Fordham Urban Law Journal

Volume 39
Number 1 *Padilla and the Future of the Defense Function*
Article 10

February 2016

Realizing Padilla's Promise: Ensuring Noncitizen Defendants are Advised of the Immigration Consequences of a Criminal Conviction

Yolanda Vàzquez
University of Pennsylvania Law School

REALIZING *PADILLA*'S PROMISE: ENSURING NONCITIZEN DEFENDANTS ARE ADVISED OF THE IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION

*Yolanda Vázquez**

* Clinical Supervisor and Lecturer, University of Pennsylvania School of Law. I would like to thank Anne Kringel, Karla McKanders, Serena Mayeri, Michael Pinard, and Catherine Struve for their support, ideas, and comments on earlier drafts of this Article. I also thank Rose Villazor for inviting me to speak on this topic at Hofstra's Colloquium on Law and Citizenship and for its faculty's thoughtful comments. The author served as counsel for amici in support of petitioner at the certiorari stage, and then as part of the litigation team for petitioner at the merits stage, in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

INTRODUCTION

On March 31, 2010, the United States Supreme Court decided *Padilla v. Kentucky* and created a Sixth Amendment duty for defense attorneys to warn defendants of the immigration consequences of a criminal conviction under the Sixth Amendment.[1] This decision followed decades of contrary precedent in which the majority of state and federal courts refused to create the duty under the Sixth Amendment in their jurisdictions.[2] *Padilla* is one of the most important Supreme Court decisions in recent years. It affords thou-

1. *See* Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

2. *See, e.g.*, Gumangan v. United States, 254 F.3d 701, 706 (8th Cir. 2001) (citing with approval the Fourth and Fifth Circuits' conclusion that failure to advise a defendant of the prospect of deportation does not constitute ineffective assistance of counsel); Russo v. United States, No. 97-2891, 1999 WL 164951, at *2 (2d Cir. Mar. 22, 1999) ("[C]ounsel cannot be found ineffective for the mere failure to inform a defendant of the collateral consequences of a plea, such as deportation."); United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993) (finding that attorney's failure to inform client of possible deportation is not ineffective assistance of counsel; rather, defendant must show that there was a serious deficiency in counseling and that such deficiency is prejudicial); United States v. George, 869 F.2d 333, 338 (7th Cir. 1989); United States v. Yearwood, 863 F.2d 6, 7–8 (4th Cir. 1988); United States v. Campbell, 778 F.2d 764, 769 (11th Cir. 1985); Williams v. Duffy, 513 S.E.2d 212, 214 (Ga. 1999) (holding that a guilty plea will not be set aside because a defendant was not advised of possible collateral consequences of the plea); State v. Muriithi, 46 P.3d 1145, 1152 (Kan. 2002) ("We conclude that here the failure to advise [defendant] of the deportation consequences does not amount to ineffective assistance of counsel, rendering his plea manifestly unjust."); Commonwealth. v. Fuartado, 170 S.W.3d 384, 386 (Ky. 2005) (holding that defense counsel's failure to advise defendant of potential deportation consequences of his guilty plea was not cognizable as a claim for ineffective assistance of counsel). For a more detailed list of cases on the subject, see Yolanda Vázquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L. J. 31, 33 n.10, 35 n.17 (2010) [hereinafter Vázquez, *Advising Noncitizen Defendants*].

sands of noncitizen immigrants a right that may protect their ability to remain in this country.[3]

While *Padilla* affirmatively answered the broad question of whether a duty exists under the Sixth Amendment to advise a defendant of the immigration consequences of a criminal conviction, it also left many questions unanswered. One critical inquiry is the extent of the advice required by the Sixth Amendment under *Padilla*. The majority held that "counsel must inform her client whether his plea carries a risk of deportation."[4] In addition, the court determined that when immigration law is "succinct, clear, and explicit," defense counsel is required to give his or her client correct advice regarding the immigration consequences of a criminal conviction.[5] However, if immigration law is not "succinct and straightforward," defense counsel is only required to give general advice that the plea *may* have adverse effects on his/her immigration status.[6] The two-tiered advice system created by *Padilla* has three troubling effects. First, it creates considerable uncertainty as to what constitutes sufficient advice under the Sixth Amendment. Second, the level of information that must be provided by defense counsel to her client to satisfy the Sixth Amendment is based on immigration law and its perceived complexities instead of on the client's goals. Third, the ability for defense counsel to negotiate a favorable plea that could prevent removal is not guaranteed to all noncitizen defendants.

This Article discusses the potential detrimental impact of *Padilla's* ambiguous holding and the creation of a two-tiered admonishment system on a defendant's ability to remain in the United States, as well as the confusion it causes for defense counsel and the court. Part I discusses the historical posture of a defendant's right to advice on the immigration consequences of a criminal conviction under the Sixth Amendment. Part II discusses the holding in *Padilla*, highlighting some of the key points that the case left unanswered and explores its potential failure to achieve the goal of assisting noncitizen defendants in preventing their removal from the United States. Part III suggests ways to ensure that all noncitizen defendants are given adequate counsel on the immigration consequences of criminal conviction.

3. *See* Margaret Colgate Love & Gabriel J. Chin, Padilla v. Kentucky: *The Right to Counsel and the Collateral Consequences of Conviction*, 34 CHAMPION 18, 18 (2009), *available at* http://www.nacdl.org/champion.aspx?id=14611 (describing *Padilla* as causing a "major upheaval" and surprising even those following the case).

4. *Padilla*, 130 S. Ct. at 1486.

5. *See id.* at 1483.

6. *See id.*

This Article concludes that, although the *Padilla* decision was an incremental and positive step toward reform in criminal representation, legislative action, increased implementation and enforcement of professional standards, reassessment of educational training, and future litigation will be necessary before all defense counsel will begin to advise clients consistently of the specific immigration consequences of a conviction and to assist in potential plea negotiations to prevent deportation of each of their noncitizen clients. If lawyers fail to build on its promise, *Padilla* will not be the landmark decision it could be.

I. HOW *PADILLA* "CHANGED" THE SIXTH AMENDMENT DUTY OWED TO NONCITIZEN DEFENDANTS

The United States Constitution and *Gideon v. Wainwright* established the right to counsel in criminal trials.[7] The Supreme Court recognized that counsel during a criminal court proceeding was necessary to ensure the "fundamental human rights of life and liberty."[8] The "right of counsel" has been interpreted to guarantee the right to the *effective* assistance of counsel,[9] requiring assistance of counsel to be "within the range of a competence demanded of attorneys in criminal cases."[10]

Following from this right to effective assistance of counsel, a defendant may challenge a conviction or plea bargain by putting forth a Sixth Amendment claim of ineffective assistance of counsel. When deciding whether defense counsel has violated a client's Sixth Amendment right to counsel, courts use the U.S. Supreme Court's *Strickland* test.[11] To prevail on an ineffective assistance of counsel claim under *Strickland*, the defendant must prove: (1) that his counsel's performance was deficient; and, (2) that the deficiency in his counsel's performance prejudiced his defense.[12] Plainly speaking, un-

7. *See* U.S. CONST. amend. VI; U.S. CONST. amend. XIV, § 1; Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963) (holding that the Sixth Amendment guarantee of counsel is a fundamental right and is made obligatory to the states by the Fourteenth Amendment).

8. Johnson v. Zerbst, 304 U.S. 458, 462, 467 (1938) (holding that compliance with the Sixth Amendment's mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of life or liberty); *accord* Grosjean v. Am. Press Co., 297 U.S. 233, 243–44 (1936) (holding that "the fundamental right of the accused to the aid of counsel in a criminal prosecution" is "safeguarded against state action by the due process of law clause of the Fourteenth Amendment.").

9. *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

10. *Id.* at 771.

11. *See* Strickland v. Washington, 466 U.S. 668, 721 (1984).

12. *See id.* at 687.

der *Strickland*, counsel's representation must fall "below an objective standard of reasonableness" and there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[13]

The U.S. Supreme Court extended the *Strickland* test to encompass guilty pleas. In *Lockhart v. Hill*, the Supreme Court held that *Strickland's* two-prong test applied to challenges of guilty pleas based on ineffective assistance of counsel claims.[14] While the analysis for the first prong of *Strickland* remains the same for guilty pleas, the second prong, the "prejudice prong," is satisfied if the defendant shows that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.[15]

Although the right to effective assistance of counsel was established under the Sixth and Fourteenth Amendments many years ago,[16] the scope of the advice that counsel is obligated to give clients continues to evolve.[17]

A. Immigration Consequences and the Sixth Amendment Pre-*Padilla*

Prior to March 31, 2010, lower federal and state courts were divided over whether effective assistance of counsel under the Sixth Amendment required a lawyer to advise his client of the immigration consequences of a criminal conviction. Most adopted and applied the

13. *Id.* at 688, 694.

