

February 2016

You are the Last Lawyer They Will Ever See Before Exile: *Padilla v. Kentucky* and One Indigent Defender Office's Account of Creating a Systematic Approach to Providing Immigration Advice in Times of Tight Budgets and High Caseloads

Carlos J. Martinez

George C. Palaidis

Sarah Wood Borak

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [Criminal Law Commons](#), [Immigration Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Carlos J. Martinez, George C. Palaidis, and Sarah Wood Borak, *You are the Last Lawyer They Will Ever See Before Exile: Padilla v. Kentucky and One Indigent Defender Office's Account of Creating a Systematic Approach to Providing Immigration Advice in Times of Tight Budgets and High Caseloads*, 39 Fordham Urb. L.J. 121 (2012).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol39/iss1/7>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

**YOU ARE THE LAST LAWYER THEY WILL
EVER SEE BEFORE EXILE:
PADILLA V. KENTUCKY AND ONE
INDIGENT DEFENDER OFFICE’S ACCOUNT
OF CREATING A SYSTEMATIC APPROACH
TO PROVIDING IMMIGRATION ADVICE IN
TIMES OF TIGHT BUDGETS AND HIGH
CASELOADS**

*Carlos J. Martinez**
*George C. Palaidis and Sarah Wood Borak***

Introduction121
I. The Factual Background, by the Numbers123
 A. Immigration Enforcement.....123
 B. The Public Defender’s Office126
 C. Immigration Advice and PD-11129
II. Building a Better System Without New Funding131
 A. Information Gathering Component.....133
 B. Advice Component135
 C. Staff Development Component.....137
III. The Future141
Conclusion.....144

INTRODUCTION

The recent decision in *Padilla v. Kentucky*¹ reaffirmed what criminal defense lawyers have known for years: “It is quintessentially the

* Public Defender, Eleventh Judicial Circuit of Florida, 2009–present. B.A., 1985, Florida International University; J.D., 1990, University of Miami School of Law. Mr. Martinez established a specialized unit to provide immigration reviews at his office. The authors thank John Morrison, appellate Assistant Public Defender (“APD”), for his extensive assistance editing this Article, and Diane Yanez, the Public Defender’s Executive Assistant, for her contributions in researching and editing for this Article.

** Mr. Palaidis serves the Public Defender for the Eleventh Judicial Circuit of Florida as an APD, 2007–present. J.D., 2007, St. Thomas University; B.S., 2005, Florida State University. Mr. Palaidis was the first APD assigned to Public Defender for the Eleventh Judicial Circuit of Florida’s specialized unit to provide immigration advice.

duty of counsel to provide her client with available advice about an issue like deportation”² This task is particularly daunting when faced with high caseloads and shrinking budgets. Public defenders must nevertheless find a way to ensure that every noncitizen client is properly advised under the standards of professionalism as reflected in *Padilla*.³

This Article shares the experience of one public defender’s office regarding the intermediate steps it took to create a systematic approach to advising clients on the immigration consequences of their pleas. In sharing our experience, we do not purport to set forth the standard for all criminal defense lawyers or even other indigent defense lawyers.⁴ As national immigration advocacy organizations have recognized in the wake of *Padilla*, “what works best for one office or program may not work best for another.”⁵ Our hope is that our experience can serve as a point of departure for other indigent defense offices in Florida and other states.

This Article expands on issues presented at the *Padilla* and the Future of the Defense Function conference, sponsored by the National Association of Criminal Defense Lawyers (“NACDL”) and the National Legal Aid and Defender Association (“NLADA”), and co-sponsored by the American Bar Association Criminal Justice Section Task Force on Comprehensive Representation. This Article provides an overview of how one Florida public defender’s office is attempting to meet its professional and ethical obligations as reflected in *Padilla*,

Mr. Palaidis played a key role in designing and implementing that unit. Ms. Wood Borak assisted him in this effort and currently serves as an APD, 2011–present, 2005–2006. J.D. *magna cum laude*, 2005, University of Miami School of Law; B.S., 1999, University of Michigan-Ann Arbor.

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

2. *Id.* at 1484 (citation omitted).

3. The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation “[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients’

Id. at 1482–83 (citation omitted).

4. See Phyllis E. Mann, *Boots on the Ground: The Ethical and Professional Battles of Public Defenders*, 75 MO. L. REV. 715, 715–26 (2010) (providing a description of indigent defense systems in the United States).

5. PETER L. MARKOWITZ, IMMIGRANT DEF. PROJECT & NEW YORK STATE DEFENDERS ASS’N, PROTOCOL FOR THE DEVELOPMENT OF AN IMMIGRATION SERVICE PLAN 2 (2009), http://www.immigrantdefenseproject.org/docs/2010/10_Public%20Defender%20Immigration%20Protocol.with%20appendice.pdf.

2011]

YOU ARE THE LAST LAWYER

123

and also addresses the *Padilla* implications in Florida, where, every year, tens of thousands plead guilty or no contest in misdemeanor cases without adequate counsel.

I. THE FACTUAL BACKGROUND, BY THE NUMBERS

A. Immigration Enforcement

The level of federal immigration enforcement activity has increased radically in the past three years. Today, federal immigration enforcement activity prioritizes the removal of noncitizens with criminal convictions. The United States Immigration and Customs Enforcement agency (“ICE”) boasts proudly that “[f]or two years running, ICE has removed more aliens than it did under the prior Administration.”⁶ Under the Obama Administration, ICE has removed more than one million noncitizens.⁷ Allegedly, ICE has a quota of 404,000 people to remove during this year alone.⁸ In the same vein, there are 300,000 open removal cases clogging immigration courts.⁹ Currently, 34,000 people are being held in immigration detention facilities at a cost of \$166 per person per day, for an approximate total of \$5.5 million per day.¹⁰ While removal is a civil sanction, the detention setting is that of a criminal proceeding.¹¹ The seemingly rapid-fire pace of removals and the significant detention population are likely due to the federal government’s Secure Communities program.

6. *Fact vs. Fiction*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/fact-fiction/> (last visited Aug. 31, 2011).

7. *ICE Total Removals*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals.pdf> (last visited Feb. 1, 2012).

8. See Michelle Fei, *More Double Punishment for Immigrants with Convictions*, NEW AMERICA MEDIA, Aug. 31, 2011, <http://newamericamedia.org/2011/08/more-double-punishment-for-immigrants-with-convictions.php>.

9. See, e.g., Editorial, *Common Sense on Immigration*, MIAMI HERALD, (Aug. 23, 2011), <http://www.miamiherald.com/2011/08/23/2371953/common-sense-on-immigration.html>.

10. NAT’L IMMIGRATION FORUM, *THE MATH OF IMMIGRATION DETENTION: RUN-AWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES* 1 (2011), <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>.

11. See DORA SHAPIRO, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS* 4 (2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (“[T]he facilities that ICE uses to detain aliens were originally built, and currently operate, as jails and prisons.”).

