defense cases shows that the Court is less willing to consider the obligations of felony defense as a high constitutional threshold.

3. *Misdemeanor Defense*

While the right to counsel does extend to misdemeanor charges, there is little definitive case law to define the scope of the Sixth Amendment's substantive requirements. This continues the Court's trend of being less willing to intervene when it sees the "reasonableness" threshold to be lower as a result of the lower associated punishments from conviction. Furthermore, by nature of the minor incarcerative results of misdemeanor charges, the Supreme Court has had only very brief opportunities to address adequacy of counsel for misdemeanants.

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43 *See infra* Part I.D for more on the right to counsel in peripheral criminal defense processes.

44 Padilla v. Kentucky, 559 U.S. 356, 366 (2010).

45 *See id*. at 366–67 (citing to the ABA, National Legal Aid and Defender Association, the Department of Justice's Compendium of Standards for Indigent Defense Systems, and other determinants of professional norms); *see also infra* Part I.E.

46 United States v. Mooney, 497 F.3d 397, 404, 409 (4th Cir. 2007).

47 Riggs v. Fairman, 399 F.3d 1179, 1183–84 (9th Cir.), *reh'g en banc granted*, 430 F.3d 1222 (9th Cir. 2005), *appeal dismissed on other grounds*, No. 02-55185, 2006 WL 6903784 (9th Cir. 2006).

48 *Id*. at 1183.

However, *Gideon* definitively still applies to misdemeanor sentences,[49] and cases challenging the effectiveness of counsel for misdemeanors still receive the *Strickland* two-prong analysis.[50] Therefore, while some degree of protection still exists under the right to effective counsel, the boundaries lack any tangible specific guidance relative to those that risk more severe punishment.

The Court has only addressed effective counsel claims for misdemeanor charges on two occasions. In *Argersinger*, the Supreme Court noted that the right to counsel applies to any criminal case that involves a defendant facing incarceration, even if for a misdemeanor.[51] In *Shelton*, the Court confirmed that *Argersinger* attaches the right to counsel to all cases involving criminal detention, even if that detention is conditional or prospective.[52]

Without any specification that would limit *Strickland* to cases decided on felony counts, it appears that the same duties of reasonable counsel extend to misdemeanor cases as well. What is unclear, however, is the extent of the obligation. For example, the Fourth Circuit in *Mooney* upheld a duty to investigate an affirmative defense to a felony charge of a previously convicted felon possessing a firearm.[53] There, the court held that Mooney's attorney had a duty to investigate the justification that Mooney had seized the firearm from his ex-wife as she was attacking him with it only for him to surrender it to the police.[54] While the duty to investigate affirmative defenses reached that far in the case of a felony charge, there is likely a duty to investigate to only a lesser extent for a simple misdemeanor charge. Prevailing professional norms, of course, are key in determining how much time, effort, and persistence a defense attorney would need to expend in searching for potential defenses—a threshold affirming that misdemeanors have lower reasonableness requirements for defense attorneys.[55]

D. Effective Counsel Outside the Courtroom

In two of the Court's landmark cases, the Court expanded the right to counsel beyond simply investigation and courtroom advocacy. In *Padilla v. Kentucky* and *Missouri v. Frye*, the majorities recognized the pragmatic needs of

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49 Argersinger v. Hamlin, 407 U.S. 25, 32 (1972) (noting that the decision in *Gideon* suggests certain fundamental rights apply to all criminal prosecutions "where an accused is deprived of his liberty").

50 *See* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 314 n.157 (2011) (listing federal circuit and district court applications of the *Strickland* test to misdemeanor charges).

51 *Argersinger*, 407 U.S. at 32, 37.

52 Alabama v. Shelton, 535 U.S. 654, 662 (2002).

53 United States v. Mooney, 497 F.3d 397, 404 (4th Cir. 2007).

54 *Id.* at 399, 404.

55 As discussed in Part I.E, professional guidance suggests that investigation into misdemeanors does not have to be as searching as in felony cases.

reasonably effective counsel require attorneys to provide some outside advisory and consulting duties in key steps in the criminal defense process.[56]

When a collateral consequence is so severe as to blur the lines between collateral and direct punishment, counsel has an obligation to advise his client about the potential or mandatory results of a guilty plea. One of the most important modern cases in Sixth Amendment jurisprudence is *Padilla*, in which the Court found inadequate representation when the attorney failed to warn his client that a conviction would necessarily mean deportation.[57] Although the Court refused to determine whether the deportation was a direct or a collateral consequence of conviction,[58] the formal distinction between the two suggests that it would apply as a collateral consequence.[59] Regardless, Justice Stevens, writing for the majority, eventually concluded that the punishment of automatic deportation was so significant that a reasonable attorney would have to advise his client of the mandatory outcome of a guilty plea.[60] Anything less than clear advice, in the case of an explicit and clear mandate for deportation, is a "deficiency" in counsel of *Strickland* proportions.[61] The Court, therefore, requires counsel to advise their clients on severe collateral legal consequences of a guilty plea.[62]

When some aspect of the litigation process, inside or outside the courtroom, is essential to the judicial system, the Sixth Amendment requires counsel to communicate about it with his client. In *Frye*, the Court continued to hold that an accused felon's right to counsel can apply to essential litigation steps outside the courtroom.[63] Frye's attorney failed to respond to plea deals or pass the offers on to the defendant before they expired.[64] Upon eventual appeal, Frye successfully argued that a failure to pass the plea bargains on prejudiced the entire process and constituted a violation of his Sixth Amendment rights.[65] The Court agreed that an attorney has a duty to pass plea offers on to his client as a natural function of the plea bargain's "central" role in the administration of justice.[66]

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56 Missouri v. Frye, 566 U.S. 134, 143 (2012); Padilla v. Kentucky, 559 U.S. 356, 366 (2010).

