PADILLA V. KENTUCKY: HOW MUCH ADVICE IS ENOUGH?

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In Padilla v. Kentucky*, the Supreme Court declared that defense attorneys must give advice to noncitizen defendants regarding the risk of deportation in order to meet the constitutional standard for effective assistance of counsel. Acknowledging the confusing nature of immigration law, the Court stated that when the law is not straightforward, a criminal defense attorney need do no more than advise a noncitizen client that a conviction may carry a risk of adverse immigration consequences. However, when the deportation consequence is clear, the attorney must give similarly clear advice. Some lower courts have chipped away at* Padilla*'s holding, allowing vague advice—either from the defense attorney or from other sources—to be deemed effective even in cases where* Padilla *would seem to require more specific advice. In treating vague defense attorney advice as reasonable, or allowing generic warnings from the court or arresting officers to "cure" a lack of immigration advice from defense attorneys, courts are circumventing* Padilla*'s demand for specific advice in situations where the consequences of a guilty plea are clear, and thus undermining the underlying concerns of the Supreme Court's reasoning. Especially in cases where deportation is virtually mandatory, receiving general advice that there is a "risk" of deportation leaves a client with the impression that there is a chance to stay in the country. This impression could have a serious effect on the defendant's ultimate decision to plead guilty or go to trial. Furthermore, these courts' approach gives little incentive for defense attorneys to look into the immigration consequences of their clients' convictions. This Note argues that courts should not allow generalized and unclear advice to meet the standard for effective assistance of counsel when the immigration consequences are actually clear-cut, because doing so undercuts the purpose of the* Padilla *decision and is unhelpful to noncitizen clients.*

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Introduction

In 2006, Maria Taganeca, a native of Fiji and long-time U.S. lawful permanent resident (LPR), was arrested while driving with a friend who was in possession of narcotics.[1] Although she herself had no drugs on her, she was charged with possession of a controlled substance with intent to deliver.[2] Her attorney did not inform her that the crime qualified as a form of drug trafficking, an aggravated felony for which she would be mandatorily deported.[3] She pled guilty and was not sentenced to any prison time, but Immigration and Customs Enforcement detained her and initiated removal proceedings.[4] She filed for postconviction relief, arguing that her attorney's advice was ineffective because he did not advise her of the immigration consequences of her plea.[5] The court vacated her conviction and allowed her to plead guilty to simple possession, sparing her from deportation.[6]

Taganeca had graduated from high school, enrolled in community college, and held a series of steady jobs.[7] She was the primary caregiver for her mother, who was a wheelchair-bound diabetic; her father, who suffered from chronic illnesses; and her uncle, who was battling throat cancer.[8] Both the relatively minor gravity of her conduct and her personal history made Taganeca a particularly sympathetic example of the impact of uninformed decisions in the criminal justice system on immigrants—surely most would agree she did not

[1] Brief for Amici Curiae Asian American Justice Center et al. in Support of Petitioner at 14, Padilla v. Kentucky, 559 U.S. 356 (2010) (No. 08-651) (discussing Taganeca's personal history and arrest).

[2] *Id.* at 14–15.

[3] *Id.* at 15.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id*. at 14.

[8] *Id.*

deserve to be deported.[9] Nevertheless, the postconviction relief she ultimately received rested on dubious constitutional foundations until the Supreme Court's landmark *Padilla v. Kentucky* decision in 2010.[10] Even today, however, the amount of advice she should have received from her attorney given her circumstances remains in question.

In *Padilla v. Kentucky*, the Court examined the case of Jose Padilla, an LPR from Honduras, who was accused of transporting almost 1000 pounds of marijuana in a truck that he owned and operated.[11] After his indictment for a variety of serious drug offenses,[12] his counsel told him that he "did not have to worry about immigration status since he had been in this country so long."[13] In reality, his subsequent guilty plea made deportation "virtually mandatory."[14] Like Taganeca, Padilla filed a motion to vacate his plea because of his attorney's misadvice, but the court denied the motion.[15] On appeal, the Supreme Court of Kentucky deemed collateral consequences of guilty pleas, including immigration consequences, "outside the scope of the guarantee of the Sixth Amendment right to counsel."[16] In a landmark decision, the Supreme Court of the United States disagreed.[17]

Recognizing that changes in immigration law have made deportation "practically inevitable" for noncitizens who plead guilty to certain crimes, the Court emphasized the heightened importance of accurate legal advice for noncitizen criminal defendants.[18] Holding that "counsel must inform her client whether his plea carries a risk of deportation,"[19] the Court drew a distinction between cases where the consequences of a particular conviction are clear-cut and cases where the law may be more confusing:

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[9] *See id.* at 15–16 (noting that the postconviction relief was critical for Taganeca's family because she was the primary caregiver for her chronically ill family members).

[10] *See id.* at 16 (highlighting the importance of the Court's ruling in *Padilla* for securing legal advice to noncitizen defendants).

[11] Petition for a Writ of Certiorari at 2, *Padilla*, 559 U.S. 356 (No. 08-651).

[12] Padilla was indicted for misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia, and felony trafficking in marijuana. *Id.* at 3. He eventually pled guilty to a ten-year sentence, including five years of incarceration followed by five years of probation. *Id.*

[13] *Id.*

[14] *Padilla*, 559 U.S. at 359.

[15] Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd*, 559 U.S. 356 (2010).

[16] *Id.* at 485.

[17] *Padilla*, 559 U.S. at 366.

[18] *Id.* at 363–64 (noting that under 8 U.S.C. §§ 1101(a)(43)(B) and 1228, with limited exceptions, discretionary relief is not available for offenses related to trafficking in a controlled substance).

[19] *Id.* at 374.

> When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.[20]

The Court's decision demonstrated its dual concerns: providing defense attorneys with the proper incentives to research immigration issues and discuss them with their clients, and ensuring noncitizen clients will ultimately get accurate advice tailored to their particular situation whenever possible.

Unfortunately, despite *Padilla*'s strong language, ambiguity in the law remains. Taganeca, who received no advice regarding the deportation consequences of her conviction, and Padilla, who received affirmative misadvice from his criminal defense attorney, obviously suffered ineffective assistance of counsel under the *Padilla* standard. However, in cases where attorneys or other actors in the criminal justice system give *some* advice about immigration consequences, it becomes much more difficult to determine what *Padilla* requires. Some lower courts have considered vague advice—either from the defense attorney or from other sources—to qualify as effective, even in cases where *Padilla* requires more specific advice.[21] These lower court decisions claim to abide by the *Padilla* mandate but seem to disagree with *Padilla* about what constitutes clear advice.[22] This Note argues that courts should not allow generalized advice to meet the standard for effective assistance when the immigration consequences are actually clear-cut, because doing so undercuts the purpose of the *Padilla* decision and is unhelpful to noncitizen clients.

When courts treat vague defense attorney advice as reasonable, or when they allow generic warnings from the court itself or from arresting officers to compensate for a lack of immigration advice from defense attorneys, these courts set an unacceptably low bar for the specificity of advice required in situations where the consequences of a conviction are clear. Especially in cases where deportation is virtually mandatory, receiving general advice that there is a "risk" of deportation leaves a client with the impression that she may still be able to remain in the country. This impression could seriously affect the defendant's ultimate decision about whether to plead guilty or go

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[20] *Id.* at 369 (footnote omitted).

[21] *See infra* Part II.A (describing cases where vague advice was deemed sufficient to meet the *Padilla* standard despite the fact that the immigration consequences of the conviction were clear).

[22] *See infra* Part II.A (describing cases where courts apply *Padilla* but require less specific advice from defense attorneys than *Padilla* mandates).

to trial.[23] Furthermore, this approach allows defense attorneys to meet their constitutional obligation by giving vague advice or simply relying on the court or arresting officers to provide their clients with the necessary information, thus giving the attorneys little incentive to research and consider the significant immigration consequences of their clients' potential convictions.[24] *Padilla* recognizes that defense attorneys are often the last line of defense against deportation for noncitizen clients and seeks to incentivize doing whatever is feasible to help their clients avoid such a drastic collateral consequence of conviction.[25]

As one would expect given the groundbreaking nature of the *Padilla* decision, much scholarly work has focused on its implications. Some literature focuses on the criminal justice system's approach to immigration before *Padilla* and the ways it has changed since.[26] Other papers focus on the constitutional implications of the decision, attempting to reconcile the Court's historical formalism regarding the distinction between civil and criminal penalties with its current realism,[27] or arguing that deportation *is* punitive and merits the same constitutional protections that exist in the criminal justice system.[28] Other academics focus on the deficiencies of the *Padilla* decision, arguing either that it does not go far enough[29] or that, as interpreted by some courts, its breadth makes criminal defense attorneys' jobs too

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[23] *See infra* Part III.B (discussing the possible effects of risk language on clients' decision-making process).

[24] *Cf. infra* notes 42–48 and accompanying text (describing the importance of defense attorneys in helping noncitizen defendants avoid deportation).

[25] *See infra* Part I.A (describing the importance of defense attorneys as a last line of defense against deportation for noncitizen criminal defendants).

[26] *See, e.g.*, Kara Hartzler, *"Do I Have to Learn What a Crime of Moral Turpitude Is?": The World Before and After* Padilla v. Kentucky, 24 FED. SENT'G REP. 66 (2011) (detailing the author's personal observations as to immigration training pre- and post-*Padilla*).

