WHERE DO WE GO FROM HERE: PLEA COLLOQUY WARNINGS AND IMMIGRATION CONSEQUENCES POST-*PADILLA*

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Introduction

Although deportation[1] can sometimes represent a more serious consequence for a non-citizen[2] defendant than some criminal sanctions, deportation has traditionally been viewed as a purely civil matter.[3] This is well reflected in criminal law, where the threat of deportation has typically been categorized as a collateral consequence of criminal activity.[4] As a result, non-citizen defendants were often not made aware of the possibility of deportation pursuant to criminal conviction. However, in *Padilla v. Kentucky* the United States Supreme Court held that deportation is unique in that it cannot be cabined as either a direct or collateral consequence; therefore, defense counsel can be found constitutionally ineffective for not informing a client of the possibility of deportation before plea colloquy.[5]

The holding in *Padilla* is significant in that it breaks from the legal fiction traditionally adopted by the criminal justice system, wherein courts distinguished between two different types of legal consequences for criminal activity: those that are direct and those

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1. For the purposes of this Note, the terms "deportation" and "removal" should be read to have the same meaning. *See* Calcano-Martinez v. INS, 533 U.S. 348, 350 n.1 (2001) (stating that there has been a "statute-wide change in terminology" such that orders of deportation and exclusion are now referred to as orders of removal).

2. For the purposes of this Note, the term "non-citizen" refers to all individuals present in the United States who have not obtained citizenship. The term non-citizen includes both legal permanent residents as well as undocumented individuals. With the exception of quotations from other sources, which will be left as-is, this Note will not make use of the terms "illegal immigrant" or "illegal alien."

3. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (stating that removal proceedings are civil, not criminal, in nature).

4. *See* Commonwealth v. Padilla, 253 S.W.3d 482, 485 (Ky. 2008).

5. *Cf.* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

that are collateral.[6] Although the Supreme Court has never officially approved of the validity of the collateral consequences doctrine, its prior silence on the subject has not discouraged lower courts nationwide from embracing the doctrine.[7]

The traditional distinction is drawn as follows: the sentence and the conviction itself are direct consequences, with everything else being collateral.[8] Although collateral consequences can obviously be of the utmost importance to defendants facing criminal charges, a formal distinction means that defense counsel is not responsible for informing a defendant of these collateral consequences.[9] For example, defense counsel can be found to be constitutionally ineffective for misinforming a defendant of the possible maximum sentence,[10] but defense counsel will typically not be found ineffective for failing to warn a client of the effects a conviction may have upon: the right to vote;[11] access to public benefits, including government subsidized housing;[12] employment in certain fields;[13] registration as a sex-offender;[14] or the ability to obtain a driver's license.[15]

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6. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 704–05 (2002).

7. *Id.* at 706–07.

8. Collateral consequences can also be defined as those consequences that are "imposed by operation of law" pursuant to a conviction, as opposed to direct consequences, which are imposed "by decision of the sentencing judge." Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 15–17 (Marc Mauer & Meda Chesney-Lind eds., 2002).

9. *See* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 643–44 (2006).

10. *See* Hammond v. United States, 528 F.2d 15, 19 (4th Cir. 1975) (holding that the defendant's plea was not voluntary when counsel "grossly exaggerated the benefit to be derived from the pleas of guilty" by overcounting the possible maximum sentence).

11. *See, e.g.*, People v. Boespflug, 107 P.3d 1118, 1121 (Colo. App. 2004) (rejecting defendant's request to withdraw his plea because he was not advised that he would lose the right to vote while imprisoned).

12. *See, e.g.*, State v. Merten, 668 N.W.2d 750, 754–55 (Wis. Ct. App. 2003) (rejecting defendant's request to withdraw his plea because he was not advised that the plea would lead to the denial of Medicare and Medicaid benefits); *see also* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 136 (2002) (holding that local public housing authorities have the "discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known about the drug-related activity").

13. *See, e.g.*, Henry v. State, No. 207, 2003 Del. LEXIS 507, at *2, *6 (Del. Oct. 7, 2003) (rejecting defendant's request to withdraw his plea because counsel did not "inform him of the possible revocation of his Mortgage Loan Broker License").

14. *See, e.g.*, State v. Moore, 86 P.3d 635, 643 (N.M. Ct. App. 2004) (finding that registration as a sex offender is not a direct consequence of sentencing).

15. *See, e.g.*, State v. Carney, 584 N.W.2d 907, 910 (Iowa 1998) (holding that counsel's failure to inform defendant that a guilty plea could lead to the revocation of his license was not grounds for a finding of ineffective assistance of counsel).

This Note argues for the passage of criminal procedure rules that would require judges to warn criminal defendants about immigration consequences at plea colloquy. Part I addresses the overlap of criminal and immigration law, arguing that the increased use of the criminal justice system to police federal immigration laws calls for greater protection of non-citizen defendants at plea colloquy. Part II then addresses the legal duties imposed on both defense counsel and trial courts in relation to plea colloquy. *Padilla* merely addressed the duty of defense counsel to provide constitutionally effective assistance before plea colloquy and did not reach the question of whether a trial court's duty at plea colloquy need be altered as well. However, in light of the Supreme Court's cabining of deportation as a unique consequence, the altered legal duty of defense counsel post-*Padilla* necessarily calls for a re-examination of the legal duty of trial courts as well. This is especially true in light of the fact that a trial court's assessment of the validity of a plea is conditioned on the quality of assistance provided by defense counsel. Although *Padilla* does not mandate that trial courts re-assess the language of their plea colloquy warnings, a changed duty on the part of defense counsel will realistically lead to a changed duty on the part of trial courts.

Taking these considerations into account, in Part III I will thus introduce model language for new criminal rules of procedure that would impose a duty upon courts to inform all criminal defendants of immigration consequences at plea colloquy. Standing alone, *Padilla*'s holding is not robust enough to safeguard the interests of non-citizen defendants; the holding is deliberately limited to clear cases involving only the adverse immigration consequence of deportation. Given the vast deference afforded to defense counsel under the ineffective assistance of counsel inquiry, a mere policing of defense counsel's duty will not actually result in added protections for non-citizen defendants. Court instruction on the immigration consequences of criminal activity is thus necessary in order to: (1) secure well-informed pleas by non-citizen defendants; and (2) conserve the limited resources of the criminal justice system.

I. OVERLAP OF CRIMINAL AND IMMIGRATION LAW

Although the first 100 years of American immigration law are typically characterized as a period of virtually no restrictions,[16] American immigration law has become increasingly restrictive since Congress implemented the first racially discriminatory immigration laws in the late 1800s.[17] As the civil immigration system continues to exercise more influence on the criminal justice system, the need for transparent dialogue about the immigration consequences of criminal activity becomes more critical. Given the historical analysis of American immigration law that precedes the holding in *Padilla*,[18] an extensive survey of that history will not be conducted in this Note; however, a brief look at the mounting consequences that criminal activity has on an individual's immigration status will be instructive.

A. History of American Immigration Law

At its inception, the American republic was not concerned with the topic of immigration. The Constitution itself, as originally enacted in 1787, referenced immigration only implicitly in language concerning slavery.[19] Although Congress first discussed the topic of immigration in 1798,[20] an immigration law, as opposed to a law *referencing* the act of immigration, would not be passed until almost a century later in 1875.[21] As a sanction for non-citizens, deportation was not conditioned on post-entry conduct until 1917,[22] whereupon

16. This characterization is likely based on the fact that the first federal immigration law was not passed until 1875. *See infra* note 17. *But see* Gerald L. Neuman, *The Lost Century of American Immigration Law*, 93 COLUM. L. REV. 1833, 1835–40 (1993) (arguing that a lack of federal legislation on the issue did not necessarily imply that the early stages of the American republic could realistically be depicted as one of completely unrestricted immigration).

17. *See, e.g.*, Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943); Act of March 3, 1875 (Page Act), ch. 141, 18 Stat. 477 (repealed 1974) (policing "the immigration of any subject of China, Japan, or any Oriental country, to the United States").

18. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1478–81 (2010).

