No. _____

In The

Supreme Court of the United States

KENNETH TROTTER,

Petitioner,

v.

STATE OF UTAH,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Utah

PETITION FOR A WRIT OF CERTIORARI

TROY L. BOOHER
ZIMMERMAN JONES BOOHER LLC
136 S. Main Street
Suite 721
Salt Lake City, UT 84101

MATTHEW D. CARLING
51 E. 400 North
Cedar City, UT 84720

MICHAEL J. TETER
Counsel of Record
UNIVERSITY OF UTAH, S.J. QUINNEY COLLEGE OF LAW
332 S. 1400 East
Salt Lake City, UT 84112
(801) 585-1863
michael.teter@law.utah.edu

Counsel for Petitioner Kenneth Trotter

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The question presented is whether a defendant receives ineffective assistance of counsel under the Sixth Amendment when his attorney fails to advise him that the offense to which he is pleading guilty will require him to register as a sex offender.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 1

RELEVANT CONSTITUTIONAL PROVISIONS .. 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

I. State And Federal Courts Are Openly Divided Over Whether The Sixth Amendment Requires Defense Counsel To Advise Defendants Of The Sex Offender Registration Consequences Of Pleading Guilty 9

A. Courts Are Split Over How To Apply *Padilla* 10

B. Courts Are Divided Over Whether Sex Offender Registration Constitutes A Direct Or Collateral Consequence Of A Criminal Conviction 15

TABLE OF CONTENTS – Continued

Page

II. The Question Of Whether Defense Counsel Must Advise A Client Of The Requirement To Register As A Sex Offender As A Consequence Of Pleading Guilty Presents A Pressing Issue Of National Scope And Concern 19

III. This Case Serves As An Optimal Vehicle For The Court To Resolve These Issues 23

IV. Failure By Defense Counsel To Advise A Defendant About The Sex Offender Registration Requirement Of A Plea Bargained Conviction Constitutes Ineffective Assistance Of Counsel Under The Sixth Amendment 25

A. The Sex Offender Registration Requirement Presents A Severe Consequence Of Conviction And Is Deeply Enmeshed In Utah's Criminal Process..... 26

B. Sex Offender Registration Constitutes A Direct Consequence Of Conviction 31

C. Mr. Trotter's Attorney Provided Ineffective Assistance Of Counsel By Failing To Advise Mr. Trotter Of The Registration Requirement Of Pleading Guilty..... 34

CONCLUSION..... 38

TABLE OF CONTENTS – Continued

Page

APPENDIX

Supreme Court of Utah Opinion Filed May 20, 2014 ..... App. 1

District Court Judgment, Sentence, Stay of Execution of Sentence, Order of Probation and Restitution, and Commitment Filed November 3, 2011 ..... App. 28

District Court Decision and Order Denying Motion to Withdraw Plea Filed July 19, 2011 ..... App. 36

§ 77-27-21.7. Sex Offender Restrictions ..... App. 43

§ 77-41-105. Registration of Offenders – Offender Responsibilities ..... App. 45

§ 77-41-106. Registerable Offenses ..... App. 52

§ 77-41-107. Penalties ..... App. 53

TABLE OF AUTHORITIES

Page

CASES

Anderson v. State, 182 S.W.3d 914 (Tex. Crim. App. 2006) 16

Bauder v. Dep't of Corr., 619 F.3d 1272 (11th Cir. 2010) 14

Blaise v. State, 801 N.W.2d 627, 2011 WL 2078091 (Iowa Ct. App. 2011).....12

Brady v. United States, 397 U.S. 742 (1970) 5

Calvert v. State, 342 S.W.3d 477 (Tenn. 2011).....12

Carr v. United States, 560 U.S. 438 (2010).....21

Commonwealth v. Abraham, 62 A.3d 343 (Pa. 2012) 13

Commonwealth v. Leidig, 956 A.2d 399 (Pa. 2008) 18

Commonwealth v. Pridham, 394 S.W.3d 867 (Ky. 2012).....11

Commonwealth v. Ventura, 987 N.E.2d 1266 (Mass. 2013) 17

Davenport v. State, 620 N.W.2d 164 (N.D. 2000).....18

Doe v. Dep't of Pub. Safety & Corr. Serv., 62 A.3d 123 (Md. 2013).....16

Doe v. Poritz, 662 A.2d 367 (N.J. 1995).....17

Doe v. State, 189 P.3d 999 (Alaska 2008).....17

Femedeer v. Haun, 227 F.3d 1244 (10th Cir. 2000) 21

TABLE OF AUTHORITIES – Continued

Page

Hill v. Lockhart, 474 U.S. 52 (1985) 4, 37

In re Birch, 515 P.2d 12 (Cal. 1973) 16

Jackson v. United States, 463 F. App'x 833 (11th Cir. 2012).....14

Kaiser v. State, 641 N.W.2d 900 (Minn. 2002).....17

Leslie v. Randle, 296 F.3d 518 (6th Cir. 2002).....24

McNab v. Kok, 170 F.3d 1246 (9th Cir. 1999).....24

Missouri v. Frye, 132 S. Ct. 1399 (2012).....20

Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473 (2010).....*passim*

People v. Dodds, 7 N.E.3d 83 (Ill. App. Ct. 2014).....12, 16

People v. Fonville, 804 N.W.2d 878 (Mich. Ct. App. 2011).....12, 16

People v. Gravino, 928 N.E.2d 1048 (N.Y. 2010) 17

People v. Hughes, 983 N.E.2d 439 (Ill. 2012).....11, 18

Ramsey v. State, 182 S.W.3d 655 (Mo. Ct. App. 2005).....17

Ray v. State, 982 P.2d 931 (Idaho 1999) 17

Reynolds v. United States, 132 S. Ct. 975 (2012) 21

Sames v. State, 805 N.W.2d 565 (Minn. Ct. App. 2011) 12, 13

Starkey v. Oklahoma Dep't of Corr., 305 P.3d 1004 (Okla. 2013).....17

State v. Bollig, 605 N.W.2d 199 (Wis. 2000) 18

TABLE OF AUTHORITIES – Continued

Page

State v. Edwards, 157 P.3d 56 (N.M. Ct. App. 2007) 16

State v. Letalien, 985 A.2d 4 (Me. 2009) 17

State v. Myers, 923 P.2d 1024 (Kan. 1996).....17

State v. Partlow, 840 So.2d 1040 (Fla. 2003).....17

State v. Timperley, 599 N.W.2d 866 (S.D. 1999).....18

State v. Ward, 869 P.2d 1062 (Wash. 1994).....18

State v. Whalen, 588 S.E.2d 677 (W. Va. 2003).....16

State v. Williams, 952 N.E.2d 1108 (Ohio 2011).....17

Steele v. State, 291 P.3d 466 (Idaho Ct. App. 2012) 13

Strickland v. Washington, 466 U.S. 668 (1984) ...*passim*

Taylor v. State, 698 S.E.2d 384 (Ga. Ct. App. 2010) 12, 16

United States v. Reeves, 695 F.3d 637 (7th Cir. 2012) 14, 18

United States v. Riley, 72 M.J. 115 (C.A.A.F. 2013) 14

United States v. Tuakalau, No. 12-4052, 2014 WL 1303295 (10th Cir. Apr. 2, 2014).....14

Wallace v. State, 905 N.E.2d 371 (Ind. 2009) 17

Webb v. State, 334 S.W.3d 126 (Mo. 2011) 13

Williams v. State, 662 S.E.2d 615 (S.C. Ct. App. 2008) 17

TABLE OF AUTHORITIES – Continued

Page

Wilson v. Flaherty, 689 F.3d 332 (4th Cir. 2012) 24

Wilson v. State, 244 P.3d 535 (Alaska Ct. App. 2010) 12

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI .....*passim*

U.S. Const. amend. XIV 2, 3

STATUTES

18 U.S.C. § 2250(a) 22

28 U.S.C. § 1257(a) 1

28 U.S.C. § 2241 24

28 U.S.C. § 2254(a) 24

28 U.S.C. § 2255(a) 24

42 U.S.C. § 16901 (2006), *et seq*. 21

42 U.S.C. § 16914 .....21, 22

42 U.S.C. § 16918 22

42 U.S.C. § 16920 22

42 U.S.C. § 16925 21

R.I. Gen. Laws § 11-37.1-4(e) (2013) 27

R.I. Gen. Laws § 11-37.1-4(f) (2013) 27

Utah Code Ann. § 76-4-401 36

Utah Code Ann. § 77-21-21.7(1)(a)(iii) (2012).....7

Utah Code Ann. § 77-21-21.7(1)(a)(iv) (2012).....7

TABLE OF AUTHORITIES – Continued

Page

Utah Code Ann. § 77-21-21.7(2) (2012).....7

Utah Code Ann. § 77-27-21.7 .....2, 29

Utah Code Ann. § 77-41-102(9).....21, 36

Utah Code Ann. § 77-41-102(16).....21, 36

Utah Code Ann. § 77-41-105 .....2, 7, 29

Utah Code Ann. § 77-41-105(1).....27, 30, 31

Utah Code Ann. § 77-41-105(3).....32

Utah Code Ann. § 77-41-105(3)(a).....30

Utah Code Ann. § 77-41-106 .....2, 29, 36

Utah Code Ann. § 77-41-107 2

Utah Code Ann. § 77-41-107(1).....30, 32

Utah Code Ann. § 77-41-111(1) 30

Utah Code Ann. § 77-41-112(1) 34

OTHER AUTHORITIES

ABA Standards for Criminal Justice § 14-3.2(f) (1999).....35

Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117 (2011).....22

Carpenter & Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L.J. 1071 (2012).....7, 20, 26

TABLE OF AUTHORITIES – Continued

Page

Dept. of Justice, Nat'l Inst. of Justice, Sex Offender Residency Restrictions: How Mapping Can Inform Policy (2008).....29

Larkin, *A Proposed Framework for Evaluating Effectiveness of Counsel Under* Padilla v. Kentucky, 34 Am. J. Trial Advoc. 565 (2011) 22

Love, et al., *Procedural Bars to Padilla Relief, in* COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 4:11 (2013) 23, 24

Love, et al., *Sex Offense-Related Collateral Consequences – Registration and Community Notification (RCN)*, *in* COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 2:39 (2013) 19, 26

Love & Chin, Padilla v. Kentucky: *The Right to Counsel and the Collateral Consequences of Conviction*, CHAMPION, May 2010 22

Marrow, *Limitations on the Duty to Advise: Knowing When It's Time to Say More, Not Less*, N.Y. St. B.J., March/April 2011 22

Nat'l Ctr. for Missing & Exploited Children, *Registered Sex Offenders in the United States and Its Territories per 100,000 Population* (2008).....20

Nat'l Ctr. for Missing & Exploited Children, *Registered Sex Offenders in the United States and Its Territories per 100,000 Population* (2014).....20

TABLE OF AUTHORITIES – Continued

Page

Performance Guidelines for Criminal Representation § 6.2 (Nat'l Legal Aid & Defender Assn. 1995) 35

Proctor & King, *Post*-Padilla: Padilla*'s Puzzles for Review in State and Federal Courts*, 23 Fed. Sent'g Rep. 239 (2011) 24

Ravitz, *Court Supervision After* Padilla v. Kentucky, 98 Ill. B.J. 362 (2010) 22

Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 Minn. L. Rev. 670 (2008) 31

Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 Iowa L. Rev. 119 (2009) 4

Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 How. L.J. 795 (2011) 22

Torres, *Direct and Collateral Consequences After* Padilla v. Kentucky, S.C. Law, May 2011 22

PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth Trotter respectfully petitions for a writ of certiorari to review the judgment of the Utah Supreme Court.

OPINIONS BELOW

The opinion of the Utah Supreme Court, Pet. App. 1, not yet published, is available on Westlaw at 2014 WL 2090556. Two unpublished opinions of the Utah District Court for the Fifth District are relevant here: the November 3, 2011, Judgment, Sentence, Stay of Execution of Sentence, Order of Probation and Restitution, and Commitment, Pet. App. 28, and the July 19, 2011, Decision and Order Denying Motion to Withdraw Plea. Pet. App. 36.

JURISDICTION

The judgment of the Utah Supreme Court was entered on May 20, 2014. Pet. App. 1. Petitioner did not file a motion for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (2012).

RELEVANT STATUTORY PROVISIONS

The Appendix to this Petition reproduces relevant portions of the State of Utah's sex offender

registration laws, Utah Code Ann. §§ 77-27-21.7, 77-41-105, 77-41-106, 77-41-107, at Pet. App. 43-54.

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

All fifty states and the federal government impose mandatory and automatic registration requirements on defendants convicted of crimes designated as sex offenses. These sex offender registration laws impose severe restrictions on defendants' liberty interests by limiting places where they may live, work, or enter, and by subjecting them to the stigma and ostracizing associated with being classified as a sex offender. Further, the laws invade registrants' privacy and place them in danger by making their photographs, home address, name and address of their employer and/or school, and license plate and vehicle description publicly available.

In *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), this Court held that it violates the Sixth Amendment for defense counsel to fail to advise her client that a guilty plea would likely result in deportation. In reaching this conclusion, the Court eschewed the established practice among lower courts of determining whether deportation constituted a direct or collateral consequence of conviction. *Id*. at 1481. Instead, the Court concluded that deportation is ill-suited for the direct versus collateral analysis lower courts had developed because deportation is enmeshed in the criminal process and imposes severe burdens on the defendant. *Id*. at 1481-82.

This case presents the question of whether a defense counsel's failure to advise her client of the sex offender registration requirement resulting from pleading guilty violates the Sixth Amendment. Subsumed within that question are two issues over which state and federal courts are openly divided. First, does the Court's holding in *Padilla* extend beyond deportation to mandatory sex offender registration given the similarities between the two consequences? Second, if *Padilla*'s logic does not apply to sex offender registration, does the registration requirement constitute a direct consequence of conviction, thereby implicating *Strickland*'s test and requiring counsel to advise a defendant of the mandatory sex offender registration requirements that will result automatically from a guilty plea?

1. The Sixth Amendment guarantees that, "In all criminal prosecutions, the accused shall enjoy the

right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. This right, applied to the states via the Fourteenth Amendment, means "the right to the effective assistance of counsel," *Strickland v. Washington,* 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)), and applies at trial as well as during plea negotiations. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). When a criminal defendant pleads guilty under the advice of counsel, "the voluntariness of the plea depends on whether counsel's advice was 'within the range of competence demanded of attorneys in criminal cases.'" *Id.* at 56 (quoting *McMann*, 397 U.S. at 771).

