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STRICKLAND-LITE: PADILLA'S TWO-TIERED DUTY FOR NONCITIZENS

CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ*

ABSTRACT

The quarter-century-old ineffective assistance of counsel framework announced in Strickland v. Washington recognizes a Sixth Amendment duty to investigate the law and facts underlying a criminal defendant's legal predicament. In Padilla v. Kentucky the Supreme Court of the United States for the first time extended the Strickland analysis to cover the right of noncitizen defendants to receive information about the immigration consequences of a conviction. Faced with the competing considerations of providing noncitizen criminal defendants with critical information about immigration consequences, on the one hand, and the burden on defense attorneys of researching immigration law, on the other hand, this Article argues that the Court split the difference and invented a "Strickland-lite" duty. Under Strickland-lite, the Court failed to require that criminal defense attorneys investigate the law and facts relevant to immigration consequences as fully as it has long required attorneys to do when investigating other aspects of a criminal case, including even immigration law provisions central to guilt or punishment. This Article locates Padilla within a quarter-century of Strickland analyses and contends that the new Strickland-lite approach conflicts with Strickland's mandate and fails to remedy

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the problem of inaccurate advice for noncitizen criminal defendants that Padilla purports to remedy.

INTRODUCTION

The U.S. Constitution's Sixth Amendment right to counsel¹ sits at the messy intersection of criminal procedure and immigration law.² Criminal procedure scholars frequently lament the unrealized promise of the right to counsel.³ As interpreted by courts, they claim, the right to the assistance of counsel in defending against criminal

1. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

2. See Dana Leigh Marks, *Still a Legal "Cinderella"? Why the Immigration Courts Remain an Ill-Treated Stepchild Today*, 59 FED. LAWYER 25, 27 (2012) (noting the opinion of the Supreme Court of the United States "reject[ing] the state court's finding that erroneous advice about immigration consequences is merely 'collateral' and thus not covered by the Sixth Amendment's guarantee of effective assistance of counsel"); see also 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, 1473–74 (2011) (explaining how, following *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), deportation has been neither categorically covered by nor categorically removed from the umbrella of Sixth Amendment right to counsel); see also Aarti Kohli, *Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens*, 2 CAL. L. REV. CIRCUIT 1, 11, 13 (2011) (noting that "[t]he [*Padilla*] Court concludes that an immigration consequence is in a unique category under the 'ambit' of the Sixth Amendment," and positing that *Padilla* may be an indication that the Court "may be open to expanding Fourth, Sixth, and Eighth Amendment rights in immigration proceedings"); Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 651 (2012) (noting that *Padilla* has implications for criminal and immigration proceedings).

3. See, e.g., Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake*, 1997 ANN. SURV. AM. L. 783, 783–84 (explaining how, despite the constitutionally established right to counsel, wealth disparities create a troubling barrier to equal justice and little is being done to remedy this disparity); William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 147–48 (1995) (highlighting how practical application of the *Strickland* doctrine has produced acutely harmful consequences for capital defendants on appeal); Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 427 (1996) ("Unfortunately, indigent criminal defendants are not always provided with competent appointed counsel. Sometimes they are not even appointed attorneys who remain alert or sober during trial.").

charges lacks the jurisprudential muscle necessary for it to function as a true bulwark against the state's prosecutorial power.⁴ Instead, as one scholar claimed, it is a "lethal fiction"⁵—a promise of protection fallen victim to overly narrow interpretations of its meaning and purpose.⁶ By contrast, immigration law scholars and attorneys routinely pine for the protections that the Sixth Amendment's Right to Counsel Clause offers.⁷ If courts made a realistic assessment of immigration law today, these attorneys claim, the Sixth Amendment would protect the rights of individuals in immigration proceedings, thereby increasing the likelihood that noncitizens would be removed from the United States because it is required by law, not solely

4. See Bruce A. Green, "Through a Glass, Darkly": *How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201, 1235 (1989) (recounting the historical evolution of the Court's interpretation of the Sixth Amendment and properly noting that the Court has only recently interpreted the Sixth Amendment to encompass the effective assistance of counsel).

5. Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 433 (1993).

6. See Steve Zeidman, *Padilla v. Kentucky: Sound and Fury, or Transformative Impact*, 39 FORDHAM URB. L.J. 203, 211–12 n.35 (2011) (providing support for the proposition that, while ineffective assistance of counsel is typically the most common argument raised by defendants on appeal, it is rarely successful); see also Yolanda Vázquez, *Realizing Padilla's Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 39 FORDHAM URB. L.J. 169, 179–80 (2011) [hereinafter Vázquez, *Realizing Padilla's Promise*] (lamenting the *Strickland* standard's practical failings, whose "strict and narrow view" has made it nearly impossible for defendants to prevail on ineffective assistance of counsel claims).

7. See, e.g., Cyrus D. Mehta, *Right to Appointed Counsel in Removal Proceedings? The Supreme Court May Have Opened the Door in Turner v. Rogers*, INSIGHTFUL IMMIGR. BLOG (June 29, 2011, 9:16 PM), <http://blog.cyrusmehta.com/2011/06/right-to-appointed-counsel-in-removal.html> ("The Sixth Amendment clearly grants an indigent defendant the right to state appointed counsel in a criminal case, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and so why not the same right to a non-citizen in a removal case?"); Maureen A. Sweeney, *Where Do We Go from Padilla v. Kentucky? Thoughts on Implementation and Future Directions*, 45 NEW ENG. L. REV. 353, 366 (2011) (arguing that *Padilla* "severely undermined [the] fundamental principle that deportation was not a penalty but a remedial, civil sanction," and thus that there may be "implications for the right to counsel in crime-related deportation proceedings under the Sixth Amendment"); Maria Teresa Rojas, *A "Gideon Decision" for Immigrants*, OPEN SOC'Y FOUND. BLOG (Apr. 7, 2010), <http://blog.soros.org/2010/04/a-gideon-for-immigrants> (reporting that one immigrants' rights advocate said about *Padilla*: "In some ways, this is the *Gideon v. Wainwright*. for immigrants.").

because it is the inevitable byproduct of pro se proceedings or, just as troubling, of incompetent representation.⁸

In *Padilla v. Kentucky*,⁹ the Supreme Court of the United States took a significant—and surprising—turn in the latter direction.¹⁰ Noncitizen criminal defendants, the Court held, are constitutionally entitled to advice about the potential deportation consequences of a conviction prior to entering a guilty plea.¹¹ Failure to do so may constitute ineffective assistance of counsel, allowing a noncitizen to collaterally attack the criminal conviction and, with that, erase the basis for removal from the United States.¹² It has now become clear that *Padilla* marks a turning point in the procedural protections afforded noncitizen criminal defendants.¹³ For the many noncitizen

8. See Aliza B. Kaplan, *A New Approach to Ineffective Assistance of Counsel in Removal Proceedings*, 62 RUTGERS L. REV. 345, 347 (2010) (“Without an appropriate and flexible remedy for ineffective assistance of counsel, deportation decisions are less likely to be based on an accurate review of the law and the facts . . . and more likely to be based on the competence, or lack thereof, of a hired attorney.”).

9. 559 U.S. 356, 130 S. Ct. 1473 (2010).

10. See Vázquez, *Realizing Padilla’s Promise*, *supra* note 6, at 175 (resolving a prior divide among jurisdictions, *Padilla* articulated a new Sixth Amendment duty requiring defense attorneys to describe to their clients the immigration consequences of a criminal conviction).

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

12. See Dana Leigh Marks & Denise Noonan Slavin, *A View Through the Looking Glass: How Crimes Appear from the Immigration Court Perspective*, 39 FORDHAM URB. L.J. 91, 113–14 (2011) (emphasizing that a vacated conviction on the basis of a procedural defect may no longer be considered a conviction for immigration purposes); see also *In re Adamiak*, 23 I. & N. Dec. 878, 879–81 (B.I.A. 2006) (holding that a state conviction vacated for failure to advise about the immigration consequences of a criminal conviction could not serve as the basis for removal).

13. 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, 62 (2012) (highlighting that *Padilla* illustrates the Court’s acknowledgement that “deportation is an integral part—indeed sometimes the most important part—of the penalty”); Rachel E. Rosenbloom, *Will Padilla Reach Across the Border?*, 45 NEW ENG. L. REV. 327, 328 (2011) (same); see also Christopher Gowen & Erin Magary, *Collateral Consequences: How Reliable Data and Resources Can Change the Way Law is Practiced*, 39 FORDHAM URB. L.J. 65, 71 (2011) (describing how the Court’s shift in *Padilla* to describing deportation consequences as “integral” as opposed to “collateral” more perfectly aligns with the reality faced by noncitizens with criminal records (internal quotation marks omitted)); Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1349–50 (2011) (articulating that

criminal defendants whose most precious goal is to remain in the United States, *Padilla* offers a layer of procedural protection between life in a place they know and life in a place they hope to avoid.¹⁴

A criminal defense attorney is now constitutionally obligated to review the noncitizen defendant's predicament and advise about immigration troubles that clearly lay ahead.¹⁵ This is no minor guarantee. Before *Padilla*, noncitizen criminal defendants frequently proceeded through the criminal justice system blind as to how these proceedings might impact their immigration status.¹⁶ The cutting-edge practices of the criminal defense bar trended toward advising about immigration consequences,¹⁷ but, prior to *Padilla*, untold numbers of defense attorneys did not consider immigration consequences as a matter of course.¹⁸ Immigration consequences largely remained the province of immigration law attorneys.¹⁹

Padilla marks the first step in the Court recognizing that deportation lies between both the civil and criminal realms).

14. See Vázquez, *Realizing Padilla's Promise*, *supra* note 6, at 170–71 (“[*Padilla*] affords thousands of noncitizen immigrants a right that may protect their ability to remain in this country.”).

15. *Padilla*, 130 S. Ct. at 1483 (explaining how, even where the law may not be so succinct, a criminal defense attorney must still advise a noncitizen criminal defendant that the pending charges may result in deportation).

16. To illustrate the sheer magnitude of deportations, a pair of scholars noted that “[m]ore than 128,000 noncitizens with criminal convictions were deported in 2009.” Gary Proctor & Nancy King, *Post Padilla: Padilla's Puzzles for Review in State and Federal Courts*, 23 FED. SENT'G REP. 239, 239 (2011).

17. Scott E. Bratton, *Representing a Noncitizen in a Criminal Case*, THE CHAMPION, Jan./Feb. 2007, at 61; see also AM. BAR ASS'N, STANDARDS FOR CRIM. JUSTICE: PLEAS OF GUILTY STANDARD 14-3.2(f) (3d. ed. 1999) (“To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.”).

18. See 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, 66 (2011) (explaining how some defense attorneys “struggled in vain to provide accurate advice on a byzantine field of law,” while “others avoided the issue altogether”).

19. See *id.* (explaining how, prior to *Padilla*, defense attorneys typically adopted one of two approaches with regard to advising on immigration: either (1) the defense attorney recognized the importance of advising and would seek advice from an immigration expert, or (2) the defense attorney would refrain from answering immigration questions that

Without a recognized right to appointment of counsel in immigration court, the reality was that many noncitizen criminal defendants navigated their criminal and immigration proceedings without guidance on the immigration pitfalls of their criminal charge and conviction.²⁰ The post-*Padilla* world is different. Advice about immigration consequences, once a sign of a defense attorney going above and beyond, is now a constitutionalized minimum.²¹ The importance of this new reality, as Yolanda Vázquez aptly put it, is “immeasurable” to noncitizen defendants.²²

All, however, is not perfect. *Padilla* purported merely to apply a long line of right-to-counsel cases to this new context, including *Strickland v. Washington*,²³ the Court’s modern formulation of the ineffective-assistance-of-counsel test.²⁴ Under the *Strickland* standard, the defendant must show two things: first, that counsel failed to function as “the ‘counsel’ guaranteed . . . by the Sixth Amendment” and second, that this “deficient performance prejudiced the defense.”²⁵ Only by avoiding deficient representation, the rationale goes, can counsel facilitate “a reliable adversarial testing process.”²⁶ Though the Court has never identified a comprehensive list of requirements necessary to satisfy *Strickland*,²⁷ it has repeatedly

properly fell within the province of an immigration lawyer upon the belief that immigration was a collateral consequence to a criminal conviction).

20. See Yolanda Vázquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 LA RAZA L.J. 31, 32 (2010) (providing statistics illustrating the number of individuals removed and families separated by removal, and in turn stressing how alarming these statistics are in light of the reality that many of the convicted were unaware of the impact their conviction would have on their immigration status); see also Ira J. Kurzban, *Criminalizing Immigration Law*, in 42ND ANNUAL IMMIGRATION & NATURALIZATION INSTITUTE 321, 326 (2009).

21. See Zeidman, *supra* note 6, at 208.

22. Vázquez, *Realizing Padilla’s Promise*, *supra* note 6, at 200.

23. 466 U.S. 668 (1984).

24. See Richard P. Rhodes, Jr., Note, *Strickland v. Washington: Safeguard of the Capital Defendant’s Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121, 123 (1992) (noting that the *Strickland* Court “articulated a two-pronged test that defendants must fulfill to establish their counsels’ ineffectiveness”).

25. *Strickland*, 466 U.S. at 687.

26. *Id.* at 688 (citing *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

27. See *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (“We have declined to articulate specific guidelines for appropriate attorney conduct . . .”).

discussed several duties that the right to counsel imposes upon criminal defense attorneys.²⁸ Among these is the duty to investigate the law and facts relevant to a defendant's predicament.²⁹ Thorough investigation, the Court explained in *Strickland* and several subsequent decisions, allows the attorney to make "strategic choices" about the best defense strategy.³⁰ Choices made after "less than complete investigation of the relevant law and facts" or "a reasonable decision that makes particular investigations unnecessary" deprive the defendant of the counsel guaranteed under *Strickland*.³¹

This Article will argue that *Padilla* purports to faithfully apply *Strickland*, but in fact lowers the right-to-counsel duty to investigate law and facts in the context of advice about immigration consequences.³² Instead of requiring criminal defense attorneys to hone their skills by grappling with the nuances of the Immigration and Nationality Act ("INA")³³ and the volumes of precedential decisions interpreting its provisions, *Padilla* allows attorneys to provide legal advice to noncitizen defendants without first unraveling the complexities of crime-based removal.³⁴ The *Padilla* Court announced that "when the

28. See *Strickland*, 466 U.S. at 688 (outlining certain basic duties—to remain loyal, avoid conflicts of interest, advocate for defendant's cause, and consult with the defendant on important decisions—while maintaining that any case presenting an ineffectiveness claim must be decided based on whether counsel's assistance was "reasonable considering all the circumstances").

29. See *id.* at 690–91 (emphasizing that counsel's investigations must be "reasonable" and that any decision not to investigate must be "directly assessed for reasonableness . . . , applying a heavy measure of deference to counsel's judgments").

30. *Id.*; see *Wiggins*, 539 U.S. at 521–22 (relying on *Strickland* to emphasize the "deference" owed "strategic judgments" for the purpose of determining the adequacy of counsel's investigation).

31. *Strickland*, 466 U.S. at 690–91; see *Wiggins*, 539 U.S. at 524–25 (explaining that counsel's investigation fell short of both Maryland professional standards and ABA standards, and further distinguishing the case from prior precedents in which the Court found counsel's limited investigations into mitigating evidence to be reasonable).

32. This Article fits within a small but growing body of literature that acknowledges *Padilla*'s value while taking a critical look at its shortcomings. See, e.g., Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1395–96 (2011); Vázquez, *Realizing Padilla's Promise*, *supra* note 6, at 170–71; Zeidman, *supra* note 6, at 204, 226.

33. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

34. See Hew, *supra* note 13, at 32 (acknowledging that the "scope of *Padilla*'s attorney performance mandate, however, is limited to situations where pertinent immigration con-

deportation consequence is truly clear . . . the duty to give correct advice is equally clear.”³⁵ But the Court also noted that “[w]hen the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”³⁶ In effect, the Court adopted a two-tiered duty. If deportation is a “truly clear” consequence, then a defense attorney must tell the defendant as much.³⁷ If, however, “the law is not succinct and straightforward,” then there is no need to unpack its messy nuances; instead, an attorney need only advise the defendant that a conviction “may carry a risk of adverse immigration consequences.”³⁸

Unlike the duty to thoroughly investigate matters related to criminal liability or even sentencing, the “*Strickland-lite*” duty to investigate immigration consequences allows an attorney to cease investigation for reasons completely unrelated to a calculation that further investigation would yield the defendant no additional benefit.³⁹ *Padilla* sanctions ending investigation of immigration

sequences are ‘truly clear’” (citation omitted)); Nicholas D. Thornton, *The Failing Promise of Padilla: How Padilla v. Kentucky Should Have Changed the Game in North Dakota, but Did Not*, 87 N.D. L. REV. 85, 99 (2011) (“In the case of unclear immigration concerns, the Court noted the scope and nature of a criminal defense attorney’s advice would be limited, which implicitly suggests that the client should seek counsel from an immigration attorney.”); Malia Brink, *A Gauntlet Thrown: The Transformative Potential of Padilla v. Kentucky*, 39 FORDHAM URB. L.J. 39, 48 (2011) (explaining that certain criminal convictions trigger automatic deportation, whereas the consequences of other criminal convictions are far less clear). For a thorough explanation of *Padilla*’s breadth, see César Cuauhtémoc García Hernández, *Criminal Defense After Padilla v. Kentucky*, 26 GEO. IMMIGR. L.J. (forthcoming) [hereinafter García Hernández, *After Padilla*].

35. *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1483 (2010).

36. *Id.*

37. *Id.*

38. *Id.* In a similar vein, Vázquez describes *Padilla*’s duty as “limited” in scope. See Vázquez, *Realizing Padilla’s Promise*, *supra* note 6, at 188 (“While the Court successfully created a Sixth Amendment duty to advise as to the immigration consequences of a criminal conviction, it limited that duty.”).

39. See Hew, *supra* note 13, at 48–51 (arguing that criminal defense attorneys should inform their clients of other immigration consequences, including mandatory detention, travel restrictions, and limitations on naturalization, which do not fall within *Padilla*’s mandate); Vázquez, *Realizing Padilla’s Promise*, *supra* note 6, at 189 (noting that *Padilla* al-

consequences upon realizing that the relevant law is complex, regardless of whether further investigation would be beneficial.⁴⁰ Nowhere else in the duty-to-investigate case law can one find such an end point.⁴¹

Padilla's peril does not, however, begin there. The *Padilla* Court's narrow conceptualization of "investigation" means that in some instances attorneys will provide constitutionally sound advice that nonetheless misleads defendants.⁴² Even in situations in which deportation is "truly clear," as *Padilla* envisions that phrase, attorneys will not accurately inform defendants of their likelihood to remain in the United States.⁴³

lows a "generic advisement" when the immigration consequence of conviction is unclear, which adversely impacts a defense attorney's ability to negotiate a more favorable plea).

40. See Hew, *supra* note 13, at 49 ("While the *Padilla* majority noted that defense counsel must notify the defendant of deportation when its threat is truly clear, the Court should have specifically identified potential mandatory detention as another area worthy of notice."); Vázquez, *Realizing Padilla's Promise*, *supra* note 6, at 189 (noting that *Padilla* may adversely impact a defendant's leverage during plea negotiations).

41. See, e.g., Pavel v. Hollins, 261 F.3d 210, 218–19 (2d Cir. 2001) (stating that an attorney's decision to end the case investigation by failing to call important witnesses because of a desire to save time and effort provided support for an ineffective assistance of counsel claim). Importantly, however, the Sixth Amendment does not reach collateral consequences of conviction, and thus, the duty to investigate does not apply. See Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 703–04 (2002) (explaining the collateral consequences rule and observing that courts have not explained how the rule "fits into the system for evaluating claims of ineffective assistance of counsel"). *Padilla* clarified that the direct versus collateral consequence distinction does not apply to deportation concerns. *Padilla*, 130 S. Ct. at 1482; see also *Padilla v. Kentucky*, 381 S.W.3d 322, 325 (Ky. Ct. App. 2012) (acknowledging the Supreme Court's rejection of the "direct" and "collateral" distinction "in the context of immigration consequences").

42. Cf. Vázquez, *Realizing Padilla's Promise*, *supra* note 6, at 190 ("By excusing defense attorneys from providing information about the immigration consequences of a conviction or plea to their noncitizen defendants when the law is not clear, *Padilla* will deprive certain noncitizen defendants of advice and performance that the *Padilla* Court itself recognized to be of paramount importance.").

43. See *infra* Part III.C; see also Hew, *supra* note 13, at 48 ("If the client wishes to remain in the United States . . . the criminal defense attorney must explain the immigration consequences of a plea—other than just the certainty of removal . . .").

For all its value to noncitizen criminal defendants, then, *Padilla* falls short of its full potential.⁴⁴ By allowing attorneys to cease investigating the applicable law and facts of a criminal prosecution without considering every nuance or upon a realization that the “law is not succinct and straightforward,” *Padilla* threatens to leave many noncitizen defendants in much the same position as before this landmark decision—forced to decide whether to plead guilty based on incomplete or inaccurate advice about the deportation consequences of conviction.⁴⁵ Adopting such a *Strickland*-lite standard, this Article will argue, presents dangers both for the noncitizen defendants whom the *Padilla* Court concerned itself with protecting and for the representation rights of criminal defendants more generally.⁴⁶ Moreover, leaving noncitizen defendants with little protection places *Padilla* within a pattern of processes through which standard criminal prosecutions are shorn of key features that protect defendants, emblemized by Operation Streamline and fast-track plea agreements.⁴⁷ Like these programs, *Padilla* allows criminal proceedings against noncitizen defendants to proceed *en masse* with a semblance of constitutional normalcy, while in reality deviating far from constitutional standards.⁴⁸

This Article will proceed in four parts. Part I will survey the rationale underlying the right to counsel articulated in the twentieth-century line of cases that includes *Powell v. Alabama*,⁴⁹ *Gideon v. Wainwright*,⁵⁰ and *Strickland v. Washington*. The historical record captured in these cases and elsewhere, Part I will suggest, consistently evidences a conscious, if imperfect, desire to promote fairness and reliability in criminal proceedings by interjecting a skilled counselor between the state’s professional prosecutor and the defendant. Following this overview, Part II will closely examine how *Strickland*’s

44. See Vázquez, *Realizing Padilla’s Promise*, *supra* note 6, at 200 (“Although *Padilla* is a landmark case and will help many noncitizen defendants get information about the immigration consequences of a criminal conviction, the opinion falls short of mandating that defense attorneys provide their noncitizen clients with the advice needed to prevent deportation in each and every case.”).

45. See *id.* at 189 (opining that *Padilla*’s two-tiered test results in “a very generic, and often useless, warning” for noncitizen defendants).

46. See *infra* Parts III, IV.B.

47. See *infra* Part IV.A.

48. See *infra* notes 417–419 and accompanying text.

49. 287 U.S. 45 (1932).

50. 372 U.S. 335 (1963).

duty to investigate has unraveled in subsequent Supreme Court cases and the lower courts. Part II will contend that courts have steadfastly maintained a distinction between a defense attorney's thoroughly investigated, strategic choices, which are constitutionally sound, and decisions that follow inattentive investigation, which have never received constitutional sanction. Until *Padilla* that is.

Part III will then turn to *Padilla* and its unique status within the *Strickland* duty to investigate body of case law. Part III will display the complexity of the INA's crime-based provisions and *Padilla*'s reluctance to push defense attorneys to navigate those complex waters.⁵¹ By allowing incompletely researched advice about criminal charges that are almost certain to lead to entry of a removal order, *Padilla*'s two-tiered standard denies noncitizen criminal defendants the counsel that is guaranteed by the Sixth Amendment. In some cases, the advice that *Padilla* mandates may be worse for the noncitizen than no advice at all, particularly when inaccuracies in information influence a noncitizen's decisions in potentially detrimental ways.⁵²

Lastly, Part IV will contemplate *Strickland*-lite's possible repercussions outside the realm of immigration consequences. Although the unique history of immigration law may have pushed the *Padilla* Court's application of *Strickland* into the realm of immigration consequences, there is no guarantee that its *Strickland*-lite standard will remain within those confines.⁵³ Indeed, history counsels that when constitutional protections as applied to immigrants begin to erode, that erosion later chips away at the core of the rights as applied to all.⁵⁴ In this way, *Strickland*-lite threatens to erode the baseline Sixth Amendment guarantee of the right to assistance of counsel.

