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Crime and Banishment: Padilla v. Kentucky Debunks the Myth That Deportation Is Not Punishment

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CRIME AND BANISHMENT: *PADILLA V. KENTUCKY* DEBUNKS THE MYTH THAT DEPORTATION IS NOT PUNISHMENT

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I. INTRODUCTION

Under modern immigration law, a noncitizen convicted of a crime may face a range of immigration consequences more severe than imprisonment. Jose Padilla understands this better than anyone. Kentucky authorities arrested Padilla, a truck driver, when a large amount of marijuana was discovered in his tractor-trailer during a weigh-station inspection.[1] A lawful permanent resident of the United States for over forty years,[2] Padilla pleaded guilty to felony marijuana trafficking, taking a plea bargain under the counsel of his court-appointed attorney.[3] Because Padilla's crime is a removable offense under U.S. immigration law,[4] pleading guilty made Padilla "subject to automatic deportation."[5]

After realizing that deportation proceedings had been initiated against him, Padilla appealed his conviction on the basis of ineffective assistance of counsel, claiming he had accepted the plea bargain in reliance on his attorney's advice and that he had not understood the true consequences of his plea when he made it.[6] Padilla's case highlights an ongoing debate in the legal field among immigration law scholars: whether deportation is a direct

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1. Padilla v. Kentucky, 130 S. Ct. 1473, 1477 (2010).
2. *Id.*
3. Brief of Petitioner at 9–10, *Padilla*, 130 S. Ct. 1473 (No. 08-651).
4. 8 U.S.C. § 1227(a)(2)(B)(i) (2006).
5. *Padilla*, 130 S. Ct. at 1478.
6. Brief of Petitioner, *supra* note 3, at 11.

consequence, and thus subject to the *Strickland* standard,[7] or a collateral consequence[8] outside the scope of the Sixth Amendment.[9] The U.S. Supreme Court's finding that deportation is a unique consequence intimately related to the criminal process, triggering *Strickland* review, may be a "watershed decision in the immigration rights area," potentially affecting thousands of criminally accused noncitizens facing immigration consequences.[10]

This Comment discusses the Supreme Court's historic holding in *Padilla v. Kentucky*.[11] Part II of this Comment outlines the relevant facts and procedural history. Part III provides a brief legal background of the issues raised in *Padilla*. Part IV summarizes the Supreme Court's majority, concurring, and dissenting opinions. Part V offers a historical context to the changes in immigration law affecting noncitizens like Padilla. Part VI argues why the Supreme Court correctly recognized the unique relationship between deportation and criminal convictions but notes that it still needs to resolve whether the holding in *Padilla* is retroactive.

7. Ineffective assistance of counsel claims are traditionally determined under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Knowles v. Mirzayance, 129 S. Ct. 1411, 1419 (2009) (discussing *Strickland* as the "general standard for ineffective-assistance-of-counsel claims" and emphasizing that the "Court has repeatedly applied that standard to evaluate ineffective-assistance-of-counsel claims where there is no other Supreme Court precedent directly on point").

8. The law distinguishes between a guilty plea's direct and collateral consequences. While the courts require a defendant to understand the direct consequences of his plea for it to be valid, it is generally accepted that a defendant does not have to know or understand the plea's collateral consequences to enter a valid plea. *See infra* Part III.A. The courts have found the following examples of consequences to a conviction to be collateral: effects on parole or probation, civil commitment, civil forfeiture, registration requirements, ineligibility to serve on a jury, disqualification from public benefits, and ineligibility to possess firearms. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 705 (2002).

9. Many legal scholars have debated the categorization of immigration consequences as collateral and have argued that immigration consequences, and deportation in particular, are not collateral consequences. *E.g.*, Chin & Holmes, *supra* note 8; Sarah Keefe Molina, *Rejecting the Collateral Consequences Doctrine: Silence About Deportation* May *or* May Not *Violate* Strickland*'s Performance Prong*, 51 ST. LOUIS U. L.J. 267 (2006); Andrew Moore, *Criminal Deportation, Post-Conviction Relief and The Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665 (2008).

10. *All Things Considered: High Court: Lawyers Must Give Immigration Advice* (NPR radio broadcast Mar. 31, 2010), http://www.npr.org/templates/story/story.php?storyId=125420249 (providing transcript quoting Stephen Kinnaird, attorney for Padilla). A total of 97,133 noncitizens were removed on the basis of a criminal conviction in 2008. HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2008 YEARBOOK OF IMMIGRATION STATISTICS 102 (2008).

11. 130 S. Ct. 1473 (2010).

