UP THE SLIPPERY SLOPE: THE NEED TO ADVISE CRIMINAL DEFENDANTS THAT THEIR PLEAS CAN LEAD TO TERMINATION OF THEIR PARENTAL RIGHTS

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Luna was a Mexican the law called an alien;
For coming across the border with a baby and a wife;
Though the clothes upon his back were wet;
Still he thought that he could get;
Some money and things to start a life;
It hadn't been too very long when it seemed like
everything went wrong;
They didn't even have the time to find themselves a home;
This foreigner, a brown-skin male;
Thrown into a Texas jail;
It left the wife and baby quite alone.[1]

What if Luna comes to Florida, instead of Texas, and what if he does not meet the tragic end the song goes on to portray?[2] Instead, he

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[1] JOAN BAEZ, *Prison Trilogy (Billy Rose)*, *on* COME FROM THE SHADOWS (A&M Records 1972).

[2] The song continues as follows:

He eased the pain inside him;
With a needle in his arm;

works out a plea to the criminal charges—perhaps, they involve stealing money or holding up a store to get the resources he needed to feed his baby—that leads to his receiving a sentence of incarceration.

I. THE PLEA COLLOQUY

The judge conducts a colloquy, determining that Luna understands that his plea may carry immigration consequences. That determination is made pursuant to Florida Rule of Criminal Procedure 3.172(c)(8), which requires trial judges to place each defendant entering a plea of guilty or nolo contendere under oath and determine that he or she understands "that if he or she pleads guilty or nolo contendere, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service."[3]

The judge also makes certain that Luna understands the impact of his plea in numerous other respects. Specifically, the judge complies with Florida requirements compelling trial judges to determine that a defendant understands

> (1) the nature of the charge to which the plea is offered, the maximum possible penalty, and any mandatory minimum penalty provided by law;
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> (2) if not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, an attorney will be appointed to represent him or her;
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> (3) the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury, and at that trial a defendant has the right to the assistance of counsel, the right to compel attendance of witnesses on his or her behalf, the right to confront and cross-examine witnesses against him or her, and the right not to testify or be compelled to incriminate himself or

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> But the dope just crucified him;
> He died to no one's great alarm.

Id.

[3] FLA. R. CRIM. P. 3.172(c)(8).

herself;

(4) that upon a plea of guilty, or nolo contendere without express reservation of the right to appeal, he or she gives up the right to appeal all matters relating to the judgment, including the issue of guilt or innocence, but does not impair the right to review by appropriate collateral attack;

(5) that if the defendant pleads guilty or is adjudged guilty after a plea of nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he or she waives the right to a trial;

(6) that if the defendant pleads guilty or nolo contendere, the trial judge may ask the defendant questions about the offense to which he or she has pleaded, and if the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against him or her in a prosecution for perjury;

(7) the complete terms of any plea agreement, including specifically all obligations the defendant will incur as a result; [and]

. . .

(9) that if the defendant pleads guilty or nolo contendere, and the offense to which the defendant is pleading is a sexually violent offense or a sexually motivated offense, or if the defendant has been previously convicted of such an offense, the plea may subject the defendant to involuntary civil commitment as a sexually violent predator upon completion of his or her sentence.[4]

What the judge does not tell Luna is that his plea may result in the termination of his parental rights with regard to his baby. Yet, that is a possibility under Florida law. It is a consequence that is more severe, more devastating, and more extreme than deportation. It deals with a right that is more basic, more fundamental, and more precious than the rights involved in deportation. The same reasons underlying

[4] FLA. R. CRIM. P. 3.172(c)(1)-(7), (9).

the requirement to advise defendants that their pleas may carry immigration consequences should therefore be extended to advising them that they might lose their children.

II. INCARCERATION CAN CAUSE THE TERMINATION OF PARENTAL RIGHTS

A. Crimes Against Children

It goes without saying that crimes parents commit against their children can result in termination of their parental rights. Numerous Florida statutory grounds might apply to such situations, depending on the facts. One such ground is abandonment.[5]

Another is when "the parent or parents engaged in conduct toward the child or toward other children that demonstrates that the continuing involvement of the parent or parents in the parent-child relationship threatens the life, safety, well-being, or physical, mental, or emotional health of the child irrespective of the provision of services."[6]

Also, when "[t]he parent or parents engaged in egregious conduct or had the opportunity and capability to prevent and knowingly failed to prevent egregious conduct that threatens the life, safety, or physical, mental, or emotional health of the child or the child's sibling."[7]

Moreover, termination is proper when "[t]he parent or parents have subjected the child or another child to aggravated child abuse . . . , sexual battery or sexual abuse . . . , or chronic abuse."[8]

It may occur as well when "[t]he parent or parents have committed the murder, manslaughter, aiding or abetting the murder, or conspiracy or solicitation to murder the other parent or another child, or a felony battery that resulted in serious bodily injury to the child or to another child."[9]

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[5] FLA. STAT. § 39.806(1)(b) (2013).
[6] § 39.806(1)(c).
[7] § 39.806(1)(f).
[8] § 39.806(1)(g).
[9] § 39.806(1)(h).

Another ground, applicable after a child has been adjudicated dependent and a case plan has been filed with the court, is when "[t]he child continues to be abused, neglected, or abandoned by the parent or parents."[10]

Termination on any of these bases arises from the actions or inactions of the parent without regard to any criminal proceeding that might also arise.