19. U.S. CONST. art. 1, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

20. Act Respecting Alien Enemies (Alien Enemies Act), ch. 66, 1 Stat. 577 (1798) (current version at 50 U.S.C. §§ 21–24 (2006)); Act Concerning Aliens (Alien Friends Act), ch. 58, 1 Stat. 570 (1798).

21. 18 Stat. 477.

22. Immigration Act of 1917, ch. 29, 39 Stat. 874. Although convicts were previously excluded from entrance in 1882, before the passage of the Act of 1917, non-citizens who were convicted of crimes after entering the United States were not subject to exclusion or deportation. *See* Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1651–62

deportation was authorized for those who committed crimes of moral turpitude, a term left undefined by statute.[23] Congress would later introduce the concept of an aggravated felony, such that noncitizens would be subject to deportation if convicted either of a crime of moral turpitude or of an aggravated felony.[24]

The most drastic changes in American immigration law came next in 1996, in response to a national wave of anti-immigrant sentiment fueled in part by the fear of the criminal alien.[25] The new legislation greatly expanded the definition of aggravated felony to the extent that certain convictions imposing sentences of just one year or more could trigger deportation proceedings, even if the sentence was suspended.[26] The 1996 legislation was embodied in two separate acts: one act restricted judicial review of immigration decisions,[27] while the other completely barred review of immigration decisions in certain cases.[28]

B. The Influence of Immigration Policy Upon Criminal Law

Just as criminal law considerations have informed the application of immigration statutes, aspects of immigration law are now impacting the administration of the criminal justice system Given

(2009) (stating that at the turn of the century, "deportation was only used to correct admissions mistakes. Deportation grounds were based on inadmissibility rather than post-entry behavior," which in contrast to modern immigration law "seeks to regulate the post-entry behavior of noncitizens"); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1912 (2000) ("The modern regime of deportation for post-entry conduct began with the 1917 Immigration Act.").

23. Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874 (1917).

24. *See* 39 Stat. 874 (authorizing deportation for immigrants who committed crimes of moral turpitude); Anti-Drug Abuse Act (ADAA) of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (1988) (now codified at 8 U.S.C. § 1101(a)(43) (2006)). It should also be noted that an aggravated felony does not have to be either 'aggravated' or a 'felony' as those terms are typically understood in the criminal law context.

25. *See* Evangeline Abriel, *Ending the Welcome: Changes in the United States' Treatment of Undocumented Aliens (1986–1996)*, 1 RUTGERS RACE & L. REV. 1, 2–3 (1998); Stephen H. Legomsky, E Pluribus Unum*: Immigration, Race, and Other Deep Divides*, 21 S. ILL. U. L.J. 101, 103 (1996).

26. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 321(a)(3), 110 Stat. 3009 (1996) (codified at Immigration and Naturalization Act (INA) § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(F), (G), (N), (P) (1998)) (changing the definition from including only crimes whose sentences were "at least five years" to "at least one year").

27. Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, § 423, 110 Stat. 1214 (1996) (formerly codified at 8 U.S.C. § 1105(e)(1) (1996)) (repealed 1997).

28. IIRIRA §§ 303(a), 304(a)(3), 306(a)(2), 343, 604 (codified as amended in scattered sections of 1 U.S.C. and 8 U.S.C.).

the increased interplay between the criminal justice system and the immigration enforcement system in the past two decades,[29] the mutually influential relationship between the two fields is hardly surprising.

Beginning with the Immigration Act of 1917, which made crimes of moral turpitude deportable offenses,[30] the immigration enforcement system has looked to the criminal justice system to determine how to proceed in certain cases. With the implementation of Judicial Recommendations Against Deportation (JRAD), which allowed a criminal sentencing judge to recommend that a non-citizen otherwise convicted of a deportable offense be allowed to stay in the United States, actors in the criminal justice system were granted a considerable amount of *civil* discretion in what happened to non-citizen defendants.[31]

Prosecutors in particular have utilized this relationship between criminal and immigration law, often to their significant advantage. If a prosecutor is aware of a defendant's non-citizen status, he or she is able to start off plea negotiations in a particularly powerful position, because non-citizen defendants may be interested in serving longer sentences in order to avoid adverse immigration consequences, or vice versa.[32] In 1995, Attorney General Janet Reno circulated a memo that encouraged federal prosecutors to deliberately offer non-citizen defendants lessened sentences in return for agreements that would result in decisions more favorable to the government in immigration courts.[33]

Immigration is a concern of the federal legal system; individual states have traditionally been understood to have no power to enforce federal immigration law.[34] However, despite the classification of immigration as a federal matter, the federal government, under both the second Bush administration as well as the current Obama administration, has begun to impose federal immigration responsi-

29. *See supra* Part I.A (showing that post-entry conduct such as criminal activity has increasingly become reason for the imposition of adverse immigration consequences).

30. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874 (1917).

31. *See id.* § 19. As a practice, JRAD was circumscribed in the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952), and later entirely eliminated in the Immigration Act of 1990, Pub. L. No. 101-659, § 505, 104 Stat. 4978 (1991).

32. Margaret Taylor & Ronald Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1160 (2002).

33. *Id.* ("[A] 1995 directive from the Attorney General encourages federal prosecutors to give noncitizen defendants more favorable treatment in the criminal system, in exchange for an agreement to concede deportability and waive procedural rights in immigration court.").

34. *See* Michael Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1090 (2004) ("[F]or many years the DOJ was of the view that state and local police were not empowered to enforce civil immigration laws.").

bilities onto local and state criminal law enforcement agencies. In the past decade, the federal government implemented three major programs creating formal agreements between federal immigration authorities and local criminal enforcement agencies.[35]

The federal government has also begun entering immigration information into the National Crime Information Center (NCIC).[36] The NCIC, which serves as the Federal Bureau of Investigation's (FBI) criminal database, is accessed by local and state criminal enforcement agencies on a daily basis, the effect of which is that "local police around the nation have begun to make immigration arrests of persons encountered in routine traffic stops and other ordinary police-civilian encounters."[37]

Judges, prosecutors, and the varied branches of the criminal enforcement system are thus aware of the impact that their actions have in the context of immigration law. Given the increasing involvement of the criminal justice system in civil immigration proceedings, through the direct efforts of criminal justice actors or through the commandeering of law enforcement for the benefit of US Immigration and Customs Enforcement, non-citizen defendants' need for protection regarding immigration consequences becomes all the greater. Without the enactment of substantive protections in the criminal justice system, non-citizen defendants will increasingly find that any interactions with the criminal justice system might put them in positions of greater vulnerability vis-à-vis their immigration status.[38]

II. WHAT MAKES A PLEA AGREEMENT VALID?

A criminal defendant's plea of guilty or nolo contendere may be found invalid "if the trial court fails to conduct a plea colloquy

35. *Criminal Alien Program*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/criminal-alien-program (last visited Oct. 14, 2011) ("The Criminal Alien Program identifies, processes and removes criminal aliens incarcerated in federal, state and local prisons and jails throughout the U.S."); *Criminal Alien Program*, *supra* (click "Expand All"); *Section 287(g)*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/287g (last visited Oct. 14, 2011) ("The 287(g) program . . . allows a state and local law enforcement entity to enter into a partnership with ICE . . . . The state or local entity receives delegated authority for immigration enforcement within their jurisdictions."); *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/doclib/secure-communities/pdf/lea-benefits.pdf (last visited Oct. 14, 2011) (The Secure Communities Initiative works by "improving public safety every day by transforming the way criminal aliens are identified and removed from the United States.").

36. Wishnie, *supra* note 34, at 1086.

37. *Id.* at 1087.

38. *See infra* Part III.C.2.

establishing that the plea is knowing, voluntary, and intelligent, or if the plea was involuntary because it was induced by ineffective assistance of counsel."[39] There exists a distinct legal duty on behalf of both trial court and defense counsel to ensure the validity of a given plea. Although the majority holding in *Padilla* speaks solely to the legal duty of defense counsel,[40] Justice Alito's concurrence[41] as well as proposed changes to state criminal procedure rules[42] evince an acknowledgement that *Padilla* may affect the duty imposed on trial courts as well.[43] In analyzing the legal impact of *Padilla*, it thus becomes important to understand the legal roles of both trial court and defense counsel in the context of plea agreements.