57 *Padilla*, 559 U.S. at 359, 374.

58 *Id*. at 366.

59 Collateral consequences take effect through civil enforcement, not as a direct criminal punishment. *See* INVISIBLE PUNISHMENT, *supra* note 5.

60 *Padilla*, 559 U.S. at 368–69.

61 *Id.* at 369.

62 Because the Court refused to recognize *Padilla* as a retroactive right, there have been very few opportunities to apply it to habeas proceedings in federal court in the few years since *Padilla* was handed down. *See* Chaidez v. United States, 133 S. Ct. 1103, 1107 (2013) (holding *Padilla* is a non-retroactive rule). However, the potential exploration under *Padilla* is likely to fill in several of the gaps left in how to effectuate the precedent..

63 *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) (stating that the Sixth Amendment applies to the plea bargain process).

64 *Id*. at 138–39.

65 *Id*. at 139–40.

66 *Id*. at 143.

Per the Court's dual precedents of *Padilla* and *Frye*, effective counsel is not limited to activity inside the courtroom or to a duty to investigate. Instead, defense representation must provide effective counsel at all central steps of the criminal defense process, including learning about and understanding the possible implications of some collateral consequences that a guilty verdict or plea could trigger.

E. Role of ABA Guidance

Most compellingly demonstrating the Court's application of a sliding scale is the Court's reliance on professional standards, which show different expectations for attorney action based on the severity of the charge. In her article examining *Strickland*'s standards for misdemeanants, Professor Jenny Roberts discusses the expectations for counsel's level of care in criminal defense:

> In the wake of the Supreme Court's emphatic reliance on professional standards in recent ineffective assistance jurisprudence, an institutional defender office or an attorney new to criminal practice might reasonably turn to published professional standards for guidance on representation in misdemeanor cases. That attorney will find different defender caseload recommendations for felonies and misdemeanors. That attorney may also find different levels of compensation for felony and misdemeanor representation in her jurisdiction, which suggests different expectations for felony and misdemeanor representation.[67]

For example, the American Bar Association has adopted the guidelines of the National Advisory Commission ("NAC") on Criminal Justice Standards and Goals for attorney caseload maximums.[68] The NAC standards recommend no more than 150 felony defense cases per attorney per year, but concedes a higher total of 400 as a cap for misdemeanor defense cases.[69] Professor Roberts also indicates the heightened pay grade for felony defense attorneys than their misdemeanor counterparts,[70] while felony and capital defense attorneys typically also have a higher degree of expertise as well.[71]

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67 Roberts, *supra* note 50, at 326–27 (footnotes omitted).

68 *See* TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 4 n.2, 5 n.19 (AM. BAR ASS'N 2002) [hereinafter ABA TEN PRINCIPLES] (indicating conformance with NAC Standard 13.12, including a maximum attorney caseload recommendation of 150 felonies per year or 400 misdemeanors per year).

69 *Id.* at 5 n.19.

70 Roberts, *supra* note 50, at 326–27, 327 n.214.

71 *See id.* at 363 (noting that the ABA's *Ten Principles* imply "that there are certain classes of cases that require a certain level of experience and expertise," such as "cases that carry significant potential prison—or death—sentences"). Generally, public defenders start on misdemeanor cases before working their way up to felony defense and then possibly to capital defense. *See id.* at 303, 305, 364 (remarking that "new attorneys" often begin their practice with misdemeanor cases); *see also id.* at 326–27 (explaining that a new attorney might "reasonably turn to published professional standards for guidance" and that when she does, she will find different recommendations based on the level of offense).

The Court widely cites the ABA and other professional organizations as useful guides to determine prevailing professional norms.[72] However, the Court has fluctuated on the extent of its reliance on the ABA as a promulgator of professional norms—ranging from using ABA guidelines as the "standards for capital defense work"[73] to "guides . . . [but] they are only guides."[74] Exactly how definitive ABA guidelines are remains unclear, since full deference to the ABA would allow the organization the ability to define constitutional norms without oversight.[75] Nonetheless, the Court continues to reference them as an essential benchmark in how reasonably attorneys must act.

Professor Roberts cites to the Court's reliance on the ABA's and other professional organizations' guidelines as evidence that attorneys' duties in service of criminal defendants must rise and fall proportionately to the level of punishment for the accused crime.[76] Her interpretation of the Court's sliding scale accords with the model examined above—higher punishment crimes require more care, effort, and counsel from defense attorneys.