In *Strickland*, this Court established a two-prong test for determining whether a "counsel's assistance was so defective as to require a reversal of a conviction." *Strickland*, 466 U.S. at 687. As an initial matter, "the defendant must show that counsel's performance was deficient." *Id*. Second, the defendant must show he suffered actual prejudice, *id*., which, with a guilty plea, means that the defendant would not have accepted the negotiated plea deal. *Hill*, 474 U.S. at 59.

Lower courts have manufactured an exemption from *Strickland*'s analysis for claims relating to a defense counsel's failure to advise a defendant about the "collateral" consequences of pleading guilty. *Padilla*, 130 S. Ct. at 1481, n.9; *see also* Roberts, *Ignorance is Effectively Bliss: Collateral Consequences,*

Silence, and Misinformation in the Guilty-Plea Process, 95 Iowa L. Rev. 119, 124, n.15 (2009). This Court, though, has never recognized a distinction between "direct" and "collateral" consequences in defining what "reasonable professional assistance" is required under *Strickland*. *Padilla*, 130 S. Ct. at 1481. Instead, with respect to *Strickland*'s deficient performance prong, this Court has stated that the Sixth Amendment does not "specify[ ] particular requirements of effective assistance." *Strickland*, 466 U.S. at 688. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id*.

There is, therefore, nothing in this Court's jurisprudence that categorically removes "collateral" consequences from the Sixth Amendment's requirements. Rather, the Court has spoken in terms such as "relevant circumstances," "likely consequences," and even "possible consequences" when discussing what defense counsel must inform a client of for a plea to be knowing and voluntary. *Brady v. United States*, 397 U.S. 742, 748, n.6 (1970).

Moreover, in *Padilla*, the Court removed from the direct-collateral dichotomy advice relating to deportation. 130 S. Ct. at 1481. There, Jose Padilla pleaded guilty to a state offense and later sought post-conviction relief on the ground that his counsel's failure to advise him that a guilty plea would subject him to virtually certain deportation constituted deficient performance under *Strickland*. *Id*. at 1477-78. This Court agreed, pointing to the severity of the

consequences of the conviction and the "prevailing professional norms." *Id*. at 1482-83 (citing *Strickland*, 466 U.S. at 688). In reaching this conclusion, the Court withheld judgment as to the correctness of dividing consequences into direct or collateral for purposes of Sixth Amendment analysis. *Id.* at 1481.

2. In 2007, Kenneth Trotter, then twenty years old, was charged with having consensual sex with a girl who was between the ages of fourteen and sixteen. Pet. App. 3. On the advice of appointed counsel, he pleaded guilty to one count of unlawful sexual activity with a minor.[1] Pet. App. 3. Unbeknownst to Mr. Trotter at the time he agreed to plead guilty, Utah law required him to register as a sex offender as a direct result of that conviction. Upon learning of the registration requirement, Mr. Trotter retained new counsel and sought to withdraw his guilty plea several months before his sentencing. Pet. App. 3-4. The trial court denied the request, ruling that the registration requirement constituted a collateral consequence of his conviction, of which his defense counsel did not need to apprise him. Pet. App. 41-42. Mr. Trotter renewed his request, specifically requesting the trial court consider this Court's holding in *Padilla* and apply its logic in the sex offender registration context. The trial court again denied his motion and

[1] The Utah Supreme Court incorrectly stated that the conviction at issue here constituted a Class A misdemeanor. Pet. App. 3. In fact, the conviction for which Mr. Trotter seeks to withdraw his guilty plea was for a third degree felony. Pet. App. 29.

entered the judgment of conviction. Pet. App. 28. Mr. Trotter's sentence – ordered by the court – required sex offender registration, and Mr. Trotter was placed in the classification with the highest-risk sex offenders in Utah because the crime involved a minor. Pet. App. 32-35.

Mr. Trotter filed a timely appeal with the Utah Supreme Court. Pet. App. 5. The Utah Supreme Court issued an opinion on May 20, 2014, in which it held that *Padilla* does not apply in the context of sex offender registration and that because sex offender registration represents a collateral consequence of conviction, the Sixth Amendment does not require defense counsel to advise a criminal defendant of the registration requirements for a plea to be voluntary and knowing. Pet. App. 24.

3. Because of his conviction for a crime designated by the State as a sex offense, Utah forbids Kenneth Trotter from taking his two children to the park. Utah Code Ann. § 77-21-21.7(1)(a)(iv), (2) (2012). He also cannot attend his child's school play or back-to-school night. *Id*. § 77-21-21.7(1)(a)(iii), (2) (2012). His photograph, physical description, home and employment addresses, and date of birth – among other things – are all publicly available on the Internet. *Id.* § 77-41-105 (2012). He has been branded a sex offender, with all the accompanying stigma and difficulties that entails. *See* Carpenter & Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L.J. 1071, 1108-16 (2012) (describing the "hallmarks of shaming" that

registration entails including "banishment, loss of freedom of movement, public shame and humiliation, occupational or housing disadvantages, and conditions analogous to probation or supervised release"). In fact, the Utah Supreme Court might have said it best when describing the consequences for Mr. Trotter of his having to register as a sex offender:

> [W]e begin by acknowledging the serious social stigmas that attach to one who must register as a sex offender. Interested parties may easily locate by name and address any sex offender living in their neighborhood. In many instances, the most regrettable actions in an individual's life are posted for the public to see. Once identified as a sex offender, the individual may feel compelled to move away, quit a job, or stay indoors. The offender's family members and friends may also be ostracized, and a number of other social pressures may complicate and burden the offender's life upon registration. Pet. App. 15.

Nevertheless, Mr. Trotter does not challenge the constitutionality of these substantive requirements. He seeks only to validate his Sixth Amendment right to have been informed that he was agreeing to these severe consequences when he pleaded guilty to one count of sexual activity with a minor. His immediate efforts, pre-sentencing, to withdraw his guilty plea upon learning of the sex offender registration requirement strongly indicate he never would have agreed to plead guilty had he been properly informed

by his appointed counsel that he would be required to register as a sex offender for ten years.

REASONS FOR GRANTING THE WRIT

I. State And Federal Courts Are Openly Divided Over Whether The Sixth Amendment Requires Defense Counsel To Advise Defendants Of The Sex Offender Registration Consequences Of Pleading Guilty.

Courts have long been split over whether sex offender registration requirements are a direct or collateral consequence of conviction. This Court's holding in *Padilla* that a criminal defendant receives ineffective assistance of counsel when not advised that a guilty plea may trigger virtually automatic deportation, 130 S. Ct. at 1486, served to deepen the divide. In fact, as discussed below, it is evident that an entrenched, three-way split has now emerged. There exists a group of states and federal courts of appeals that, post-*Padilla*, reject the direct versus collateral distinction in the context of sex offender registration and therefore apply *Strickland*. Another group has concluded that sex offender registration requirements constitute a direct consequence of conviction, rendering *Strickland*'s Sixth Amendment analysis appropriate. Finally, a cohort of courts have either determined that *Padilla* does not apply to sex offender registration or have not reached that question and continue to view the registration laws as collateral consequences of conviction.

In short, courts across the country have reached different conclusions about whether the Sixth Amendment requires that counsel advise a defendant about the sex offender registration requirements of pleading guilty. Unless this Court provides guidance to the lower courts, instability and inconsistency will continue to define the case law regarding this important constitutional right.

A. Courts Are Split Over How To Apply *Padilla*.

In applying the Sixth Amendment's right to counsel to a defense attorney's advice regarding deportation, the Court in *Padilla* avoided relying on the lower courts' well-worn collateral versus direct distinction because it is "ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation." *Id*. at 1482. One of the issues currently dividing lower courts is whether *Padilla*'s holding extends beyond the deportation context. The supreme courts of Kentucky, Illinois, and Tennessee, along with two federal circuit courts of appeals have concluded that *Padilla* applies to more than deportation. In contrast, the Utah and Pennsylvania supreme courts and the Seventh Circuit limited *Padilla*'s reach. Relatedly, lower courts are uncertain as to whether the direct versus collateral distinction for determining *Strickland*'s applicability survived *Padilla*.

1. The split over whether *Padilla* applies to consequences other than deportation is simple, yet

deep. The Court's conclusion that deportation was "difficult to classify as either a direct or a collateral consequence," *id*. at 1482, rested on deportation's "close connection to the criminal process." *Id*. At the same time, the Court took pains in *Padilla* to explain why deportation was "unique," *id.* at 1481, and should not be subjected to the direct versus collateral analysis. *Id*. at 1481-82. Courts that have extended *Padilla*'s reach undertake a similar analysis to that employed by this Court in determining the consequence's connection to the criminal process. Courts that reject extending *Padilla* do not focus on the Court's approach in that case, but instead rely exclusively on the Court's characterization of deportation as unique.

2. In 2012, the Supreme Court of Kentucky tackled the question directly. *Commonwealth v. Pridham*, 394 S.W.3d 867, 870 (Ky. 2012). The Kentucky court held that defense counsel's failure to advise a defendant that drug offenses to which he was pleading guilty would subject him to longer parole eligibility supported an ineffective assistance claim under the Sixth Amendment. *Id.* at 886. In doing so, the Kentucky high court rejected the state's "minimalist" reading of *Padilla*, concluding that, "we cannot agree that [*Padilla*'s] holding implicates no collateral consequence but deportation." *Id*. at 879.

The Illinois Supreme Court relied upon *Padilla* when it held the risk of involuntary civil commitment for particular sex offenses was certain and severe enough to rise to the level warranting a Sixth Amendment duty to advise. *People v. Hughes*, 983

N.E.2d 439, 455 (Ill. 2012). Similarly, the Supreme Court of Tennessee understood the reasoning of *Padilla* to apply to more than just deportation when it held that a defense counsel's failure to advise a client about mandatory lifetime community supervision constituted ineffective assistance of counsel. *Calvert v. State*, 342 S.W.3d 477, 490 (Tenn. 2011).

Many lower state courts have also faced the issue of *Padilla*'s reach, several involving the very question of sex offender registration. State appellate courts in Alaska, *Wilson v. State*, 244 P.3d 535, 539-40 (Alaska Ct. App. 2010); Michigan, *People v. Fonville*, 804 N.W.2d 878, 895-96 (Mich. Ct. App. 2011); Georgia, *Taylor v. State*, 698 S.E.2d 384, 388 (Ga. Ct. App. 2010); and Illinois, *People v. Dodds*, 7 N.E.3d 83, 93 (Ill. App. Ct. 2014), have all concluded that the logic of *Padilla* extends to matters beyond deportation, with the latter three cases decided in the context of sex offender registration. In doing so, many of these courts have openly questioned whether the collateral versus direct consequence distinction remains viable following *Padilla*. *Taylor*, 698 S.E.2d at 387-88; *see also Sames v. State*, 805 N.W.2d 565, 570 (Minn. Ct. App. 2011); *Blaise v. State*, 801 N.W.2d 627, 2011 WL 2078091, at *3 (Iowa Ct. App. 2011).

3. These decisions are in sharp contrast with the Utah Supreme Court's decision below, which sought to confine *Padilla*'s holding to deportation, and applied the direct-collateral dichotomy. Pet. App. 15-20. So, too, the Supreme Court of Pennsylvania, which, over a strong dissent, refused to extend *Padilla* beyond the context of defense counsel's advice

regarding deportation. *Commonwealth v. Abraham*, 62 A.3d 343, 353, 357-62 (Pa. 2012). Several lower appellate state courts share the view that *Padilla* applies exclusively to deportation, and continue to assess whether a consequence is direct or collateral to determine whether the Sixth Amendment imposes any duty on defense counsel to inform a client about the consequence of pleading guilty. *See Sames*, 805 N.W.2d 565, 569-70; *Steele v. State*, 291 P.3d 466, 470 (Idaho Ct. App. 2012).

The divide regarding *Padilla*'s reach is perhaps best illustrated by the Missouri Supreme Court. In a *per curiam* opinion, the court held that a court should apply *Strickland*'s test to a defendant's claim of ineffective assistance related to his counsel's failure to advise him regarding his parole eligibility. *Webb v. State*, 334 S.W.3d 126, 127 (Mo. 2011). Three of the court's seven justices wrote a concurring opinion focusing on the question of whether *Padilla* extends beyond deportation, concluding that it does. *Id*. at 134-39. Three other justices dissented from the *per curiam* opinion precisely because they did not agree that *Padilla* applied outside of the deportation context. *Id*. at 143-45. This even split is being replicated all over the country.

4. Though resolving the question of *Padilla*'s reach falls primarily on the shoulders of state courts handling the large majority of criminal cases, the pronounced split dividing state courts is evident in the federal circuits as well. The Seventh Circuit flatly rejected efforts to extend *Padilla*, stating that,

"*Padilla* is rife with indications that the Supreme Court meant to limit its scope to the context of deportation only." *United States v. Reeves*, 695 F.3d 637, 640 (7th Cir. 2012).

The Court of Appeals for the Armed Forces refused to follow the Seventh Circuit's approach, and instead held that *Padilla*'s rationale applied with equal force in the context of sex offender registration. *United States v. Riley*, 72 M.J. 115, 120-21 (C.A.A.F. 2013). This follows a similar willingness on the part of the Eleventh Circuit to consider claims that require extending *Padilla* to non-deportation advice. *Jackson v. United States*, 463 F. App'x 833, 835 (11th Cir. 2012); *Bauder v. Dep't of Corr.*, 619 F.3d 1272, 1275 (11th Cir. 2010).

The Tenth Circuit, which encompasses Utah, acknowledged in an opinion issued just one month before the Utah Supreme Court concluded otherwise in this case, that *Padilla* "may have called the distinction between direct and collateral consequences into doubt," *United States v. Tuakalau*, No. 12-4052, 2014 WL 1303295, at *3, n.4 (10th Cir. Apr. 2, 2014), though the court was not faced with answering that question.

Unless this Court resolves the question of *Padilla*'s reach and the viability of the direct versus collateral distinction, when the Tenth Circuit and other courts are squarely faced with the issue, they will see inconsistency among circuits and states and will only serve to widen the split in authority.

Thus, now is the appropriate time for the Court to step in and resolve the critical question of *Padilla*'s reach.

B. Courts Are Divided Over Whether Sex Offender Registration Constitutes A Direct Or Collateral Consequence Of A Criminal Conviction.