[27] *See* Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2011) (analyzing how the Court's new recognition of the close link between deportation and the criminal justice system impacts its due-process jurisprudence).

[28] *See* Anita Ortiz Maddali, Padilla v. Kentucky*: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1 (2011) (arguing that deportation should be considered punishment and advocating for even more procedural safeguards for immigrants than those guaranteed by *Padilla*).

[29] *See* Maurice Hew, Jr., *Under the Circumstances:* Padilla v. Kentucky *Still Excuses Fundamental Fairness and Leaves Professional Responsibility Lost*, 32 B.C. J.L. & SOC. JUST. 31 (2012) (arguing that the Court should have created a bifurcated professional responsibility standard that differs for public defenders and private criminal defense attorneys).

difficult.[30] None, however, have examined the growing body of conflicting interpretations of *Padilla* by lower courts, which vary drastically in terms of the accuracy and specificity of advice required. While an article grappled with the scope of *Padilla* soon after it was decided,[31] enough time has now passed to thoroughly examine how lower courts have applied the decision and analyze whether or not they have adhered to it properly. This analysis could guide practicing defense attorneys and courts toward ensuring that noncitizen defendants receive the effective assistance of counsel the Supreme Court envisioned when deciding *Padilla*.

Part I of this Note provides a close analysis of the *Padilla v. Kentucky* decision and its important caveat regarding the degree of clarity needed to meet the *Strickland v. Washington*[32] standard for effective counsel. It includes an analysis of the text of the actual decision as well as the briefs of the parties and the multiple amici curiae. In laying out the driving forces behind the Court's decision, Part I seeks to demonstrate why specific and clear advice, coming directly from the defense attorney, is crucial to meet the *Padilla* standard as the Court envisioned it.

Part II of the Note examines the landscape of lower court decisions that have been decided after *Padilla*. It discusses examples where lower courts have misapplied the *Padilla* standard, including when they have accepted vague advice from defense attorneys and from other actors in the judicial process. These cases demonstrate that some lower courts apply *Padilla* in a way that sets the bar for specificity of advice below what *Padilla* actually requires. Part II also describes instances in which courts have demanded that attorneys give more precise advice, demonstrating that such advice can be given effectively. In these cases, the lower courts did not set unrealistic expectations for defense attorneys. Instead, they focused on the reality of noncitizen defendants' fates and emphasized that brief and unsubstantial warnings often left those defendants with insufficient knowledge regarding the mandatory deportation that would result from their pleas. These decisions properly incentivize defense attor-

[30] *See* Colleen A. Connolly, Note, *Sliding Down the Slippery Slope of the Sixth Amendment: Arguments for Interpreting* Padilla v. Kentucky *Narrowly and Limiting the Burden It Places on the Criminal Justice System*, 77 BROOK. L. REV. 745 (2012) (arguing that the liberal reading of *Padilla* has made the jobs of criminal defense attorneys onerous and suggesting limitations that lower courts should read into *Padilla*).

[31] *See* Lindsay C. Nash, *Considering the Scope of Advisal Duties Under* Padilla, 33 CARDOZO L. REV. 549 (2011) (discussing the scope of defense counsel's duty under *Padilla* to advise a defendant about immigration consequences).

[32] 466 U.S. 668 (1984).

neys to research potential consequences of noncitizen clients' convictions and to provide clients with the proper advice.

Part III discusses the reasons for making sure lower courts set a high bar for clarity and specificity of advice when evaluating effective assistance of counsel. First, it argues that demanding more specific advice from defense attorneys is practically possible. Although it is unrealistic to expect criminal defense attorneys to understand all the complexities of immigration law, defense attorneys can and typically do receive some basic immigration training.[33] Therefore, where the immigration consequences of a given conviction are clearly defined by statute or case law, the defense attorney should be able to give his client correct advice.[34] Second, this Part uses psychological research on people's understanding of risk to address the issue of whether the actual specificity of the warning matters to clients. This research demonstrates that using the phrase "risk of deportation" when a client's deportation is actually mandatory might fail to convey the urgency of the situation—and thus affect the client's behavior in the plea-bargaining process. Focusing on the certainty of deportation in these situations gives the client a more thorough view of the consequences of pleading guilty and creates different incentives for the attorney in plea negotiations with the prosecution. On the other hand, where the consequences are not clear—as in cases where a certain crime may or may not qualify as a crime involving moral turpitude, or where there is uncertainty about the status of a crime as an aggravated felony—a warning that there is a risk of adverse immigration consequences, as well as a recommendation to consult with an immigration attorney if possible, should be sufficient.

I
The Expansion of Defense Attorneys' Duties to Noncitizen Defendants

Constitutionally, *Padilla* rests on the Sixth Amendment right to "effective assistance of competent counsel."[35] To demonstrate that defense counsel was ineffective, a defendant must prove the two

[33] *See infra* notes 142–47 and accompanying text (discussing the various training materials available to defense attorneys representing noncitizen clients).

[34] *See, e.g.*, 8 U.S.C. § 1229b(a)(3) (2012) (making lawful permanent residents (LPRs) convicted of an aggravated felony ineligible for discretionary cancellation of removal). A noncitizen convicted of an aggravated felony can still apply for deferral of removal under the Convention Against Torture, but this form of relief is very hard to obtain and does not lead to resident status. *See* 8 C.F.R. § 208.17 (2014).

[35] Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

prongs of the *Strickland v. Washington* test: (1) Defense counsel's representation "fell below an objective standard of reasonableness";[36] and (2) there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[37] If a defendant fails to satisfy one of the prongs, the court need not consider the other prong.[38] Traditionally, collateral consequences of a conviction, such as deportation, have been deemed "outside the scope of representation required by the Sixth Amendment," making the "failure of defense counsel to advise the defendant of possible deportation consequences . . . not cognizable as a claim for ineffective assistance of counsel."[39]

In holding that advice regarding deportation, a civil sanction and a potential collateral consequence of a criminal conviction for noncitizen defendants, falls within the Sixth Amendment right to counsel in criminal proceedings, *Padilla* has been heralded as a "significant," albeit "long overdue" decision with "virtues of both logic and justice."[40] The *Padilla* Court noted that it "ha[d] never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*" and set aside the question of whether such a distinction is appropriate in general because of the "unique nature of deportation."[41] In other words, realizing that deportation is often the harshest punishment a noncitizen can receive—above and beyond time in prison—the Court decided that defense attorneys have a constitu-

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[36] 466 U.S. at 688.

[37] *Id.* at 694.

[38] *Id.* at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."). Some courts dismiss *Padilla* claims on the second prong of the *Strickland* test, even though *Padilla* itself focuses on the first prong. *Compare Padilla*, 559 U.S. at 369 (analyzing only the performance prong and remanding for consideration of the prejudice prong), *with infra* Part II.A (discussing cases that found that unreasonable advice from defense attorneys under the first prong did not cause their clients prejudice as required by the second prong).

[39] Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd*, 559 U.S. 356 (2010); *see also* United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir. 2000) ("Counsel's failure to advise a defendant of a collateral consequence is a legally insufficient ground for a plea withdrawal."), *abrogated by Padilla*, 559 U.S. 356; United States v. George, 869 F.2d 333, 337 (7th Cir. 1989) (holding that effective assistance of counsel does not extend to warnings regarding collateral consequences of a guilty plea), *abrogated by Padilla*, 559 U.S. 356; United States v. Yearwood, 863 F.2d 6, 7–8 (4th Cir. 1988) (holding that "an attorney's failure to advise a client that deportation may result from a conviction does not constitute ineffective assistance of counsel" because the alternative result "would place the unreasonable burden on defense counsel to ascertain and advise of the collateral consequences of a guilty plea," which courts had uniformly rejected), *abrogated by Padilla*, 559 U.S. 356.

[40] Kanstroom, *supra* note 27, at 1463.

[41] *Padilla*, 559 U.S. at 365 (quoting *Strickland*, 466 U.S. at 689).

tional duty to warn noncitizen defendants of potential deportation consequences of their convictions. This holding recognized both the crucial role of defense attorneys as the last line of defense against deportation for noncitizen criminal defendants, and the importance of clear and tailored immigration advice for noncitizen criminal defendants whenever feasible.

A. The Crucial Role of Defense Attorneys in Noncitizen Criminal Cases

Considering the gravity of deportation as a collateral consequence, it is perhaps unsurprising that the Court went as far as to deem deportation the most important penalty for noncitizen defendants who plead guilty to certain crimes.[42] The Court's conclusion reflects the reality that once removal proceedings begin, immigrants have virtually no defense if their convictions fall into the aggravated felony category,[43] making criminal defense counsel "the last line of defense."[44] While noncitizens in removal proceedings may be represented by counsel, the Immigration and Nationality Act specifies that the government will not provide them with an attorney if they cannot afford one.[45] This means that only those noncitizens who are "fortuitous enough" to afford a private attorney or obtain pro bono services have representation at their removal proceedings.[46] Effectively, a majority of the "respondents" in removal proceedings (the noncitizens charged as deportable) stand alone against a government attorney advocating for their deportation.[47] This gives a dual meaning to the idea of defense attorneys as a "last line of defense" against deporta-

[42] *See id.* at 364 ("[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." (footnote omitted)).

