

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1221**

Alen Sasic, petitioner,
Respondent,

vs.

State of Minnesota,
Appellant.

**Filed October 15, 2012
Reversed
Hudson, Judge**

Olmsted County District Court
File No. 55-K9-02-000478

James P. Ryan, Jr., Ryan & Grinde, Ltd., Rochester, Minnesota; and

James O. Hacking, III (pro hac vice), Hacking Law Practice, LLC, St. Louis, Missouri
(for respondent)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Eric M. Woodford, Assistant County
Attorney, Rochester, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and
Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HUDSON, Judge

In this postconviction appeal, the state challenges the postconviction court's ruling that respondent's pleas were not intelligent and the guilty pleas therefore violated due process under the Fifth Amendment. Because the district court erred in ruling that the pleas violated due process under the United States Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), we reverse.

FACTS

Respondent Alen Sasic, a noncitizen resident who came to the United States from Bosnia in 1995, pleaded guilty in 2003 to two counts of first-degree witness tampering in exchange for the state dismissing the remainder of the charges against him. Sasic submitted a rule 15 petition to plead guilty, which stated that, as a noncitizen, pleading guilty could result in deportation. Minn. R. Crim. P. 15.01. When his plea was accepted, Sasic stated to the court that he had had enough time to go over the rule 15 petition with his attorney. Sasic was sentenced in accordance with the plea agreement.

In December 2010, Immigration and Customs Enforcement apprehended Sasic and initiated proceedings to deport him based on the two 2003 witness tampering convictions. Thereafter, Sasic filed a motion to withdraw his guilty pleas. The district court rejected Sasic's argument that his attorneys assured him in 2003 that he would not suffer immigration consequences if he pleaded guilty pursuant to the plea agreement. The postconviction court determined that appellant was not denied effective assistance of counsel but that he was denied due process because his plea was not intelligent. On the

ineffective-assistance-of-counsel claim, the postconviction court determined that it was unlikely that *Padilla* would apply retroactively. On the due process claim, the postconviction court found that respondent would not have pleaded guilty pursuant to the plea agreement had he known that doing so would lead to deportation.

The state appealed the order granting postconviction relief. After the appeal was briefed, the supreme court released its decision in *Campos v. State*, 816 N.W.2d 480 (Minn. 2012), on the retroactivity of *Padilla*. This court requested supplemental briefing on the impact of *Campos* on this appeal.

D E C I S I O N

A postconviction court's decision will not be reversed absent an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). Issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

We note that the district court rejected Sasic's ineffective-assistance-of-counsel claim, ruling that the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), that defense counsel may have a duty to advise noncitizen clients of the immigration consequences of a guilty plea, was not likely to be retroactively applicable. Our supreme court has since confirmed that opinion, holding that *Padilla* established a "new rule" that is not a watershed rule, and, therefore, cannot be applied retroactively on collateral review. *Campos*, 816 N.W.2d at 499.

Despite its ruling on Sasic's ineffective-assistance claim, the district court applied the reasoning of *Padilla* to Sasic's due process claim. The court found that respondent's

guilty pleas to two witness-tampering charges, which were crimes of moral turpitude, “made [Sasic]’s deportation just as ‘mandatory,’ ‘automatic,’ and ‘inevitable’ as was Jose Padilla’s deportation after he ple[]d guilty to a narcotics charge.” The postconviction court stated that pre-*Padilla* Minnesota cases were based on the mistaken understanding that deportation was not an immediate and definite federal immigration consequence and that *Padilla* corrected that misunderstanding. The postconviction court ruled that Sasic could withdraw his 2003 guilty pleas because a resident noncitizen whose guilty plea will automatically result in deportation must know of that consequence in order to enter a valid guilty plea.

The state argues that the postconviction court’s due process ruling, although unaffected by *Campos*, is not supported by the *Padilla* decision. Sasic argues, however, that the district court’s reading of *Padilla* was correct, even though *Campos* does not “dictate” the due process analysis.

Neither *Padilla* nor *Campos* involved a due process claim. A Sixth Amendment ineffective-assistance claim brought by a noncitizen defendant such as Sasic and Sasic’s Fifth Amendment due process claim are separate constitutional claims. But we acknowledge that they share a common link in the direct-versus-collateral-consequences distinction. *See Alanis v. State*, 583 N.W.2d 573, 578–79 (Minn. 1998) (relying on direct-versus-collateral-consequences distinction to reject both due process and ineffective-assistance claims).

The United States Supreme Court held in *Padilla* that the Sixth Amendment right to counsel extends to the right to be informed by counsel of the deportation consequences

that flow automatically from a guilty plea. 130 S. Ct. at 1482 (concluding that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel”). Thus, *Padilla* applied the test for ineffective assistance of counsel that was set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Id.* But the *Padilla* Court first disposed of the Kentucky Supreme Court’s reliance on the “collateral” nature of deportation consequences in rejecting *Padilla*’s claim. *Id.* at 1481.

The *Padilla* Court noted that “[w]e, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*.” *Id.* Although this may be read to leave Kentucky (or Minnesota) free to use the distinction, *Padilla* went on to say that “[t]he collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation.” *Id.* at 1482.