Secure Communities is a “biometric information sharing capability” that works in tandem with local jail facilities’ booking processes.¹² When a person is booked and fingerprinted into a state or county jail, the Secure Communities program operates to automatically and simultaneously check an arrestee’s fingerprints against the Federal Bureau of Investigation’s criminal history records as well as the Automated Biometric Identification System (“IDENT”), maintained by the Department of Homeland Security (“DHS”).¹³ If the fingerprints match fingerprints in these systems, a notification to ICE is automatically generated and ICE takes enforcement action as it deems appropriate.¹⁴ Immigrant advocacy groups and others have criticized the program for lacking transparency and casting too wide of a net over noncitizens, regardless of status, who have not been convicted criminally or have only been convicted of or arrested for nonviolent crimes,¹⁵ as well as naturalized citizens and even U.S. born citizens.¹⁶ Closer to home, the *Miami Herald* has reported that the federal government has deported at least three Cubans in the last five years.¹⁷ Secure Communities has been operational in Miami-Dade County since 2009 and is operational in all sixty-seven counties in Florida as of 2010.¹⁸

12. See Press Release, U.S. Immigration and Customs Enforcement, ICE and Florida Department of Law Enforcement Announce Statewide Activation of Secure Communities to Prioritize, Identify, and Remove Illegal Aliens (June 29, 2010) (on file with authors); see also U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, Activated Jurisdictions (2011), <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>.

13. See Press Release, U.S. Immigration and Customs Enforcement, *supra* note 12.

14. See *id.*

15. The Associated Press conducted a computer analysis using an ICE database obtained through a public records request of every detainee on the night of January 25, 2009. It found that 18,690 out of 32,000 had no criminal conviction. See Associated Press, *Immigrants Face Long Detention, Few Rights*, MSNBC (Mar. 15, 2009), http://www.msnbc.msn.com/id/29706177/ns/us_news-security/t/immigrants-face-long-detention-few-rights/.

16. See Alfonso Chardy, *Cases of Detained Citizens Emerge*, MIAMI HERALD, (June 19, 2011), available at <http://www.miamiherald.com/2011/06/17/2274562/cases-of-detained-citizens-emerge.html>.

17. See Alfonso Chardy, *U.S.: Some Non-Mariel Cubans Can Be Deported*, MIAMI HERALD, (June 29, 2011), available at <http://www.miamiherald.com/2011/06/28/2290259/us-some-non-mariel-cubans-can.html>.

18. See Alfonso Chardy, *Some Bail Agents Do Not Reimburse Bond Payments for Undocumented Immigrants Who Cannot Be Released*, MIAMI HERALD, (July 18, 2011), available at <http://www.miamiherald.com/2011/07/08/2319305/some-bail-agents-do-not-reimburse.html>.

Given all of the above, indigent defenders are hard-pressed to investigate the criminal case while noncitizen clients with ICE detainers remain in local custody for fear that bonding out will trigger a transfer to ICE custody. Once in immigration detention, over 46% of detained noncitizens are transferred two or more times with an average transfer distance of 370 miles, further straining the indigent criminal defender's ability to properly investigate and handle the criminal case.¹⁹

In addition to noncitizens, indigent defenders may also represent U.S. citizens who have ICE holds and are on the verge of being unlawfully detained by ICE. For example, in March 2011, immigration officials deported a four-year old girl to Guatemala even though she is a U.S. citizen.²⁰ In June 2011, immigration officials detained and questioned a U.S. citizen while he was riding his bike in Miami Beach despite the man's insistence that he was a citizen.²¹ The man contacted the *Miami Herald* to share his story after reading about other U.S. citizens who suffered a similar plight.²² Numerous citizens have been swept up and detained in connection with ICE workplace raids.²³

In contrast to criminal cases, in immigration matters, there is no right to government-appointed counsel even though the result can be worse than imprisonment.²⁴ As there is no right to government-appointed counsel at removal proceedings,²⁵ for the "overwhelming

19. See generally HUMAN RIGHTS WATCH, A COSTLY MOVE: FAR AND FREQUENT TRANSFERS IMPEDE HEARINGS FOR IMMIGRANT DETAINEES IN THE UNITED STATES (June 2011), <http://www.hrw.org/sites/default/files/reports/us0611webwcover.pdf>.

20. Sam Dolnick, *U.S. Returns a Young Girl, a Citizen, to Guatemala*, N.Y. TIMES, Mar. 23, 2011, at A23.

21. See Chardy, *Cases of Detained Citizens Emerge*, *supra* note 16.

22. *Id.*

23. See Emily Bazar, *Citizens Sue After Detention, Immigration Raids*, U.S.A. TODAY, (June 24, 2008), available at http://www.usatoday.com/news/nation/2008-06-24-Immigration-raids_N.htm.

24. *United States v. Parrino*, 212 F.2d 919, 924 (2d Cir. 1954) (Frank, J., dissenting) ("Deportation, while not literally constituting criminal punishment, may have far more dire effects on this defendant than his sentence of imprisonment for two years. For all practical purposes, the court sentenced him to serve (a) two years in jail and (b) the rest of his life in exile. For the Supreme Court has said that 'deportation is a drastic measure, at times the equivalent of banishment or exile' and 'is a penalty.' Mr. Justice Jackson has described it as 'a life sentence of banishment'. I cannot believe that no 'manifest injustice' exists merely because the sentence of banishment for life was not imposed directly by the judge.") (emphasis added) (citations omitted).

25. OFFICE OF IMMIGRATION LITIGATION, U.S. DEP'T OF JUSTICE, IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTION: *PADILLA V. KENTUCKY* 3 (2010) ("An alien in civil immigration proceedings is not afforded the same rights as a defendant in a criminal trial. The alien has a right to representation at no expense to the Gov-

majority” of individuals, “the last lawyer they will ever see before they get deported is the defense counsel who tries to help them in their criminal trial.”²⁶ While indigent defense work attracts lawyers with a wide range of skills and personality traits, the common denominator among all defenders is a deeply held belief in the constitutional right to force the government to prove beyond a reasonable doubt that the person on trial committed the charged offense. Defenders are united around the concept that the liberty of no person, whether rich or poor, should be taken away without fighting every step of the way within the boundaries of ethics and the law. That fight can rarely come to pass when a defendant is not represented by counsel and, by extension, uninformed. Naturally, defenders are disturbed at the thought of people representing themselves in criminal cases, and the same thinking resonates regarding noncitizen clients who are or will soon be facing removal. For low-income people who are already living on the margins of society—among them lawful permanent residents with no prior contacts with the criminal justice system—an overworked APD laboring within an assembly line system of justice is truly their last defense, not only in their criminal cases, but also to prevent their removal and exile.²⁷ As discussed below, thousands in Florida face exile without adequate representation.²⁸

B. The Public Defender’s Office

Florida has twenty judicial circuits serving 18,537,420 residents.²⁹ An elected public defender heads up each circuit’s office. The Public

ernment . . .”) (citing 8 U.S.C. § 1229A(B)(4); 8 C.F.R. §§ 1236.1(E), 1240.3-1240.10), available at http://www.justice.gov/civil/docs_forms/REVISED%20Padilla%20v.%20Kentucky%20Reference%20Guide_11-8-10.pdf.