II. STATEMENT OF THE CASE

In September 2001, Jose Padilla,[12] a licensed commercial truck driver, drove his tractor-trailer through Hardin County, Kentucky, and stopped at a weigh station. Authorities arrested Padilla at the weigh station after he consented to allow inspection officers to inspect his truck,[13] which allegedly contained over 1,000 pounds of marijuana.[14] Padilla was indicted for misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia, and felony trafficking in marijuana.[15]

Padilla initially pleaded not guilty but was then offered a plea bargain that gave him five years in prison if he pleaded guilty to the misdemeanor possession and felony trafficking counts.[16] During the plea discussions, Padilla's attorney advised him that he "did not have to worry about immigration status since he had been in this country so long."[17] This advice was wrong.[18] Like most drug offenses, other than most simple marijuana possession cases, Padilla's felony drug conviction was a deportable crime and an aggravated felony under immigration law.[19] Shortly after Padilla entered a guilty plea,[20] he

12. Padilla was born in Honduras in 1950 and came to the United States in the 1960s. Brief of Petitioner, *supra* note 3, at 8. He served in the U.S. military during the Vietnam War and had been lawfully residing in California with his family for over forty years. *Id.*

13. Brief of Respondent at 2, *Padilla*, 130 S. Ct. 1473 (No. 08-651).

14. *Id.*; Petition for Writ of Certiorari at 2, *Padilla*, 130 S. Ct. 1473 (No. 08-651). According to Kentucky, Padilla gave his written and signed consent to allow an officer with the Kentucky Vehicle Enforcement search Padilla's person, truck, trailer, and belongings. Brief of Respondent, *supra* note 13, at 2. After evidence of marijuana use was discovered in the passenger compartment of the truck, police detained Padilla and read him his *Miranda* rights; Padilla allegedly signed a waiver of those rights. *Id.* at 3. Officers then searched the trailer with Padilla's assistance and found twenty-three Styrofoam boxes. *Id.* When asked what was in the boxes, Padilla supposedly said, "Maybe drugs." *Id.*

15. Brief of Petitioner, *supra* note 3, at 8. Padilla initially pleaded not guilty and was released on bond until the Immigration and Naturalization Service (INS) lodged an immigration detainer, which resulted in the District Court's revocation of bail. *Id.* Because Padilla's counsel failed to raise the fact that Padilla was a lawful permanent resident with the district court, Padilla spent a year in custody. *Id.* at 8–9.

16. *Id.* The plea agreement "provided only meager benefit to Padilla" by recommending the maximum concurrent ten-year sentence, with five years served and five probated. *Id.* at 9–10.

17. Petition for Writ of Certiorari, *supra* note 14, at 3 (internal quotation marks omitted). Additionally, the language of the agreed-upon plea and sentence did not change the petitioner's belief that the plea would not affect his immigration status. *Id.*

18. *See Padilla*, 130 S. Ct. 1477 n.1.

19. 8 U.S.C. §§ 1227(a)(2)(A)(iii), (B)(i) (2006); Brief of Petitioner, *supra* note 3, at 11; *see also Padilla*, 130 S. Ct. at 1477 n.1 (noting that "virtually every drug offense except for only the most insignificant marijuana offenses" is a deportable offense).

was issued an immigration detainer.[21]

Padilla subsequently filed a pro se motion for post-conviction relief, asking the Hardin Circuit Court to vacate his plea based on his attorney's misadvice about the immigration consequences of his plea.[22] In 2004, the Hardin Circuit Court denied Padilla's motion.[23] On appeal, the Kentucky Court of Appeals reversed the judgment of the Hardin Circuit Court, finding that an attorney's misadvice regarding deportation consequences qualified as ineffective assistance of counsel.[24] The Kentucky Court of Appeals remanded the case to the trial court for an evidentiary hearing to determine whether Padilla had been misadvised, and if so, whether that misadvice prevented Padilla from entering a knowing, intelligent, and voluntary guilty plea.[25]

The Kentucky Supreme Court reversed the Kentucky Court of Appeals in a 5–2 decision, denying Padilla post-conviction relief without the benefit of a hearing.[26] In its opinion, the Kentucky Supreme Court held:

> As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief. In neither instance is the matter required to be addressed by counsel, and so an attorney's

20. Padilla entered a guilty plea on August 22, 2002. Brief of Respondent, *supra* note 13, at 4.

21. Petition for Writ of Certiorari, *supra* note 14, at 3–4.

22. *Id.* As Padilla later explained in his brief to the Supreme Court, his attorney "failed to investigate the immigration consequences associated with the proposed plea, and yet nonetheless affirmatively advised his client" that there was nothing to worry about. Brief of Petitioner, *supra* note 3, at 11.

23. "Padilla cannot show ineffective assistance of counsel merely because of a statement of opinion [by his attorney] on whether the Immigration and Naturalization Service would choose to deport Padilla given his length of time in the United States." Petition for Writ of Certiorari, *supra* note 14, at 4.

24. *Id.* at 5 ("We are persuaded that counsel's wrong advice regarding deportation could constitute ineffective assistance of counsel.").

25. Brief of Petitioner, *supra* note 3, at 12–13. The Kentucky Court of Appeals decision was a split decision (2–1). Brief of Respondent, *supra* note 13, at 6.

26. Commonwealth v. Padilla, 253 S.W.3d 482, 485 (Ky. 2008), *rev'd*, 130 S. Ct. 1473 (2010). Justice Cunningham dissented, along with Justice Schroder, arguing: "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." *Id.* (Cunningham, J., dissenting).

failure in that regard cannot constitute ineffectiveness . . . .[27]
Padilla appealed to the U.S. Supreme Court.