Most consequentially, the Court itself referenced the amount of harm as applicable to *Strickland*'s requirement of reasonable assistance of counsel. In demurring from defining a clear rule of whether direct or indirect punishments can influence the requirements of *Strickland*, the *Padilla* Court noted that the extent of punishment is vital to "define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."[77] By accepting the extent of punishment as a definitive factor in the requirements of the right to counsel, the Court implicitly adopted Professor Roberts' analysis, and by extension the analysis above, to adopt *Strickland* as an adaptive requirement.

II. CLIENT-SPECIFICITY—EVALUATING THE IMPACT OF COLLATERAL CONSEQUENCES

"When the deprivation of property rights and interests is *of sufficient consequence*, denying the assistance of counsel . . . is a denial of due process."[78] Justice Powell, in his concurrence in *Argersinger*, noted the interplay between

72 *See* Padilla v. Kentucky, 559 U.S. 356, 367 (2010) (citing the National Legal Aid and Defender Association, Department of Justice, and journal and treatise guidelines for effective aid).

73 Wiggins v. Smith, 539 U.S. 510, 524 (2003).

74 Strickland v. Washington, 466 U.S. 668, 688 (1984).

75 *See id*. at 688–89 (stating that a "particular set of detailed rules for counsel's conduct . . . would interfere with the constitutionally protected independence of counsel").

76 *See* Roberts, *supra* note 50, at 326–27 (observing that there are "different expectations for felony and misdemeanor representation" under current professional guidelines); *supra* text accompanying note 67 (stating the same); *see also* ABA TEN PRINCIPLES, *supra* note 68, at 5 n.19 (noting that an attorney may take on at the most 400 misdemeanors and 150 felonies per year).

77 *Padilla*, 559 U.S. at 365 (quoting *Strickland*, 466 U.S. at 689).

78 Argersinger v. Hamlin, 407 U.S. 25, 48 (1972) (Powell, J., concurring in the result) (emphasis added) (footnote omitted).

collateral consequences and the variable requirements of *Strickland*.[79] Greater punitive harms, whether direct or collateral, require greater obligations of defense counsel.

The right to effective counsel should mandate that defense attorneys discuss the possible implications of collateral consequences with their clients. This requirement stems from *Padilla*'s required consideration of *all* punitive harms, not merely incarcerative ones,[80] as well as *Frye*'s rule that the Sixth Amendment covers vital stages of defense even outside the courtroom.[81] While the exact extent of the right to effective counsel may vary along with the amount of punishment, a defense attorney must assess (1) the applicability of the collateral consequences to the client and (2) the client's comparative interests in avoiding incarcerative or non-incarcerative punishments. Only after this conversation can an attorney assess the level of punishment and provide the appropriate *Strickland* level effective assistance.

To demonstrate this conclusion, we must first recognize that, in terms of *Strickland*'s sliding scale, misdemeanors with significant collateral harms merit more in-depth care than previous analysis has suggested. *Padilla* states that the consideration of additional, collateral harms affects the total harm of a conviction and therefore increases the amount of care a reasonably effective attorney would provide.[82] But, buried in *Padilla*, there is a second step: some implicit analysis of the nature of the collateral consequence—whether punitive or pragmatic—that may prove a useful distinction for courts in determining *Padilla*'s effect on *Strickland*.[83] Following the second step, effective counsel must, at the very least, discuss and be prepared to weigh the effects of punitive collateral consequences as they apply to the client, whether on felony or misdemeanor charges.

A. Which Consequences Should Attorneys Consider?

One of the many monumental pillars created by *Padilla* is the majority's discussion of collateral consequences. Justice Stevens's majority addressed automatic deportation, though not a criminal punishment in the historic Sixth Amendment context of incarceration, as "uniquely difficult to classify as either a direct or a collateral consequence."[84] Although the Court did not ultimately address the larger world of collateral consequences, the ruling did

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79 *Id.*; *see also id.* at n.11 (listing several collateral consequences as included in "property rights and interests").

80 *See infra* Part II.A.1.

81 *See supra* Part I.D.

82 *Padilla*, 559 U.S. at 364–65, 373.

83 *See id.* at 365–66 (explaining that though deportation proceedings are civil, deportation is a penalty closely tied to criminal conviction).

84 *Id.* at 360, 366.

establish that punitive actions are an integral part of *Strickland*'s effective counsel analysis.[85] Justice Alito, in concurrence, suggested similar consequences that would merit additional scrutiny under the *Padilla* standard, albeit while rejecting large portions of Stevens' opinion.[86] Among these comparable collateral consequences, Justice Alito included "civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses."[87] In doing so, Justice Alito recognized the implications of *Padilla*, if unchecked, could reach further than merely the narrowest reading in deportation cases. However, Justice Alito's concurrence also raised a significant question in collateral consequence defense: Which collateral consequences should *Strickland* factor in?

