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PADILLA V. KENTUCKY: THE CRIMINAL DEFENSE ATTORNEY'S OBLIGATION TO WARN OF IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTION

Nicole Sykes*

INTRODUCTION

Abigail is a resident of Georgia.[1] She immigrated to the United States and became a lawful permanent resident seventeen years ago.[2] She married a United States citizen, and the couple now has three children.[3] Abigail's life took a devastating twist recently when the United States Department of Homeland Security (DHS) initiated deportation proceedings against her for shoplifting a pack of cigarettes.[4] She committed the crime over ten years ago and entered a guilty plea after consulting with a defense attorney.[5] Under Georgia law, she received First Offender treatment and the judge sentenced her to twelve months confinement, suspended.[6] Unfortunately, Georgia's First Offender treatment does not translate into federal immigration law and her plea constitutes a conviction.[7] When Abigail applied for citizenship, DHS noted her conviction and initiated removal proceedings against her.[8] If Abigail's attorney had advised

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1. This scenario was taken from an article written by Grace Sease and Socheat Chea with minor changes made to the facts. *See* Grace A. Sease & Socheat Chea, *The Consequences of Pleas in Immigration Law*, 6 GA. B. J. 24, 24–27 (Oct. 2000).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id. See* GA. CODE ANN. § 42-8-60 (2006) (permitting the court, upon a plea of guilty, to defer proceeding and place a defendant who has never been convicted of a felony on probation or sentence the defendant without entering a judgment of guilt).
7. 8 U.S.C. § 1101(a)(48)(A) (2006) (defining an alien's plea of guilt and some form of court-ordered punishment as a "conviction" even if "adjudication of guilt has been withheld").
8. Sease & Chea, *supra* note 1. Because Abigail was convicted of a theft offense and sentenced to

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her that her plea would adversely affect her ability to apply for citizenship or remain in the United States, she may have never pleaded guilty.[9]

In Georgia, the courts recognize a noncitizen's claim of ineffective assistance of counsel when an attorney makes an *affirmative misrepresentation* as to the immigration consequences of a conviction or a plea.[10] If Abigail had asked her attorney whether she would face adverse immigration consequences and he had responded in the negative, the court might vacate her judgment. The Georgia Supreme Court, however, does not recognize a claim for ineffective assistance of counsel when an attorney *fails to inform* a client of potential consequences on the client's status.[11] If Abigail's attorney had never asked if she was a citizen and Abigail had never inquired into the possible immigration consequences, the court might uphold the judgment.[12]

Other circuit and state courts have recognized this distinction between affirmative misrepresentation and a failure to inform,[13] with

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twelve months confinement, her offense is defined as an aggravated felony. *Id.* As a lawful permanent resident convicted of an aggravated felony, she is not eligible for a waiver and her only relief from deportation is withholding of removal or protection under the Convention Against Torture. *Id.* Unfortunately, these forms of relief have a very high threshold that most applicants cannot meet. *Id.*

9. *See* Sease & Chea, *supra* note 1, at 27.

10. Rollins v. State, 591 S.E.2d 796, 798 (Ga. 2004) (holding that claims of ineffective assistance of counsel that arise from an attorney's affirmative misrepresentation to immigration consequences of criminal activity must be determined by the two-prong test of *Strickland v. Washington*); *see* Strickland v. Washington, 466 U.S. 668, 687 (1984).

11. *Rollins*, 591 S.E.2d at 797–98 (finding that the habeas court "erred by failing to distinguish between a lawyer's failure to inform his client of the collateral consequences attending a guilty plea and the affirmative misrepresentation of such consequences").

12. *See* NORTON TOOBY, TOOBY'S GUIDE TO CRIMINAL IMMIGRATION LAW: HOW CRIMINAL AND IMMIGRATION COUNSEL CAN WORK TOGETHER TO PROTECT IMMIGRATION STATUS IN CRIMINAL CASES 7 (Kerrin Staskawicz ed., 2008) (emphasizing that attorneys must ask every client whether the client is a noncitizen because a "client with a name like Peter Jackson who speaks perfect colloquial American English and appears Caucasian may turn out to be a citizen of Canada who has lived here since he was two years old").

13. United States v. Gonzalez, 202 F.3d 20, 25–28 (1st Cir. 2000) (rejecting the defendant's claim of ineffective assistance of counsel when counsel failed to advise him of his plea's immigration consequences); United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990) (adopting the rule that "counsel's failure to advise the defendant of the collateral consequences of a guilty plea cannot rise to the level of constitutionally ineffective assistance" (quoting United States v. Campbell, 778 F.2d 764, 768 (11th Cir. 1985))). *But see* State v. Paredez, 101 P.3d 799, 804 (N.M. 2004) (holding that the defendant's counsel had an affirmative obligation to determine the defendant's immigration status and advise him on the immigration consequences resulting from his plea).

some courts finding that even affirmative misrepresentation does not constitute ineffective assistance of counsel.[14] The United States Supreme Court recognized this inconsistency and sought to correct this disparity in *Padilla v. Kentucky*.[15] In this case, the Supreme Court rejected the distinction between affirmative misrepresentations and a failure to inform and found that noncitizens facing criminal charges have a right to know that these charges may negatively impact their immigration status.[16]

In Abigail's situation, *Padilla v. Kentucky* would require that her attorney not remain silent as to her possible immigration consequences;[17] however, the extent of her attorney's obligations and responsibilities remains unclear.[18] The majority mandated that counsel has the "duty to give correct advice" when immigration law is "truly clear," and furthermore even if "the law is not succinct and

14. Downs-Morgan v. United States, 765 F.2d 1534, 1540 (11th Cir. 1985) (declining to hold that counsel's affirmative misrepresentation "in response to a specific inquiry by the accused which results in a plea of guilty necessarily constitutes ineffective assistance of counsel"); Commonwealth v. Padilla, 253 S.W.3d 482, 485 (Ky. 2008) (concluding that counsel's "act of advising appellee incorrectly provides no basis for relief" because immigration consequences of a conviction are outside the ambit of the Sixth Amendment).

15. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) ("[D]eportation is a particularly severe 'penalty.'" (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1983))). *See* Nina Totenberg, *High Court: Lawyers Must Give Immigration Advice*, NATIONAL PUBLIC RADIO, Mar. 31, 2010, http://www.npr.org/templates/story/story.php?storyId=125420249 ("[Benita] Jain, of the Immigrants Rights' Project, notes that deportation for an immigrant who's been here since childhood can mean being deported to a country where the individual has no family left, where he or she may not speak the language, and may not know how to 'get a job, a house or even order a meal.' And for some immigrants granted asylum here, deportation may return them to a country where they risk persecution.").

16. *Padilla*, 130 S. Ct. at 1484 n.11 ("[W]ere a defendant's lawyer to know that a particular offense would result in the client's deportation and that, upon deportation, the client and his family might well be killed due to circumstances in the client's home country, any decent attorney would inform the client of the consequences of his plea.").

17. *See id.* at 1483. "Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice." *Id.* at 1483 n.10.

18. *See id.* at 1496 (Scalia, J., dissenting) (arguing that the majority's opinion "has no logical stopping-point"); *see also* Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to* Padilla v. Kentucky, 25 CRIM. JUST. 21, 22 (Fall 2010) (asserting that the rationale of *Padilla* should extend to other severe consequences of conviction and that this expansion of counsel's obligations "represents sound public policy"); Margate Colgate Love & Gabriel J. Chin, Padilla v. Kentucky*: The Right to Counsel and the Collateral Consequences of Conviction*, 34 CHAMPION 18, 22 (May 2010) [hereinafter Love & Chin, *The Right to Counsel*] ("The biggest question mark about *Padilla*, and its greatest potential for systemic impact beyond the immigration context, lies in its extension to indirect legal effects of a plea other than deportation.").

straightforward," an attorney still has the obligation to "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."[19] Yet, the Supreme Court never defined "competent" for the purposes of determining effective assistance of counsel or even how far a criminal defense attorney must investigate into a client's immigration status.[20]

Part I of this Note will initially discuss the noncitizen's ineffective assistance of counsel claim under the *Strickland* test[21] and the two prongs a defendant must satisfy to raise a successful claim.[22] This Note will then delve into the *Padilla v. Kentucky* case and the Supreme Court's conclusion that criminal defense attorneys cannot remain silent as to the immigration consequences resulting from a plea or conviction of criminal charges.[23] Part II will analyze the complex nature of immigration law and the difficulty in applying *Padilla's* "truly clear" test in order to determine whether counsel has an obligation to advise a client of the adverse immigration consequences of a plea or conviction.[24] Part III will propose that defender offices establish a comprehensive service plan so defense attorneys can confidently provide their noncitizen clients information and advice about the immigration consequences of a plea or

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

20. *See* Love & Chin, *The Right to Counsel*, *supra* note 18, at 22–23 ("The *Padilla* decision will greatly expand the responsibilities of defense lawyers in counseling and advocating for their clients, and give impetus to a trend toward 'a more holistic and comprehensive model of representation.'" (quoting Robin Steinberg, *Supreme Court Ruling Speaks of a New Kind of Criminal Defense*, HUFFINGTON POST, Apr. 5, 2010, http://www.huffingtonpost.com/robin-steinberg/supreme-court-ruling-spea_b_522044.html)); *see also*, *e.g.*, TOOBY, *supra* note 12, at 8 ("Some clients will conceal noncitizen status in the mistaken belief that—as noncitizens—they would not qualify for public defender services. . . . Other clients may honestly believe they are U.S. citizens, since all their brothers and sisters automatically became citizens when both parents naturalized, but the client was the only one who did not because s/he was married, over 18, or not a lawful permanent resident at the time of the parents' naturalization. . . . Counsel must, therefore, not accept a client's statement s/he is a citizen without careful verification.").