[43] For immigration purposes, an aggravated felony is a broad term including crimes specifically listed in 8 U.S.C. § 1101(a)(43)(A), such as murder, rape, or sexual abuse of a minor. Fernando A. Nuñez, *Collateral Consequences of Criminal Convictions to Noncitizens*, MD. B.J., July 2008, at 40, 43. It also includes less specifically described crimes such as "illicit trafficking in a controlled substance" under 8 U.S.C. § 1101(a)(43)(B) and crimes of violence for which the term of imprisonment is at least one year under 8 U.S.C. § 1101(a)(43)(F). *Id.* Since the 1996 amendments to the Immigration and Nationality Act (INA), pleading guilty to an offense defined as an aggravated felony "generally means certain and speedy deportation." Brief of the American Bar Ass'n as Amicus Curiae in Support of Petitioner at 11, *Padilla*, 559 U.S. 356 (No. 08-651) (quoting ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY standard 14-1.4 cmt. at 58 n.96 (3d ed. 1999)).

[44] Brief of Petitioner at 7, *Padilla*, 559 U.S. 356 (No. 08-651).

[45] *See* 8 U.S.C. §§ 1229a(b)(4)(A), 1362 (2012) (stating that legal representation must be at no cost to the government).

[46] Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. FOR SOC. JUST. 169, 169 (2010).

[47] *Id.*

tion for noncitizen clients—not only do they present the last chance for noncitizen defendants to avoid a criminal conviction that forecloses any form of immigration relief,[48] but defense attorneys are also often the last attorneys noncitizen defendants will be able to turn to for advice prior to their removal.

Citing examples gathered by the Asian American Justice Center and other immigrants' rights organizations in their amicus curiae brief, the Court was clearly concerned with the plight of immigrants whose relatively minor crimes led to deportation[49]—a grave civil penalty which overshadowed any criminal sanctions they had received. Thus, the Court's reasoning was influenced by a desire to ensure that defense counsel take noncitizen clients' deportation risk into account when representing them. In order to effectively consider the possibility of deportation during plea bargains, defense attorneys must be aware of—and make sure their clients are aware of—the immigration consequences of a given guilty plea.[50]

The Court bolstered the notion of defense counsel as the last line of defense against deportation by rejecting a distinction between affirmative misadvice and omission of advice for the purposes of meeting the standard for effective assistance of counsel.[51] Had the Court deemed only affirmative misadvice to be unreasonable under the circumstances, defense attorneys would have an incentive to simply ignore the issue and not mention immigration at all—a result the Court clearly wanted to avoid.[52] While there is no reason to doubt defense attorneys' good intentions in properly advising their clients, a

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[48] "[I]f a noncitizen has committed a removable offense . . . , his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General . . . . Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance." *Padilla*, 559 U.S. at 363–64 (footnote and citation omitted).

[49] *See id.* at 364 n.7 (citing Brief for Amici Curiae Asian American Justice Center et al. in Support of Petitioner, *supra* note 1, at 12–27).

[50] *See* Brief for Amici Curiae Asian American Justice Center et al. in Support of Petitioner, *supra* note 1, at 11 (noting that seemingly well-intentioned plea arrangements for lighter sentences sometimes expose noncitizen defendants to mandatory deportation). For example, because a theft offense with a sentence of at least one year of imprisonment qualifies as an aggravated felony, and because for the purposes of the INA the term of imprisonment includes suspended sentences, pleading to shoplifting with a one-year suspended sentence (meaning no time is served in prison) results in mandatory detention and deportation, whereas pleading guilty to shoplifting with six months of actual prison time avoids mandatory deportation. *Id.* (citing 8 U.S.C. § 1101(a)(43)(G), (48)(B) (2012)).

[51] *See Padilla*, 559 U.S. at 370 (holding that there is no constitutional difference between affirmative misadvice and a failure to advise).

[52] *See id.* (noting that limiting the holding to affirmative misadvice would "give counsel an incentive to remain silent on matters of great importance, even when answers are readily available").

rational defense attorney who is trying to avoid an ineffective-assistance-of-counsel claim in the future might not give any immigration advice whatsoever if she knows that the only way to be found constitutionally ineffective is to give incorrect information.[53] Thus, by emphasizing that omission of advice, in addition to affirmative misadvice, is grounds for ineffective assistance, the Court sought to incentivize defense attorneys to investigate potential immigration issues and be aware of them as they proceed with their noncitizen clients' cases.

B. Accurate Advice as a Necessary Element of Effective Representation

Providing the right incentives for defense attorneys goes hand in hand with the other goal of the *Padilla* holding—ensuring that noncitizen defendants have accurate information regarding the potential deportation consequences of their guilty pleas. Having established that deportation is not categorically barred from the Sixth Amendment inquiry, the Court focused on the first *Strickland* prong—reasonableness of the representation.[54] Noting that this prong is linked to the general practice and expectations of the legal community, the Court emphasized that most defense counsel already took the time to inform themselves of the basics of immigration law so they could give thorough advice to their noncitizen clients.[55] Furthermore, various authorities, including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications, "universally require[d] defense attorneys to advise as to the risk of deportation consequences for non-citizen clients."[56] These already-existing practices supported the Court's declaration that Padilla's attorney's misadvice regarding the deportation consequences of his plea was sufficient to prove constitutional deficiency and satisfy the first prong of *Strickland*.[57]

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[53] The Court was quite concerned with incentivizing silence under these circumstances because it recognized that the possibility of deportation presents such a significant hardship on noncitizen defendants. *See id.* ("Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement." (internal quotation marks omitted)).

[54] The Court did not address the issue of whether Padilla was prejudiced by his counsel's constitutionally deficient advice. *Id.* at 374.

[55] *See id.* at 367 ("The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.").

[56] *Id.* (quoting Brief for Legal Ethics, Criminal Procedure & Criminal Law Professors as Amici Curiae in Support of Petitioner at 14, *Padilla*, 559 U.S. 356 (No. 08-651)).

[57] *Id.* at 369.

In addition to refusing to impose an affirmative misadvice limitation on the duty to give immigration advice,[58] the Court decided not to limit its holding in another crucial way. It could have deemed a generalized warning regarding a risk of deportation consequences enough to satisfy the standard in all cases.[59] Instead, the Court provided a framework for the amount of advice a defense attorney is required to give to meet the standard for effective counsel. Noting the various changes to immigration law that have "dramatically raised the stakes of a noncitizen's criminal conviction," the Court emphasized that "accurate legal advice for noncitizens accused of crimes has never been more important."[60] The Court viewed deportation as an "integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants."[61] This recognition of the severity of deportation as a collateral consequence influenced the Court's emphasis on the importance of accuracy of immigration advice for noncitizen defendants. In Padilla's instance, the terms of the immigration statute deeming him mandatorily deportable were "succinct, clear, and explicit."[62] The Court emphasized that Padilla's counsel could have determined the consequences of his plea without specialized immigration knowledge—in fact, he needed to simply read the statute—and concluded that in situations like this, "when the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear."[63] On the other hand, in recognition of the complexity and ambiguity inherent in much of immigration law, the Court held that when the law is "not succinct and straightforward," the defense attorney's duty is to inform the client that criminal charges "*may* carry a risk of adverse immigration consequences."[64] Therefore, even if Padilla's attorney *had* advised him that he would face a risk of deportation, the advice would not have been reasonable under the first prong of the *Strickland* test, because the attorney

[58] *See supra* notes 51–53 and accompanying text (discussing the Court's decision to reject the notion of a distinction between affirmative misadvice and omission of advice).

[59] *See Padilla*, 559 U.S. at 375 (Alito, J., concurring in judgment) (disagreeing with the majority's decision that a criminal defense attorney should attempt to explain the particular immigration consequences of a conviction given the complexity of immigration law).

[60] *Id.* at 364 (majority opinion).

[61] *Id.* (footnote omitted).

[62] *Id.* at 368. The Court emphasized that 8 U.S.C. § 1227(a)(2)(B)(i) "commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." *Id.* While discretionary relief to cancel removal is available for certain categories of crimes, with limited exceptions, this relief is not available for an offense related to trafficking in a controlled substance. *Id.* at 363–64.

[63] *Id.* at 369.

[64] *Id.* (emphasis added).

would have failed to inform Padilla that deportation was actually presumptively mandatory. Like the Court's reasoning regarding the lack of distinction between affirmative misadvice and omission of advice,[65] its conclusion here implies a concern with both clients' proper understanding of the immigration consequences of their pleas and defense attorneys' incentives to actually research such consequences and provide accurate advice.

In determining the amount of advice required, the Court attempted to balance its concerns regarding the significance of immigration consequences for convicted noncitizens[66] with the reasonable apprehension, expressed by Justice Alito in his concurring opinion, that mandating specific advice would put an unreasonable burden on defense attorneys who are often not well versed in the intricacies of immigration law.[67] The majority placed a greater emphasis on a higher degree of specificity and accuracy of advice whenever possible, whereas Justice Alito took a more generalized approach. He proposed requiring that attorneys "(1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney."[68] The fact that Justice Alito wrote his concurring opinion at all underscores the majority's insistence on more specific advice in cases where the immigration consequences are clear—if that requirement was merely dictum to a main holding requiring some sort of warning regarding deportation consequences, he would not have felt compelled to propose a separate standard.[69]

As Part II will show, lower courts do not always interpret the standard for clear advice the way the majority intended, instead

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[65] *See supra* notes 51–53 and accompanying text (describing the Court's reasoning in deeming omission of advice, in addition to affirmative misadvice, to be constitutionally deficient).

[66] *See Padilla*, 559 U.S. at 364 (noting that developments in immigration law have made advice regarding the deportation consequences of noncitizen defendants' guilty pleas particularly critical).