14. *See* Hill v. Lockhart, 474 U.S. 52, 57 (1985).

15. *See id.* at 58–59.

16. *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963) (declaring that the Sixth Amendment right to counsel applies equally in state courts by virtue of the Fourteenth Amendment); Powell v. Alabama, 287 U.S. 45 (1932) (holding the Constitution requires states to provide defendants charged with capital crimes a fair opportunity to secure counsel when state law has already conceded the right to counsel).

17. *See, e.g.*, Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011) (discussing evolution of the right to counsel through Sixth Amendment case law); Josh Bowers, *Fundamental Fairness & the Path from* Santobello *to* Padilla*: A Response to Professor Bibas*, CALIF. L. REV. (2011) (discussing right to counsel through Fourteenth Amendment case law); John H. Blume & Stacey D. Neumann, *"It's Like Déjà Vu All Over Again":* Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127 (2007) (discussing Sixth Amendment case law returning to a guidelines approach that was seen prior to *Strickland*).

"collateral consequences doctrine"[18] and the Court's classification of immigration law. The Court held in *Brady v. United States* that under the Fifth Amendment, courts were only responsible for admonishing the defendant on the "direct" consequences and not the "indirect" or "collateral" consequences of a plea.[19] The Court held in *Fong Yue Ting v. United States* that deportation was not considered a criminal punishment but rather a civil penalty.[20] While these cases were never analyzed by the Supreme Court under the Sixth Amendment, state and federal jurisdictions incorporated these holdings into their Sixth Amendment jurisprudence.[21] As a result, the majority of jurisdictions refused to impose a duty on defense counsel to advise as to immigration consequences under the Sixth Amendment because immigration was deemed a "collateral" matter.[22]

Since the majority of state and lower federal courts determined that defense counsel had no duty to advise on immigration issues, criminal defendants were typically prevented from arguing that counsel's failure to give such advice violated their Sixth Amendment right.[23] More specifically, noncitizen defendants were unable to prevail on ineffective assistance of counsel claims because failure to advise as to immigration consequences could not satisfy *Strickland's* first prong, which required a showing of "unreasonable" or "deficient" assistance.[24]

In the ensuing years, immigration law and its enforcement became increasingly intertwined with the criminal justice system and the ramifications of the collateral consequence doctrine became clear: the number of criminal charges that resulted in immigration consequences increased, immigration relief available for those who were convict-

18. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 704–09 (2002) (discussing history of the collateral consequence doctrine).

19. *See* Brady v. United States, 397 U.S. 742, 755 (1970).

20. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (stating that deportation was not punishment for a crime).

21. For a discussion of cases in which immigration consequences were found to be "collateral" rather than direct, see *supra* note 2 and accompanying text. *See, e.g.*, United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993) (characterizing deportation as a "harsh collateral consequence"); United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990) (characterizing deportation as a "harsh collateral consequence"); United States v. George, 869 F.2d 333, 336–37 (7th Cir. 1989) (characterizing deportation as a "harsh collateral consequence").

22. *See supra* note 2 and accompanying text.

23. *See* Vázquez, *Advising Noncitizen Defendants*, *supra* note 2, at 33 n.10.

24. *See id.*

ed of a crime decreased, and immigration enforcement targeting those with criminal convictions increased.[25] As a result, some states and federal courts began to break from the traditional mantra that failure to advise as to the immigration consequences of a conviction could not be found to violate the Sixth Amendment.[26] Prior to *Padilla*, jurisdictions across the country were divided on whether the immigration consequences of a criminal conviction should be excluded from the Sixth Amendment analysis to determine whether or not counsel was ineffective in failing to provide such advice.[27]

B. The *Padilla* Decision

On March 31, 2010, everything changed. The Supreme Court issued an opinion in *Padilla* that shocked many, gave noncitizen defendants new hope, and left the courts and defense counsel wondering how they would implement this new duty.[28] The Court, in a sev-seven-to-two decision, declared that defense attorneys *do* have a Sixth Amendment duty to advise their clients of the immigration consequences of a criminal conviction.[29] The Court stated that "counsel must inform her client whether his plea carries a risk of deportation."[30]

The Court refused to incorporate the long-held belief of state and lower federal courts that because immigration consequences were "collateral" in nature, defense counsel had no duty to advise on such

25. *See*, *e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1276–77 (codified as amended at 8 U.S.C. §1182(c) (2006)); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a), 110 Stat 3009-546, 3009-597 (codified as amended at 8 U.S.C. § 1229 (2006)).

26. *See*, *e.g.*, United States v. Kwan, 407 F.3d. 1005, 1015 (9th Cir. 2005) (finding that misadvice can be found to be ineffective assistance of counsel under the Sixth Amendment); State v. Paredez, 101 P.3d 799, 805 (N.M. 2004); People v. Pozo, 746 P.2d 523, 529 (Colo. 1987) (holding that failure to investigate potential deportation consequences of a guilty plea constitutes ineffective assistance of counsel if the attorney had sufficient information to form a reasonable belief that client was an alien).

27. *Compare Paredez*, 101 P.3d at 805 (N.M. 2004), *with* United States v. Sambro, 454 F.2d 918, 922–23 (D.C. Cir. 1971) (finding that since immigration consequences are collateral, even misadvice cannot, as a matter of law, invalidate a guilty plea).

28. *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, 796 (2010) (describing *Padilla's* holding as "shocking commentators and practitioners alike").

29. *See* Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

30. *Padilla*, 130 S. Ct. at 1486.

information.[31] The Court stated emphatically, "We, however, have never applied a distinction between direct and collateral consequences, to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."[32] The Justices instead acknowledged that deportation was a consequence "enmeshed" in the criminal process and held that the collateral consequence doctrine could not be applied.[33] Advice regarding deportation consequences was protected from being "categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim."[34]

C. Understanding the Importance of *Padilla*

Over the last approximately twenty-five years, the intersection between immigration and criminal law has grown and the connection has become more noticeable publically.[35] Three reasons can be given for this increase: (1) the number of criminal charges that qualify as a removable offense has risen over the years; (2) the number of remedies for relief from removal has decreased; and (3) there has been increased enforcement of removal for noncitizens convicted of a crime.[36]

As a result, the number of noncitizens removed from this country because of a criminal conviction has increased astronomically. For instance, in 1986, the United States removed 1978 noncitizens based on their criminal and narcotics violations, accounting for approximately three percent of total removals.[37] In 1996, just ten years later, the number of individuals removed from the United States had increased to 69,680, 36,909 of whom were removed based on criminal and narcotics violations. These individuals accounted for 53.8% of

31. *See id.* at 1482.

32. *Id.* at 1481.

33. *See id.*

34. *Id.* at 1482.

35. *See* Danny Hakim & Nina Bernstein, *New Paterson Policy May Reduce Deportations*, N.Y. TIMES, May 3, 2010, http://www.nytimes.com/2010/05/04/nyregion/04deport.html?pagewanted=print.

36. *See Padilla*, 130 S. Ct. at 1478–80; Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471–72 (2007); *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions*, *supra* note 2 at, 37–46.

37. *See* MARY DOUGHERTY, DENISE WILSON & AMY WU, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGR. STATISTICS, ANN. REP.: IMMIGR. ENFORCEMENT ACTIONS: 2004 6 (2005), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004.pdf.

the total number of individuals removed that year.[38] In 2010, the Department of Homeland Security removed approximately 387,242 noncitizens, 168,532 of whom were removed because of a criminal conviction, accounting for 43.5% of the total number of removals.[39] Between 1996 and 2010, more than one million individuals were removed due to criminal violations.[40]

And the number of noncitizens who will be removed as a result of committing a crime will only increase. This year the Obama Administration stated that it plans to remove approximately 400,000 noncitizens from the country, focusing on noncitizens who have committed crimes.[41]

As Justice Stevens so incisively noted, removal affects not only the individual removed, but also the family left behind.[42] It is estimated that nearly ten percent of families with children in the United States

38. *See* U.S. DEPT'T OF HOMELAND SEC., OFFICE OF IMMIGR. STATISTICS, 1996 STATISTICAL YEARBOOK 171 (1996).

