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PADILLA AND THE FUTURE OF THE DEFENSE FUNCTION

A Gauntlet Thrown: The Transformative Potential of Padilla v. Kentucky

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A GAUNTLET THROWN: THE TRANSFORMATIVE POTENTIAL OF *PADILLA V. KENTUCKY*

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INTRODUCTION

In *Padilla v. Kentucky*,[1] a lawyer misadvised his client. He stated that the client did not need to worry about deportation when pleading guilty to a drug distribution offense. When the government subsequently initiated deportation proceedings, the client moved to vacate the underlying criminal conviction on the ground of ineffective assistance of counsel. The Supreme Court held that, under the circumstances presented, the lawyer had a duty to correctly advise his client about the deportation consequences of a conviction.

The obvious question is, how far will the Court's holding in *Padilla* extend? Some argue that it has started a revolution, fundamentally altering the concept of the criminal sentence and eradicating the distinction between direct and collateral consequences. Others contend that *Padilla* is likely to alter very little because the opinion is narrow,

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1. 130 S. Ct. 1473 (2010).

the consequence of non-compliance is small, and the workload of the criminal defense bar, or at least the indigent defense bar, is already unmanageable.

I assert that the power to determine the long-term meaning of *Padilla* lies primarily with the defense bar. If defense lawyers, particularly public defenders and court-appointed counsel, become mired in skepticism about the time and resources needed to fulfill the letter, no less the spirit, of the *Padilla* decision, the decision may change very little. If instead they embrace *Padilla* and utilize its mandate as a tool to fight for the resources necessary to provide each client with effective representation, the effect could be transformational. The defense bar must be at the forefront, arguing for a broad interpretation of *Padilla*, embracing the duty to warn each client of all of the severe consequences of his potential conviction and, further, utilizing this information together with information about the client's life and goals to achieve the best outcome for that individual.

The first section of this Article analyzes the *Padilla* case, demonstrating that the decision does require defense lawyers affirmatively to advise clients of the applicability of a large segment of collateral consequences, as well as provide detailed information about other potentially applicable collateral consequences. Part II discusses how *Padilla*'s focus on the importance of a consequence to a client has the potential to transform the defense function. Part III examines whether hurdles to the implementation of *Padilla*, particularly the crisis in indigent defense, will curtail this transformation and outlines how *Padilla*, in fact, can particularly assist public defense lawyers to obtain greater resources.

I. THE MEANING OF *PADILLA V. KENTUCKY*

Padilla v. Kentucky concerned a man who had been a lawful permanent resident of the United States for over forty years, including serving as a member of the U.S. Armed Forces.[2] Mr. Padilla pled guilty to drug distribution charges after his lawyer assured him that because he had been legally in the United States for so long, he did not need to worry about deportation as a consequence of conviction.[3]

2. *Id.* at 1477.
3. *Id.* at 1478.

In reality, after Padilla entered a guilty plea to drug distribution, his deportation was virtually automatic.[4]

Once deportation proceedings were initiated, Mr. Padilla challenged his drug distribution conviction, asserting that absent his counsel's erroneous advice about deportation, he would not have pled guilty.[5] The Supreme Court held that Mr. Padilla's attorney had a duty under the Sixth Amendment right to effective assistance of counsel to provide his client with correct advice on his likelihood of being deported.[6]

There is no doubt that *Padilla* broke new ground. Until the *Padilla* decision, the vast majority of courts across the county held that defense lawyers had no affirmative duty to inform a client about the collateral consequences of a plea.[7] In other words, the defense lawyer's sole responsibility was the potential sentence to be handed down in a criminal case. Any other impact the conviction might have, whether on housing, employment, child custody, or even lifetime registration with the police, was not the purview or obligation of the defense lawyer. While some courts had held that a lawyer has a duty not to provide inaccurate advice,[8] no federal court had held that the defense lawyer has an affirmative duty to provide correct advice.[9] Until *Padilla*, silence or even "I don't know" was sufficient—a reality that resulted in a defense culture of not providing information regarding collateral consequences despite practice standards that required this advice.[10]

4. *Id.* at 1477 n.1 ("Padilla's crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i).").

5. *Id.* at 1478.

6. *Id.* at 1483 ("This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.").

7. *See, e.g.*, Commonwealth v. Fuartado, 170 S.W.3d 384 (Ky. 2005); Commonwealth v. Fromenta, 555 A.2d 92 (Pa. 1989); *see also* Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence and Misinformation in the Guilty Plea Process*, 95 IOWA L. REV. 119, 131–32 (2009).

8. *See, e.g.*, Sparks v. Sowders, 852 F.2d 882, 885 (6th Cir. 1988); Cepulonis v. Ponte, 699 F.2d 573, 577 (1st Cir. 1983); *see also* Roberts, *supra* note 7, at 135–40 (discussing the affirmative misadvice exception to the collateral consequences rule).

9. *See* Roberts, *supra* note 7, at 132 (citing Brief for Criminal and Immigration Law Professors et. al. as Amici Curiae Supporting Petitioner at 11–12, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 164242 (noting that all federal courts and most state high courts adhere to the collateral consequences rule)).

10. *See* Roberts, *supra* note 7, at 125–26.

Still, the full meaning of the Court's decision in *Padilla* is far from clear. The Court's rationale could be read very broadly or very narrowly, and the decision itself appears internally inconsistent.[11] On one hand, the Court rejects the position that only direct consequences are relevant under the Sixth Amendment: "We . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*[.]"[12] Focusing on this pronouncement, many assert that *Padilla* is a revolution, eradicating the formalistic distinction between direct and collateral consequences and fundamentally altering the concept of the criminal sentence.[13]

On the other hand, the *Padilla* holding only addresses deportation, and the Court specifically distinguishes deportation from other "collateral" consequences. "Deportation as a consequence of a criminal conviction is . . . uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation."[14] Further, the Court is careful to note that its holding does not extend to all deportation situations, but only to those where "the law is . . . succinct and straightforward."[15] The Court emphasizes that Mr. Padilla's counsel had a duty to advise his client correctly because the inevitability of deportation was obvious from the plain language of the statute.[16] In this way, Justice Steven's majority opinion suggests that the decision is carefully circumscribed.

To predict the likely impact of *Padilla*, one has to scrutinize carefully the Court's analysis. In reaching its conclusion that the defense lawyer had a duty to provide correct advice on deportation to Mr. Padilla, the Court relied on a couple of factors, namely: (1) "deportation is a particularly severe penalty;" and that (2) deportation is "intimately related to the criminal process," *i.e.*, it is "nearly an automat-

11. *See* Daniel Kanstroom, *The Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1481 (2011) (noting that the majority opinion "seems to vacillate" among three positions about the direct-versus-collateral distinction).

12. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (citing Strickland v. Washington, 466 U.S. 668, 689 (1984)).