[67] *See id.* at 377–81 (Alito, J., concurring in judgment) (highlighting various complexities and ambiguities in immigration law, including the malleable definition of crimes involving moral turpitude, various government agencies' and courts' differing interpretations of what qualifies as an aggravated felony, ambiguity regarding a client's alien status, and uncertainty as to whether a given state disposition will actually result in a conviction for immigration law purposes).

[68] *Id.* at 375.

[69] *See* Danielle M. Lang, Note, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 988–89 (2012) (noting that Justice Alito's concurring opinion "reinforces the argument that the majority opinion in *Padilla* does not permit the use of general plea colloquies on immigration consequences to cure deficient performance of counsel").

enforcing a standard similar to Justice Alito's proposed scheme. Whatever merits his proposal might have in terms of clarity, efficiency, and preventing the overburdening of defense attorneys,[70] it was ultimately not adopted by the Court. The Court was striving to achieve two main goals: incentivizing defense attorneys to fully achieve their potential as the last line of defense against deportation, and ensuring that advice attorneys convey to their clients is both accurate and specifically tailored to the circumstances (assuming the immigration law is clear). Thus, lower courts that deem generalized advice regarding the immigration consequences of a criminal conviction sufficient under all circumstances do not carry out the Supreme Court's intention.

II
Lower Courts' Contradictory Applications of *Padilla*

The crux of *Padilla*'s holding stems from the presumptively *mandatory* deportation Padilla faced and the importance the Court placed on incentivizing both the defendant and defense counsel to consider this severe consequence when choosing whether to agree to a plea or go to trial. The language an attorney uses when giving advice is crucial; if "risk" language is employed when deportation is clearly mandatory, the advice does not properly warn a noncitizen defendant of the actual consequences of her plea and should be considered misadvice. In other words, telling a noncitizen defendant there *may* be deportation consequences, when in fact she *will* be deported, creates the illusion that the defendant can somehow avoid deportation after pleading guilty. Furthermore, requiring such generalized advice does not provide the proper incentive for defense attorneys to actually perform rudimentary research and consider their clients' immigration status when plea bargaining—considerations that clearly influenced the Supreme Court's reasoning in *Padilla*.[71] Advice that does not

[70] According to Maureen A. Sweeney, Justice Alito was "certainly accurate" in noting the complexity of providing advice on immigration consequences. 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). In fact, she explains, the task is "even more complex than [he] described." *Id.* The "most draconian consequences are often quite clear," but the immigration consequences of conviction for broad categories like crimes involving moral turpitude can vary according to a variety of factors, while other crimes have "triggers" that the defense attorney can avoid, such as simple assault, which is "immigration-friendly" with a sentence of under a year but results in "automatic deportation" with a sentence of a year or more. *Id.* at 357–58.

[71] *See supra* Part I.A (emphasizing the importance of defense attorneys knowing the immigration consequences of their clients' convictions so that they can both convey the

employ the proper degree of specificity under the circumstances should therefore be deemed deficient. When generalized advice comes from other sources such as presentencing reports and plea colloquies, courts should be especially wary, because accepting other sources of advice undermines one of the important underlying concerns of the *Padilla* Court—ensuring defense attorneys have proper incentives to look into potential deportation consequences for their noncitizen clients.[72] Part II.A considers cases that deem such generalized advice to be sufficient and argues that they misinterpret the clarity of advice required under *Padilla*. In contrast, Part II.B analyzes cases that, in alignment with *Padilla*, demand more specific advice—demonstrating that the Supreme Court's holding, if applied properly, does not necessarily pose an undue burden on defense attorneys.

A. Courts Accepting General Advice About Deportation Risk

Sometimes lower courts hold advice coming directly from the attorney to be reasonable even though it does not provide the degree of clarity required by *Padilla*. In these cases, the second prong of *Strickland* does not come into play. Instead, courts decide that an attorney's advice satisfies the first prong because it meets the standard for reasonable representation set out in *Padilla*. For example, in *Diunov v. United States*,[73] the defendant pled guilty to a variety of aggravated felonies, making her subject to presumptively mandatory deportation.[74] Her attorney told her that she had a very good chance of receiving a hardship waiver because she was married to an American citizen.[75] Even though the chances of receiving such a hardship waiver were small,[76] and Diunov claimed she definitely would not have pled guilty had she known the conviction would render her mandatorily deportable,[77] the court held that her attorney's advice was not unreasonable under the first prong of *Strickland*.[78] The court believed the advice "broadly reflected the immigration consequences

information to clients and negotiate plea bargains that avoid mandatory deportation when possible).

[72] *See supra* Part I.A (describing the importance of defense attorneys as the last line of defense against deportation for noncitizen clients).

[73] No. 08 Civ. 3184(KMW), 2010 WL 2483985 (S.D.N.Y. June 16, 2010).

[74] She was convicted of three counts of mail fraud, wire fraud, and conspiracy to commit these crimes, receiving a sentence of seventy-eight months of prison time. *Id.* at *1.

[75] *Id.* at *4.

[76] *See id.* at *5 (citing a former chief of the Immigration Unit of the U.S. Attorney's Office for the Southern District of New York, who advised Diunov that she would be subject to expedited removal and would not be able to get a hardship waiver).

[77] *Id.* at *4.

[78] *Id.* at *12.

of her guilty plea," even though her attorney "failed to explain and/or misstated certain of the factors that would be relevant to obtaining a hardship waiver."[79]

While the hardship waiver was theoretically available, the attorney misrepresented her chances of getting it, and this influenced the defendant's decision to plead guilty.[80] Such a result surely does not satisfy the clear advice demanded by *Padilla* under the circumstances. Diunov's attorney should have told her that her conviction was an aggravated felony, and that she was presumptively deportable.[81] Instead, the court reasoned that because the advice gave her a broad idea of the consequences of her guilty plea, it met the standard for effective assistance.[82] The court viewed the general idea conveyed by the attorney's advice as sufficient to give Diunov notice of the fact that she faced some risk of deportation, a notion more in line with Justice Alito's concurrence than the majority opinion.[83] This sort of ruling does not properly incentivize the defense attorney to thoroughly research the issue, and it does not provide immigrants with accurate, specific advice.

Other courts have "cured" attorneys' insufficient (or nonexistent) advice by ruling that the defendant did not suffer prejudice under the second prong of *Strickland* despite the attorney's constitutionally inadequate performance because the defendant received some generalized advice either through a plea colloquy or court-issued document.[84] Such generalized advice includes presentencing materials that mention the potential deportation consequences of a conviction. For example, in *Abraham v. United States*,[85] the Eighth Circuit deemed that the defendant could not satisfy *Strickland*'s prejudice prong because the defendant's presentence-investigation report (PSR) "indicated a likelihood that [the defendant] would be deported if convicted; [the defendant] confirmed that he had read the PSR, discussed it with his counsel, and understood it; and [the defendant] never

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[79] *Id.* at *1.

[80] *Id.* at *4.

[81] Because she was an "alien convicted of an aggravated felony," Diunov faced "presumptively mandatory deportation." *Id.* at *1.

[82] *Id.*

[83] *See supra* note 68 and accompanying text (describing Justice Alito's proposal for requiring generalized advice by defense attorneys).

[84] *See* Strickland v. Washington, 466 U.S. 668, 691–92 (1984) ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . Accordingly, any deficiencies in counsel's performance must be prejudicial . . . to constitute ineffective assistance . . . ." (citation omitted)).

[85] 699 F.3d 1050 (8th Cir. 2012).

moved to withdraw his guilty plea."[86] Abraham had pled guilty to possession with intent to distribute cocaine.[87] He alleged that his counsel told him nothing about the immigration consequences of his guilty plea, despite the fact that his conviction "*virtually ensured* . . . deportation."[88] Because his counsel did not mention the issue, and because he had been an LPR since he was a small child, Abraham pled guilty believing that "regardless of what the PSR stated, he would not face the severe and harsh consequence of deportation."[89]

The *Abraham* court took a generalized approach to the advice required, reasoning that under the prejudice prong of *Strickland*, the fact that Abraham read over the PSR with his attorney was sufficient to demonstrate that he could not have been prejudiced by any unreasonableness in his attorney's performance.[90] The court's reliance on the prejudice prong was motivated by its desire to avoid deciding whether *Padilla* applied retroactively, an issue that was then hotly debated in lower courts.[91] Instead of deciding whether or not the

[86] *Id.* at 1053 (alterations in original) (quoting Correa-Gutierrez v. United States, 455 F. App'x 722, 723 (8th Cir. 2012) (per curiam)).

[87] *Id.* at 1051.

[88] Brief of the Defendant-Appellant, Ansu Abraham at 8, 19, *Abraham*, 699 F.3d 1050 (No. 11-3284).

[89] *Id.* at 19. The PSR included the following language regarding Abraham's immigration status: "Mr. Abraham is a Legal Permanent Resident of the United States, and is authorized to live and work here. The instant offense renders him deportable. As a result of his immigration status, the Bureau of Immigration and Customs Enforcement will lodge a Detainer for Deportation against the defendant." *Abraham*, 699 F.3d at 1051.

[90] *Abraham*, 699 F.3d at 1053.