26. Won Kidane, Padilla v. Kentucky: *A Professional Lesson from the Medical World*, WASH. STATE BAR ASSOC. BAR NEWS (Mar. 2011), <http://www.wsba.org/News-and-Events/Publications-Newsletters-Brochures/Bar-News/Bar-News-Mar-2011/Mar2011Padilla>.

27. See *Parrino*, 212 F.2d at 924 (Frank, J., dissenting).

28. See ALISA SMITH & SEAN MADDAN, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS 15 (2011). See generally ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS (2009), [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf).

29. See *Florida—Selected Characteristics of the Total and Native Populations in the United States*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=ACS&_submenuId=datasets_1&_lang=en&_ts= (follow “2009 American Community Survey 1-Year Estimates” hyperlink; then follow “Sub-

Defender for the Eleventh Judicial Circuit of Florida (“PD-11”) serves Miami-Dade County, Florida, an urban county with almost 2.5 million residents, of which 620,839 are not citizens.³⁰ Miami-Dade’s noncitizen residents comprise 25% of its population.³¹ In contrast, Florida’s noncitizen population would be 7.6%, if Miami-Dade were not counted in the equation.³² Therefore, immigration consequences reviews are necessary in significantly fewer cases in the other nineteen public defender offices.

PD-11, by far the busiest public defender’s office in Florida, handles approximately 100,000 cases each year.³³ PD-11 primarily uses a horizontal model of representation, which means that a client’s case tends to be handled by many different APDs as the case progresses to different stages.³⁴ Approximately 175 APDs are assigned to handle trial cases, with more experienced APDs assigned to more demanding cases.

For decades, indigent defense lawyers throughout the United States have been dealing with chronic underfunding while trying to

ject Tables” hyperlink; then follow “state” selection under the “Select a geographic type” hyperlink, then follow “County” selection under the “Select a geographic type” hyperlink, “Florida” selection under the “Select a state” hyperlink and click “Show Result” hyperlink; then follow the “S0501 Selected Characteristics of the Native and Foreign-born Populations” hyperlink).

30. See *Miami-Dade County, Florida—Selected Characteristics of the Native and Foreign Born Populations*, U.S. CENSUS BUREAU, [http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=ACS&_submenuId=datasets_1&_lang=en&_ts=\(follow+“2009+American+Community+Survey+1-Year+Estimates”+hyperlink;+then+follow+“Subject+Tables”+hyperlink;+then+follow+“County”+selection+under+the+“Select+a+geographic+type”+hyperlink,+“Florida”+selection+under+the+“Select+a+state”+hyperlink+and+“Miami-Dade”+selection+under+the+“Select+a+geographic+area+and+click+‘Show+Result’”+hyperlink;+then+follow+the+“S0501+Selected+Characteristics+of+the+Native+and+Foreign-born+Populations”+hyperlink\).](http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=ACS&_submenuId=datasets_1&_lang=en&_ts=(follow+“2009+American+Community+Survey+1-Year+Estimates”+hyperlink;+then+follow+“Subject+Tables”+hyperlink;+then+follow+“County”+selection+under+the+“Select+a+geographic+type”+hyperlink,+“Florida”+selection+under+the+“Select+a+state”+hyperlink+and+“Miami-Dade”+selection+under+the+“Select+a+geographic+area+and+click+‘Show+Result’”+hyperlink;+then+follow+the+“S0501+Selected+Characteristics+of+the+Native+and+Foreign-born+Populations”+hyperlink).)

31. See *supra* note 29 and accompanying text.

32. See *supra* note 29–30 and accompanying text.

33. Florida’s Public Defenders handled approximately 800,000 cases; 100,000 of those are in Miami-Dade County. See *Caseload Statistics*, FLA. PUB. DEFENDER ASS’N, INC., http://www.flpda.org/caseload_statistics.htm; MIAMI-DADE PUBLIC DEFENDER, www.pdmiami.com (last visited Nov. 1, 2011).

34. This situation is not ideal and is the result of budget inadequacies. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard 5-6.2 (3rd ed. 1992) (rejecting horizontal representation); ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1, 3 (Feb. 2002), <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf> (stating that “the same attorney continuously represents the client until completion of the case.”).

provide competent representation to millions of clients each year. The PD-11 is no exception.³⁵

During the last thirty years, indigent defense has been drowning in the flood of arrests caused by a massive infusion of federal dollars into local police departments and prosecutor offices to fight the war on drugs. Federal funding seldom has included indigent defense in the funding distribution. At the same time, many state legislatures have adopted minimum mandatory and enhanced sentences (e.g., three strikes, 10/20/life, habitual offender)³⁶ and prosecutors have expanded their use of untested methods (junk science)³⁷ to prove their cases. Those practices have resulted in enormous, unsustainable growth in jail and prison populations³⁸ and an ever-increasing amount of work required for competent indigent defense.

In June 2008, PD-11 filed motions to decline new noncapital felony case appointments due to ethical conflicts arising from its high case-loads.³⁹ After a contested hearing, the trial court agreed.⁴⁰ The trial court's decision was stayed pending the prosecution's appeal.⁴¹ The Third District Court of Appeal of Florida reversed the trial judge's order.⁴² The Florida Supreme Court accepted jurisdiction on the first case in May 2010.⁴³ PD-11 filed a motion to withdraw on one case, *State v. Bowers*, as prescribed by the Third District's opinion.⁴⁴ After

35. See generally Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104 (2009); NATIONAL RIGHT TO COUNSEL COMMITTEE, THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (Apr. 2009), <http://www.constitutionproject.org/pdf/139.pdf>.

36. See Fla. STAT. §§ 775.084, 775.087 (2010).

37. See PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 2-3 (1991).

38. See JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 2 (July 2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf ("By not fully investing in public defense systems, states and counties are frequently choosing incarceration over justice, leading to increased costs now and in the future. With many states struggling with overwhelming criminal justice populations and incarceration costs, the need to address the chronic crisis of public defense is as great as ever.").

39. See *id.*

40. *In Re: Reassignment and Consolidation of Public Defender Motions to Appoint Other Counsel in Unappointed Noncapital Felony Cases*, 15 FLA. L. WEEKLY SUPP. 1078a (2008).

41. *State v. Pub. Defender*, Eleventh Judicial Circuit, 996 So.2d 213 (Fla. 2008).

42. *State v. Pub. Defender*, Eleventh Judicial Circuit, 12 So. 3d 798, 805-06 (Fla. Dist. Ct. App. 2009), *review granted*, 34 So. 3d 2 (Fla. 2010).

