

February 2016

Conference Report: Padilla and the Future of the Defense Function

Joel M. Schumm

Indiana University Robert H. McKinney School of Law

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Recommended Citation

Joel M. Schumm, *Conference Report: Padilla and the Future of the Defense Function*, 39 Fordham Urb. L.J. 3 (2012).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol39/iss1/8>

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CONFERENCE REPORT: *PADILLA* AND THE FUTURE OF THE DEFENSE FUNCTION

*Joel M. Schumm**

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INTRODUCTION

In March 2010, the Supreme Court held in *Padilla v. Kentucky* that the failure to advise a client that a guilty plea carried the risk of deportation violated the Sixth Amendment.¹ Just over a year later, on June 20 and 21, 2011, more than eighty professionals were invited to reflect on the future of the defense function in light of *Padilla* at a conference sponsored by the National Legal Aid and Defender Association (NLADA) and National Association of Criminal Defense Lawyers (NACDL) and co-sponsored by the American Bar Association Criminal Justice Section Task Force on Comprehensive Representation.

* Clinical Professor of Law, Indiana University Robert H. McKinney School of Law.

1. 130 S. Ct. 1473, 1486 (2010).

Defense lawyers from public defender organizations and private practices from across the country joined leading clinical and doctrinal professors and other lawyers specializing in both immigration and other areas affected by the “collateral” consequences of criminal conviction. Through eleven panel discussions, this esteemed group looked back briefly on *Padilla* and the current state of affairs. Primarily, however, they looked to the future, focusing on the obligations, challenges, and promises arising from *Padilla*. The impressive agenda appears at the end of this report. The pages in between offer a summary of the key topics of discussion, including the immediate impact of *Padilla* on defense lawyers, the case’s early reach beyond the realm of immigration, and the interplay between ethical and practice standards. Recognizing that *Padilla* can be a “lever for systemic change,”² the report turns to the future in considering whether *Padilla* suggests that a new type of criminal defense lawyer should be hired, trained, and supervised; the ways that law school curricula may be refined to meet the challenges and the promise of *Padilla*; the broader concerns for partnerships and resources in realizing *Padilla*’s potential; and, finally, a theme throughout the conference: the need for concerted data collection to achieve many of these goals.

I. THE IMMEDIATE IMPACT OF *PADILLA*

Participants debated and discussed the significance of *Padilla* in both the near and long term. For some defender organizations—like the Bronx Defenders, which has long taken a holistic approach to defense representation—the significance in day-to-day functioning has been minimal.³ For other defense organizations or appointed counsel, the expectations underlying *Padilla* suggest a significant shift. Unfortunately, some lawyers do not do basic things like interview witnesses or talk to their clients. Expecting these lawyers now to provide a broad array of *Padilla* advisements is optimistic, to say the

2. Norman Reimer, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

3. Although The Bronx Defenders is a high-volume practice, it provides representation through integrated practice teams that include at least one general civil and immigration lawyer. McGregor Smyth, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

least.⁴ When judges have the power to appoint counsel, some will appoint those lawyers who push back (and do) the least.⁵

Although the conference focused on *Padilla*, the discussion at times broadened to the concerns that pervade the entire criminal justice system. Overcriminalization has been a concern for decades. It is now an even greater concern, not because of the direct consequences that arise from a misdemeanor or low-level felony conviction, which often consist of a short term of probation at most, but rather because of numerous and expanding collateral consequences.⁶ The criminalization of dog leash violations, feeding the homeless, fish and game violations, and turnstile jumping clogs courtrooms and then burdens violators with the serious, life-long consequences that result from a conviction.⁷ If a defendant cannot make bail, he or she may plead guilty to obtain release.⁸ If defense counsel is now expected to advise clients about immigration and many other types of collateral consequences, excessive caseloads become an even greater concern.⁹ The

4. Unidentified Speaker, Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author) (“They are not going to be scared into doing more.”).

5. See CONSTITUTION PROJECT, NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 80, 82 (2009) [hereinafter JUSTICE DENIED], available at <http://www.constitutionproject.org/pdf/139.pdf> (discussing the problems with lack of independence for indigent defense counsel).

6. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS 12–13 (2009), available at <http://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808>.

7. *Id.* at 7, 12.

8. Barry Scheck, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author). Another panelist spoke against a categorical approach, noting that clients may decide that a plea at arraignment is in their best interest, such as when immigration officials are likely to sweep in later for deportation or if the client will lose a job if the case drags on. Robin Steinberg, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

9. Norman Lefstein, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) [hereinafter Lefstein, Remarks] (audio of remarks on file with the author). Professor Norman Lefstein, who recently completed a book on excessive caseloads, emphasized that, with few exceptions, caseloads nationally are “way beyond what is reasonable for competent representation.” *Id.* The caseload problem is partially the result of a structural deficiency in the manner in which indigent defense is administered in many places, giving all cases to public defenders and marginalizing the role of the private bar. Without an elastic supply of lawyers to provide a release valve, caseloads can continue to rise. See generally

limited resources that have long plagued defender organizations have become especially scarce in recent years as state and local government budgets have tightened. These budget cuts have made fulfilling *Padilla's* promise — indeed, the obligation created — all the more challenging.¹⁰ Although counsel have always had a professional obligation to advise clients of collateral consequences,¹¹ *Padilla* nevertheless serves as a useful “wake-up call” for defense lawyers and provides a new impetus to challenge excessive caseloads.¹²

Even before *Padilla* was decided in 2010, many defense organizations employed a variety of approaches to providing comprehensive representation to clients. Representation for indigent defendants comes in three broad types: public defense, contract counsel, and private assigned counsel.¹³ Considerable variations exist within each model. Some defense organizations are well-funded and are able to offer clients assistance on immigration and other collateral matters; others struggle with excessive caseloads that make even speaking with clients charged with serious offenses a challenge. As discussed below, training and other resources available to contract or assigned counsel vary as well.¹⁴ Angie Junck of the Immigrant Legal Resource Center described her work in California, where a quarter of the undocumented population resides. Her organization contracts with counties to provide technical immigration assistance within forty-eight hours of a request.¹⁵ Wendy Wayne of the Massachusetts Public Counsel

NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE (2011) [hereinafter LEFSTEIN, SECURING REASONABLE CASELOADS].