A. Ineffective Assistance of Counsel

Although a cursory reading of the Sixth Amendment may not seemingly confer criminal defendants a right to the effective assistance of counsel,[44] the Supreme Court has interpreted the Sixth Amendment as requiring just that.[45] The Supreme Court later expanded on this Sixth Amendment right in *Strickland v. Washington*, setting out the means by which defense counsel can be determined to have rendered constitutionally ineffective assistance.[46] The Court delineated a two-prong test, both prongs of which must be met for an ineffective assistance of counsel claim to prevail:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel"

39. Chin & Holmes, *supra* note 6, at 727.

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

41. *Id.* at 1491 (Alito, J., concurring).

42. Proposed Amendments of Rules 6.302 and 6.610 of the Michigan Court Rules, ADM File No. 2010-16 (Jun. 30, 2010), *available at* http://www.courts.michigan.gov/supremecourt/resources/administrative/2010-16-06-30-10.pdf.

43. Even before the *Padilla* holding, some resources for defense attorneys stated that trial courts may have a duty at plea colloquy, because "[a] non-American citizen defendant who enters a plea without understanding the immigration consequences of such a plea has not made a knowing plea . . . . In the end, it's all about knowledge and informed choices." MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS xxii (2003).

44. Indeed, the Sixth Amendment only notes that, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence [sic]." U.S. CONST. amend. VI.

45. *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel.").

46. Strickland v. Washington, 466 U.S. 668 (1984).

> guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[47]

The first prong of the *Strickland* standard is rather generous to defense counsel, as "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[48] Moreover, the *Strickland* test is meant only to police the bare minimum performance constitutionally required from defense counsel, and "not to improve the quality of legal representation."[49]

Strickland, however, involved a case in which the petitioner alleged ineffective assistance of counsel before and at sentencing.[50] Given that the holding in *Strickland* was "premised in part on the similarity between [a sentencing proceeding] and the usual criminal trial,"[51] it was initially an open question whether the *Strickland* standard applied to the plea process. The Supreme Court later answered the question in the affirmative.[52] However, the Court modified the two-prong *Strickland* test to better suit claims arising out of the plea process. Although the first *Strickland* prong remained virtually the same, the second prong was adapted, such that the question became whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial."[53] Because the Supreme Court found that the petitioner's claims did not meet the first prong of the *Strickland* test, they did not attempt to "determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel[.]"[54] In the context of pleas submitted on the basis of counsel's advice, the Supreme Court ruled that "[i]f a prisoner pleads guilty on the advice of

47. *Id.* at 687.
48. *Id.* at 690.
49. *Id.* at 689.
50. *See id.* at 671–75.
51. Hill v. Lockhart, 474 U.S. 52, 57 (1985).
52. *See id.*
53. *Id.* at 58–59.
54. *Id.* at 60. However, the concurrence stated that "[t]he failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis adopted by the majority, as such an omission cannot be said to fall within 'the wide range of professionally competent assistance' demanded by the Sixth Amendment." *Id.* at 62 (citation omitted).

counsel, he must demonstrate that the advice was not 'within the range of competence demanded of attorneys in criminal cases.' "[55]

Although it is widely assumed that the Sixth Amendment does not require defense counsel to inform a client about the collateral consequences arising out of a guilty plea or a plea of nolo contendere, the Supreme Court has never directly spoken on the issue.[56] However, lower courts have split on the question of whether defense counsel's misadvice, as opposed to a lack of advice, on the collateral consequences of criminal activity may constitute constitutionally deficient performance under *Strickland*.[57]

B. Duty of Trial Courts During Plea Colloquy

Johnson v. Zerbst introduced the notion that trial courts have a duty to police the validity of a plea.[58] Given that *Johnson* was decided before the Sixth Amendment right to appointed counsel was affirmed in *Gideon v. Wainwright*,[59] the *Johnson* court necessarily found that:

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused . . . is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.[60]

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55. Tollett v. Henderson, 411 U.S. 258, 266 (1973) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

56. Chin & Holmes, *supra* note 6, at 706 ("The Supreme Court created the rule that the Due Process Clause requires the trial court to explain only the direct consequences of conviction. The extension of this principle to defense counsel's duties under the Sixth Amendment, although never passed upon by the Supreme Court, is nevertheless among the most widely recognized rules of American law."). Although the Supreme Court recognized the existence of the collateral consequences doctrine in *Padilla*, they expressly declined to review its continued legal validity. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) ("Whether that distinction [between direct and collateral consequences] is appropriate is a question we need not consider in this case because of the unique nature of deportation.").

57. Before *Padilla*, some courts have held that *misadvice* on immigration consequences might trigger the first prong of the *Strickland* test, although non-advice would not. *See* Chin & Holmes, *supra* note 6, at 708.

58. Johnson v. Zerbst, 304 U.S. 458, 469 (1938) ("If . . . the District Court finds from all of the evidence that petitioner . . . did not competently and intelligently waive his right to counsel, it will follow that the trial court did not have jurisdiction to proceed to judgment and conviction of petitioner . . . .").

59. 372 U.S. 335 (1963).

60. *Johnson*, 304 U.S. at 465.

The *Johnson* language seemingly implied that the trial court's duty to determine the validity of a plea only came into effect in situations where a defendant was not represented by counsel; in the absence of the assistance of defense counsel, the trial court was thus called upon to perform an equivalent screening function at plea colloquy. However, after the Supreme Court affirmed the right to appointed counsel in *Gideon*, the duty of trial courts to perform this screening function was still found applicable in the federal system. The Court held that "a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in [Federal Rule of Criminal Procedure] 11."[61] The Court further determined that "Rule 11 expressly directs the district judge to inquire whether a defendant who pleads guilty understands the nature of the charge against him and whether he is aware of the consequences of his plea."[62] Although the Federal Rules of Criminal Procedure do not govern state courts, the Supreme Court later held that "the prophylactic procedures of [Federal Rule of Criminal Procedure] 11 are substantially applicable to the States as a matter of federal constitutional due process."[63] The duty of trial courts to determine the validity of a proferred plea is therefore independent of defense counsel's duty to provide constitutionally effective assistance, and trial courts must perform this screening function whether or not a defendant is represented by counsel.

In *Boykin v. Alabama*, the Supreme Court found that the Due Process Clause requires that a guilty plea be both knowing and voluntary in order for it to be valid.[64] A guilty plea is not knowing if a defendant was not previously aware of the consequences of submitting a guilty plea,[65] but trial courts need only explain the direct,

61. McCarthy v. United States, 394 U.S. 459, 463–64 (1969).

62. *Id.* at 464.

63. Boykin v. Alabama, 395 U.S. 238, 247 (1969). The Court also incorporated the *Johnson* language, stating that "[i]t was error . . . for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Id.* at 242.

64. *Boykin*, 395 U.S. at 242–43. The voluntariness inquiry has traditionally been focused on whether a plea was "induced by threats (or promises to discontinue improper harassment), misrepresentation . . . , or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." Brady v. United States, 397 U.S. 742, 755 (1970). To the extent that this Note is not concerned by the threat of coercion in the plea process, the analysis here will be focused on the requirement that a plea be 'knowing.'

65. *Cf. Brady*, 397 U.S. at 755. A guilty plea will also fail this inquiry if a defendant does not know the nature of the charges against him or her, Henderson v. Morgan, 426 U.S. 637, 645 (1976), or if a defendant does not know the nature of the rights waived by a plea, *Boykin*, 395 U.S. at 243–44 (1969). However, neither of these analyses are pertinent here.

as opposed to the collateral, consequences of conviction.[66] However, in parsing the requirement that a guilty plea must be made knowingly, the Supreme Court has stated that the competency of defense counsel's legal assistance is pertinent.[67] Thus, the duty of trial courts at plea colloquy is informed by the duty of defense counsel before a defendant's submission of a guilty plea, as the latter will necessarily impact whether a plea is knowing.

