

**[J-32-2011]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

**CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 36 WAP 2010
	:	
Appellant	:	Appeal from the Order of Superior Court
	:	entered June 8, 2010 at No. 1158 WDA
v.	:	2009, reversing the Order of the Court of
	:	Common Pleas of Allegheny County
	:	entered June 22, 2009 at CP-02-CR-
JOSEPH ABRAHAM,	:	0005423-2008 and remanding.
	:	
Appellee	:	996 A.2d 1090 (Pa. Super. 2010)
	:	
	:	ARGUED: April 13, 2011

**OPINION**

**MR. JUSTICE EAKIN**

**DECIDED: DECEMBER 7, 2012**

The Commonwealth appeals from the order of the Superior Court reversing the order denying appellee's petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546, and remanding for an evidentiary hearing. We reverse.

Appellee, Joseph Abraham, was a high school teacher in the Pittsburgh public school system. In 2008, one of his students alleged he offered her \$300 to have sex with him and touched her buttocks; she further stated he gave her one of his business cards and wrote his private cell phone number on it. After these allegations surfaced, appellee, who was 67 years old, retired from teaching and began receiving pension payments of \$1,500 per month. Shortly after appellee retired, he was charged for the above incident. Pursuant to a negotiated agreement, appellee pled guilty to corruption

of a minor<sup>1</sup> and indecent assault of a person less than 16 years of age.<sup>2</sup> He was sentenced to probation; no direct appeal was filed.

Because the crime of indecent assault of a person less than 16 years of age is one of the enumerated offenses in the Public Employee Pension Forfeiture Act (PEPFA), 43 P.S. §§ 1311-1315, appellee forfeited his pension when he pled guilty to this charge. He filed a motion to withdraw his plea nunc pro tunc, alleging he was not informed of his right to seek withdrawal of his plea or of the possible sentences he faced. The trial court denied the motion.

Appellee filed a timely PCRA petition alleging plea counsel was ineffective for failing to inform him he would forfeit his pension upon pleading guilty. The PCRA court, after giving the required notice pursuant to Pa.R.Crim.P. 907(1), dismissed the petition without a hearing. In its Pa.R.A.P. 1925(a) opinion, the PCRA court stated the loss of appellee's pension was an issue collateral to the plea; thus, under Commonwealth v. Frometa, 555 A.2d 92, 93 (Pa. 1989), plea counsel's failure to explain this consequence to appellee was not relevant to whether his plea was knowing and voluntary. Accordingly, the PCRA court held counsel was not ineffective.

On appeal, the Superior Court reversed, holding a recent United States Supreme Court decision, Padilla v. Kentucky, 130 S.Ct. 1473, 1483 (2010), abrogated Frometa, which held deportation was collateral consequence of a guilty plea and therefore did not need to be explained to the defendant. The Superior Court noted Padilla, which also dealt with deportation following entry of a guilty plea, held such consequences were so intimately connected with the criminal process that a direct versus collateral

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<sup>1</sup> 18 Pa.C.S. § 6301.

<sup>2</sup> Id., § 3126.

consequences analysis<sup>3</sup> was ill suited to evaluate an ineffectiveness claim arising in this context. Commonwealth v. Abraham, 996 A.2d 1090, 1092 (Pa. Super. 2010). Rather, the court observed, Padilla examined the totality of the circumstances to determine whether counsel’s failure to advise his client he would be deported if he pled guilty to drug charges constituted ineffective assistance. Id. The Superior Court noted factors such as the certainty of the consequence, the connection between criminal activity and the consequence, and the consequence’s being succinct, clear, and distinct played a role in the Supreme Court’s analysis. Id., at 1092-93. However, the court concluded it was unclear whether, under Padilla, the direct versus collateral consequences analysis was still viable, noting such “analysis might still be useful if the nature of the action is not as ‘intimately connected’ to the criminal process as deportation.” Id., at 1092.

The court reasoned that determining whether a consequence is civil or penal — an analysis predominantly used to evaluate ex post facto challenges — was relevant to determining whether counsel was constitutionally effective in this case, as both situations implicate due process. Id., at 1093. Accordingly, the court analyzed pension forfeiture under the two-prong test applied in Lehman v. Pennsylvania State Police, 839 A.2d 265 (Pa. 2003),<sup>4</sup> and applied the seven “guideposts” Lehman used in assessing the effect of the measure at issue. The court concluded: (1) the legislature intended forfeiture of pension benefits under PEPFA to be a civil sanction; (2) pension forfeiture

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<sup>3</sup> This analysis has been traditionally employed by Pennsylvania courts in determining whether a consequence is civil or penal, and is discussed in more detail infra.