10. Dan Slater, *ABC: Budget Cuts Causing “Crisis” in Public Defenders’ Offices*, WALL ST. J. L. BLOG (June 16, 2008, 11:21 AM), <http://blogs.wsj.com/law/2008/06/16/abc-budget-cuts-causing-crisis-in-public-defenders-offices/> (“[P]ublic defenders from Kentucky to Minnesota to Miami are saying budget cuts are leaving them unable to handle misdemeanor and, in some instances, serious felony cases.”).

11. See MODEL RULES OF PROFESSIONAL CONDUCT R. 1.1 (1983). Decades earlier, the performance standards of the National Legal Aid and Defender Association similarly included a duty to advise clients of collateral consequences. See NAT’L LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION R. 8.2 (1995), available at http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#eighttwo.

12. Lefstein, Remarks, *supra* note 9.

13. JUSTICE DENIED, *supra* note 5, at 53.

14. See *infra* Part IV.

15. The organization’s website lists hourly rates of \$215 for private attorneys and \$200 for public defenders. *Service Options & Rates*, IMMIGRANT LEGAL RES. CTR., <http://www.ilrc.org/legal-assistance/service-options-rates> (last visited Oct. 6, 2011).

Services began part-time in 2003.¹⁶ She now has two staff attorneys working with her to provide advice on individual cases to the full-time and contract lawyers who work for the statewide system.¹⁷ Lawyers must be certified before they may accept cases on contract in Massachusetts, and mandatory immigration training is required for all certified attorneys.¹⁸ Jojo Annobil described the successful use of four immigration criminal law specialists within the New York Legal Aid Society. A criminal immigration specialist is always available either by phone or email to advise criminal defense attorneys and their clients of the immigration consequences of various criminal dispositions and to help them fashion favorable pleas to avoid certain deportation.¹⁹ Christie Hedman is the executive director of the Washington Defender Association, which operates as a resource center for public defenders.²⁰ Her office has seen a doubling of cases since *Padilla* and is considering raising dues and leveling a surcharge on larger defense offices.²¹ Other offices have relied on fellowship programs through groups like Equal Justice Works and AmeriCorps.²²

Regardless of whether the assistance provided is in-house or external, full-time or part-time, success depends on buy-in from those lawyers whose clients face deportation or other collateral consequences. The Legal Aid Society model, with dedicated in-house criminal immigration specialists, has worked well because of institutional buy-in from the criminal defense attorneys and management.²³ If a resource lawyer is not always available, buy-in can become more difficult.²⁴

16. Wendy Wayne, Panelist's Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

17. *Id.*

18. *Id.*

19. Jojo Annobil, Panelist's Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

20. Christie Hedman, Panelist's Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

21. *Id.*

22. Cait Clarke, Panelist's Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author). An effective fellows' program requires mentorship and supervision, especially early on. Effective programs should also last for a minimum of two, if not three, years because of the steep learning curve for the fellow and the challenges of making defenders aware of and comfortable with them. *Id.*

23. Annobil, *supra* note 19.

24. Caitlin Barry, Panelist's Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author)

Similarly, fellowship programs may hinder buy-in if lawyers view fellows as mere temporary employees.²⁵ Sharing positive outcomes with criminal defense attorneys, regardless of the type of system used, can help with buy-in.²⁶

II. CONSEQUENCES BEYOND IMMIGRATION AND THE PROMISE OF AND PROBLEMS WITH CHECKLISTS

Although the challenge in *Padilla* focused on advice regarding deportation, hundreds of other consequences result from criminal convictions in every state.²⁷ The majority opinion in *Padilla* focused almost exclusively on deportation and advice about immigration matters, but it also acknowledged that “removal proceedings are civil in nature” and that the Court had “never applied a distinction between direct and collateral consequences to define the scope of the constitutionally ‘reasonable professional assistance’ required under *Strickland*.”²⁸ Justice Scalia’s dissent asserted “no logical stopping-point” for defense counsel’s obligation to advise about collateral consequences, quoting from the following list in the concurring opinion: “civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses.”²⁹

Professor Josh Bowers reported on several post-*Padilla* cases in lower courts that have addressed consequences beyond immigration. In the span of just over a year since *Padilla* came down, some trends have started to emerge as lower courts wrestle with the requirement that defense lawyers offer correct advice on collateral consequences

(Barry, of the Defender Association of Philadelphia, spends half of her time as an immigration specialist along with two appellate lawyers who are also half-time).

25. Angie Junck, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

26. Annobil, *supra* note 19.

27. See Jack Hanna, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author) (reporting on the American Bar Association (ABA) project that has identified 40,000 consequences from across the country, or an average of 650 from each state). Janet Levine, *ABA Criminal Justice Section Adult Collateral Consequences Project*, ABA CRIMINAL JUSTICE SECTION (Nov. 20, 2011), <http://isrweb.isr.temple.edu/projects/accp/accproject/blog.cfm?RecordID=1>.

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

29. *Id.* at 1496 (Scalia, J., dissenting) (quoting *id.* at 1488 (Alito, J., concurring)).

that can be easily determined, such as deportation in Padilla's case.³⁰ In cases where the law is "not succinct and straightforward," however, defense counsel "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."³¹ Relying on *Padilla*, defendants have succeeded in challenging sex offender registration³² and parole eligibility.³³ Others have succeeded in the failure to advise about the automatic forfeiture of a vested pension³⁴ and in challenging the erroneous advice that a no-contest plea to assault would not prejudice a civil case involving the same incident.³⁵ Courts have not yet addressed the reach of *Padilla* to advice regarding employment licenses or eligibility for public benefits.³⁶ Professor Bowers suggested that, notwithstanding extant doctrinal ambiguities, lawyers should consider themselves constitutionally obligated to advise clients about potential restrictions on housing, employment, and travel.³⁷ In short, clients ought to be given this information as a matter of right, not privilege.

Professor Gabriel "Jack" Chin described these collateral consequences as "civil death,"³⁸ albeit not an immediate or painless death. The consequences seldom hit a defendant all at once, and each state legislature may retroactively add to the existing ones.³⁹ Rather than going through a list of current consequences, Professor Chin suggested that trial courts should tell defendants who plead guilty that all their civil rights will be held at sufferance and can be taken away in the future. This warning is a more accurate description of what will happen, although it might discourage some defendants from taking

30. Josh Bowers, Panelist's Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

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

32. *Taylor v. State*, 698 S.E.2d 384 (Ga. Ct. App. 2010); *but cf. Ward v. State*, 315 S.W.3d 461 (Tenn. 2010).