21. Under the *Strickland* test, a convicted defendant who claims that his counsel's assistance was "so defective as to require reversal of a conviction" must show that his counsel's performance was deficient and that this performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984).

22. *See infra* Part I.A.

23. *See infra* Part I.B.

24. *See infra* Part II.A–C.

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conviction.[25] This will ensure that both noncitizens and the State can use pleas to their benefit.[26]

I. THE EXPANSION OF THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR NONCITIZENS

A. The Strickland *Test and Georgia's Approach to Noncitizens' Claims of Ineffective Assistance of Counsel*

The Supreme Court recognizes a constitutional right to effective assistance of counsel.[27] For a noncitizen to bring an ineffective assistance of counsel claim and vacate a conviction or plea, the noncitizen must meet both prongs of the *Strickland* test.[28] A noncitizen must initially prove that "counsel's performance was deficient" to satisfy the first prong.[29] Then the noncitizen must show that the attorney's "deficient performance prejudiced the defense."[30] If a noncitizen cannot meet both prongs, the court will deny the ineffective assistance of counsel claim.[31]

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25. *See infra* Part III.

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

27. Strickland v. Washington, 466 U.S. 668, 686 (1984) (emphasizing that "'the right to counsel is the right to the effective assistance of counsel'" (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970))); *see* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.").

28. *See Strickland*, 466 U.S. at 686 (addressing the meaning of the "constitutional requirement of effective assistance" and declaring that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct . . . undermined the proper functioning of the adversarial process . . .").

29. *Id.* at 687–89 (concluding that a defendant must show that his counsel's conduct "fell below an objective standard of reasonableness" and that scrutiny "must be highly deferential" to counsel's performance).

30. *Id.* at 687. The Court mandated that the standard is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

31. *Id.* at 687, 699–700. The Court held that the defendant failed to meet both prongs of the test when his counsel made the choice to argue extreme emotional distress and rely on the defendant accepting responsibility for his crime. *Id.* at 699. Counsel's unsuccessful choice resulted from "reasonable professional judgment," and there was no probability that omitted evidence would have changed the sentence imposed. *Id.* at 699–700; *see also* Roe v. Florres-Ortega, 528 U.S. 470, 484 (2000) (finding error in the court of appeals' "per se prejudice rule" because it evades the requirement that counsel's error "must actually cause the forfeiture of the appeal": if the defendant cannot establish that but for the counsel's error the defendant would have timely appealed, the defendant is not entitled to

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The Georgia Supreme Court recognizes that noncitizens have a claim of ineffective assistance of counsel but limits the claim to when counsel affirmatively misinforms the client.[32] In *Rollins v. State*, the petitioner pled nolo contendere to a charge of driving under the influence and pled guilty as a First Offender to a Georgia Controlled Substance Act violation.[33] Before pleading guilty, Rollins, a native of Barbados, received her attorney's assurances that the pleas would not have any adverse consequences on her immigration status or her desire to become an attorney.[34] Following these pleas, Rollins earned four degrees, including a Juris Doctor degree; passed the Florida Bar Examination; and received an offer of employment from the state as a prosecutor.[35] Despite her success, the Florida State Bar received a copy of her guilty plea and held in "abeyance its decision whether to admit Rollins to the practice of law," and the Department of Immigration and Naturalization Services instituted deportation proceedings against her.[36]

The Georgia Supreme Court, in considering Rollins's claim, emphasized that while a defendant has a right to trial and effective assistance of counsel, that constitutional obligation does not extend to *collateral consequences* such as deportation proceedings.[37] The

relief); Hill v. Lockhart, 474 U.S. 52, 60 (1985) (affirming the district court's decision to deny a hearing for the petitioner's claim of ineffective assistance of counsel, as the petitioner failed to satisfy the prejudice prong of *Strickland* when he alleged that, absent counsel's error, he would have pleaded not guilty and gone to trial).

32. Rollins v. State, 591 S.E.2d 796, 798 (Ga. 2004). The Georgia Supreme Court held that the two-prong test of *Strickland* must apply to noncitizens' claims of ineffective assistance of counsel when noncitizens allege that counsel affirmatively misinformed them as to the consequences of their guilty plea. *Id*. The court permitted the petitioner to withdraw her plea because her case involved the "affirmative act of giving misinformation to his client" in contrast to a case in which counsel "failed to inform his client of the collateral consequences." *Id.* at 798–800.

33. *Id*. at 797. The state discovered trace amounts of cocaine on a dollar bill in Rollins' purse. *Id*. She denied any knowledge of the cocaine and claimed she had no idea why it was on the money. *Id.* However, because she did not deny the bill came from her purse, on the advice of counsel she entered a guilty plea. *Id*.

34. *Id.*

35. *Id.* Rollins earned an associate degree from Clayton State College and a double-major bachelor's degree from Georgia State University. *Id.*

36. *Id.* The Homeland Security Act of 2002 transferred the functions of the Department of Immigration and Naturalization Services (INS) to the Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. This Note will refer to the Department of Homeland Security (DHS) since the Act abolished the INS.

37. *Rollins*, 591 S.E.2d at 798 (citing Williams v. Duffy, 513 S.E.2d 212 (Ga. 1999); Thompson v.

defendant establishes an ineffective assistance of counsel claim regarding collateral repercussions only when he proves counsel gave erroneous advice or information.[38] The Georgia Supreme Court overturned the habeas court's decision only because counsel affirmatively assured his client she would not suffer negative consequences from her plea.[39]

Georgia courts do not recognize that noncitizens have a constitutional right to know all of the collateral consequences of their pleas or convictions.[40] The Georgia Code, however, statutorily requires courts to "determine whether the defendant is freely entering the plea with an understanding that if he or she is not a citizen of the United States, then the plea may have an impact on his or her immigration status."[41] While the statute does not address counsel's obligations to their noncitizen clients, the statute demonstrates the nexus between pleas and a noncitizen's status and emphasizes the necessity of noncitizens understanding the consequences to maintain

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Greene, 462 S.E.2d 747 (Ga. 1995)). The Supreme Court of Georgia maintained that "there is no constitutional requirement that a defendant be advised of collateral consequences in order for her guilty plea to be valid." *Id.* at 797–98; *see also* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators*,*"* 93 MINN. L. REV. 670, 678 (2008) (defining collateral consequences as consequences "that result from some law or regulation that takes the fact of conviction into account in deciding whether to impose the particular consequence").

38. *Rollins*, 591 S.E.2d at 799. The defendant's counsel failed to perform basic research about the effects of a plea on deportation proceedings and state bar fitness*. Id.* Therefore, counsel's representation fell below the objective standard of reasonableness. *Id.*

39. *Id.* at 798. *See* State v. Patel, 626 S.E.2d 121, 122–23 (Ga. 2006) (affirming the order to permit the defendant to withdraw his plea because the defendant had inquired about the impact of a plea on payors—such as Medicare and Medicaid—and his medical practice, and his counsel "expressly advised" his plea would not result in any "long-term adverse consequences" on his practice).

40. Christina Hendrix & Olivia Orza, *No Second Chances: Immigration Consequences of Criminal Charges*, 13 GA. B.J. 27, 27 (Dec. 2007).

41. GA. CODE ANN. § 17-7-93(c) (2010) ("[T]he court shall determine whether the defendant is freely entering the plea with an understanding that if he or she is not a citizen of the United States, then the plea may have an impact on his or her immigration status. This subsection shall apply with respect to acceptance of any plea of guilty to any state offense in any court of this state or any political subdivision of this state."). This law applies to all courts in Georgia, including municipal courts. Sease & Chea, *supra* note 1, at 24. Courts should ask every defendant whether he is a citizen of the United States. *Id*. If the defendant is a noncitizen, the court should ask whether he understands that the plea may impact his immigration status. *Id*. A court's failure to inquire into the defendant's status and his understanding may result in a future habeas corpus petition on the grounds that the defendant did not enter in the plea knowingly or voluntarily. *Id*.

the integrity of the plea.[42] The legislature, in requiring courts to instruct noncitizens of potential immigration consequences, acknowledged the growing immigrant population and the approximately 900,000 foreign-born individuals living in Georgia.[43]

B. Padilla v. Kentucky

The Supreme Court in *Padilla v. Kentucky*[44] addressed a situation similar to the scenario in *Rollins*. The petitioner, Jose Padilla, had been a lawful permanent resident for the previous forty years and served in the Vietnam War.[45] Before pleading guilty to the transportation of a large amount of marijuana, counsel advised him that he "did not have to worry about Immigration Status since he had been in the country so long."[46] As a result of this drug conviction, the defendant was placed in removal proceedings.[47] The Court granted certiorari to address whether, as a matter of law, a noncitizen's counsel has an obligation to advise him that pleading guilty would result in his removal from this country.[48] The Court agreed with the

42. *See* Hendrix & Orza, *supra* note 40 (noting that the Georgia legislature "recognized the importance of informing defendants of the consequences of guilty pleas" and amended the Georgia Code to instruct courts to determine that noncitizens understand that a plea may impact their status).