I. RIGHT-TO-COUNSEL RATIONALE

The right to counsel has been at the core of criminal proceedings in the United States since before it became one of a handful of guaranties enacted to satisfy members of the founding

51. See *infra* Part III.A–B.

52. See *infra* Part III.C.

53. See *infra* Part IV.B.

54. See, e.g., David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 988–1003 (2002) (providing “examples [that] illustrate how measures initially directed at immigrants can pave the way for incursions on citizens’ rights”).

generation who were wary of centralized state power.⁵⁵ Over the course of the nation's legal history, the right to counsel has constantly adapted to meet evolving criminal justice needs and expectations.⁵⁶ From meager origins to today's far more expansive right to the appointment of an attorney, the counsel guarantee has been broadened to include protections not imagined at the time the Sixth Amendment was ratified.⁵⁷ *Padilla's* mandate regarding immigration consequences exemplifies this "constant, almost relentless expansion."⁵⁸

This consistent expansion of the right to counsel reflects its central role in criminal proceedings. As the Supreme Court explained in *Lakeside v. Oregon*⁵⁹: "In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel."⁶⁰ Adds Pamela R. Metzger: "[The right to counsel] is the tool by which our criminal justice system protects the accused, [and] secures a truly adversary proceeding."⁶¹ In a similar vein, Justice Black wrote in his opinion for the Court in *Johnson v. Zerbst*⁶² that the right-to-counsel provision "embodies a realistic recognition of the obvious

55. See *Powell v. Alabama*, 287 U.S. 45, 61–65 (1932) (surveying right-to-counsel provisions in colonial constitutions and statutes); John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. (forthcoming 2013) (manuscript at 9), available at <http://ssrn.com/abstract=2037500> ("Even prior to the ratification of the Sixth Amendment, American colonies were much more liberal than English courts in their recognition of a right to counsel . . .").

56. See Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-To-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1637 (2003) ("The counsel guarantee has never been a rigid or static doctrine. Rather, it has been an evolving embodiment of the fair process norms of a given historical context.").

57. See King, *supra* note 55, at 9 (observing that "subsequent interpreters of the Sixth Amendment have found a right to counsel much broader than that foreseen by the Framers"). Most notably, the constitutional provision was not originally thought to include appointment of counsel at the government's expense. FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT* 110–11 (Greenwood Press 1969).

58. JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 34 (2002). According to Tomkovicz, this expansion halted in the last quarter of the twentieth century. *Id.* at 36.

59. 435 U.S. 333 (1978).

60. *Id.* at 341.

61. Metzger, *supra* note 56, at 1699.

62. 304 U.S. 458 (1938).

truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.”⁶³

The decision in *Powell* that the young, illiterate black defendants charged with raping two white women on a train in Jim Crow Alabama were entitled to counsel is, in effect, a recognition that even if the defendants had been given the time to prepare a defense, they could not have done so.⁶⁴ The Court observed that the young men simply lacked the ability to speak on their own behalf in any way that might assist them in court or in any way that might shed light on the truth of what occurred on their fateful train ride, regardless of their actual culpability.⁶⁵ In such situations, however, a defense attorney’s knowledge harnessed into the role of a “zealous, partisan advocate,” could equip the defendant with the necessary skill to mount a defense that would lead to a fair adversarial process.⁶⁶ The “guiding hand of counsel,”⁶⁷ as the *Powell* Court described the benefit of representation, ensures that a criminal prosecution does not become “a sacrifice of unarmed prisoners to gladiators.”⁶⁸ Inequality may exist,⁶⁹ but

63. *Id.* at 462–63.

64. *See Powell v. Alabama*, 287 U.S. 45, 49–52, 71–72 (1932) (reasoning that to deny aid of counsel to one who “is incapable adequately of making his own defense . . . would be to ignore the fundamental postulate . . . that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard” (internal quotation marks omitted)).

65. *See id.* at 52–53, 71 (noting “the ignorance and illiteracy of the defendants” and the fact that their families lived in other states, which makes it difficult for the defendants to secure counsel without “reasonable time and opportunity” to do so).

66. *See TOMKOVICZ, supra* note 58, at 128–29 (“[A] lawyer’s assistance is essential because the accused has severe deficiencies and disabilities. . . . The adversarial contest would be grossly imbalanced and thus unfair without the equalizing presence of a legally trained assistant.”); *see also* *Evitts v. Lucey*, 469 U.S. 387, 394 (1985) (noting that the attorney “must play the role of an active advocate” and that a “defendant’s liberty depends on his ability to present his case”).

67. *Powell*, 287 U.S. at 69.

68. *United States v. Cronin*, 466 U.S. 648, 657 (1984) (quoting *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)).

69. *See, e.g.,* Stephen B. Bright, *The Right to Counsel in Death Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right and What We Should Do About It*, 11 J.L. & SOC’Y 1, 3 (2010) (expressing concern that “[i]n many jurisdictions, the workloads of lawyers defending the poor are so overwhelming, that it is impossible for them to give their clients

criminal liability, the counsel guarantee suggests, should not be imposed solely because the defendant was unable to utter a cognizable defense.⁷⁰

For all its lofty promises of evening the playing field between professional prosecutors and lay defendants, there was still no “guiding hand of counsel” available to those criminal defendants who could not afford to hire an attorney.⁷¹ It took almost 150 years after the Sixth Amendment’s enactment for right-to-counsel jurisprudence to finally recognize a constitutional right to appointed counsel; even then, this guarantee extended only to federal prosecutions.⁷² A quarter century later, in the watershed *Gideon* decision, the Supreme Court announced a right to appointed counsel in state prosecutions—a monumental extension if for no other reason than the dominant role of the states in imposing criminal liability.⁷³ From

the individual attention they require” and that “[m]any court-appointed lawyers have no resources for investigation and expert assistance”).

70. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973) (“For without that right [to counsel], a wholly innocent accused faces the real and substantial danger that simply because of his lack of legal expertise he may be convicted.”); see also Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 96–120 (2012) (identifying a series of cases in which the Supreme Court has expanded procedural due process protections in immigration proceedings to argue in favor of appointed counsel for detained immigrants pending removal proceedings).

71. *Powell*, 287 U.S. at 69; see Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 573–74 (2005) (“[T]he word ‘indigent’ appears nowhere in the text of the Sixth Amendment, nor does the Amendment explicitly specify that the government will provide counsel to those who are impoverished or indigent.”).

72. See *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (stating that the Sixth Amendment requires federal courts to provide assistance of counsel unless a defendant waives the right); see also Gershowitz, *supra* note 71, at 574 (“During the first half of the twentieth century, the key Sixth Amendment question was whether the right to counsel should be applied to state defendants. The early answer to this question was in the negative.”).

73. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); see *What the Federal Courts Do*, FED. JUD. CTR., <http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu2b&page=/federal/courts.nsf/page/CCA93B3B87C844BC85256C7900460860?opendocument> (last visited Feb. 2, 2013) (“[M]ost criminal cases involve violations of state law and are tried in state court.”). *Gideon* was doubly monumental because it overturned the Court’s decision twenty years earlier that the U.S. Constitution did not require states to furnish counsel for criminal defendants. See *Betts v. Brady*, 316 U.S. 455, 471–73 (1942), *rev’d*, *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Illustrating the states’ dominant

1963, when *Gideon* was decided, to the present day, the Sixth Amendment has ensured that every individual charged with a non-petty offense receives the benefit of counsel.⁷⁴

It would, of course, be improper to proclaim too highly the miracle of appointed counsel. As *Powell* makes unmistakably clear, even appointing the entire local bar is meaningless if none of the attorneys actually function as an adversary to the prosecutor.⁷⁵ Yet the Court did not, at that time, explicitly declare a Sixth Amendment quality-control criterion. Not surprisingly, examples of ineffectual, pro-forma representation post-*Powell* are plentiful.⁷⁶ It would be almost forty years after *Powell*, and seven after *Gideon*, until the Court explicitly enunciated, in *Strickland*, the test for establishing a claim of ineffective assistance of counsel.⁷⁷ Adding a qualitative component to the Sixth Amendment right, suggests one commentator, ensures that, “[i]n the adversarial battle, the defense lawyer serves as both an offensive ‘sword’ and a defensive ‘shield’ for the defendant.”⁷⁸ This is perhaps more idealistic a portrayal of Sixth Amendment case law than

role in prosecuting alleged criminal activity, in fiscal year 2009 the United States Attorneys’ offices nationwide filed 67,864 cases, while there were approximately twenty million cases filed in state courts. EXEC. OFFICE FOR U.S. ATTORNEYS, DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT: FISCAL YEAR 2010, at 9 fig.2.2 (2010); R. LAFOUNTAIN ET AL., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 19–20 (2011), available at <http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf>.

74. See *Whorton v. Bockting*, 549 U.S. 406, 419 (2007) (“In *Gideon* . . . the Court held that counsel must be appointed for any indigent defendant charged with a felony.”). Importantly, the Supreme Court has interpreted the Sixth Amendment right to counsel as prohibiting imprisonment without counsel; thus, punishment short of imprisonment is permissible without the benefit of counsel. *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979).

75. See *Powell*, 287 U.S. at 59 (“It is not enough to assume that counsel . . . precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. . . . No attempt was made to investigate. No opportunity to do so was given.”); see also *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (“That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.”).

76. See, e.g., David Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2–3 (1973) (providing examples of shoddy defense representation).

77. See *Strickland*, 466 U.S. at 687 (outlining a two-part test for a claim of ineffective assistance of counsel, which requires (1) a “show[ing] that counsel’s performance was deficient,” and (2) a “show[ing] that the deficient performance prejudiced the defense”).

78. TOMKOVICZ, *supra* note 58, at 49.

is merited. Indeed, subsequent case law has provided plenty of fodder for criticism.⁷⁹ Still, through the concrete mechanisms discussed in Part II, the Court's recognition "that the right to counsel is the right to the effective assistance of counsel"⁸⁰ can be said to have meaningfully improved some criminal proceedings.

II. DUTY TO INVESTIGATE

Despite the simplicity of the constitutional text—ensuring “the assistance of counsel”—the right to counsel has evolved into a multifaceted obligation. As the *Strickland* Court explained, “[r]epresentation of a criminal defendant entails certain basic duties.”⁸¹ Although the Supreme Court refused to provide an exhaustive list of requirements, it did identify several broad duties imposed upon a criminal defense attorney to “assist the defendant,” which include “advocat[ing] the defendant’s cause[,] . . . consult[ing] with the defendant on important decisions[,] and . . . keep[ing] the defendant informed of important developments in the course of the prosecution.”⁸² The Court also noted that criminal defense attorneys should remain loyal to the defendant and avoid a conflict of interest, “bring[ing] to bear such skill and knowledge as will render the trial a reliable adversarial testing process.”⁸³ Last, but most relevant here, the Court observed that defense attorneys have a duty to investigate.⁸⁴

The adversarial process would not function properly were defense counsel not required to investigate the strength of the prosecution’s case and search for possible defense strategies.⁸⁵

79. See *McFarland v. Scott*, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting) (“[P]ractical experience establishes that the *Strickland* test, in application, has failed to protect a defendant’s right to be represented by something more than ‘a person who happens to be a lawyer.’” (citation omitted)); Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 426–27 (1996) (providing examples of how the *Strickland* standard “allow[s] slipshod representation of indigent defendants”).

80. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

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

82. *Id.*

83. *Id.*

84. *Id.* at 690–91; see also *Cullen v. Pinholster*, 131 S. Ct. 1388, 1406–07 (2011) (reiterating the duty to investigate); *Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (reiterating the duty to advocate the defendant’s cause and remain loyal to the defendant).

85. *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

Without investigation, counsel proceeds blindly, relying on little more than guesswork. In effect, without “thorough-going investigation and preparation” or a reasonable decision to stop investigating,⁸⁶ an attorney cannot effectively serve the defendant as an advocate before the prosecutor or the court.⁸⁷ To avoid this outcome, *Strickland* mandated that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”⁸⁸

Investigation by counsel is necessary precisely because the attorney brings special skills and knowledge to the defense unit.⁸⁹ While the defendant may have access to critical facts, that information is effectively useless if it is not paired with the defense attorney’s ability to determine how those facts ought to be handled to best assist the defendant.⁹⁰ Criminal law and procedure, implied the *Powell* Court, is far too complicated for a layperson to comprehend with the skill necessary to mount an adequate defense.⁹¹

86. *Powell v. Alabama*, 287 U.S. 45, 57 (1932); *Strickland*, 466 U.S. at 691.

87. See *Kimmelman*, 477 U.S. at 384 (explaining that the “adversarial testing process generally will not function properly unless defense counsel has done some investigation”). Indeed, several of the *Padilla* amici made this point in urging the Court to adopt an interpretation of the Sixth Amendment right to counsel that requires exploration of potential immigration consequences of conviction. Brief for the National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner, *Padilla v. Kentucky* 559 U.S. 356, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 1567356, at *16–17.

88. *Strickland v. Washington*, 466 U.S. 668, 691 (1984); see Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 *FORDHAM URB. L.J.* 1097, 1106 (2004) (“[T]o provide effective assistance of counsel consistent with the Sixth Amendment, defense counsel has a duty to investigate the case.”).

89. See, e.g., Ingrid V. Eagly, *Criminal Clinics in the Pursuit of Immigrant Rights: Lessons from the Loncheros*, 2 *U.C. IRVINE L. REV.* 91, 112–16 (2012) (explaining that the contemporary criminal defense attorney helps defendants navigate proceedings and considerations outside of what is typically thought of as criminal law and procedure).

90. TOMKOVICZ, *supra* note 58, at 136.

91. See *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932) (“Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense . . .”); see also Scott R. Grubman, *I Want My (Immigration) Lawyer! The Necessity of Court-Appointed Immigration Counsel in Criminal Prosecutions After Padilla v. Kentucky*, 12 *NEV. L.J.* 364, 368–69 (2012) (explaining that the Court’s concern for the untrained layperson’s ability to understand legal proceedings also

Without access to trained counsel, the criminal process was thought to lack fundamental fairness.⁹² Indeed, a statute passed by the General Assembly for the colony of Rhode Island in 1660 affording defendants a right to counsel recognized the obstacles facing lay defendants.⁹³ These individuals, the statute's prefatory language explained, "may not bee accomplished with soe much wisome and knowledge of the law as to plead [their] own inocencye, &c. [sic]."⁹⁴ Ultimately, investigation allows the defense attorney to determine whether the defendant's goals are flights of fancy or legal possibilities.⁹⁵ Only then can the attorney advise the client about suitable strategies to accomplish the defendant's goals.⁹⁶

Despite the centrality of investigation to the right to counsel, the Supreme Court has repeated many times over that no attorney is obligated to investigate endlessly.⁹⁷ In a recent reprise of *Strickland*'s acknowledgment that the Sixth Amendment recognizes a reasonable limit on the duty to investigate,⁹⁸ the Court in *Cullen v. Pinholster*⁹⁹ explained that "[t]here comes a point where a defense attorney will reasonably decide that another strategy is in order, thus 'mak[ing] particular investigations unnecessary.'"¹⁰⁰ The question then becomes

appeared in *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938), a right-to-counsel decision issued six years after *Powell*).

92. See TOMKOVICZ, *supra* note 58, at 122 (discussing the importance of having an attorney for an appeal as a matter of right from a criminal conviction); Metzger, *supra* note 56, at 1642 (explaining that the *Powell* Court's articulation of the right to counsel as evening the imbalance between the prosecution and the defense "echoed the colonists' views about counsel").

93. TOMKOVICZ, *supra* note 58, at 11.

94. *Id.* (citation omitted).

95. See, e.g., *Nix v. Whiteside*, 475 U.S. 157, 171 (1986) (determining that defense counsel acted within the bounds of professional conduct by refusing to go along with a client's decision to perjure himself).

96. See TOMKOVICZ, *supra* note 58, at 124 (noting that defense counsel must make "herself aware of all the apposite facts and law . . . to formulate arguments and positions, and to plan strategies").

97. See, e.g., *Cullen v. Pinholster*, 131 S. Ct. 1388, 1406–07 (2011) ("*Strickland* itself rejected the notion that the same investigation will be required in every case.>").

98. See *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (explaining that counsel has a duty to make "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary").

99. 131 S. Ct. 1388 (2011).

100. *Id.* at 1407 (quoting *Strickland*, 466 U.S. at 691).

what constitutes a reasonable decision to cease investigation. It is clear that a “cursory investigation” is insufficient, even where, as in *Wiggins v. Smith*,¹⁰¹ counsel claims to have decided to focus their efforts on one aspect of a defense strategy over another.¹⁰² If, however, counsel elects to end the investigation based on “reasonable professional judgments,” then the choice is deemed a matter of defense strategy beyond the reach of courts to second-guess.¹⁰³ In sum, the amount of deference given to an attorney’s decision to stop investigating largely depends on what the attorney learned prior to ending the investigation.¹⁰⁴

In the highly important plea context, given its dominance in contemporary criminal proceedings,¹⁰⁵ a defense attorney is charged with equipping the defendant with the information needed to understand the consequences of pleading versus going to trial.¹⁰⁶ Specifically, the duty to investigate requires that the defense attorney do as much investigation as necessary to provide the defendant with an understanding of the proposed plea conditions and options.¹⁰⁷

101. 539 U.S. 510 (2003).

102. See *id.* at 527 (“In assessing the reasonableness of an attorney’s investigation, however, a court must consider . . . whether the known evidence would lead a reasonable attorney to investigate further.”). In *Wiggins*, one of two defense attorneys claimed that defense counsel decided to “disput[e] Wiggins’ direct responsibility for the murder” during the sentencing proceeding rather than present mitigation evidence of Wiggins’ troubled life. *Id.* at 516–17.

103. *Wiggins*, 539 U.S. at 528 (quoting *Strickland*, 466 U.S. at 690–91).

104. See Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 531 (2009) (noting that the *Wiggins* Court determined that if the defense attorneys “had seen how powerful the background evidence was, even they would have introduced it”).

105. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (writing that plea bargaining “is not some adjunct to the criminal justice system[, but instead] is the criminal justice system”).

106. Jane Campbell Moriarty & Marisa Main, “Waiving” Goodbye to Rights: *Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 HASTINGS CONST. L.Q. 1029, 1042–43 (2011).

107. See *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981) (“When a defendant pleads guilty on the advice of counsel, the attorney has the duty to advise the defendant of the available options and possible consequences.”); *Correale v. United States*, 479 F.2d 944, 949 (1st Cir. 1973) (“Particularly when a plea bargain is discussed . . . it is incumbent on counsel to acquaint himself or herself with all the available alternatives and their consequences for the defendant’s liberty and rehabilitation.”); Moriarty & Main, *supra* note 106, at 1043 (observing that in *Padilla*, the Supreme Court held that the defense attorney

Some circuits have concretized this as a requirement that the attorney give the defendant an “informed opinion” about how to plea, though no circuit requires that counsel recommend a particular plea.¹⁰⁸ For its part, the Supreme Court recently explained that effective assistance of counsel involves providing accurate advice about plea negotiations.¹⁰⁹ Thus, not providing advice, or providing inaccurate advice that leads to a worse outcome, whether by pleading to a worse offer or by conviction after trial, can serve as the basis of an ineffective assistance claim.¹¹⁰

Because the right to counsel is not concerned with obtaining a favorable outcome for the defendant¹¹¹—a goal that most defendants understandably think is paramount—it is not surprising that many ineffective assistance of counsel claims fail.¹¹² Rather, courts correctly conclude that thorough investigation and corresponding advice satisfy the counsel guarantee.¹¹³ So too does thorough investigation followed

was ineffective for failing “to advise the defendant of possible deportation consequences of a guilty plea”). In *Hill v. Lockhart*, the Supreme Court extended the *Strickland* standard for the ineffectiveness of counsel to the plea process. 474 U.S. 52, 57–58 (1985).

108. *Boria v. Keane*, 99 F.3d 492, 497 (2d Cir. 1996); see *United States v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003) (“[I]t is equally ineffective to fail to advise a client to enter into a plea bargain when it is clearly in the client’s best interest.”); *Purdy v. United States*, 208 F.3d 41, 48 (2d Cir. 2000) (concluding that failure to advise the defendant on whether to take a plea did not constitute ineffective assistance when counsel fully informed the defendant of the strength of the government’s case). The informed opinion requirement finds support in *Von Moltke v. Gillies*, where the Court stated: “Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.” 332 U.S. 708, 721 (1948).

109. *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012).

110. *Lafler v. Cooper*, 132 S. Ct. 1376, 1384–85 (2012) (determining that when ineffective advice leads a criminal defendant to reject, not accept, a plea offer, “a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court” to demonstrate *Strickland* prejudice).

111. Cf. TOMOKVICZ, *supra* note 58, at 49 (“The core reason for the constitutional right to [counsel] is to ‘equalize’ the status of the criminal defendant in the battle with the state.”).

112. See, e.g., VICTOR E. FLANGO, *HABEAS CORPUS IN STATE AND FEDERAL COURTS* 62 tbl.17 (1994) (indicating that eight percent of state court habeas petitions based on ineffective assistance claims and less than one percent of such federal claims were successful).

113. See *supra* notes 80–110 and accompanying text.

by an incorrect prediction of how certain facts will be perceived by a court or jury, or how a court or jury will decide regarding guilt.¹¹⁴

A mistaken prediction about a factual or legal issue's effect, however, is different from incorrect advice based on an attorney's unreasonable unawareness of that issue. Ending investigation because an attorney has incorrectly identified the state of applicable law, for example, is wholly distinct from identifying that legal principle correctly, but mistakenly predicting how a court would interpret it.¹¹⁵ In the first instance, an attorney failed to perform her function as a legal expert, and in the second, the attorney performed that function and exercised her judgment in a reasonable manner. A similarly troubling issue arises when counsel allegedly cuts off investigation of relevant facts or law due to "inattention;" in such instances the duty to investigate is likewise violated.¹¹⁶ If, by contrast, the attorney decided to cease investigation as a result of "reasoned strategic judgment," then there is no deficiency in the duty to investigate.¹¹⁷

A. *Investigating Facts*

Although many ineffective assistance of counsel claims are unsuccessful, Supreme Court decisions are filled with examples of attorneys who failed to conduct sufficient investigation of pertinent

114. See *Lafler*, 132 S. Ct. at 1390–91 (acknowledging that failure to predict the outcome of a trial is not automatically deemed ineffective assistance of counsel); *McMann v. Richardson*, 397 U.S. 759, 770 (1970) (explaining that judicial refusal to accept a plea does not amount to ineffective assistance of counsel if the plea was made under "reasonably competent advice"); see also *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) ("Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel.").

115. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.10(c) (3d ed. 2000). Compare *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000) (stating that the failure to investigate records from the defendant's "nightmarish childhood" was based on a misunderstanding "that state law barred access to such records" and that defense counsel "did not fulfill their obligation to conduct a thorough investigation"), with *McMann*, 397 U.S. at 770 (explaining that "the good-faith evaluations of a reasonably competent attorney [may] turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts").

116. *Wiggins v. Smith*, 539 U.S. 510, 523–29 (2003).

117. *Id.*

facts to allow for a reasonable decision to stop investigating.¹¹⁸ In *Rompilla v. Beard*,¹¹⁹ for example, the Court concluded that defense counsel were constitutionally deficient for failing to examine the court file on the defendant's prior conviction.¹²⁰ Any reasonably competent attorney, the Court held, would have consulted this information, though voluminous, because it was clear from the nature of the charged offense of murder and the prosecution's announced intent to seek the death penalty that the prosecution would probably rely on information of prior convictions in the sentencing phase as the evidence of aggravation necessary to obtain a death sentence.¹²¹ According to the Supreme Court, knowing this information, reasonably competent counsel would have tried to learn what they could about Rompilla's prior convictions so as to become familiar with the strength of the prosecution's aggravation claim and to identify potential sentencing mitigation evidence.¹²² Similarly, in *Porter v. McCollum*,¹²³ the Court reiterated defense counsel's obligation "to conduct *some* sort of mitigation investigation"—specifically into the factual matters of the defendant's mental health, family history, and military service.¹²⁴ The Court found that the failure to conduct such an investigation, rendered the representation Porter received constitutionally deficient.¹²⁵

118. Though many of these cases arose from capital sentencing proceedings, the Court applied *Strickland* to a non-capital sentencing claim and numerous courts of appeal have done the same. See *infra* Part II.B.1; see also Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1080–81 (2009) (explaining that the two-prong test for capital sentencing applied in *Strickland* has been applied to non-capital sentencing by the Supreme Court and most of the lower federal courts).

119. 545 U.S. 374 (2005).

120. *Id.* at 383.

121. *Id.* at 377–78, 383. Pennsylvania law in effect at the time of Rompilla's trial required evidence of aggravation to issue a death sentence. 42 PA. CONS. STAT. § 9711(c)(2) (2007). Among the statutorily permissible aggravating circumstances was evidence that "[t]he defendant had a history of felony convictions involving the use or threat of violence to a person." *Id.* § 9711(d)(9).

122. See *Rompilla*, 545 U.S. at 385 ("[I]t is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation.").

123. 558 U.S. 30, 130 S. Ct. 447 (2009).

124. *Id.* at 453.

125. *Id.*

Following a similar vein, in *Kimmelman v. Morrison*¹²⁶ the Supreme Court concluded that a defense attorney who did not conduct any pretrial discovery, and therefore was unaware of the importance of moving to suppress key evidence, “fell below the level of reasonable professional assistance” required by *Strickland*.¹²⁷ The Court explained that “a total failure to conduct pre-trial discovery” was “unreasonable, that is, contrary to prevailing professional norms” because the decision “was not based on ‘strategy,’ but on counsel’s mistaken beliefs that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense.”¹²⁸ Without discovery, the Court explained, defense counsel could neither investigate nor reach a reasonable decision not to investigate.¹²⁹

Even where counsel conducts some investigation into mitigating circumstances, it may not be enough to satisfy the Sixth Amendment duty. In *Wiggins*, for example, the Supreme Court determined that counsel fell short of providing reasonably competent assistance where they did not pursue leads about possible mitigation evidence that were apparent from the investigation they performed.¹³⁰ In particular, the Court stated that the evidence of Wiggins’s troubled life that his defense attorneys uncovered should have informed them of the need

126. 477 U.S. 365 (1986).

