Fordham Urban Law Journal

Volume 39
Number 1 *Padilla and the Future of the Defense Function*
Article 11

February 2016

Padilla v. Kentucky: Sound and Fury, or transformative impact

Steven Zeidman
CUNY School of Law

PADILLA V. KENTUCKY: SOUND AND FURY, OR TRANSFORMATIVE IMPACT

Steven Zeidman[*]

The March 2010 decision by the Supreme Court in *Padilla v. Kentucky*,[1] holding that it was constitutionally deficient for a defense attorney to fail to warn his client of the near-certain deportation consequences of a guilty plea, was lauded by many individuals and groups as having the potential to transform criminal defense representation.[2] On its face, the decision merited adulation and reification; after all, the stories are legion of people being deported as a result of uncounseled and/or ill-advised pleas.[3]

Two years later, commentators still sanctify *Padilla* as heralding a "revolutionary shift" in practice,[4] and *Padilla*-inspired trainings, con-

[*] Professor, CUNY School of Law.Professor; J.D., Duke University School of Law. For their encouragement, honest critique, suggestions, and line edits, I thank Sameer Ashar, Mari Curbelo and Tom Klein. I also gratefully acknowledge the tireless research assistance of Raymond Fernandez, as well as the support of CUNY School of Law.

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

2. *See, e.g.*, Alisa A. Johnson, *Defense Counsel Has Duty to Inform Client of Deportation Consequences of Guilty Pleas*, 87 CRIM. L. REP. (BNA) 1, 2 (2010) (quoting defense attorney Laura Kelsey Rhodes) ("It's a relief that the court has . . . clarified counsel's obligation."); Margaret Colgate Love & Gabriel J. Chin, Padilla v. Kentucky*: The Right to Counsel and the Collateral Consequences of Conviction*, 34 CHAMPION 18, 19 (2010) ("The systemic impact of this new obligation cannot be underestimated. *Padilla* may turn out to be the most important right to counsel case since *Gideon* . . . ."); Tony Mauro, *New Standard is Set for Advice on Deportation in Criminal Cases*, 243 N.Y. L.J. 1, 2 (Apr. 1, 2010) (quoting Benita Jain, co-director of the Immigrant Defense Project) ("This is one of the biggest ineffective assistance of counsel rulings in years."); *id.* (quoting the National Association of Criminal Defense Lawyers stating it will "assure the integrity" of plea negotiations).

3. *See, e.g.*, Nina Bernstein, *How One Marijuana Cigarette May Lead to Deportation*, N.Y. TIMES, Mar. 31, 2010, at A17; Karen Branch-Brioso and Peter Shinkle, *Longtime Legal Residents Face Deportation for Minor Crimes*, ST. LOUIS POST-DISPATCH, May 3, 2004, at A1; Editorial, *Should Minor Drug Offenses Lead to Deportation*, WASH. POST, Mar. 31, 2010, at A16.

4. McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 798 (2011).

ferences and law review symposia crowd the legal calendar.[5] But has there been any impact on the nature and quality of representation provided to those accused of crime? It is time to examine whether there has been substantive change to match the optimistic rhetoric. A careful analysis of the inadequate, unethical, and now unconstitutional counseling at the heart of *Padilla*, and of the ramifications of the Court's holding, suggests that the immediate outpouring of support and gratitude for the decision overstated the impact of the case and overlooked potential areas of concern.

This Article explores the reasons for the high expectations and the limited impact of this Supreme Court ruling on a complex reality. The appropriate starting point for such an inquiry is to try and understand the underlying problem which, while perhaps not motivating the Court to issue its ruling, did move many immigrant's rights organizations to zero in on *Padilla* as the potential holy grail of effective assistance from the moment the Court granted certiorari. For these advocates, the seemingly recurring wrong that needed a remedy involved a defendant taking an uncounseled or misadvised plea, which in turn led to deportation. A ruling that appeared to address this problem was seen as a godsend.

Two questions immediately arise if one hopes to assess whether the Court's holding will right the above-mentioned wrong: how widespread was the problem, and why was it occurring?

Quantifying or in any meaningful way measuring the extent of the problem is likely an impossible task. Perhaps one could count the number of appeals that raise the inadequate immigration advice issue, and also see if these cases were of relatively recent vintage or had been increasing in number. Reported cases, even those where the courts deny ineffective assistance of counsel claims, often recite facts that paint a clear picture of substandard, if not constitutionally ineffective, assistance as to immigration issues.[6] Maybe the extent of the

5. *See, e.g.*, N.Y.C BAR ASS'N, *PADILLA V. KENTUCKY*: THE NEW YORK CITY CRIMINAL COURT SYSTEM, ONE YEAR LATER 4 (2011) (discussing numerous trainings held by defender offices and bar associations); Symposium, *Collateral Consequences: Who Really Pays the Price for Criminal "Justice"?* 54 HOW. L.J. 501 (2011); Symposium, *Crossing the Border: The Future of Immigration Law and Its Impact on Lawyers*, 45 NEW ENG. L. REV. 301 (2011); Symposium, *Criminal Law and Immigration Law: Defining the Outsider*, 58 UCLA L. REV. 1389 (2011).

6. Prior to *Padilla*, courts drew a distinction between direct and collateral consequences of a guilty plea, and required defense attorneys to advise their clients only about direct consequences. *See, e.g.*, Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 124–25 (2009) [hereinafter Roberts, *Ignorance is Bliss*]. The

problem was captured by the growing number of media accounts of people with longstanding ties to the United States facing deportation because of ill-advised pleas,[7] or by the burgeoning interest in the issue as reflected by the myriad law review articles on point.[8] Or perhaps there was just a vague, shared sense that criminal defense attorneys, maligned since the first days after *Gideon*,[9] do not know what they are doing, have divided loyalties, or are just too under-resourced and overwhelmed to pay sufficient attention to the law and to their clients' immigration statuses.[10]

---

overwhelming majority of courts that have considered the issue have held that deportation is a collateral consequence. *See, e.g.*, Broomes v. Ashcroft, 358 F.3d 1251, 1257 (10th Cir. 2004). As a result, failure to warn about potential deportation or even, in many cases, misadvice about the likelihood of deportation, has been deemed to be outside the purview of an ineffective assistance of counsel claim. *See, e.g.*, People v. Ford, 657 N.E.2d 265 (N.Y. 1995); Gonzalez v. State, 134 P.3d 955 (Or. 2006); Roberts, *Ignorance is Bliss*, *supra*. For a detailed explanation of the direct versus collateral issue, see Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators*," 93 MINN. L. REV. 670 (2008).

7. *See supra* note 3 and accompanying text.

8. *See, e.g.*, Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002); Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589 (1998); 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 (2003); Lea McDermid, *Deportation is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CALIF. L. REV. 741 (2001); Roberts, *Ignorance is Bliss*, *supra* note 6.

9. Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (establishing the right to counsel for all indigent defendants charged with felonies).

10. *See, e.g.*, Duncan v. State, 784 N.W.2d 51, 52 (Mich. 2010) (discussing plaintiffs argument that the State's failure to fully fund and tend to indigent defense has led to systemic, widespread ineffective assistance of counsel); Hurrell-Harring v. State, 930 N.E.2d 217 (N.Y. 2010); *see also* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006); THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (April 2009); NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009); AMERICAN BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUESTION FOR EQUAL JUSTICE 4 (2004) ("thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation"); NAT'L SYMPOSIUM ON INDIGENT DEF., IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS 1 (2000), *available at* http://www.nlada.net/sites/default/files/doj_improvingcriminaljustice_1999.pdf ("[I]ndigent defense in the United States today is in a chronic state of crisis").