[91] The retroactive application of *Padilla* was a major question left open by the Supreme Court's decision. *Compare* United States v. Amer, 681 F.3d 211, 214 (5th Cir. 2012) (holding that *Padilla* announced a new rule and thus does not apply retroactively), *and* United States v. Chang Hong, 671 F.3d 1147, 1155 (10th Cir. 2011) (same), *with* United States v. Orocio, 645 F.3d 630, 641 (3d Cir. 2011) (holding that *Padilla* is "a new application of an 'old rule'" and does apply retroactively). Ultimately, the Supreme Court resolved the retroactivity issue in *Chaidez v. United States*, 133 S. Ct. 1103 (2013), where it held that *Padilla* declared a new rule answering an open question about the reach of the Sixth Amendment and thus could not be applied retroactively. *Id.* at 1107. This holding obviously limited the application of *Padilla* in many cases which were initiated before February 20, 2013 (when *Chaidez* was decided) with the hope that *Padilla* would apply retroactively, and ultimately resulted in defeat for immigrants whose convictions became final prior to March 31, 2010 (when *Padilla* was decided). Thus, there has been a wave of *Padilla*-related cases dismissed solely on retroactivity grounds. *See, e.g.*, United States v. Flores, No. 89 CR 0056 L, 2013 WL 5670924, at *2 (S.D. Cal. Oct. 15, 2013) (denying relief on the grounds that *Padilla* does not apply retroactively); Alcena v. Comm'r of Corr., 76 A.3d 742, 744 (Conn. App. Ct. 2013) (same). These opinions give little guidance on whether the advice (or lack thereof) would be deficient under the *Padilla* standard, so current case analysis is largely limited to cases decided before *Chaidez*, when courts were still operating on the assumption that there was a possibility of retroactive application and thus engaging in a *Padilla* analysis. This muddled precedent makes it all the more crucial to clarify the *Padilla* standard for courts and litigants in the future.

alleged mechanical reading of the PSR, without further advice, "fell below an objective standard of reasonableness" under the first prong of *Strickland*,[92] the court concluded that Abraham's admitted reading of the PSR with his attorney ensured that the result of the proceeding would have been the same either way.[93] While the PSR mentioned that the offense rendered Abraham deportable, it left open the possibility that he could obtain relief at a subsequent deportation hearing.[94] The court accepted that language as sufficient to warn Abraham of the implications of his plea, finding that "there is no 'reasonable probability that . . . the result of the proceeding would have been different' had Abraham's attorney advised him of the immigration consequences of pleading guilty."[95]

This conclusion implies that had Abraham's attorney delivered the generalized advice that his offense rendered him deportable, it would have been sufficient under the first prong of *Strickland*. The court's cursory treatment of the language in the PSR indicates that it viewed that language as a substitute for the professional advice that the attorney should have given, and thus Abraham could not have been prejudiced by his attorney's allegedly unreasonable representation since he received adequate advice anyway.[96] This, in turn, implies that the attorney would not have violated the first prong of *Strickland* if the attorney told Abraham the same thing he read in the PSR. However, under *Padilla*, the attorney had to warn Abraham that his deportation was presumptively mandatory.[97] Deciding that generalized

[92] *Abraham*, 699 F.3d at 1053 n.3 (quoting Padilla v. Kentucky, 559 U.S. 356, 366 (2010)).

[93] *Abraham*, 699 F.3d at 1053. The *Abraham* court therefore focused on the second prong of the *Strickland* test for ineffective assistance of counsel, which requires that, even if counsel's representation was objectively unreasonable, a defendant must also prove that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984).

[94] See *supra* note 89 for the language included in the PSR.

[95] *Abraham*, 699 F.3d at 1053 (alteration in original) (quoting *Padilla*, 559 U.S. at 366).

[96] *See id.* (noting that Abraham's revised PSR indicated that the offense rendered him deportable, and concluding that Abraham's admitted reading of the PSR meant he could not possibly be prejudiced by his attorney's allegedly ineffective advice, despite Abraham's argument that his attorney was ineffective for failing to advise him that the offense "virtually ensured" deportation).

[97] Abraham's conviction for possession with intent to distribute cocaine was an aggravated felony under the INA. *See* 8 U.S.C. § 1101(a)(43)(B) (2012) (stating that an "aggravated felony" includes "illicit trafficking in a controlled substance (as defined in [21 U.S.C. § 802]), including a drug trafficking crime (as defined in [18 U.S.C. § 924(c)])"). The commission of an aggravated felony makes deportation virtually unavoidable. *See id.* § 1229b(a)(3) (making LPRs with aggravated felony convictions ineligible for discretionary relief from deportation). Thus, this was not a case of complicated and ambiguous immigration law, but rather a simple matter of reading the relevant provisions of the INA.

advice from another source "cures" any deficiencies in the attorney's advice weakens the requirement of specific attorney advice contained in the *Padilla* decision and reflects the reasoning of Justice Alito's concurrence rather than the majority opinion. The court should have required the attorney to do more than have his client mechanically read the PSR.[98]

More frequently, courts find that plea colloquies mentioning potential immigration consequences can defeat defendants' claims under the prejudice prong.[99] Plea colloquy warnings are generally broad in nature and are often perceived by defendants as "largely ceremonial."[100] Nonetheless, many courts have seen them as an adequate substitute for accurate advice from defendants' attorneys.[101] Under some circumstances, the plea colloquy uses generalized language that simply conveys the potential risk of deportation.[102] For example, in *De*

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[98] Similar logic has been applied to deem that reading over a plea agreement can cure allegations of ineffective advice. For example, in *People v. Richey*, the court emphasized that the plea agreement stated: "I understand that if I am not a citizen of the United States the conviction for the offense(s) charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." G046919, 2013 WL 1402354, at *1 (Cal. Ct. App. Apr. 8, 2013). The court held that the defendant's acknowledgment that she read over the plea agreement with her attorney, in addition to receiving a warning from the court, meant she was adequately advised, despite the fact that the agreement gave a generalized warning. *Id.* at *2–3.

[99] *See* Lang, *supra* note 69, at 962–64 (noting that one of the many ways courts "cabin" the reach of *Padilla* is by using plea colloquy warnings to "'cure' *Padilla* violations and bar findings of prejudice," and arguing that these rulings circumvent the purpose of the *Padilla* decision). Lang focuses her analysis on the constitutional implications of "conflat[ing] the role of the court in Fifth Amendment plea colloquies and the role of counsel under the Sixth Amendment." *Id.* at 947. These constitutional implications offer another lens through which plea colloquies can be viewed as deficient in meeting the *Padilla* standard, but they fall outside the scope of this Note, which focuses on the fact that the advice provided in plea colloquies is not tailored enough to meet the standard the Court set in *Padilla*.

[100] *See id.* at 964 (describing the generalized nature of plea colloquies and their insufficiency in conveying the immigration consequences of a plea to a noncitizen defendant).

[101] *See id.* at 975 (noting that the majority of the fifty-one cases the author reviewed considered the plea colloquy to be "significant, if not controlling, evidence weighing against a finding of prejudice").

[102] Other cases involve more specific plea colloquies. For example, in one case decided by the Supreme Court of Georgia, the trial court asked the defendant if he understood that "the federal government will take action to deport [him] to [his] native country." State v. Martinez, 729 S.E.2d 390, 392 (Ga. 2012). The judge further asked if Martinez understood that "the federal government will, in fact, maybe not today, maybe not tomorrow, but some time in the future . . . take action to deport [him] even though [he is] a legal resident alien." *Id.* In this context, it appears the defendant received sufficient clarity of advice in terms of the actual risk of deportation, making this plea colloquy a better option than a generalized one, but still significantly different from actually getting the advice directly from the defense attorney. Martinez alleged he was receiving advice from his attorney that "called into question the information he was receiving from the court." *Id.* The reviewing

La Rosa v. United States,[103] the court asked the defendant: "Do you understand if you are not a United States citizen, that this plea may result in your deportation?" to which he answered affirmatively.[104] De La Rosa claimed his attorney was ineffective for failing to recognize and advise him of the automatic deportation consequences of his plea.[105] As in *Abraham*, the court did not engage in the first prong of the *Strickland* analysis and make a factual finding as to whether De La Rosa's attorney actually advised him properly as required under *Padilla*.[106] Instead, it opted to rely on an alternative source of information about the immigration consequences of De La Rosa's guilty plea.[107] The court emphasized that, "[e]ven assuming counsel misadvised De La Rosa as he claims, [he] became aware of the possibility that an adjudication of guilt can affect his immigration status . . . when the Court specifically advised [him] of this fact during the plea colloquy."[108]

To meet the *Padilla* standard, however, De La Rosa's attorney should have warned him that a guilty plea would render deportation presumptively mandatory.[109] A generalized warning of the sort the plea colloquy provided, even if coming from the attorney himself, would not have been enough. By concluding that a generalized plea

court questioned the evidence provided in support of that allegation and suggested that more evidence of advice directly contradicting the plea colloquy could aid Martinez's claim; however, it ultimately concluded that "[r]egardless of the prior erroneous advice from plea counsel," the trial court's colloquy sufficiently warned Martinez of the mandatory deportation consequences and thus Martinez could not prove he was prejudiced by any allegedly deficient performance. *Id.* at 393. A plea colloquy that gives clear advice is certainly better than a vague one, but it still should not serve as a substitute for advice from the attorney, especially if the attorney has given conflicting advice.

103 Nos. 09-Cv-22646-COHN, 08-Cr-20685-COHN, 2012 WL 4466533 (S.D. Fla. Aug. 17, 2012), *adopted by* No. 09-22646-CIV, 2012 WL 4466531 (S.D. Fla. Sept. 27, 2012).

