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PROFESSIONAL NORMS AT A CROSSROADS: *FARHANE* AND ITS IMPLICATIONS FOR LEGAL COUNSEL

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This Note examines the right to effective assistance of counsel during guilty pleas through the lens of the pending Second Circuit case Farhane v. United States. *This case will have significant implications for the right to effective legal representation, particularly in terms of defense attorneys' duty to warn clients of the potential risk of denaturalization as a consequence of pleading guilty. In May 2024, the court reheard* Farhane *en banc and will issue a decision later this year. If this opinion aligns with the court's initial decision, it will severely limit the rights of all defendants in criminal proceedings in the Second Circuit. This Note traces the development of the right to effective assistance of counsel to contextualize* Farhane. *This Note then critiques the initial* Farhane *decision, highlighting its incongruity with historical approaches to ineffective assistance of counsel (IAC) claims. This Note then argues for a shift toward a client-centric and circumstance-specific approach to IAC claims. Such approach would be grounded in evolving professional norms and acknowledge the severe nature of certain consequences to ensure defendants receive comprehensive legal counsel during plea negotiations. This*

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Note contends that courts should demand more "competent" counsel to protect the fairness of plea bargaining and the overall integrity of the criminal justice system.

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INTRODUCTION

Abderrahmane Farhane is likely to lose his United States citizenship as the result of a years-old criminal conviction, for which he already served eleven years in prison.[1] Farhane has lived in the United States since 1995.[2] He raised two of his six children in New York and ran a small gift shop on Brooklyn's Atlantic Avenue.[3] Farhane became a United States citizen in 2002, enabling two of his Moroccan-born children to also become citizens.[4] However, in December 2001, the Federal Bureau of Investigation (FBI) began investigating Farhane for possible links to terrorist funding.[5] Although Farhane maintains his innocence of the charges against him, he pled guilty in 2006 out of fear of a worse outcome if he proceeded to trial.[6] Although his conviction pertained to activity that clearly pre-dated his naturalization, Farhane's criminal defense attorney did not inform him that this plea put him at risk of denaturalization.[7] Farhane then spent over a decade in prison, was released, and hoped to live a quiet life with his family in upstate New York.[8]

But, in 2018, the U.S. government initiated civil denaturalization proceedings against Farhane, alleging that he had illegally procured his citizenship by failing to disclose his pre-naturalization criminal activity on his naturalization application.[9] In

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1 *See* Petitioner-Appellant's Petition for Rehearing En Banc at 17–18, Farhane v. United States, No. 20-1666 (2d Cir. argued May 22, 2024) [hereinafter Petition for Rehearing].

2 Hannah Allam & Razzan Nakhlawi, *He Pleaded Guilty in a Terrorism Case and Did His Time. Now the Government Wants to Strip Him of His American Citizenship*, WASH. POST (Dec. 18, 2021), https://www.washingtonpost.com/national-security/trump-biden-denaturalization-deportation/2021/12/18/e31c958e-5854-11ec-a219-9b4ae96da3b7_story.html [https://perma.cc/WJ36-DWBL].

3 Allam & Nakhlawi, *supra* note 2.

4 Farhane v. United States, 77 F.4th 123, 125 (2d Cir. 2023); Brief & Special Appendix for Petitioner-Appellant at 2, Farhane v. United States, 77 F.4th 123 (2d Cir. 2023) (No. 20-1666).

5 Allam & Nakhlawi, *supra* note 2. Farhane and his family maintain that the investigation into Farhane's shop and the subsequent charges brought against him were a result of the post-9/11 rise in Islamophobia. *See id.* For more information on the events leading up to Farhane's plea, see generally United States v. Farhane, 634 F.3d 127 (2d Cir. 2011). *See also* Caryle Murphy, *Informant's Fire Brings Shadowy Tale*, WASH. POST (Nov. 21, 2004), https://www.washingtonpost.com/wp-dyn/articles/A813-2004Nov20.html [https://perma.cc/X6TK-3Y7H] (describing the activities of the FBI informant who instigated the investigation into Farhane).

6 Allam & Nakhlawi, *supra* note 2.

7 *Farhane*, 77 F.4th at 125.

8 *Id.*

9 United States v. Farhane, No. 05 CR. 673-4, 2020 WL 1527768, at *1 (S.D.N.Y. Mar. 31, 2020), *aff'd*, 77 F.4th 123 (2d Cir. 2023).

response, Farhane filed a habeas corpus petition in federal court, asserting that his criminal defense attorney should have warned him of the risk of denaturalization and deportation that arose from his 2006 guilty plea.[10] Although courts have recognized that the loss of U.S. citizenship equates to "the loss 'of all that makes life worth living,'"[11] a three-judge panel in the Second Circuit Court of Appeals initially held that Farhane's former criminal attorney was not obligated to warn Farhane of the "extraordinarily severe penalty"[12] that could result from Farhane's plea.[13] The Court of Appeals is now reconsidering Farhane's petition.[14] The court's ruling will determine whether the U.S. government may revoke Farhane's citizenship and, by extension, that of two of his adult children.[15]

The Sixth Amendment guarantees defendants the right to effective assistance of counsel at "critical stages of a criminal proceeding," including plea bargaining.[16] Since 1984,[17] federal and state courts have slowly articulated a nuanced body of caselaw defining the constitutional standard for adequate representation at all stages of criminal proceedings.[18] Today, courts acknowledge a fundamental right to "effective assistance of counsel."[19] Defendants, like Farhane, may file habeas corpus petitions seeking to vacate their pleas or convictions based on ineffective assistance of counsel.[20] To easily resolve such claims, many jurisdictions have utilized the "collateral consequences

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10 *Id.*

11 Knauer v. United States, 328 U.S. 654, 659 (1946) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

12 Klapprott v. United States, 335 U.S. 601, 612 (1949).

13 Farhane v. United States, 77 F.4th 123, 125 (2d Cir. 2023).

14 *See* Order for Appeal to Be Heard en Banc, Farhane v. United States, 77 F.4th 123 (2d Cir. 2023) (No. 20-1666); *see also* Nika Schoonover, *American Citizen Facing Deportation Asks Appellate Court to Vacate Conspiracy Conviction*, COURTHOUSE NEWS SERV. (May 22, 2024), https://www.courthousenews.com/american-citizen-facing-deportation-asks-appellate-court-to-vacate-conspiracy-conviction [https://perma.cc/EWR5-GGXM] (summarizing the recent en banc hearing in *Farhane v. United States*).

15 *Farhane*, 77 F.4th at 125.

16 *Id.* at 137 (Carney, J., dissenting) (quoting Lafler v. Cooper, 566 U.S. 156, 165 (2012)). For a deeper dive into the history of Sixth Amendment jurisprudence, see generally Lafler v. Cooper, 566 U.S. 156 (2012); Missouri v. Frye, 566 U.S. 134 (2012).

17 *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

18 *See infra* notes 39–124 and accompanying text.

19 *Strickland*, 466 U.S. at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

20 *See Habeas Corpus—Ineffective Assistance of Counsel—Procedural Default*—Shinn v. Ramirez, 136 HARV. L. REV. 400, 400 (2022).

test" to analyze allegations of ineffectiveness of counsel.[21] Under this approach, courts have held that the Sixth Amendment does not require that counsel warn defendants of any "collateral" consequences of a plea.[22] But, the Supreme Court's 2010 decision *Padilla v. Kentucky*[23] brought the collateral consequences test into question.[24]

A three-judge panel of the Second Circuit Court of Appeals initially issued a ruling ("*Farhane I*") in Abderrahmane Farhane's case,[25] explicitly embracing the so-called "direct/collateral dichotomy" to Sixth Amendment ineffective assistance claims.[26] This marked a return to the pre-*Padilla*, strict adherence to the collateral/direct dichotomy.[27] This decision narrowed the Sixth Amendment's protections for criminal defendants, definitively excluding "collateral" consequences—such as civil denaturalization—from the ambit of the right to effective legal counsel.[28] In holding that collateral consequences are categorically removed from Sixth Amendment protection,[29] *Farhane I* deepened the Second Circuit's erroneous commitment to the outdated and fundamentally flawed collateral consequences test. Scholars argue *Padilla* requires that courts need not follow this dichotomy and may instead proceed to the standard, two-prong "*Strickland* inquiry"[30] for ineffective assistance claims.[31] Both binding precedent and the modern state of the criminal legal field demand a circumstance-specific approach to ineffective assistance claims that takes into consideration the clarity of a consequence, a client's priorities, and prevailing professional standards.[32] Thus, the panel's rigid adherence to this

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21 Colleen F. Shanahan, *Significant Entanglements: A Framework for the Civil Consequences of Criminal Convictions*, 49 AM. CRIM. L. REV. 1387, 1399–1400 (2012).

22 *See* Farhane v. United States, 77 F.4th 123, 137 (2d Cir. 2023) (Carney, J., dissenting); Shanahan, *supra* note 21, at 1399–1400.

23 559 U.S. 356 (2010).

24 *See* César Cuauhtémoc García Hernández, Strickland-*Lite:* Padilla*'s Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844, 923–24 (2013) (explaining that *Padilla* can be interpreted as extending the right to advice about collateral consequences that "are intricately tied to conviction and are of great importance to many defendants").

25 *See generally Farhane*, 77 F.4th 123 (majority opinion).

26 *Farhane*, 77 F.4th at 137 (Carney, J., dissenting).

27 *See id.*

28 *See id.* at 127 (majority opinion).

29 *Id.* at 126–27.

30 *See* Strickland v. Washington, 466 U.S. 668, 690–96 (1984) (outlining the two-prong test used to analyze an attorney's conduct, requiring a holistic evaluation of both the quality of counsel's performance and its impact on the fairness of the trial).

31 *See* Amber Qureshi, *The Denaturalization Consequences of Guilty Pleas*, 130 YALE L.J.F. 166, 180–81 (2020).

32 *See infra* Part II.

outdated test would have weakened the constitutional protections the Sixth Amendment offers to criminal defendants of all backgrounds.

Fortunately, the Second Circuit Court of Appeals granted a petition for rehearing en banc in Farhane's case.[33] On May 22, 2024, the Court of Appeals reheard Farhane's case en banc.[34] The court will likely announce its decision in *Farhane II* later this year. While it is unlikely that the court will do away with the collateral/direct distinction in its entirety, this will be a chance for the court to soften the sweeping language of *Farhane I*, thus protecting the rights of defendants in criminal proceedings.

This Note argues that *Farhane I* was incorrectly decided and that, in *Farhane II*, the Second Circuit should abandon the collateral consequences test for ineffective assistance claims, in favor of a client-centric and circumstance-specific approach. This Note begins by providing background and context on the right to effective assistance of counsel in Part I, including the development of the right to effective assistance of counsel, how jurisdictions commonly define the direct and collateral consequences of a conviction, and the development of the collateral consequences test.[35] Part II discusses the Second Circuit's holding in *Farhane I*.[36] Part III then provides an analysis of how the *Farhane I* opinion improperly narrowed *Padilla*'s holding and, in doing so, furthered the jurisdiction's blunt application of the collateral/direct dichotomy.[37] Finally, Part IV proposes discarding the collateral consequences test and instead adopting a consequence-specific approach to ineffective assistance claims, in line with existing Supreme Court precedent.[38]

I. BACKGROUND ON CLAIMS OF INEFFECTIVE ASSISTANCE

A. *The Evolution of the Right to Effective Assistance of Counsel*

The Sixth Amendment of the United States Constitution enshrines the right of criminal defendants to receive assistance from

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33 Order for Appeal to Be Heard en Banc, Farhane v. United States, 77 F.4th 123 (2d Cir. 2023) (No. 20-1666).

