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Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendants' Ability To Bring Successful *Padilla* Claims

ABSTRACT. In *Padilla v. Kentucky*, the Supreme Court held that a lawyer's failure to advise her noncitizen client of the deportation consequences of a guilty plea constitutes deficient performance of counsel in violation of a defendant's Sixth Amendment rights. In the plea context, defendants are also protected by the Fifth Amendment privilege against self-incrimination and the Due Process Clause, which requires that judges and defendants engage in a conversation regarding the consequences of the plea—the so-called "plea colloquy"—before the defendant can enter a valid guilty plea.

In many plea colloquies, judges issue general warnings to defendants regarding the immigration consequences of a guilty plea. Since *Padilla*, a number of lower courts have held that such general court warnings prevent a defendant from proving prejudice and prevailing on an ineffective assistance of counsel claim where there might otherwise be a *Padilla* Sixth Amendment violation.

This Note argues that those rulings mistakenly conflate the role of the court in a Fifth Amendment plea colloquy and the role of counsel under the Sixth Amendment and, further, that they misread the clear directives of *Padilla*. In the plea context, the court and defense counsel serve complementary but distinct functions in our constitutional structure; neither can replace the other, and the failure of either court or counsel constitutes a breakdown in our system. Circumscribing *Padilla*'s requirements by allowing plea colloquies to "cure" the prejudice created by Sixth Amendment *Padilla* violations is problematic because the Fifth Amendment plea colloquy provides significantly less protection to criminal defendants. Thus, the substitution of the plea colloquy for advice from counsel will substantially undercut the *Padilla* decision.

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INTRODUCTION

In 2010, the Supreme Court held in *Padilla v. Kentucky*[1] that a lawyer's failure to advise her noncitizen client of the deportation consequences of a guilty plea constitutes ineffective assistance of counsel in violation of a defendant's Sixth Amendment rights. As with many landmark decisions, the ruling left several unanswered questions for the lower courts to decide. The answers to those questions have the capability to either considerably expand or limit the practical effects of the decision on litigants. The purpose of this Note is to analyze one unanswered question left in *Padilla*'s wake that could have the effect of seriously circumscribing the protection that *Padilla* provides.

The test for ineffective assistance of counsel, established in *Strickland v. Washington*, has two parts: a defendant must first show that her counsel was constitutionally deficient and then show that the deficiency prejudiced the result of her case.[2] In cases involving guilty pleas, a defendant must show that in the absence of deficient counsel she would have insisted on going to trial.[3] Defendants are also protected by the Due Process Clause, which requires that judges and defendants engage in a conversation regarding the consequences of the plea—the so-called "plea colloquy"—before defendants can enter valid guilty pleas. The plea colloquy is meant to ensure that the plea is knowing and voluntary. While not required by the Fifth Amendment, many states mandate that judges issue general warnings to defendants regarding the immigration consequences of a guilty plea.[4] Since *Padilla*, a number of lower courts have held that such general court warnings prevent a defendant from proving prejudice and prevailing on an ineffective assistance of counsel claim where there might otherwise be a Sixth Amendment *Padilla* violation.[5]

This Note argues that those rulings mistakenly conflate the role of the court in Fifth Amendment plea colloquies and the role of counsel under the Sixth Amendment, and, further, that they misread the clear directives of *Padilla*. Such circumscribing of *Padilla*'s requirements is problematic because the Fifth Amendment plea colloquy provides significantly less protection to

1. 130 S. Ct. 1473 (2010).

2. 466 U.S. 668, 687 (1984).

3. *See* Hill v. Lockhart, 474 U.S. 52 (1985).

4. *See* Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 148 & n.116 (collecting sources).

5. *See infra* Subsection III.B.2.

criminal defendants, and thus the substitution of the plea colloquy for advice from counsel will substantially undercut the *Padilla* decision.

The Note proceeds in six parts. Part I discusses the Court's doctrines on the Sixth Amendment right to effective assistance of counsel and the Fifth Amendment plea colloquy requirement. It argues that these two protections serve complementary but distinct functions in our constitutional structure—neither can replace the other, and the failure of either constitutes a breakdown in our system. Part I also discusses the background of *Padilla v. Kentucky* and highlights the constitutional concerns that arise when courts pay insufficient attention to the distinct roles of the court during the plea colloquy and counsel in the guilty plea context. Prior to *Padilla*, lower courts nearly uniformly imported the collateral consequences rule, designed to limit the requirements of the court in the Fifth Amendment plea colloquy, into the Sixth Amendment context to limit the responsibilities of counsel. The application of this rule then directed lower courts' holdings that counsel was not required to advise defendants regarding the immigration consequences of their pleas, leading to the challenge in *Padilla*.

Part II describes the Court's decision in *Padilla*, which rejected the importation of the collateral consequences rule into the Sixth Amendment context. Under *Padilla*, a defendant can establish that her counsel was deficient if her attorney failed to advise her of the immigration consequences of a guilty plea. However, the *Padilla* decision did not address the prejudice prong of the *Strickland* test, and therefore left many questions of application unanswered. Part II explains how courts may circumscribe *Padilla*'s protections by using plea colloquy warnings to negate findings of prejudice in Sixth Amendment *Padilla* claims. Part III provides an in-depth account of how courts have implemented *Padilla* thus far, focusing particularly on how plea colloquies affect findings of prejudice. Part IV argues that the lower courts' use of plea colloquies to negate findings of prejudice in *Padilla* claims repeats the mistake made by lower courts regarding the importation of the collateral consequences rule into the Sixth Amendment by paying scant attention to the distinct functions of counsel and judge in the plea context. Given their distinct functions in the system, general plea colloquy warnings represent very weak evidence that the deficiency of counsel did not prejudice the defendant's decision to accept a guilty plea offer. Further, Part IV argues that both the language and logic of *Padilla* directly oppose the conclusion that a plea colloquy warning cures the deficiency of counsel.

Part V highlights the particular importance of maintaining the robust protection mandated by *Padilla* for noncitizen defendants facing possible deportation if they plead guilty to a crime. *Padilla*'s mandate is all the more crucial given the prevalence of guilty pleas, the harshness of the current

immigration laws, and the low rates of representation for noncitizens in removal proceedings. Finally, Part VI concludes by outlining possible strategic considerations for litigators challenging the lower court decisions.

I. THE SIXTH AMENDMENT RIGHT TO COUNSEL AND FIFTH AMENDMENT PLEA COLLOQUIES: COMPLEMENTS, NOT SUBSTITUTES IN THE CONTEXT OF GUILTY PLEAS

A. The Sixth Amendment Right to Effective Assistance of Counsel and the Fifth Amendment Voluntary Waiver Requirement

A defendant entering into the plea bargaining stage is protected by both the Sixth Amendment right to effective assistance of counsel, which entitles him to the guidance of a proficient defense attorney, and the Fifth Amendment Due Process requirement that a valid guilty plea be "knowing," "intelligent," and "voluntary."[6] These two rights, both well-established in Supreme Court jurisprudence, work in tandem to ensure that the adversarial process functions fairly, not only in trials, but in plea bargains as well.

Since 1970, the Supreme Court has recognized that the Sixth Amendment right to counsel is the right "to the *effective* assistance of competent counsel,"[7]

6. Brady v. United States, 397 U.S. 742, 748 (1970); *see also* Boykin v. Alabama, 395 U.S. 238, 242-43 (1969).

7. McMann v. Richardson, 397 U.S. 759, 771 (1970) (emphasis added). The concept of *effective* assistance of counsel was first articulated by the Supreme Court in *Powell v. Alabama*, 287 U.S. 45 (1932). However, that case addressed the right to counsel as embodied in the Due Process Clause of the Fourteenth Amendment, before *Gideon v. Wainwright*, 372 U.S. 335 (1963), incorporated the Sixth Amendment against the states. Therefore, the holding in *Powell* was limited to extreme cases:

> All that it is necessary now to decide . . . is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

287 U.S. at 71. *McMann v. Richardson* was the first case to discuss the right to effective assistance of counsel under the Sixth Amendment. 397 U.S. at 771; *see* Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 629 (1986); Virginia Hatch, Ineffective Assistance of Counsel and the U.S. Supreme Court: History and Development of a Constitutional Standard 14 (Oct. 1, 2009) (unpublished M.A. thesis, Boise State University), http://scholarworks.boisestate.edu/crimjust_gradproj/1.

because it "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."[8] In its 1984 decision in *Strickland v. Washington*, the Court outlined a two-part test for ineffective assistance of counsel claims. In order to prevail, a defendant must show: (1) "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) that "the deficient performance prejudiced the defense."[9] As to the first requirement, the Court held that counsel's performance should be analyzed under an "objective standard of reasonableness," relying on benchmarks for prevailing norms of practice such as the American Bar Association standards.[10] The *Strickland* threshold is difficult to meet. In applying the first prong, courts should be "highly deferential" in scrutinizing counsel's performance in order to mitigate the effects of hindsight.[11] Further, where the defendant successfully demonstrates deficient performance, he must also "affirmatively prove prejudice."[12] Where lack of prejudice is clear, courts need not first determine whether the performance was deficient.[13]

One year after *Strickland*, in *Hill v. Lockhart*,[14] the Court applied the *Strickland* analysis to ineffective assistance of counsel claims in the guilty plea context. The Court held that in order to satisfy the prejudice requirement where a defendant pled guilty, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[15] This test erects a high bar for success. However, by applying the *Strickland* analysis to the plea context, the Court recognized the modern reality that, in many cases, advice on plea bargaining is the most important service that the defense bar provides to its clients. Given that the vast majority of all criminal convictions are the result of guilty pleas,[16] the *Hill* ruling was pivotal to maintaining the right to counsel in criminal cases.

8. Strickland v. Washington, 466 U.S. 668, 685 (1984).

9. *Id.* at 687.

10. *Id.* at 688.

11. *Id.* at 689.

12. *Id.* at 693.

13. *Id.* at 697.

14. 474 U.S. 52 (1985).

15. *Id.* at 59.

16. Recent reports indicate that well over 90% of both state and federal convictions are the result of guilty pleas. *See infra* notes 194-197 and accompanying text.

In the plea bargaining context, a defendant is protected by the Fifth Amendment in addition to the Sixth Amendment right to counsel. In *Boykin v. Alabama*[17] and *Brady v. United States*,[18] the Court recognized that a guilty plea constitutes a waiver of the Fifth Amendment right against self-incrimination as well as a waiver of the right to a trial by jury and the right to confront one's accusers. Therefore, the Due Process Clause requires that, in order that the waiver of these rights be valid, the guilty plea must be knowing, voluntary, and intelligent.[19] It is the responsibility of the court, through the plea colloquy, to ensure the validity of the waiver before accepting the plea.[20] Where a plea is entered involuntarily, it must be set aside as invalid.[21] The voluntariness of a plea must be evaluated "by considering all of the relevant circumstances surrounding it."[22] Rule 11 of the Federal Rules of Criminal Procedure[23] (and its state analogues),[24] which requires that the court inform the defendant of the various consequences of his plea in a colloquy preceding acceptance of the plea, is designed to meet the Fifth Amendment waiver requirement.[25] Where the court fails to properly execute a Rule 11 plea colloquy and thus ensure a valid plea, a defendant can vacate his plea on the grounds that his waiver was not knowing or voluntary.[26] However, as in the context of the Sixth Amendment

17. 395 U.S. 238 (1969).

18. 397 U.S. 742 (1970).

19. *Id.* at 748.

20. *Boykin*, 395 U.S. at 243-44 ("What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review . . . .") (reversing the conviction where the record "[did] not disclose that the defendant voluntarily and understandingly entered his pleas of guilty" (quoting Boykin v. State, 207 So. 2d 412, 415 (Ala. 1968))).

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

22. *Id.* at 749.

23. FED. R. CRIM. P. 11.

24. *See, e.g.*, ALASKA R. CRIM. P. 11; OHIO R. CRIM. P. 1; W. VA. R. CRIM. P. 11.

25. McCarthy v. United States, 394 U.S. 459, 465 (1969) ("[A]lthough the procedure embodied in Rule 11 has not been held to be constitutionally mandated, it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary." (citation omitted)).

26. *Id.* at 471-72 ("We . . . conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea.").

standard, the defendant must show that the Rule 11 deficiency was prejudicial.[27]

B. *The Sixth Amendment Right to Counsel and Fifth Amendment-Mandated Court Plea Colloquy: Complementary but Distinct Roles in Our Criminal Justice System*

While the Fifth Amendment duties of the court and the Sixth Amendment responsibilities of defendant's counsel in the plea context are intimately related in their roles protecting the defendant in the criminal justice system, they are complements, not substitutes, in our constitutional structure. If the Fifth Amendment plea colloquy were sufficient to protect defendants at the plea bargaining stage, the right to counsel would be unnecessary for those defendants who choose to plead guilty rather than go to trial. However, the Court has repeatedly recognized that "defendants cannot be left to the mercies of incompetent counsel" at the plea bargaining stage.[28] Therefore, the plea colloquy alone is not sufficient to protect a defendant's rights at the guilty plea stage of the criminal process. Likewise, effective assistance of counsel does not negate the court's duty to ensure the voluntariness of a plea. *Boykin* and its progeny established the independent importance of the court's duty to create a record determining the voluntariness of a plea. In *McCarthy v. United States*,[29] the Court set aside a guilty plea that was accepted in violation of Rule 11, even though the defendant had been represented by counsel throughout.[30] Taken together, *McMann*, *Boykin*, *McCarthy* and their progeny clearly demonstrate that competent counsel does not negate the need for a Fifth Amendment plea colloquy ensuring voluntariness; and vice versa, a competent Fifth Amendment plea colloquy cannot negate the requirement of competent counsel at every critical stage of the criminal process.

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27. The expansive rule applied in *McCarthy*—that all Rule 11 deviations merit setting aside a guilty plea—was limited by a subsequent amendment to Rule 11: "A variance from the requirements of this rule is harmless error if it does not affect substantial rights." FED. R. CRIM. P. 11(h). The Supreme Court has interpreted the rule to mean that defendants can only rely on Rule 11 violations to set aside verdicts if they can demonstrate prejudice—i.e., that but for the violation, they would not have pled guilty. *See* United States v. Dominguez Benitez, 542 U.S. 74 (2004).

28. McMann v. Richardson, 397 U.S. 759, 771 (1970); *see also* Hill v. Lockhart, 474 U.S. 52, 58 (1985) (applying the *Strickland* test to the guilty plea context).

29. *McCarthy*, 394 U.S. at 459.

30. While the Court now requires a demonstration of prejudice, akin to the requirement in the Sixth Amendment context, *McCarthy*'s central holding, the necessity of a court colloquy ensuring a voluntary plea, remains valid.