39. *See* U.S. DEP'T OF HOMELAND SEC., IMMIGR. ENFORCEMENT ACTIONS: 2010 ANNUAL REPORT 4, tbls. 2, 4 (June 2011) [hereinafter 2010 ANNUAL REPORT], *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf.

40. *See House Subcommittee Holds Hearing on Deportees to Latin American and Caribbean Countries,* 84 INTERPRETER RELEASES 1802 (2007) [hereinafter *Hearing on Deportees*] (citing Representative Eliot L. Engel (D-N.Y.), Chairman of the U.S. House of Representatives Committee on Foreign Affairs, Subcommittee on the Western Hemisphere, at a July 24, 2007 hearing); U.S. DEP'T OF HOMELAND SEC., IMMIGR. ENFORCEMENT ACTIONS: 2008 ANNUAL REPORT 4, tbl. 4 (July 2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf; U.S. DEP'T OF HOMELAND SEC., IMMIGR. ENFORCEMENT ACTIONS 2009 4, tbl. 4 (Aug. 2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf; 2010 ANNUAL REPORT, *supra* note 39, at 4, tbl. 4.

41. *See* Maria Hinojosa, *The White House on Secure Communities and Deportations*, LATINOUSA WITH MARIA HINOJOSA (Aug. 26, 2011), *available at* http://www.latinousa.org/960-2/ (play the interview with Luis Miranda, Director of Hispanic Media at the White House, where he discusses the targeted removal of approximately 400,000 noncitizens, prioritizing "criminal aliens"); Celia Muñoz, *Immigration Update: Maximizing Public Safety and Better Focusing Resources*, THE WHITE HOUSE BLOG (Aug. 18, 2011), *available at* http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources (stating that they will focus on removing those noncitizens who have been convicted of crimes).

42. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010). For a further discussion of the impact of immigration consequences of a criminal conviction on individuals, families, and their communities, see Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. OF L. & SOC. CHANGE 55, 70–76 (2007); Yolanda Vázquez, *of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L J. 639, 665–75 (2011) [hereinafter Vázquez, *Perpetuating the Marginalization*].

live in a "mixed status" household.[43] A mixed status household is a family that has both citizen and noncitizen members.[44] It is estimated that 1.6 million families in the United States were separated between 1997 and 2007.[45] Also, between 1998 and 2007, more than 100,000 parents of United States citizen children were removed.[46] These mixed status families face the breakup of the family nucleus and must confront issues of separation, poverty, and health,[47] and the communities in which they live must deal with the ramifications of the loss of members of their community, leading to financial and economic devastation.[48]

In the criminal justice system, over eighty percent of individuals prosecuted are poor.[49] Of those convicted, nearly ninety-five percent plead guilty.[50] Therefore, the individuals most affected by removal resulting from a criminal conviction are poor noncitizens, their families, and their communities.

Taking this all together, it is strikingly apparent that: (1) the only way to avoid a deportation order based upon a criminal conviction is during the criminal court proceeding; (2) the majority of noncitizen defendants will be too poor to afford an immigration attorney to assist them in maneuvering through the criminal justice system; (3) the majority of noncitizen defendants will not have the education to navigate through the potential immigration consequences of a criminal conviction without assistance; and (3) the majority of noncitizens will plead guilty in the criminal court system.

---

43. *See* Michael Fix & Wendy Zimmermann, *All Under One Roof: Mixed-Status Families in an Era of Reform*, 35 INT'L MIGRATION REV. 397, 397 (2001).

44. *See id.*

45. *See* Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, at 44 (July 17, 2007), *available at* http://www.unhcr.org/refworld/docid/46a764862.html.

46. *See* U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GENERAL, REMOVAL INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 5 (2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-15_Jan09.pdf.

47. *See id.*

48. *See* Vázquez, *Perpetuating the Marginalization*, *supra* note 42, at 665–74.

49. *See* STEVEN K. SMITH & CAROL J. DEFRANCES, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE 1 (1996), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/id.pdf.

50. Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010) (quoting DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003 418, tbl. 5.17 (31st ed. 2005)) ("[O]nly approximately 5%, or 8,612 out of 68,533, of federal criminal prosecutions go to trial; [SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003 at 450, tbl 5.46] (only approximately 5% of all state felony criminal prosecutions go to trial).").

Therefore, a noncitizen defendant's only potential salvation will typically depend on whether his court appointed attorney or public defender has the ability and knowledge necessary to negotiate a plea bargain during the criminal proceedings that will result in a disposition that will prevent the noncitizen defendant from being deported. This demands that defense counsel not only give accurate advice, but also possess sufficient knowledge of immigration law to understand how to prevent a client's removal from the United States. The question then remains, does *Padilla* provide for this? If not, what will?

II. PADILLA'S *UNFINISHED WORK*

With many court dockets and attorney caseloads at crushing levels, the system's primary goal has been to get through cases as quickly and efficiently as possible, regardless of whether a defendant knows what his or her options are and how different outcomes might affect his or her life.[51]

This reality was seen throughout pre-*Padilla* Sixth Amendment case law. Although *Strickland* created a standard under which federal and state courts could objectively assess Sixth Amendment cases, it also made it impossible to win an ineffective assistance of counsel claim.[52] The two-prong test seemed to be too difficult to maneuver and most defendants could not overcome its strict and narrow view.[53] Counsel was allowed to disappear, be legally intoxicated, on drugs, and have no prior experience in criminal defense when trying a death

51. *See, e.g.*, Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral consequences at Guilty Pleas*, 54 HOW. L.J. 675, 678–81 (2011) (discussing the reality of advising on collateral consequences due to crushing caseloads and underfunding of public defender offices); Smyth, *supra* note 28, at 806–07 (discussing attorneys' difficulties balancing "case outcomes" and "life outcomes"); Ronald F. Wright, Padilla *and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1530–34 (2011) (discussing ways in which defense organizations and smaller practices are developing various methods for delivering adequate representation to their clients).

52. *See* David Cole, Gideon v. Wainwright *&* Strickland v. Washington, *in* CRIM. PROCEDURE STORIES 101, 126 (Carol S. Steiker ed., 2006) (stating that from 1984 until 2000, the Court had not found a single ineffective assistance of counsel case under *Strickland*'s analysis).

53. *Cf.* Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 B.Y.U. L. REV. 1, 45 (2002) (stating that because of *Strickland's* two-prong test, "it is exceedingly difficult for a petitioner to prove that he received constitutionally inept representation").

penalty case.[54] For fifteen years after *Strickland*, the Court was unable to find one Sixth Amendment violation for ineffective assistance of counsel.[55] Instead of creating a standard by which "tactical" decisions and unchecked representation would assist in defending clients zealously, defense counsel learned *Strickland* asked for nothing; defendants' rights were not the priority.[56]

However, in 2000, the Court brought life back into the Sixth Amendment by focusing on attorneys' work under professional norms rather than on the finality or accuracy of the criminal conviction.[57] The Court's use of professional guides and standards to determine a violation of the first prong of *Strickland* appeared in response to ineffective assistance claims in death penalty cases.[58] *Williams v. Taylor*, *Wiggins v. Smith*, and *Rompilla v. Beard* all held that counsel was ineffective when failing to investigate possible mitigation for sentencing purposes as well as failing to investigate documents that the prosecution would be using against the defendant.[59]

While *Rompilla*'s dissent particularly focused on *Strickland*'s view that professional norms and standards were only to be used as guides in a Sixth Amendment determination, the majority rejected such a formalistic and inflexible attitude.[60] The dissent laid out particular issues that historically prevented a defendant from winning a Sixth Amendment case under *Strickland*. First, the dissent noted the ever-present reality that in Sixth Amendment analysis, the Court has "consistently declined to impose mechanical rules on counsel—even when

54. *See* Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 455–60 (1996).

55. *See* Cole, *supra* note 52, at 126.

56. *See id.* at 115 ("Courts frequently excuse atrocious lawyering as a 'tactical' decision, subject to deference under the Court's directive in *Strickland*. But as *Strickland* itself illustrated, almost any deficiency in performance can in hindsight be described as 'strategic.'").

57. *See* Blume & Neumann, *supra* note 17, at 142–47.

58. *See* Rompilla v. Beard, 545 U.S. 374, 380–81 (2005); Wiggins v. Smith, 539 U.S. 510, 523 (2003); Williams v. Taylor, 529 U.S. 362, 394–95 (2000). *See generally* Blume & Neumann, *supra* note 17.