III. BACKGROUND

A. The Doctrine of Direct Versus Collateral Consequences

The U.S. Supreme Court held in *Brady v. United States*[28] that a guilty plea is valid only when it is voluntary, knowing, and intelligent.[29] Under *Brady*, a guilty plea meets the "voluntary, knowing, and intelligent" standard only where a defendant has been properly advised regarding the consequences of his plea. Courts have broadly applied *Brady* when evaluating ineffective assistance of counsel claims in which a defendant pleads guilty.[30] The Court's opinion in *Brady*, however, suggested that a defendant need only be properly informed of the direct consequences of his plea for that plea to fulfill the voluntary, knowing, and intelligent requirement.[31] This implication gave rise to the doctrine that a defendant not informed or misinformed on non-direct (or *collateral*) consequences may still have given a valid plea.[32]

27. *Id.* (majority opinion). The Kentucky Supreme Court in *Padilla* and in *Commonwealth v. Furtado*, 170 S.W.3d 384 (Ky. 2005), followed the collateral-consequences doctrine, and found that deportation as a consequence to the guilty plea could not trigger an ineffective assistance of counsel claim. *Id.*; *Furtado*, 170 S.W.3d at 386 ("[T]he Sixth Amendment requires representation encompassing only the criminal prosecution itself and the direct consequences thereof.").

28. 397 U.S. 742 (1970).

29. *Id.* at 748. The *Brady* Court found that "a guilty plea is a grave and solemn act to be accepted only with care and discernment" and thus, to be valid, a plea "must [not only] be voluntary but must be [a] knowing, intelligent act[] . . . done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* Similarly, just one year prior to *Brady*, the Court in *Boykin v. Alabama*, 395 U.S. 238 (1969), noted that "[s]everal federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered," and thus, such a plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." 395 U.S. at 243 & n.5 (quoting Johnson v. Zerbst, 304 U.S. 458, 466 (1938)).

30. Chin & Holmes, *supra* note 8, at 726 ("[T]he doctrine provides a test for determining the voluntary and intelligent character of the plea, it is applied both to the trial court—as a measure of its performance in establishing the voluntary and intelligent character of the plea before accepting it—and to defense counsel—as a measure of his performance in providing a defendant with the information necessary to render the plea voluntary and intelligent." (quoting Santos v. Kolb, 880 F.2d 941, 944 (7th Cir. 1989))).

31. *Id.* at 728 ("[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand . . . .") (quoting Banda v. United States, 1 F.3d 354, 356 (5th Cir. 1993) (quoting *Brady*, 397 U.S. at 755)).

32. *See id.* at 726 ("The collateral consequences rule is based in large part on the *Brady*

Direct consequences have generally been defined as consequences having "definite, immediate and largely automatic effect on the range of the defendant's punishment."[33] In contrast, collateral consequences are "not within the control and responsibility of the district court."[34] The collateral-consequences doctrine is misleading, however, in light of how serious these consequences can be.[35] Indeed, the collateral consequences of a guilty plea may be far more significant than the sentence itself, such as in the case of deportation.[36] Considering the severity of certain collateral consequences, it is surprising and unfortunate that courts reviewing ineffective counsel claims have consistently applied the collateral-consequences doctrine.[37]

Court's implication that a trial court need advise a defendant only of direct consequences to render a plea voluntary under the Due Process Clause."). Federal circuits have widely interpreted *Brady* as drawing a distinction between direct and collateral consequences. *E.g.*, United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971) ("We presume that the Supreme Court meant what it said when it used the word '*direct*'; by doing so, it excluded *collateral* consequences.").

33. United States v. Littlejohn, 224 F.3d 960, 965 (9th Cir. 2000) (quoting Torrey v. Estelle, 842 F.2d 234, 236 (9th Cir. 1988)); United States v. Lambros, 544 F.2d 962, 966 (8th Cir. 1976); *see* John J. Francis, *Failure to Advise Noncitizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?*, 36 U. MICH. J.L. REFORM 691, 710 & n.109 (2003).

34. United States v. El-Nobani, 287 F.3d 417, 421 (6th Cir. 2002).

35. Collateral consequences range from ineligibility for various federal benefits (such as federally funded health care benefits, food stamps, housing assistance, education funding) to losing the right to vote or enlist in the military, to having driving privileges suspended. Chin & Holmes, *supra* note 8, at 699–700. Of the myriad of collateral consequences, deportation is probably one of the most severe. As the Court in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), stated:

> [I]t needs no citation of authorities to support the proposition that deportation is punishment. Everyone knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.

Id. at 740.

36. For instance, courts have held defense counsel to be effective when the defendant was advised to plead guilty to trivial offenses, such as stealing cigarettes, but not told that the conviction would result in deportation. Chin & Holmes, *supra* note 8, at 700 & n.23; *see also* Brief for Asian American Justice Center et al. as Amici Curiae in Support of Petitioner at 5, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651) (discussing how deportation "tear[s] apart families and disrupt[s] long-settled expectations," so that for noncitizens, deportation may be "the most important consideration in deciding whether to accept a guilty plea").