43. Migration Policy Institute, *Georgia: Social and Demographic Characteristics*, MPI DATA HUB, http://www.migrationinformation.org/datahub/state.cfm?ID=GA (last visited Aug. 3, 2011). In Georgia between 2000 and 2009, the foreign-born population grew from 577,273 to 920,381. *Id.* Compare this 59.4% change in Georgia's population to the national level, where the foreign-born population grew from 31,107,889 to 38,517,234, a 23.8% change. *Id.* In Georgia from 2000 to 2009, the number of persons who obtained legal permanent resident status has increased from 14,707 to 28,396. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS 16 tbl.4 (2010).

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

45. *Id.* at 1477.

46. *Id.* at 1478 (quoting Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008)).

47. *Id.* at 1477 n.1 ("[V]irtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i)."); 8 U.S.C. § 1227(a)(2)(B)(i) (2006) ("Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a state, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

48. *Padilla*, 130 S. Ct. at 1478. The Kentucky Supreme Court denied Padilla's petition for relief because it held that a defendant's Sixth Amendment right does not extend to "collateral" consequences of a plea or conviction. *Id.* (citing Commonwealth v. Padilla, 253 S.W.3d at 485). Counsel's erroneous advice or failure to inform regarding removal proceedings did not provide Padilla with a basis for relief. *Id.*

petitioner that "constitutionally competent counsel" would have advised him that his guilty plea would make him subject to amenable deportation.[49]

1. Removing Deportation from the Collateral Consequences Label and Placing It Within the "Ambit of the Sixth Amendment Right to Counsel"[50]

When the Kentucky Supreme Court heard Mr. Padilla's ineffective assistance of counsel argument, the court denied his claim because it concluded that advice regarding the risk of deportation is only a *collateral consequence*.[51] Collateral consequences are not defined in federal or state statutes but are repercussions of criminal activity that "stem from the fact of conviction rather than from the sentence of the court."[52] The Kentucky Supreme Court held that while a defendant has a Sixth Amendment right to counsel, that right does not extend to collateral consequences of a plea or conviction.[53] Therefore, an ineffective assistance of counsel claim based on an attorney's incorrect advice about immigration consequences has no constitutional relief.[54]

The United States Supreme Court noted that many courts similarly distinguish between direct and collateral consequences but failed to determine whether that distinction is appropriate under *Strickland*.[55]

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49. *Id.* The Supreme Court did not grant Padilla's relief, because it did not determine whether his counsel's erroneous advice prejudiced his defense enough to meet the *Strickland* test, but instead remanded his case. *Id.*

50. *Id.* at 1482.

51. Commonwealth v. Padilla, 253 S.W.3d at 485; *see* Roberts, *supra* note 37, at 689 ("[T]he lower courts have developed three different, and largely unsatisfactory, definitions of a 'direct' consequence: (1) whether the consequence is 'definite, immediate and largely automatic'; (2) whether the consequence is punitive; and (3) whether the consequence is within 'the control and responsibility' of the sentencing court." (footnotes omitted)).

52. Roberts, *supra* note 37 (quoting Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634 (2006)).

53. Commonwealth v. Padilla, 253 S.W.3d at 485.

54. *Id.* ("In neither instance [counsel's failure to advise or advising incorrectly] is the matter required to be addressed by counsel, and so an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*.").

55. *Padilla*, 130 S. Ct. at 1481 ("Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.").

Instead the Court noted that the "unique nature of deportation" made it difficult to "classify as either a direct or collateral consequence."[56] The Court reasoned that it was "'most difficult' to divorce the penalty from the conviction in the deportation context" and concluded that most noncitizens also will find it difficult to separate deportation that results from a conviction from the conviction itself.[57] While the Court agreed that deportation is not a criminal sanction but is civil in nature, it found that deportation "is nevertheless intimately related to the criminal process."[58] After dismissing the "direct" and "collateral" label for removal proceedings, the Court refused to categorically remove it from the "ambit of the Sixth Amendment right to counsel" and overruled the Kentucky Supreme Court's decision by determining that the *Strickland* analysis should apply.[59]

2. Deportation Proceedings and the Criminal Defense Attorney's Obligation

In determining whether counsel's performance was deficient—the first prong under *Strickland*—the Supreme Court looked to the professional norms that guide criminal and immigration attorneys.[60] The Court concluded that the "weight of prevailing professional norms supports the view that counsel must advise her client regarding

56. *Id.* at 1481–82. In discussing the nature of deportation, the Court emphasized that federal law has expanded deportable offenses and eliminated discretionary relief for many offenses. *Id.* at 1479–81. In 1990, Congress eliminated the procedure known as judicial recommendation against deportation that had permitted the sentencing judge to recommend that the government not deport an alien. *Id.* at 1480. The Supreme Court noted that if a noncitizen commits a removable offense, his removal "is practically inevitable" and the Attorney General no longer has the authority to exercise equitable discretion except for particular classes of offenses in which he may cancel removal. *Id.* (citing 8 U.S.C. § 1229(b) (2006)); *see also* 8 U.S.C. § 1228(c) (2006) (declaring that an alien who commits an aggravated felony "shall be conclusively presumed to be deportable").

57. *Padilla*, 130 S. Ct. at 1481 (quoting United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982)); *accord* Hendrix & Orza, *supra* note 40, at 32 ("Defendants convicted of certain crimes face possible removal and, in some cases, complete banishment from the United States. Upon removal, these defendants are separated from their families and may face persecution upon return to their countries.").

58. *Padilla*, 130 S. Ct. at 1481.

59. *Id.* at 1482; *see* Hendrix & Orza, *supra* note 40, at 32 ("Noncitizen defendants facing criminal charges in the United States are guaranteed certain constitutional rights, such as the right to enter a knowing and voluntary guilty plea and the right to effective assistance of counsel. To a non-citizen, a knowing and voluntary plea should encompass the knowledge that, by entering a guilty plea, he or she may be accepting life-altering immigration consequences.").

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

the risk of deportation."[61] In analyzing the petitioner's claim, the Court concluded that his counsel could have easily determined that a guilty plea to a drug offense would make him deportable, but instead, his counsel falsely told him his conviction would not have an effect.[62]

Using the petitioner as an example, the Supreme Court explained a defense attorney's obligation and mandated that when the "deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear."[63] For instances in which the law is "unclear or uncertain," the Court stated that a defense attorney "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."[64] The Court concluded that in the petitioner's situation, the terms of the immigration statute were "succinct, clear, and explicit in defining the removal consequence" and therefore easily satisfied the first prong of the *Strickland* test.[65] The Court

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61. *Id.* The Court looked to standards such as the National Legal Aid and Defender Association's Performance Guidelines for Criminal Representation and the America Bar Association for Criminal Justice's Prosecution Function and Defense Function. *Id.*; *see* Brief of the National Ass'n of Criminal Defense Lawyers et al. as Amici Curiae in Support of Petitioner at 11, *Padilla*, 130 S. Ct. 1473 (2010) (No. 08-651) (hereinafter Brief of the National Ass'n). The National Legal Aid and Defender Association (NLADA) guidelines "underscore that competent . . . counsel" must consider immigration consequences throughout "all stages of the process." *Id.* NLADA guidelines accounted for immigration consequences such as the possibility of deportation at the initial interview stage, the plea bargaining stage, and the sentencing stage. *Id. Contra Padilla*, 130 S. Ct. at 1488 (Alito, J., concurring) ("[W]e must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.").

