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## Under the Circumstances: *Padilla v. Kentucky* Still Excuses Fundamental Fairness and Leaves Professional Responsibility Lost

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# UNDER THE CIRCUMSTANCES: *PADILLA v. KENTUCKY* STILL EXCUSES FUNDAMENTAL FAIRNESS AND LEAVES PROFESSIONAL RESPONSIBILITY LOST

MAURICE HEW, JR.\*

**Abstract:** The Supreme Court's decision in *Padilla v. Kentucky* includes within the Sixth Amendment's right to the effective assistance of counsel advice on immigration, but still falls short of attaining fundamental fairness and legal professional responsibility. Where *Padilla's* recognized representation standard only requires an attorney to advise when the immigration consequences of a guilty plea are "truly clear"—allowing the attorney to "do no more" when not clear—the guiding hand of an attorney remains fractured and will force a noncitizen client to proceed in plea bargaining without informed consent. Rather than giving a private practitioner an excuse to "do no more," the private practitioner should simply study and provide the applicable immigration law under the circumstances. A public defender not knowledgeable in immigration law, however, should be allowed to do no more based on their uncontrollable caseload, provided an immigration lawyer is also appointed.

*Courts are almost universally in agreement that an assertion of ineffective assistance of counsel will prevail only where the trial representation was so inadequate as to amount to no counsel at all and the trial was reduced to a sham and a mockery of justice.*

—State v. Cathey<sup>1</sup>

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<sup>1</sup> 145 N.W.2d 100, 103 (Wis. 1966).

## INTRODUCTION

In *Padilla v. Kentucky*, the United States Supreme Court held that the Sixth Amendment right to effective assistance of counsel requires lawyers to inform their clients of pertinent and potential immigration consequences regarding criminal convictions.<sup>2</sup> As a result, the Court raised the constitutional attorney performance standards to meet the prevailing norms of attorney practice that, since the mid-1990s, requires criminal defense attorneys to advise clients of deportation risks.<sup>3</sup> The scope of *Padilla*'s attorney performance mandate, however, is limited to situations where pertinent immigration consequences are "truly clear."<sup>4</sup> Where immigration laws are not truly clear, counsel must, at a minimum, "do no more than advise a noncitizen client that pending criminal charges *may* carry a risk of adverse immigration consequences."<sup>5</sup>

While the *Padilla* decision is a step forward for immigration rights advocates, its "vague half-way test" still allows for unsatisfactory performance by attorneys unfamiliar with—or perhaps unwilling to learn—immigration law.<sup>6</sup> *Padilla* is a mere application of *Strickland v. Washington*, which holds attorneys to an objective standard of reasonableness, and

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<sup>2</sup> 130 S. Ct. 1473, 1486 (2010). Justice Stevens delivered the opinion of the Court in which Justices Kennedy, Ginsburg, Breyer, and Sotomayor joined. The Sixth Amendment reads in full:

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 defence.

U.S. CONST. amend. VI.

<sup>3</sup> *Padilla*, 130 S. Ct. at 1485–86 ("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."); see Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002) (over thirty states and eleven circuit court decisions had all held that there was no constitutional duty to inform of collateral consequences); see also *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984) ("Any such set of rules [regarding counsel's conduct] would interfere with the constitutionally protected independence of counsel . . .").

<sup>4</sup> *Padilla*, 130 S. Ct. at 1483.

<sup>5</sup> *Id.* (emphasis added).

<sup>6</sup> See *id.* at 1487 (Alito, J., concurring); *Strickland*, 466 U.S. at 669–70. Justice Alito's concurring opinion, in which Chief Justice Roberts joined, refers to the majority's truly-clear test as a "vague, half-way test." *Padilla*, 130 S. Ct. at 1487. It is important to note that this article considers the "stricter rules of practice" substantially similar to the rules of professional responsibility, including but not limited to the American Bar Association's (ABA) Model Rules of Professional Conduct.

not an adoption of the American Bar Association's (ABA) more compelling Rules of Professional Responsibility.<sup>7</sup> As such, *Padilla's* disjointed attorney performance standard may leave uncertainties for noncitizen clients making the crucial decision of whether to plead guilty.<sup>8</sup>

*Padilla's* truly-clear test for reasonable attorney performance will likely foster further immigration misadvice or incomplete advice by public defenders who are not necessarily familiar with immigration law but are expected by courts to advise clients on the immigration-related consequences of a conviction.<sup>9</sup> There is also a continuing danger of private or appointed attorneys decidedly doing no more—or opting out of competence—because the effects of certain immigration laws are not truly clear.<sup>10</sup> When private attorneys are unwilling to effectively inform clients of potential immigration-related consequences of a criminal conviction—and public defenders do not have the resources to appropriately do so—*Padilla* disadvantages clients, still erroneously excuses fundamental fairness, and leaves professional responsibility lost.<sup>11</sup>

Using *Padilla* as a backdrop, this Article critically analyzes competent representation of aliens in criminal proceedings.<sup>12</sup> In Part I, this Article presents the *Padilla* decision and a brief case history, including the Supreme Court's interpretation of the Sixth Amendment's attorney

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<sup>7</sup> See *Padilla*, 130 S. Ct. at 1476; *Strickland*, 466 U.S. at 669.

<sup>8</sup> See *Padilla*, 130 S. Ct. at 1483 (explaining that when the law is not truly clear, “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”).

<sup>9</sup> Private and court appointed attorneys are distinguished from public defenders, as the latter are precluded from the private practice of law pursuant to 18 U.S.C. § 3006A(g) (2) (A) (2006). See *Flores v. State*, 57 So. 3d 218, 219, 221 (Fla. Dist. Ct. App. 2010) (holding that, even though an attorney erroneously advised his client to plead to the reduced charge of possession of drug paraphernalia as opposed to the possession of marijuana, the defendant's guilty plea “assumed the risk of deportation”); Immigration & Nationality Act (INA) 8 U.S.C. § 1227(a) (2) (B) (i) (2006) (making deportable any noncitizen convicted under any law related to a controlled substance with the exception of a single offense of possession of thirty grams or less of marijuana); see also Maureen A. Sweeney, *Where Do We Go from Padilla v. Kentucky? Thoughts on Implementation and Future Directions*, 45 NEW ENG. L. REV. 353, 357 (2011) (“Given the previously unrecognized constitutional duty of criminal defense counsel to advise about immigration consequences and the fact that most criminal defense attorneys are not familiar with immigration law, it is clear that there is a very large educational task ahead as a result of *Padilla*.”).

<sup>10</sup> See *Padilla*, 130 S. Ct. at 1483.

<sup>11</sup> See *id.*

<sup>12</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”). Though the term alien is derogatory, it is defined in the INA as “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a) (3).

performance standards as established in *Strickland*. Part II moves from the constitutional standards of attorney performance to the prevailing professional norms of practice, insofar as they are articulated by the ABA Rules of Professional Responsibility. This part uses the facts from *Padilla* to establish the level of advice for immigration removal and relief that should be expected of competent criminal counsel under the ABA Model Rules of Professional Conduct. This analysis demonstrates that the potential for deportation in Padilla's case was not "truly clear" because one needs to do more than read the text of the immigration statute to establish whether a guilty plea would result in removal.

Finally, Part III addresses the *Padilla* majority's truly-clear standard with criticism and suggests an alternative, bifurcated attorney performance test in an effort to provide a workable solution that preserves fundamental fairness for clients and encourages professional responsibility for lawyers. This part argues that the Supreme Court should have bifurcated its analysis, separating the standards of professional conduct expected of public defenders from those of private or appointed attorneys.

### I. STRICKLAND APPLIES TO PADILLA'S CLAIM

In *Padilla v. Kentucky*, the Supreme Court applied the *Strickland v. Washington* attorney performance test.<sup>13</sup> The *Padilla* Court held that immigration advice is not collaterally or categorically excluded from the ambit of the Sixth Amendment's guarantee of effective assistance of counsel.<sup>14</sup> In *Strickland*, the Supreme Court clarified that counsel is ineffective if two requirements are met: (1) performance deficiency and (2) prejudice.<sup>15</sup> In its decision, the *Padilla* Court clarified the three competing approaches used to determine whether the Sixth Amendment right to effective assistance of counsel applied to an attorney's advice concerning immigration consequences of a criminal conviction, rejecting them and implementing the truly-clear standard.<sup>16</sup>

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<sup>13</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010); see *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

<sup>14</sup> See *Padilla*, 130 S. Ct. at 1486; *Strickland*, 466 U.S. at 687; *Commonwealth v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008), *reversed and remanded sub nom.* *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

<sup>15</sup> *Strickland*, 466 U.S. at 687.

<sup>16</sup> See *Padilla*, 130 S. Ct. at 1482–84; Brief of the American Bar Association as Amicus Curiae in Support of Petitioner at 5–7, *Padilla v. Kentucky*, 130 S. Ct. 1473 (No. 08-651); Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1397 (2011); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1303–04 (2011); *infra* notes 41–50 and accompanying text.