33. *Webb v. State*, 334 S.W.3d 126 (Mo. 2011).

34. *Commonwealth v. Abraham*, 996 A.2d 1090 (Pa. Super. Ct. 2010), *appeal granted*, 9 A.3d 1133 (Pa. 2010).

35. *Wilson v. State*, 244 P.3d 535 (Alaska Ct. App. 2010).

36. Bowers, *supra* note 30. A more detailed summary of cases applying *Padilla* can be found in Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 1, 18–23 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883809.

37. Bowers, *supra* note 30.

38. *See generally* Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, 25 CRIM. JUSTICE 21 (Fall 2010).

39. Gabriel "Jack" Chin, Panelist's Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

pleas.⁴⁰ Sharon Dietrich, a civil legal services lawyer in Philadelphia, emphasized that expungement offers some clients a remedy⁴¹ and suggested that others may use Title VII against employers because of the racially disparate impact when categorically rejecting applicants with convictions instead of tailoring hiring decisions to the specific position sought.

The “Beyond Immigration” panel ended with a suggestion that lawyers ask their clients a minimum of the following six questions:

1. Are you a citizen?
2. What is your job (or where do you work)?
3. Do you live in public housing?
4. Do you collect food stamps?
5. Are you a parent?
6. What do you want to do in the future?

These questions would allow lawyers to better advise or refer clients to other professionals for advice about not only the immediate consequences of a conviction, but also possible future consequences if the client later decides to attend college or pursue a new vocation with licensing restrictions. Although such a checklist might help ensure at least a minimum level of representation, participants differed on the efficacy of checklists, which some analogized to form motions that allow or encourage lawyers not to think. Participants emphasized the importance of expending the time and effort necessary to get to know each client in order to provide the effective assistance that *Padilla* requires in advising about collateral consequences.

III. RESOURCES AND PARTNERSHIPS

One size seldom fits all. Every state and the communities within those states have different needs and resources. Those who lead defender organizations must repeatedly make the case to city councils or state budget committees to secure the funds necessary to fulfill the requirements of *Padilla* and may also seek grant funding and develop new relationships with other organizations that can assist. Robin Steinberg, the executive director of The Bronx Defenders, sees *Padilla*'s “incredible value” in helping defenders find access to resources

40. *Id.*

41. Ms. Dietrich recommended MARGARET LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (2005) as the “single most important resource.” The book explains the expungement and pardon process in all fifty states. *Id.*

to do things that have always been the responsibility of defense lawyers.⁴² It provides a platform to argue for resources that are not just helpful to clients, but now are also constitutionally mandated.

Providing even minimal advice about the consequences of a conviction requires resources, including both additional staff and more time and training for existing staff to know which questions should be asked.⁴³ Although most solutions cost money, defense organizations must sometimes be creative in approaches to the challenges.⁴⁴ Proposals must reflect the realities of different jurisdictions. In an office with few resources, even a part-time immigration specialist would be an improvement.

Many types of grants are available from the Department of Justice, and Attorney General Holder has spoken out forcefully about the need to address indigent defense.⁴⁵ The grants given to each state could be used more for indigent defense than the current allocation provides, which is weighted heavily toward prosecutors and courts.⁴⁶ Although innovative approaches to seeking resources to meet the demands of *Padilla* are important, ultimately panelists emphasized the duty of states to provide effective counsel and the need to keep states “on the hook” to meet this constitutional mandate.⁴⁷

Although less structured, private practitioners have a range of resources available to them as well.⁴⁸ They can consult relatively informally with friends who have expertise in the area or with members of the criminal justice section of the state bar. More formally, they can

42. Steinberg, *supra* note 8.

43. Ronald F. Wright, *Padilla and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1518–19 (2011) (“*Padilla* reinforces long-term trends in criminal defense. It tilts the field towards larger defender organizations with greater specialization of function and more coordination of effort among attorneys—in short, toward a more bureaucratic criminal defense.”).

44. When Phyllis Subin ran the New Mexico Public Defenders and was not allowed to hire additional staff, she instead retained an excellent immigration law specialist on contract. Phyllis Subin, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

45. *Commentary: Attorney General Eric Holder Speaks Out on Need to Address Crisis in Indigent Defense*, BRENNAN CTR. FOR JUST. (July 17, 2009), http://www.brennancenter.org/content/resource/holder_indigent_defense/.

46. Clarke, *supra* note 22.

47. *See, e.g.*, Manny Vargas, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

48. Marvin Schechter, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

seek help from organizations like the Immigrant Defense Project, which advises defense lawyers about the consequences of convictions.⁴⁹ They may also contact law schools which often have faculty with immigration expertise or even clinics focusing on immigration law. Jojo Annobil of the Legal Aid Society described the Society's willingness to field calls from criminal defense attorneys on the assigned counsel panel. Nevertheless, Annobil stressed that private attorneys must do the "legwork" of collecting the relevant information about their clients' immigration status to allow the Society's criminal immigration experts to provide assistance.⁵⁰ For now, the National Immigration Project also has a policy of taking calls from anyone.⁵¹ Other resources, however, are not always freely available.⁵² If these resources do not provide answers, counsel may file a motion with the court requesting funds to retain an immigration specialist.⁵³ These motions may prove successful if counsel can demonstrate that a complicated immigration issue is at stake. Counsel should be careful, however, not to tip off the government to a potential issue that otherwise might not be apparent.

Some states have eased the burden on lawyers by creating central resource centers. The indigent defense system is "balkanized" because *Gideon v. Wainwright*⁵⁴ was an unfunded mandate.⁵⁵ Central resource centers provide good economies of scale, and the private bar should make the case to create them. Mr. Schechter urged participants to pursue a summit on the need for a resource center in their jurisdictions, observing that some large law firms have donated office space, paralegal support, and overhead costs to fund public interest projects like the New England Innocence Project, which is housed within Goodwin Procter LLP in Boston.⁵⁶

Closely related to the topic of resources are partnerships. Because defense lawyers do not have unlimited time and resources, they often

49. *About*, IMMIGRANT DEF. PROJECT, <http://immigrantdefenseproject.org/about> (last visited Oct. 14, 2011).