Notwithstanding the difficulties inherent in aggregating the "ill-advised plea to deportation" problem, if we accept that such a problem exists to a significant degree, and that it is of national dimension, then it behooves all concerned to identify the underlying causes. Otherwise, we run the risk of fashioning a solution, in this case by way of the holding in *Padilla*, that addresses only the symptoms. Furthermore, we cannot hope to evaluate the potential impact and limitations of *Padilla* without a firm grasp on the source of the underlying crisis.

What, then, were the causes of the problem; why were there an intolerable number of deportations stemming from "bad" pleas? After all, as the Court noted, "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."[11] As support for that assertion, the Court listed an amalgam of standards and legal analyses, some written as far back as 1993, from, inter alia, the National Legal Aid and Defender Association, the Department of Justice, the American Bar Association Standards for Criminal Justice, criminal practice manuals, and law reviews.[12] Emphasizing the point that the duty to advise was not merely well-known, but was also universally acknowledged, the Court quoted from the *amicus* brief filed by Legal Ethics, Criminal Procedure, and Criminal Law Professors: "authorities of every stripe . . . universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients . . . ."[13] While the Court seized upon this language to argue that the duty to advise about deportation consequences was indeed a prevailing professional norm,[14] the unambiguous and concordant language of those multiple sources poses a larger question—if the duty is so clear, why isn't it being followed? Put another way, why isn't the prevailing professional norm actually prevailing? Difficult as it is to identify with certainty the causes of noncompliance with previously promulgated rules, potential causes should be identified; otherwise it is impossible to assess whether *Pa-*

11. *Padilla*, 130 S. Ct. 1473, 1482 (2010).

12. *Id.*

13. *Id.*

14. In *Strickland v. Washington*, the Court held that to prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient, and that but for the inadequate performance the result would have been different. 466 U.S. 668, 687 (1984). The Court explained further that the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688.

dilla will have the revolutionary impact on indigent defense that some have already prophesized.[15]

While there are myriad possible reasons for the seemingly systemic violation of extant professional norms concerning immigration counseling, the issue is best analyzed through two lenses: individual attorney fault and structural failure. With regard to the former, there is little doubt that many of these travesties are attributable to bad lawyers and bad lawyering. Whether due to attorney ignorance, attorney indifference, or attorney malevolence, many of the ill-advised pleas of the *Padilla* variety lay blame at the doorstep of individual defense attorneys.

It is also beyond question that many of these faulty pleas are the result of the chronic underfunding and resultant overburdening of public defenders who labor under crushing caseloads.[16] These institutional defenders have little or no time to investigate their clients' backgrounds or the deportation consequences of their cases.[17] Coincident and intertwined with the overwhelmed public defender, is an overwhelmed system. With quality-of-life, hyper-aggressive policing sweeping the nation, prosecutors and judges have heavy caseloads, too.[18] The end result is a premium on, and pressure for, guilty plea dispositions at the first possible moment, long before any attorney could investigate and ascertain her client's immigration status and learn the consequences that flow from the offered plea.[19] Given the complex interplay between the quality of individual lawyers and an intractable criminal justice system, it is difficult to imagine a straight-

15. *See, e.g.*, Love & Chin, *supra* note 2, at 18 (*Padilla* is "an extraordinary expansion of the Sixth Amendment rights of criminal defendants"); *id.* at 23 ("The *Padilla* decision promises to transform the landscape of criminal representation in this country by requiring consideration of collateral consequences at the front end of a criminal case. In that regard, it is surely a 'major upheaval' in Sixth Amendment jurisprudence with broad systemic ramifications."); 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) (referring to the "revolution brought about by Padilla").

16. While Padilla retained private counsel, the majority of criminal defendants are represented by government supplied attorneys. *See, e.g.*, Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 678 (2011) ("Most criminal defendants in the United States are represented by public defenders or other appointed counsel.").

17. *See supra* note 10 and accompanying text.

18. *See, e.g.*, THE CONSTITUTION PROJECT, *supra* note 10, at 72–73; NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 10, at 25.

19. *See, e.g.*, Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL'Y 645 (2011), *available at* http://ssrn.com/abstract=1916148.

forward, *Padilla*-inspired remedy for the underlying immigration advice problem. Without quantifying what percentage of criminal defense attorneys fall into any of the groups above, it is certainly also the case that many attorneys were well aware of the standards referenced by the Supreme Court and had already been advising their clients, at least to some extent, about immigration consequences of proposed guilty pleas. Furthermore, accepting the Court's premise that the prevailing norm has always been for attorneys to provide adequate immigration impact advice, then surely there are a large number of attorneys who for years have already been providing their clients with this kind of advice. In fact, if these lawyers reflect the prevailing norm, then presumably they are in the majority of criminal defense attorneys.

Yet, it is clear that a significant problem exists and persists, and even well-intentioned lawyers frequently fail to provide adequate immigration advice. The critical question becomes whether *Padilla* can, or will, affect the practice of those who—either because of their own incompetence or because of institutional impediments to effective representation—have been ignorant of, unwilling, or unable to conform to prevailing norms. Before we canonize the holding in *Padilla*, we must ask whether it addresses, let alone fixes, the larger problem—will *Padilla* have any significant impact on the nature and quality of the practice of those who have heretofore been violating longstanding, universally acknowledged and accepted rules?

Maybe the Supreme Court imprimatur on the duty to advise will make a difference. To the extent that some attorneys were unaware of the relationship between pleas and immigration consequences, the Supreme Court's bully pulpit may get their attention in ways that the American Bar Association, Department of Justice or National Legal Aid and Defender Association standards apparently did not. Yet, it is difficult to escape the irony of noting that to support its holding, the Court cited the very standards that had been largely ignored or relegated into obscurity.

Perhaps now that the duty to advise is a constitutional, as opposed to a "mere" ethical, obligation, attorneys will adhere to its dictates for fear of being found to have provided ineffective assistance of counsel. Maybe the specter of the ineffectiveness scarlet letter is more real to practicing attorneys than the vague and seldom realized threat of professional discipline.[20] In a similar vein, perhaps more attorneys will

20. *See, e.g.*, Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 1 B.Y.U. L. REV. 1, 4–5 (2002) (discussing

now provide the requisite advice out of greater concerns about *coram nobis*[21] or malpractice claims flowing from allegations of constitutionally deficient representation.[22] Perhaps then, *Padilla* will drag some percentage of the recalcitrant, ineffective lawyers along, albeit kicking and screaming or in spite of themselves. On the other hand, it is hard to see how the new admonition will change the practice of those who already are aware of their obligations, and have fought uphill and often losing battles to adhere to ethical requirements in the face of institutional pressures.

Even if attorneys become cognizant of their now constitutionalized counseling obligations, whether they will advise as required, and, if they do, whether they will do it well, remains in doubt. It is easy to imagine *Padilla* becoming memorialized in, or reduced to, some kind of defense attorney form or checklist. Commentators have already referred to a "*Padilla* advisory,"[23] suggesting a routine kind of standard operating procedure. Rather than serving to encourage thoughtful lawyering and counseling, *Padilla* could readily devolve into practices for attorneys to try to shield themselves from potential liability by adopting a rote, standard practice in every case.[24] As with all

the fact that defense attorneys are seldom disciplined for professional misconduct); *see also* William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 162 (1995) ("[There is] no reported case of an attorney being disciplined for failures related to criminal defense.").