13. *See* McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 798–808 (2011) (describing *Padilla* as a revolution).

14. *Padilla*, 130 S. Ct. at 1482.

15. *Id.* at 1483.

16. *Id.*

ic result" of conviction.[17] The Court then went on to say that for a circumstance to require correct advice, the application of the consequence to the particular defendant's case must be clear.[18]

A. The Key Factors: Severity and Automatic Application

Looking at the set of factors that the Court identified in the first part of the *Padilla* analysis, those who favor a broad interpretation appear to have the better argument. The Court's reasoning with regard to deportation could equally apply to a variety of collateral consequences.[19] As one commentator observed, the Court's "invocation of 'uniqueness' [with regard to deportation] rings hollow . . . . Nothing about th[e] explanation of deportation's 'uniqueness' limited the analysis to immigration penalties."[20]

Many collateral consequences, from sex offender registration, to loss of child custody, to the termination of food and housing assistance benefits, are severe.[21] Like deportation, these consequences may be as important to the client as the criminal sentence itself, if not more so.[22] It is not difficult to imagine an individual who would be willing to plead guilty if it would result in spending some time in jail, but who would not be willing to enter the same plea if it would result

17. *Id.* at 1481 (citations omitted); *see also Sixth Amendment—Effective Assistance of Counsel*, 124 HARV. L. REV 199, 206–07 (2010) (discussing two factors by which the Court determined deportation was unique).

18. *See Padilla*, 130 S. Ct. at 1483.

19. In the aftermath of *Padilla*, the appropriate use of the term "collateral consequences" is very much in question. Some suggest that the term is outdated and should be replaced by a term that does not relegate these consequences to a secondary status. *See* Smyth, *supra* note 13, at 825 (recommending the term "enmeshed penalties"). I continue to use the term "collateral consequences" to mean any consequence of a conviction that is not the actual criminal sentence for the offense.

20. Smyth, *supra* note 13, at 801. Professor Gabriel Chin, arguably the leading academic scholar on the subject of "collateral" consequences, concurs in this assessment. *See* Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 675–76 (2011) ("*Padilla*'s clear implication is that defense attorneys should warn clients about other serious consequences—the 'collateral consequences'—that flow automatically from a criminal conviction, even if they are not technically denominated criminal punishment.").

21. *See* Joanna Woolman, Padilla's *"Truly Clear" Test: A Case for a Broader Application in Minnesota*, 37 WM. MITCHELL L. REV. 840, 848 (2011) (arguing that restrictions on child custody, disqualification from employment licensing, and sex offender registration should be considered severe); Smyth, *supra* note 13, at 824–25 (reviewing severe penalties).

22. *See, e.g.*, Woolman, *supra* note 21, at 849–54 (describing the impact of particular collateral consequences on specific exemplar clients).

in the termination of his professional license[23] or exclusion from living in subsidized housing with his family when he is released.[24] Similarly, it is easy to imagine a college student happy to accept a plea to probation for a minor charge of drug possession, until she learns that accepting the plea will result in the immediate termination of her financial aid.[25]

Moreover, like deportation, most collateral consequences are "intimately related to the criminal process"[26] in that criminal conviction automatically triggers the consequences. There is no discretion involved in the application of the consequence, meaning that there is no separate procedure for determining whether the consequence is appropriate or necessary in a particular case. Consider the hypothetical of the student arrested for drug possession. Regardless of whether the student pleads to a misdemeanor or a felony, under the Drug Free Student Loan Act of 1988, she will lose her federal financial aid if she is convicted of drug possession.[27] There is no process for argument or appeal. So, like the deportation statute at issue in *Padilla*, the application of the consequence in this example is automatic and, therefore, tied to the criminal proceeding.

Measuring other collateral consequences against these two factors of severity and nondiscretionary application, it seems clear that many would meet this *Padilla* test. Indeed, in the short time since the *Padilla* decision, a number of courts have reviewed other collateral consequences and found them to be equally as "unique" as deportation. These courts have expanded *Padilla* to include failures by counsel to

23. *See, e.g.*, THE REENTRY OF EX-OFFENDERS CLINIC, UNIV. OF MD. SCH. OF LAW, A REPORT ON THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN MARYLAND 22–27 (2007), *available at* http://www.sentencingproject.org/doc/publications/cc_report2007.pdf (examining a range of professional licenses that can be impacted by criminal convictions in Maryland); Woolman, *supra* note 21, at 851–52 (discussing the impact of a criminal conviction on licensing by the Department of Health and Human Services in Minnesota).

24. *See, e.g.*, 24 C.F.R. § 960.203 (2010) (requiring local public housing authorities to promulgate regulations that exclude individuals from housing if convicted of certain offenses).

25. *See* Drug Free Student Loans Act of 1998, 20 U.S.C. § 1091(r) (2010).

26. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010).

27. *Id.* The impact of these consequences is noteworthy. With regard to this particular example, according to Students for Sensible Drug Policy, "over 200,000 students have been ineligible for federal loans, grants, and work-study because of" this law. *The Higher Education Act*, STUDENTS FOR SENSIBLE DRUG POLICY, http://ssdp.org/campaigns/the-higher-education-act.

advise clients about sex offender registration,[28] mandatory lifetime supervision,[29] and other consequences typically viewed as collateral to the criminal proceeding, such as revocation of vested pension benefits.[30] In so doing, the courts have emphasized that the consequences involved are harsh and that their application is automatic. For example, in *Commonwealth v. Arnold*, a Pennsylvania appellate court noted,

> Because of the automatic nature of forfeiture, the punitive nature of the consequence, and the fact that only criminal behavior triggers forfeiture, [it] 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 of pleading guilty.[31]

These cases provide a reason to be optimistic that the holding of *Padilla* will extend, at a minimum, to other collateral consequences that have potentially dire effects on a client's life.

B. Clarity and the Level of Advice Required

The second part of the analysis undertaken by the Court is the more interesting because it relates to the level of advice required when a collateral consequence meets the two factor test. The Court,

28. *See, e.g.*, Taylor v. State, 698 S.E.2d 384, 389 (Ga. 2010) (holding that failing to advise a client on mandatory sex offender registration program constitutes deficient performance of counsel); State v. Fonville, No. 294554, 2011 WL 222127, at *10 (Mich. Ct. App. Jan. 25, 2011) (holding that counsel's failure to warn client of sex offender registration requirement was constitutionally defective).

29. *See* Calvert v. State, 342 S.W.3d 477, 491–92 (Tenn. 2011) (holding that counsel's failure to warn a defendant about mandatory lifetime community supervision constituted deficient performance).

30. *See* Commonwealth v. Abraham, 996 A.2d 1090, 1091–95 (Pa. Super. Ct. 2010) (applying *Padilla* to conclude that forfeiture of vested pension benefits is a collateral consequence about which the attorney had a duty to warn), *appeal granted by* 9 A.3d 1133 (Pa. 2010).