C. What Padilla *Changed*

Before *Padilla*, both state and federal courts applied the collateral consequence doctrine[68] to ineffective assistance of counsel claims.[69] Indeed, as late as 2003, every federal circuit "to address the question ha[d] concluded that 'deportation is a collateral consequence of the criminal process and hence the failure to advise does not amount to ineffective assistance of counsel.' "[70] However, state courts were not similarly unified in their opposition to the *Padilla* proposition. Some states had recognized a *Padilla*-like duty on defense counsel[71] and some had passed statutes imposing a duty on trial courts to inform criminal defendants of deportation consequences at plea colloquy.[72]

Like the majority of state and federal courts before *Padilla*, Michigan did not recognize a cognizable ineffective assistance of

66. *Brady*, 397 U.S. at 755 ("A plea of guilty entered by one fully aware of the direct consequences . . . must stand unless induced by threats . . . , misrepresentation . . . , or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business . . . ."); *see also* United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971) ("We presume that the Supreme Court meant what it said when it used the word '*direct*'; by doing so, it excluded *collateral* consequences.").

67. McMann v. Richardson, 397 U.S. 759, 771 (1970).

68. *See, e.g.*, *Brady*, 397 U.S. at 755; *Sambro*, 454 F.2d at 922.

69. *See* Commonwealth v. Fuartado, 170 S.W.3d 384, 385–86 (Ky. 2005) (listing a diverse set of opinions which hold "that a defendant cannot as a matter of law succeed on a claim for ineffective assistance of counsel by showing that his attorney failed to inform him of the possibility of deportation following a guilty plea").

70. United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003) (citing all relevant circuit opinions at the time of the decision).

71. *See* People v. Pozo, 746 P.2d 523, 529 (Colo. 1987) ("[W]hen defense counsel in a criminal case is aware that his client is an alien, he may reasonably be required to investigate relevant immigration law."); *see also* People v. Soriano, 194 Cal. App. 3d 1470, 1482 (1987); People v. Padilla, 502 N.E.2d 1182, 1184–85 (Ill. App. Ct. 1987); Williams v. Indiana, 641 N.E.2d 44, 47–49 (Ind. Ct. App. 1995); Commonwealth v. Wellington, 451 A.2d 223, 224–25 (Pa. Super. Ct. 1982). *But see Pozo*, 746 P.2d at 526 ("The trial court is required to advise the defendant only of the direct consequences of the conviction to satisfy the due process concerns that a plea be made knowingly and with full understanding of the consequences thereof.").

72. *See* CAL. PENAL CODE § 1016.5 (West 2010); CONN. GEN. STAT. § 54-1j (West 2011); MASS. GEN. LAWS ch. 278, § 29D (2011); WASH. REV. CODE § 10.40.200 (2011).

counsel claim in situations where defense counsel did not inform a criminal defendant of the possible deportation consequences of a guilty plea or a plea of nolo contendere.[73] In *People v. Davidovich*, the Michigan Supreme Court upheld an appellate ruling that "immigration consequences of a plea are collateral matters that do not bear on whether the defendant's plea was knowing and voluntary . . . . [A] failure by counsel to give immigration advice does not render the lawyer's representation constitutionally ineffective."[74]

The *Padilla* holding, of course, changes the precedent set in cases like *Davidovich*. Although *Padilla* addresses only the duty of defense counsel at plea colloquy, the Michigan Supreme Court is now considering amendments to portions of the Michigan Court Rules that govern the trial court's duty to determine the validity of a submitted plea.[75] Although members of the Michigan Supreme Court recognize that *Padilla* does not mandate such an amendment,[76] that both of the initially proposed amendments addressed only the role of trial courts at plea colloquy signals that such a change may be prudent.

The recent developments in Michigan may serve as an early glimpse into how states may come into compliance with *Padilla*. Both the concurring opinion in *Padilla*[77] as well as the dissent in *Davidovich*[78] refer to the parallel duty of trial courts at plea colloquy. The duty of the trial court to gauge the knowing and voluntary nature of a plea is inherently dependent on the duty of defense counsel to inform a criminal defendant of the consequences, given that the trial court duty is predicated on the same language and arises from a case where the trial court was forced to act in the absence of defense counsel.[79] That the Michigan Supreme Court feels compelled to consider the possibility of amending criminal procedure rules to impose a duty on trial courts that is not required by

73. *See* People v. Davidovich, 618 N.W.2d 579, 582–83 & n.8 (Mich. 2000) (listing other courts which "declin[ed] to find ineffective assistance of counsel where a defendant was not informed of the immigration consequences of a guilty plea[,]" and finding no equivalent ineffective assistance claim existed in Michigan).

74. *Id.* at 582.

75. Proposed Amendments of Rules 6.302 and 6.610 of the Michigan Court Rules, ADM File No. 2010-16, 4 (Jun. 30, 2010), *available at* http://www.courts.michigan.gov/supremecourt/resources/administrative/2010-16-06-30-10.pdf ("Proposal A would require a judge to ask a noncitizen defendant and the defendant's lawyer if they have discussed possible risk of deportation as a consequence of a guilty plea . . . . Proposal B would require a judge to give general advice to any defendant . . . that a guilty plea by a noncitizen may carry immigration consequences.").

76. *Id.* at 4–5.

77. Padilla v. Kentucky, 130 S. Ct. 1473, 1491 (2010) (Alito, J., concurring).

78. *Davidovich*, 618 N.W.2d at 584–85 (Kelly, J., dissenting).

79. *See* Johnson v. Zerbst, 304 U.S. 458 (1938).

Padilla points to the notion that *Padilla* represents a major break in established precedent beyond its position on *Strickland*. If so, *Padilla* will be followed by a great deal of nationwide scrutiny of the proper roles of *both* defense counsel and trial courts at plea colloquy. Just as *Padilla* threatens to dissolve the collateral consequences doctrine, it also positions many jurisdictions to reconsider their criminal procedure rules and the language of the *Brady* line of cases.

III. AMENDING CRIMINAL PROCEDURE RULES NATIONWIDE

This Note proposes a set of reforms meant to bolster those protections extended by *Padilla*. As previously stated in Part II, the legal duty of trial courts at plea colloquy is affected by the legal duty of defense counsel before the admission of the plea. Thus, amending criminal procedure rules to require more robust judicial warnings of the potential immigration consequences to criminal conviction would serve to further the goals identified in *Padilla* and provide non-citizen defendants with more meaningful protection at plea colloquy.

I will outline the ways in which *Padilla* does not actually provide non-citizen defendants with the information and means to combat the submission of criminal pleas with devastating immigration consequences. In light of that reality, I will recommend that the federal system and all states amend their criminal procedure rules to require trial courts to warn defendants of the potential immigration consequences of a plea of guilty or nolo contendere. I will then address the suitability of judicial warnings as a vehicle for reform and present an argument in favor of the substance of the advocated language, responding to policy concerns and appealing to cost-benefit analyses when appropriate.

A. Why Padilla *Is Not Enough*

Padilla's holding, although progressive, does not go far enough to protect the rights of non-citizen defendants in the criminal justice system; standing alone, it may not have much of a practical effect.[80] *Padilla* presents three major obstacles that threaten to leave non-citizen defendants in the same, or similar, situation as that which came before the Court in *Padilla*.

80. *See* Darryl K. Brown, *Why* Padilla *Doesn't Matter (Much)*, 58 UCLA L. REV. 1393 (2011), *available at* http://ssrn.com/abstract=1792529.

In examining each of these obstacles in greater detail, I will attempt to show that *Strickland* claims are likely to grant only the most extraordinary defendants relief from uncounseled pleas, that the concept of a 'clear' case is illusory and open to future manipulation, and that other adverse immigration consequences are similarly situated to that of deportation.

1. The Strictness of *Strickland*

Padilla stands for the proposition that non-citizen defendants may be able to present a valid *Strickland* claim if their defense counsel does not adequately advise them about certain immigration consequences associated with pleading guilty. However, this holding does nothing but state that the collateral consequences doctrine will no longer stand as a bar to the mere raising of *Strickland* claims in such circumstances; in other words, *Padilla* can only provide as much protection to defendants as *Strickland* does.