### A. *Background: Padilla v. Kentucky*

Jose Padilla was born in Honduras and was a legal permanent resident alien of the United States for over forty years before his arrest.<sup>17</sup> He arrived in the United States in the 1960s and later honorably served the U.S. military in Vietnam.<sup>18</sup> Prior to his arrest, Padilla lived in La Puente, California with his family.<sup>19</sup> He worked as a commercial truck driver under a Nevada commercial driver's license.<sup>20</sup> In 2001, law enforcement officers at a Kentucky weigh station stopped Padilla for not having a weight and distance number on his truck.<sup>21</sup> He consented to a search of the truck and officers found approximately one thousand pounds of marijuana.<sup>22</sup>

In October of 2001, a Hardin County, Kentucky grand jury indicted Padilla for misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia, felony trafficking in marijuana, and failing to have a weight and distance tax number on his truck.<sup>23</sup> He subse-

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<sup>17</sup> *Padilla*, 130 S. Ct. at 1477; see 8 U.S.C. § 1101(a)(20) (2006) (defining the term “lawfully admitted for permanent residence” as “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed”). Also, it should be noted that the Jose Padilla involved in this case is not the same as the enemy combatant in the 2004 Supreme Court decision of *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

<sup>18</sup> See *Padilla*, 130 S. Ct. at 1477.

<sup>19</sup> Joint Appendix at 77, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651).

<sup>20</sup> *Id.* at 79.

<sup>21</sup> Brief for the United States as Amicus Curiae Supporting Affirmance at 2, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651).

<sup>22</sup> Brown, *supra* note 16, at 1400.

<sup>23</sup> Joint Appendix, *supra* note 19, at 48–49; KY. REV. STAT. ANN. § 218A.1421–218A.1422 (LexisNexis 2002) (“A person is guilty of possession of marijuana when he or she knowingly and unlawfully possesses marijuana . . . . Possession of marijuana is a Class A misdemeanor.”). The Kentucky statute for possession of drug paraphernalia reads in part:

(2) It is unlawful for any person to use, or to possess with the intent to use, drug paraphernalia for the purpose of planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packing, repacking, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter . . . .

. . . .

(5) Any person who violates any provision of this section shall be guilty of a Class A misdemeanor.

KY. REV. STAT. ANN. § 218A.500. The Kentucky statute regarding operating without a weight and distance tax number reads:

With respect to KRS 138.655 to 138.725, it is unlawful for any person to:

(1) Fail to pay the tax imposed;

quently pled guilty to felony trafficking, relying on the advice of his attorney that he would not be deported from the United States because “he had been in the country so long.”<sup>24</sup> While serving his sentence for marijuana trafficking, officials placed Padilla in removal proceedings based on his criminal conviction, which is categorized as an aggravated felony under the amendments to the Immigration and Nationality Act (INA).<sup>25</sup> In turn, Padilla filed a petition for post-conviction relief in Kentucky state court, alleging a violation of his Sixth Amendment right to effective assistance of counsel because his attorney misadvised him of the potential immigration consequences of his guilty plea.<sup>26</sup> He further alleged that, had he known the certainty of his deportation after the guilty plea, he would have insisted on going to trial.<sup>27</sup>

On appeal, the Supreme Court of Kentucky held that immigration consequences of a conviction are collateral in nature, such that advice concerning deportation does not fall within the ambit of the Sixth Amendment right to effective assistance of counsel.<sup>28</sup> On certiorari, the Supreme Court reversed, holding that immigration advice was neither collateral nor categorically excluded from the ambit of the Sixth Amendment.<sup>29</sup>

### B. *The Strickland v. Washington Test for Attorney Performance*

In *Padilla*, the Court used the familiar attorney performance test established in *Strickland*.<sup>30</sup> In *Strickland*, the Supreme Court clarified

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- (2) Fail, neglect, or refuse to file any return in the manner or within the time required;
  - (3) Make any false statement or conceal any material fact in any record, return, or affidavit;
  - (4) Conduct any activities requiring a license without such license or after such license has been surrendered, canceled or revoked;
  - (5) Assign or attempt to assign a license; or
  - (6) Violate any other provisions.

KY. REV. STAT. ANN. § 138.720.

<sup>24</sup> Joint Appendix, *supra* note 19, at 80 (quoting a pro se petition by Padilla written during his imprisonment). Padilla, in addition to pleading to felony trafficking, pled guilty to possession of marijuana and possession of drug paraphernalia. *Id.* at 54.

<sup>25</sup> See 8 U.S.C. § 1227(a)(2)(A)(iii) (2006); Joint Appendix, *supra* note 19, at 54, 80. Among other punishments, Padilla was sentenced to serve ten years in jail with five years probation. See Joint Appendix, *supra* note 19, at 54.

<sup>26</sup> Brief of Petitioner at 11, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651).

<sup>27</sup> *Id.*

<sup>28</sup> See *Padilla*, 253 S.W.3d at 485.

<sup>29</sup> *Padilla*, 130 S. Ct. at 1478, 1482, 1486; see U.S. CONST. amend. VI.

<sup>30</sup> *Padilla*, 130 S. Ct. at 1482; *Strickland*, 466 U.S. at 687.

that counsel is ineffective if two requirements are met: (1) performance deficiency and (2) prejudice.<sup>31</sup> The Court stated:

In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Judicial scrutiny of counsel's performance must be highly deferential.<sup>32</sup>

Thus, the *Strickland* constitutional standard for professional responsibility is simply what is reasonable under the circumstances, and not strict adherence to the ABA guidelines.<sup>33</sup>

In *Bobby v. Van Hook*, the Supreme Court affirmed the reasonable-under-the-circumstances test, holding it inappropriate to rely on the ABA guidelines "as inexorable commands with which all capital defense counsel must fully comply."<sup>34</sup> The Court stated that, "[w]hile states are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal

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<sup>31</sup> *Strickland*, 466 U.S. at 687.

<sup>32</sup> *Id.* at 688–89 (internal citations omitted).

<sup>33</sup> *See id.*; Santos-Sanchez v. United States, 548 F.3d 327, 332 (5th Cir. 2008), *vacated* 130 S. Ct. 2340 (2010) (citing United States v. Castro, 26 F.3d 557, 559 (5th Cir. 1994)) ("We determine whether counsel's performance was deficient by measuring it against an 'objective standard of reasonableness under prevailing professional norms.'")

<sup>34</sup> 130 S. Ct. 13, 17 (2009) (internal quotations omitted).



Constitution imposes one general requirement: that counsel make objectively reasonable choices.”<sup>35</sup> Expanding on *Strickland* in *Hill v. Lockhart*, the Supreme Court held that the *Strickland* performance test also applies to advice provided during plea agreements.<sup>36</sup>

The *Padilla* majority applied *Strickland*, addressing its performance prong and holding *Padilla*’s representation constitutionally deficient for his attorney’s misadvice as to the immigration consequences of pleading guilty to trafficking marijuana.<sup>37</sup> The Court specifically enunciated that the weight of professional norms supports the view that counsel must advise clients of the risks of deportation when such a consequence is truly clear after examining the relevant immigration statute.<sup>38</sup> When the consequences are not truly clear and the potential for deportation is not easily gleaned from the statute, however, “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.”<sup>39</sup>

### C. Pre-*Padilla* Standards Rejected

Prior to *Padilla*, courts had developed three general approaches for determining whether the Sixth Amendment right to effective assistance of counsel applied to an attorney’s advice concerning the immigration consequences of a criminal conviction.<sup>40</sup> The first approach is that of the Kentucky Supreme Court and echoed by Justice Scalia in his dissent in *Padilla*.<sup>41</sup> The Kentucky Supreme Court explained that the Sixth

<sup>35</sup> *Id.* (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000)).

<sup>36</sup> 474 U.S. 52, 57 (1985); see Chin & Holmes, *supra* note 3, at 697 (“Because over ninety percent of criminal convictions result from guilty pleas, perhaps the most important service criminal defense lawyers perform is advising their clients whether to plead guilty and on what terms.”).

<sup>37</sup> *Padilla*, 130 S. Ct. at 1483 (“Accepting his allegations as true, *Padilla* has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*.”). In *Padilla*, the Supreme Court remanded the case back to the Kentucky Supreme Court to determine if *Padilla* could establish the second *Strickland* prong of prejudice. *Id.* at 1483–84. See generally Jenny Roberts, *Proving Prejudice, Post-*Padilla**, 54 How. L.J. 693 (2011) (discussing proving prejudice under the second prong of *Strickland* after *Padilla*).

<sup>38</sup> *Padilla*, 130 S. Ct. at 1483.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1484; Brief of the American Bar Association as *Amicus Curiae* in Support of Petitioner, *supra* note 16, at 6; see *Padilla*, 130 S. Ct. at 1494–95 (Scalia, J., dissenting); Brown, *supra* note 16, at 1397; Markowitz, *supra* note 16, at 1331.

<sup>41</sup> *Padilla*, 130 S. Ct. at 1494–95 (Scalia, J., dissenting). Justice Scalia stated:

I dissent from the Court’s conclusion that the Sixth Amendment requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about those consequences renders

Amendment right to effective assistance of counsel extends only to advice concerning direct consequences of a criminal conviction and not collateral consequences.<sup>42</sup> Prior to *Padilla*, most courts considered immigration consequences to be collateral and wholly outside the scope of the Sixth Amendment.<sup>43</sup> Justice Stevens and the *Padilla* majority dismissed this view, however, holding that “immigration advice has not been categorically removed from the scope of the Sixth Amendment.”<sup>44</sup>

The second approach, advocated by the ABA in its amicus brief, removes the distinction between direct and collateral consequences and asserts that *Strickland*’s standard applies to all consequences of a conviction.<sup>45</sup> In this sense, the second approach follows the stricter guidelines of attorney performance proffered by the ABA.<sup>46</sup> The

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an attorney’s assistance in defending against the prosecution constitutionally inadequate; or that the Sixth Amendment requires counsel to warn immigrant defendants that a conviction may render them removable.