<sup>4</sup> The first prong addresses whether the intent of the measure is punitive or civil. If it is civil, the second prong inquires whether the measure is so punitive in purpose or effect as to negate the legislative intent to deem it civil. Lehman, at 271. This test was enunciated in Smith v. Doe, 538 U.S. 84 (2003).

is an affirmative disability; (3) there does not appear to be a historical use of pension forfeiture as applied to criminal behavior; (4) no independent finding of scienter is required to trigger pension forfeiture; (5) the underlying behavior to which pension forfeiture applies is solely criminal; (6) pension forfeiture promotes the traditional aims of punishment, acting as both retribution and deterrence; and (7) there is no alternative purpose for pension forfeiture, and thus there is no need to determine whether the sanction appears excessive in relation to such purpose. Abraham, at 1093-94. Based on these guideposts, the court concluded, “[I]t is apparent the loss of pension is punitive in nature.” Id., at 1094. Applying Padilla’s “newly minted” approach, id., at 1093, the court concluded:

Because of the automatic nature of forfeiture, the punitive nature of the consequence, and the fact that only criminal behavior triggers forfeiture, the application of PEPFA is, like deportation, intimately connected to the criminal process. Therefore, counsel was obliged to warn his client of the loss of pension as a consequence to pleading guilty.

Id., at 1095.

The court alternatively concluded that if it applied the direct versus collateral consequences analysis, the result would be the same: “loss of pension is related to the nature of the sentence and the application of the measure has a definite, immediate and automatic effect on the range of punishment.” Id. (citing Commonwealth v. Wall, 867 A.2d 578, 582 (Pa. Super. 2005)). Therefore, the court held plea counsel was obliged to inform appellee he would forfeit his pension if he pled guilty to the triggering crime.

The Superior Court thus concluded appellee met the “arguable merit” and “reasonable basis” prongs of the ineffectiveness test,<sup>5</sup> but held in the absence of a

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<sup>5</sup> To establish counsel’s ineffectiveness, a PCRA petitioner must demonstrate: (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for the course of action chosen; and (3) counsel’s action or inaction prejudiced the petitioner. See (continued...)

record, it could not conclude whether appellee suffered prejudice resulting from counsel's inaction; the only evidence was appellee's signed, notarized declaration that if counsel had advised him of the pension forfeiture, he would have either sought to plead guilty to a charge other than indecent assault or would have gone to trial. Accordingly, the Superior Court held an evidentiary hearing was necessary to determine the issue of prejudice, and reversed and remanded. Judge Bowes concurred in the result.

We granted the Commonwealth's Petition for Allowance of Appeal to determine:

- (1) Whether, in light of Padilla v. Kentucky, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1473 (2010), the distinction in Pennsylvania between direct and collateral consequences to define the scope of constitutionally "reasonable and professional assistance" required under Strickland v. Washington, 486 U.S. 668 (1984) is appropriate?
- (2) If so, whether the forfeiture of a pension that stems from a public school teacher's negotiated plea to crimes committed in the scope of his employment is a collateral consequence of a criminal conviction which relieves counsel from any affirmative duty to investigate and advise?

Commonwealth v. Abraham, 9 A.3d 1133 (Pa. 2010). Because these are questions of law, our scope of review is plenary, and our standard of review is de novo. Commonwealth v. Colavita, 993 A.2d 874, 886 (Pa. 2010).

We first address whether a direct versus collateral consequences analysis remains viable in light of Padilla.<sup>6</sup> Padilla, a native of Honduras, had been a lawful

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(...continued)

Strickland v. Washington, 466 U.S. 668, 687 (1984); Commonwealth v. Pierce, 527 A.2d 973, 975 (Pa. 1987).