34 *Id.*

35 *See infra* Part I.

36 *See infra* Part II.

37 *See infra* Part III.

38 *See infra* Part IV.

counsel.[39] This is a fundamental guarantee, crucial to the modern-day functioning of our legal system. But, it was not until relatively recently that the Supreme Court expanded this right to its current scope. In the 1963 decision *Gideon v. Wainwright*[40] and 1972 decision *Argersinger v. Hamlin*,[41] the Court broadened this Sixth Amendment guarantee to all criminal cases "where an accused is deprived of his liberty,"[42] acknowledging the necessity of counsel to a fair trial.[43] In 1970, *McMann v. Richardson* then expanded the guarantee of counsel to plea bargaining.[44] The *McMann* Court held that a guilty plea is open to collateral attack on the ground that counsel did not provide "reasonably competent advice," since defendants are constitutionally entitled to the assistance of counsel of this caliber.[45] Thus began the recognition of the right to "effective assistance of counsel."[46] But it was the Supreme Court's 1984 decision *Strickland v. Washington*[47] that established the definitive, two-prong test for evaluating claims of ineffective assistance of counsel under the Sixth Amendment.[48] This remains the foundational framework for assessing ineffective assistance claims, and it continues to shape the legal landscape nationwide.[49]

B. Strickland*'s Test for Ineffective Assistance of Counsel*

Strickland concerned a defendant who attempted to collaterally attack his conviction on the grounds that he received defective advice

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39 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.").

40 372 U.S. 335 (1963).

41 407 U.S. 25 (1972).

42 *Id.* at 32.

43 John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L.L. REV. 1, 11 (2013) (citing *Argersinger*, 407 U.S. at 33).

44 McMann v. Richardson, 397 U.S. 759, 770 (1970).

45 *Id.* at 770–71.

46 Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

47 466 U.S. 668 (1984).

48 *Id.* at 687.

49 *See* Farhane v. United States, 77 F.4th 123, 126 (2d Cir. 2023) (identifying *Strickland* as setting forth the test for ineffective assistance of counsel); *see also* Matthew Hughes, *Sixth Amendment Protections for Attorney-Client Communications*, 13 CRIM. L. PRAC. 1, 9 (2023) (quoting Andrus v. Texas, 140 S. Ct. 1875, 1881 (2020)) (explaining that "[t]he right to *effective* assistance of counsel requires a showing of *Strickland* prejudice ('show by a preponderance of the evidence . . . that there was a reasonable probability that the result of the proceeding would have been different')").

from his attorney during the pre-sentencing phase of his proceedings.[50] He argued that his attorney was so ineffective as to have violated his Sixth Amendment right to competent counsel.[51] To address his claim, the Supreme Court developed a two-prong test by which to analyze an attorney's conduct, requiring a holistic evaluation of both the quality of counsel's performance[52] and its impact on the fairness of the trial.[53] In doing so, the Court emphasized the need for a case-specific analysis, noting that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."[54] Thus, for a petitioner to successfully assert a violation of their constitutional right to effective counsel, they must demonstrate both that their attorney exhibited deficient performance and that this performance actually prejudiced them.[55]

The first prong of the *Strickland* test—the so-called "deficient performance prong"—requires an inquiry into whether an attorney's behavior meets an "objective standard of reasonableness."[56] To conduct this inquiry, "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."[57] The analysis here centers the Court's belief in the importance of guaranteeing professionally competent representation that is in line with contemporaneous prevailing professional norms, without imposing more duties on counsel than feasible.[58]

However, even assuming deficient performance, the petitioner must still demonstrate the requisite prejudicial effect.[59] To satisfy the

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50 *Strickland*, 466 U.S. at 675.

51 *Id.* at 678, 683.

52 *See id.* at 690 ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.").

53 *See id.* at 696 ("[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."). The *Strickland* Court specifically held that, to judge claims of ineffectiveness of counsel, courts must probe whether "counsel's conduct so undermined the proper functioning of the adversarial process" such that the trial did not "produce[] a just result." *Id.* at 686.

54 *Id.* at 688–89.

55 *See id.* at 687.

56 *Id.* at 687–89.

57 *Id.* at 690.

58 *See id.* at 688–89.

59 *Id.* at 687 ("Second, the defendant must show that the deficient performance prejudiced the defense.").

second prong of the *Strickland* ineffective assistance test—regarding prejudice to the defendant—a petitioner must show that their attorney's deficient performance resulted in a "reasonable probability" of a different trial outcome.[60] This inquiry goes to the heart of the extent to which an attorney's conduct deprived the petitioner of a reliable and fair proceeding.[61]

C. *Delineating Direct and Collateral Consequences*

Legal counsel does not bear the responsibility of ensuring that a defendant receives a fair trial alone: the Fifth Amendment imposes a similar duty on courts.[62] To limit this duty in the context of plea bargains, lower courts developed a rule in the mid-twentieth century requiring that a defendant must first be apprised of the direct, but not the collateral, consequences of the plea before pleading guilty to a crime.[63] The Second Circuit, for example, determined that it would not be manifestly unjust to hold a defendant to a plea "merely because they did not understand or foresee . . . collateral consequences."[64]

Collateral consequences of criminal convictions are the legal penalties, disabilities, or disadvantages imposed on a person either automatically upon conviction or subsequently authorized in relation to the conviction.[65] More simply, they are typically described as "all civil restrictions that flow from a criminal conviction."[66] The Second Circuit has defined direct consequences as "those that 'have a definite, immediate and largely automatic effect on the range of the defendant's punishment,' with all other consequences being collateral."[67] Such

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60 *Id.* at 694; *see also* Thornell v. Jones, 144 S. Ct. 1302, 1310 (2024) (holding that, when an ineffective assistance of counsel claim is based on counsel's performance at the sentencing phase of a capital case, a defendant must prove "a reasonable probability that, absent [counsel's] errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death") (quoting *Strickland*, 466 U.S. at 695).

61 *See Strickland*, 466 U.S. at 702 (Brennan, J., concurring).

62 Boykin v. Alabama, 395 U.S. 238, 242 (1969) (holding that a court may not accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary).

63 Peter L. Markowitz, *Deportation Is Different*, 13 UNIV. PA. J. CONST. L. 1299, 1336 (2011).

64 United States v. Parrino, 212 F.2d 919, 921–22 (2d Cir. 1954).

65 *See Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, STANDARDS FOR CRIM. JUST. § 19-1.1(a) (AM. BAR ASS'N 2003).

66 King, *supra* note 43, at 23 (quoting Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999)); Markowitz, *supra* note 63, at 1338.

67 Farhane v. United States, 77 F.4th 123, 131 (2d Cir. 2023) (quoting United States v. Youngs, 687 F.3d 56, 60 (2d Cir. 2012)).

consequences may be "very impactful and long-lasting,"[68] and they have rapidly increased, both in number and severity, since the inception of the "War on Drugs."[69] Defendants may also be primarily concerned with avoiding such consequences.[70]

In 1970, the Supreme Court adopted the view that a truly voluntary plea can only be made by a defendant who is "fully aware of the direct consequences" of the plea.[71] *Brady v. United States* defined "direct consequences" as including "the actual value of any commitments made to him by the court, prosecutor, or his own counsel."[72] The Court assumed that pleas made "with adequate advice of counsel" satisfy this standard.[73] Following *Brady*, lower courts almost universally adopted the so-called "collateral consequences test:" before a defendant pleads guilty to a crime, they must only be appraised of the direct consequences—not the collateral consequences—of the plea for it to qualify as knowing and voluntary.[74]

D. *Expansion of the Direct/Collateral Consequences Test*

Following *Brady*, courts broadly applied the collateral consequences test to Fifth Amendment claims.[75] But a question loomed: did it apply equally to ineffective assistance claims? In 1985, the Supreme Court was presented with a chance to address this question but

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68 Alex Tway & Jonathan K. Gitlen, *An End to the Mystery, A New Beginning for the Debate: National Inventory of Collateral Consequences of Conviction (NICCC) Provides Complete List of Every Collateral Consequence in the Country*, 2 CRIM L. PRAC. 15, 15 (2015).

69 *Id.*; Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 254 (2002).

70 The Court has repeatedly recognized this may well be the case for many criminal defendants. *See, e.g.*, Lee v. United States, 582 U.S. 357, 370 (2017); Padilla v. Kentucky, 559 U.S. 356, 368 (2010); I.N.S. v. St. Cyr, 533 U.S. 289, 324 (2001). *See also* Carlie Malone, *Plea Bargaining and Collateral Consequences: An Experimental Analysis*, 73 VAND. L. REV. 1161, 1188 (2020) (quantitatively demonstrating that defendants were more hesitant to accept plea offers when informed of potential collateral consequences).

71 Brady v. United States, 397 U.S. 742, 755 (1970).

72 *Id.*

73 *Id.* at 758.

74 *See, e.g.*, Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973); United States v. U.S. Currency in the Amount of $228,536.00, 895 F.2d 908, 915 (2d Cir. 1990); United States v. Edwards, 911 F.2d 1031, 1035 (5th Cir. 1990); United States v. King, 618 F.2d 550, 552 (9th Cir. 1980). *See also* Markowitz, *supra* note 63, at 1336–38.

75 *See* Soojin Kim, Note, United States v. Reeves*: The Struggle to Save the Direct/Collateral Consequences Test After* Padilla, 62 CATH. Univ. L. REV. 853, 859–62 (2013) (tracing the expansion of the collateral consequences test after *Brady*).

failed to deliver a satisfactory answer.[76] Importantly, in *Hill v. Lockhart*, the Court extended *Strickland*'s two-prong test to the plea-bargaining process.[77] The Court recognized the critical importance of effective representation during the plea-bargaining stage, highlighting the prevalence of plea bargaining and the substantial impact it has on defendants' fates.[78] However, *Hill* did little to address "whether advice concerning a collateral consequence must satisfy Sixth Amendment requirements."[79] In *Hill* dicta, the Court stated that "parole eligibility [was] a collateral rather than a direct consequence of a guilty plea, of which a defendant need not be informed."[80] However, the Court did not definitively determine whether an attorney's failure to advise a client of the collateral consequences of a conviction could violate the Sixth Amendment.[81]

Consequently, in the uncertainty following *Hill*, courts applied the direct/collateral dichotomy to Sixth Amendment ineffective assistance of counsel claims.[82] Under this approach, appellate courts in nearly thirty states concluded that attorneys were not required to inform their clients of any collateral consequences of a conviction.[83] Such reasoning presumes that defendants have no constitutional right to be made aware of such consequences before pleading guilty. By extension, defendants have no right to withdraw a guilty plea for ignorance of collateral consequences.[84] The only exception to this bar is the near-universal prohibition against affirmative misadvice from counsel.[85] But the collateral consequences test, despite its facial simplicity, has "not necessarily lead to clarity—or fair results—regarding such

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76 *See generally* Hill v. Lockhart, 474 U.S. 52 (1985).