62. *Padilla*, 130 S. Ct. at 1483 (citing 8 U.S.C. § 1227(a)(2)(B)(i) (2006)) ("Any alien who at any time after admission has been convicted of a violation (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

63. *Padilla*, 130 S. Ct. at 1483. Although the Solicitor General asked the Supreme Court to hold that *Strickland* applies to a noncitizen's claim only when his counsel provides erroneous advice, the Supreme Court rejected limiting its holding to "affirmative misadvice." *Id.* at 1484. The Court reasoned that limiting a claim to only situations where counsel gives incorrect advice would give counsel an incentive to stay silent "on matters of great importance," and further it would deny advice on deportation to those clients least able to represent themselves, even though such advice is easily accessible and available. *Id.*

64. *Id.* at 1483. The majority opinion, written by Justice Stevens, dismisses Justice Alito's concerns that immigration consequences are frequently unclear and will place too heavy a burden on defense counsel. *Id.* at 1483 n.10. Justice Stevens declared that the "[l]ack of clarity in the law . . . does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice." *Id.*

65. *Id.* at 1483 ("This is not a hard case in which to find deficiency: The consequences of Padilla's

remanded the case for a finding as to whether the petitioner can demonstrate prejudice as a result of his counsel's deficient performance.[66]

C. Implications of Padilla v. Kentucky

By mandating that criminal defense attorneys must inform their noncitizen clients of the possibility of deportation before entering pleas, the Supreme Court attempted to benefit not only noncitizen defendants but the State as well.[67] This decision marked a major development in upholding noncitizens' rights to counsel and the integrity of pleas.[68] However, the Court's requirement that criminal defense attorneys advise clients when the law is clear fails to appreciate the dynamic nature of immigration law.[69] This places a high burden on defense attorneys not only to recognize immigration issues but also to give correct advice to their clients.[70] The Court's

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plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory and his counsel's advice was incorrect."); *see* Commonwealth v. Padilla, 253 S.W.3d 482, 485 (Ky. 2008) (Cunningham, J., dissenting) ("Counsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all. Common sense dictates that such deficient lawyering goes to effectiveness. . . . I do not believe it is too much of a burden to place on our defense bar the duty to say, 'I do not know.'").

66. *Padilla*, 130 S. Ct. at 1487.

67. *Id.* at 1486. ("Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.").

68. *Supreme Court Upholds Integrity of Criminal Justice System for Immigrants*, DEFENDING IMMIGRANTS PARTNERSHIP (Mar. 31, 2010), http://defendingimmigrants.org/news/article.305930-Supreme_Court_Upholds_Integrity_of_Criminal_Justice_System_for_Immigrants. Michelle Fei, co-director of the Immigrant Defense Project, commented on the Supreme Court's decision: "We're thrilled that the Supreme Court has recognized that deportation is an extreme penalty and that noncitizens have a constitutional right to legal advice about the consequences of pleading guilty." *Id.*; *see also* OFFICE OF IMMIGRATION LITIG., U.S. DEP'T OF JUSTICE, IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: *PADILLA V. KENTUCKY* i (2010) (noting that after *Padilla*, "it is even more important than ever for prosecutors, defense counsel, judges, and other interested parties at the federal and local levels to have a basic understanding of the immigration consequences that flow from an alien's guilty plea").

69. *Padilla*, 130 S. Ct. at 1488 (Alito, J., concurring) ("The Court's new approach is particularly problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex."); *see also* Love & Chin, *The Right to Counsel*, *supra* note 18, at 21 ("The inconsistencies and uncertainties revealed in the passages from the ABA Criminal Lawyer's Guide to Immigration Law quoted by Justice Alito would be hilarious if the subject matter were not so deadly serious.").

70. *Padilla*, 130 S. Ct. at 1487–88 (emphasizing that criminal defense attorneys specialize in

proposed resolution to the complexity of immigration law—that when the law is "unclear or uncertain," the attorney need only advise a client that adverse immigration consequences may follow criminal charges—does not provide sufficient guidelines or resources to ensure noncitizens receive adequate representation.[71]

II. THE DIFFICULTY IN APPLYING *PADILLA*'S "SUCCINCT AND STRAIGHTFORWARD" ANALYSIS TO IMMIGRATION LAW

The Supreme Court held, in *Padilla v. Kentucky*, that when immigration consequences are "succinct, clear, and explicit" a criminal defense attorney has the duty to give correct advice regarding removal proceedings.[72] The implication of this holding is that it binds the criminal defense attorney's obligation to the complexity of the law.[73] Justice Alito in his concurrence chastised the majority's approach, calling it a "vague, halfway test."[74] He argued that this approach is problematic for many reasons.[75] Primarily, he noted that a defense attorney cannot always easily ascertain whether the law is clear without having an expertise in immigration law.[76] Secondly, he claimed that counsel might mislead defendants by

criminal proceedings and "it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience"); *see also* Love & Chin, *The Right to Counsel*, *supra* note 18, at 21 ("That the *Padilla* holding rested squarely on the Sixth Amendment, however, makes clear that counsel's new duty extends to every criminal case—not just the 95 percent that result in guilty pleas, but also those that go to trial.").

71. *Padilla*, 130 S. Ct. at 1491 (Alito, J., concurring) ("[I]f defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled.").

72. *Id.* at 1483.

73. *Id.*; *see supra* Part I.B.

74. *Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring). Justice Alito concurred in the judgment because he agreed with the Court that if an attorney misleads a client by giving incorrect advice about removal proceedings, the attorney fails to provide effective assistance of counsel under *Strickland*. *Id.* His opinion differed from the Court's regarding the attorney's obligation to his noncitizen client. *Id.* He argued that if an attorney abstains from giving incorrect advice and instead advises a noncitizen that immigration consequences may result from a conviction and the client may consult with an immigration attorney regarding those consequences, then the attorney satisfies his duty to his client. *Id.* Under Justice Alito's approach, whether immigration law is clear or unclear, the defense attorney would not need to decipher or explain the immigration consequences. *Id.*

75. *Id.* at 1490–92.

76. *Id.* at 1490 ("How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in isolation?").

advising about the risks of deportation because deportation is only one of many collateral consequences of a conviction.[77] Justice Alito's concurrence highlights the complexity and dynamic nature of immigration law and demonstrates the discrepancy between the Court's decision and the actual practice of immigration law.[78] While the majority appropriately pointed out that determining the consequences of Mr. Padilla's plea merely required reading a statute, most investigations into immigration law are not so easy.[79]

A. The Complex and Dynamic Nature of Immigration Law

Immigration law does not merely consist of statutes and regulations that a criminal defense attorney can read to easily determine the consequences of a plea or conviction.[80] Instead, immigration law consists of a complex mixture of statutes, policies, memos, precedent, administrative decisions, and judicial decisions.[81] Attorneys and their noncitizen clients facing criminal charges must be aware of consequences that might result in the clients' *removal*.[82]

77. *Id.* at 1491. Justice Alito also argued that a statute or other administrative reform is a more appropriate remedy, and he argued that the majority's decision usurps Sixth Amendment law. *Id.*

78. *See* OFFICE OF IMMIGRATION LITIG., *supra* note 68, at i–ii. The Office of Immigration Litigation (OIL) prepared a monograph in response to the *Padilla* decision to provide prosecutors, defense attorneys, and judges with a basic understanding of immigration law. *Id.* In its preface, the OIL noted that it does not provide an in-depth analysis of immigration law because of its complexity and scope. *Id.* It emphasized that "administrative and judicial precedents on immigration matters are far from uniform, and determining what precedent to apply might be difficult because the removal proceeding may not be completed in the same jurisdiction as the criminal proceeding." *Id.*

79. *Padilla*, 130 S. Ct. at 1488–89 (Alito, J., concurring).

80. *Id.* at 1488. Justice Alito emphasized the complexity of immigration law due to the fact that "'[m]ost crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act], but instead fall under a broad category of crimes, such as *crimes involving moral turpitude or aggravated felonies*.'" *Id.* (quoting MICHAEL JOHN GARCIA & LARRY M. EIG, CONG. RESEARCH SERV., RL 32480, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY summary (2006)).

81. RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 1–22 (Stephanie L. Browning ed. 2006) ("Many immigration provisions created by Congress are inconsistent—be they provisions to allow non-American citizens to enter the United States or provisions to effect their removal. Immigration Law is a patchwork of promulgations and represents a tide-like shift between restrictiveness and openness towards immigrants.") (footnote omitted). *See* Brief for the United States as Amicus Curiae Supporting Affirmance at 19, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651) ("Advising defendants on immigration law in particular can involve complex legal and factual questions—ranging from the characterization of an offense for immigration purposes, to naturalization questions, to research into an alien defendant's past immigration status—that are unfamiliar to many criminal defense attorneys.").

82. *See* BOSWELL, *supra* note 81, at 24.

Removal in the immigration context means "the ejection of a person from the United States."[83] A noncitizen may face removal either through grounds of *inadmissibility* or *deportability*.[84] A noncitizen "*seeking admission* must overcome the inadmissibility grounds" while a noncitizen "who *has been admitted* faces the deportability grounds."[85] Inadmissibility, deportability and their relevant provisions are often confused. Even the Office of Immigration Litigation,[86] which produced a monograph in response to *Padilla's* holding to aid defense attorneys, prosecutors, and federal and state judges, incorrectly stated that a marijuana exception applies to grounds of inadmissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(II).[87] This marijuana "exception" applies under the criminal grounds of deportability under 8 U.S.C. § 1227(a)(2)(B)(i).[88] The differences

83. *Id.*

84. *Id.* "Inadmissibility" and "deportability" are often confusing because in 1996 Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). *Id.* This act made many changes to immigration law, including the procedure for ejecting a person from the United States. *Id.* Before IIRAIRA, noncitizens seeking admission were subject to inadmissibility grounds and went before an Immigration Judge at "exclusion hearings." *Id.* at 25. Noncitizens who entered the United States were subject to deportability grounds at "deportability hearings." *Id.* IIRAIRA combined exclusion and deportation hearings into "removal hearings" that are for all noncitizens, regardless of whether they are seeking admission or the government is trying to eject them following their admission. *Id.*

85. BOSWELL, *supra* note 81, at 25. Immigration and Nationality Act (INA) section 212(a) covers inadmissibility grounds, and INA section 237 covers deportability grounds. *Id.* at 24 n.7. *See* 8 U.S.C. §§ 1182, 1227 (2006). Inadmissibility applies to noncitizens who have not been legally admitted to the United States, noncitizens who are physically present within the Untied States and want to change status, and noncitizens who are returning from a trip abroad. Hendrix & Orza, *supra* note 40, at 28 (explaining that a noncitizen returning from a trip abroad is treated as "someone entering the country for the first time"). Deportability applies to noncitizens who have been admitted to the United States and are later charged with being in the country in violation of the law. MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS 56 (2003).