<sup>6</sup> We note the Superior Court recently acknowledged Padilla did not create a new constitutional right; rather, it "clarified and refined the scope of a criminal defendant's long-standing constitutional right to the effective assistance of counsel during the guilty plea process." Commonwealth v. Garcia, 23 A.3d 1059, 1064 (Pa. Super. 2011) (footnote omitted). Likewise, the Third Circuit has held Padilla is retroactively applicable (continued...)

permanent resident of the United States for over 40 years when he was charged with transporting drugs, a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i). He pled guilty, not knowing he faced deportation. He later claimed his counsel did not advise him of this consequence prior to entry of the plea, assuring him he did not have to worry about deportation because he had been in the country for so long. Padilla contended he would have insisted on going to trial had counsel not given him incorrect advice.

The Supreme Court of Kentucky denied relief, holding deportation was a collateral consequence of Padilla's conviction, such that the Sixth Amendment's guarantee of effective assistance of counsel did not protect him from counsel's erroneous advice regarding deportation. Commonwealth v. Padilla, 253 S.W.3d 482, 485 (Ky. 2008). In the Court's view, "collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel[.]" Id.

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(...continued)

on collateral review because it did not announce a new rule of law. See United States v. Orocio, 645 F.3d 630, 641 (3d Cir. June 29, 2011). However, the Seventh and Tenth Circuits have held Padilla constitutes a new rule and is thus not to be applied retroactively. See Chaidez v. United States, 655 F.3d 684, 688-93 (7<sup>th</sup> Cir. 2011), cert. granted, Chaidez v. United States, 132 S.Ct. 2101 (2012); see also United States v. Chang Hong, 671 F.3d 1147, 1158-59 (10<sup>th</sup> Cir. 2011). The district courts that have addressed the issue are split. See United States v. Diaz-Palmerin, 2011 U.S. Dist. LEXIS 37151 (N.D. Ill. filed April 5, 2011) (Padilla did not announce new rule); Martin v. United States, 2010 U.S. Dist. LEXIS 87706 (C.D. Ill. filed Aug. 25, 2010) (same); United States v. Chavarria, 2011 U.S. Dist. LEXIS 38203 (N.D. Ind. filed April 7, 2011) (same); United States v. Laguna, 2011 U.S. Dist. LEXIS 38856 (N.D. Ill. filed April 11, 2011) (Padilla announced new rule); United States v. Aceves, 2011 U.S. Dist. LEXIS 27813 (D. Hawaii filed March 17, 2011) (collecting cases). The United States Supreme Court heard argument in Chaidez November 1, 2012, on the issue of Padilla's retroactivity.

We need not address Padilla's retroactivity, as this issue is not raised by the parties. Whether Padilla is applied or not, appellee is not entitled to relief, as discussed infra.

The United States Supreme Court reversed, concluding counsel had an obligation to advise Padilla the offense to which he would plead guilty was a deportable one, and that constitutionally competent counsel would have given such advice. Padilla v. Kentucky, 130 S.Ct. 1473 (2010). Accordingly, the Court concluded Padilla had established Strickland's first prong — constitutional deficiency. However, the Court declined to conclude Padilla established Strickland's second prong — prejudice — because this issue was not ruled upon below. The Court reversed and remanded for proceedings consistent with its decision. See id., at 1483-84, 1487.

In holding counsel's failure to properly advise on deportation deprived Padilla of his Sixth Amendment right to effective counsel, the Court noted changes to immigration law over the past century "have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for non-citizens accused of crimes has never been more important." Id., at 1480. The Court observed the Kentucky Supreme Court was not alone in its view that deportation was a collateral consequence, but stated, "We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under Strickland. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation." Id., at 1481 (citation omitted). Thus, the Court declined to rule on the specific question before us: whether the direct versus collateral consequences analysis is appropriate in assessing a claim of ineffectiveness in connection with entry of a plea. Instead, the starting point for the Court's analysis was that deportation was a unique consequence which did not lend itself to such an analysis. The Court, in examining the nature of deportation, observed:

We have long recognized that deportation is a particularly severe “penalty”; but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context.

Id., at 1481 (citations omitted). Because of deportation’s “close connection to the criminal process,” the Court concluded it was “uniquely difficult to classify as either a direct or collateral consequence[,]” and “[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 Superior Court held that Padilla made it unclear whether the direct versus collateral consequences analysis was still viable in assessing ineffectiveness claims involving the consequences of a plea. The court went on to conclude pension forfeiture, like deportation, was so “intimately connected” to the criminal process that, like deportation, counsel was required to advise his client of the consequence of pension forfeiture. We disagree.