50. Annobil, *supra* note 19.

51. Dan Kesselbrenner, Panelist's Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author); see *Contact*, NAT'L IMMIGRATION PROJECT, <http://www.nationalimmigrationproject.org/contact.htm> (last visited Oct. 6, 2011).

52. See *supra* note 15 (describing the Immigrant Legal Resource Center fees).

53. Schechter, *supra* note 48.

54. 372 U.S. 335 (1963).

55. Reimer, *supra* note 2.

56. See NEW ENGLAND INNOCENCE PROJECT, <http://www.newenglandinnocence.org/> (last visited Oct. 6, 2011).

must rely on others for help. Jack Hanna, the director of the Criminal Justice Section of the ABA, effectively framed the panel discussion on “Partnerships in a Post-*Padilla* World” as falling into two categories: practice-oriented and political/public relations-oriented partnerships.⁵⁷

One of the most impressive resources on the practice front is the ABA’s Adult Collateral Consequences Project.⁵⁸ Funded by a grant from the National Institute of Justice, the project’s mission is to catalogue every collateral consequence of criminal convictions for inclusion in a database that will allow users to determine the specific consequences from each criminal offense.⁵⁹ The project will ultimately “become a free online resource for attorneys, policymakers, and the public to input specific criminal offenses and view the collateral consequences attaching to convictions.”⁶⁰ The state-by-state differences are important because each state’s population may have unique interests; for example, a livery license has greater significance in some places while a hunting license may be more important in others.⁶¹ Sejal Zota of the School of Government at the University of North Carolina at Chapel Hill explained the creation of a similar database in North Carolina that allows authorized users to enter an offense and see all the state and federal consequences or type in a consequence and see a list of offenses to which it applies.⁶² Once completed, the database will require funding for continued operation and updating, which may require subscription sales.⁶³

Some participants were more optimistic than others about engaging prosecutors as practice-oriented partners. Robert Johnson, a member of the ABA Criminal Justice Section and a retired career prosecutor, emphasized that every community is different and the defense bar thus should tailor partnerships to specific communities.⁶⁴

57. See Hanna, *supra* note 27.

58. See *supra* note 27.

59. *Id.*

60. *Id.* Mr. Hanna explained that 40,000 consequences from across the country, or an average of 650 from each state, had been gathered. Hanna, *supra* note 27.

61. Steinberg, *supra* note 8.

62. Sejal Zota, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author); see also Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 How. L.J. 675, 687 n.39 (2011).

63. Zota, *supra* note 62.

64. Robert Johnson, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

Prosecutors are elected officials, so prosecutors who want to be re-elected will listen to influential community leaders, whether those leaders come from religious, business, or other communities. Jennifer Friedman from the Bronx Defenders emphasized engaging prosecutors in a way that will allow clients to avoid harmful collateral consequences.⁶⁵ The appropriate “pitch” may vary based on the specific prosecutor assigned to the case and his or her supervisor.⁶⁶ Sometimes the consequence should be part of the pitch while other times defense lawyers may want to keep their cards close to the vest. If the prosecutor insists that reducing a charge would give a client a benefit not available to U.S. citizens, defenders may propose a plea to a more severe charge that eliminates the harmful collateral consequence.⁶⁷ Seemingly small details, such as the difference of even one day in a plea agreement, can be life-altering. For example, a one year suspended sentence for theft requires deportation while a 364-day sentence instead allows an immigration hearing and the possibility of avoiding removal.⁶⁸ Some participants reported that prosecutors may be willing to offer a favorable plea agreement for clients who seek to enlist in the military.⁶⁹ Other participants, though, were less enthusiastic about partnering with prosecutors, suggesting that “for every wonderful prosecutor . . . there are twenty horrendous ones.”⁷⁰ “For every victory in New York, there have been twenty defeats” because of opposition from prosecutors.⁷¹ This participant suggested engaging prosecutors only with the support of other partners, like religious leaders in New York, which would lead prosecutors to pay more attention.

Finally, judges can be allies on the practice front. Judges may be unhappy when some other agency undermines their orders and could be instrumental in helping the parties reach creative solutions in some cases. They may also help with resources. Chief Judge Lippman told participants about efforts in New York to reduce caseloads by court

65. Jennifer Friedman, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

66. *Id.*

67. *Id.*

68. Kesselbrenner, *supra* note 51.

69. Bruce Green, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author); Johnson, *supra* note 64.

70. Unidentified Speaker, Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

71. *Id.*

rule over a four-year period and limit attorneys to 400 misdemeanor or 150 felony cases.⁷² Lawyers with more manageable caseloads can achieve more just outcomes for their clients.⁷³ New York adopted this approach using the judiciary's budget, and Chief Judge Lippman emphasized that the judiciary must be "bold and proactive" in ensuring the defense function.⁷⁴

On the political front, participants reported a wide range of partnerships from organizations at all points on the political spectrum. NACDL has had success working with the business community and some conservative groups. Groups such as the Chamber of Commerce and American Banking Association share its interest in keeping the government off the back of people on issues like immigration and white collar crime.⁷⁵ Groups like the National Rifle Association have been powerful and effective allies on gun-related issues, and groups like the Cato Institute share NACDL's view of decriminalizing drugs.⁷⁶

Recently, Republicans in some states have advanced progressive and thoughtful reforms of the criminal justice system.⁷⁷ For example, in North Carolina, a recent statute that allows some convicted defendants to apply for a certificate of relief passed the Republican legislature nearly unanimously.⁷⁸ This legislation would give administrative agencies discretion in issuing licenses that could be crucial to securing employment.⁷⁹ The bill was touted as a crime prevention bill because employment reduces recidivism. The legislation was proposed by a former state probation officer and passed with support of law enforcement and the Attorney General.⁸⁰

72. Hon. Jonathan Lippman, Keynote Address at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

73. *Id.*

74. *Id.*

75. Schechter, *supra* note 48.

76. NAT'L ASS'N CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 20–21 (2009), available at <http://www.nacdl.org/criminaldefense.aspx?id=20191&libID=20161>; see generally, GLENN GREENWALD, CATO INST., DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES (2009), available at http://www.cato.org/pubs/wtpapers/greenwald_whitepaper.pdf.