The Court's insistence on the assurance of the voluntariness of every guilty plea through a plea colloquy and on effective counsel for all defendants at the guilty plea stage accords with the distinct goals that the two protections serve in our constitutional system. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[31] The Supreme Court has repeatedly emphasized that the purpose of the Sixth Amendment is to "protect[] the unaided layman at critical confrontations with his adversary"[32] by providing "the right to rely on counsel as a 'medium' between him[self] and the State."[33] In other words, the right to counsel is "intended to minimize the public prosecutor's tremendous advantage over lay persons,"[34] and thus "level the adversarial playing field, thereby promoting balance and fairness within the criminal justice system."[35] Thus, the goal of the Sixth Amendment is broad in scope; it serves to protect not only individual defendants, but also the integrity of the entire criminal justice system by ensuring that imbalances of power do not subvert the adversarial process upon which our system relies. The Court has recognized that the Sixth Amendment's guarantee of the right to counsel is "indispensable to the fair administration of our adversarial system of criminal justice."[36]

Meanwhile, the Fifth Amendment plea colloquy is a prophylactic mechanism meant to ensure that the defendant properly waives his right against self-incrimination as well as the other constitutional protections of a trial. While the plea colloquy is an important part of the plea process, its purpose is limited to "ensuring (in the absence of coercion, improper threats, misrepresentations, or promises) that the accused understands the nature of the constitutional

31. U.S. CONST. amend. VI.

32. United States v. Gouveia, 467 U.S. 180, 189 (1984).

33. Maine v. Moulton, 474 U.S. 159, 176 (1985).

34. Brooks Holland, *A Relational Sixth Amendment During Interrogation*, 99 J. CRIM. L. & CRIMINOLOGY 381, 388 (2009) (quoting Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1640 (2003)); *see also* Michael C. Mims, *A Trap for the Unwary: The Sixth Amendment Right to Counsel After* Montejo v. Louisiana, 71 LA. L. REV. 345, 369 (2010) ("[T]he primary function of the Sixth Amendment right to counsel is to ensure a defendant's right to a fair trial by putting him on a level playing field with the prosecutor.").

35. Geoffrey M. Sweeney, Note, *If You Want It, You Had Better Ask for It: How* Montejo v. Louisiana *Permits Law Enforcement To Sidestep the Sixth Amendment*, 55 LOY. L. REV. 619, 625 (2009).

36. *Moulton*, 474 U.S. at 168-69.

protections that he is waiving."[37] From this purpose flows the court's limited responsibility to ensure that the defendant has "sufficient understanding of the nature of the charges such that his plea can stand as 'an intelligent admission of guilt' and that he understands the 'direct consequences' of the conviction."[38]

From the foregoing, it is clear that the Sixth Amendment right to counsel and the Fifth Amendment plea colloquy serve analytically distinct purposes. The Fifth Amendment plea colloquy is by its nature a far more limited enterprise. In fact, the Court's rulings on the bounds of the Fifth Amendment plea colloquy assume the existence of broader counsel provided by the defendant's attorney, as guaranteed by the Sixth Amendment. In *Brady*, the Court indicated that "an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney,"[39] and then, in upholding the plea, observed that Brady had been "represented by competent counsel throughout."[40] The *Brady* Court recognized that, regardless of the plea colloquy, "a guilty plea to a felony charge entered without counsel and without a waiver of counsel is invalid."[41] According to *McMann* and *Strickland*, constitutional provision of counsel means "effective assistance of counsel."[42] Thus, in *Brady*, where the defendant pled guilty to avoid the death penalty, if a lawyer had insufficiently advised the defendant on the relative advantages and disadvantages of the plea for his sentence, a plea colloquy regarding those consequences would not be sufficient. The *Brady* Court's reasoning compels the conclusion that effective guidance from counsel is vital to the defendant regardless of the breadth of the plea colloquy, which merely ensures the voluntariness of the defendant's waiver of his Fifth Amendment rights. In other words, the *Brady* Court found the limited plea

37. Brief of Petitioner at 31, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651) (citing Henderson v. Morgan, 426 U.S. 637, 645 n.13 (1976)).

38. *Id.* at 31 (quoting *Henderson*, 426 U.S. at 645 n.13; Brady v. United States, 397 U.S. 742, 755 (1970)).

39. 397 U.S. at 748 n.6.

40. *Id.* at 743; *see* Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 728 (2002); *see also* Brief of Petitioner, *supra* note 37, at 30 ("Indeed, judges' duties to ensure the voluntariness of pleas are restricted precisely because competent counsel will provide a broader range of advice tailored to each particular defendant's needs."); Roberts, *supra* note 4, at 172 ("Brady brought no Sixth Amendment claim before the Court; indeed, the decision found that Brady 'had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty.'" (quoting *Brady*, 397 U.S. at 754)).

41. *Brady*, 397 U.S. at 748-49 n.6.

42. Strickland v. Washington, 466 U.S. 668, 687 (1984); McMann v. Richardson, 397 U.S. 759, 771 (1970).

colloquy sufficient precisely because it was complemented by the necessarily more robust protection of competent counsel.

The court and counsel's separate roles in the system align with their distinct purposes in protecting defendants, particularly in the plea process: "The judge is neutral, but counsel is supposed to pursue the interests of the client."[43] Moreover, the role of court and counsel are defined in contrast to one another; while counsel must investigate, advise, and advocate for his client, "the court's function and duties quintessentially *exclude* such assistance, advocacy and consultation."[44] As discussed above, the role of counsel is seen as "indispensable" precisely because the judge, in the role of neutral arbiter, cannot fulfill the functions of counsel. The Court wrote in *Powell v. Alabama*: "[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? . . . [A judge] cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."[45] In the plea process, the judge cannot, and should not, investigate facts, determine the goals of the client, and negotiate with the prosecutor to achieve the best outcome. These are tasks quintessentially left to defense counsel.

C. *The Collateral Consequences Rule: Inattention to the Distinct Roles of Courts and Counsel in the Plea Context Leading to the* Padilla *Challenge*

The previous Section demonstrated the important doctrinal and normative distinctions between the role of the courts in the plea colloquy and the role of counsel in the plea context. However, prior to *Padilla*, the lower courts, without giving due consideration to these distinctions, imported wholesale the collateral consequences rule—which limited the responsibilities of the court in plea colloquies—into the Sixth Amendment context, thereby limiting the responsibilities of counsel. According to the collateral consequences rule, neither court nor counsel is required to advise a defendant of any collateral consequence of a conviction before she enters a guilty plea. Since courts considered deportation to be a collateral consequence of a conviction, courts categorically held that effective assistance of counsel did not encompass advice

43. Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to* Padilla v. Kentucky, 25 CRIM. JUST. 21, 28 (2010).

44. Brief of Petitioner, *supra* note 37, at 32 (quoting *In re* Resendiz, 19 P.3d 1171, 1182 (Cal. 2001)).

45. 287 U.S. 45, 61 (1932).

on the deportation consequences of pleas. This state of affairs led to the challenge in *Padilla v. Kentucky*. The importation of the collateral consequences rule into the Sixth Amendment context demonstrates how courts, by paying scant attention to the distinct functions of court and counsel in the plea context, may inappropriately narrow the protection of the Sixth Amendment right to counsel by equating its role with that of the court during the plea colloquy.[46]

As discussed above, the Fifth Amendment requires that a guilty plea be knowing, intelligent, and voluntary.[47] It is the court's responsibility, through the plea colloquy, to ensure that all accepted pleas are indeed knowing and voluntary.[48] In *Brady v. United States*, the Court held that the voluntariness of the plea hinged on the defendant's knowledge of the "direct consequences" of the plea.[49] The lower courts interpreted this holding to mean, by negative implication, that courts need not inform defendants of indirect, or collateral, consequences of the plea.[50] The category of collateral consequences includes sex offender registration, loss of welfare benefits, license revocation, and other job

46. Scholars have made similar prudential arguments regarding inattention to the distinct functions of Fifth Amendment prophylactic rules and the broader Sixth Amendment right to counsel in urging the Court to reconsider its decision in *Montejo v. Louisiana*, 556 U.S. 778 (2009). *Montejo* overturned the rule established in *Michigan v. Jackson*, 475 U.S. 625 (1986)—that after assertion of the right to counsel in an arraignment or other proceeding, any waiver of the right to counsel where police initiated interrogation is presumptively invalid. Scholars argue that Sixth Amendment concerns, distinct from Fifth Amendment concerns arising out of the Fifth Amendment's more limited "right to counsel" in interrogation scenarios, were ignored in the *Montejo* Court's analysis. *See, e.g.*, Mims, *supra* note 34; Sweeney, *supra* note 35. These prudential arguments are noteworthy; however, *Montejo* arose out of an entirely different doctrinal context than *Padilla*.

47. Brady v. United States, 397 U.S. 742, 748 (1970).

48. FED. R. CRIM. P. 11(b)(2); Boykin v. Alabama, 395 U.S. 238, 242 (1969).

49. 397 U.S. at 755 ("The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit: '[A] plea of guilty entered by one fully aware of the *direct* consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).'" (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958))).

50. *See, e.g.*, United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971) ("We note that the accused must be 'fully aware of the *direct* consequences.' We presume that the Supreme Court meant what it said when it used the word '*direct*'; by doing so, it excluded *collateral* consequences." (quoting *Brady*, 397 U.S. at 755)); *see also* Chin & Holmes, *supra* note 40, at 728.

eligibility consequences.[51] Direct consequences are often defined as those that are "automatic,"[52] and the exclusion of collateral consequences from the plea colloquy is sometimes justified on the basis that they are "beyond the control of the sentencing court."[53] The bright line rule against requiring disclosure of collateral consequences in the plea colloquy became deeply entrenched.[54] It continues to provide guidance to courts in executing colloquies and promotes the goal of assuring the finality of guilty pleas.

In the years following *Strickland* and *Hill*—which established the right to effective assistance of counsel in the plea context—the lower courts adopted the collateral consequences rule from the Fifth Amendment plea colloquy context and applied it to the Sixth Amendment requirements of counsel. Therefore, a rule that previously solely affected the duties of courts subsequently also limited counsel's duty to inform clients of only the direct consequences of their pleas. Ultimately, the collateral consequences rule was applied in the Sixth Amendment context by practically all federal, and most state, courts.[55] Therefore, under the prevailing federal rule, defense counsel were not required to advise defendants on collateral consequences that might significantly affect a defendant's judgment about whether or not to accept a plea. Courts concluded that parole eligibility, consecutive versus concurrent sentencing, disenfranchisement, disqualification for public benefits, dishonorable discharge, loss of business or professional licenses, and many other significant

51. Chin & Holmes, *supra* note 40, at 705-06.

52. *Id.* at 704 n.45 (quoting United States v. Littlejohn, 224 F.3d 960, 966-67 (9th Cir. 2000)).

53. *Id.* at 704 (citing United States v. Gonzales, 202 F.3d 20, 27 (1st Cir. 2000)).

54. *See, e.g.*, United States v. Hernandez, 234 F.3d 252, 255 (5th Cir. 2000); Warren v. Richland Cnty. Circuit Court, 223 F.3d 454, 457 (7th Cir. 2000); Bargas v. Burns, 179 F.3d 1207, 1216 (9th Cir. 1999) ("A trial court is not required to inform a defendant of all of the consequences of his plea; instead this Court only will find a due process violation where the trial court failed to inform a defendant of the *direct* consequences of his plea, as opposed to the collateral consequences."); *see also* 9 FEDERAL PROCEDURE, LAWYER'S EDITION § 22:933 (2011) (explaining the collateral consequences rule for plea colloquies).

55. *See* Chin & Holmes, *supra* note 40, at 706-08 (noting that, as of 2002, the collateral consequence rule was accepted in the Sixth Amendment context in the "Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits, and by the Army Court of Military Review. The Court of Appeals for the District of Columbia has accepted the rule, as have courts in Alabama, Alaska, Arizona, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin").

consequences fell under the blanket category of collateral consequences.[56] When *Padilla* was decided, the ten federal circuit courts that had confronted the particular question of whether the Sixth Amendment required criminal defense lawyers to advise their clients of the immigration consequences of a guilty plea had ruled that defense lawyers had no such obligation because immigration consequences were collateral to the plea.[57] Seventeen state court jurisdictions agreed.[58] Only three courts, all state courts, had ever recognized such a requirement under the Sixth Amendment.[59]

Although the collateral consequences rule became widely accepted by the circuit courts, the Supreme Court itself had never applied the collateral consequences distinction to a Sixth Amendment case (a fact the Court noted in its opinion in *Padilla v. Kentucky*).[60] The only guidance available to lower courts was the Supreme Court's decision in *Hill v. Lockhart*.[61] The lower court in *Hill* had dismissed the defendant's ineffective assistance of counsel claim on the basis that parole eligibility was a collateral consequence about which the

56. *Id.* at 705.

57. Brief of Criminal and Immigration Law Professors et al. as Amici Curiae Supporting Petitioner's Petition for Writ of Certiorari at 10-11, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651) [hereinafter Brief of Criminal and Immigration Law Professors] (citing Santos-Sanchez v. United States, 548 F.3d 327 (5th Cir. 2008); Yong Wong Park v. United States, 222 Fed. App'x 82 (2d Cir. 2007); Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir. 2004); United States v. Fry, 322 F.3d 1198 (9th Cir. 2003); Gumangan v. United States, 254 F.3d 701 (8th Cir. 2001); United States v. Gonzalez, 202 F.3d 20 (1st Cir. 2000); United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990); Santos v. Kolb, 880 F.2d 941 (7th Cir. 1989), *superseded by statute*, Immigration Act of 1990, Pub. L. No. 101-649, § 505(b), 104 Stat. 4978, 5050 (1990); United States v. Yearwood, 863 F.2d 6 (4th Cir. 1988); United States v. Campbell, 778 F.2d 764 (11th Cir. 1985)).

58. *Id.* (citing Oyekoya v. State, 558 So. 2d 990 (Ala. Crim. App. 1989); Tafoya v. State, 500 P.2d 247, 251 (Alaska 1972); State v. Rosas, 904 P.2d 1245 (Ariz. Ct. App. 1995); Major v. State, 814 So. 2d 424 (Fla. 2002); Williams v. Duffy, 513 S.E.2d 212 (Ga. 1999); People v. Huante, 571 N.E.2d 736, 741 (Ill. 1991); Mott v. State, 407 N.W.2d 581, 583 (Iowa 1987); State v. Muriithi, 46 P.3d 1145, 1152 (Kan. 2002); Commonwealth v. Fuartado, 170 S.W.3d 384 (Ky. 2005); State v. Montalban, 810 So. 2d 1106 (La. 2002); Alanis v. State, 583 N.W.2d 573, 579 (Minn. 1998); State v. Zarate, 651 N.W.2d 215 (Neb. 2002); Barajas v. State, 991 P.2d 474 (Nev. 1999); State v. Dalman, 520 N.W.2d 860 (N.D. 1994); Commonwealth v. Frometa, 555 A.2d 92 (Pa. 1989); Nikolaev v. Weber, 705 N.W.2d 72 (S.D. 2005); State v. McFadden, 884 P.2d 1303 (Utah Ct. App. 1994)).