The provision of PEPFA which directs forfeiture provides:

(a) Notwithstanding any other provision of law, no public official or public employee nor any beneficiary designated by such public official or public employee shall be entitled to receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest, if such public official or public employee is convicted or pleads guilty or no defense to any crime related to public office or public employment.

(b) The benefits shall be forfeited upon entry of a plea of guilty or no defense or upon initial conviction and no payment or partial payment shall be made during the pendency of an appeal. If a verdict of not guilty is rendered or the indictment or criminal information finally dismissed, then the public official or public employee shall be reinstated as a member of



the pension fund or system and shall be entitled to all benefits including those accruing during the period of forfeiture if any. Such conviction or plea shall be deemed to be a breach of a public officer's or public employee's contract with his employer.

43 P.S. § 1313(a)-(b) (emphasis added). PEPFA's definition of "[c]rimes related to public office or public employment" includes "[a]ny of the criminal offenses set forth in [18 Pa.C.S. § 3121 et seq.] ... when the criminal offense is committed by a school employee ... against a student." Id., § 1312.

PEPFA contains no statement of purpose. It is triggered by a specific class of crimes which are particularly abhorrent when committed by those serving the public; that a plea to such crimes is deemed a breach of the employment contract suggests strongly that the statute is designed to ensure employees maintain their integrity while in public employment. That is, its goal is to restrict future benefits for public employees who commit certain crimes, a deterrent. PEPFA is not contained in Title 18, the Crimes Code; it is in Title 43, following the Unemployment Compensation Act, 43 P.S. § 751 et seq. PEPFA vests the authority to promulgate implementing regulations and to enforce its provisions in the State Employees Retirement Board. Although a public employee may appeal the retirement board's decision to the Commonwealth Court, these procedures do not contain the procedural requirements and safeguards associated with the criminal process. Common pleas courts and district attorneys are not involved in the forfeiture proceedings. All of these facts suggest pension forfeiture is a non-punitive, civil consequence of a criminal conviction, independent of the criminal process.

This Court, in assessing PEPFA's legislative history, has noted PEPFA was designed to "promote integrity in public employment by imposing a forfeiture provision that would deter acts of criminal misconduct, thereby encouraging public employees to maintain standards of conduct deserving of the public's trust." Mazzo v. Board of Pensions and Retirement of City of Philadelphia, 611 A.2d 193, 196 (Pa. 1992); see

Shiomos v. Commonwealth State Employees' Retirement Board, 626 A.2d 158, 163 (Pa. 1993) ("It is neither unconscionable nor unreasonable to require honesty and integrity during an employee's tenure in public service.").<sup>7</sup> The Commonwealth Court has also described PEPFA's purpose as promoting the public's trust in its employees and sanctioning employees who violate that trust. See Apgar v. State Employees' Retirement System, 655 A.2d 185, 189 (Pa. Cmwlth. 1994) ("Because criminal conduct committed in the course of one's employment is a violation of the trust the people of the Commonwealth place in their employees, such conduct shall not be sanctioned.").

Additionally, the discussion on PEPFA when it was pending as a bill demonstrates its aim of preventing those who violate the public's trust from receiving the benefit of a taxpayer-funded pension: "What these amendments essentially are doing is drawing distinction between the high standard of conduct and the violation thereof that is incumbent on elected public officials .... In my travels throughout the Commonwealth, I have found that that is what is most prominent in the minds of our citizens." 1978 S. Jour. Vol. I, p. 448 (Statement of Senator Kelley). Floor debate in the

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<sup>7</sup> As one sister state has aptly observed:

It has also been recognized that one of the "fundamental purposes" underlying the pensioning of civil servants is to "secure good behavior and the maintenance of reasonable standards of discipline during service." ... Forfeiture in this context has been viewed as within the Legislature's intendment to establish both a deterrent against committing misdeeds related to employment and as an inducement to continued faithful, diligent and efficient public service.

Uricoli v. Board of Trustees, 449 A.2d 1267, 1271 (N.J. 1982) (citations omitted).

House elicited similar comments:

This bill now not only applies to state employees but to all public employees. I think that is what the taxpayers of Pennsylvania want. They do not want a bill to be limited to just state employees. They want it to apply also to those people who are covered by the State Teacher Employment Fund and the municipal retirement funds.