*Id.* Similarly, the Kentucky Supreme Court stated:

We conclude that our unequivocal holding in *Fuortado* leaves Appellee without a remedy . . . . 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 failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*.

253 S.W.3d at 485.

<sup>42</sup> *Id.*

<sup>43</sup> See *Santos-Sanchez*, 548 F.3d at 334 (citing *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993)) (“Defense counsel has done all he must under the Constitution when he advises his client of the direct consequences of a guilty plea.”); Chin & Holmes, *supra* note 3, at 706–08 (stating that the collateral consequences rule has been accepted by the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh and District of Columbia Federal Circuit Courts of Appeals, as well as courts in 35 states); John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?*, 36 U. MICH. J.L. REFORM 691, 710 (2003) (quoting *King v. Dutton*, 17 F.3d 151, 153 (6th Cir. 1994)).

<sup>44</sup> *Padilla*, 130 S. Ct. at 1482.

<sup>45</sup> See Brief of the American Bar Association as *Amicus Curiae* in Support of Petitioner, *supra* note 16, at 4.

<sup>46</sup> *Id.* The ABA states in its amicus brief:

As elaborated in the ABA Standards for Criminal Justice, the duties of competence and communication oblige a criminal defense lawyer to be fully informed of the facts and the law, and to advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

*Id.*

*Padilla* majority, however, implicitly rejected this approach by reiterating that “prevailing norms of practice as reflected in the American Bar Association’s standards and the like . . . are guides to determining what is reasonable [but] . . . are only guides . . . .”<sup>47</sup>

The Kentucky Appeals Court adopted the third approach, which maintains the distinction between direct and collateral consequences, and held that *Strickland* does not generally apply to collateral consequences but that it does apply to affirmative misrepresentations regarding those consequences.<sup>48</sup> This approach leads to an exception where “an affirmative act of gross misadvice relating to collateral matters can justify post conviction relief.”<sup>49</sup> Justice Stevens and the *Padilla* majority, however, also dismissed this line of thinking.<sup>50</sup>

## II. LIVING UP TO THE ABA’S RULES OF PROFESSIONAL RESPONSIBILITY

The Supreme Court has consistently reaffirmed its opposition to a concrete set of rules, such as the ABA’s Model Rules of Professional Conduct, to serve as the constitutional standards of attorney performance.<sup>51</sup> In part, the Court’s position is that attorneys need to be free from strict guidelines or limitations that might “restrict the wide latitude counsel must have in making tactical decisions.”<sup>52</sup> Indeed, “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.”<sup>53</sup> Yet, when an attorney makes the purposeful decision to undertake a “cr-immigration” representation—a criminal case

<sup>47</sup> *Padilla*, 130 S. Ct. at 1482 (internal citations and quotations omitted).

<sup>48</sup> See *Padilla*, 253 S.W.3d at 483–84.

<sup>49</sup> *Id.* (internal quotations omitted); see also *Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988). In *Padilla*, both the concurring opinion and dissenting opinion agreed with the majority that an attorney should not be permitted to provide misadvice regarding immigration consequences. See *Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring) (“I concur in the judgment because 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 of a conviction. In my view, such an attorney must . . . refrain from unreasonably providing incorrect advice . . . .”); *Id.* at 1494 (Scalia, J., dissenting) (“In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised.”).

<sup>50</sup> *Padilla*, 130 S. Ct. at 1484 (majority opinion).

<sup>51</sup> See *Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009); *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984).

<sup>52</sup> *Strickland*, 466 U.S. at 688–89 (citing *United States v. Decoster*, 624 F.2d 196, 208 (D.C. Cir. 1979)).

<sup>53</sup> *Id.* at 688–89.

with immigration consequences—counsel’s subsequent decision not to become familiar with the state of immigration law or failure to advise a noncitizen client of possible immigration consequences should not be considered tactical in nature.<sup>54</sup> Rather, such unsatisfactory attorney behavior should be considered constitutionally deficient under the Sixth Amendment’s guarantee of effective assistance of counsel.

Model Rule of Professional Conduct 1.16(a) requires that a criminal defense attorney not undertake representation of a client when that representation creates a violation of the Model Rules or any other law.<sup>55</sup> The drafters of the Model Rules of Professional Conduct intentionally made the first rule require competent representation, including the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>56</sup> To fulfill the ABA competency requirement, lawyers need not be familiar with every field of law pertinent to their client at the outset of a case, but must reasonably believe that they can acquire familiarity in a timely manner.<sup>57</sup>

#### A. *Immigration Status and Criminal History of Clients*

In the realm of cr-immigration matters, the ABA Rules of Professional Responsibility require competent representation such that criminal defense counsel should minimally determine: (1) the immigration status and criminal history of the client; (2) immigration ramifications of a proposed plea; (3) the client’s wishes and plans for the near future; and (4) a criminal trial strategy to meet the client’s needs.<sup>58</sup> In satisfying

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<sup>54</sup> See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1484 (2010); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 381 (2006); see also Carlos Moctezuma García & César Cuathtémoc García Hernández, *CrImmigration: PRAC. ANALYSIS KEY CASES ABOUT IMMIGR. CONSEQUENCES CRIM. VIOLATIONS*, <http://www.crImmigration.com> (last visited Nov. 10, 2011) (using the term “crImmigration” to denote the intersection of criminal and immigration law). In effect, when considering the adequacy of trial counsel’s investigation, courts do look to ABA standards to determine whether the Sixth Amendment has been satisfied. See John H. Blume & Stacey D. Neumann, *It’s Like Déjà Vu All Over Again*: Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127, 129 (2007).

<sup>55</sup> MODEL RULES OF PROF’L CONDUCT R. 1.16(a) (2011) (“Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in a violation of the Rules of Professional Conduct or other law . . .”).

<sup>56</sup> MODEL RULES OF PROF’L CONDUCT R. 1.1.

<sup>57</sup> RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT’S GUIDE 87 (2010).

<sup>58</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.0(e), 1.1, 1.2, 1.3; *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987) (“[A]ttorneys must inform themselves of material legal princi-

the first factor of determining immigration status and criminal history, a criminal attorney should not be quick to accept as true a client's statement as to his or her alien status.<sup>59</sup> Immigrants may not be certain of which status they hold or may otherwise be falsely informed.<sup>60</sup>

Determining whether one is a United States citizen can be complicated.<sup>61</sup> Citizenship corresponds with a unique area of immigration law, distinct from naturalization, commonly referred to as "nationality law" and is not necessarily based upon where one was born.<sup>62</sup> Under nationality law, these "naturally-born" individuals might unknowingly and automatically become United States citizens by operation of law though simply meeting certain criteria upon or after birth.<sup>63</sup> These criteria are

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ples that may significantly impact the particular circumstances of their clients."). This Article does not delve into how to investigate the criminal history of clients. If a client has a past criminal history, it may have immigration ramifications that need to be taken into consideration before entering a guilty plea. For example, one is subject to removal and inadmissibility for multiple criminal convictions. 8 U.S.C. § 1227(a)(2)(A)(ii) (2006).

<sup>59</sup> See 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 1001.1(p) (2010). The Code of Federal Regulations states:

The term *lawfully admitted for permanent residence* means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion, deportation, removal, or rescission.

8 C.F.R. § 1001.1(p).

<sup>60</sup> See Vicky J. Salinas, Comment, *You Can Be Whatever You Want to Be When You Grow Up, Unless Your Parents Brought You to This Country Illegally: The Struggle to Grant In-State Tuition to Undocumented Immigrant Students*, 43 Hous. L. Rev. 847, 861–62 (2006) ("Many children of illegal immigrants do not learn of their undocumented status until they attempt to pursue higher education.").

<sup>61</sup> See Antonia Hernandez, Essay, *American Citizenship Post 9-11*, 1 STAN. J. C.R. & C. L. 289, 290–91 (2005).

<sup>62</sup> See 8 U.S.C. § 1401. The citizenship clause of the 14th Amendment, codified at 8 U.S.C. § 1401(a), requires not only birth in the United States but being subject to jurisdiction as well. U.S. CONST. amend. XIV; 8 U.S.C. § 1401 ("The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof . . ."); see James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 367, 368–69 (2006).

<sup>63</sup> See 8 U.S.C. § 1401(c) (stating that "a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person," is a citizen of the United States). By virtue of the statute, a person born in a foreign country that practices *ius soli* citizenship—or of the soil—and who is issued the nationality of that country would also simultaneously acquire United States nationality having been born outside of the United States through the principle of *ius sanguinis*, or by descent. See *id.* §§ 1401(a), 1431(a); Hernandez, *supra* note 16, at 290–91. Section 1431(a) of the U.S. Code, chapter eight, states:

largely based on actions of one's parents or grandparents.<sup>64</sup> Natural-born clients might create confusion for unfamiliar criminal defense attorneys, as the client will probably have a birth certificate or other documentation from a foreign country but not a United States birth certificate.

In Padilla's case, he advised his attorney that he was a lawful permanent resident alien, but to confirm the factual accuracy of his assertion, counsel should have obtained a copy of his alien registration card.<sup>65</sup> Lawful permanent resident aliens are permitted to reside and work in the United States for the duration of their status.<sup>66</sup> Neverthe-

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A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:

(1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.

(2) The child is under the age of eighteen years.