31. *Abraham*, 996 A.2d at 1094–95. By contrast, few courts have proven willing to dismiss *Padilla* as applicable only to immigration. In *United States v. Bakilana*, for example, a district court addressed whether failure to warn about potential civil liability constituted ineffective assistance. No. 1:10-cr-00093 (LMB), 2010 WL 4007608 (E.D. Va. Oct 12, 2010). Addressing *Padilla* only briefly, the court suggested that the case might apply only to immigration, but went on to at least analyze the consequence under the factors set forth in *Padilla*. *Id.* at *3 n.2 ("Potential damages liability in a civil suit by a victim simply does not rise to the same level as deportation in terms of its pervasive effects on a defendant's life. For that reason, the holding in *Padilla* does not undermine the validity of the plea colloquy in this case."). *But see* Brown v. Goodwin, Civ. No. 09-211(RMB), 2010 WL 1930574, at *13 (D.N.J. May 11, 2010) ("[T]he holding of *Padilla* seems not importable—either entirely or, at the very least, not readily importable—into scenarios involving collateral consequences other than deportation.").

apparently fearful of placing too onerous a burden on the defense lawyer, limits the affirmative duty to advise clients on the likelihood of collateral consequences where that likelihood can be "easily determined."[32] Specifically, the Court states,

> Immigration law can be complex, and it is a legal specialty of its own . . . . There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.[33]

The interpretation of this factor is critical to the potential reach of *Padilla*. If this limitation means that a defense attorney has no affirmative duty to advise whenever the burden of locating and advising on the consequences of conviction is taxing, then *Padilla* would likely mean very little.

Indeed this interpretation is being pursued in some jurisdictions. For example, in the United States District Court for the District of Arizona, some plea agreements now contain generic provisions regarding warnings about potential immigration consequences, ostensibly in an effort to satisfy the requirements of *Padilla*. One such agreement states:

> Defendant recognizes that pleading guilty may have consequences with respect to the defendant's immigration status if the defendant is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offense(s) to which the defendant is pleading guilty. Removal and other immigration consequences are subject to a separate proceeding, however, defendant understands that no one, including the defendant's attorney or the district court, can predict to a certainty the effect of the defendant's conviction on the defendant's immigration status. Defendant nevertheless affirms that the defendant wants to plead guilty regardless of any immigration consequences that the defendant's plea may entail, even if the consequence is the defendant's automatic removal from the United States.[34]

Such a warning, particularly delivered in the course of the plea document, is useless to a client.

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32. *Padilla*, 130 S. Ct. at 1483.

33. *Id.*

34. Plea Agreement at 3, United States v. Shirley, No. 10-8135M (BPV) (D. Ariz. Aug. 13, 2010) (on file with the author).

A careful reading of the Court's analysis shows that interpreting *Padilla* to permit such general warnings is incorrect. *Padilla* requires individualized advice whenever that advice can be clear. And when there is some ambiguity or lack of clarity in the applicability of a particular severe consequence in a client's case, *Padilla* still requires that the lawyer provide an individualized assessment of the consequence, explaining not only the nature of the consequence, but also why its operation is ambiguous in the client's case.

In creating the limitation regarding clarity, the Court was not concerned with the temporal or research burden of locating the consequences that might apply, but rather with the legal analysis of whether, if the statute or rule is not clear, the consequence would apply in the defendant's particular case. The Court did not say that the complexity of immigration law excuses the defense lawyer from reading the law or attempting to determine its particular applicability to the defendant's situation. To the contrary, the Court's decision specifically faults Mr. Padilla's lawyer for not having researched and read the immigration statute, emphasizing that its applicability to Mr. Padilla was obvious: "Padilla's counsel could have easily determined that his plea would make him eligible for deportation *simply from reading the text of the statute*."[35]

The lawyer must locate and read about the consequence because it is only through that process a lawyer can determine if the consequence's application in a particular case is clear. If, but only if, the application to a defendant's particular set of circumstances "is not succinct and straightforward,"[36] that defense lawyer can satisfy the minimal standard of effective assistance by providing less than direct advice on the actual applicability of the consequence to the particular defendant. In other words, the onerous burden on defense counsel that concerned the Court was not the burden of searching out the consequences and reading the statutes, code or rules that contain them. Rather, the burden on defense counsel arises from understanding when those rules would apply to a particular plea if, for example, the rule in question uses a construction or set of definitions that is not yet clear or would be unfamiliar to a criminal defense lawyer.

This interpretation makes sense in light of collateral consequence statutes. Often, these statutes are constructed in a way that would be very familiar to defense lawyers. For example, felony convictions trigger a number of collateral consequences. Florida's voter registra-

35. *Padilla*, 130 S. Ct. at 1483 (emphasis added).

36. *Id.*

tion law provides that a person may not register to vote if he "has been convicted of any felony by any court of record."[37] A criminal defense lawyer can be expected to understand this distinction and, therefore, can be required to affirmatively and accurately advise her client about the application of this type of consequence in the client's particular case.

By contrast, some consequences are automatically triggered by a smaller range of convictions, the definition of which may be more difficult for a criminal defense lawyer to determine. In the immigration context, a conviction for certain types of crimes triggers automatic deportation, such as the drug offense at issue in *Padilla*.[38] But there are many other crimes for which the immigration consequences are far less clear. A noncitizen convicted of a crime involving moral turpitude (that is not one of the subset of automatically deportable offenses) is deportable only if: (1) the conviction carries a maximum sentence of at least one year and is committed within five years of the individual's admission to the United States; or (2) the individual was previously convicted of a crime involving moral turpitude. The definition of crime of moral turpitude differs by jurisdiction and purpose.[39] For the purpose of deportation, it is the federal immigration case law that controls, and state convictions must be "translated" into this federal rubric.[40] Given these more complicated circumstances, under *Padilla*, a defense lawyer representing a noncitizen offered a plea to theft with a two year sentence would likely not be required to provide specific advice. According to *Padilla*, a more "general warning" would suffice.[41] But a general warning that endeavors to evade

37. FLA. STAT. § 97.041 (2009).

38. Other crimes for which a conviction constitutes immediate grounds for deportation include domestic violence, child abuse, stalking, and any aggravated felony. *See* 8 U.S.C. § 1227(a)(2) (2010).

39. *See, e.g.*, Stidwell v. Md. St. Bd. of Chiropractic Exam'rs, 799 A.2d 444, 447 (Md. 2002) (distinguishing the definition of moral turpitude in the criminal context from the definition in the administrative context, noting "while Maryland's administrative and regulatory statutes repeatedly use the phrase 'moral turpitude,' that use is variable and inconsistent . . .").