59. *Id.* at 12 (citing People v. Pozo, 746 P.2d 523, 527 (Colo. 1987), *rev'd on other grounds*, 746 P.2d 523 (1987) (en banc); State v. Paredez, 101 P.3d 799, 805 (N.M. 2004); State v. Creary, No. 82767, 2004 WL 351878, at *2 (Ohio Ct. App. Feb. 26, 2004)).

60. 130 S. Ct. at 1481.

61. 474 U.S. 52 (1985).

attorney did not have to advise his client.[62] Rather than affirming the decision below by applying the rigid collateral consequences rule, the Court made clear that the two-part test of *Strickland* should apply.[63] However, *Hill* did not definitively resolve the collateral consequences question because the Court dismissed the case under the prejudice prong: "We find it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the . . . requirement of 'prejudice.'"[64] As discussed above, lower courts persisted in their application of the collateral consequences rule to the Sixth Amendment context after the (ambiguous) ruling in *Hill* touched upon the question.

By defining a lawyer's responsibilities as equivalent to the duties of the court in a plea colloquy, the lower courts denigrated the robust role defense counsel is meant to play in ensuring a fair criminal process by advising defendants of their best options and, essentially, made the role of the lawyer in the plea process superfluous.[65] As Gabriel Chin and Richard Holmes forcefully argued in a 2002 article,[66] the collateral consequences rule does not rely upon the supposition that collateral consequences are irrelevant to a defendant's decision, but rather that defense counsel is better suited than courts to provide this advice. Therefore, the importation of the collateral consequences rule into the Sixth Amendment was inapposite since the rule did "not capture, even as a rule of thumb, anything important about the concerns of competent lawyers or their clients."[67] It was precisely this conflation between the role of the court and the role of counsel that the petitioners in *Padilla* challenged; the petitioner's brief argued that "the collateral-consequences doctrine originated from Rule 11 jurisprudence to define the duties of *a court* with regard to guilty pleas. It has no bearing on the distinct and more far-reaching duties of *defense*

62. *Id.* at 55 (citing Hill v. Lockhart, 731 F.2d 568, 570-73 (8th Cir. 1984)).

63. *Id.* at 58 ("We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.").

64. *Id.* at 60.

65. See Chin & Holmes, *supra* note 40, for a useful critique of the importation of the collateral consequences rule into the Sixth Amendment.

66. *See id.*

67. *Id.* at 712.

counsel with which the Sixth Amendment is concerned."[68] For the most part, the *Padilla* Court agreed.[69]

II. *PADILLA V. KENTUCKY*, REJECTING THE COLLATERAL CONSEQUENCES RULE AND THE DANGER THAT PLEA COLLOQUIES WILL BAR PREJUDICE

A. Padilla v. Kentucky*: Rejecting the Collateral Consequences Rule*

Jose Padilla, originally from Honduras, was a forty-year legal resident of the United States and a veteran of the Vietnam War. He was arrested for transporting marijuana and pled guilty to the charges against him. When Padilla asked his attorney about the effect a plea might have on his immigration status, his attorney told him, incorrectly, that he "did not have to worry about immigration status since he had been in the country so long."[70] Subsequently, when he faced deportation, Padilla brought a claim of ineffective assistance of counsel seeking to have his plea vacated. He argued that if his attorney had correctly advised him of the mandatory deportation consequences of his plea, he would have insisted on going to trial. The Supreme Court of Kentucky ruled that Padilla could not seek relief because immigration consequences were "collateral" to the plea and therefore neither silence nor affirmative misadvice of counsel was sufficient to prove ineffective assistance of counsel.[71] The Kentucky court's ruling was out of line with most lower courts; most courts recognized an affirmative misadvice exception to the collateral consequences rule.[72]

In *Padilla v. Kentucky*, a pivotal decision affecting both criminal procedure and immigration policy, the Supreme Court held that criminal defense lawyers have an affirmative obligation under the Sixth Amendment to advise their

68. Brief of Petitioner, *supra* note 37, at 25.

69. The Court noted that it had never before applied the collateral consequence rule and did not apply it in *Padilla*. However, the Court avoided technically addressing the question of whether the rule is ever appropriate in the Sixth Amendment context. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010). After *Padilla*, it is at least clear that the collateral consequences rule cannot *always* govern the analysis under the first prong of *Strickland*.

70. *Padilla*, 130 S. Ct. at 1478.

71. Commonwealth v. Padilla, 253 S.W.3d 482, 484-85 (Ky. 2008), *rev'd* 130 S. Ct. 1473.

72. *See* Brief of Criminal and Immigration Law Professors, *supra* note 57, at 13-14 (noting that only two courts, including Kentucky, had ruled that affirmative misadvice on collateral consequences could not be ineffective assistance of counsel, while seventeen courts took the contrary position).

clients of the immigration consequences of their pleas. When the deportation consequence is "succinct, clear, and explicit," lawyers have a duty to explain that consequence correctly.[73] Where the deportation consequence is uncertain or unclear, lawyers have a duty to warn a noncitizen of possible adverse immigration consequences and refer her to an immigration lawyer.[74] The *Padilla* Court refused to adopt the lower court's bright line approach, stating: "We . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."[75] Rather than directly abrogating the collateral consequences rule, the *Padilla* Court focused on the "unique nature of deportation,"[76] particularly its severity and intimate relationship to the criminal process. The Court determined that the "collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation."[77] Therefore, at minimum, advice regarding the collateral consequences of deportation must be analyzed under the ordinary two-prong test of *Strickland*. Further, the logic of *Padilla* tracks the reasonableness standard of *Strickland*, suggesting that where other collateral consequences are serious enough that a reasonable lawyer would address them, a failure to address them also violates the Sixth Amendment.

Professional standards such as the American Bar Association standards and the guidelines of National Legal Aid and Defender Association require defense counsel to warn noncitizens of the immigration consequences of conviction.[78] Under the first prong of *Strickland*, the *Padilla* Court found that these professional recommendations sufficiently show the existence of an obligation under the Sixth Amendment.[79] Furthermore, the Court acknowledged that its own jurisprudence had recognized that defendants had a reasonable expectation of such advice. In *INS v. St. Cyr*,[80] the Court had noted that "[p]reserving the client's right to remain in the United States may be more

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

74. *Id.* at 1490.

75. *Id.* at 1481 (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).

76. *Id.*

77. *Id.* at 1482.

78. *Id.*

79. *Id.* at 1482-83.

80. 533 U.S. 289 (2001), *superseded by statute*, REAL ID Act of 2005 § 106(a), 8 U.S.C. § 1252(a)(5) (2006).

important to the client than any potential jail sentence,"[81] and indicated its expectation that counsel would "follow[] the advice of numerous practice guides and . . . advise[] him" of the important immigration consequences of a plea offer.[82] The *Padilla* Court rejected the "affirmative misadvice" rule, which some courts had previously adopted and which the Solicitor General recommended to the Court,[83] whereby only affirmative misadvice, not silence, would constitute ineffective assistance of counsel. The Court reasoned that the rule would create two "absurd results": (1) it would encourage silence on the part of lawyers on a matter of importance to the client, and (2) "it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available."[84] Finally, the Court dismissed any "floodgates" concerns that might be raised by recognizing an additional ground on which defendants can collaterally attack their convictions after they are final. The Court relied on the high bar of the prejudice prong of *Strickland*, which adequately eliminates "specious claims."[85] The Court then remanded the case for further hearings on the second prong of *Strickland*: prejudice.

B. *The Plea Colloquy Warning: An Effective Barrier to Successful* Padilla *Claims?*

There are many ways in which the lower courts may cabin—and in many cases already have cabined—the reach of the *Padilla* decision. Part III discusses the various ways in which courts have addressed the plethora of questions raised by the Court's decision. This Note focuses on one way that courts may limit *Padilla*: by using plea colloquy warnings to "cure" *Padilla* violations and bar findings of prejudice. The idea of using plea colloquies to "cure" *Padilla* violations has the potential to reintroduce inattention to the separate roles of court and counsel in the plea context, a confusion that the Supreme Court sought to resolve in *Padilla* by rejecting the collateral consequences rule. Further, it threatens to drastically change the practical effects of the decision. Although advisement of immigration consequences in a plea colloquy is not required under Rule 11 or the Fifth Amendment, at least two dozen states have statutes, rules, or standard plea forms that require a defendant to receive a

81. *Id.* at 322 (quoting 3 MATTHEW BENDER, CRIMINAL DEFENSE TECHNIQUES §§ 60A.01, 60A.02[2] (1999)).

82. *Id.* at 323 n.50.

83. *Padilla*, 130 S. Ct. at 1484.

84. *Id.*

85. *Id.* at 1485.

warning regarding the potential immigration consequences of a plea.[86] That number is likely to increase in the wake of *Padilla*. The traditional plea colloquy warning is general and broad in nature. For example, the Florida rule states:

> [T]he trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he or she understands . . . that . . . if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service.[87]

The question these plea colloquies raise is what, if any, effect they have on *Padilla* Sixth Amendment claims. Defendants will be able to satisfy the first prong of *Strickland*, which looks at whether there was deficient performance of counsel, regardless of these colloquy warnings. However, the question remains whether defendants can adequately prove prejudice—that is, that they would not have pled guilty if not for the attorney's deficient performance—when they received blanket warnings from the court or sign blanket waivers on standard plea forms at the time of their pleas.

Norman Reimer, Executive Director of the National Association of Criminal Defense Lawyers, has raised this issue as fundamental to the survival of the substance of the *Padilla* decision. He criticizes the insertion of a blanket waiver regarding immigration consequences into "fast track" plea agreements in Arizona, describing it as "a calculated maneuver to utilize prosecutorial control of the plea process to effectively circumvent the Supreme Court's holding in *Padilla*."[88] While Reimer may be correct that these waivers are being used in a concerted effort to circumvent *Padilla*, they may also be seen as providing another layer of protection in recognition of the importance to noncitizens of the consequences of deportation. A number of scholars have argued that warnings regarding immigration and other collateral consequences should be a required part of the plea colloquy under the Fifth Amendment's knowing, intelligent, and voluntary standard for pleas.[89] As a general matter,

86. Roberts, *supra* note 4, at 148 & n.116 (compiling the various state statutes, rules, and regulations).

87. FLA. R. CRIM. P. 3.172(c).

88. Norman L. Reimer, *Decision: Was 2010 the Year Marking a Paradigm Shift in the Role of Defense Counsel—or Just More Business as Usual?*, CHAMPION, Dec. 2010, http://www.nacdl.org/champion.aspx?id=16247 (italics added).

89. *See, e.g.*, Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right To Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47 (2010) (arguing that courts should warn immigrants of the possible deportation consequences of their guilty

advocates for noncitizen criminal defendants likely would support requiring warnings from both court and counsel to ensure that noncitizen defendants are adequately informed at every stage of the proceedings.

Whether intended to benevolently provide additional protection to noncitizens, or cynically added to thwart future *Padilla* claims, these pre-plea warnings threaten to circumvent *Padilla*'s robust holding. In practice, they could replace the requirement that counsel discuss with and advise defendants on immigration consequences during the defendant's decision-making process with a generalized warning at the moment that the defendant is entering her plea. The plea colloquy is an insufficient protection of the noncitizen's right to know, consider, and devise strategies regarding the immigration consequences of her plea. As the scholar Evelyn Cruz writes: "A noncitizen warning from the judge alone will not provide the necessary protections for noncitizen defendants. To be confident of her decision, the defendant will need time to consult with her attorney and hope that he/she competently advises her on all the consequences of the proposed plea."[90]

Practitioners and scholars alike have expressed doubts about the effectiveness of plea colloquy warnings.[91] They argue that defendants perceive Rule 11 colloquies as largely ceremonial. As a result, defendants may not realize that they have the right to change their minds and may feel undue pressure or coercion to finalize the plea at that point in the process.[92] Given the foregoing, some scholars have seriously criticized the plea colloquy for elevating form over substance. Scholar Richard Klein writes frankly: "[A]ny participant in the

pleas during the plea colloquy); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670 (2008) (arguing that courts should warn defendants of the collateral consequence of involuntary commitment for certain sex offenders during the plea colloquy).

90. Cruz, *supra* note 89, at 54.

91. *See* E-mail from Steven Duke, Professor, Yale Law Sch., to author (May 9, 2011, 11:40 AM EST) (on file with author) ("I would argue that in the typical guilty plea case, the defendant has already made his decision and the Rule 11 inquiry is largely ceremonial, or would be so regarded by the defendant. Even if he were paying attention and even if he understood what the judge said about deportability that would not be a substitute for having been counseled on the matter in private by his attorney."); E-mail from Manuel Vargas, Senior Counsel, Immigration Def. Project, to author (April 6, 2011, 4:35 PM EST) (on file with author) ("What's a defendant who has been advised that pleading guilty will not affect his or her immigration status to do when confronted with this language in a plea agreement (assuming he or she is even given a real opportunity to read and digest it)? Refuse to sign the plea agreement? Is that realistic in the face of the pressure/coercion he or she would likely be under at that point to just go ahead and plead?").

92. *See id.*

criminal justice system knows that the colloquy between the judge and the defendant is scripted, ritualistic, perfunctory, pro forma, and quite meaningless."[93] Without accepting that the plea colloquy is "meaningless," one can easily accept that the plea colloquy is unlikely to affect a defendant's decision to plead guilty at that late point in the process and thus cannot replace the guidance of counsel in deciding whether or not to plead guilty. Recognizing these practical realities, in defining the bounds of the requirements of the plea colloquy, the Supreme Court has recognized the vital importance of the advice of counsel prior to the acceptance of any plea. Despite this mandate, the concern that courts will find plea colloquies sufficient to "cure" *Padilla* violations is very real, and, as Section III.B demonstrates, courts in a growing number of jurisdictions have already done so.

III. A DESCRIPTIVE ACCOUNT: THE LOWER COURTS' IMPLEMENTATION OF *PADILLA*

In order to analyze how the lower courts are implementing *Padilla*, I conducted a review of 265 lower court cases that have addressed *Padilla* since it was decided in March 2010. This review included all cases available at the time of citing that WestlawNext designated in the top two tiers for depth of treatment of *Padilla*.[94] While the review does not cover all of the decisions that reference or rule on the application of *Padilla*, it likely captures a segment sufficient to provide a reasonable understanding of how the courts are responding to the decision in various contexts. To my knowledge, this is the first study of this kind since the *Padilla* decision. It should provide both a

93. Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1401 (2004); *see also* Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 552 (1997) ("Efforts to improve plea bargaining should focus on its most disturbing defects: the hypocrisy that reduces the public plea colloquy before the judge to a carefully rehearsed charade during which the participants merely enact a script that was carefully crafted in the backroom of the prosecutor's office . . . ."); Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 460 (2008) ("[I]n many cases, the rituals surrounding plea acceptance and sentencing lack real significance as decision-making processes . . . . Procedural justice in these contexts may thus appear an empty formality and serve only to highlight the absence of procedural justice in reaching the plea deal.").