The distinction between direct and collateral consequences is often determinative, as lower courts have generally held that defense counsel are not required to advise clients about collateral consequences of conviction under the Sixth Amendment. Despite the importance of the inquiry and the relatively similar definitions of "direct" and "collateral" consequences, courts are split over how to categorize sex offender registration. The highest courts in four states consider the registration requirement a direct consequence of conviction, while twelve state supreme courts have reached the opposite conclusion. As discussed above, *Padilla* served to add greater uncertainty, dividing courts not only over *Padilla*'s application outside the context of deportation-related advice, but also by calling into question the direct-collateral distinction altogether. Even if this Court declines to clarify *Padilla*'s reach, it should resolve the entrenched split in authority over the extent to which the Sixth Amendment requires counsel to advise defendants as to the sex offender registration requirements of conviction.

1. Over four decades ago, the California Supreme Court determined that mandatory sex offender registration constituted a direct consequence of conviction. *In re Birch*, 515 P.2d 12, 17 (Cal. 1973). The Texas Court of Criminal Appeals – the state's highest court for such matters and sitting *en banc* – reached the same conclusion, holding that "[t]he registration requirement for persons who are convicted of sex offenses is a direct consequence" of conviction. *Anderson v. State*, 182 S.W.3d 914, 918 (Tex. Crim. App. 2006). West Virginia's Supreme Court of Appeals concluded that, at least in some circumstances, a defendant must be apprised of the direct consequence of being required to register. *State v. Whalen*, 588 S.E.2d 677, 680-81 (W. Va. 2003). And, even more recently, Maryland's highest court concluded that sex offender registration constituted a direct consequence of a conviction, noting that "[b]ut for" the defendant's conviction of a sex offense, he would not be required to register. *Doe v. Dep't of Pub. Safety & Corr. Serv.*, 62 A.3d 123, 138 (Md. 2013).

Similarly, lower appellate courts in Georgia, *Taylor*, 698 S.E.2d 384, 388; Michigan, *Fonville*, 804 N.W.2d 878, 895-96; New Mexico, *State v. Edwards*, 157 P.3d 56, 65-66 (N.M. Ct. App. 2007); and Illinois, *Dodds*, 7 N.E.3d 83, 96-97, have also held that the Sixth Amendment requires defense counsel to advise clients about the sex offender registration consequence of a plea bargain because it flows directly and automatically from the conviction. And though they have not ruled expressly on the direct versus

collateral question, the highest courts in Oklahoma, *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004, 1030 (Okla. 2013); Ohio, *State v. Williams*, 952 N.E.2d 1108, 1112-13 (Ohio 2011); Maine, *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009); Indiana, *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009); Alaska, *Doe v. State*, 189 P.3d 999, 1018 (Alaska 2008); and Kansas, *State v. Myers*, 923 P.2d 1024, 1044 (Kan. 1996), have each concluded that sex offender registration laws are punitive, rather than regulatory, which would indicate that those courts consider the requirements to be part of the defendant's direct sentence.

2. Meanwhile, in addition to the Utah Supreme Court here, Pet. App. 1, state supreme courts in Massachusetts, *Commonwealth v. Ventura*, 987 N.E.2d 1266, 1271 (Mass. 2013); Minnesota, *Kaiser v. State*, 641 N.W.2d 900, 907 (Minn. 2002); and Idaho, *Ray v. State*, 982 P.2d 931, 937 (Idaho 1999), have held that for Sixth Amendment purposes, sex offender registration constitutes a collateral consequence of conviction. Lower appellate courts in two other states have reached the same conclusion. *Ramsey v. State*, 182 S.W.3d 655, 661 (Mo. Ct. App. 2005); *Williams v. State*, 662 S.E.2d 615, 618 (S.C. Ct. App. 2008). In addition, ten other highest courts have held that for purposes of assessing a court's duty to ensure that a guilty plea is knowing and voluntary, sex offender registration represents a collateral consequence. *State v. Partlow*, 840 So.2d 1040, 1043 (Fla. 2003); *Doe v. Poritz*, 662 A.2d 367, 406 n.18 (N.J. 1995); *People v. Gravino*, 928 N.E.2d 1048, 1049 (N.Y. 2010);

Davenport v. State, 620 N.W.2d 164, 166 (N.D. 2000); *Commonwealth v. Leidig*, 956 A.2d 399, 406 (Pa. 2008); *State v. Timperley*, 599 N.W.2d 866, 869 (S.D. 1999); *State v. Ward*, 869 P.2d 1062, 1075-76 (Wash. 1994); *State v. Bollig*, 605 N.W.2d 199, 206 (Wis. 2000).

3. As evidenced by the earlier discussion regarding the split over *Padilla*'s reach, there is no viable wait-and-see approach that can resolve this matter. Some courts will extend *Padilla* to sex offender registration; others will not. Some courts will treat the registration requirements as direct consequences of conviction; others as collateral. The current state of affairs means that defendants subject to nearly identical sex offender registration laws possess vastly different Sixth Amendment rights, depending on the state in which they live. A defendant in New York or Utah, for example, receives no constitutional protection ensuring that she will be advised of the sex offender registration consequences of a guilty plea whereas a defendant in California or Texas enjoys stronger Sixth Amendment protections because those states consider sex offender registration to be a direct consequence of conviction.

4. More worrisome still is the divide in some circuits between the federal and state courts. The different approaches followed by the Illinois Supreme Court, *Hughes*, 983 N.E.2d 439, and the Seventh Circuit, *Reeves*, 695 F.3d 637, shows that defendants in a single state will have the Sixth Amendment

apply differently to them depending on whether they are in federal or state court.

National increases in the number of registered sex offenders – roughly 21,000 each year, as discussed below – demonstrate that this issue will continue to present itself to courts across the country. Allowing it to percolate in the lower courts will only serve to place increasing numbers of criminal convictions in jeopardy. For reasons of certainty in criminal justice, this demonstrably divisive issue should be resolved now. Additionally, waiting will not serve to clarify the issues. As noted, the issue presented is largely one of how to interpret *Padilla*. Lower courts cannot provide any additional clarity to that issue – only the Court can.

The way to ensure uniform treatment of this important constitutional issue is for the Court to grant the writ and resolve the question.

II. The Question Of Whether Defense Counsel Must Advise A Client Of The Requirement To Register As A Sex Offender As A Consequence Of Pleading Guilty Presents A Pressing Issue Of National Scope And Concern.

Though it was only recently that sex offender registration laws emerged as a criminal justice force, every state and territory in the United States now imposes a registration requirement on certain classes of sex offenders. *See* Love, et al., *Sex Offense-Related*

Collateral Consequences – Registration and Community Notification (RCN), *in* COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 2:39 (2013). The National Center for Missing and Exploited Children reports over 770,000 individuals are registered as sex offenders nationally. *See* Nat'l Ctr. for Missing & Exploited Children, *Registered Sex Offenders in the United States and Its Territories per 100,000 Population* (2014), available at http://www.missingkids.com/en_US/documents/Sex_Offenders_Map.pdf.

Over the last six years, approximately 130,000 individuals have been added to state registries, averaging over 21,000 each year. Nat'l Ctr. for Missing & Exploited Children, *Registered Sex Offenders in the United States and Its Territories per 100,000 Population* (2008), available at http://www.solresearch.org/~SOLR/cache/date/20080717-NCMEC-SOmap.pdf. No available statistics assess how many of those convictions came through guilty pleas. However, using the generalized figure that ninety-four percent of all state convictions come through plea bargains, *see Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (citing Dept. of Justice, Bureau of Justice Statistics, Felony Sentences in State Courts, 2006 – Statistical Tables 1 (2009)), each year roughly 20,500 defendants are required to register as sex offenders as a result of a plea bargained conviction.

Moreover, states are expanding the crimes for which sex offender registration becomes mandatory upon conviction. Carpenter & Beverlin, *supra*, at

1081-84. For example, in 2000, Utah imposed its registration requirement on defendants convicted of twenty different offenses. *Femedeer v. Haun*, 227 F.3d 1244, 1247 n.1 (10th Cir. 2000). Today, Utah's registration scheme lists forty triggering offenses. Utah Code Ann. § 77-41-102(9), (16) (2012).

The sheer volume of cases and the growing list of crimes now classified as sex offenses, along with the indisputable importance of ensuring clear rules designed to effectuate each defendant's Sixth Amendment rights, provide a compelling basis for granting the writ.

Nevertheless, it is also worth mentioning the federal interest at stake, and recognizing how federal policy has helped propel the push for stricter sex offender registration laws. Congress enacted the Sex Offender Registration and Notification Act (SORNA) as part of the Adam Walsh Child Protection and Safety Act of 2006. 42 U.S.C. § 16901 (2006), *et seq*. The law requires states to implement sex offender registration programs that meet detailed standards or lose federal criminal justice grant funding. 42 U.S.C. § 16925. For example, each state must collect and make available on the Internet a registered offender's name, home address, place of employment and work address, date of birth, physical description, and photograph. 42 U.S.C. § 16914. As this Court is well aware, *see, e.g.*, *Reynolds v. United States*, 132 S. Ct. 975 (2012); *Carr v. United States*, 560 U.S. 438 (2010), SORNA also imposes additional substantive mandates on the individuals convicted of state and

federal sex offenses, such as requiring the individual to provide information to be included in the federal registry, making it a crime for such person to travel in interstate or foreign commerce, and imposing criminal penalties for knowingly failing to register or update the required information. 42 U.S.C. §§ 16914, 16918, 16920; 18 U.S.C. § 2250(a).

Finally, practitioners recognize the uncertainty stemming from *Padilla*, which "sent a shockwave through criminal courts and defense offices throughout the nation." Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 How. L.J. 795, 809 (2011); *see also* Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1151 (2011); Love & Chin, Padilla v. Kentucky: *The Right to Counsel and the Collateral Consequences of Conviction*, CHAMPION, May 2010, at 18, 22. A review of various bar journals and practice guides shows that the decision's ambiguity complicated the responsibilities of defense counsel who seek to understand their duties post-*Padilla*. *See, e.g.*, Larkin, *A Proposed Framework for Evaluating Effectiveness of Counsel Under* Padilla v. Kentucky, 34 Am. J. Trial Advoc. 565 (2011); Marrow, *Limitations on the Duty to Advise: Knowing When It's Time to Say More, Not Less*, N.Y. St. B.J., March/April 2011, at 33; Ravitz, *Court Supervision After* Padilla v. Kentucky, 98 Ill. B.J. 362 (2010); Torres, *Direct and Collateral Consequences After* Padilla v. Kentucky, S.C. Law, May 2011, at 16.

Congress and the President thought it wise and in the country's interest to establish a national standard for state sex offender registration. It is at least equally paramount to ensure a uniform understanding of the Sixth Amendment rights of those defendants – over 20,000 each year – who plead guilty to crimes classified as sex offenses. As discussed above, no such uniform approach to the Sixth Amendment rights implicated by sex offender registration currently exists.

III. This Case Serves As An Optimal Vehicle For The Court To Resolve These Issues.

This matter provides the proper vehicle to address the question of whether a defendant has a constitutional right to be informed of the sex offender registration consequence when considering whether to plead guilty. Mr. Trotter's case comes to this Court free of procedural constraints and under the broadest standard of review. Nor are there preliminary or threshold concerns this Court would have to decide before addressing the issues presented. Mr. Trotter's claims were precisely presented to the trial court and the Utah Supreme Court squarely ruled on the matter.

Moreover, procedural bars often prevent individuals seeking to challenge a plea bargain for ineffective assistance of counsel from having a court reach the merits of the claim. *See* Love, et al., *Procedural Bars to Padilla Relief, in* COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE

§ 4:11 (2013). Most such efforts come in the form of a petition seeking a writ of habeas corpus, which typically requires the individual to be "in custody." 28 U.S.C. §§ 2241, 2254(a), 2255(a); *see* Love, et al., *supra*, at § 4:11 (noting that twenty-four states require a habeas petitioner be in custody). Moreover, federal courts have held that being subject to sex offender registration laws does not constitute being "in custody." *See Wilson v. Flaherty*, 689 F.3d 332, 339 (4th Cir. 2012); *Leslie v. Randle*, 296 F.3d 518, 522-23 (6th Cir. 2002); *McNab v. Kok*, 170 F.3d 1246, 1247 (9th Cir. 1999) (per curiam). Even beyond the "in custody" question, habeas claims present additional hurdles to reaching the merits of such challenges, including statutes of limitations, successive petitions rules, and procedural default. *See* Proctor & King, *Post*-Padilla: Padilla*'s Puzzles for Review in State and Federal Courts*, 23 Fed. Sent'g Rep. 239, 240-43 (2011).

Because Mr. Trotter immediately sought to withdraw his guilty plea, even prior to sentencing, upon learning of the registration requirement, this case arises from a direct appeal to the Utah Supreme Court from the trial court's denial of his motion to withdraw. Pet. App. 5. Thus, this case avoids all of the procedural hurdles that often arise with habeas petitions. It may take years before this Court is again presented with these pressing questions on a direct appeal, without any of the muddying factors that often surface in collateral reviews. Thus, Mr. Trotter's case is the ideal opportunity to resolve the questions

and thereby provide lower courts with much needed guidance.

IV. Failure By Defense Counsel To Advise A Defendant About The Sex Offender Registration Requirement Of A Plea Bargained Conviction Constitutes Ineffective Assistance Of Counsel Under The Sixth Amendment.

The Sixth Amendment required Mr. Trotter's defense counsel to advise him of the registration requirement that flows automatically and directly from pleading guilty to a sex offense. The Utah Supreme Court incorrectly concluded otherwise by seeking to distinguish *Padilla* and by holding that the registration requirement represented a collateral consequence of conviction. In fact, however, this Court's logic in *Padilla* applies with equal – if not greater – force here. Moreover, even relying on the direct-collateral dichotomy, sex offender registration squarely falls under the category of consequences requiring *Strickland* analysis. Applying *Strickland*, the failure of Mr. Trotter's counsel to advise him of the sex offender registration requirements of pleading guilty constituted ineffective assistance of counsel under the Sixth Amendment.

A. The Sex Offender Registration Requirement Presents A Severe Consequence Of Conviction And Is Deeply Enmeshed In Utah's Criminal Process.

1. In *Padilla*, this Court determined that deportation was particularly ill-suited to the direct-collateral consequences distinction, noting that a dramatically changed legal landscape has made deportation a much more automatic and mandatory result of conviction; that deportation is intimately related to the criminal process; and that deportation is a particularly severe and harsh penalty. *Padilla*, 130 S. Ct. at 1478-81.