127. *Id.* at 385–86.

128. *Id.* Though the Court does not explain why Morrison’s attorney was deficient, it was likely because, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, the defense attorney should have submitted a request for exculpatory evidence tailored to the defense strategy rather than rely on the prosecutor’s much more lax obligation to affirmatively turn over evidence that is obviously of substantial value to the defense. *Cf. id.* at 84, 87 (“hold[ing] that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment”); *see also* United States v. Agurs, 427 U.S. 97, 110 (1976) (explaining that when “evidence is obviously of such substantial value to the defense . . . elementary fairness requires it to be disclosed even without a specific request”); Michael A. Collora & William A. Haddad, *Exculpatory Evidence: Getting It and Using It*, CHAMPION, Mar. 2010, at 16–17 (suggesting best defense practices for obtaining exculpatory information). In *Kimmelman*, the defense attorney failed to learn that the police confiscated a bedsheet from the defendant’s home without a warrant or an applicable exception because he did not request any discovery. 477 U.S. at 368–69, 385.

129. *Id.* at 385.

130. *See Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003) (“[C]ounsel uncovered no evidence in their investigation to suggest that a mitigation case . . . would have been counter-productive, or that further investigation would have been fruitless . . .”).

to investigate his background further to allow for an “informed choice” about how to proceed with the defense.¹³¹

Following this theme, in *Williams v. Taylor*¹³² the Court found deficient performance where sentencing-phase counsel “failed to conduct an investigation that would have uncovered extensive records graphically describing Williams’ nightmarish childhood” that could have bolstered a mitigation argument.¹³³ Even though Williams’s sentencing-stage attorney presented some mitigation evidence—testimony provided by Williams’s mother, two neighbors, and a psychiatrist, plus repeated references to Williams’s confession—the Court nonetheless concluded that counsel’s failure to explore and present the background history denied Williams effective assistance because the mitigation investigation was shortened by attorney error, rather than by reasoned decision making.¹³⁴ As the Court explained, defense counsel failed to investigate Williams’ troubled childhood “not because of any strategic calculation but because they incorrectly thought that state law barred access to such records.”¹³⁵ The Court then stated that investigation cut short due to the attorney’s mistaken understanding of state law is not characteristic of an attorney who has “fulfill[ed her] obligation to conduct a thorough investigation of the defendant’s background.”¹³⁶ Instead, it is the “unprofessional service” targeted by *Strickland*’s deficiency prong.¹³⁷

Lower state and federal courts have followed similar paths. The Supreme Court of Utah in *State v. Holland*,¹³⁸ for example, found ineffective assistance of counsel where the record suggested that the defense attorney might not have done any factual investigation. The record, the court explained, was unclear about whether the defense attorney had “analyzed the law and the facts and laid out the options”

131. *Id.*; see also *Porter v. McCollum*, 553 U.S. 30, 130 S. Ct. 447, 453 (2009) (comparing the case to *Wiggins* and observing that defense counsel should have conducted an investigation based on information about the defendant’s background revealed in court-ordered competency evaluations).

132. 529 U.S. 362 (2000).

133. *Id.* at 395, 398–99; see also *supra* note 115.

134. *Id.* at 369, 395–96.

135. *Id.* at 395.

136. *Id.* at 396.

137. See *id.* (acknowledging that defense counsel did not fulfill their obligations to Williams and then determining whether that “unprofessional service prejudiced Williams within the meaning of *Strickland*”).

138. 921 P.2d 430 (Utah 1996).

for the defendant prior to pleading, or whether the attorney encouraged the defendant to plead guilty “on the basis of his own judgment that [the defendant] was guilty.”¹³⁹ Meanwhile, in *Linstadt v. Keane*¹⁴⁰ the Second Circuit concluded that an attorney’s representation was deficient in part because he failed to do enough factual investigation to realize a discrepancy in a key date.¹⁴¹

These cases suggest an unmistakable and profoundly common-sense trend: Defense attorneys must conduct a reasonably thorough investigation of the facts regarding a client’s predicament. This reasonableness threshold varies from case to case, but it always prohibits decision-making based on uninformed assumptions or incorrect beliefs about what facts the law allowed them to access. As this Article argues, *Padilla*, in contrast, waters down the duty to investigate such that poorly informed counseling may be constitutionally permissible in the context of the immigration consequences of conviction.¹⁴²

B. Investigating Law

Ineffective assistance can also result from constitutionally inadequate investigation of relevant legal issues.¹⁴³ An attorney who fails to become familiar with the relevant law, numerous court decisions have concluded, cannot properly advise a defendant about the wisdom of entering a guilty plea.¹⁴⁴ For example, in *United States v. Cavitt*,¹⁴⁵ a decision that epitomizes this jurisprudential theme, the Fifth Circuit explained that “[t]he lawyer must ‘actually and substantially assist his client in deciding whether to plead guilty.’”¹⁴⁶ The court went on to state: “It is [the attorney’s] job to provide the accused an understanding of the law in relation to the facts. The

139. *Id.* at 436.

140. 239 F.3d 191 (2d Cir. 2001).

141. *See id.* at 198–204 (“An effective lawyer who worked out the chronology of the events could have argued convincingly that the child’s errors evidence manipulative coaching by an adult.”).

142. *See infra* Part III.

143. *See supra* notes 95–96 and accompanying text.

144. *See, e.g.,* *United States v. Cavitt*, 550 F.3d 430, 440–41 (5th Cir. 2008) (examining the extent of defense counsel’s familiarity with the relevant law to determine whether the attorney’s performance with respect to the plea advice was deficient).

145. 550 F.3d 430 (5th Cir. 2008).

146. *Id.* at 440 (quoting *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974)).

advice he gives need not be perfect, but it must be reasonably competent. His advice should permit the accused to make an informed and conscious choice.’”¹⁴⁷

No matter the specific aspect of criminal law involved, these judicial decisions clearly announce courts’ sentiments that an attorney who does not understand the relevant law cannot help the defendant make an informed and conscious choice about how best to proceed. Though courts have come to this conclusion about a range of substantive areas of law,¹⁴⁸ two are particularly relevant to an understanding of how *Padilla* alters the duty to investigate: sentencing law and immigration law provisions that bear directly on criminal liability or punishment in criminal courts.

1. *Understanding Sentencing Law*

The effective-assistance-of-counsel requirements pertaining to sentencing law are especially instructive for two reasons. First, the *Padilla* majority’s characterization of deportation as part of the punishment meted out upon conviction suggests that it considers deportation to be a feature of sentencing. A majority of the *Padilla* Court clearly viewed deportation as a “penalty” that arises from a criminal conviction.¹⁴⁹ Importantly, the majority described deportation as “an integral part—indeed, sometimes the most important part—of the penalty that may be imposed” upon conviction.¹⁵⁰ This is no minor statement, since imprisonment and fines, both of which are routine consequences of conviction, are undeniably weighty considerations.

Second, sentencing law is particularly relevant because it dovetails remarkably complex legal analysis about the effect of criminal liability with the need for an attorney to exercise predictive judgment about how that law will be applied. By melding complicated legal analysis with an attorney’s informed predictions, sentencing law tracks the analysis of immigration law and penal statutes that determine the immigration law consequences of conviction at the heart of the *Padilla* Court’s concern. Importantly, federal and state courts have held that predictive judgments do not

147. *Id.* (quoting *Herring*, 491 F.2d at 128).

148. *See, e.g., id.* at 435–41 (addressing ineffectiveness of counsel and the duty to investigate the relevant law in the context of a Fourth Amendment claim).

149. *Padilla v. Kentucky*, 559 U.S. 256, 130 S. Ct. 1473, 1481–82 (2010).

150. *Id.* at 1480 (footnote omitted).

render assistance of counsel ineffective if they turn out to have been incorrect, as long as they were reasonable.¹⁵¹ In contrast, courts have consistently deemed defense attorneys' errors about the applicable substantive sentencing law—rather than errors in the predictions made based on the law—to fall below the standard of professional competence set out in *Strickland*.

Numerous courts have taken issue with defense attorneys who poorly understood sentencing law and, as a result, advised clients that they were exposed to less severe sentences than turned out to be true, a situation comparable to the defense attorney who incorrectly advises that deportation will not result from conviction. The Sixth Circuit, for example, in *Magana v. Hofbauer*¹⁵² determined that an attorney who informed a defendant that he faced “at most, a ten-year sentence were he to be convicted at trial” provided constitutionally deficient advice because, unknown to the attorney, a state statute required that the sentences from multiple convictions run consecutively.¹⁵³ The court observed that the attorney was “complete[ly] ignoran[t] of the relevant law under which his client was charged,”¹⁵⁴ which rendered the assistance of counsel constitutionally “inadequate.”¹⁵⁵ Likewise, the First Circuit in *Correale v. United States*¹⁵⁶ announced that defense counsel “must know or learn about the relevant law and evaluate its

151. See, e.g., *Beckham v. Wainwright*, 639 F.2d 262, 265 (5th Cir. 1981) (“Nor is an erroneous estimate by counsel as to the length of sentence necessarily indicative of ineffective assistance.” (citing *Johnson v. Massey*, 516 F.2d 1001, 1002 (5th Cir. 1975) (per curiam)); *Johnson*, 516 F.2d at 1002 (denying a voluntariness challenge to a plea premised on the defense attorney’s “good faith but erroneous prediction of [the] sentence”); *Masciola v. United States*, 469 F.2d 1057, 1059 (3d Cir. 1972) (concluding that if counsels’ assurances were nothing “more than predictions based on [their] knowledge and experience,” then, even if inaccurate, the assurance did not render the plea involuntary); *Perna v. United States*, 975 F. Supp. 657, 670–72 (D.N.J. 1997) (denying ineffective assistance relief where the defense attorney informed the defendant that he would request a twenty-year sentence, but the defendant was aware that the government would seek twenty-five years, and the court followed the government’s suggestion).

152. 263 F.3d 542 (6th Cir. 2001).

153. *Id.* at 545–50.

154. *Id.* at 550.

155. *Id.* at 549–50; see also *Finch v. Vaughn*, 67 F.3d 909, 916–17 (11th Cir. 1995) (determining that an attorney provided ineffective assistance where he advised a defendant in a state criminal proceeding that his state conviction and a federal conviction would run concurrently).

156. 479 F.2d 944 (1st Cir. 1973).

application to his or her client.”¹⁵⁷ The court stated that failure to do so “amount[s] to constitutionally ineffective assistance of counsel.”¹⁵⁸ The court further explained that counsel’s failure to learn about an important sentencing statute that prohibited the sentence issued (and resulted in a longer sentence) was “inexcusable.”¹⁵⁹

This sentiment also appears in the Iowa Supreme Court’s conclusion in *State v. Kress*¹⁶⁰ that a defense attorney’s failure to correct the trial court’s misstatement about the maximum possible punishment “placed counsel below the range of normal competency.”¹⁶¹ The attorney’s failure, the court explained, “‘does not involve trial tactics, strategies, or other judgment calls that we do not ordinarily second-guess. . . . Rather, it concerns counsel’s legal misadvice resulting from his unfamiliarity with and failure to research applicable statutory provisions’”¹⁶² Constitutionally adequate counsel would have corrected the trial court’s erroneous statement that it had the power to waive the mandatory minimum sentence, thus giving the defendant an accurate understanding of the consequences of pleading.¹⁶³

Two circuits have specifically addressed situations in which the defendant received inaccurate advice that he would become eligible for parole or probation sooner than was actually true. In *Garmon v.*

157. *Id.* at 949; *see also* *Straw v. United States*, 931 F. Supp. 49, 51–52 (D. Mass. 1996) (applying the *Correale* principle in a prosecution for illegal re-entry to the United States, which resulted in a sixteen-level sentencing enhancement for having been convicted of an aggravated felony). The Seventh Circuit has similarly noted that “erroneous advice [regarding the likely sentences that] stem[med] from the failure to review the statute or case law that the attorney knew to be relevant” was deficient performance. *Moore v. Bryant*, 348 F.3d 238, 242 (7th Cir. 2003).

158. *Correale*, 479 F.2d at 949.

159. *Id.* at 948–49. The court ultimately decided the case on another issue. *Id.* at 946–47, 950.

160. 636 N.W.2d 12, 22 (Iowa 2001).

161. *Id.* at 21–22.

162. *Id.* (quoting *Meier v. State*, 337 N.W.2d 204, 206–07 (Iowa 1983)).

163. *Id.* at 19 (agreeing with the defendant that “her counsel’s failures were [constitutionally deficient] because they resulted in a plea that was neither knowing nor voluntary”). At the plea hearing, the judge told the defendant that she would be required to serve “one-third of the maximum indeterminate sentence . . . unless the sentencing court waived the one-third requirement.” *Id.* at 16. The sentencing court, however, lacked the authority to waive this requirement. *Id.* at 18–19.

Lockhart,¹⁶⁴ the Eighth Circuit granted an ineffective assistance claim where a defendant “impressed on his trial counsel the importance of parole eligibility to his decision to plead guilty,” yet the defense attorney erroneously told the defendant that he would become eligible for parole in five years instead of fifteen years.¹⁶⁵ Had the attorney conducted even “[m]inimal research,” the court implied, the attorney would have realized the correct parole eligibility date.¹⁶⁶ Meanwhile, in *Iaea v. Sunn*¹⁶⁷ the Ninth Circuit found that an attorney’s performance was deficient because she informed the defendant that there was a “good chance” he would receive probation upon pleading guilty and “that the chance of his getting an extended sentence was ‘almost zero.’”¹⁶⁸ If the defendant went to trial, the attorney added, he faced a mandatory ten-year term of imprisonment under Hawaii’s minimum sentencing law.¹⁶⁹ Upon pleading, the defendant was sentenced to life sentences on three counts, twenty-year sentences on two counts, and one ten-year sentence.¹⁷⁰ Defense counsel committed a “serious error” in advising the defendant about sentencing, the court explained.¹⁷¹ Specifically, the Eighth Circuit noted that such “gross mischaracterization of the likely outcome presented in this case, combined with the erroneous advice on the possible effects of going to trial, falls below the level of competence required of defense attorneys.”¹⁷²

The Seventh Circuit has found deficient performance when the opposite situation presented itself—when an attorney advised the defendant that he faced more jail time than was actually true, which is advice that is akin to incorrectly saying that deportation awaits. In

164. 938 F.2d 120 (8th Cir. 1991).

165. *Id.* at 120–22.

166. *Garmon*, 938 F.2d at 121.

167. 800 F.2d 861 (9th Cir. 1986).

168. *Id.* at 863–65.

169. *See id.* at 863, 864–65 & n.2 (explaining why the mandatory minimum sentencing guideline did not apply to the defendant in this case).

170. *Id.* at 863.

171. *Id.* at 864–65.

172. *Id.* at 865. *But see* *Doganieri v. United States*, 914 F.2d 165, 168 (9th Cir. 1990) (determining that advising a defendant that he faced a maximum term of imprisonment of twelve years only to receive a term of fifteen years “does not rise to the level of a gross mischaracterization of the likely outcome of his case, and thus does not constitute ineffective assistance of counsel”).

Moore v. Bryant,¹⁷³ the court considered an ineffective assistance claim where the defense attorney told the defendant that if he pled guilty immediately he faced a ten-year sentence, but if he lost at trial he faced twenty-two to twenty-seven years imprisonment.¹⁷⁴ In reality, the defendant faced ten years upon pleading, but twelve and one-half to fifteen years after being convicted at trial.¹⁷⁵ The defense attorney, however, did not know this because he had failed to research the applicable statute and case law.¹⁷⁶ The Seventh Circuit reasoned:

[M]isinformation provided by an attorney on an issue that is certainly critical to the plea decision—the length of the sentence that the defendant faces—and that . . . is the result of the attorney’s failure to examine the statute and the law that the attorney himself identified as relevant may be considered objectively unreasonable.¹⁷⁷

Some courts have allowed ineffective assistance claims to proceed where counsel failed to understand a recidivist enhancement provision. The D.C. Circuit in *United States v. McCoy*¹⁷⁸ explained that “‘familiarity with the structure and basic content of the [Sentencing] Guidelines (including the definition and implications of career offender status) has become a necessity for counsel who seek to give effective representation.’”¹⁷⁹ The court observed that where the defense attorney “failed to follow the formula specified on the face of the Guidelines,” as occurred in *McCoy*, the defendant received constitutionally deficient representation.¹⁸⁰ Similarly, in *Ey v. State*¹⁸¹

173. 348 F.3d 238 (7th Cir. 2003).

174. *Id.* at 240–41.

175. *Id.* at 242.

176. *Id.*

177. *Id.* As the Seventh Circuit explained in another case, “a reasonably competent lawyer will attempt to learn all of the relevant facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis to the client before allowing the client to plead guilty.” *Bethel v. United States*, 458 F.3d 711, 717 (7th Cir. 2006). In *Bethel*, the court found that the record was insufficiently developed to determine whether the defense attorney met this standard. *Id.* at 717–718. Instead, the court disposed of the ineffective assistance claim by deciding that the defendant had not been prejudiced. *Id.* at 718–19.

178. 215 F.3d 102 (D.C. Cir. 2000).

179. *Id.* at 108 (quoting *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992)).

180. *Id.* The issue of recidivism arose in *McCoy* because the defendant had two previous drug felony convictions. *Id.* at 104. Pleading guilty to a third offense made him a “career

the Supreme Court of Florida found ineffective assistance where the defense attorney failed to accurately research the state's habitual offender statute, resulting in incorrect advice about the sentencing impact of one proceeding on another.¹⁸² The court was not swayed by the fact that the prosecution of the second case had not yet begun at the time that the attorney provided this advice.¹⁸³ Rather, the supreme court stressed that the "potential for sentence enhancement [wa]s real."¹⁸⁴ Telling the defendant that a conviction in the first case would not affect a sentence in the second case was therefore constitutionally deficient representation.¹⁸⁵

Also addressing a recidivist offender statute, but in a case involving the opposite advice, the Supreme Court of South Carolina in *Berry v. State*¹⁸⁶ granted an ineffective assistance claim where the defense attorney did not inform the defendant that a prior offense could not serve as a sentencing enhancement and, when the state successfully sought enhancement based on this conviction, the attorney did not object.¹⁸⁷ The court explained that "the Sixth Amendment guarantee of effective assistance of counsel requires that

offender" and increased his base offense level, which meant that the crime he was charged with committing carried a maximum penalty of life imprisonment. *Id.* at 105. The defense attorney and prosecutor both told the defendant that, pursuant to the Sentencing Guidelines, if he pleaded guilty he would be sentenced to between 188 and 235 months after accounting for a reduction for accepting responsibility. *Id.* Instead, the correct sentencing range was 262 to 327 months. *Id.*

181. 982 So. 2d 618, 623 (Fla. 2008).

182. *Id.* at 620, 623.

183. *See id.* at 620 (noting that the defendant "both committed and informed his counsel about the second crime before he pleaded guilty to the first one," but had not yet been arrested for the second crime at that point, and that the defendant later filed a pro se motion attacking his conviction in the second case).

184. *Id.* at 623. In focusing on the fact that the second offense had already been committed at the time the attorney provided the faulty advice and the fact that the attorney was aware of the second offense, the court distinguished its earlier holding that incorrectly advising a defendant about the sentencing impact of one offense on an uncommitted, and therefore "hypothetical" second offense, was not ineffective assistance. *Id.* at 621–23 (discussing *State v. Dickey*, 928 So. 2d 1193 (Fla. 2006)). The court also distinguished *Ey* from instances where the attorney did not advise about the impact "of a guilty plea on a sentence for a future crime." *Id.* at 621 (discussing *Major v. State*, 814 So. 2d 424 (Fla. 2002)).

185. *Id.* at 625.

186. 675 S.E.2d 425 (S.C. 2009).

187. *Id.* at 426–27.

counsel accurately inform a defendant, to the extent possible, of the qualifying nature of a prior offense for enhancement purposes.”¹⁸⁸ In this case, the court added, counsel should have informed the defendant that there was a sound argument to be made that the prior offense could not be used for sentencing enhancement because, until *Berry*, the court had not decided the issue.¹⁸⁹ Where an argument exists that a prior conviction cannot be used to augment a sentence, in other words, defense counsel’s failure to consider raising such a challenge constitutes deficient representation.¹⁹⁰

Continuing the disapproval of advice based on incorrect legal analyses, at least two circuits and the Supreme Court have found an attorney’s performance constitutionally inadequate where incorrect advice led the defendant to reject the plea and suffer a worse fate at trial. The Fifth Circuit in *Beckham v. Wainwright*¹⁹¹ held that an attorney’s advice was deficient where the attorney incorrectly and upon “no basis” assured the defendant that he faced a five-year sentence whether he pleaded guilty or, as actually occurred, withdrew the plea and went to trial.¹⁹² After withdrawing a guilty plea and being convicted at trial, the defendant was sentenced to fifty years imprisonment.¹⁹³ Likewise, in *United States v. Gaviria*¹⁹⁴ the D.C. Circuit found deficient performance where the defense attorney failed to account for a precedential decision altering the career offender enhancement.¹⁹⁵ As a result of the misinformation he then received from counsel, the defendant turned down the plea offer that

188. *Id.* at 427.

189. *See id.* (noting that defense counsel never told the defendant about “the potential challenge to the use of the drug paraphernalia conviction for enhancement” and finding that “counsel’s failure to even consider [the issue] fell below the standard of objective reasonableness”).

190. *Id.* In another case, the Supreme Court of South Carolina determined that an attorney was deficient in failing to tell the defendant that a crime was a felony rather than a misdemeanor—a distinction with an obvious sentencing effect. *Jackson v. State*, 535 S.E.2d 926, 927 (S.C. 2000).

191. 639 F.2d 262 (5th Cir. 1981).

192. *Id.* at 263, 267.

193. *Id.* at 263–64.

194. 116 F.3d 1498 (D.C. Cir. 1997).

195. *See id.* at 1512 (stating that defense counsel should have been aware of the D.C. Circuit’s decision in *United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993), which held that “a defendant convicted of conspiracy could not be sentenced as a career offender”).

would have resulted in a fifteen- to twenty-two-year prison term.¹⁹⁶ Instead, after a trial conviction, the defendant was sentenced to mandatory life imprisonment.¹⁹⁷ More recently, the U.S. Supreme Court decided *Lafler v. Cooper*,¹⁹⁸ a case in which the defense attorney, based on an incorrect understanding of the state law pertaining to murder, advised the defendant to reject a favorable plea offer.¹⁹⁹ The defendant followed his attorney's advice only to receive a much harsher sentence after trial than had been offered during plea negotiations.²⁰⁰ The parties conceded that this conduct constituted deficient performance, so the Court had no occasion to decide this issue itself, unlike the Fifth Circuit in *Beckham*.²⁰¹ The Court did, however, go on to conclude that this deficient performance prejudiced the defendant precisely because he received a much harsher sentence than he could have pleaded to.²⁰²

In some instances, courts have even concluded that a defense attorney's failure to inform the defendant of a favorable plea offer can be deficient performance. Recently, in *Missouri v. Frye*²⁰³ the Supreme Court held that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."²⁰⁴ Similarly, twenty years earlier, the Court of Appeals of Maryland considered *Williams v. State*²⁰⁵ in which the defense attorney failed to inform the defendant that the prosecutor was willing to accept a plea with a ten-year prison term instead of the mandatory twenty-five year term that the defendant faced by going to trial.²⁰⁶ The court stated that a reasonably competent attorney cannot "provide[] the

196. *Id.*

197. *Id.*

198. 132 S. Ct. 1376 (2012).

199. *Id.* at 1383, 1386–87.

200. *Id.* at 1383.

201. *Id.* at 1386, 1391; *see supra* notes 191–193 and accompanying text.

202. *Id.* at 1391. *Strickland's* prejudice prong is beyond the scope of this Article.

203. 132 S. Ct. 1399, 1408 (2012).

204. *Id.*

205. *Williams v. State*, 326 Md. 367, 605 A.2d 103 (1992).

206. *Id.* at 379, 605 A.2d at 109.

defendant with incomplete or misleading information with regard to the [plea] offer.”²⁰⁷

Legal advice based on significant misunderstandings of applicable sentencing law is constitutionally problematic because it deprives the defendant of the skilled counsel contemplated by the Sixth Amendment. As the Tenth Circuit explained in *United States v. Washington*,²⁰⁸ “fail[ure] to understand the basic structure and mechanics of the sentencing guidelines” constitutes deficient assistance of counsel because it renders the defense attorney “incapable of helping the defendant to make reasonably informed decisions throughout the criminal process.”²⁰⁹ In that case, the court added, the defendant was denied reasonably competent representation because he was not informed about the impact of relevant conduct on sentencing.²¹⁰ The defense attorney failed to provide this information, not for any strategic reason but “because [he] did not understand [the relevant conduct’s] significance in the sentencing scheme.”²¹¹

207. *Id.* at 378, 605 A.2d at 108. Though the Supreme Court recently held in *Frye* that a defense attorney must inform the defendant of a favorable plea offer, unlike the Maryland Court of Appeals in *Williams*, the Court did not frame this holding as a question concerning the attorney’s duty to provide the defendant with accurate or complete information. Instead, *Frye* held that defense counsel has a duty to inform his client about favorable plea offers. 132 S. Ct. at 1408.

