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Sentencing Advocacy for Immigrants in Federal Criminal Courts.

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SENTENCING ADVOCACY FOR IMMIGRANTS IN FEDERAL CRIMINAL COURTS

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I. INTRODUCTION

Lawyers are often conscious of improving their litigation skills. However, federal criminal cases are more likely to end in a sentencing hearing than in a trial. According to a recent account by the *Wall Street Journal*, ninety-seven percent of federal cases prosecuted to their conclusion end in guilty pleas.[1] This is probably truer for immigrants charged with illegal reentry, for which there are extremely limited opportunities at a defense. Significantly, a report released in 2009 by the Pew Research Center revealed that in 2007, Latinos comprised forty percent of all offenders sentenced.[2] Furthermore, in the same year, immigra-

1. Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar as Bargains Trump Trials*, WALL ST. J., Sept. 24, 2012, at A1. Today, few defendants exercise their constitutional right to a trial. *Id.* The number is even lower for those who exercise their right to trial and receive a verdict of "not guilty." *Id.* In 1990, the percentage of cases ending in a guilty plea was eighty-four percent; in 2011, guilty pleas accounted for ninety-seven percent of the federal criminal cases. *Id.* It is interesting to note that the number of cases between 1990 and 2011 nearly doubled, while the number of defendants exercising their right to trial dropped by almost two-thirds. *Id.*

2. MARK HUGO LOPEZ & MICHAEL T. LIGHT, PEW RESEARCH CTR., A Rising Share: Hispanics and Crime 1 (2009), *available at* http://www.pewhispanic.org/files/reports/104.pdf. In 2007, whites represented twenty-seven percent of offenders sentenced in federal court, while blacks represented twenty-three percent. *Id.* Contrast this with the data from 1991 revealing Hispanics represented twenty-four percent of offenders sentenced in federal court, whites represented forty-three percent, and blacks represented twenty-seven percent. *Id.*

tion offenses accounted for twenty-four percent of all federal convictions.[3]

A criminal defense lawyer has a unique set of challenges when representing an immigrant. Language and cultural barriers often affect communication.[4] To effectively represent an immigrant, an attorney must be sufficiently familiar with immigration laws in order to meaningfully discuss whether a plea or trial is a better option, given the probable immigration consequences an immigrant faces for certain convictions.[5] Moreover, federal cases present the challenge of applying federal sentencing laws as well.

Sentencing advocacy in federal court has evolved following a series of U.S. Supreme Court cases holding the Federal Sentencing Guidelines are advisory only.[6] No longer are judges tied to the Federal Sentencing Guidelines.[7] Still, in determining the appropriate sentence, federal judges are required to properly calculate a defendant's guideline score before taking into account other considerations.[8] Therefore, it is incum-

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3. LOPEZ & LIGHT, *supra* note 2, at 4. This represents an increase of seventeen percent in sixteen years. *Id.* at i. In 1991, the immigration offenses accounted for seven percent of all federal convictions. *Id.*

4. Kathlyn Mackovjak, *Interviewing of Immigrant Clients and Special Immigration Relief for Crime Victims*, *in* CULTURAL ISSUES IN CRIMINAL DEFENSE 39, 42 (Linda Friedman Ramirez ed., 3d ed. 2010). Not only is choosing the appropriate interpreter essential to the representation of an immigrant client, the criminal defense lawyer also should learn about both the culture and the background of the immigrant client. *Id.* This will enable the attorney to understand the reasoning of the client in making the decisions he or she made. *Id.* Further, it is important to recognize that a language, although the same, may be different depending on the region or country. *Id.* For example, the Spanish spoken in Mexico is quite different from the Spanish spoken in Chile or Argentina; a Spanish word in Mexico may have a completely different meaning if used by an Argentinean. *See id.*

5. KARA HARTZLER, FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, SURVIVING PADILLA: A DEFENDER'S GUIDE TO ADVISING NONCITIZENS ON THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS 8–9 (2011). Additionally, the criminal defense attorney must be able to explain the consequences of a plea, a trial, or a conviction in such words that the immigrant client understands. *See id.* at 8.

6. *E.g.*, Kimbrough v. United States, 552 U.S. 85, 91 (2007); Gall v. United States, 552 U.S. 38, 46 (2007); Rita v. United States, 551 U.S. 338, 361 (2007); United States v. Booker, 543 U.S. 220, 245 (2005).

7. *See, e.g.*, *Kimbrough*, 552 U.S. at 91 (holding "under *Booker*, the cocaine Guidelines, like all other Guidelines, are advisory only"); *Gall*, 552 U.S. at 46 ("[T]he Guidelines are advisory rather than mandatory . . . ."); *Rita*, 551 U.S. at 355 (recognizing the advisory nature of the Guidelines); *Booker*, 543 U.S. at 245 ("[T]he provision of the federal sentencing statute that makes the Guidelines mandatory . . . [are] incompatible with today's constitutional holding . . . mak[ing] the Guidelines effectively advisory.").

8. *See Booker*, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."); *Rita*, 551 U.S. at 350–51 ("The sentencing courts, applying the Guidelines in individual cases, may depart [from the Guidelines] . . . .").

bent on federal criminal defense lawyers representing immigrants to be well-versed in the Federal Sentencing Guidelines primarily impacting immigrants, to understand the sentencing factors found in Section 3553(a) of Title 18, and to be familiar with common motivations and special issues that arise when representing immigrants at sentencing. This Article examines these issues and is intended to assist federal criminal defense attorneys who represent immigrants.

II. Illegally Entering or Remaining in the United States

One of the most common offenses a federal criminal defense attorney encounters while representing immigrants is Illegal Reentry pursuant to Section 1326 of Title 8 of the U.S. Code.[9] This offense is problematic in practice because both the statutory maximum punishment and the guideline score are impacted by the defendant's criminal history. To best represent an immigrant client, defense attorneys need to understand how the Sentencing Guidelines impact a sentencing court's ruling, consider potential sentence enhancements, appreciate how those enhancements are applied, and fully investigate their client's prior criminal history. Only by taking these steps can an immigrant client be adequately represented in Illegal Reentry cases.

A. *The Charge and Enhancements: Section 1326 of Title 8 of the U.S. Code*

Immigrants charged with the crime of illegal reentry face a maximum sentence of two years in prison, a fine, or both.[10] However, if the immigrant's removal occurred after a "conviction for the commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony)," the immigrant's maximum sentence shall not be more than ten years, plus a fine, or both.[11] If the immigrant was previously removed after the commission of an offense classified as an aggravated felony, the maximum sentence shall not be more than twenty years in prison, a fine, or both.[12]

These enhancements are complicated by the U.S. Supreme Court's holding in *Almendarez-Torres v. United States*.[13] According to the Court, the Government is not required to plead—in the indictment—the exis-

9. *See* 8 U.S.C. § 1326 (2012) (outlawing illegal reentry of those "denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding" with the possibility of criminal penalty).

10. *Id.* § 1326(a).

11. *Id.* § 1326(b)(1).

12. *Id.* § 1326(b)(2).

13. Almendarez-Torres v. United States, 523 U.S. 224 (1998).

tence of a prior conviction or convictions; therefore, the enhancement is considered a sentencing issue.[14] However, the Court has called the *Almendarez-Torres* holding into question in several opinions, most notably in *Apprendi v. New Jersey*.[15] Therefore, if the enhancement is not alleged in the indictment, defense counsel should preserve error by objecting to the presentence report that requests the enhancement.[16] Defense counsel should further object to the enhancement at the sentencing hearing.[17] Failure to object at both points may waive any error.[18]

B. *Illegal Reentry: Section 2L1.2 of the U.S. Sentencing Guidelines*

In illegal reentry cases,[19] statutory maximums and minimums are defined by statute as cited above. Although the judge is not required to sentence the defendant according to the U.S. Sentencing Guidelines, the sentencing judge is required to calculate the score.[20]

Each offense in the Guidelines begins with a base offense level.[21] The base offense level for Illegal Reentry pursuant to Section 1326 of Title 8

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14. *Id.* at 226–27 ("[Subsection (a) of 8 U.S.C. § 1326] is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution requires the Government to charge the factor that it mentions, an earlier conviction, in the indictment.").

15. Apprendi v. New Jersey, 530 U.S. 466, 489–90 (2000).

16. FED. R. CRIM. P. 32(f)(1) ("Within [fourteen] days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report."); *see also* United States v. Wheeler, 322 F.3d 823, 827 (5th Cir. 2013) (stating defendant must object to the presentence report in order to preserve error for appeal).

17. *Cf.* Johnson v. United States, 520 U.S. 461, 466 (1997) ("Rule 52(b) [of the Federal Rules of Criminal Procedure] . . . allows plain errors affecting substantial rights to be noticed even though there was no objection [at trial]."). In order for an appellate court to "correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Id.* at 466–67.

18. *See Johnson*, 520 U.S. at 465–67 (discussing Rule 30 and 52(b) of the Federal Rules of Criminal Procedure and how they affect preservation of error for appellate purposes).

19. "Illegal reentry," when used in this Article, means an individual was deported or removed, and unlawfully remained in the country. 8 U.S.C. § 1326 (2012).

20. United States v. Booker, 543 U.S. 220, 264 (2005) ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."). Furthermore, a sentence that is within the sentencing guideline range is presumed to have been reasonable. Rita v. United States, 551 U.S. 338, 350–51 (2007).

21. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(2) (2013), *available at* http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/2013_Guidelines_Manual_Full_Optimized.pdf. The sentencing court is instructed to determine the base offense level when calculating the sentence and the guideline range to be applied to the defendant. *Id.*

of the U.S. Code is an "8."[22] However, immigrants charged with illegal reentry can qualify for an upward adjustment based on prior conviction(s).[23] These upward adjustments can increase scores anywhere from four to sixteen levels depending on the type of crime or conviction.[24]

Therefore, taking into account prior conviction(s), the defense lawyer, when trying to determine an immigrant client's potential federal sentence, must attempt to accurately calculate the defendant's Guideline score based on these adjustments in addition to statutory maximums found in Section 1326 of Title 8 of the U.S. Code. Not only can this be legally complex for the lawyer, but immigrant defendants are often perplexed by the process. The immigrant defendant may remark to counsel, "Why is the judge going to punish me for a crime that I already paid for?" This is not an unreasonable comment given the immigrant may have served a prison sentence and been deported for the same criminal conduct that is now being used to increase the immigrant's statutory maximum penalty and Guideline score.

In the sentencing of federal cases, the immigrant is actually punished in several ways for the same criminal conduct. First, as discussed above, the statutory maximums may increase pursuant to Section 1326 of the U.S. Code.[25] Next, as set forth below, the immigrant's Guideline score may be adjusted upwardly, sometimes dramatically.[26] Further, since prior convictions are used to determine the defendant's criminal history category in the Guidelines, the immigrant's criminal history category determined by the Sentencing Guidelines may increase based on the very same conduct.[27]

The outlook for certain immigrants may be even worse if he or she was on state probation, federal probation, or federal supervised release at the time of the illegal reentry.[28] If that is the case, probation or supervised release might be revoked based on the new offense (the illegal reentry).[29]

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22. *Id.* § 2L1.2(a).

23. *Id.* § 2L1.2(b). The level increase depends on the number and kind of prior convictions of the defendant. *Id.*

24. *Id.*

25. 8 U.S.C. § 1326(b)–(c) (2012).

26. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b) (2013), *available at* http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/2013_Guidelines_Manual_Full_Optimized.pdf (establishing the applicable upward adjustments).

27. *See id.* § 4A1.1 (revealing points may be added for prior sentences to determine the criminal history category).

28. *See id.* § 7A2(b) ("[T]he Sentencing Reform Act [under 18 U.S.C. § 3561] recognize[s] probation as a sentence itself.").

29. *Id.* § 7A2(a)–(b). Citing 18 U.S.C. § 3565, the Guidelines state, "[A] court that finds a defendant violated a condition of probation . . . may continue probation . . . or revoke probation and impose any other sentence that initially could have been imposed."

The sentence for the revocation can then run consecutively to the illegal reentry charge.[30] In fact, according to the introductory commentary of Guideline 7B1.1 of the Sentencing Guidelines, the Sentencing Commission's policy states "[T]he sanction imposed upon revocation is to be served consecutively to any other term of imprisonment imposed for any criminal conduct that is the basis of the revocation."[31]

i. Definition of Previous Conviction

For any of the upward adjustments in the Sentencing Guidelines to apply to a previous conviction for unlawfully entering or remaining in the United States, the defendant must have been removed or deported after the previous conviction or departed the United States "while an order of exclusion, deportation, or removal was outstanding[,]" or if the defendant was deported "subsequent to the conviction, regardless of whether the deportation was in response to the conviction."[32] Offenses occurring before the criminal immigrant was eighteen years of age are not considered for purposes of any of the below upward adjustments in the Guidelines.[33]

ii. A 16-Level Upward Adjustment

When scoring an illegal reentry case, a 16-level upward adjustment is required pursuant to the U.S. Sentencing Guidelines Manual, Section 2L1.2(b)(1)(A), if the defendant has a previous conviction for a crime of violence, a firearms offense, a child pornography offense, a national security or terrorism offense, a human trafficking offense, an alien smuggling offense, or a drug trafficking offense for which the sentence imposed exceeded thirteen months and that "conviction receives criminal history points under Chapter Four."[34]

Id. § 7A2(a). "When the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release . . . or revoke supervised release and impose a term of imprisonment." *Id.* § 7A2(b).