B. Incarceration

Termination of parental rights may also arise from a parent's incarceration itself even if the crime that forms the basis for the incarceration has nothing to do with the child. Indeed, parental rights may be terminated when a parent "is incarcerated in a state or federal correctional institution" and "[t]he period of time for which the parent is expected to be incarcerated will constitute a significant portion of the child's minority."[11]

In addition, termination is allowed when

> [t]he incarcerated parent has been determined by the court to be a violent career criminal . . . , a habitual violent felony offender . . . , or a sexual predator . . . ; has been convicted of first degree or second degree murder . . . or a sexual battery that constitutes a capital, life, or first degree felony violation . . . ; or has been convicted of an offense in another jurisdiction which is substantially similar to one of the [listed offenses].[12]

Further, termination may occur when the court determines "that continuing the parental relationship with the incarcerated parent would be harmful to the child and, for this reason, that termination . . . is in the best interest of the child."[13]

Therefore, three separate and independent bases of termination

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[10] § 39.806(1)(e)(1).
[11] § 39.806(1)(d)(1).
[12] § 39.806(1)(d)(2).
[13] § 39.806(1)(d)(3).

due to incarceration exist. In 1997, when Florida enacted section 39.464(1)(d), Florida Statutes, the predecessor to the current statutory scheme,[14] the section contained three similar provisions, but they were conjunctive in nature.[15] Thus, proof of all three was required in order to terminate parental rights.

In 1999, the legislature revised the provision[16] "by making its three subsections independent alternatives."[17] The revision "isolated the 'substantial portion' language" from the provisions dealing with "the severity of the crime or recidivism" and with "finding that continuing the relationship with the parent would be harmful to the child."[18] Thus, each of the three manners of proof "now provides an independent basis for termination of the parental rights of a parent incarcerated in a state or federal correctional institution."[19]

Despite this "triple threat," defendants in Florida courts routinely enter pleas of guilty or nolo contendere to criminal offenses knowing that they will receive terms of imprisonment but not knowing that those terms could cause them to lose their parental rights.

This problem is particularly acute with regard to terminations resulting from incarceration. Parents who plead guilty to committing an offense against a child certainly know that they risk losing their rights. Most pleas are to offenses unrelated to children, however, and parents who enter such pleas likely have no idea that the possibility of termination looms.

III. FLORIDA'S REQUIREMENT TO ADVISE OF IMMIGRATION CONSEQUENCES

In Florida, the genesis of the requirement to advise defendants that their pleas might lead to deportation was the decision in *Edwards v.*

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[14] 1997 Fla. Laws 3926, 3927.

[15] B.C. v. Fla. Dep't of Children & Families, 887 So. 2d 1046, 1049 (Fla. 2004).

[16] 1999 Fla. Laws 1103, 1165.

[17] *B.C.*, 887 So. 2d at 1049.

[18] *Id.*

[19] *Id.*

State.[20] There, the defendant filed a motion to vacate the judgment and sentence entered against him after a guilty plea.[21] He asserted two related grounds: that the trial court's failure to advise him of the consequence of deportation rendered his plea involuntary and that his counsel was ineffective in not advising him of that consequence.[22] The trial court denied the motion summarily.[23]

The defendant appealed, asserting error with regard to the rejection of each of his claims. The Third District Court of Appeal flatly rejected his argument with regard to the first of the contentions, pointing out that deportation is a "collateral consequence" of a criminal conviction and that courts are not required to advise defendants of consequences of that nature.[24] The court therefore concluded "that it is not the responsibility of the trial court to advise a defendant of federal deportation consequences at the time of taking a guilty plea."[25]

The court went on to find, however, that the defendant's ineffective-assistance claim could not be rejected as a matter of law and reversed the case for a hearing on that issue.[26] In doing so, the court addressed the importance of the collateral consequence of deportation:

> [L]abeling the consequence as collateral does not diminish its significance. Indeed, the penalty of deportation has been recognized as often far more extreme than the direct consequences which may flow from a plea of guilty to an offense. Deportation has been said to be "the equivalent of banishment," *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1947); "a savage penalty," "a life sentence of exile," *Jordan v. DeGeorge*, 341 U.S. 223 (1951) (Jackson, J., dissenting); an event that results in "loss of property or life; or of all that makes life

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[20] Edwards v. State, 393 So. 2d 597 (Fla. Dist. Ct. App. 1981), *rev. denied*, 402 So. 2d 613 (Fla. 1981).

[21] *Id.* at 598.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 600.

> worthwhile," *Ng Fung Ho v. White*, 259 U.S. 276 (1922).[27]

Chief Judge Hubbart dissented, recognizing that "deportation consequences which may flow from the entry of a guilty plea are serious in nature" but pointing out that "so are other collateral consequences attendant upon a guilty plea, such as loss of present employment, loss of a vast array of future employment opportunities, and loss of a host of civil rights."[28] Because "[a]ctual knowledge of these collateral consequences by a defendant is simply not a prerequisite to the entry of an otherwise voluntary guilty plea," Chief Judge Hubbart stated, "I fail . . . to understand why defense counsel is constitutionally compelled to advise the defendant as to any such collateral consequences, be it deportation or otherwise."[29]

Other Florida appellate courts had perspectives that differed from the *Edwards* approach to the issue. In *Hahn v. State*,[30] a case which arose from Escambia County,[31] the First District Court of Appeal, which is headquartered in Tallahassee,[32] indicated that it was "of the opinion" that the failure of the defendant's attorney to advise him that he faced deportation after a guilty plea was "not a substantial and serious deficiency measurably below competent counsel."[33] It then stated, "In the northern part of this State, counsel would not reasonably expect his client to be an alien. This possibly distinguishes *Edwards*, . . . which dealt with an attorney in Miami."[34] While the court in *Hahn* may have distinguished *Edwards* simply to avoid creating conflict between districts, the fact that it drew the distinction it did would seem to imply agreement with the idea that, when it is reasonable to believe that

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[27] *Id.* at 598.

[28] *Id.* at 601 (Hubbart, C.J., dissenting).

[29] *Id.*

[30] Hahn v. State, 421 So. 2d 710 (Fla. Dist. Ct. App. 1982).