1978 Pa.H.R. Jour. Vol. I, No. 35, p. 2431 (Statement of Representative Hayes).

Thus, PEPFA's aim is to ensure accountability and address corruption; it is triggered by an employee's breach of the public employment contract by commission of a very specific class of crimes. An employee who breaches his contract forfeits his right to deferred compensation for services rendered in the past. See Mazzo, at 196 ("[I]t has long been recognized in this Commonwealth that pensions for public employees are not mere gratuities provided by the employer, but rather are deferred compensation for services rendered in the past.") (citing Commonwealth ex rel. Zimmerman v. Officers and Employees Retirement Board, 469 A.2d 141, 142 (Pa. 1983) (plurality opinion collecting cases)). Entitlement to the compensation that is deferred, however, is not without conditions, the relevant one being that the employee not commit any of the enumerated crimes.

Not getting money as a consequence of breaching an employment contract cannot be equated with being forced to leave the country. Based on PEPFA's aim, procedure, and consequences, we cannot conclude forfeiture of an employment benefit is so enmeshed in the criminal process that it cannot be subjected to a direct versus collateral consequences analysis. Accordingly, we hold Padilla did not abrogate application of such analysis in cases that do not involve deportation. Frometa's general holding remains: a defendant's lack of knowledge of collateral consequences of the entry of a guilty plea does not undermine the validity of the plea, and counsel is

therefore not constitutionally ineffective for failure to advise a defendant of the collateral consequences of a guilty plea. Frometa, at 93.

Having concluded a direct versus collateral consequences analysis is appropriate in this case, we look to the relevant case law. In addressing whether a result is a direct or collateral consequence of pleading guilty, this Court has stated, “[T]he distinction between a direct and collateral consequence of a guilty plea has been effectively defined by this Court as the distinction between a criminal penalty and a civil requirement over which a sentencing judge has no control.” Commonwealth v. Leidig, 956 A.2d 399, 404 (Pa. 2008) (citing Commonwealth v. Duffey, 639 A.2d 1174, 1176-77 (Pa. 1994)).<sup>8</sup> In determining whether a provision is a criminal penalty or a civil requirement, this Court has adopted the analysis employed by the United States Supreme Court in Smith, supra, to assess whether a statute is punitive. See Lehman, supra (employing Smith test in determining whether Federal Gun Control Act is punitive, ex post facto law); Commonwealth v. Williams, 832 A.2d 962 (Pa. 2003) (employing Smith test in determining whether Megan’s Law II is punitive).

Under Smith, the first inquiry is whether the legislature’s intent in enacting the provision at issue was punitive. See Smith, at 90-93; Lehman, at 271; Williams, at 971. If the intent is found to be nonpunitive and therefore civil, the second inquiry is whether,

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<sup>8</sup> In Duffey, we observed the collateral consequences of pleading guilty are numerous, and include loss of the right to vote, enlist in the armed services, own a firearm, hold a fishing license, inherit property, or practice a particular profession. See Duffey, at 1176 (citations omitted); see also Frometa, at 93 n.1 (observing guilty plea may be grounds for divorce, termination of parental rights, disqualification from public office, or dismissal for cause from public employment). Duffey held the loss of driving privileges is a collateral consequence of a conviction for underage drinking, Duffey, at 1176, and Leidig held the registration requirements of Megan’s Law II were a collateral consequence of a conviction for aggravated indecent assault, Leidig, at 404-06.

despite this intent, “the statute is ‘so punitive either in purpose or effect as to negate [the] intention to deem it civil.’” Lehman, at 271 (quoting Smith, at 92) (internal quotations omitted); see also Williams, at 972. In applying the second prong, courts “ordinarily defer to the legislature’s stated intent,” and “only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty[.]” Smith, at 92 (internal quotations omitted). The second prong enlists seven factors as “useful guideposts” for determining whether the statute imposes criminal punishment. See id., at 97; Lehman, at 271; Williams, at 973. The factors, initially set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963), are:

- (1) whether the sanction involves an affirmative disability or restraint;
- (2) whether it has historically been regarded as punishment;
- (3) whether it comes into play only on a finding of scienter;
- (4) whether its operation will promote the traditional aims of punishment — retribution and deterrence;
- (5) whether the behavior to which it applies is already a crime;
- (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and
- (7) whether it appears excessive in relation to the alternative purpose assigned.