Ideally, an ineffective assistance of counsel claim should be employed to police the defense bar so instances of clear incompetence are not allowed to stand. However, *Strickland* created a two-pronged test, such that findings of both deficient performance and prejudice are necessary.[81] Given the presumption of effectiveness under the first prong, along with the deference afforded to various tactical decisions that are more or less insulated from appellate review, the *Strickland* doctrine has been widely panned as being toothless.[82]

Courts have declined to find ineffective assistance of counsel in capital cases where defense counsel was drunk at trial and was severely underprepared;[83] defense counsel was asleep for the majority of trial, citing boredom as an excuse when questioned;[84] and defense counsel was seen using a multitude of drugs during and after trial was in session.[85] These cases serve to illustrate the inability of *Strickland* to give relief to defendants that suffer from even

81. Strickland v. Washington, 466 U.S. 668, 687 (1983).

82. *See* William S. Geimer, *A Decade of* Strickland's *Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1445–53 (1999); George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 546–47 (2004).

83. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not For the Worst Crime But For the Worst Lawyer*, 103 YALE L.J. 1835, 1843 & n.54 (1994).

84. Bruce Shapiro, *Sleeping Lawyer Syndrome*, NATION, Apr. 7, 1997, at 27.

85. Jeffrey L. Kirchmeier, *Drinks, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 426, 455–60 (1996).

egregiously ineffective assistance of counsel.[86] Although in recent years, the Supreme Court has re-invigorated *Strickland* by requiring attorneys to engage in modest amounts of pre-trial investigation, the impact of these modern holdings has mostly been found applicable to capital cases only; in all other aspects, *Strickland* claims remain as feeble as ever.[87]

Because the "reasonably competent attorney" standard remains vague and because courts have declined to adopt objective measures of competency as identified by organizations like the American Bar Association,[88] findings of attorney competency are subject to "excessive variation."[89] More troubling is the idea that the low bar of competency may be determined by the representation provided by appointed counsel. In states like Michigan, where budget concerns have lead to the evisceration of indigent defender services,[90] the idea that a reasonably competent attorney refers to a reasonably competent *appointed* attorney leads to obvious questions of what deficient performance means, if anything.[91]

Strickland further insulates incompetent performance because "the very enterprise of after-the-fact review is doomed to failure."[92] The threat of hindsight bias is especially pertinent to the *Strickland* analysis, as the Supreme Court explicitly instructs appellate courts to refrain from "intrusive post-trial inquiry" due to fears of "the

86. In all three cases, the court declined to find counsel ineffective either by way of *Strickland* or *United States v. Cronic*, 466 U.S. 648 (1984), the latter of which is meant to govern instances where ineffectiveness can be presumed under the assumption that no lawyer could have provided effective assistance under the circumstances. *See* Bright, *supra* note 83, at 1843 n.54; Kirchmeier, *supra* note 85, at 460; Shapiro, *supra* note 84, at 27.

87. *See* Robert R. Rigg, *The T-Rex Without Teeth: Evolving* Strickland v. Washington *and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 94–98 (2007).

88. *See Criminal Justice Standards*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html#1.1 (last visited July 5, 2011).

89. Strickland v. Washington, 466 U.S. 668, 707 (1984) (Marshall, J., dissenting).

90. *See Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 1, 11, 15, 52–53 (2009) [hereinafter *Hearing*].

91. *See Strickland*, 466 U.S. at 708 (Marshall, J., dissenting) ("It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case. Is a 'reasonably competent attorney' a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney?"); *see also* Klein, *supra* note 82, at 1452 ("If the norms are that counsel, due to overwhelming caseloads, typically fail to do much of what ought to be done to provide a competent and effective defense, then in any given case involving such failings, that counsel's work would *not* be deemed deficient. Is this all that the Sixth Amendment now stands for?").

92. Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 2 (2004).

distorting effects of hindsight."[93] In the absence of any objective benchmarks by which to evaluate an attorney's performance, this exhortation against intrusive inquiry leads reviewing courts towards a tendency of construing the performance as reasonable.[94] The possibility that confirmation bias will act against a defendant's interests is particularly likely in the context of guilty pleas, where often no record is made of an attorney's performance.[95]

Given the proven inability of *Strickland* to provide relief to defendants, it seems unlikely that *Padilla* will result either in the improvement of defense counsel in matters of immigration law or in appellate relief for non-citizen defendants who plead in reliance on the misadvice or non-advice of defense counsel. However, the Supreme Court now recognizes the notion that certain immigration consequences are important enough to affect the validity of submitted pleas. Although *Padilla* may not provide a robust remedy for non-citizen defendants, it nevertheless opens the door for consideration of other means of protecting these rights.

2. What Constitutes a 'Clear' Case?

Padilla's holding was deliberately limited to those "truly clear cases" in which a reading of the relevant statute or penal code would put defense counsel on notice of the possibility of deportation pursuant to a plea.[96] However, the determination of whether a case is clear or not will mostly depend on an individual attorney's familiarity with immigration law.

The Supreme Court labors under the notion that law school and continuing legal education requirements equip criminal attorneys with all the training they might need.[97] But criminal procedure is not a required course at most law schools, and it is well-documented that some criminal attorneys are woefully undereducated on matters pertaining to their everyday practice.[98]

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93. *Strickland*, 466 U.S. at 689–90.

94. Bibas, *supra* note 92, at 5–6 ("Deference and the presumption of effectiveness turn flexible review into almost no review at all, as courts can find some rationale for almost any behavior. When courts start out presuming that attorney actions are tactics rather than errors, the confirmatory bias leads them to interpret almost any action as tactical.").

95. *Id.* at 4–5.

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

97. *See* Connick v. Thompson, 131 S. Ct. 1350, 1361–62 (2011).

98. *See id.* at 1385–86 (Ginsburg, J., dissenting) ("Whittaker told the jury he did not recall covering *Brady* in his criminal procedure class in law school . . . . One can qualify for admission to the profession with no showing of even passing knowledge of criminal law and procedure.").

How, then, can it be expected that defense attorneys will have any familiarity with the particularized language of immigration statutes? A proficient immigration lawyer would find the threat of deportation to be clear in situations where a defendant is being charged with a crime of moral turpitude that is committed within five years of the defendant's date of admission, and for which a sentence of one year or longer may be imposed.[99] Although an immigration lawyer would be familiar with the elements that constitute a crime of moral turpitude, it is not clear that a criminal defense attorney would understand what crimes are covered under that classification. It is also unclear whether criminal defense attorneys would think to ask for immigration-specific information, like their client's date of admission.

By whose standard is the clearness of a case meant to be judged? Even if it is presumed that the Supreme Court meant to have clearness evaluated by a criminal defense attorney's perspective, the ambiguous standard of *Strickland* means that we have no means by which to judge how familiar a reasonably competent defense attorney is with immigration law. Although the Supreme Court meant to restrict the universe of cases in which a valid *Padilla* claim might be had, in assessing cases by the clearness of immigration consequences, the Supreme Court has instead only muddied the waters.

3. Deportation and Other Immigration Consequences

In refusing to speak on the continued relevance of the collateral consequences doctrine, and in identifying deportation as neither direct nor collateral in nature, the *Padilla* Court explicitly limits its holding to cases involving the threat of deportation. After a long examination of the history of immigration law, the *Padilla* Court concludes that deportation is a consequence of such significance that it must be taken into consideration in a defendant's plea calculus.[100] Undoubtedly, this is true for most, if not all non-citizen defendants. However, the majority in *Padilla* did not consider the impact that other adverse immigration consequences might have on non-citizen defendants.[101] In choosing not to address this issue,

99. *See* 8 U.S.C. § 1227(a)(2)(A)(i) (2006).

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

101. The majority did find that, "[w]hen the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of *adverse immigration consequences*." *Id.* at 1483 (emphasis added). It is unclear whether there is a duty on defense counsel to warn against the full panoply of

non-citizen defendants whose pleas leave them vulnerable to adverse immigration consequences other than deportation are therefore left without any legal recourse.[102]

It is evident that the imposition of other adverse immigration consequences follows just as clearly from the submission of a plea as did deportation in *Padilla*. For example, if a non-citizen defendant pleads guilty to a crime involving moral turpitude, the defendant is inadmissible;[103] if a non-citizen defendant pleads guilty to an aggravated felony committed within five years of admission, they are permanently barred from becoming naturalized.[104]

It is also unclear whether deportation is so unique as to defy comparison to other adverse immigration consequences. If a legal permanent resident is found to be inadmissible pursuant to a guilty plea, they are not automatically deported from the country.[105] However, if they leave the country for any reason, they will later be denied entrance if they attempt to return.[106] In situations where defendants must travel abroad for work or because of a personal emergency, a finding of inadmissibility might then be tantamount to deportation.