77 *Id.* at 58.

78 *Id.* at 57–58.

79 Chaidez v. United States, 568 U.S. 342, 349 (2013). *See also* Farhane v. United States, 77 F.4th 123, 128 (2d Cir. 2023) ("In *Hill v. Lockhart*, the Supreme Court explicitly avoided the question of whether the Sixth Amendment applies to the collateral consequences of a guilty plea.").

80 *Hill*, 474 U.S. at 55.

81 *See Chaidez*, 568 U.S. at 350.

82 *See id.*

83 *Id.* at 351.

84 *See* Tway & Gitlen, *supra* note 68, at 17.

85 *See* Lee v. United States, 582 U.S. 357, 360 (2017) (noting that counsel's misadvice can form the basis for a plausible claim of ineffective assistance of counsel); *see also* Doe v. United States, 915 F.3d 905, 910 (2d Cir. 2019) (noting that affirmative misrepresentations by counsel are objectively unreasonable); United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002) (holding that "an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable").

applicability."[86]

E. Padilla v. Kentucky*: Reevaluating Direct/Collateral Consequences*

The landmark decision *Padilla v. Kentucky* signaled a dramatic shift in Sixth Amendment jurisprudence. *Padilla* held that an attorney's failure to advise clients of a clear risk of deportation may constitute ineffective assistance.[87] *Padilla* addressed the pressing issue of deportation consequences in the context of guilty pleas,[88] emphasized the importance of prevailing professional norms,[89] and rejected a rigid distinction between direct and collateral consequences.[90] Previously, most jurisdictions considered deportation and other immigration consequences to be "collateral" consequences that could not form the basis of an ineffective assistance of counsel claim.[91] But *Padilla* departed from this approach: the Court held that "[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence."[92] Thus, before delving into the reasonableness or prejudicial nature of counsel's actions, the *Padilla* Court found this dichotomy inapplicable because "[t]he collateral versus direct distinction is . . . ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation."[93]

The Court first recognized that the supposedly "collateral" consequence of deportation was a particularly severe consequence, reiterating that it is "the equivalent of banishment or exile."[94] It then

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86 Shanahan, *supra* note 21, at 1399. *But see* Farhane v. United States, 77 F.4th 123, 129 (2d Cir. 2023) ("[T]he utility of the [collateral/direct] framework necessarily lies in it being a guide to defense counsel when advising a client in advance of a guilty plea.").

87 Padilla v. Kentucky, 559 U.S. 356, 371 (2010) ("It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation . . . .").

88 *Id.* at 369 ("[W]hen the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.").

89 *Id.* at 366–67, 372.

90 *Id.* at 366.

91 *See* Chaidez v. United States, 568 U.S. 342, 350 (2013); *see also* Markowitz, *supra* note 63, at 1302–07 (discussing conflation between the recognized "civil" nature of deportation and its classification as a "collateral consequence" of a conviction, despite the use of deportation as a quasi-criminal punishment).

92 *Padilla*, 559 U.S. at 366.

93 *Id.*; *see also Chaidez*, 568 U.S. at 352 ("Before asking whether the performance of Padilla's attorney was deficient under *Strickland*, we considered . . . whether *Strickland* applied at all.").

94 *Padilla*, 559 U.S. at 373 (citing Delgadillo v. Carmichael, 332 U.S. 388, 390–91 (1947)).

examined the close connection between deportation and criminal convictions, noting that removal was "nearly an automatic result for a broad class of noncitizen offenders."[95]

The *Padilla* Court, in conducting its subsequent *Strickland* analysis, then underscored the importance of prevailing professional norms in defining the scope of reasonable representation.[96] However, the Court placed limits on counsel's duty to advise clients of a conviction's potential deportation consequences, noting that, "[w]hen 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, . . . the duty to give correct advice is equally clear."[97]

As interpreted in the subsequent 2013 decision *Chaidez v. United States*, *Padilla* announced a "new rule"[98] by expanding the duties owed by defense counsel to explain the immigration consequences of a plea.[99] As the Court explained in *Chaidez*,[100] before *Padilla*, "it was widely held that the right to effective assistance of counsel in the context of plea agreements extended only to advice about the 'direct,' as opposed—to 'collateral' consequences of a plea agreement."[101] *Padilla* thus elevated the standard of effective assistance by recognizing the significance of non-criminal consequences in the plea-bargaining process.[102] In rejecting a rigid distinction between direct and collateral consequences, *Padilla* reinforced the constitutional imperative articulated in *Strickland* that defense counsel provide accurate advice to their clients,[103] ensuring that both defenders and prosecutors could "reach agreements that better satisfy the interests of

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95 *Id.* at 365–66.

96 *Id.* at 366 (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)) ("[C]onstitutional deficiency . . . is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'").

97 *Id.* at 369.

98 *Chaidez*, 568 U.S. at 354 .

99 *Id.*

100 *Id.* at 350–51.

101 *See* Rodriguez v. United States, No. 98 Cr. 00764, 2012 WL 6082477, at *5 (S.D.N.Y. Dec. 4, 2012); *see also* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002) (explaining that, as of 2002, "no court" rejected the general rule that lawyers need not explain collateral consequences of criminal convictions to criminal defendants).

102 *See Padilla*, 559 U.S. at 365–66.

103 *See* Strickland v. Washington, 466 U.S. 668, 694 (1984).

both parties."[104]

Subsequent decisions, such as *Lee v. United States*, have suggested support for a departure from a rigid application of the collateral consequences test.[105] Many lower courts have since eschewed the test and no longer categorically reject ineffective assistance claims related to collateral consequences of convictions.[106] However, other courts have stubbornly adhered to the direct/collateral dichotomy for both Sixth Amendment ineffective assistance claims and Fifth Amendment attacks on pleas.[107] This creates even further confusion, given the "analogous" relationship between defendant's Fifth and Sixth Amendment attempts to withdraw pleas.[108] This inconsistency, confusion, and resulting unevenness in protection of criminal defendants' Constitutional rights[109] underscores the need for a more robust approach.

F. *Civil Denaturalization: No Warning Guaranteed Under the Constitution?*

Padilla's breach of the "wall between direct and collateral

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104 *See id.* at 373.

105 Lee v. United States, 582 U.S. 357, 367 (2017) (noting that "categorical rules are ill suited to an inquiry that we have emphasized demands a 'case-by-case examination' of the 'totality of the evidence'"). However, it bears noting that *Lee* was primarily concerned with the "prejudice" prong of the *Strickland* analysis. *See id.* at 360 ("The question presented is whether [the Petitioner] can show he was prejudiced as a result.").

106 Farhane v. United States, 77 F.4th 123, 139–40 (2d Cir. 2023) (Carney, J., dissenting) (citing Alexander v. State, 772 S.E.2d 655, 659 (Ga. 2015); United States v. Yansane, 370 F. Supp. 3d 580, 589 (D. Md. 2019) ("*Padilla* and Rule 11(b)(1)(O) reflect a growing recognition of the critical importance of a defendant understanding [the immigration consequences of a conviction]."); Commonwealth v. Thompson, 548 S.W.3d 881, 890 (Ky. 2018); Commonwealth v. Pridham, 394 S.W.3d 867, 879 (Ky. 2012); United States v. Tuakalau, 562 F. App'x 604, 609 n.4 (10th Cir. 2014) (summary order); Taylor v. State, 698 S.E.2d 384, 387 (Ga. Ct. App. 2010)).

107 *See Farhane*, 77 F.4th at 140 n.5 (listing decisions wherein courts "decided to maintain the distinction's application at least in some particular contexts"); *see also* United States v. Youngs, 687 F.3d 56, 60–62 (2d Cir. 2012) (holding that the collateral consequences test still applies to Fifth Amendment claims, despite "recogniz[ing] that *Padilla* may create some uncertainty as to the usefulness of categorizing *certain* consequences as either 'direct' or 'collateral' in the Fifth Amendment context") (emphasis in original).

108 *See Farhane*, 77 F.4th at 126 n.6 (describing Fifth and Sith Amendment claims as "closely analogous").

109 *See* Joanna Rosenberg, Note, *A Game Changer? The Impact of* Padilla v. Kentucky *on the Collateral Consequences Rule and Ineffective Assistance of Counsel Claims*, 82 FORDHAM L. REV. 1407, 1428 (2013) (noting that "courts disagree over whether Padilla upends the traditional collateral consequences rule").

consequences"[110] encouraged some defendants and their attorneys to argue for additional exceptions to the collateral consequences doctrine and push courts to re-evaluate how they determine which consequences are essential to a knowing voluntary plea.[111] Naturally, as a result of *Padilla*'s emergence from the realm of immigration law, advocates attempted to expand this breach to other immigration consequences.[112] Denaturalization has been one such heavily-litigated consequence.[113]

Denaturalization is the legal process through which the government may revoke an individual's U.S. citizenship.[114] The process formally dates back to 1906.[115] Today, there are two mechanisms by which the government may seek denaturalization: 18 U.S.C. § 1425 criminal denaturalization and 8 U.S.C. § 1451(a) civil denaturalization.[116] This Note is concerned with the latter. Under § 1451(a), U.S. Attorneys may initiate civil proceedings to revoke the citizenship of naturalized individuals if that citizenship was "illegally procured" or was "procured by concealment of a material fact or by willful misrepresentation,"[117] and "an illegal act by the defendant played

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110 Chaidez v. United States, 568 U.S. 342, 352–53 (2013).

111 *See* Rosenberg, *supra* note 109, at 1432.

112 *See* Norman Reimer, *Padilla's Tenth Anniversary: The Supreme Court's Limited Step Triggers Awareness and a National Movement to Combat Collateral Consequences*, IMMIGR. DEF. PROJECT, https://www.immigrantdefenseproject.org/padilla-anniversary-reimer [https://perma.cc/N3EJ-LZRF].

113 *See generally* Rodriguez v. United States, 730 F. App'x 39 (2d Cir. 2018) (addressing immigrant's coram nobis petition based on counsel's advice that petitioner did not need to worry about the immigration consequences of a guilty plea); United States v. Yansane, 370 F. Supp. 3d 580 (D. Md. 2019) (assessing claim for ineffective assistance where counsel failed to verify a foreign-born defendant's immigration status); United States v. Yetisen, No. 3:18-cv-00570, 2022 WL 3644926, (D. Or. Aug. 22, 2022) (involving claim for ineffective assistance of counsel where counsel failed to warn defendant that guilty plea could result in denaturalization); United States v. Singh, No. 13-20551, 2022 WL 2209369 (E.D. Mich. June 19, 2022) (denying writ of coram nobis on the basis of ineffective assistance of counsel where counsel did not inform defendant that guilty plea could result in subsequent denaturalization).

114 *See Fact Sheet on Denaturlization*, NAT'L IMMIGR. F. (Oct. 2, 2018), https://immigrationforum.org/article/fact-sheet-on-denaturalization [https://perma.cc/VJ9W-FRB6].