2. Like deportation, the "landscape of the law" for sex offender registration has changed dramatically in recent years. The notion of a sex offender registry barely existed twenty years ago. Love, et al., *supra*, at § 2:39. Additionally, the number of offenses requiring registration has steadily increased, while judges enjoy less discretion and flexibility to mitigate harsh results. Carpenter & Beverlin, *supra*, at 1081-84. Finally, registration imposes severe burdens on individuals subject to its requirements. *Id*. at 1087-90, 1108-16.

3. The Court in *Padilla* also noted that deportation is so "enmeshed" and "intimately related to the criminal process" that trying to classify it as direct or collateral proves "difficult." *Padilla*, 130 S. Ct. at 1481-82. Just like deportation, sex offender registration requirements are so intimately related to, and

enmeshed with, the criminal process that the direct-collateral distinction is inapposite. Sex offender registration requirements are "intimately related" to the criminal process because they are automatic, mandatory results following conviction for specified offenses. Indeed, sex offender registration is even more enmeshed with the criminal process than deportation and it is impossible – not just "difficult" – to divorce registration from the underlying conviction.

First, unlike deportation, conviction of a particular offense is the *only* way someone becomes required to register and *everyone* convicted of a specified offense must register almost immediately – within twenty-four hours to ten days, depending on the state. *See, e.g.*, R.I. Gen. Laws § 11-37.1-4 (e), (f) (2013); Utah Code Ann. § 77-41-105(1). Second, the same criminal process results in the conviction and the need to register. This is unlike deportation, where, for example, Mr. Padilla was convicted of a state criminal offense and then subject to a later federal civil deportation proceeding. If that future – speculative, even if likely – federal civil proceeding was enmeshed with Kentucky's criminal process, Utah's sex offender registration requirement certainly must be entangled with the state's own criminal process. In this case, the sentencing order issued by the trial court specifically required Mr. Trotter to register as a sex offender. Pet. App. 32-35. Again, this demonstrates how much more enmeshed the sex offender requirement is with a state's criminal process than deportation. Perhaps the strongest

indication of the interrelationship between Utah's criminal process and the state's sex offender registration scheme is that the requirements for registration are a part of the Utah Code of Criminal Procedure.

4. *Padilla* emphasized that deportation is a particularly severe penalty. *Padilla*, 130 S. Ct. at 1481. The Court placed special emphasis on the burden and problems that deportation can create for families. *Id.* at 374. Just like deportation, sex offender registration is a severe penalty. The requirements place an extremely onerous burden on registrants that affects their lives for decades and can cause particular disruption in their family units because of the restrictions on the areas where they can lawfully reside, work, travel, and play.

In many respects, sex offender registration is a harsher result than deportation. When noncitizens are deported, they must return to their home country, but once there, they face no continued punishment – they are free to live their lives however they choose, so long as they do not reenter the United States. Sex offenders, on the other hand, are restrained in their own country. They must continue to abide by the terms of the registration requirements for years, and in some cases, the remainder of their lives. They feel continuous and constant social stigma and pressure. The range of places where they can reside, work, and visit is reduced. Indeed, studies by the United States Department of Justice show that some residency restrictions are so severe that they limit the area where an offender may legally reside to just seven

percent of the jurisdiction. *See* Dept. of Justice, Nat'l Inst. of Justice, Sex Offender Residency Restrictions: How Mapping Can Inform Policy (2008). Their ability to gain future employment is hampered not only by the registration burdens, but also by the fact that the place of employment must be made publicly available. Like deportation, the impact on the family, especially for offenders with children, is severe. Effects can include reducing the ability of parents to accompany their children to school or other social activities where other children may be present. Although the statute in Utah does not, by default, limit the ability of parents to interact with their own children, the range of locations where they may do so is so drastically reduced that it has the potential to hinder the parent-child relationship dramatically. *See* Utah Code Ann. § 77-27-21.7.

5. Two final considerations further justify departing from the direct versus collateral analysis. The sex offender law is "succinct, clear, and explicit" in defining the terms of the registration requirement. Utah Code Ann. §§ 77-27-21.7; 77-41-105; 77-41-106. A defense counsel can easily determine whether the plea bargain she is advising her client about will result in the need to register. Utah Code Ann. § 77-41-106. For Mr. Trotter to be fully advised, his counsel needed to utter one sentence: "By entering this guilty plea, you will be required to register as a sex offender in Utah and with the federal government and you will be subject to the requirement for ten years." There are no ifs, buts, maybes, or caveats.

There is, in short, no ambiguity. In this case, unlike in *Padilla* or with many of the other collateral consequences often discussed in opinions on this topic, Mr. Trotter is seeking a rule requiring a criminal defense counsel admitted to the Utah State Bar to advise a client about the immediate obligations imposed by a Utah state conviction, the requirements for which are spelled out in the Utah Code of Criminal Procedure. There is nothing "complex" about it. *Padilla*, 130 S. Ct. at 1488 (Alito, J., concurring).

Also unlike deportation or "civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses," *id*. at 376 (Alito, J., concurring), a registration requirement imposes an obligation on a defendant to take action, with the failure to comply constituting its own criminal offense. Utah Code Ann. § 77-41-107(1). Specifically, Utah's sex offender registration law imposes a duty on defendants to take action within ten days to register, Utah Code Ann. § 77-41-105(1), to update their registration semi-annually or within three days of any status changes, *id*. § 77-41-105(3)(a), and to pay an annual fee. *Id*. § 77-41-111(1). This affirmative obligation further counsels subjecting the sex offender registration requirement to *Strickland*'s standards without regard to the direct or collateral nature of the consequence.

B. Sex Offender Registration Constitutes A Direct Consequence Of Conviction.

1. Even operating outside of *Padilla*'s framework, sex offender registration laws should be subject to *Strickland* analysis because they constitute a direct consequence of conviction. The Utah Supreme Court concluded that the Sixth Amendment did not require Mr. Trotter's appointed counsel to advise him of the sex offender registration requirements of his guilty plea because it constitutes a collateral consequence of conviction. The Utah Supreme Court's analysis is unpersuasive.

2. Lacking specific guidance from the Supreme Court, lower courts have differed in how they define "direct" and "collateral" consequences of conviction. Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 Minn. L. Rev. 670, 689-94 (2008). Utah employs one of the more restrictive definitions of direct consequences, with courts holding that a direct consequence is only that which has an "immediate and automatic effect on the range of a defendant's punishments." Pet. App. 20-21. Even under this definition, however, the requirement that Mr. Trotter register as a sex offender constitutes a direct consequence of conviction. It is mandatory, with Mr. Trotter being required to register within ten days of his conviction. Utah Code Ann. § 77-41-105(1). In other words, the timeframe for Mr. Trotter's completing the initial registration is tied directly to the date of his

conviction. Moreover, unlike other consequences deemed collateral by lower courts, sex offender registration is tied to particular offenses only – it does not flow from a general felony conviction.

Additionally, under Utah law, the underlying conviction offense and sentence determines the length of the registration requirement. *Id*. § 77-41-105(3). Mr. Trotter is required to remain in the state's sex offender registry for ten years following completion of his sentence because he pleaded guilty to sexual activity with a minor. *Id*. Had he been convicted of some other offense, his registration term could have been longer. *Id*. Thus, much like a prison term or probation period, the length of the registration requirement is tied directly to the offense. And Utah law determines the seriousness of a registration violation by looking to the underlying conviction. *Id*. § 77-41-107(1).

3. The Utah Supreme Court based much of its holding that the state's registration requirement constitutes a collateral consequence of conviction on the fact that

> [u]nlike parole, probation, or the length of imprisonment, the requirement to register as a sex offender is beyond the control of the trial court. The judge has no discretion whatsoever in determining whether the defendant will have to comply with registration statutes; instead, it is a legal obligation, predetermined by the legislature, placed on

> those convicted of particular crimes and is an automatic operation of statute. Pet. App. 22.

But, as noted above, the clear and automatic nature of the requirements strongly weigh in favor of subjecting the sex offender registration requirement to the same analysis as deportation under *Padilla*. 130 S. Ct. at 1481-82.

Moreover, just two paragraphs after stating that a direct consequence is one that is "immediate and automatic," the Utah Supreme Court relied on those very characteristics to treat sex offender registration as collateral. Pet. App. 22.

Furthermore, the Utah legislature has imposed mandatory sentences for a variety of sex offenses. Under the Utah Supreme Court's approach, the mandatory twenty-five-to-life sentence for child rape would constitute a collateral consequence of conviction since a judge lacks discretion, it is predetermined by the legislature, placed on those convicted of particular crimes, and operates automatically by statute. An analysis that would require the conclusion that a defense counsel need not advise a defendant about a twenty-five-to-life sentence should be immediately suspect.

4. Finally, all of this ignores the fact that Utah courts actually do play an important role in the administration of the sex offender registration system. It is the trial court – as part of its judgment and sentencing order – that mandated that Mr. Trotter register as a sex offender, just as its order placed

Mr. Trotter in the custody of the Utah Department of Corrections. Pet. App. 28-35. If Mr. Trotter were to have ignored his registration requirement, he would have been violating the trial court's order just as much as he would have been violating the relevant statutory provision. Additionally, Utah law provides many registered individuals with the right to seek relief from the registration obligation. Utah Code Ann. § 77-41-112(1). To do so, the individual goes not to the agency tasked with administering the registry, but to the trial court that entered the judgment of conviction. *Id*. Thus, the Utah courts undeniably play a critical role in the sex offender registration system.

Because the sex offender registration obligation flowed immediately and automatically from Mr. Trotter's conviction for sexual activity with a minor, the requirement constituted a direct consequence of his guilty plea, thereby necessitating analysis under *Strickland* to determine whether defense counsel's failure to advise Mr. Trotter of that duty violated the Sixth Amendment.

C. Mr. Trotter's Attorney Provided Ineffective Assistance Of Counsel By Failing To Advise Mr. Trotter Of The Registration Requirement Of Pleading Guilty.

1. Under *Strickland*, the test for ineffective assistance of counsel is first, whether defense counsel's

conduct fell below an objective standard of reasonableness and, second, whether the criminal defendant suffered prejudice as a result. *Strickland*, 466 U.S. at 688.

One of the primary measures of what constitutes an objective standard of reasonableness is what professional norms recommend. *Id*. ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.") For example, ABA requirements can be objective indications of what constitutes reasonable conduct. *Padilla*, 130 S. Ct. at 1482. Additionally, *Padilla* recognized that when a statute specifies that a consequence will follow in "succinct, clear, and explicit" terms, failure to advise of such a consequence constitutes deficient conduct. *Id.* at 1483.

2. In the context of sex offender registration requirements, the ABA Standards for Criminal Justice describe sex offender registration as a consequence about which defense counsel should advise their clients before entering a guilty plea. *See* ABA Standards for Criminal Justice § 14-3.2(f), cmt., at 116, 125-27 (1999); *see also* Performance Guidelines for Criminal Representation § 6.2 (Nat'l Legal Aid & Defender Assn. 1995). Indeed, the Utah Supreme Court acknowledged as much when it stated that "best practices suggest that defense counsel should inform a defendant that his guilty plea carries with it the requirement to register as a sex offender." Pet. App. 13.

3. The Court in *Padilla* found it important that the statute was "succinct, clear, and explicit" about the consequence of deportation. *Padilla*, 130 S. Ct. at 1483. The Court noted that "Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which . . . commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." *Id.* Here, the relevant laws are even more "succinct, clear, and explicit" about the registration requirements that will follow conviction. The relevant statutory provisions are entitled "Registerable Offenses," and includes "any offense listed in Utah Code sections 77-41-102(9) or (16)." Utah Code Ann. § 77-41-106. Subsection 77-41-102(16) includes "a felony or class A misdemeanor violation of Section 76-4-401," the offense with which Mr. Trotter was charged. Moreover, there are no exceptions. And while Mr. Padilla's conviction for a deportable offence left him "eligible" for deportation, it still required a federal enforcement action to deport Mr. Padilla. Mr. Trotter, on the other hand, became immediately subject to the registration requirement upon his conviction. In short, like *Padilla*, this is "not a hard case to find deficiency." *Padilla*, 130 S. Ct. at 1483.

4. To prevail under the second prong of *Strickland*, a defendant must show that "counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show

that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

In *Hill*, the Court held that defendant's failure to allege that he would not have pleaded guilty but for the ineffective advice of counsel was fatal to his *Strickland* claim. *Id.* at 53. Here, unlike in *Hill*, Mr. Trotter has alleged that, if he had been informed by counsel that he would be required to register as a sex offender, he would not have pleaded guilty and instead would have insisted on going to trial. Pet. App. 37. Given the fact that Mr. Trotter sought to withdraw his guilty plea prior to his sentencing, the evidence strongly suggests he has met that second prong of *Strickland*. Nevertheless, the Court may wish to follow the same path it took in *Padilla*, by remanding to the Utah courts to consider that question in the first instance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL J. TETER
Counsel of Record
UNIVERSITY OF UTAH,
S.J. QUINNEY
COLLEGE OF LAW
332 S. 1400 East
Salt Lake City, UT 84112
(801) 585-1863
michael.teter@law.utah.edu

Counsel for Petitioner
Kenneth Trotter

TROY L. BOOHER
ZIMMERMAN JONES
BOOHER LLC
136 S. Main Street
Suite 721
Salt Lake City, UT 84101

MATTHEW D. CARLING
51 E. 400 North
Cedar City, UT 84720

2014 UT 17

IN THE

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Appellee,

v.

KENNETH TROTTER,
Defendant and Appellant.

No. 20111056
Filed May 20, 2014

The Honorable G. Michael Westfall
Fifth District, Cedar City Dep't
No. 071500541

Attorneys:

Sean D. Reyes, Att'y Gen., Jeffrey S. Gray,
Asst. Att'y Gen.,
Salt Lake City, for plaintiff

J. Bryan Jackson, Matthew D. Carling,
Cedar City, for defendant

JUSTICE DURHAM authored the opinion of the Court, in which CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE NEHRING, JUSTICE PARRISH, and JUSTICE LEE joined.