208. 619 F.3d 1252 (10th Cir. 2010).

209. *Id.* at 1260.

210. *Id.* at 1259, 1262; *see also id.* at 1254 (acknowledging that “the district court considered as relevant conduct [a] confidential informant’s statements and [a] probation office’s report regarding [the defendant’s] drug distribution activities between 1990–91”).

211. *Id.* at 1259. The *Washington* court distinguished an older Tenth Circuit decision in which the court determined that “[a] miscalculation or erroneous sentence estimation by defense counsel is not a constitutionally deficient performance rising to the level of ineffective assistance of counsel.” *United States v. Gordon*, 4 F.3d 1567, 1570 (10th Cir. 1993). *Gordon*, the Tenth Circuit explained in *Washington*, is limited to situations in which counsel miscalculated the sentencing impact of relevant conduct. *Washington*, 619 F.3d at 1258–59. Specifically, the *Washington* court pointed out that *Gordon*’s attorney “advised him regarding relevant conduct, but had [mistakenly] predicted that the court would not add to his sentence for such conduct.” *Id.* at 1258 (discussing *Gordon*, 4 F.3d at 1569). *Gordon*’s allowance of misinformation, *Washington* decided, is distinct from the situation in *Washington* in which the defense counsel “never in any way informed [the defendant] about the applicability or impact of relevant conduct.” *Washington*, 619 F.3d at 1259.

Collectively, these cases demonstrate courts' repeated insistence that attorneys become sufficiently familiar with the sentencing law that will affect their clients' future. Attorneys are not required to become clairvoyants who can predict what judges or juries will do.²¹² They must, however, "provide the accused an understanding of the law in relation to the facts" such that the defendant can "make an informed and conscious choice" about how to proceed.²¹³

Much as in the sentencing law context, the fate of noncitizen criminal defendants often lies in a complicated mix of statutes and case law.²¹⁴ And much like sentencing law, sometimes the immigration law provisions that become highly relevant upon entering the criminal justice system bear good news for defendants—avoiding removal—just as they sometimes bear bad news—the possibility of removal. For the criminal defendant, the goal is always the same—receive the defense attorney's assistance navigating the relevant law to reach an informed decision. *Padilla* promised to constitutionalize this duty with regard to immigration consequences just as these cases illustrate has long been true with regard to sentencing consequences. Part III explains how that promise continues to remain unfulfilled.

2. *Understanding Immigration Law*

Despite some pre-*Padilla* perception that immigration law has no formal role to play in criminal law,²¹⁵ immigration law, like sentencing law, has long been part of the substantive purview of criminal proceedings. While it is true that most immigration consequences of conviction arise in separate administrative proceedings, two immigration consequences were or are determined within the criminal proceeding itself—judicial recommendations against

212. See *Cooks v. United States*, 461 F.2d 530, 532 (5th Cir. 1972) (stating that "counsel need not be a fortune teller" and that "counsel's inability to foresee *future* pronouncements . . . does not render counsel's representation ineffective").

213. *United States v. Cavitt*, 550 F.3d 430, 440 (5th Cir. 2008) (quoting *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974)).

214. See *infra* Part II.B.2.

215. See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1487–88 (2010) (Alito, J., concurring) ("Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience."); *id.* at 1488 ("[M]any criminal defense attorneys have little understanding of immigration law . . .").

deportation (“JRAD”)²¹⁶ and immigration questions that form an element of the substantive crime.²¹⁷ Long before *Padilla*, some courts considered knowledge and advice about the immigration law provisions governing these concerns to be the responsibility of the constitutionally competent criminal defense attorney.²¹⁸

Numerous courts have granted ineffective assistance claims where defense attorneys failed to inform themselves and, by extension, their clients, of the possibility of obtaining a JRAD, a now-repealed form of relief from removal that featured prominently in the *Padilla* decision.²¹⁹ A judge’s decision to issue a JRAD, as *Padilla* explained, “had the effect of binding the Executive to prevent deportation.”²²⁰ An attorney’s failure to identify the possibility of obtaining a JRAD, therefore, was akin to failing to learn that the defendant was not eligible for a particular punishment and failing to object to that punishment’s prescription.²²¹ Indeed, the Second Circuit, in *Janvier v. United States*,²²² a decision cited by *Padilla*, concluded that a JRAD “is part of the sentencing process, a critical stage of the prosecution to which the Sixth Amendment safeguards are applicable.”²²³ The end result was that criminal defense attorneys

216. See *Janvier v. United States*, 793 F.2d 449, 452 (2d Cir. 1986) (determining that JRAD is part of the sentencing phase of a criminal prosecution, not part of the subsequent deportation proceeding).

217. David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 158 (2012) (“Immigration cases now are not only the largest category of federal criminal prosecutions; they are a *majority* of federal criminal prosecutions.”).

218. See, e.g., *Ittah v. United States*, 761 F. Supp. 157, 158 (D. Me. 1989) (“The failure to request a judicial recommendation against deportation or to advise his client of the possibility of such relief was not a strategic choice in this case; it was inadequate representation.”).

219. *Padilla*, 130 S. Ct. at 1479–80.

220. *Id.* at 1479.

221. See *United States v. Shaibu*, 957 F.2d 662, 664 (9th Cir. 1992) (describing the JRAD as “analogous to the imposition of a binding penalty in sentencing”). In *Lyons v. Pearce* (“*Lyons F*”), the Supreme Court of Oregon “[e]quat[ed] an attorney’s failure to request a recommendation against deportation from the court with failure to perfect an appeal” because “[i]n one the defendant faces certain exile from his chosen country and in the other the defendant faces certain imprisonment or other imposed penalties.” 694 P.2d 969, 978 (Or. 1985).

222. 793 F.2d 449 (2d Cir. 1986).

223. *Id.* at 455; *United States v. Castro*, 26 F.3d 557, 561 (5th Cir. 1994) (adopting the *Janvier* reasoning); see also *Padilla*, 130 S. Ct. at 1479–80 (describing the *Janvier* holding that

were required to research the possibility of obtaining a JRAD just as they were required to explore the possibility that a sentencing statute did not apply.²²⁴ Given this reality, a federal district court, on remand from the Second Circuit decision in *Janvier*, analogized to the failure to file a motion to suppress in *Kimmelman* and, following the Second Circuit's approach, determined that an attorney's failure to seek a JRAD was not a strategic choice because the attorney was not aware of the deportation consequence of conviction and "made no effort to determine if such consequence existed."²²⁵

Highlighting the importance of reasonable investigation of applicable law, in *Ittah v. United States*,²²⁶ the U.S. District Court for the District of Maine found inadequate, rather than strategic, representation provided by an attorney who "did not know of the deportation consequences of Petitioner's conviction and . . . did not effectively research the law dealing with situations like that of Petitioner."²²⁷ Yet another federal court, the U.S. District Court for the District of Massachusetts, in *United States v. Khalaf*,²²⁸ explained that an attorney provided ineffective assistance when he incorrectly led a defendant to believe (and enter a plea based on that erroneous advice) that a JRAD was available even though it was not.²²⁹ As the *Khalaf* court explained: "An attorney has a duty to research the applicable law and to advise his client in such a way as to allow him to

the "right to effective assistance of counsel applies to a JRAD request"). But see *Retamoza v. State*, 874 P.2d 603, 607 (Idaho 1994) (identifying a division among courts holding that failure to advise about the possibility of JRAD relief could form the basis of an ineffective assistance claim and courts holding the opposite). It merits noting that, according to *Retamoza*, many courts that held the failure to advise about JRAD relief was not ineffective assistance did so "upon the rationale that counsel's obligation to advise regarding the consequences of a guilty plea or conviction encompasses only direct consequences, not collateral consequences such as deportation." *Id. Padilla* explicitly rejected this distinction. 130 S. Ct. at 1482 ("The collateral versus direct distinction is . . . ill-suited to evaluating a *Strickland* claim . . .").

224. See *supra* note 218 and accompanying text; see also *supra* Part II.B.1.

225. *Janvier v. United States*, 659 F. Supp. 827, 828 n.1, 829 (N.D.N.Y. 1987). According to the court: "Such a failure to investigate the applicable law of a case cannot be considered adequate under prevailing norms of professional competency." *Id.* at 829.

226. 761 F. Supp. 157 (D. Me. 1989).

227. *Id.* at 158.

228. 116 F. Supp. 2d 210 (D. Mass. 1999).

229. *Id.* at 215.

make informed choices”²³⁰ Thus, counsel’s “failure to read the statute and articulate the proper meaning to Petitioner [was] unreasonable under prevailing professional norms” precisely because it led to a misinformed choice.²³¹

The Supreme Court of Oregon took a more nuanced approach in *Lyons v. Pearce (Lyons I)*²³² and *Lyons v. Pearce (Lyons II)*,²³³ a pair of cases, considered in tandem and issued the same day, that involved a single noncitizen. In *Lyons I*, the court held that if conviction would subject the defendant to deportation, then counsel’s failure to request a JRAD was constitutionally inadequate representation.²³⁴ In *Lyons II*, however, the court noted that if “there was no possibility” that conviction would result in deportation, then counsel was under no obligation to request JRAD relief.²³⁵ The supreme court concluded that the defense attorney should have sought a JRAD upon entry of the second conviction for a “crime potentially involving moral turpitude”—that is, a conviction that might render the noncitizen deportable for having been “convicted of two crimes involving moral turpitude.”²³⁶

As these cases suggest, the importance of researching and advising about the possibility of JRAD eligibility became a feature of constitutionally adequate criminal defense practice in the mid- to late-1980s.²³⁷ Indeed, a leading figure in “crimmigration”²³⁸ circles, Lory

230. *Id.* at 213.

231. *Id.* at 215.

232. 694 P.2d 969 (Or. 1985).

233. 694 P.2d 978 (Or. 1985).

234. *Lyons I*, 694 P.2d at 978.

235. *Lyons II*, 694 P.2d at 980. *Lyons I* and *Lyons II* are companion cases that both raised an ineffective assistance claim. The court separately addressed the ineffective assistance claim arising from a conviction that rendered the noncitizen deportable and the claim arising from a conviction that did not result in deportability. *Lyons I*, 694 P.2d at 971–72; *Lyons II*, 694 P.2d at 980.

236. See *Lyons I*, 694 P.2d at 972 n.3 (discussing 8 U.S.C. § 1251(a)(4) (1982), under which the defendant was vulnerable to deportation).

237. See *id.* at 978 (“Commentators have observed that the recommendation against deportation is a significant tool available to forestall deportation of which defense attorneys should be aware.” (citing Irving A. Appleman, *The Recommendation Against Deportation*, 58 A.B.A.J. 1294 (1972)); David B. Wexler & James O. Neet, Jr., *The Alien Criminal Defendant: An Examination of Immigration Law Principles for Criminal Law Practice*, 2 IMMIGR. & NAT’LITY L. REV. 285 (1979)).

D. Rosenberg, then in private practice and later a member of the Board of Immigration Appeals, co-authored an article in 1988 that listed “defense counsel’s failure to advise about the availability of a judicial recommendation against deportation . . . and to seek one” as a basis for vacating a conviction due to ineffective assistance, and discussed a number of opinions supporting this proposition.²³⁹

These decisions further demonstrate courts’ views that defense attorneys were required to dirty their hands with the intricacies of immigration law. To accurately learn if a JRAD was available, an attorney would first have to determine whether the defendant was in fact a U.S. citizen (and thereby immune from removal) or, if not, the current status of the defendant’s immigration authorization. Then the attorney would need to grasp how a conviction for the particular offense charged would impact the defendant’s immigration authorization—specifically, the attorney would need to determine if conviction rendered the defendant deportable or inadmissible.²⁴⁰ If conviction did not render the defendant deportable, then JRAD would be irrelevant. Lastly, though no court seems to have relied on this requirement as the basis for an ineffective assistance claim, a defense attorney would need to address tactical considerations that depended in large part on the noncitizen defendant’s legal status and “the possible consequences of notifying the INS [Immigration and Naturalization Service] of his existence.”²⁴¹ Each of these steps required investigation and analysis of factual and legal questions most aptly described as quintessential immigration law. Yet, as with sentencing law, courts regularly required defense attorneys to become familiar with these areas.

238. See Sklansky, *supra* note 217, at 159 (“Immigration enforcement and criminal justice are now so thoroughly entangled it is impossible to say where one starts and the other leaves off; growing numbers of practitioners describe themselves as working in the merged field of ‘crimmigration.’”).

239. Lory D. Rosenberg & Kenneth H. Stern, *Ineffective Assistance of Counsel: An Antidote for the Convicted Alien*, 65 INTERPRETER RELEASES 529, 532, 536–37 (1988). In 1995, Ms. Rosenberg was appointed to the Board of Immigration appeals, “the highest administrative body for interpreting and applying immigration laws.” *Biographies*, EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP’T OF JUSTICE, <http://www.vkblaw.com/attorney/biablo.htm> (last updated Feb. 15, 2000).

240. See DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW & CRIMES 775–86 (2012) (discussing the aspects of a JRAD remedy).

241. *Id.* at 785–86.

Another circumstance that has historically required defense attorneys to delve into immigration law niceties arises when immigration law provisions form part of the substantive crime. In *United States v. Juarez*,²⁴² a recent Fifth Circuit decision, the defendant was charged with the federal crimes of making a false claim of citizenship and illegal re-entry and pleaded guilty to both crimes.²⁴³ The court considered whether an attorney provided ineffective assistance by failing to learn about an obscure provision of naturalization law through which a minor noncitizen can automatically become a U.S. citizen—a process called “derivative citizenship,” to which the defendant had an arguable claim.²⁴⁴ To qualify for derivative citizenship, several conditions had to be met, including that the individual “[*began*] to reside permanently in the United States while under the age of eighteen years.”²⁴⁵ The defense attorney in *Juarez* admitted to having never heard of derivative citizenship; needless to say, he did not investigate whether Juarez satisfied the eligibility criteria.²⁴⁶ The court concluded that the attorney “had a duty to independently research the law and investigate the facts surrounding [his client’s] case.”²⁴⁷ As such, the Fifth Circuit concluded that the attorney’s “failure to investigate was unreasonable.”²⁴⁸

More interesting than the court’s determination that the attorney was obligated to investigate the law surrounding derivative citizenship is the fact that the relevant law was hard to find, potentially not applicable given the defendant’s background, and nebulous at best. First, the relevant derivative citizenship provision was repealed in 2000, a full six years prior to entry of the defendant’s guilty pleas.²⁴⁹ Finding the law was, therefore, not a simple matter of

242. 672 F.3d 381 (5th Cir. 2012).

243. *Id.* at 384.

244. *Id.* at 384–86.

245. 8 U.S.C. § 1432(a)(5) (1994) (emphasis added), *repealed by* Child Citizenship Act of 2000, Pub. L. No. 106–395, § 103, 114 Stat 1631, 1632 (2000). The other conditions for derivative citizenship included the naturalization of at least one parent that took place before the individual turned eighteen years old. *Id.* § 1432(a)(1)–(4).

246. *Juarez*, 672 F.3d at 386–87.

247. *Id.* at 387.

248. *Id.* at 388.

249. *Id.* at 384, 386 n.2; *see also supra* note 245 and accompanying text.

picking up a current copy of the INA.²⁵⁰ Second, the defendant, as the defense attorney knew, had previously been deported and may have been under the impression that he was not a U.S. citizen, given that he pleaded guilty to lying about being a U.S. citizen²⁵¹ on a firearms purchase form and to illegal reentry.²⁵² Third, even if the attorney had known about derivative citizenship and realized its potential application in *Juarez*, there was little authority interpreting the sole contested eligibility criterion: the meaning of “reside permanently.” No binding precedent exists in the Fifth Circuit where *Juarez* was convicted.²⁵³ Still, the court concluded that a reasonable investigation would have led the attorney to a “plausible” defense of derivative citizenship as articulated in one of the following sources: dicta from a Second Circuit decision,²⁵⁴ an unpublished Ninth Circuit decision,²⁵⁵ and a suggested interpretation in a leading immigration law treatise.²⁵⁶ From this, the court determined, the defense attorney could have devised a plausible claim that *Juarez* was in fact a U.S. citizen, which, if the theory prevailed, would have been an

250. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

251. See 18 U.S.C. § 911 (2006) (“Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both.”).

252. See 8 U.S.C. § 1326(a) (2006) (“[A]ny alien who—has been denied . . . deported . . . and thereafter . . . enters, attempts to enter, or is at any time found in, the United States, . . . shall be fined under Title 18, or imprisoned not more than 2 years, or both.”); see also *Juarez*, 672 F.3d at 384–85 (“[The defendant] claims he first learned the possibility of his derivative U.S. citizenship through his mother’s naturalization in August, 2007,” the year after he pleaded guilty).

253. See *Juarez*, 672 F.3d at 387 (“No Fifth Circuit case law interpreted § 1432(a)(5) [the ‘reside permanently’ provision,] at the time [the defendant] pled guilty and today we decline to interpret the statute.”).

254. *Id.* at 387; see *Ashton v. Gonzales*, 431 F.3d 95, 98 (2d Cir. 2005) (“[A] child’s bare subjective intent to stay in the United States is insufficient to establish that he resides here permanently We believe that there must be some objective official manifestation of the child’s permanent residence”).

255. See *United States v. Diaz-Guerrero*, 132 F. App’x 739, 740–41 (9th Cir. 2005) (“[T]he definitions of ‘permanent’ and ‘residence’ that accompany the . . . statute belie a requirement of legal residency.”).

256. See *Juarez*, 672 F.3d at 387 (citing IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK: A COMPREHENSIVE OUTLINE AND REFERENCE TOOL (11th ed. 2008)).

impenetrable defense to the false claim to citizenship and illegal reentry prosecutions.²⁵⁷

Whether focused on guilt for a substantive immigration-related crime or on JRAD relief from deportation, these court decisions illustrate that defense counsel who are poorly informed about immigration law provisions are not the constitutionally mandated advocates that the Sixth Amendment guarantees. Errors derived from a “lack of diligence,” as one court explained, are wholly different from errors in exercises of judgment.²⁵⁸ To avoid improperly advising a defendant, attorneys have been expected to become knowledgeable about the applicable law and, importantly, to advise the defendant accordingly, even, as these cases illustrate, when immigration law makes all the difference to a defendant.²⁵⁹

257. *Id.* at 384, 387–88. Perhaps the court was motivated to find relief out of sympathy that a United States citizen defendant had been deported and was now facing criminal punishment for having violated immigration laws to which, it turns out, he was not subject. But, as the *Juarez* court noted, *Strickland* commands reviewing courts to “make ‘every effort . . . to eliminate the distorting effects of hindsight.’” *Id.* at 386 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Heeding this dictate, the *Juarez* court concerned itself with the defense attorney’s unreasonable actions in failing to inquire into an absolute defense available to the defendant. *Id.* at 386–88. To comfortably challenge the court’s stated rationalization would be to do what might be impossible but is certainly beyond the scope of this Article—peel back the court’s words and pierce the judges’ minds.

258. *See United States v. Loughery*, 908 F.2d 1014, 1018 (D.C. Cir. 1990) (“[A] defendant is more likely to prevail on an ineffective assistance of counsel claim where the error he points to arises from counsel’s lack of diligence rather than the exercise of judgment.”).

259. *See Juarez*, 672 F.3d at 388 (stating that defense counsel had a duty to investigate the law and facts to help the defendant make an informed decision and that the failure to do so was unreasonable under the first prong of *Strickland*); *see also* *State v. Doggett*, 687 N.W.2d 97, 102 (Iowa 2004) (“A normally competent attorney who undertakes to represent a criminal defendant should either be familiar with the basic provisions of the criminal code, or should make an effort to acquaint himself with those provisions which may be applicable to the criminal acts allegedly committed by his client.” (quoting *State v. Schoelerman*, 315 N.W.2d 67, 71–72 (Iowa 1982))). Importantly, an attorney is not required to raise every argument that might prove helpful to the defendant. *See Busby v. Dretke*, 359 F.3d 708, 716 (5th Cir. 2004) (explaining that a reasonable attorney could have elected to bring a claim “despite its low likelihood of success,” but that it was not deficient for the attorney to elect not to bring such a claim).

Although JRADs were repealed in 1990,²⁶⁰ criminal defense attorneys in federal and state courtrooms across the country continue to grapple with other immigration law provisions. Possession of a firearm by a person without authority to be in the United States, for example, is a federal crime, though several narrow exceptions apply.²⁶¹ Determining whether a particular defendant fits within the class of unauthorized individuals contemplated by this provision requires a nuanced understanding of multiple immigration law processes—nonimmigrant visa stay limitations, adjustment of status applications, parole (as this term is used in immigration law), and the impact of employment authorization.²⁶² Despite this immigration law mélange, criminal defense attorneys regularly defend against such prosecutions, having immersed themselves in the applicable law and facts.²⁶³ Defense attorneys in Arizona state courts, for example, encounter human smuggling prosecutions that turn on a person's status under federal immigration laws, even when the defendant is the person smuggled into the United States.²⁶⁴ These attorneys must also contend with a state constitutional prohibition on setting bail in certain cases, including self-smuggling, that involve defendants without authorization to be in the country.²⁶⁵

260. Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050 (eliminating judicial recommendations against deportation).

261. See 18 U.S.C. § 922(d)(5) (2006); 18 U.S.C. § 922(y)(2) (listing exceptions).

262. See *United States v. Latu*, 479 F.3d 1153, 1158–59 (9th Cir. 2007) (analyzing the definition of “legally or unlawfully in the United States” in the context of an adjustment of status situation); *United States v. Bazargan*, 992 F.2d 844, 848–49 (8th Cir. 1993) (examining “whether the INS’s grant of an employment authorization . . . made [the defendant] a legal alien for the purposes of 18 U.S.C. § 922(g)(5)”).

263. See, e.g., *United States v. Mendez*, 514 F.3d 1035, 1039 (10th Cir. 2008) (noting that the defendant was charged with twelve counts, which ranged from possession with the intent to distribute methamphetamine to possession of a firearm by an alien not lawfully in the United States).

264. See, e.g., *State v. Barragan-Sierra*, 196 P.3d 879, 885–86, 891 (Ariz. Ct. App. 2008) (determining that the conspiracy and human smuggling statutes “allow the person smuggled to be convicted of conspiracy to commit human smuggling”).

265. ARIZ. CONST. art. 2, § 22(A)(4) (“All persons charged with crime shall be bailable by sufficient sureties, except: . . . For serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge.”); Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1762–63

More dramatically, in recent years hundreds of thousands of people have been prosecuted annually for federal crimes that hinge on immigration law.²⁶⁶ There were 43,688 people prosecuted for illegal entry and another 35,836 for illegal reentry in fiscal year 2010 in the United States; the following fiscal year began with more federal prosecutions lodged for illegal reentry than for any other federal crime, whether related to immigration activity or not.²⁶⁷ Both crimes contain as an element of the offense a provision that is quintessential immigration law: the defendant must be an “alien.”²⁶⁸ The word “alien” is a term of art defined in the INA,²⁶⁹ and, along with its opposite term, “United States citizen,” interpreted by innumerable courts.²⁷⁰

Meanwhile, illegal reentry prosecutions require a prior, constitutionally sound removal. Thus, defense attorneys must consider as one of their litigation tools the possibility that an underlying removal order did not conform to due process requirements dependent on immigration law.²⁷¹ For example, the

(2011) (“Undocumented immigrants charged with smuggling themselves could now be detained without any possibility of bond.”).

266. Sklansky, *supra* note 217, at 164–68; *see also supra* note 217 and accompanying text.

267. Transactional Records Access Clearinghouse, *Lead Charges for Criminal Immigration Prosecutions, FY 1986–FY 2011*, http://trac.syr.edu/immigration/reports/251/include/imm_charges.html (last visited Feb. 24, 2013); Transactional Records Access Clearinghouse, *Illegal Reentry Becomes Top Criminal Charge*, <http://trac.syr.edu/immigration/reports/251/> (last visited Feb. 24, 2013) (explaining that the 18,552 illegal reentry prosecutions filed in the first six months of fiscal year 2011 comprised forty-seven percent of all federal criminal prosecutions). Accordingly, the projected numbers of recorded prosecutions for fiscal year 2011 are 35,540 for illegal entry and 37,104 for illegal reentry. *Lead Charges for Criminal Immigration Prosecutions, FY 1986–FY 2011, supra*.

268. 8 U.S.C. § 1325 (2006) (improper entry by alien); 8 U.S.C. § 1326 (2006) (reentry of removed aliens).

269. *See* 8 U.S.C. § 1101(a)(3) (2006) (“The term ‘alien’ means any person not a citizen or national of the United States.”).

270. *See supra* notes 242–257, 261–265 and accompanying text.