30. *See id.* § 7B1.1, introductory cmt. ("[T]he Sentencing Commission[ ] may order a term of imprisonment to be served consecutively or concurrently to an undischarged term or imprisonment.").

31. *Id.* § 7B1.1, introductory cmt.

32. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C), cmt. nos. 1(A)(i)–(ii) (2013), *available at* http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/2013_Guidelines_Manual_Full_Optimized.pdf.

33. *Id.* § 2L1.2(b)(1)(C), cmt. no. 1(A)(iv). Note, however, conviction of the immigrant before turning eighteen years old *will* be considered if such conviction is categorized as an adult conviction according to the jurisdiction in which the defendant was convicted. *Id.*

34. *Id.* § 2L1.2(b)(1)(A).

A "crime of violence" includes "murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses . . . statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense . . . that has as an element the use, attempted use, or threatened use of physical force against [another] person[,]" and also warrants a 16-level increase when "the conviction receives criminal history points under Chapter Four" of the Guidelines.[35]

However, note that these offenses are subject to a 12-level adjustment if the conviction does not receive any criminal history points.[36] A prior conviction will not receive criminal history points if it is sufficiently remote in time.[37] This 16-level or 12-level increase is added to the base offense level–level 8.[38]

iii. A 12-Level Upward Adjustment

A defendant will be subject to a 12-level upward adjustment for a previous felony drug trafficking conviction for which the sentence imposed was thirteen months or less.[39] However, if the defendant does not receive criminal history points, the upward adjustment is only 8 levels.[40] Again, whether the prior conviction receives criminal history points depends on the remoteness of the conviction.[41] Pursuant to the definition in the commentary notes, drug trafficking offenses are those prohibiting the "manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or counterfeit controlled substance) or the possession of a controlled substance (or counterfeit controlled substance) with the intent to manufacture, import, export, distribute, or dispense."[42] Note, however, mere possession is not enough.[43] The length of the sen-

35. *Id.* § 2L1.2(b)(1)(A), cmt. no. 1(B)(iii).

36. *Id.* § 2L1.2(b)(1)(A).

37. *See id.* § 4A1.1, cmt. nos. 1–3 (listing the prior sentences that "are not or are counted only under certain conditions"). "Remoteness" may include length of time since between the current offense and a previous conviction, the defendant's age when he or she committed the previous conviction, a sentence for a foreign conviction, etc. *Id.* § 4A1.1, cmt. nos. 1–3.

38. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(a)–(b)(1)(A) (2013), *available at* http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/2013_Guidelines_Manual_Full_Optimized.pdf.

39. *Id.* § 2L1.2(b)(1)(B).

40. *Id.* § 2L1.2(b)(1)(B).

41. *Id.* § 4A1.1, cmt., nos. 1–3.

42. *Id.* § 2L1.2(b)(1), cmt. no. 1(B)(iv).

43. *See* Lopez v. Gonzalez, 549 U.S. 47, 53 (2006) ("Mere possession is not . . . a felony under the federal CSA [Controlled Substances Act] . . . although possessing more than what one person would have for himself will support a conviction for the federal felony of possession with intent to distribute . . . ."). Thus, as Justice Thomas wrote in his dissenting opinion, "[b]ecause mere possession does not constitute commercial dealing . . .

tence—thirteen months—is based on time actually served, including revocations of probation.[44]

iv. An 8-Level Upward Adjustment

A previous aggravated felony conviction warrants an 8-level enhancement.[45] According to the commentary, an aggravated felony is defined under Section 1101(a)(43) of Title 8 of the U.S. Code.[46] This list is lengthy, and includes a wide-range of criminal conduct.[47]

v. A 4-Level Upward Adjustment

The defendant is subject to a 4-level enhancement for any other felony not included in the 16-, 12-, or 8-level enhancements, or for "three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses."[48]

C. *Determining if an Enhancement/Adjustment Applies: The Two Approaches*

Once the defendant's conviction is finalized, the next step is determining the correct crime classification as defined in the Immigration and Na-

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[the] possession offense cannot qualify as an 'illicit trafficking' offense and thus cannot apply as a 'drug trafficking crime.'" *Id.* at 64 (Thomas, J., dissenting).

44. *See* United States v. Compian-Torres, 320 F.3d 514, 516 (5th Cir. 2003) ("Under both federal and state law a sentence imposed upon revocation of probation is treated as a sentence on the original underlying offense. Such a sentence is not considered a sanction for the new conduct which constituted a probation violation."). In *Compian-Torres*, the defendant pleaded guilty to illegal reentry after being deported for being convicted for possession of a controlled substance. *Id.* at 514–15. He was then sentenced to a ten-year imprisonment term, probated for ten years; thus, defendant was not to serve time. *Id.* at 515. However, six years later his probation was revoked, and "he was sentenced to two years' imprisonment." *Id.* The court determined that a revocation resulting in imprisonment is part of the punishment for the original offense: it is part of the offense for which the defendant received a probation sentence. *Id.* at 516; *see also* United States v. Hidalgo-Macias, 300 F.3d 281, 285 (2nd Cir. 2002) (holding that a term of imprisonment imposed as the result of a probation revocation "is a modification of the original sentence[ ] and must be considered part of the 'actual sentence imposed' for the original offense").

45. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2013), *available at* http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/2013_Guidelines_Manual_Full_Optimized.pdf.

46. *Id.* § 2L1.2(b)(1)(C), cmt. no. 3; *see* 8 U.S.C. § 1101(a)(43) (2012) (listing all the offenses falling under the category of aggravated felony).

47. *See* 8 U.S.C. § 1101(a)(43) (2012) (listing crimes ranging from murder and rape to certain kinds of fraud and some instances of a failure to appear before the court).

48. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D)–(E) (2013), *available at* http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/2013_Guidelines_Manual_Full_Optimized.pdf.

tionality Act (INA).[49] In determining whether a prior conviction qualifies for a sentencing enhancement pursuant to 8 U.S.C. Section 1326 or an upward adjustment pursuant to the Sentencing Guidelines in an illegal reentry case, the Government must prove the offense giving rise to the enhancement meets the Guideline offense criteria. There are several instances where the guidelines refer to generic crimes, such as "manslaughter," "burglary of a dwelling," "arson," etc.[50]

Taylor v. United States[51] and *Shepard v. United States*[52] explain how to determine whether a specific state crime forming the basis of an enhancement meets the generic federal definition of a crime that would qualify the defendant for the enhancement or upward adjustment. According to *Taylor*, since the state may define the crime serving to enhance a sentence more broadly than the generic federal definition in the enhance-

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49. MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS 235 (5th ed. 2012).

50. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A), cmt. no. 1(B)(iii) (2013), *available at* http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/2013_Guidelines_Manual_Full_Optimized.pdf (using these terms to define a crime of violence).

51. Taylor v. United States, 495 U.S. 575 (1990). When the defendant "pleaded guilty to . . . possession of a firearm by a convicted felon, in violation of [18 U.S.C.] § 922(g)(1)," he had four prior convictions under Missouri law, two for second-degree burglary. *Id.* at 578. A defendant convicted under this statute and "who has three prior convictions for specified types of offenses, including 'burglary[ ]'" is subject to a sentence enhancement under 18 U.S.C. § 924(e). *Id.* 577–78. The federal statute stated burglary "involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 578. The defendant argued that his conviction for burglary did not involve such conduct and therefore should not count for sentence enhancement. *Id.* at 579. Thus, there was confusion because the States define "burglary" differently, and Congress has not clearly defined whether "burglary" means "whatever the State of the defendant's prior conviction defines as burglary, or whether . . . some uniform definition of burglary applies to all cases in which the Government seeks a[n] . . . enhancement." *Id.* at 580. The Court decided a uniform definition independent from the various States' criminal codes should apply. *Id.* at 592. When a state statute's definition for burglary is broader than the uniform or generic view, the Government is not restricted to the statutory definition of the prior offense in determining if it "substantially corresponds to 'generic' [definition of] burglary," but it may also look at other evidence, such as "the charging paper and jury instructions actually requir[ing] the jury to find all the elements of generic burglary in order to convict the defendant" for the purposes of sentence enhancement. *Id.* at 602.

52. Shepard v. United States, 544 U.S. 13 (2005). The defendant was indicted and pleaded guilty to the federal offense of being a felon in possession of a firearm. *Id.* at 16. The government sought to enhance his sentence based on his being convicted of four prior convictions under one of the state's burglary statutes. *Id.* Again, the Court was asked to decide what documents may be reviewed in determining whether the previous convictions meet the elements for the generic definition of burglary under the federal Sentencing Guidelines for enhancement purposes. *Id.* The government urged the Court to consider a police report regarding the complaint against the defendant in making its determination. *Id.* at 18. The Court held that a reviewing court may not consider such police reports. *Id.* at 16.

ment statute, the sentencing court may look to the statutory elements of the state crime, the charging documents in the given case, and the jury instructions in the case in deciding whether the defendant was necessarily convicted of the generic offense.[53] Essentially, as established by *Taylor*, the Court will first look at the statute of conviction to see if it matches the offense of the enhancement or upward adjustment as defined by the Sentencing Guidelines.[54] This process is called the categorical approach.[55]

However, when the underlying statute of conviction is ambiguous, in that it is divisible and it is not clear under which sub-section of the statute the defendant was convicted, the sentencing court should apply the modified categorical approach established by *Shepard*, which allows the sentencing court to look at additional documents to decide if the conviction meets the generic federal crime.[56] In *Shepard*, the Supreme Court upheld *Taylor* and ruled that in determining whether the crime of conviction meets the generic federal definition for purposes of an adjustment, the sentencing court is limited to looking at statutory elements, the charging documents, the written plea agreement, a transcript of the plea colloquy, and findings of the trial court to which the defendant assented.[57]

For each offense that the Government will use in departing upward or enhancing the penalty, defense counsel must obtain the judgment, the indictment, the statute of conviction, and possibly the plea colloquy. These are essential in determining whether the particular state offense fits the generic federal version of the crime. It is important for defense counsel to get these documents early in order to advise the client of the potential impact prior convictions may have on sentencing.

D. *Discovery of Criminal History*

In *Padilla v. Kentucky*,[58] the Supreme Court held effective assistance of counsel requires defense counsel give the client proper legal advice con-

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53. *Taylor*, 495 U.S. at 602.

54. *See* Thomas K. Coan, *Defending the Crime of Illegal Entry and Reentry*, *in* CULTURAL ISSUES IN CRIMINAL DEFENSE 633, 709 (Linda Friedman Ramirez ed., 3d ed. 2010) ("Under [the categorical] approach the state statute of conviction is 'compared with the generic definition of that crime to determine if the defendant's conviction is a crime [. . .] pursuant to the Sentencing Guidelines.'").

55. *Id.* at 708–09.

56. *Id.* at 710.

57. *Shepard*, 544 U.S. at 16. The government must prove, with clear and convincing evidence, the prior conviction. United States v. Bonilla-Montenegro, 331 F.3d 1047, 1049 (9th Cir. 2003), *cert. denied,* 540 U.S. 1210, 124 S.Ct. 1487 (2004).

58. Padilla v. Kentucky, 559 U.S.__, 130 S. Ct. 1473 (2010). Jose Padilla was a native of Honduras, who had been a lawful permanent United States resident for over forty years and served in the Vietnam War. *Id.* at 1477. Padilla pled guilty to a charge of transporting marijuana. *Id.* He filed a motion for post-conviction relief, claiming his attorney failed to

cerning an issue that may affect a defendant's decision to plead guilty when the "deportation consequence is truly clear."[59] Given the immigrant may face a post-plea enhancement or a significant upward adjustment, defense counsel should fully research the client's prior criminal history before entering a plea to be effective under *Padilla*, since the potential punishment may influence an immigrant's decision to plead guilty. Investigating criminal history should begin early in the process of mounting a defense so the attorney can gain access to relevant documentation, such as judgments of prior convictions, indictments, and possibly transcripts of plea colloquies.

One method of obtaining a client's criminal history is appearing at the detention hearing, as opposed to waiving it. At detention hearings, the pretrial services officer usually produces the defendant's criminal history to the court in the Pretrial Service Report.[60] Criminal history should also be obtained as part of discovery from the Government and from the client interview. The defendant's family may sometimes be a good resource in getting this information. Defense counsel may then follow up by sending subpoenas to the jurisdiction of the convictions or by contacting clerk's offices and paying for the documents.