1. *Punitive Versus Pragmatic Collateral Consequences*

Padilla recognized deportation as something a defense attorney must discuss with the defendant because of deportation's punitive nature.[88] Justice Stevens, in writing the opinion, explicitly refused to state whether direct and collateral forms of punishment merit equal consideration in the *Strickland* analysis.[89] However, he nonetheless included deportation as a relevant harm to the defendant because the American legal system has "long recognized that deportation is a particularly severe 'penalty.'"[90] The Court adopted deportation harms as relevant to reasonable assistance of counsel because, although "it is not, in a strict sense, a criminal sanction," convicted noncitizens see deportation as a punitive outcome.[91] In subsequently discussing this divide, the Court has stated that "the severity of the penalty and the 'automatic' way it follows from conviction" are the relevant factors to whether the consequences merit *Strickland* scrutiny.[92]

The Court therefore relies on a distinction within the broad scope of collateral consequences—those which have punitive outcomes versus those which exist for social protection. Although not always a clear line, many

85 *Id.* at 365–66, 369. Stevens suggests that a punitive intent, rather than mere pragmatic concerns, may be a distinctive consideration for when a collateral consequence is relevant to a *Strickland* analysis. *Id.* at 365–66 (explaining that deportation merits special scrutiny "because of its close connection to the criminal process").

86 *Id.* at 375–77 (Alito, J., concurring in the judgment).

87 *Id.* at 376.

88 *Id.* at 365, 374 (majority opinion) (discussing deportation as "a particularly severe 'penalty'" (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893))).

89 *Id.* at 365.

90 *Id.* at 365–66 (quoting *Fong Yue Ting*, 149 U.S. at 740).

91 *Id.*

92 Chaidez v. United States, 133 S. Ct. 1103, 1111–12 (2013) (quoting *Padilla*, 559 U.S. at 366) (rejecting that *Padilla* stood for a complete eradication of the "direct-collateral" distinction).

collateral consequences can be seen as promulgated for one of these two purposes, and therefore they apply to a different extent in a *Strickland* analysis.

Deportation, for example, is one of the most obvious examples of a punitive consequence. The goal of instituting automatic or discretionary deportation proceedings for a noncitizen convict is to deter crime.[93] Criminal deportation generally falls into the deterrence theory of punishment because the enhanced punishment would scare potential criminals by sanctioning criminal action to a greater extent.[94] On the other hand, criminal deportation serves little non-retributive purpose in protecting society. Crime rates for noncitizens are significantly lower than those of citizens in the United States.[95] Recidivism rates among noncitizens are lower than recidivism for U.S. citizens, so the threat to social safety by post-incarceration noncitizens is lower than that of citizens.[96] Because of its punitive role, the Court factored deportation, a punitive collateral consequence, into the *Strickland* formula.

Some collateral consequences grow instead from a social protection interest. A typical example is that sex offenders cannot work in public schools based on certain crimes. Alaska has a mandatory ban on certifying teachers with previous sexual offense convictions involving a minor.[97] Similar statutes exist in other jurisdictions, including California[98] and Vermont,[99] with parallels in some federal education programs as well.[100] The purpose of statutes like these is clearly not a punitive one—there is little deterrent potential in prohibiting future employment at a public school relative to the much larger deterrent impacts of criminal sentences. Collateral consequences like these

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93 Anita Ortiz Maddali, Padilla v. Kentucky*: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1, 43 (2011).

94 *Id.*

95 Richard Pérez-Peña, *Contrary to Trump's Claims, Immigrants Are Less Likely to Commit Crimes*, N.Y. TIMES (Jan. 26, 2017), https://www.nytimes.com/2017/01/26/us/trump-illegal-immigrants-crime.html.

96 Peter H. Schuck, *Immigrant Criminals in Overcrowded Prisons: Rethinking an Anachronistic Policy*, 27 GEO. IMMIGR. L.J. 597, 600 n.12 (2013) (noting a 1995 study showing that recidivism for noncitizens was 17.1% compared to 22.8% for U.S. citizens). However, the effect of deportation on these data is unclear.

97 ALASKA STAT. ANN. § 14.20.020(f) (West 2017) ("The department may not issue a teacher certificate to a person who has been convicted of a crime . . . involving a minor under [sexual offense statutes] . . . .").

98 If an employment applicant for a child-care position has a previous guilty or nolo contendere plea or conviction for a violent crime or sexual offense, the California state government must deny their application. While many crimes have some waiver potential, this waiver is prohibited for sexual offenses. CAL. CODE REGS. tit. 22, § 101170(k)(1) (2017), WL 22 CCR § 101170(m) (citing CAL. HEALTH & SAFETY CODE § 1596.871(b) (West 2017)) (prohibiting waiver for sexual offense convictions).

99 VT. STAT. ANN. tit. 16, § 255(i) (West 2017) ("A person convicted of a sex offense that requires registration . . . shall not be eligible for employment [in public or independent schools].").