21. In *United States v. Morgan*, 346 U.S. 502 (1954), the Supreme Court held that federal courts are authorized to grant a writ of error *coram nobis* pursuant to the All Writs Act, 28 U.S.C. § 1651(a), for defendants who are no longer in custody and therefore cannot use habeas procedures to obtain review of their conviction. *Id.* at 506 n.6, 513; *see also* Jimenez v. Trominski, 91 F.3d 767, 768 (5th Cir. 1996) ("The writ of *coram nobis* is an extraordinary remedy available to a petitioner no longer in custody who seeks to vacate a criminal conviction in circumstances where the petitioner can demonstrate civil disabilities as a consequence of the conviction, and that the challenged error is of sufficient magnitude to justify the extraordinary relief.").

22. *See, e.g.*, Roberts, *Ignorance is Bliss*, *supra* note 6, at 164 (noting that successful malpractice claims against public defenders are practically non-existent).

23. Love & Chin, *supra* note 2, at 19. In his dissent, Justice Scalia also referred to a "*Padilla* warning." *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1496 (Scalia, J., dissenting).

24. The fabled *Miranda* warnings provide a cautionary tale. Miranda v. Arizona, 384 U.S. 436 (1966). While originally intended to fully apprise the accused of his valuable constitutional rights, the warnings by most accounts have devolved to a rote recitation of words devoid of explanation or meaning. *See, e.g.*, People v. Nitschmann, 41 Cal. Rptr. 2d 325, 327 (Ct. App. 1995) (quoting Transcript of Record, People v. Nitschmann, No. 201378) ("You know, sometimes this so-called *Miranda* advisement becomes a kind of ritual where the officer just blabs by rote those warnings, and I suspect the defendant sits there with eyes glazed over and maybe comprehends and maybe doesn't."); Richard Rogers, et al., *In Plain English: Avoiding Rec-*

checklists, a checkmark in the appropriate box says nothing about the nature and quality of the task performed.[25] Is one brief conversation enough? Padilla argued that his attorney gave faulty advice.[26] Would it have been constitutionally sufficient if the attorney had said simply, "the plea will result in deportation"? What if Padilla still wanted to plead guilty? Is the attorney required to advise against the plea, and/or to probe further whether the client truly understands the *Padilla* advisory and the ramifications of his decision?[27] In his dissent, Justice Scalia bemoaned the likely *Padilla*-inspired "innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given."[28] These particular concerns about *Padilla's* ambiguity and the promise of future litigation may well pale in comparison to appeals focused on the nature and quality of the advising. While *Padilla* requires defense counsel to provide advice, it says nothing about the dimensions and context of this critically important and sensitive counseling.[29]

Furthermore, while lawyer ignorance, indifference, and malevolence are part of the problem, a focus on individual laywering practices obfuscates the larger, structural issue—indigent defense systems with otherwise competent attorneys who are under-resourced, overwhelmed, and overburdened with cases. The relevant inquiry turns from *will* the attorney effectively advise, to *can* the attorney effectively advise. Through this lens, context becomes all-important. No mat-

ognized Problems with Miranda *Miscomprehension*, 17 PSYCHOL. PUB. POL'Y & L. 264, 282 (2011) ("Some Miranda terminology is likely to spell trouble in reasonably conveying constitutional protections . . . ."). While, of course, the *Miranda* warnings are administered by law enforcement, and the *Padilla* advisory would be given by defense counsel, the potential for "routinization" in the *Padilla* context is real.

25. With apologies to Atul Gawande and his bestseller, THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT (1st ed. 2009).

26. Padilla claimed his attorney advised that he "did not have to worry about immigration status since he had been in the country so long." *Padilla*, 130 S. Ct. at 1478.

27. *See, e.g.*, Boria v. Keane, 90 F.3d 36, 37–38 (2d Cir. 1996) (holding that in addition to conveying any plea offer to the accused, defense counsel was also required to offer an informed opinion as to the wisdom of accepting or rejecting the offer). Again referencing *Miranda* by way of analogy, the Court has held that interrogators are under no duty to clarify or explain if the accused's seeming invocation of his rights is ambiguous. *See* Berghuis v. Thompkins, 130 S. Ct. 2250, 2264 (2010); Davis v. United States, 512 U.S. 452, 461–62 (1994).

28. *Padilla*, 130 S. Ct. at 1496 (Scalia, J., dissenting).

29. Yet another potential issue ripe for litigation is whether the deportation consequences were "truly clear" so that "correct advice," versus a general warning, was required. *Id.* at 1483 (majority opinion). The Court distinguished between situations where the "the law is not succinct and straightforward" and where it is "truly clear," and calibrated the attorney's constitutional counseling obligations accordingly. *Id.*

ter how well-intentioned and *Padilla*-inspired an attorney may be, if she is representing close to 1000 people in a year, she either cannot follow the dictates of *Padilla*, or will at most pay lip service to its holding.[30] *Padilla* unplugged from the real-world problems and well-documented national crisis in indigent defense is more likely to be an exercise in futility than a catalyst for systemic change.[31] Ironically, though the Court in *Padilla* cited to all kinds of defense attorney standards to support its holding, it did not address the related and critical standard of caseload caps for indigent defense attorneys.[32] Put simply, omnipresent, seemingly intractable, overwhelming caseloads prohibit public defenders from meeting their *Padilla*-imposed constitutional counseling obligations.[33] If indigent defense attorney caseloads are not addressed, *Padilla* will be consigned to the same fate as *Gideon*—a lofty but unrealized ideal.

It is striking and telling that the Supreme Court acknowledged that Padilla's lawyer rendered ineffective assistance. Ineffective assistance

30. *See, e.g.*, Robert Behre, *Public Defender is One Busy Guy*, CHARLESTON POST & COURIER, May 1, 2010, *available at* http://www.postandcourier.com/news/2010/may/01/public-defender-is-one-busy-guy (discussing a Charleston public defender who represented forty-four clients in one day and about 930 during the year); Fred McKissack, *Maximum Caseload: Misdemeanor Public Defenders Must Scramble*, J. GAZETTE, Apr. 3, 2005, http://www.nlada.org/News (search "Fred McKissack Maximum Caseload" in the search box on the upper right corner; follow the "Journal Gazette 04/03.2005 Maximum Caseload" link to the article) (discussing two contract defenders in Indiana who were assigned 2668 cases in one year) (last visited Oct. 24, 2011); Joy Powell, *Minnesota's Public Defenders Buried by Caseloads*, STAR TRIB., Mar. 30, 2009, *available at* http://www.startribune.com/local/south/42060622.html (discussing public defenders handling about 800 cases per year and 125–150 clients on any given day).

31. *See supra* note 10 and accompanying text.

32. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended that a defense attorney should not handle more than 150 felonies, or more than 400 misdemeanors, in any given year. *See* NATIONAL LEGAL AID & DEFENDER ASS'N, COMPENDIUM OF INDIGENT DEFENSE STANDARDS § 13.12, *available at* http://www.nlada,org/Defender/Defender_Standards/Standards_For_The_Defense#thirteentwelve. These numbers have become the gold standard and are cited with approval in any discussion of caseload or workload caps for indigent defense attorneys. *See, e.g.*, ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 4 n.19 (2002).