37. Chin & Holmes, *supra* note 8, at 703 ("[A]ll courts that have considered the issue [of effective assistance of counsel] have held that defense lawyers must explain the direct consequences of a plea, such as length of imprisonment and amount of fine, but need not explain 'collateral consequences,' such as . . . that the plea may result in deportation."); *see, e.g.*, *Littlejohn*, 224 F.3d at 965; Kincade v. United States, 559 F.2d 906, 909 (3d Cir. 1977); *see also Padilla*, 130 S. Ct. at 1481 n.9 (citing cases following the collateral-consequences doctrine).

Under this distinction between direct and collateral consequences, immigration repercussions such as deportation inevitably fall under the umbrella of collateral consequences.[38] The reasoning here is straightforward: an immigration consequence is not punishment directly imposed by the criminal court and therefore is collateral in nature.[39] Although federal circuit courts and state courts have both generally accepted this reasoning,[40] modern immigration law has made all but the most minor offenses deportable, and even minor or misdemeanor convictions may trigger automatic deportation.[41]

B. The Strickland *Standard for Sixth Amendment Ineffective Assistance of Counsel Claims*

The Sixth Amendment ensures a defendant's right to "have the Assistance of Counsel for his defense."[42] In *Strickland v. Washington*,[43] the Supreme Court set forth a two-prong test for determining whether a defense attorney's advice violated the Sixth Amendment's guarantee to effective assistance.[44] The first prong of

38. United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003) (stating that all circuits that have addressed the question of immigration consequences, "have concluded that 'deportation is a collateral consequence of the criminal process and hence the failure to advise does not amount to ineffective assistance of counsel'") (quoting United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993)); *accord* United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir. 2000); Varlea v. Kaiser, 976 F.2d 1357, 1358 (10th Cir. 1992); United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990); United States v. Yearwood, 863 F.2d 6, 7–8 (4th Cir. 1988); United States v. Campbell, 778 F.2d 764, 769 (11th Cir. 1985); United States v. Santelises, 509 F.2d 703, 704 (2d Cir. 1975).

39. Francis, *supra* note 33, at 709; *see also* Galvan v. Press, 347 U.S. 522, 530–32 (1954) (holding that deportation is a civil penalty rather than a criminal punishment).

40. While the federal courts have by and large categorized immigration consequences as collateral, most but not all state courts have agreed. California courts, for instance, have held that it is ineffective assistance of counsel if a defense attorney fails to investigate immigration consequences and advise a noncitizen on these consequences before a plea. People v. Soriano, 240 Cal. Rptr. 328, 336 (Ct. App. 1987). Also, the California Supreme Court has found that affirmative misadvice to a noncitizen regarding the immigration consequences of a plea satisfies the deficiency prong of the test for ineffective assistance of counsel. *See In re* Resendiz, 19 P.3d 1171, 1174 (Cal. 2001) ("[A]ffirmative misadvice regarding immigration consequences may, depending on the circumstances of the particular case, constitute ineffective assistance of counsel.").

41. *See infra* Part IV.A; *see also* Nina Bernstein, *How One Marijuana Cigarette May Lead to Deportation*, N.Y. TIMES, Mar. 30, 2010, at A17 (reporting the story of adult legal resident facing deportation to Haiti, a country he left at age three, after being found with one marijuana cigarette).

42. U.S. CONST. amend. VI.

43. 466 U.S. 668 (1984).

44. *Id.* at 687.

the *Strickland* test asks whether counsel's representation "fell below an objective standard of reasonableness"[45] and looks to prevailing professional norms as the reasonable standard.[46] The second prong requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[47]

Under the collateral-consequences doctrine, the Sixth Amendment, as well as the *Strickland* standard, is only triggered when a defendant claims his defense attorney failed to properly advise him regarding the direct consequences of his guilty plea.[48] A failure to advise a criminal defendant on collateral consequences would not require a *Strickland* analysis because defense counsel is not required to cover such effects.[49]

IV. REASONING OF THE COURT

A. The Majority Opinion

In a 7–2 decision, the Supreme Court reversed the Kentucky Supreme Court, holding that defense counsel has a constitutional obligation to inform a noncitizen client regarding the risk of deportation associated with a guilty plea.[50] The majority opinion, written by Justice Stevens, dodged the larger questions surrounding the collateral-consequences doctrine but carved out an exception to the doctrine for deportation.[51] Specifically, the majority rejected the distinction drawn between direct and collateral consequences in Padilla's case because "deportation is a particularly severe 'penalty'" and "intimately related to the criminal process."[52] The majority based this conclusion on its finding that deportation has become unique in

45. *Id.* at 687–88 ("First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.").

46. *Id.* at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.").

47. *Id.* at 694. Without prejudice, "professionally unreasonable" performance by defense counsel does not constitute "ineffective assistance" under the Constitution. *Id.* at 691–92.

48. *See* Chin & Holmes, *supra* note 8, at 703–10.

49. *Id.*

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

51. *Id.* at 1481.