271. *Cf.* *United States v. Mendoza-Lopez*, 481 U.S. 828, 837 (1987) (noting that if the reentry of removed aliens statute “envisions that a court may impose a criminal penalty for reentry after *any* deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been, the statute does not comport with . . . due process”), *superseded by statute*, 8 U.S.C. § 1326(d) (2006), *as recognized in* *United States v. Perez-Madrid*, 71 F. App’x 795 (10th Cir. 2003); *United States v. Barranza-Leon*, 575 F.2d 218, 220 (9th Cir. 1978) (“Although deportation proceedings are civil in nature, and thus not

Second Circuit in *United States v. Perez*²⁷² concluded that an illegal reentry prosecution could not stand because the underlying removal proceeding was constitutionally defective.²⁷³ Importantly, the noncitizen defendant in the illegal reentry prosecution, through counsel, was able to show that his deportation order was constitutionally defective by focusing on the immigration attorney's failure to request a form of relief from removal that existed at the time of the deportation proceeding, but that had been repealed years before the illegal reentry prosecution was initiated.²⁷⁴ In mounting this defense, the criminal defense attorney representing the noncitizen in the illegal reentry prosecution evidenced a sophisticated understanding of immigration law, past and present, and its importance in the criminal case.²⁷⁵

In other instances, an attorney defending against an illegal reentry prosecution must determine whether a defendant's prior offense constitutes an aggravated felony. This category of crimes, a basis for deportation since 1988,²⁷⁶ has become one of the most poignant features of modern immigration law. Because the scope of "aggravated felony" is broad (encompassing twenty-one types of crimes)²⁷⁷ and its impact far-reaching (most notably, resulting in removal and ineligibility for cancellation of removal),²⁷⁸ the

subject to the full panoply of procedural safeguards accompanying criminal trials, we have held that due process must be afforded in deportation hearings." (citation omitted)).

272. 330 F.3d 97 (2d Cir. 2003).

273. *Id.* at 101, 104. The court determined that the removal proceeding was fundamentally unfair because the defendant was denied the effective assistance of counsel guaranteed by the Fifth Amendment Due Process Clause. *Id.* at 101; *see* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

274. *Id.* at 99–100, 102 (noting that the defendant's immigration attorney did not "seek relief under . . . Section 212(c) of the Immigration and Naturalization Act, which at that time permitted the Attorney General to grant a discretionary waiver of deportation").

275. *Cf. id.* at 100–02 (determining that "[a]lthough [the defendant] did not appeal his deportation order to the BIA, he has satisfied the exhaustion requirement by appealing the denial of his motion to reopen to the BIA" and that "[the defendant] has shown . . . that he could have made a strong showing in support of his application for [discretionary] relief" from deportation).

276. Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7345(a), 102 Stat. 4181, 4471 (1988).

277. *See* 8 U.S.C. § 1101 (a)(43) (2006) (defining "aggravated felony").

278. *See, e.g.,* 8 U.S.C. § 1326(a)(2) (2006) (outlining the criminal penalties for reentry of certain removed aliens and stating that "in the case of any alien . . . whose removal was

aggravated felony statutory provision emblemizes the expansiveness and harshness of modern immigration law that partly motivated the *Padilla* Court to act. Yet, for its central role in modern immigration law practice, “aggravated felony” frequently appears in criminal courtrooms as the heated subject of debate among defense attorneys and prosecutors, especially because it carries important sentencing implications.²⁷⁹ These defense attorneys, in other words, must delve deep into the core of modern immigration law to best promote their clients’ interests.

No matter the specific legal doctrine involved, and whether it historically involved immigration law knowledge, each of these state and federal courts constitutionally required that a defense attorney conduct the investigation necessary to reasonably understand the defendant’s predicament and provide sound advice based on that information.²⁸⁰ While no court requires unending investigation, all courts require as much as is necessary to exercise reasonable and informed judgment about how to proceed in light of the defendant’s goals and the strength of the prosecution’s case. In the context of advice about immigration consequences that arise from conviction, however, *Padilla* seemingly alters that requirement.

III. STRICKLAND-LITE

The Supreme Court’s adoption of a reasonableness standard for measuring effective assistance of counsel reflects an accommodation

subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both”).

279. See, e.g., *United States v. Esparza-Perez*, 681 F.3d 228, 229 (5th Cir. 2012) (considering whether a conviction for aggravated assault qualified as a conviction for a crime of violence, which would increase the base offense level for an illegal reentry by sixteen levels). A crime of violence constitutes an aggravated felony under the INA. 8 U.S.C. § 1101(a)(43)(F) (2006). Other federal and state courts have also litigated issues of what constitutes an aggravated felony. See, e.g., *Richards v. United States*, 2011 WL 3875335, at *1, 5 (S.D.N.Y. 2011) (discussing a claim that possession of marijuana for sale is not an aggravated felony); *Commonwealth v. Martinez*, 966 N.E.2d 223, 225 n.2, 226–27 (Mass. App. Ct. 2012) (determining that a conviction for distribution of powder cocaine was both an aggravated felony and a controlled substances offense and considering the impact of the resulting consequences on a *Padilla*-based ineffective assistance claim).

280. Regarding the connection to *Strickland*’s second requirement, prejudice, the Supreme Court has explained that “our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.” *Glover v. United States*, 531 U.S. 198, 203 (2001).

of multiple values, including: the recognition that sound representation takes many forms, a hesitation to second guess counsel's decisions, and a commitment to breathe life into this Sixth Amendment guarantee that promotes fairness and accuracy.²⁸¹ *Padilla's* two-tiered test likewise accommodates multiple goals. On the one hand, the Court unmistakably signaled its appreciation of the interconnectedness of criminal and immigration proceedings, and the importance to noncitizen defendants of receiving sound advice about the presumptively mandatory immigration consequences of conviction. On the other hand, the Court stopped short of a result that it felt might effectively require criminal defense attorneys to become immigration defense attorneys.

Where the *Strickland* line of cases and *Padilla* diverge, however, is in how much investigation they require before the constitutional duty is satisfied.²⁸² The *Padilla* Court explained that "when the deportation consequence is truly clear," the constitutional mandate, or "the duty to give correct advice[,] is equally clear."²⁸³ When, however, "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."²⁸⁴

Despite marking the first time that the Court has recognized any Sixth Amendment obligation regarding advice about immigration consequences, *Padilla* created a two-tiered duty that does not require attorneys to come to terms with the law affecting their clients' future to the same extent as *Strickland's* reasonable-investigation standard requires. The first of *Padilla's* two prongs—the obligation to provide "clear" advice when deportation is "truly clear"—requires attorneys to stop investigating and advise that deportation will be presumptively mandatory based on a cursory examination of statutory text and little

281. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012) (acknowledging that "[t]he performance prong of *Strickland* requires a defendant to show that counsel's representation fell below an objective standard of reasonableness" (citation omitted) (internal quotation marks omitted)); TOMKOVICZ, *supra* note 58, at 165 (explaining that the Supreme "Court provided an open-ended, unspecific definition of the deficient performance prong [and] refused to impose particular obligations").

282. Cf. *Zeidman*, *supra* note 6, at 224 (describing the duty of defense counsel "to assure" that he has "investigate[d] the relevant facts and law" of a client's predicament as "pre-conditions to providing *Padilla* advice").

283. *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1483 (2010).

284. *Id.*

more, even where that advice might not prove to be an accurate reflection of the law.²⁸⁵ Meanwhile, *Padilla*'s other prong allows attorneys to cease investigating and advise simply that "adverse immigration consequences" may arise, even where more research might produce a more definite answer.²⁸⁶ Both levels of advice, this Part explains, conflict with *Strickland* and its progeny and threaten to undermine the promise at *Padilla*'s core: providing noncitizen defendants with critical information about the immigration consequences of conviction.²⁸⁷

A. *What Padilla Requires and What It Allows*

The two-tiered standard announced in Justice Stevens's majority opinion in *Padilla* recognizes that, despite immigration law's long presence within criminal proceedings, criminal defense attorneys typically do not have the intimate familiarity with immigration law, especially with the INA's crime-based removal and relief provisions, necessary to replicate an immigration attorney's advice in removal proceedings.²⁸⁸ Nor does the *Padilla* standard require criminal defense attorneys to provide such advice.²⁸⁹ Whereas an immigration

285. See, e.g., *United States v. Randazzo*, 2011 WL 1743395, at *5–6 (E.D. Penn. 2011) (concluding that a defense attorney's conduct was not constitutionally deficient where the attorney admitted to not being aware that the defendant's convictions might avoid being classified as aggravated felonies if the court imposed multiple sentences of less than a year rather than a single sentence of more than a year as the court did and instead advised the defendant and informed the court that deportation was expected).

286. See Vázquez, *Realizing Padilla's Promise*, *supra* note 6, at 189 ("In those instances where *Padilla* would only require a generic advisement, criminal noncitizen defendants will be deprived of information and assistance to effectively combat removal from the United States but will be unable to bring a Sixth Amendment claim for relief.").

287. See *id.* at 190 ("*Padilla* will deprive certain noncitizen defendants of advice and performance that the *Padilla* Court itself recognized to be of paramount importance.").

288. Cf. Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1150 (2002) (explaining that "the JRAD option was not widely known among criminal defense attorneys" despite its long history). For an example of some of the complexities facing immigration lawyers, see Noferi, *supra* note 70, at 38.

289. See *supra* text accompanying note 284. Whether *Padilla* applies to other consequences of conviction remains in doubt. See *infra* Part IV.A. It is plausible that the Supreme Court's rationale applies to immigration consequences as much as to other consequences traditionally considered collateral to the criminal process. The *Padilla* majority, after all, reiterated its "responsibility under the Constitution . . . that no criminal defendant . . . is left to the 'mercies of incompetent counsel.'" *Padilla*, 130 S. Ct. at 1486 (quoting

attorney representing a client in removal proceedings must trudge into the muddy corners of immigration law in search of a viable argument against removal or in support of a claim for relief from removal,²⁹⁰ a defense attorney representing that same client in criminal proceedings can comply with *Padilla* without going to such investigative lengths; therein lies the departure from the traditional *Strickland* standard.²⁹¹

No better example exists of *Padilla*'s willingness to allow criminal defense attorneys to cease investigation far before the normal *Strickland* calculation than the facts of *Padilla* itself. In the decision, the Supreme Court explained that *Padilla*'s "deportation was presumptively mandatory," citing to the INA's controlled substances offense provision.²⁹² This result, the Court noted, was clear "simply

McMann v. Richardson, 397 U.S. 759, 771 (1970)). Incompetent counsel could of course arise no matter what law is involved. At the same time, the Court stressed the "unique nature of deportation," suggesting that the holding might be limited to this context. *Id.* at 1481. Meanwhile, the two Justices who concurred took issue with what they perceived as the majority "downplay[ing] the severity of the burden it imposes on defense counsel," which suggests that they would not be comfortable expanding *Padilla* beyond immigration consequences. *Id.* at 1490 (Alito, J., concurring).

290. See *supra* Part II.B.2.

291. As Mary Holper explained regarding one category of removal offense, crimes involving moral turpitude ("CIMT"), "*Padilla* . . . left defense counsel representing noncitizens with no clear obligation to read case law and determine whether a given offense will lead to deportation for a CIMT." Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647, 649 (2012). Though Noferi is correct that "the constitutional impact of infringement on available discretionary relief is less clear" regarding challenges to removability than whether someone is deportable or inadmissible, *supra* note 70, at 78 n.67, the point here is not to suggest that a criminal defense attorney should be required to predict how an immigration judge will exercise discretion. Kanstroom put it well when he wrote that it would be improper "to focus excessively on the possible availability of discretionary relief in immigration court." Kanstroom, *supra* note 2, at 1508. Rather, the point is that *Padilla* does not require criminal defense attorneys to consider how a conviction will affect a defendant's statutory eligibility for relief—mandatory or discretionary—and, more profoundly, it does not require the attorneys to consider the nuances of the substantive immigration law that will determine whether a defendant is deemed deportable upon conviction.

292. 8 U.S.C. § 1227(a)(2)(B)(i) (2006) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams

from reading the text of the statute.”²⁹³ As such, Padilla’s defense attorney was required to advise him about the possibility of deportation with just as much clarity.

But a legal determination based on a superficial review of the law, described as all that is required in *Padilla*, does not necessarily tell noncitizen defendants concerned about their immigration status what they want to know—whether pleading is likely to result in forced repatriation. On occasion, some of these individuals, it turns out, are actually U.S. citizens and thus legally immune from removal.²⁹⁴ Meanwhile, lawful permanent residents are regularly convicted of crimes that do not result in removal.²⁹⁵ Not only is their removal not “presumptively mandatory” upon conviction, but the conviction alone has no bearing on their immigration status. Similarly, thousands of other individuals are able to remain in the United States despite a conviction. In fiscal year 2011 alone, almost 5,000 were granted the relief that is available to individuals with a controlled substances offense conviction.²⁹⁶ More than 2,000 individuals convicted of

or less of marijuana, is deportable.”); *Padilla*, 130 S. Ct. at 1483; see *Padilla v. Commonwealth*, 381 S.W.3d 322, 326, 328–30 (Ky. Ct. App. 2012) (pointing out that deportation would be presumptively mandatory on the conviction of an aggravated felony).

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

294. See, e.g., *Lytle v. United States*, 867 F. Supp. 2d 1256, 1266–67, 1269–74 (M.D. Ga. 2012) (describing the experience of a United States citizen who was wrongfully deported); *Perez v. United States*, 502 F. Supp. 2d 301, 303–04 (N.D.N.Y. 2006) (same); DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 14–15, 99–102 (2012) (“[W]rongful deportations of U.S. citizens have occurred with distressing frequency.”).

295. See, e.g., 8 U.S.C. § 1227(a)(2)(A)(i) (2006) (providing that a conviction for a crime involving moral turpitude results in deportability only if committed within five years of admission and then only if punishable by at least one year in prison); KESSELBRENNER & ROSENBERG, *supra* note 240, at 35–39 (explaining that juvenile dispositions are not convictions for immigration law purposes); *id.* at 43–45 (noting several possibilities for avoiding a criminal disposition that is defined as a “conviction” for immigration law purposes, regardless of whether it constitutes a conviction under the relevant jurisdiction’s penal code).

296. See César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 LA RAZA L.J. 17, 46 (2011) [hereinafter García Hernández, *Prison Transfers*] (discussing options for relief available to lawful permanent residents); see also 8 U.S.C. § 1229b(a)–(b)(1) (2006) (barring cancellation of removal for lawful permanent residents convicted of an aggravated felony, but not precluding eligibility for individuals convicted of a controlled substances offense); EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP’T OF JUSTICE, FY 2011 STATISTICAL

aggravated felonies were granted relief in fiscal year 2011.²⁹⁷ Perhaps more surprisingly, an unknown number of otherwise unauthorized individuals are convicted of crimes without facing the possibility of removal.²⁹⁸

A comparison between the research contemplated as necessary for criminal defense attorneys to conduct and the exercise that an immigration attorney engages in to defend against removal demonstrates just how cursory the *Padilla* requirement for investigation really is. Reviewing the statutory text, as the *Padilla* majority explained, would have been sufficient to inform Padilla's attorney that Padilla's deportation was presumptively mandatory; such a cursory analysis, however, is an insufficient step in the immigration attorney's investigative process. Padilla was convicted for controlled substance offenses, which, according to the Court were grounds for removal.²⁹⁹ As a lawful permanent resident of forty years,³⁰⁰ however, Padilla might have qualified for cancellation of removal, the most charitable form of relief from removal that currently exists in immigration law, even had the Court of Appeals of Kentucky not subsequently vacated his conviction.³⁰¹ To truly predict the effect of the conviction on Padilla's immigration status, an attorney would

YEAR BOOK R3 tbl.16 (2012) [hereinafter EOIR 2011 YEAR BOOK] (stating that 3,994 lawful permanent residents received cancellation of removal in fiscal year 2011 and another 892 were granted relief under former INA § 212(c)). For a discussion of former INA Section 212(c), see *supra* note 274 and accompanying text.

297. García Hernández, *Prison Transfers*, *supra* note 296, at 45 n.193; see also Hew, *supra* note 13, at 55 (explaining that protection under the Convention Against Torture ("CAT") is available to individuals who have been convicted of an aggravated felony). In fiscal year 2011, immigration courts granted 629 CAT claims. EOIR 2011 YEAR BOOK, *supra* note 296, at M1 tbl. 10. Another 2,040 were granted withholding of removal, a mandatory form of relief available to individuals who have committed a crime so long as it is not a "particularly serious crime," a term that includes, but is not limited to, aggravated felonies where the term of imprisonment issued was at least five years. 8 U.S.C. § 1231(b)(3)(B) (2006).

298. See 8 C.F.R. § 244.1 (2012) (providing that crimes punishable by imprisonment of five days or less are not felonies or misdemeanors for purposes of Temporary Protected Status, a form of relief available to individuals without other authorization to be present in the United States).

299. *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1483 (2010).

300. *Id.* at 1477.

301. See 8 U.S.C. § 1229b (2006) (precluding eligibility for cancellation from removal for lawful permanent residents convicted of an aggravated felony but not a controlled substances offense); *Padilla v. Commonwealth*, 381 S.W.3d 322, 330–31 (Ky. Ct. App. 2012).

need to understand whether Padilla had a good claim for cancellation of removal.

As part of this calculus, an immigration attorney would have to determine if any of Padilla's convictions fell within any of the twenty-one types of aggravated felony categories in the INA, which would have rendered him statutorily ineligible for cancellation of removal.³⁰² Despite having been convicted of three drug offenses—misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia, and felony trafficking in marijuana³⁰³—determining whether one or more of these offenses is an aggravated felony is no simple matter. Unlike the simple reading of the “succinct, clear, and straightforward” statutory text that *Padilla* commands of a criminal defense attorney, an immigration attorney representing Padilla in removal proceedings would have needed to consider the many nuances of the drug-related aggravated felony category. Standing alone, for example, Padilla's two possession convictions were likely not aggravated felonies pursuant to the Supreme Court's decision in *Lopez v. Gonzales*.³⁰⁴ Combined, however, there is a slim possibility that they qualified as an aggravated felony pursuant to the Court's interpretation of the “illicit trafficking” aggravated felony provision in *Carachuri-Rosendo v. Holder*.³⁰⁵ In contrast, Padilla's trafficking conviction appears at first blush to fit neatly within the illicit trafficking provision. *Garcia-Echaverria v. United States*,³⁰⁶ a Sixth

302. See 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) (“Any alien who is convicted of an aggravated felony at any time after admission is deportable.”).

303. *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd sub nom.*, *Padilla v. Kentucky*, 559, U.S. 356, 130 S. Ct. 1473, 1473 (2010).

304. 549 U.S. 47 (2006). In *Lopez*, the Court determined that simple possession does not fall within the illicit trafficking aggravated felony category. *Id.* at 52, 55–57.

305. See 8 U.S.C. § 1101(a)(43)(B) (2006) (“The term ‘aggravated felony’ means . . . illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)”); *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010). In *Carachuri-Rosendo*, the Court “[h]eld that when a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a prior conviction, he has not been ‘convicted’” of illicit trafficking. *Id.* at 2589–90. Kentucky authorizes enhancement for felony offenses committed after having been convicted of one or more felonies. KY. REV. STAT. § 532.080(2)–(3) (West 2012). Enhancement is not permitted based on prior misdemeanor offenses. *Newton v. Commonwealth*, 760 S.W.2d 100, 101–02 (Ky. Ct. App. 1988). The record of Padilla's conviction makes no mention of an enhancement based on a prior conviction.

306. 376 F.3d 507 (6th Cir. 2004).

Circuit decision interpreting this offense as an aggravated felony, only adds to that inclination.³⁰⁷ The closer examination required of a zealous immigration attorney, however, casts doubt on these impressions because Padilla was convicted under a clause other than the statutory language that the Sixth Circuit addressed, and one that may have taken the conviction out of the realm of an aggravated felony.³⁰⁸ An immigration attorney who performed this more exhaustive research would have arrived at a viable argument that Padilla's convictions were not aggravated felonies.

If, however, Padilla's convictions were deemed an aggravated felony, then he would have been precluded from seeking cancellation of removal but not from other types of relief from removal; Padilla might have been eligible for less generous forms of relief.³⁰⁹ To best explore other relief possibilities, an attorney would be required to research the relevant law and, if Padilla met the statutory eligibility requirements, to develop a persuasive factual record to submit to an immigration judge who would have ultimately decided whether he was allowed to remain in the United States. None of this research, however, is required of a criminal defense attorney providing constitutionally adequate representation pursuant to *Padilla*.³¹⁰ Indeed, without considering any of these possibilities, the Supreme Court was satisfied that Padilla's conviction rendered his deportation presumptively mandatory and that defense counsel needed to advise Padilla as such.

This outcome is particularly curious because of Justice Stevens's role. Then in his final days on the Court, Justice Stevens mustered seven votes to indelibly and impressively expand the right-to-counsel's benefit to noncitizens.³¹¹ The accommodation that Justice Stevens's opinion crafted, however, sets the *Strickland*-lite duty articulated above in sharp contrast with his earlier enthusiasm for *Strickland*'s duty to

307. *Id.* at 511–13.

308. See García Hernández, *After Padilla*, *supra* note 34, at n.132.

309. See *supra* note 296 and accompanying text.

310. See, e.g., *Ex parte Alfredo Olvera*, No. 05–11–01349–CR, 2012 WL 2336240, at *3 (Tex. Crim. App. 2012) (explaining that the relevant statutory text indicated that deportation was the clear result of conviction in defendant's case without mentioning the role of case law in the determination).

311. Joining in Justice Stevens' majority opinion were Justices Kennedy, Ginsburg, Breyer, and Sotomayor. *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1477 (2010). Justice Alito, joined by Chief Justice Roberts, filed a concurring opinion. *Id.* at 1487 (Alito, J., concurring).

investigate thoroughly, or, at least, to investigate enough such that a decision to cease investigating is based on an informed understanding of the relevant law and facts.

Justice Steven's support for a broad duty to investigate dates back to 1985 when he joined Justice White's concurring opinion in *Hill v. Lockhart*,³¹² expressing a desire to see *Strickland*'s first prong impose greater obligations on defense attorneys. Although Justices White and Stevens concluded that the petitioner's specific allegations were insufficient, even if true, to demonstrate deficiency on the part of counsel, the concurrence made clear that failure to inform the defendant about the relevant law would be deficient performance under *Strickland*.³¹³ Had Hill claimed that his attorney knew about a prior conviction and still failed to advise him about the state's recidivist offender enhancement law, Justices White and Stevens would have decided that the attorney provided ineffective assistance.³¹⁴ Their position is particularly instructive to understanding *Padilla* because this hypothetical is akin to the error committed by Padilla's attorney—providing inaccurate sentencing advice—and also because *Padilla* firmly placed deportation within the sentencing phase of criminal proceedings.³¹⁵

A quarter-century after *Hill* and two months before *Padilla*, Justice Stevens repeated his vision of a muscular *Strickland* deficiency prong in *Wood v. Allen*.³¹⁶ This time writing his own dissenting opinion, joined by Justice Kennedy, Justice Stevens articulated a duty to investigate that fits quite neatly into the *Strickland* line of cases. Counsel must do more, he wrote, than simply decide to cease investigating a client's predicament.³¹⁷ Rather, a decision to end investigation must be "strategic."³¹⁸ Building off of *Wiggins*'s

312. 474 U.S. 52 (1985).

313. *Id.* at 62–63 (White, J., concurring in the judgment) ("The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis . . . as such an omission cannot be said to fall within 'the wide range of professionally competent assistance' demanded by the Sixth Amendment." (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984))).

314. *Id.*

315. *Padilla*, 130 S. Ct. at 1480–81.

316. 558 U.S. 290, 130 S. Ct. 841 (2010).

317. *See id.* at 853 (Stevens, J., dissenting) (noting that Supreme Court precedent "make[s] clear that counsel's unconsidered decision to fail to discharge that duty [to investigate mitigating evidence] cannot be strategic").

318. *Id.*

distinction between “inattention” and “reasoned strategic judgment” to forgo further investigation,³¹⁹ Justice Stevens argued: “A decision cannot be fairly characterized as ‘strategic’ unless it is a conscious choice between two legitimate and rational alternatives. It must be borne of deliberation and not happenstance, inattention, or neglect. Moreover, a cursory investigation does not automatically justify a tactical decision with respect to sentencing strategy.”³²⁰ Counsel, in other words, must conduct sufficient research to identify sound alternatives. Only then may a constitutionally adequate attorney advise the defendant on how to proceed.