77. See, e.g., *Criminal Justice: Reforming from the Right*, ECONOMIST DEMOCRACY IN AM. BLOG (Sept. 2, 2011, 19:46), <http://www.economist.com/blogs/democracyinamerica/2011/09/criminal-justice>.

78. Zota, *supra* note 62.

79. *Id.*

80. *Id.*

The development of practice standards gives rise to another significant partnership. Although some participants expressed concern about the “gulf” between the Court’s reliance on standards and the practitioner’s unawareness of those standards, practice standards such as the ABA’s Standards for Criminal Justice have long been important in Supreme Court decisional law.⁸¹ The Standards have the force of law only if incorporated into the Sixth Amendment, and the defense community can shape the Sixth Amendment by playing a role in the promulgation of standards.⁸²

Similarly, the Uniform Law Commission creates model statutes that may be introduced in state legislatures when there is a need for uniformity. Modeled after the ABA Standards, the Uniform Law Commission began drafting a uniform act on collateral consequences in 2004 that was adopted in 2009.⁸³ Although no state has yet adopted the uniform act, it provides a framework that gives supportive state legislators an easy way to propose legislation.

Some partnerships blur the line between practice and politics, such as the Criminal Justice Coordinating Council in the District of Columbia.⁸⁴ The Council offers an opportunity for the key stakeholders—including the Mayor’s Office, judges, police, prosecutor, defense, Bureau of Prisons, and pretrial services—to meet regularly and discuss both immediate and larger policy concerns.⁸⁵ Similarly, Chief Judge Lippman helped create the Indigent Legal Services Board in New York, which brings together representatives from all three branches of government to monitor, study, and make efforts to improve indigent defense in the state.⁸⁶ Finally, human rights organiza-

81. During the October 2009 term in which *Padilla* was decided, the Supreme Court decided eight cases involving lawyering, and most of these discussed ABA standards, which led one speaker to opine that the standards are not “pie in the sky.” Ellen Yaroshesky, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

82. Corey Stoughton, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

83. UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT (Proposed Draft 2009), available at http://www.law.upenn.edu/bll/archives/ulc/ucsada/2009_final.htm; see Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 783–85 (2011).

84. See generally *CJCC Members*, CRIMINAL JUSTICE COORDINATING COUNCIL, <http://cjcc.dc.gov/cjcc/cwp/view,a,1249,q,537330.asp> (last visited Oct. 14, 2011).

85. *Id.*

86. See generally N.Y. STATE DEFENDERS ASS’N, <http://www.nysda.org/> (last visited Oct. 14, 2011).

tions may also be important allies in advocating for keeping families intact and against laws that deport breadwinners.

IV. A NEW TYPE OF DEFENSE LAWYER?: THE CHALLENGES OF HIRING, TRAINING, AND SUPERVISING IN A POST-*PADILLA* WORLD

Some participants suggested that *Padilla* may highlight the need for a different type of defense lawyer than the courtroom gladiator that many revere. Defense organizations may reassess the type of person they want to hire, the type of training to offer, and the meaning of effective supervision. The broader profession may want to consider requiring certification.

A. Hiring

Padilla requires a different mindset for lawyers who think that the most important thing in a client's life is the criminal case. Lawyers must now ask the right questions to be able to provide appropriate advice that allows clients to prioritize. This may mean taking what seems like a bad plea if it saves housing benefits or taking a challenging case to trial if it allows the client the possibility of keeping his or her kids.⁸⁷

The conference promoted a discussion of whether this new reality of defense practice should alter hiring practices. Perhaps first-rate courtroom skills must be balanced with good listening and counseling ability. Sound judgment remains crucial as well. Quite a bit can be learned about a prospective hire even during a short interview. For example, the Miami Dade Office of the Public Defender has asked interviewees what they would do if they just had met a client in court for the first time and were given a plea and five minutes to decide whether to take it.⁸⁸

B. Training

Training on collateral consequences presents a number of challenges, including content, availability, and motivating lawyers to attend. Because of the complexity of immigration and other areas of the law, a few hours of training cannot provide mastery. The manda-

87. Steinberg, *supra* note 8.

88. Carlos Martinez, Panelist's Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author). More than half have responded that five minutes is sufficient time.

tory training offered to public defenders by the Massachusetts Committee for Public Counsel Services provides a brief overview of the immigration consequences of criminal conduct, focuses on several key and commonly misunderstood concepts, and emphasizes the complexity of this area of law so attorneys will be concerned enough to contact an immigration specialist at the agency for advice and assistance.⁸⁹ If an office does not have immigration specialists available, training is much more difficult. Two hours of training only scratches the surface of important immigration knowledge.

The ABA standards on which cases like *Padilla* rely heavily should be discussed in training and made more accessible. The Miami Dade Office of the Public Defender gives a copy of the NLADA standards to its new lawyers.⁹⁰ Although the second edition of the ABA Standards were in four large volumes, the third edition is in small books that can easily be taken to court and that also are now available online complete with commentary.⁹¹

Training should also address concerns about judicial overreaching in the wake of *Padilla*. Some judges now routinely provide advisements, suggesting the defense lawyer has not done his or her job. The majority opinion in *Padilla* made clear that “counsel must inform her client whether his plea carries a risk of deportation.”⁹² It did not adopt Justice Alito’s view that simply advising a client of the possibility of “adverse immigration consequences” and encouraging him to “consult an immigration attorney” would suffice.⁹³ In Louisiana some judges have also asked defendants about their immigration status and notified immigration authorities if the defendants are non-citizens or do not know their status.⁹⁴ Only defense counsel, though, has the duty and ability to obtain the necessary information and provide a proper advisement. Documents such as a “Notice of Immigration Consequences” provided by prosecutors and filed with the court presume across-the-board rules that seldom exist.⁹⁵ Chief Judge Lippman ex-

89. Wayne, *supra* note 16.

90. Martinez, *supra* note 88.

91. Lefstein, Remarks, *supra* note 9; see ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION (3d ed. 1993), available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_df_unc_toc.html.

92. 130 S. Ct. 1473, 1486 (2010).

93. *Id.* at 1487 (Alito, J., concurring).