III. Downward Departures on Reentry Cases

As discussed above, many factors have the potential to increase a defendant's Sentencing Guideline score. Only by understanding these factors and their interrelationship can defense attorneys effectively advocate for their clients. While understanding these potentially detrimental consequences is important, there are two notable factors potentially decreasing a defendant's score after such an increase has been applied. Therefore, defense attorneys must also appreciate factors potentially reducing a client's sentence, while also being aware of those potentially increasing a client's sentence.

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advise him that he could face deportation, and erroneously advised him that he would not have to worry about his immigration status if he pled guilty. *Id.* at 1478. The Court agreed, holding a "constitutionally competent counsel would have advised him" that he would be subject to automatic deportation for his conviction. *Id.*

59. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1483 (2010).

60. *See Who Does What: Pretrial Services Officer: Qs & As*, Fed. Jud. Center, http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu5b&page=/federal/courts.nsf/page/55E359A8C3008AB785256A3E006DB65F?opendocument (last visited Jan. 12, 2014) (noting the pretrial services report includes the defendant's prior criminal record and focuses on assessing the defendant's danger to the community and likelihood of nonappearance at future court hearings, not on the current offense).

A. *Downward Departures for Overstatement of Prior Conviction*

Application Note 7 to Section 2L1.2 of the U.S. Sentencing Guidelines provides a downward departure from the 16-level or 12-level enhancement in reentry cases in which the applicable offense level "substantially overstates" the seriousness of a prior conviction.[61] For example, "[i]n a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted."[62] It is important to note this departure only applies to the prior conviction used in enhancing an illegal reentry violation; it does not apply to criminal history generally.[63]

Defense counsel should use this departure, if applicable, in arguing the facts in the particular case are not as serious as the conviction may seem. For example, if the defendant was convicted of aggravated assault with a deadly weapon, defense counsel could argue that the victim was not injured, the weapon was a knife that was not actually used, the defendant merely made a threat, the defendant was intoxicated, and/or the victim did not even take the threat seriously or was not actually in danger. The sentencing court could consider these facts and depart from the enhancement.[64]

B. *Departure for Cultural Assimilation*

In its 2010 amendment to Section 2L1.2, the U.S. Sentencing Guidelines added commentary allowing for a downward departure from the sentencing guidelines on the grounds of cultural assimilation.[65] This amendment specifically recognizes there are cases in which the circumstances warrant a downward departure based on cultural assimilation. Pursuant to Application Note 8, a downward departure based on cultural assimilation may be proper in cases where:

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61. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, cmt., no. 7 (2013), *available at* http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/2013_Guidelines_Manual_Full_Optimized.pdf.

62. *Id.* § 2L1.2, cmt., no. 7.

63. A separate downward departure for overstatement of criminal history is available under Guideline 4A1.3(b)(1), which is beyond the scope of this Article. *See id.* § 4A1.3(b)(1) (establishing overstatement of criminal history or likelihood of committing future criminal offenses as criteria for a downward departure under the sentencing guidelines).

64. This example illustrates the importance of knowimg the facts of both the client's present case—the one before the sentencing court—and the facts of the client's prior convictions. The attorney must get to know his or her client and the client's story and history.

65. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, cmt., no. 8 (2013), *available at* http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/2013_Guidelines_Manual_Full_Optimized.pdf.

> (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.[66]

The application note provides a nonexclusive list of seven factors the court considers in determining whether a departure is warranted.[67] Among the factors to consider, the Guidelines list the following:

> (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.[68]

Here, the attorney must use advocacy in convincing the sentencing court an immigrant qualifies for a cultural assimilation departure. An attorney should get to know the client through personal interviews of both the immigrant and the immigrant's family members. It is important to obtain details about the immigrant's arrival date to the United States and activities in which the immigrant has been involved, such as school, extra-curricular activities, church, military service, and employment, among other.

To help prove assimilation, family members can be a great resource for defense attorneys. They may be able to find or solicit letters from teachers, coaches, friends, neighbors, and employers. They may also be able to provide photographs depicting the immigrant as a child in the United States, in a classroom setting, at school events or activities, or involved in other activities which may help impress upon the judge the idea that the immigrant has resided in the United States since childhood. A photo taken of the immigrant at or near the time he or she arrived in the United States can also reiterate this point to the sentencing court. Other items, such as school awards, certificates, ribbons, and trophies, can also be per-

66. *Id.* § 2L1.2, cmt. no. 8.
67. *Id.* § 2L1.2, cmt. no. 8.
68. *Id.* § 2L1.2, cmt. no. 8.

suasive. It is important that the immigrant addresses the Court in English, if possible, as this will bolster an argument of assimilation.

IV. SUPERVISED RELEASE FOR IMMIGRANTS: SECTION 5D1.1(C) OF THE U.S. SENTENCING GUIDELINES

Once sentencing and reduction options are considered, there is yet another factor for defense attorneys to use when advocating for their immigrant clients. The Sentencing Commission amended Section 5D1.1 in November 2011, adding an exception to the imposition of supervised release for deportable aliens.[69] Pursuant to Section 5D1.1(c) of the U.S. Sentencing Guidelines, the "court ordinarily should not impose a term of supervised release" when it is not required to do so by statute and "the defendant is a deportable alien who likely will be deported after imprisonment,"[70] because the defendant will be deported as soon as he or she finishes the imprisonment sentence and therefore does not need supervision.[71] In the event the alien returns illegally, "the need to afford adequate deterrence" can be remedied by administering a new prosecution.[72]

Therefore, if an immigrant is a deportable alien charged with an offense that does not require supervised release, defense counsel should object to any recommendation by the Probation Department in the presentence investigation report for supervised release. Failure to object to the Presentence Investigation Report (PSR) constitutes agreement with the PSR.[73] Therefore, if the defendant fails to object to the PSR, the appellate court will review the district court's ruling on sentencing under the plain error standard rather than the abuse of discretion standard.[74] In the event of a future reentry, the objection may shield the immigrant from subsequent double prosecution: once for reentry and the other for revocation of supervised release. In such case, the immigrant may end up serving consecutive sentences.

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69. *Id.* § 5D1.1(c).

70. *Id.* § 5D1.1(c).

71. *See* U.S. SENTENCING GUIDELINES MANUAL § 5D1.1(c), cmt. no. 5 (2013) (stating supervised release is unnecessary, unless the defendant returns to the United States legally).

72. *Id.* § 5D1.1(c), cmt. no. 5 (noting a term of supervised release a defendant that returns illegally may be imposed "if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case").

73. United States v. Martinez-Vega, 471 F.3d 559, 563 (5th Cir. 2006) (discussing the ramifications of counsel's failure to object to admissions of facts contained in a PSR and affording the defendant no relief because of such a failure).

74. *See Martinez-Vega*, 471 F.3d at 563 (requiring a showing of plain error).

V. Advisory Purpose of Sentencing Guidelines

The U.S. Supreme Court has ruled the Federal Sentencing Guidelines are only advisory upon the sentencing court and the judge has the discretion of imposing a sentence outside of the guideline range.[75] A sentence outside the guidelines is often referred to as a "variance."[76] If the sentencing court determines there is either a mitigating or aggravating factor not properly considered in drafting the guidelines, the court has authority to impose a sentence outside the prescribed guidelines.[77] In the event there is no applicable sentencing guideline in a particular case, the sentencing court shall impose a sentence according to Section 3553(a) of Title 18 of the United States Code.[78]

The Sentencing Commission also acknowledges there are factors that were not considered in drafting the U.S. Sentencing Guidelines that the sentencing courts may adequately consider and, thus, grant a departure in sentencing a defendant.[79] A departure in the guidelines may also be supported where the circumstances presented in a particular case are not mentioned or identified in the guidelines but are relevant and should be considered in appropriately sentencing a defendant.[80]

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75. Kimbrough v. United States, 552 U.S. 85, 101 (2007) ("[T]he Guidelines [are] effectively advisory.") (quoting United States v. Booker, 543 U.S. 220, 245 (2005)); United States v. Booker, 543 U.S. 220, 265 (2005) ("[The U.S. Supreme Court] do[es] not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system. . . . But . . . that is not a choice that remains open.").

76. U.S. Sentencing Guidelines Manual § 1B1.1, cmt. Background (2013), *available at* http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/2013_Guidelines_Manual_Full_Optimized.pdf.

77. 18 U.S.C. § 3553(b)(1) (2012). In determining whether a factor was properly considered in the formulation of the sentencing guidelines, the sentencing court shall take into account the following: (1) the Sentencing Guidelines; (2) the policy statements; and (3) the U.S. Sentencing Commission's official commentary. *Id.* § 3553(b)(1).

78. *See id.* § 3553(b)(1) ("In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2)."). The sentencing court is to consider both the nature and the circumstances of the crime along with the history of the defendant. *Id.* § 3553(a)(1). Additionally, the sentencing court must ensure that the sentence imposed adequately:

> [R]eflect[s] the seriousness of the offense, . . . promote[s] respect for the law, and . . . provide[s] just punishment for the offense; . . . afford[s] adequate deterrence to criminal conduct; . . . protect[s] the public from further crimes of the defendant; and . . . provide[s] the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .

Id. § 3553(a)(2).

79. U.S. Sentencing Guidelines Manual § 5K2.0(a)(2)(A) (2013), *available at* http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/2013_Guidelines_Manual_Full_Optimized.pdf (noting a departure may be taken for the circumstances identified under Section 5K2 of the Guidelines).

80. *Id.* § 5K2.0(a)(2)(B).

VI. LENGTH OF THE SENTENCE

Another important consideration at sentencing is the potential immigration consequences a sentence's length may have on the convicted immigrant.[81] Convictions for some crimes carry different immigration consequences depending on the length of the sentence.[82] For example, there are some offenses defined as aggravated felonies only if the length of the sentence is at least one year.[83] Aggravated felonies are the types of crimes having the most serious immigration consequences.[84] For instance, a lawful permanent resident is ineligible for cancellation of removal if convicted of an aggravated felony.[85]

In cases where the definition of aggravated felony includes a sentence of "at least one year," it is recommended that defense counsel ask the court for imposition of a sentence of three hundred and sixty-four days or less, including any suspended sentence.[86] Common federal crimes considered aggravated felonies and defined as such by a sentence of at least one year are: counterfeiting, obstruction of justice, perjury, subornation

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81. *See* HARTZLER, *supra* note 5, at 44 (recognizing the serious immigration consequences of certain convictions, such as an aggravated felony); Tova Indritz & Jorge L. Barón, *Immigration Consequences of Criminal Convictions*, *in* CULTURAL ISSUES IN CRIMINAL DEFENSE 241, 300–01 (Linda Friedman Ramirez eds., ed. 3d 2010) (listing some of the potential immigration consequences of an aggravated felony conviction).

82. *See* Indritz & Barón, *supra* note 81, at 334 ("In some cases, reducing a prison sentence by [just] one day can make a huge difference in the immigration consequences triggered.").

83. *See* HARTZLER, *supra* note 5, at 44 (listing the most common aggravated felonies, including some—such as theft—that require a sentence of just one year to qualify as an aggravated felony for federal deportation purposes).

84. *See id.* ("An aggravated felony is the ground of deportation with the most serious immigration consequence . . . mak[ing] [an individual] ineligible for almost all forms of relief, strip[ping] the immigration judge of discretion, and trigger[ing] a lifetime bar to future immigration status.").

85. 8 U.S.C. § 1229b(a)(3) (2012) ("The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable . . . if the alien . . . has not been convicted of any aggravated felony."); *see* Indritz & Barón, *supra* note 81, at 303 ("Cancellation of removal for lawful permanent residents is unavailable to a person who has been convicted of an aggravated felony."); *see also* 8 U.S.C. § 1229b(b) (2012) (listing certain convictions that prevent the attorney general from cancelling removal or adjusting the status of certain nonpermanent residents).

86. Indritz & Barón, *supra* note 81, at 334. Although decreasing a sentence to three hundred and sixty-four days may avoid an aggravated felony conviction, it may not avoid being a crime of moral turpitude. *Id.* Also note, "the one-year line is relevant in only SOME subcategories of the 'aggravated felony' categories. Some subcategories . . . do not require any imprisonment to trigger the aggravated felony category." *Id.*

of perjury or bribery of a witness, commercial bribery, and crimes of violence.[87]

VII. Sentencing Factors Found in 18 U.S.C. § 3553(a)

Section 3553(a) of Title 18 of the U.S. Code outlines sentencing factors a court should consider in assessing a criminal sentence.[88] The defendant's Sentencing Guideline score is only one of several factors that the sentencing court should consider.[89] Therefore, it is important for a criminal defense lawyer to understand his client's motivation in committing the crime for which he or she is accused, to understand the client's personal history—including education, mental and physical health history, substance abuse issues, family life, hobbies, etc.—and any other qualities that may sway the sentencing judge.[90] Client interviews are the starting point for the criminal defense lawyer in determining which sentencing factors apply.[91]

Since the guidelines are merely advisory,[92] it is important for the defense attorney to identify each applicable sentencing factor in each sentencing memorandum.[93] Below are some of the Section 3553(a) factors and commentary that are particularly relevant to immigrant clients.