59. *See Rompilla*, 545 U.S. at 387; *Wiggins*, 539 U.S. at 524; *Williams*, 529 U.S. at 396. *See generally* Blume & Neumann, *supra* note 17.

60. *See Rompilla*, 545 U.S. at 400 (2005) (Kennedy, J., dissenting) ("[W]hile we have referred to the ABA Standards for Criminal Justice as a useful point of reference, we have been careful to say these standards 'are only guides' and do not establish the constitutional baseline for effective assistance of counsel.").

those rules might lead to better representation;"[61] second, that *Strickland* was never meant to raise the bar of representation; and third, the dissent stressed that defense counsel must work within their limited budgets and cases which mandate that a *per se* new rule would only cause less effective representation.[62] All these pronouncements reiterated that the Court felt that defendants should be happy with any representation they received and that the rights of defendants would be upheld within the budgetary constraints of the current system. What the dissenters failed to address, and of which the majority may have been keenly aware, is the fact that *Strickland's* two-prong test had permitted such abysmal representation that it was hard to imagine anything worse.

The dissenters also failed to see that the problem with the criminal justice system may not be in the cost of defense, but rather in the cost of mass prosecution and detention.[63] If mandates had been put on the criminal justice system that required particular performance, it is possible that our system would be less expensive because of fewer appeals, post-trial motions, prison inmates, and less overall criminal case prosecution.[64] The majority in *Padilla* may have been acutely aware of this possibility as well.

Williams, *Wiggins*, and *Rompilla* were touted as making a "significant step forward" in reinvigorating Sixth Amendment claims.[65] They sent a message to the criminal justice system and defense counsel that counsel's performance in past decades had been deficient and change was coming.

In *Padilla*, the Court made additional significant steps forward in reinvigorating Sixth Amendment claims. First, the Court reinforced the importance of professional norms and standards when it again used them when analyzing the first prong of *Strickland* to determine whether or not the attorney's conduct "fell below an objective standard of reasonableness."[66] Second, *Padilla* expanded lower federal and

61. *Id.* at 403 (Kennedy, J., dissenting) (citing Roe v. Flores-Ortega, 528 U.S. 470, 481 (2000)).

62. *See id.* (Kennedy, J., dissenting).

63. One important point is that only approximately 3.5% of the total budget for the criminal justice system goes toward indigent defense compared to over 50% for police and prosecution. *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 64 (1999).

64. Note that many states are now looking to counter the cost of their criminal justice systems due to budgetary constraints. *See* Nora V. Demleitner, *Replacing Incarceration: The Need for Dramatic Change*, 22 FED. SENTENCING REP. 1, 1 (2009).

65. Blume & Neumann, *supra* note 17, at 164.

66. Strickland v. Washington, 466 U.S. 668, 687–88 (1984).

state courts' narrow definition of what advice was required under the Sixth Amendment by adding ramifications that were important to the defendant, even if his goals or objectives were not technically within the purview of the criminal court.[67] Both of these steps further client representation because they move attorneys' Sixth Amendment duties closer to the rules that attorneys should follow under their professional standards.[68]

The *Padilla* opinion was a triumph. It took the collateral consequence doctrine out of Sixth Amendment analysis and refocused the analysis on the defendant's goals, a professional norm and standard. While the death penalty cases dealt with the mitigation of sentencing, the *Padilla* Court "expanded" counsel's duty to advise under the Sixth Amendment to encompass consequences that traditionally had not been seen as criminal punishment, but were important to the defendant.[69] The fact that the Court has been increasingly using professional norms as a benchmark for reasonable representation creates hope that attorneys who are drunk, on drugs, or absent during trial may one day be considered to have violated the Sixth Amendment.[70]

Padilla transformed four aspects of Sixth Amendment jurisprudence and defense representation: first, it took the collateral consequence doctrine out of the Sixth Amendment analysis;[71] second, it reestablished the duty to work within the client's objectives and goals in the attorney-client relationship regardless of whether the ultimate disposition takes place in criminal court;[72] third, it further reinforced the importance of professional standards in determining Sixth

67. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010) ("[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.").

68. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2010) (stating that "a lawyer shall abide by a client's decisions concerning the objectives of representation").

69. I placed the term expanded in quotation marks because the Court never ruled that collateral consequences were barred from Sixth Amendment analysis; therefore, while others felt the Court had expanded lawyers' duty to their clients, the Court was clear that it had not. *See Padilla*, 130 S. Ct. at 1481 ("We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*.").

70. *See* Kirchmeier, *supra* note 54, at 455–63 (discussing cases where the attorney was asleep or mentally impaired); Deborah L. Rhode, *Legal Ethics in an Adversary System: The Persistent Question*, 34 HOFSTRA L. REV. 641, 652 (2006) (discussing the fact that Sixth Amendment violations have not been found when attorneys have been drunk, on drugs, asleep, parking their cars, et cetera).

71. *See Padilla*, 130 S. Ct. at 1481–82.

72. *See id.* at 1483.

Amendment violations;[73] and finally, it emphasized the importance of plea negotiations as a right under the Sixth Amendment.[74]

While *Padilla* positively transformed several aspects of Sixth Amendment jurisprudence, however, two issues remain problematically unresolved after *Padilla*. First, *Padilla* created a two-tiered system that does not distinctly delineate a bright line for courts and defense counsel, leaving both unclear as to their mandate under *Padilla*.[75] Second, while the Court clearly states that negotiation is part of the Sixth Amendment, its holding and the two-tiered system ultimately undermined its impact.[76] Given the holding and its two-tiered system, negotiation seems unnecessary to satisfactorily comply with the Sixth Amendment. Finally, *Padilla* failed to address the second prong of *Strickland*, leaving the lower courts without guidance to determine the final outcome in a Sixth Amendment violation under its holding.[77]

The following section focuses on the issues above that may be detrimental to *Padilla's* potential to bring about change in legal representation. This discussion is significant because to find ways to better represent defendants in the criminal justice system, it is important to find the problematic areas and look for ways to address them.

A. *Padilla* and Plea-Bargaining

Criminal punishment has become a massive industry.[78] The United States has the highest incarceration rate of any country as well as the greatest number of cases passing through its criminal justice system.[79] With crushing court dockets and massive caseloads, the goal of efficiently processing and finalizing cases has become one of the most important goals of the criminal justice system.[80] Prosecutors, courts, and defense attorneys find themselves focused on getting the docket

73. *See id.* at 1482.

74. *See id.* at 1486.

75. *See id.* at 1483.

76. *See id.* at 1486.

77. *See id.* at 1485 n.12. This Article will not touch on prejudice as it has been discussed by other scholars. For example, see Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOW. L. J. 693 (2011).

78. *See* William J. Stuntz, Bordenkircher v. Hayes*: Plea Bargaining and the Decline of the Rule of Law*, *in* CRIMINAL PROCEDURE STORIES 351, 379 (Carol S. Steiker ed., 2006).

79. *See* Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1029 (2010).

80. *See* Chin, *supra* note 51, at 678–81.

moving, sometimes in lieu of their other obligations within the criminal justice system.[81] While historically criminal cases were disposed of by trial, the "American criminal justice system has been transformed by plea bargaining."[82] Without it, the criminal justice system would cease to function.[83]

In 2010, the crimes that most frequently led to removal were dangerous drugs, immigration violations, and criminal traffic offenses. Combined, these crimes accounted for 62.3% of removals based on criminal convictions.[84] Dangerous drug crimes include "manufacturing, distribution, sale and possession of illegal drugs."[85] Immigration violations are defined as "entry and reentry, false claims to citizenship and alien smuggling."[86] Criminal traffic offenses are not defined.[87]

In 2010, 83,941 cases were disposed of in the federal court system.[88] Out of the 83,941 cases, 81,217, or 96.8%, of the cases were disposed of by guilty pleas.[89] In federal court, drug offenses constituted 25,042 of all federal cases.[90] Those convicted of trafficking pled guilty 96.4% of the time.[91] Those convicted of simple possession pled guilty ninety-eight percent of the time.[92] Those convicted of communication facility, which refers to the use of a communication device such as a telephone during a drug trafficking offense, pled guilty 99.8% of the time.[93] As for immigration violation cases, 28,504 cases were disposed

81. *See* Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863, 919 (2004) (describing the Court's holding as an interest in judicial economy).

82. Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 564 (1977).