86. The Office of Immigration Litigation (OIL) is part of the Department of Justice and is responsible for handling and organizing all federal immigration litigation. OFFICE OF IMMIGRATION LITIG., *supra* note 68, preface. The OIL features "experts in interpreting and applying [immigration] statutes." *Id.*

87. RAHA JORJANI, UNIV OF CAL. DAVIS, SCHOOL OF LAW, IMMIGRATION LAW CLINIC, ERRORS IN OIL'S 2010 POST-*PADILLA* REFERENCE GUIDE: "IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: *PADILLA V. KENTUCKY*" (2010); *see* OFFICE OF IMMIGRATION LITIG., *supra* note 67, at 11.

88. Jorjani, *supra* note 87; *see also* 8 U.S.C. § 1227(a)(2)(B)(i) (2006) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."). The "petty offense exception" does not exempt the

between inadmissibility and deportability are significant because the consequences for a noncitizen who remains in the United States may vary from a noncitizen who has the same conviction but travels outside the United States.[89]

In addition to analyzing whether a client is subject to grounds of inadmissibility and deportability, a criminal defense attorney must analyze the conviction to determine "the proper classification of the crime."[90] Making this classification is not an easy task. However, it is a significant part of a noncitizen's defense.[91] Criminal defense attorneys must be able to classify the crime to defend against severe immigration consequences such as "guaranteed deportation."[92] *Aggravated felonies* and *crimes involving moral turpitude* are the major categories of crimes in immigration law.[93] In order for a criminal defense attorney to understand and advise a client on the immigration consequences, the attorney must initially categorize the crime charged so that the attorney can then identify the possible adverse consequences, the potential forms of relief, and possible solutions for the accused.[94]

While crimes involving moral turpitude are listed throughout the Immigration and Nationality Act (INA), the INA never defines this phrase.[95] Crimes involving moral turpitude are defined by case law and determined on a case-by-case basis unless controlled by clear precedent.[96] The Board of Immigration Appeals (BIA)[97] and other

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noncitizen from deportation but merely permits the noncitizen to apply for a waiver, which is very difficult to obtain. *See* Matter of Almanza-Arenas, 24 I. & N. Dec. 771, 776 (BIA 2009) (finding the fact that the noncitizen's conviction might fall within the petty offense exception to be "irrelevant" and denying his application for cancellation of removal).

89. KRAMER, *supra* note 85, at 57 ("A person's status and personal goals determine whether the grounds of inadmissibility, deportability, or both, apply.").

90. *Id.* at 75.

91. *Id.*

92. ROBERT JAMES MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS 152 (2d ed., 2006).

93. KRAMER, *supra* note 85, at 75.

94. *Id.* at xxiii.

95. *Id.* at 76.

96. *Id.*

97. The Board of Immigration Appeals (BIA) is part of the Department of Justice's Executive Office for Immigration Review. BOSWELL, *supra* note 81, at 154. The BIA reviews removal cases and defensive benefit applications decided by Immigration Judges. *Id.* at 155.

courts recognize crimes involving moral turpitude as conduct "that is inherently dishonest, base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[98] A crime of moral turpitude makes a defendant deportable when the potential sentencing term is one year or longer and the noncitizen committed the offense within five years of his admission to the United States.[99] While the definition of crimes involving moral turpitude includes crimes such as murder, it also lumps crimes such as theft and aggravated assault into the same category.[100] A permanent resident who pleads no contest to aggravated assault for waving a baseball bat and yelling "get out or I'll kill you" at trouble-makers will be deported for committing a crime involving moral turpitude on the same grounds as a person who attempted murder.[101]

The second category of crimes in immigration law is aggravated felonies.[102] Aggravated felony is a term of art defined statutorily as

98. OFFICE OF IMMIGRATION LITIG., *supra* note 68, at 8. Examples of offenses that may constitute crimes involving moral turpitude include murder, voluntary manslaughter, theft offenses, forgery, kidnapping, mayhem, rape, fraud, spousal abuse, child abuse, and driving under the influence without a license. *Id.*

99. 8 U.S.C. § 1227(a)(2)(A)(i) (2006); OFFICE OF IMMIGRATION LITIG., *supra* note 68, at 8. A noncitizen is inadmissible for committing a crime involving moral turpitude under 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006). OFFICE OF IMMIGRATION LITIG., *supra* note 68, at 10. The OIL, however, again made an error regarding the petty offense exception to inadmissibility:

> The exception applies to offenses for which the maximum possible term of imprisonment does not exceed one year. OIL misstates this exception as "for which the maximum possible term of imprisonment was less than one year." This is significant because under California law, for example, a misdemeanor where the actual sentence didn't exceed 6 months may qualify under the exception because the possible term of imprisonment for a California Misdemeanor does not exceed one year. OIL's error, if relied upon, would mistakenly signal to parties that a California misdemeanor conviction cannot be crafted in such a way as to fall within the petty offense exception and thereby avoid or mitigate certain immigration consequences.

JORJANI, *supra* note 87, at 1 (quoting OFFICE OF IMMIGRATION LITIG., *supra* note 68, at 11).

100. *See* KRAMER, *supra* note 85, at 76–82. In determining whether a crime is one involving moral turpitude, certain offenses should be examined specially. *Id.* at 78. For example, the BIA has determined that theft crimes involve moral turpitude only when a "permanent taking is intended." *Id.* (citing V-Z-S, 22 I. & N. Dec. 1338, 1360 n.12 (B.I.A. 2000)). "[J]oyriding, failure to return a rental car, and similar situations that do not involve stealing with an intent to permanently deprive an owner of a property right may not—depending on the statute at hand—involve moral turpitude." *Id.*

101. *Id.* at xxi, 80.

102. BOSWELL, *supra* note 81, at 49.

well as by BIA and federal court decisions.[103] The definition, however, is only a list of those offenses considered aggravated felonies.[104] The definition includes offenses such as murder,[105] trafficking of controlled substances,[106] money laundering if the amount exceeds $10,000,[107] and theft or burglary if the term of imprisonment is for at least one year.[108] The definition is far reaching, including offenses that are not felonies under state or federal law.[109] A conviction for an aggravated felony has serious consequences and renders a noncitizen removable at any time.[110]

The dynamic nature of crimes of moral turpitude and aggravated felonies further complicates their analysis. While criminal defense attorneys may be tempted to rely on a prepared list of crimes involving moral turpitude or aggravated felonies, they will do so to the detriment of their clients.[111] The Office of Immigration Litigation (OIL) gives a list of offenses that may constitute crimes involving moral turpitude, including "driving under the influence without a license."[112] This list, however, may mislead attorneys.[113] While in the Ninth Circuit driving under the influence "with knowledge that the driver is prohibited from driving with a suspended or otherwise restricted license" is a crime involving moral turpitude, two statutes

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103. 8 U.S.C. § 1101(a)(43) (2006); BOSWELL, *supra* note 81, at 49 n.134.

104. 8 U.S.C. § 1101(a)(43).

105. 8 U.S.C. § 1101(a)(43)(A).

106. 8 U.S.C. § 1101(a)(43)(B).

107. 8 U.S.C. § 1101(a)(43)(D).

108. 8 U.S.C. § 1101(a)(43)(G). The INA specifies all the various aggravated felony offenses in § 1101(a)(43)(A–U).

109. BOSWELL, *supra* note 81, at 49 (citing United States v. Marin-Navarette, 244 F.3d 1284 (11th Cir. 2001); Small, 23 I. & N. Dec. 448 (B.I.A. 2002).

110. 8 U.S.C. § 1227(a)(2)(A)(iii) (2006); BOSWELL, *supra* note 81, at 49 ("A person convicted of an aggravated felony will not be able to avail him- or herself of a waiver of deportability grounds or relief from removal . . . [and] he or she will not later be eligible for re-admission." (citing 8 U.S.C. § 1182(h) (2006)).

111. KRAMER, *supra* note 85, at 75 ("Every client's case presents a unique set of facts and circumstances that must be reviewed in light of both the specific offense conduct and the applicable criminal statute involved. . . . Relying on charts, graphs, and other written 'sound bites' for the quick and easy answer can lead to mistakes in the long run."); Jorjani, *supra* note 87 (explaining that the definition of a crime involving moral turpitude is "unclear" and warning that one circuit court has called the determination of a crime involving moral turpitude "a nebulous question" (citing Ocegueda-Nunez v. Holder, 594 F.3d. 1124, 1127 (9th Cir. 2010))).