43. *Pub. Defender, Eleventh Judicial Circuit v. State*, 34 So.3d 2 (Fla. 2010).

44. 12 So. 3d at 805-06.

several weeks of extensive discovery and two days of testimony, the trial court granted the motion to withdraw from that single case and the State appealed.⁴⁵ The appellate court reversed the trial judge's order⁴⁶ and certified the question to the Florida Supreme Court as one of great public importance. PD-11 sought review in the Florida Supreme Court and moved to consolidate the *Bowens* case with the first case.⁴⁷ The State subsequently filed and lost its motion to dismiss based on suggestion of mootness.⁴⁸ Both cases are pending before the Florida Supreme Court. To date, PD-11 has not received relief.

C. Immigration Advice and PD-11

In the midst of excessive caseloads, individual APDs did what they could to avail themselves of existing resources to analyze immigration consequences. Given the diverse population of Miami-Dade County, APDs were aware that a criminal case could significantly impact a client's immigration status, ultimately resulting in deportation, the risk of being detained when traveling, and/or a bar to naturalized citizenship.

The onus was on the individual APD to not only identify noncitizen clients, but also to seek out and obtain information on potential immigration consequences from an external source, typically Americans for Immigrant Justice ("AI Justice"), formerly known as the Florida Immigrant Advocacy Center ("FIAC"). A local immigration law expert who worked at AI Justice generously gave courtesy advice using an email account dedicated to that purpose. Initially, this advice was available only to APDs, but when she joined the faculty at the University of Miami School of Law, the service was expanded to all court-appointed attorneys.⁴⁹ A consultation worksheet—an outline of the information needed such as current charges, client's immigration status, and prior record—was distributed office-wide to all APDs.

Some subjects within immigration laws are "infamous for their byzantine complexity,"⁵⁰ and the duty to provide competent immigra-

45. *See id.*

46. *State v. Bowens*, 39 So. 3d 479, 482 (Fla. Dist. Ct. App. 2010), *appeal docketed*, No. SC10-1349 (Fla. July 12, 2010).

47. *Id.*

48. *Id.*

49. *Immigration Clinic, Univ. of Miami Sch. of Law*, <http://www.law.miami.edu/clinics/immigration.php?op=8> (last visited Oct. 20, 2011).

50. Kevin R. Johnson, *The Immigration Laws, Infamous for Their Byzantine Complexity, Must Be Simplified with a Clearly Enunciated Set of Goals*, IMMIGRA-

tion advice, as reflected in *Padilla*, “is not a challenge that can be met with a simple round of continuing legal education seminars.”⁵¹ Despite the budget situation, PD-11 decided that in order to improve the quality of its representation of non-citizen clients, it needed to construct a systemic, structural mechanism to ensure quality immigration advice, rather than rely entirely on the individual efforts of the approximately 175 trial APDs.

As the first step, PD-11 looked to the substantive legal guidance of experienced immigration legal service providers. Apart from consulting with professors at the University of Miami School of Law, the Immigrant Defense Project, the Immigrant Legal Resource Center, and AI Justice, we also drew upon pro bono resources⁵² for assistance in performing extensive legal research on the immigration penalties of numerous crimes codified in the Florida Statutes.

Fortunately, through these community resources, PD-11 learned of the Defending Immigrants Partnership (“DIP”).⁵³ DIP is a joint initiative of the National Legal Aid and Defender Association, the Immigrant Defense Project, the Immigrant Legal Resource Center, and the National Immigration Project, which offers “defender programs and individual defense counsel critical resources and training about the immigration consequences of crimes” and “actively encourages and supports development of in-house immigration specialists in defender programs”⁵⁴

DIP welcomed and supported the attendance of two carefully selected APDs at PD-11 (a seasoned APD in the Appellate Division and a felony training APD) plus an AmeriCorps Legal Fellow at the DIP initiative’s National Training on the Immigration Consequences of Criminal Convictions held in Albuquerque, New Mexico, in January 2011.⁵⁵ This conference was the foremost national training geared

TION PROF BLOG (Apr. 26, 2010), <http://lawprofessors.typepad.com/immigration/2010/04/the-immigration-laws-infamous-for-their-byzantine-complexity-must-be-simplified-with-a-clearly-enunc.html>.

51. Maureen A. Sweeney, *Where Do We go from Padilla v. Kentucky? Thoughts on Implementation and Future Directions*, 45 NEW ENG. L. REV. 353, 357 (2011).

52. Andrej Micovic, Deferred Associate, White & Case, LLP; and Sarah Bradfield, Law Student, University of Miami School of Law.

53. See *About*, DEFENDING IMMIGRANTS PARTNERSHIP, <http://defendingimmigrants.org/about> (last visited Nov. 1, 2011).

54. *Id.*

55. *The Fifth National Training on the Immigration Consequences of Criminal Convictions*, DEFENDING IMMIGRANTS PARTNERSHIP, http://defendingimmigrants.org/trainings/item.2587-The_Fifth_National_Training_on_the_Immigration_Consequences_of_Criminal_Con (last visited Nov. 1, 2011).

for an audience of indigent defenders since the *Padilla* decision and, more importantly, it served as an operational turning point for PD-11.

Networking with the DIP initiative and its partner organizations at the National Training brought us an extensive online library of resources. The *Protocol for the Development of a Public Defender Immigration Service Plan* (“Protocol”) published by the New York State Defenders Association and the Immigrant Defense Project was one of the most useful resources we discovered.⁵⁶ The Protocol implores public defender offices to develop and implement an Immigration Service Plan that, at a minimum, is comprised of certain key pieces: Information-Gathering, Advice, Staff Development, Language Access, and Direct Immigration Service or Referral.⁵⁷

II. BUILDING A BETTER SYSTEM WITHOUT NEW FUNDING

PD-11 has “continuous improvement” as one of its operational values. Internal streamlining and automation efforts that began years ago have started to come to fruition. Many of PD-11’s efforts focused on increasing support staff efficiency. Automation replaced manual tasks that delayed communication. Specialization in tasks has replaced multi-tasking. Because of the high volume of work, it has been possible to reassign tasks and test pilot new methods. As a result of restructuring the workflow, PD-11 has been able to reduce support staff and administrative positions, shifting them into APD positions.

Additionally, good working relationships with other stakeholders in the criminal justice system have yielded significant results. For example, the mutually beneficial arrangement between PD-11 and the Director of the local jails has resulted in a working relationship that gives APDs the opportunity to speak with clients on one day’s notice through a secure video conferencing connection between the APDs desktop and the clients’ jail cells. Video conferencing facilitates prompt and frequent communication with clients, and saves hundreds of hours of APD time.⁵⁸

56. Peter L. Markowitz, *Protocol for the Development of a Public Defender Immigration Service Plan*, N.Y.S DEFENDER ASS’N & IMMIGRANT DEF. PROJECT (2009), http://immigrantdefenseproject.org/docs/2010/10_Public%20Defender%20Immigration%20Protocol.with%20appendice.pdf.