Despite Justice Stevens’s positions in *Hill* and *Wood*, the majority opinion he authored in *Padilla* follows a much different path. *Padilla*’s two-tiered standard represents a conscious choice by the Court between two legitimate and rational objectives—(1) providing noncitizen defendants with important information that they want, while (2) attempting to avoid overburdening criminal defense attorneys.³²¹ These two tiers do not, however, require that an attorney make “a deliberate choice between two permissible alternatives” available to the defendant.³²² On the contrary, *Padilla* allows advice after nothing more than the “cursory investigation” Justice Stevens pronounced inadequate in *Wood*. The *Padilla* majority, led by Justice Stevens only two months after *Wood*, endorsed such a practice when it suggested that Padilla’s attorney would have satisfied Padilla’s right-to-counsel protection had he simply read the text of the controlled substances ground of removal and advised Padilla that, upon conviction, his deportation would become presumptively mandatory.³²³ Of course, had Padilla’s crimes fallen within a more amorphous ground of removal, then his attorney would have more easily satisfied the counsel guarantee; all the attorney would have needed to do was tell Padilla that “pending criminal charges may carry a risk of adverse immigration consequences.”³²⁴

319. *Wiggins v. Smith*, 539 U.S. 510, 526 (2003).

320. *Wood*, 130 S. Ct. at 853 (discussing *Wiggins* and *Strickland*) (citations omitted) (internal quotation marks omitted).

321. See *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1483 (2010) (stating that there is a clear “duty to give advice” when there are clear deportation consequences while noting that private practitioners have a “more limited” duty when consequences “are unclear or uncertain”).

322. *Wood*, 130 S. Ct. at 854.

323. *Id.*

324. *Id.*

Neither of these routes even suggests that defense attorneys must engage in the investigation of the law and facts relevant to a client's predicament that Stevens had previously endorsed. A Texas intermediate appellate court opinion illustrates how lower courts are applying *Padilla*. In *Ex parte Alfredo Olvera*,³²⁵ the Court of Appeals of Texas, faced with an ineffective assistance claim arising from an instance in which an attorney told a defendant that he "could" be deported but did not provide the kind of certitude required by *Padilla*'s more strenuous clear-advice prong, queried the clarity of the relevant statutes. Had the attorney considered the statutory text of the state criminal offense—in this case, assault of a public servant under Texas law—and the INA's crime of violence definition, then the attorney would have learned that "the immigration consequences of a guilty plea to the assault offense in this case were clear."³²⁶ Thus, the court concluded that "counsel's duty . . . was to give [the noncitizen petitioner] clear advice about those consequences."³²⁷ The court's analysis turned on its reading of the penal and immigration statutes: a "crime of violence" is an aggravated felony;³²⁸ an "offense that has as an element the use . . . of physical force against the person" is a "crime of violence,"³²⁹ one of two prongs of the crime of violence definition and the only prong cited in *Olvera*; and the Texas Penal Code defines "assault" as an offense that "causes bodily injury to another."³³⁰ Importantly, the court did not reference the Board of Immigration Appeals or judicial interpretations of any of these statutes. Had it done so, it might have learned that six years earlier the Fifth Circuit had determined that "use of force is not an element of assault under section 22.01(a)(1) [of the Texas Penal Code], and the assault offense does not fit [18 U.S.C.] subsection 16(a)'s definition for crime of violence."³³¹ This case, which contradicts the

325. No. 05–11–01349–CR, 2012 WL 2336240 (Tex. Crim. App. 2012).

326. *Id.* at *3.

327. *Id.*

328. 8 U.S.C. § 1101(a)(43)(F) (2006).

329. 18 U.S.C. § 16(a) (2006).

330. TEX. PENAL CODE ANN. § 22.01(a)(1) (West 2011); see *Olvera*, 2012 WL 2336240, at *3 (citing the relevant statutes).

331. *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006); see also *United States v. Ramirez*, 606 F.3d 396, 397 (7th Cir. 2010) (explaining that the Texas assault "offense does not have, as an element, the use or threatened use of physical force"); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1113 (10th Cir. 2008) (same). While assault of a public servant is a felony under section 22.01(b) of the Texas Penal Code, the *Olvera*

court's reading of the statutory text, is highly relevant to a Texas defense attorney representing a client being prosecuted in suburban Dallas and would likely lead a court to conclude comfortably that the reasonable defense attorney would have known about the law.

Yet the Texas court in *Olvera* easily concluded that a barebones reading of the statutory text met *Padilla*'s mandate despite the obvious superficiality of such investigation. This analysis unquestionably fits Justices White and Stevens's explanation in *Hill* of deficient performance: "The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis . . . as such an omission cannot be said to fall within 'the wide range of professionally competent assistance' demanded by the Sixth Amendment."³³² This clear-cut pronouncement, and Justice Stevens's dissenting repudiation in *Wood* of attorneys who decide to cease investigation based on inattention or neglect to their client's predicament, makes a barely perceptible appearance in *Padilla*, which requires attorneys to at least consider the immigration consequences of conviction. Justice Stevens's opinion in *Padilla*, however, makes clear that attorneys do not need to consider the immigration consequences of conviction with the same thoroughness as they would the traditional sentencing impact of conviction.³³³

court cited and quoted section 22.01(a). *Olvera*, 2012 WL 2336240, at *3. Similarly, while it is possible that assault in Texas may be a crime of violence under the definition provided in 18 U.S.C. § 16(b), again, the *Olvera* court cited and quoted section 16(a). *Id.*

332. *Hill v. Lockhart*, 474 U.S. 52, 62 (1985) (White, J., concurring) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)).

333. Though Justice Stevens' more forceful articulation of the duty to investigate in *Hill* and *Wood* might be attributable to his focus in those cases on traditional criminal consequences, whereas *Padilla* centered on a non-traditional consequence of conviction, such a reading is belied by the *Padilla* opinion. In *Padilla*, Justice Stevens eviscerated any distinction between immigration consequences and traditional criminal consequences of conviction that may have been thought to exist. *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1482 (2010) (concluding that "advice regarding deportation is not categorically outside of the Sixth Amendment right to counsel"). He went out of his way to ground the Court's holding in the view that "deportation is an integral part . . . of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* at 1480. In addition to aligning deportation with traditional criminal conviction consequences, Justice Stevens distinguished deportation from other consequences and, by extension, the advice required of attorneys whose clients face the possibility of deportation from that required of those attorneys whose clients face the possibility of suffering other non-traditional consequences of conviction. *See id.* at 1480–82 (discussing the "unique nature

Even without turning to Justice Stevens's aged concurrence in *Hill* or his dissent in *Wood*, had the *Padilla* Court applied the robust body of lower court case law interpreting *Strickland*, the reasonable decision to stop investigating before advising a defendant would look much different than how it looks under *Padilla*. A decision to stop investigating would require careful inquiry of the facts, diligent research to identify and understand applicable law, nuanced if not perfect comprehension of sentencing consequences, and, above all else, a commitment to avoid misleading a defendant. *Strickland* and its progeny have long required as much from criminal defense attorneys in an effort to provide defendants with the "guiding hand of counsel."³³⁴ More concretely, had *Padilla* followed the existing path, criminal defense attorneys would have been required to become intimately familiar with the following areas of immigration law: the INA's crime-based grounds of removal; options for relief from removal; citizenship provisions, including derivative citizenship obtained through family members; the assortment of agency policies and regulations implementing these provisions; and the innumerable administrative and judicial decisions interpreting these laws.³³⁵ As if that were not enough, defense attorneys would need to become familiar with some long-repealed provisions concerning removal, relief from removal, and citizenship.³³⁶

This appears to be a daunting task, but it is one that is already required of criminal defense attorneys representing noncitizens in some instances. State and federal courts across the country, in a series of decisions spanning several decades, have frequently attributed a detailed understanding of immigration law to the reasonable criminal defense attorney. As detailed above, numerous courts have concluded that attorneys were ineffective when they failed to challenge the elements of a conviction or raise a plausible claim for relief that rested on a nuanced familiarity with immigration law.³³⁷

of deportation"). Deportation, he explained, is "unique" because it is a "severe penalty" that is "intimately related to the criminal process." *Id.* at 1481. Because of this unique nature, the majority shunned the direct or collateral consequences distinction with regard to "the specific risk of deportation," while explicitly refusing to consider whether this distinction is generally appropriate in the *Strickland* context. *Id.* at 1481–82.

334. *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *see supra* Part II.A–B.1.

335. *See supra* Part II.B.2.

336. *See supra* Part II.B.2.

337. *See supra* Part II.B.2.

In its quest to remedy the significant problem of noncitizen defendants receiving the wrong advice or none at all, the *Padilla* Court failed to appreciate this reality. Had the Court done so, it could simply have turned to the standard to which defense attorneys are held when providing advice about immigration law during the criminal proceeding.³³⁸ The Court failed to do that, however, and *Padilla*'s two-tiered standard, while an improvement from what existed previously,³³⁹ represents a lost opportunity, and for some noncitizen defendants, a requirement that they receive advice that is more harmful than were they to receive no advice at all.

B. Two Duty-to-Investigate Standards

Padilla's recognition of a weakened duty to investigate when determining the immigration consequences of conviction creates a troubling dichotomy: Defense attorneys must investigate the law concerning the substantive elements of a crime, even elements involving immigration law, and the penal consequences of conviction as fully as ever, while investigating the immigration consequences of conviction, even for the same crime, but to a lesser degree. An attorney whose client is charged with burglary of a vehicle in Texas, for example, would need to investigate the relevant state statute to determine whether the client has any available defenses under Texas

338. See *supra* Part II.B.2.

339. See *infra* notes 377–379 and accompanying text. Though *Padilla* has improved the criminal defense bar's understanding of immigration consequences and served as a back-end method for attacking constitutionally deficient convictions, the decision's potential was limited by the Court's determination that it does not apply retroactively. *Chaidez v. United States*, 2013 WL 610201, *10 (U.S. Feb. 20, 2013). Meanwhile, criminal proceedings in states that have developed more robust protections—for example, Colorado and New Mexico—are likely to remain unaffected. See *State v. Paredez*, 101 P.3d 799, 803–04 (N.M. 2004) (“We go one step further . . . and hold that an attorney’s non-advice to an alien defendant on the immigration consequences of a guilty plea would also be deficient performance.”); *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987) (“When defense counsel in a criminal case is aware that his client is an alien, he may reasonably be required to investigate relevant immigration law.”). For practice tips on *Padilla*'s potential applicability to convictions that were final prior to March 31, 2010, the date *Padilla* was announced, see SEJAL ZOTA AND DAWN SEIBERT, DEFENDING IMMIGRANTS P'SHIP, SEEKING POST-CONVICTION RELIEF UNDER PADILLA V. KENTUCKY AFTER CHAIDEZ V. U.S. (Feb. 28, 2013), available at http://crimmigration.com/files/0/6/4/7/5/167292-157460/Chaidez_advisory_FINAL_20130228.pdf.

law and identify the likely sentencing provision that applies.³⁴⁰ An attorney representing a noncitizen defendant would then turn to the INA to explore potential immigration consequences. There the attorney would read that a “burglary offense for which the term of imprisonment [is] at least one year” is an aggravated felony.³⁴¹ Because Texas punishes this offense with up to one year of imprisonment,³⁴² the statutory text seems to be clear, succinct, and straightforward: If the maximum sentence is ordered, this offense qualifies as an aggravated felony. Under *Padilla*, a defense attorney would then need to advise the noncitizen defendant that conviction means presumptively mandatory deportation. Once that occurred, the constitutional guarantee of effective assistance of counsel, as interpreted by *Padilla*, is met. The fictitious defendant in this scenario, however, has received incorrect advice about the aggravated felony characterization. Despite the clarity of the statutory text, burglary of a vehicle is not an aggravated felony.³⁴³

Clearly it is troubling that, after *Padilla*, a noncitizen defendant can receive constitutionally sound but inaccurate advice about the immigration consequences of conviction. This is doubly problematic because it creates two duty-to-investigate standards. One standard applies to the advice given about the applicability of particular law—in this example, the state burglary offense as announced by the state legislature and interpreted by the state courts, including possible defenses and sentencing consequences. The other standard applies to the advice given about potential immigration consequences.

The two investigation standards *Padilla* identified go from problematic to nonsensical when located in a jurisprudential history that requires defense attorneys to consider immigration law just as thoroughly as they consider other types of law that determine

340. TEX. PENAL CODE ANN. § 30.04(a)–(e) (West 2011). Zeidman cautions against focusing so narrowly on limiting the adverse impact of a guilty plea to the extent that the inevitability of a plea is simply presumed. See Zeidman, *supra* note 6, at 215.

341. 8 U.S.C. § 1101(a)(43)(G) (2006) (citation omitted).

342. See TEX. PENAL CODE ANN. §§ 12.21(2), 30.04(d) (West 2011).

343. *In re Perez*, 22 I. & N. Dec. 1325, 1327 (B.I.A. 2000). While the common law version of burglary required an entry into a dwelling place, the “modern crime . . . has little in common with its common-law ancestor except for the title of burglary.” WAYNE R. LAFAVE, 3 SUBSTANTIVE CRIMINAL LAW § 21.1 (2d ed.). Indeed, many state burglary statutes include conveyances such as vehicles. See *id.* at n.188 (collecting statutes from sixteen states). As such, a criminal defense attorney whose client is charged with burglary gains little from focusing on the common law formulation.

criminal culpability and punishment. Justice Alito may wish, as he expressed in his concurring opinion in *Padilla*, that “a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney’s expertise,”³⁴⁴ but his wish conflicts with decades of reality. For years, attorneys representing noncitizen criminal defendants have been required to identify the possible relevance of immigration law provisions, conduct the necessary investigation into law and facts to determine whether the defendant might be eligible for this form of relief from deportation, and advise the defendant accordingly.³⁴⁵

None of the lower courts that review the advice criminal defense attorneys provide about immigration law provisions such as JRAD eligibility or aggravated felonies have suggested that the law is too complicated for these attorneys to possibly understand. Nor do they or the justices in *Padilla* express any desire to let attorneys off the proverbial “hook” by relaxing their obligation to investigate the relevant law and facts affecting guilt or the non-immigration consequences of conviction.³⁴⁶ The *Padilla* Court’s two tiers of advice, however, especially the generic advice required by the second tier, facilitate this reduced standard of investigation with regard to immigration law provisions that determine whether a defendant will face deportation. Under the second tier of *Padilla*, “[w]hen the law is not succinct and straightforward,”³⁴⁷ the attorney is not required to thoroughly investigate the law’s nuances. Rather, “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.”³⁴⁸

If this succinct and straightforward requirement were analogized to sentencing law, then the standard might read: “When the law is not succinct and straightforward, a criminal defense attorney need do no more than advise a client that pending criminal charges may carry a

344. *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1494 (2010) (Alito, J., concurring).

345. See *supra* Part II.B.2.

346. See, e.g., Lindsay C. Nash, *Considering the Scope of Advisal Duties Under Padilla*, 33 CARDOZO L. REV. 549, 566 (2011) (“[E]ven when courts interpret *Padilla* to require advice only about deportation-triggering pleas,” defense attorneys must, “as a practical matter . . . provide more comprehensive, tailored advice.”).

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

348. *Id.*

risk of adverse consequences to his liberty.” If this requirement were analogized to immigration law provisions that form the elements of an offense, then instead of finding ineffective assistance, the standard might be that when the law is not succinct and straightforward, the criminal defense attorney is required to do no more than advise the client that pending criminal charges might not apply to him.³⁴⁹

Such advice would be unprecedented and would certainly fail *Strickland*’s duty-to-investigate requirement as it has unraveled over the last quarter century.³⁵⁰ It would also fail for the very reason that the United States recognizes a right to counsel: to promote adversarial proceedings that are fair and conclude in outcomes based on truth.³⁵¹ Rather than receive the “guiding hand of counsel,”³⁵² defendants subjected to this type of relaxed duty to investigate would be forced to make critical decisions about their defense without the benefit of an attorney’s skills. Yet this is precisely the obligation imposed on defense attorneys representing noncitizen defendants when advising them about the likelihood of remaining in the United States. These individuals, the *Padilla* Court implicitly endorsed, are entitled to no Sixth Amendment duty, as many lower courts have concluded, nor are they entitled to the duty to investigate articulated in *Strickland* and its progeny. Instead, they are only entitled to a reduced duty applicable solely to the immigration consequences of conviction.

C. *Strickland-Lite*’s Unintended Consequences

The gap between the legal and factual research required by *Padilla* and what is required of an immigration attorney sometimes makes no difference. In other situations, however, it may leave noncitizens in criminal proceedings or subsequent immigration proceedings in a worse position than they would have been had *Padilla* not been decided. In its wake, *Strickland-lite*’s lax constitutional competency standard leads attorneys to misadvise defendants—almost certainly without malice—while not running

349. See *United States v. Juarez*, 672 F.3d 381, 387–88 (5th Cir. 2012) (reversing Juarez’s conviction on the grounds that “[a]s Juarez’s attorney, Izaguirre had a duty to independently research the law and investigate the facts surrounding Juarez’s case,” and “[his] failure to investigate was unreasonable”). For a discussion of *Juarez*, see *supra* notes 246–257 and accompanying text.

350. See *supra* Part II.

351. See *supra* Part I.

352. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

amiss of the right to counsel; compare the next four examples. In the first, *Padilla* sanctions misleading advice but does not affect the fate ultimately suffered by the defendant. In contrast, the second and third scenarios exemplify one facet of *Padilla*'s downside—advice that complies with *Strickland*-lite's reduced investigation requirement suggests that deportation is inevitable even though a plausible argument exists, identifiable upon thorough investigation of the relevant law, that would have avoided deportability entirely. This can be referred to as *Padilla*'s "overadvice" problem. The fourth and final example highlights a related downside—*Padilla*-compliant advice that leaves a defendant unsure of the immigration consequences of conviction, even though more thorough investigation could have provided more definitive guidance. This is *Padilla*'s "underadvice" problem.

The first example involves noncitizen defendant *A*, a lawful permanent resident of ten years with no prior criminal history. *A* is charged with simple possession of cocaine, a crime that unmistakably falls within the controlled-substances-offense ground of removal,³⁵³ and is offered a reduced sentence in exchange for a guilty plea. Regardless of whether *A* is advised about the immigration consequences of conviction, *A* will become presumptively deportable upon conviction. Likewise, whether *A* is convicted through plea or trial, and no matter what sentence is issued, *A* will become presumptively deportable. Relief from removal is likely available in immigration proceedings,³⁵⁴ but the possibility of relief is not part of the *Padilla* analysis, so the criminal defense attorney does not have to advise *A* about relief options.³⁵⁵ As is true of ninety-seven percent of federal convictions and ninety-four percent of state convictions,³⁵⁶

353. 8 U.S.C. § 1227(a)(2)(B) (2006); see *supra* note 292.

354. See 8 U.S.C. § 1229b(a)(3) (2006) (precluding eligibility for cancellation of removal for lawful permanent residents convicted of an aggravated felony only).

355. Lower courts have disagreed about whether the availability of discretionary forms of relief, such as cancellation of removal, render the immigration consequence of conviction clear or unclear, but the *Padilla* Court's failure to discuss relief, despite describing *Padilla*'s conviction as a type for which relief is available, suggests that courts considering *Padilla* claims are not required to consider relief. García Hernández, *After Padilla*, *supra* note 34, at Part II.B.4.

356. See BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, CRIMINAL DEFENDANTS DISPOSED OF IN U.S. DISTRICT COURTS, available at <http://www.albany.edu/sourcebook/pdf/t5222009.pdf> (noting that in 2009, 83,707 out of 86,314 federal criminal defendants entered a plea of guilty or nolo conten-

assume that *A* pleads guilty under the impression that deportation is presumptively required and without having heard a word about the eminently plausible possibility of receiving cancellation of removal. Though this advice accurately reflects the law, it falls dramatically short “of helping the defendant to make reasonably informed decisions,” which the Tenth Circuit has explained is counsel’s Sixth Amendment duty,³⁵⁷ because defendant *A* is concerned about her ability to remain in the country and not about legal niceties short of that. Indeed, this standard fails to require “counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered,” as the Supreme Court explained is the criminal defendant’s Sixth Amendment entitlement.³⁵⁸

Now take a second example. Noncitizen defendant *B*, also a lawful permanent resident of ten years with no prior criminal history, is charged with statutory rape and rape, offenses that appear to fall within the “rape” or “sexual abuse of a minor” type of aggravated felony because the victim was sixteen-years-old.³⁵⁹ Assume that the prosecutor offers to drop the charge relating to rape in exchange for *B*’s guilty plea to statutory rape. Upon receiving advice from counsel that conviction for either offense will result in presumptively mandatory deportation because, as counsel says, both are aggravated

dere); S. ROSENMERKEL, M. DUROSE & D. FAROLE, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006-STATISTICAL 1, 3 tbl.1 (2009), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf> (“Most (94%) of felony offenders sentenced [in state court] in 2006 pleaded guilty.”).

357. *United States v. Washington*, 619 F.3d 1252, 1260 (10th Cir. 2010).

358. *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948). Though this advice might prompt a noncitizen defendant to seek the advice of an immigration attorney, relying on defendants is perilous and inconsistent—perilous because not all noncitizen defendants are aware that they are not U.S. citizens and inconsistent because courts have repeatedly stressed that it is the attorney’s duty to raise critical factual and legal issues for defendants, not a defendant’s duty to raise those issues. *See also* Vázquez, *Realizing Padilla’s Promise*, *supra* note 6, at 193 (writing that *Padilla*’s two-tiered system “jeopardizes noncitizen defendants by basing counsel’s duty on the perceived complexity or clarity of the law instead of the duty to look to the goals of the client[,] leaving an uneducated, poor and foreign-born individual to his own devices”).

359. *See* 8 U.S.C. § 1101(a)(43)(A) (2006) (defining an “aggravated felony” as including “rape, or sexual abuse of a minor”).

felonies,³⁶⁰ *B* decides to reject the plea offer and instead elects to take his chances by going to trial. *B* is then convicted of committing both crimes. In the removal proceeding that results from these convictions, *B*'s immigration attorney, not the criminal defense attorney, successfully argues that statutory rape is not rape or sexual abuse of a minor and thus without more the conviction has no immigration impact.³⁶¹ Assume, however, that the Department of Homeland Security ("DHS") is able to show that rape is an aggravated felony.³⁶² As a result, *B* is worse off, both in his criminal proceeding—

360. See 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

361. See, e.g., *Perez-Gonzalez v. Holder*, 667 F.3d 622, 626 (5th Cir. 2012) (explaining that "rape" as used in immigration law "stayed close to the common law definition" of rape which, in turn, "meant the 'unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will' where there was 'at least a slight penetration of the penis into the vagina.'"); Charles E. Torcia, 3 WHARTON'S CRIM. L. § 285 (15th ed.) (stating that "force is not an element of statutory rape" and that "statutory rape involves consensual sexual intercourse"); *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1012, 1016 (9th Cir. 2009) (concluding that California's unlawful sexual intercourse with a minor offense does not constitute sexual abuse of a minor for immigration law purposes because it lacks the scienter requirement for that aggravated felony category and criminalizes conduct that may not be abusive); *United States v. Vidal-Mendoza*, CR. No. 10-393-MA, 2011 WL 1560987, at *3-4 (D. Or. Apr. 25, 2011) (holding that Oregon's "statutory rape" offense is not categorically a sexual abuse of a minor type of aggravated felony because it lacks the four year age difference between the defendant and the minor that is required for immigration law purposes), *rev'd*, No. 11-30127, 2013 WL 174495, at *7 (9th Cir. Jan. 14, 2013) (explaining that the offense was sexual abuse of a minor at the time that the noncitizen was convicted, but not addressing whether it constitutes sexual abuse of a minor under subsequent Ninth Circuit case law relied upon by the district court); *State v. Telford*, 22 A.3d 43, 45, 51-52 (N.J. Super. Ct. App. Div. 2011) (explaining that third-degree child endangerment where the defendant admitted to touching a thirteen-year-old girl's breasts "for sexual pleasure" might not constitute sexual abuse of a minor and noting that, as a result, the defense attorney was required only to advise that adverse immigration consequences might result from conviction).

362. Alternatively, DHS might show that *B*'s two convictions are crimes involving moral turpitude, thus rendering *B* removable as an "alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct." 8 U.S.C. § 1227(a)(2)(A)(ii) (2006); see *Marciano v. INS*, 450 F.2d 1022, 1025 (8th Cir. 1971) (affirming the BIA's determination that statutory rape is a crime involving moral turpitude); *Ng Sui Wing v. United States*, 46 F.2d 755, 756 (7th Cir. 1931) (concluding that rape is a crime involving moral turpitude).

he was convicted of an additional offense beyond the plea he rejected—and in his immigration proceeding because he would not have been removable and ineligible for cancellation of removal, the most charitable form of relief from removal available under current immigration law, had he taken the plea offer.

B's predicament results directly from the *Strickland*-lite standard. Simply reading the relevant statutory text suggests that statutory rape is rape or sexual abuse of a minor, but binding case law that is perhaps not intuitive even to the seasoned immigration attorney provides otherwise. Learning this, however, requires doing much more than the cursory research obligated by *Padilla*. Rather, it requires that the attorney fully inform herself of the relevant law.³⁶³ Without conducting in-depth research of the applicable law, an attorney is essentially guessing based on intuition: Statutory rape “sounds like” rape or sexual abuse of a minor, so then it must be. Prior to *Padilla*, the right to counsel as articulated by *Strickland* required more than high-probability guesswork based on intuition and a cursory reading of the statute.³⁶⁴ Had *B*'s attorney been held to the usual duty-to-investigate standard that requires thorough investigation of the relevant law, then *B* would have been advised that the offer to plead guilty to statutory rape would not have subjected her to removal. *B* could have chosen to avoid removal by pleading. This would have shortened the criminal process, produced a desirable outcome for *B* (avoiding deportability), and promoted the goal of judicial efficiency that underlies support for plea-bargaining. Instead, having been told that a statutory rape conviction would lead to the same unpalatable result as a rape conviction (or convictions for both), *B* chose to go to trial—a time-consuming, expensive option that the prosecutor probably wanted to avoid and one that needlessly exposed *B* to a consequence he could have avoided: deportability.