100 29 U.S.C. § 3195(b)(3) (2012) (barring any applicant for the Job Corps (a federal vocational training program) from approval if the mandatory background check shows a conviction for "child abuse, or a crime involving rape or sexual assault").

fall into the bucket of utilitarian or social protection punishments—pragmatic punishments that potentially or automatically preclude convicted criminals from high risk activities. Other similar collateral consequences include bans on elected office from people previously convicted of bribery or crimes of moral turpitude[101] or abridging firearm ownership rights for people convicted of violent felonies.[102]

Collateral consequences of this pragmatic or social welfare nature may not fit into the *Strickland* scale because of *Padilla*'s inclusion of collateral consequences posed as a penalty. Justice Stevens' opinion hinted that non-punitive collateral consequences are not factors in determining the required extent of *reasonably effective counsel*.[103] Furthermore, Justice Alito's concurrence listed pragmatic collateral consequences as an example of the *Padilla* majority's logic *ad absurdum*.[104]

The harder questions arise when a collateral consequence doesn't easily fit into either category—that of wholly punitive or wholly pragmatic. An example might be the loss of access to welfare based on a criminal record,[105] which serves the dual purposes of further penalizing criminal conduct while also trying to cut down on the risk that public funds could be used inappropriately. In addressing these questions, the Sixth Amendment would then require consideration only of the extent of a consequence's punitive aspects. On the other hand, the non-punitive, social welfare aspects of the collateral consequence wouldn't be pertinent to the *Strickland* analysis of what the Sixth Amendment requires. Either way, to assess the punitive extent of a consequence on a defendant, defense counsel must have a preliminary discussion with her client or risk providing inadequate assistance in violation of the defendant's constitutional rights.

2. *Discretionary Versus Mandatory Collateral Consequences*

Padilla expanded the scope of *Strickland* obligations as they pertained to a client facing mandatory deportation. The Court did not, however, discuss the obligations in light of mandatory or discretionary harms. Instead, the discussion of the Court may suggest that *Strickland* considerations would be based on the *amount of risk* of the collateral harm, which would again treat the issue as a spectrum, with mandatory consequences at the 100% level of risk.

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101 *See, e.g.*, ALA. CODE § 17-17-41 (West 2017) (barring a public official, once convicted of meddling in an election, from taking office as a result of that election).

102 *See, e.g.*, *id.* § 13A-11-72(a) (prohibiting persons convicted of crimes of violence from legally obtaining or possessing a firearm).

103 Padilla v. Kentucky, 559 U.S 356, 364–66 (2010).

104 *Id.* at 376–77 (Alito, J., concurring in the judgment).

105 *See, e.g.*, WYO. STAT. ANN. § 42-2-112(n) (West 2017) (denying welfare to individuals who do not comply with statutory requirements).

The Court's subsequent discussion of *Padilla* in *Chaidez* confirms the importance of the mandatory-discretionary distinction as a factor of consideration in the *Strickland* framework.

The closest Supreme Court discussion in *Padilla* to address mandatory versus discretionary punishments comes in Justice Stevens' discussion about the risks of the attorney misreading the law on mandatory enforcement:

> There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.[106]

In this excerpt, Justice Stevens discusses the risk that the law requires deportation, in light of an individual attorney being unable to predict legal outcomes with precise foresight.[107] Nonetheless, the text also describes the same balance of risk and harm that discretionary collateral consequences carry. In this alternate reading, "consequences" are still "unclear or uncertain"—not because the "law can be complex" but because discretionary outcomes cannot be predicted.[108] When there is a risk of a punitive consequence, Stevens notes, there is an obligation to disclose the risk.[109] And when there is a risk, the "possibility of [punishment] . . . will affect the scope and nature of counsel's advice."[110]

However, the Court later reexamined the extent of *Padilla* in *Chaidez*, a case that noted that the "automatic" nature of the deportation in *Padilla* was a necessary component in the Court's determination.[111]

Given *Padilla*'s discussion of risk and *Chaidez*'s discussion of the automatic nature of deportation, the Court's dividing line likely still accords with a model based on likely punitive harms, rather than a strict adherence to the mandatory-discretionary boundary.

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106 *Padilla*, 559 U.S. at 369 (majority opinion) (footnote omitted).

107 *Id.* at 369, 369 n.10 (referencing Justice Alito's concurrence and his concern that the majority's opinion would hold all criminal defense attorneys to the standard of specialists in immigration law and policy); *see also id.* at 387–88 (Alito, J., concurring in the judgment) ("[A] criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise.").

108 *Id.* at 369 (majority opinion).

109 *Id.*

110 *Id.* at 369 n.10.

111 Chaidez v. United States, 133 S. Ct. 1103, 1112 (2013) (quoting *Padilla*, 559 U.S. at 366).

B. Client-Specific Impacts and Priorities of Collateral Consequences

Collateral consequences vary significantly between jurisdictions, and can touch on a broad array of aspects of a defendant's life. In Pennsylvania, for example, there are fifty different automatic collateral consequences that are triggered by various misdemeanor convictions, including forfeit of retirement benefits for public employees,[112] loss of jury privileges,[113] juvenile transfer to alternate education programs,[114] ineligibility for public welfare until all terms served,[115] and immediately having to leave public office.[116] Any of these different consequences would affect defendants very differently based on the defendants' personal circumstances.