115 Stephanie DeGooyer, *Why Trump's Denaturalization Task Force Matters*, THE NATION (July 10, 2018), https://www.thenation.com/article/archive/trumps-denaturalization-task-force-matters [https://perma.cc/4XXX-BS8K].

116 *See* Cassandra Burke Robertson & Irina D. Manta, *(Un)civil Denaturalization*, 94 N.Y.U. L. REV. 402, 407 (2019).

117 *See* 8 U.S.C. § 1451(a); U.S. Dep't of Just., Just. Manual § 4-7.200 (2022). § 1451(a) denaturalization proceedings can only succeed if the citizen willfully misrepresented or concealed a fact material to their initial grant of citizenship. *See* Kungys v. United States, 485 U.S. 759, 767, 772 (1988). Factors such as discovery of fraudulent acquisition of citizenship, willful misrepresentation during the naturalization process, or certain criminal convictions can trigger the government to initiate denaturalization proceedings. *See* 8 U.S.C. § 1451.

some role in her acquisition of citizenship."[118] But, there is no statute of limitations on the government's ability to initiate these types of proceedings, and the defendant has no right to a jury nor appointed counsel.[119]

Although the Office of Immigration Litigation's District Court Section Enforcement Unit has primary authority to bring denaturalization cases under § 1451(a),[120] it pursues cases in line with the Department of Justice Civil Division's priorities.[121] Denaturalization cases rise and fall with each presidential administration, often dependent upon prosecutorial discretion directives and historical crises.[122] Starting in 2008, denaturalization cases surged after being largely absent from American policy for the previous fifty years.[123] Given the resource-intensive nature of denaturalization, the Civil Division prioritizes cases involving matters of national importance, including terrorism.[124] This confluence of priorities and current events is what led the U.S. government to initiate civil denaturalization proceedings against Abderrahmane Farhane over a decade after his conviction.

II. BACKGROUND ON *FARHANE V. UNITED STATES*

Farhane v. United States raises the question of whether counsel has a Sixth Amendment duty to advise a criminal defendant about the risk of civil denaturalization resulting from a guilty plea.[125]

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118 Maslenjak v. United States, 582 U.S. 335, 338 (2017).

119 *See* Robertson & Manta, *supra* note 116, at 405.

120 *See* U.S. Dep't of Just., Just. Manual § 4-7.200 (2022).

121 *Id.*

122 *See* Qureshi, *supra* note 31, at 169–70.

123 *See* Robertson & Manta, *supra* note 116, at 403–04; Qureshi, *supra* note 31, at 173. Operation Janus and Operation Second Look dramatically increased the number of denaturalization proceedings brought. *See* Qureshi, *supra* note 31, at 173. In this most recent surge of denaturalization cases, U.S. Attorneys have increasingly relied upon civil litigation to seek denaturalization. *See* Robertson & Manta, *supra* note 116, at 405.

124 *See* U.S. DEP'T OF JUST., CIV. IMMIGR. ENF'T & THE OFF. OF IMMIGR. LITIG. DIST. CT SECTION (2017), https://www.justice.gov/usao/page/file/984701/dl [https://perma.cc/MSB6-P6CQ] ("Typically, the government does not expend resources on civil denaturalization actions unless the ultimate goal is the removal of the defendant from the United States.").

125 *See infra* Section II.A.

A. *Facts & Procedural History*

In 2006, Abderrahmane Farhane pled guilty to providing false statements to federal law enforcement and conspiring to launder money.[126] During his plea allocution, Farhane stated that some of the acts for which he was convicted had been committed in 2001.[127] This activity pre-dated his 2002 naturalization.[128] Accordingly, in 2018, the United States government filed a complaint in the Eastern District of New York seeking to revoke Farhane's citizenship under 8 U.S.C. § 1451(a).[129] During Farhane's 2002 naturalization process, he reportedly denied ever knowingly committing a crime for which he had not been arrested.[130] In light of his subsequent 2006 guilty plea, the denaturalization complaint alleged that Farhane had illegally concealed pre-naturalization criminal acts from the government.[131]

In December 2018, while on supervised release, Farhane filed a 28 U.S.C. § 2255 habeas corpus petition to vacate his guilty plea, conviction, and sentence.[132] He claimed that his lawyer did not warn him of the risks of denaturalization and deportation arising from his plea.[133] The district court, however, denied Farhane's habeas petition, stating that Farhane failed to demonstrate that his lawyer's conduct was unreasonable.[134] Farhane then appealed to the Second Circuit Court of Appeals.[135] Initially, a panel within the Court of Appeals affirmed the district court's holding in August 2023 ("*Farhane I*").[136] But, in February 2024, the court ordered a rehearing en banc for *Farhane v. United States*, following a petition Farhane filed on October 16, 2023.[137] Oral arguments were held on May 22, 2024, and the decision is

126 Farhane v. United States, 77 F.4th 123, 125 (2d Cir. 2023).

127 *Id.*

128 *Id.*

129 *Id.*

130 United States v. Farhane, No. 05 CR. 673-4, 2020 WL 1527768, at *1 (S.D.N.Y. Mar. 31, 2020), *aff'd*, 77 F.4th 123 (2d Cir. 2023).

131 *Farhane*, 77 F.4th at 125.

132 *Id.*

133 *Id.*

134 *Farhane*, 2020 WL 1527768, at *1–2.

135 *Farhane*, 77 F.4th at 126.

136 *Id.* at 123.

137 Order for Appeal to Be Heard en Banc, Farhane v. United States, 77 F.4th 123 (2d Cir. 2023) (No. 20-1666); Petition for Rehearing, *supra* note 1, at 1.

pending.[138]

B. *The* Farhane I *Decision*

The *Farhane I* decision proclaimed that, "[b]ecause civil denaturalization is a collateral and not a direct consequence of a conviction, . . . the Sixth Amendment does not require attorneys to warn of that risk."[139] The court also held that, despite *Padilla*, collateral consequences are "categorically removed from the scope of the Sixth Amendment," except in cases of affirmative misadvice.[140] The majority further wrote that attorneys cannot be expected to possess expertise on subjects outside their area of expertise,[141] and thus cannot be expected to advise clients of the collateral consequences of a conviction. The panel characterized Farhane's denaturalization as an unforeseeable collateral consequence.[142] Accordingly, Farhane's attorney was not required to warn him of such a risk.[143]

Farhane's claim fared no better under the panel's application of *Padilla*'s "step zero"[144] analysis. The majority conceded that denaturalization is a severe punishment but opined that denaturalization is not "intimately related" to the criminal process."[145] It noted that denaturalization can occur with or without a criminal conviction, signifying that Farhane's denaturalization was not sufficiently dependent on the outcome of his criminal case.[146] Civil denaturalization therefore cannot be "intimately related to the criminal process"[147] and

138 Order for Appeal to Be Heard en Banc, Farhane v. United States, 77 F.4th 123 (2d Cir. 2023) (No. 20-1666).

139 *Farhane*, 77 F.4th at 126.

140 *Id.* at 126–27 (quoting Chaidez v. United States, 568 U.S. 342, 349 (2013)).

141 *Id.* at 127 (quoting Padilla v. Kentucky, 559 U.S. 356, 376 (2010) (Alito, J., concurring)).

142 *Id.* at 132. The panel also noted that the fact that Farhane's plea prevented him from disputing the facts underlying the government's denaturalization charges does not make that collateral estoppel a "direct consequence" of his plea. *See id.*

143 *Id.* at 127.

144 The term "step zero" here refers to the fact that, before even reaching the first prong of *Strickland* analysis, the *Farhane* majority looked to *Padilla* to provide an initial analysis of whether the direct/collateral framework applies to the "collateral" consequence of civil denaturalization. *Id.* at 129–30. Specifically, the majority asked whether civil denaturalization was "so severe and automatic" that it was not suited to the direct/collateral dichotomy. *Id.* at 129.

145 *Id.* at 130 (quoting *Padilla*, 559 U.S. at 365 (majority opinion)).

146 *Id.* ("While Farhane's conviction might alleviate the government's evidentiary burden, the government could have sought his denaturalization by proving his substantive conduct, without waiting for, relying on, or even referencing his criminal conviction.").

147 *Id.* at 131 (quoting *Padilla*, 559 U.S. at 365).

thus does not merit the *Padilla* exception from the direct/collateral dichotomy.[148]

The *Farhane I* dissent, written by Judge Carney, criticized the majority's blunt application of the direct/collateral consequences distinction.[149] The dissent argued that *Padilla* truly signified that courts should inquire into whether a consequence is "sufficiently severe" and "intimately related to the criminal process."[150] Ultimately, after applying this test, Judge Carney would have held that civil denaturalization is both sufficiently severe and intimately related to the criminal process to merit the same treatment that deportation received in *Padilla*.[151] The dissent also firmly disagreed with the majority's comparison of Fifth and Sixth Amendment jurisprudence. Judge Carney countered that, while there may be overlap between a court's Fifth Amendment obligation and an attorney's Sixth Amendment duties to their client, the attorney's obligations are greater.[152] Accordingly, the dissent would not have categorically dismissed Farhane's claim as concerning a "merely collateral consequence of his plea."[153]

C. *The* Farhane II *Opinion*

Subsequently, recognizing that the *Farhane I* panel's decision improperly construes Supreme Court precedent and "raises questions of exceptional importance," Farhane filed a petition for a rehearing en banc with the Court of Appeals,[154] which the court granted.[155] On May 22, 2024, the Court of Appeals reheard Farhane's case en banc.[156] The court will likely announce its decision in *Farhane II* later this year.

Despite the initial panel decision reaffirming the circuit's commitment to the collateral/direct dichotomy, the en banc decision will override the panel's ruling and determine the direction of the circuit's future Sixth Amendment jurisprudence. This presents an opportunity for the court to soften the strong language of *Farhane I*, thereby safeguarding defendants' rights in criminal proceedings.

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148 *Id.* at 130–33.

149 *Id.* at 135 (Carney, J., dissenting).

150 *Id.* at 146 (citing *Padilla*, 559 U.S. at 365).

151 *Id.* (citing *Padilla*, 559 U.S. at 365).

152 *Id.* at 143 (quoting United States v. Youngs, 687 F.3d 56, 62 (2d Cir. 2012)).

153 *Id.* at 150.

154 Petition for Rehearing, *supra* note 1, at 2.

155 *See* Order for Appeal to Be Heard en Banc, Farhane v. United States, 77 F.4th 123 (2d Cir. 2023) (No. 20-1666).

156 *Id.*

Farhane II also offers a chance for the Second Circuit to update its approach to informing defendants about significant collateral consequences, bringing its legal principles in line with the prevailing professional standards as mandated by *Strickland*.