94. WestlawNext ranks the citing references for any given case with "depth of treatment" bars ranging from one bar, indicating minimal treatment, to four bars, indicating significant examination of the relevant cases. This Note's dataset includes cases assigned three or four "depth of treatment" bars for *Padilla* in WestlawNext.

useful guide to practitioners litigating these cases and a starting point for further academic dialogue on how the lower courts are implementing *Padilla*.

The empirical analysis in this Part begins by addressing a few threshold issues arising out of the *Padilla* decision that could potentially limit the set of cases to which *Padilla* can apply. In particular, it tracks how courts have responded to questions regarding the retroactive application of *Padilla*, the availability of a vehicle for *Padilla* claims for those no longer in state custody, and extension of *Padilla* to collateral consequences besides deportation. After demonstrating the lower courts' trend towards limiting the set of cases to which *Padilla* applies, the second section of this Part interrogates how lower courts are actually implementing *Padilla*, specifically whether a plea colloquy warning prevents the defendant from meeting the prejudice prong of the *Strickland* test.

A. A Trend Towards Limiting Padilla*'s Reach*

This Section focuses on how lower courts have ruled on three key issues in the wake of *Padilla*: (1) the retroactivity of *Padilla*'s holding, (2) the availability of a remedy for those already out of government custody, and (3) the extension of *Padilla*'s holding to other collateral consequences. Table 1 shows how courts in different jurisdictions have ruled on these questions. The lower courts are split on each of these issues. Since each of these are threshold questions that will determine whether *Padilla* can reach a defendant's case, the consensus on each of these questions will have a dramatic effect on *Padilla*'s reach. Furthermore, this overview of post-*Padilla* case law demonstrates a general trend in the lower courts towards limiting the reach of *Padilla*'s holding.

Table 1.

		RETROACTIVE[95]	AVAILABLE REMEDY FOR DEFENDANTS OUT OF CUSTODY[96]	EXTENSION TO OTHER COLLATERAL CONSEQUENCES
YES	TOTAL	38 Cases[97]	7 Cases[98]	9 Cases[99]
	FEDERAL COURTS	3d Cir.; S.D. Cal.; D. Ariz.; S.D. Ohio; C.D. Cal.; D. Minn.; N.D. Miss.; E.D. Cal.; E.D. Tex.; N.D. Ind.; N.D. Ill.; S.D. Tex.; W.D. Ky.; C.D. Ill; E.D.N.C.	3d Cir.; E.D. Cal.; N.D. Ill; W.D. Ky.	A.F. Ct. Crim. App.
	STATE COURTS	Ill. App. Ct.; Mass.; Minn. Ct. App.; N.J. Super. Ct. App. Div.; N.Y. Sup. Ct.; N.Y. Crim. Ct.; N.Y. Cnty. Ct.; Tex. Ct. App.	Pa. Com. Pl.	Ala. Crim. App.; Alaska Ct. App.; Ga. Ct. App.; Ky. Ct. App.; Mich. Ct. App.; Pa. Super. Ct.; Tenn.
NO	TOTAL	20 Cases[100]	7 Cases[101]	12 Cases[102]
	FEDERAL COURTS	E.D. Va.; D.S.C.; N.D. Ga; M.D. Fla.; E.D.N.Y.; E.D.N.C.; N.D. Ill.; D.N.J.; D. Neb.	E.D. Pa.; E.D. Mich.	D. Md.; C.D. Cal.; S.D. Ohio; E.D. Ky.; E.D. Va.; E.D. Mo.; S.D.N.Y.
	STATE COURTS	Ariz. Ct. App.; Fla. Dist. Ct. App.; Md. Ct. Spec. App.; N.J. Super. Ct. App. Div.; N.Y. Sup. Ct.; N.Y. Crim. Ct.; Tenn. Crim. App.	Cal. Ct. App.; Conn. App. Ct.; Del.; Ill.; Va.	Ill. App. Ct.; Iowa Ct. App.; N.Y. Sup. Ct.; Mo. Ct. App.
CAST DOUBT ON RETROACTIVITY/ EXTENSION BUT DID NOT RESOLVE	TOTAL	5 Cases[103]		3 Cases[104]
	FEDERAL COURTS	4th Cir.; D. Md.; E.D.N.C.; D.N.H.		S.D. Tex.
	STATE COURTS	N.J. Super. Ct. App. Div.		Ky. Ct. App.; Mo.

95. It is important to note the limitations of the review of cases in Table 1 addressing the retroactive application of *Padilla*. This analysis does not include those cases that might apply *Padilla* retroactively without addressing the retroactivity concern directly. There are two reasons for this limitation. First, where the retroactivity question was not explicitly addressed, it is likely that it was not briefed and that, therefore, the court may not have weighed the legal issues regarding *Padilla*'s retroactivity. Secondly, determining which cases involve retroactive applications *sub silentio* would pose practical difficulties that would bear little fruit given the former consideration. This review also does not include those cases that narrowly addressed whether *Padilla* should not be retroactively applied *if* it was considered a "new rule" under *Teague v. Lane*, 489 U.S. 288, 290 (1989) (citing *Mackey v. United States*, 401 U.S. 667, 692 (1971)), which held that "new rules" should *not* apply retroactively unless they either place "certain kinds of primary . . . conduct beyond the power of criminal law-making authority" or "require[] the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'" This review does not include such cases because (1) they only conditionally addressed the retroactivity question and (2) courts are far more likely to apply *Padilla* retroactively if it is not considered a "new rule." These cases arise when petitioners bring *Padilla* claims after the one-year statute of limitations for habeas corpus claims has run because the statute is only tolled if there is both a new rule *and* it applies retroactively. 28 U.S.C. § 2255(f) (2006); *see, e.g.*, Mudahinyuka v. United States, No. 10 C 5812, 2011 WL 528804 (N.D. Ill. Feb. 7, 2011). These cases do not resolve whether *Padilla* applies retroactively more generally. Finally, the table does not capture those cases that only mention, but do not weigh in on, the retroactivity issue but includes only those cases that either explicitly rule on retroactivity or cast doubt on retroactivity while also ruling in the alternative.

96. As with the retroactivity analysis, this review only addresses those cases that either explicitly ruled on the availability of *coram nobis* or another vehicle for recovery in *Padilla* cases or cast doubt on the availability of such vehicles while also ruling in the alternative.

97. United States v. Orocio, 645 F.3d 630 (3d Cir. 2011); Jiminez v. Holder, No. 10-cv-1528-JAH(NLS), 2011 WL 3667628 (S.D. Cal. Aug. 19, 2011); United States v. Hurtado-Villa, No. CV-10-01814-FJM(MHB), 2011 WL 4852284 (D. Ariz. Aug. 12, 2011); United States v. Reid, No. 1:97-CR-94, 2011 WL 3417235 (S.D. Ohio Aug. 4, 2011); Song v. United States, No. CV 09-5184 DOC, 2011 WL 2940316 (C.D. Cal. July 15, 2011); United States v. Dass, No. 05-140 (3) (JRT/FLN), 2011 WL 2746181 (D. Minn. July 14, 2011); Amer v. United States, No. 1:06CR118-GHD, 2011 WL 2160553 (N.D. Miss. May 31, 2011); United States v. Krboyan, No. 1:02-cr-05438 OWW, 2011 WL 2117023 (E.D. Cal. May 27, 2011); Guadarrama-Melo v. United States, No. 1:08-CV-588, 2011 WL 2433619 (E.D. Tex. May 2, 2011); United States v. Chavarria, No. 2:10-CV-191 JVB, 2011 WL 1336565 (N.D. Ind. Apr. 7, 2011), *vacated*, No. 2:10-CV-191 JVB, 2011 WL 4916568 (N.D. Ind. Oct. 14, 2011); United States v. Diaz-Palmerin, No. 08-cr-777-3, 2011 WL 1337326 (N.D. Ill. Apr. 5, 2011); Zapata-Banda v. United States, No. B:10-256, 2011 WL 1113586 (S.D. Tex. Mar. 7, 2011); Marroquin v. United States, No. M-10-156, 2011 WL 488985 (S.D. Tex. Feb. 4, 2011); United States v. Zhong Lin, No. 3:07-CR-44-H, 2011 WL 197206 (W.D. Ky. Jan. 20, 2011); Martin v. United States, No. 09-1387, 2010 WL 3463949 (C.D. Ill. Aug. 25, 2010); Al Kokabani v. United States, No. 5:06-CR-207-FL, 2010 WL 3941836 (E.D.N.C. July 30, 2010); United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625 (E.D. Cal. July 1, 2010); People v. Gutierrez, 954 N.E.2d 365 (Ill. App. Ct. 2011); Commonwealth v. Clarke, 949 N.E.2d 892 (Mass. 2011); Constanza v. State, No. A10-2096, 2011 WL 3557824 (Minn. Ct. App. Aug. 15, 2011);

Campos v. State, 798 N.W.2d 565 (Minn. Ct. App. 2011); State v. Barros, No. 07–07–01165, 2011 WL 2314773 (N.J. Super. Ct. App. Div. June 6, 2011); People v. Garcia, No. 4902/02, 2011 WL 3569329 (N.Y. Sup. Ct. July 26, 2011); People v. Forbes, No. 11395/1990, 2011 WL 3273520 (N.Y. Sup. Ct. July 1, 2011); People v. Coles, No. 8532/1994, 2011 WL 1991980 (N.Y. Sup. Ct. May 4, 2011); People v. Bevans, No. 20704V-2008, 2011 WL 923077 (N.Y. Sup. Ct. Jan. 31, 2011); People v. De Jesus, No. 10335/98, 2010 WL 5300535 (N.Y. Sup. Ct. Dec. 24, 2010); People v. Clarke, No. 2086/1994, 2010 WL 4809141 (N.Y. Sup. Ct. Oct. 27, 2010); People v. Paredes, No. 1104/04, 2010 WL 3769234 (N.Y. Sup. Ct. Sept. 21, 2010); People v. Garcia, 907 N.Y.S.2d 398 (N.Y. Sup. Ct. 2010); People v. Nunez, No. 6786/94, 2010 WL 2326584 (N.Y. Sup. Ct. May 21, 2010); People v. Harding, No. 99N075060, 2011 WL 892744 (N.Y. Crim. Ct. Mar. 15, 2011); People v. Ortega, No. 2008NY012378, 2010 WL 3786254 (N.Y. Crim. Ct. Sept. 28, 2010); People v. Ramirez, No. 2004NY012357, 2010 WL 3769208 (N.Y. Crim. Ct. Sept. 17, 2010); People v. Bennett, 903 N.Y.S.2d 696 (N.Y. Crim. Ct. 2010); People v. Bent, No. 2009-269C, 2011 WL 1019266 (N.Y. Cnty. Ct. Mar. 22, 2011); People v. Garcia Hernandez, No. 02556/2008, 2011 WL 846231 (N.Y. Cnty. Ct. Feb. 24, 2011); *Ex Parte* Tanklevskaya, No. 01-10-00627-CR, 2011 WL 2132722 (Tex. Ct. App. May 26, 2011).

98. United States v. Orocio, 645 F.3d 630 (3d Cir. 2011); United States v. Krboyan, No. 1:02-cr-05438, 2011 WL 2117023 (E.D. Cal. May 27, 2011); United States v. Diaz-Palmerin, No. 08-cr-777-3, 2011 WL 1337326 (N.D. Ill. Apr. 5, 2011); United States v. Zhong Lin, No. 3:07-CR-44-H, 2011 WL 197206 (W.D. Ky. Jan. 20, 2011); United States v. Chaidez, No. 03 CR 636-6, 2010 WL 3979664 (N.D. Ill. Oct. 6, 2010), *rev'd* 655 F.3d 684 (7th Cir. 2011); United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625 (E.D. Cal. July 1, 2010); Commonwealth v. Ainalchaybeh, 17 Pa. D. & C.5th 46 (Pa. Com. Pl. 2010).

99. United States v. Rose, No. ACM 36508 f rev, 2010 WL 4068976 (A.F. Ct. Crim. App. June 11, 2010); Frost v. State, No. CR-09-1037, 2011 WL 2094777 (Ala. Crim. App. May 27, 2011); Wilson v. State, 244 P.3d 535 (Alaska Ct. App. 2010); Taylor v. State, 698 S.E.2d 384 (Ga. Ct. App. 2010); Jacobi v. Commonwealth, No. 2009-CA-001572-MR, 2011 WL 1706528 (Ky. Ct. App. May 6, 2011); Pridham v. Commonwealth, No. 2008-CA-002190-MR, 2010 WL 4668961 (Ky. Ct. App. Nov. 19, 2010); People v. Fonville, 804 N.W.2d 878 (Mich. Ct. App. 2011); Commonwealth v. Abraham, 996 A.2d 1090 (Pa. Super. Ct. 2010); Calvert v. State, 342 S.W.3d 477 (Tenn. 2011).

100. United States v. Chapa, No. 1:05-CR-254-3, 2011 WL 2730910 (N.D. Ga. July 12, 2011); Llanes v. United States, No. 8:11-cv-682-T-23TBM, 2011 WL 2473233 (M.D. Fla. June 22, 2011); Ellis v. United States, No. 10 Civ. 4017 (BMC), 2011 WL 3664658 (E.D.N.Y. June 3, 2011); Mathur v. United States, No. 7:07-CR-92-BO, 2011 WL 2036701 (E.D.N.C. May 24, 2011); Dennis v. United States, 787 F. Supp. 2d 425 (D.S.C. 2011); United States v. Laguna, No. 10 CR 342, 2011 WL 1357538 (N.D. Ill. Apr. 11, 2011); Mendoza v. United States, 774 F. Supp. 2d 791 (E.D. Va. 2011); Doan v. United States, 760 F. Supp. 2d 602 (E.D. Va. 2011); United States v. Perez, No. 8:02CR296, 2010 WL 4643033 (D. Neb. Nov. 9, 2010); United States v. Hough, No. 2:02-cr-00649-WJM-1, 2010 WL 5250996 (D.N.J. Dec. 17, 2010); United States v. Gilbert, No. 2:03-cr-00349-WJM-1, 2010 WL 4134286 (D.N.J. Oct. 19, 2010); State v. Poblete, 260 P.3d 1102 (Ariz. Ct. App. 2011); Castano v. State, 65 So. 3d 546 (Fla. Dist. Ct. App. 2011); Barrios-Cruz v. State, 63 So. 3d 868 (Fla. Dist. Ct. App. 2011); Hernandez v. State, 61 So. 3d 1144 (Fla. Dist. Ct. App. 2011); Miller v. State, 11 A.3d 340 (Md. Ct. Spec. App. 2010); State v. Gaitan, 17 A.3d 227 (N.J. Super. Ct. App. Div. 2011); People v. Ebrahim, No. 08-W21, 2010 WL 4053086 (N.Y. Sup. Ct. Sept. 30, 2010); People v.