In analyzing the impact of collateral consequences, the *Strickland* standard requires consideration of the weight or effect of each of these harms on the individual defendant. For example, although the threat of mandatory deportation poses little concern to a natural-born U.S. citizen, the Court recognizes that "[p]reserving the [immigrant] client's right to remain in the United States may be more important to the client than any potential jail sentence."[117]

At this point, it may be more helpful to discuss a hypothetical defendant—George. George is a noncitizen who lives in the United States, working as a taxi cab driver. Although he works hard, George barely can support his family, who also lives in the U.S. with him in public housing. One day, George is arrested and charged with several misdemeanor crimes—domestic abuse against his wife, followed by public intoxication and driving under the influence. The alleged events also contain elements of sexual assault. Asserting his Sixth Amendment right to an attorney, George gets appointed counsel—a local public defender named Rachel from a very busy office. Rachel must vigorously advocate for George's interests, but also she has hundreds, if not thousands, of other cases crossing her desk in any given year. So what obligations does Rachel have to her client, George, under the Sixth Amendment? The *Strickland* scale would be informative, but only once we know the true extent of punishment George faces.

This leads Rachel to two key steps—though they don't need to be performed in any specific order. One, after seeing the charges brought forth by the prosecution, Rachel should look at the related collateral consequences that

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112 43 PA. STAT. AND CONS. STAT. ANN. § 1313(a) (West 2017).

113 42 PA. STAT. AND CONS. STAT. ANN. § 4502(a) (West 2017).

114 24 PA. STAT. AND CONS. STAT. ANN. § 21-2134(a), (d) (West 2017).

115 62 PA. STAT. AND CONS. STAT. ANN. § 432(9) (West 2017).

116 65 PA. STAT. AND CONS. STAT. ANN. § 121 (West 2017).

117 Padilla v. Kentucky, 559 U.S. 356, 368 (2010) (first alteration in original) (quoting Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 322 (2001), *superseded by statute*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302).

can harm her client.[118] Here the charges are misdemeanors, but they potentially include domestic abuse. As Rachel is aware, a noncitizen who pleads guilty to or is convicted of a domestic abuse charge is subject to automatic deportation.[119] For his DUI charge, George could lose his taxi license.[120] For any of these crimes, George could lose his eligibility for public housing.[121]

Other collateral consequences may also apply, based on George's history and specific circumstances. This gives rise to Rachel's other step—to adequately provide for George's representation, Rachel needs to have a discussion with him regarding both the applicability of collateral consequences to his life and his relative concerns between collateral and direct punishments. To be able to adequately advocate for her client, Rachel needs to know what her client most wants to avoid. Anything less would risk subjecting her client to a significant punishment that lies against his interests. Here, George may be willing to plead guilty to the two alcohol-related crimes to avoid the automatic deportation aspects of the domestic violence charge. Depending on his attachment to his job, he may be more willing to risk deportation by going to trial unless he can also plead around the DUI. But all of this is subject to both George's individual history and personal preferences. His attorney needs to know these things to be able to represent his interests.

Further enforcing the need to have this conversation is the logic underlying *Padilla*—that counsel has a responsibility to tell her client about significant punitive collateral risks[122]—and that of *Frye*—that the Sixth Amendment includes non-litigation obligations that are central to the criminal justice system.[123]

Finally, these discussions with George are essential because they allow Rachel to understand exactly how much a reasonable attorney should do to protect her client. If Rachel was unaware of George's backstory,[124] as pertinent to collateral consequences, she might only prioritize her time such that

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118 A single jurisdiction can have immense numbers of collateral consequences for various crimes, some mandatory and some discretionary. Without an independent entity turning these into a single database, the demand on Rachel's time to research this could threaten to drown her. Fortunately, the Department of Justice has already funded the creation of this database under the Council of State Governments' Justice Center. *See Nat'l Inventory Collateral Consequences Conviction*, JUST. CTR., COUNCIL ST. GOV'TS, https://niccc.csgjusticecenter.org (last visited Jan. 10, 2018).

119 8 U.S.C. § 1227(a)(2)(E) (2012).

120 *See, e.g.*, 52 PA. CODE § 30.76(d)(3) (2017), WL 52 Pa. Code § 30.76 (requiring mandatory loss of taxi driver certificate for drunk driving convictions if driving the taxi while under the influence).

121 42 U.S.C. § 13661(c) (2012) (allowing public housing officials discretionary authority to deny admission to convicted people who may threaten the health or safety of other residents).

122 *See supra* Part II.A.1.

123 *See supra* Part I.D.

124 This hypothetical does take advantage of over-simplification, of course. In a real proceeding, even a time-strapped Public Defenders' Office would likely note George's citizenship status and profession in the most preliminary intake procedure. However, these offices may not also include other pertinent information. *See, e.g.*, Office of the Pub. Def., Northampton Cty. Gov't, Public Defender Application 1–2 (2018), https://www.northamptoncounty.org/PUBDEF/Documents/Application%

she represents him with an unconstitutionally low amount of her time. While the loss of taxi driving permission likely wouldn't contribute to the *Strickland* analysis because of its presumably pragmatic basis, the potential loss of public housing access might have some effect on Rachel's obligations. Once she knows that her client faces deportation, certainly, the increased punitive outcome from the proceedings require her to advocate more vigorously along the *Strickland* standard.[125] Based on this information, Rachel can opt how to negotiate a plea bargain or proceed to trial. In a likely outcome, George may have to plead guilty to one or both of the alcohol-related charges, but doing so would allow him to stay in the United States, perhaps after only a fine and rehabilitation requirements.