III. *FARHANE I* ERRONEOUSLY ADHERED TO THE DIRECT/COLLATERAL CONSEQUENCES TEST

The *Farhane I* dissent properly identified the major flaws underlying the majority's reasoning. *Padilla*'s mandate that counsel warn defendants of the deportation risks of a conviction is sufficient to show that Farhane received objectively unreasonable assistance from his former criminal defense counsel.[157] Further, the *Farhane I* majority improperly narrows the reach of *Padilla* in holding that collateral consequences are categorically removed from Sixth Amendment protection.[158] In doing so, the court glossed over the "seismic" effect of *Padilla* on effective assistance of counsel claims and the Supreme Court's disapproval of "traditional frames of formalism" as applied to duties of defense counsel.[159] *Padilla* provided a clear pathway toward an approach to Sixth Amendment ineffective assistance claims that is more flexible and fair, in line with the vision articulated in *Strickland*.[160] Finally, the majority also incorrectly analyzed the cases that it relied upon in support of its holding, leading to an incorrect determination that the collateral consequences test is consistent with Supreme Court precedent.[161]

A. Farhane I *Is Inconsistent with* Padilla

The *Farhane I* majority failed to understand that a conviction that creates a high risk of denaturalization automatically creates a high risk of deportation, thus requiring a warning under *Padilla*. Further, it incorrectly determined that civil denaturalization is not "intimately related to the criminal process" to merit an exception to the

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157 *See generally* Padilla v. Kentucky, 559 U.S. 356 (2010).

158 *See Farhane*, 77 F.4th at 126–27 (majority opinion).

159 McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 798 (2011) (noting that *Padilla* "ripped the foundations from the perennially unsound 'collateral/direct' consequence distinction").

160 *See* Strickland v. Washington, 466 U.S. 668, 696 (1984) ("[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.").

161 *See infra* Section III.B.1.

direct/collateral test.[162]

1. *Padilla* Requires That Counsel Warn of a Risk of Denaturalization

Under *Padilla*, counsel has a constitutional duty to inform criminal defendants when "pending criminal charges may carry a risk of adverse immigration consequences."[163] A conviction that creates a high risk of denaturalization automatically translates to a high risk of deportation,[164] which requires a warning under *Padilla*. Generally, the government does not allocate the resources necessary for denaturalization proceedings without intending to ultimately remove the defendant as well.[165] Moreover, once § 1451(a) denaturalization proceedings[166] are initiated against a defendant who has entered such a guilty plea, the defendant is collaterally estopped from disputing facts previously admitted to in a plea, leaving the defendant without a viable defense.[167] Additionally, courts "lack any equitable discretion to deny the government's application to revoke the citizenship of a citizen subject to denaturalization."[168]

Accordingly, neither the defendant nor the court can prevent the stripping of the defendant's citizenship and their subsequent guaranteed removability. As a result, it hardly makes sense to argue that an attorney has a Sixth Amendment obligation to advise their client about the potential for deportation resulting from a plea, except in cases where the government must first revoke the client's citizenship.[169] This additional step cannot be deemed an extra hurdle that makes deportation any less likely when denaturalization is sufficient to guarantee this result. Thus, under *Padilla*, competent counsel must warn defendants when a plea

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162 *Farhane*, 77 F.4th at 130.

163 Padilla v. Kentucky, 559 U.S. 356, 369 (2010).

164 *See* notes 176–79 and accompanying text.

165 *See Farhane*, 77 F.4th at 150 (Carney, J., dissenting); *see also* U.S. DEP'T OF JUST., CIV. IMMIGR. ENF'T & THE OFF. OF IMMIGR. LITIG. DIST. CT SECTION, *supra* note 124, at 16–17 ("Typically, the government does not expend resources on civil denaturalization actions unless the ultimate goal is the removal of the defendant from the United States.").

166 Under § 1451(a), the government may cancel a naturalized citizen's certificate of naturalization on the ground that naturalization was "illegally procured" or was "procured by concealment of a material fact or by willful misrepresentation." 8 U.S.C. § 1451(a).

167 *See* Fedorenko v. United States, 449 U.S. 490, 517 (1981); Maietta v. Artuz, 84 F.3d 100, 102 n.1 (2d Cir. 1996); Jean-Baptiste v. United States, 395 F.3d 1190, 1194 (11th Cir. 2005).

168 *Farhane*, 77 F.4th at 149 (Carney, J., dissenting) (citing *Fedorenko*, 449 U.S. at 517).

169 *Id.* at 151 (quoting Brief for Nat'l Ass'n of Crim. Def. Law. & N.Y. State Ass'n of Crim. Def. Law. as Amici Curiae Supporting Petitioner-Appellant at 13, Farhane v. United States, 77 F.4th 123 (2d Cir. 2023) (No. 20-1666)).

carries a risk of denaturalization.[170]

2. Denaturalization Merits Exception to the Collateral Consequences Test

For the same reasons that *Padilla* is dispositive in showing that a risk of denaturalization requires a warning from counsel, such a warning is also warranted after applying *Padilla*'s "step zero" exception analysis. As the *Farhane I* court recognized, *Padilla* asked whether deportation was "intimately related" to the criminal process so as to require Sixth Amendment protection.[171] As denaturalization is a penalty that is difficult to divorce from a conviction and shares other characteristics with deportation, it merits exception from the strict direct/collateral test.[172]

The *Farhane I* panel applied *Padilla*'s test to civil denaturalization but reached the incorrect conclusion. As the Supreme Court has recognized time and time again, denaturalization is an extraordinarily severe consequence of a conviction, which can affect both a defendant and their family members.[173] The *Farhane I* majority thus properly conceded that denaturalization is sufficiently severe to satisfy this prong of *Padilla*'s "step zero" framework.[174] However, the panel failed to recognize that denaturalization "directly flow[s]" from a criminal conviction.[175]

Farhane's plea immediately made him vulnerable to a charge of naturalization fraud under 18 U.S.C. § 1425. Upon a conviction under 8 U.S.C. § 1451, the court must immediately revoke the grant of citizenship and declare the individual's naturalization certificate canceled.[176] Farhane's plea therefore made him vulnerable to denaturalization under § 1451(a), which provides that "*it shall be the duty* of" the government to institute such proceedings to revoke naturalization in such circumstances.[177] As the *Farhane I* dissent

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170 *See* Qureshi, *supra* note 31, at 178.

171 Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

172 *Id.* at 365–66.

173 *See* Qureshi, *supra* note 31, at 180 (arguing that if noncitizens have a right to counsel about the deportation consequences of their convictions, then *Padilla* also requires counseling naturalized citizens of the denaturalization consequences of convictions).

174 *See Farhane*, 77 F.4th at 130 (stating that the severity of denaturalization is "undisputed").

175 *See* United States v. Parrino, 212 F.2d 919, 921 (2d Cir. 1954).

176 *Farhane*, 77 F.4th at 146 n.14 (Carney, J., dissenting) (quoting 8 U.S.C. § 1451(a), (e)).

177 8 U.S.C. § 1451(a) (emphasis added); *see also Farhane*, 77 F.4th at 147 n.15 (Carney, J., dissenting).

recognized, the fact that one must look to other statutory provisions to determine whether prior criminal conduct renders naturalization "illegally procured" does not make denaturalization "any less automatic" a result.[178]

Denaturalization and deportation are also essentially indistinguishable in terms of their relationship to a criminal conviction. Both consequences may or may not occur after a plea and both may be initiated even without a conviction.[179] In attempting to distinguish denaturalization from deportation, the *Farhane I* majority relied upon the fact that denaturalization is a "separate proceeding" from a criminal prosecution that can occur with or without a criminal conviction and is subject to the government's considerable discretion in bringing denaturalization cases.[180] However, as the dissent noted, the same is true of deportation.[181] Denaturalization proceedings, like removal proceedings, may be civil or criminal.[182] Moreover, the government can choose to initiate both denaturalization and deportation without a criminal conviction.[183] Finally, both denaturalization and deportation are innately bound up with government discretion and may be canceled via prosecutorial discretion.[184] There is, therefore, no real procedural distinction between denaturalization and deportation, and both have a close connection to a conviction.

B. Farhane I *Mischaracterizes the Nature of the Cases It Relies on for Support*

Relevant Supreme Court precedent does not mandate that the Second Circuit shackle itself to the harshness of the direct/collateral dichotomy and the *Farhane I* majority's broad claim that *all* collateral convictions are removed from the ambit of Sixth Amendment protection. The majority recognized that "this framework may not survive the Supreme Court's decision in *Padilla v. Kentucky*."[185] Yet,

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178 *Farhane*, 77 F.4th at 148 n.19.

179 *See id.* at 135.

180 *Id.* at 131 (majority opinion).

181 *Id.* at 148 (Carney, J., dissenting).

182 *Id.* (quoting Padilla v. Kentucky, 559 U.S. 356, 365 (2010)); *see also* U.S. CITIZENSHIP & IMMIGR. SERV., USCIS POL'Y MANUAL, vol. 12, pt. L, ch. 1(A) (2013) ("A person's naturalization can be revoked either by civil proceeding or pursuant to a criminal conviction.").

183 *See Farhane*, 77 F.4th at 148 (Carney, J., dissenting). For further reading, see Markowitz, *supra* note 63, at 1326 n.112.

184 *See Farhane*, 77 F.4th at 149 (Carney, J., dissenting).

185 *Id.* at 127 (majority opinion).

the majority relied on *Chaidez* and *Padilla* to claim that counsel's failure to inform a defendant of the collateral consequences of a guilty plea is never a violation of the Sixth Amendment.[186]

However, the majority mischaracterizes this excerpt from *Chaidez*, which described the lower courts' approaches to the Sixth Amendment ineffective assistance claims in the wake of *Hill* but *before* the *Padilla* decision.[187] The *Chaidez* opinion goes on to note that the *Padilla* Court rejected the categorical approach in the context of immigration consequences and found the distinction poorly suited to addressing deportation.[188] The *Farhane I* majority's justification for its adherence to the direct/collateral dichotomy thus boils down to citations to *Youngs v. United States* and the Seventh Circuit case *United States v. Reeves*.[189] However, neither case is dispositive in this instance, and the *Farhane I* panel thus was not required to apply the collateral consequences test. Rather, the Supreme Court has already formulated an alternative to this dichotomy in *Padilla* and *Strickland*,[190] which the *Farhane I* panel should have followed. The collateral consequences test is too inflexible to be applied to Sixth Amendment claims in the modern criminal legal landscape and should therefore be abandoned.[191]

1. Neither *Youngs* Nor *Reeves* Require Adherence to the Collateral Consequences Test

Despite the claims of the *Farhane I* majority,[192] not applying the collateral consequences test would not be contrary to Second Circuit precedent. The direct/collateral dichotomy itself did not originate in the Sixth Amendment context: rather, it emerged from *Brady*, which concerned the court's duty to ensure that a defendant's plea is informed and voluntary.[193] Defense counsel's obligations, however, are broader

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186 *Id.* at 128 (quoting Chaidez v. United States, 568 U.S. 342, 350 (2013)).

187 *See Chaidez*, 568 U.S. at 350 (noting that, in the interim between the Supreme Court's decisions in *Hill* and *Padilla*, "state and lower federal courts . . . almost unanimously concluded that the Sixth Amendment does not require attorneys to inform their clients of a conviction's collateral consequences, including deportation").

188 *See id.* at 355.

189 *See Farhane*, 77 F.4th at 128 (citing United States v. Youngs, 687 F.3d 56, 62 (2d Cir. 2012)); *id.* (citing United States v. Reeves, 695 F.3d 637, 640 (7th Cir. 2012)).