If a non-citizen is deported or denied entrance to the United States, they must wait for a number of years before they can legally re-enter.[107] In contrast, pleading to an aggravated felony might stand as a lifetime bar to naturalization;[108] even if denial of naturalization is found to be different in kind from either deportation or inadmissibility, the complete revocation of the possibility to naturalize would speak to the weight that this sanction would have on a non-citizen defendant's decision to plead.

B. Judicial Warnings

If the criminal justice system is to concern itself with the interest of non-citizen defendants at plea colloquy, it would be prudent for

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adverse immigration consequences, given the majority's exclusive use of the word "deportation" in its holding.

102. *See id.* at 1491 (Alito, J., concurring).

103. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006). However, there are two caveats: first, there is a petty offense exception, *id.* § 1182(a)(2)(A)(ii); and second, the defendant may yet qualify for a waiver of inadmissibility, *id.* § 1182(h).

104. *See* 8 U.S.C. § 1427(a)(3) (2006) (requiring a showing of "good moral character" as a prerequisite to naturalization).

105. *See* ROBERT JAMES MCWHIRTER, AMERICAN BAR ASSOCIATION, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS § 4.14, at 111 (2d ed. 2006).

106. *See id.*

107. *See* 8 U.S.C. § 1182(a)(9)(A)(i) (2006).

108. *See id.* § 1427(a)(3).

courts to begin issuing immigration warnings to non-citizen defendants at plea colloquy. Judicial warnings are not mandated by the *Padilla* holding; however, giving the indulgent nature of the *Strickland* doctrine, judicial warnings may be the only way to protect non-citizen defendants from making completely uncounseled decisions.

1. Proposed Reform

This Note's proposed reform was initially drafted to mirror the Michigan Court Rules,[109] but the substantive portions of the reform can easily be adapted to correspond to the criminal procedure rules of other jurisdictions. Because each state has the freedom to adopt and further modify its own criminal procedure rules,[110] the rules governing the admission of pleas for each state will vary from jurisdiction to jurisdiction. For the sake of simplicity, this Note's reform will be worded generally, so as to allow compatibility with any system.

The reform proposed here would amend criminal procedure rules that govern the admission of pleas of guilty or nolo contendere. Amendments would generally read as follows:

> Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands that a plea of guilty or nolo contendere by a non-citizen may result in removal, denial of admission to the United States, denial of naturalization, or an otherwise adverse change in legal status under the laws of the United States. Either upon request or according to the discretion of the court, the court shall allow the defendant or defendants a reasonable amount of time to consider the appropriateness of the plea in light of the advisement.

109. *See generally* MICH. CT. R. 6.302 (stating Michigan criminal procedure rule governing plea colloquy).

110. Despite this freedom, "[r]oughly half of the states have court rules of criminal procedure or statutory codes of criminal procedure that borrow heavily from the Federal Rules." Jerold Israel, *Federal Criminal Procedure as a Model for the States*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 138 (1996). Although "the one source most frequently emulated is the Federal Rules of Criminal Procedure[,]" other common models of criminal procedure are the American Law Institute's Code of Criminal Procedure and the American Bar Association's Standard for Criminal Justice. *Id.* at 137–38.

Where possible, I would advise that the generic warning above be tailored to the individual charges that form the basis of the plea agreement. Trial courts normally will not be privy to the exact nature of plea agreements, but at least in circumstances where the pled-to charges are known by the court to carry specific immigration consequences, warnings that name the specific consequences attached to the charges in the plea agreement would be more appropriate than the general warning given above.

In cases that allege a failure to warn, the burden of proof would be on the government to provide documentation otherwise. The appropriate remedy would be to allow defendants to retract their pleas of guilty or nolo contendere.

2. Why Judicial Warnings?

In his *Padilla* concurrence, Justice Alito identified judicial warnings as a potential vehicle for ensuring that non-citizen defendants plead in full knowledge of the possibility of deportation.[111] Many states currently require judges to give some form of judicial warning as to immigration consequences during plea colloquy[112] and at least one state is now considering the possibility of implementing similar warnings in light of the *Padilla* decision.[113]

Because there exists a concurrent duty on defense counsel and trial courts to ensure the validity of a defendant's plea, it seems eminently rational to employ judicial warnings in a post-*Padilla* world. Although the duty on defense counsel to provide effective assistance is not interchangeable with the duty on the trial court to police the knowing and intelligent nature of a plea, they both serve to safeguard similar interests. Judicial warnings cannot serve as a *substitute* for the effective assistance of counsel, but their implementation can rectify many of the weaknesses that plague the stand-alone *Padilla* holding.[114]

Given the trend of *Strickland* over the past decades, it seems clear that *Padilla*'s holding will do little to improve the representation that non-citizen defendants are afforded in the criminal justice system. If we mean to craft an actual standard by which non-citizen defendants are afforded some protection from pleading in

111. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1491 (2010) (Alito, J., concurring).

112. *See id.*

113. Proposed Amendments of Rules 6.302 and 6.610 of the Michigan Court Rules, ADM File No. 2010-16, 4 (Jun. 30, 2010), *available at* http://www.courts.michigan.gov/supremecourt/resources/administrative/2010-16-06-30-10.pdf.

114. *See supra* Part III.A.

ignorance of immigration consequences, it makes more sense to pin the burden of responsibility on courts. Judges, who can avail themselves of the court's resources and who are ostensibly more familiar with the various branches of civil law, are inherently better positioned to instruct defendants on aspects of immigration law. This is a function that judges served quite ably until recently. For many decades, judges were allowed to submit motions pursuant to criminal sentencing that would prevent the deportation of a non-citizen defendant.[115] Although Congress elected to remove this sort of judicial discretion from the deportation calculus, judges should still be proficient at applying immigration law in a criminal context.

Moreover, it is important to recall that the Supreme Court remanded the *Padilla* case for a finding on the prejudice prong of the *Strickland* test.[116] *Hill v. Lockhart* stands for the proposition that Padilla might not be able to meet the prejudice prong standard.[117] The question is not just about whether Padilla would have pled guilty, in full knowledge of the possibility of deportation; the reviewing court must also take into account "predictions of the outcome at a possible trial," such that Padilla may have to show that he would not have been convicted of the crime at trial.[118]

Proponents of defendants' rights should note that this counsels heavily in favor of judicial warnings, as opposed to the *Strickland* remedy fashioned by the *Padilla* Court. Imagine a non-citizen defendant charged of a crime for which deportation is mandated. If that defendant is not warned of the immigration consequences of his plea, there may still be no relief under *Padilla* if the reviewing court determines that the defendant would have lost at trial. However, if that defendant is warned of such consequences before a plea is entered, the defendant will be able to opt into trial and take a chance on winning an acquittal. Although courts frown upon the idea of viewing verdicts as products of chance, the reality is that they are. Given the choice, non-citizen defendants would likely prefer to risk their chances at trial than have a reviewing court summarily adjudge that their legal case was not strong enough to merit *Strickland* relief.

Appellate review of failure-to-warn claims would also provide a more workable standard for courts to apply and be more protective of a non-citizen defendants' interests. Failure-to-warn claims are

115. *See supra* Part I.B. (discussing Judicial Recommendations Against Deportation).

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

117. *See* 474 U.S. 52, 58–59 (1985) (holding that defendant must still show that "there is a reasonable probability" that the he "would have insisted on going to trial").

118. *Id.* at 59–60.

inherently less complex than *Strickland* claims; an appellate court need only determine, based on the plea colloquy record, whether a defendant received the necessary warning. The presence of an objective standard means that failure-to-warn claims are less vulnerable to various psychological biases and the inevitable error introduced by the elaborate hypothetical reasoning required by the *Strickland* test. Because such claims are easier to implement in the first instance and because a failure-to-warn is easier to remedy on appeal, non-citizen defendants will be able to gain access to vital information about immigration consequences in a more uniform manner.