57. MARKOWITZ, *supra* note 5, at 7–8.

58. For example, two local jail facilities are Turner Guilford Knight Correctional Center (TGK) and Metro West Detention Center (Metro West). TGK is an eighteen-mile round-trip drive from the PD-11 main office and about thirty minutes of travel time under normal traffic conditions. Metro West is a thirty-one-mile round-trip drive and about forty-five minutes of travel time under normal traffic conditions.

The “public defender court calendar” is another new, beneficial innovation. Previously, dozens of misdemeanor cases would be set for a calendar call before a judge. Calendar calls would sometimes run three to four hours long. The cases were not differentiated in any way by the type of attorney. APDs would wait for their cases to be called, sometimes for hours. APD cases are now set on a separate calendar. PD-11 clients and APDs no longer have to wait while the court handles cases of private attorneys or *pro se* defendants. This change frees the APD to spend more time on case preparation. Both the video conferencing and calendar initiatives have increased the amount of time that APDs have available to work on their cases.

PD-11 has a long history of designing and implementing coordinated strategies for effective and efficient representation. Over the years, to deal with high caseloads, PD-11 created specialized representation and support units. PD-11 established a Capital Litigation Unit, long recognized as a model of representation of capital clients at the trial level, to focus exclusively on death penalty cases. The Early Representation Unit (“ERU”), initially formed to more efficiently and diligently obtain pre-trial release and represent in-custody clients before arraignment, was expanded in late 2008 with the addition of the Felony Intake Unit, which provides representation to out-of-custody felony clients. Separate units also handle cases with other specialized legal issues, such as juveniles being tried as adults, clients with mental health issues, and clients facing indefinite civil commitments as sexually violent predators. The challenge became how to form an effective team to provide the professional services as reflected in *Padilla* while dealing with budget cuts and high caseloads.

Using these experiences to adapt the Protocol to its excessive caseload situation, PD-11 took an incremental approach to reach as many noncitizen clients as possible, as early as possible in the court process, and focused on three goals:

- (1) obtaining important background information about the client’s citizenship and immigration status (Information-Gathering Component);
- (2) creating a mechanism for providing noncitizen clients advice on the immigration penalties (Advice Component); and
- (3) working within the office’s organizational culture in order to increase awareness of the professional requirements reflected in *Padilla*

Additionally, APDs typically have to wait a minimum of fifteen minutes at the jail to interview the client.

2011]

YOU ARE THE LAST LAWYER

133

among upper management, APDs, paralegals, and other staff (Staff Development Component).

Each of these components will be considered below.⁵⁹

A. Information Gathering Component

While the process of figuring out how to do more with less was quite familiar, the scope of the need was unclear at the outset of this project. A critical first step was to obtain reliable data, not just anecdotes, regarding the potential number of cases and the amount of time it would take to review, analyze, and provide written advice.

PD-11 has the benefit of an existing, highly-integrated, homegrown database application—the Public Defender File and Case Tracking System (“PDFACTS”). This office-wide database is a treasure trove of information for the APD on each case, from the opening of the file to its closing. Key confidential data and documents are entered and stored in PDFACTS, including the client’s custody status, future court dates, paralegal and attorney interviews with clients, discovery, motions and pleadings, correspondence, witness subpoenas, social worker and expert referrals, plea offers, and other pending case numbers. The immigration intake and advice process had to be integrated and documented within this broader system of data collection and tracking.

PD-11 chose its initial intake interview process as the first vehicle by which to compile data on the number of noncitizen clients to whom PD-11 is appointed to represent. The benefit of such a system is that APDs (in ERU) representing clients before arraignment have the information they need to communicate with the client regarding their immigration status/consequences. Accordingly, APDs representing clients at arraignment and thereafter will have that information so they can stop a harmful plea disposition from taking place at arraignment.

As background, conducting a comprehensive interview with the client as soon as possible after his or her arrest is an essential first step in investigating a criminal case and identifying whether the client has medical issues and/or mental health conditions that require immediate attention. At PD-11, paralegals meet with the clients in the jail within twenty-four to forty-eight hours after their arrest to initiate the

59. The Language Access Component was not as much of an immediate concern for PD-11 because most of the office’s day-to-day interpreter needs are met through a shared costs program with the Eleventh Judicial Circuit’s Administrative Office of the Courts.

client intake process and collect information that will be used in case preparation. Previously, paralegals captured this information in hard copy, but in 2009 PD-11 converted the intake interview to an electronic format. Now, paralegals conduct the initial client interviews using a netbook, to complete the electronic form and print a copy for the ERU or Felony Intake APD to review. The completed interview form is available in PDFACTS to the trial APD who subsequently handles the case.

Before implementation of this program, the immigration questionnaire merely asked the country of birth, whether or not the client was a United States citizen, if not a citizen what the status was, and whether the client wanted us to contact his or her embassy. The options for immigration status were: Resident, Tourist, Student, and Work Permit. Based on the data gathered using that form, PD-11's first estimate of the number of cases requiring immigration advice was rather small, fewer than one-thousand cases a year. This estimate turned out to be low because of poor data.

The national training materials from the Albuquerque conference included a sample immigration intake form. PD-11 converted this sample defender immigration intake form into a mini-checklist of questions and added it to the other checklists of questions comprising the initial interview. This interview form now prompts paralegals to inquire into, among other things: the client's alien number; location of birth; date and location of entry in the United States (e.g., visa over-stays, supervision, asylum, refugee); when the client obtained lawful status, if any, and what kind; information on whether the client has been deported previously; the immigration status of the client's family members; and the existence of convictions outside of Miami- Dade County.⁶⁰ PD-11 also added a field to identify whether an ICE detainer had been placed on the client. Staff scan and upload the arrest report and local priors' printout into the electronic client file. To implement this program, many hours of coordination and collaboration between the APDs, the supervisor of all paralegals and investigators, and the information technology department were required.

With respect to out-of-custody clients, if the client comes in for an interview pre-arraignment, Felony Intake staff conducts the interview and the same process takes place. By automating the case screening process of identifying non-citizen clients and streamlining their cases

60. See *Sample Intake for Defender Office*, DEFENDING IMMIGRANTS PARTNERSHIP, <http://www.defendingimmigrants.org> (follow "*Padilla v. Kentucky*: Basic Materials" hyperlink).

2011]

YOU ARE THE LAST LAWYER

135

for review by a single in-house attorney expert, PD-11 greatly reduced the risk that a noncitizen's case would not be flagged and/or immigration advice not be provided.

Based on the better data, PD-11 now estimates that 18% of its felony cases will require the attorneys to provide immigration advice.