There is a very strong argument that *Padilla* should apply retroactively based on the Supreme Court's retroactivity doctrine.[105] In *Teague v. Lane*, the Supreme Court held that "new rules" of criminal procedure do not apply retroactively unless they fall into two narrow exceptions.[106] However, where the Court only applies a well-established rule to a specific set of facts, it does not create a "new rule,"[107] and its holding will apply to cases on both direct and

Kabre, 905 N.Y.S.2d 887 (N.Y. Crim. Ct. 2010); Gomez v. State, No. E2010-01319-CCA-R3-PC, 2011 WL 1797305 (Tenn. Crim. App. May 12, 2011).

101. Fenton v. Ryan, No. 11-2303, 2011 WL 3515376 (E.D. Pa. Aug. 11, 2011); United States v. Jankovic, No. 90-80775, 2011 WL 1397437 (E.D. Mich. Apr. 13, 2011); People v. Barraza, No. H033755, 2010 WL 4252684 (Cal. Ct. App. Oct. 28, 2010); State v. Alegrand, 23 A.3d 1250 (Conn. App. Ct. 2011); Ruiz v. State, No. 54, 2011, 2011 WL 2651093 (Del. July 6, 2011); People v. Carrera, 940 N.E.2d 1111 (Ill. 2010); Commonwealth v. Morris, 705 S.E.2d 503 (Va. 2011).

102. Thomas v. United States, No. RWT-10-2274, 2011 WL 1457917 (D. Md. Apr. 15, 2011); Pelaya v. Cate, No. CV 10-2270-VBF (VBK), 2011 WL 976771 (C.D. Cal. Jan. 18, 2011); United States v. Nelson, No. 1:08-cr-068, 2011 WL 883999 (S.D. Ohio Jan. 5, 2011); United States v. Francis, No. 5:04-CR-74-KSF, 2010 WL 6428639 (E.D. Ky. Dec. 30, 2010); United States v. Bakilana, No. 1:10-cr-00093 (LMB), 2010 WL 4007608 (E.D. Va. Oct. 12, 2010); Maxwell v. Larkins, No. 4:08 CV 1896 DDN, 2010 WL 2680333 (E.D. Mo. July 1, 2010); Eber-Schmid v. Cuomo, No. 09 Civ. 8036(BSJ)(AJP), 2010 WL 1640905 (S.D.N.Y. Apr. 22, 2010); People v. Hughes, No. 2-09-0992, 2011 WL 3105820 (Ill. App. Ct. July 19, 2011); Blaise v. State, No. 10-0466, 2011 WL 2078091 (Iowa Ct. App. May 25, 2011); State v. Romos, No. 09-0585, 2010 WL 2598630 (Iowa Ct. App. June 30, 2010); State v. Rasheed, 340 S.W.3d 280 (Mo. Ct. App. 2011); People v. Lopresti, No. 2003BX003466, 2011 WL 781409 (N.Y. Sup. Ct. Mar. 1, 2011).

103. United States v. Hernandez-Monreal, 404 F. App'x 714 (4th Cir. 2010); Obomighie v. United States, No. ELH-11-746, 2011 WL 2938218 (D. Md. July 18, 2011); Wassouf v. United States, No. 11-cv-51-SM, 2011 WL 529815 (D.N.H. Feb. 7, 2011); Escobar-Pacheco v. United States, No. 7:06-CR-92-1-BO, 2011 WL 1750762 (E.D.N.C. May 6, 2011); State v. Barrios, 2010 WL 5071177 (N.J. Super. Ct. App. Div. Dec. 14, 2010).

104. Zapata-Banda v. United States, No. B:10-256, 2011 WL 1113586 (S.D. Tex. Mar. 7, 2011); Cox v. Commonwealth, No. 2008-CA-000176-MR, 2010 WL 3927704 (Ky. Ct. App. Oct. 8, 2010); Webb v. State, 334 S.W.3d 126 (Mo. 2011).

105. *See* DAN KESSELBRENNER, NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, A *DEFENDING IMMIGRANTS PARTNERSHIP* PRACTICE ADVISORY: RETROACTIVE APPLICABILITY OF *PADILLA V. KENTUCKY* (2011), *available at* www.fd.org/pdf_lib/padilla%20retro%20revised%203-2011.pdf; Gray Proctor & Nancy King, *Post* Padilla*:* Padilla*'s Puzzles for Review in State and Federal Courts*, 23 FED. SENT'G REP. 239, 240-41 (2011).

106. 489 U.S. 288, 305-06 (1989).

107. Turner v. Williams, 35 F.3d 872, 885 (4th Cir. 1994) ("[W]hen we apply an extant normative rule to a new set of facts (leaving intact the extant rule) generally we do not announce a new constitutional rule of criminal procedure for purposes of *Teague*."); U.S. v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *5 (E.D. Cal. July 1, 2010) (applying *Padilla* retroactively) ("When the Supreme Court applies a well-established rule of law in a new

collateral review.[108] General constitutional standards, such as *Strickland*, which require case-by-case application, do not create "new rules" each time they are applied to new facts. As Justice Kennedy explained in *Wright v. West*: "Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."[109] Thus, in *Williams v. Taylor*, the Court held that applications of the well-established standard of *Strickland* are not new rules.[110] The Court in *Padilla* applied the *Strickland* framework to the deportation consequence and "merely reiterate[d] that no . . . alternative test," such as the collateral consequences rule, "can serve as a substitute."[111] Therefore, it should not constitute a "new rule" and should apply retroactively.

Furthermore, the Court's discussion of the concern that its decision in *Padilla* could open the "floodgates" to collateral attacks on conviction[112] only makes sense if *Padilla* applies retroactively; otherwise, there would be no backlog of past cases that would "flood" in. The Court's response presumes retroactive application by considering the past fifteen years of defense counsel standards:

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way based on the specific facts of a particular case, it does not generally establish a new rule." (citing Stringer v. Black, 503 U.S. 222, 228-29 (1992))).

108. Whorton v. Bockting, 549 U.S. 406, 416 (2007) ("Under the *Teague* framework, an old rule applies both on direct and collateral review . . . ."). There has been some question about the lasting vitality of *Teague* in cases involving collateral attacks in federal courts of state convictions after amendments to 28 U.S.C. § 2254 (2006), the governing statute. 28 U.S.C. § 2254 requires a finding that the state decision either "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts." *Id.* The Court has made clear that the *Teague* analysis survives the changes in § 2254. *See* Horn v. Banks, 536 U.S. 266 (2002) (holding that courts must apply *Teague* retroactivity analysis as a threshold issue). After retroactivity is established, the defendant must also meet the requirements of § 2254. The Court has recognized some symmetry between § 2254 and *Teague*. *See* Williams v. Taylor, 529 U.S. 362, 412 (2000) (holding that an "old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States'" (quoting 28 U.S.C. § 2254). However, the relationship between *Teague* doctrine and § 2254 is still not entirely resolved. *See* Greene v. Palakovich, 606 F.3d 85 (3d Cir. 2010), *cert. granted* sub nom., Greene v. Fisher, 131 S. Ct. 1813 (2011) (mem.) (granting certiorari to determine the temporal cutoff for "clearly established Federal law" under § 2254).

109. 505 U.S. 277, 309 (1992) (Kennedy, J., concurring).

110. 529 U.S. at 391 ("[T]he *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims . . . .").

111. Proctor & King, *supra* note 105, at 240.

112. 130 S. Ct. 1473, 1484-85 (2010).

> It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea . . . . We should . . . presume that counsel satisfied their obligation to render competent advice . . . .[113]

Finally, in April 2010, the Court vacated and remanded *Santos-Sanchez v. United States*[114] in light of its decision in *Padilla*. Since *Santos-Sanchez* involves a collateral attack on a conviction that was final before the *Padilla* decision, the Court's decision implies retroactive effect.

The majority (thirty-eight) of the cases reviewed that confronted the retroactivity question applied *Padilla* retroactively.[115] The Third Circuit, the first court of appeals to rule on retroactivity,[116] found that *Padilla* does apply retroactively. However, a significant minority (twenty) of the cases reviewed held that *Padilla* does not have retroactive effect.[117] An additional five decisions found that *Padilla* was likely not retroactive, but declined to rule on the question because assuming, arguendo, that *Padilla* did apply, there was no prejudice.[118] Moreover, after the completion of this empirical analysis, further developments in the circuit courts have shifted the trend against retroactivity. In August 2011, both the Seventh and Tenth Circuits held that *Padilla* constitutes a "new rule" under *Teague* that should not be applied retroactively.[119] Therefore, there is now a circuit split (Seventh and Tenth vs. Third) on this question, with two circuits favoring non-retroactivity and only one supporting retroactivity. The Supreme Court denied certiorari in a case raising this question on October 3, 2011.[120]

Another major obstacle for many defendants is finding an appropriate vehicle with which to vindicate a *Padilla* claim. For those who have already served their sentences and are no longer in custody, habeas corpus is not available. If there is no alternative vehicle for relief for those no longer in

113. *Id.* at 1485.

114. 130 S. Ct. 2340 (2010).

115. *See supra* Table 1.

116. *See* United States v. Orocio, 645 F.3d 630 (3d Cir. 2011).

117. *See supra* Table 1.

118. *See id.*

119. United States v. Chang Hong, No. 10-6294, 2011 WL 3805763 (10th Cir. Aug. 30, 2011); Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011).

120. Morris v. Virginia, No. 10-1498, 2011 WL 4530355 (U.S. Oct. 3, 2011) (Mem.).

custody, noncitizens with valid *Padilla* claims regarding their convictions may be deported on the basis of those convictions without the opportunity to raise their claims. Typically, the only remaining vehicle with which to challenge the conviction that provides a basis for deportation is a writ of *coram nobis*, an "extraordinary remedy" designed to correct errors of a "fundamental character . . . 'only under circumstances compelling such action to achieve justice.'"[121] Thus far, several federal courts have entertained *Padilla* claims through the writ of *coram nobis* when the conviction was federal.[122] However, several states and some federal jurisdictions have held that writs of *coram nobis* are not available for *Padilla* claims,[123] leaving some noncitizens with valid Sixth Amendment claims without any available remedy. Table 1 tracks the jurisdictions that have allowed writ of *coram nobis* petitions for *Padilla* claims and those that have foreclosed any relief for those out of state or federal custody.

Another unresolved issue is how broadly *Padilla's* logic will be applied and extended (or not extended) to other collateral consequences of conviction. The logic of *Padilla* naturally extends beyond immigration consequences to at least some other serious collateral consequences, such as registration as a sex offender or elimination of federal benefits. However, courts have been wary of expanding its reach. Of the twenty-four cases in this review in which claimants sought extension of *Padilla*'s holding to another collateral consequence of conviction, courts extended *Padilla* in only nine of them.[124] Those cases extended *Padilla* to sex offender registration, community supervision, parole eligibility, misadvice on the plea's effect on civil liability, and loss of pension

121. United States v. Hubenig, No. 6:03-mh-040, 2010 WL 2650625, at *1 (E.D. Cal. July 1, 2010) (quoting United States v. Morgan, 346 U.S. 502, 511 (1954)).

122. *See, e.g.*, United States v. Diaz Palmerin, No. 08-cr-777-3, 2011 WL 1337326 (N.D. Ill. Apr. 5, 2011); *Hubenig*, 2010 WL 2650625, at *1.

123. *See, e.g.*, People v. Carrera, 940 N.E.2d 1111 (Ill. 2010); Commonwealth v. Morris, 705 S.E.2d 503 (Va. 2011).

124. United States v. Rose, No. ACM 36508, 2010 WL 4068976 (A.F. Ct. Crim. App. June 11, 2010) (extending *Padilla* to sex offender registration); Frost v. State, No. CR-09-1037, 2011 WL 2094777 (Ala. Crim. App. May 27, 2011) (extending *Padilla* to parole eligibility); Wilson v. State, 224 P.3d 535 (Alaska Ct. App. 2010) (extending *Padilla* to the effect of a plea on a civil case, at least where there is affirmative misadvice); Taylor v. State, 698 S.E.2d 384 (Ga. Ct. App. 2010) (extending *Padilla* to sex offender registration); Jacobi v. Commonwealth, No. 2009-CA-001572-MR, 2011 WL 1706528 (Ky. Ct. App. May 6, 2011) (extending *Padilla* to parole eligibility); Pridham v. Commonwealth, No. 2008-CA-002190-MR, 2010 WL 4668961 (Ky. Ct. App. Nov. 19, 2010) (same); People v. Fonville, No. 294554, 2011 WL 222127 (Mich. Ct. App. Jan. 25, 2011) (extending *Padilla* to sex offender registration); Commonwealth v. Abraham, 996 A.2d 1090 (Pa. Super. Ct. 2010) (extending *Padilla* to loss of pension rights); Calvert v. State, 342 S.W.3d 477 (Tenn. 2011) (extending *Padilla* to community supervision requirement).

rights.[125] In the remaining cases, the courts declined to extend *Padilla* to enhanced penalty and "three strike" consequences, sex offender registration, civil commitment, reduced eligibility for parole, effects on civil liability, employment consequences, possible use of guilty pleas in other criminal proceedings, loss of waiver eligibility when already removable, and other immigration consequences such as mandatory detention.[126]

The lower courts' limiting approach to *Padilla* can be seen in various other rulings as well. As referenced above regarding noncitizens out of custody, the lower courts have strictly enforced limitations on the scenarios in which defendants can bring Sixth Amendment *Padilla* claims. They have held that noncitizens cannot use review of their removal orders to collaterally attack the underlying convictions supporting the removal orders.[127] Likewise, noncitizens cannot collaterally attack the underlying convictions that resulted in their removal orders during illegal reentry cases, although they can challenge the removal orders generally.[128] The lower courts have repeatedly rejected arguments requesting equitable tolling of the habeas statute's one-year statute of limitations based on the idea that *Padilla* is a "newly recognized right" that applies retroactively or that the defendant's removal proceedings constitute recently discovered facts.[129] Thus, in effect, even if *Padilla* applies retroactively, the habeas corpus remedy will be closed to those defendants whose judgments became final over a year ago.

Some courts also appear to limit counsel's responsibility post-*Padilla*. Several courts have intimated that counsel does not have an affirmative duty to ask clients about their immigration status and have held that no Sixth Amendment claim lies where an attorney did not know that her client was not

125. *See id.*

126. People v. Lopresti, No. 2003BX003466, 2011 WL 781409 (N.Y. Sup. Ct. Mar. 1, 2011) (holding that the "enhanced" sentencing consequence was not truly a "collateral consequence"); cases cited *supra* notes 102 and 104.

127. *See, e.g.*, Ramos v. Clark, No. C10-1226-RSM-JPD, 2011 WL 321743 (W.D. Wash. Jan. 12, 2011); Alou v. Holder, No. 10-3728, 2010 WL 4316946 (D.N.J. Oct. 22, 2010).