94. Unidentified Speaker, Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

95. Vargas, *supra* note 47.

plained that New York provided training programs for judges who exercised “vigilance in plea allocutions . . . while respecting the attorney-client relationship.”⁹⁶ Defense counsel should resist the trend of including broad language advising clients of collateral consequences in plea agreements, which could remove the prejudice prong for an ineffective assistance of counsel claim and neutralize *Padilla*.⁹⁷

Although full-time public defenders can be required by their offices to attend training, motivating the private bar and contract lawyers may be more challenging. If training is not mandatory, those who need it most are unlikely to attend. Posting training notices on courtroom doors or making forms readily available may help raise the level of representation for at least some lawyers.⁹⁸ Bill Gallagher, who oversees the national CLE programming for NACDL, emphasized tailoring training to the specific audience and new avenues such as web-based training. For others, requiring training to keep a contract ensures attendance.⁹⁹ Merely attending a CLE may be “worthless,” though, without follow-up to make sure that information is being applied, which requires an effective supervisory process.¹⁰⁰

Finally, beyond the defense bar, the training of prosecutors is also essential. A career prosecutor emphasized the lack of crucial training about the exercise of discretion for prosecutors, who often treat criminal cases like a law school exercise.¹⁰¹ The Rules of Professional

96. Lippman, *supra* note 72.

97. Deportation must have been an important consideration to prove prejudice. For example, a recent opinion from the Massachusetts Supreme Judicial Court explained, “the defendant has the burden of establishing 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,’” which requires showing

either that (1) he had “an available, substantial ground of defence,” [sic] that would have been pursued if he had been correctly advised of the dire immigration consequences attendant to accepting the plea bargain; (2) there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated at the time; or (3) the presence of “special circumstances” that support the conclusion that he placed, or would have placed, particular emphasis on immigration consequences in deciding whether or not to plead guilty.

Commonwealth v. Clarke, 949 N.E.2d 892, 905–06 (Mass. 2011) (internal citations omitted).

98. David Gonzalez, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

99. Wayne, *supra* note 16.

100. Scheck, *supra* note 8.

101. Johnson, *supra* note 64.

Conduct¹⁰² and National District Attorney's Association require that prosecutors do "justice," which is not the same as "max crime, max time."¹⁰³

C. Supervision

The broadened role of defense counsel also creates challenges for supervision. Supervisors who do not understand immigration or employment law may find it difficult to evaluate and train others on the advice given. But this is nothing new as other types of cases or evidence, such as DNA, have posed similar challenges in the past.¹⁰⁴ Effective supervisors must understand the right questions to ask and engage others in the process.

Although the independence of the defense function is firmly ingrained in defense lawyers, it cannot become an excuse for poor lawyering or a reason to resist having closed files reviewed for assessment purposes. After Carlos Martinez was elected Miami Dade public defender he met with all the supervisors to review and discuss a form with his expectations. He made it clear that these expectations would be considered when evaluating them. Another speaker discussed the reticence of defense lawyers to "pull the trigger" and get rid of lawyers who are not doing their jobs, preferring instead to give them another chance.¹⁰⁵

Effective supervision is difficult. Changing expectations can be difficult when lawyers have been in the office doing things a particular way for decades. Some more experienced lawyers may prefer to "try the case" rather than deal with the advisements and counseling necessary under *Padilla*. Moreover, supervision cannot simply focus on input measures (like the number of CLEs attended), but must instead assess output and quality by reviewing closed files and observing attorneys in court or meeting with clients. Reviewing a checklist or even a detailed time and task sheet at most confirms that a lawyer did a task; it does not assess the quality of that lawyer's work.

102. MODEL RULES OF PROFESSIONAL CONDUCT R. 3.8 cmt. 1 (1983).

103. Johnson, *supra* note 64; *see generally* Catherine A. Christian, *Collateral Consequences: Role of the Prosecutor*, 54 HOW. L.J. 749, 750 (2011) ("[A] just and fair prosecutor will consider the collateral consequences that may apply in a particular case and take them into account when considering a disposition.").

104. Edwin Burnette, Panelist's Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

105. Unidentified Speaker, Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

D. Certification

Several participants spoke in favor of requiring certification of criminal defense lawyers. Law school seldom teaches the necessary skills to represent a person charged with a crime, but a diploma and bar passage allows graduates to hang out a shingle and often accept court appointments without any additional testing or training. The medical profession requires board certification periodically. Similar testing could be required of those practicing criminal defense.¹⁰⁶ England requires certification for solicitors before they are permitted to represent criminally charged clients.¹⁰⁷ A broad certification requirement would be a sweeping change that could only occur after a lengthy discussion that included bar organizations and defense providers.

More narrowly, though, defense providers could require certification before offering contracts or assigning cases to counsel, as the Massachusetts Public Counsel Services does.¹⁰⁸ The certification requirement, however, needs to “mean something” and cannot simply be a requirement to attend some training, sit in the back, and not engage.¹⁰⁹ For example, in Massachusetts a lawyer seeking certification to provide representation in first- or second-degree murder cases must submit an application that includes “the names and addresses of three criminal defense practitioners familiar with the applicant’s work.”¹¹⁰ Additionally, the applicant must explain why he or she meets the following qualifications:

1. “Five years of criminal litigation experience.”
2. “Familiarity with practice and procedure of Massachusetts courts.”
3. “Lead counsel in at least ten jury trials of serious and complex cases within the preceding five years, at least five of which have been life felony indictments, in which the cases resulted in a verdict, decision or hung jury.” To meet this requirement, the applicant must provide information about each of the cases, including “a description of the major issues.”

106. Reimer, *supra* note 2.

107. Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 865 (2004).

108. Wayne, *supra* note 16.

109. Karl Doss, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

110. LEFSTEIN, SECURING REASONABLE CASELOADS, *supra* note 9, at 206.

4. “Familiarity with and experience in the utilization of expert witnesses, including psychiatric and forensic evidence.” Cases describing the use of expert witnesses should be included in the list of ten jury trials required under number 3.
5. “Attendance at specialized training programs . . .” Also, the applicant is requested to submit the “names, dates, and sponsors of training programs which meet . . . [this] requirement . . .”
6. Certification for murder and superior court case assignments is for a term of four to five years. Lawyers must apply for recertification for these assignments at the conclusion of their terms. Initial certification for District Court representation is provisional and is subject to a satisfactory performance review within the lawyer’s first twelve to twenty-four months of handling case assignments. Maintenance of certification for all criminal and delinquency cases requires annual attendance at eight hours of continuing legal education approved by CPCS.¹¹¹

V. RETHINKING THE LAW SCHOOL CURRICULUM THROUGH THE *PADILLA* LENS

Padilla examined law as a practicing lawyer does, not in neat little categories.¹¹² This may prove to be a positive development for legal education because it requires both clinical and doctrinal professors to broaden the scope of their courses and figure out ways to help students remove their blinders.¹¹³ One panel was devoted entirely to the topic of “Changing Legal Education to Reflect Client-Centered Representation.” Legal education pigeonholes problems by subject, such as family law, criminal law, or immigration law, when defense lawyers are really practicing poverty law.¹¹⁴ Their clients have been given a free lawyer, sometimes for the first time in their lives, because they have been arrested and need a complete solution to their problems.