JUSTICE DURHAM, opinion of the Court:

INTRODUCTION

¶1 In 2007, Kenneth Trotter pled guilty to unlawful sexual conduct with a minor. Mr. Trotter later moved to withdraw his guilty plea, claiming it was not made voluntarily or knowingly because his defense counsel and the trial court failed to advise him that his plea would carry with it the requirement that he register as a sex offender. Mr. Trotter argued that this failure amounted to ineffective assistance of counsel in violation of the Sixth Amendment and a violation of rule 11 of the Utah Rules of Criminal Procedure. The district court denied Mr. Trotter's motion to withdraw because it held that the registration requirement was a collateral consequence of the guilty plea, and therefore neither defense counsel nor the district court had an obligation to inform him of that consequence. Mr. Trotter appeals that denial.

¶2 We hold that the requirement to register on the state's sex offender registry is properly classified as a collateral consequence of a defendant's guilty plea. Therefore, neither defense counsel nor the trial court is constitutionally compelled to inform a defendant of the registration requirement before a guilty plea may be accepted as knowing and voluntary. We thus affirm the decision of the district court.

BACKGROUND

¶3 In 2007, Mr. Trotter, then twenty years old, was arrested and charged for having sexual intercourse with two minor girls between the ages of fourteen and sixteen. Mr. Trotter's public defender advised him to plead guilty to the unlawful sexual conduct in exchange for a reduction of his charge to a class A misdemeanor. It appears from the record that neither defense counsel nor the trial court informed Mr. Trotter that if he pled guilty, he would be required to register on the state's sex offender registry. The trial court followed the procedures outlined by rule 11 of the Utah Rules of Criminal Procedure to confirm with Mr. Trotter that his plea was freely, knowingly, and voluntarily given. Mr. Trotter acknowledged this fact in writing, and the plea was subsequently accepted by the court in March 2009.

¶4 Mr. Trotter later hired private counsel and filed a motion requesting to withdraw his guilty plea. Mr. Trotter argued that his plea was not made voluntarily and knowingly as required by the Due Process Clause of the United States Constitution and Utah Code section 77-13-6(2)(a) (Plea Withdrawal Statute) because the trial court did not inform him of the sex offender registration requirement. Alternatively, he claimed that his public defender's failure to inform him of the registration requirement amounted to ineffective assistance of counsel in violation of the Sixth Amendment. At this point, Mr. Trotter's sole argument was that the registration requirement was a direct rather than collateral consequence of his

guilty plea, meaning that the court and defense counsel were obligated to ensure he understood the requirement prior to his submitting – and the court accepting – his guilty plea. The State responded by arguing that sex offender registration was a collateral consequence of the plea, so that neither the court nor defense counsel was constitutionally obligated to disclose this consequence for his plea to be valid. In July 2011, the trial court denied Mr. Trotter's motion to withdraw his plea, holding that the requirement to register on the sex offender registry, despite its definite and automatic nature, was not a direct consequence of the plea.

¶5 Three months later, but prior to his sentencing, Mr. Trotter again attempted to withdraw his guilty plea in October 2011, this time advancing a new argument for withdrawal. Mr. Trotter argued that the United States Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010) – which stated that defendants have a constitutional right to be informed of the deportation risks of a guilty plea – should also extend to the sex offender registration requirement. Mr. Trotter argued that *Padilla* rendered the distinction between direct and collateral consequences of a guilty plea immaterial whenever a consequence is severe enough to warrant discarding it. And due to the severity of the consequence of sex offender registration, Mr. Trotter urged the trial court to extend *Padilla*'s reasoning to the sex offender registry context and to conclude that because he was not informed of the registration requirement, his

guilty plea was not knowing and voluntary and was therefore invalid. The district court rejected Mr. Trotter's arguments and denied his second motion to withdraw his plea. In November 2011, the court entered a judgment and sentence against Mr. Trotter on the unlawful sexual conduct charge. Mr. Trotter now appeals the district court's denial of his motion to withdraw his plea.

STANDARD OF REVIEW

¶6 Though appellate review of a district court's denial of a motion to withdraw a guilty plea could implicate questions of law, questions of fact, and mixed questions of law and fact, the questions before us on this appeal – concerning the scope of *Padilla* and whether sex offender registration is a direct or collateral consequence of a plea – are pure questions of law reviewed for correctness. *See State v. Candland*, 2013 UT 55, ¶¶ 9-10, 309 P.3d 230. *See also Commonwealth v. Abraham*, 62 A.3d 343, 346 (Pa. 2012) (reviewing similar questions de novo).

ANALYSIS

¶7 As noted above, Mr. Trotter advances two related arguments in support of his claim that the district court erred when it denied his motion to withdraw his guilty plea. Both arguments hinge on the fact that he was not informed, prior to entry of his guilty plea, that if he pled guilty he would be required to register as a sex offender. Mr. Trotter claims that

the district court and his defense counsel were both required to inform him of this consequence and that by failing to do so, the district court violated rule 11 of the Utah Rules of Criminal Procedure and his defense counsel rendered constitutionally deficient performance under the Sixth Amendment to the United States Constitution.

¶8 We note that Mr. Trotter's claim of error on the part of the district court is improperly framed as a violation of rule 11. Mr. Trotter incorrectly assumes that rule 11 is the source of his right to withdraw a guilty plea that is unknowing and involuntary. The actual source of this right is the federal Due Process Clause; its derivative "knowing and voluntary" standard is further codified in Utah's Plea Withdrawal Statute. *See State v. Alexander*, 2012 UT 27, ¶ 19, 279 P.3d 371 ("Although rule 11 provides guidance for the entry of guilty pleas, any attempt to withdraw that plea is governed by statute. . . . This statutory ['knowing and voluntary'] standard mirrors the showing necessary for defendants to prove that their pleas are unconstitutional." (footnotes omitted)). And as we recently clarified in Alexander,

> compliance with rule 11 is not mandated by the Plea Withdrawal Statute or by the U.S. Constitution. . . . Thus, even if there was a violation of rule 11 during the plea hearing, appellate courts must continue to inquire into whether there is evidence that the plea was nonetheless knowingly and voluntarily made.

Id. ¶ 25. Accordingly, if a defendant's guilty plea was not knowing and voluntary and the district court refuses to allow a defendant to withdraw that plea, the federal Due Process Clause and our Plea Withdrawal Statute – not rule 11 – would mandate that we reverse the district court's decision. We therefore proceed under the framework provided in Utah's Plea Withdrawal Statute.

¶9 Judges have discretion to grant a defendant's motion to withdraw a guilty plea only when "a defendant's plea was not knowingly and voluntarily entered." *State v. Ruiz*, 2012 UT 29, ¶ 32, 282 P.3d 998 (recognizing that the revised Plea Withdrawal Statute did away with the broad discretion previously given to judges on this matter); *see also* UTAH CODE § 77-13-6(2)(a) (2007). A guilty plea is made voluntarily and knowingly only if the defendant is "fully aware of the direct consequences" of his plea. *Brady v. United States*, 397 U.S. 742, 755 (1970) (internal quotation marks omitted). A direct consequence "is one that will have a definite, immediate and largely automatic effect on the range of the defendant's punishment such as lack of eligibility for parole." *State v. Smit*, 2004 UT App 222, ¶ 29, 95 P.3d 1203 (internal quotation marks omitted). A collateral consequence, on the other hand, is one that is unrelated to the length and nature of the sentence imposed on the basis of the plea. *See United States v. Hurlich*, 293 F.3d 1223, 1231 (10th Cir. 2002); *State v. McFadden*, 884 P.2d 1303, 1304 (Utah Ct. App. 1994). The Sixth Amendment's right to counsel compels defense

attorneys to ensure a defendant is aware of the direct consequences of his or her plea, *see Brady*, 397 U.S. at 755, while rule 11 of the Utah Rules of Criminal Procedure reflects the trial court's responsibility to do the same, *Alexander*, 2012 UT 27, ¶¶ 16-17.

¶10 Mr. Trotter argues that after *Padilla v. Kentucky*, 559 U.S. 356 (2010), the direct versus collateral consequence distinction is no longer relevant in determining whether defense counsel must inform a defendant regarding a particular consequence resulting from a guilty plea. Therefore, he argues, defendants should have a constitutional right to be informed of the sex offender registration consequence prior to entering their guilty plea, regardless of whether that consequence is deemed direct or collateral to the plea. Alternatively, Mr. Trotter asserts that even if the direct versus collateral distinction survived *Padilla*, the sex offender registration requirement is properly characterized as a direct rather than a collateral consequence of a defendant's guilty plea.

¶11 We disagree with both arguments. We conclude that *Padilla* did not dissolve the constitutional significance between direct and collateral consequences in contexts other than deportation. We further hold that the sex offender registration requirement is a collateral consequence, and therefore neither defense counsel nor the trial court was obligated to disclose it.

I. DEFENSE COUNSEL DID NOT PROVIDE CONSTITUTIONALLY DEFICIENT ASSISTANCE BY FAILING TO INFORM MR. TROTTER THAT HE WOULD BE REQUIRED TO REGISTER AS A SEX OFFENDER AS A CONSEQUENCE OF HIS GUILTY PLEA

¶12 Mr. Trotter claims that his public defender provided ineffective assistance of counsel by failing to advise him that pleading guilty would result in his registration as a sex offender. As noted above, the Sixth Amendment generally requires defense counsel to inform clients of direct but not collateral consequences of a guilty plea. But Mr. Trotter would have us hold either that *Padilla* eviscerated the direct versus collateral distinction and that guilty pleas are always unknowing and involuntary unless defendants are informed of the sex offender registration requirement, or alternatively that the registration requirement is a direct consequence of his plea. The State responds that the direct versus collateral dichotomy survived *Padilla* and that the registration requirement is properly characterized as a collateral consequence. Accordingly, the State argues that the Sixth Amendment did not compel Mr. Trotter's defense counsel to inform him that he would be required to register as a consequence of his guilty plea.

¶13 Generally, to resolve a claim of ineffective assistance of counsel, we would apply the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires the defendant to demonstrate that his or her defense counsel provided

constitutionally deficient performance that resulted in prejudice. However, when the alleged deficient performance is defense counsel's failure to inform a client of a particular consequence of a guilty plea, we must first consider whether *Strickland* applies at all. *Chaidez v. United States*, ___ U.S. ___, 133 S. Ct. 1103, 1110 (2013). To do so, we must determine whether the particular consequence was direct or collateral to the plea. If direct, the Sixth Amendment's protections are triggered and we must undertake a *Strickland* analysis; if collateral, however, most courts hold – and we agree – that defense "counsel's failure to inform a defendant of the collateral consequence[ ] . . . is never a violation of the Sixth Amendment." *Id*. at 1109 (internal quotation marks omitted).

¶14 In *Chaidez*, the Court explained that when it approached the ineffective assistance issue in *Padilla*, its "first order of business was . . . to consider whether the widely accepted distinction between direct and collateral consequences categorically foreclosed Padilla's [Sixth Amendment] claim." *Id*. at 1111. The Court noted that nearly every state court and all lower federal courts that have addressed this issue have held that the "Sixth Amendment does not require attorneys to inform their clients of a conviction's collateral consequences." *Id*. at 1109. Indeed, the Court recognized that exclusion of advice about collateral consequences from the Sixth Amendment's scope was "one of the most widely recognized rules of American law." *Id*. (internal quotation marks omitted). And although the *Chaidez* Court did not expressly

endorse the majority rule,[1] it clarified that *Padilla* did not "eschew the direct-collateral divide across the board," but simply recognized that the distinction was "ill-suited" to the unique circumstance of deportation. *Id*. at 1112 (internal quotation marks omitted).

¶15 We thus turn our attention first to the issue of whether Utah's sex offender registration requirement is sufficiently akin to deportation such that the direct-collateral divide is "ill-suited" to dispose of Mr. Trotter's claims. Since we hold that it is not, we then consider whether the registration requirement is properly categorized as a direct or collateral consequence.

---

[1] Although the United States Supreme Court has not directly answered the question whether there may be circumstances under which advice about a matter deemed collateral violates the Sixth Amendment, the clear majority rule is that "counsel's failure to inform a defendant of the collateral consequences of a guilty plea is never a violation of the Sixth Amendment." *Chaidez*, ___ U.S. at ___, 133 S. Ct. at 1109 (internal quotation marks omitted). We likewise hold that advice about collateral consequences is categorically excluded from the scope of the Sixth Amendment's protections. We accordingly need not reach the *Strickland* analysis where defense counsel's alleged deficiency was the failure to inform the defendant of a guilty plea's collateral consequences.

A. *The Direct-Collateral Dichotomy Is Appropriately Applied to the Consequence of Sex Offender Registration*

¶16 As noted above, *Padilla* did not eliminate the direct-collateral distinction but merely carved out a special exception for advising defendants about the risk of deportation associated with a guilty plea. *Padilla* noted that this exception was premised on the "unique nature" of deportation. 559 U.S. at 365.

¶17 In *Padilla*, the Court explained that deportation's unique nature arose from the changes in immigration law that had "dramatically raised the stakes of a noncitizen's criminal conviction" and transformed deportation into "an integral part – indeed, sometimes the most important part – of the [criminal] penalty," akin to "banishment or exile." *Id*. at 364, 373 (footnote omitted) (internal quotation marks omitted). Removal from the country, the Court noted, is "nearly an automatic result for a broad class of noncitizen offenders." *Id*. at 366. The Court also recognized that deportation is a particularly "severe 'penalty'" and that it is difficult to separate it from the defendant's conviction. *Id*. at 365-66. Thus, the Court determined that deportation is uniquely ill-suited for the direct-collateral divide because (1) it results automatically from the entry of the plea, and (2) it is a particularly severe penalty. *Id*. at 366. Accordingly, any rationale for extending *Padilla*'s reasoning to other contexts, such as registration as a sex offender, must be rooted in both of these justifications.

¶18 Mr. Trotter cites several state court decisions to support his claim that *Padilla*'s rationale should be extended to the consequence of sex offender registration. For example, the Georgia court of appeals in *Taylor v. State* ruled to extend *Padilla*'s reasoning to a registration requirement by relying on three primary justifications: the prevailing professional norms, the automatic nature of the requirement, and the severity of the requirement. 698 S.E.2d 384, 388-89 (Ga. Ct. App. 2010). We address each in turn.

¶19 First, the *Taylor* court cited the ABA Standards for Criminal Justice, which instruct defense counsel to advise their clients of the registration requirement before entering a guilty plea. *Id*. at 388. We certainly agree that best practices suggest that defense counsel should inform a defendant that his guilty plea carries with it the requirement to register as a sex offender, but best practices often extend beyond the minimum level of professional competence mandated by the Constitution. *See, e.g., Whiting v. United States*, 231 F.3d 70, 76 (1st Cir. 2000) (stating that "there is daylight between desirable policy and the bare minimum required by the Constitution"). We conclude that is the case here.