(3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

8 U.S.C. § 1431(a).

<sup>64</sup> See 8 U.S.C. § 1431(a) (2006). In the United States, parents must naturalize before the child is eighteen and the child does not necessarily have to perform any actions in order to become a United States Citizen. See *id.* § 1433. Some examples include:

Case 1: Padilla might be a citizen of the United States if he was born abroad to US citizen parents or if he is a lawful permanent resident Alien born to parents who naturalized prior to his eighteenth birthday. See *id.* § 1431(a).

Case 2: If one of Padilla's parents' naturalized before his eighteenth birthday, he might also be a citizen depending on the year in which he was born. See *id.* § 1433.

Case 3: If Padilla was also born out of wedlock, and considered illegitimate, to a United States Citizen mother, he might be a United States Citizen. See *id.* § 1409.

Case 4: If Padilla's grandparents were United States Citizens, they might be able to transmit their physical presence for purposes of conferring United States Citizenship upon Padilla. See *id.* § 1433.

<sup>65</sup> See 8 U.S.C. § 1101(a)(20); *Padilla*, 130 S. Ct. at 1483; *Green Card (Permanent Residence)*, U.S. CITIZENSHIP & IMMIGR. SERVICES (May 13, 2011), <http://www.uscis.gov/green-card>. The 2008 presidential election revealed that presidential candidate and Senator John McCain was not born in the United States but in the country of Panama. See Carl Hulse, *McCain's Canal Zone Birth Prompts Queries About Whether That Rules Him Out*, N.Y. TIMES, Feb. 28, 2008, at A21. Theoretically, he should have a Panamanian birth certificate and should not be in possession of a birth certificate issued by any U.S. state. See 8 U.S.C. § 1403. Were McCain involved in any criminal court proceedings, his defense counsel should take note of his Panamanian birth certificate and investigate nationality laws. See *id.*

<sup>66</sup> See 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 274a.12(a)(1) (2010). "The term 'United States', except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands." 8 U.S.C. § 1101(a)(38) (Supp. 2010).

less, they are still subject to deportation and inadmissibility, regardless of how long they have resided in the United States.<sup>67</sup>

### B. *Immigration Impact of the Proposed Plea*

Under the immigration laws of the United States, an alien placed in removal proceedings may be charged with any applicable ground of inadmissibility under section 212(a) or any applicable ground of deportability under section 237(a) of the INA.<sup>68</sup> Had Padilla fit within any of the enumerated statutory provisions, he should have been advised of the immigration consequences beyond removal.<sup>69</sup> Moreover, Padilla should have been advised of potential forms of relief to overcome any of the grounds of removal, all prior to his plea of guilt.

#### I. Removal

After an alien client advises an attorney of an arrest, the attorney will need to review the grand jury indictment or bill of information to determine the precise charges and compare the state or federal statutes with immigration statutes for a categorical match to a ground of inadmissibility, removal, or both.<sup>70</sup>

##### a. *Removal for Controlled Substances*

In Padilla's situation, the relevant immigration removal provisions are those concerning (1) controlled substances and (2) aggravated felonies. The removal statute for controlled substances provides:

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

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<sup>67</sup> See 8 U.S.C. § 1227(a)(1)(D) (2006). Padilla was misadvised by his criminal attorney that he was not subject to deportation because he had been in the country for a long time. See *Padilla*, 130 S. Ct. at 1478.

<sup>68</sup> INA §§ 212(a), 237(a), 8 U.S.C. §§ 1182(a), 1227(a).

<sup>69</sup> See *id.*; *Padilla*, 130 S. Ct. at 1483.

<sup>70</sup> See INA §§ 212, 237(a), 8 U.S.C. §§ 1182, 1227(a); *Leocal v. Ashcroft*, 543 U.S. 1, 4–5 (2004); *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 180 (5th Cir. 2008) (Dennis, J., dissenting) (discussing “the Supreme Court’s *Taylor-Shepard* ‘modified categorical approach’” used in removal cases). The Supreme Court, in an effort to determine removal, has accepted the categorical approach of looking to the elements and the nature of the offense of conviction rather than particular facts relating to the petitioner’s crime in an effort to determine removal. See *Leocal*, 543 U.S. at 4–5.

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.<sup>71</sup>

Therefore, to be subject to removal, one must be: (1) an alien; (2) admitted; (3) convicted in a State, the United States, or a foreign country; and (4) convicted on charges relating to a controlled substance other than a single offense involving possession for one's own personal use of thirty grams or less of marijuana.<sup>72</sup> The term "conviction," as used in the INA, has an independent meaning from that used in state law.<sup>73</sup> For example, in Massachusetts, a continuation of a defendant's case without a finding of guilt is a conviction for immigration purposes and, in Texas, a deferred adjudication would also count as a conviction, regardless of the state's intentions.<sup>74</sup>

<sup>71</sup> 8 U.S.C. § 1227(a)(2)(B)(i).

<sup>72</sup> See 8 U.S.C. § 1227(a). "Admitted" is a term of art that is specifically defined by statute. See *id.* § 1101(a)(13). While the administrative immigration courts have traditionally categorized the term adjustment as an admission, the United States Courts of Appeal for the Fifth and Eleventh Circuits have distinguished the two terms. See *Lanier v. U.S. Att'y Gen.*, 631 F.3d 1363, 1366–67 (11th Cir. 2011); *Bianco v. Holder*, 624 F.3d 265, 267 (5th Cir. 2010); *Martinez v. Mukasey*, 519 F.3d 532, 542–43 (5th Cir. 2008). This distinction is significant. See *Martinez*, 519 F.3d at 542–43. Arguably, where an alien has adjusted status and is subsequently convicted of a controlled substance offense, the alien could fall outside of this removal statute, as the alien was never admitted. See 8 U.S.C. § 1227(a); *Lanier*, 631 F.3d at 1366; *Martinez*, 519 F.3d at 542–43.

<sup>73</sup> See 8 U.S.C. § 1101(a)(48)(A) (2006); see, e.g., *De Vega v. Gonzales*, 503 F.3d 45, 49 (1st Cir. 2007) (finding that a continuation of a defendant's case without a finding of guilt is a conviction for immigration purposes); *Moosa v. INS*, 171 F.3d 994, 1006 (5th Cir. 1999) (finding that a deferred adjudication is a conviction, regardless of the state's intentions). The statute defining the term "conviction" reads:

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.

8 U.S.C. § 1101(a)(48)(A).

<sup>74</sup> *De Vega*, 503 F.3d at 49; *Moosa*, 171 F.3d at 1006. One should also tread carefully when interpreting the phrase "relating to." Here, the statute mandates that the conviction be relating to a controlled substance, as defined under federal law. See *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1076 (9th Cir. 2007) (quoting *Gameros-Hernandez v. INS*, 883 F.2d 839, 841 (9th Cir. 1989)) ("The government must prove by 'clear, unequivocal, and convincing evidence that the facts alleged as grounds of [removability] are true.'). Courts have defined "relating to" broadly, such that a conviction for possession of drug paraphernalia in itself equates to the controlled substance conviction needed for removal under several



### b. Removal for Aggravated Felonies

While an alien may fall into a class subject to removal for a controlled substance conviction, that alien might also be subject to other statutory grounds for removal.<sup>75</sup> Under the INA, “an alien convicted of an aggravated felony at any time after admission is deportable.”<sup>76</sup> “Aggravated felony,” a term of art used in the INA, is defined in part as “illicit trafficking in a controlled substance . . . , including a drug trafficking crime . . . .”<sup>77</sup>

In *Garcia-Echaverria v. United States*, the Sixth Circuit held that a Kentucky conviction for the offense of trafficking marijuana weighing between eight ounces and five pounds was an aggravated felony within the meaning of the INA.<sup>78</sup> Likewise, Padilla’s Kentucky indictment reveals that officers arrested him for trafficking marijuana, a Class C felony, in excess of five pounds. Therefore, because Padilla’s trafficking charges involved more marijuana than in *Garcia-Echaverria*, prosecutors would likely charge him with an aggravated felony, too.

Additionally, the Act narrowly interprets the term “illicit trafficking.”<sup>79</sup> Thus, where a state statute broadly defines that term, an individual’s state conviction for illicit trafficking may not qualify him or her as an aggravated felon under the INA.<sup>80</sup>

courts’ interpretations of this statute. See *Hussein v. Att’y Gen. of the U.S.*, 413 F. App’x 431, 432–33 (3d Cir. 2010); *Bermudez v. Holder*, 586 F.3d 1167, 1168–69 (9th Cir. 2009); *Barraza v. Mukasey*, 519 F.3d 388, 392 (7th Cir. 2008). In the instant matter, Padilla’s drug paraphernalia offense more than likely related to a controlled substance because the grand jury named marijuana, a controlled substance under federal law, in its indictment. See *Padilla*, 130 S. Ct. at 1483; Joint Appendix, *supra* note 19, at 48. Under the removal statute for controlled substances, however, a conviction for personal use of thirty grams or less of marijuana does not fall within the statute. See 8 U.S.C. § 1227(a)(2)(B)(i).

<sup>75</sup> See 8 U.S.C. § 1227.

<sup>76</sup> *Id.* § 1227(a)(2)(A)(iii).

<sup>77</sup> *Id.* § 1101(a)(43)(B).

<sup>78</sup> *Garcia-Echaverria v. United States*, 376 F.3d 507, 513 (6th Cir. 2004).

<sup>79</sup> See 8 U.S.C. § 1101(a)(43)(B) (2006); *United States v. Gonzales*, 484 F.3d 712, 716 (5th Cir. 2007).