[31] Escambia County, which encompasses Pensacola and borders Alabama on both its north and west, is the westernmost county in Florida's Panhandle. It is the Florida county geographically furthest from Miami, where the Third District Court of Appeal is based. FLA. STAT. § 35.05(1) (2013).

[32] § 35.05(1).

[33] *Hahn*, 421 So. 2d at 710.

[34] *Id.*

defendants might be aliens, they should be advised of the immigration consequences of their pleas.

The issue came before the Second District Court of Appeal in *Villavende v. State*,[35] in which the court noted both *Edwards* and *Hahn*, acknowledged that "geography does serve to distinguish the two cases," but based its agreement with the *Hahn* conclusion on the fact that deportation is a collateral consequence of a conviction and that a trial court's failure to advise a defendant of such consequences is not a basis for relief.[36]

The *Villavende* court also noted[37] that the United States Court of Appeals for the Eleventh Circuit, in *United States v. Campbell*,[38] specifically declined to adopt *Edwards* when a claim of ineffective assistance was made with respect to counsel's failure to advise the defendant of the deportation consequences of her plea. The court in *Campbell* recognized that "[d]eportation is admittedly a harsh consequence of a guilty plea."[39] Nonetheless, it "decline[d] Campbell's invitation to adopt the *Edwards* holding,"[40] pointing out that "counsel owes a lesser duty to a client who pleads guilty than to one who decides to go to trial,"[41] that "[t]he interest at stake here is that of the defendant in obtaining 'a general knowledge of the possible legal consequences of facing trial,'"[42] and that "actual knowledge of the collateral consequences of a guilty plea is not a prerequisite to the entry of a knowing and intelligent plea."[43]

Both the *Villavende*[44] and *Campbell*[45] courts pointed out,

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[35] Villavende v. State, 504 So. 2d 455 (Fla. Dist. Ct. App. 1987).

[36] *Id.* at 456.

[37] *Id.*

[38] United States v. Campbell, 778 F.2d 764 (11th Cir. 1985).

[39] *Campbell*, 778 F.2d at 769.

[40] *Id.* at 768.

[41] *Id.* (quoting Wofford v. Wainwright, 748 F.2d 1505, 1508 (11th Cir. 1984)) (alteration omitted).

[42] *Id.* (quoting *Wofford*, 748 F.2d at 1508).

[43] *Id.*

[44] 504 So. 2d at 456-57 (citing Downs-Morgan v. United States, 765 F.2d 1534 (11th Cir. 1985); People v. Padilla, 502 N.E.2d 1182 (Ill. App. Ct. 1986)).

[45] 778 F.2d at 768-69 (citing *Downs-Morgan*, 765 F.2d at 1540-41; United States v.

however, that a lawyer's affirmative misrepresentations as to the immigration consequences of a plea could give rise to a valid ineffective-assistance contention.

In *State v. Ginebra*,[46] the Supreme Court of Florida resolved the conflict among the districts. The court initially made clear that trial judges have no responsibility to advise defendants of the collateral consequences, including deportation, of pleas.[47] It went on to reject the idea that an attorney's failure to advise a client of the possibility of deportation constitutes ineffective assistance of counsel,[48] leaving open the question of whether ineffective assistance might arise from counsel's positive misadvice regarding deportation.[49] The court, however, "acknowledge[d] the observation made in *Edwards* that deportation may, in fact, be a much more severe sanction than the prison sentence actually imposed on a defendant"[50] and agreed with the observation made in *Campbell* that, while "[i]t is highly desirable that both state and federal counsel develop the practice of advising defendants of the collateral consequences of pleading guilty; what is desirable is not the issue before us."[51]

Some six months after deciding *Ginebra*, the Supreme Court of Florida, in *In re Amendments to Florida Rules of Criminal Procedure*,[52] adopted the requirement that trial judges determine that defendants understand that their pleas may carry immigration consequences.[53]

Justice Overton, joined by Justice McDonald, dissented from the adoption of the amendment establishing the requirement, pointing out that there is no constitutional right to notification of immigration consequences, suggesting that the new rule overruled *Ginebra*, and noting that all the effects of a plea can never be fully covered by a

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Santelises, 509 F.2d 703, 704 (2d Cir. 1975)).

[46] State v. Ginebra, 511 So. 2d 960 (Fla. 1987).

[47] *Id.* at 960-61.

[48] *Id.* at 962.

[49] *Id.* at 962 n.6.

[50] *Id.* at 960.

[51] *Id.* at 962 (quoting *Campbell*, 778 F.2d at 769).

[52] *In re* Amendments to Fla. Rules Criminal Procedure, 536 So. 2d 992 (Fla. 1988).

[53] *Id.* at 994.

court.[54]

In response, Justice Grimes, in a concurrence joined in by Justices Shaw and Kogan, stated,

> Contrary to the view of Justice Overton, I do not construe the amendment to rule 3.172(c)(viii) as affecting our decision in *State v. Ginebra*, 511 So. 2d 960 (Fla. 1987), or creating a new constitutional right. The amendment simply represents a policy decision that in a state where so many non-U.S. citizens reside, it is desirable henceforth to advise defendants that deportation may be one of the consequences of their guilty pleas.[55]

Thus, Florida's requirement to advise defendants of the potential immigration consequences of their pleas came about as a matter of policy, not as a matter of constitutional law.