52. *Id.*

its severity and relationship to the criminal process because modern immigration law has made deportation "virtually inevitable for a vast number of noncitizens convicted of crimes."[53] Discussing the evolution of immigration law and the gradual elimination of discretionary relief for noncitizens convicted of crimes facing deportation,[54] the majority stated that under contemporary circumstances, the close connection between deportation and the criminal process made deportation "uniquely difficult to classify as either a direct or collateral consequence."[55] Noting that the specific risk of deportation is ill suited to analysis under the collateral-consequences doctrine, the majority decided to apply the two-prong *Strickland* test.[56]

To determine whether Padilla's attorney's conduct fell below an objective standard of reasonableness under *Strickland*'s first prong, the majority looked at the "prevailing professional norms," which appeared to "universally require defense attorneys to advise as to the risk of deportation consequences."[57] In its reasoning, the majority recognized that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence."[58] Because "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction"[59] and "Padilla's counsel could have easily determined that his plea would make him eligible for deportation," the majority reasoned that Padilla's attorney's conduct was unreasonable under *Strickland*'s first prong.[60] The Court

53. *Id.* at 1478.

54. *Id.* at 1478–82.

55. *Id.* at 1482.

56. *Id.*

57. *Id.* (quoting Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as Amici Curiae in Support of Petitioner at 12–14, *Padilla*, 130 S. Ct. 1473 (No. 08-651)).

58. *Id.* at 1483 (alteration in the original) (quoting Immigration & Naturalization Servs. v. St. Cyr, 533 U.S. 289, 323 (2001)).

59. *Id.* The majority pointed out that this is particularly true for drug convictions, because section 1227(a)(2)(B)(i) of the Immigration and National Act (INA) states:

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance[], other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

Id. (quoting 8 U.S.C. § 1227(a)(2)(B)(i) (2006)).

60. *Id.*

remanded the case for determination on whether Padilla was prejudiced as a result of his attorney's misadvice, as required under *Strickland*'s second prong.[61]

B. Justice Alito's Concurrence

Justice Alito, joined by Chief Justice Roberts, agreed with the majority in the conclusion that "a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland* . . . if the attorney misleads a noncitizen client regarding the removal consequences."[62] Justice Alito agreed that in Padilla's case, defense counsel misled Padilla by advising him not "to worry about immigration status since he had been in the country so long."[63] According to Justice Alito, "[A]n attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney."[64]

Justice Alito disagreed, however, that "the attorney must attempt to explain what [deportation] consequences may be," as the majority's language suggested.[65] According to Justice Alito,

> [w]hile the line between "direct" and "collateral" consequences is not always clear . . . the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of

61. *Id.* at 1483–84.

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

63. *Id.* at 1478 (majority opinion) (quoting Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd*, 130 S. Ct. 1473).

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

65. *Id.* The majority acknowledged "[i]mmigration law can be complex" and that "[t]here will . . . undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." *Id.* at 1483 (majority opinion). In contrast to Alito, however, the majority states that in such situations, "[w]hen the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences," but "[w]hen the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." *Id.*

training and experience.[66]

C. Justice Scalia's Dissent

Justice Scalia's dissenting opinion, in which Justice Thomas joined, stated that "[t]he Sixth Amendment guarantees the accused a lawyer 'for his defense' against a 'criminal prosecutio[n]'—not for sound advice about the collateral consequences of conviction."[67] Declaring that "[t]he Constitution . . . is not an all-purpose tool for judicial construction of a perfect world," Justice Scalia criticized both the majority and the concurrence for going beyond "constitutional commands" and argued that this issue is best left to statutory resolution.[68]

V. HISTORICAL FRAMEWORK FOR REMOVAL OF NONCITIZENS WHO ARE CONVICTED OF CRIMES

While there was no general federal law regulating the admission of aliens for the first one hundred years of U.S. history, one of the first immigration laws—the Act of March 3, 1875—specifically prohibited entry to noncitizen prostitutes and convicted criminals.[69] Despite the long relationship between criminal conduct and immigration rights, deportation on the basis of criminal conduct within U.S. borders did not arise until the Immigration and National Act (INA) of 1917, which authorized deportation as the consequence of certain criminal convictions.[70] Built into the 1917 INA, however, was discretionary judicial power allowing both state and federal

66. *Id.* at 1487–88 (Alito, J., concurring). Justice Alito appears to follow the argument raised by the United States. The United States argued as amicus curiae that there was no affirmative duty on defense counsel to raise the issue of deportation consequences with his client about to plea, but that if the issue was raised, defense counsel then had a duty to give competent advice. Brief for the United States as Amicus Curiae Supporting Affirmance at 14, 20, *Padilla*, 130 S. Ct. 1473 (No. 08-651). This duty to give correct advice, however, might be satisfied by simply stating that there are potential immigration consequences and referring the client to an immigration attorney. *See id.* at 24–25 (stating that counsel is under a duty to provide reasonably competent advice "if she chooses to speak" but pointing out that "she could decline to give advice in the matter").

67. *Padilla*, 130 S. Ct. at 1494 (Scalia, J., dissenting) (second alteration in original).

68. *Id.* at 1494–97.

69. WALTER A. EWING, IMMIGRATION POLICY CTR., OPPORTUNITY AND EXCLUSION: A BRIEF HISTORY OF THE U.S. IMMIGRATION POLICY 3 (2008). Until 1874, the United States experienced "unrestricted immigration." *Id.* at 2.