40. *See, e.g.*, *Quick Reference Chart for Determining Immigration Consequences of Common New York Offices*, IMMIGRANT DEFENSE PROJECT, http://immigrantdefenseproject.org/wp-content/uploads/2011/02/06_QuickReferenceChartforNewYorkStateOffenses.pdf (noting whether certain offenses under New York state law constitute a crime of moral turpitude under federal immigration law).

41. *Padilla*, 130 S. Ct at 1483 ("When the law is not succinct and straightforward . . . a criminal defense attorney need to no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."). Indeed, the example of crimes of moral turpitude definition was specifically raised by

the requirement that the defense lawyer research the consequences and, to the extent possible, determine their applicability to the client, would obviously still fall far short of this standard.

Under *Padilla*, the duty of the criminal defense lawyer is broad. She must research all severe collateral consequences that would automatically apply to the defendant as a result of a potential plea. These collateral consequences are not limited to deportation or even immigration issues, but to any consequence that is punitive and critical to the client and whose application is nondiscretionary. Where the applicability of the collateral consequence is obvious from the research, the lawyer must specifically advise the client on how the consequence will apply. Where the applicability is not clear, the lawyer must explain the consequence to the client, and, noting the lack of clarity regarding its applicability in a particular case, warn the client about the potential for the consequence to apply.

II. THE TRANSFORMATIVE POWER OF *PADILLA*

The logical extension of the *Padilla* analysis to other collateral consequences unnerves many in the defense community, to whom the idea of identifying all collateral consequences alone, no less determining their applicability in every client's case, sounds daunting. This concern is understandable given the state of the law and defense practice pre-*Padilla*. Although practice standards had long declared that lawyers should advise their clients of the applicability of collateral consequences,[42] *Padilla* came as a shock to the defense community. Leading commentators in the area of collateral consequences called the decision surprising, even for those who had been following the case closely.[43] Why? In many jurisdictions prior to *Padilla*, misadvice

Justice Alito as an example of an instance in which the immigration consequence might not be clear. *Id.* at 1489. The Majority responded by noting that many of Justice Alito's examples were times when a more general warning would prove sufficient. *Id.* at 1483.

42. *See, e.g.*, ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.2(f) (3d ed. 1999) ("To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."); *see also* Brief of the National Association of Criminal Defense Lawyers, et. al. as Amici Curiae Supporting Petitioner, at *9–22, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 1567356 at *9–22 (discussing obligations under professional and ethical standards to research and warn clients regarding possible immigration consequences of a conviction).

43. *See, e.g.*, Margaret Colgate Love & Gabriel Chin, Padilla v. Kentucky*: The Right to Counsel and the Collateral Consequences of Conviction*, 34 CHAMPION 18, 19 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1591264.

was viewed as ineffective assistance, while failing to advise was viewed as acceptable.[44] The culture of much of the defense community was to affirmatively avoid providing advice on immigration consequences, and indeed collateral consequences generally. Advising incorrectly could get a defense attorney in trouble, but saying nothing would not; so why try to advise?[45] Moreover, most defense lawyers are constrained by significant limitations on the amount of time they can devote to a particular case. Public defenders are required to carry a certain caseload, and court-appointed counsel and even attorneys retained by most non-indigent clients are compensated for only a limited amount of work. In the circumstance of limited resources, one has to prioritize. Between the risk that erroneous advice would cause trouble and the perceived secondary importance of collateral consequences, research regarding the applicability of collateral consequences was kicked off the "to do" list, despite their increasing number and impact on clients. The system actively dissuaded defense lawyers from investigating the applicability of collateral consequences to their clients, and the norm for most defense lawyers became not to do so.

Very few people recognized the dramatic shift that this decision to ignore collateral consequences signified. The limitation on the scope of representation that the collateral consequence doctrine created was fundamentally inconsistent with the role of the defense lawyer. A fundamental principle of lawyering is that the client should be the lawyer's focus and sole concern.[46] In no specialty is this more of a tradition than in criminal defense. As Henry Lord Brougham stated in his defense of Queen Caroline, "an advocate, in the discharge of his duty, knows but one person in all the world and that person in his

44. *See supra* notes 7–9 and accompanying text.

45. *See* Roberts, *supra* note 7, at 140 ("Judicial decisions that incorporate the collateral-consequences rule and the affirmative-misadvice exception deliver the following message to lawyers and judges: it is better to say nothing than take the risk of saying something wrong. . . .").

46. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/comment_on_rule_1_3.html.

client."[47] The collateral consequences doctrine chipped away at this first principle. By making silence the safest course of action, it created a *de facto* limit on the scope of representation provided to criminal defendants, which then focused exclusively on the potential sentence in the criminal case.[48]

Against this backdrop, the importance of the rationale underlying *Padilla* and the power of the decision to bring about transformational change is clear. *Padilla* is, above all else, a prudential decision.[49] It tears away the importance previously accorded the formalistic distinction between collateral consequences and direct consequences in favor of markedly practical considerations: the level of harm posed to the client, the unavoidability of the harm, and the likelihood of application in a particular case.[50] The Court recognized that there are some consequences of a conviction that may be more important to the client than the criminal sanction and, giving credence to the client in this regard, required that the attorney research those consequences and explain them. By prioritizing the importance to and impact on the client above the formal divide between the criminal case and its collateral consequences, *Padilla* can and should motivate a return to first principles and a shift toward client-centered defense.

But practically, what does the implementation of *Padilla* mean? Many fear that it will drown defense lawyers in obscure code and administrative law research as they try to identify applicable collateral consequences. This interpretation underestimates *Padilla*'s pragmatism and overlooks the emphasis that *Padilla* places on the importance of the consequence to a defendant. *Padilla* is first and foremost a mandate to get to know one's client. The only way to determine which collateral consequences might apply and which might be important to the client is to ask the client. After *Padilla*, it is

47. Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 771 (2006) (citing 2 Trial of Queen Caroline 3 (1821)).

48. In so doing, the collateral consequences doctrine arguably also exacerbated the disparity between the representation received by the poor and the representation received by the wealthy. A small subset of criminal defendants, who recognized for themselves the importance of collateral consequences and who could afford to pay, could demand and receive comprehensive representation. For example, a stock broker charged with insider trading who was concerned about his license might ask for and receive the information. But for most criminal defendants who did not know to ask the question and/or could not afford to pay for the answers, representation was limited to that which had the potential to impact the criminal sanction.

49. Smyth, *supra* note 13, at 806–09.

50. *Id.*

no longer sufficient to limit one's knowledge to where the defendant was at the time of the alleged offense. The defense lawyer must know where and with whom the defendant lives, where the defendant works, and the defendant's goals. Only by knowing this information can a defense lawyer know whether the criminal case may implicate limitations on housing, child custody, licenses, or loans. In this way, the starting point that *Padilla* requires is not obscure research. Rather, a defense lawyer should begin by having a conversation with the client that goes beyond the plea that he or she is willing to accept. Ideally, having information specific to the client's case and needs would lead in turn to very focused research.