190 *See infra* notes 209–218 and accompanying text.

191 *See infra* notes 219–251 and accompanying text.

192 *See Farhane*, 77 F.4th at 126–27 (claiming that, per Second Circuit precedent, collateral consequences are outside the scope of the Sixth Amendment).

193 Brady v. United States, 397 U.S. 742, 758 (1970).

than those of a judge.[194] As the *Youngs* court itself noted, the "Sixth Amendment responsibilities of counsel to advise of the advantages and disadvantages of a guilty plea are greater than the responsibilities of a court under the Fifth Amendment."[195]

With respect to *Youngs*, the *Farhane I* majority claimed the case showed that the Second Circuit had limited *Padilla*'s holding to cases involving deportation.[196] The *Youngs* court reasoned that the consequence at issue in the case was "remote and uncertain" and therefore beyond the scope of *Padilla*'s possible exceptions.[197] However, the issue in *Youngs* arose out of the analogous—but still distinct—Fifth Amendment duty of courts to inform criminal defendants of possible conviction consequences. *Youngs* merely stands for the proposition that *Padilla* did not discard the direct/collateral distinction for due process nor for Fifth Amendment claims.[198] The *Youngs* court itself recognized that counsel's duty to advise a client of the pros and cons of a guilty plea under the Sixth Amendment is greater than the court's responsibilities under the Fifth Amendment.[199] The court paid special attention to the language in *Libretti v. United States*: "[I]t is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo."[200]

The *Farhane I* majority acknowledged this distinction between the obligations of counsel and courts but dismissed it, simply stating that the Fifth Amendment responsibilities of the court are "closely related."[201] But the majority provided no specific justification as to why the court's narrowing of *Padilla*'s holding in the Fifth Amendment context should apply to defense counsel, of whom clients and the legal field expect more.[202] Nor did the majority address countervailing precedent from other federal courts that suggest that courts have a

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194 *See Farhane*, 77 F.4th at 143–44 (Carney, J., dissenting) (noting that courts have not "generally found . . . coextensive the Fifth Amendment obligations of a court" and counsel's Sixth Amendment obligations).

195 United States v. Youngs, 687 F.3d 56, 62 (2d Cir. 2012) (citing Libretti v. United States, 516 U.S. 29, 50–51 (1995)).

196 *Farhane*, 77 F.4th at 128 (quoting *Youngs*, 687 F.3d at 62).

197 *Youngs*, 687 F.3d at 62.

198 *Id.*

199 *Id.* (citing *Libretti*, 516 U.S. at 50–51)*; see also Farhane*, 77 F.4th at 143–44 (Carney, J., dissenting).

200 *Libretti*, 516 U.S. at 50–51.

201 *Farhane*, 77 F.4th at 131.

202 *See Farhane*, 77 F.4th at 143–44 (Carney, J., dissenting) (arguing that the majority overlooked this distinction).

broader obligation under the Fifth Amendment than attorneys do under the Sixth Amendment.[203] In light of these rationale, *Youngs* does not mandate the application of the direct/collateral test in these circumstances.

The Seventh Circuit case that the majority relies upon, *United States v. Reeves*, is similarly unavailing to the *Farhane I* majority's perspective. *Reeves* involved a defendant's ineffective assistance claim, wherein the defendant claimed that his attorney did not inform him that a guilty plea could be used against him to trigger a statutory sentencing enhancement in a subsequent proceeding.[204] The *Reeves* court compared the characteristics of sentencing enhancement to the severity and automatic nature of deportation and found that the consequence was not an "automatic" one to justify the *Padilla* exception.[205] The Seventh Circuit distinguished *Padilla* from the facts in *Reeves* and narrowed its holding, reasoning that the *Padilla* exception was limited to deportation only and thus did not foreclose the court from applying the direct/collateral consequences test.[206] The *Reeves* court ultimately held that it was not unreasonable for Reeves' attorney to fail to advise his client that a guilty plea could subsequently result in a sentencing enhancement.[207] *Reeves* thus has no direct bearing on the outcome in *Farhane I*, as it is distinguishable from the facts here.[208]

Thus, neither *Youngs* nor *Reeves* require that the Second Circuit adhere to the collateral consequences test. *Youngs* is fundamentally a Fifth Amendment case that does not dictate the outcome in *Farhane I*, and the Seventh Circuit's decision in *Reeves* is limited to counsel's failure to advise on potential sentence enhancements.[209] Instead, the *Farhane I* panel should have looked to the principles explicitly outlined in *Padilla* and *Strickland* to make its decision.

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203 *See, e.g.*, United States v. Delgado-Ramos, 635 F.3d 1237, 1239–40 (9th Cir. 2011); United States v. Hollins, 70 F.4th 1258, 1264 (9th Cir. 2023); United States v. Nicholson, 676 F.3d 376, 381 n.3 (4th Cir. 2012).

204 United States v. Reeves, 695 F.3d 637, 639 (7th Cir. 2012).

205 *Id.* at 640 ("Put simply, there is no automatic consequence to the guilty plea in this case."). For further reading on *Reeves* and why its outcome was also flawed, see Kim, *supra* note 75, at 869–75.

206 Kim, *supra* note 75, at 867.

207 *Reeves*, 695 F.3d at 640 (citing Lewis v. United States, 902 F.2d 576, 577 (7th Cir. 1990)).

208 Moreover, *Reeves* is a Seventh Circuit case and is persuasive at best. Viewed in balance against countervailing Second Circuit precedent and the split among circuit courts on this issue, the *Farhane I* panel should not have assigned this amount of weight to the *Reeves* decision.

209 *Reeves*, 695 F.3d at 640–41.

2. The Supreme Court Formulated an Alternative to the Collateral Consequences Test

The Supreme Court has never sanctioned the application of the collateral consequences test to Sixth Amendment ineffective assistance claims.[210] In *Padilla*, the Court distanced itself from the dichotomy.[211] The Court reaffirmed that *Strickland* remained the core of an ineffective assistance claim and that its two-part test should be applied once a court makes a threshold determination that a consequence falls within the Sixth Amendment's ambit.[212] *Chaidez* also did not mandate the continued use of the direct/collateral dichotomy in the Sixth Amendment context: it primarily stands for the proposition that *Padilla* cannot be applied retroactively.[213] It also clarified that *Padilla* did not provide a general opinion on the future applicability of the dichotomy in the context of the Sixth Amendment.[214] This left the door open for subsequent challenges to the dichotomy's fairness and ultimate constitutionality. As clear from the growing gap between the legal field's standard for "effective counsel" and the standard upheld in the lower courts, the dichotomy is not useful. Rather, it prevents the development of higher standards for defense counsel and erodes the fairness of defendants' plea agreements.[215]

Strickland also demands that "[p]revailing norms of practice as reflected in American Bar Association standards and the like" serve as "guides to determining what is reasonable" to expect from attorneys.[216] As the amici submitted to the court in advance of both the *Farhane I* decision and *Farhane II* oral argument noted, it has been common practice for competent defense counsel to warn criminal defendants of a wide array of immigration consequences, such as denaturalization, since

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210 Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (citing Strickland v. Washington, 466 U.S. 668, 689 (1984)) ("We . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.").

211 *Padilla*, 559 U.S. at 366.

212 *See id.*; Terrence Regan, Note, *The Proper Borders of* Padilla*: Courts Must Avoid Over-Expansion of Sixth Amendment Claims*, 87 ST. JOHN'S L. REV. 669, 691 (2013).

213 *See* Chaidez v. United States, 568 U.S. 342, 355 (2013).

214 *Id.*

215 *See infra* Section IV.A.

216 *Padilla*, 559 U.S. at 366 (quoting Strickland v. Washington*,* 466 U.S. 668, 688 (1984)).

before Farhane pleaded guilty.[217] For example, the American Bar Association (ABA) has urged attorneys to go beyond *Padilla*'s mandate to advise clients about the clear deportation consequences of their convictions.[218] The ABA instructs attorneys to inquire into a client's citizenship and immigration status as well as advise clients of all potential immigration consequences, "including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family."[219]

Therefore, the *Farhane I* majority should have foregone the collateral consequences test in this instance and instead looked to the framework provided in *Padilla*, as well as the prevailing professional standards in place at the time of Farhane's plea. Under both lenses, it is clear that Farhane should have received a warning that his plea, as taken, subjected him to a reasonably discernable risk of denaturalization.

IV. PROPOSAL: A CIRCUMSTANCE-SPECIFIC ALTERNATIVE

The *Farhane I* panel should have adopted a more circumstance-specific approach to Sixth Amendment claims, rather than asserting that collateral consequences are "categorically removed from the scope of the Sixth Amendment."[220] The Second Circuit should return to fundamental due process and fairness basics: client priorities, prevailing professional standards, and the nature of the post-conviction consequence in question. Such a turn would not be unprecedented: courts have already begun to reexamine their adherence to the direct/collateral framework.[221] Moreover, doing so would bring the court's approach in line with the basic principles articulated in *Strickland* and *Padilla*.[222] Nothing less than this nuanced approach, set

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217 *See, e.g.*, Brief for Nat'l Ass'n of Crim. Def. Law. & N.Y. State Ass'n of Crim. Def. Law. as Amici Curiae Supporting Petitioner-Appellant at 5–6, Farhane v. United States, 77 F.4th 123 (2d Cir. 2023) (No. 20-1666).

218 Thea Johnson, *2023 Plea Bargain Task Force Report*, ABA 21 (2023) https://www.americanbar.org/groups/criminal_justice/committees/taskforces/plea_bargain_tf (last visited Aug. 11, 2024).

219 STANDARDS FOR CRIM. JUST.: DEFENSE FUNCTION § 4-5.5 (AM. BAR ASS'N 2017).

220 Farhane v. United States, 77 F.4th 123, 127 (2d Cir. 2023) (quoting Chaidez v. United States, 568 U.S. 342, 349 (2013)).

221 *Id.* at 143 (Carney, J., dissenting).

222 *Strickland* requires a case-by-case approach to Sixth Amendment claims that emphasizes fundamental fairness, explicitly warning against bright-line rules. *See* Strickland v. Washington,

forth by the Supreme Court in the 1980s[223] and not since undermined, protects the ultimate fairness of plea bargaining.

A. *Counsel's Duty to Determine Client Priorities and Warn of Clear Risks*

The *Farhane I* majority expressed dismay at the dissent's suggestion that *Padilla* requires that courts determine if the Sixth Amendment requires that counsel advise defendants of a specific consequence on a case-by-case basis.[224] The majority asserted that the collateral/direct dichotomy is more useful than this case-specific approach because it is a guide to defense counsel.[225] Reliance on a rigid dichotomy, however, risks ignoring the Supreme Court's historic reliance on professional norms and on pragmatic impacts of a plea.[226] It is also inconsistent with the directive in *Strickland* to conduct a "case-by-case examination"[227] of the totality of the evidence to determine whether the "particular errors of counsel" prejudiced a defendant.[228] In fact, in *Strickland*, the Court noted that "[m]ore specific guidelines are not appropriate."[229] The Second Circuit has also recognized the validity of case-specific analysis.[230] And, as the *Farhane I* majority itself noted, there may be other so-called collateral consequences that are severe and automatic enough that they are, like deportation, "ill suited" to the framework.[231] Courts are therefore already bound to conduct a case-by-case inquiry, and counsel should endeavor to warn defendants of

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466 U.S. 668, 670 (1984); *see also* Sarah Keefe Molina, Comment, *Rejecting the Collateral Consequences Doctrine: Silence About Deportation May or May Not Violate* Strickland*'s Performance Prong*, 51 ST. LOUIS U. L.J. 267, 289 (2006) (arguing that, in light of *Strickland*, courts should look to the specific circumstances of a case to analyze an attorney's performance).