128. *See, e.g.*, United States v. Adame-Orozco, 607 F.3d 647 (10th Cir. 2010); United States v. Sanchez-Carmona, No. 2:09-cr-00516-PMP-RJJ, 2010 WL 3894133 (D. Nev. Sept. 2, 2010).

129. *See, e.g.*, Rodriguez v. United States, No. 1:10-CV-23718-WKW, 2011 WL 3419614 (S.D. Fla. Aug. 4, 2011); United States v. Dass, No. 05-140 (3) (JRT/FLN), 2011 WL 2746181 (D. Minn. July 14, 2011); United States v. Aceves, No. 10-00738, 2011 WL 976706 (D. Haw. Mar. 17, 2011); Mudahinyuka v. United States, No. 10 C 5812, 2011 WL 528804 (N.D. Ill. Feb. 7, 2011); United States v. Shafeek, No. 10-12670, 2010 WL 3789747 (E.D. Mich. Sept. 22, 2010); Sanchez v. State, No. A11-134, 2011 WL 3654489 (Minn. Ct. App. Aug. 22, 2011); Commonwealth v. Garcia, 23 A.3d 1059 (Pa. Super. Ct. 2011).

a citizen.[130] Another court refused to find a Sixth Amendment violation where an attorney gave general immigration advice (for example, where the attorney's "usual practice" was "to advise defendants that a plea *may* have an impact on their [immigration] status") despite *Padilla*'s clear mandate for an unequivocal discussion of the mandatory deportation consequences of a plea.[131] Finally, one case in the survey denied an ineffective assistance of counsel claim where the petitioner claimed that his lawyer did not advise him of the immigration benefits of a plea bargain offer, which would have allowed him to avoid mandatory deportation, and the petitioner therefore chose to go to trial.[132]

B. Treatment of Plea Colloquies Under the Prejudice Prong

Section III.A reviewed the lower courts' treatment of key threshold issues in the wake of *Padilla*. This Section focuses on a question regarding the implementation of *Padilla*: the effect of plea colloquy warnings regarding immigration consequences on *Padilla* claims under the prejudice prong of *Strickland*. This review found fifty-one cases that addressed the issuance of a plea colloquy warning in analyzing whether a defendant could show that counsel's deficient performance under *Padilla* prejudiced her case under the second prong of *Strickland*. The majority of these cases considered the plea colloquy to be significant, if not controlling, evidence weighing against a finding of prejudice.

130. State v. Limarco, No. 101,506, 2010 WL 3211674 (Kan. Ct. App. Aug. 6, 2010) (per curiam); Phillips v. State, No. A10-1012, 2011 WL 781197 (Minn. Ct. App. Mar. 8, 2011); People v. Wong, No. 2006QN025879, 2010 WL 4861044 (N.Y. Crim. Ct. Nov. 23, 2010).

131. Coutu v. State, No. 2008-4598, 2010 WL 3016771, slip op. at 7 (R.I. Super. Ct. July 29, 2010).

132. People v. Headley-Ombler, No. 15074/96, 2010 WL 5648312 (N.Y. Sup. Ct. June 29, 2010).

Table 2.

	TOTAL	OUTCOMES	FEDERAL COURTS	STATE COURTS
PLEA COLLOQUY DID NOT BAR PREJUDICE	14 Cases	Judgment Vacated: 4 cases[133]	S.D.N.Y.	Colo. App.; Fla. Dist. Ct. App.; Kan. Ct. App.; N.J. Super. Ct. App. Div.; N.Y. Sup. Ct.; Tex. Ct. App.; Wash.
		Evidentiary Hearing Granted: 8 cases[134]		
		No Prejudice on Other Grounds: 1 case[135]		
		No Retroactive Application: 1 case[136]		
PLEA COLLOQUY CONSIDERED IN CASES FINDING NO PREJUDICE	37 Cases	*Padilla* Claim Dismissed: All	See The Two Rows Below	See The Two Rows Below
PLEA COLLOQUY WARNING DECISIVE OR PRIMARY FACTOR IN PREJUDICE ANALYSIS[137]	27 Cases[138]	*Padilla* Claim Dismissed: All	4th Cir.; D. Md.; E.D. Cal.; S.D. Fla.; S.D. Tex.; E.D. Va.; C.D. Cal.; S.D.N.Y.; D. Nev.; E.D.N.C.; E.D.N.Y.	Cal. Ct. App.; Del. Super. Ct.; Fla. Dist. Ct. App.; Ga. Ct. App.; Iowa Ct. App.; Ky. Ct. App.; N.Y. Sup. Ct.; Ohio Ct. App.; Tex. Ct. App.
PLEA COLLOQUY ONLY ONE OF SEVERAL FACTORS IN PREJUDICE ANALYSIS	10 Cases[139]	*Padilla* Claim Dismissed: All	D. Kan.; D. Haw.; N.D. Iowa; S.D. Tex.; D.N.J.	Mass; Minn. App.; N.Y. Sup. Ct.; R.I.; R.I. Super. Ct.

133. People v. Garcia, 907 N.Y.S.2d 398 (N.Y. Sup. Ct. 2010); *Ex parte* Romero, No. 04-11-00175-CR, 2011 WL 3328821 (Tex. Ct. App. Aug. 3, 2011); *Ex parte* Tanklevskaya, No. 01-10-

00627-CR, 2011 WL 2132722 (Tex. Ct. App. May 26, 2011); State v. Sandoval, 249 P.3d 1015 (Wash. 2011).

134. People v. Kazadi, No. 09CA2640, 2011 WL 724754 (Colo. App. Mar. 3, 2011); State v. Limarco, No. 101,506, 2010 WL 3211674 (Kan. Ct. App. Aug. 6, 2010); State v. Zambrano, 2011 WL 1660697 (N.J. Super. Ct. App. Div. May 4, 2011); State v. Wray, No. 07–01–0033–A, 2011 WL 1045116 (N.J. Super. Ct. App. Div. Mar. 24, 2011); State v. Gaitan, 17 A.3d 227 (N.J. Super. Ct. App. Div. 2011); State v. Duroseau, No. 07-05-0796, 2010 WL 4608249 (N.J. Super. Ct. App. Div. Nov. 16, 2010); State v. Calero, No. 03-10-2034, 2011 WL 9325 (N.J. Super. Ct. App. Div. June 22, 2010); People v. De Jesus, No. 10335/98, 2010 WL 5300535 (N.Y. Sup. Ct. Dec. 24, 2010).

135. Boakye v. United States, No. 09 Civ. 8217, 2010 WL 1645055 (S.D.N.Y. Apr. 22, 2010).

136. Hernandez v. State, 61 So. 3d 1144 (Fla. Dist. Ct. App. 2011).

137. Many of these cases only considered the plea colloquy in their prejudice analysis and therefore clearly fall under this category. However, there is a judgment call inherent within the distinction between this category and the latter (where the plea colloquy is only one of several factors considered). Cases were placed in this category when the court most heavily relied on the plea colloquy evidence in its analysis of prejudice.

138. United States v. Hernandez-Monreal, 404 F. App'x 714 (4th Cir. 2010); Zoa v. United States, No. PJM 10-2823, 2011 WL 3417116 (D. Md. Aug. 1, 2011); Zavala v. Yates, No. 2:09-cv-00775-JKS, 2011 WL 1327135 (E.D. Cal. Apr. 5, 2011); Mendoza v. United States, 774 F. Supp. 2d 791 (E.D. Va. 2011); Smith v. United States, No. 10-21507-Civ-COOKE, 2011 WL 837747 (S.D. Fla. Feb. 4, 2011); Marroquin v. United States, No. M-10-156, 2011 WL 488985 (S.D. Tex. Feb. 4, 2011); Falcon v. D.H.S., No. SACV 07-66 JSL (JC), 2010 WL 5651187 (C.D. Cal. Nov. 29, 2010); Gonzalez v. United States, No. 10 Civ. 5463(AKH), 2010 WL 3465603 (S.D.N.Y. Sept. 3, 2010); United States v. Sanchez-Carmona, No. 2:09-cr-00516-PMP-RJJ, 2010 WL 3894133 (D. Nev. Sept. 2, 2010); Al Kokabani v. United States, No. 5:06-CR-207-FL, 2010 WL 3941836 (E.D.N.C. July 30, 2010); United States v. Obonaga, No. 10-CV-2951 (JS), 2010 WL 2710413 (E.D.N.Y. June 30, 2010); United States v. Bhindar, No. 07 Cr 711-04(LAP), 2010 WL 2633858 (S.D.N.Y. June 30, 2010); Ellington v. United States, No. 09 CIV 4539(HB), 2010 WL 1631497 (S.D.N.Y. Apr. 20, 2010); People v. Castrellon, No. C065185, 2011 WL 2039600 (Cal. Ct. App. May 23, 2011); State v. Davis, No. IN-04-04-0374, 2011 WL 2085900 (Del. Super. Ct. May 20, 2011); Castano v. State, 65 So. 3d 546 (Fla. Dist. Ct. App. 2011); Flores v. State, 57 So. 3d 218 (Fla. Dist. Ct. App. 2010); Taylor v. State, 698 S.E.2d 384 (Ga. Ct. App. July 8, 2010); Chang Ming Lin v. State, 797 N.W.2d 131 (Iowa Ct. App. 2010); Cox v. Commonwealth, No. 2008-CA-000176-MR, 2010 WL 3927704 (Ky. Ct. App. Oct. 8, 2010); People v. Crawford, No. 2285/04, 2011 WL 1464133 (N.Y. Sup. Ct. Feb. 14, 2011); People v. William, No. 5221/2006, 2010 WL 5648314 (N.Y. Sup. Ct. June 25, 2010); State v. Ikharo, No. 10AP-967, 2011 WL 2201193 (Ohio Ct. App. June 7, 2011); State v. Yazici, No. 2010CA00138, 2011 WL 441473 (Ohio Ct. App. Feb. 7, 2011); State v. Gallegos-Martinez, No. 10-CAA-06-0403, 2010 WL 5550237 (Ohio Ct. App. Dec. 28, 2010); State v. Bains, No. 94330, 2010 WL 4286167 (Ohio Ct. App. Oct. 21, 2010); *Ex parte* Diaz, No. 10-10-00344-CR, 2011 WL 455273 (Tex. Ct. App. Feb. 9, 2011).

139. United States v. Viera, No. 08-20106-03-KHV, 2011 WL 3420842 (D. Kan. Aug. 4, 2011); United States v. Aceves, No. 10-00738 SOM/LEK, 2011 WL 976706 (D. Haw. Mar. 17, 2011); Sanchez-Contreras v. United States, No. 10-CV-4008-DEO, 2011 WL 939005 (N.D. Iowa Mar. 16, 2011); Zapata-Banda v. United States, No. B:10-256, 2011 WL 1113586 (S.D. Tex. Mar. 7, 2011); United States v. Gilbert, No. 2:03-cr-00349-WJM-1, 2010 WL 4134286

1. *Cases in Which Plea Colloquy Warnings Did Not Bar Findings of Prejudice*

In only fourteen of the fifty-one cases addressing the issue did the courts make clear that the issuance of a general plea colloquy warning would not bar a finding of prejudice. In eight of those cases, the courts granted evidentiary hearings on the questions presented.[140] In four, the court affirmatively found both prongs of *Strickland* satisfied and vacated the plea.[141] The other two cases were resolved on other grounds.[142] In a number of the cases, the state court was reversing a lower court decision that denied the claim based purely on the plea colloquy. Notably, five of these fourteen cases were heard in New Jersey superior courts and relied not only upon *Padilla* but also on a state supreme court case, *State v. Nuñez-Valdéz*,[143] which found that, under state constitutional law, the plea statement warning was not sufficient to cure ineffective assistance of counsel regarding immigration consequences of a plea. This raises the question of whether the New Jersey Supreme Court case based on state constitutional law influenced the lower courts' application of *Padilla*. In states without congruent state constitutional law, courts may be less likely to find plea colloquy warnings insufficient to bar prejudice.

These cases focused on the generic and indefinite character of the warnings given, in contrast to the specific warning required under *Padilla* in cases of mandatory deportation. Therefore, these decisions leave open the possibility that more specific warnings might bar prejudice. While not all cases specifically referenced whether or not the case involved mandatory deportation, it appears that most of them did involve mandatory deportation offenses. Meanwhile, in all but two cases, the warning, either given by the judge or written in the plea form, was phrased in the terms of "may" cause removal or "might" be deported. The courts focused on the holding in *Padilla* that effective assistance

(D.N.J. Oct. 19, 2010); Commonwealth v. Clarke, 949 N.E.2d 892 (Mass. 2011); Sanchez v. State, No. A11-134, 2011 WL 3654489 (Minn. Ct. App. Aug. 22, 2011); People v. Bahamadou, No. 4668-1999, 2011 WL 3503149 (N.Y. Sup. Ct. Aug. 1, 2011); Neufville v. State, 13 A.3d 607 (R.I. 2011); Brea v. State, No. 2010-4426, 2010 WL 5042898 (R.I. Super. Ct. Dec. 3, 2010).

140. *See* sources cited *supra* note 134.

141. People v. Garcia, 907 N.Y.S.2d 398 (N.Y. Sup. Ct. 2010); *Ex parte* Romero, No. 04-11-00175-CR, 2011 WL 3328821 (Tex. Ct. App. Aug. 3, 2011); *Ex parte* Tanklevskaya, No. 01-10-00627-CR, 2011 WL 2132722 (Tex. Ct. App. May 26, 2011); State v. Sandoval, 249 P.3d 1015 (Wash. 2011).

142. Boayke v. United States, No. 09 Civ. 8217, 2010 WL 1645055 (S.D.N.Y. Apr. 22, 2010); Hernandez v. State, 61 So. 3d 1144 (Fla. Dist. Ct. App. 2011).

143. 975 A.2d 418 (N.J. 2009).

requires not only a blanket warning of possible immigration consequences, but also, where the deportation consequence is clear, specific advice on the particular immigration consequences of the plea.[144] In both Florida and New Jersey, courts have intimated that an edited plea colloquy that advises defendants of mandatory deportation consequences, where relevant, would be sufficient to cure any prejudice resulting from counsel's failure to advise on the matter.[145]

In some cases, the inadequacy of the plea colloquy was even clearer. In *People v. Kazadi*,[146] while the plea statement did have a general "guilty plea may cause removal" sentence, it only said that "certain *felonies* . . . could *require* removal and permanent exclusion."[147] The defendant had pled to a misdemeanor but was nonetheless subject to mandatory deportation. Therefore, the court found that the advisement did not appropriately warn him of the immigration consequences of his plea. Similarly, in *People v. De Jesus*,[148] the judge warned, "I must advise you that if you are not a citizen or a resident alien, as a result of the plea of guilty, you may be deported."[149] The defendant was a legal permanent resident (a "resident alien") but was still subject to mandatory deportation due to the conviction. The court did not address whether the warning could cure the prejudice when it remanded for an evidentiary hearing, likely because its inadequacy in that case was so clear.