112. OFFICE OF IMMIGRATION LITIG., *supra* note 68, at 8.

113. Jorjani, *supra* note 87.

cannot be combined to create an offense that would fit this definition.[114] Hence in California, a conviction of a simple driving under the influence (DUI) and driving without a license—which are two separate crimes each without an intent requirement—cannot be combined to constitute a crime involving moral turpitude.[115]

B. Citizenship and Conviction: Words with Special Meaning in Immigration Law

While criminal defense attorneys may feel more comfortable working with terms like "citizenship" and "conviction" because they are more familiar than terms like "crimes involving moral turpitude" and "aggravated felonies", the concepts all have special meaning in immigration law.[116] An inquiry into citizenship is vital for criminal defense attorneys. If a client is a citizen, the client is not subject to grounds of deportability or inadmissibility, and the defense attorney can then negotiate for pleas without worrying about the client's immigration status.[117]

The majority opinion in *Padilla v. Kentucky*, however, fails to establish how far practitioners must go to determine citizenship.[118] While one client's status "could be easily determined" by looking at a birth certificate, the analysis required for other clients may not be so "succinct and straightforward."[119] The inquiry into citizenship should not end with a determination that the client was born outside the United States—a criminal defense attorney must follow up with

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114. *Id.* (citing Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009) (en banc)) ("The elements of a crime involving moral turpitude must be found in the statute of conviction.").

115. *Id.*

116. Unfortunately, mistakes concerning citizenship are common, and "[h]undreds of thousands of Latino United States citizens were wrongfully deported to Mexico during the last century . . . ." TOOBY, *supra* note 12, at 9; *see also* Padilla v. Kentucky, 130 S. Ct. 1473, 1489 (2010) (Alito, J., concurring) ("[I]t may be hard, in some cases, for defense counsel even to determine whether a client is an alien." (footnote omitted)); KRAMER, *supra* note 85, at 1 ("Some people, believe it or not, may be American citizens through derivation and not even know it.").

117. KRAMER, *supra* note 85, at 1.

118. *See Padilla*, 130 S. Ct. at 1489–90 (Alito, J., concurring); *see also supra* note 20 and accompanying text.

119. *Padilla*, 130 S. Ct. at 1483; BOSWELL, *supra* note 79, at 176 ("Whether an individual acquired citizenship at birth abroad where one or both parents are U.S. citizens is a complex question controlled by statute.").

questions about where the client's parents and grandparents were born.[120] Attorneys who limit their inquiry into citizenship to easily ascertainable means, such as a mere question on an intake sheet, may incorrectly advise their client as an immigrant when their client is a citizen, or advise their client as a citizen when the client is only a legal permanent resident.[121] An attorney must therefore seek documentation of citizenship.[122]

Conviction is another term where the criminal defense attorney's familiarity with the concept may be more harmful than helpful. Before an attorney can provide advice on the consequences of an action, the attorney must first determine whether an offense constitutes a conviction for immigration purposes. However, a state's definition of "conviction" may not match up with the INA's expansive definition of "conviction."[123] Examples of valid convictions under the INA include pleas, deferred adjudications, a court martial's entering of guilty judgment, probation before judgment, guilty pleas held in abeyance, and all costs that constitute

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120. BOSWELL, *supra* note 79, at 176. When a noncitizen is born abroad, the noncitizen may acquire citizenship through a U.S. citizen; however, this acquisition depends on the date of the individual's birth and the law at the time of birth. *Id.* The determination also depends on whether the noncitizen was born out of wedlock and for how long the U.S. citizen parent lived in the United States. *Id.*; *see* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK app. B (12th ed. 2010) (providing multiple charts that outline the requirements and laws concerning automatic acquisition of citizenship and tables that show the transmission requirements for individuals born abroad, depending on the date of birth).

121. *See* TOOBY, *supra* note 12, at 8–9. An intake information sheet should reflect a much more comprehensive inquiry. *Id.* at 190–91. Questions should include an inquiry into where the client was born; whether the client's mother is a U.S. citizen and, if so, whether she is a citizen by birth or naturalization; and whether the client's father is a U.S. citizen and, if so, whether he is a citizen by birth or naturalization. *Id.*

122. TOOBY, *supra* note 12, at 8 ("Common documentation of U.S. citizenship includes a birth certificate establishing that the client was born in the United States (or a listed possession); a United States passport [or] a U.S. Certificate of Citizenship . . . ; a U.S. Certificate of Naturalization . . . or a U.S. Citizen Identification Card . . . .").

123. TOOBY, *supra* note 12, at 48; 8 U.S.C. § 1101(a)(48) (2006) ("(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where— (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. (B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."); *see, e.g.*, OFFICE OF IMMIGRATION LITIG., *supra* note 68, app. at C-1.

"punishment" or "penalty."[124] A deferred adjudication is when the judge sentences a defendant who pleads guilty or *nolo contendere* but does not enforce the sentence at that time.[125] If the defendant completes requirements such as probation or community service, the charges are dismissed; however, for immigration law purposes, even if the charges are dismissed the adjudication is still considered a conviction.[126] The statutory definition of "conviction" does not require finality in the normal sense of the word, but instead, finality lies at the point where either there is a "formal judgment of guilt" or a "sufficient finding of guilt and the imposition of punishment."[127] Even state convictions vacated for "rehabilitative purposes" remain valid convictions for immigration purposes in some circuits.[128]

*C. Criminal Defense Attorneys in Georgia Post-*Padilla

Despite the complexities of immigration law and determining whether an offense constitutes a conviction for immigration purposes and the consequences of that conviction, criminal defense attorneys in Georgia do not have a wealth of resources. While the majority in *Padilla v. Kentucky* deemed it essential that an attorney advise a client as to whether the client's plea carries a risk of deportation, the opinion failed to provide attorneys with the tools to meet this

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124. OFFICE OF IMMIGRATION LITIG., *supra* note 68, app. at C-2–C-3; *see* Hendrix & Orza, *supra* note 40, at 28 ("Georgia's First Offender Statute is a deferred adjudication program. Thus, the INA considers a 'guilty' plea entered under the First Offender Program to be a conviction." (citing Ga. Code Ann. § 42-8-60 (2007))).

125. Hendrix & Orza, *supra* note 40, at 28.

126. *Id.* ("The only instance when a deferred adjudication is not considered a conviction is when the sentencing court merely orders the defendant to pay court costs.").

127. 8 U.S.C. § 1101(a)(48)(A) (2006); *see* Mejia Rodriguez v. U.S. Dep't of Homeland Sec., 629 F.3d 1223 (11th Cir. 2011). In *Mejia Rodriguez*, a Honduran was denied renewal of temporary protected status (TPS) because of two prior offenses. *Id.* at 1225. He argued that the charges brought in state court for marijuana possession and driving with a suspended license did not amount to a "conviction." *Id.* The Eleventh Circuit disagreed and held that the state court's acceptance of a plea, its "finding of guilt," and the fact that it "imposed a sentence of time served" constituted a "formal judgment of guilt" and was therefore a "conviction." *Id.* at 1228.

128. OFFICE OF IMMIGRATION LITIG., *supra* note 68, app. at C-2; *see* Pickering v. Gonzales, 465 F.3d 263, 266 (6th Cir. 2006) ("A conviction vacated for rehabilitative or immigration reasons remains valid for immigration purposes, while one vacated because of procedural or substantive infirmities does not."); Ali v. U.S. Attorney Gen., 443 F.3d 804, 810–11 (11th Cir. 2006) (concluding that the defendant's conviction was not vacated for procedural or substantive purposes when he mistakenly thought a guilty plea under the First Offender Act would constitute an acquittal).

obligation.[129] Furthermore, the Georgia Supreme Court's holding in *Smith v. State*[130] did little to alleviate this burden. In *Smith*, a noncitizen asserted that the trial court violated Georgia Code section 17-7-93(c) by "failing to advise him on the record" of the possible immigration consequences of his plea.[131] The court held that a noncitizen must establish that "withdrawal is needed to correct a manifest injustice" to make a claim against the state for the court's failure.[132] The court recognized the burden of informing noncitizens of the risk of deportation and emphasized that it was an "unrealistic burden" to have the trial court determine "all of the potential important consequences of the plea to the particular defendant appearing before the court."[133] The court, however, did not claim this was an unrealistic burden for defenders. Instead of having trial courts share the obligation to inform clients of the adverse immigration consequences of a plea, the court declared that Georgia Code section 17-7-93(c) is a statutory right and the noncitizen's relief resided in the ineffective assistance of counsel claim.[134]

In Georgia, with the growing number of consequences attorneys must communicate to their clients and the complex nature of immigration law, some defense attorneys may be tempted to rely on

129. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1490 (2010) (Alito, J., concurring) (noting that the Court's answer to "the severity of the burden it imposes on defense counsel" is to hinge the obligation on the difficulty of determining the consequences).