223 *See* 49 GEO. L.J. ANN. REV. CRIM. PROC. 591, 615–17 (2020).

224 *Farhane*, 77 F.4th at 129.

225 *Id.*

226 *See* Paul Quincy, Comment, *Right to Be Counseled: The Effect of Collateral Consequences on the* Strickland *Standard*, 20 U. PA. J. CONST. L. 763, 765 (2018).

227 Williams v. Taylor, 529 U.S. 362, 391 (2000) (quoting Wright v. West, 505 U.S. 277, 308 (1992)).

228 *See* Strickland v. Washington, 466 U.S. 668, 693 (1984). Notably, although *Strickland* was decided after lower courts began applying the collateral/direct dichotomy, the Court did not sanction nor even acknowledge this inflexible test. *See generally Strickland*, 466 U.S. 668.

229 *Id.* at 688.

230 *See* Kovacs v. United States, 744 F.3d 44, 52 (2d Cir. 2014) ("[E]ach case is a context-specific application of *Strickland* directed at a particular instance of unreasonable attorney performance."); Doe v. United States, 915 F.3d 905, 912 (2d Cir. 2019) (holding that courts must look to a defendant's expressed preferences).

231 Farhane v. United States, 77 F.4th 123, 129 (2d Cir. 2023).

important consequences of a plea or conviction.[232]

Of course, given the sheer number of collateral consequences of convictions, it would be far too burdensome for counsel to warn defendants of every potential consequence.[233] The appropriate limiting principle for this duty should therefore be determined by an inquiry into a client's preferences and tolerance for risk.[234] It is a basic and well-recognized principle that good attorneys should determine which consequences are the most important to their client's decision-making.[235] The Supreme Court has also repeatedly sanctioned this approach. In *Hill*, the Court suggested that counsel should pay attention to circumstances that are of particular importance to a defendant and whether this issue affected their decision to plead guilty.[236] In the 2017 decision *Lee v. United States*, the Court also noted the significance of "a defendant's expressed preferences" and the importance that a defendant places on a particular consequence.[237] The Second Circuit has also explicitly recognized the importance of inquiring into a defendant's expressed preferences.[238] Adopting such a standard would encourage attorneys to appropriately intake, interview, and weigh risks with their

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232 After assessing a client's priorities, under *Padilla*, counsel must then provide a warning and counsel clients on the potential consequences of a conviction when the consequences are "clear." Padilla v. Kentucky, 559 U.S. 356, 369 (2010). Admittedly, determining whether a consequence is "clear" is not always an easy task, but it is not prohibitively overburdensome. *See* Lilia S. Stantcheva, Note, Padilla v. Kentucky*: How Much Advice is Enough?*, 89 N.Y.U. L. REV. 1836, 1860 (2014). Typically, "if there is a relevant statute that clearly spells out the deportation consequences, attorneys have the duty to advise their clients regarding those consequences." *Id.* Looking at the clarity of the relevant law is therefore sufficient. For Farhane, the risk of denaturalization was clear from the language of the relevant denaturalization statute; therefore, his attorney should have warned him of this apparent risk. *See* 8 U.S.C. § 1451(a) (explicitly authorizing denaturalization against individuals who procure naturalization by concealing a material fact or by willful misrepresentation).

233 *See Padilla*, 559 U.S. at 385 (Alito, J., concurring); *see also* Colleen A. Connolly, Note, *Sliding Down the Slippery Slope of the Sixth Amendment: Arguments for Interpreting* Padilla v. Kentucky *Narrowly and Limiting the Burden It Places on the Criminal Justice System*, 77 BROOK. L. REV. 745, 781 (2012) (arguing that an overextension of *Padilla* could "produce a massive caseload in the form of ineffective assistance of counsel claims" and overburden the courts).

234 Quincy, *supra* note 226, at 783, 786 ("[T]he 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.").

235 *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2024) ("[T]he lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered . . . ."); N.Y. RULES OF PRO. CONDUCT r. 1.2(a) (amended 2022) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

236 *See* Connolly, *supra* note 233, at 754 n.71 (citing Hill v. Lockhart, 474 U.S. 52, 60 (1985)).

237 Lee v. United States, 582 U.S. 357, 358, 369 (2017).

238 Doe v. United States, 915 F.3d 905, 912 (2d Cir. 2019).

clients.[239]

For example, in the wake of *Padilla*, criminal defense attorneys modified their behavior to ensure that defendants were advised of the risk of immigration consequences.[240] Before the decision, some jurisdictions did not recognize such a failure as ineffective assistance.[241] But now, even in jurisdictions where such warnings were not commonplace before 2010, *Padilla*'s holding is an enforceable norm.[242] It has led frontline criminal defense organizations to ensure that defendants are thoroughly advised of the possible consequences of their convictions and seek to avoid such consequences.[243] Training on such consequences has also become a "staple" for defense lawyers across the country.[244] All in all, this motivated attorneys to think creatively about defense and to improve representation efforts overall to comply with *Padilla*'s holding.[245]

When attorneys gather information about a client's priorities and defendants receive more complete information about the consequences of a plea, it enables both parties to effectively navigate plea negotiations (hence why the Supreme Court has approved such practices).[246] Such practices have been shown to have a significant impact on whether a defendant chooses to enter a plea or proceed to trial.[247] Thus, because expecting more effort from attorneys can demonstrably benefit clients, it should not be something the legal field avoids. Through such thoroughness, attorneys can ensure that a plea truly "represents a voluntary and intelligent choice among the

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239 *See* Quincy, *supra* note 226, at 775; Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 688–90 (2011).

240 *See* Reimer, *supra* note 112.

241 *See* Connolly, *supra* note 233, at 757.

242 *See id.* at 773; García Hernández, *supra* note 24, at 847–48.

243 *See, e.g.*, *Padilla Support Center*, IMMIGR. DEF. PROJECT, https://www.immigrantdefenseproject.org/what-we-do/padilla-support-center [https://perma.cc/828S-4VKM]; *Post-Conviction Relief*, IMMIGR. L. RES. CTR., https://www.ilrc.org/immigrant-post-conviction-relief [https://perma.cc/YS46-PW8J]. For further reading on efforts by public defense organizations to comply with *Padilla*'s mandate, see generally Ingrid Eagly, Tali Gires, Rebecca Kutlow & Eliana Navarro Gracian, *Restructuring Public Defense After* Padilla*,* 74 STAN. L. REV. 1 (2022) (describing California counties' efforts to address the need to inform immigrant defendants of possible immigration consequences of convictions).

244 Reimer, *supra* note 112.

245 *See id.*

246 *See* Lee v. United States, 582 U.S. 357, 371 (2017).

247 *See* Malone*, supra* note 70, at 1188, 1198–99 (finding that communicating collateral consequences is important for plea bargain acceptance decisions, and respondents were significantly more likely to exercise their right to trial when collateral consequences were communicated as part of the plea bargain offer).

alternative courses of action open to the defendant."[248]

Especially when weighed against the demonstrated benefits of setting more demanding standards for attorneys, the risk of inconvenience to attorneys under such an approach should not trump the maintenance of defendants' constitutional rights.[249] Rather, the obligations imposed on defense attorneys—who are charged with advocating for the best interests of their clients and often their liberty—should "strive to meet the constitutional standard, rather than to admit that the Constitution cannot be followed."[250] And, although it may be at times difficult for courts judging an attorney's actions to make judgments on the specifics of counsel's decisions, this is what both precedent[251] and fundamental fairness demand.[252]

B. *Evolving Professional Norms as a Measure of Effectiveness*

Relatedly, both *Strickland* and *Padilla* point to professional standards—which emphasize accounting for the specific circumstances of each defendant's case and are responsive to changes in the legal field and society at large—as setting the best applicable "objective reasonableness" standard to apply for ineffective assistance claims.[253] Such prevailing norms of professional practice may serve as guides for attorneys' behavior. *Strickland* and *Padilla* also already recognized such standards as ultimately defining the scope of reasonably effective counsel.[254]

As noted in *Padilla*, such standards are helpfully set forth in "[ABA] standards and the like."[255] The ABA and other professional associations have long-encouraged attorneys to advise their clients of the potential collateral consequences that could result from a plea.[256]

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248 Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

249 *See* Chin, *supra* note 239, at 678 (arguing that burdens imposed on defense attorneys by having to warn of potential collateral consequences to clients "should not stand in the way of recognizing constitutional rights of defendants").

250 *Id.* at 681.

251 *See* Strickland v. Washington, 466 U.S. 668, 693, 695 (1984).

252 Quincy, *supra* note 226, at 786; Chin, *supra* note 239, at 681–82, 684.

253 *See* Padilla v. Kentucky, 559 U.S. 356, 366 (2010); *Strickland*, 466 U.S. at 688.

254 *Padilla*, 559 U.S. at 366; *Strickland*, 466 U.S. at 688.

255 *Padilla*, 559 U.S. at 366 (quoting *Strickland*, 466 U.S. at 688).

256 *See, e.g.*, STANDARDS FOR CRIM. JUST.: PLEAS OF GUILTY § 14-3.2(f) (AM. BAR ASS'N 1999) [hereinafter STANDARDS FOR CRIM. JUST.: PLEAS OF GUILTY 1999] ("To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of

These practices pre-date the relevant events in *Farhane I*.[257] Although such standards may set a high bar, it is the duty of courts to ensure that attorneys abide by these widely accepted conventions when reasonable.

Such compilations of standards are also subject to regular updates to keep pace with developments in the law and the legal field.[258] In a recent task force report, the ABA noted that defense attorneys must "ascertain reasonably identifiable collateral consequences . . . prior to the entry of any guilty plea."[259] This emphasizes the duty of defense counsel to thoroughly investigate claims and give case-specific advice to clients.[260] More to the point for Farhane, it has been common practice for competent defense counsel to warn criminal defendants of a wide array of immigration consequences since before Farhane pled guilty.[261]

The ABA has also long instructed attorneys to inquire into a client's citizenship and immigration status and advise clients of all potential immigration consequences, including "*denial of citizenship*[] *and adverse consequences to the client's immediate family*"[262]—both relevant in Farhane's case. The remoteness of such possibilities is no matter: counsel is charged with providing a client with full information

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any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."); PERFORMANCE GUIDELINES FOR CRIM. DEF. REPRESENTATION § 6.2(a) (NAT'L LEGAL AID & DEF. ASS'N 1995), https://www.nlada.org/defender-standards/performance-guidelines [https://perma.cc/WJ6H-2P7T] [hereinafter PERFORMANCE GUIDELINES FOR CRIM. DEF. REPRESENTATION 1995]; STANDARDS FOR PROVIDING MANDATED REPRESENTATION § I-7 (N.Y. STATE BAR ASS'N 2005).