IV. ALONG COMES *PADILLA*

Twenty-two years after the Florida Supreme Court's policy determination, the constitutional landscape changed dramatically when the United States Supreme Court decided *Padilla v. Kentucky*.[56]

The events that led to this landmark decision began in 2001, when Jose Padilla, a truck driver,[57] made a fateful decision. He was having axle problems, so he deviated from his planned route to a less hilly one.[58] Doing so took him through Kentucky, a state he would not have visited otherwise, and led to his stopping at a weigh station on Interstate 65 in that state.[59] An inspector noticed that Padilla did not have certain paperwork required in Kentucky and that he looked nervous.[60] With Padilla's consent, the inspector searched the cab of the

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[54] *Id.* at 1007 (Overton, J., concurring in part, dissenting in part).
[55] *Id.* (Grimes, J., concurring).
[56] Padilla v. Kentucky, 559 U.S. 356 (2010).
[57] Padilla v. Commonwealth, 381 S.W.3d 322, 327 (Ky. Ct. App. 2012).
[58] *Id.*
[59] *Id.*
[60] *Id.*

truck and found marijuana and drug paraphernalia.[61] Subsequently, the police searched the cargo portion of the tractor-trailer Padilla had been driving and found boxes of marijuana.[62]

In 2002, Padilla entered a guilty plea to various marijuana-related charges and was sentenced to five years of incarceration and five years of probation.[63] He was to later testify that he only pleaded guilty "because his wife, Ingrid, and daughter, Yoshii, were distraught over his potential prison sentence."[64]

The plea put Padilla, a native of Honduras who had lived in the United States for over forty years and served with honor in the country's armed forces during the Vietnam War, in a position in which he faced a threat of deportation.[65]

Some twenty-two months after judgment was entered, Padilla filed a motion for postconviction relief asserting that his attorney was ineffective in misadvising him about consequences of his plea and specifically alleging that counsel had told him that "he did not have to worry about immigration status since he had been in the country so long."[66]

After the motion was summarily denied, Padilla appealed and, in an unpublished opinion, the Kentucky Court of Appeals reversed the trial court decision and remanded the case for an evidentiary hearing.[67] The court, relying on the decision of the United States Court of Appeals for the Sixth Circuit in *Sparks v. Sowders*,[68] held that while counsel does not have to advise a defendant of collateral consequences of a plea, "an affirmative act of 'gross misadvice' relating to collateral matters can justify postconviction relief"[69] and Padilla's attorney's wrong

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[61] *Id.*
[62] *Id.*
[63] *Id.* at 324.
[64] *Id.* at 327.
[65] Padilla v. Kentucky, 559 U.S. 356, 359 (2010).
[66] Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008).
[67] *Id.*
[68] Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988).
[69] *Padilla*, 253 S.W.3d at 483-84 & n.2.

advice could therefore constitute ineffective assistance of counsel.[70]

The Supreme Court of Kentucky reversed the appellate court, finding that deportation is a collateral consequence of a conviction, that collateral consequences are outside the scope of the Sixth Amendment right to counsel, and that neither the failure to advise Padilla of the consequence nor the misadvice given constituted ineffectiveness of counsel.[71]

Two justices dissented, agreeing with the majority that deportation need not be addressed by counsel, but opining that "[c]ounsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all" and that "[c]ommon sense dictates that such deficient lawyering goes to effectiveness."[72]

Padilla obtained review in the United States Supreme Court, which began its analysis of the opinion under review by noting that Kentucky's high court was far from alone in its view of collateral consequences.[73] Immediately thereafter, however, the Court pointed out that it had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under" *Strickland v. Washington*,[74] which establishes the standard to apply in reviewing ineffective-assistance-of-counsel claims under the Sixth Amendment. Under that standard, courts "first determine whether counsel's representation 'fell

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[70] *Id.* at 484.

[71] *Id.* at 485.

[72] *Id.* (Cunningham, J., dissenting).

[73] Padilla v. Kentucky, 559 U.S. 356, 365 (2010). The Court cited several cases that had reached similar conclusions, including *Santos-Sanchez v. United States*, 548 F.3d 327 (5th Cir. 2008), *Broomes v. Ashcroft*, 358 F.3d 1251 (10th Cir. 2004), *United States v. Gonzalez*, 202 F.3d 20 (1st Cir. 2000), *United States v. Del Rosario*, 902 F.2d 55 (D.C. Cir. 1990), *United States v. Yearwood*, 863 F.2d 6 (4th Cir. 1988), *United States v. Campbell*, 778 F.2d 764 (11th Cir. 1985), *Oyekoya v. State*, 558 So. 2d 990 (Ala. Ct. Cr. App. 1989), *State v. Rosas*, 904 P.2d 1245 (Ariz. Ct. App. 1995), *State v. Montalban*, 810 So. 2d 1106 (La. 2002), and *Commonwealth v. Frometa*, 555 A.2d 92 (Pa. 1989). *Padilla*, 559 U.S. at 365 n.9.

[74] *Padilla*, 559 U.S. at 365 (citing Strickland v. Washington, 466 U.S. 668, 689 (1984)).

below an objective standard of reasonableness'"[75] and then "ask whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[76]

Although the Court declined to consider whether the distinction between direct and collateral consequences[77] is an appropriate one in the context of defining the scope of constitutionally "reasonable professional assistance,"[78] it found that "deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."[79] It therefore concluded that Padilla's allegations were sufficient under the first prong of *Strickland* in that they asserted that counsel's representation fell below an objective standard of reasonableness and left to the Kentucky courts a determination as to whether Padilla could satisfy *Strickland*'s second, prejudice, prong.[80]

V. DOES THE RATIONALE OF *PADILLA* APPLY TO TERMINATION OF PARENTAL RIGHTS?

If lawyers can be found to be constitutionally ineffective for failing to advise defendants of the possibility that they might be deported as the result of pleas, could such a finding also be based on the failure to warn of the potential that parental rights might be terminated? It seems likely.

A. The Impact of the Termination of Parental Rights

When it answered the ineffectiveness question in the

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[75] *Id.* (quoting Strickland, 466 U.S. at 688).

[76] *Id.* (quoting *Strickland*, 466 U.S. at 694).