33. *See, e.g.*, Backus & Marcus, *supra* note 10, at 1081–82 (noting that exorbitant caseloads prevent public defenders from investigating, preparing, and maintaining communication with their clients); Chin, *supra* note 16, at 680 ("The workloads of many attorneys do not give them the time to prepare cases as carefully as the standards require."); Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Rights to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 663–75 (1986).

of counsel is perhaps the most common argument raised by defendants on appeal,[34] yet it is rarely successful.[35] Rather than provide a careful, specific delineation of the component parts of constitutionally sufficient defense lawyering, the Court in *Strickland v. Washington* chose to define the Sixth Amendment right to the assistance of counsel in general terms of reasonable performance.[36] If this easily malleable standard was not enough for appellate courts to rely on to quickly dispense with postconviction ineffectiveness claims, the Court put an additional nail in the coffin of such appeals by requiring that the defendant also show that any deficient performance resulted in actual prejudice.[37] As a result, it is extremely difficult to show ineffective assistance, and appellate courts have denied such claims even where the defense attorney was drunk,[38] on drugs,[39] asleep,[40] or inexperienced.[41]

34. EMILY M. WEST, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES 1, *available at* http://www.innocenceproject.org/docs/Innocence_Project_IAC_Report.pdf (2002) ("Review studies of post conviction appeals have demonstrated that ineffective assistance of counsel is the most commonly raised issue."); *see also* Jonah Wexler, *Fair Presentation and Exhaustion: The Search for Identical Standards*, 31 CARDOZO L. REV. 581, 612 (2009) (stating ineffective assistance of counsel is the most common claim asserted in habeas petitions by state prisoners).

35. WEST, *supra* note 34, at 1 ("While nearly half of [all] state claims involved allegations of ineffective assistance of counsel, only eight percent found relief."); *see also* Debra L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47, 55 (2003); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1578 (2005) (noting that ninety-nine percent of ineffective assistance claims were unsuccessful).

36. 466 U.S. 668, 687–88 (1984) ("When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate.").

37. *Id.* at 694 ("[b]ut for counsel's unprofessional errors, the result of the proceeding would have been different").

38. *See, e.g.*, Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993); Fowler v. Parratt, 682 F.2d 746, 750 (8th Cir. 1982).

39. *See, e.g.*, Berry v. King, 765 F.2d 451, 455 (5th Cir. 1985), *cert. denied*, 476 U.S. 1164, 1164 (1986).

40. *See, e.g.*, Ortiz v. Artuz, 113 F. Supp. 2d 327, 341–42 (E.D.N.Y. 2000) *aff'd*, 36 F. App'x 1, 3 (2d Cir. 2002); Jackson v. State, 290 S.W.3d 574, 587 (Ark. 2009), *reh'g denied*, 2009 Ark. LEXIS 440 (Ark. Feb. 12, 2009); McFarland v. State, 928 S.W.2d 482, 505–06 (Tex. Crim. App. 1996), *abrogated by* Mosley v. State, 983 S.W.2d 249, 264 n.18 (Tex. Crim. App. 1998); s*ee also* 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, 465–70 (1996).

41. *See, e.g.*, United States v. Cronic, 466 U.S. 648, 665–66 (1984); Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002); Ira Mickenberg, *Drunk, Sleeping, and Incompetent*

Against the post-*Strickland* backdrop of countless failed ineffective assistance of counsel appeals, the Court decided that Padilla's private attorney was one of the very few that crossed a constitutional line. Emphasizing the harsh nature of deportation in holding that a failure to provide adequate immigration advice constitutes ineffective assistance, the Court distinguished this inadequacy from other forms of unacceptable counseling. Yet, while no one can deny that deportation is, indeed, a harsh consequence for a criminal defendant, the question remains: why is this sanction so unique and different from other consequences of 'bad lawyering?' Why was the Court willing to constitutionalize the duty to inform regarding immigration consequences, even though it has steadfastly declined over the years to so elevate many core functions at the heart of zealous defense lawyering in general? Why has the Court not sanctified—and constitutionalized—standards that require factual and legal investigation in every case, full and thorough discovery and motion practice, regular meetings with clients to keep them apprised of developments in their cases, efforts to establish a relationship of trust and understanding, et cetera? These core, critical, and ever-present defense attorney functions pertain to every single defendant, and were also promulgated and extolled in a variety of professional standards and manuals dating back many years, indeed, well before the standards concerned with immigration advice.[42]

Furthermore, there is little mystery involved in understanding the severe consequences for criminal defendants whose lawyers fail to effectively perform these core functions: innocent defendants who plead guilty because they have no faith in their ineffective and unapproachable defense attorney; defendants whose illegal search is never litigated by attorneys who are unprepared to argue for suppression; defendants who are convicted at trial and sentenced to countless years in prison because their attorneys failed to negotiate in earnest; et cetera. Surely, the ten, twenty or more additional years in state prison is at least as harsh a consequence as deportation. In addition, it is universally acknowledged that the failure to adequately perform

Lawyers: Is It Possible to Keep Innocent People Off Death Row?, 29 U. DAYTON L. REV. 319, 322 (2004).

42. The ABA Standards of Criminal Justice were first promulgated in 1974. *See* ABA STANDARDS OF CRIMINAL JUSTICE VOL. 1 (1st ed. 1974). Today, in its third edition, the standards continue to guide policymakers and practitioners on defense counsel's obligations, including the duty to investigate and engage in prompt action to protect the accused. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, §§ 4-3.6–4-4.1 (3d ed. 1993) [hereinafter ABA STANDARDS].

these core functions is commonplace. As with the duty to advise regarding immigration consequences, we know that many attorneys either do not or cannot measure up to the standards, with dire consequences resulting for tens of thousands of indigent defendants every year.[43] Nevertheless, the Court maintains silence on these aspects of defense lawyering.

As commentators write about the criminal justice system's emphasis on guilty pleas and how institutional actors have ignored myriad consequences that attach to arrest and conviction, they rightfully point out that systemic concerns for finality and efficiency drive the plea train and the unwillingness to bring so-called collateral consequences into the picture.[44] After all, consideration of any additional factors presents the potential for gumming up the works and slowing down the plea machinery. While true, that critique comes up short. Although the criminal court is driven by concerns for finality and efficiency, ultimately it is built on an unwillingness to litigate and challenge law enforcement policies, especially those that criminalize vast numbers of the poor and people of color under the guise of "quality of life" policing. Guilty pleas, early and often, were the driving force long before the implosion of collateral consequences.[45] Institutional actors fail to examine collateral consequences for the same reason they fail to examine the underlying police practices and the actual charges—the system is predicated on presumption of guilt and lack of concern about, or interest in, the constitutionality of the arrest or the guilt or innocence of the accused.

Post-*Padilla*, many have written, thought, and strategized about taking *Padilla* viral, extending it to a host of other consequences.[46]

43. *See, e.g.*, Chin, *supra* note 16, at 680 ("In many instances, defense attorneys are unable to perform basic work associated with representing a client, such as interviewing witnesses, seeking discovery from the prosecution, or studying the caselaw surrounding the charge.").

44. *See, e.g.*, Smyth, *supra* note 4, at 818 ("[i]nstitutional pressures from courts concerned with system costs . . . will continue to motivate a return to the limiting principle of the collateral consequences rule.").

45. *See, e.g.*, Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1182 (1975); Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 18 (1967); Klein, *supra* note 33, at 656–57; Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1912 (1992); David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255, 255–56, 258–59 (1965).

46. *See, e.g.*, Margaret Love & Gabriel J. Chin, *The "Major Upheaval" of* Padilla v. Kentucky: *Extending the Right to Counsel to the Collateral Consequences of Conviction*, 25 CRIM. JUST. 36, 41 (2010) ("Justice Stevens' opinion specifically left open

The clarion call for defense attorneys to consider all consequences of a guilty plea, however, is ominously silent with respect to attacking the underlying criminal charges. This silence speaks volumes about the manner in which the criminal justice system rushes to its own defense, and how difficult it is to speak critically while operating within it. There are now many who bemoan the phrase "collateral" consequences for its implicit suggestion that those consequences are somehow less significant than other results of a criminal conviction. After all, they argue, negative consequences like eviction, loss of public benefits, or deportation may be more harmful to a particular defendant than some time in jail. While there is doubtless merit to this argument, these same commentators often fail to acknowledge that they are now devoting their attention to what is essentially a collateral attack on the criminal justice system. By focusing so exclusively on the attorney's obligation to limit the negative impact of a plea, they appear to take the guilty plea itself as a given.