Next, consider a third example, a slight variant of *B*'s situation. Noncitizen defendant *C*, also a lawful permanent resident of ten years with no prior criminal history, is charged only with statutory rape. *C*'s defense attorney advises that this is a sexual abuse of a minor type of

363. See *United States v. Loughery*, 908 F.2d 1014, 1018 (D.C. Cir. 1990) (explaining that an attorney's performance is measured as the “reasonableness under prevailing professional norms” which here requires that counsel be fully informed of the facts and law, thoroughly advise the client on all issues, and keep the client informed about the case).

364. See Nash, *supra* 346, at 573–74 (2011) (“Under *Strickland*, it is established that investigation, through research into law and fact, is fundamental to the efficacy of counsel . . .”).

aggravated felony.³⁶⁵ As such, *C*'s attorney adds that, upon conviction, *C* will be presumptively deportable.³⁶⁶ Assume that *C* is principally concerned about remaining in the United States, so *C* turns down a plea offer for statutory rape that would have resulted in less jail time. After a trial, *C* is convicted. Having been told that he would be deported if convicted, *C* does not hire an immigration attorney to represent him in the subsequent removal proceedings and is soon deported. Had *C* received no advice about the immigration consequences, as frequently occurred prior to *Padilla*, he may have hired an immigration attorney who would have discovered that statutory rape is not necessarily sexual abuse of a minor.

As in *B*'s situation, the outcome in *C*'s circumstance arises directly due to *Strickland*-lite's cursory investigation requirement. *C* acted on incorrect advice in turning down a plea offer; despite this, *C* could have remained in the United States had he sought a second opinion while in removal proceedings. An immigration attorney who fully researched the applicable law could have told *C* that, notwithstanding the statutory rape conviction, he was not removable. *C*, however, rationally chose to conserve his family's money by not hiring an immigration attorney to represent him in what he had already been told by his criminal defense attorney was a losing battle. Given the high rate of unrepresented individuals in removal proceedings, this is not a far-fetched hypothetical.³⁶⁷

Finally, a fourth example involves noncitizen defendant *D* who is a lawful permanent resident of four years rather than the ten years of the other hypothetical defendants. *D* is charged with the crime of tampering with records. His attorney concludes that this might constitute a crime involving moral turpitude but that the statute is not clear.³⁶⁸ As such, the attorney merely advises that conviction may have adverse immigration consequences for *D*; nothing more about immigration consequences is discussed. Assume that *D* is offered a reduced sentence in exchange for a guilty plea and accepts it without exploring other possibilities, including the possibility of pleading to

365. See *supra* note 359.

366. See *supra* note 360 and accompanying text.

367. Only 51% of immigration cases completed in fiscal year 2011 involved represented respondents. See EOIR 2011 YEAR BOOK, *supra* note 296, at G1.

368. See *Lopez-Penaloza v. State*, 804 N.W.2d 537, 545 (Iowa Ct. App. 2011) ("[D]etermining whether Lopez-Penaloza's conviction for tampering with records is a CIMT making her eligible for deportation is not as simple as reading the text of the INA.").

another offense or going to trial. Even though *D* retains an immigration attorney in the subsequent removal proceedings, the immigration judge concludes that tampering with records is a crime involving moral turpitude because it involves fraudulent or dishonest intent.³⁶⁹ Because *D* has been a lawful permanent resident for less than five years, he is deportable and ineligible for cancellation of removal.³⁷⁰ Had *D* known that tampering with records was a crime involving moral turpitude that would render him removable, he could have taken his chances at trial or worked to negotiate a plea deal for a different crime that does not carry an adverse immigration consequence.

D's scenario also illustrates the perils of *Strickland*-lite's lax duty to investigate. *D* was allowed to proceed through the criminal process without the benefit of useful advice about the impact of a conviction for tampering with records on his ability to remain in the United States, even though more detailed research would have turned up a sound basis upon which to conclude that a conviction would result in deportation. Unlike the numerous court decisions that have prohibited similarly limited advice in the sentencing context,³⁷¹ *Padilla* does not require such investigation.³⁷² Proceeding with limited information about a conviction's impact on defendants' immigration status is, along with the problem of defendants receiving incorrect

369. See Iowa Supreme Court Bd. of Prof. Ethics & Conduct v. Romeo, 554 N.W.2d 552, 554 (Iowa 1996) (explaining that, for purposes of attorney licensure, "the term 'moral turpitude' connotes behavior involving 'fraudulent or dishonest intent'" and that Iowa's tampering with records offense "on its face, involves moral turpitude" (citations omitted)).

370. See 8 U.S.C. § 1227(a)(2)(A)(i) (2006) ("Any alien who . . . is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable."); 8 U.S.C. § 1229b(a)(1) (2006) ("The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien . . . has been an alien lawfully admitted for permanent residence for not less than 5 years . . .").

371. See *supra* Part II.B.

372. See *Kostraba v. Minnesota*, No. A11-319, 2011 WL 5829141, at *5 (Minn. Ct. App. Nov. 21, 2011) (concluding that an attorney was required to provide only the general advisory because the law was too complex to be easily determined); see also *People v. Cristache*, 907 N.Y.S.2d 833, 842-43 (N.Y. Crim. Ct. 2010) (concluding that an attorney was required only to provide the general advisory because the removal consequence was "unclear or uncertain" despite the fact that, as the court explained, two of the defendant's crimes were crimes involving moral turpitude that, when combined, trigger deportation).

advice about a conviction's impact, the very dilemma that *Padilla* sought to remedy.

In each example, the criminal defense attorney complied with *Padilla* by examining the crime charged and the crime-based provisions of the INA and by concluding based on the language of the statutory grounds for removal that, upon conviction, deportation would be presumptively mandatory or that adverse immigration consequences may arise. And in the four hypothetical scenarios, the criminal defense attorney advised the defendant accordingly, as *Padilla* requires. The defendant in each example then acted quite rationally by, in the first and fourth examples, pleading guilty in exchange for a reduced sentence, and, in the second and third examples, taking his chances at trial. Until *Padilla* (and perhaps after *Padilla* outside the immigration consequences context),³⁷³ the duty to investigate required that counsel provide the defendant with her informed opinion based on "thorough investigation."³⁷⁴ Representation has been deemed deficient when attorneys promised less severe punishment than what the law required, when they incorrectly advised that more severe punishment awaited, when they muddled the compounding effects of multiple convictions, or when they adversely affected the defendant's calculation about the wisdom of pleading or going to trial.³⁷⁵ As it currently stands, however, *Padilla* allows similarly faulty advice to proceed under constitutional cover when it comes to the immigration consequences of conviction.³⁷⁶ The end result is that some noncitizen criminal defendants are left to make critical decisions about whether or not to accept a plea based on incorrect or incomplete advice.

373. See *infra* Part IV.

374. See *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (explaining that "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background" in omitting "voluminous" information regarding the defendant's background); *Boria v. Keane*, 99 F.3d 492, 497 (2d Cir. 1996) (describing the "effective assistance of counsel" as assistance that includes an "informed opinion as to what pleas should be entered" based on a "suitable inquiry" into what valid defenses exist (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948))).

375. See *supra* Part II.B.1.

376. See *supra* Part III.A–B.

IV. A CREEPING THRESHOLD

This Article has endeavored to show that *Padilla* treads a new route alongside *Strickland*'s well-worn path. The majority opinion is written in the language of *Strickland*'s two-pronged test and has been applied as an extension of that foundational framework. For all of *Strickland*'s shortcomings, on the whole, noncitizen defendants have gained much by the *Padilla* Court's recognition that their immigration concerns come within *Strickland*'s purview. For instance, innumerable immigration law specialists have provided educational opportunities for criminal defense attorneys in the years since *Padilla* was issued.³⁷⁷ Meanwhile, many attorneys have successfully vacated convictions obtained in violation of *Padilla*'s mandate.³⁷⁸ In this sense there can be no doubt that *Padilla* is of immense benefit to many—perhaps even most—noncitizen defendants.³⁷⁹

Padilla is not, however, a panacea. Instead, it is a mixed bag that gives to some noncitizen defendants and takes from others. *Padilla* is not *Strickland*, plain and simple, and some noncitizen defendants are worse off with advice that complies with *Padilla* than they might be with no advice at all.³⁸⁰ While troubling in and of its own right, *Padilla* presents other problematic consequences. First, the two-tiered test fits within a pattern of diminished procedural protections in criminal cases based on the immigrant identity of defendants. Second, the

377. See, e.g., N.Y.C. BAR ASS'N, *PADILLA V. KENTUCKY: THE NEW YORK CITY CRIMINAL COURT SYSTEM, ONE YEAR LATER* 4 (2011), available at <http://www2.nycbar.org/pdf/report/uploads/PadillaCrimCtsCJOREportFINAL6.15.11.pdf> (listing several trainings in the New York area and the increased demand for immigration expertise within criminal defender organizations).

378. See, e.g., *United States v. Reid*, No. 1:97-CR-94, 2011 WL 3417235, at *5 (S.D. Ohio Aug. 4, 2011) (concluding that the defendant's "primary concern was the effect of his criminal charges on his immigration status" and that "he was directly prejudiced when he entered the plea after being informed incorrectly of the deportation consequences"). For an example of one attorney from Texas who successfully used a *Padilla* claim to vacate a conviction, then successfully terminated removal proceedings, see *1 Client, 2 Wins: Successful Padilla Claims in Crim & Immigration Courts*, CRIMMIGRATION.COM (July 10, 2012, 4:00 AM), <http://crimmigration.com/2012/07/10/1-client-2-wins-successful-padilla-claims-in-crim-immigration-courts.aspx>.

379. For a first-person account of *Padilla*'s impact on noncitizens and their families, see *1st Person Account: Why Padilla Matters*, CRIMMIGRATION.COM, <http://crimmigration.com/2012/05/24/1st-person-account-why-padilla-matters.aspx> (May 29, 2012, 4:00 AM).

380. See *supra* Part III.C.

Court's decision portends a worrisome future: Will *Strickland*-lite become the new duty-to-investigate standard for all criminal defendants?

A. A Pattern of Relaxed Procedural Protections

Relaxing the procedural norms used in criminal proceedings involving immigrants may appear anomalous, but it would not be the first time this has happened. Professor Jennifer Chacón has written insightfully about law enforcement's ability to circumvent traditional procedural limitations by relying on the much looser procedures of immigration law when it is more convenient to do so. She has observed "that the protective features of criminal investigation and adjudication are melting away at the edges in certain criminal cases involving migration-related offenses."³⁸¹ For instance, "[r]ogue agents" can investigate immigration-related crimes without concern for internal regulations or Fourth Amendment limitations "because there is almost no chance of an impoverished migrant bringing—much less winning—a civil suit from outside of the country after removal."³⁸² Or, as occurred in *Abel v. United States*,³⁸³ a case decided by the Supreme Court in 1960, criminal law enforcement agents (from the FBI) can take the following actions: ask immigration agents (from the now-nonexistent Immigration and Naturalization Service) to obtain an administrative search warrant for an individual thought to have engaged in espionage, arrest the individual, transport the detainee from New York to an immigration prison in Texas, and make the detainee available to FBI interrogators.³⁸⁴ Despite the fact that the FBI sought the INS's assistance because it lacked the evidence to obtain a criminal warrant, the Court refused to exclude evidence obtained during the search and used in a subsequent criminal prosecution for espionage—the very activity that set off the FBI's

381. Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137 (2009).

382. *Id.* at 145–46; see KANSTROOM, *supra* note 294, at 59 (observing that even federal agents "trained to comply with [the] Fourth Amendment" frequently utilize home raids because "violations are much less likely to be proven in court in deportation cases than in criminal cases").

383. 362 U.S. 217 (1960).

384. *Id.* at 219–25 (describing a series of events involving searches and seizures by the FBI and INS that the Supreme Court determined were not unconstitutional).

investigation.³⁸⁵ As such, law enforcement officers who are so inclined, including immigration agents, can usually get around the Fourth Amendment's limitations on their powers without fear of losing the ability to use illegally obtained evidence in civil removal proceedings³⁸⁶ or criminal prosecutions for any type of crime so long as the constitutional violation was committed in the course of investigating a possible violation of civil immigration law.³⁸⁷

Furthermore, the procedures used in criminal matters involving immigration-related crimes have in recent years increasingly resembled the far more lax constitutional and statutory structure of removal proceedings.³⁸⁸ Operation Streamline, a Justice Department initiative launched in 2005, through which the federal government prosecutes unauthorized individuals for committing the crime of illegal entry or illegal reentry, has resulted in skyrocketing criminal dockets in federal district and magistrate courts.³⁸⁹ According to the

385. *Id.* at 226, 228–29, 237–41. At the time, INS district directors, acting as the Attorney General's surrogate, were authorized to issue an administrative arrest warrant whenever it appeared that the arrest of a noncitizen was "necessary or desirable." *Id.* at 232 (citing INA § 242(a), 8 U.S.C. § 1252(a) (1952)); *see also* 8 C.F.R. § 242.2(a) (1957) (providing that a noncitizen "may be arrested and taken into custody under the authority of a warrant of arrest issued by a district director whenever, in his discretion, it appears that the arrest of the respondent is necessary or desirable").

386. *See* *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (stating that application of the Fourth Amendment exclusionary rule would present too high a cost in civil deportation hearings).

387. *See Abel*, 362 U.S. at 237 ("We conclude . . . that government officers who effect a deportation arrest have a right of incidental search analogous to the search permitted criminal law-enforcement officers."); *United States v. Oscar-Torres*, 507 F.3d 224, 232 (4th Cir. 2007) (concluding that, despite indications that a planned criminal prosecution motivated the defendant's arrest, there was evidence of "an administrative purpose" because "immigration agents testified that they arrested Oscar-Torres simply to deport him").

388. *See* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1351 (2010) (observing that "criminal law can function as immigration law . . . by operating as a border screening device").

389. *See* DONALD KERWIN & KRISTEN MCCABE, MIGRATION POLICY INST., ARRESTED ON ENTRY: OPERATION STREAMLINE AND THE PROSECUTION OF IMMIGRATION CRIMES (Apr. 29, 2010), <http://www.migrationinformation.org/USfocus/print.cfm?ID=780>. (noting the steep rise from 39,458 immigration prosecutions in fiscal year 2007 to 79,431 in fiscal year 2008, ultimately reaching an "all-time high" in fiscal year 2009 where illegal entry and illegal reentry cases made up ninety-two percent of the 91,899 Operation Streamline prosecutions); *see also* Eagly, *supra* note 388, at 1351 ("Defendants are processed en masse in what

Ninth Circuit's Judicial Council, "Tucson division magistrate judges hear 70 Operation Streamline cases per workday. During Calendar Year 2010, the Tucson Division disposed of 20,066 immigration petty offense cases, of which 16,981 were part of Operation Streamline."³⁹⁰ This caseload, the Judicial Council added, is "crushing" and "taking a severe toll on staff."³⁹¹ In response, some "court[s] have also adopted the practice of hearing criminal immigration cases en masse, meaning that multiple persons (as many as fifty to one hundred) appear at the same time before a judge."³⁹²

Obligated to both preside over mass hearings and ensure that defendants receive key legal protections, some judges have expressed concern about the fast-paced, overwhelmed courtrooms dedicated to Operation Streamline. For example, the chief judge of the U.S. District Court for the District of New Mexico explained:

The increase in our criminal caseload, especially in Las Cruces, has caused us to conduct hearings in a way that we've never had to conduct them before, and in a way that other jurisdictions don't have to. We have . . . up to 90 defendants in a courtroom. Our magistrate judges try very hard to conduct their hearings in a way that is understandable to the defendants. But most of our defendants have a first or second grade education in their native countries. Some of them are not even able to read in their native languages. And so, we explain to them their constitutional rights in a legal system entirely foreign to them.

You line them up in a courtroom that is intimidating even to American citizens, and we ask them to waive their constitutional rights. It is a difficult atmosphere in which to waive important constitutional rights, and to ask them if they understand their rights. Defendants in other parts of the country do not have to give up critical rights in this

is frequently described as a 'cattle call' or an 'assembly line' in which defense attorneys provide minimal representation, often to multiple defendants at the same time.").

390. *In re* Approval of Jud. Emer. Decl. in Dist. of Ariz., 639 F.3d 970, 975 (9th Cir. Jud. Council 2011).

391. *Id.* at 979.

392. Kerwin & McCabe, *supra* note 389.

atmosphere, only in the border districts because of this exploding caseload.³⁹³

The few Operation Streamline cases to have reached the courts of appeal provide some insight into the communications between defendants and judges. After the judge addresses the defendants collectively, including for purposes of advising them of their constitutional rights, the defendants respond with a “[g]eneral yes answer.”³⁹⁴ These proceedings have become so rote that one defense attorney described it as “not really practicing law,” while other individuals involved in Operation Streamline proceedings have likened them to “assembly-line justice” or a “cattle call.”³⁹⁵ Despite misgivings expressed by some judges, Operation Streamline remains in effect. So long as federal prosecutors continue to charge massive numbers of people with low-level immigration crimes, courts will likely continue to use these procedures, which one Ninth Circuit panel described as a “shortcut” that is “understandable” and “reasonable.”³⁹⁶

Though persistent, these shortcut procedures nonetheless raise “serious questions . . . as to whether all of these pleas are actually considered and intelligent,” notes Professor Chacón.³⁹⁷ Indeed, the Ninth Circuit concluded that mass plea hearings involving forty-seven or, in another incident that was part of the same consolidated case, fifty defendants, prevented the judge from addressing each defendant “personally” prior to accepting a plea and ensuring that each plea was entered voluntarily, as required by Federal Rule of Criminal Procedure 11(b).³⁹⁸ In the court’s words, “[n]either an indistinct murmur or medley of yeses nor a presumption that all those brought to court by the Border Patrol must have crossed the border is

393. ADMIN. OFFICE OF THE U.S. COURTS, REPORT ON THE IMPACT ON THE JUDICIARY OF LAW ENFORCEMENT ACTIVITIES ALONG THE SOUTHWEST BORDER 16 (2008).

394. *United States v. Diaz-Ramirez*, 646 F.3d 653, 655 & n.2 (9th Cir. 2011); *see also* *United States v. Roblero-Solis*, 588 F.3d 692, 695–97 (9th Cir. 2009) (evidencing similar responses in the record).

395. Eagly, *supra* note 388, at 1351 n.405 (internal quotation marks omitted).

396. *Roblero-Solis*, 588 F.3d at 693.

397. Chacón, *supra* note 381, at 146–47 (citation omitted) (internal quotation marks omitted).

398. *See Roblero-Solis*, 588 F.3d at 699–701; *see also* FED. R. CRIM. P. 11(b)(1) (“Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court.”).

sufficient to show that each defendant pleaded voluntarily.”³⁹⁹ Yet the court upheld the convictions because the defendants did not meet the stringent plain error standard of review.⁴⁰⁰ In the years that have elapsed since the 2009 *Roblero-Solis* decision, the Ninth Circuit has twice upheld convictions entered in groups of sixty-seven defendants.⁴⁰¹ On both occasions, the court concluded that the defendants’ Fifth Amendment due process rights were not violated.⁴⁰²

Another policy initiative intended to facilitate federal criminal prosecutions of immigration-related crimes similarly treads on procedural protections. Implemented by federal prosecutors in the Southern District of California in the 1990s, “fast-track” plea agreements offer noncitizen defendants charged with an immigration crime a reduced sentence in exchange for quickly waiving a host of rights and consenting to immediate sentencing and removal.⁴⁰³

399. *Roblero-Solis*, 588 F.3d at 700.

400. *Id.* at 701.

401. See *United States v. Diaz-Ramirez*, 646 F.3d 653, 655, 658 (9th Cir. 2011) (finding that neither defendant demonstrated “that they would not have pleaded guilty if the plea hearing had been more individualized”); *United States v. Escamilla-Rojas*, 640 F.3d 1055, 1058, 1063 (9th Cir. 2011) (concluding that the defendant received “adequate” representation despite a temporary separation because she failed to demonstrate with a “reasonable probability that . . . the result of the proceeding would have been different” had counsel been present (citations omitted)).

402. *Diaz-Ramirez*, 646 F.3d at 656–58; *Escamilla-Rojas*, 640 F.3d at 1062.

403. See Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 146 (2005) (“In the last decade, federal prosecutors along the southwestern border established fast-track programs [T]hese programs typically ask defendants to waive indictment, discovery, and presentence reports; plead guilty at the initial appearance; and consent to immediate sentencing. In return, prosecutors agree to recommend downward departures or let defendants plead to lesser charges.”); see also Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Border: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 301 (1998) (“The centerpiece of our new criminal alien policy was a ‘fast-track’ system whereby discovery was provided, and a preindictment plea offer made, within 24 hours of arraignment.”). The early fast track agreements routinely reduced the maximum term of imprisonment from twenty years to two years. *Id.* Current Department of Justice policy requires that defendants waive their rights to seek to suppress evidence, to discovery, to a claimed defect in the indictment or information, to an appeal, and to seek a sentencing variance. See Memorandum from James M. Cole, Deputy Attorney General, U.S. Dep’t of Justice to All United States Attorneys 3–4 (Jan. 31, 2012) [hereinafter *Cole Memo*], available at www.justice.gov/dag/fast-track.

Because the defendant agrees to removal in the criminal proceeding, a separate administrative removal proceeding and its concomitant imprisonment become unnecessary.⁴⁰⁴ In this way, the fast-track criminal process was over in a median of less than ten days, according to 2008 data analyzed by Professor Ingrid V. Eagly.⁴⁰⁵ Thanks in large part to the fast-track process, criminal prosecutions of immigration crimes moved through the court system much more rapidly than any other type of crime; the next quickest category in 2008, white collar crime, took approximately 250 days from start to finish, with drug and weapons crimes each hovering near the 270-days mark.⁴⁰⁶ Today, fast-track programs are available in every jurisdiction in which felony illegal reentry offenses are prosecuted; plus, they have received congressional sanction mandating oversight by the U.S. Sentencing Commission.⁴⁰⁷

Such quick adjudication means immigration prosecutions are individually less taxing than other types of prosecutions on the criminal justice system. Professor Eagly explains: “Not only do federal prosecutors spend less time on these cases, but judges also spend less time. In fact, when compared to all other felony criminal matters, judges spend the least time on immigration.”⁴⁰⁸ More pertinent to the

program.pdf (outlining the “Minimum Requirements for ‘Fast-Track’ Plea Agreement[s]”).

404. See Bersin & Feigin, *supra* note 403, at 301 (noting that “the stipulated removal order guarantees that the defendant will be sent to his country of origin immediately . . . rather than after further prolonged INS detention and a potentially protracted hearing and appeals process”).

405. See Eagly, *supra* note 388, at 1324 (noting that “[b]y 2008, the median number of days for immigration case processing was less than ten, compared with over 250 for other crime categories”).

406. *Id.* at 1325.

407. See Cole Memo, *supra* note 403, at 1, 4 (explaining that the PROTECT Act, passed by Congress in 2003, “harmonized these [‘fast-track’] programs with the departure provisions of the federal Sentencing Guidelines” and that all “[d]istricts prosecuting felony illegal reentry cases should implement this new policy no later than by March 1, 2012”).

408. See Eagly, *supra* note 388, at 1324. For this point, Eagly relies on the “case weight” assigned to the various civil and criminal matters that federal district courts hear. See *id.* at 1324 n.261 (citing PATRICIA LOMBARD & CAROL KRAFKA, FED. JUDICIAL CTR., 2003–2004 DISTRICT COURT CASE-WEIGHTING STUDY: FINAL REPORT TO THE SUBCOMMITTEE ON JUDICIAL STATISTICS OF THE COMMITTEE ON JUDICIAL RESOURCES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5–6 (2005)). This “case weight,” determined by researchers at the Federal Judicial Center, measures the interaction of “(1) the different

right to counsel, however, is the impact fast-track proceedings have on defense attorneys. Public defenders have complained that fast-track proceedings—which typically give the defendant two weeks or less to decide whether to accept or to reject the plea offer⁴⁰⁹—require defendants to make a decision on the offer “before we have adequate time to investigate their lives and circumstances.”⁴¹⁰ In practice this means attorneys sometimes lack the time necessary to adequately investigate the defendant’s background, including the possibility that a client is a U.S. citizen and thus has an absolute defense to an immigration crime.⁴¹¹ Even if an attorney later discovers an appealable issue, there is little chance of success because fast-track agreements require that the defendant waive the right to appeal.⁴¹² The end result is that fast-track proceedings reduce procedural protections and, as Stephanos Bibas posits, may increase the likelihood of convicting the innocent.⁴¹³ Nowhere else in the federal

events that a judge must complete to process a case (e.g., hold hearings, read briefs, decide motions, and conduct trials) and (2) the amount of time required to accomplish those events.” *Id.* at 1. The two immigration-related categories, “alien smuggling” and “other immigration,” were weighted 0.57 and 0.47, respectively, whereas drug offenses ranged from a low of 0.86 for possession to a high of 4.36 for continuing criminal enterprise cases; firearms offenses were weighted 1.00; “robbery and burglary” received a 0.71 weight; and a miscellaneous “other felony offenses” category was weighted 1.00. *Id.* at 6 tbl.1.