Clinical programs offer a particularly good opportunity to teach the “gold standard,”¹¹⁵ but students may not be prepared for the reality of practice where many will face overwhelming caseloads and lack re-

111. *Id.* at 206–07 (citation omitted).

112. Stephanos Bibas, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

113. *Id.*

114. John Gross, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

115. Jon Rapping, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

sources such as on-staff immigration specialists. Clinics can instill a solid foundation, but their graduates then go on to organizations where it may be common and part of the culture to practice law in a way that is not acceptable.¹¹⁶ Students need to be prepared for the different types of practices they may enter and should be encouraged to try to change unacceptable systems when necessary.

Moreover, clinical programs are expensive and not available to most students.¹¹⁷ Jo-Ann Wallace described a pilot project of the National Legal Aid & Defender Association that sent students to courtrooms to observe, where they often saw and could then discuss the injustices of waiving counsel and accepting uncounseled pleas. Many were “stunned” by the difference between reality and the view from television or law school casebooks.¹¹⁸ With an opportunity for guided reflection, these low-cost opportunities may be beneficial.¹¹⁹ Rick Jones, Executive Director of the Neighborhood Defender Service of Harlem, has attempted to teach client counseling skills as an adjunct professor to law students at Columbia by requiring students to conduct client interviews without notes or without discussing the law, which is very challenging and takes effort.

Doctrinal courses need to shift away from exclusively focusing on reading appellate opinions and toward important things like understanding clients.¹²⁰ Requiring students to read a short book on plea bargaining, for example, can help introduce students to the reality of practice.¹²¹ The law school curriculum can also change to include,

116. Lefstein, Remarks, *supra* note 9.

117. Few law schools require students to complete a clinical course before graduation. Subin, *supra* note 44.

118. Jo-Ann Wallace, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author). A Fordham student in the audience described a student-run program through which students help inmates at Riker’s understand their rights. That project recently won third prize in the American Bar Association Section on Litigation’s Good Works Law Student Competition. See *Prisoners’ Rights Advocates: Winner in ABA Good Works Law Student Competition*, FORDHAM UNIV. SCH. OF LAW (July 1, 2011), <http://law.fordham.edu/newsroom/23006.htm>.

119. Court observation without guided reflection could be “disastrous.” Abbe Smith, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author). Students are more likely to have a life-changing experience if they are able to connect and get to know a real litigant as a client. *Id.*

120. Bibas, *supra* note 112.

121. *Id.*

ideally in the first year, classes like access to justice or poverty law, which offer a broader perspective.¹²²

VI. THE NEED FOR DATA

Throughout the conference, participants discussed the importance of more and better data collection in realizing the potential of *Padilla*. Specifically, Justice Alito's concurring opinion in *Padilla* asserted that "ascertaining the level of professional competence required by the Sixth Amendment is ultimately a task for the courts," and "standards promulgated by private bar groups . . . may represent only the aspirations of a bar group rather than *an empirical assessment of actual practice*."¹²³ Rather than delegating to bar groups what the standards should be, Barry Scheck emphasized the need for defense lawyers to develop empirical support. Empirical assessment, though, requires data, and defense organizations often do not collect data. Criminal defense should not be the "least sophisticated" in using data.¹²⁴ Criminal defense lawyers should use quality control checklists, which exist in many other organizations like banks and hospitals and which set a minimum standard of performance.

Participants emphasized the need for defender organizations to require time and task records, which would both aid in supporting funding requests and provide a meaningful tool to supervise and assess performance.¹²⁵ Although new lawyers may be willing and technologically savvy, requiring detailed records would require a "cultural change" for many defense lawyers.¹²⁶ At a minimum, reimbursement vouchers could be reviewed to determine whether lawyers have visited clients and perhaps requested immigration or other referrals. Technology should allow for easier record-keeping, collection, and analysis of data.

Time records could be very useful in challenging excessive case-loads.¹²⁷ But the data largely do not exist because defense lawyers do

122. Smith, *supra* note 119.

123. 130 S. Ct. 1473, 1488 (Alito, J., concurring) (emphasis added).

124. Scheck, *supra* note 8.

125. Reimer, *supra* note 2.

126. Yaroshefsky, *supra* note 81.

127. Lefstein, Remarks, *supra* note 9. The Lancaster County Public Defender in Lincoln, Nebraska has required lawyers to track time since 1980. Once a paper system in 2009, the office began using a computerized "case log" system, which means "the office is able to generate substantial data, including the amount of time that individual attorneys spend on different types of cases (e.g., misdemeanors, various kinds of felonies) and the cumulative amount of time that all of the agency's attor-

not—and many are quite opposed to—keep time sheets.¹²⁸ More seasoned lawyers in particular must be told the purpose in keeping timesheets for each activity. Technology should allow this to be done more efficiently and effectively than in the past. Many clinics require timesheets, and programs like iManage have been incorporated into some clinics as well.¹²⁹

Finally, data is also important in making the case for additional resources and in justifying the existing use of resources in the face of proposed cuts. Lawyers in Philadelphia and Massachusetts report keeping data on referrals, but not outcomes.¹³⁰ Although the Legal Aid Society keeps track of the advice given in each case, follow up is often required to learn the outcome.¹³¹ The Bronx Defenders has tracked individual client data for the past twelve years.¹³² Last year, 84% of plea consults led to a positive outcome.¹³³

CONCLUSION: MUCH MORE WORK REMAINS

The conference brought together a remarkable group of people for a very enlightening and far-reaching discussion. Nevertheless, the opportunities and challenges presented by *Padilla* will require efforts on many fronts and the assistance of many individuals and groups within and outside the criminal justice system. To that end, in the weeks after the conference NACDL and NLADA created five working groups to make the promise offered by *Padilla* a reality. They include: (1) the Working Group on Post-*Padilla* Policy Changes, which will work to form coalitions for legislative and policy reform that will shrink crushing caseloads through decriminalization, diversion, and reclassification of crimes; (2) the Working Group on Post-*Padilla* Ethical Rules and Standards, which will examine and propose changes to

neys spend on these different kinds of cases.” LEFSTEIN, SECURING REASONABLE CASELOADS, *supra* note 9, at 160.