130. Smith v. State, 697 S.E.2d 177 (Ga. 2010).

131. *Id.* at 180. The State conceded that the trial court failed to satisfy Georgia Code Section 17-7-93(c); however, the court maintained that the noncitizen could not show "manifest injustice" in order to withdraw his plea. *Id.* at 181; *see* GA. CODE ANN. § 17-7-93(c) (2010) ("[T]he court shall determine whether the defendant is freely entering the plea with an understanding that if he or she is not a citizen of the United States, then the plea may have an impact on his or her immigration status. This subsection shall apply with respect to acceptance of any plea of guilty to any state offense in any court of this state or any political subdivision of this state.").

132. *Smith*, 697 S.E.2d at 186. To satisfy a manifest injustice, the noncitizen would have to show "(1) that he is not a citizen; (2) that the facts, viewed in conjunction with the immigration laws, show some real risk to his immigration status; (3) that no one ever advised him of those risks; and (4) that if he had known of the risks, he would have refused to plead guilty and taken his chances at trial." *Id.* at 187.

133. *Id.* at 184.

134. *Id.* The court noted that the U.S. Supreme Court did not mandate extending direct consequences to include adverse effects on immigration status and therefore held that the "impact that a guilty plea might have on a defendant's immigration status is a collateral consequence of the plea, so that the trial court's failure to advise a defendant regarding the potential impact does not require that the guilty plea be set aside as a matter of constitutional law." *Id.* at 184–85.

lists of crimes involving moral turpitude or aggravated felonies.[135] However, as the Supreme Court noted in *Padilla*, with the growing severity of immigration law, it is essential that criminal defense attorneys at a minimum know how to research the crime in order to determine the impact of the offense.[136] Otherwise, the *Padilla* holding will fail to ensure "that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel'" and instead will multiply instances of affirmative misrepresentation.[137]

III. PROPOSAL FOR GEORGIA CRIMINAL DEFENSE ATTORNEYS TO UPHOLD *PADILLA*

Georgia criminal defense attorneys, to meet the *Padilla* holding, must establish a comprehensive service plan for providing representation to noncitizens that includes self-education and actively fostering collaborations with immigration attorneys. For public defenders with a burdensome caseload, this task will be daunting. However, to effectively represent their clients after *Padilla*, they must consider immigration consequences, and comprehensive service plans will provide defense attorneys with the most effective tools to ease the burden. While statutory relief providing defense attorneys with more resources would be ideal, given the current politics of immigration, it is not likely that Georgia will pass legislation giving defense attorneys funding to represent noncitizens.[138] Therefore,

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135. *See* Taylor v. State, 698 S.E.2d 384, 389 (Ga. Ct. App. 2010) (holding that a failure to advise a noncitizen that pleading guilty will require the noncitizen to register as a sex offender "is constitutionally deficient performance"). The court relied on the *Padilla* decision to extend representation to informing a client on sex offender registration because "like deportation, registration as a sex offender is 'intimately related to the criminal process' in that it is an 'automatic result' following certain criminal convictions." *Id.* at 388 (quoting *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010)); Love & Chin, *The Right to Counsel*, *supra* note 18, at 22.

136. *Padilla*, 130 S. Ct. at 1478–80; KRAMER, *supra* note 85, at 75 ("It is key that the practitioner understand how to analyze the elements of a crime and do the research on his or her own, rather than rely on a chart or graph to give the quick answer.").

137. *Padilla*, 130 S. Ct. at 1486 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

138. *See* Jeremy Redmon, *Governor Signs Arizona-Style Immigration Bill into Law*, ATLANTA J.-CONST. (May 13, 2011 6:26 PM), http://www.ajc.com/news/georgia-politics-elections/governor-signs-arizona-style-944703.html; *see also Padilla*, 130 S. Ct. at 1496 (Scalia, J., dissenting). Justice Scalia argued that legislation could have more appropriately resolved the problems of warning of immigration consequences rather than the Court's constitutional holding:

defense attorneys will need to take a comprehensive and active approach to defending their noncitizen clients.

Instead of structuring their representation to their clients on whether immigration law is "succinct and straightforward," criminal defense attorneys should avoid the Supreme Court's "vague halfway test" altogether.[139] Their approach should begin with self-education through various manuals and books as well as attending immigration defense trainings specifically tailored for criminal defense attorneys. Georgia practitioners should couple this foundational understanding of immigration law with outside resources such as collaborations with immigration attorneys and local nonprofit organizations. "Immigration Service Plans" also offer public defenders another avenue to ensure that their offices provide effective assistance of counsel to noncitizen clients.[140] These proposals, while applicable to all criminal defense attorneys in Georgia, are tailored to public defenders and the challenges of working with limited resources, and they aim to help attorneys go beyond the bare minimum requirements of *Padilla*.

A. Education Through Self-Study and Trainings

Georgia criminal defense attorneys should use the numerous websites and resources online to learn more about their obligations to their clients after *Padilla*. The Immigrant Defense Project and the Immigrant Legal Resource Center both have published practice advisories for criminal defense lawyers.[141] These organizations are

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> The Court's holding prevents legislation that could solve the problem addressed by today's opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given.

Id.

139. *Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring); *see* discussion *supra* Part II.

140. PETER L. MARKOWITZ, PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER IMMIGRATION SERVICE PLAN 6 (2009) (studying various public defender offices and providing various components necessary for defenders in representing noncitizen clients).

141. KATHERINE BRADY & ANGIE JUNCK, A DEFENDING IMMIGRANTS PARTNERSHIP PRACTICE ADVISORY: STEPS TO ADVISING A NONCITIZEN DEFENDANT UNDER *PADILLA V. KENTUCKY* 1 (2010); MANUEL D. VARGAS, A DEFENDING IMMIGRANTS PARTNERSHIP PRACTICE ADVISORY: DUTY OF CRIMINAL DEFENSE COUNSEL REPRESENTING AN IMMIGRANT DEFENDANT AFTER *PADILLA V.*

partners in the Defending Immigrants Partnership, a collaboration of criminal defense and immigrant advocates who have expertise in minimizing or avoiding immigration consequences of convictions.[142] These advisories not only highlight the significant points of the *Padilla* decision and the ramifications for defense attorneys, but they also provide checklists of immigration consequences for certain convictions and explain how practitioners can handle representing immigration consequences.[143] The Defending Immigrants Partnership website includes a sample intake sheet that provides a section for noncitizen defendants to state their goals such as "avoid conviction that triggers deportation," "preserve eligibility to obtain future immigration benefits," or "get out of jail ASAP."[144] Georgia defense attorneys should use these online resources as a guide to highlight relevant immigration issues that will arise during the defense process.

Defense attorneys must supplement this introduction into immigration consequences resulting from criminal dispositions with formal training offered by a local bar association. The Southern Public Defender Training Center offered a two-day training to new public defenders to introduce them to their legal and ethical obligations in representing noncitizens.[145] The training covered the steps public defenders should take to meet *Padilla* and provided an overview of immigration law and drug offenses, property crimes,

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KENTUCKY 1 (2010).

142. About the Defending Immigrants Partnership, DEFENDING IMMIGRANTS PARTNERSHIP, http://defendingimmigrants.org/about/ (last visited Oct. 27, 2010) ("The Partnership offers defender programs and individual defense counsel critical resources and training about the immigration consequences of crimes, actively encourages and supports development of in-house immigration specialists in defender programs, forges connections between local criminal defenders and immigration advocates, and provides defenders technical assistance in criminal cases.").

143. VARGAS, *supra* note 141, at 2–6.

144. WASH. DEFENDER ASS'N'S IMMIGRATION PROJECT, SAMPLE INTAKE FOR DEFENDER OFFICE, (2010), *available at* http://www.probono.net/library/attachment.171728. The options for noncitizen defendants to choose from when declaring their overall goal of representation are to "avoid conviction that triggers deportation," "preserve eligibility to obtain future immigrations (e.g. LPR status or citizenship)," "preserve ability to ask immigration judge to get/keep lawful status [and] stay in U.S.," "get out of jail ASAP," and "immigration consequences, including deportation are not a priority." *Id.*

145. *Immigration Law Training*, DEFENDER CONNECTIONS (The Southern Public Defender Training Center, Atlanta, Ga.), Fall 2010, *available at* http://www.thespdtc.org/uploads/Defender_Connections-Fall_2010.pdf. The Southern Public Defender Training Center provides new public defenders with training to help them better represent their clients. *Id.*

crimes against persons, the definition of conviction for immigration purposes, detention, and crime-related immigration laws.[146] Other local bar associations and organizations offered trainings that cater to a broader group of attorneys.[147] On November 12, 2010, the Immigration Section and Criminal Law Section of the State Bar of Georgia co-sponsored training on Immigration Consequences of Criminal Activity.[148] The training covered definitions of crimes involving moral turpitude and aggravated felonies and their significance for convictions; the effect of criminal dispositions on relief from removal such as waivers and adjustment of status; and significant federal and Board of Immigration Appeals cases concerning criminal issues and immigration.[149] Georgia attorneys conducted this training, offering attendees their experience in immigration and Georgia law as well as knowledge of the local courts and local resources.[150]

B. Collaborations: Bringing Immigration and Criminal Defense Attorneys Together

Other states have successfully formed collaborations between their public defender offices and local immigration organizations.[151] Several states, such as Colorado and Massachusetts, have a central office with immigration experts who provide knowledge and advice for various defense attorney offices.[152] Many of these experts were former public defenders, so they are able to provide information on the consequences of convictions with both the immigration and

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146. *Id.* The training was conducted by staff from the Immigrant Defense Project. *Id.*

147. *See* PADILLA CENTRAL: THE CLEARINGHOUSE FOR PADILLA V. KENTUCKY, http://www.padillacentral.com/home/ (last visited Feb. 1, 2012).