B. Advice Component

As a starting point, PD-11 used the Protocol discussed above because it analyzes the benefits and drawbacks of several models for executing the Advice Component. The options were: (i) maintain its practice of having almost 175 trial attorneys independently know enough criminal immigration law so that they can provide the appropriate advice; (ii) teach attorneys to only identify noncitizen clients with potential immigration consequences, and refer that case to an outside immigration reviewer; or (iii) create a specialized immigration unit that would do the brunt of the work for the trial attorneys (including screening cases to identify noncitizen clients).

PD-11 chose the third option; having attorneys immersed in an immigration-focused criminal practice was the most efficient way to provide immigration advice in an office-wide setting. The burden of outsourcing the work by contracting with an immigration legal service provider, if one were even available, appeared to outweigh the benefits.⁶¹ Besides, a contract model would not address the first step of identifying noncitizen clients with open criminal cases; that process, unless automated, would be incredibly labor- and time-intensive. Out of necessity, PD-11 had to address the immediate need to identify and advise noncitizen clients with open felony charges as soon as plea negotiations commence, sometimes as early as twenty-one days after the arrest.⁶²

Contemporaneous with other staffing changes, PD-11 opted to dedicate an experienced trial APD to review new case files, write and

61. For instance, the Immigrant Legal Resource Center charges defenders at a rate of \$200 an hour if the defender office has engaged the ILRC's ongoing contract service option; a one-time consultation will cost a defender \$260, with a minimum charge of one-tenth of an hour. *Technical Assistance: Service Options and Rates*, IMMIGRANT LEGAL RESOURCE CENTER, <http://www.ilrc.org/legal-assistance/service-options-rates> (last visited Nov. 1, 2011).

62. A misdemeanor case could be set for report within two to three days of the defendant's arrest. At these report settings, the prosecution will typically extend a variation of a "credit for time served" plea. Such plea offers are enticing to defendants who cannot afford to post bond, but do not want to languish in jail while awaiting a trial date.

electronically transmit memos to trial APDs analyzing—in a forward-looking manner—potential immigration consequences to their noncitizen clients if the clients are formally charged at arraignment and recommending alternate plea offers. All immigration reviews for noncitizen clients in felony cases would flow through dedicated APDs, who were also charged with responding to on-demand calls from other APDs regarding time-sensitive, borderline emergency issues that have arisen in court.

Creating a program from scratch, though, would prove not to be an easy task. The new program, similar to the ERU program already in place, would identify and evaluate the cases of noncitizen clients in terms of the immigration consequences that could result from their cases. To know how many APDs we would need to staff such a program, PD-11 had to start the reviews and track the time spent.

The information gathered in the initial interview triggers immigration review by APDs in some cases. These reviews include, at a minimum, the client's immigration status, pending criminal charges, prior criminal record, and expressed priorities in the litigation. After review, the APD providing the immigration advice analyzes the client's situation and writes the immigration analysis memorandum. This memorandum is saved in the client's electronic file in PDFACTS, and a copy is also attached to the arraignment calendar.

Because case reviews vary based on a number of factors such as priors, pending charges, and present immigration status, the time it takes to perform a review and send it electronically varies as well. Generally, there are between ten and thirty new in-custody felony cases a day that require review, and conducting and writing the reviews generally takes at least half of the day. PD-11 estimated that, on average, it takes between thirty minutes to an hour to complete the process in a single case. Obviously, as the APDs specializing in immigration gain more experience and knowledge, the amount of time required to finish work on individual cases will decrease. The remainder of the immigration APDs' workday involves handling on-demand calls from other APDs assigned to trial divisions, developing additional training materials, researching new developments in criminal immigration law and expanding knowledge of current law.

Based on this data, PD-11 estimated that it needs four APDs to provide competent and diligent office-wide immigration advice. PD-11 was not able to commit four APDs, but through some of the efficiencies mentioned above, PD-11 was able to dedicate at first one and now two APDs to the project. These attorneys have worked to im-

2011]

YOU ARE THE LAST LAWYER

137

prove their knowledge of criminal immigration law and policy. Using materials from organizations such as the DIP initiative, the Immigrant Legal Resource Center, the Department of Homeland Security, and the Executive Office for Immigration Review, as well as consulting with outside experts, these APDs were able to gain an understanding and knowledge of the immigration consequences of criminal convictions. Specifically, these APDs determined the immigration consequences of most of Florida's crimes, including whether and under which circumstances federal immigration law would consider them crimes of moral turpitude and/or aggravated felonies. To test their understanding, they forwarded initial drafts of their written analyses to outside experts for review.

A major benefit from having an existing APD assigned to the newly-created unit providing immigration advice is that an APD already has a grasp of criminal law and procedure, as well as a realistic take on the culture and life in "the pits."⁶³ The APD knows the fast-paced environment of the office and knows that the other APDs need succinct, prompt and accurate information. The APD also knows the most probable alternative charges the prosecutor might accept in bargaining for plea dispositions that eliminate or mitigate the immigration penalties to the client.

Another benefit of an in-house immigration specialist is having a "go-to" person to immediately answer APDs' questions. These attorneys, while doing their reviews, also field calls and emails from other attorneys and respond as soon as possible, even within minutes when plea negotiations are taking place in the middle of calendar in court. They also are called in to client interviews to assist the assigned APD in gathering and explaining immigration advice to the clients. The immigration APDs must always set time aside to stay abreast of the ongoing changes in immigration law to routinely create and amend training materials for the division APDs.

C. Staff Development Component

The process of forming and implementing a systematic approach to providing immigration advice within a defender office must take into account the office's organizational culture, including the behavioral styles of the supervisors, trainers, staff attorneys, and paralegals.

63. In the local vernacular, the "pits" are the trial courts. The name comes from the "well" of the court, which is the area between the bar and the bench where the attorneys work. The tone is a reflection of the cynicism that many APDs develop as the result of handling excessive caseloads.

Overlooking organizational culture could greatly curtail the plan's effectiveness. When broken down into elements, the organizational culture at PD-11 and many urban PD offices is rooted in: (i) a supportive learning environment; (ii) professional autonomy, tempered by deference to experienced colleagues; and (iii) efficiency or specialization.

As part of PD-11's learning environment, when a new APD is hired, that APD is assigned a training attorney. The training attorney serves as a mentor for the new attorney; the office-wide training plan acknowledges "one-on-one training is essential."⁶⁴ By contrast, mentoring offered by outsiders wholly unfamiliar with the realities of laboring in the pits, while welcome and always appreciated, may be less credible or reliable as they do not have the first hand experience. To put it another way, when the source of the message speaks the same language as you, it makes it that much easier to digest and apply the message.

Regularly scheduled training is a basic component of PD-11's approach to providing competent immigration advice. PD-11 decided that trial attorneys value training more if communicated by other criminal defense colleagues working in the same office rather than outside experts. The APDs assigned to provide the immigration reviews, together with the APDs who attended the national training conference in Albuquerque, prepared a "for defenders, by defenders"-style immigration training module. PD-11 also received input from PD-11's valued community partners at the University of Miami School of Law and contacts made at the national training conference.