This hypothetical demonstrates the oversimplification in wholesale reliance on the ABA maximums based on the felony/misdemeanor distinction. Under the minimal interpretation suggested by ABA standards, Rachel could ethically represent four hundred Georges in a year—an average of five hours per client in a two-thousand-hour work year. In those five hours, Rachel must acquaint herself with the client, assess the accusations, perform reasonable background investigations, receive and assess plea deals, and keep the client involved abreast of all vital stages of the litigation. On the other hand, one of Rachel's peers could handle four hundred alleged misdemeanants, all U.S. citizens in private housing and with job security unaffected by criminal records. Each of these defendants would get the same average of five hours of attorney representation, regardless of the applicability of collateral consequences, because they are all misdemeanants in the ABA guidelines.

However, if we hypothesize that all four hundred of Rachel's clients face automatic deportation if she cannot find the time to vigorously defend their rights—adequately learn the facts of their case, realize that the defendants face this form of punitive harm, create a plea-bargaining strategy to avoid mandatory deportation, and leverage this preparation in negotiations with the prosecution—they will each face deportation. As a matter of ethical concern, "reasonable professional assistance" should be a more demanding constitutional baseline when the nature of the harm contains the kind of punitive collateral consequences that *Padilla* addresses.

Based on the Court's evolving discussion on the right to counsel and the impact of collateral consequences, assessing the punitive effect of collateral consequences on the client is a constitutional obligation both for determining the client's needs in the proceedings and for assessing the constitutional floor of adequacy of counsel. These professional obligations derive not only from

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20for%20Public%20Defender.pdf. While a cursory review could take the place of the first step described above, counsel must still have a discussion regarding the risks and priorities that the defendant needs personally.

125 *See supra* note 88 and accompanying text.

an ethical obligation to adequately represent one's clients, but also from the reasonableness requirements of *Strickland* and the more holistic advocacy interpretations of *Padilla* and *Frye*.

III. TANGIBLE REQUIREMENTS OF THE RIGHT TO COUNSEL

Because of the varying effects of collateral consequences on defendants, defense counsel must discuss possibly applicable punitive consequences with the client to ascertain (1) the risks to the client of a conviction or guilty plea and (2) the client's relative concerns in facing incarcerative or non-incarcerative punishments. Only after this conversation can an attorney be sure to provide the client with sufficient representation under the Sixth Amendment's requirements and ensure that she advocates the client's true interests.

A. Relative Importance of Collateral Consequences—A "Reverse" Strickland *Sliding Scale?*

The above requirements may not apply in the most highly punitive cases, since these conversations are only applicable in assessing significant impacts of collateral consequences on the total amount of punishment. Despite the importance of determining a baseline of sufficient representation, the pragmatic requirements of defining effective assistance may include the reality that higher levels of incarcerative punishments would mean that collateral consequences wouldn't make a significant impact on the needs of *Strickland* advocacy. Put this into the most far-reaching example: A client facing the death penalty wouldn't want his attorney to be preoccupied by whether he might lose the ability to run for local government office someday. Applying this "reverse sliding scale" analysis is a logical offshoot of both the need of the attorney to consider the relative harms of punishments as well as the reality that higher-level crimes already merit more rigorous defense representation than misdemeanor defense.

While the *Strickland* sliding scale appears to suggest that attorneys must put more effort to defend their felony or capital case clients, the effect of collateral consequences on effective counsel's requirements may actually *decrease* relative to the level of criminality. As a result, the pragmatic consideration of collateral consequences may only make an impact on criminal representation in misdemeanor cases or, in extreme circumstances, some felony charges.

Throughout effective counsel jurisprudence, courts reference back to reasonableness and prevailing professional standards.[126] In the *Strickland* sliding scale model, pragmatism and reasonableness define the requirements of attorney actions. In the case of significant incarcerative punishments, the result

126 *See supra* Part I.C.

may be a reasonable presumption that collateral consequences will not be significant factors in the defendant's decision-making process. This accords with *Frye*'s determination that ineffective counsel claims can also be upheld even when a defendant is removed from the "central" stages of prosecution[127]—when comparing minor collateral consequences to major incarcerative terms, pleading around minor potential collateral consequences certainly can become non-central to the proceedings.

Considering the potential implications of this theory, it would mean that there are constitutional requirements under *Strickland* that would impact misdemeanor cases and some lesser felony cases without as much impact at the highest levels of criminality. In *Padilla*, the Court affirmed the need to discuss collateral consequences in a felony drug distribution case with one of the most significant consequences—mandatory deportation.[128] The presumptive relevance of collateral consequences might decrease in felony cases, where the direct punishments are generally far more significant. In felony cases, therefore, it would make sense that a defense attorney may only need to perform cursory examinations of potential collateral consequences to focus exclusively on the harshest collateral effects. Put simply—losing a driver's license is probably not as an important of a concern for someone facing a life sentence as it would be for someone facing parole.