[77] Citing Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 124 n.15 (2009), the Court pointed out that "[t]here is some disagreement among the courts over how to distinguish between direct and collateral consequences." *Padilla*, 559 U.S. at 364 n.8. The prevailing standard, however, is whether the consequence is within a court's responsibility and control. 5 WAYNE R. LAFAVE, ET. AL., CRIMINAL PROCEDURE § 21.4(d) (5th ed. 2009).

[78] *Padilla*, 559 U.S. at 365.

[79] *Id.* at 366.

[80] *Id.* at 369.

affirmative, the *Padilla* Court provided the basis for its conclusion by stating, "Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less."[81] It is thus apparent that the primary consideration for the holding was the impact of deportation on defendants and their families.

There can be no question that "deportation is a particularly severe 'penalty,'"[82] "the equivalent of banishment."[83] Yet, the termination of parental rights is a matter far more fundamental in nature. Parental rights have existed for as long as people have existed. They were recognized long before the world even had the national borders that define the scope of deportation. They are ingrained in our beings, in our very humanity. They are rights that we recognize by nature, not merely through the laws we make.

"Surely there can be few losses more grievous than the abrogation of parental rights."[84] "Nature gives to parents that right to the custody of their children which the law merely recognizes and enforces."[85] Thus, "[t]he termination of one's rights to his or her children has been referred to as 'the parental death penalty.'"[86] Imposing that penalty "is an extreme and harsh judicial act."[87] Indeed, "[f]ew consequences of judicial action are so grave as the severance of natural family ties."[88] Such severance is "a unique kind of

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[81] *Id.* at 374.

[82] *Id.* at 365 (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).

[83] Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (citing Delgadillo v. Carmichael, 332 U.S. 388 (1947)).

[84] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 40 (1981) (Blackmun, J., dissenting).

[85] Moore v. Christian, 56 Miss. 408, 410 (1978).

[86] L.A.G. v. Fla. Dep't of Children & Family Servs., 963 So. 2d 725, 728 (Fla. Dist. Ct. App. 2007) (Shepherd, J., concurring) (citing State *ex rel.* S.A.C., 938 So. 2d 1107, 1109 (La. Ct. App. 2006); Michele R. Forte, Comment, *Making the Case for Effective Assistance of Counsel in Involuntary Termination of Parental Rights Proceedings*, 28 NOVA L. REV. 193 (2003)).

[87] *In re Adoption of* Braithwaite, 409 So. 2d 1178, 1179 (Fla. Dist. Ct. App. 1982).

[88] Santosky v. Kramer, 455 U.S. 745, 787 (1982) (Rehnquist, J., dissenting).

deprivation"[89] that "is both total and irrevocable."[90] It is devastating in effect and leaves "the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, or physical development."[91]

As the United States Supreme Court declared in *Stanley v. Illinois*,[92] "The rights to conceive and to raise one's children have been deemed 'essential,' *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and '[r]ights far more precious . . . than property rights,' *May v. Anderson*, 345 U.S. 528, 533 (1953)."[93]

A parent's "interest . . . in the companionship, care, custody, and management of his or her children,"[94] is therefore one that is both "important"[95] and "fundamental,"[96] and one that "occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility."[97]

The extent of the centrality of family life is vividly demonstrated by the fact that "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment"[98] as well as in the right to privacy guaranteed by article I, section 23 of the Florida Constitution.[99] Moreover, the First Amendment might protect that integrity as well.[100]

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[89] *Lassiter*, 452 U.S. at 27.
[90] *Id.* at 39 (Blackmun, J., dissenting).
[91] *Id.*
[92] Stanley v. Illinois, 405 U.S. 645 (1972).
[93] *Id.* at 651.
[94] *Id.*
[96] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981).
[96] Troxel v. Granville, 530 U.S. 57, 66 (2000); Santosky v. Kramer, 455 U.S. 745, 753 (1982).
[97] *Lassiter*, 452 U.S. at 38 (Blackmun, J., dissenting).
[98] *Stanley*, 405 U.S. at 651 (citations omitted).
[99] Cranney v. Coronado, 920 So. 2d 132, 134 (Fla. Dist. Ct. App. 2006).
[100] *Troxel*, 530 U.S. at 95 (Kennedy, J., dissenting).

Parental rights are as old as humanity itself, "perhaps the oldest of the fundamental liberty interests recognized by" our courts.[101] They are "among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all men . . . are endowed by their Creator,'"[102] and "among those [rights] 'essential to the orderly pursuit of happiness by free men."[103] "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."[104] Thus, "[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."[105]

And in so reflecting, our jurisprudence has recognized the rights of parents to be one of the underpinnings, one of the strengths, one of the pillars, of our society. Few rights are more fundamental.

Jose Padilla would likely agree. As noted above, he testified that his plea was prompted in part by the concerns of his wife and his daughter, Yoshii. He agreed to what he believed would be a shorter period of incarceration to minimize the amount of time he would be away from them. Imagine if his plea could have severed all of his ties to Yoshii and her siblings.[106] It is hard to imagine that he would have pled guilty under such circumstances.

Moreover, it seems clear that Padilla's case was argued with a

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[101] *Id.* at 65 (majority opinion).

[102] *Id.* at 91 (Scalia, J., dissenting).

[103] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 38 (Blackmun, J., dissenting) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[104] Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

[105] Parham v. J.R., 442 U.S. 584, 602 (1979).