The training involves a series of mandatory sessions for which all attendees receive Continuing Legal Education course credit from The Florida Bar. To date, at least eighty-two APDs, ranging from newly hired APDs to a longtime APD who has tried upwards of three-hundred cases in his career, have attended one of these detailed trainings. Each session and the accompanying written training materials were tailored in substance to be more relevant for the given audience. For instance, while some areas of immigration law can be complex, because there are fewer types of commonly-charged misdemeanor offenses than felony offenses, it is easier to identify the misdemeanor charges that carry immigration penalties. Establishing a consistent and frequent training program, with regularly updated checklists, will

64. See CARLOS J. MARTINEZ, LAW OFFICES OF THE PUB. DEFENDER OFFICEWIDE TRAINING PLAN 8 (Oct. 7, 2005), <http://www.pdmiami.com/officewidetrainingplan.pdf>.

have a major impact on addressing immigration penalties in misdemeanor cases.

The APD assigned to provide immigration reviews also trained ten paralegals on the significance of the questions in the immigration intake portion of the client interview form and how to address challenges in getting honest responses from the clients, many of whom are fearful of answering questions about their immigration status.

Out of recognition of, and respect for, each attorney's professional autonomy, the trainings were designed as "reality checks" encouraging APDs to focus more on the immigration consequences of convictions for their clients. The training was not expected to impart sufficient knowledge to accurately advise each noncitizen client regarding immigration consequences. Rather, our initial goal was to foster the "buy-in" of trial attorneys by increasing their awareness of the immigration penalties arising from criminal offenses, even seemingly minor ones, and their professional responsibility to provide competent immigration advice as reflected in *Padilla*.⁶⁵

65. See RULES REGULATING FLA. BAR R. 4-1.1 (Competence) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation"); RULES REGULATING FLA. BAR R. 4-1.3 (Diligence) ("A lawyer shall act with reasonable diligence and promptness in representing a client."). The ABA's "Responsibilities of defense counsel" are similar:

- (a) Defense counsel should keep the defendant advised of developments arising out of plea discussions conducted with the prosecuting attorney, and should promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney.
- (b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.
- (c) Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant.
- (d) Defense counsel should not knowingly make false statements or representations as to law or fact in the course of plea discussions with the prosecuting attorney.
- (e) At the outset of a case, and whenever the law, nature and circumstances of the case permit, defense counsel should explore the possibility of a diversion of the case from the criminal process.
- (f) 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."

But rather than being one more thing for APDs to do, the creation of the specialized unit to provide immigration advice was presented as a way to assist the APDs and increase their efficiency. Given the limited resources, the need for efficiency is paramount because reinventing the wheel on every case is not an option. At PD-11, and other large public defender offices, the organizational culture corresponds closely with the nature of a defender's job, which is, at its core, a form of triage due to chronic underfunding.⁶⁶ The legal triage approach is prevalent regardless of whether the case involves juvenile delinquency matters, misdemeanor charges, or felony charges.

When investigating cases in preparation for trial, APDs have neither resources to spare nor the luxury of time to chase dead ends. Individual APDs have to learn to quickly and properly identify legal and/or factual issues in each and every trial case, lest the issues go overlooked. Like a "medic on a battlefield,"⁶⁷ a trial APD is continually in legal triage mode, prioritizing his or her caseload to "do the most work for the most severely injured,"⁶⁸ while simultaneously trying to ascertain and advocate for every client's expressed priorities, needs, and values.⁶⁹ The more tasks and decisions the APD has to independently consider and manually undertake, the more likely it is that a task will be missed. When most of one's clients are sitting in a jail cell awaiting their constitutional right to a trial (set on the same day as seven or more other clients' trials), there is no time to start a research project or motion from scratch. In this criminal justice setting, prosecutors routinely extend plea offers as early as an arraignment, even though APDs have not yet had an opportunity to investi-

See ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.2 (1999), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_tocold.html.

66. PAUL B. WICE, PUBLIC DEFENDERS AND THE AMERICAN JUSTICE SYSTEM 175 (Praeger 2005) (summarizing the work environment of another urban public defender office as one of "[l]egal triage, similar to its medical equivalent used in emergency rooms and MASH units . . . a system of prioritizing the seriousness of each case, taking into consideration the strength of the prosecution's case as well as the merits of the defense position.").

67. Rodney Thaxton, *Professionalism and Life in the Trenches: The Case of the Public Defender*, 8 ST. THOMAS L. REV. 185, 187 (1995).

68. *Id.*

69. See *supra* notes 35–37 and accompanying text (demonstrating that the ethical conflicts of interest caused by this situation are the reason PD-11 is seeking relief from its excessive caseload). See RULES REGULATING FLA. BAR RULE 4-1.7(A) ("[A] lawyer shall not represent a client if: . . . there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client . . .").

2011]

YOU ARE THE LAST LAWYER

141

gate these cases. The potential for a plea offer to become harsher always looms as a threat the longer that the case stays open. Excessive caseloads greatly compound these issues.

Accordingly, maximizing efficiency is a necessity. At PD-11, it does not take long for a new APD, upon inheriting an oversized trial caseload within weeks of taking the Florida Bar exam and commencing employment, to realize the value of drawing upon the institutional knowledge of seasoned APDs and the training or supervising attorney. The establishment of a specialized unit to provide immigration advice is another resource new APDs can use to increase their efficiency.

III. THE FUTURE

While PD-11 has made progress⁷⁰ in implementing its systemic program, continuing challenges lie ahead for PD-11 and other public defender offices in providing competent immigration advice for noncitizen clients charged with misdemeanor crimes. Adequate staffing remains the single biggest challenge. While we have been able to staff the project with two attorneys by reducing support staff, consolidating job functions and restructuring work flow, those are temporary solutions that may, in fact, increase the likelihood of errors by support staff. Much remains to be done to be able to provide immigration advice to our misdemeanor, juvenile, and out-of-custody felony clients.

The initial intake method also has its drawbacks. It cannot be the sole source of reviewing cases and providing necessary advice. While the office routinely mails a letter to every client requesting the client to schedule a pre-arraignment interview, if the client does not have the interview, the APD cannot adequately advise the client at arraignment.⁷¹ Of the new clients PD-11 reviewed for immigration consequences in July 2011, 279 were in custody. A smaller number of noncitizens had an immigration detainer placed upon them. Only ten were out-of-custody. PD-11 was appointed to represent 848 out-of-

70. Our progress is due, in no small part, to the substantial guidance we received from Professors Rebecca Sharpless and Farrin Anello from University of Miami School of Law, together with other local experts from the Florida Immigration Advocacy Center and national experts from the DIP-affiliated organizers of the training conference in Albuquerque—the American Bar Association, NACDL, and NLADA.