Moreover, if judicial warnings are implemented, judges may become more open to the possibility of authorizing defense counsel to use court fees to retain immigration attorneys. Although judicial warnings alone may not allow non-citizen defendants ample time to consider their plea in light of new information, the notice that such warnings have on *defense counsel* may serve to facilitate timely counsel-client conversations about immigration consequences.[119]

The proposed judicial warnings are also meant to be relatively exhaustive; because they are not restricted only to clear cases involving deportation, they will provide more protection for a larger class of defendants. Besides being more defendant-friendly, the proposed judicial warnings will also promote uniform implementation and ease of adjudication at the appellate level. Because the proposed reform does not differentiate based on the clearness of the case or the type of immigration consequence, courts will know exactly when warnings are required and when a failure to warn merits a withdrawal of a plea.

Judicial warnings have already been shown to be easily implemented. Even before the Court announced the *Padilla* holding, several states required similar judicial warnings to be given at plea colloquy.[120] In California, for example, warnings about immigration consequences have been in place since 1985.[121] One need only look at the example set by similarly situated states to determine that judicial warnings are a workable solution.

119. *See* Pinard, *supra* note 9, at 678 ("The relative lack of *lawyer* focus on these components may well correlate to the lack of attention that trial courts have afforded these components . . . .").

120. *See Padilla*, 130 S. Ct. at 1491 (Alito, J., concurring).

121. CAL. PENAL CODE § 1016.5 (West 1985).

C. Counter-Arguments

In light of *Padilla*, some states are now considering amending their criminal procedure rules to include judicial warnings of the immigration consequences of entering a plea of guilty or nolo contendere. In particular, the Michigan Supreme Court's call for amendments to the state's court rules has resulted in a number of responses from various sectors of the Michigan bar. Some of the criticisms lodged against the proposals in Michigan are also relevant to the reform suggested by this Note; I will thus rely in part on the debate in Michigan to discuss why such a reform is necessary.

1. Adverse Immigration Consequences

Padilla concerned merely the threat of deportation; even if a judicial warning is to be implemented alongside *Padilla*, why should such a warning inform non-citizen defendants about adverse immigration consequences other than deportation? A more focused judicial warning would tend to be more successful at actually putting defendants on notice. Given these concerns, why should proposed reforms include language that warns about the "removal, denial of admission to the United States, denial of naturalization, or an otherwise adverse change in legal status under the laws of the United States"?[122]

Critics of broad judicial warnings argue that they should "limit[] the inquiry specifically to the deportation consequences of a guilty plea, which was the only issue before the Court in *Padilla*, rather than expanding this inquiry to encompass other collateral matters . . . ."[123] Although the majority in *Padilla* held only that "counsel must inform her client whether his plea carries a risk of deportation,"[124] the majority opinion also held that in ambiguous cases, a defense attorney "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."[125] Here, the implication is that the lynchpin of *Padilla*'s holding turns on the *clearness* that an adverse immigration consequence would be imposed, instead of the *type* of adverse immigration consequence imposed.

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122. *See supra* Part III.B.1 (quoting language from this Note's proposed reform).

123. Proposed Amendments of Rules 6.302 and 6.610 of the Michigan Court Rules, ADM File No. 2010-16, 4 (Jun. 30, 2010), *available at* http://www.courts.michigan.gov/supremecourt/resources/administrative/2010-16-06-30-10.pdf.

124. *Padilla*, 130 S. Ct. at 1486.

125. *Id.* at 1483.

It may be argued that this language merely implies that warning of adverse immigration consequences is only required in ambiguous cases to the extent that it serves as a proxy to warn about deportation specifically.[126] However, that reading of the Court's language creates an oddly over-inclusive program; if the Court is concerned with deportation to the exclusion of all other immigration consequences, they would ostensibly only ask defense attorneys to advise clients that pending criminal charges may carry a risk of deportation. That the Court relies so heavily on the word deportation[127] in their holding signifies only that they meant to refer to consequences other than deportation when using the phrase "adverse immigration consequences."

If defense attorneys have a duty to give clients general advice on the immigration consequences of pleading, then judicial warnings should similarly be required to warn defendants about a broader set of immigration consequences.

2. Non-Citizen Defendants Only?

The intent is that the proposed judicial warning will be read to all defendants, regardless of their legal status. Some may criticize this approach as being overbroad, preferring any such warnings to instead be targeted to non-citizen defendants.[128] However, restricting warnings to non-citizen defendants could result in four major drawbacks: (1) it could encourage racial profiling, (2) it could interfere with attorney-client privilege, (3) it could expose non-citizen defendants to greater vulnerability, and (4) differentiating between citizen and non-citizen could result in an impracticable standard.

We must first ask how such a standard would be applied in practice; how would courts actually determine which defendants are non-citizens? It seems possible, if not necessarily inevitable, that such language would direct judges to engage in blatant racial profiling during plea colloquy. Although in limited circumstances, racial profiling has been deemed to have satisfied the rational basis

126. *See* Comment of Timothy A. Baughman, Wayne Cnty. Office of the Prosecuting Attorney, to Corbin Davis, Clerk, Mich. Supreme Court 2 (Sept. 15, 2010) (commenting on ADM 2010-16, the Proposed Amendments of MICH. CT. R. 6.302 and 6.610).

127. *Id.* at 1–2.

128. *See* Proposed Amendments of Rules 6.302 and 6.610 of the Michigan Court Rules, ADM File No. 2010-16, 4 (Jun. 30, 2010), *available at* http://www.courts.michigan.gov/supremecourt/resources/administrative/2010-16-06-30-10.pdf. To the extent that fears about the costs inherent in such warnings are merely red herrings, they will be addressed in greater detail in Part III.C.5 of this Note.

standard in immigration cases,[129] racial profiling has been more limited in the criminal context.[130] Because plea colloquy is governed by the rules of criminal procedure, the importation of such racial profiling to the criminal context might be prone to legal attack.

Racial profiling would also be both an over- and under-inclusive means of warning non-citizens of immigration consequences. Racial profiling in the immigration context often leads to an intense focus on those of perceived Latino descent;[131] judges would likely base their determinations of citizenship at least partially on whether a defendant appeared to be Latino. This would be over-inclusive inasmuch as not all Latinos are non-citizens, and under-inclusive because such warnings would not be given to non-citizens of other races. Here, the fear of under-inclusive warnings is especially profound, given that the purpose of amending plea colloquy rules is to allow non-citizen defendants to make a knowing and intelligent plea before any adverse immigration consequences attach.

If warnings are directed only to non-citizen defendants, and if such warnings avoid the pitfalls of racial profiling, courts will then be forced to inquire about a defendant's legal status at plea colloquy.[132] However, asking either a defense attorney or a defendant about the defendant's legal status would be extremely inadvisable.

If non-citizen defendants state their legal status on the record in a court proceeding, they may run the risk of leaving themselves open to greater vulnerability in future immigration proceedings. A defendant need not plead to, or be convicted of, a criminal offense in order to be open to adverse immigration consequences; "[t]he law states that a person who 'admits the essential elements' of a crime involving moral turpitude even though he or she does not

129. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975) (holding that "the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor" in conducting an immigration stop).

130. *See* Terry Freiden, *Ashcroft Tells Caucus He's Committed to Ending Racial Profiling*, CNN POLITICS (Feb. 28, 2001), http://articles.cnn.com/2001-02-28/politics/ashcroft.profiling_1_judge-ronnie-white-ashcroft-presidential-vote?_s=PM:ALLPOLITICS (noting Attorney General John Ashcroft's intention to "'determine the extent and nature of racial profiling'" in the criminal context, and to "take steps to end the practice of police stopping individuals based on their race").

131. *See* Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting From INS and Local Police's Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75, 85 (2005).

132. A defendant's legal status is sometimes included in their presentencing investigation report. However, such information may not be gathered in every case or made available to the court before sentencing because legal status is not an element of any state criminal offense.

have a final conviction is inadmissible."[133] Non-citizen defendants are thus deterred from answering questions about their legal status in a full and complete fashion.[134] But if a defendant refuses to answer such a question honestly, why should the court not consider its duty discharged? Actors in the criminal justice system should not attempt to expose a certain class of defendants to greater legal risks in proceedings that do not concern the underlying criminal charge. *Padilla* acknowledges the importance that certain immigration consequences may have on a defendant's decision to plead guilty; it would thus be absurd to supplement the protections of that ruling by asking courts to put defendants to a "Sophie's Choice" of remaining uninformed or identifying themselves to Immigration and Customs Enforcement.