III. *PADILLA* AND HURDLES TO FULL IMPLEMENTATION

There is much skepticism, even from within the defense community, about *Padilla's* ability to bring about transformative change. Some have noted that, despite its pragmatic analysis, *Padilla* may lack pragmatic effect. Some believe that assessing even the most significant consequences of every client's potential conviction is simply impossible, particularly for public defenders and court-appointed counsel. Indeed, some believe that defense lawyers are unable to give full meaning to *Padilla* with regard to the severe collateral consequences of a conviction, including but not limited to the impact on immigration status.

A. Duty Without Prejudice: What is a Right Without a Remedy?

In his article *Why* Padilla *Doesn't Matter (Much)*, Professor Darryl Brown asserts that *Padilla's* implementation will be limited because the decision does not require defense attorneys to act on the information they gather, and a claim of ineffective assistance does not provide an effective mechanism for ensuring compliance.[51] While I agree with Professor Brown that *Padilla* will not guarantee better results for clients, I believe he underestimates both the magnitude of the shift that *Padilla* demands and the power of a statement by the Supreme Court that a particular practice is constitutionally required.

Raising claims of ineffective assistance of counsel under *Strickland v. Washington*[52] is a fruitless means of compelling compliance with

51. Darryl K. Brown, *Why* Padilla *Doesn't Matter (Much)*, 59 UCLA L. REV. (forthcoming 2011) (manuscript at 12–15), *available at* http://ssrn.com/abstract=1792529.

52. 466 U.S. 668 (1984).

professional norms.[53] Requiring a showing of prejudice means that most attorney errors will not be redressed. Moreover, the purpose of *Strickland* is not to provide a remedy that compels compliance with practice norms, but rather only to redress those specific cases where such errors raise sufficient doubt about the fairness of the outcome.[54] This limitation does not mean, however, that the Court's declarations regarding practices that do not meet constitutional standards of effective assistance have no utility. The inability to enforce a duty through a particular means is hardly a reason not to articulate the duty in the first place. And judicial decisions, particularly those of the United States Supreme Court, can send a powerful message to the legal community regarding expectations. Few lawyers would choose to ignore a court-pronounced duty, even if the potential for reversal or even acknowledgment of the error, is low. Indeed, the furor over *Padilla* is itself evidence of this effect. Defense lawyers, public and private, are concerned about compliance. They are worried about trying to meet the articulated standard, even though the circumstances under which failing to meet the standard would cause reversal have not yet been settled.

B. Padilla and the Indigent Defense Crisis

Professor Brown further charges that the implementation of *Padilla* is dependent upon resources and that *Padilla* is, in essence, an unfunded mandate that the indigent defense community cannot afford.[55] While I agree with Professor Brown regarding the relevance of the indigent defense crisis to the implementation of *Padilla*, I do not agree with his conclusion. To the contrary, I believe that *Padilla* has great potential to facilitate considerable improvement in the area of indigent defense.

53. *See generally* William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 120–21 (1995) (detailing the limited review available under habeas).

54. Stephen F. Smith, *Right to Effective Assistance of Counsel: Taking* Strickland *Claims Seriously*, 93 MARQ. L. REV. 515, 519 (2009) ("[T]he constitutional ideal of effective representation does not seek to improve the quality of representation bar members provide . . . . The Constitution is concerned about the level of competence of defense attorneys only to the extent attorney performance threatens the ability of the judicial system to reach accurate and reliable results in criminal cases.") (citation omitted).

55. Brown, *supra* note 51, at 12.

Approximately 80% of criminal defendants receive appointed counsel at state expense.[56] Accordingly, the ability of indigent defense systems to implement *Padilla* will be critical to the decision's long-term impact. But the indigent defense systems of the United States are in crisis. A recent study by the National Right to Counsel Committee summarized the situation: "Throughout the United States, indigent defense systems are struggling . . . . [M]any are truly failing."[57] The Report attributes many of these problems to inadequate funding, noting that "inadequate financial support continues to be the single greatest obstacle to delivering 'competent' and 'diligent' defense representation, as required by the rules of the legal profession, and 'effective assistance,' as required by the Sixth Amendment."[58]

Acknowledging the crisis, however, is not an excuse for failing to implement *Padilla* any more than the low likelihood of reversal is an excuse for failing to establish the duty. Moreover, it is an error to accept that defenders have no ability to remediate this crisis.[59] Defenders have methodologies for seeking the resources needed to enforce *Padilla*, and the ideological shift authorized by the decision away from limited representation to client-centered representation should not only further compel them to do so, but also improve their chances of success.

1. Challenging Public Defender Caseloads

The most obvious result of the underfunding of public defense is the "astonishingly large caseloads" that public defense attorneys car-

56. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf. This percentage has likely actually increased within the past few years as a result of the global financial crisis. In 2000, when the cited study was published, the percentage of the population living below the poverty line was 11.3%; the percentage living below the poverty line has since risen to 15.1%. *See* Don Lee, *Record 46.2 Million Americans Live in poverty, Census Bureau Says*, L.A TIMES BLOG (Sept. 13, 2011 7:43 AM), http://latimesblogs.latimes.com/nationnow/2011/09/record-462-million-americans-in-poverty-census-bureau-says.html.

57. NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 2 (2009), *available at* http://www.constitutionproject.org/manage/file/139.pdf.

58. *Id.* at 6–7.

59. *Id.* at 7 ("[D]efense lawyers are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession's rules . . . . Yes, the clients have lawyers, but lawyers with crushing caseloads who, through no fault of their own, provide second-rate legal services, simply because it is not humanly possible for them to do otherwise.").

ried.[60] For example, in 2008 alone, public defenders in Miami received approximately five hundred new felony cases and 2225 new misdemeanor cases.[61] Other jurisdictions report similarly high caseloads.[62] Assuming a defender works fifty weeks per year, five days per week, eight hours per day, that individual defender can devote about two thousand hours per year to her caseload.[63] To prevent a backlog and close the same number of cases she received, that public defender in Miami must close a felony every four hours or a misdemeanor every fifty-four minutes.

Viewed in this light, the impact of the indigent defense crisis on the implementation of *Padilla* is obvious. Four hours, and certainly fifty-four minutes, does not provide the defense lawyer enough time to meet with the client, determine what consequences might be applicable in the case, then research those collateral consequences, investigate the underlying allegations, research the applicable law, draft relevant motions, attend preliminary court hearings, confer with the prosecutor, and make a plea recommendation.[64] And this does not even contemplate the possibility that a client would prefer to proceed to trial.