A. *18 U.S.C § 3553(a)(1) and (a)(2)(A)*

Section 3553(a)(1) states, "The court, in determining the particular sentence to be imposed, shall consider the nature and circumstances of the offense and the history and characteristics of the defendant . . . ."[94] Thus,

87. 8 U.S.C. § 1101(a)(43)(F), (R)–(S) (2012); *see* Hartzler, *supra* note 5, at 44 (listing the most common aggravated felonies).

88. 18 U.S.C. § 3553(a) (2012).

89. *Id.* § 3553(a); *see also* United States v. Booker, 543 U.S. 220, 245–46 (2005) ("[The statute] requires a sentencing court to consider Guidelines ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well.").

90. *See* Mackovjak, *supra* note 4, at 41 (emphasizing the need to gain an in-depth knowledge of client history, which may be utilized to develop defenses, sentencing mitigation, and potential immigration legal relief).

91. *See id.* (highlighting the importance of client interviews for understanding a client's past and gaining the client's trust).

92. *E.g.*, Kimbrough v. United States, 552 U.S. 85, 91 (2007); Gall v. U.S., 552 U.S. 38, 46 (2007); Rita v. United States, 551 U.S. 338, 361 (2007); *Booker*, 543 U.S. at 245.

93. *See generally* Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 Geo. Mason L. Rev. 303 (2009) (explaining the impact of the advisory status of the guidelines on what a prosecutor must show in order to overcome these additional factors, such as the "reasonableness" of a sentence, "proving sentencing facts and arguing Guidelines law to establish the appropriate Guidelines range[,]" and referencing the traditional purposes of punishment).

94. 18 U.S.C. § 3553(a)(1) (2012).

defense counsel must provide the defendant's particular history and individual characteristics for consideration.[95] Further, defense counsel should connect this information to the nature and the circumstances of the offense.[96] If defense counsel does not address these factors, the sentencing judge might not afford them sufficient weight during sentencing. Additionally, Section 3553(a)(2)(A) states, "[A] court shall impose a sentence sufficient, but not greater than necessary . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense . . . ."[97]

Regarding both of the above sentencing factors, defense counsel can argue removing immigration status based on the current offense essentially imposes an additional punishment—banishment from the country. The human impact of losing immigration status can be quite severe on an individual and his or her family. For example, an immigrant who has resided in the United States may be so culturally assimilated that societal integration into the immigrant's home country will be difficult. Further, the immigrant may leave behind a spouse, children, parents, and siblings. Subsequent removal may cause the separation of a family.

Further, the significance of these Section 3553(a)(1) and Section 3553(a)(2)(A) factors is related to those cases in which the immigrant is convicted of and sentenced for an offense in which imprisonment for at least one year is an element of the definition of aggravated felony.[98] This, again, is why defense counsel should ask for imposition of a sentence of three hundred and sixty-four days or less, including any suspended sentence, thus reducing potential additional punishment an immigrant could face in the future.[99]

B. *18 U.S.C § 3553(a)(2)(B) and (a)(2)(C)*

Section 3553(a)(2)(B) and 3553(a)(2)(C) state, "[A] court shall impose a sentence sufficient, but not greater than necessary . . . . [T]o afford adequate deterrence to criminal conduct . . . [and] to protect the public

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95. *See Gall*, 552 U.S. at 56–60 (approving of lower court's consideration of defendant's characteristics).

96. *See Kimbrough*, 552 U.S. at 110 (upholding the district court's decision, which "properly calculat[ed] and consider[ed] the advisory Guidelines" by "consider[ing] 'the nature and circumstances' of the crime").

97. 18 U.S.C. § 3553(a)(2)(A) (2012).

98. *See* 8 U.S.C. § 1101(a)(43) (2012) (defining aggravated felony); HARTZLER, *supra* note 5, at 44 (listing the most common aggravated felonies, including some—such as theft—that require a sentence of a year or longer in order to qualify as an aggravated felony).

99. Indritz & Barón, *supra* note 81, at 334.

from further crimes of the defendant . . . [,]" respectively.[100] Based upon this Section, the defense attorney can effectively argue the immigrant will certainly be removed or deported from the country after released from prison. Removal is a strong deterrent and provides complete protection for the public from the crimes of the defendant. Therefore, the court should consider a sentence below the Guidelines since the immigrant's removal accomplishes the goals of deterrence and public protection.

C. *18 U.S.C § 3553(a)(3)*

Section 3553(a)(3) states, "The court, in determining the particular sentence to be imposed, shall consider . . . the kinds of sentences available . . . ."[101] This sub-section of 3553(a) may be relevant in situations in which the length of the sentence imposed will determine whether the conviction is for an aggravated felony. Defense counsel should specifically advise the court in the sentencing memorandum and at the sentencing hearing of the immigration consequences to the particular defendant based on the length of sentence imposed by the court. In other words, advocating for the immigrant client facing sentencing in a federal criminal charge includes advising the sentencing court of the possible consequences to the immigrant client if the sentencing court imposes a given sentence. For example, if the immigrant is being sentenced for an offense in which a prison sentence of "at least one year" is an element of the definition of aggravated felony, defense counsel should ask the judge to sentence the immigrant to less than one year. Therefore, the immigrant, although having a criminal conviction, may be eligible, *ceteris paribus*, for cancellation of removal. On the other hand, if the immigrant is a lawful permanent resident, a sentence of "at least one year" will mean that the immigrant will be ineligible for cancellation of removal, and counsel should so advise the court.

D. *18 U.S.C § 3553(a)(4)(A)*

Section 3553(a)(4)(A) states, "The court, in determining the particular sentence to be imposed, shall consider . . . the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . ."[102] This sub-section is relevant to an immigrant being sentenced on an illegal reentry charge who is also facing a sentence on a revocation of supervised release. Defense counsel can argue for a concurrent sentence or a lower sentence that has the effect of lowering the

100. 18 U.S.C. § 3553(a)(2)(B)–(C) (2012).
101. *Id.* § 3553(a)(3).
102. *Id.* § 3553(a)(4)(A).

total length of the combined sentences. Essentially, defense counsel is arguing against permissible "double counting."[103]

E. *18 U.S.C. § 3553(a)(5)*

Section 3553(a)(5) states, "The court, in determining the particular sentence to be imposed, shall consider . . . any pertinent policy statement . . . ."[104] In the event the sentencing court does not grant a requested departure—for example, a cultural assimilation departure or a departure based on the seriousness of the prior conviction[105]—defense counsel can reargue the same points as policy statements that the sentencing court can consider under this sub-section.

F. *18 U.S.C § 3553(a)(6)*

Section 3553(a)(6) states, "The court, in determining the particular sentence to be imposed, shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . . ."[106] Relying on this section, the immigrant's defense counsel must bring to the attention of the court other similarly situated individuals who were given favorable sentences.

VIII. CONCLUSION

The federal criminal defense attorney representing immigrants must deal with language and cultural barriers, and must also be familiar with several different areas of law affecting an immigrant's sentence. Given the overwhelming number of federal cases ending in a guilty plea or guilty verdict, learning sentencing law and the immigration consequences of the conviction of the different offenses is essential.[107]

A guilty plea is more likely in an illegal reentry case pursuant to Title 8 Section 1326 of the U.S. Code, in which there are few opportunities to present a meaningful defense. Therefore, the criminal defense lawyer must be familiar with the enhancements related to prior criminal history in the illegal reentry statute that can increase the maximum sentence

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103. *See generally* United States v. Vizcarra, 668 F.3d 516, 519–27 (7th Cir. 2012) (exploring the permissibility of double counting). "In the context of guidelines sentencing, the term 'double counting' refers to using the same conduct more than once to increase a defendant's guidelines sentencing range." *Id.* at 519.

104. 18 U.S.C. § 3553(a)(5) (2012).

105. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, cmt., nos. 7–8 (2013).

106. 18 U.S.C. § 3553(a)(6) (2012).

107. *See* Fields & Emshwiller, *supra* note 1 (discussing the increase of the innocent pleading guilty).

from two years, to ten years, even to twenty years.[108] The lawyer must also be familiar with the upward adjustments related to the defendant's criminal history contained in the U.S. Sentencing Guidelines Manual that increase the base level of eight by four, eight, twelve or sixteen levels.[109] These increases in the statutory maximums under Section 1326 of Title 8 of the U.S. Code and the upward adjustments in the Sentencing Guidelines may add years of imprisonment to any given defendant's sentence.

Defense lawyers should remember they are representing a person and should become familiar with their client's personal history in order to make effective sentencing arguments.[110] In mitigating the immigrant's sentence, defense lawyers should be familiar with the departures for overstatement of prior convictions[111] and for cultural assimilation.[112] Since the sentencing guidelines are advisory only,[113] defense lawyers should also be familiar with the section 3553(a) sentencing factors and request a variance from the Court.

108. *See* 8 U.S.C. § 1326(a)(2), (b)(1–2) (2012) (listing criminal penalties for reentry of certain removed aliens and the number of possible year of imprisonment ranging from two to twenty years).

109. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b) (2013).

110. *See* Mackovjak, *supra* note 4, at 41 (advocating for in-depth client interview when representing an immigrant criminal defendant).

111. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, cmt. no. 7 (2013).

112. *Id.* § 2L1.2, cmt. no. 8.

113. *E.g.*, Kimbrough v. United States, 552 U.S. 85, 91 (2007); Gall v. United States, 552 U.S. 38, 46 (2007); Rita v. United States, 551 U.S. 338, 361 (2007); United States v. Booker, 543 U.S. 220, 245 (2005).

EFFECTIVE PLEA BARGAINS FOR NONCITIZENS

CRAIG ESTLINBAUM*

The Sixth Amendment right to counsel guarantees persons charged with crimes the right to effective assistance of counsel.[1] This guarantee ensures fairness in the critical stages of a criminal case, when "defendants cannot be presumed to make critical decisions without counsel's advice."[2] One such critical stage arises when the defendant pleads guilty to the charge, or some lesser-included charge, before the court.[3] Until recently, courts generally held counsel's Sixth Amendment duty to advise the defendant at this stage extended only to advice regarding the guilty plea's

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

2. Lafler v. Cooper, 566 U.S. __, 132 S. Ct. 1376, 1385 (2012) ("The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding . . . [this] applies to pretrial critical stages that are part of the whole course of a criminal proceeding . . . .").

3. White v. Maryland, 373 U.S. 59, 60 (1963) (holding the Sixth Amendment right to counsel attaches at a preliminary hearing where the defendant enters a guilty plea). The Supreme Court recently acknowledged ninety-seven percent of federal convictions and ninety-four percent of state court convictions result from guilty pleas. Missouri v. Frye, 566 U.S. __, 132 S. Ct. 1399, 1407 (2012) (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.22.2009 (2009)). Most guilty pleas are entered following a plea bargain. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2470–86 (2004) (discussing the pressures and incentives presented to prosecutors and defendants that motivate plea bargaining). Plea bargains are agreements between the defendant and the prosecutor whereby each side obtains concessions in exchange for certainty, risk avoidance, and closure. *Id.* (discussing plea bargaining's purpose and the perspectives of both the defense and prosecution on plea bargaining).

direct consequences.[4] This changed in 2010 when the U.S. Supreme Court issued its opinion in *Padilla v. Kentucky*.[5]

The case came before the Supreme Court because Jose Padilla, a lawful permanent resident, sought post-conviction review of a plea-bargained felony conviction[6] that triggered removal proceedings.[7] Padilla asked the Supreme Court to set aside his conviction because his attorney failed to give him correct advice regarding his guilty plea's immigration consequences.[8] In order to prevail on this Sixth Amendment claim, Padilla had to show deficiency in his trial counsel's performance and that the deficient performance prejudiced his defense.[9]

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4. Chaidez v. United States, 568 U.S. __, 133 S. Ct. 1103, 1109 (2013) (observing prior to *Padilla v. Kentucky*, 559 U.S. __, 130 S. Ct. 1473 (2010), federal courts "almost unanimously concluded that the Sixth Amendment does not require attorneys to inform their clients of a conviction's collateral consequences, including deportation"); *see, e.g.*, United States v. Banda, 1 F.3d 354, 355 (5th Cir. 1993) ("We hold that an attorney's failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel.").

5. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1473 (2010).

6. In immigration law, the term "conviction" is a term of art with broader meaning than in the state criminal law world.

> (A) The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) [t]he judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.
>
> (B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

INA § 101(a)(48), 8 U.S.C. § 1101(a)(48). Since probation counts as a restraint on liberty, suspended sentences and deferred adjudications are considered "convictions" for immigration law purposes. *See, e.g.*, Cole v. U.S. Att'y Gen., 712 F.3d 517, 524–26 (11th Cir. 2013) (holding a "confession of guilt is sufficient to establish a 'conviction'" under immigration law, even where adjudication is deferred).

7. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1475 (2010).

8. *Id.* at __, 130 S. Ct. at 1475 (2010).

9. *Id.* at __, 130 S. Ct. at 1476–77 (2010) (applying *Strickland*'s two-prong test, which requires showing counsel's representation was deficient and prejudiced defendant); Strickland v. Washington, 466 U.S. 668, 687 (1984) (reversing a conviction based on a claim of ineffective assistance of counsel requires the defendant to first "show that counsel's performance was deficient" and second, show the "deficient performance prejudiced the defense"); *see* Justin F. Marceau, *Remedying Pretrial Ineffective Assistance*, 45 TEX. TECH L. REV. 277, 280 (2012) ("Under the *Strickland* test, a defendant alleging that his right to counsel was violated through the ineffective assistance of his attorney bears the burden of proving that his lawyer's performance was below the 'prevailing professional norms,' and

In finding Padilla's attorney was deficient under these circumstances, the Supreme Court held the Sixth Amendment requires a defendant's attorney to provide specific advice about the deportation risk resulting from a guilty plea.[10] Specifically, the Supreme Court held criminal defense attorneys representing noncitizens have an affirmative duty to correctly advise the client about the specific immigration consequences of the plea when those consequences are "succinct, clear, and explicit."[11] When those consequences are not so clear, an attorney "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse consequences."[12] *Padilla* has been described as a "watershed"[13] case with a "seismic"[14] effect on how criminal law is practiced.[15]

While much has been written about *Padilla*, its impact, and its possible reach, there has been little written about how trial courts should address the challenges *Padilla's* holding imposes. Trial courts have a duty to ensure guilty pleas are entered voluntarily and intelligently. *Padilla* suggests when a noncitizen makes a plea agreement and wishes to enter a plea, there are more significant consequences that may not be evident at first glance. Trial courts should examine noncitizen guilty pleas with care to ensure the plea is given voluntarily and intelligently and will withstand post-conviction scrutiny on any immigration issue.

This Article addresses how *Padilla v. Kentucky* affects best practices for courts and defense attorneys at the plea bargain stage. This Article suggests courts take affirmative steps prior to accepting a noncitizen's

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he must demonstrate a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'").

10. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1482 (2010).

11. *Id.* at __, 130 S. Ct. at 1483 (2010); *see also* Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2657 (2013) (stating *Padilla* holds "criminal defense attorneys have an affirmative constitutional duty to properly advise clients about the near-automatic deportation consequences of a guilty plea").

12. *Id.* at __, 130 S. Ct. at 1483 (2010).

13. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1118, 1120–21 (2011) (discussing the impact of *Padilla* on plea bargaining).

14. McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 798 (2011) (identifying Padilla as a "seismic event" and the ways attorneys can advise their clients on the range of potential penalties that may be imposed as a result of their criminal conduct).

15. The Supreme Court found Padilla's trial counsel was deficient when he gave his client incorrect advice regarding immigration consequences. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1475 (2010). The Supreme Court remanded the case to the Kentucky courts for further proceedings to determine whether the ineffective counsel prejudiced Padilla's trial. *Id.* at __, 130 S. Ct. at 1476 (2010).

guilty plea to reveal whether the defendant's Sixth Amendment right to relevant immigration advice has been afforded. Further, courts should develop a record of the plea proceedings that demonstrates trial counsel has fully informed the defendant about the immigration consequences and from which post-conviction review may proceed to resolution.

This Article proceeds in four parts. The first part addresses *Padilla's* factual background and holding to identify defense counsel's duty to provide immigration advice to the noncitizen client. The second part discusses the plea bargain in modern criminal jurisprudence and reviews how courts establish that a guilty plea is offered voluntarily and intelligently through the plea colloquy. In Part III, the Article analyzes *Strickland v. Washington's* two-prong test to establish ineffective assistance of counsel as applied in immigration consequences claims. This framework will inform the steps trial courts can take to ensure a noncitizen's guilty plea satisfies constitutional mandates. In Part IV, the Article closes by suggesting best practices for courts and counsel to safeguard a noncitizen's constitutional rights while developing a record that can respond to any post-conviction challenge on Sixth Amendment grounds.

I. PADILLA V. KENTUCKY

Prior to his arrest for drug-related charges in Hardin County, Kentucky,[16] Jose Padilla had been a lawful resident in the United States for over forty years.[17] Padilla's drug crime, like "virtually every" drug offense under federal immigration law, was a deportable offense.[18] Padilla's attorney conveyed a plea offer that required Padilla to plead guilty to the drug offenses, in exchange for a partially probated sentence and dismissal of the non-drug charges.[19] Because of his many years of residency in the United States, Padilla's attorney assured him he would incur no immigration consequences as a result of his guilty plea.[20] Padilla agreed to the plea bargain and the trial court accepted his plea.

Later, citing Padilla's drug-related conviction, the government initiated deportation proceedings against him.[21] Padilla filed for post-conviction relief on grounds that his trial counsel failed to advise him about the im-

16. Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd Padilla*, 559 U.S. at __, 130 S. Ct. at 1473.

17. *Id.* at 483. The Commonwealth of Kentucky charged Padilla with "trafficking in more than five pounds of marijuana, possession of marijuana, possession of drug paraphernalia, and operating a tractor/trailer without a weight and distance tax number." *Id.*

18. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1477 n.1 (2010).

19. *Padilla*, 253 S.W.3d at 483.

20. *Id.*

21. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1475 (2010).

migration-related consequences of his plea.[22] Padilla based his claim for relief from the conviction on the Sixth Amendment's guarantee of effective assistance of counsel.[23] The Sixth Amendment guarantees defendants the right to counsel,[24] a right that extends to the plea bargaining process.[25] A defendant challenging a guilty plea based on ineffective assistance of counsel must show his attorney's representation was deficient and the deficiency prejudiced the defense to obtain relief.[26]

In state court, Padilla's case turned on the collateral nature of the attorney's allegedly deficient advice.[27] The Supreme Court of Kentucky held collateral matters such as immigration consequences lay outside the Sixth Amendment's right to counsel guarantee and denied Padilla's request for relief.[28] The U.S. Supreme Court granted certiorari.[29] The question presented was whether, as a matter of federal law, Padilla's attorney had a duty to advise him that the offense to which he was pleading guilty would subject him to automatic deportation under federal immigration law.[30] The Supreme Court answered this question in the affirmative and remanded the case for further proceedings as to whether the ineffective counsel prejudiced Padilla's case and to determine his potential remedy.[31]

Prior to *Padilla*, state and federal courts "almost unanimously" held a criminal conviction's collateral consequences, such as deportation, lie outside the Sixth Amendment's ambit.[32] In granting Padilla relief, the Supreme Court did not rely upon the problematic distinction between a

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22. *Id.* at __, 130 S. Ct. at 1475 (2010).

23. *Id.* at __, 130 S. Ct. at 1478 (2010).

24. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."); *see also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding the appointment of counsel is a fundamental right and essential to a fair trial).

25. Hill v. Lockhart, 474 U.S. 52, 58 (1985) (holding the "two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel").

26. Strickland v. Washington, 466 U.S. 668, 694 (1984).

27. Commonwealth v. Padilla, 253 S.W.3d 482, 483–84 (Ky. 2008), *rev'd Padilla*, 559 U.S. at __, 130 S. Ct. at 1473 (discussing the trial court's holding which did not require the defendant be informed of the collateral consequences of a guilty plea, which held that counsel not advising on collateral consequences, such as deportation, may constitute ineffective assistance of counsel).

28. *Id.* at 485 (reversing the Kentucky Court of Appeals and reinstating the final judgment of the trial court).

29. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1473 (2010).

30. *Id.* at __, 130 S. Ct. at 1475 (2010).

31. *Id.* at. __, 130 S. Ct. at 1477, 1487 (2010).

32. Chaidez v. United States, 568 U.S. __, 133 S. Ct. 1103, 1109 (2013).

conviction's direct and collateral consequences,[33] but relied instead upon the "unique nature of deportation" and its close connection to criminal proceedings and the recent changes to immigration law making removal a nearly automatic punishment for noncitizen offenders.[34] While *Padilla's* implications for the collateral consequences of other criminal convictions are not yet clearly established,[35] *Padilla* unequivocally provides guidance regarding the constitutionally mandated advice and counsel attorneys must provide regarding immigration consequences.

To make these distinctions, the Supreme Court detailed the developments in immigration law over the years that have "dramatically raised the stakes of a noncitizen's criminal conviction."[36] Justice Stevens observed, since the early nineteenth century, federal law has enmeshed deportation and criminal convictions, with current immigration law making removal from the country an automatic consequence for many crimes.[37] Because immigration and criminal law are so intermingled, the Supreme Court concluded immigration consequences are "uniquely difficult to classify as either a direct or a collateral consequence."[38] However, because a criminal conviction's immigration consequences have become increasingly severe, the Supreme Court found accurate advice on the subject has gained critical importance for defendants.[39]

Whether an attorney's representation was constitutionally effective depends upon whether that representation meets objective standards of reasonableness after considering the prevailing professional standards.[40]

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33. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1481, n.8 (2010) (noting "there is some disagreement among the courts over how to distinguish between direct and collateral consequences" but that it "has no bearing on the disposition of this case . . . ").

34. *Id.* at __, 130 S. Ct. at 1481 (2010).

35. *Id.* at __, 130 S. Ct. at 1488 (2010) (Alito J., concurring) (mentioning collateral consequences such as "civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business and professional licenses" are not matters that have yet been extended to the criminal defense attorney's duties under the Sixth Amendment).

36. *Id.* at __, 130 S. Ct. at 1476 (2010) (listing the expansion of the class of deportable offenses and the limitation of the judge's discretionary authority as changes that have "raised the stakes of a noncitizen's criminal conviction").

37. *Id.* at __, 130 S. Ct. at 1479–81 (2010) (stating contemporary law is more harsh because it has significantly limited the Attorney General's use of discretion to provide relief from deportation).

38. *Id.* at __, 130 S. Ct. at 1482 (2010).

39. *Id.* at. __, 130 S. Ct. at 1480 (2010).

40. Strickland v. Washington, 466 U.S. 668, 688 (1984) (stating "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides" for determining whether an attorney's performance was reasonable for purposes of ineffective assistance of counsel claims).

The Supreme Court found a broad range of authorities that strongly urged defense counsel to advise noncitizen clients "as to the possible collateral consequences that might ensue from entry of the contemplated plea."[41] The Supreme Court also recognized "preserving the client's right to remain in the United States" may be more important to the client than any potential jail sentence.[42] Requiring, as a matter of constitutional law, defense counsel give sound advice about a guilty plea's immigration consequences affirms the defendant's choice principle by giving the defendant the best opportunity to make a truly voluntary and intelligent choice about his case's disposition.

Immigration law is a fluid and highly complex legal specialty and, in many cases, a conviction's immigration consequences will not be clear. However, in other cases, the immigration consequences are very clear. This was the case for Jose Padilla because immigration law mandates removal for virtually every drug crime.[43] The Supreme Court determined Padilla's attorney could have easily realized a guilty plea made Padilla eligible for deportation simply by reading the statute.[44] This statute expressly mandates removal from the country for all controlled substances convictions, except for the most minor marijuana possession offenses.[45]

Counsels' specific duty to their noncitizen clients after *Padilla* depends, then, upon whether the convictions' immigration consequences are clear or uncertain. The Sixth Amendment provides, when the immigration consequences are "truly clear," counsel has an equally clear duty to provide correct advice to the noncitizen defendant.[46] However, when the immigration consequences are unclear, counsel's duty extends to merely

41. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3.2(f) (1999), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk.html#3.2. *See also Padilla*, 559 U.S. at __, 130 S. Ct. at 1482 (2010) (noting advising clients of deportation consequences has become the prevailing norm for defending noncitizen clients).

42. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1476 (2010) (quoting INS v. St. Cyr., 533 U.S. 289, 323 (2001)).

43. *Id.* at __, 130 S. Ct. at 1478 (2010) ("[A]gree[ing] . . . that constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation.").

44. *Id.* at __, 130 S. Ct. at 1476–77 (2010).