70. Immigration Act of February 5, 1917, ch. 29, § 19, 39 Stat. 874, 889–90; *Padilla*, 130 S. Ct. at 1478–79.

judges to recommend against deportation regardless of the conviction.[71] The power of judicial recommendation against deportation (JRAD) acted as a procedural protection to "ameliorate unjust results on a case-by-case basis."[72]

As Justice Stevens pointed out in his majority opinion, "The landscape of federal immigration law has changed dramatically over the last 90 years."[73] While courts previously evaluated deportation cases on the facts and circumstances unique to each case, there has been a policy shift toward a legislatively structured classification system where "one-size-fits-all."[74] Immigration reform legislation has essentially eliminated JRAD power since 1917.[75]

In addition to the policy shift toward a categorical approach to deportation, recent legislation has increased the number of offenses mandating deportation. In particular, the 1996 passages of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Anti-terrorism and Effective Death Penalty Act (AEDPA) have "rendered the immigration consequences of convictions for many crimes more certain, immediate, and severe."[76] The INA now requires deportation of noncitizens who have been convicted of a crime qualifying as an "aggravated felony."[77] Because the 1996 amendments expanded the number of offenses that qualify as aggravated felonies, convictions for relatively minor state law crimes, which previously were not removable offenses, can now

71. *Padilla*, 130 S. Ct. at 1479.

72. *Id.*

73. *Id.* at 1478.

74. Francis, *supra* note 33, at 699. The main reasons for this policy shift have been (1) an increasing number of noncitizens entering the penal system, and (2) an increasingly negative attitude towards immigrants, which was expounded by terrorist attacks (such as the 1993 attack on the World Trade Center, the 1995 bombing in Oklahoma City, and the September 11, 2001 attacks). *Id.* at 700.

75. The JRAD power was first circumscribed in the 1952 INA. Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 182. *See* Gerald Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1967–68 (2000). In 1990, Congress took away the JRAD power. Act of Nov. 29, 1990, Pub. L. No. 101-649, § 505(b), 104 Stat. 5050. *See generally* Allison Leal Parker, *In Through the Out Door? Retaining Judicial Review for Deported Lawful Permanent Resident Aliens*, 101 COLUM. L. REV. 605, 608–13 (2001) (discussing how Congress limited alien access to the federal courts in the second half of the twentieth century).

76. Brief for Asian American Justice Center et al. as Amici Curiae in Support of Petitioner, *supra* note 36, at 6.

77. 8 U.S.C. § 1227(a)(2)(A)(iii) (2006).

result in mandatory deportation.[78] A conviction for an aggravated felony practically ensures that the noncitizen will be deported because an immigration judge no longer has discretion to grant relief in such a case.[79]

This shift in immigration policy toward a classification system for deportation cases and the continued expansion of offenses mandating deportation has "dramatically raised the stakes of a noncitizen's criminal conviction."[80] Today, accurate criminal legal advice for noncitizens has never been more important.[81]

V. ANALYSIS

A. Deportation Has a Unique and Intimate Relationship to Criminal Proceedings

Rather than resolve the debate about whether there is a distinction between direct and collateral consequences under the Sixth Amendment, the Supreme Court in *Padilla* dodged the issue by focusing on "the unique nature of deportation."[82] In light of the severity of deportation and the likelihood of such a consequence under modern immigration law, the majority correctly found

78. Brief for Asian American Justice Center et al. as Amici Curiae in Support of Petitioner, *supra* note 36, at 6. A major factor in determining whether an offense is an aggravated felony is the length of the prison sentence. Francis, *supra* note 33, at 701. The 1996 amendments reduced the qualifying length of a prison sentence from five years to only one year. *Id.* The result is that an offense classified as a misdemeanor under state law could be classified as aggravated felony under the INA. *Id.* For example, in *United States v. Christopher*, 239 F.3d 1191 (11th Cir. 2001), the Eleventh Circuit upheld a finding that a conviction for shoplifting, a misdemeanor in the state in which the defendant was convicted, that resulted in a twelve-month sentence qualified as an aggravated felony under the INA. *Id.* at 1193; *see also* Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 INTERPRETER RELEASES 1317, 1324 (1997) ("The term 'aggravated felony' is not a concept of criminal law, but rather an invention of immigration law. . . . [Some] offenses classified as aggravated felonies . . . are not what would typically be thought of as 'particularly serious.'").

79. Brief for Asian American Justice Center et al. as Amici Curiae in Support of Petitioner, *supra* note 36, at 7 & n.9 ("Only in extraordinary circumstances can a conviction for an aggravated felony not lead to mandatory deportation. For example, non-citizens convicted of aggravated felonies who can show that they will be subject to torture if deported . . . might qualify for relief . . . .").

80. Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010).

81. *See* Brief for Asian American Justice Center et al. as Amici Curiae in Support of Petitioner, *supra* note 36, at 5 ("Because detention and deportation tear apart families and disrupt long-settled expectations, for many non-citizens, the immigration consequences of a particular conviction are the most important consideration in deciding whether to accept a guilty plea.").