The postconviction court concluded that *Padilla* “calls into question” the distinction heretofore recognized in Minnesota between direct and collateral consequences. The court proceeded to reject the collateral nature of the deportation consequences of Sasic’s guilty plea as a basis for denying him relief on his due process claim. Thus, the postconviction court, in effect, applied *Padilla* and its analysis of direct versus collateral consequences to Sasic’s petition with respect to his due process claim, even though it had earlier indicated that *Padilla* established a “new rule” that could not be applied retroactively to Sasic with respect to his ineffective-assistance claim.

The supreme court in *Campos* also focused some attention on *Padilla*'s treatment of the distinction between direct and collateral consequences. But *Campos* rejects a retroactive application of *Padilla*, at least in the Sixth Amendment ineffective-assistance context. And *Campos* does not suggest that *Alanis*, or Minnesota caselaw on the direct-versus-collateral-consequences distinction generally, should be discarded in light of *Padilla*.

Campos begins its analysis of *Padilla* as a “new rule” for purposes of *Teague* retroactivity analysis by focusing on the pre-*Padilla* state of the law as to the duty to advise a defendant of collateral consequences of a guilty plea. *Campos*, 816 N.W.2d at 485, 490 (following the framework outlined in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989)). The *Campos* court notes that the federal courts had held that defense attorneys were not required by the Sixth Amendment to advise criminal defendants of collateral consequences, including deportation. *Id.* at 486. But, as *Campos* points out, *Padilla* noted that *the Supreme Court* had never applied the direct-versus-collateral-consequences distinction in the Sixth Amendment context. 130 S. Ct. at 1481. And *Padilla* discussed that distinction only in clearing the way for a discussion of defense counsel's duty to advise of deportation consequences that are clear and easily discovered. *Id.* at 1483.

Thus, *Campos* seems to read *Padilla* as calling into question the direct-versus-collateral-consequences distinction, at least for Sixth Amendment purposes. But extending *Padilla*'s language on that distinction to the Fifth Amendment due process

context would require this court to take *Campos*, and its reading of *Padilla*, one step further.

As the state points out, other jurisdictions have declined to extend *Padilla*'s treatment of the direct-versus-collateral-consequences distinction to the due process context. See *United States v. Delgado-Ramos*, 635 F.3d 1237, 1240–41 (9th Cir. 2011) (holding that *Padilla*'s Sixth Amendment holding “sheds no light” on the due process obligations of a court accepting a guilty plea from a noncitizen); *State v. Ortiz*, 44 A.3d 425, 430–31 (N.H. 2012) (following *Delgado-Ramos*'s interpretation that “*Padilla* does not speak to the due process obligations of a trial court accepting a guilty plea”); *Smith v. State*, 697 S.E.2d 177, 183 (Ga. 2010) (distinguishing Fifth Amendment due process claims from Sixth Amendment *Strickland* analysis and reading *Padilla* as relying on an application of *Strickland* rather than a rejection of the direct-versus-collateral-consequences distinction). These cases suggest applying caution before eliminating the direct-versus-collateral-consequences distinction from the due process analysis.

Campos supports the district court's description of *Padilla* as “call[ing] into question” the direct-versus-collateral-consequences distinction, at least for Sixth Amendment purposes. But the Sixth Amendment holding of *Padilla* is not retroactively applicable here. The question is whether, following *Campos*, this court can abandon the direct-versus-collateral-consequences distinction in the Fifth Amendment due process context. We conclude that we cannot take that step.

This court is an “error correcting court.” *State v. Patterson*, 796 N.W.2d 516, 533 (Minn. App. 2011) (quotation omitted), *aff'd*, 812 N.W.2d 106 (Minn. 2012). The “task

of extending existing law” belongs to the supreme court or the legislature, not this court. *State v. Hahn*, 799 N.W.2d 25, 39 (Minn. App. 2011) (quotation omitted), *review denied* (Minn. Aug. 24, 2011). And we conclude that, in light of *Campos*, *Padilla* cannot be selectively applied retroactively.

This court has recently recognized that the direct-versus-collateral-consequences distinction is used in Minnesota to determine whether a guilty plea complies with due process. *Sames v. State*, 805 N.W.2d 565, 567–68 (Minn. App. 2011). The *Sames* court also recognized that *Padilla* may have called into question the validity of the direct-versus-collateral-consequences distinction. *Id.* at 569. But this court noted that *Padilla* “did not clearly state that the direct-collateral distinction should not be applied in cases not involving the risk of deportation.” *Id.* at 570. Thus, *Sames* supports a cautious approach, although for a different reason.

We conclude that even if *Padilla* wholly rejected the direct-versus-collateral-consequences distinction in the Sixth Amendment context, it is not clear authority for discarding it in the due process context, and cannot be selectively applied retroactively in that fashion. The supreme court in *Campos* may have hinted that it might abandon the direct-versus-collateral-consequences distinction altogether, but it provided no basis for this court, in its “error correcting” function, to abandon supreme court precedent. Thus, we decline to read *Campos* as abandoning the distinction made in *Alanis* between direct and collateral consequences in the due process context.

We conclude that the district court abused its discretion in vacating Sasic's conviction based on a finding that due process was violated when his guilty plea was entered without his being aware of the deportation consequences of his plea.

Reversed.