71. Should the out-of-custody client, who was not interviewed before arraignment, decide to accept a plea at arraignment against the advice of counsel, no intake interview or immigration analysis would ever occur.

custody felony clients in July; though not all noncitizens, many are, and not all of those would receive an immigration review. PD-11 is still struggling with ensuring that all out-of-custody clients are properly screened. Additionally, some APDs, after they interview an out-of-custody client post-arraignment, are not using the electronic interview screen and are not requesting the assistance of the APD designated to provide immigration reviews.

One future goal is to assign a specialized immigration APD to in-custody clients accused of misdemeanors. In Miami-Dade County, indigent defendants unable to post bond (and hence remain in custody) are brought to a special court division within three to four days after their arrest. Often, paralegals have not had time to visit them and, therefore, there is no review of their immigration consequences. Yet, it is at this court hearing that a simple “adjudication and credit for time served” (“CTS”) plea could be taken that would have disastrous results for the noncitizen client. Having an immigration APD in that courtroom will allow for spot identification and review, and, if necessary, a request to the judge for more time to better evaluate the situation. Such an assignment would also be part of staff development, allowing the trial court APDs to better learn the methods and the immigration aspect of the law.

Another cause for concern in Florida and other states is post-plea (post-adjudicatory) drug court programs. These programs require the participant to enter a plea of guilty or no contest in exchange for participating in drug court, and most of the time without any defense investigation done on the case.⁷² Such requirements for noncitizens are, at best, counter-therapeutic when they result in deportation.⁷³ On the other hand, pre-trial diversion drug courts, which do not require a plea or admission to the facts, may offer a better option for the noncitizen client who wants help.

Finally, there is one issue of great concern that, while much broader than immigration advice, has a great effect on the issue. In Miami-Dade County, misdemeanor first appearance hearings take place eve-

72. See FLA. STAT. § 397.334(3a) (2010).

73. See FLA. STAT. § 397.334(4) (2010) (requiring drug courts to “include therapeutic jurisprudence principles”); see generally JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 7–9 (Bruce J. Winick & David B. Wexler eds., 2003) (discussing the implementation of problem-solving courts as a public health approach to the judicial system using principles of therapeutic jurisprudence); Nadav Davidovitch & Michal Alberstein, *Therapeutic Jurisprudence and Public Health: A Broad Perspective on Dialogue*, 30 T. JEFFERSON L. REV. 507, 523 (2008).

ry day, 365 days a year, and involve in-custody defendants arrested in the previous twenty-four hours.⁷⁴ Characterizing these appearances as “hearings” is an exaggeration, as the word connotes a minimum amount of due process that is, in reality, nonexistent. These first appearances are staffed with at least one APD, but because of the volume of cases, there is virtually no ability for that attorney to have a private conversation with defendants for whom the Public Defender is appointed. At these “hearings,” often either the prosecutor or the court will offer the defendant a CTS plea that many defendants will accept because it means they get out of jail right away. Yet, some of these misdemeanor convictions carry with them immigration penalties as equally severe, or even more severe, than some felony convictions.⁷⁵

To illustrate the problem, a lawful permanent resident (“LPR”) who enters a no contest plea to the misdemeanor offense of possession of drug paraphernalia,⁷⁶ will be deported and his or her LPR status will be revoked unless that individual successfully convinces the federal immigration judge to grant discretionary relief from removal, which is essentially an impossible feat given that the offense is drug-related. At a misdemeanor first appearance hearing in Miami-Dade County, that damage could be done in the space of one to two minutes, which is all the time that it takes for the defendant to walk to the podium, be informed by the judge of the charges and a CTS plea offer, and give a nod of the head.⁷⁷ In almost all instances, this occurs before counsel has met or interviewed the client.

The reliability of the criminal justice system depends on defense counsel properly performing his or her function. Defense counsel has a duty to investigate to ensure that the client’s guilty plea is knowing, voluntary and in the client’s best legal interest.⁷⁸ That obligation can-

74. *See generally* SMITH & MADDAN, *supra* note 28.

75. *See* SMITH & MADDAN, *supra* note 28.

76. FLA. STAT. § 893.147(1) (2010).

77. *See* SMITH & MADDAN, *supra* note 28.

78. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-4.1, Duty to Investigate cmt. at 182 (3d ed. 1993) (“The lawyer’s duty to investigate is not discharged by the accused’s admission of guilt to the lawyer or by the accused’s stated desire to enter a guilty plea The lawyer’s duty is to determine, from knowledge of all the facts and applicable law, whether the prosecution can establish guilt in law, not in some moral sense The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate’s role. Failure to make adequate pretrial investigation and preparation may also be grounds for finding ineffective assistance of counsel.”)(emphasis removed).

not be met when counsel's role is reduced to that of a conduit of information (the plea offer) from the prosecutor to the defendant without the requisite investigation into the facts and the law, and the circumstances of the client.⁷⁹ The preceding does not even present the worst scenario. In Miami-Dade every year, tens of thousands of people arrested for misdemeanors and criminal traffic offenses, many of them LPRs, plead guilty or no contest or are convicted for offenses that will subject them to deportation and other immigration penalties without counsel.⁸⁰ It is deplorable that almost fifty years after *Gideon v. Wainwright*,⁸¹ people face prosecution with severe consequences for themselves and their families, without counsel to guide them through the criminal justice system.⁸² Immediate reform is essential for justice to ever be achieved.

CONCLUSION

Immigration penalties impact real people as well as their children and spouses who are United States citizens. Noncitizens face what to most of us would be unthinkable—banishment or exile from the United States. Many citizens may have minor brushes with the law and take immediate responsibility for their actions with minimal consequences. Noncitizens do the same, yet face severe consequences, including detention that could last months, deportation, ineligibility for U.S. citizenship, ineligibility to get a green card, or exclusion from the United States after a trip abroad. In Miami-Dade, many of the people facing exile to their home country are people who fled communism or totalitarian governments, yet still found themselves in criminal court without an attorney, with an overburdened attorney or without the benefit of specific legal advice regarding the impact of the criminal conviction on their immigration status.

Even without adequate resources, public defenders' offices can and should take steps to improve their immigration law advice to noncitizen clients. PD-11 recognizes that many public defenders' offices in Florida do not have sufficient volume to justify a full-time or part-time position. PD-11 is engaged in discussions to find resources to

79. *Id.*

80. *Id.*; see also Brummer, *supra* note 35, at 146–49.

81. 372 U.S. 335 (1963).

82. Public Defender Carlos J. Martinez is in favor of reclassifying non-violent misdemeanor offenses as civil infractions, prohibiting use of uncounseled pleas to enhance misdemeanor offenses to felonies or to increase the penalties on a subsequent misdemeanor charge, and requiring appointment of counsel if the misdemeanor charge can result in an immigration penalty.

2011]

YOU ARE THE LAST LAWYER

145

help other public defenders' offices with immigration law reviews and technical assistance through mutual agreements. This would help the entire state improve the quality and accuracy of its immigration advice to noncitizen clients. Even incremental change can have a significant and immediate impact on the lives of others. That is why we became public defenders in the first place.