<sup>80</sup> See 8 U.S.C. § 1101(a)(43)(B); see, e.g., *Gonzales*, 484 F.3d at 716. In *United States v. Gonzales*, the Fifth Circuit held that a Texas conviction for delivery of a controlled substance did not meet the definition of a drug trafficking crime for criminal sentence enhancement purposes. 484 F.3d at 716. The Texas statute for delivery of a controlled substance included the term “offering to sell,” which was not an element of the federal drug trafficking offense. *Id.* at 714–15. As such, the court deemed the state statute broader than the federal statute and it did not consider the petitioner an aggravated felon for the mere offer to sell. See *id.* While Padilla should have tried to avoid a plea to distribution of marijuana, likely making him an aggravated felon for immigration purposes, the law is not always as clear as Justice Stevens and the majority interprets it. See *Padilla*, 130 S. Ct. at 1486; *Gonzales*, 484 F.3d at 715; *Garcia-Echaverria*, 376 F.3d at 512.

## 2. Inadmissibility

While a conviction for a controlled substance may lead to removal from the United States, it might also lead to future inadmissibility.<sup>81</sup> In comparing the INA's inadmissibility provision with its removal provision, one should notice that a conviction is not needed to render one inadmissible to the United States.<sup>82</sup> Rather, a mere admission of the essential elements of a controlled substances conviction is enough to trigger inadmissibility.<sup>83</sup> One should also notice that, unlike the re-

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<sup>81</sup> See *Xi v. INS*, 298 F.3d 832, 838 (9th Cir. 2002). As part of the broad structural changes to the Illegal Immigration Reform and Immigrant Responsibility Act, Congress "dropped the concept of 'excludability' and now uses the defined term of 'inadmissibility.'" *Id.* One inadmissibility controlled substance provision provides:

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . .

(II) 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 the [Controlled Substances Act]), is inadmissible.

8 U.S.C. § 1182(a)(2)(A)(i).

<sup>82</sup> Compare 8 U.S.C. § 1182(a)(2)(C) (not requiring conviction for inadmissibility), with *Id.* § 1227(a)(2)(B)(i) (including aliens convicted of a controlled substance violation in list of deportable classes).

<sup>83</sup> See *Id.* § 1182(a)(2)(C). The statutory provision directly references inadmissibility of controlled substance traffickers:

Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

*Id.*; cf. *Id.* § 1227(a)(2)(B)(ii). Under the removal statute, aliens that are drug abusers or addicts are also subject to removal on those grounds. 8 U.S.C. § 1227(a)(2)(B)(ii). The Board of Immigration Appeals (BIA) has developed a three part test to determine whether an admission has occurred: (1) "the admitted conduct must constitute the essential elements of a crime . . . ."; (2) "the applicant for admission must have been provided with the definition and essential elements of the crime prior to his admission . . . ."; and (3) "[the] admission must have been voluntary." See *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1215–16 (9th Cir. 2002). It should be noted that this admission is different from the term used in the INA. See 8 U.S.C. § 1101(a)(13)(A); *Pazcoguin*, 292 F.3d at 1215–16. Further-

removal provision, there is no exception to the inadmissibility provision for possessing thirty grams or less of marijuana for personal use, but one may potentially qualify for a “212(h) waiver.”<sup>84</sup> As such, Padilla’s guilty plea to counts 1 through 3 of his indictment would render him subject to removal and inadmissible to the United States in the future.<sup>85</sup>

### C. *The Client’s Wishes and Plans for the Near Future*

Under the stricter rules of competence, a criminal defense attorney should determine the client’s wishes and plans for the near future regarding United States residency.<sup>86</sup> For example, while the criminal defense attorney might believe that the client’s objective is to avoid incarceration, sometimes removal from or inadmissibility into the United States is actually the client’s paramount concern.<sup>87</sup> Therefore, an alien might prefer incarceration if that option could salvage his or her immigration status.<sup>88</sup> If the client wishes to remain in the United States, however, the criminal defense attorney must explain the immigration consequences of a plea—other than just the certainty of removal—including but not limited to: (1) mandatory detention, (2) travel restrictions, and (3) naturalization.<sup>89</sup> Alternatively, criminal defense attorneys may also need to consider the possibility that the client would prefer removal over incarceration.<sup>90</sup>

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more, this provision would arguably trigger the *Miranda* warnings. See *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

<sup>84</sup> See 8 U.S.C. §§ 1182(a)(2)(A), 1182(h), 1227(a)(2)(B). The term “212(h) waiver” corresponds to its INA provision and is codified at 8 U.S.C. § 1182(h).

<sup>85</sup> See Joint Appendix, *supra* note 19, at 47; see also 8 U.S.C. §§ 1182(a)(2)(A), 1227(a)(2)(B) (2006).

<sup>86</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.1 (2011).

<sup>87</sup> See *Padilla*, 130 S. Ct. at 1480.

<sup>88</sup> See *id.*

<sup>89</sup> See 8 U.S.C. § 1226(c)(1) (detailing situations when the Attorney General shall take into custody inadmissible or deportable aliens); *Id.* § 1101(a)(13)(C)(v) (allowing a lawful permanent resident alien to be regarded as seeking admissions to the United States if they are inadmissible to the United States for having committed an offense under section 1182(a)(2)); *Id.* § 1101(a)(23) (defining naturalization as “the conferring of nationality of a state upon a person after birth, by any means whatsoever”).

<sup>90</sup> See *Padilla*, 130 S. Ct. at 1480. The lawyer should be careful and inquire into the reasons for the alien wanting to leave the United States because the client might be planning to return without documentation after having been deported. See 8 U.S.C. § 1326. This is a federal crime. *Id.* The attorney needs also to advise the client of the criminal and immigration ramifications of returning after having been deported. See *Padilla*, 130 S. Ct. at 1480; MODEL RULES OF PROF’L CONDUCT R. 2.1. Additionally, the client might want to be removed or self-deport in an effort to avoid criminal liability. Of course, the attorney cannot encourage the client to evade the law. See MODEL RULES OF PROF’L CONDUCT R. 8.4(c).

## 1. Mandatory Detention

Mandatory detention is a significant immigration consequence that must be taken into consideration with any proposed plea of criminal guilt.<sup>91</sup> While the *Padilla* majority noted that defense counsel must notify the defendant of deportation when its threat is truly clear, the Court should have specifically identified potential mandatory detention as another area worthy of notice.<sup>92</sup> In pertinent part, the INA provides that:

The attorney general shall take into custody any alien who—  
 (A) is inadmissible by reason of having committed any offense covered in section 1182 (a) (2) of this title [(inadmissibility for controlled substances)], [or]  
 (B) is deportable by reason of having committed any offense covered in section 1227(a) (2) (A) (ii) [(multiple criminal convictions)], (A) (iii) [(aggravated felony)], (B) [(controlled substances)], (C) [(certain firearm offenses)], or (D) [(miscellaneous crimes)] of this title . . . .<sup>93</sup>

If Padilla were to fall within this statute, he would be detained without bond eligibility pursuant to the INA.<sup>94</sup> This period of custody would last for the pendency of the immigration removal proceeding, which usually begins after any criminal sentence is served.<sup>95</sup> Further, if Padilla had decided to present an immigration defense, he should also have been advised that he would likely remain in an immigration jail without bond until the trial's completion.<sup>96</sup> Alternatively, if he acqui-

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<sup>91</sup> See 8 U.S.C. § 1226(c) (1) (2006).

<sup>92</sup> See *id.*; *Padilla*, 130 S. Ct. at 1483.

<sup>93</sup> 8 U.S.C. § 1226(c) (1).

<sup>94</sup> See *id.* §§ 1226(c) (1), 1231(a) (2); Joint Appendix, *supra* note 19, at 48.

<sup>95</sup> 8 U.S.C. § 1226(c) (1). “[W]hen an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the ‘removal period’).” *Id.* § 1231(a) (1) (A). The mandatory detention period referenced here is the time prior to an order signed by an immigration judge. See *id.* § 1226(a). During the pendency of the removal proceedings the attorney general arguably does not have jurisdiction to issue a bond. Some studies report that the average wait time in the United States for an immigration case to be brought to trial is almost five hundred days. See *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, TRAC IMMIGR. (July 26, 2011), [http://trac.syr.edu/phptools/immigration/court\\_backlog](http://trac.syr.edu/phptools/immigration/court_backlog). Immigration removal proceedings are generally referred to as Section 240 proceedings. See INA § 240, 8 U.S.C. § 1229a. However, the Service can choose to remove an Alien prior to the completion of the criminal sentence under limited situations. *Id.* § 1231(a) (4) (B).

<sup>96</sup> See 8 U.S.C. §§ 1226(c) (1), 1231(a) (2); Joint Appendix, *supra* note 19, at 48.

esced to deportation, the time of incarceration in an immigration jail would be reduced, but he would be subsequently inadmissible to the United States.<sup>97</sup>

## 2. Travel Restrictions

While a single conviction for possession of less than thirty grams of marijuana would not result in removal, such a conviction could result in future inadmissibility should an alien leave and then attempt to return to the United States.<sup>98</sup> As such, if Padilla fell within the marijuana provision of the INA and, by virtue of possessing less than thirty grams, fell outside of the removal statute, his criminal defense counsel would have needed to advise him about his future inadmissibility.<sup>99</sup>

## 3. Naturalization

To qualify for United States naturalization, an applicant must possess good moral character for the applicable statutory period.<sup>100</sup> The INA does not define “good moral character” and instead provides a categorical list of circumstances where an individual would show a lack of good moral character.<sup>101</sup> For instance, if an alien is inadmissible to the United States due to a conviction relating to a controlled substance, has been incarcerated for 180 days or more, or was convicted of an aggravated felony, that person would lack good moral character and be incapable of naturalization.<sup>102</sup>

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<sup>97</sup> See 8 U.S.C. § 1231(a)(4)(B) (2006).