409. *Id.* at 1322.

410. See Joint Statement of Thomas W. Hillier II, Fed. Pub. Defender, W. Dist. of Wash., & Davina Chen, Assistant Fed. Pub. Defender, Cent. Dist. of Cal., The Sentencing Reform Act of 1984: 25 Years Later: Public Hearing Before the U.S. Sentencing Comm. 28 (May 27, 2009) [hereinafter Hillier & Chen].

411. See *id.* (“Competent attorneys have had the experience of advising their clients to plead guilty and learning only later that they were U.S. citizens . . .”).

412. Cole Memo, *supra* note 403, at 3–4.

413. Bibas, *supra* note 403, at 147; see Eagly, *supra* note 388, at 1324–25 (noting the widespread concern about the increased likelihood of convicting the innocent). Although, as Victor C. Romero argues, unauthorized border crossings are strict liability offenses and whether or not someone crossed the border without permission is rarely a complicated determination, there are other considerations that may result in the conviction of innocent individuals: For example, a person may be a United States citizen, which is a defense to illegal entry and illegal reentry, see *supra* notes 248–257, 294 and accompanying text, or may not have been deported as required by the illegal reentry statute. See Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273, 275 (2010) (discussing factors that might criminalize an otherwise innocent person); see also United

criminal realm are such perfunctory prosecutions routine.⁴¹⁴ Indeed, even though fast-track proceedings could operate in any substantive category of offense, in practice they are reserved almost exclusively for immigration crimes.⁴¹⁵

Strickland-lite follows the path worn by Operation Streamline and fast-track agreements insofar as each sacrifices procedural norms at the heart of modern criminal proceedings for the sake of efficiency.⁴¹⁶ Streamline proceedings and fast-track pleading give short shrift to the personalized attention that the Constitution and court rules typically require defense attorneys and judges to give to defendants.⁴¹⁷ When it comes to immigration crime prosecutions, these programs privilege efficiency over thoughtful deliberation; the principal goal is to move massive numbers of cases through the system.⁴¹⁸ Ensuring that defendants and their attorneys have the opportunity to fully contemplate the defendant's predicament is, at best, a secondary goal—one that frequently goes unrealized. Likewise, *Padilla's* *Strickland-lite* framework redefines the duty to investigate for one class of defendants: noncitizens and those thought to be noncitizens who may face removal upon conviction.⁴¹⁹ Instead of requiring thorough investigation of the potentially relevant laws and facts affecting these defendants' ability to remain in the United States, *Strickland-lite*

States v. Mendoza-Alvarez, 79 F.3d 96, 97–98 (8th Cir. 1996) (concluding that the government failed to prove that an individual had been deported even though he pleaded guilty to illegal reentry).

414. See Eagly, *supra* note 388, at 1321 (noting that “immigration has bred a unique form of federal criminal adjudication”).

415. *Id.* at 1322–23; see also Cole Memo, *supra* note 403, at 1 (describing fast-track programs as a strategy “to handle increasingly large numbers of criminal immigration cases”).

416. See Kerwin & McCabe, *supra* note 389, at 2 (“The high volume of illegal-entry prosecutions has forced many magistrate judges to complete court proceedings—explaining the charges, reading the accused his or her rights, accepting a plea, and sentencing—in a single hearing.”).

417. *Id.*

418. See *id.* at 2–3 (magistrate courts have adopted the practice of hearing criminal immigration cases en masse—as many as fifty to 100 at once).

419. See *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1483 (2010) (describing the duties of a criminal defense attorney when dealing with immigration law cases).

lowers the measure of constitutional competence to a modicum of investigation.⁴²⁰

Though *Strickland*-lite shares much with these examples, it deviates in one critical aspect: *Padilla* is a substantive change to criminal procedure, whereas Operation Streamline and fast-track pleas are changes to the way criminal cases are investigated or prosecuted. As a right-to-counsel decision, *Padilla* alters our understanding of the Sixth Amendment, but Operation Streamline and fast-track pleas fall outside the Constitution's reach.⁴²¹ Remedying the problematic effects of non-constitutional practices is much easier—a change in departmental policy or statutory amendment suffices—than remedying *Padilla*'s pitfalls, so the likelihood is that *Strickland*-lite will become more entrenched. Indeed, even recent developments suggesting that the exclusionary rule is undergoing a revival in removal proceedings support this proposition: Those cases, involving what the Third Circuit aptly described in one instance as an “ordeal,” have been limited to the most egregious of circumstances.⁴²² Cases involving governmental conduct that might otherwise constitute nothing more than an ordinary Fourth Amendment violation, however, continue beyond constitutional reproach.⁴²³

420. See *id.* at 1487 (Alito, J., concurring) (noting that a criminal defense attorney need only “advise the defendant that a criminal conviction may have adverse immigration consequences and that . . . [he] should consult an immigration attorney”).

421. Compare *id.* at 1482 (majority opinion) (concluding that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel), with Kerwin & McCabe, *supra* note 389, at 2–3 (describing the en masse sentencing procedures).

422. See, e.g., *Oliva-Ramos v. Att’y Gen.*, 694 F.3d 259, 262–64, 274–82 (3d Cir. 2012) (stating that the exclusionary rule applies in removal proceedings to egregious or widespread constitutional violations); *Puc-Ruiz v. Holder*, 629 F.3d 771, 778 (8th Cir. 2010) (leaving open the possibility that the exclusionary rule applies in removal proceedings to egregious violations); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006) (holding that the exclusionary rule applies in removal proceedings to egregious violations); *Orhorhaghe v. INS*, 38 F.3d 488, 493 (9th Cir. 1994) (same); Irene Scharf, *The Exclusionary Rule in Immigration Proceedings: Where It Was, Where It Is, and Where It May Be Going*, 12 SAN DIEGO INT’L L.J. 53, 54, 80 (2010) (providing two recent examples of successful uses of the exclusionary rule in removal proceedings).

423. See *Almeida-Amaral*, 461 F.3d at 236 (discussing cases involving noncitizens and the Fourth Amendment).

B. Padilla's Slippery Edges

Strickland-lite creates two duty-to-investigate standards and furthers a trend in which procedural protections in criminal proceedings involving immigrants are lowered. In addition, the historical tendency to use cases involving immigrants to bend constitutional norms demands that we ask whether *Strickland*-lite represents the future of the duty-to-investigate standard applicable in all cases, whether the defendant is a U.S. citizen or not. Though explicitly focused on noncitizen defendants and their right to advice about immigration consequences, *Padilla*, as is frequently true of Supreme Court decisions, has slippery edges.⁴²⁴ Already, the Court's reasoning has been applied to govern the right to advice about collateral consequences that are intricately tied to conviction and are of great importance to many defendants. For example, at least one federal appellate court and a number of state appellate courts have extended *Padilla*'s reasoning to sexual offender registration requirements.⁴²⁵ Another court held that, pursuant to *Padilla*, a

424. Indeed, Justices Alito and Scalia expressed concern that *Padilla*'s reasoning was not limited to immigration consequences. See *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring) ("This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing . . ."); see also *id.* at 1496 (Scalia, J., dissenting) ("[T]he concurrence's suggestion that counsel must warn defendants of potential removal consequences . . . cannot be limited to those consequences except by judicial caprice." (citation omitted)).

425. See, e.g., *Bauder v. Dep't of Corr.*, 619 F.3d 1272, 1274–75 (11th Cir. 2010); see also *Taylor v. State*, 698 S.E.2d 384, 389 (Ga. Ct. App. 2010) (concluding that failure to advise a client that a guilty plea will require registration as a sex offender is constitutionally deficient performance); *People v. Fonville*, 804 N.W.2d 878, 894–95 (Mich. App. 2011) (concluding that "applying the *Padilla* rationale to this case supports a holding that defense counsel must advise a defendant that registration as a sexual offender is a consequence of the defendant's guilty plea"); *State v. Powell*, 935 N.E.2d 85, 92 (Ohio Ct. App. 2010) (concluding that defendant received ineffective counsel in that he was not advised that voyeurism was a registration-exempt sexually oriented offense). But see *United States v. Francis*, No. 5:10-cv-7114-KSF, 2010 WL 6428639, at 3 (E.D. Ky. Dec. 30, 2010) ("[T]he Court observe[d] that civil commitment cannot be said automatically or certainly to occur, based on a given result in another proceeding. That is, unlike deportation, as addressed by the Supreme Court in *Padilla*, civil commitment requires significant additional proceedings."). The Second Circuit distinguished *Padilla*'s Sixth Amendment holding from the obligations imposed upon courts by the Fifth Amendment Due Process Clause and Rule 11 of the Federal Rules of Criminal Procedure to inform defendants about certain consequences of conviction prior to accepting a guilty plea. See *United States v. Youngs*, 687

criminal defense attorney was obligated to advise the defendant about the plea's consequence on a subsequent civil proceeding,⁴²⁶ while an appellate judge on a different court opined that it demands advice about the law governing parole eligibility.⁴²⁷ The extensions in these cases, which have held that a defendant had a right to some advice on the various matters, certainly represent a benefit to defendants.⁴²⁸

A different extension of *Padilla*, however, may prove less beneficial to defendants, including U.S. citizens, who face traditional penal consequences upon conviction. Instead of the thorough investigation required by *Strickland*'s duty to investigate, *Padilla* places a constitutional imprimatur on a more superficial inquiry. Unlike noncitizen defendants needing advice about immigration consequences, for whom *Padilla*'s two-tiered duty represents an expanded constitutional awareness of their interests, for criminal defendants generally, *Padilla*'s anomalous, relaxed duty to investigate offers the prospect of a diminished Sixth Amendment protection. That is, if lower courts, applying *Padilla* as another in the *Strickland* line of cases, interpret its two-tiered duty as a departure from the duty-to-investigate standard that previously applied to guilt-stage inquiries and sentencing, criminal defendants will not receive the procedural protection they might otherwise have enjoyed.

If courts follow this path, the measurement of constitutionally competent representation will not be the thorough investigation of relevant facts and law that courts time and again have required, but a reduced investigation standard akin to *Padilla*'s that tailors

F.3d 56, 61–63 (2d Cir. 2012) (declining to require courts to inform defendants about the possibility of civil commitment as a sexually dangerous person). Some commentators argue that *Padilla* requires defense attorneys to advise defendants, regardless of immigration status, about non-immigration consequences of conviction. See, e.g., Joanna Woolman, *Padilla*'s "Truly Clear" Test: A Case for a Broader Application in Minnesota, 37 WM. MITCHELL L. REV. 840, 848 (2011) (urging Minnesota courts to expand *Padilla*'s mandate to include advice about restrictions on parental custody, disqualification for professional licenses, and sex offender registration).

426. See *Wilson v. Alaska*, 244 P.3d 535, 539 (Alaska Ct. App. 2010) (requiring, under *Padilla*, a criminal defense attorney to advise about a plea's effect on subsequent civil proceedings related to damages arising for liability for civil assault and battery claims).

427. *Webb v. State*, 334 S.W.3d 126, 136 (Mo. 2011) (Wolff, J., concurring).

428. See Woolman, *supra* note 425, at 848–49; see also King, *supra* note 55, at 38 (arguing that *Padilla* "suggests the possibility of rethinking the federal constitutional right to counsel" so as to provide appointed counsel to all criminal defendants not just those facing the possibility of incarceration).

constitutional competence to factual and legal complexity.⁴²⁹ An example involving tax law may help illustrate this point. Like immigration law, tax law is a statutory nightmare; indeed, immigration law has been described as “second only to the Internal Revenue Code in complexity,”⁴³⁰ so the analogy is especially appropriate. Without question, a criminal defendant in a tax prosecution is entitled to the right to effective assistance of counsel.⁴³¹ To date, that has involved the duty to investigate the intricacies of the tax code’s criminal provisions.⁴³² Much as civil immigration consequences sometimes arise from criminal convictions, some civil tax consequences arise from criminal tax convictions⁴³³ and, as with immigration consequences before *Padilla*, have been characterized as collateral consequences of conviction.⁴³⁴

Is it possible that a court, building on *Padilla*, would conclude that the right to counsel requires that the criminal defense attorney provide the defendant with advice about the possible civil tax consequence? The cases in which lower state and federal courts have used *Padilla*’s reasoning to impose such an obligation on defense attorneys about sex offender registration and other civil consequences certainly suggest that it is;⁴³⁵ so too do arguments that *Padilla* requires

429. See *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1483 (“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.”); see also *supra* note 420 and accompanying text.

430. *Castro-O’Ryan v. Dep’t of Immigr. & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (quoting ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 107 (1985)).

431. See, e.g., *United States v. Payne*, 954 F.2d 199, 203–04 (4th Cir. 1992); *United States v. Schwartz*, No. 1:08–CR–10, 2008 WL 2074018, at *1–2 (W.D. Mich. May 14, 2008).

432. See, e.g., *United States v. Tucker*, 716 F.2d 576, 578, 584 (9th Cir. 1983) (applying the right to counsel’s duty to investigate in a prosecution for conspiracy to defraud the United States and making false income tax returns); *United States v. Carr*, 740 F.2d 339, 341, 349 (5th Cir. 1984) (same, but regarding mail fraud and conspiracy to defraud the United States by impeding the IRS’s functions).

433. See, e.g., *Considine v. United States*, 683 F.2d 1285, 1287 (9th Cir. 1982) (holding that a civil tax penalty requiring proof that a taxpayer willfully submitted a false tax return could be shown through the existence of a prior tax crime conviction requiring proof of falsity).

434. See *United States v. Miss Smart Frocks, Inc.*, 279 F. Supp. 295, 299 (S.D.N.Y. 1968) (discussing *United States v. Parrino*, 212 F.2d 919, 922 (2d Cir. 1954)).

435. See *supra* note 425.

advice about, as one commentator put it, “direct” and “dire” consequences.⁴³⁶ But instead of applying the duty to thoroughly investigate tax law, a *Padilla*-inspired court would differentiate between clear and unclear consequences as the *Padilla* Court did. Such a mandate would require that if the civil tax penalty would clearly result from conviction, the defense attorney must advise accordingly, but if the tax code is not succinct and straightforward then the defense attorney must only advise that adverse tax consequences may arise. There is no need to fully immerse oneself in complicated tax law; a modicum of investigation is all the Constitution requires. For all the criticism that has been rightfully lodged at the *Strickland* line of cases, this would represent a significant watering down of the duty to investigate. Courts may have been too liberal in their interpretation of what constitute “strategic” choices, but at least they have held steadfast in their expectation that the Sixth Amendment requires defense attorneys to grapple with the law and facts that apply.⁴³⁷ A *Padilla* unhinged from its immigration law mooring threatens to rot even that tooth in *Strickland*’s bite.

Admittedly, no court to date has applied *Padilla*’s two-tiered standard to the traditional criminal consequences of a conviction instead of the time-tested duty to investigate. But just as numerous courts have borrowed *Padilla*’s reasoning to extend the right to counsel to some collateral consequences not expressly contemplated by the majority opinion,⁴³⁸ it is possible that courts will turn to *Padilla* as the new model for the Sixth Amendment duty to investigate. *Padilla*’s two-tiered standard, after all, arises from the Court’s awareness of deportation’s severity and “close connection to the criminal process,” and the Court’s realization that “[s]ome members of the bar who represent clients facing criminal charges . . . may not be well versed in [immigration law].”⁴³⁹ Despite the Court’s characterization of deportation as “unique” and at least one scholar’s powerful argument that “deportation is different,”⁴⁴⁰ lower courts applying *Padilla* have been less restrained. To these courts and the

436. Woolman, *supra* note 425, at 841. Another commentator argues that *Padilla*’s reasoning extends to “any consequence that is punitive and critical to the client and whose application is nondiscretionary.” Brink, *supra* note 34, at 49.

437. See *supra* Part II.A–B.

438. See *supra* note 425.

439. *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1482–83 (2010).

440. See generally Markowitz, *supra* note 13, at 1301 (arguing that deportation is neither a civil nor criminal proceeding, but rather something in between).

judges on other courts who have concurred or dissented in separate opinions, the characterizations that motivated the *Padilla* Court to act apply to other consequences of conviction. Perhaps, then, it is only a matter of time before a court is asked to follow *Padilla*'s reasoning in a manner that contracts the constitutional protection previously afforded or does not expand the right to counsel's benefit as much as would have occurred under the Court's pre-*Padilla* duty-to-investigate jurisprudence.

The historical record suggests that there is reason to remain vigilant. Time and again, constitutional norms have been relaxed or altogether ignored when it comes to processing immigrants, only to expand or resurface later as a policy applied toward U.S. citizens as well.⁴⁴¹ The Alien Enemies Act of 1789,⁴⁴² for example, gives the President sweeping authorization to imprison, deport, and otherwise curtail the civil liberties of noncitizens deemed dangerous during wartime.⁴⁴³ It was twice used—during the War of 1812 and World War I—against citizens of countries against which the United States was at war, much as its title implies.⁴⁴⁴ During World War II, however, it became the basis for interning individuals of Japanese descent, whether U.S. citizens or not, partly due to lists of dangerous persons that the government acknowledged were unreliable.⁴⁴⁵ Over a period of time spanning both world wars, the FBI refined its efforts to curtail leftist political radicalism first by targeting noncitizens during the “Red Scare” that culminated in the Palmer Raids of 1919 and 1920, then by implementing similar tactics against U.S. citizen radicals during the McCarthy period of the 1940s and 1950s.⁴⁴⁶ In another example stretching from one war to another, the government has long been permitted to use secret evidence in immigration proceedings based on a post-World War II decision, *Knauff v.*

441. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 85 (2003); see also David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 989–1003 (2002) (describing various periods of U.S. history in which controversial policies designated for noncitizens were subsequently extended to U.S. citizens).

442. Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 (codified at 50 U.S.C. § 21 (2006)).

443. Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 992–94 (1998).

444. COLE, *supra* note 441, at 92.

445. *Id.* at 92–94.

446. Cole, *supra* note 441, at 995–96.

Shaughnessy.⁴⁴⁷ After September 11, 2001, prosecutors sought to use secret evidence in criminal prosecutions of U.S. citizens deemed “enemy combatants.”⁴⁴⁸

Likewise, law enforcement innovations have regularly been introduced to police immigration law, then applied toward other substantive areas. Private prisons, for example, gained widespread use in the immigration context before they became popular for penal confinement.⁴⁴⁹ More recently, unmanned aerial vehicles (UAVs or drones), which DHS has used for several years for border surveillance,

447. 338 U.S. 537, 544 (1950) (allowing the Attorney General to exclude a noncitizen from the United States on the basis of “confidential” information). For a more detailed discussion of the use of secret evidence in immigration proceedings, see Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 321–26 (2002).

448. See COLE, *supra* note 441, at 178–79 (discussing the use of secret evidence against United States citizens José Padilla and Yasser Hamdi). The federal government’s post-September 11th efforts were further buttressed by the D.C. Circuit’s reliance on *Knauff* and a host of other immigration cases stretching back to the late nineteenth century’s *Chinese Exclusion Case*, 130 U.S. 581 (1889), to reject the efforts of Uighur detainees held at Guantánamo Bay, Cuba to gain release into the United States. *Kiyemba v. Obama*, 555 F.3d 1022, 1025–26 (D.C. Cir. 2009), *opinion reinstated as amended, after remand from Supreme Court*, 605 F.3d 1046 (D.C. Cir. 2010); KANSTROOM, *supra* note 294, at 180–83. Though some detainees have since left Guantánamo, much of the same rationale continues to be used against others. Ernesto Hernández-López, *Kiyemba, Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World*, 2 U.C. IRVINE L. REV. 193, 194, 198 n.16 (2012). Hernández-López argues that the doctrinal reasoning provided in the *Kiyemba* decision is rooted in the plenary power doctrine developed in the immigration law context and “may impact detentions far beyond those concerning the Uighurs or Guantánamo”—namely, United States citizens over whom federal courts have habeas power but decline to exercise it as occurred in *Munaf v. Green*, 553 U.S. 674 (2008), involving United States citizens detained in Iraq by the United States military. Hernández-López, *supra*, at 222.

449. See TOM BARRY, BORDER WARS 10–11 (2011) (“The Immigration and Naturalization Service’s (INS) 1983 decision to outsource immigrant detention to the newly established Corrections Corporation of America gave birth to the private-prison industry . . .”); Richard Harding, *Private Prisons*, in CRIME & JUSTICE 265, 267 (2001) (describing contracts awarded by the Texas Department of Corrections to two private prison corporations in 1988 as the moment in which private companies became “operators of ‘real’ prisons”); see generally MICHAEL WELCH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX 162–66 (2002) (dating the private prison industry’s involvement in immigration detention to the 1980s).

have now been lent to local law enforcement officers to arrest U.S. citizens suspected of cattle rustling.⁴⁵⁰ Reports suggest that UAV use continues to expand for domestic security purposes as mundane as traffic violations.⁴⁵¹

This history suggests that the treatment of immigrants can at times be considered, to borrow a phrase from Professor Kevin R. Johnson, a “magic mirror” into the state of the law if existing legal protections ceased to exist.⁴⁵² Law is not static.⁴⁵³ It evolves one policy initiative or judicial decision at a time and not even the keenest legal observer can predict where it will be in the months or years ahead. In light of this history, *Padilla*’s *Strickland*-lite duty to investigate merits reevaluation: Will it remain focused on immigration consequences of conviction or continue branching out to include advice about other consequences? Similarly, will it become the new standard for duty-to-investigate inquiries or remain an anomaly?

V. CONCLUSION

It is too early to know how *Padilla* and the *Strickland* line of cases will ultimately relate to one another. *Padilla* undoubtedly extends some amount of *Strickland* protections to a new context: immigration consequences of conviction.⁴⁵⁴ Already, the Supreme Court has referenced *Padilla* in more recent *Strickland*-based right-to-counsel decisions, evidencing that it too views *Padilla* as one branch of a much larger jurisprudential body.⁴⁵⁵

450. *North Dakota Police Using Predator Spy Drones*, LOSS OF PRIVACY BLOG (Dec. 19, 2011), <http://www.lossofprivacy.com/index.php/2011/12/north-dakota-police-using-predator-spy-drones/>; Nick Paumgarten, *Here’s Looking at You*, NEW YORKER, May 14, 2012, at 46.

451. Steve Clemons, *Air Force Drones Trail Civilian Auto Traffic in New Mexico*, ATLANTIC (July 6, 2012), <http://www.theatlantic.com/technology/archive/2012/07/air-force-drones-trail-civilian-auto-traffic-in-new-mexico/259517/>.

452. KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 14 (2004).

453. See OLIVER WENDELL HOLMES, THE COMMON LAW 1 (2005) (“The law embodies the story of a nation’s development through many centuries In order to know what it is, we must know what it has been, and what it tends to become.”).

454. See *supra* Part III.A–B.

455. See, e.g., *Missouri v. Frye*, 132 S. Ct. 1399, 1406 (2012) (noting that *Padilla* illustrates that there may be instances when claims of ineffective assistance can arise after the conviction is entered).

Padilla, however, fits into *Strickland* without the neat edges of a carefully packaged gift. Its *Strickland*-lite duty to investigate, on its face, applies only to advice about the immigration consequences of conviction.⁴⁵⁶ Perhaps it will remain within that context where its impact is largely an improvement from the nonexistent requirement that prevailed prior to *Padilla*. This alone is notable because, in the hands of zealous advocates, it has resulted in countless vacated convictions.⁴⁵⁷ In this sense, *Padilla* can be thought of as breathing life into *Strickland*. Perhaps that quarter-century-old decision will continue to disappoint criminal law scholars. To immigrants who want to remain in the United States despite a conviction and their attorneys, however, it offers a final glimmer of hope. In effect, *Padilla* is a back end opportunity even where *Strickland*, at the front end of the crimmigration process, leaves much room for improvement.

But perhaps *Padilla*'s *Strickland*-lite duty will not remain confined to advice about immigration consequences. If *Strickland*-lite moves significantly away from its immigration-focused center, then all criminal defendants stand to lose an important aspect of the Sixth Amendment right to counsel. We will have to wait much longer before we know whether it is *Padilla*'s rough edges that shape how it unravels or whether that process will be led by its more sanguine core. Until then, *Padilla* will continue to represent a much-needed improvement for most noncitizen defendants, while simultaneously continuing to represent a lost opportunity.⁴⁵⁸

456. See *supra* Part III.A–B.

457. See *supra* notes 377–379 and accompanying text.

458. See Vázquez, *Realizing Padilla's Promise*, *supra* note 6, at 200 (observing that *Padilla* is “a landmark case” that nonetheless “falls short” of providing noncitizen defendants the advice they need to make an informed decision about pleading).