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

deportation to be unique and beyond the direct-and-collateral distinction. As argued in the amici briefs of various national criminal defense and immigration organizations,

> [a] criminal defendant's immigration status affects every stage of the criminal process, from pre-trial proceedings through post-conviction confinement. The non-citizen also faces the potential consequences of deportation—permanent exile from perhaps the only country he has ever really known—with a single ill-advised plea.[83]

Although deportation is not a punishment meted out by the criminal courts and thus not strictly considered a criminal sanction, the Supreme Court has nevertheless historically recognized that deportation is a severe penalty resulting from a conviction.[84] This is especially true as the evolution of immigration law has virtually guaranteed that most noncitizens will be deported if they are convicted of a crime.[85]

B. Strickland *Provides the Appropriate Standard for Ineffective Assistance of Counsel Claims Based on Failure to Properly Advise Regarding Deportation Consequences*

Under the Sixth Amendment, the criminally accused have a right to *effective* counsel.[86] This is an essential part of the fundamental right to a fair trial.[87] In *Strickland*, the Supreme Court recognized the

83. Brief for the National Ass'n of Criminal Defense Lawyers et al. as Amici Curiae in Support of Petitioner at 4, *Padilla*, 130 S. Ct. 1473 (No. 08-651).

84. *Id.*; *see also* Francis, *supra* note 33, at 693 ("For non-citizens, deportation is often a more serious consequence than the maximum statutory penalty of a criminal offense.").

85. *Padilla*, 130 S. Ct. at 1478. It is also worth noting that there has been a dramatic increase in the number of noncitizens deported based on criminal convictions or charges in the last few decades, though it is unclear what the direct correlation is between this increase and the harshening of immigration laws. DEFENDING IMMIGRANTS P'SHIP, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS: A NATIONAL GUIDE 3 (2008), *available at* http://www.tulsalaw.com/pdfs/DIP-National-Training-2008-Manual.pdf ("In fiscal year 2004, the [Department of Homeland Security] removed 42,510 noncitizens based on criminal grounds, compared to only 1,221 noncitizens deported or excluded based on criminal grounds twenty years earlier in fiscal year 1984."); *see also* STEVEN A. CAMAROTA & JESSICA M. VAUGHAN, CTR. FOR IMMIGRATION STUDIES, IMMIGRATION AND CRIME: ASSESSING A CONFLICTED ISSUE 2 (2009) ("From 1998 to 2007, 816,000 criminal aliens were removed from the United States because of a criminal charge or conviction. This is equal to about one-fifth of the nation's total jail and prison population.").

86. U.S. CONST. amend. VI; Greta Van Susteren, *The Responsibility of a Criminal Defense Attorney*, 30 LOY. L.A. L. REV. 125, 125–26 (1996) (discussing the difficulty of defining the term "effective counsel").

87. Strickland v. Washington, 466 U.S. 668, 684–85 (1984); *see also* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the effective

critical role an attorney plays under the Sixth Amendment[88] and established a two-prong standard for ineffective assistance of counsel claims.[89] The *Strickland* Court established that representation of a criminal defendant comprises certain duties, including "the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions . . . ."[90]

The Court properly decided to apply *Strickland* to Padilla's ineffective assistance of counsel claim because immigration consequences often take priority in the minds of noncitizens making strategic plea decisions.[91] For many, such as Padilla, deportation may be the ultimate punishment, permanently and cruelly separating the individual from home and family.[92] Because deportation is a consequence that is "certain, immediate, and severe," advisement on such an important risk should be included under a defense attorney's duty to counsel.[93] As argued by Padilla's attorney during oral argument to the Supreme Court, a defense attorney for a noncitizen facing a criminal conviction is obligated to competently represent his client by properly assessing the legal risks of each decision, including deportation.[94] Just like any other criminal proceeding in which advisement is necessary to help a defendant make decision; advisement on deportation risk is fundamental and should be protected by the Sixth Amendment.[95] Thus, whether these obligations are met is appropriately assessed under *Strickland*.

C. Applying Strickland*, Proper Advisement on Deportation Risk*

assistance of counsel.").

88. *Strickland*, 466 U.S. at 685–86 (acknowledging the "vital importance of counsel's assistance").

89. *Id.* at 687–88; *see supra* Part III.B.

90. *Strickland*, 466 U.S. at 688.

91. Brief for the National Ass'n of Criminal Defense Lawyers et al. as Amici Curiae in Support of Petitioner, *supra* note 83, at 4–6.

92. Brief for Asian American Justice Center et al. as Amici Curiae in Support of Petitioner, *supra* note 36, at 5; *see* Brief of Petitioner, *supra* note 3, at 12; Brief for Asian American Justice Center et al. as Amici Curiae in Support of Petitioner, *supra* note 36, at 5.

93. Brief for Asian American Justice Center et al. as Amici Curiae in Support of Petitioner, *supra* note 36, at 6.

94. Transcript of Oral Argument at 9, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651) (stating that defense counsel "has an obligation to competently represent him, competently assess the legal risks, and advise the client" because these duties "are fundamental to lawyering").

95. *Id.* at 3, 9–10.