One might, instead, think that the first insight to follow from the belated recognition of the many negative and severe consequences that flow from conviction would be the need for new defense challenges to the very system that thrives on countless quick guilty pleas. One might hope to see newly energized defenders attack the constitutionality of individual arrests and general arrest policies. One might even envision masses of defenders challenging the prosecution's ability to prove their cases beyond a reasonable doubt. One might hope that immediately following a lecture about the many ills—deportation and others—that flow from conviction would be an exhortation to litigate like never before. After all, the obvious truth is that if the charges are challenged, litigated, and ultimately dismissed, then the majority of negative consequences will evaporate.

Unfortunately, *Padilla* has spawned analyses focused on and confined to so-called collateral consequences. Lacking is any similar movement to attack the underlying basis for the arrest or to develop case theories and trial advocacy skills to achieve dismissal. Just as the collateral consequences devotees chastise the institutional players for

the possibility that its holding might extend to other indirect consequences of a plea . . ."); Love & Chin, *supra* note 2, at 22 (arguing that *Padilla* will likely "have a broader application" to other collateral consequences); Rachel E. Rosenbloom, *Will* Padilla *Reach Across the Border?*, 45 NEW ENG. L. REV. 327, 328 (2011) ("*Padilla* suggests the potential for a more general blurring of the line between 'direct' and 'collateral' consequences of convictions"); Smyth, *supra* note 4, at 809 ("Even a cursory reading of Padilla begs an inquiry into its application to other so-called 'collateral consequences' . . . .").

focusing on the wrong things, they, too, ignore fundamental aspects of criminal defense and of client goals.

Ironically, the collateral consequence emphasis ends up in the same place as the typical plea-focused trial court—fast forwarding past the constitutionality of the arrest and proof of guilt; ignoring any challenge to policies of mass arrests for minor offenses, and relegating any meaningful testing of police behavior to second-class status. It is no wonder that post *Padilla*, so many trial and appellate courts, criminal justice administrators, and prosecutors, have all pledged fealty to the cause of collateral consequences. It ensures that attention will remain diverted from the rampant race-based stop-and-frisks that characterize twenty-first century policing,[47] the staggering 2.3 million people in jails and prisons across the country,[48] and the concomitant destruction of families and communities of color.[49] Indeed, the full-throated institutional support emerging from all criminal justice quarters for increased attention to collateral consequences has become a uniting and exclusive force in criminal justice. Defense attorneys, prosecutors, and judges attend the same trainings and all agree to be more attentive to issues such as the impact of guilty pleas on student loans,

47. Stop-and-frisk procedures continue to rise in New York City. *See, e.g.*, Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813 (2007); Press Release, CTR. FOR CONSTITUTIONAL RIGHTS, *New NYPD Data for 2009 Shows Significant Rise in Stop-and-Frisks: More than Half Million New Yorkers Stopped Last Year*, (Feb. 10, 2010), http://ccrjustice.org/newsroom/press-releases/new-nypd-data-2009-shows-significant-rise-stop-and-frisks%3A-more-half-million (quoting CCR Executive Director Vincent Warren) ("2009 was the worst year for stop-and-frisks . . .[and] [f]or many kids, getting stopped by the police . . . has become a normal afterschool activity . . . .").

48. Michael A. Simons, *Sense and Sentencing: Our Imprisonment Epidemic*, 25 J. C. R. & ECON. DEV. 161, 162 (2010); Adam Liptak, *U.S. Prison Population Dwarfs that of All Other Nations*, N.Y. TIMES, Apr. 23, 2008, http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all.

49. Stop-and-frisk procedures and the massive prison population continue to affect predominantly African Americans and Latinos. *See, e.g.*, Brett E. Garland, Cassia Spohn, & Eric J. Wodah, *Racial Disproportionality in the American Prison Population: Using the Blumstein Method to Address the Critical Race and Justice Issue of the 21st Century*, 5 JUST. POL'Y. J. 1, 10–11 (2008) ("An offender's relationships with his/her spouse, children, and neighbors all incur strain from the effects of imprisonment."); Al Baker, *New York Minorities More Likely to Be Frisked*, N.Y. TIMES, May 13, 2010, at A1 ("Blacks and Latinos were nine times as likely as whites to be stopped by the police in New York City in 2009 . . . ."); Editorial, *The Truth Behind Stop-and-Frisk*, N.Y. TIMES, Sept. 2, 2011, at A20 ("There is no dispute that minorities are disproportionately singled out."). *See generally* Marc Mauer, *Thinking About Prison and its Impact in the Twenty-First Century*, 2 OHIO ST. J. CRIM. L. 607 (2005).

public housing, deportation, et cetera. It is increasingly common for judges, as part of a plea allocution, to ask the accused if he is aware that his plea could have an adverse impact on a variety of things in his life.[50] Prosecutors, too, feel obliged to ensure that the accused has been fully apprised of immigration issues stemming from an offered plea.[51] Some courts and prosecutor's offices now distribute fact sheets to defendants in their initial court appearance to let them know that a plea can have negative immigration consequences.[52] Whether motivated by concern for the accused or to insulate pleas from post-conviction attack, it is clear that judges and prosecutors are part of the *Padilla* juggernaut.

It is precisely this all-encompassing, "we're in this together" mentality that should give defense attorneys pause. This mindset is eerily reminiscent of the burgeoning so-called "problem-solving" court movement where defense attorneys are urged to be team players alongside prosecutors and judges.[53] In the end, this communal focus

50. *See* N.Y.C. BAR ASS'N, *supra* note 5, at 7 ("Since *Padilla* . . . many more judges are providing some kind of warning to defendants in many cases, including felonies and misdemeanors."). *See generally* Steven Weller & John A. Martin, Padilla v. Kentucky *and the Duties of the State Court Criminal Judge in Accepting Guilty Pleas*, CENTER FOR PUBLIC POLICY STUDIES; Darryl K. Brown, *Why* Padilla *Doesn't Matter (Much)*, 58 UCLA L. REV. 1393 (2011).

51. *See* N.Y.C. BAR ASS'N, *supra* note 5, at 6 ("[T]hree [District Attorneys'] offices indicate that they generally note on the record that they have served the defendant through counsel with a notice of immigration consequences."); Andrew E. Taslitz, *Destroying the Village to Save It: The Warfare Analogy (or Dis-Analogy?) and the Moral Imperative to Address Collateral Consequences*, 54 HOW. L.J. 501, 527–28 (2011).

52. N.Y.C. BAR ASS'N, *supra* note 5, at 6 ("Three [District Attorneys'] offices . . . have issued their own written advisals, indicating that convictions may lead to immigration consequences and listing types of offenses that may trigger these consequences . . . . The Queens County District Attorney's Office provides the form to defense counsel at the time of the plea allocution in misdemeanor and felony cases . . . and in some but not all cases involving violations.").

53. *See, e.g.*, Terry Carter, *Red Hook Experiment: In This Brooklyn Neighborhood, Justice Has A Distinct Community Flavor*, 90 A.B.A. J. 36, 39 (2004) (describing a "community court" in Brooklyn, New York and observing that "the prosecutor and defense lawyer are part of the same team, working on the long-term best interests of individual defendants and the community"); Judith S. Kaye, *Lawyering for a New Age*, 67 FORDHAM L. REV. 1, 5 (1998); James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1543 (2003); Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL'Y 57, 59–60 (2009) (observing that in the Miami Drug Court, "[p]rosecutors and defense attorneys changed their roles . . . to become part of the treatment court 'team.'"). For a critique of that conception of the defense attorney's role, see Mae C.

serves to preserve the criminal justice status quo. After all, defense organizations with limited funds and overburdened staff establish priorities and make choices about where and how to devote their energy and resources. Many new defenders find themselves well-trained to find the "best" plea option, yet woefully inadequate when faced with the prospect of cross-examining an arresting police officer. These days, the clear message is that the emphasis should be on figuring out how best to fashion a plea that limits the potential damage to the accused, as opposed to devising new and innovative ways to challenge the police in individual cases and on behalf of families and communities.