83. *See* Bordenkircher v. Hayes, 434 U.S. 357, 372 (1978) (Powell J., dissenting) (discussing the fact that plea-bargaining is "essential to the functioning of the criminal-justice system"); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1041 (1984) (discussing the belief that without plea bargaining, the judicial system would come to a halt).

84. *See* 2010 ANNUAL REPORT, *supra* note 39, at 4, tbl. 4.

85. *Id.*

86. *Id.*

87. *See id.*

88. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2010, tbl. 5.34.2010 (2010), *available at* http://www.albany.edu/sourcebook/pdf/t5342010.pdf.

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.*

of in 2010, 28,321, or 99.4% of which, were disposed of with guilty pleas.[94]

Immigration judges have lost their ability to provide relief in most instances in which a person is in deportation proceedings based upon a criminal conviction. Once the conviction is handed down, the damage is done.[95] In most instances, therefore, the only avenue to ensure the potential for relief from deportation is during the criminal court proceeding. It is only during the criminal proceeding that a defendant can avoid a conviction or plea to either a charge that does not carry immigration consequences or will allow for some form of relief in immigration court. Since the vast majority of cases end with plea bargains, negotiation is crucial for a noncitizen defendant to have a chance to remain in the United States. In *Padilla*, the majority recognized that.

Many scholars, commentators, and defense attorneys have rightly criticized the use of plea-bargaining.[96] Most criticism stems from the belief that there is little "bargaining" between the prosecutor and the defendant or defense counsel.[97] Plea bargaining had historically supported the supposition that as long as the outcome was accurate, defense counsel was appointed, and the prosecutor did not tie a defendant to a chair and make him sign the agreement, a violation would rarely occur.[98]

In *Padilla*, however, the defendant's knowledge prior to his plea was at the heart of the discussion, both in oral argument and in the ultimate opinion of the Court.[99] Whether it was based upon voluntariness, knowledge, fundamental fairness, or professional standards, the

94. *See id.* Although one could argue that an immigration violation puts everyone on notice and does not require any admonishment, the duty to advise and investigate is no less important. For an example of an attorney who failed to investigate a client's status, which led to the client's deportation and fifty-seven months in federal custody despite the fact that he was a United States citizen, see Perez v. United States, 502 F. Supp. 2d 301 (N.D.N.Y. 2006).

95. *See* Vázquez, *Advising Noncitizen Defendants*, *supra* note 2, at 45.

96. *See, e.g.*, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 705 (1981) (describing plea-bargaining as coercive); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2129 (1998) (stating that the term "'plea bargaining' is something of a misnomer"). *See generally* Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43 (1988).

97. *See generally* Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37 (1983).

98. *See generally* Cook, III, *supra* note 81.

99. *See generally* Transcript of Oral Argument, Padilla v. Kentucky, 130 S. Ct. 1483 (2010) (No. 08-651).

discussion focused on how much and what information the defendant needed to know before his plea could be accepted without violating the Constitution.[100]

The *Padilla* majority opinion focused on three points to emphasize the importance of plea-bargaining during the criminal court process: (1) there is a Sixth Amendment duty to negotiate; (2) plea-bargaining is advantageous for the criminal justice system; and (3) even the most rudimentary understanding of immigration law can give counsel the ability to obtain a beneficial plea for her client.[101]

Padilla declared that the Court had "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[102] It found that the "severity of deportation—'the equivalent of banishment or exile,'—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation."[103]

Padilla demonstrated the Court's belief that plea-bargaining benefits both the prosecutor and the defendant.[104] The prosecutor can dispose of a case without going to trial and keep the wheels moving. The defendant gets a better deal that meets his goals, and, in cases where it is a concern, he may avoid deportation altogether.[105] Continuing in that vein, the Court describes how the ability to bring deportation consequences into the conversation between the prosecutor and defense attorney would be advantageous to the plea-bargaining process and, therefore, would accomplish and satisfy the interests of both parties.[106]

Finally, the Court further reinforces the importance and need for negotiation by stating that defense attorneys should have little excuse

100. *See id.*

101. Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

102. *Id.* (citing Hill v. Lockhart, 474 U.S. 52, 57 (1985)).

103. *Id.* (citation omitted).

104. *See id.*; *accord* Brady v. United States, 397 U.S. 742, 752 (1970) (discussing mutual advantage of plea bargaining).

105. *See Padilla*, 130 S. Ct. at 1486; Santobello v. New York, 404 U.S. 257, 261 (1971) (citation omitted). Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

106. *Padilla*, 130 S. Ct. at 1486.

for not negotiating as part of their job function. Justice Stevens states that defense counsel with even the "most rudimentary understanding" should have the capability to negotiate a plea that would limit or prevent her client's deportation,[107] further emphasizing the Court's acceptance of this function as a duty.

One critique of the *Padilla* decision is that the opinion will fail to make a difference because prosecutors and the law will not allow defendants to plea to a non-deportable offense; the increasingly hostile climate of immigration law leaves few crimes that do not require deportation.[108] While it is true that the government may not agree to a plea that will keep an individual from being deported, defense counsel is still obligated to negotiate the best plea for her client and to allow the client to make the choice between accepting the plea or going to trial. As Justice Sotomayor noted during oral arguments, the defendant may decide to risk jail, believing that staying in a United States jail is preferable to being sent to a country that he does not know.[109]

Padilla's ultimate holding did not expressly state that defense counsel for noncitizen clients has an obligation to negotiate a plea that would prevent deportation.[110] However, failure to engage in plea negotiations conflicts with the Court's declaration that plea negotiation is part of the Sixth Amendment. The next section further discusses the problem with the ability or duty to negotiate under the *Padilla* ruling.

B. *Padilla* and Its Two-Tiered Admonishment Test

The Supreme Court has been concerned for some time with the immigration consequences of a criminal conviction and counsel's advice regarding those consequences during the criminal court proceedings. In 2001, in *INS v. St. Cyr*, Justice Stevens wrote for the majority that counsel that was competent but unaware of the discretionary relief of 212(c) would "follow[] the advice of numerous practice guides"

107. *Id.*

108. *See* Darryl K. Brown, *Why* Padilla *Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1399 (2011).

109. Transcript of Oral Argument at 35, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651) ("I do go to trial and I serve that longer sentence, but it's here in the U.S. and not in my home country, where I might starve to death. I think I'll stay here and take that risk.").

110. *See* Wright, *supra* note 51, at 1516.

to educate herself on the subject in order to assist defendants in preserving eligibility for relief under the statute.[111]

A decade later, this concern emanated throughout the courtroom during oral arguments in *Padilla*. The most concise and insightful question on the predicament of this issue was made by Justice Alito. He hit the nail on the head when he directly inquired as to whether or not the Deputy Solicitor General wanted the Court to draw the distinction between giving advice to the defendant or just letting him fly in the wind.[112]

> JUSTICE ALITO: But what are you going to do in a situation where the defendant is concerned about removal . . . the client says: "Well, I'm also concerned about the immigration consequences." And the lawyer says: "I'm not going to tell you . . . you've got to get an immigration lawyer." And the alien defendant says: "Well, I have no money; that's why you were appointed to represent me. How am I going to get advice on the immigration law issue?" And the lawyer says: "Well, that's just too bad for you." And that's the line you want us to draw?[113]

A decade later, Justice Stevens was able to further articulate this belief by writing:

> The importance of accurate legal advice for noncitizens accused of crimes has never been more important. . . . [D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.[114]

And in the end, the *Padilla* Court simply stated, "we now hold that counsel must inform her client whether his plea carries a risk of deportation."[115] While the Court successfully created a Sixth Amendment duty to advise as to the immigration consequences of a criminal conviction, it limited that duty.[116] Where the immigration consequences of a criminal conviction are "succinct, clear and explicit," *Padilla* imposes on the defense attorney a duty to give *specific* advice as

111. INS v. St. Cyr, 533 U.S. 289, 323 & n.50 (2001); *see* 8 U.S.C. § 1182(c) (1994) (repealed 1996).

112. *See* Transcript of Oral Argument at 29, Padilla v. Kentucky, 130 S. Ct. 1473 (No. 08-651).

113. *Id.* The irony is not lost on this author that Justice Alito's concurrence held exactly what he seemed to be against during oral argument.

114. *Padilla*, 130 S. Ct. at 1480 (internal citation omitted).

115. *Id.* at 1486.