¶20 The second two considerations raised by the *Taylor* court – the automatic nature and severity of the registration consequence – are relevant to our determination. First, *Taylor* noted that, just like deportation, Georgia's registration requirement was an automatic consequence of the crime to which Mr. Taylor pled guilty. 698 S.E.2d at 388. Similarly,

Utah's registration requirement is automatically triggered if a person is convicted of certain crimes. *See* UTAH CODE §§ 77-41-106, 105(3)(a) (2013). But the automatic nature of the registration requirement cannot alone render the consequence identical to deportation; otherwise, other civil deprivations such as losing one's right to vote or carry a weapon would suffice to remove the consequence from the direct versus collateral dichotomy, which they do not. *See, e.g., Spencer v. Kemna*, 523 U.S. 1, 8 (1998) (discussing a number of civil deprivations as a collateral consequence); *Kipp v. State*, 704 A.2d 839, 841-42 (Del. 1998) (discussing prohibition of deadly weapon possession); *Saadiq v. State*, 387 N.W.2d 315, 325 (Iowa 1986) (collecting cases on distinction between direct and collateral consequences). Thus, if the registration requirement is to be treated like deportation, it must be based not only on its automatic nature, but also on its severity.

¶21 We evaluated the severity of deportation and its impact on defendants when we decided *State v. Rojas-Martinez*, 2005 UT 86, 125 P.3d 930, *overruled by Padilla*, 559 U.S. 356. We recognized that deportation is an especially severe consequence because it is essentially the "'equivalent of banishment or exile.'" *Id*. ¶ 19 (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). We also noted that deportation severely restricts the defendant's freedom of movement and opportunity because it "'deprives him of the right to stay and live and work in this great land.'" *Id*. (quoting *Reno v. Am. Arab Anti-Discrimination*

Comm., 525 U.S. 471, 497-98 (1999)). It also interferes with familial relationships and places great strain on the family when the separation occurs. *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 787 (1982)).[2]

¶22 In addressing whether sex offender registration rises to the same level of severity as the consequence of deportation, we begin by acknowledging the serious social stigmas that attach to one who must register as a sex offender. Interested parties may easily locate by name and address any sex offender living in their neighborhood. In many instances, the most regrettable actions in an individual's life are posted for the public to see. Once identified as a sex offender, the individual may feel compelled to move away, quit a job, or stay indoors. The offender's family members and friends may also be ostracized, and a number of other social pressures may complicate and burden the offender's life upon registration. We do not mean to diminish in any way the real and significant civil and social burdens a sex offender must face as a result of registration. Nevertheless, we conclude that the statutory restrictions imposed on sex offenders – and the resulting social consequences – are not akin to the restrictions and consequences faced by deportees.

---

[2] The Supreme Court noted similar reasons when creating the deportation exception in *Padilla*, including the "steady expansion of deportable offenses" and the impact on an individual's ability to remain in the country. *Padilla*, 559 U.S. at 363.

¶23 Under Utah Code section 77-27-21.7(2), a registered offender may not "be in any protected area on foot or in or on any vehicle." Protected areas under the statute include day care and preschool facilities, public swimming pools, primary and secondary schools, public parks, public playgrounds, and other areas designed for children to engage in recreational activity.[3] A protected area may also include any area within one thousand feet of the victim's residence but only if the offender is on probation or parole and the victim affirmatively requests the buffer zone.[4] The victim's residence is also categorically excluded

---

[3] "'Protected area' means the premises occupied by: (i) any licensed day care or preschool facility; (ii) a swimming pool that is open to the public; (iii) a public or private primary or secondary school that is not on the grounds of a correctional facility; (iv) a community park that is open to the public; and (v) a playground that is open to the public, including those areas designed to provide children space, recreational equipment, or other amenities intended to allow children to engage in physical activity." UTAH CODE § 77-27-21.7(1)(a).

[4] "'[P]rotected area' also includes any area that is 1,000 feet or less from the residence of a victim of the sex offender's offense . . . if: (A) the sex offender is on probation or parole for an offense . . . ; (B) the victim or the victim's parent or guardian has advised the Department of Corrections that the victim desires that the sex offender be restricted from the area . . . and authorizes the Department of Corrections to advise the sex offender of the area where the victim resides for the purposes of this Subsection . . . ; and (C) the Department of Corrections has notified the sex offender in writing that the sex offender is prohibited from being in the protected area . . . and has also provided a description of the location of the protected area to the sex offender." *Id*. § 77-27-21.7(1)(b)(i).

from the definition of "protected area" if the victim is a member of the offender's immediate family and the terms of the offender's probation or parole so allow.[5]

¶24 Furthermore, the statute affords additional exceptions to the definition of "protected area" that make its impact on the defendant far less severe than the consequence of deportation. For example, a sex offender may enter a protected area during times when the offender must be present to fulfill "necessary parental responsibilities."[6] Additionally, when the protected area is a school building, the offender may still enter when the building is being used for a "public activity" that is not a school-related function involving individuals under the age of eighteen.[7] Or, if the protected area is a licensed day care or preschool facility, the offender may enter when the building is

---

[5] " 'Protected area' . . . does not apply to the residence and area surrounding the residence of the victim if: (A) the victim is a member of the immediate family of the sex offender; and (B) the terms of the sex offender's agreement of probation or parole allow the sex offender to reside in the same residence as the victim. *Id*. § 77-27-21.7(1)(b)(ii).

[6] "It is a class A misdemeanor for any sex offender to be in any protected area on foot or in or on any vehicle, including vehicles that are not motorized, except for: (a) those specific periods of time when the sex offender must be present within a protected area in order to carry out necessary parental responsibilities. . . ." *Id*. § 77-27-21.7(2)(a).

[7] "[W]hen the protected area is a school building . . . (ii) being opened for or being used for a public activity; and (iii) not being used for any school-related function that involves persons younger than 18 years of age. . . ." *Id*. § 77-27-21.7(2)(b).

open to the public for activities that are operated separately from the day care or preschool.[8] Aside from the ban on entering protected areas, it appears that the only other unique legal deprivation a registered sex offender suffers is the choice to change his or her name. *See* UTAH CODE § 77-41-105(9)(a) (2013).

¶25 Taken as a whole, these prohibitions, while onerous, do not rise to the same level of severity as deportation from the country. While deportation is similar to banishment or exile, a sex offender retains a good deal of freedom to conduct himself as he or she chooses. The offender's movement and activity is relatively uninhibited by registration, with the exception of certain protected areas under narrowly tailored circumstances. The offender may go to work, to school, to the gym, to the grocery store, to the movie theater, to the post office, and to a restaurant without violating any of the conditions set out by the registry laws. For the most part, the registered offender maintains the choice to live and work where he or she chooses.

¶26 Moreover, rather than permanently interfering with familial relationships in the way that deportation does, the registry allows offenders to

---

[8] "[W]hen the protected area is a licensed day care or preschool facility . . . located within a building that is open to the public for purposes, services, or functions that are operated separately from the day care or preschool facility located in the building, except that the sex offender may not be in any part of the building occupied by the day care or preschool facility." *Id.* § 77-27-21.7(c).

continue to live with their families despite registration. This is true even if the victim is a member of the offender's immediate family, absent some other condition of probation or parole. And even if the offender's parole does not allow contact with the victim and requires the offender to live elsewhere, nothing in the statute itself prohibits visits and interactions with other family members. This is, again, a very different scenario from that of the defendant who is deported and is thereby permanently deprived of face-to-face contact with family in the United States. Moreover, the statute allows an offender to enter even protected areas on a very limited basis to carry out necessary parental responsibilities. Instead of removing the offender from his family unit as deportation would do, registration in Utah still allows the offender to function as a parent. On balance, the restrictions imposed by Utah's sex offender registration requirement seem to us significantly removed from banishment or exile.

¶27 Nevertheless, Mr. Trotter argues that the registration requirement "significantly impacts the defendant's unfettered liberty for years into the future." Although Mr. Trotter does not elaborate on that statement, we recognize that one way the defendant's liberty may be impacted is through the registration's public reporting requirements. *See id.* § 77-41-105 (2011). Under these requirements, a sex offender is obligated to deliver certain personal information, including addresses, fingerprints, a DNA specimen, internet identifiers, and professional licenses to the appropriate department or entity. *See id.*

§ 77-41-105(8). The Department of Corrections then publishes some, but not all, of this information on a website specifically maintained for this purpose. *See id*. § 77-41-110 (2012). Yet all of the information displayed on this website is information that is independently classified as public information, meaning members of the public can obtain the information by making a request pursuant to Utah Code section 63G-2-201(1). *See id*. § 77-41-108; *see also Femedeer v. Haun*, 227 F.3d 1244, 1250 (10th Cir. 2000) (stating that "public accessibility of information concerning a sex offender's conviction, including accessibility of that information through the Internet, is not punishment"). Although making this information public carries with it additional real and automatic social burdens, the severity of these burdens does not rise to same level as deportation. We therefore decline to extend *Padilla* to remove advice regarding the consequence of sex offender registration from the generally applicable direct-collateral dichotomy.

B. The Sex Offender Registration Requirement Is a Collateral Consequence of a Defendant's Guilty Plea

¶28 Because we hold that *Padilla*'s reasoning does not extend to the registration requirement, we must now determine whether registering as a sex offender is properly categorized as a direct consequence or a collateral consequence of a defendant's guilty plea. A direct consequence has an immediate and automatic effect on the range of a defendant's

punishments. *State v. Smit*, 2004 UT App 222, ¶ 29, 95 P.3d 1203. "Examples of direct consequences include the forfeiture of trial rights, the imposition of a mandatory term of imprisonment that results from an unconditional guilty plea, and the imposition of mandatory postrelease supervision," *People v. Peque*, 3 N.E.3d 617, 628 (N.Y. 2013) (citations omitted), including probation and the eligibility for parole, *see Smit*, 2004 UT App 222, ¶ 29; *United States v. Krejcarek*, 453 F.3d 1290, 1297 n.7 (10th Cir. 2006).

¶29 Conversely, a consequence is collateral if it is unrelated to the length and nature of the sentence imposed on the basis of the plea. *United States v. Hurlich*, 293 F.3d 1223, 1231 (10th Cir. 2002); *State v. McFadden*, 884 P.2d 1303, 1304 (Utah Ct. App. 1994). It is a consequence that is based more on the individual's personal circumstances, *see Peque*, 3 N.E.3d at 628, and is "beyond the control and responsibility of the district court in which [the] conviction was entered." *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000), *overruled on other grounds by Padilla*, 559 U.S. 356. "Illustrations of collateral consequences are loss of the right to vote or travel abroad, loss of civil service employment, loss of driver's license, loss of the right to possess firearms or an undesirable discharge from the armed services." *People v. Ford*, 657 N.E.2d 265, 267-68 (N.Y. 1995) (citations omitted). Consequences that can be "foreseen because of the automatic operation of statutes" may also count as collateral. *Aldus v. State*, 748 A.2d 463, 469 n.6 (Me. 2000).

¶30 We hold that the registration requirement is properly characterized as a collateral consequence because, although automatic in effect, it is unrelated to the range of the defendant's punishments. Unlike parole, probation, or the length of imprisonment, the requirement to register as a sex offender is beyond the control of the trial court. The judge has no discretion whatsoever in determining whether the defendant will have to comply with registration statutes; instead, it is a legal obligation, predetermined by the legislature, placed on those convicted of particular crimes and is an automatic operation of statute. Similar to the consequence of losing one's driver's license or the right to possess a firearm, the registration requirement is intended to act not as a criminal punishment but as a prophylactic civil remedy. *See, e.g., Smith v. Doe*, 538 U.S. 84, 95-96 (2003) (holding that Alaska's registration requirement was a civil remedy and nonpunitive); *United States v. Carel*, 668 F.3d 1211, 1213 (10th Cir. 2011) (determining that the registration requirement of the federal sex offender registry law is a "civil component"); *Femedeer*, 227 F.3d at 1249-53 (evaluating aspects of Utah's registration laws and determining that they constitute a "civil remedy"); *State v. Holt*, 2010 UT App 138, ¶ 12 n.7, 233 P.3d 828, *overruled on other grounds by State v. Johnson*, 2012 UT 68, 290 P.3d 21 (noting that "[r]egistration as a sex offender is not considered a criminal penalty, but rather a civil penalty" (internal quotation marks omitted)).

¶31 For instance, in *Femedeer* the Tenth Circuit evaluated the nature of Utah's sex offender registry Internet notification system, which derives from the existing registration database. It found that the Utah Legislature's intent in creating the system "was clearly to establish a civil remedy." 227 F.3d at 1249. The court observed that legislative intent may be ascertained from "the simple fact that the legislature placed the statute in the civil code as opposed to the criminal code." *Id*. (internal quotation marks omitted). Furthermore, the court determined that the system promoted civil goals including "deterrence, avoidance and investigation." *Id*. at 1252. It reasoned that the negative consequences imposed on sex offenders from the notification system – and impliedly from the underlying registration requirement – imposed "only a civil burden upon sex offenders." *Id*. at 1253.

¶32 The reasons identified by the *Femedeer* court in the context of the notification system are persuasive to us in determining that the registration requirement itself is a civil remedy. The requirement appears in the civil code rather than the criminal code, and the information is available only to those who affirmatively choose to seek it out. Moreover, the civil purposes advanced by the notification system – deterrence and avoidance – also underpin Utah's registration requirement. Indeed, the sex offender registry provides helpful information to parents in protecting their children from past offenders. It also offers an additional tool for making informed decisions regarding child care and victimization prevention.

¶33 We conclude that the registration requirement is a civil remedy and is properly categorized as a collateral consequence rather than a direct consequence of a defendant's guilty plea because it is unrelated to the length or nature of the sentence. *See McFadden*, 884 P.2d at 1304; *see also Peque*, 3 N.E.3d at 628 (identifying sex offender registration as a collateral consequence). Because we determine that the registration requirement is a collateral consequence, Mr. Trotter's trial counsel was not ineffective for failing to advise him of it prior to entering his guilty plea. *See Chaidez*, ___ U.S. at ___, 133 S. Ct. at 1109 (noting the strong judicial consensus that "counsel's failure to inform a defendant of the collateral consequences of a guilty plea is never a violation of the Sixth Amendment" (internal quotation marks omitted)). We accordingly affirm the trial court's denial of Mr. Trotter's motion to withdraw his guilty plea on Sixth Amendment grounds. We take this opportunity to reemphasize, however, that attorneys follow best practices by advising their clients of the sex offender registration requirement when it is a condition of the client's guilty plea, even if doing so goes beyond the minimum standard mandated by the Constitution.