60. *Id.*; *see also* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031, 1053 (2006); Steven N. Yermish, *Ethical Issues in Indigent Defense: The Continuing Crisis of Excessive Caseloads*, 33 CHAMPION 22, 22–23 (2009) ("The ultimate impact of this underfunding crisis is that public defenders are saddled with an excessive and unmanageable caseload and lack the necessary resources to properly represent their clients.").

61. Eric Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 8, 2008, at A1.

62. *See, e.g.*, Backus & Marcus, *supra* note 60, at 1053–59 (citing examples of high caseloads across the country); Joy Powell, *Minnesota's Public Defenders Buried By Caseloads*, MINNEAPOLIS STARTRIBUNE, March 30, 2009, http://www.startribune.com /local/south/42060622.html (reporting a mixed felony/misdemeanor caseload of 800 per attorney); ROBERT BORUCHOWITZ, MALIA BRINK & MAUREEN DIMINO, THE NAT'L. ASS'N. OF CRIMINAL DEF. LAWYERS MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 21 (2009) (reporting misdemeanor caseloads of over 2000 per attorney per year in Chicago, Utah, and New Orleans).

63. In reality, the number of hours available is significantly less. While this estimation accounts for federal holidays, it does not allow for any vacation time, nor does it permit any time to be used for training or administrative responsibilities. Indeed, the billable hours requirements at major law firms are generally less than 2000 per year. *See* National Association for Law Placement, *How Much Do Associates Work? Not All Firms Require 2,000 Billable Hours*, NALP BULLETIN (April 2008), *available at* http://www.nalp.org/2008aprbillablehours (showing average billable hours requirement at 1887 hours per year).

64. *See* BORUCHOWITZ, BRINK & DIMINO, *supra* note 62, at 22.

But far from justifying the failure to comply with *Padilla's* mandate, these facts demand that public defenders reduce their caseloads in order to permit compliance. Ethical standards require defense attorneys, public defenders or otherwise, to take steps to ensure that they are not so overburdened as to inhibit their ability to represent their clients effectively.[65] Under *Padilla*, the defense lawyer's minimum obligations now include advising the client on severe collateral consequences that will result directly from his or her conviction. If this requirement cannot be met under current caseloads, the ethical rules require a defender or defender office to file a motion to cease new assignments or, if necessary, to withdraw from pending cases.[66]

Public defenders successfully raised claims for caseload reduction even before *Padilla*.[67] For example, in Mohave County, Arizona, the public defender requested withdrawal from almost one hundred cas-

65. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006) (holding that public defenders have a duty to seek a reduction in caseload whenever that caseload interferes with their ability to effectively represent their clients); Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 920 (2005) ("In order to allow zealous investigation and research, defense counsel is forbidden to carry a workload that interferes with th[e] minimum standard of competence, or one that might lead to the breach of other professional obligations.") (citations omitted).

66. The American Bar Association issued an ethics opinion that specifically addresses the obligations of a public defender to address a workload that inhibits her ability to effectively represent her clients. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006), at 4. The Opinion states, "If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation." *Id.* (citing MODEL RULES OF PROF'L CONDUCT R. 1.16(a) (1983)). The Opinion directs the public defender to, upon determining that her workload is excessive, request not to be assigned to any new cases. *Id.* at 5. If curtailing the assignment of new cases is insufficient to correct the problem, the public defender must request to withdraw from a sufficient number of cases to permit effective representation in the remaining cases. *Id.* at 4–5. Similarly, if a chief public defender determines that the entire office is overburdened, the chief public defender must take steps to reduce the caseloads of subordinates, including asking that no new cases be assigned to the office and, if necessary, that the office be permitted to withdraw from a sufficient number of cases to permit effective representation in the remainder. *See id.* at 7 ("[T]he supervisor must monitor the workloads of subordinate lawyers to ensure that the workload of each lawyer is appropriate . . . . If any subordinate lawyer's workload is found to be excessive, the supervisor should take whatever additional steps are necessary to ensure that the subordinate lawyer is able to meet her ethical obligations in regard to the representation of her clients.").

67. For a comprehensive review of caseload challenges based on the ABA Ethics Opinion, see Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, AMERICAN BAR ASSOCIATION (forthcoming 2011).

es.[68] After a hearing at which the court was presented with caseload information and heard testimony from ethics and criminal defense experts, the court granted the motion to withdraw, stating:

> The Court has to decide whether the members of the Public Defender's Office can discharge their professional and ethical responsibilities if they are not allowed to withdraw in these cases and whether the defendants represented by those attorneys will be denied effective representation of counsel if attorneys are not allowed to withdraw . . . . The evidence presented at the hearing leaves the court with no doubt whatsoever that the attorneys in the Public Defender's Office cannot continue representing the defendants in these cases in light of their already existing caseloads.[69]

Unfortunately, despite the obvious applicability of this duty, many public defenders have proven reluctant to bring motions to reduce their caseloads.[70] While it may be naïve to think that this new duty would motivate public defenders to take this step when so many other duties have not had that effect, the revived focus on the client in *Padilla*, even more than the additional duty it creates, provides incredible support for taking this step.

One rationale for the failure to seek caseload reductions is that these motions can result in a protracted battle that further takes resources away from clients. It is true that caseload challenges have at times proved onerous. For example, in Miami the public defender began an initiative in 2008 to reduce caseloads by curtailing appointments in noncapital felony cases.[71] This effort is still ongoing.[72] The

68. Malia Brink, *Indigent Defense*, 32 CHAMPION 43, 43 (2008).

69. Court Order, Arizona v. Lopez, No. CR-2007-1544, at 11–12 (Dec. 17, 2007) (order granting motion to withdraw).

70. Eckholm, *supra* note 61, at A1 ("In my opinion, there should be hundreds of [caseload] motions or lawsuits.") (quoting Norman Lefstein, a renowned expert in ethics and indigent defense).

71. After a two day evidentiary hearing during which the State Attorney was permitted to appear and offer evidence in opposition of the public defender's motion, the trial court granted the request in part. *See generally* Order Granting in Part and Denying in Part Public Defender's Motion to Appoint Other Counsel to Unappointed Noncapital Felony Cases (Fla. Cir. Ct. 11th Cir. Sept. 3, 2008), *available at* http://www.pdmiami.com/Order_on_motion_to_appoint_other_counsel.pdf [hereinafter Unassigned Felony Cases Order] (order granting in part and denying in part public defender's motion to appoint other counsel).

> This Court concludes that the testimonial, documentary, and opinion evidence shows that PD-11's caseloads are excessive by any reasonable standard. As a result, its attorneys are able to provide, at best, minimally competent representation in their assigned cases. Further, it is clear that future appointments to noncapital felony cases will create a conflict of interest in the cases presently handled by PD-11.

fact that caseload challenges might be onerous or protracted does not alleviate the obligation of an overburdened public defender to pursue one. And it is noteworthy that caseload reduction cases have proven difficult to litigate in part because they are not raised as a matter of course. Instead of addressing a minor caseload problem when it arises, public defender offices frequently wait until the problem reaches crisis level. As a result, the remedy they must seek to correct the problem likely is extreme and may be difficult for a court to contemplate administering.