116. *Id.* at 1483.

to the immigration consequences ("*Padilla* duty").[117] However, "[w]hen the [relevant immigration] 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."[118]

In implementing *Padilla*, this clarity determination will be critical because it will determine the scope of the Sixth Amendment duty. Defense counsel's lack of understanding regarding when the *Padilla* duty is triggered will certainly jeopardize noncitizen defendants' Sixth Amendment rights. Further, courts reviewing *Padilla* claims may themselves be ill-equipped to appropriately resolve the clarity inquiry that *Padilla's* two-tiered advisement system requires.[119] Yet, a noncitizen defendant's Sixth Amendment right will be completely dependent on their defense attorney's assessment and/or a reviewing court's decision on this matter.

Under *Padilla*, the advice that defense counsel must provide depends on the type of criminal charge and its relationship to immigration law. In those instances where *Padilla* would only require a generic advisement, criminal noncitizen defendants will be deprived of information and assistance to effectively combat removal from the United States but will be unable to bring a Sixth Amendment claim for relief. If the relevant immigration law is not succinct, clear, and explicit, *Padilla* holds that simply telling a defendant that the criminal conviction *may* affect his immigration status is sufficient to satisfy the attorney's Sixth Amendment duty. The need for defense counsel to advise a noncitizen defendant of the exact immigration consequences that he may face as a result of his plea or conviction seems no less important when immigration consequences are not succinct and straightforward. Because of the two-tiered system created by *Padilla*, some noncitizen defendants will receive only a very generic, and often useless, warning.

In addition, if the attorney is not required to give specific advice, it seems unlikely that the attorney will not be able to negotiate a plea for the noncitizen defendant that will assist in preventing his deportation. This holding conflicts with the Court's own declaration that it

117. *Id.* (emphasis added) ("But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.").

118. *Id.* (emphasis added).

119. *See* César Cuauhtémoc García Hernández, *When State Courts Meet* Padilla*: A Concerted Effort is Needed to Bring State Courts Up to Speed on Crime-Based Immigration Law Provisions*, 12 LOY. J. PUB. INT. L. 299, 305 (2011).

has previously recognized that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence,"[120] as well as its assertion that it has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[121] This two-tiered admonishment system is also inconsistent with Justice Stevens' reason for rejecting limiting the holding to affirmative misadvise: "it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation . . . ."[122]

It is a cause for concern that the scope of a defendant's Sixth Amendment right to effective counsel varies depending on the criminal charge and its perceived "clarity" in immigration law. By excusing defense attorneys from providing information about the immigration consequences of a conviction or plea to their noncitizen defendants when the law is not clear, *Padilla* will deprive certain noncitizen defendants of advice and performance that the *Padilla* Court itself recognized to be of paramount importance.

1. Defense Attorneys and Distinguishing the Two-Tiered Requirement

While giving a blanket duty to advise as to the possibility of adverse immigration consequences of a criminal conviction, the Court, as usual, did not explain what counsel must do to fulfill that obligation.[123] In articulating the manner in which counsel would be able to determine whether she needs to give specific advice or only inform the noncitizen defendant that the conviction *may* have immigration consequences, the Court went to the plain reading of the statute.[124]

How defense attorneys are to determine whether implicated immigration law is "succinct, clear, and explicit" is far from clear. Mr. Padilla was charged with and convicted of a narcotics violation.[125] In deciding Mr. Padilla's Sixth Amendment claim, Justice Stevens recited the implicated immigration provision and then declared that "Pa-

120. *Padilla*, 130 S. Ct. at 1483 (quoting INS v. St. Cyr, 533 U.S. 289, 323 (2001)).

121. *Id.* at 1486 (citing Hill v. Lockhart, 474 U.S. 52, 57 (1985)).

122. *Id.* at 1484.

123. *See* Adam Liptak, *Justices are Long on Words but Short on Guidance*, N.Y. TIMES (Nov. 17, 2010) at A1, http://www.nytimes.com/2010/11/18/us/18rulings.html ?pagewanted=print (discussing the Roberts Court's opinions which are long, but consistently give little guidance to the lower courts).

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

125. *See id.* at 1477.

dilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute," because "[t]he consequences of Padilla's plea could easily be determined from reading the removal statute . . . ."[126] Justice Stevens did not provide further guidance as to how courts should decide whether the clarity of the implicated immigration law provision is "succinct, clear, and explicit" to impose a duty to give specific advice.[127] Instead, the Court merely noted that there would "undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain" and imposed the more limited duty in those situations.[128]

In the concurring opinion of *Padilla*, Justice Alito also discussed this problematic feature of the majority's rule. He characterized the majority approach as "problematic" for a number of reasons, but objected first that "it will not always be easy to tell whether a particular statutory provision is 'succinct, clear, and explicit.'"[129] He questioned how an attorney inexperienced in general immigration law could ever "be sure that a seemingly clear statutory provision actually means what it seems to say when read in isolation[.]"[130] Like Justice Stevens, Justice Alito did not provide any other guidance because he determined that as a result of this confusion, defense counsel, if she knows her client is not a United States citizen, should only be obligated to say that the

> criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.[131]

126. *Id.* at 1483 (citing 8 U.S.C. § 1227(a)(2)(B)(i) (2006)) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.")).

127. *See id.*; *accord* Liptak, *supra* note 123, at A1 (discussing the Roberts Court's opinions that are long, but consistently give little guidance to the lower courts).

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

129. *Id.* at 1490 (Alito, J., concurring).

130. *Id.*

131. *Id.* at 1494.

2. Determining Which Admonishment Defense Counsel was Required to Follow Under Padilla

Prior to *Padilla*, federal and state courts had many years of determining Sixth Amendment violations under *Strickland*.

Now federal and state courts will have an extra layer to analyze before they can determine a Sixth Amendment violation under the *Strickland* test. The lower federal and state courts reviewing *Padilla* claims are now burdened with the duty to determine whether the noncitizen defendant's conviction was subject to immigration law that was "succinct, clear, and explicit."

In attempting to determine whether the immigration law is "succinct, clear, and explicit," state courts have been left to flounder by themselves. As a result, the outcomes have been inconsistent and problematic, leaving defendants less likely to win on a Sixth Amendment violation claim under *Padilla*.[132]

III. IN THE AFTERMATH OF *PADILLA*: ENSURING THAT NONCITIZEN DEFENDANTS WILL BE ADVISED OF IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION

As David Cole has commented, ". . . despite the promise of 'effective assistance' set forth in *Strickland*, in actuality as long as the state provides a warm body with a law degree and a bar admission, little else matters."[133] In light of *Padilla's* potential shortcomings, additional measures will be needed to ensure that noncitizen defendants are advised of the immigration consequences of a criminal conviction. Fortifying the duty of defense counsel will be most important. In thinking about how to reinforce the *Padilla* duty, however, it is important to consider how the responsibility for justice in the criminal system is typically allocated to defense counsel, the prosecution, and the court. Though the *Padilla* decision correctly assigned the duty to counsel the defendant on the immigration consequences of a criminal conviction to defense counsel under the Sixth Amendment, there should also be a duty for both the prosecutor and the court in making sure noncitizen defendants are informed of these consequences by their counsel.

132. *See generally* Hernández, *supra* note 119 (discussing the lower courts' inability to determine whether immigration law is succinct, clear, and explicit for a *Padilla* determination).

133. Cole, *supra* note 52, at 101–03.

A. Enforcing a Duty for Defense Counsel to Give Specific Advice Through Legislative Enactments and Ethical Rules

The attorney-client relationship is the most important aspect of lawyering. Without legal counsel, the accused could not hope to secure his or her rights.[134] The right to counsel is a fundamental right in a criminal proceeding and at the core of our criminal justice system.[135] The right to counsel also attaches to a guilty plea since it is a "critical" stage of the process.[136] And as the Court held in *Padilla*, negotiation is part of the Sixth Amendment right to effective assistance of counsel.[137] Because "[c]ounsel's concern is the faithful representation of the interest of [the] client,"[138] regardless of a heavy caseload, it is defense counsel's responsibility to take the time necessary to provide effective representation.[139]

The most fundamental way to ensure that noncitizens will be advised of the immigration consequences of a criminal conviction is to require defense counsel to provide specific advice to each noncitizen client facing criminal conviction, instead of generic advice in some instances. The two-tiered advisement system under *Padilla* jeopardizes noncitizen defendants by basing counsel's duty on the perceived complexity or clarity of the law instead of the duty to look to the goals of the client; leaving an uneducated, poor and foreign-born individual to his own devices. This treatment runs afoul of the standards the legal profession purports to uphold.