Williams, at 973 (citing Mendoza-Martinez, at 168-69); see also Smith, at 97; Lehman, at 271.

Turning to the present matter, the first inquiry under Smith is whether the legislature’s intent in enacting PEPFA was punitive. As noted above, PEPFA functions to ensure public servants maintain integrity while in public employment. The chief intent behind the statute is to promote accountability, not to impose punishment.

Having found PEPFA was not enacted with punitive intent, we next examine the statute in light of the Mendoza-Martinez factors. See Smith, at 97; Lehman, at 271-72; Williams, at 972-73. “The Mendoza-Martinez factors are ‘neither exhaustive nor dispositive,’ but they ‘must be considered in relation to the statute on its face, and only the clearest proof will suffice to override legislative intent and transform ... a civil

remedy into a criminal penalty.” Lehman, at 271-72 (quoting Smith, at 97; Hudson v. United States, 522 U.S. 93, 100 (1997)). “One factor alone does not provide the ‘clearest proof’ [a statute] has a punitive purpose; each of the other factors must be evaluated.” Id., at 272.

The first factor is whether the sanction involves an affirmative disability or restraint. Certainly, the loss of deferred compensation may be affirmative, but it cannot be said to be so onerous as to be on the same plane as incarceration or deportation. See Hudson, at 104 (“[T]he sanctions imposed do not involve an ‘affirmative disability or restraint,’ as that term is normally understood[;] [w]hile petitioners have been prohibited in further participating in the banking industry, this is certainly nothing approaching the infamous punishment of imprisonment.”) (citation and quotation omitted).

Appellee’s decision to retire followed the accusations stemming from his criminal conduct. It may be that he relied on the income from his pension when making that decision; it is equally possible his decision was not economic but an attempt to forestall the consequences of his acts. Regardless, as noted above, PEPFA is triggered by a public employee’s breach of his public employment contract through the commission of certain crimes not befitting a public servant. Appellee may be precluded from receiving the funds to which he would otherwise be entitled, but he is not precluded from earning a living in some other capacity. The fact he chose to engage in behavior with serious consequences does not amount to a restraint.

The second factor is whether the statute has historically been regarded as a punishment. There is nothing in the legislative history or judicial precedent pertaining to PEPFA which suggests it has been viewed as punishment. Rather, as previously noted, the legislative intent underlying PEPFA is ensuring accountability and preventing employees who violate the public trust from receiving taxpayer-funded pensions.

Furthermore, “whether a sanction constitutes punishment is not determined from the defendant’s perspective, as even remedial sanctions carry the sting of punishment.” Williams, at 976 (quoting Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 777 n.14 (1994)).<sup>9</sup> Thus, while forfeiting his pension may feel punitive to appellee, historically, forfeiture has not been viewed as such. In this sense, he is not losing something he already had in hand — he is not getting something he would have received but for his misconduct.

The third factor is whether the statute comes into play only on a finding of scienter. Here, the statute states that scienter is not required for a person to forfeit a pension. PEPFA “is imposed on all those who have committed certain crimes in the past, regardless of intent or awareness of the statute.” Lehman, at 272. All that was required for PEPFA to apply to appellee was that he be convicted of one of the offenses listed in Chapter 31 of the Crimes Code. See 43 P.S. § 1312 (defining crimes related to public office or public employment as any of offenses in Subchapter B of Chapter 31, when offense is committed by school employee against student); id., § 1313 (no public employee shall be entitled to receive any retirement, other benefit, or payment of any kind if such employee pleads guilty to any crime related to public employment).

The fourth factor is whether the statute promotes the traditional aims of punishment — retribution and deterrence. PEPFA is aimed at promoting accountability by preventing those who violate the public’s trust from receiving a benefit funded by the public. This Court has noted PEPFA was also designed to “deter acts of criminal

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<sup>9</sup> See Leprince v. Board of Trustees, Teachers’ Pension and Annuity Fund, 631 A.2d 545, 549 (N.J. Super. 1993) (“The ‘punishment’ [of pension forfeiture] is not punishment in the criminal sense, but rather is a collateral consequence of the employee’s breach of the condition of honorable service. The ‘punishment’ is analogous to a judgment for damages arising out of a breach of contract.”).

misconduct, thereby encouraging public employees to maintain standards of conduct deserving of the public's trust." Mazzo, at 196. Retribution, however, has not been recognized as a goal of the statute.