II. A DEFENDANT'S GUILTY PLEA IS VOLUNTARY AND KNOWING NOTWITHSTANDING A TRIAL COURT'S FAILURE TO INFORM THE DEFENDANT OF THE REQUIREMENT TO REGISTER AS A SEX OFFENDER

¶34 Utah's Plea Withdrawal Statute states that "[a] plea of guilty . . . may be withdrawn only upon . . . a showing that it was not knowingly and voluntarily made." UTAH CODE § 77-13-6(2)(a). The United States Supreme Court has defined a "voluntary" plea as one made by a defendant who is "fully aware of the direct consequences" of his guilty plea. *Brady v. United States*, 397 U.S. 742, 755 (1970) (internal quotation marks omitted). Federal law almost universally holds that the due process guarantee entitles a defendant "to be informed of the direct, but not collateral, consequences of his plea." *Warren v. Richland Cnty. Circuit Court*, 223 F.3d 454, 457 (7th Cir. 2000); *see also United States v. Suter*, 755 F.2d 523, 525 (7th Cir. 1985) ("A defendant is entitled to be informed of the direct, not all the collateral, consequences of his plea."); *George v. Black*, 732 F.2d 108, 110 (8th Cir. 1984) ("[T]he accused need only be informed of the 'direct consequences' of the guilty plea. It is not necessary to attempt to inform the defendant of all the indirect or collateral consequences." (citation omitted)); *Michel v. United States*, 507 F.2d 461, 465 (2d Cir. 1974) (noting the "long-standing rule . . . that the trial judge when accepting a plea of guilty is not bound to inquire whether a defendant is aware of the collateral effects of his plea"). Although there is no Utah case law interpreting the Plea Withdrawal

Statute to incorporate this well-ingrained principle of federal law, it is reflected in rule 11 of the Utah Rules of Criminal Procedure, which states that "a court is not required to inquire into or advise concerning any collateral consequences of a plea." UTAH R. CRIM. P. 11(e)(8). Today we hold that like the federal Due Process Clause, the Plea Withdrawal Statute's "knowing and voluntary" standard incorporates the principle that a guilty plea may be voluntarily given even if the defendant is uninformed of the plea's collateral consequences.

¶35 As a result, our prior conclusion that the registration requirement is a collateral consequence compels us to likewise conclude that the trial court had no responsibility under either the federal Due Process Clause or the Utah Plea Withdrawal Statue to inform Mr. Trotter that by pleading guilty he would be required to register on the state's sex offender registry. Since the district court is not required to advise a defendant of a plea's collateral consequences, the trial court's colloquy in Mr. Trotter's case was constitutionally sufficient to verify that Mr. Trotter pled guilty voluntarily and knowingly.

CONCLUSION

¶36 We hold that the trial court did not abuse its discretion when it denied Mr. Trotter's motion to withdraw his 2009 guilty plea because the plea was entered voluntarily and knowingly. Further, we hold that the requirement to register as a sex offender as

result of a defendant's guilty plea is a collateral consequence of that plea, which imposes no constitutional obligation on the trial court or on defense counsel to inform a defendant of that risk. For these reasons, we affirm the lower court's judgment.

IN THE FIFTH JUDICIAL DISTRICT COURT,
IN AND FOR IRON COUNTY,
STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. KENNETH TROTTER, Defendant.	)))))))))))	**JUDGMENT, SENTENCE, STAY OF EXECUTION OF SENTENCE, ORDER OF PROBATION AND RESTITUTION, AND COMMITMENT** (Filed Nov. 3, 2011) Criminal No. 071500541 Judge G. Michael Westfall

The Defendant, KENNETH TROTTER, having been convicted pursuant to his plea of guilty to the offense of UNLAWFUL SEXUAL ACTIVITY WITH A MINOR, a Third-Degree Felony, on March 9, 2009, and the Court having accepted said plea of guilty and thereafter having ordered the preparation of a pre-sentence investigation report, and after said report was prepared and presented to the Court, the above-entitled matter having come on before the Court for sentencing on October 25, 2011, in Cedar City, Utah, and the Defendant, KENNETH TROTTER, having appeared in person, together with his attorney of record Jack B. Burns, and the State of Utah having appeared by and through Iron County Attorney Scott F. Garrett, and the Court having reviewed the

presentence investigation report and the file in detail, and having heard statements from all parties and being fully advised in the premises, now makes and enters the following Judgment, Sentence, Stay of Execution of Sentence, Order of Probation and Restitution, and Commitment as follows:

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, KENNETH TROTTER, and pursuant to his plea of guilty, has been convicted of the offense of UNLAWFUL SEXUAL ACTIVITY WITH A MINOR, a Third-Degree Felony; and the Court having asked whether the Defendant had anything to say in regard to why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is adjudged that the Defendant is guilty as charged and convicted.

SENTENCE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant, KENNETH TROTTER, and pursuant to his conviction of UNLAWFUL SEXUAL ACTIVITY WITH A MINOR, a Third-Degree Felony, shall serve a term of imprisonment for a period of zero (0) to five (5) years in the Utah State Prison, and the Defendant is hereby placed in the custody of the Utah Department of Corrections.

IT IS FURTHER ORDERED that the Defendant, KENNETH TROTTER, and pursuant to his conviction UNLAWFUL SEXUAL ACTIVITY WITH A MINOR, a Third-Degree Felony, shall pay a fine in the sum and amount of five thousand dollars ($5,000), plus a ninety percent (90%) surcharge, and a court security fee in the sum and amount of thirty-three dollars ($33).

STAY OF EXECUTION OF SENTENCE

IT IS HEREBY ORDERED that the execution of the term of incarceration imposed and the fine imposed in this case are hereby stayed, pending the Defendant's strict adherence to and compliance with the following terms and conditions of probation.

ORDER OF PROBATION AND RESTITUTION

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, KENNETH TROTTER, is hereby placed on probation for a period of thirty-six (36) months under the supervision of the Department of Adult Probation and Parole, strictly within the following terms, provisions, and conditions:

1. The Defendant shall forthwith make and execute a formal agreement provided by the Utah Department of Adult Probation and Parole, and during the period of probation set forth herein, shall strictly conform with all the terms, provisions, and

conditions, and the same are hereby made a part of this Order by means of incorporation.

2. The Defendant shall report as ordered and required by the Court and the Department of Adult Probation and Parole during the period of this probation.

3. The Defendant shall commit no law violations during the period of this probation.

4. The Defendant shall serve a term of incarceration in the Iron County Jail for a period of ninety (90) days. The Defendant shall report to jail on November 28, 2011, at 9:00 a.m. The Defendant shall be given credit for the time he has served, in the event that the time served exceeds more than twenty-four (24) hours. If the time served does not exceed more than twenty-four (24) hours, the Defendant shall not be eligible for credit for time served.

5. The Defendant shall pay a fine and fee in the amount of one thousand five hundred dollars ($1,500), plus a court security fee in the amount of thirty-three dollars ($33). The Defendant shall be eligible for a dollar-for-dollar credit against the costs of treatment, in the event the Defendant successfully completes the same.

6. The Defendant shall pay **restitution** in an amount to be determined, either by stipulation or a restitution hearing, within one hundred eighty (180) days of the date of sentencing. If the restitution

amount is not determined within that time frame, no restitution will be ordered.

7. The Defendant shall not consume or possess alcohol, nor visit establishments where alcohol is the chief item of sale or where consumption of alcohol is the primary activity. Further, the Defendant shall not consume or possess energy drinks, other drinks, or medications that contain alcohol.

8. The Defendant shall not consume or possess illegal narcotics or mind-altering substances, nor associate with people that consume or possess said substances.

9. The Defendant is ordered to obtain a psycho-sexual evaluation, said evaluation to be completed within sixty (60) days of the Defendant's release from incarceration. The evaluation shall be completed by a licensed clinical psychologist approved by the Utah State Department of Corrections to evaluate and treat perpetrators of sexually-based crimes. Thereafter, the Defendant shall follow through with any recommendations of the psycho-sexual evaluation.

10. The Defendant shall enter into, complete, and pay for sex offender therapy and complete any and all sex offender treatment with the Intermountain Specialized Abuse Treatment (ISAT) Center or other treatment provider licensed to treat convicted sex offenders in the State of Utah.

11. The Defendant shall comply with Group A Sex Offender conditions as follows:

A. Enter into, participate in and successfully complete sex offender therapy as determined by the treating facility, therapists and the Utah Department of Corrections.

B. Enter into and successfully complete established progressive curfews or electronic monitoring where available, when required by Adult Probation and Parole.

C. Have no direct or indirect contact with victim(s) or victim's family without prior approval from Adult Probation and Parole.

D. Have no contact or association with pubescent females under the age of 18 years without prior written approval of Adult Probation and Parole.

E. Not date persons with children residing at home under the age of 18 years of age without prior written approval of Adult Probation and Parole.

F. Not enter places or events where children congregate, including but not limited to: schools, playgrounds, parks, arcades, parties, family functions, holiday festivities, or any other place or function where children are present or reasonably expected to be present without the prior written approval from Adult Probation and Parole or without the supervision of a responsible adult previously approved by Adult Probation and Parole.

G. Not have in my possession or under my control any material that acts as a sexual stimulus for my particular deviancy(s), including but not

limited to: computer programs, computer links, photographs, drawings, video tapes, audio tapes, magazines, books, literature, writings, etc. without prior written approval from Adult Probation and Parole,

H. Not have in my possession or under my control any material that describes or depicts human nudity, the exploitation of children, consensual sex acts, non-consensual sex acts, sexual acts involving force or violence, including but not limited to; computer programs, computer links, photographs, drawings, video tapes, audio tapes, magazines, books, literature, writings, etc without prior written approval of my probation officer.

I. Not have in my possession or under my control any items or material either designed or used to entertain, lure or attract the attention of children under the age of 18 without prior approval from Adult Probation and Parole.

J. Submit to random polygraph examinations.

K. Employment must be approved by Adult Probation and Parole.

L. Residence and residence changes must be approved by Adult Probation and Parole.

M. Execute and adhere to the terms of the Interstate Compact Waiver and Agreement, if probation or parole is served outside the State of Utah.

N. Comply with requirements of Utah Sex Offender Registration and DNA specimen requirements.

COMMITMENT

TO THE SHERIFF OF IRON COUNTY, STATE OF UTAH:

YOU ARE HEREBY COMMANDED to take the Defendant, KENNETH TROTTER, and deliver him to the Iron County Jail in Cedar City, Utah, there to be kept and confined in accordance with the above and foregoing Judgment, Sentence, Stay of Execution of Sentence, Order of Probation and Restitution, and Commitment.

DATED this 3rd day of November, 2011.

BY THE COURT:

/s/ [Illegible]
G. MICHAEL WESTFALL
District Court Judge

IN THE FIFTH JUDICIAL DISTRICT COURT,
IN AND FOR
IRON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. KENNETH TROTTER, Defendant.	**DECISION AND ORDER DENYING MOTION TO WITHDRAW PLEA** (Filed Jul. 19, 2011) Case No. 071500541 Judge G. Michael Westfall

On June 26, 2009, prior to sentencing in this case, Defendant Kenneth Trotter filed a Motion to Withdraw Plea. On January 21, 2010, he filed a supporting memorandum ("Mem. in Supp."). On February 26, 2010, the State filed an opposition memorandum ("Mem. in Opp."). On June 22, 2010, the State requested that the matter be submitted for decision.[1] On October 14, 2010, Defendant filed a reply. On May 20, 2011, the State again requested that the matter be submitted for decision.

ANALYSIS

Defendant moves to withdraw his guilty plea pursuant to Utah Code section 77-13-6, which

[1] For some reason, this request was not communicated to the judge assigned to this case.

provides, in pertinent part: "A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made." Utah Code Ann. § 77-13-6(2)(a). Here, Defendant attempts to make such showing via his affidavit asserting that neither his prior counsel nor the court informed him of the sex offender registration requirements that would result from pleading guilty to the crime of unlawful sexual activity with a minor, and that he would not have entered such plea had he been aware of such requirements. Reviewing the statutory registration framework that requires a court to forward convictions such as the one involved here to the Department of Corrections, "who then engages in the ministerial act of registration," Mem. in Supp. at 5 (unpaginated) (citing Utah Code Ann. § 77-27-21.5(4), (5)), Defendant concludes that the registration requirements are "part and parcel of any sentence to be imposed," and that they are therefore "not a collateral consequence but rather a direct consequence of the conviction" as to which he must have been advised. *See* Mem. in Supp. at 6 (unpaginated).

In response, the State disputes (without presenting any evidence) Defendant's affidavit testimony that he was not advised by counsel regarding the registration requirements that would follow his conviction.[2] Further, while recognizing that "[u]nder

[2] Due to the absence of any evidence in the record to support the State's position on this factual issue, the court

(Continued on following page)

federal law and Utah law, trial courts are required to inform defendants about the direct consequences of a guilty plea," *State v. Smit*, 2004 UT App 222, ¶ 29 (citations, quotation marks, and brackets omitted), the State challenges Defendant's characterization of the sex offender registration requirements as a "direct" rather than "collateral" consequence. It cites *State v. McFadden*, 884 P.2d 1303 (Utah Ct. App. 1994), which explained that "[a] collateral consequence is one that is not related to the length or nature of the sentence imposed on the basis of the plea," *id.* at 1304 (citing *Kincade v. United States*, 559 F.2d 906, 909 (3d Cir.) (per curiam), cert. denied, 434 U.S. 970 (1977)), and *Smit*, which described "[a] 'direct' consequence" as "one that will have a 'definite, immediate and largely automatic effect on the range of the defendant's punishment' such as lack of eligibility for parole." 2004 UT App 222, ¶ 29 (quoting *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir.1973)). The State notes that deportation and an enhanced penalty in the event of a future conviction have been held to be collateral consequences about which a defendant need not be advised, *see McFadden*, 884 P.2d at 1304-05 (deportation); *State v. Marshall*, 2003 UT App 381, ¶ 21 n.9 (enhanced penalty), and argues that sex offender registration is akin to such consequences.

---

assumes for purposes of this decision that Defendant was not advised of the sex offender registration requirements.