Courts should also refrain from asking defense counsel about their client's legal status. Conversations between defense counsel and defendant about a client's legal status are protected by attorney-client privilege and should not be disclosed;[135] "Due process concerns should outweigh the court's or prosecutor's need for court efficiency in a curtly-worded amendment."[136]

Because it would be inappropriate for the court to ask either a defendant or defense attorney to divulge the defendant's legal status, and because the court would have no other means by which to determine a defendant's legal status in a legally appropriate manner, judicial warnings should be given to all defendants. Asking courts to make these determinations would "place[] an unnecessary burden on judicial decision-making and resources, by requiring the trial court to make a citizenship determination of every criminal defendant."[137] Given the complexities of citizenship determination, which often extend beyond the simple question of birthplace,[138] the cost-benefit analysis obviously runs in favor of extending judicial warnings to all defendants.

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133. MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS 112 (2003).

134. *See* Comment of Aaron W. Todd, Chief Counsel of the Mich. and Ohio Office of the Dep't of Homeland Sec., to Corbin R. Davis, Clerk, Michigan Supreme Court 1 (Sept. 21, 2010) (commenting on the Proposed Amendments of MICH. CT. R. 6.302 and 6.610).

135. *See* Comment of Cynthia M. Nuñez, Walker & Assoc.'s of Mich., P.C., to Corbin R. Davis, Clerk, Mich. Supreme Court 3 (Sept. 30, 2010) (commenting on Proposed Amendments of MICH. CT. R. 6.302 and 6.610); Todd, *supra* note 134, at 1.

136. *See* Nuñez, *supra* note 135, at 3.

137. Todd, *supra* note 134, at 2.

138. Citizenship may "depend on whether [a defendant] derived or acquired citizenship based upon their parents' (or grandparents') activities decades prior." *Id.* at 1; *see also* Nguyen v. INS, 533 U.S. 53, 73 (2001) (holding that a federal statute, which imposed different requirements for a child's acquisition of citizenship depending upon whether the citizen

3. Notice

Another concern is that defendants do not currently pay attention to the rote nature of warnings at plea colloquy, and that non-citizen defendants therefore would not actually be put on notice of the immigration consequences they might face. Inasmuch as the criticism against the routine itself is valid, it applies to the entirety of judicial warnings at plea colloquy as well as other stock warnings like *Miranda* warnings. However, our legal system operates under the belief that both judicial warnings and *Miranda* warnings cure the harms they are designed to prevent. Society at large certainly has contributed to individual understanding of the rights afforded to everyone in the criminal justice system, perhaps more so than individual courts or police officers; but regardless of the source of such knowledge, there must be a basis in the law that afford individuals protection before dissemination of knowledge becomes meaningful.

Even if judicial warnings may not immediately put non-citizen defendants on notice about the possibility of adverse immigration consequences, their inclusion will certainly act to put defense counsel on notice. The real benefit of judicial warnings may lie in signaling to defense counsel that they should inquire about a client's legal status and attempt to engage in conversation about the possibility of immigration consequences. *Padilla*, by itself, will not force the hand of most defense attorneys who are well aware that most *Strickland* claims are futile. However, if language about immigration consequences is regularly injected into the plea colloquy process, defense attorneys will increasingly be reminded that immigration consequences are too important to ignore.

4. Cost-Benefit Analysis

Because *Padilla* focuses on the role of defense counsel, critics argue that amending criminal procedure rules to include judicial warnings would be unnecessarily costly and time-consuming.[139] However, given the routine nature of judicial warnings, it is unclear how the inclusion of a warning on adverse immigration consequences might entail more than a negligible increase in time or

parent was the child's mother or father, is consistent with the Due Process Clause of the Fifth Amendment).

139. *See* Proposed Amendments of Rules 6.302 and 6.610 of the Michigan Court Rules, ADM File No. 2010-16, 4 (Jun. 30, 2010), *available at* http://www.courts.michigan.gov/supremecourt/resources/administrative/2010-16-06-30-10.pdf.

resources.[140] Certainly several states nationwide have implemented such warnings before *Padilla* without being burdened with overwhelming systemic costs.[141] This is especially true for states like California,[142] who have maintained immigration warnings for decades despite having a non-citizen population that far outstrips that of states like Michigan.[143]

That states with large non-citizen populations tend to incorporate such warnings into their criminal procedure rules tends to demonstrate that such judicial warnings may actually represent a net *savings*.[144] *Padilla*'s holding would allow an entire class of defendants to raise ineffective assistance of counsel claims. Even if they are not granted, as most *Strickland* claims are not, these claims would still represent a significant cost in terms of time and money.[145] However, the inclusion of judicial warnings at plea colloquy could convert *Padilla* claims to instances of harmless error; this could serve to both discourage the filing of *Padilla* claim in the first instance, or to make appellate rulings less complicated. Some states have held that a failure to warn does not undermine a valid *Padilla* claim, or convert it to instances of harmless error. But in Florida, at least, the key distinction was that the judicial warning was worded with the permissive 'may.'[146] However, the reform posed by this Note allows for adjustments according to the pled-to offense[147]; in situations where the threat of deportation is sufficiently clear, a judge should edit the language accordingly.

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140. Comment of Criminal Def. Attorneys of Mich., to Corbin Davis, Clerk, Mich. Supreme Court 2 (Sept. 30, 2010) ("This routine statement during plea colloquy does not appear to appreciably waste time or resources and facilitates a knowing, understanding and voluntary plea.").

141. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1491 (2010) (Alito, J., concurring) (stating that twenty-eight states and the District of Columbia have adopted rules that require some sort of judicial warning of immigration consequences).

142. *See* CAL. PENAL CODE § 1016.5 (West 2011).

143. U.S. CENSUS BUREAU, NATIVITY STATUS AND CITIZENSHIP IN THE UNITED STATES: 2009, 5 (2009), *available at* http://www.census.gov/prod/2010pubs/acsbr09-16.pdf (stating that California has a non-citizen population of 14.6%, with an overall state population of 36,962,000, whereas Michigan has a non-citizen population of 3.2%, with an overall state population of 9,970,000).

144. *See id.*; ARIZ. R. CRIM. PROC. 17.2(f) (West 2011); FLA. R. CRIM. PROC. 3.172(c)(8) (West 2011); N.M. R. CRIM. PROC. 5-303(F)(5) (West 2011); TEX. CODE CRIM. PROC. ANN. Art. 26.13(a)(4) (West 2011).

145. *Hearing*, *supra* note 90, at 118–23 (written testimony of Dawn Van Hoek, Chief Deputy Director, Michigan's State Appellate Defender Office).

146. Flores v. Florida, 57 So. 3d 218, 221 (Fla. Dist. Ct. App. 2010).

147. *See supra* Part III.B.1 ("Where possible, I would advise that the generic warning above be tailored to the individual charges that form the basis of the plea agreement.").

Conclusion

The *Padilla* opinion is undoubtedly one of the most important criminal procedure cases handed down in recent history because of its potential impacts on the collateral consequences doctrine. Although the contours of what *Padilla* means have not yet been determined, the opinion implies that at least one 'collateral' civil consequence will have direct bearing in the context of criminal law. As lower courts debate the scope of *Padilla*'s holding, it is clear that the unique circumstances of indigent defense nationwide mandate a change in criminal procedure at plea colloquy.

The holding of *Padilla* did not suggest a functional remedy to the problem posed to non-citizen defendants at plea colloquy, particularly those who have appointed counsel. Although *Padilla* does not mandate the implementation of judicial warnings, their implementation could help address many of the open questions left in the wake of the *Padilla* holding. Judicial warnings, although not a cure-all, would be better suited to inform and protect all non-citizen defendants of their rights. This reform could also serve to make implementation of *Padilla* more feasible in state courts across the country. Until a time comes when *Strickland* has been scrapped and reworked into a more feasible standard, judicial warnings represent the best compromise that our criminal justice system can offer.