128. Scheck, *supra* note 8.

129. Yolanda Vazquez, Panelist’s Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author). Formerly known as Interwoven WorkSite, iManage is a document management system with wide capabilities. See *WorkSite*, COLLABORATIVE TECH. SOLUTIONS, <http://www.smartcollabs.com/?Products:WorkSite> (last visited Oct. 6, 2011).

130. Caitlin Barry & Wendy Wayne, Panelists’ Remarks at the *Padilla* and the Future of the Defense Function Conference (June 20–21, 2011) (audio of remarks on file with the author).

131. Annobil, *supra* note 19.

132. Smyth, *supra* note 3.

133. *Id.*

ethical rules and practice standards and find ways that both can help defense lawyers and organizations access the resources necessary to comply with *Padilla*; (3) the Working Group on Quality Assurance and Data Collection, which work toward the improvement of the data collection that is necessary for many audiences. This working group will also work toward establishing benchmarks for quality representation; (4) the Working Group on Criminal/Immigration Partnerships which, while recognizing many excellent models for making immigration expertise accessible, will work toward identifying experts and cultivating and expanding those currently available; and (5) the Working Group on Post-*Padilla* Attorney Training, which will work on several fronts including squaring law school curricula with the modern demands of defense representation, the possibility of requiring defense lawyer certification or fulfillment of CLE requirements in the criminal defense arena, and developing a model *Padilla* training module.

APPENDIX A: AGENDA

Welcome

Jo-Ann Wallace, National Legal Aid & Defender Association

Introduction to Purpose of the Conference and Goals

Norman Reimer, National Association of Criminal Defense Lawyers

What is Good Lawyering?

Barry Scheck, Innocence Project

Bruce Green, Fordham University School of Law

Robin Steinberg, The Bronx Defenders

Moderator: Steve Zeidman, CUNY School of Law

Methodologies for Different Practice Arrangements: Exploring Comprehensive Defense Models and Practice Approaches

Wendy Wayne, Massachusetts Public Counsel Services

Heather Pinckney, Harden & Pinckney, PLLC

Angie Junck, Immigrant Legal Resource Center

Jojo Annobil, Legal Aid Society

Caitlin Barry, Nationalities Service Center

Moderator: McGregor Smyth, The Bronx Defenders

Padilla Pushback: Overcoming Obstacles that Prevent Expansion

2011]

CONFERENCE REPORT

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of *Padilla's* Impact*Manny Vargas*, Immigrant Defense Project*Dan Kesselbrenner*, National Immigration Project of the National Lawyers Guild*Norman Lefstein*, Indiana University School of Law-Indianapolis*Carlos Martinez*, Miami Dade Office of the Public Defender*Moderator: Robert Boruchowitz*, Seattle University School of Law**A: Overseeing Quality in Comprehensive Defense Environments***Vincent E. Doyle III*, Connors & Vilaro, LLP*Rick Jones*, Neighborhood Defender Service of Harlem*Mark Stephens*, Knox County Public Defender's Community Law Office*Tamar Meekins*, Howard University School of Law*Avis Buchanan*, Public Defender Service for the District of Columbia*Moderator: Ed Burnette*, National Legal Aid & Defender Association**B: Partnerships in the Post-*Padilla* World***Jennifer Friedman*, The Bronx Defenders*Sejal Zota*, School of Government, UNC Chapel Hill*April Frazier*, Public Defender Service for the District of Columbia*Robert Johnson*, ABA Criminal Justice Section*Moderator: Jack Hanna*, American Bar Association**C: Raising the Defense Bar***David Gonzalez*, Sumpter & Gonzalez, LLP*Phyllis Subin*, Pennsylvania Indigent Defense Representation Reform Project*William Gallagher*, Arenstein & Gallagher*Moderator: Justine Luongo*, Legal Aid Society**D: Beyond Immigration: Litigating Expansions of *Padilla****Gabriel J. "Jack" Chin*, University of Arizona, James E. Rogers College of Law*Josh Bowers*, University of Virginia School of Law*Richard Cassidy*, Hoff Curtis*Sharon Dietrich*, Community Legal Services of Philadelphia

Moderator: Chris Gowen, American Bar Association

E: Changing Legal Education to Reflect Client-Centered Representation

Michael Pinard, University of Maryland School of Law

Jon Rapping, Southern Public Defender Training Center

Abbe Smith, Georgetown University Law Center

Stephanos Bibas, University of Pennsylvania Law School

Dennis Murphy, Legal Aid Society

Moderator: Karl Doss, National Legal Aid & Defender Association

F: Leveraging *Padilla* to Seek Additional Resources for the Defense

William H. Buckman, William H. Buckman Law Firm

Cait Clarke, National Legal Aid & Defender Association

Christie Hedman, Washington Defender Association

Moderator: Vanessa Antoun, National Association of Criminal Defense Lawyers

Address by The Honorable Jonathan Lippman, Chief Judge of the New York Court of Appeals

Developing and Using Ethical and Practice Standards Post-*Padilla*

Margaret Love, Law Office of Margaret Love

Ellen Yaroshesky, Benjamin N. Cardozo School of Law

Corey Stoughton, New York Civil Liberties Union

Steve Banks, Legal Aid Society

Moderator: Malia Brink, National Association of Criminal Defense Lawyers

Redefining Defense Practice: Charting a Plan of Action

Jo-Ann Wallace, National Legal Aid & Defender Association

Jim Lavine, Zimmermann, Lavine, Zimmermann & Sampson, P.C.

Yolanda Vazquez, University of Pennsylvania Law School

J. Vincent Aprile II, Lynch, Cox, Gilman & Goodman

Moderator: Norman Reimer, National Association of Criminal Defense Lawyers