The Miami caseload challenge demonstrates perfectly this problem. By the time the challenge was brought, caseloads were so extreme that the remedy needed to correct the problem was not merely a slowing of the rate of new case assignments or withdrawal from a finite number of cases, but a complete bar on appointments of all felonies, save for death penalty cases. Such a remedy, if granted, poses incredible administrative challenges for the court. Are the conflict offices or court appointed counsel able to absorb a massive influx of new appointments? If not, will the court be forced to bar prosecutions from proceeding due to the absence of counsel?[73] If the focus on the client in *Padilla* and the concurrent change in the focus of the defense could motivate pursuing these challenges more often to address smaller problems, I contend the challenges would be more successful.

Id. at 6. The court then ordered that the public defender be permitted to decline representation in low level felony cases, which account for approximately 60% of felony filings, but required the office to continue to accept appointments to major felony cases. *Id.* at 4–6. Since that time, however, the case has been tied up in appeals and the order permitting the public defender to decline appointments has been stayed pending resolution of the matter by the Florida Supreme Court. The State Attorney appealed the order, which was stayed pending appeal, and the appeal proceeded to the State Supreme Court, where it was dismissed for lack of jurisdiction. *See* State v. Pub. Defender, Eleventh Judicial Circuit, 996 So. 2d 213 (Fla. 2008). The intermediate appellate court eventually reviewed the case and concluded that the trial court had erred in authorizing an office-wide withdrawal from cases. *See* State v. Pub. Defender, 12 So. 3d 798, 802–03 (Fla. Dist. Ct. App. 3d Cir. 2009). The court held that motions to withdraw must be individualized. *See id.* The Florida Supreme Court granted review, and the case is still pending. Pleadings, including the appellate documents filed in the Florida Supreme Court, are available on the Public Defender's website, at http://www.pdmiami.com/ExcessiveWorkload/Excessive_Workload_Pleadings.htm.

72. *See* Unassigned Felony Cases Order, *supra* note 71.

73. *See* Lavallee v. Justices in Hampden Superior Court, 812 N.E.2d 895 (Mass. 2004) (holding that where no counsel was available to represent an indigent defendant, the individual would have to be released and, if no counsel could be found within a reasonable period, the charges against the individual would have to be dismissed).

2. Padilla's *Relevance to Caseload Challenges*

One might assert that *Padilla*'s holding, while undoubtedly placing additional duties on public defenders, does nothing to impact the formation or outcome of caseload challenges. I would disagree. The indigent defense crisis is reaching a critical phase. The economic crisis has led to further cuts and increased caseloads.[74] Particularly at this moment, *Padilla*, with its remarkable focus on the needs, interests and priorities of the clients, should help to compel defenders to do what they perhaps should have done long ago: challenge their excessive caseloads.

If *Padilla* could motivate more consistent action in this regard, the outcome of the cases brought would likely improve. Caseload challenges suffer from a failure of uniform action. One defender challenges caseloads of five hundred felonies per attorney, while others do not. How is a court to conclude that a particular caseload is excessive, with the cost and administrative burden that it entails for the jurisdiction, when in nearby jurisdictions, the public defenders willingly accede to the same caseload?

Moreover, *Padilla* may help to clarify the appropriate legal standard in caseload challenges. The essential elements of caseload challenges are often debated. Defenders correctly contend that the sole question is whether they are capable of effectively representing their clients, while often the representative of the jurisdiction contends that the court must balance this concern against other factors, such as what alternatives for representation exist or whether the defender is somehow in part responsible for the current situation.[75] In this debate, the power of a pronouncement from the Supreme Court focus-

74. *See, e.g.*, Dave Collins, *Connecticut Public Defenders Worry About Budget Cuts*, STAMFORD ADVOCATE, July 20, 2011, http://www.stamfordadvocate.com/news/article/Conn-public-defenders-worry-about-budget-cuts-1475263.php; Eckholm, *supra* note 61; Nicklaus Lovelady, *County Wants to Cut Indigent Defense Costs*, THE HOUSTON CHRONICLE, July 12, 2011, http://www.chron.com/news/article/County-wants-to-cut-indigent-defense-costs-2080732.php; Allison Retka, *Public Defender in Missouri Tells Court of its Sub-Par Lawyers*, MISSOURI LAWYERS MEDIA, June 16, 2011, *available at* http://findarticles.com/p/articles/mi_7992/is_20110616/ai_n57713123.

75. *See, e.g.*, Unassigned Felony Cases Order, *supra* note 72 (noting that the public defenders' caseloads were excessive by any standards, but limiting the remedy granted due to public safety and administrative concerns), *available at* http://www.pdmiami.com/Order_on_motion_to_appoint_other_counsel.pdf*;* Arizona v. Lopez, No. CR-2007-1544, at 11–12 (noting that the state attorney requested that the court consider whether the public defender was responsible for the caseload problem by failing to hire an additional funded full-time attorney position).

ing on the duties of the defense lawyer to the client, with its implicit acknowledgment of the duty of the courts to ensure compliance with minimal norms, should not be underestimated. Where practice standards and ethical rules are persuasive, the Supreme Court is authoritative. A constitutional right to advice cannot be disregarded as setting a merely aspirational standard not truly attainable given the realities of the criminal court docket.[76] Raising *Padilla* in the context of a caseload reduction motion should help to avoid the erroneous consideration of administrative concerns in caseload challenge decisions to the detriment of the public defenders raising them.[77]

Moreover, *Padilla* articulates a black letter requirement for defense lawyers, which prevents any argument over whether an attorney must act in a particular case. Every attorney in every criminal case is required to investigate the applicability of severe collateral consequences to their clients. A public defender or office[78] that cannot ful-

76. It is noteworthy that in *Padilla*, twenty-seven State Attorneys General filed an amicus brief claiming that the Court should not require defense lawyers to investigate the impact of collateral consequences because to do so would increase the costs of indigent defense. *See* Brief for the State of Louisiana et. al. as Amici Curiae Supporting Respondent at 6 Padilla v. Kentucky, 130 S. Ct. 1472 (2010) (No. 08-651) ("The [collateral consequences] rule thus protects the state's interest in an efficient justice system by preventing it from having to pay for counsel to advise defendants on a variety of specialized collateral matters outside the sentencing court's control. . . ."). The majority opinion tacitly rejected this argument.

77. Arizona v. Lopez, No. CR-2007-1544, at 11 ("The financial implications and logistics of identifying, appointing and paying attorneys outside the Public Defender's Office to handle any case in which defendants are left without counsel will have to be addressed by the County and will not be considered by the Court in its analysis of the legal and factual issues presented in these cases.").