104 *Id.* at *8.

105 *Id.* at *6.

106 *Id.* at *8.

107 *See id.* (noting that, through the plea colloquy, "the Court cured any error due to counsel's alleged misadvice").

108 *Id.*

109 De La Rosa pled guilty to a number of crimes, including making a false statement on an application for a United States passport and aggravated identity theft. *Id.* at *1. He was thus mandatorily deportable. *See* 8 U.S.C. § 1229b(b)(1)(C) (2012) (barring nonpermanent residents convicted of crimes involving moral turpitude from eligibility for cancellation of removal). While it is sometimes hard to determine if a given crime involves moral turpitude depending on a given jurisdiction's case law, State Department regulations clearly stipulate that "[t]he most common elements involving moral turpitude are: (1) [f]raud; (2) [l]arceny; and (3) [i]ntent to harm persons or things." 9 FOREIGN AFFAIRS MANUAL § 40.21(a) n.2.2 (U.S. Dep't of State 2014), *available at* http://www.state.gov/documents/organization/86942.pdf. Thus, given that his convictions involved fraud, they fell into the realm of crimes of moral turpitude and rendered De La Rosa mandatorily deportable.

colloquy "cured" any prejudice De La Rosa might have faced,[110] the court was essentially saying that, had the generalized advice come from the defense attorney, it would have met the requirement for reasonable representation under the first prong of *Strickland*. De La Rosa could not have been prejudiced by the attorney's alleged failure to deliver the advice because he heard everything he needed to hear from another source. In other words, the court thought that generalized advice, despite its lack of specificity, gave the defendant the necessary warning that the plea might lead to deportation.

As with *Abraham*, such a conclusion is at odds with *Padilla*'s reasoning that clear immigration advice coming from the defense attorney can make a real difference in noncitizen clients' cases. Aside from constitutional issues relating to the distinction between the role of the court in Fifth Amendment plea colloquies and the role of counsel under the Sixth Amendment (which are beyond the scope of this Note),[111] such a result completely circumvents the intention of *Padilla* to ensure clear advice regarding the deportation consequences of a conviction and to incentivize defense attorneys to actually consider potential deportation consequences in the plea-bargaining process. While plea colloquies can be a useful supplement to attorney advice,[112] they are not a meaningful substitute. Like mechanically reading PSRs and receiving advice that merely gives a broad picture of the immigration consequences of conviction,[113] plea colloquies do not provide the specificity and accuracy required by *Padilla*. In deciding these cases under the second prong of *Strickland*, these courts are sending a message about the sort of advice that would be sufficient under the first prong, because they are implying that the defendants received all the information *Padilla* requires from a different source. This implicit assumption undermines *Padilla*'s demand for more tailored, specific advice and leaves defendants with insufficient warning about the deportation consequences of their guilty pleas.

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110 *De La Rosa*, 2012 WL 4466533, at *8.

111 *See* Lang, *supra* note 69, at 947 (emphasizing the difference between the role of the court in Fifth Amendment plea colloquies and the role of counsel under the Sixth Amendment).

112 *See id.* at 963–64 ("[A]dvocates for noncitizen criminal defendants likely would support requiring warnings from both court and counsel to ensure that noncitizen defendants are adequately informed at every stage of the proceedings.").

113 *See supra* notes 82–83 and accompanying text (describing a holding that allowed broad advice to substitute for the specific advice required by *Padilla*). See also *supra* note 89 for the language of a typical PSR.

B. Courts Requiring More Precise Advice About Deportation Risk

The cases discussed in the prior section demonstrate courts' willingness to adopt a generalized approach to deportation advice (even when it stems from a source other than the attorney), essentially offering a more lenient standard of clarity and specificity than *Padilla* mandates.[114] The cases seem more in line with the logic behind Justice Alito's concurring opinion than that of the *Padilla* majority. It is possible that these decisions stem from concerns similar to Justice Alito's—that requiring more specific advice would overburden defense attorneys and courts attempting to analyze these claims, and that general advice still puts noncitizen defendants on notice of the deportation consequences of a plea. However, requiring clear, specific advice when the circumstances call for it comports better with the *Padilla* standard and does not impose an undue burden on defense attorneys.

For example, in *Thiersaint v. Warden*,[115] the court deemed the attorney's imprecise advice to be deficient under *Padilla*.[116] Thiersaint pled guilty to possession with intent to sell narcotics,[117] which clearly constituted an aggravated felony.[118] Though Thiersaint alleged that his attorney gave him no immigration advice at all, his attorney, Imhoff, believed he told Thiersaint that he would "'probably' have to deal with immigration after his state criminal proceedings concluded."[119] Regardless of the exact content of Imhoff's advice, he certainly did not inform Thiersaint that his deportation was a "virtual certainty."[120] Emphasizing that *Padilla* set out a two-tiered analytical framework based on whether the consequences of a conviction are truly clear,[121] the court concluded that because Thiersaint's mandatory deportation was unambiguous under the relevant statutes, Imhoff's conduct had to be "assessed under the stricter standard as to whether he provided the petitioner 'correct advice.'"[122] Because Imhoff's advice "allowed for

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114 *See* Lang, *supra* note 69, at 966–67 (noting the general trend of lower courts limiting *Padilla*'s reach).

115 No. CV104003350S, 2012 WL 6786081 (Conn. Super. Ct. Dec. 7, 2012).

116 *Id.* at *13.

117 *Id.* at *1.

118 Such a conviction falls under the category of "illicit trafficking in a controlled substance," making it an aggravated felony. 8 U.S.C. § 1101(a)(43)(B) (2012).

119 *Thiersaint*, 2012 WL 6786081, at *3. Imhoff further claimed that he knew the conviction constituted an aggravated felony and told Thiersaint he should consult with an immigration attorney. *Id.* He also informed Thiersaint that if he had an immigration hearing, he would have a chance of winning, albeit a remote one. *Id.*

120 *Id.*

121 *Id.* at *13; *see also supra* notes 63–69 and accompanying text (describing the bifurcated *Padilla* framework).

122 *Thiersaint*, 2012 WL 6786081, at *14.

the possibility" that Thiersaint could win in an immigration proceeding, when his deportation was a virtual certainty, it was incorrect.[123] The court correctly interpreted *Padilla* and found that Imhoff's advice was deficient under the first prong of *Strickland*.

Other courts, such as the Eastern District of California in *United States v. Krboyan*,[124] have similarly refused to allow attorneys to meet the effectiveness standard with general advice when mandatory deportation was imminent. When Krboyan pled guilty to mail fraud and aiding and abetting mail fraud to avoid a longer sentence,[125] his attorney failed to consider that the restitution amount of $12,113 automatically classified the mail fraud as an aggravated felony regardless of the sentence, which made Krboyan mandatorily deportable.[126] Emphasizing that the relevant statutes were "unambiguous" in that regard, the court held that the attorney's performance was deficient because Krboyan pled guilty based on the advice that a sentence of less than a year would lower his chances of deportation.[127] In deeming the advice deficient under the first prong of *Strickland*, the court went as far as to say that the attorney's advice, that Krboyan "*may* face the possibility of immigration consequences" but that the loss amount alone would probably not lead to deportation, was the "opposite" of what the attorney should have advised.[128] This case demonstrates that incomplete advice may be just as detrimental as no advice at all. While the attorney had intended to help his client avoid deportation, his gap

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[123] *Id.* The court relied on several cases that made the same distinction between the precise advice necessary when a conviction will clearly lead to mandatory deportation, and the more generalized advice sufficient when the law is unclear regarding the deportation consequences of the conviction. *See, e.g.*, United States v. Bonilla, 637 F.3d 980, 984 (9th Cir. 2011) ("A criminal defendant who faces almost certain deportation is entitled to know more than that it is *possible* that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty."); *Ex parte* Romero, 351 S.W.3d 127, 131 (Tex. App. 2011) ("Because the deportation consequence was truly clear, trial counsel had a duty to inform [the defendant] of the specific consequences of his plea.").

[124] Nos. 1:02-cr-05438 OWW, 1:10-cv-02016 OWW, 2011 WL 2117023 (E.D. Cal. May 27, 2011).

[125] Krboyan's attorney acknowledged that there could be immigration consequences and helped him avoid a sentence of over twelve months, believing a longer sentence would increase his chances of deportation. *Id.* at *3.

[126] *See* 8 U.S.C. § 1101(a)(43)(M)(i) (2012) (including in the definition of "aggravated felony" offenses that "involve[ ] fraud or deceit in which the loss to the victim or victims exceeds $10,000"). The aggravated felony conviction made deportation presumptively mandatory. *See Krboyan*, 2011 WL 2117023, at *9 (noting that discretionary relief is not available for aggravated felonies under 8 U.S.C. § 1229b, with limited exceptions).

[127] *Krboyan*, 2011 WL 2117023, at *10 ("Under *Padilla* . . . , [counsel] should have advised Petitioner of the mandatory immigration consequences of his guilty plea.").

[128] *Id.* at *10–11.

in knowledge[129] misled his client. The lack of comprehensiveness and accuracy in the attorney's legal research, as expressed in the inaccurate degree of risk ultimately conveyed to the client, made a difference—both to the client and to the court's analysis.