<sup>98</sup> See *id.* §§ 1182(a)(2)(A)(1), 1227(A)(2)(B)(ii). A lawful permanent resident alien can be regarded as inadmissible to the United States for having committed an offense under INA section 212. See *id.* §§ 1101(a)(3), 1101(a)(20), 1182(a)(2).

<sup>99</sup> See *id.* §§ 1101(a)(3), 1101(a)(20), 1182(a)(2). For example, in *People v. Garcia*, the Department of Homeland Security arrested a permanent resident alien after he returned from a trip abroad for having a previous controlled substance conviction. 907 N.Y.S.2d 398, 400–401 (Sup. Ct. 2010). He, however, had not been deported prior to leaving the country. See *id.* at 399–400. The court found *Padilla* retroactive and reopened the conviction despite the attorney’s immigration warning and the court’s admonishments. *Id.* at 404.

<sup>100</sup> 8 U.S.C. § 1427(a); see also 8 U.S.C. § 1101(a)(23) (defining naturalization as “the conferring of nationality of a state upon a person after birth, by any means whatsoever”). The statutory period differs depending on the statute used to seek naturalization. Compare *id.* § 1427(a) (“No person, except as otherwise provided in this subchapter, shall be naturalized unless such applicant . . . has resided continuously . . . within the United States for at least five years . . .”), with *id.* § 1430(a) (requiring only three years of residence for a person whose spouse is a citizen or who is a spouse or child of a citizen who battered him or her).

<sup>101</sup> See 8 U.S.C. §§ 1101(f), 1427(a).

<sup>102</sup> See *id.* § 1101(f)(3), (7), (8).

For naturalization purposes, the INA indicates that if Padilla had pled guilty to an aggravated felony, he would be permanently ineligible for naturalization.<sup>103</sup> If, however, he had pled guilty to a lesser offense not classified as an aggravated felony, he would merely lack the requisite good moral character for the duration of the statutory period, after which he could be eligible for naturalization.<sup>104</sup>

#### D. *Criminal Trial Strategy*

An alien charged with a crime involving controlled substances will likely consider the immigration consequences of a conviction in deciding whether or not to plead guilty or proceed to trial.<sup>105</sup> While an alien might be legally subject to removal, that person might also be eligible to apply for protection from removal upon meeting the applicable statutory relief requirements and meriting a favorable exercise of discretion.<sup>106</sup> The circumstances surrounding Padilla's case present the following potential avenues of immigration relief: (1) adjustment of status; (2) waivers of inadmissibility; and (3) invoking the Convention Against Torture.<sup>107</sup>

#### I. Adjustment of Status

In general, adjustment of status is a procedural vehicle whereby the Attorney General may, at his or her discretion, adjust the status of an approved Violence Against Women Act (VAWA) self-petitioner or of an alien who was inspected and admitted or paroled into the United States.<sup>108</sup> Adjustment of status is generally not available to one with a

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<sup>103</sup> See 8 U.S.C. § 1101(f)(8) (2006). This only applies where the conviction was entered on or after November 29, 1990. Immigration Act of 1990, Pub. L. No. 101-649, § 509, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1101); Reyes, 20 I. & N. Dec. 789, 790 (Bd. of Immigration Appeals Apr. 28, 1994).

<sup>104</sup> See 8 U.S.C. § 1101(f)(3), (7).

<sup>105</sup> See *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999); Attila Bogdan, *Guilty Pleas by Non-Citizens in Illinois: Immigration Consequences Reconsidered*, 53 DEPAUL L. REV. 19, 19 n.4; see also *Padilla*, 130 S. Ct. at 1478, 1480.

<sup>106</sup> See 8 U.S.C. § 1229a(c)(4)(A).

<sup>107</sup> See *id.* §§ 1255(a), 1182(h), 1229b(a); *Padilla*, 130 S. Ct. at 1477–78; 8 C.F.R. § 1208.17(a) (2010).

<sup>108</sup> See 8 U.S.C. § 1255(a); see also 8 U.S.C. § 1101(a)(51) (defining “VAWA self-petitioner”). The statute provides:

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that

controlled substance conviction because that person is inadmissible to the United States.<sup>109</sup> A waiver, however, could be available to cure the ground of inadmissibility where the alien is convicted of possession of less than thirty grams of marijuana.<sup>110</sup> Individuals in nonimmigrant visa classifications S, T, and U could possibly adjust their status regardless of their criminal convictions.<sup>111</sup>

## 2. Certain Waivers

Individuals subject to deportation or who are inadmissible to the United States may nevertheless be eligible for certain waivers, thereby curing that status.<sup>112</sup> While a discussion of all possible waivers is beyond the scope of this Article, at least two types of waivers should be considered: (1) The INA § 212(h) waiver and (2) the INA § 240A waiver, which is the modern day version of the INA § 212(c) cancellation of removal.<sup>113</sup>

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of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. § 1255(a).

<sup>109</sup> See 8 U.S.C. §§ 1182(a)(2)(A)(i), 1255(a)(2). A conviction for a crime classified as an aggravated felony, standing alone, does not render one ineligible for adjustment because an aggravated felony is a ground of removal and not a ground of inadmissibility. See Torres-Varela, 23 I. & N. Dec. 78, 80, 87 (Bd. of Immigration Appeals May 9, 2001).

<sup>110</sup> See 8 U.S.C. § 1182(h)(2006); *Barraza*, 519 F.3d at 393.

<sup>111</sup> See 8 U.S.C. § 1255(j), (l)–(m); see also 8 U.S.C. § 1101(a)(15)(S), (T), (U). Individuals granted S visas can adjust their status without regard to their criminal convictions. See 8 U.S.C. §§ 1101(a)(15)(S), 1255(j).

<sup>112</sup> See *id.* §§ 1182(h), 1229b(a).

<sup>113</sup> See *id.* §§ 1182(h), 1229b(a). On the matter of cancellation of removal, the INA states:

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

- (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
- (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
- (3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b(a).

a. *The INA § 212(h) Waiver*

Aliens inadmissible to the United States for crimes involving moral turpitude, for having multiple criminal convictions, or for controlled substance convictions insofar as they relate to a single offense of simple possession of thirty grams or less of marijuana may be eligible for an inadmissibility waiver.<sup>114</sup> The INA § 212(h) waiver is relevant to

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<sup>114</sup> See *id.* § 1182(h). The BIA defines a crime involving moral turpitude as “conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality . . . .” Franklin, 20 I. & N. Dec. 867, 868 (Bd. of Immigration Appeals Sept. 13, 1994). The INA § 212(h) Waiver reads:

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if—

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that—

- (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien’s application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien’s denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien is a VAWA self-petitioner; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien’s applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.



Padilla's predicament because it is one possible strategy to cure inadmissibility following his conviction for possession of less than thirty grams of marijuana—count 1 of his indictment—or for possessing drug paraphernalia—count 2 of his indictment.<sup>115</sup> The INA § 212(h) waiver, however, will not necessarily cure Padilla's aggravated felony controlled substance conviction for trafficking in marijuana.<sup>116</sup>

b. *The INA § 212(c) Waiver and Cancellation of Removal*

The INA § 212(c) waiver had its beginnings in the "Seventh Proviso" of the 1917 INA.<sup>117</sup> The waiver is important because it can possibly cure grounds of removal for aliens who are considered aggravated felons.<sup>118</sup> In 1996, however, the Antiterrorism and Effective Death Penalty Act severely curtailed INA § 212(c) by precluding relief for aliens with convictions for controlled substances.<sup>119</sup> On April 1, 1997, the Illegal Immigration Reform and Immigrant Responsibility Act repealed INA § 212(c) and replaced it with an entirely different form of relief, which is commonly referred to as cancellation of removal.<sup>120</sup>

Despite its repeal, the waiver continues to be available to those aliens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for

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8 U.S.C. § 1182(h). An alien with two or more convictions who has served an aggregate of five or more years in confinement as a result thereof is inadmissible. *Id.* § 1182(a)(2)(B). The pertinent statute reads:

Any alien convicted of 2 or more offenses (other than purely political offenses) regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

*Id.*

<sup>115</sup> See 8 U.S.C. § 1182(h); Joint Appendix, *supra* note 19, at 48.

<sup>116</sup> See 8 U.S.C. § 1182(h) (2006) ("No waiver shall be granted under this subsection in the case of an alien [who] has been convicted of an aggravated felony . . ."); Joint Appendix, *supra* note 19, at 48.

<sup>117</sup> See INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed Sept. 30, 1996); Immigration Act of 1917, ch. 29, 39 Stat. 874, 878 ("That aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe . . .").

<sup>118</sup> See 8 U.S.C. § 1182(c) (repealed Sept. 30, 1996).

<sup>119</sup> See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (1996); 8 U.S.C. § 1182(c) (repealed Sept. 30, 1996).

<sup>120</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-587, 3009-594 (codified as amended at 8 U.S.C. § 1229b(a) (2006)).