45. 8 U.S.C. § 1227(a)(2)(B)(i) (2012) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

46. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1477 (2010).

advising the noncitizen client that pending criminal charges may include future adverse immigration consequences.[47]

In Padilla's case, the Supreme Court determined counsel was deficient because he gave Padilla incorrect advice about the plea and conviction's immigration consequences when those consequences were "truly clear."[48] The Supreme Court reversed the Kentucky Supreme Court's decision denying relief and remanded the case to determine whether the attorney's misinformation caused Padilla prejudice, a matter not addressed by the lower courts.[49] To prevail on remand, Padilla had to show the decision to reject the plea and proceed toward trial would have been "rational under the circumstances" had he been correctly advised about the immigration consequences.[50]

II. Plea Requirements: Voluntarily and Intelligently

While Jose Padilla's journey through the criminal court system produced a landmark Sixth Amendment holding, by another important measure, the case was quite unremarkable. Padilla, like the overwhelming majority of persons convicted in the state and federal systems, pled guilty to his crime after reaching a plea bargain with the state.[51] An examination of these figures led Justice Kennedy to recently state the criminal justice system "is for the most part a system of pleas, not a system of trials."[52] Plea bargains in criminal cases are similar to settlements in civil cases.[53] A plea bargain occurs when the defendant pleads guilty, giving up important rights and the chance for acquittal, and in exchange the government surrenders the right to more fully charge or punish the de-

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47. *Id.* at __, 130 S. Ct. at 1477 (2010); *see also* César Cuauhtémoc García Hernández, Strickland-*Lite:* Padilla's *Two-Tiered Duty for Noncitizens*, 72 Md. L. Rev. 844, 851, 854 (2013) (arguing application of the *Strickland* test in *Padilla* "threatens to erode the baseline Sixth Amendment guarantee of the right to assistance of counsel").

48. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1476–77 (2010).

49. *Id.* at __, 130 S. Ct. at 1487 (2010).

50. *Id.*. at __, 130 S. Ct. at 1485 (2010).

51. *Id.* at __, 130 S. Ct. at 1485 (2010) ("Pleas account for nearly [ninety-five percent] of all criminal convictions."). According to the Department of Justice, over ninety-seven percent of dispositions in the felony courts were by guilty plea or nolo contendre in 2010. U.S. Dep't of Justice, United States Attorneys' Annual Statistical Report: Fiscal Year 2010, at 10 (2010), *available at* http://www.justice.gov/usao/reading_room/reports/asr2010/10statrpt.pdf; *see also* Missouri v. Frye, 566 U.S. __, 132 S. Ct. 1399, 1407 (2012) (stating ninety-seven percent of federal convictions and ninety-four percent of state convictions result from guilty pleas).

52. Lafler v. Cooper, 566 U.S. __, 132 S. Ct. 1376, 1388 (2012).

53. *Compare* Black's Law Dictionary 1270 (9th ed. 2009) (defining a plea bargain as an agreement whereby a defendant pleads guilty in exchange for a more lenient sentence or dismissal of other charges), *with* Black's Law Dictionary 1496 (9th ed. 2009) (defining a settlement as an agreement to end a lawsuit).

fendant.[54] For defendants, plea bargains are exercises in risk avoidance.[55] For the prosecution, a plea bargain preserves resources and provides certainty.[56]

Early common law courts were hesitant to accept guilty pleas, with courts urging a confessing defendant to retract the plea because most felony crimes were mandatorily punishable by death.[57] Over time, even as a greater number of felony crimes became punishable by means other than death—either due to judicial mercy or relaxed penalties—courts continued to be reluctant in accepting guilty pleas, especially when accompanied by any offer of favor.[58] As the number of criminal laws—and criminal cases—grew in the early twentieth century, courts became less wary of guilty pleas as a matter of administrative necessity, because the rapid developments in criminal law outpaced the growth in courts and prosecutorial staff.[59]

To accommodate the rise in bargained-for guilty pleas, the Supreme Court established a constitutional standard requiring pleas be entered voluntarily and intelligently.[60] The Supreme Court also held the trial judge accepting the plea should establish a record "adequate for any re-

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54. BLACK'S LAW DICTIONARY 1270 (9th ed. 2009); *see also* Brady v. United States, 397 U.S. 742, 758 (1970) (endorsing plea bargains as a means to resolve criminal cases provided the defendant's plea is made voluntarily and intelligently); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992) (describing more fully the concessions and benefits typically present in plea bargain cases).

55. *Brady*, 397 U.S. at 752; Easterbrook, *supra* note 54.

56. *Brady*, 397 U.S. at 752; Easterbrook, *supra* note 54.

57. Barry J. Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty*, 65 ALB. L. REV. 181, 183–84 (2001).

58. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM L. REV. 1, 12–13 (1979) (offering a historical perspective on guilty pleas and plea bargaining).

59. *See, e.g.*, Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 36 n.14, 38 (2002) (discussing the dominance of guilty pleas in criminal practice in the twentieth century and the perception that "plea bargaining makes the prosecutor more administratively efficient"); *see also* Ellen S. Thomas, *Plea Bargaining: The Clash Between Theory and Practice*, 20 LOY. L. REV. 303, 312 (1974) (stating the plea bargaining system was originally built "to make practical our cherished notions of justice[,]" and arguing the system is no longer meeting those goals, but rather continues to exist merely "for the maintenance of the system itself . . . "). The Supreme Court has also noted the administrative benefits presented by allowing plea bargaining to occur. United States v. Ruiz, 536 U.S. 622, 632 (2002) (noting "resource-saving advantages" of the plea bargaining process); *Brady*, 397 U.S. at 752 (approving plea bargaining as an avenue to preserve "scarce judicial and prosecutorial resources").

60. *Brady*, 397 U.S. at 748 ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.").

view that may be later sought" and sufficient to withstand "collateral proceedings that seek to probe murky memories."[61]

A judge accepting a guilty plea plays no role in the plea bargain process,[62] other than to ensure a guilty plea made by plea bargain once reached is made voluntarily and intelligently. Because courts do not participate in the plea bargain negotiations, but must formally approve the bargain reached, plea bargains are thought of as two-part contracts. As the Seventh Circuit observed in *United States v. Kraus*:[63]

Excluding the judge from the plea discussions thus serves three purposes: it minimizes the risk that the defendant will be judicially coerced into pleading guilty, it preserves the impartiality of the court, and it avoids any appearance of impropriety. Of course, once the parties have themselves negotiated a plea agreement and presented that agreement to the court for approval, it is not only permitted but expected that the court will take an active role in evaluating the agreement. . . . Preeminently, the court must make sure that the defendant's plea is both voluntary and knowing. . . . Indeed, it is exactly because the court plays such a vital role in assessing the validity of the plea that it must remain removed from the discussions culminating in that plea, lest its objectivity and impartiality be compromised.[64]

Courts may accept or reject a plea bargains for many reasons. The Constitution, however, requires a court to confirm the defendant makes his plea voluntarily and intelligently as a condition before accepting the plea.[65] These requirements guarantee informed choice.[66] *Padilla* affirms the choice principle by placing the duty upon the noncitizen defendant's

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61. Boykin v. Alabama, 395 U.S. 238, 244 (1969).

62. FED. R. CRIM. P. 11(c)(1) (stating "the court must not participate in [the plea agreement] discussions"). Many states require this same prohibition. *See, e.g.*, Wilson v. State, 845 So. 2d 142, 156–57 (Fla. 2003) ("It is not the judge's role to advocate for a plea offer. When the trial judge becomes an advocate for a plea-either one offered by the judge or by the State-the trial judge runs the risk of departing from its critical role as a neutral arbiter."); People v. Killebrew, 330 N.W.2d 834, 841 (Mich. 1982) ("A trial judge shall not initiate or participate in discussions aimed at reaching a plea agreement. He may not engage in the negotiation of the bargain itself. The trial judge's role in the plea-bargaining procedure shall remain that of a detached and neutral judicial official."); State v. Warren, 558 A.2d 1312, 1320 (N.J. 1989) ("Courts . . . cannot become involved in the negotiation of guilty pleas. . . . Strict limitations on judicial participation in plea negotiations relate to the concern that judicial neutrality and objectivity must be preserved."); Moore v. State, 295 S.W.3d 329, 332 (Tex. Crim. App. 2009) ("The only proper role of the trial court in the plea-bargain process is advising the defendant whether it will 'follow or reject' the bargain between the state and the defendant.").

63. United States v. Kraus, 137 F.3d 447 (7th Cir. 1998).

64. *Id.* at 452–53 (citations omitted).

65. *Brady*, 397 U.S. at 748.

attorney to inform the client about a criminal conviction's immigration consequences.[67]

In the 2011–2012 Term, the Supreme Court affirmed the criminal defendant's informed, voluntary choice in two more cases relating to ineffective assistance during plea bargaining. In *Lafler v. Cooper*,[68] the Supreme Court found defense counsel provided constitutionally deficient representation when he misinformed Cooper as to a relevant and material legal issue, leading Cooper to reject a plea bargaining opportunity he otherwise would have accepted.[69] Rather than accepting a plea deal, Cooper's case went to a jury trial where the jury convicted Cooper of the offense.[70] Cooper received a sentence significantly greater than the one he rejected.[71] The State argued any deficiency in the attorney's representation was cured when Cooper subsequently received a fair trial.[72] The Supreme Court rejected this point and found the constitutional harm occurred when Cooper lost the benefits he might have received through informed choice in the plea bargaining process.[73]

Missouri v. Frye,[74] also decided during the 2011–2012 term, involved similar informed choice concerns. In *Frye*, the defendant's counsel was deficient for failing to convey to the client a favorable written plea offer extended by the prosecutor.[75] This offer, among other things, reduced Frye's charge from a felony to a misdemeanor.[76] The plea offer expired and Frye later pled guilty on an open plea to the felony.[77] The judge sentenced Frye to a three-year prison term—substantially more than the ninety-day sentence recommended in the original plea offer.[78] The court found counsel's performance to be deficient because under prevailing norms, attorneys have a duty to communicate formal plea offers from the prosecution to the client.[79] By failing to communicate the plea offer to

66. Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133, 1139, 1150 (2013) (exploring the "jurisprudential rift between the meaning of effective assistance of counsel at bargain and trial").

67. Padilla v. Kentucky, 559 U.S. __, 130 S. Ct. 1473, 1483, 1486 (2010).

68. Lafler v. Cooper, 566 U.S. __, 132 S. Ct. 1376 (2012).

69. *Id.* at __, 132 S. Ct. at 1391 (2012).

70. *Id.* at __, 132 S. Ct. at 1386 (2012).

71. *Id.* at __, 132 S. Ct. at 1386 (2012) (noting respondent received a sentence three and a half times more severe than he would have likely received from pleading guilty).

72. *Id.* at __, 132 S. Ct. at 1385 (2012).

73. *Id.* at __, 132 S. Ct. at 1388 (2012).

74. Missouri v. Frye, 566 U.S. __, 132 S. Ct. 1399 (2012).

75. *Id.* at __, 132 S. Ct. at 1404 (2012).

76. *Id.* at __, 132 S. Ct. at 1404 (2012).

77. *Id.* at __, 132 S. Ct. at 1404 (2012).

78. *Id.* at __, 132 S. Ct. at 1404–05 (2012).

79. *Id.* at __, 132 S. Ct. at 1408 (2012).

the defendant, counsel deprived his client of the opportunity to make an informed choice.[80]

While counsel has the duty to advise the client about the relative merits of a plea,[81] the decision to plead guilty or stand trial rests solely with the defendant.[82] When the defendant chooses to enter a plea, courts have an obligation to ensure the plea is made voluntarily and intelligently before accepting it.[83] *Padilla*, *Lafler*, and *Frye* all provide an attorney's performance is constitutionally deficient when the attorney fails to inform (or misinforms) the defendant about relevant and material matters closely connected to the plea process.[84]

Courts determine a plea is made voluntarily and intelligently by questioning the defendant prior to accepting a plea in what is known as the plea colloquy.[85] The colloquy provides courts an opportunity to determine if the defendant knows the charge, the range of punishment, the plea bargain's terms, and the extent to which the defendant has rights related to a defense, such as the right to remain silent.[86] These inquiries and interchanges allow judges to determine the defendant's competency

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80. *Frye*, 566 U.S. at __, 132 S. Ct. at 1410 (holding "'counsel's representation fell below an objective standard of reasonableness[,]'" making it deficient).

81. *See* Walker v. Caldwell, 476 F.2d 213, 224 (5th Cir. 1973) (holding effective assistance of counsel includes counsel's informed opinion regarding what pleas should be entered). Counsel is not required to "investigate all the facts of the case, explore all possible avenues of defense, etc." *Id.*

82. *See* Jones v. Barnes, 463 U.S. 745, 751 (1983) (stating "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to *whether to plead guilty*, waive a jury, testify in his or her own behalf, or take an appeal") (emphasis added); *see also* Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1237 (2006) ("The defendant decides whether to plead guilty or go to trial . . . ."). The American Bar Association's Standards for Criminal Justice, Model Rules of Professional Conduct, and Model Code of Professional Responsibility also provide that the ultimate decision to plead guilty rests with the defendant. Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice of Lawyer-Inflicted Indignity*, 93 KY. L.J. 39, 67 (2004).

83. *See* Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 9 (2012) (stating the requirement a guilty plea be made voluntarily and intelligently protects individual autonomy); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1913 (1992) (discussing autonomy considerations that justify plea bargaining).

84. Lafler v. Cooper, 566 U.S. __, 132 S. Ct. 1376, 1376, 1387, 1391 (2012); Missouri v. Frye, 566 U.S. __, 132 S. Ct. 1399, 1401–03 (2012); Padilla v. Kentucky 559 U.S. __, 130 S. Ct. 1473, 1475–77 (2010); *see also* Scott & Stuntz, *supra* note 83, at 1951, 1957–59 (concluding the Supreme Court declined to define the outer limits of the Sixth Amendment's reach, settling instead for a case-by-case review of the attorney's actions).