Yet, if defense advocates are aware of the ways that *Padilla* may push them into a compromised position—in which all actors in the system supposedly work together for the clients' best interest—then perhaps *Padilla* can be exploited in positive ways. While some commentators write that the decision "promises to transform the landscape of criminal representation . . . by requiring consideration of collateral consequences,"[54] others reach higher. These authors emphasize with great optimism the potential for *Padilla* to "greatly expand the responsibilities of defense lawyers in counseling and advocating for their clients."[55] Indeed, *Padilla* can be transformative if exploited to address the full range of criminal defense lawyering, not "just" collateral consequences. While Supreme Court cases in and of themselves seldom have transformative effects,[56] they can influence practice if they become part of the fabric of a larger effort. If not confined to newfound attention to collateral consequences, *Padilla's* rationale can be used as a springboard to impel defense attorneys to inquire into, investigate, advise about, and challenge the underlying charges in every case in ways that heretofore occur only sporadically.

Padilla may be most significant for the Court's embracing and wielding its authority to mandate at least part of what a defense attorney must say and discuss with her client in particular circumstances.[57] As a window into the attorney-client relationship, *Padilla* pre-

Quinn, *Whose Team am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2000).

54. Love & Chin, *supra* note 2, at 23.

55. *Id.* at 22–23.

56. *See, e.g.*, Brown, *supra* note 50, at 1413–14 (arguing that even cases of the magnitude of *Gideon v. Wainwright*, 83 S. Ct. 792 (1963), and *Brown v. Board of Education*, 347 U.S. 483 (1955), were more "symbolic than practically transformative").

57. It is important to note that while this may be a well-intentioned effort to make sure that the accused is adequately advised, it represents judicial encroachment into

sents an opportunity, if not a necessity, for defense attorneys to think harder about what they say, and when and how they say it, when they counsel clients.[58] After all, the essence of criminal defense lawyering is counseling,[59] and *Padilla* certainly focuses renewed attention on that lawyering skill. While courts have held that defense attorneys must convey all plea offers to their clients,[60] and now, that they must provide adequate immigration impact advice, the Court did not pro-

the attorney-client relationship, counseling and privileged communications. While many applaud the impetus for this intrusion, it bears noting that the Court is wading into heretofore relatively sacrosanct waters. There are indeed other examples of courts dictating to defense counsel what she must say to her clients, and they similarly raise red flags. In *United States v. Fernandez*, a case handled under the then fully inforce Sentencing Guidelines, the defendant received a harsher sentence than would likely have been possible had he provided substantial cooperation with the government. 2000 WL 534449, at *1 (S.D.N.Y. May 3, 2000), *opinion adhered to on reconsideration*, 2000 WL 815913, at *1 (S.D.N.Y. June 22, 2000). The court held that "the advent of the Sentencing Guidelines now makes it mandatory that every defendant be advised at an early stage that cooperation with the Government may be the only course that can substantially reduce the sentence that will ultimately be imposed." *Id.* at *6. The more courts enter into that sphere and dictate what counsel must say or do, the more the potential grows for judicial interference in the attorney-client relationship. In fact, claimed violations of the *Padilla* rule can only be accurately determined by having defense counsel testify about what research she did regarding the immigration impact of a proffered plea, what she knew about her client's immigration status, and, ultimately, what conversation(s) she had with her client about the confluence of those facts. Many states already require trial judges to advise defendants about possible immigration consequences prior to accepting a plea, or to inquire whether counsel provided such advice. Padilla v. Kentucky, 130 S. Ct. 1473, 1491 (2010); Roberts, *Ignorance is Bliss*, *supra* note 6, at 194. Such an inquiry might adversely impact the attorney-client relationship or raise Fifth Amendment concerns. In the context of the Fifth Amendment right to testify at trial, courts have hesitated to obtain an on-the-record waiver of the right to testify. The primary concern is that such an inquiry might intrude inappropriately on the attorney-client relationship. *See, e.g.*, United States v. Stark, 507 F.3d 512, 516 (7th Cir. 2007).

58. There are countless books and articles devoted to client counseling techniques, issues, and considerations. *See generally* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987).

59. *See generally* Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841 (1998).

60. *See, e.g.*, United States v. Blaylock, 20 F.3d 1458, 1465–66 (9th Cir. 1994); United States v. Rodriguez, 929 F.2d 747, 752 (1st Cir. 1991); Johnson v. Duckworth, 793 F.2d 898, 902 (7th Cir. 1986); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982); Beckham v. Wainwright, 639 F.2d 262, 267 (5th Cir. 1981); United States v. Barber, 808 F. Supp. 361, 378 (D.N.J. 1992), *aff'd,* 998 F.2d 1005 (3d Cir. 1993); Barentine v. United States, 728 F. Supp. 1241, 1251 (W.D.N.C. 1990), *aff'd,* 908 F.2d 968 (4th Cir. 1990); Lloyd v. State, 373 S.E.2d 1, 3 (Ga. 1988); Lyles v. State, 382 N.E.2d 991, 993 (Ind. Ct. App. 1978), *holding modified by* Dew v. Indiana, 843 N.E.2d 556 (Ind. Ct. App. 2006); State v. James, 739 P.2d 1161, 1166 (Wash. Ct. App. 1987).

vide rules or guidance as to how those conversations should take place. *Padilla* presents an opportunity for defense lawyers to reconsider the content and the context of counseling clients generally.[61]

The recent case of *People v. McLartey*[62] illustrates the complexity of the counseling issues embedded in the seemingly simple admonishment that defense attorneys must provide adequate advice in general and about the immigration consequences of a guilty plea in particular. In *McLartey*, the defendant pleaded guilty to felony narcotics charges and was subsequently ordered to be deported. His attorney provided no advice on the immigration consequences of a plea, but that was, apparently, because the defendant told the lawyer that he believed he was a "derivative" citizen.[63] The issue was whether defense counsel had any affirmative obligation to investigate the defendant's statement that he believed he was a "derivative" citizen. The court held that while *Padilla* requires an attorney to counsel a noncitizen client about the risk of adverse consequences, it does not similarly require an attorney to counsel a client professing to be a citizen.[64] These facts, and the court's holding, raise the question of whether a client's simple "yes," mumbled in response to a rapid-fire arraignment interview inquiry regarding citizenship, would satisfy the lawyer's *Padilla* obligations.

In addition to starting a serious and long overdue conversation about the parameters of the attorney's ethical and constitutional counseling obligations, *Padilla* can be a catalyst for positive change in other aspects of defense lawyering. By extrapolating from *Padilla* the need for meaningful, adversarial testing of the charges, defense practice would better fall in line with client goals. As commentators argue that institutional defense attorneys have refrained from, and may continue to balk at, embracing a focus on collateral consequences, the suggestion has been that concerns about collateral consequences reflect "reality from a client's perspective."[65] While chiding institution-

61. *See generally* GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978); DAVID A. BINDER AND SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING (1977); Evelyn Cruz, *Through the Clinical Lens: A Pragmatic Look at Infusing Therapeutic Jurisprudence into Clinical Pedagogy*, 30 T. JEFFERSON L. REV. 463 (2008); Stephen Ellmann et al., *Legal Interviewing and Counseling: An Introduction*, 10 CLINICAL L. REV. 281 (2003).