78. Public defenders are not the only providers of indigent defense. A large number of individuals who are entitled to defense representation at public expenses are represented by court-appointed lawyers. *See* Thomas H. Cohen, *Who's Better at Defending Criminals?: Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, at 3 n.1 (2011) ("While there are no nationwide statistics on the prevalence of these three forms of indigent defense, a survey of indigent defense systems in the nation's 100 most populous counties conducted in 2000 showed public defenders handling 82%, assigned counsel 15%, and contract attorneys 3% of the 4.2 million cases disposed of in these counties.") (citation omitted), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876474. These lawyers are not part of a large, institutional defender office, and thus the implementation of *Padilla* poses different challenges to these indigent defenders. Although court-appointed counsel exert greater control over their caseloads than public defenders, they often lack access to the experts and training materials cultivated in institutional defender settings. While I cannot detail the approach in this article, I would suggest that, much like public defenders and caseload challenges, court-appointed counsel should utilize *Padilla* to pursue the resources necessary to aid in its full implementation, including, on an individual case basis, seeking the right to consult with experts regarding relevant collateral consequences. *See* N.Y.C. BAR ASS'N, PADILLA V.

fill this requirement because of an overwhelming caseload is entitled to redress.

CONCLUSION

By cutting through the collateral consequence/criminal sentence distinction, *Padilla* authorizes defense lawyers to focus on what is important to the client, rather than subject lawyers to formalistic limitations on their role. The duty articulated in *Padilla* is, at its core, a mandate to get to know one's client and focus the defense not solely on the criminal sentence but on those consequences of a conviction, sentence included, that are the most severe and critical to the client. In this way, *Padilla* has enormous power to bring about transformative changes in how the defense bar practices. But *Padilla* does not impose all of the change it should bring about. It is a tool, and like all tools, it is only as useful as its user. The decision resides with the defense lawyers as to whether they choose to maximize *Padilla*.

The defense bar's response to *Padilla* thus far shows a promising recognition of the case's import. With the aid of expert organizations, defenders have taken significant steps to ensure compliance with the mandate that clients be advised of immigration consequences, including producing trainings on immigration consequences,[79] cultivating in-house expertise to assist defender organizations,[80] and developing primers to assist defense lawyers in determining the application of a

KENTUCKY, THE NEW YORK CITY CRIMINAL COURT SYSTEM, ONE YEAR LATER 8 (2011) [hereinafter N.Y.C. BAR ASS'N] *available at* http://www2.nycbar.org/pdf/report/uploads/PadillaCrimCtsCJOReportFINAL6.15.11.pdf ("For defense counsel who do not have the benefit of in-house immigration expertise and resources . . . expert fees for immigration experts may be necessary."). Additionally, on a systemic basis, counsel should seek a system-wide training and consulting system on collateral consequences, like the Immigration Impact Unit, which was established within the Massachusetts Committee on Public Counsel Services and provides training and case conconsultation on immigration issues in criminal cases not just for public defenders, but also for the court-appointed counsel (called bar advocates). *See Immigration Impact Unit*, COMM. FOR PUB. COUNSEL, http://www.publiccounsel.net/practice_areas/immigration/immigration_index.html.

79. *See*, *e.g.*, NACDL *PADILLA* IN PRACTICE TRAINING (SEPT. 7, 2010) http://www.ustream.tv/recorded/9417685#utm_campaign=synclickback&source=http://ctpublicdefendertraining.com/webinars.htm&medium=9417685.

80. *See* N.Y.C. BAR ASS'N, *supra* note 78, at 4 ("Several institutional defender offices have in-house immigration experts who provide direct advice and support to defense counsel on immigration issues . . . . Several of these offices report hiring additional staff after *Padilla* in order to meet the increased demand for immigration advice.").

consequence in a particular case.[81] Further steps need to be taken to extend *Padilla* to other collateral consequences.[82] Steps suggested by knowledgeable academics and commentators include the development of charts and databases of collateral consequences, including summaries of their applicability, as well as trainings and checklists.[83] But these steps, while positive, go to the direct implementation of *Padilla*, not necessarily the broader change in the focus of the defense function.

As the defense bar proceeds to implement *Padilla* and designs tools to help with this effort, the starting place should be the encouragement of substantive dialogue between the defense lawyer and her client to determine not just whether a collateral consequence applies, but which of the applicable consequences are most important to the individual impacted.[84] And perhaps most importantly, defense lawyers, particularly public defense lawyers, must take steps to ensure that they can comply with *Padilla*. They must reduce their caseloads and ensure that they can take the time to focus, not just on the criminal penalty, but on the consequences of conviction that are the most severe for and important to their clients. *Padilla* provides critical motivation and support for taking this step.

81. *See*, *e.g.*, Quick Reference Chart for Determining Immigration Consequences of Common New York Offenses, IMMIGRANT DEFENSE PROJECT, http://www.immigrantdefenseproject.org/docs/06_QuickReferenceChartforNewYorkStateOffenses.pdf.

82. *See* Chin, *supra* note 20, at 684–90.

83. *See id.*; Smyth, *supra* note 13, at 834–35.

84. One of the suggestions offered by Professor Chin is the creation a checklist of questions to be posed to a client, including:

- Whether the client is a citizen of the United States;
- How the client is employed;
- Whether the client owns firearms;
- Whether the client receives any public benefits;
- Whether the client holds any licenses, permits, or government contracts; and
- Whether the client has any questions based on the categorical advisement.

Chin, *supra* note 20, at 690. To achieve the goals I have suggested, a tool like this should be evaluated not only for its efficacy at getting the needed information to determine the applicability of a consequence, but also for its ability to ascertain the importance of the consequence to the client, both presently and in the future. To this end, questions should be open-ended to encourage a narrative and not simply a yes or no answer. For example, a lawyer should ask what a client's immigration status is rather than whether the client is a citizen of the United States. The lawyer should also address both future prospects and current situations, e.g., not just "what do you do for a living," but also "what do you want to do for a living?" *See* Smyth, *supra* note 13, at 834 ("Attorneys must build relationships with their clients to discover clients' risk-related statuses, priorities, and goals and empower them to make informed decisions.").

Whether *Padilla* will extend this far is a question that only the defense bar can answer. If defense lawyers wait for an external force to hand them resources or force them to focus on the concerns most important to the client, *Padilla* will likely be relegated to vague warnings about consequences and their indeterminate nature. If defense lawyers pick up the mantle of *Padilla* and use its mandate to fight for more time with clients, reduced caseloads, and better resources, *Padilla* could transform the way persons accused of crimes are treated by the criminal justice system. *Padilla* thus stands as both an incredible challenge to and opportunity for the defense bar to decide its own future.