In a misdemeanor, however, the presumptive relative importance of collateral consequences is much higher, as a single guilty plea can affect thousands of collateral consequences while risking only a few days in jail. This would mean that examination of potential collateral consequences would have to be much more searching than in the field of felony defense, since the relative importance of minor collateral consequences is higher.

The issue of defining a "presumptive" relative interest is a potentially thorny matter. When can the court system or an attorney presume to know that any reasonable client would be more concerned about incarceration than threats to access to government benefits? To housing? To child custody? Complicating matters further is the prospective applicability of many collateral consequences—how can this formula consider a misdemeanant's hopes of future political aspirations?

Given the Court's history of deference to attorney discretion, it is possible that this standard would be a highly pro-attorney one. On the other hand, the Court may opt to hold information-sharing to a high standard, given the high interests of a criminal defendant in being able to rely on her attorney to advocate for their interests vigorously. After all, the defendant's liberty is at risk, and the attorney has a professional and constitutional obligation to advise her client of central litigative steps.

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127 Missouri v. Frye, 566 U.S. 134, 143, 145 (2012).

128 Padilla v. Kentucky, 559 U.S. 356, 368–69 (2010).

Without more guidance by the Court on these matters, it is unclear whether there would be a pro-defendant or pro-attorney presumption; indeed, whether there could be a presumption at all is another issue never addressed by the Supreme Court's supervision. But the existence of a presumption is likely both as a pragmatic limitation on the obligations of counsel and as a realistic understanding of what criminal defendants want their attorneys to focus on.

B. What Does Effective Collateral Consequence Counseling Look Like in Practice?

Just as the Court has given little direct guidance on the standards of *Frye* and *Padilla* in collateral consequence advocacy, there is little to no guidance on how to actually advise clients on collateral consequences. Certainly the Constitution wouldn't require overworked public defenders to talk through every potential collateral consequence with every defendant who gets pushed through their doors. Instead, we once again can consider pragmatic needs and functional realities to determine how *Strickland* manifests in the realm of collateral consequence advocacy. As previously noted, "reasonable" advocacy may be subject to some limiting principle of presmptive importance, based on factors like potential harms and likelihood of applicability. Some collateral harms are more likely applicable than others—a criminal defendant is more likely to be concerned about access to government benefits like housing or welfare than the ability to form a nonprofit livestock co-op.

Some of these most general issues can be addressed by a simple intake questionnaire, asking about clients' need for government benefits, pending child custody issues, or plans to use government loans for education, for example. This model is currently being explored by the San Francisco Public Defender's Office, examining the usefulness of questionnaires in several areas of criminal defense.[129] Among these questionnaires, the San Francisco Public Defender's Office has released examples of questionnaires to ensure end-to-end client testimony preparation, establish evidence chains-of-custody, or clarify eyewitness records.[130] While the office has not published an intake questionnaire, the office advocates checklists for some of the same reasons that one would benefit from collateral consequence awareness—enhanced thoroughness, reliability, and efficiency.

Recall, however, that collateral consequences could introduce two requirements on effective advocacy—the representing attorney must ascertain (1) the risks to the client of a conviction or guilty plea and (2) the client's relative concerns in facing incarcerative or non-incarcerative punishments. While an intake questionnaire consisting of a simple series of checkboxes might constitute a reasonable investigation into the first prong (along with

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129 *See generally* Jeff Adachi, *Using Checklists to Improve Case Outcomes*, CHAMPION, Jan.–Feb. 2015, at 30.

130 *Id.*

the help of a collateral consequences database to determine applicability), the attorney would still be obliged to meet with the client to address relative concerns about incarcerative and non-incarcerative punishments. Additionally, *Padilla* and *Frye* still represent the requirements of counsel informing the client of these potential risks when significantly impactful, a task that likely requires some form of personal discussion.

CONCLUSION

Strickland represented the Supreme Court's acknowledgement that fair criminal prosecution cannot take place without the effective assistance of defense counsel. As a constitutional principle, criminal defendants need effective attorneys to protect their rights from abuse by the prosecutorial side of criminal justice. Although protections of the Sixth Amendment are slow to be recognized, the Court has nonetheless recognized that protections must be reasonable and commensurate with prevailing professional norms—resulting in the birth of a proportional defense measure in the *Strickland* sliding scale.

The *Strickland* sliding scale faced significant changes after the Supreme Court's rulings in *Padilla* and *Frye*, which suggested a significant pragmatic bend in the previous determinations of effective client representation. Among these impacts is the requirement that collateral consequences, when both punitive and sufficiently central to criminal defense proceedings, are factored into *Strickland* evaluations.

Looking into these considerations, the bare minimum requirement of collateral consequence advocacy is that attorneys take the time to ascertain the potential application of these harms to their clients, as well as the client's relative concerns about incarcerative versus collateral punishments. Without significant further guidance by the Court, it is hard to understand more of what this model might require, but it is clear that effective counsel requires, at the very least, attorneys who are sufficiently informed of the potential punitive minefield of collateral consequences in defending their clients.