Other cases involve incomplete advice of a different kind. Attorneys may be tempted to automatically refer noncitizen clients to immigration specialists when they are unsure about the consequences of their pleas. However, such advice by itself should not be sufficient representation under *Padilla* if the immigration consequences are straightforward; defense attorneys cannot merely pass on their duty to warn noncitizens of these consequences. For example, in *People v. Garcia*,[130] the defendant asked his attorney about the immigration consequences of pleading guilty to a misdemeanor drug possession charge.[131] His attorney admitted ignorance concerning immigration law, refused to research the issue, and told Garcia to seek advice from an immigration specialist.[132] Garcia consulted an immigration paralegal, who erroneously told him the misdemeanor conviction would not carry adverse immigration consequences.[133] Garcia's "mistaken belief" that he would not be deportable "motivated him to take the plea."[134] The court concluded that where the immigration consequences of the plea were "fairly straightforward," mere advice to seek outside immigration assistance did not qualify as objectively reasonable representation under the first prong of *Strickland*.[135] Thus, even though deportation was not presumptively mandatory in this case, the fact that it was clearly possible meant the attorney had a duty to inform his client that he could be deported if he pled guilty.

Cases in which courts analyze the actual risk of deportation and mandate clear and accurate advice when the consequences are "suc-

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129 Nuttall, the defendant's successor counsel during his plea agreement, admitted that "the concept of deportation based upon a loss related aggravated felony was not contemplated by either of us." *Id.* at *5.

130 907 N.Y.S.2d 398 (Sup. Ct. 2010).

131 *Id.* at 399–400. Garcia pled guilty to a single count of criminal possession of a controlled substance in the seventh degree under section 220.03 of the New York Penal Law. *Id.* at 399.

132 *Id.* at 400.

133 *Id.*

134 *Id.* at 406.

135 *Id.* at 405. The court also found that the defendant satisfied the prejudice prong of *Strickland*, despite a plea colloquy with the court warning that there could be deportation consequences to his plea. *See id.* at 406–07 ("I hold that where, as here, defendant is found in fact to have been misled by bad advice from a so-called retained specialist and by a lack of advice from his defense attorney, the Court's general warning will not automatically cure counsel's failure nor erase the consequent prejudice.").

cinct, clear, and explicit"[136] provide useful precedent for future *Padilla* claims. They not only accord with the standard for clarity of advice set out in *Padilla*, but also recognize the main concerns that drove the *Padilla* Court to its decision. These cases also demonstrate that courts' analyses of whether immigration consequences are clear need not be overly complex—if there is a relevant statute that clearly spells out the deportation consequences, attorneys have the duty to advise their clients regarding those consequences.

III
WHY LOWER COURTS SHOULD DEMAND GREATER SPECIFICITY FROM DEFENSE ATTORNEYS

Courts that focus on the accuracy of the attorney's advice must necessarily analyze the risk of deportation a noncitizen faced at the time of his conviction, the clarity of the law in that regard, and whether the attorney's advice properly conveyed the risk. This Part argues that requiring a high standard of clarity and specificity does not overburden defense attorneys. It also uses psychological research to argue that holding defense attorneys to this standard is important because the language they use to describe the risk matters greatly under these circumstances. Aside from incentivizing attorneys to perform research regarding their particular clients' immigration circumstances, mandating more specific advice allows clients to adequately understand the consequences of a guilty plea and make a well-reasoned decision.

A. The Feasibility of More Specific Advice by Defense Attorneys

In his *Padilla* concurrence, Justice Alito argues that the Court's approach is problematic for several reasons. He emphasizes the difficulty a defense attorney might face in determining whether a statutory provision is clear and succinct (thus making it hard for an attorney to determine if specific advice is required) and the possibility of confusion if defense counsel must provide advice regarding only one of many collateral consequences of a criminal conviction.[137] He under-

[136] United States v. Krboyan, Nos. 1:02-cr-05438 OWW, 1:10-cv-02016 OWW, 2011 WL 2117023, at *9 (E.D. Cal. May 27, 2011) (quoting Padilla v. Kentucky, 559 U.S. 356, 368 (2010)).

[137] *See Padilla*, 559 U.S. at 381–82 (2010) (Alito, J., concurring in judgment) (describing these deficiencies in the majority's rule). For example, if an alien is excludable but not removable, advice that a conviction will not lead to removal might not put the alien on notice that leaving the country will render her unable to return. *Id.* at 382.

scores the clarity of his proposed general warning standard, contrasting it with the problems in the majority's rule.[138]

Although Justice Alito's concerns about overburdening defense attorneys[139] are legitimate,[140] he downplays the professional norms that already guide defense attorneys and the resources available to them. For example, the ABA Standards for Criminal Justice already mandate that "defense counsel should advise a non-citizen client about the immigration consequences of conviction when the client is considering whether to plead guilty" and that "defense counsel should be *fully informed* about the immigration consequences of a guilty plea, because these consequences can shape and determine the outcome of criminal proceedings at various stages."[141] Bar assocations sponsor educational resources concerning the immigration consequences of criminal convictions, including training courses and literature.[142] Organizations like the New York State Defenders Association have specific projects designed to "integrate immigration expertise into New York State criminal defense representation to ensure that effective public defense representation is afforded."[143] Its website includes a variety of resources, including a section titled "Who Is At Risk For Removal And How?"[144] In California, the Immigration Legal Resource Center "educates and assists indigent criminal defenders about immigration consequences of crimes."[145] The Legal Aid Society in New York City ensures that new attorneys training for its criminal practice group visit the immigration unit in addition to other units relating to collateral consequences of conviction so they can "provide concrete guidance on civil law issues that overlap with criminal practice."[146] For attorneys who do not have access to sepa-

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138 *See id.* at 375 (arguing that the majority's "vague, halfway test will lead to much confusion and needless litigation").

139 *See id.* at 377 ("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.").

140 *See* Sweeney, *supra* note 70, at 358 (noting the difficulties of taking immigration consequences into account when representing noncitizen defendants in criminal proceedings).

141 Brief of the American Bar Ass'n as Amicus Curiae in Support of Petitioner, *supra* note 43, at 5 (emphasis added).

142 *Id.* at 29–43.

143 *New York State Defenders Association Criminal Defense Immigration Project*, N.Y. ST. DEFENDERS ASS'N, http://www.nysda.org/index-3.html (last visited Oct. 16, 2014).

144 *Criminal Defense Immigration Project Training Resources*, N.Y. ST. DEFENDERS ASS'N, http://www.nysda.org/Imm-TrainingResources.html (last visited Oct. 16, 2014).

145 *Criminal and Immigration Law: Defending Immigrants' Rights*, IMMIGRANT LEGAL RESOURCE CENTER, http://www.ilrc.org/crimes (last visited Oct. 16, 2014).

146 *Training*, LEGAL AID SOC'Y, https://www.legal-aid.org/en/criminal/criminalpractice/training.aspx (last visited Oct. 16, 2014).

rate departments of experts, other organizations have produced simple handouts that outline which convictions can lead to deportation or mandatory deportation.[147] One glance at such a handout would have informed Padilla's lawyer that a conviction for a drug trafficking crime would make him mandatorily deportable.

These guides cannot completely replace legal research, but they provide a starting point for reasonable research to reveal the appropriate statutes. There are circumstances where it is unclear whether a crime is an aggravated felony or whether it is the basis for presumptively mandatory deportation; in those cases, defense attorneys would not need to provide precise advice to their clients.[148] Instead, discovering the uncertainty of their clients' plights would in and of itself promote effective advocacy by alerting them to the existence of an immigration issue and allowing them to give their clients generalized advice where more specificity is impractical.

As the *Padilla* Court recognized, today's deep intersections between the criminal justice and immigration systems make this role for defense attorneys more crucial than ever. Previously, courts could issue a judicial recommendation against deportation (JRAD)[149] in criminal cases where deportation seemed an unusually harsh penalty for the crime committed.[150] Because these "recommendations" were binding on the Attorney General, they allowed judges to conclusively bar a given conviction from serving as a basis for deportation.[151] However, Congress eliminated JRAD in 1990 and further curtailed noncitizen defendants' opportunity to avoid deportation by severely limiting the Attorney General's authority to grant discretionary relief in 1996.[152] Simultaneously, Congress expanded the range of offenses that qualify as aggravated felonies, including a wide swath of nonviolent offenses such as "passport or document fraud, obstruction of

147 *See, e.g.*, DEFENDING IMMIGRANTS P'SHIP, IMMIGRATION CONSEQUENCES OF DRUG OFFENSES (2012), *available at* http://www.nacdl.org/uploadedFiles/Content/Legal_Education/Live_CLE/Live_CLE/03_Drug_Offenses_Handout.pdf.

148 *See* Nuñez, *supra* note 43, at 43 (describing various instances when the status of an aggravated felony is open to interpretation); *see also supra* notes 64, 66–67 and accompanying text (describing the *Padilla* Court's reasoning in condoning generalized advice when the law is unclear).

149 *See* Padilla v. Kentucky, 559 U.S. 356, 363 (2010) (noting that Congress first curtailed JRAD in 1952 and then entirely eliminated the provision in 1990).

150 *See* Brief of Petitioner, *supra* note 44, at 4 (describing JRAD procedures).