[106] Padilla, at least at the time of the Kentucky Court of Appeals opinion following remand from the United States Supreme Court, lived in California "with his wife, three disabled children and elderly mother-in-law." Padilla v. Commonwealth, 381 S.W.3d 322, 324 (Ky. Ct. App. 2012). Additionally, he has three adult children. *Id.* at 324, 330. It is not clear if Yoshii is an adult or not. Obviously, if she is, termination would not be an issue as to her, but it would certainly be a concern as to Padilla's minor children. Regardless, the fact is that there are plenty of defendants who have minor children who would be loath to enter pleas that could cause the loss of parental rights with regard to those children. Just replace the references in the above paragraph to Padilla and Yoshii with the name of any of those defendants and of his or her child or children and the point is just as valid.

recognition by many of its participants that termination of parental rights compares in magnitude to deportation.

During oral argument, Justice Ginsburg asked how to decide which consequences the rule suggested by Padilla's counsel would cover[107] and how counsel would distinguish deportation from losing one's driver's license or right to vote.[108] Counsel replied that the Court could "simply recognize deportation as among the few collateral consequences that is so severe and so material in a high number of cases" and "leave for another day" determinations as to other consequences.[109]

Justice Scalia did not care for that idea, stating that the Court could not leave that question for another day, and that it had to "decide whether we are opening a Pandora's box here," before asking, "What about advice on whether pleading guilty would—would cause him to lose custody of his children? That's—that's pretty serious."[110]

When counsel answered by suggesting that the "contextual inquiry of *Strickland*" would address various consequences and admitting that "certainly, parental termination may in a given case be so severe a consequence that it would be material," Justice Scalia replied, "Sure. Sure."[111]

Later, when counsel for the United States, an amicus curiae supporting affirmance of the Kentucky Supreme Court, was arguing, Justice Scalia returned to the subject, asking, "What—what about mis-advice as to whether he will lose custody of his children, or mis-advice as to whether his truck which he owns will be confiscated by the government?"[112] Counsel recognized the significance of termination by responding, "I would put them, Justice Scalia, all in the same general basket, which is to say, mis-advice on a legal matter of importance to the defendant that could skew his decision to plead guilty may be

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[107] Transcript of Oral Argument at 5, Padilla v. Kentucky, 559 U.S. 356 (2010) (No. 08-561).
[108] *Id.* at 6.
[109] *Id.*
[110] *Id.* at 7.
[111] *Id.*
[112] *Id.* at 24.

deficient representation under *Strickland*."[113]

Chief Justice Roberts then entered the fray, voicing his assumption that counsel for the United States was urging an objective inquiry, and demonstrating his point by saying, "We assume, for example, that someone who is going to lose the custody of their children would regard that as important. You don't want testimony about this guy doesn't care about the children, so it's not a big deal to him."[114]

B. The Parental Termination Statutory Scheme

Although *Padilla* was based primarily on the impact of deportation, the Court also relied on the fact that the immigration statutes relevant to the case were "succinct, clear, and explicit in defining the removal consequence for Padilla's conviction."[115] As discussed above, the same is true with regard to termination of parental rights. Any lawyer, indeed any nonlawyer, should know that offenses defendants commit against their children or that reflect a danger to those children might lead to termination. To the extent that the parental termination statutory scheme refers to specific offenses, it is crystal clear. While it might not be as clear when incarceration for a substantial portion of a child's remaining minority will meet the criteria for termination, it should always be readily apparent when termination on this ground might loom as a possibility.[116]

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[113] *Id.*

[114] *Id.*

[115] *Padilla*, 559 U.S. at 368.

[116] In *B.C. v. Florida Dep't of Children & Families*, the Florida Supreme Court declined to determine what specific percentage of the relevant time period constitutes a substantial portion of a child's remaining minority. 887 So. 2d 1046, 1055 n.6 (Fla. 2004). In that case, however, the court concluded that incarceration for 28.6% of the time before the child was to turn eighteen years of age was of insufficient length to warrant termination. *Id.* at 1054. The court also noted with approval that the Second District Court of Appeal, in *In re A.W.*, 816 So. 2d 1261, 1264 (Fla. Dist. Ct. App. 2002), had found not to be substantial percentages of twenty-six and thirty-two percent. *B.C.*, 887 So. 2d at 1054. The Florida courts have not, in the wake of *B.C.*, established a bright-line test. Thus, percentages higher than thirty-two should create concern in the mind of a reasonable attorney that termination could result.

C. Other Considerations

An argument against applying *Padilla*'s rationale to termination of parental rights would likely focus on that portion of the Court's opinion pointing out that deportation is "intimately related to the criminal process"[117] and that "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders."[118]

It would have to be agreed that termination of parental rights is not as closely connected to the criminal process as is deportation and that termination is nowhere near as automatic a result of incarceration. Indeed, most criminal convictions of parents do not meet the criteria for termination, and, when they do, there is no guarantee that termination will even be sought. Further, even if sought and the statutory ground proven, termination is only proper when the trial court finds that it is in the manifest best interest of the child or children.[119]

The Court discussed these factors, however, not in its analysis of whether the failure to advise a defendant of the possibility of deportation can constitute ineffective assistance, but in the context of finding that "[t]he collateral versus direct distinction is . . . ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation."[120] Thus, unless the Court in future cases resurrects the distinction between direct and collateral consequences, these factors might not carry a great deal of weight in determining whether to extend the *Padilla* approach to termination of parental rights.

Perhaps the biggest concern about extending the reasoning of *Padilla* in such a manner is a concern that doing so would be to start, or continue, if one views *Padilla* as having started, down a slippery slope.

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[117] *Padilla*, 559 U.S. at 365.

[118] *Id.* at 366.

[119] "A termination of parental rights proceeding involves a two-step process. First, the court must find by clear and convincing evidence that one of the grounds set forth in section 39.806, Florida Statutes . . . , has been proven. Second, the court must determine what outcome is in the manifest best interest of the children." C.M. v. Dep't of Children & Family Servs., 854 So. 2d 777, 779 (Fla. Dist. Ct. App. 2003) (citations omitted).