A review of existing professional responsibility rules demonstrate that defense counsel should provide all noncitizen defendants with specific advice regarding the immigration consequences of a criminal

134. *See* Kimmelman v. Morrison, 477 U.S. 365, 377 (1986) (citations omitted).

135. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

136. *See* Arsenault v. Massachusetts, 393 U.S. 5, 6 (1968); White v. Maryland, 373 U.S. 59, 60 (1963).

137. *See* Padilla v. Kentucky, 130 S. Ct. 1474, 1486 (2010).

138. Tollett v. Henderson, 411 U.S. 258, 268 (1973).

> The principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it . . . . Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution, or by contesting all guilt.

Id. at 267–68 (citation omitted).

139. *See* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1255 (1975).

conviction.[140] A functional definition of an attorney provided by one set of professional standards outlines the central role that defense counsel must play in implementing the *Padilla* holding.

The Standards for Criminal Justice already hold that the function of the defense attorney is to "serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation."[141] Further, to carry out that function, the Model Rules of Professional Conduct explain that a lawyer should represent a client "zealously" and "competently."[142] To properly perform zealously and competently, the attorney must communicate with and advise the client.[143]

In 1999, the ABA added an additional subsection that specifically states that defense counsel should determine and advise the defendant as to the possible collateral consequences of the contemplated plea.[144] The rationale behind the addition was the ABA's recognition that a separate standard was needed to address and recognize the responsibility of defense counsel in assessing collateral consequences

140. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007) ("a lawyer shall abide by a client's decisions concerning the objectives of representation"). *Padilla* acknowledged that the "weight of prevailing professional norms supports the view that counsel must advise her client regarding the risks of deportation." *Padilla*, 130 S. Ct. at 1482; *see also* Vázquez, *Advising Noncitizen Defendants*, *supra* note 2, at 58–59.

141. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-1.2(b) (3d ed. 1993).

142. MODEL RULES OF PROF'L CONDUCT Preamble (2010) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *Id.* at R 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

143. *See id.* at R 1.4.

144. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, standard 14-3.2(f), at 116 (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."), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pleas_guilty.authcheckdam.pdf. In a related subsection, the ABA also requires that,

> [c]ounsel should be provided in all proceedings arising from or connected with the initiation of a criminal action against the accused, including but not limited to extradition, mental competency, postconviction relief, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature.

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, standard 5-5.2, at 64 (3d ed. 1992), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providing_defense_services.authcheckdam.pdf.

for his client, due to the ever-increasing amount of proceedings that are considered "collateral."[145] The ABA specifically names immigration as a collateral consequence to be addressed.[146] The ABA also expressly acknowledges that immigration consequences are at times a defendant's greatest concern, creating a responsibility for defense counsel to investigate and advise on such matters.[147] The ABA should enforce *Padilla* by providing separate rules specifically addressing immigration.[148]

Existing professional rules clearly anticipate more robust advocacy efforts from defense counsel with respect to noncitizen defendants than *Padilla*'s advisement scheme would require. As one commentator stated, however, "The Sixth Amendment entitles a criminal client to representation that satisfies at least a minimal standard of effectiveness, to be assessed against an objective standard of reasonableness. Able, quality, and responsible representation, of course, meets standards far beyond constitutional minima."[149]

Jurisdictions should adopt stronger ethical rules, create legislative statutes, and then stringently enforce these professional standards to ensure that all citizens are advised as to the specific immigration consequences of their pleas.

145. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, at 8 (3d ed. 2004), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_standards_collateralsanctionwithcommentary.authcheckdam.pdf ("The collateral consequences of conviction have been increasing steadily in variety and severity for the past 20 years, and their lingering effects have become increasingly difficult to shake off. The dramatic increase in the numbers of persons convicted and imprisoned means that this half-hidden network of legal barriers affects a growing proportion of the populace.").

146. *See id.* at 16 & n.13 ("To the extent a non-citizen's immigration status changes as a result of a criminal conviction, so that the offender becomes automatically deportable without opportunity for discretionary exception or revision, deportation too must be regarded as a 'collateral sanction.'").

147. *See* Flo Messier, *Alien Defendants in Criminal Proceedings: Justice Shrugs*, 36 AM. CRIM. L. REV. 1395, 1416 (1999) ("Most aliens base their challenges on the claim that they received ineffective assistance of counsel because their attorneys failed to inform them of the immigration consequences of the criminal conviction.").

148. This is not to say that the ABA should not address other consequences that the courts will still deem to be collateral. However, immigration consequences should be separate since the *Padilla* decision specifically took it out of the collateral consequence definition.

149. Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 329 (1997).

The Sixth Amendment represents an evolving process and one that has been changing in incremental stages.[150] With the foundation of *Padilla*, an increasing body of professional standards and rules, and a continued shift towards client-centered representation, future Sixth Amendment litigation can only further advance the rights of the defendant. *Padilla* marks the continuation in a string of Sixth Amendment cases, which may bring the Sixth Amendment to encompass the goals embodied in the rules of professional standards.

B. Imposing a Duty for Prosecution to Inform Defendants of the Immigration Consequences of Their Pleas

Prosecutors have often been considered to hold all the power. Instead of the law ruling in our society, it is the prosecutors who rule.[151] In a time when criminal prosecutors, along with local police officers, are increasingly given the responsibility, duty and mission to assist with removing noncitizen defendants from this country during criminal proceedings, imposing a duty of transparency about the exercise of prosecutorial power is not unreasonable.[152] A prosecutor's ethical obligation to the criminal justice system is "to seek justice;" it is important that in the pursuit of justice, "justice is fairly done." [153]

In the context of advising on the immigration consequences of a criminal conviction, a prosecutor's "duty to seek justice" would be met by transparency of the relationship between the charges she elects to prosecute as well as the pleas she offers and the impact they will have on the immigration consequences of a criminal conviction. In many cases, prosecutors have the information regarding the immigration consequences of a criminal conviction readily available based upon their relationship with Immigration and Customs Enforcement (ICE), the Department of Justice, and the Federal Bureau of Investigation. Thus, justice should require a sharing of that knowledge and information.

150. *See supra* note 17 and accompanying text.

151. Stuntz, *supra* note 78, at 379.

152. *See Enforcement & Removal*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/# (last visited Oct. 2, 2011) (including Criminal Alien Program, Delegation of Immigration Authority 287(g), Rapid REPAT, and Secure Communities); Brown, *supra* note 108 (arguing that prosecutors are encouraged by DHS and have built-in incentives not to cooperate with defense attorneys).

153. Robert M.A. Johnson, *Collateral Consequences*, THE PROSECUTOR, May–Jun. 2001, *available at* http://www.ndaa.org/ndaa/about/president_message_may_june_2001.html.

A prosecutor has complete discretion when deciding whether to charge an individual with a crime and, if charged, whether to offer the individual a plea and under what terms.[154] With such complete discretion comes responsibility.[155] Robert M.A. Johnson, former president of the National District Attorneys Association, has stated that prosecutors should understand all consequences that stem from a criminal conviction.[156] Mr. Johnson's position reflects that justice cannot be served if the prosecutor does not understand all the possible effects of the plea offer on the defendant because the plea must be proportionate to the crime to serve justice; the effects of a plea offer include the immigration consequences of a conviction.[157]

There may be times when the prosecutor does not know the immigration status of a defendant and counsel may find it necessary to keep it confidential. By requiring the prosecutor to advise clients of the immigration consequences of a criminal charge or plea offer in every single case, the confidentiality of the defendant's immigration status need not be breached.

A system of transparency with regard to the immigration consequences of pleas and criminal charges should be implemented as soon as possible. The information regarding immigration consequences should be provided when an individual is charged with a crime, at discovery, during plea negotiations, and at any other time when the defendant can be advised of the ramifications of a charge or plea.

C. Creating a Duty for the Court to Advise as to Immigration Consequences

Under Federal Rule 11 of Criminal Procedure and many states' Rule 11 of Criminal Procedure or statutes, courts are *required* to admonish a defendant at the time of the plea to ensure that the plea is both knowing and voluntary.[158] Despite their prior position that immigration consequences were "collateral," many state legislatures added provisions in their Rule 11 or enacted specific statutes that require courts to admonish defendants that their plea may have adverse

154. *See* Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 734–36 (2008).

155. *See* Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 427–36 (2009).

