The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 16 | Number 3 Article 4

1-1-2014

Effective Plea Bargaining for Noncitizens

Craig Estlinbaum

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

* Judge, 130th District Court of Texas. B.S. and M.Agr., Texas A&M University. J.D., South Texas College of Law.

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]

---

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

---

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

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]

---

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-

---

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-

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

---

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

---

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-

---

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

---

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.

---

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.

---

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-

---

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

---

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]

---

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.

---

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.