[120] *Padilla*, 559 U.S. at 365-66.

Or, as Justice Scalia put it above, "opening a Pandora's box."[121] What about the loss of drivers' licenses or the right to vote? What about forfeitures of property? Kentucky's brief in *Padilla* posited that there exist hundreds of collateral consequences in that state's statutes alone that affect ex-offenders upon their release from incarceration.[122] The same is undoubtedly true everywhere.

This concern is a legitimate one, but it must be viewed in its proper context. *Padilla* did not take a step down the slippery slope. It took a leap. It brought within *Strickland*'s ambit a consequence that, while unquestionably harsh and severe, does not deal with rights as basic, fundamental, or inherent as those involved in termination. Thus, applying *Padilla*'s reasoning to termination of parental rights would be climbing back *up* the slippery slope, not sliding down it.

Padilla may eventually apply to rights that lie further down the slope. And, it might not—the line might be drawn at deportation. But extending *Padilla* to termination of parental rights would be consistent with either approach because the rights involved in termination hold a position on the slope above wherever the line might be drawn.

VI. FLORIDA COURTS SHOULD ADVISE DEFENDANTS OF THE FACT THAT THEIR PLEAS CAN CAUSE THE TERMINATION OF THEIR PARENTAL RIGHTS

In Florida, the question of whether the rationale of *Padilla* will extend to termination of parental rights will likely involve reexamining the decision in *Slater v. State*.[123] In that case, the defendant argued on appeal that the trial court should have advised him of the potential for termination of his parental rights at the time he entered a no contest plea to criminal charges that called for consecutive sentences of fifteen years incarceration and fifteen years probation.[124] The court rejected the

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[121] *See supra* note 110 and accompanying text.

[122] Brief of Respondent at 17 (quoting Troy B. Daniels et al., Note, *Kentucky's Statutory Collateral Consequences Arising From Felony Convictions: A Practitioner's Guide*, 35 N. KY. L. REV. 413 (2008)).

[123] Slater v. State, 880 So. 2d 802 (Fla. Dist. Ct. App. 2004).

[124] *Slater*, 880 So. 2d at 803. The appellate court pointed out, but did not discuss, that the defendant made this claim despite the fact that the charges pled to were manslaughter of a child and aggravated child abuse and the fact that the victims were

defendant's claim on the basis that trial courts are only obligated to inform defendants of the direct consequences of their pleas, not the collateral ones, and the finding that termination of parental rights is a collateral consequence.[125]

The court decided *Slater* some five and a half years before the United States Supreme Court's decision in *Padilla*.[126] It remains to be seen whether the same conclusion would be appropriate now, in light of *Padilla*'s casting doubt on the viability of the distinction between direct and collateral consequences and giving great weight to the impact of the consequence of deportation on defendants and their families.[127] Florida should not wait until the questions regarding the impact of *Padilla* are answered. It should act now to adopt a requirement that trial courts advise defendants entering pleas of guilty or no contest of the possibility that they could have their parental rights terminated.

As discussed above, Florida required its trial judges to advise defendants entering pleas of possible immigration consequences some twenty-two years before *Padilla*. This approach established a procedure that was more fair, more open, more just than otherwise—one that would have been admirable and appropriate even if the Supreme Court had decided *Padilla* differently and found that advice as to deportation by counsel was not required. It unquestionably reduced the number of cases in which issues arose after conviction, not just by bringing the

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the defendant's twin sons. *Id.*

[125] *Id.* at 803-04.

[126] *See Padilla*, 559 U.S. 356; *Slater*, 880 So. 2d 802.

[127] Certainly, there are differences over and above the specific consequence involved between the issue dealt with in *Slater*, whether the trial court should have advised the defendant of the possibility of termination, and those in *Padilla*, whether it was ineffective assistance for counsel to fail to advise of the possibility of deportation, to misadvise as to the issue, or both. The defendant in *Slater* did raise ineffectiveness in his trial court motion, but the appellate court's decision only addressed the claim regarding the trial court's failure to advise him that he might lose his parental rights. *Slater*, 880 So. 2d at 803-04. It is possible that the defendant did not on appeal raise ineffectiveness. It is also possible that he did raise it and that the appellate court chose not to speak to it. In any event, the distinction between direct and collateral consequences will likely be at issue in future litigation in this general area of the law regardless of whether claims are directed to the plea colloquy conducted by the court or to the advice given by counsel.

matter to the attention of defendants in time for them to reassess their pleas when appropriate, but also by ingraining in the minds of attorneys who participate in innumerable plea colloquies the importance of making their clients aware of what might await them.[128]

And Florida was far from alone in its approach. As the *Padilla* Court noted,[129] similar requirements predated its decision in: Alaska,[130] California,[131] Connecticut,[132] the District of Columbia,[133] Georgia,[134] Hawaii,[135] Idaho,[136] Iowa,[137] Maryland,[138] Massachusetts,[139]

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[128] Not only does the requirement promote understanding among defendants of the possibility of deportation, thereby reducing the number of uninformed pleas and the number of postconviction issues, but it promotes appropriate dispositions in those cases in which postconviction issues do arise. In *Hernandez v. State*, 124 So. 3d 757 (Fla. 2012), the court rejected the state's claim that any prejudice resulting from the defendant's counsel's failure to advise him of the deportation consequences of his plea was cured by the fact that the defendant responded affirmatively when asked during the plea colloquy if he understood that the conviction could be used against him in a deportation proceeding. *Id.* at 763. The court found that, because the deportation consequences for the defendant were "truly clear," the equivocal warning during the colloquy was insufficient to defeat his *Strickland* claim. *Id.* The court went on to say, however,

> The fact that an equivocal warning from the trial court is insufficient to categorically eliminate prejudice in every circumstance is not to say, however, that the plea colloquy is meaningless. . . . Instead, a colloquy containing an equivocal warning from the trial court and an acknowledgement from the defendant contributes to the totality of the circumstances by providing evidence that the defendant is aware of the possibility that a plea could affect his immigration status. In other words, the colloquy required by rule 3.172(c)(8) may refute a defendant's postconviction claim that he had no knowledge that a plea could have possible immigration consequences; however, it cannot by itself refute a claim that he was unaware of presumably mandatory consequences.