Is Reasonable Under Prevailing Professional Norms

The *Padilla* majority correctly determined that prevailing professional norms indicate that competent defense attorneys not only must give appropriate advice regarding deportation risk (which may be simply to identify the risk and refer the client to an immigration specialist)[96] but also must raise the issue of deportation risk when necessary.[97] Contrary to Justice Alito's opinion, criminal defense and immigration associations generally agree that prevailing professional standards require defense attorneys to advise noncitizen clients about deportation risks.[98] Additionally, the *Padilla* majority consulted and directly cited numerous and varied treatises and practitioners guides, all indicating the prevailing professional norm of properly advising a client regarding deportation risk.[99]

D. The Padilla *Majority Should Have Specified That* Padilla *Would Be Retroactive*

Whether the holding in *Padilla* is retroactive is a pressing question facing federal and state judges, as well as criminal defense practitioners seeking post-conviction relief for their clients. When courts review requests for post-conviction relief, they apply the law that existed at the time a case became "final."[100] Thus, for noncitzens currently seeking post-conviction relief to benefit from *Padilla*, its holding must be found to be retroactive. Arguably, *Padilla*'s majority's language implies that it considered the potential retroactive application of its holding—and believed there would be limited retroactive consequences—because defense attorneys were already obligated under professional norms to provide advice on

96. When the law is unclear, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear." *Padilla*, 130 S. Ct. at 1477.

97. *Id.* at 1483–84.

98. *E.g.*, Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as Amici Curiae in Support of Petitioner, *supra* note 57, at 12–14 ("[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients.").

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

100. Griffith v. Kentucky, 479 U.S. 314, 320–21 (1987). "By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Id.*

deportation risk.[101] The *Padilla* Court, however, stopped short of saying specifically that its ruling was retroactive for collateral attacks on guilty pleas that had occurred prior to *Padilla*.

A decision of the Supreme Court is retroactive unless "the Court has expressly declared a rule . . . to be a clear break with the past."[102] Where the Court has "merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively."[103] The issue whether *Padilla* applied settled precedent or established a clear break from the past is not yet resolved.[104] While it is difficult to determine precisely how many individuals would have a potential ineffective assistance of counsel claim if the holding in *Padilla* were retroactive, a significant number of individuals would likely be affected. [105]

Both state and federal courts have applied *Padilla* retroactively to cases involving individuals facing pending deportation proceedings as the result of a guilty plea.[106] The issue of retroactivity, however, has caused confusion and contradictory rulings within jurisdictions.[107] Although language in the *Padilla* opinion suggests

101. *Id.* at 1485 ("It seems unlikely that our decision today will have significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea.").

102. United States v. Johnson, 457 U.S. 537, 549 (1982) (internal quotation marks omitted); *accord* Yates v. Aiken, 484 U.S. 211, 216 (1988).

103. *Johnson*, 457 U.S. at 549 ("In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.").

104. *See, e.g.*, United States v. Obonaga, No. 07-CR-402, 2010 WL 2629748, at *1 (E.D.N.Y. June 24, 2010) ("It is unclear if *Padilla* applies retroactively. Reasonable jurists have disagreed about whether *Padilla* has retroactive effect. And, because the Supreme Court issued *Padilla* less than three months ago, the Second Circuit has not yet decided this issue.").

105. The Government Accountability Office estimated in 2005 that the number of noncitizens incarcerated in the federal prison system was 49,000, compromising approximately 27 percent of the federal prison population. U.S. GOV'T ACCOUNTABILITY OFFICE, INFORMATION ON CRIMINAL ALIENS INCARCERATED IN FEDERAL AND STATE PRISON AND LOCAL JAILS 2,5 (2005). Although this information cannot provide an estimate of how many noncitizens in the country are in a situation similar to the plaintiff in *Padilla*, it does suggest that a significant number of people could be impacted.

106. *See, e.g.*, United States v. Chaidez, 730 F. Supp. 2d 896, 902–04 (N.D. Ill. 2010) (finding that *Padilla* was an extension of *Strickland* and not a new rule); *see also* People v. Garcia, 907 N.Y.S.2d 398, 404 (N.Y. 2010) (holding that *Padilla* did not create a new rule even though deportation was previously considered a collateral consequence under New York law).

107. Noreleen G. Walder, *Courts Differ About Retroactive Effect of High Court Counsel Ruling*, LAW.COM (July 27, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202463921126.

that the Supreme Court may have assumed its holding would be retroactive, the Court failed to indicate this with specificity.[108] This issue will need to be clearly resolved in the near future whether by circuit court consensus or the Supreme Court itself.

V. CONCLUSION

The U.S. Supreme Court's holding in *Padilla v. Kentucky* may affect thousands of criminally accused noncitizens and their attorneys. By defining deportation as a unique, intimate consequence of criminal convictions, the *Padilla* Court properly acknowledged the severity of deportation. The Court applied *Strickland* and prevailing professional norms for defense attorneys and found that the Sixth Amendment imposed a duty on defense counsel to provide competent advice as to deportation risk. The *Padilla* Court, however, failed to directly address the issue of whether *its holding* would be retroactive—a question that needs to be answered in the near future.

108. Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010).