156. *See* Johnson, *supra* note 153.

157. *See id.*

158. *See* FED. R. CRIM. P. 11; Brady v. United States, 397 U.S. 742, 748 (1970).

effects on their immigration status if they are noncitizens.[159] Some state-required admonishments even require courts to advise that a plea may have adverse effects, not only on a defendant's immigration status, but also on his ability to naturalize.[160] Currently, thirty states, the District of Columbia, and the United States military require such admonishments.[161]

While these court admonishments may assist in ensuring that defendants receive valuable information concerning the effects that a conviction might have on their immigration status, they should be used to supplement counsel's advice rather than to substitute for such advice.[162] Many court admonishments have been plagued with issues concerning their timeliness, accuracy and vagueness. Typically, only a generic admonishment is given to every defendant who pleads guilty

159. *See, e.g.*, CAL. PENAL CODE § 1016.5 (West 2008); CONN. GEN. STAT. § 54-1j (2009); D.C. CODE § 16-713 (2011); GA. CODE ANN. § 17-7-93 (2011); HAW. REV. STAT. § 802E-2 (2008); 725 ILL. COMP. STAT. ANN. 5/113-8 (West 2011); MASS. GEN. LAWS ch. 278, § 29D (2011); MONT. CODE ANN. § 46-12-210 (2011); NEB. REV. STAT. § 29-1819.02 (2008); N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2011); N.C. GEN. STAT. § 15A-1022 (2009); OHIO REV. CODE ANN. § 2943.031 (West 2010); OR. REV. STAT. § 135.385 (2011); R.I. GEN. LAWS § 12-12-22 (2010); TEX. CODE CRIM. PROC. ANN. art. 26.13 (West 2010); VT. STAT. ANN. tit. 13, § 6565(c) (2009); WASH. REV. CODE § 10.40.200 (2011); WIS. STAT. § 971.08 (2011); ALASKA R. CRIM. P. 11(c)(3)(C); ARIZ. R. CRIM. P. 17.2(f); FLA. R. CRIM. P. 3.172(c)(8); IDAHO CRIM. R. 11(d)(1); IOWA R. CRIM. P. 2.8(2)(b)(3); ME. R. CRIM. P. 11(h); MD. R. 4-242(e); MASS. R. CRIM. P. 12(c)(3)(C); MINN. R. CRIM. P. 15.01, 15.02; N.M. R. CRIM. P. 5-303(F)(5); *see also* D. COLO. CRIM. R. App. K §3(h), *available at* http://www.cod.uscourts.gov/Documents/LocalRules/LR_App_K.pdf (form guilty plea notification requiring acknowledgement of possible deportation); Ky. Plea Form AOC-491, at 2 ¶ 10 (Ver. 1.01, Rev. 2-03), *available at* http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf; NJ Jud. Plea Form, N.J. Dir. 14-08, at 3 ¶ 17, *available at* http://www.judiciary.state.nj.us/forms/10079_main_plea_form.pdf (promulgated pursuant to N.J. R. CRIM. P. 3-9).

160. *See, e.g.*, Slytman v. United States, 804 A.2d 1113, 1116-18 (D.C. 2002) (finding trial court's warning to noncitizen regarding immigration consequences, which omitted mention of exclusion and denial of naturalization, did not substantially comply with the alien sentencing statute and defendant was permitted to withdraw his guilty plea).

161. *See* U.S. DEP'T OF THE ARMY, PAMPHLET 27–9, MILITARY JUDGES' BENCHBOOK FOR TRIAL OF ENEMY PRISONERS OF WAR: ACCEPTANCE OF GUILTY PLEA, ch. 2, § II, para. 2-2-8 (2010); *see also supra* note 159.

162. *See* John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should this Be Grounds to Withdraw a Guilty Plea?*, 36 U. MICH. J.L. REFORM 691, 714–20 (2003); Joanne Gottesman, *Avoiding the "Secret Sentence": A Model for Ensuring that New Jersey Criminal Defendants are Advised About Immigration Consequences Before Entering Guilty Pleas*, 33 SETON HALL LEGIS. J. 357, 385 (2009).

to a crime in that particular jurisdiction.[163] Despite these failings, requiring judges to admonish on immigration consequences may be beneficial and can be used responsibly to help guarantee that noncitizen defendants are informed of the immigration consequences of a guilty plea. If the court is admonishing each and every defendant during bail, arraignment, indictment, and at the time of the plea, the importance of the subject may reverberate to defense counsel and advice by counsel will become a permanent and consistent result.

D. Public Defender Organizations, the ABA, and Law Schools

Some believe *Padilla* was the catalyst needed to make attorneys reassess their conduct and representation, resulting in a change to the benefit of clients.[164] Many organizations, however, had already been advising on immigration and other consequences deemed to be collateral when representing criminal defendants in the criminal court system,[165] but since the *Padilla* decision, many more organizations have begun to take seriously *Padilla's* mandate. For example, the National Association of Criminal Defense Lawyers (NACDL) has begun to put together trainings on the immigration consequences of criminal convictions through live streaming as well as CLE programs and video trainings.[166] The American Bar Association (ABA) has been awarded a grant from The National Institute of Justice to develop a website that will make information about the collateral consequences of a criminal conviction in each state available to attorneys across the country.[167] An attorney will simply input the necessary information and a printout will be available which shows all the collateral consequences applicable to a person pleading guilty in that state.[168]

In addition, increasing educational opportunities for law students to learn about the intersection between immigration and criminal law would help to educate future prosecutors, defense attorneys, clerks,

163. *See* Lea McDermid, Comment, *Deportation is Difference: Noncitizens and Ineffective Assistance of Counsel*, 89 CALIF. L. REV. 741, 751–52 (2001).

164. *See* Norman L. Reimer, *Inside NACDL: The* Padilla *Decision: Was 2010 the Year Marking a Paradigm Shift in the Role of Defense Counsel—Or Just More Business as Usual?*, 34 CHAMPION 7 (2010).

165. *See* Wright, *supra* note 51 (discussing the different delivery models that defense organizations and private defense attorneys are attempting to use to comply with the *Padilla* mandate).

166. Reimer, *supra* note 164, at 8.

167. *See* AMERICAN BAR ASSOCIATION, http://www2.americanbar.org/sections/criminaljustice/CR206500/Pages/collateral.aspx (last visited Sept. 7, 2011).

168. *Id.*

and judges on the issue before they enter the profession.[169] Law school could create clinics that focus on representing clients in this area of law, giving law students practical experience while representing a class of individuals in drastic need of representation. These efforts would assist in increasing the number of attorneys with practical experience in the area as well as help alleviate the current dearth of lawyers knowledgeable on the subject.[170]

CONCLUSION

The consequences of criminal convictions affect immigration status, the ability to naturalize, to remain out on bond pending criminal trial or hearing, and to negotiate a plea. The most devastating impact, however, is a noncitizen defendant's ability to remain with family, friends, and loved ones in a country that he calls "home." Therefore, the importance of advice as to the immigration consequences of a criminal conviction as well as the ability to negotiate a plea that may prevent his deportation is immeasurable.

Although *Padilla* is a landmark case and will help many noncitizen defendants get information about the immigration consequences of a criminal conviction, the opinion falls short of mandating that defense attorneys provide their noncitizen clients with the advice needed to prevent deportation in each and every case. Courts, prosecutors, legislatures, and advocates must assist in ensuring that defense counsel observe not only *Padilla* and the Sixth Amendment, but also their ethical and moral responsibility to their clients. Accordingly, advocates must continue to push for reform until *all* noncitizen defendants receive *specific* advice as to the immigration consequences of a criminal conviction.

It may take years for the criminal justice system to incorporate *Padilla*.[171] Further litigation will be necessary to provide a more robust Sixth Amendment duty. If attorneys, advocates, and legislative bodies, however, further reinforce and expand *Padilla's* duty through legislative mandates, increased professional standards, and overall grassroots implementation, future Sixth Amendment case law will

169. *See* Maureen A. Sweeney, *Where Do We Go from* Padilla v. Kentucky*? Thoughts on Implementation and Future Directions*, 45 NEW ENGLAND L. REV. 353, 367 (2011).

170. *See id.* at 368.

171. *See* Wright, *supra* note 51, at 1536 (stating that it could take many months before criminal defense and immigration attorneys will be able to absorb *Padilla*'s decision and implications).

continue to bring effective assistance of counsel within the standards that attorneys' professional norms currently aspire to achieve.