The fifth factor is whether the behavior to which the statute applies is already a crime. As in Lehman, which dealt with a convicted felon's disqualification from purchasing firearms, "[t]his factor is inapplicable here because [appellee] has not been charged with violating the statute." Lehman, at 273. Although the statute is triggered by a guilty plea or conviction, the conduct to which it applies is the breach of the public trust by the commission of the crime.

The sixth and seventh factors are whether the statute has a rational connection to an alternative, non-punitive purpose, and whether the statute appears excessive in relation to such purpose. Although Mazzo mentioned deterrence as one aim of PEPFA, its primary aim, as also observed in Mazzo, Shiomos, and Apgar, supra, is to promote integrity in public employment by encouraging public employees and officials to maintain standards of conduct deserving of the public's trust. Should the employee breach that trust by committing one of the enumerated offenses, which include crimes of sexual impropriety with underage students, the Pennsylvania State Retirement Board is relieved of its contractual obligation to pay retirement benefits. Conditioning a public employee's entitlement to receive a taxpayer-funded pension on honorable completion of public service is not excessive in relation to the statute's purpose. PEPFA has a non-punitive, alternative purpose, which it carries out by reasonable means.

Our assessment of the above factors leads us to conclude PEPFA's pension forfeiture provisions are not so punitive in force or effect as to negate the legislative



intent that it be a civil, remedial provision. See Smith, at 92-93; Lehman, at 271. PEPFA is not punitive, and is thus a collateral consequence of appellee's guilty plea.<sup>10</sup>

Because counsel cannot be deemed ineffective for failing to advise a defendant regarding the collateral consequences of a plea, appellee's ineffectiveness claim fails. Therefore, we reverse the order of the Superior Court granting appellee a PCRA hearing on the issue of prejudice, and we remand for reinstatement of the PCRA court's order denying appellee relief.

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<sup>10</sup> Other jurisdictions that have considered whether pension forfeiture statutes are criminal in nature, and thus punitive, have reached the same conclusion. In MacLean v. State Board of Retirement, 733 N.E.2d 1053 (Mass. 2000), the Court, in rejecting the appellant's argument that pension forfeiture subjected him to double jeopardy, applied the "guideposts" described above and concluded revocation of pension benefits was not criminal punishment for double jeopardy purposes. Id., at 1063. The Court noted the benefits were revoked by the state retirement board in a civil proceeding, and further observed although the pension forfeiture statute "certainly contains an element of deterrence, it also serves other, nonpunitive purposes, such as protection of the public fisc and preserving respect for government service." Id. The Court concluded its decision was consistent with those of other jurisdictions that had ruled pension forfeiture statutes are civil in nature. See id. (citing LePrince, supra; Retirement Bd. of the Employees' Retirement System of R.I. & Cranston v. Azar, 721 A.2d 872 (R.I. 1998)).

In Busbee v. Division of Retirement, 685 So.2d 914 (Fla. App. 1996), the appellant claimed forfeiture of his pension after he pled guilty to accepting a bribe violated double jeopardy, due process, and the Eighth Amendment's prohibition against excessive fines. The Court rejected these claims, focusing on the contractual aspect of pension forfeiture; it noted the forfeiture proceedings were merely an action to enforce the terms of the pension contract and were not punishment for the crime of bribery. Id., at 917-18. The law governing the Florida Retirement System provided for forfeiture of pension benefits upon conviction of bribery in connection with employment; therefore, the Court held when appellant elected to become a member of the system, the forfeiture provision was part of the pension contract between him and the state. Id., at 916.

Order reversed; case remanded. Jurisdiction relinquished.

Madame Justice Orié Melvin did not participate in the decision of this case.

Mr. Chief Justice Castille, and Messrs. Justice Saylor and Baer join the opinion.

Mr. Chief Justice Castille also files a concurring opinion.

Mr. Justice Saylor also files a concurring opinion in which Messrs. Justice Baer and McCaffery join.

Madame Justice Todd files a dissenting opinion.