Courts have also considered how a lawyer's advice might interact with a defendant's understanding of a plea colloquy. In *State v. Limarco*,[150] a Kansas court considered the fact that the defendant's lawyer told him that the warning in the plea statement was "simply boilerplate," vitiating the effect of the warning on the defendant.[151] In two cases where the courts vacated the pleas, they did so even though the warnings were more explicit because the defendants had relied on affirmative misadvice, rather than mere silence, either from their attorneys or another source because their attorneys refused to provide the relevant guidance.

144. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

145. *See Hernandez*, 61 So. 3d 1144; State v. Gaitan, 17 A.3d 227 (N.J. Super. Ct. App. Div. 2011) (relying on *Nuñez-Valdéz*'s statement regarding state law).

146. No. 09CA2640, 2011 WL 724754 (Colo. App. Mar. 3, 2011).

147. *Id.* at *1 (first emphasis added).

148. No. 10335/98, 2010 WL 5300535 (N.Y. Sup. Ct. Dec. 24, 2010).

149. *Id.*

150. No. 101,506, 2010 WL 3211674 (Kan. Ct. App. Aug. 6, 2010) (per curiam).

151. *Id.*

In *People v. Garcia*,[152] the defendant's counsel told the defendant that he was not an immigration expert and to consult an immigration attorney for advice on possible immigration consequences. Since the defendant was indigent, he sought advice from an immigration paralegal, who misinformed him. Under *Padilla*, the defendant had a right to correct advice on the mandatory deportation consequences of his plea from his defense counsel. The judge, during the plea colloquy, warned the defendant in no uncertain terms:

> I can't make any representations about what immigration would do and I understand he's got independent immigration counsel and that's fine, but a controlled substance conviction can certainly lead to deportation and I don't want him to have any doubt about th[at] fact . . . . *[A]s far as I'm concerned, he can assume that he's deportable*.[153]

Nevertheless, the court found both prongs of *Strickland* satisfied and vacated the plea. The court wrote: "Until and unless there is controlling appellate authority to the contrary, I hold that a Court's warning regarding deportability, standing alone, while a significant factor, should not be given conclusive and dispositive effect on the issue of prejudice."[154]

Similarly, in *State v. Sandoval*,[155] the plea warning stated explicitly: "If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law *is grounds* for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."[156] However, because Sandoval relied on his attorney's incorrect or misleading advice that "he would . . . have sufficient time to retain proper immigration counsel to ameliorate any potential immigration consequences of his guilty plea,"[157] the court found prejudice despite the plea statement warning and vacated the plea.

152. 907 N.Y.S.2d 398 (N.Y. Sup. Ct. 2010).

153. *Id.* at 400 (emphasis added).

154. *Id.* at 407 n.20.

155. 249 P.3d 1015 (Wash. 2011).

156. *Id.* at 1017-18 (emphasis added). While this statement is not entirely clear regarding the consequence of mandatory deportation, it is more strongly worded than other "may" or "might" warnings in many of the cases discussed.

157. *Id.* at 1017.

2. Cases in Which Plea Colloquy Warnings Contributed to a Finding of No Prejudice

In the clear majority of the cases reviewed, thirty-seven of the fifty-one relevant cases, courts weighed plea colloquy warnings as evidence in their ultimate determinations that defendants could not demonstrate prejudice and therefore had no viable *Padilla* claims.[158] Some courts considered the colloquy among multiple other factors in the prejudice analysis. For example, in *Zapata-Banda v. United States*,[159] the court laid out a five-factor test for prejudice inquiries in this context: (1) strength of the prosecution's case, (2) presence of a viable defense, (3) benefit obtained from the plea, (4) whether the complained-of deficiency was cured by the court's admonishments, and (5) whether experience or custom led the attorney to recommend pleading for reasons not easily categorized.[160] In addition to identifying the cases in which the court weighed the plea colloquy as evidence in determining a lack of prejudice, this review sought to distinguish those cases that relied either solely or primarily on the plea colloquy from those that only relied on the plea colloquy among other factors in finding no prejudice. While there is some line drawing inherent in this exercise, this review located twenty-seven cases (of the relevant set of fifty-one cases) where the court relied either solely or primarily on the plea colloquy in determining that defendants could not show prejudice.[161] Some of these cases—by ruling solely based upon the plea colloquy without considering other factors—appear to impose a per se bar on *Padilla* claims where the defendants were issued plea colloquy warnings on the record, at least absent unusual circumstances. *Flores v. State*[162] provides an example of a decision that appears to impose such a bright-line rule: "The court's warning that Flores may be deported based on his plea cured any prejudice that might have flowed from counsel's alleged misadvice."[163] A

158. *See supra* Table 2.

159. No. B:10-256, 2011 WL 1113586 (S.D. Tex. Mar. 7, 2011).

160. *Id.* at *10-12.

161. *See supra* Table 2. While most courts considered the colloquy or plea agreement warnings to be relevant to the prejudice prong, others fashioned the analysis as a first prong question. Some courts argued that the fact that a defendant initialed the "I have discussed this with my attorney" box on the form was sufficient to refute the defendant's subsequent claims otherwise. Other courts refashioned the first prong to ask whether the defendant was aware of the immigration consequences of the plea rather than whether counsel adequately informed her of them, thus importing the prejudice inquiry into the first prong.

162. 57 So. 3d 218 (Fla. Dist. Ct. App. 2010) (per curiam).

163. *Id.* at 220-21 (citing Bermudez v. State, 603 So. 2d 657, 658 (Fla. Dist. Ct. App. 1992)).

federal district court wrote: "Simply put, petitioner's sworn acknowledgement in this regard *is, by itself, dispositive* of the prejudice analysis."[164] This analysis is reflective of the bright-line logic of many of the cases that considered the effect of plea colloquies on *Padilla* claims. While many of these are federal district court and state court decisions, one of the cases espousing the strong view that colloquies cure the Sixth Amendment violation was a circuit court decision.[165]

In four of these decisions, the language in the plea colloquy or form warning was entirely unequivocal, for example, "you will be deported," making the warning more akin to what is required from counsel under *Padilla*. In two others, the warnings, although not entirely unequivocal, were issued in very strong language by the court. For example, one judge told the defendant that the plea "could definitely make it difficult, if not impossible, for [him] to successfully stay legally in the United States."[166] But in most of these decisions, the warnings involved were precisely the same equivocal warnings discussed above—for example, "you may be deported"—but the courts nonetheless found them sufficient to negate any possible prejudice arising from deficient performance of counsel under the Sixth Amendment. In several cases, the courts did not even consider affirmative misadvice from counsel, rather than mere silence, to be sufficient to show a possibility of prejudice in the face of a generic plea colloquy.[167]

The courts reasoned that because the defendants were made aware of the risk of deportation before entering their guilty pleas, affirmed their understanding of those risks, and chose to enter the pleas, it would not be reasonable to infer that "but for counsel's errors, [they] would not have pleaded guilty and would have insisted on going to trial."[168] The courts rarely addressed the concern raised in the cases on the other end of spectrum (discussed in Subsection III.B.1): that *Padilla* holds that defendants are entitled to more than standard warnings of the possibility of deportation in making their plea agreements. They did not consider whether defendants might treat the *risk* of deportation differently than the *certainty* of deportation in their calculus regarding whether or not to take a plea bargain or continue to trial. Nor did they consider how counsel's advice might guide a defendant's decision

164. Mendoza v. United States, 774 F. Supp. 2d 791, 799 (E.D. Va. 2011) (emphasis added).

165. United States v. Hernandez-Monreal, 404 F. App'x 714 (4th Cir. 2010).

166. *Id.* at 715 (alteration in original).

167. *See, e.g.*, *Flores*, 57 So. 3d 218; Smith v. United States, Nos. 10-21507-Civ-COOKE, 2011 WL 837747 (S.D. Fla. Feb. 4, 2011) (finding no prejudice even assuming, though not deciding, that there was misadvice).

168. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

differently than a court warning directly before the entry of a plea. Several courts distinguished *Padilla* in two respects: first, in *Padilla*, counsel affirmatively misadvised his client; and, second, the court did not warn Padilla of immigration consequences during the plea colloquy. This reasoning is flawed in both respects. First, the *Padilla* Court explicitly extended its holding beyond situations involving misadvice by counsel.[169] Second, the Court did address plea colloquies and did not indicate that they bar prejudice.[170]

Most of the courts bolstered their no-prejudice holdings with language emphasizing the importance of sworn statements in open court. They held that sworn statements carry "a strong presumption of verity"[171] and that, therefore, the court should assume that defendants truly understood the consequences they swore under oath to understanding. Courts used the "sworn statement" argument to reaffirm their no-prejudice holdings even where the defendants asserted that their counsel affirmatively misadvised them. In *Flores v. State*, the Florida court wrote:

> A defendant's sworn answers during a plea colloquy must mean something. A criminal defendant is bound by his sworn assertions and cannot rely on representations of counsel which are contrary to the advice given by the judge . . . . When the Court advises that the plea may result in deportation, a defendant has an affirmative duty to speak up if the attorney has promised something different.[172]

The court therefore held that through this colloquy the defendant "assumed the risk" of deportation.[173]

The extreme case of *Al Kokabani v. United States*[174] demonstrates the sometimes mechanical reliance of courts on the effectiveness of plea colloquies in informing defendants as well as their failure to recognize the important distinction between possible and certain deportation for defendants' decisionmaking. In that case, counsel had informed the defendant that "there [would] be no adverse immigration consequences if the court sentenced [Al Kokabani] to a term of imprisonment of twelve months or less."[175] The defendant's plea bargain recommended a lower sentence, but he was made

169. 130 S. Ct. 1473, 1484 (2010).

170. *Id.* at 1486 n.15; *see infra* notes 177-179 and accompanying text.

171. Falcon v. D.H.S., No. SACV 07-66 JSL, 2010 WL 5651187, at *10 (C.D. Cal. Nov. 29, 2010).

172. 57 So. 3d at 220 (citation omitted).

173. *Id.* at 221.

174. No. 5:06-CR-207-FL, 2010 WL 3941836 (E.D.N.C. July 30, 2010).

175. *Id.* at *3.

aware during the plea colloquy that a sentence of more than twelve months was a possibility. The court found: "[I]t cannot be said that but for counsel's unprofessional errors, Petitioner would not have pled guilty."[176] The court declined to find prejudice even though the counsel's advice was incorrect: the defendant was only sentenced to twelve months but still was subject to mandatory deportation.

IV. *PADILLA* COUNSELS AGAINST CONFLATING FIFTH AND SIXTH AMENDMENT PROTECTIONS IN THE PLEA PROCESS

A. The Collateral Consequences Rule in Reverse: Courts Continue To Conflate Fifth and Sixth Amendment Protections to the Detriment of the Constitutional Structure

Section III.B demonstrates that courts are repeatedly using general plea colloquy warnings to bar findings of prejudice in *Padilla* claims. This Note argues that these rulings pay insufficient attention to the distinct roles of the court in the Fifth Amendment plea colloquy and counsel under the Sixth Amendment, as discussed in Part I; thus, these rulings undermine the constitutional structure that rests atop the complementary, but distinct, constitutional protections.

Padilla v. Kentucky only addressed the first prong of *Strickland*'s Sixth Amendment analysis, deficient performance of counsel. It is under the second prong, the prejudice prong, that courts have used plea colloquy warnings to negate findings of Sixth Amendment violations when defendants bring *Padilla* claims. The primary objection to this Note's claim is that courts considering colloquies under the prejudice prong are not evaluating counsel's performance but only analyzing all of the evidence to determine whether the performance affected the ultimate outcome.[177] However, by holding that plea colloquies

176. *Id.* at *6.

177. Alternatively, objectors may argue that this Note's true concern is with the prejudice prong of *Strickland*. This Note instead argues that within the confines of the *Strickland* framework, plea colloquies represent, at best, weak evidence to defeat a claim of prejudice in *Padilla* claims. However, it would be remiss not to note the wealth of scholarship highlighting the significant concerns raised by the *Strickland* framework and demonstrating how it severely limits defendants' ability to prevail on ineffective assistance of counsel claims. *See generally* William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995) (providing a thorough critique of *Strickland v. Washington*); *see also* ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE 33 (1992) (calling *Strickland* an "insuperable threshold"); Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense*

"cure" the Sixth Amendment violation, courts necessarily presume that judges fulfilling Fifth Amendment requirements can provide the same function as lawyers fulfilling their Sixth Amendment obligations. Counsel's role under the Sixth Amendment is distinct from the role a court can play during a plea colloquy. Defense counsel should guide and inform a defendant's decisionmaking, equipping her with the knowledge to balance her options. The court plea colloquy cannot, and is not designed to, serve these functions.[178] Moreover, the plea colloquy, as discussed above, is largely ceremonial and takes place directly before the defendant enters her plea, *after* she has made that choice.[179] It is unlikely to ever affect a defendant's plea. Therefore, evidence that the court gave a standard warning prior to the entry of a plea is weak evidence at best regarding how deficient performance of counsel affected the defendant's case. The courts' frequent use of plea colloquies to find lack of prejudice in *Padilla* claims demonstrates that courts continue to pay scant attention to the separate functions of these distinct protections within the criminal justice system. Although *Padilla* barred the importation of the collateral consequences rule into Sixth Amendment standards, courts are still conflating the protections, albeit in a different way.

By using plea colloquies to cure the prejudice of deficient counsel, courts undermine the strong protections *Padilla* provides for noncitizen defendants. In states where a general warning on immigration consequences during the plea colloquy is mandated by statute or regulation, *Padilla* will effectively become dead letter. Whether or not a lawyer advises a noncitizen on the immigration consequences of her plea will be irrelevant to her ability to prevail on a Sixth Amendment claim. The robust protection of the Sixth Amendment, meant to ensure the integrity of the criminal process, will be replaced by Fifth Amendment plea colloquy warnings that cannot possibly play the same role in our criminal justice system. Moreover, the structure for recognizing Sixth Amendment violations will no longer align whatsoever with the substantive expectations of defense lawyers established by the first prong of the Sixth Amendment. To the extent that the Sixth Amendment is meant to set the bar for minimally proficient counsel, it will no longer serve that function with respect to immigration consequences.

Even where colloquies are more informative—for example, where they indicate that deportation is a mandatory consequence for conviction of the crime at issue—the colloquy cannot substitute for the advice of counsel because

Attorneys: A System in Need of Reform, 2002 BYU L. REV. 1, 19 (arguing that *Strickland* weakened constitutional protection for the right to counsel).

178. *See supra* Section I.B.

179. *See supra* notes 91-93 and accompanying text.

of the court's structural role in the system. A judge cannot satisfactorily investigate the defendant's individual situation, gauge the importance of plea consequences to the defendant, and advise the defendant based on that information. That is the province of an attorney: the defendant's advocate. In *Gideon v. Wainwright*,[180] the Court rejected its prior rule whereby an appointed counsel was only required when "special circumstances" made one necessary to ensure a fair trial. The Court in *Gideon* recognized that in our adversarial system, the court alone cannot ensure the fairness of any criminal process; "lawyers in criminal courts are necessities, not luxuries."[181] Today, the vital Sixth Amendment mandate is not the right to counsel pro forma but the right to effective assistance of counsel.[182] As the Court did in *Gideon*, courts should continue to reject the premise that courts can fulfill the role of defense counsel in ensuring a fair criminal process, be it in the plea stage—where most convictions occur—or at trial.