151 *Id.*

152 *Id.* at 5–6 (citing Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a)(3), (b), 110 Stat. 3009-546, 3009-594 to -595, 3009-597 (codified as amended at 8 U.S.C. §§ 1182(c), 1229b(a)–(c) (2012)); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277; Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050).

justice, forgery, perjury, commercial bribery, and trafficking in vehicles with altered identification numbers."[153] These developments have created a strong link between criminal convictions and deportations that has only been reinforced by executive policies.[154] More immigrants are getting deported than ever before, and the bulk of them have been convicted of crimes.[155] This makes immigration advice during a noncitizen's criminal proceedings a crucial, and often final, opportunity to avoid deportation. The importance of the advice defense attorneys give cannot be overemphasized, and courts should abide by a strict interpretation of the *Padilla* mandate in order to properly incentivize them to research and provide accurate immigration advice.

As demonstrated in Part II.B, courts can effectively evaluate whether the amount of advice given under the circumstances is appropriate. Like all claims under *Strickland*, the *Padilla* analysis is a mixed question of fact and law that depends on reasonableness under prevailing professional norms.[156] A detailed and personalized conversation between the defense attorney and his client about the immigration consequences of conviction should be considered reasonably effective advice. For example, in *State v. Owusu*,[157] defense counsel stated he was "99.9% certain" his client would get deported after consulting with an immigration attorney.[158] While the client argued that his attorney did not inform him that deportation was presumptively mandatory, the conversation clearly communicated the gravity of his situation, and the defense attorney had obviously done his research.[159] Had the attorney simply said there was a "risk" of

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[153] *Id.* at 6 (citing 8 U.S.C. § 1101(a)(43)(P), (R)–(S) (2012)). In some cases, the aggravated felony category for immigration purposes may include state misdemeanor offenses. *Id.*

[154] In May 2011, President Obama said that as a result of his administration's policy to focus deportation efforts on convicted criminals, the removal of criminals increased by seventy percent. Remarks in El Paso, Texas, 2011 DAILY COMP. PRES. DOC. 5 (May 10, 2011), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201100337/pdf/DCPD-201100337.pdf.

[155] As of December 2013, the total number of deported immigrants under President Obama is more than 1.9 million, more than under any other American president. Julia Preston, *U.S. Deportations Decline; Felons Made Up Big Share*, N.Y. TIMES, Dec. 20, 2013, at A20. Ninety-eight percent of the deported fit into one of Immigration and Customs Enforcement's priority categories: convicted criminals, national security risks, serious immigration offenders, and recent border crossers. *Id.*

[156] *See* Strickland v. Washington, 466 U.S. 668, 688, 698 (1984) (noting that American Bar Association standards are relevant to the question of reasonableness).

[157] No. A-1939-11T3, 2013 WL 1798681 (N.J. Super. Ct. App. Div. Apr. 30, 2013) (per curiam).

[158] *Id.* at *3.

[159] *See id.* (holding that defense counsel's advice was sufficient to meet the

deportation, the client might fairly have claimed that his attorney's advice was ineffective because the attorney would not have effectively communicated the magnitude of the risk. However, under the circumstances, no defense attorney could practically give a more accurate assessment than a 99.9% certainty of deportation, so there is no reason to view that advice as deficient under the first prong of *Strickland*.

B. Clients' Understanding of Risk

The concern about providing accurate advice regarding the risk of deportation is not merely a matter of semantics. Although courts sometimes appear to doubt defendants' allegations that they were not aware of the immigration consequences of their pleas despite having received some generalized advice to that effect,[160] the difference between advice that a conviction *may* lead to deportation and advice that a conviction *will* lead to deportation can be very significant for noncitizens deciding whether to plead guilty. Risk perception is an oft-studied field in psychological research, and insights from those studies can shed light on the decision-making process of a noncitizen defendant when the defendant receives advice implying a possibility (rather than certainty) of deportation.

Emotional predispositions can significantly affect perceptions of risk. In one study, survey respondents conveyed their opinions about various technologies, listing both the benefits and risks of each technology.[161] Researchers observed an "implausibly high negative correlation" between the level of benefit and the level of risk respondents perceived for each technology.[162] In other words, people who were favorably disposed toward a technology rated it as offering large benefits and imposing a relatively small risk, while those who did not like the technology listed few benefits and perceived plenty of risk.[163] Time pressure exaggerated these effects, and even people who should have known better[164] demonstrated the same correlation.[165] Even more jarring, respondents who read arguments that focused on the benefits of a certain technology changed their minds about the perceived risks, despite a lack of any relevant evidence regarding the

effective-assistance standard).

[160] *See supra* Part II.A (analyzing cases that consider generalized advice sufficient under *Padilla*).

[161] DANIEL KAHNEMAN, THINKING, FAST AND SLOW 139 (2011). The technologies surveyed included water fluoridation, chemical plants, food preservatives, and cars. *Id.*

[162] *Id.*

[163] *Id.*

[164] Members of the British Toxicology Society responded in a similar manner as the general population. *Id.*

[165] *Id.*

risks.[166] Although the respondents received no information regarding the actual risk of the technology, they perceived the technology as less risky after they began to like it more as a result of reading about its benefits. In other words, "[t]he emotional tail wags the rational dog."[167] This phenomenon, known as the affect heuristic, implies that people perceive a risk "not only by what they think about it but also by how they feel about it."[168]

In the context of plea negotiations, a defense attorney who genuinely believes the plea is a good deal for his client will obviously extol its benefits and thus bias the client's risk perception. For example, presumably Diunov's attorney recommended that she plead guilty, yet the attorney said that he did not believe that her deportation was a "foregone conclusion" and emphasized the availability of the hardship provision.[169] While he certainly mentioned the possibility of deportation, the language he used did not properly emphasize the risk.[170] Given the perceived benefits of her plea, it is reasonable to believe she disregarded much of the risk when deciding whether to plead guilty.[171] Similarly, a client who has already agreed to plead guilty, has heard the benefits of the plea from her attorney, and presumably feels the plea is more favorable than going to trial, is not likely to be swayed by a nominal warning regarding the "risk" of deportation issued by the court in a plea colloquy or read by her attorney from a PSR.[172] The perceived benefits of the plea overshadow any associated risks. Thus, if the deportation is actually presumptively mandatory, advice that it *may* happen could lead a defendant to perceive a statistically certain event as one that is relatively unlikely to happen. This effect is bolstered by a general optimism bias, which causes people to

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166 *Id.* at 140.

167 *Id.*

168 Paul Slovic & Ellen Peters, *Risk Perception and Affect*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 322, 323 (2006).

169 Diunov v. United States, No. 08 Civ. 3184(KMW), 2010 WL 2483985, at *2 (S.D.N.Y. June 16, 2010).

170 Diunov's attorney told her that he thought she had a "good argument for being allowed to remain in the country under an INS hardship exception" even though she was statutorily ineligible for any discretionary relief. *Id.* at *4–5. The court deemed the advice effective because it "broadly" warned Diunov of the immigration consequences of her guilty plea. *Id.* at *7.

171 Diunov alleged that she relied on the possibility of a hardship waiver when she made the decision to enter a guilty plea and claimed that she "would not have taken a plea if [she] knew that [she] would be automatically deported and that there was no such thing as a 'hardship waiver.'" *Id.* at *4 (emphasis omitted).

172 "The more we perceive a benefit from a potentially hazardous agent or process or activity, such as drugs or vaccines or skiing or bungee jumping, the less fearful we are of the risk." David Ropeik, *Understanding Factors of Risk Perception*, NIEMAN REP., Winter 2002, at 52, 52.

underestimate the probability that negative events will happen to them as opposed to others.[173] Optimism bias implies that noncitizen clients who have received advice about the "risk" of deportation might see it as an unlikely event.[174]

Padilla's mandate to offer clear advice when the consequences are succinct and straightforward avoids this issue. It forces defense attorneys to tell clients in certain terms that they will be deported, thus eliminating the likelihood that they could perceive a minimized risk. When defendants accurately perceive the risk of deportation, they may weigh the costs and benefits of a plea differently, and may opt to go to trial instead of accepting a plea bargain that would render them mandatorily deportable. Courts that do not demand this clarity and specificity miss the mark and may put defendants in the position of pleading guilty without fully understanding the deportation consequences of their convictions.

CONCLUSION

Padilla v. Kentucky signaled the Supreme Court's acknowledgment of the increasing intersection between immigration and criminal law. As noncitizens who have been convicted of crimes have become the primary targets for deportation, the importance of providing defendants with accurate advice regarding the deportation consequences of their potential convictions has grown. The Court sought to provide a standard that would ensure accurate advice for clients and provide the proper incentives for defense attorneys to serve as a strong last line of defense against deportation. In applying the *Padilla* standard, lower courts have disagreed about the clarity of advice required, often allowing vague advice, in some cases not even from the defense attorney himself, to satisfy the requirement of effective assistance of counsel. This practice is fundamentally at odds with the intent of *Padilla* and does not provide noncitizen defendants with the specificity they need when their deportation is imminent. Courts should properly apply the *Padilla* standard and demand clear advice from attorneys when the deportation consequences their clients face are unambiguous.

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[173] *See* Christine Jolls, *On Law Enforcement with Boundedly Rational Actors*, *in* THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR 268, 270 (Francesco Parisi & Vernon L. Smith eds., 2005) ("As documented in over 250 studies, people exhibit a strong tendency to underestimate the probability that negative events will happen to them as opposed to others."). In some contexts, this "bias reflects . . . underestimation of the probability of a negative event relative to the actual probability of that event." *Id.* at 271.

[174] *See id.* at 270 (noting that optimism bias has been observed in a wide variety of contexts, "rang[ing] from estimates of the probability of getting a particular disease to estimates of the likelihood of getting fired from a job").