257 *See generally* STANDARDS FOR CRIM. JUST.: PLEAS OF GUILTY 1999, *supra* note 256; PERFORMANCE GUIDELINES FOR CRIM. DEF. REPRESENTATION 1995, *supra* note 256.

258 *See, e.g.*, STANDARDS FOR CRIM. JUST.: DEFENSE FUNCTION § 4-1.3 (AM. BAR ASS'N 2017) [hereinafter STANDARDS FOR CRIM. JUST.: DEFENSE FUNCTION] ("Defense counsel should consider the impact of these duties at all stages of a criminal representation and on all decisions and actions that arise in the course of performing the defense function. These duties include . . . a duty to consider the collateral consequences of decisions and actions, including but not limited to the collateral consequences of conviction."); 2021 REVISED STANDARDS FOR PROVIDING MANDATED REPRESENTATION 1 (N.Y. STATE BAR ASS'N 2021).

259 Johnson, *supra* note 218, at 21.

260 *See, e.g.*, STANDARDS FOR CRIM. JUST.: DEFENSE FUNCTION, *supra* note 258, § 4-3.3 ("[D]efense counsel should also discuss . . . relevant collateral consequences resulting from the current situation as well as from possible resolutions of the matter."); *id.* § 4-5.4 ("When defense counsel knows that a consequence is particularly important to the client, counsel should advise the client as to whether there are procedures for avoiding, mitigating or later removing the consequence, and if so, how to best pursue or prepare for them.").

261 *See* Brief for Nat'l Ass'n of Crim. Def. Law. & N.Y. State Ass'n of Crim. Def. Law. as Amici Curiae Supporting Petitioner-Appellant at 5–6, Farhane v. United States, 77 F.4th 123 (2d Cir. 2023) (No. 20-1666); *see also* STANDARDS FOR CRIM. JUST.: PLEAS OF GUILTY 1999, *supra* note 256, § 14-3.2(f) cmt. at 126 ("[O]nly defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case.").

262 STANDARDS FOR CRIM. JUST.: DEFENSE FUNCTION, *supra* note 258, § 4-5.5(c) (emphasis added).

regarding the immigration consequences of a plea or conviction "under all possible eventualities."[263] In light of *Strickland*'s clear directive that professional standards set the bar for effective assistance, it hardly makes sense for the courts to lag behind such clear professional standards.[264]

If courts continue to fail to encourage attorneys to provide defendants with information about reasonably relevant consequences of a conviction, it would be nothing short of an erosion of Sixth Amendment guarantees, especially in light of the current landscape of the criminal legal system. In 2022, the overwhelming majority—about 89.5%—of defendants in federal criminal cases pled guilty rather than proceeding to trial, while another 8.2% had their cases dismissed.[265] This makes advice related to the consequences of pleas more important today than ever before. Moreover, there are over forty thousand possible collateral consequences that may result from criminal convictions.[266] While the *Farhane I* majority balks at requiring counsel to warn clients of such consequences,[267] it is even more illogical to require defendants to navigate through the Kafkaesque potential consequences of their pleas alone. What else, if not for assistance in navigating such a complex system, is counsel for?

Indeed, criminal lawyers are not expected to have expertise in other areas of the law, and it would be unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.[268] However, as detailed, the prevailing professional norms for defense attorneys now dictate that attorneys should make efforts to advise their clients of relevant collateral consequences and ascertain their clients' priorities. It is through such practices that counsel ensures that the legal system produces "just results."[269] When the Supreme Court has identified such norms as the standards by which to

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263 STANDARDS FOR PROVIDING MANDATED REPRESENTATION § I-7 (N.Y. STATE BAR ASS'N 2005) § I-7(e).

264 *See* Strickland v. Washington, 466 U.S. 668, 688 (1984) ("The Sixth Amendment . . . relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.").

265 John Gramlich, *Fewer Than 1% of Federal Criminal Defendants Were Acquitted in 2022*, PEW RSCH. CTR. (June 14, 2023), https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022 [https://perma.cc/R879-F869].

266 Johnson, *supra* note 218, at 26.

267 *See* Farhane v. United States, 77 F.4th 123, 126–27 (2d Cir. 2023).

268 *Id.* at 127 (quoting Padilla v. Kentucky, 559 U.S. 356, 376 (2010) (Alito, J., concurring)).

269 Strickland v. Washington, 466 U.S. 668, 685 (1984).

judge ineffective assistance of counsel claims,[270] it is illogical for the courts to not heed such standards.

C. *Inquiry into the Nature of a Consequence*

Padilla also suggests a third approach to a case-by-case analysis of post-conviction consequences: namely, an inquiry into whether a consequence is punitive.[271] Before *Padilla*, courts long considered immigration proceedings to be civil, rather than criminal,[272] and that deportation is not a form of punishment for a crime.[273] Despite this, the Supreme Court finally held in *Padilla* that deportation's severe nature merited recognition that it is not quite a civil nor a criminal consequence.[274] This suggests that the quasi-criminal nature of deportation as a consequence bore some weight in the court's decision-making.[275] It is now plain that immigration consequences, like denaturalization, fit within the "incarcerative" or punitive bucket of consequences. As the *Farhane I* majority conceded, denaturalization is a "serious" consequence, which merits consideration.[276]

An inquiry into the nature of a consequence easily applies to other collateral consequences as well. Indeed, the Supreme Court has recognized that "the severity of the penalty and the 'automatic' way it follows from conviction" are the relevant factors to determine whether the consequences merit *Strickland* scrutiny."[277] The Court therefore sanctions a distinction between collateral consequences that have "punitive outcomes versus those which exist for social protection."[278] Such an inquiry into the "nature" of a consequence neatly aligns with *Padilla*'s inquiry into the severity of a consequence at issue.[279] This also

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270 *See Padilla*, 559 U.S. at 366; *Strickland*, 466 U.S. at 688.

271 *See Padilla*, 559 U.S. at 366.

272 *See generally* Fong Yue Ting v. United States, 149 U.S. 698 (1893)*; see also* Markowitz, *supra* note 63, at 1304–07 (discussing history of the "civil" label of removal proceedings).

273 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

274 *See* Markowitz, *supra* note 63, at 1335–36 (arguing that *Padilla*'s recognition of deportation as neither collateral nor direct strongly suggests a recognition "that deportation is neither purely civil, nor purely criminal, in nature").

275 *See* Farhane v. United States, 77 F.4th 123, 130 (2d Cir. 2023) (quoting *Padilla*, 559 U.S. at 365) (noting that, "in *Padilla* and *Chaidez*, the Court emphasized deportation's 'particularly severe' character").

276 *Id.* at 130.

277 Chaidez v. United States, 568 U.S. 342, 355 (2013) (quoting *Padilla*, 559 U.S. at 366).

278 Quincy, *supra* note 226, at 776.

279 *See Padilla*, 559 U.S. at 365–66; *Chaidez*, 568 U.S. at 355.

dovetails with an attorney's recognized obligation to inquire into and serve their client's unique interests.[280] A subsequent inquiry into the "automatic" way a consequence follows a conviction[281]—namely, examining the interrelatedness of a consequence and the relevant law, as the Court did in *Padilla*—is also consistent with a focus on the punitive nature of a consequence. By tying a consequence to the criminal system, courts can formally recognize the reality that clients often consider collateral consequences when deciding whether to enter a plea or proceed to trial.[282]

CONCLUSION

If the Court of Appeals' *Farhane II* decision aligns with *Farhane I*, it will have long-lasting consequences in the Second Circuit and severely limit the rights of defendants. Under such a broad application of the collateral consequences doctrine, courts would be barred from assessing whether any "collateral" consequence of a conviction is sufficiently "severe and automatic" to warrant following *Padilla* and *Strickland*. The recent uptick in civil denaturalization actions makes it clear that it is more important now than ever for defense counsel to advise clients of a potential risk of denaturalization resulting from a guilty plea.[283] The stakes are particularly high in light of this trend and the lack of a statute of limitations for civil denaturalization cases. If the court echoes the reasoning in *Farhane I*, naturalized citizens would be forced to navigate any vulnerabilities resulting from convictions related to pre-naturalization conduct without a guarantee of effective counsel. This would contribute to widespread anxiety among naturalized citizens, just as previous encroachments upon naturalized citizens' rights have.[284] But such a decision would also have far-reaching consequences that will affect all criminal defendants, regardless of citizenship status or national origin.

Farhane I narrowed *Padilla* to the point that it is difficult to imagine a consequence of a criminal conviction that is sufficiently related to the conviction so as to require advice from counsel under the

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280 *See supra* Section IV.A.

281 *See Padilla*, 559 U.S. at 365–66; *Chaidez*, 568 U.S. at 352.

282 *See* Malone*, supra* note 70, at 1198.

283 *See* Qureshi, *supra* note 31, at 173 ("Over the last decade, the federal government has mounted a new concerted campaign to increase the use of denaturalization to revoke the citizenship of foreign-born U.S. citizens . . . ."); Robertson & Manta, *supra* note 116, at 409–14.

284 DeGooyer, *supra* note 115.

Sixth Amendment.[285] This broad holding "risks foreclosing future Sixth Amendment challenges based on failures to advise as to other assertedly 'collateral' consequences."[286] Such a bar is relevant to all criminal defendants, especially given the increasing prevalence of guilty pleas and the growing number of collateral consequences that come part and parcel with such pleas.[287]

Fortunately, there is a chance that the Court of Appeals will issue a different decision in *Farhane II*.[288] The court should seize this opportunity to instead embrace the complexities of *Padilla*'s flexible threshold test and demand more "competent" counsel. As representation makes all the difference in the outcome of a trial,[289] the guarantee of *effective* assistance makes all the difference in providing defendants a fair opportunity to vindicate their claims. The court should be eager to ensure that attorneys provide the best possible reasonable representation to clients. The imperative to protect defendants' right to a fair trial requires nothing less.

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285 *See* Farhane v. United States, 77 F.4th 123, 132 (2d Cir. 2023).

286 *Id.* at 144–45 (Carney, J., dissenting).

287 *See* Johnson, *supra* note 218, at 26; Tway & Gitlen, *supra* note 68, at 17.

288 *See* Bonita Robinson & Harry Sandick, *Over Dissent, Circuit Embraces Strict "Collateral/Direct" Distinction for Ineffective Assistance of Counsel Claims*, JDSUPRA (Aug. 21, 2023), https://www.jdsupra.com/legalnews/over-dissent-circuit-embraces-strict-6482695 [https://perma.cc/UD7R-3MK4].

289 *See* Victor D. Quintanilla, Rachel A. Allen & Edward R. Hirt, *The Signaling Effect of Pro Se Status*, 42 L. & SOC. INQUIRY 1091, 1092–94 (2017) (noting that legal representation increased the likelihood of a defendant receiving a favorable outcome compared to the likelihood of receiving a favorable outcome when pro se, likely due to the benefit of lawyers' expertise and familiarity with the law and relevant procedures).