The court agrees with the State, but not entirely with its reasoning. Notably, the State fails to mention the *Smit* court's description of "[a] 'collateral' consequence" as "one that is *discretionary*, [*see Cuthrell*, 475 F.2d at 1366], such as the *possibility* of a concurrent state sentence, *see United States v. Degand*, 614 F.2d 176, 177-78 (8th Cir.1980), or the *possibility* of revocation of parole. *See Sanchez v. United States*, 572 F.2d 210, 211 (9th Cir.1977)." 2004 UT App 222, ¶ 29 (emphasis added).

Under section 77-27-21.5, as both Defendant and the State seem to acknowledge, neither the court nor the Department of Corrections has any discretion regarding the applicability of the registration requirements to a person convicted of unlawful sexual relations with a minor. *See* Utah Code Ann. § 77-27-21.5(4) ("Upon convicting a person of any bf the offenses listed in Subsection (1)(g) or (n),[3] the convicting court *shall* within three business days forward a copy of the judgment and sentence to the department.") (emphasis added); (5) ("An offender in the custody of the department *shall* be registered by agents of the department. . . .") (emphasis added); (12)(a) ("Except as provided in Subsections (12)(b), (c), and (d),[4] an offender shall, for the duration of the

[3] Subsection (1)(n) defines "sex offender" as "any person: (i) convicted in this state of: . . . (C) a felony violation of Section 76-5-401, unlawful sexual activity with a minor[.]"

[4] Subsection (12)(b) sets forth the registration requirements of persons convicted of sex offenses in other jurisdictions.

(Continued on following page)

sentence and for 10 years after termination of sentence or custody of the division, register every year during the month of the offender's birth, during the month that is the sixth month after the offender's birth month, and also within three business days of every change of the offender's primary residence, any secondary residences, place of employment, vehicle information, or educational information required to be submitted under Subsection (14).").

As the State puts it (albeit in an attempt to establish the collateral nature of the consequence), the sex offender registration requirements "will be imposed *regardless of the sentence*." Mem. in Opp. at 6 (emphasis added). This distinguishes the consequence at issue from deportation and a penalty enhancement, both of which are potential rather than inexorable results of a conviction. "Here, the consequence, registration as a sex offender, is definite. It is also completely automatic; if a defendant pleads to an enumerated offense, he must register; there are no exceptions, no wiggle room, no conditions which relieve him of that obligation." *Mitschke v. State*, 129 S.W.3d 130, 135 (Tex. Ct. Crim. App. 2004).

Subsection (12)(c) sets forth lifetime registration requirements for certain offenses not applicable here. Subsection (12)(d) exempts "an offender who is confined in a secure facility or in a state mental hospital" from having "to register during the period of confinement."

However, the fact that a consequence is definite and automatic is not enough to make it direct. As stated above, "[a] 'direct' consequence is one that will have a 'definite, immediate and largely automatic effect *on the range of the defendant's punishment*'. . . ." *Smit*, ¶ 29 (emphasis added). Because it appears that the sex offender registration requirements are purely civil, rather than punitive, *cf. Femedeer v. Haun*, 227 F.3d 1244, 1253 (10th Cir. 2000) ("Utah's notification scheme imposes only a civil burden upon sex offenders. . . ."), which issue has not even been addressed by Defendant, the court concludes such requirements do not constitute a direct consequence of which Defendant was required to be advised. *See also Kaiser v. State*, 621 N.W.2d 49, 53 (Minn. Ct. App. 2001) ("The majority of states that have addressed whether sex-offender registration is a direct or collateral consequence have held that it is a collateral consequence, either because it is not direct and automatic or because it is not punishment.") (citing cases).[5]

---

[5] Defendant also argues that he was denied effective assistance of counsel due to his counsel's failure to advise him of the sex offender registration requirements. Because this argument is premised on the characterization of such requirements as a "direct" consequence of a guilty plea, it is likewise rejected for the reasons given above.

ORDER

For the foregoing reasons, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. the Motion to Withdraw Plea is denied.

Dated this 19th day of July, 2011.

BY THE COURT:

/s/ [Illegible]
G. Michael Westfall
District Court Judge

§ 77-27-21.7. Sex offender restrictions

(1) As used in this section:

(a) "Protected area" means the premises occupied by:

(i) any licensed day care or preschool facility;

(ii) a swimming pool that is open to the public;

(iii) a public or private primary or secondary school that is not on the grounds of a correctional facility;

(iv) a community park that is open to the public; and

(v) a playground that is open to the public, including those areas designed to provide children space, recreational equipment, or other amenities intended to allow children to engage in physical activity.

(b)(i) Except under Subsection (1)(b)(ii), "protected area" also includes any area that is 1,000 feet or less from the residence of a victim of the sex offender's offense under Subsection (1)(c) if:

(A) the sex offender is on probation or parole for an offense under Subsection (1)(c);

(B) the victim or the victim's parent or guardian has advised the Department of Corrections that the victim desires that the sex offender be restricted from the

area under this Subsection (1)(b)(i) and authorizes the Department of Corrections to advise the sex offender of the area where the victim resides for purposes of this Subsection (1)(b); and

(C) the Department of Corrections has notified the sex offender in writing that the sex offender is prohibited from being in the protected area under Subsection (1)(b)(i) and has also provided a description of the location of the protected area to the sex offender.

(ii) "Protected area" under Subsection (1)(b)(i) does not apply to the residence and area surrounding the residence of a victim if:

(A) the victim is a member of the immediate family of the sex offender; and

(B) the terms of the sex offender's agreement of probation or parole allow the sex offender to reside in the same residence as the victim.

(c) "Sex offender" means an adult or juvenile who is required to register in accordance with Title 77, Chapter 41, Sex and Kidnap Offender Registry, due to a conviction for any offense that is committed against a person younger than 18 years of age.

(2) It is a class A misdemeanor for any sex offender to be in any protected area on foot or in or on any vehicle, including vehicles that are not motorized, except for:

(a) those specific periods of time when the sex offender must be present within a protected area in order to carry out necessary parental responsibilities;

(b) when the protected area is a school building:

(i) under Subsection (1)(a)(iii);

(ii) being opened for or being used for a public activity; and

(iii) not being used for any school-related function that involves persons younger than 18 years of age; or

(c) when the protected area is a licensed day care or preschool facility:

(i) under Subsection (1)(a)(i); and

(ii) located within a building that is open to the public for purposes, services, or functions that are operated separately from the day care or preschool facility located in the building, except that the sex offender may not be in any part of the building occupied by the day care or preschool facility.

---

§ 77-41-105. Registration of offenders – Offender responsibilities

(1) An offender convicted by any other jurisdiction is required to register under Subsection (3) and Subsection 77-41-102(9) or (16). The offender shall register

with the department within 10 days of entering the state, regardless of the offender's length of stay.

(2)(a) An offender required to register under Subsection 77-41-102(9) or (16) who is under supervision by the department shall register with Division of Adult Probation and Parole.

(b) An offender required to register under Subsection 77-41-102(9) or (16) who is no longer under supervision by the department shall register with the police department or sheriff's office that has jurisdiction over the area where the offender resides.

(3)(a) Except as provided in Subsections (3)(b), (c), and (4), and Section 77-41-106, an offender shall, for the duration of the sentence and for 10 years after termination of sentence or custody of the division, register every year during the month of the offender's date of birth, during the month that is the sixth month after the offender's birth month, and also within three business days of every change of the offender's primary residence, any secondary residences, place of employment, vehicle information, or educational information required to be submitted under Subsection (8).

(b) Except as provided in Subsections (4) and (5), and Section 77-41-106, an offender who is convicted in another jurisdiction of an offense listed in Subsection 77-41-102(9)(a) or (16)(a), a substantially similar offense, or any other offense

that requires registration in the jurisdiction of conviction, shall:

(i) register for the time period, and in the frequency, required by the jurisdiction where the offender was convicted if that jurisdiction's registration period or registration frequency requirement for the offense that the offender was convicted of is greater than the 10 years from completion of the sentence registration period that is required under Subsection (3)(a), or is more frequent than every six months; or

(ii) register in accordance with the requirements of Subsection (3)(a), if the jurisdiction's registration period or frequency requirement for the offense that the offender was convicted of is less than the registration period required under Subsection (3)(a), or is less frequent than every six months.

(c)(i) An offender convicted as an adult of any of the offenses listed in Section 77-41-106 shall, for the offender's lifetime, register every year during the month of the offender's birth, during the month that is the sixth month after the offender's birth month, and also within three business days of every change of the offender's primary residence, any secondary residences, place of employment, vehicle information, or educational information required to be submitted under Subsection (8).

(ii) This registration requirement is not subject to exemptions and may not be terminated or altered during the offender's lifetime.

(d) For the purpose of establishing venue for a violation of this Subsection (3), the violation is considered to be committed:

(i) at the most recent registered primary residence of the offender or at the location of the offender, if the actual location of the offender at the time of the violation is not known; or

(ii) at the location of the offender at the time the offender is apprehended.

(4) Notwithstanding Subsection (3) and Section 77-41-106, an offender who is confined in a secure facility or in a state mental hospital is not required to register during the period of confinement.

(5) In the case of an offender adjudicated in another jurisdiction as a juvenile and required to register under this chapter, the offender shall register in the time period and in the frequency consistent with the requirements of this Subsection (5). However, if the jurisdiction of the offender's adjudication does not publish the offender's information on a public website, the department shall maintain, but not publish the offender's information on the Sex Offender and Kidnap Offender Registration website.

(6) An offender who is required to register under Subsection (3) shall surrender the offender's license, certificate, or identification card as required under Subsection 53-3-216(3) or 53-3-807(4) and may apply for a license certificate or identification card as provided under Section 53-3-205 or 53-3-804.

(7) A sex offender who violates Section 77-27-21.8 regarding being in the presence of a child while required to register under this chapter shall register for an additional five years subsequent to the registration period otherwise required under this chapter.

(8) An offender shall provide the department or the registering entity with the following information:

(a) all names and aliases by which the offender is or has been known;

(b) the addresses of the offender's primary and secondary residences;

(c) a physical description, including the offender's date of birth, height, weight, eye and hair color;

(d) the make, model, color, year, plate number, and vehicle identification number of any vehicle or vehicles the offender owns or regularly drives;

(e) a current photograph of the offender;

(f) a set of fingerprints, if one has not already been provided;

(g) a DNA specimen, taken in accordance with Section 53-10-404, if one has not already been provided;

(h) telephone numbers and any other designations used by the offender for routing or self-identification in telephonic communications from fixed locations or cellular telephones;

(i) Internet identifiers and the addresses the offender uses for routing or self-identification in Internet communications or postings;

(j) the name and Internet address of all websites on which the offender is registered using an online identifier, including all online identifiers used to access those websites;

(k) a copy of the offender's passport, if a passport has been issued to the offender;

(l) if the offender is an alien, all documents establishing the offender's immigration status;

(m) all professional licenses that authorize the offender to engage in an occupation or carry out a trade or business, including any identifiers, such as numbers;

(n) each educational institution in Utah at which the offender is employed, carries on a vocation, or is a student, and any change of enrollment or employment status of the offender at any educational institution;

(o) the name and the address of any place where the offender is employed or will be employed;

(p) the name and the address of any place where the offender works as a volunteer or will work as a volunteer; and

(q) the offender's Social Security number.

(9) Notwithstanding Section 42-1-1, an offender:

(a) may not change the offender's name:

(i) while under the jurisdiction of the department; and

(ii) until the registration requirements of this statute have expired; and

(b) may not change the offender's name at any time, if registration is for life under Subsection 77-41-105(3)(c).

(10) Notwithstanding Subsections (8)(i) and (j) and 77-41-103(1)(c), an offender is not required to provide the department with:

(a) the offender's online identifier and password used exclusively for the offender's employment on equipment provided by an employer and used to access the employer's private network; or

(b) online identifiers for the offender's financial accounts, including any bank, retirement, or investment accounts.

---

§ 77-41-106. Registerable offenses

Offenses referred to in Subsection 77-41-105(3)(c)(i) are:

(1) any offense listed in Subsection 77-41-102(9) or (16) if, at the time of the conviction, the offender has previously been convicted of an offense listed in Subsection 77-41-102(9) or (16) or has previously been required to register as a sex offender for an offense committed as a juvenile;

(2) a conviction for any of the following offenses, including attempting, soliciting, or conspiring to commit any felony of:

(a) Section 76-5-301.1, child kidnapping, except if the offender is a natural parent of the victim;

(b) Section 76-5-402, rape;

(c) Section 76-5-402.1, rape of a child;

(d) Section 76-5-402.2, object rape;

(e) Section 76-5-402.3, object rape of a child;

(f) Section 76-5-403.1, sodomy on a child;

(g) Subsection 76-5-404.1(4), aggravated sexual abuse of a child; or

(h) Section 76-5-405, aggravated sexual assault;

(3) Section 76-4-401, a felony violation of enticing a minor over the Internet;

(4) Section 76-5-302, aggravated kidnapping, except if the offender is a natural parent of the victim;

(5) Section 76-5-403, forcible sodomy;

(6) Section 76-5-404.1, sexual abuse of a child;

(7) Section 76-5b-201, sexual exploitation of a minor; or

(8) Section 76-10-1306, aggravated exploitation of prostitution, on or after May 10, 2011.

---

§ 77-41-107. Penalties

(1) An offender who knowingly fails to register under this chapter or provides false or incomplete information is guilty of:

(a) a third degree felony and shall be sentenced to serve a term of incarceration for not less than 90 days and also at least one year of probation if:

(i) the offender is required to register for a felony conviction or adjudicated delinquent for what would be a felony if the juvenile were an adult of an offense listed in Subsection 77-41-102(9)(a) or (16)(a); or

(ii) the offender is required to register for the offender's lifetime under Subsection 77-41-105(3)(c); or

(b) a class A misdemeanor and shall be sentenced to serve a term of incarceration for not fewer than 90 days and also at least one year of probation if the offender is required to register for a misdemeanor conviction or is adjudicated delinquent for what would be a misdemeanor if the juvenile were an adult of an offense listed in Subsection 77-41-102(9)(a) or (16)(a).

(2) Neither the court nor the Board of Pardons and Parole may release a person who violates this chapter from serving the term required under Subsection (1). This Subsection (2) supersedes any other provision of the law contrary to this chapter.

(3) The offender shall register for an additional year for every year in which the offender does not comply with the registration requirements of this chapter.