85. *See* Mitchell v. United States, 526 U.S. 314, 322 (1999) ("The purpose of a plea colloquy is to protect the defendant from an unintelligent or involuntary plea.").

86. FED. R. CRIM. P. 11(b). The federal government and many states have rules that mandate the admonishments a court must give to a defendant before accepting a plea. *See*

and to confirm the defendant is entering his guilty plea voluntarily and intelligently.[87]

Supreme Court precedent mandates the plea colloquy.[88] In *Boykin v. Alabama*[89] the Supreme Court considered the case of a defendant sentenced to death following a guilty plea.[90] The record of the proceeding revealed, "[T]he judge asked no questions of petitioner concerning his plea, and [the] petitioner did not address the court."[91] The Supreme Court reversed the Alabama Supreme Court's decision stating: "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."[92] *Boykin* cautions trial judges that due process requires sufficient evidence supporting the trial judge's decision to accept the plea and that such evidence must appear in the record of the proceeding.[93] Sufficient evidence necessarily includes evidence demonstrating the defendant offered his plea voluntarily and intelligently.

Courts are given wide latitude to question defendants in their effort to determine whether the plea meets constitutional guidelines. Courts may fully question the defendant's knowledge about the specific plea agreement's relevant consequences and the constitutional rights waived to court's satisfaction.[94] A careful and thorough plea colloquy reduces the risk that the defendant's plea is not truly voluntarily or intelligently made and establishes a record for more accurate fact finding on post-conviction review.

III. INEFFECTIVE ASSISTANCE OF COUNSEL: TWO-PRONGED TEST

Defendants seeking relief from criminal conviction on ineffective assistance grounds must meet the two-prong test established in *Strickland v.*

FED. R. CRIM. P. 11(b) (listing the mandatory admonishments in federal courts); TEX. CRIM. PROC. CODE ANN. § 26.13(a) (listing the required admonishments in Texas).

87. *See* Lakeside v. Oregon, 435 U.S. 333, 341–42 (1978) ("It is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial.").

88. *See generally* Danielle M. Lang, Note, Padilla v. Kentucky: *The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 987–88 (2012) (discussing the implications and limitations of the plea colloquy).

89. Boykin v. Alabama, 395 U.S. 238 (1969).

90. *Id.* at 238.

91. *Id.* at 239.

92. *Id.* at 242.

93. *Id.* at 243 ("We cannot presume a waiver . . . from a silent record."); *see* Brady v. United States, 397 U.S. 742, 747 n.4 (1970) ("The new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily.").

94. Poulin, *supra* note 82, at 1272.

Washington.[95] This test applies when the defendant alleges counsel was ineffective during the plea bargaining process.[96] *Strickland* holds that defendants cannot prevail on an ineffective assistance of counsel claim unless they prove defective performance by the attorney and a legally cognizable, prejudicial effect on the relevant outcome.[97]

A. *Defective Performance*

The Supreme Court has rejected bright-line rules for determining whether an attorney's representation was effective; instead, claims are examined on a case-by-case basis.[98] As a result, post-conviction review of counsel's performance is often a fact-intensive affair. In cases relating to ineffective assistance claims at plea bargaining, this *post hoc* review is made more difficult by the fact that the relevant information lies outside the record. Communication between a defendant and his attorney is privileged, and this privilege extends to the attorney's advice about immigration consequences.[99] Plea negotiations and attorney-client confer-

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95. Strickland v. Washington, 466 U.S. 668, 669 (1984).

96. *Id.* at 669.

97. *Id.*; *see* Richard E. Myers II, *The Future of Effective Assistance of Counsel: Rereading* Cronic *and* Strickland *in Light of* Padilla, Frye, *and* Lafler, 45 TEX. TECH. L. REV. 229, 232 (2012) (describing *Strickland*'s requirements for ineffective assistance of counsel in terms of attorney competence and error resulting from incompetence, which affects a case's outcome); Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOW. L.J. 693, 699 (2011) (stating *Strickland* requires defendants asserting an ineffective assistance claim to show "(1) attorney error; and (2) prejudice flowing from that error"); Stephen F. Smith, *Taking* Strickland *Claims Seriously*, 93 MARQ. L. REV. 515, 518 (2009) (noting "the *Strickland* standard" is in reality a "two-pronged, performance-and-prejudice test . . . ").

98. Moreover:

> "As we have previously noted, '[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel.' Rather, courts must 'judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct,' . . . and '[j]udicial scrutiny of counsel's performance must be highly deferential[.]'"

Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (quoting *Strickland*, 466 U.S. at 688–90); *see also* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 711 (2002) (asserting *Strickland* requires a case-by-case analysis of counsel's effectiveness); Marianne Lavelle & Marcia Coyle, *Effective Assistance: Just a Nominal Right?*, 12 NAT'L L.J. 42, 42 (1990) (stating *Strickland* provides "no specific guidelines for measuring a lawyer's performance . . . ").

99. Heidi Altman, *Prosecuting Post*-Padilla*: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 21 (2012) (noting the privileged nature of communication regarding immigration matters between a noncitizen defendant and the defense attorney).

ences about a plea's merits virtually never occur in open court on the record.[100]

The *Padilla* Court rejected the argument that an attorney's or court's generic warnings stating a conviction may have immigration consequences are adequate under the Sixth Amendment when the immigration consequences are "truly clear."[101] A few courts have held a court's general warnings may cure deficient performance by the attorney on this subject, and these cases turn on the evidence in the record that the defendant knew the plea's consequences despite the poor advice.[102]

B. *Prejudicial Effect*

Strickland's prejudice prong requires establishing, by a reasonable probability, but for the unprofessional errors, the relevant result would have been different.[103] The relevant result includes broader procedural and substantive considerations than the ultimate question of guilt.[104] For example, in *Roe v. Flores-Ortega*, the Supreme Court confronted a situation in which the defendant attorney failed to file a notice of appeal on his client's behalf.[105] After addressing the performance prong, the Supreme Court held prejudice is established in this instance where the defendant proves but for counsel's deficient performance, he would have appealed, not whether that appeal would have been successful.[106]

Rompilla v. Beard[107] presented a death penalty case in which the defendant claimed his attorneys were ineffective when they failed to investigate potential mitigation evidence contained in his prison and school files.[108] The Supreme Court found the attorneys' performance deficient

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100. The Supreme Court has identified the importance the colloquy record plays in resolving post-conviction challenges on grounds the defendant's plea was not voluntarily or intelligently given. *See, e.g.*, Mitchell v. United States, 526 U.S. 314, 322 (1999) (outlining the purpose of the plea colloquy); Lang, *supra* note 88, at 947 (underscoring the Supreme Court's emphasis on the plea colloquy's role at trial).

101. Padilla v. Kentucky, 559 U.S. __, 130 S. Ct. 1473, 1477 (2010) ("When the deportation consequence is truly clear, as it was [in *Padilla*], the duty to give correct advice is equally clear.").

102. State v. Martinez, 729 S.E.2d 390, 392 (Ga. 2012) (holding a trial court's plea colloquy warnings of adverse immigration consequences precludes a finding of *Strickland* prejudice in cases in which the defendant acknowledges the conviction will lead to "certain or almost certain" deportation, regardless of counsel's poor advice).

103. *Strickland*, 466 U.S. at 694.

104. *See* Missouri v. Frye, 566 U.S. __, 132 S. Ct. 1399, 1407 (2012) ("It is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.").

105. Roe v. Flores-Ortega, 528 U.S. 470, 470 (2000).

106. *Id.* at 484.

107. Rompilla v. Beard, 545 U.S. 374, 382 (2005).

108. *Id.*

and examined whether prejudice resulted.[109] The Supreme Court held the defendant was prejudiced because the jury reviewing the evidence could have decided his sentence in the punishment phase differently.[110] The Supreme Court concluded prejudice occurred because "the undiscovered 'mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Rompilla's] culpability,' and the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing[.]"[111]

These cases show the relevant *Strickland* prejudice required depends upon the stage of the criminal case proceedings. The prejudicial effect requirement focuses upon the harm connected to the attorney's deficient performance. When a defendant seeks to show that his attorney provided deficient advice leading to a plea producing adverse immigration consequences, *Strickland's* prejudice prong requires a showing that the defendant's decision to reject the plea bargain offer would have been rational under the circumstances.[112] This prong is guided not by whether the defendant would have been acquitted at a full trial, but instead turns on whether the defendant, had he known the true immigration consequences, would have rejected the plea offer and either continued to negotiate or gone to trial.[113]

When the plea colloquy is perfunctory, the *Strickland* prejudice analysis is necessarily *post hoc* in nature. A defendant's subjective, self-serving statement stating he or she would not have pled guilty had counsel's representation not been deficient is typically not sufficient to establish prejudice.[114] Courts require the defendant produce objective evidence that a decision to reject the plea offer would have been rational. However, a *Padilla*-specific plea colloquy can help avoid the *post hoc* fact finding the plea colloquy is designed to prevent.

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109. *Id.* at 390.

110. *Id.* at 390, 393 (conceding the jury could have heard all the mitigating evidence and may have likely decided a different sentence).

111. *Id.* at 393 (citations omitted).

112. Padilla v. Kentucky, 559 U.S. __, 130 S. Ct. 1473, 1485 (2010).

113. *See* Strickland v. Washington, 466 U.S. 668, 695 (1984) ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability to undermine confidence in the outcome.").

114. Toro v. Fairman, 940 F.2d 1065, 1068 (7th Cir. 1991) (holding prejudice is not established by defendant's self-serving statement that he would have accepted the plea had his attorney performance not been deficient, but rather requires the defendant to identify "objective evidence in support of his claim of prejudice"); People v. Hale, No. 113140, 2013 WL 5488909, at *614 (Ill. Oct. 3, 2013) (stating a defendant must include more than their own "'subjective, self-serving' testimony" to show prejudice under the *Strickland* test).

In *Ex parte Murillo*,[115] a Texas appellate court identified four objective factors that could show prejudice when an attorney fails to properly advise a client about the guilty plea's immigration consequences. These factors are: (1) the evidence of defendant's guilt, (2) the defendant's factual or legal defenses, (3) whether immigration status was a primary concern, and (4) the plea deal received compared to risks at trial.[116] Applying these factors in *Murillo*, the appellate court found there was strong evidence of guilt and the defendant identified no factual or legal defenses to the crime.[117] Murillo's evidence also failed to show he expressed a desire to remain in the country before accepting the plea bargain.[118] The appellate court determined Murillo's choice was either to accept a thirty-day sentence by plea bargain and face presumptive deportation, or go to trial in a case with a significant likelihood of guilt facing the same presumptive deportation and a harsher punishment of up to a year in jail.[119] Murillo's decision to reject the plea bargain would not have been rational under the circumstances had he known the true immigration consequences.[120]

A plea colloquy inquiring into whether non-citizen defendants have received guidance pertaining to immigration status not only allows the trial courts to ensure the plea is offered voluntarily and intelligently, but can also insulate the resulting conviction from attack.[121] In the next section, the Article concludes by considering relevant questions trial courts might consider asking the noncitizen defendant and counsel before accepting a guilty plea.

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115. Ex parte Murillo, 389 S.W.3d. 922 (Tex. App.—Houston [14thDist.] 2013).

116. *Id.* at 928–30.

117. *Id.* at 931.

118. *Id.* at 932.

119. *Id.* at 931.

120. *Id.* at 931–32.

121. *See* Boykin v. Alabama, 395 U.S. 238, 243–44 n.7 (1969) ("'A majority of criminal convictions are obtained after a plea of guilty. If these convictions are to be insulated from attack, the trial court is best advised to conduct an on the record examination of the defendant which should include, inter alia, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged and the permissible range of sentences.'") (quoting Commonwealth ex rel. West v. Purdue., 237 A.2d 196, 197–98 (Pa. 1968); *see also* Burdick v. Quarterman, 504 F.3d 545, 547 (5th Cir. 2007) (suggesting a judge who discharges the function of guaranteeing the plea is voluntarily and intelligently also leaves a record adequate for post-conviction review); Commonwealth v. Flanagan, 854 A.2d 489, 512–13 (Pa. 2004) (stating a colloquy that shows "the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged and the permissible range of sentences[,] . . . serves the additional purpose of creating a complete record at the time the plea is entered, upon which a reviewing court may determine whether the plea was entered knowingly and voluntarily").