Id.

[129] *Padilla*, 559 U.S. at 374 n.15.

[130] ALASKA R. CRIM. P. 11(c)(3)(C) (2009-2010).

[131] CAL. PENAL CODE § 1016.5 (West 2008).

[132] CONN. GEN. STAT. ANN. § 54-1j (2009).

[133] D.C. CODE § 16-713 (2001).

[134] GA. CODE ANN. § 17-7-93(c) (1997).

[135] HAW. REV. STAT. ANN. § 802E-2 (2007).

[136] IDAHO CRIM. R. 11(d)(1).

Minnesota,[140] Montana,[141] New Mexico,[142] New York,[143] North Carolina,[144] Ohio,[145] Oregon,[146] Rhode Island,[147] Texas,[148] Vermont,[149] Washington,[150] and Wisconsin.[151] Indeed, by the time *Padilla* was decided, even Kentucky had adopted a plea form that provides notice of possible immigration consequences.[152]

The Supreme Court of Florida was entirely correct in *Ginebra* when it indicated that, in adjudicating constitutional claims, the court is limited to determining what is required, not what is desirable.[153] In adopting rules of procedure, however, it is not limited in that respect. As noted by the United States Supreme Court in *Lassiter v. Department of Social Services*,[154] "A wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the

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[137] IOWA R. CRIM. P. 2.8(2)(*b*)(3) (Supp. 2009).
[138] MD. R. 4-242 (Lexis 2009).
[139] MASS. GEN. LAWS ANN., ch. 278, § 29D (2009).
[140] MINN. R. CRIM. P. 15.01 (2009).
[141] MONT. CODE ANN. § 46-12-210 (2009).
[142] N.M. R. CRIM. FORM 9-406 (2009).
[143] N.Y. CRIM. PROC. LAW § 220.50(7) (West Supp. 2009).
[144] N.C. GEN. STAT. ANN. § 15A-1022 (Lexis 2007).
[145] OHIO REV. CODE ANN. § 2943.031 (West 2006).
[146] OR. REV. STAT. § 135.385 (2007).
[147] R.I. GEN. LAWS § 12-12-22 (Lexis Supp. 2008).
[148] TEX. CODE CRIM. PROC. ANN., art. 26.13(a)(4) (Vernon Supp. 2009).
[149] VT. STAT. ANN. tit. 13, § 6565(c)(1) (Supp. 2009).
[150] WASH. REV. CODE ANN. § 10.40.200 (2008).
[151] WIS. STAT. ANN. § 971.08 (2005-2006).
[152] *Padilla*, 559 U.S. at 374 n.15 (citing Ky. Admin. Office of Courts, Motion to Enter Guilty Plea, Form AOC-491 (Rev. 2/2003)). The Court provided a link to the form that is no longer valid; the current version of the form is available at http://courts.ky.gov/resources/legalforms/LegalForms/491.pdf.
[153] In light of *Padilla*, the court was clearly wrong in *Ginebra* with regard to its conclusion that defense attorneys have no constitutional duty to advise defendants as to the potential deportation consequences of their pleas. Recognizing that fact in *Hernandez*, the court receded from its holding in *Ginebra*. Hernandez v. State, 124 So. 3d 757, 762 n.5 (Fla. 2012). Doing so, of course, does not even suggest that the court's statement regarding its limitations in dealing with constitutional issues is in any way inaccurate.
[154] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

Constitution."[155]

It is not yet known whether advising defendants that they could lose their parental rights would exceed what is required by the Constitution, but it is clear that a wise policy would be for it to be done whenever a defendant enters a plea of guilty or no contest. It would serve the same purposes and achieve the same benefits of the advice regarding deportation.

It certainly appears that all of the justices who decided *Padilla* would endorse that idea. As noted, the opinion of the Court found it significant that so many jurisdictions had such a requirement regarding deportation.[156] In a concurring opinion that expressed the belief that attorneys render ineffective assistance when they misadvise clients about deportation, but not in failing to offer advice on their own, Justice Alito, joined by Chief Justice Roberts, argued that the Court's approach to the failure-to-advise question "could inadvertently head off more promising ways of addressing the underlying problem—such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences."[157] And, in a dissenting opinion, Justice Scalia, joined by Justice Thomas, suggested that "legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given."[158]

The Florida Supreme Court's decision to incorporate deportation consequences into plea colloquies reflected exactly the sort of thinking that courts and legislatures vested with the authority to establish procedural rules should utilize. The same line of thinking calls for taking a similar approach with regard to termination of parental rights.

It would indeed be a twist worthy of O. Henry were Luna to commit a crime in order to feed his baby, only to find that doing so

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[155] *Id.* at 33.

[156] *Padilla*, 559 U.S. at 374 n.15.

[157] *Id.* at 382 (Alito, J., concurring).

[158] *Id.* at 392 (Scalia, J., dissenting) (footnote omitted).

resulted in his no longer being involved in the baby's life. It is possible that nothing Luna might do would avoid termination. He could fight the criminal charges, yet be convicted at trial, and lose his parental rights as a result. For Luna to enter a plea that triggers termination without his knowing it, however, would add cruelty to the inherent irony. Luna, and every other defendant facing such a situation, should be told of the stakes and should be allowed to make decisions accordingly. The law will take its course, but that course should be one that is open and fair regardless of where it leads.