INA § 212(c) relief at the time of their plea under the laws then in effect.<sup>121</sup> Unfortunately for Padilla, the law in effect at the time of his conviction did not allow for the INA § 212(c) waiver or cancellation of removal for aliens convicted of aggravated felonies.<sup>122</sup>

### 3. The Convention Against Torture

Pursuant to the CAT, applicants must prove that it is more likely than not that they will be subject to torture upon returning to a native country and that such torture will be instigated by “or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>123</sup> Under CAT, one’s criminal history or convictions for aggravated felonies or controlled substances would not preclude relief from removal.<sup>124</sup>

### 4. Sanitize the Record

The INA places a burden on the government to establish by clear and convincing evidence that, in the case of an alien admitted to the United States, the alien is deportable.<sup>125</sup> Therefore, a possible immigration defense strategy might be to sanitize the criminal court record and make the prosecutor unable to carry the burden of proof.<sup>126</sup> Count 1 of Padilla’s indictment alleged that, at the time of arrest, he possessed an unknown amount of marijuana.<sup>127</sup> As such, a possible strategy would be to plead guilty to Count 1 only for possession of marijuana and to document in the court record or plea colloquy that Padilla was said to have possessed less than thirty grams of marijuana, thereby avoiding aggra-

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<sup>121</sup> See *INS v. St. Cyr*, 533 U.S. 289, 325, n.55 (2001).

<sup>122</sup> See 8 U.S.C. § 1182(c) (1994) (repealed Sept. 30, 1996); Joint Appendix, *supra* note 19, at 49.

<sup>123</sup> 8 C.F.R. §§ 1208.17(a), 1208.18(a)(1) (2010).

<sup>124</sup> See *id.* § 1208.16(d)(2). Mandatory denials under the Convention Against Torture are described in the Code of Federal Regulations. *Id.* See 8 C.F.R. § 1208.16(d)(3) for exceptions to the mandatory denials. If the alien has committed a particularly serious crime or an aggravated felony for which the term of imprisonment is at least five years, only deferral—not withholding—of removal is authorized. *Id.* §§ 1208.16(d)(3), 1208.17(a).

<sup>125</sup> 8 U.S.C. § 1229a(c)(3)(A) (2006).

<sup>126</sup> See JORGE L. BARÓN & ALIX WALMSLEY, A BRIEF GUIDE TO REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS IN CONNECTICUT 9 (2005), available at <http://www.immigrantdefenseproject.org/docs/fileU.pdf>.

<sup>127</sup> Joint Appendix, *supra* note 19, at 48. Count 4 of the grand jury indictment, however, discloses that officers caught Padilla trafficking in 1033 pounds of marijuana and, therefore, this strategy’s ultimate success depends on the prosecution’s willingness to drop the trafficking charges.

vated felon classification and preventing removal.<sup>128</sup> Then, Padilla would only need to stay in the United States while establishing good moral character to avoid triggering the INA's inadmissibility provision.<sup>129</sup>

### III. THE AUTHOR'S CRITICISM OF THE *PADILLA* MAJORITY AND PROPOSED RESOLUTION

The *Padilla* majority correctly held that deportation is intimately related to the criminal process and that advice about immigration consequences of a criminal conviction fall within the scope of the Sixth Amendment right to effective assistance of counsel.<sup>130</sup> While the entire Court recognized that immigration is complex and, to a certain extent, that attorney misadvice is always inappropriate, the *Padilla* majority determined that it was constitutionally acceptable to expect the criminal defense attorney to have a duty to advise only when the deportation consequences to a conviction were truly clear.<sup>131</sup> The Supreme Court's reasoning, however, is circular in that a criminal attorney must often study to determine what is truly clear in the first instance. Further, the do-no-more directive arguably fosters a lower standard of professional

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<sup>128</sup> See 8 U.S.C. § 1101(f)(3) (establishing possession of thirty grams or less of marijuana as an exception to the inadmissibility provision of § 1182(a)(2)(C)); *Padilla*, 130 S. Ct. at 1477–78; BARÓN & WALMSLEY, *supra* note 126, at 9.

<sup>129</sup> See 8 U.S.C. §§ 1101(f), 1182(a)(2)(C).

<sup>130</sup> See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (noting that the Court has “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*,” and that the “law has enmeshed criminal convictions and the penalty of deportation for nearly a century”).

<sup>131</sup> *Id.* at 1483; see also *id.* 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.”). Both the concurring opinion and dissenting opinion agreed with the majority that an attorney should not be permitted to provide misadvice regarding immigration consequences. See *id.* at 1482–83 (majority opinion); *id.* at 1487 (Alito, J., concurring) (“I concur in judgment because a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland v. Washington* . . . if the attorney misleads a noncitizen client . . . .”); *id.* at 1494 (Scalia, J., dissenting) (“In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised.”); see also Nina Totenberg, *High Court: Lawyers Must Give Immigration Advice*, NPR (Mar. 31, 2010), <http://www.npr.org/templates/story/story.php?storyId=125420249> (“In clear cases, a lawyer must advise his or her client that the guilty plea triggers automatic deportation. In less clear cases, the lawyer must still advise that an immigrant’s status could be in jeopardy.”).

responsibility, in turn violating the alien client's Sixth Amendment right to effective assistance of counsel.<sup>132</sup>

In *Padilla*, Justice Stevens found the defendant's potential immigration consequences clear, stating that "Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute . . . ." <sup>133</sup> The statute cited by the majority, in relevant part, 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.<sup>134</sup>

As this Article demonstrates, however, the above controlled substance statute is not as clear as Justice Stevens describes it.<sup>135</sup> Before even turning to the statute, criminal counsel would first need to determine Padilla's immigration status and United States citizenship prior to discerning whether the Kentucky state statutes—under which prosecutors charged Padilla—fit within the federal controlled substances immigration statute for removal.<sup>136</sup> Padilla's counsel would also need to determine whether he had been at any point: (1) admitted to the United States, (2) convicted in the United States or a foreign country, and (3) convicted in relation to a controlled substance other than a single offense involving possession of thirty grams or less of marijuana.<sup>137</sup> Moreover, counsel would need to investigate Padilla's wishes and future goals, such as staying in the United States or avoiding incarceration, to develop a strategy geared toward those priorities.<sup>138</sup>

In his concurrence in *Padilla*, Justice Alito, joined by Chief Justice Roberts, agreed with the majority that *Strickland* applies.<sup>139</sup> Justice Alito argued, however, that a client's attorney, even where the immigration consequences to a guilty plea may be truly clear, may simply tell the client to hire an immigration attorney if the client wants to know any im-

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<sup>132</sup> See *Padilla*, 130 S. Ct. at 1483 (majority opinion).

<sup>133</sup> See *id.*

<sup>134</sup> 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

<sup>135</sup> See *id.*; *Padilla*, 130 S. Ct. at 1483.

<sup>136</sup> See BARÓN & WALMSLEY, *supra* note 126, at 8.

<sup>137</sup> See *id.* at 10–14.

<sup>138</sup> See *id.* at 8–9.

<sup>139</sup> *Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring).

migration consequences.<sup>140</sup> The concurring opinion is reasonable—though, not ideal—where a privately retained attorney is involved at the outset of the representation.<sup>141</sup> The concurring opinion, however, is not constitutionally reasonable where the client does not give informed consent at the outset of representation to hire an additional immigration attorney; this is also the case for aliens represented by public defenders.<sup>142</sup> When a defendant must financially qualify for a public defender or an appointed attorney, he or she will likely not be able to secure an immigration attorney.<sup>143</sup>

### A. *Requiring Study for Private and Appointed Defenders*

A private or appointed attorney should be forced to study the law without limitation to determine what is “truly clear” because the clients expect this service. While study may afford the attorney opportunity to give incorrect or incomplete advice, private and appointed attorneys should not accept clients if they are unfamiliar with cr-immigration law or will not become competent shortly thereafter.<sup>144</sup> This rationale,

<sup>140</sup> *Id.* at 1487.

<sup>141</sup> *See id.* The Court, in its truly-clear reasoning, should not have quoted from the controlled substance statute, but instead, to the aggravated felony statute which states: “The term ‘aggravated felony’ means . . . (B) illicit trafficking in a controlled substance . . . , including a drug trafficking crime . . . .” 8 U.S.C. § 1101(a)(43) (2006); *see Padilla*, 130 S. Ct. at 1483 (majority opinion) (“The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.”). While the Court was correct because Padilla could likely be removed from the United States under the controlled substances statute, the illicit trafficking statute would have constituted an aggravated felony and could have led to a much quicker decision on deportation. This would have led to a precedential decision from the Sixth Circuit, which had motivation to equate the Kentucky marijuana trafficking statute with the INA’s aggravated felony statute for illicit trafficking. *See Garcia-Echaverria v. U.S.*, 376 F.3d 507, 511 (6th Cir. 2004).

<sup>142</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 1.1, 1.4 (2011).

<sup>143</sup> *See* 18 U.S.C. § 3006A(d)(1), (g)(2) (2006). The term “appointed attorney” is distinguished from the term “public defender” in that the appointed attorney is a private attorney who is part of a panel of attorneys paid an hourly rate to represent the accused by the government pursuant to 18 U.S.C. § 3006A. This is different from a federal public defender or an assistant federal public defender, who cannot engage in the private practice of law by statute. *See id.* § 3006A(b), (d)(1), (g)(2).