IV. Recommendations for the Creation of a Sound Record

Courts have an independent duty to ensure a guilty plea is made voluntarily and intelligently before accepting that plea.[122] This duty protects the defendant's broad array of rights, including the right to jury trial, the right to remain silent, the right to confront witnesses, and the right to effective assistance of counsel. Courts typically engage in a plea colloquy with the defendant to establish facts in the record that confirm the plea is entered voluntarily and intelligently.[123]

Padilla holds an ineffective assistance of counsel claim based upon immigration advice will be reviewed under *Strickland v. Washington's* two-part test.[124] To prevail on an ineffective assistance claim, defendants must show "counsel's performance was deficient and . . . the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial."[125]

As *Boykin* and its progeny suggest, a well-considered plea colloquy serves not only to ensure the plea is entered voluntarily and intelligently, but also to make a record that will answer a post-conviction attack on the resulting conviction.[126] Colloquy questions addressing immigration consequences follow two lines of questioning. The first, relating to effective performance, is whether the defendant has been advised or is aware of the immigration consequences of the plea. The second, relating to prejudice, identifies whether the defendant is particularly likely to show harm in the event the advice he received is incorrect.

Strickland's first prong requires defendants claiming ineffective assistance of counsel to show counsel's performance was deficient.[127] In the *Padilla* context, this means counsel failed to give relevant advice regard-

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122. *See, e.g.*, Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.").

123. *See* Mitchell v. United States, 526 U.S. 314, 322 (1999) ("The purpose of a plea colloquy is to protect the defendant from an unintelligent or involuntary plea.").

124. Padilla v. Kentucky, 559 U.S. __, 130 S. Ct. 1473, 1476 (2010).

125. Strickland v. Washington, 466 U.S. 668, 668 (1984); *see also* Smith, *supra* note 97, at 523–25, 543 (arguing *Strickland* adopted lax performance standards and its definition of prejudice treats juries "as simple fact finders who balance aggravating and mitigating factors instead of making the distinctly moral judgment of whether the defendant should receive mercy despite the severity of his crime[,]" but ultimately finding federal and state courts have reinvigorated the *Strickland* standard and ineffectiveness claims are being taken more seriously).

126. Boykin v. Alabama, 395 U.S. 238, 242–44 (1969); *see also* Anne R. Traum, *Mass Incarceration at Sentencing*, 64 Hastings L.J. 423, 439 n.116 (2013) ("Plea agreement procedures are intended to withstand appellate review and preclude collateral review.").

127. *Strickland*, 466 U.S. at 669.

ing the plea's immigration consequences to the defendant.[128] *Padilla* tells us the relevant advice is dependent upon the defendant's particular circumstances.[129] In this important aspect, the advice required by *Padilla* for noncitizens is different in character than the general advice required regarding the right to remain silent, the right to a jury trial, and the right to confront witnesses. These latter rights are the same and the advice is the same from defendant to defendant.

However, advice relating to immigration consequences is specific to the defendant and his or her particular circumstances.[130] In this regard, the advice the attorney is required to provide is fluid, much like the advice relating to the range of punishment.[131] Like immigration consequences, the range of potential punishment varies from offense to offense[132] and from defendant to defendant.[133] The best practice for both cases is to confirm the defendants have been given advice relevant to their circumstances and that they understand the advice.

Some have suggested state courts in particular lack the institutional immigration law competence to reliably determine whether a particular state law conviction will clearly result in deportation.[134] This institutional incompetence, if it exists, would be a more critical concern if the trial court were assigned the primary duty to provide the defendant the relevant advice regarding the plea's immigration consequences. This, however, is not the case. The defense attorney owes this duty to the client and it is not at all certain—and in many instances may be doubtful—whether a trial court's generic admonishment about potential immigration consequences will be an adequate substitute for the defense attorney's counsel, at least where the immigration consequences are "truly

128. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1476 (2010).

129. *See id.* at __, 130 S. Ct. at 1483 (2012) (discussing the level of the attorney's duty depends on whether "the deportation consequences of a particular plea are unclear or uncertain . . . ").

130. *See id.* at __, 130 S. Ct. at 1483 (2012).

131. *See id.* at __, 130 S. Ct. at 1484 (2012) (quoting *Strickland*, 466 U.S. at 690) ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.").

132. *See generally* TEX. PENAL CODE § 12.01 (2011) (describing a range of punishments for crimes identified in the Texas Penal Code); *see also* Stacy Caplow, *Governors! Seize the Law: A Call to Expand the Use of Pardons to Provide Relief from Deportation*, 22 B.U. PUB. INT. L.J. 293, 328 n.165 (2013) (describing the sentencing ranges produced through the federal sentencing guidelines as a "complex matrix that examines many factors").

133. *See generally* TEX. PENAL CODE § 12.41 (2011) (classifying offenses not obtained from a conviction under the Texas Penal Code).

134. César Cuauhtémoc García Hernández, *When State Courts Meet* Padilla: *A Concerted Effort Is Needed to Bring State Courts Up to Speed on Crime-Based Immigration Law Provisions*, 12 LOY. J. PUB. INT. L. 299, 311 (2011).

clear."[135] However, the purpose of the *Padilla* colloquy should not be for the *court* to advise the defendant about the immigration consequences. The colloquy's better purpose is to establish if the *attorney* has, in fact, fulfilled that duty.

At a minimum, *Padilla's* mandate requires the noncitizen defendant's attorney to know the following: "(1) the immigration status and criminal history of the client; (2) immigration ramifications of a proposed plea; (3) the client's wishes and plans for the near future; and (4) a criminal trial strategy to meet the client's needs."[136] The court's questions should be directed to establish that the attorney has made these determinations.

Determining a noncitizen's immigration status can be a very complex endeavor in its own right.[137] However, for *Padilla* purposes, the trial court's concern should focus on the noncitizen's right to remain in the country. Generally, noncitizens without legal status at the time of making a plea have no right to remain or re-enter the country with or without a criminal conviction.[138] Even among persons without legal status who have some cognizable claim for immigration relief, their immigration statuses are uncertain at best.[139] Where the immigration consequences of

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135. *See* State v. Favela, 311 P.3d 1213, 1222 (N.M. Ct. App. 2013), *cert. granted* (2013) (holding "a court's warning or advisement to a defendant regarding possible immigration consequences of accepting a plea is never, by itself, sufficient to cure the prejudice that results from ineffective assistance of counsel in that regard"); Enyong v. State, 369 S.W.3d 593, 602 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgm't vacated) (holding general plea admonishments regarding possible immigration consequences contained in plea paperwork were not sufficient to satisfy the Sixth Amendment's effective assistance of counsel requirement to give correct advice where the immigration consequences are "truly clear").

136. 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, 41 (2012); *see generally* MODEL RULES OF PROF'L CONDUCT §§ 1.0(e), 1.1, 1.2, 1.3 (2013), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html (outlining the basic rules of attorney-client interaction).

137. *See* Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of* McCollouch, 33 BERKELEY J. EMP. & LAB. L. 153, 189–90 (2012) ("Determining immigration status or whether a noncitizen is deportable are complex judgments that state and local officers untrained in the intricacies of federal immigration law are ill-suited to make."); Hew, *supra* note 136 (noting determining citizenship "can be complicated").

138. *See* United States v. Aceves, Cr. No. 08-00501 SOM, 2011 WL 976706, at *5 (D. Haw., Mar. 17, 2011) (concluding the noncitizen defendant was subject to automatic removal because he was in the country without legal status, not due to his criminal conviction).

139. César Cuauhtémoc García Hernández, Padilla v. Kentucky's *Inapplicability to Undocumented and Non-Immigrant Visitors*, 39 RUTGERS L. REC. 47, 51 (2012) ("Without a legally cognizable 'right to remain in the United States,' non-immigrants and undocumented individuals are unlikely to reap any benefit from *Padilla*.").

criminal convictions are uncertain, attorneys' constitutional obligations are fulfilled when they advise the client about the potential adverse consequences of a guilty plea.[140]

Commentators have argued trial courts should either refrain or be prohibited from questioning noncitizens about immigration status on Fifth Amendment grounds.[141] This is a valid concern; however, courts accepting a guilty plea bargain have a duty to ensure the plea is entered voluntarily and intelligently, and post-*Padilla*, immigration status and consequences are an integral part of that calculus.[142] In *Padilla*, the Supreme Court could have erased this Fifth Amendment concern by allowing a generic warning to suffice for all noncitizens. However, because *Padilla* requires warnings tailored to the noncitizen's individual situation and offense, that status becomes a necessary part of the plea colloquy.

Noncitizen defendants with a legal right to remain in the country, whether by lawful permanent resident or visa status, have greater protections under immigration law and a right to more specific advice regarding immigration consequences.[143] For example, Jose Padilla, in his landmark case, was a lawful permanent resident who had resided in the country for four decades. But for the drug conviction, Padilla had the right to remain in the country indefinitely.[144] Noncitizens in these circumstances are entitled to specific immigration advice because the consequences of criminal conviction are "truly clear."[145]

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140. Padilla v. Kentucky, 559 U.S. __, 130 S. Ct. 1473, 1483 (2010) ("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.").

141. *See* Altman, *supra* note 99, at 21 (noting "judges run the risk of compelling disclosure of privileged attorney-client communication or violating noncitizen defendants' Fifth Amendment right against self-incrimination" when they inquire into a noncitizen's immigration status); Alice Chapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 611 (2011) ("[I]t would be inappropriate, harmful, and potentially unconstitutional for trial courts to question defendants about their immigration status."); Stephen Zeidman, Padilla v. Kentucky: *Sound and Fury, or Transformative Impact*, 39 FORDHAM URB. L.J. 203, 218 n.57 (2011) (concluding a court's inquiry into the defendant's immigration status raises Fifth Amendment concerns).

142. *See Padilla*, 559 U.S. at __, 130 S. Ct. at 1493 (2010) (suggesting pleas entered with the advice of competent counsel are purported to be voluntary and intelligent decisions).

143. *See id.* at __, 130 S. Ct. at 1486 (2010) ("It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel.").

144. *Id.* at __, 130 S. Ct. at 1477 (2010).

145. *Id.* at __, 130 S. Ct. at 1477 (2010) ("[A] criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was

There are broad classes of offenses in immigration law that invoke deportation proceedings for otherwise legal noncitizens.[146] These are aggravated felonies;[147] crimes involving moral turpitude;[148] crimes involving child abuse;[149] violations of protective orders;[150] stalking-related crimes;[151] crimes involving firearm offenses;[152] failure to register as a sex offender;[153] and controlled substances offenses.[154] These classifications include a broad range of state law crimes. During the plea colloquy, the court should engage counsel in a discussion about whether the charged offense falls into a deportable category. If so, and if the noncitizen has legal status to otherwise remain in the country, the immigration consequence is likely clear, and the court should inquire further about the advice provided to the defendant to establish the Sixth Amendment obligation is met and the plea entered is voluntarily and intelligently made.

Finally, courts can inquire as to the defendant's wishes regarding possible removal in cases in which the consequences are unclear by asking defendants whether they would choose to accept the plea if the conviction would result in certain deportation. Where a noncitizen indicates on the record a desire to remain in the country, even if subjected to greater punishment, the need for correct immigration advice to avoid prejudice is greater. On the other hand, an immigrant who expresses a choice for lesser punishment, even in the face of deportation, will be unlikely to demonstrate prejudice in any post-conviction proceeding. This question is not necessary to demonstrate the plea is voluntarily and intelligently made, but can be useful as a fact finding starting point if post-conviction review is required.

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here, the duty to give correct advice is equally clear."). The Texas Code of Criminal Procedure requires a court, before accepting a plea of guilty or plea of nolo contendre, admonish the defendant "that if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendre for the offense charged may result in deportation, the exclusion of admission to this country, or the denial of naturalization under federal law." Tex. Code Crim. Pro. § 26.13 (a)(4). The *Padilla* holding suggests this general admonishment is unlikely to cure defective advice from defense counsel in cases where the immigration consequences to the defendant are "truly clear."

146. *See* 8 U.S.C. § 1227(a)(2) (2012) (listing deportable offenses for legal noncitizens).

147. *Id.* § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

148. *Id.* § 1227(a)(2)(A)(i).

149. *Id.* § 1227(a)(2)(E)(i).

150. *Id.* § 1227(a)(2)(E)(ii).

151. *Id.* § 1227(a)(2)(E)(i).

152. 8 U.S.C. § 1227(a)(2)(C) (2012).

153. *Id.* § 1227(a)(2)(A)(v).

154. *Id.* § 1227(a)(2)(B).

V. CONCLUSION

Trial judges have a clear obligation to determine a guilty plea is made voluntarily and intelligently before accepting it. After *Padilla v. Kentucky*, this requires close consideration of the immigration consequences imposed by the plea and conviction. The noncitizen's defense attorney has the primary duty to investigate the client's status, to negotiate the best possible plea, and to correctly advise about any immigration consequences within *Padilla's* advisory framework. Judges, as impartial arbiters, are not charged with curing any shortcomings in the attorney's work and giving legal advice to the defendant. However, judges may—and should—inquire about the matter during the plea colloquy to ensure the attorney's work in the area was effectively done and the advice given meets *Padilla's* requirements. This inquiry will provide a record showing the plea was voluntarily and intelligently given, guaranteeing the defendant's rights are preserved and providing a starting point for post-conviction review.