62. No. 6762/06, 2011 WL 2518628 (N.Y. Sup. Ct. June 22, 2011).

63. *Id.* at *2 ("[The defendant] believed he was a citizen, having 'derived citizenship through [his] mother,' who had become a naturalized citizen . . .").

64. *Id.* at *3.

65. Smyth, *supra* note 4, at 815.

al defense attorneys for assuming that all their clients care about is the negatively valued commodity of penal time,[66] these advocates engage in a similar form of paternalism. For many if not most arrestees, avoiding incarceration is indeed their most serious consideration, their reality. Additionally, every study from the client's perspective (the so-called "consumer perspective" studies) has found that what matters most to the accused is a desire to be heard. The accused wants his day in court, and an attorney who will fight for his rights and expose the illegal stop, the officer's racial epithets, the failure to provide *Miranda* warnings, the excessive force used to place him under arrest, et cetera.[67]

Looking ahead, how can we measure *Padilla*'s impact to see if it has affected the practice or if it is the much ballyhooed second coming of *Gideon*? We might in the not too distant future experience a collective vague sense that more attorneys get it and are finally learning immigration law or at least becoming aware of issues and discussing them with their clients. We might read about or hear of fewer stories of deportations based on criminal convictions, or we might detect a decrease in the number of appeals premised on failure to advise grounds.

However, if *Padilla* is truly effective as a change agent, it should be manifested in some concrete ways. For starters, we should see changes in the number guilty pleas, the very acts that cause the deportation problem in the first place. Given that convictions, now more than ever, lead to harmful immigration consequences,[68] there should be fewer pleas and more adversarial trials. Even if, as the Court correctly noted, a plea may often still be the best available option for a particular defendant,[69] there should be a significant number of defendants for whom a trial, and the possibility of acquittal, will be the best choice once they are apprised of the dire consequences of a plea.

Adherence to *Padilla* could end up transforming the criminal court to more closely resemble the heralded notion of an adversarial system as defendants decide to take their cases to trial. As has been written

66. *See* Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52, 62 (1967).

67. *See, e.g.*, Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 342 (2005).

68. "[C]hanges to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction . . . . Deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed." Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010).

69. *Id.* at 1485–86.

about since time immemorial, the criminal court in practice is hardly adversarial.[70] Rather, it thrives on guilty pleas premised on the prevailing going rate for a particular charge. As former federal prosecutor and present federal judge Gerard Lynch observed, "the American system as it actually operates in most cases looks much more like what common lawyers would describe as a non-adversarial, administrative system of justice than like the adversarial model they idealize."[71] This metamorphosis would also address another key finding of the consumer perspective studies. Uniformly, criminal defendants complain that their lawyers' chief objective was to get them to plead guilty.[72]

Padilla by its own terms should also end the infamous "meet 'em, greet 'em, and plead 'em" practice that has dominated so much of criminal justice, and which is the most visible and prevalent manifestation of the assembly line nature of the system.[73] The all too com-

70. *See, e.g.*, John Feinblatt et al., *The Future of Problem-Solving Courts*, 15 CT. MANAGER 28, 31 (2000) ("All too many courtrooms have become 'plea bargain mills.'"); Zeidman, *supra* note 67, at 339 ("Although the Criminal Court has been fraught with problems, an overabundance of adversarialness is not one of them.").

71. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2118 (1998); s*ee also* Chester Mirsky, *The Political Economy and Indigent Defense: New York City, 1917–1998*, 1997 ANN. SURV. AM. L. 891, 911 (arguing that the Supreme Court's legitimization of plea bargaining in *Santobello v. New York*, 404 U.S. 257 (1971), further eroded any semblance of adversarialness in criminal court practice); Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES, Sept. 26, 2011, at A1 ("Plea bargains have been common for more than a century, but lately they have begun to put the trial system out of business in some courtrooms.").

72. *See, e.g.*, JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE—THE DEFENDANT'S PERSPECTIVE 106 (1972) ("Most of the men reported that among the first words uttered by their public defender were: 'I can get you [--] if you plead guilty.'"); Alan F. Arcuri, *Lawyers, Judges, and Plea Bargaining: Some New Data on Inmates' Views*, 4 INT'L J. CRIMINOLOGY & PENOLOGY 177, 183 (1976) (defendants "reported that they were pressured into pleading guilty"); Glen Wilkerson, *Public Defenders as Their Clients See Them*, 1 AM. J. CRIM. L. 141, 143 (1972) ("Real or imagined pressure to plead guilty is a frequent complaint of defender clients.").

73. *See, e.g.*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 10, at 31 ("In many jurisdictions, cases are resolved at the first court hearing, with minimal or no preparation by the defense . . . . This process is known as meet-and-plead or plea at arraignment/first appearance."); Backus & Marcus, *supra* note 10, at 1082 ("[Recommending pleas] at a lawyer's first encounter with a client with almost no information about the case fails to meet ethical standards" and "makes it nearly impossible to determine whether a plea is in a defendant's best interest or to fulfill the duty to explain the matter sufficiently for the client to make an informed decision."); Chin, *supra* note 16, at 679 ("The literature is replete with accounts of attorneys who 'meet 'em and plead 'em,' i.e., advise their clients to plead guilty minutes after first meeting them in lock-up."); Richard Klein, *Judicial Misconduct in Criminal Cases: It's Not Just the Counsel Who May Be Ineffective and Unprofessional*, 4 OHIO ST. J. CRIM. L.

mon standard operating procedure of guilty pleas at the accused's arraignment or initial appearance certainly appears to be a de facto violation of *Padilla*.[74] While extant ethical rules require counsel to promptly investigate every case,[75] and to refrain from advising acceptance of a guilty plea until all factual and legal investigation has been completed,[76] the prevalence of arraignment pleas reveals that those aspirational standards are honored in the breach. While it has long been difficult for defense attorneys to rely on ethical rules in an effort to stand up to institutional pressures to play along,[77] now the Court has constitutionalized at least one of the same ethical aspirations. Counsel is constitutionally obligated to research the applicable immigration law (which the Court aptly noted is an ever-changing and complex body of law),[78] and, even if counsel is clear on the law in the particular situation, the attorney must be sure she knows her client's immigration situation. It is unlikely that counsel can or will discover that key piece of information at her initial meeting with her client. As every text and article ever written about criminal defense interviewing and counseling has observed, it generally takes time, thought, and patience to develop a relationship of mutual trust and respect before a client is willing to tell counsel of "negative" or incriminating facts (for example, that he is here illegally).[79] Furthermore, given the con-

195, 203 (2006) ("[I]t is common for defense counsel in our large urban courts to offer a guilty plea on behalf of their clients within minutes of having first met the defendant.").

74. *See, e.g.*, Love & Chin, *supra* note 2, at 23 ("[*Padilla*] throws a monkey wrench into the plea-bargaining process at a time when law enforcement depends upon the efficient operation of assembly-line justice.").

75. ABA STANDARDS, *supra* note 42, at §§ 4-4.1, 14-3.2(b), (f); ABA MODEL RULES OF PROFESSIONAL CONDUCT § 1.1 cmt. 5 (2006) [hereinafter MODEL RULES].

76. ABA STANDARDS, *supra* note 42, §§ 4-6.1(b), 14-3.2(b), (f); MODEL RULES, *supra* note 75, at § 1.4.

77. *See, e.g.*, Norman Lefstein, *In Search of* Gideon*'s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 907 (2004) ("Courts also are advised not to 'require' lawyers or defender programs 'to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.'") (footnote omitted).

78. Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

79. Professor Anthony Amsterdam avers that "the lawyer's primary objective in the initial interview . . . is the establishment of an attorney-client relationship grounded on mutual confidence, trust, and respect." ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 76 (4th ed. 1984). Indigent defense attorneys must overcome several obstacles to achieve Amsterdam's "primary objective." *See, e.g.*, Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853, 890–91 (1996) (indigent defendants mistrust their attorneys because, inter alia, they are foisted upon them for free by the government, and because of prevalent racial

stant turmoil of immigration law, even a very willing and forthcoming client may not be entirely accurate about his present immigration status.[80] The necessary duties that underlie the *Padilla* rule, to investigate the relevant facts and law, are essentially pre-conditions to providing *Padilla* advice, and should serve to slow down, if not eradicate, the practice of meet, greet and plead.

At the same time, to adhere to the dictates of *Padilla*, the all too familiar criminal court mindset of prosecutors, judges, and court administrators in favor of guilty pleas, early and often, has to change.[81] Beyond the basic moral human decency of ensuring that an accused is sufficiently counseled as to what Justice Stevens called the "drastic measure" of deportation,[82] prosecutors and judges should want to ensure the integrity of convictions from collateral and appellate attacks. Regardless of systemic pressures due to overcrowded dockets, adherence to *Padilla* means that prosecutors and judges can no longer demand, encourage or even allow pleas before a reasonable time has passed to assure that defense counsel has investigated her client's immigration status and the impact of a plea.[83]

Of course, creating such profound change is a formidable task. The longstanding and deeply rooted reliance on pleas early in the process will provide sturdy resistance to new approaches to lawyering and the rights of the accused. It will be a challenge to change the institutional

and class differences). It is unlikely that a defense attorney will learn much valuable information at the initial interview by bluntly asking a client, "where were you born?" *See* Sylvia Hsieh, *Criminal Defense Lawyers Weigh In On New Requirement*, LAWYERS USA, Apr. 2, 2010 (quoting a defense attorney who stated, "right after I ask [their] name, my next question is, 'Where were you born?'").

80. *See generally, e.g.*, People v. McLartey, No. 6762/06, 2011 WL 2518628 (N.Y. Sup. Ct. June 22, 2011).

81. *See, e.g.*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 10, at 33 (noting that prosecutors often exert pressure in the form of "one time only" offers to induce defendants to accept guilty pleas at the initial appearance before a judge); Klein, *supra* note 73, at 211–12 (arguing that many judges use the threat of bail to coerce defendants into accepting guilty pleas at their initial court appearance); Jane Campbell Moriarty & Marisa Main, *"Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 HASTINGS CONST. L.Q. 1029, 1042 (2011).

82. *Padilla*, 130 S. Ct. at 1478 (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)). In fact, the former President of the National District Attorneys Association observed that prosecutors "must consider [collateral consequences] if we are to see that justice is done." Roberts, *Ignorance is Bliss*, *supra* note 6, at 172.

83. The Court provided another reason for prosecutors and judges to support better informed pleas: "informed consideration of possible deportation can only benefit both the State and noncitizen defendants" because they will "reach agreements that better satisfy the interests of both parties." *Padilla*, 130 S. Ct. at 1486.

mindset and practice from the assembly line, quick and dirty arraignment disposition, to a more careful, thoughtful, and individualized approach. Yet the slowing down of an already overwhelmed system now appears to be the constitutionally required cost of effective assistance of counsel. In all likelihood, as a potential agent of systemic indigent defense reform, *Padilla* will need help in the form of a moratorium—by legislation, rule or understanding—on pleas at arraignments or initial appearance.[84] The Court's own rationale offers cogent support for such a momentous change. Given the Court's explicit reliance on ethical guidelines at the root of the holding in *Padilla*, it is worth noting that recent ABA Standards call for more careful, time-consuming consideration of plea offers. ABA Standard 14-1.3(a) provides that "[A] defendant with counsel should not be required to enter a plea if counsel makes a reasonable request for additional time to represent the client's best interests."[85] Post-*Padilla*, is virtually every request at arraignments or initial appearance for "additional time" presumptively "reasonable," if not mandatory?

Beyond the impact on disposition practices, *Padilla* also provides support for radically altering the present inadequate funding of indigent defense nationally. The timing of *Padilla*'s consequential call for systemic, comprehensive reform is fortuitous. Recent cases in Michigan and New York highlight statewide failures to provide for independent, well-funded, well-resourced indigent defense providers.[86] Inserting *Padilla* into the present indigent defense patchwork nationwide will be a constitutional unfunded mandate. To be as revolutionary a case as people hope, to be the second coming of *Gideon*, requires more than changes in attitudes—for starters, states must adequately fund indigent defense providers. These lawsuits present opportunities for organizing and strategizing ways to effectuate and expand the impact of *Padilla*.

Padilla could end up as the case that many believed *Gideon* was meant to be. *Gideon* held that states were required to provide counsel to all indigent defendants charged with felonies.[87] In *Argersinger v. Hamlin*,[88] a unanimous Court extended the right to counsel to de-

84. *See, e.g.*, Love & Chin, *supra* note 2, at 23 (arguing that as collateral consequences become the "business" of all court actors, it will become desirable to develop a "comprehensive framework" for dealing with them).

85. ABA STANDARDS, *supra* note 42, at § 14-1.3(a).

86. *See generally* Duncan v. State, 486 Mich. 1071 (2010); Hurrell-Harring v. State, 15 N.Y.3d 8 (2010).

87. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

88. 407 U.S. 25 (1972).

fendants charged with misdemeanors that carried the possibility of a jail sentence. The Court decried the "assembly line justice"[89] in the Criminal Court and the reality that "for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way."[90] As the past forty years have shown, the assembly line is alive and well.[91] Perhaps *Gideon* and *Argersinger* share the same shortfall. They hold that attorneys must be provided, but they are silent as to what those attorneys must actually do. And while the right to counsel grew to incorporate the right to the "effective assistance" of that counsel,[92] it is only now, with *Padilla*, that the Court is reaching into the depths of criminal defense practice and demanding certain behavior that must, by the very nature of its holding, serve to improve the practice in significant and meaningful ways.

The decision in *Padilla* is indeed momentous. The Supreme Court's seal of approval on the relevant professional ethical standards sends a clear signal to all defense attorneys about what their job entails, and it serves, as well, to centralize and value the accused's place in the criminal process. More significantly, it presents an opportunity, if not a necessity, to re-imagine defense practice. While *Padilla* is cloaked in concerns specific to immigration and deportation, the uncovered, underlying defects in representation point unerringly to larger problems. Many hope that *Padilla* will serve as a springboard to require effective attorney advice about a host of consequences that flow from conviction (e.g., housing, sex offender registration and notification, loss of privileges and licenses, et cetera),[93] but it would be a mistake to cabin the holding and its aftermath to discussions about direct and collateral consequences. Ultimately, *Padilla* shines a light on ineffective assistance of counsel, writ large. The components of effective assistance that mandate thorough client interviews and counseling so that defense counsel gains a sense of her client's wants, needs and goals, and in-depth fact development and legal research so that counsel is in a position to provide meaningful advice, are not *sui generis* to cases with immigration concerns. A grand opportunity will be lost if the *Padilla* holding and the attention it has generated fail to in-

89. *Id.* at 36 ("There is evidence of the prejudice which results to misdemeanor defendants from this 'assembly-line justice.'").

90. *Id.* at 35.

91. *See supra* note 10 and accompanying text.

92. *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 771 (1970).

93. *See supra* note 46 and accompanying text.

spire discussion of the larger, critical question of what it takes to be an effective criminal defense attorney.