<sup>144</sup> *See Padilla*, 130 S. Ct. at 1483; MODEL RULES OF PROF’L CONDUCT R. 1.1, 1.3, 2.1. For example, an attorney might study and advise an alien client that deportation is certain but may not give complete advice because, unbeknownst to the attorney, immigration relief is available. The result, therefore, may be an unnecessary criminal trial when a simple guilty plea and subsequent immigration relief—such as cancellation of removal—would have been sufficient. *See Padilla*, 130 S. Ct. at 1483; MODEL RULES OF PROF’L CONDUCT R. 1.1, 1.3, 2.1.

based on the ABA Model Rules of Professional Conduct, serves as a guide to what is constitutionally reasonable.<sup>145</sup>

The truly-clear standard allows private practitioners to opt out of fulfilling the duties they owe to their clients, and therefore, should be against public policy.<sup>146</sup> Basic contract law allows an attorney and an alien defendant to enter into a contract for legal services but voids the contract where it is against public policy.<sup>147</sup> Therefore, when an attorney signs a contract for what the client believes to be all-inclusive legal services but does not actually need to perform to the client's expectations, the contract should be void.

The attorney should only be able to limit the scope of representation when reasonable under the circumstances and if the client gives informed consent.<sup>148</sup> In *Padilla*, however, allowing a private attorney to represent Padilla for criminal matters but not the associated immigration matters was not reasonable under the circumstances. Simply put, it is unreasonable to presume that any client would consent to an attorney keeping a fee without providing a service.

### B. *Lowering the Study Standard for Public Defenders*

The *Padilla* majority references the differing duties of attorneys by stating that “[t]he duty of the private practitioner in such cases is more limited.”<sup>149</sup> The Court, however, erred in its statement and should have distinguished between private, appointed, and public defenders. Thus, the private and appointed defenders must not limit their duties, but the public defenders should do no more than advise of potential immigration effects.<sup>150</sup>

Although private and appointed attorneys may control their caseloads, public defenders cannot, and therefore, they should be ex-

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<sup>145</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3, 2.1.

<sup>146</sup> See *Padilla*, 130 S. Ct. at 1483; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54(2) (2000) (“An agreement prospectively limiting a lawyer’s liability to a client for malpractice is unenforceable.”).

<sup>147</sup> See RICHARD A. LORD, *Illegal Agreements and Agreements Against Public Policy*, WILLISTON ON CONTRACTS § 12:1 (4th ed. 2009); *Friedman v. Hartmann*, 787 F. Supp. 411, 421 (S.D.N.Y. 1992) (deciding an alleged agreement to indemnify for intentional misconduct, the court said: “Under the law of Connecticut, as elsewhere, contracts contrary to public policy are void and unenforceable . . . . It is well established that contracts providing for indemnity for losses incurred as a result of intentional misconduct are void and unenforceable as against public policy.”).

<sup>148</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(c).

<sup>149</sup> *Padilla*, 130 S. Ct. at 1483.

<sup>150</sup> *But see id.*

empt from the constitutional duty of determining what is truly clear.<sup>151</sup> Under the existing standard, public defenders must diligently study immigration law for each client and may not be able to effectively serve everyone.<sup>152</sup> Adhering to this rule overworks them because having too many cases is not a recognized excuse for violating ethical obligations.<sup>153</sup>

The public defender should not, however, be permitted to limit the representation—thereby avoiding the practice of immigration law—under all circumstances.<sup>154</sup> *Strickland v. Washington* simply requires that the attorney perform reasonably under the circumstances.<sup>155</sup> It is not reasonable under the circumstances to expect public defenders—who cannot control their dockets—to study immigration law and determine what is “truly clear.” There is a high likelihood that immigration law studies would interfere with the public defender’s duties to existing criminal clients that do not also have immigration issues.

Public defenders are already burdened by their immense duties, such that also learning immigration law should be unnecessary. For example, in *State v. Peart*, the court found that one public defender had, over a seven month period, represented 418 clients—including 130 guilty pleas at arraignment—“had at least one serious case set for trial for every available trial date during that period,” received minimal investigative support, and had no funds for expert witnesses.<sup>156</sup> Therefore, the public defender “was not able to provide his clients with reasonably effective assistance of counsel because of the conditions affecting his work, primarily the large number of cases assigned to him.”<sup>157</sup>

Instead of further burdening public defenders, courts should appoint immigration experts who are better suited to resolve these issues.<sup>158</sup> But, when a client privately retains an attorney, the court would not need to appoint an immigration expert because the private attorney

<sup>151</sup> See *Padilla*, 130 S. Ct. at 1483; *State v. Peart*, 621 So.2d 780, 790 (La. 1993). One of the first such cases is *State v. Peart*, in which the Louisiana Supreme Court held that, due to excessive caseloads and insufficient support, indigent clients of a New Orleans public defender were not generally provided with effective assistance of counsel. 621 So.2d at 790.

<sup>152</sup> See *Padilla*, 130 S. Ct. 1483; *Peart*, 621 So.2d at 790; MODEL RULES OF PROF’L CONDUCT R. 1.3.

<sup>153</sup> See *Padilla*, 130 S. Ct. 1483; *Peart*, 621 So.2d at 790; MODEL RULES OF PROF’L CONDUCT R. 1.3.

<sup>154</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54(2) (2000).

<sup>155</sup> *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

<sup>156</sup> *Peart*, 621 So. 2d at 784; see Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771, 776–77 (2010).

<sup>157</sup> *Peart*, 621 So. 2d at 784.

<sup>158</sup> See *id.* at 784–85.

should either study or associate with a private immigration expert.<sup>159</sup> Likewise, appointed attorneys may hire immigration specialists and pay them up to eight hundred dollars without permission of the court.<sup>160</sup>

### C. *The Fifth Amendment Direct-Collateral Distinction*

No person shall “be deprived of life, liberty, or property, without due process of law . . . .”<sup>161</sup> Accordingly, Federal Rule of Criminal Procedure 11 requires federal judges to determine whether a defendant’s guilty plea is entered knowingly, voluntarily, and intelligently.<sup>162</sup> In *Boykin v. Alabama*, the Court’s ruling enshrined the Rule 11 protections as constitutional rights applicable to state criminal proceedings.<sup>163</sup>

The Supreme Court laid the foundation for a direct-collateral dichotomy in *Brady v. United States*, which required criminal tribunals to accept guilty pleas only from defendants who are “fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel . . . .”<sup>164</sup> Thus, the Court did not require a defendant’s awareness of all consequences of a guilty plea nor did it define the term “direct consequences.”<sup>165</sup>

The *Padilla* majority ruled that the direct-collateral dichotomy has no place in the Sixth Amendment but did not proscribe it from the Fifth Amendment.<sup>166</sup> “It is clear that guilty pleas entered pursuant to bargaining must be entirely voluntary and that it is a violation of due process where such a plea is obtained by coercion or by deception or by a trick.”<sup>167</sup>

<sup>159</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.3.

<sup>160</sup> 18 U.S.C. § 3006A (2006); Judicial Council of the Fifth Circuit, *Plan for Representation on Appeal under the Criminal Justice Act*, FIFTH CIRCUIT CT. APPEALS (Apr. 2009), <http://www.ce5.uscourts.gov/cja/cjaDocs/cja.pdf>.

<sup>161</sup> U.S. CONST. amend. V.

<sup>162</sup> See FED. R. CRIM. P. 11; *Walker v. Johnston*, 312 U.S. 275, 286 (1941); *Kercheval v. United States*, 274 U.S. 220, 223 (1927).

<sup>163</sup> See FED. R. CRIM. P. 11; 395 U.S. 238, 242 (1969).

<sup>164</sup> 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 242 F.2d 101, 115 (5th Cir. 1957)).

<sup>165</sup> See *id.*; Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47, 52 (2010).

<sup>166</sup> See *Padilla*, 130 S. Ct. at 1481 n.8; See also Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117 (2011) (providing a good scholarly analysis of the direct-collateral dichotomy).

<sup>167</sup> *Commonwealth v. Siers*, 464 A.2d 1307, 1310 (Pa. Super. Ct. 1983) (quoting Wanda Ellen Wakefield, Annotation, *Judge’s Participation in Plea Bargaining Negotiations as Rendering Accused’s Guilty Plea Involuntary*, 10 A.L.R. 4TH 689, 692 (1981)).



## CONCLUSION

In 1951, the Supreme Court recognized that deportation from the United States was the equivalent of banishment or exile. Fifty years later, in 2001, the Supreme Court acknowledged that aliens would want to know what immigration consequences they faced before pleading guilty. The landmark decision of *Padilla v. Kentucky*, coming nearly a decade later, finally shows that the Supreme Court recognizes that deportation is an integral part—indeed sometimes the most important part—of the penalty that might be imposed on noncitizen defendants who plead guilty to specified crimes. The *Padilla* Court, however, misunderstood the intricacies of the boundaries between criminal and immigration laws, thereby setting the professional expectations of private cr-immigration attorneys at an unnecessarily low level.

The Court only imposed a duty on the criminal defense attorney to advise when the immigration consequences of a conviction or plea are “truly clear.” Defense attorneys, however, need do no more when those consequences are not truly clear. Therefore, *Padilla* leaves defendants pleading without knowing the likely consequences of their actions. Furthermore, the decision acts to overburden public defenders while allowing private and appointed attorneys to opt out of duties to their clients. Under the circumstances, *Padilla v. Kentucky* erroneously excuses fundamental fairness and leaves professional responsibility lost.