148. INST. OF CONTINUING LEGAL EDUC. IN GA., IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY PROGRAM MATERIALS (2010) (on file with Georgia State University Law Review).

149. *Id.*

150. *Id.* Presenters included Marshall Cohen from Cohen & Associates, Carolina Antonini from Antonini Law Firm, and Jean C. Sperling from Compano & Sperling. *Id.*

151. Brief of the National Ass'n, *supra* note 61, at 32–39 (highlighting the successful efforts of states and local organizations to provide immigration advice with defender offices either through "ad hoc" guidance or through "formal structures").

152. MARKOWITZ, *supra* note 140, at 12–13. Other offices using a central office to offer immigration expertise to various defenders are the New York Legal Aid Society and the Los Angeles County Public Defender Office. *Id.* at 13.

criminal systems in mind.[153] Another benefit to this system is the low cost required to employ the program.[154] Other states have in-house immigration attorneys to provide immigration advice and expertise to defense attorneys as well as clients.[155] In-house specialists not only enable defense attorneys to ask questions and follow up, but also provide offices the opportunity to incorporate immigration issues into the everyday routine.[156]

A different option for offices on a more local level is to contract with immigration advocacy organizations to handle the immigration issues that arise during the defense process. The California State Public Defender contracts with the Immigrant Legal Resource Center, an organization that has expertise in the defense of noncitizens, paying for only as much immigration advice as it needs.[157] However, a limitation of contracting with immigration experts for advice is that they do not provide direct client services.[158] For an office that wants to ensure its clients have direct access to immigration expertise, it could implement a system where it shares an immigration attorney with a local service provider.[159] The Defender Association of Philadelphia employs this system that not only allows direct access, but additionally fosters cooperation and education between immigration and criminal defense attorneys.[160]

Criminal defense attorneys in Georgia should look to these models and choose a system that caters to the needs of their offices. In the Atlanta area there are two main nonprofit organizations that offer immigration services for low-income clients: Catholic Charities Atlanta and the Latin American Association.[161] These organizations

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153. *Id.* at 13.

154. *Id.*

155. *Id.* at 10–11. Offices that use in-house immigration experts include the Bronx Defenders, Neighborhood Defender Service of Harlem, Defender Association of Philadelphia, Public Defender Service for the District of Columbia, and the Monroe County Public Defenders Office. *Id.*

156. *Id.* at 10.

157. *Id.* at 14.

158. MARKOWITZ, *supra* note 140, at 14.

159. *Id.* at 11–12.

160. *Id.* at 12.

161. *Immigration Legal Services*, CATHOLIC CHARITIES ATLANTA, http://www.catholiccharitiesatlanta.org/services/immigration-legal-services/immigration-legal-services/ (last visited Oct. 24, 2011); Immigration Services Offered by the Latin American Association, LATIN

offer services such as helping clients obtain legal status, assisting clients in naturalization, and legal representation in removal defense.[162] Criminal defense attorneys can reach out to these organizations to foster collaboration. Additionally, offices can contact the American Immigration Lawyers Association (AILA) to connect to other immigration attorneys in Georgia.[163] Through one of these options, criminal defense attorneys in Georgia should be able to mirror the success of partnerships in other states and provide their noncitizen clients with immigration advice.

C. Immigration Service Plans

"Immigration Service Plans" is a term describing the various approaches public defender offices can take to provide their noncitizen clients with effective representation.[164] There are five components to an Immigration Service Plan: an advice component, an information-gathering component, a language access component, a staff development component, and a direct immigration service or referral component.[165] Defender offices can choose certain components depending on their funding and create a service plan that will help alleviate the burden for individual defense attorneys, thus assuring that offices can deliver correct immigration advice in a timely manner.[166]

AM. ASS'N, http://www.thelaa.org/index.php?option=com_content&view=article&id=61&Itemid=83&lang=en (last visited Oct. 30, 2010).

162. Immigration Services Offered by the Latin American Association, LATIN AM. ASS'N, http://www.thelaa.org/index.php?option=com_content&view=article&id=61&Itemid=83&lang=en (last visited Oct. 30, 2010). To reach the Latin American Association, call (404) 471-1889. *Immigration Legal Services*, CATHOLIC CHARITIES ATLANTA, http://www.catholiccharitiesatlanta.org/services/immigration-legal-services/immigration-legal-services/ (last visited Oct. 24, 2011). Catholic Charities specializes in helping victims of domestic violence, neglected foreign children, detained immigrants, and victims of crimes and trafficking. *Id.* To reach the Immigration Legal Services department, call (404) 885-7454. *Id.*

163. AILA INFONET, http://www.aila.org (last visited Oct. 30, 2010). The American Immigration Law Association website has a feature called "Find a Lawyer," where defense attorneys can search for immigration lawyers based on location and the type of advice needed on topics such as adoption, employer sanctions, and student visas. *Id.*

164. MARKOWITZ, *supra* note 140, at 6–7.

165. *Id.* at 2.

166. *Id.* at 6–7. The Immigrant Defense Project and New York State Defenders Association surveyed leading public defenders offices throughout the country about the approaches they take to providing

The Immigration Service Plan components break down the issues defender offices should focus on when representing noncitizen clients. First, defender offices must decide how to advise their clients on immigration consequences of criminal activity through one of the collaboration options discussed above.[167] Second, offices must consider how to collect information from noncitizens about their immigration status, how to convey this information to immigration experts, and how to store this information within the office.[168] Third, public defender offices must determine how to handle language barriers. Options include using family members as interpreters, having bilingual staff members, providing document translation, and using language services in court.[169] Fourth, offices must not only train their defenders, but also keep them updated on current immigration law and practice techniques.[170] Finally, defender offices should make sure clients have access to immigration services when adjusting immigration status or when facing removal proceedings.[171] Otherwise offices "invest the time, energy, and resources into developing an Immigration Service Plan but then do nothing to ensure that the office's hard work at mitigating immigration consequences bears real fruit when a client actually faces federal immigration authorities."[172] An office that adopts an Immigration Service Plan will give its defenders the necessary tools and resources to represent noncitizen clients and eliminate the temptation to only do the bare minimum under *Padilla*.

While offices may recognize the need for an Immigration Service Plan, implementing it may be a struggle. In Georgia, offices should start with surveying the noncitizen population in their city or county to determine the need and then identify the possible funding sources

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immigration advice. *Id.* at 1. They created this protocol to aid defenders in meeting the challenges of representing noncitizens. *Id.*

167. *Id.* at 6; *see supra* Part III.B.
168. MARKOWITZ, *supra* note 140, at 20.
169. *Id.* at 23–25.
170. *Id.* at 22.
171. *Id.* at 26.
172. *Id.*

they may use to meet this need.[173] While the state or county might be the most logical source of funding, some offices will be unable to generate enough resources to meet the needs of their noncitizen clients. These offices can look to other resources such as postgraduate fellowships, grants, or fundraising.[174] Another option for offices is to phase in the Immigration Service Plan so the office has time to obtain funding.[175] While implementing the program may meet challenges, public defender offices should emphasize that they can only meet the *Padilla* holding through a comprehensive service plan.

CONCLUSION

The Supreme Court in *Padilla* put a significant burden on criminal defense attorneys when it ruled that noncitizen clients have a claim to ineffective assistance of counsel when defense attorneys fail to advise of or affirmatively misrepresent to their clients the immigration consequences of criminal activity.[176] However, given the severity of immigration law, this holding was necessary to protect the noncitizen's Sixth Amendment right.[177] Immigration law is complex, requiring more than just reading a statute. Criminal defense attorneys will need to learn not only the vocabulary, but also how to classify the crimes and analyze the possible consequences.[178] Criminal defense attorneys can meet the challenge posed by *Padilla* and the complexity of immigration law by educating themselves and fostering collaborations with immigration attorneys. As the connection between criminal and immigration law grows stronger, these relationships will be essential in representing noncitizen clients.[179] Defenders must step up to the *Padilla* holding with a determination to effectively represent their clients.

173. *Id.* at 28–29.
174. MARKOWITZ, *supra* note 140, at 29.
175. *Id.* at 30.
176. *See* Padilla v. Kentucky, 130 S. Ct. 1473 (2010).
177. *Id.* at 1486.
178. *See supra* Part II.A–B.
179. KRAMER, *supra* note 85, at xxiii ("Today, the bond between immigration and criminal law is

more significant than ever before, [and] [a]s the immigration population grows larger in the United States, the criminal-alien provisions of the law grow harsher.").