The following Section argues that in addition to conflating the role of the court in the Fifth Amendment-mandated plea colloquy and the role of counsel under the Sixth Amendment, the lower courts' use of plea colloquies to negate prejudice in *Padilla* claims directly contradicts the language, logic, and history of *Padilla* itself.

B. The Ruling in Padilla *Does Not Allow Plea Colloquies To "Cure" Prejudice*

The language, logic, and history of *Padilla* all counsel against conflating the Fifth and Sixth Amendment protections in the prejudice context. First, the claim at issue in *Padilla* arose because of the lower courts' prior conflation of the rights in this area with respect to the collateral consequences rule. Although the Court declined to directly address and quash the importation of the rule into the Sixth Amendment context, the Court's opinion states: "We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."[183] Further, the logic of *Padilla* essentially rejects the bright-line collateral consequences rule, opting instead to apply the general standard of *Strickland*; where collateral consequences are so drastic and

180. 372 U.S. 335 (1963).

181. *Id.* at 344.

182. *See* Symposium, Gideon *at 40: Facing the Crisis, Fulfilling the Promise*, 41 AM. CRIM. L. REV. 135 (2004).

183. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).

immediate that any reasonable lawyer would advise his client of them, the Sixth Amendment requires counsel to explain these consequences. By rejecting the rigid collateral consequences rule, designed to address the responsibility of the court, and instead applying the *Strickland* standard, which measures counsel's performance against prevailing professional norms to determine what advice a lawyer should provide, the Court recognized the broader role defense counsel plays in advising defendants in the plea context. Therefore, the history and logic of *Padilla* suggest that the court cannot fill the intended role of counsel in informing the defendant of the immigration consequences of her plea.

Second, the *Padilla* Court contemplated the affirmative misadvice rule and rejected it because it wanted to avoid the "absurd result" of creating an incentive for silence on the part of counsel.[184] "Silence under these circumstances," the Court wrote, "would be fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'"[185]

Holding that plea colloquies "cure" Sixth Amendment deficiencies arguably leads to the same "absurd result" whereby the law no longer encourages lawyers to impart immigration advice rather than remain silent. While many defense lawyers may not engage in this individual calculus, where *Padilla* effectively becomes a dead letter due to plea colloquy warnings, the decision will likely no longer serve the long-term norm-setting functions for the defense bar that it would otherwise. In this manner, the law would create the "absurd result" of encouraging silence just as the affirmative misadvice rule would.

Further, the individual and specific counsel that *Padilla* mandates compels the conclusion that generalized warnings can never alone "cure" the deficient performance of counsel. By their nature, plea colloquy warnings are general; courts often cannot determine whether a specific defendant will be subject to mandatory detention or deportation, and therefore their warnings say nothing more than that the plea "may" carry adverse immigration consequences. As the American Immigration Lawyers Association argued in an amicus brief for a Florida case: "It defies logic to hold that a warning from a court, which would be unconstitutional if offered by counsel, could cure constitutionally deficient advice by counsel."[186]

184. *Id.* at 1484.

185. *Id.* (quoting Libretti v. United States, 516 U.S. 29, 50-51 (1995)).

186. Brief of Am. Immigrant Lawyers Ass'n, S. Fla. Chapter, as Amicus Curiae in Support of Appellant's Motion for Rehearing at 9, Flores v. State, 57 So. 3d 218 (Fla. Dist. Ct. App. 2010) (No. 4D08-3866).

Even where warnings are more specific, judges, given their position, cannot gauge defendants' priorities, counsel defendants on how to proceed, or use the information strategically in negotiating pleas. The *Padilla* Court specifically contemplated the use of this information not only to inform a defendant's ultimate choice, but also to inform defense strategy. Justice Stevens wrote: "Counsel who possess the most rudimentary understanding of the deportation consequences . . . may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation."[187] As discussed above, a rule finding that plea colloquies "cure" prejudice and bar *Padilla* claims would not lead to the various strategic benefits, such as bargaining, that flow from defense counsel's knowledge of, and engagement with, the immigration consequences of convictions.

Justice Alito's opinion, concurring in the judgment, reinforces the argument that the majority opinion in *Padilla* does not permit the use of general plea colloquies on immigration consequences to cure deficient performance of counsel. Unlike the majority opinion, which clearly focused on the role of counsel under the Sixth Amendment, Justice Alito's concurrence perpetuated the conflation of Fifth and Sixth Amendment concerns. While discussing the right to counsel, Justice Alito focused primarily on the voluntariness of the plea, and thus was primarily concerned with misrepresentation: "[W]hen a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable . . . it seems hard to say that . . . it embodies a voluntary and intelligent decision to forsake constitutional rights."[188] He disagreed with the majority's broader holding that defense counsel must accurately and specifically advise a defendant of the immigration consequence of her plea.[189] He argued that the Court's broad ruling would "head off more promising ways of addressing the underlying problem—such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences."[190] In essence, Justice Alito's opinion suggested that plea colloquies *would* resolve the "underlying problem" in *Padilla*.[191] This position aligns with his view that the difficulty in *Padilla* was

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

188. *Id.* at 1493 (Alito, J., concurring in the judgment). Justice Scalia noted, and criticized, this conflation in his dissent. *Id.* at 1496 (Scalia, J., dissenting).

189. *Id.* at 1487 (Alito, J., concurring in the judgment) ("I do not agree with the Court that the attorney must attempt to explain what those [immigration] consequences may be.").

190. *Id.* at 1491.

191. *Id.*

that the plea was not voluntary, a Fifth Amendment concern. However, the majority opinion rejected this limited approach, as Justice Alito recognized in his opinion. Instead, the Court reinforced the significant responsibility of defense counsel as an advisor, "leveling the playing field" and protecting the defendant. If courts allow plea colloquies to categorically "cure" *Padilla* violations, the result will essentially be a vindication of Justice Alito's opinion, which was only joined by Chief Justice Roberts, over the majority opinion, which was joined by five Justices.

Finally, the Court in *Padilla* actually considered the use of plea colloquies and plea forms to warn immigrants of the possible deportation consequences of their pleas. The Court cited to the many states, including Kentucky, that currently provide such warnings through plea forms or colloquies.[192] Given Justice Alito's argument that plea colloquies would resolve the *Padilla* problem, it seems unlikely that the Court would refer to these colloquies and fail to address in any fashion how they interact with the Sixth Amendment rule it was creating (although the prejudice question itself was not squarely presented). Furthermore, the Court *did* comment on these colloquies, concluding that their use "only underscores how critical it is for *counsel* to inform a noncitizen client that he faces a risk of deportation."[193] Lower courts should heed the foregoing and recognize that, although *Padilla* did not reach *Strickland*'s prejudice prong, its language and logic strongly suggest that general plea colloquies cannot cure the prejudice of *Padilla* violations.

V. PROTECTING THE *PADILLA* DECISION IS FUNDAMENTAL TO IMMIGRANT RIGHTS AND THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

The circumvention of *Padilla* and noncitizens' Sixth Amendment rights will have particularly crushing consequences in today's social and legal environment. In particular, three factors indicate that the *Padilla* holding must be retained in its most robust form: (1) the predominance of plea bargaining in resolving criminal charges, (2) the harshness of the immigration laws regarding the deportation of those convicted of crimes, and (3) the lack of a right to representation in removal proceedings.

192. *Id.* at 1486 (Stevens, J.).

193. *Id.* (emphasis added).

A. The Prevalence of Plea Bargaining in the Criminal System

The vast majority of criminal convictions result from guilty pleas. While much of the public associates the criminal justice system with the criminal trial and all of its inherent protections, in reality criminal defendants rarely see their cases go to trial. In 2009, more than 96% of all federal criminal convictions were the result of guilty pleas.[194] That number has held steady for the past ten years.[195] Pleas are similarly prevalent in the states. The Bureau of Justice Statistics estimated that approximately 94% of felony offenders in state courts plead guilty.[196] Given the consistent prevalence of pleas over criminal trials, Robert Scott and William Stuntz's 1992 statement—that the plea process "is not some adjunct to the criminal justice system; it *is* the criminal justice system"—continues to be an apt description of our system.[197]

We might be particularly wary of eroding Sixth Amendment rights in the plea bargain context since it lacks the ordinary protections for criminal defendants and truth-finding functions of the criminal trial.[198] Some scholars have argued that the plea process "undermines the integrity of the criminal justice system" by eliminating these protections and allowing pleas, which arguably may sometimes be coerced due to the imbalance of bargaining power inherent in the process.[199] Since defendants forgo many of the protections of a criminal trial that safeguard our system when they decide to enter a guilty plea, we might consider it all the more important to maintain a robust right to

194. GLENN R. SCHMITT, U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2009, at 3 (2010), *available at* http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_ Cases.pdf.

195. *Id.*

196. SEAN ROSEMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006, at 24 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf.

197. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992); *see also* Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722 (2005) (quoting Scott & Stuntz, *supra*).

198. *See, e.g.*, Nirej Sekhon, *Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 HARV. C.R.-C.L. L. REV. 103, 118 (2011) ("Criminal trials are rare because the vast majority of criminal cases filed in the United States are resolved through plea bargains. This is ironic because the procedural protections that are attendant to trial underwrite our confidence in a defendant's guilt and, thereby, justify punishment." (citation omitted)).

199. Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 767-72 (1998) (summarizing the primary critiques of the plea bargaining system).

counsel in reaching that decision. In other words, without the other safeguards of a criminal trial, the Sixth Amendment does even more work in ensuring a fair adversarial process by "leveling the playing field."[200] Regardless of one's normative position on plea bargaining, given the prevalence of guilty pleas as the method of resolving criminal cases, the legal community should be concerned with ensuring adequate safeguards within the system. Without such safeguards, a vast number of vulnerable defendants may unwarily plead guilty contrary to their own interests. Furthermore, without sufficient protections, the plea process may be seen as illegitimate, undermining the legitimacy of the criminal justice system as a whole.

B. The Harshness of Current Immigration Laws Concerning Deportation After Conviction

As the Court in *Padilla* persuasively set forth, recent changes in immigration laws—most importantly the expansion of the category of deportable offenses through the 1996 amendments to the Immigration and Nationality Act (INA)—ensure that the "'drastic measure' of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes."[201] The INA makes deportable all noncitizens convicted of an "aggravated felony";[202] once removal proceedings begin, deportation is practically mandated because reforms to the immigration code eliminated eligibility for discretionary relief for these noncitizens.[203] Those convicted of aggravated felonies and sentenced to terms of at least five years are also ineligible for withholding of removal.[204] Once noncitizens are deported pursuant to their criminal convictions, they are barred from reentering the country in the future.[205] The category of "aggravated felony," despite its name, covers a broad range of relatively minor offenses; it has been held to include forging a check for nineteen dollars and eighty-three cents, misdemeanor theft of a video game valued at ten dollars, the sale of ten dollars worth of marijuana, pulling the hair of a woman during a fight over a boyfriend, and shoplifting

200. *See supra* notes 32-35 and accompanying text.

201. Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) (citation omitted) (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

202. 8 U.S.C. § 1227(a)(2)(A)(iii) (2006).

203. *Id.* § 1229b(a)(3).

204. *Id.* § 1231(b)(3)(B).

205. *Id.* § 1182(a)(9)(A)(ii).

fifteen dollars worth of baby clothes.[206] Often, the immigration laws do not allow courts to consider mitigating factors such as length of residence or familial connections in the United States. Therefore, a noncitizen who has lived in this country since childhood, does not speak the language of his de jure home country, and whose spouse and children live in the United States could be deported—and barred from ever returning—on the basis of a relatively minor criminal conviction.

While no amount of Sixth Amendment protection can change the harshness of our immigration laws, it is vital that noncitizens be informed of these drastic consequences for minor convictions before they plead guilty. Noncitizens may be offered time served, a short sentence, or a suspended sentence, making a guilty plea appear attractive. However, if the defendant is informed that she will be automatically deported after pleading guilty, the calculus regarding whether or not to plead changes drastically. In fact, deportation is often "the most important part[] of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[207] Furthermore, as the Court in *St. Cyr* anticipated, defense counsel can often use their knowledge of the immigration laws to negotiate plea deals that avoid the deportation consequence.[208]

Much of the language of *Padilla* suggests that, at least in part, the Court was reacting to the stark consequences of current immigration laws. The Court wrote:

> While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.[209]

206. Brief for Asian American Justice Center et al. as Amici Curiae Supporting Petitioner at 8-9, *Padilla*, 130 S. Ct. 1473 (No. 08-651).

207. *Padilla*, 130 S. Ct. at 1480.

208. INS v. St. Cyr, 533 U.S. 289 (2001), *superseded by statute*, REAL ID Act of 2005 § 106(a), 8 U.S.C. § 1252(a)(5) (2006); *see* Brief for Asian American Justice Center et al., *supra* note 206, at 28-34 (detailing various scenarios in which lawyers were able to negotiate plea deals that avoided mandatory deportation, sometimes in exchange for sentences with greater nonimmigration penalties).

209. *Padilla*, 130 S. Ct. at 1478 (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

The Court found that, at minimum, noncitizens must be protected from being exposed to these "drastic"[210] consequences without fair notice. The circumvention of *Padilla* could lead to noncitizens receiving only boilerplate warnings at the moment they enter their pleas instead of honest appraisals of their circumstances from their attorneys.

C. The Lack of Representation for Immigrants in Removal Proceedings

Finally, it is well-established law that removal proceedings, the administrative adjudications that determine a citizen's removability prior to deportation, are civil rather than criminal.[211] Therefore, the Sixth Amendment right to counsel does not attach. While the INA provides for the right to independently obtained counsel, it does not provide for appointed counsel for the indigent.[212] Some courts have theoretically adopted a "case-by-case approach" to whether there is a right to appointed counsel under the Fifth and Fourteenth Amendments in the removal context; however, the reality is that no court has ever held that a noncitizen meets the standards for the right to appointed counsel in a removal proceeding.[213] As a result, the majority of noncitizens who are subjected to removal proceedings appear pro se. Only 39% of noncitizens are represented in removal proceedings.[214] At least partially due to the inaccessibility of many immigration detention centers—which are often located in remote areas—and the common transfer of detainees far from their residence,[215] that number is significantly lower for those in immigration detention. In 2006-2007, only 16% of those in immigration detention had lawyers.[216]

Representation in removal proceedings is unquestionably valuable; in many cases, it may mean the difference between removal and a noncitizen's ability to stay in the United States. A recent study by the Katzmann

210. *Id.* at 1478.

211. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

212. Immigration and Nationality Act (INA) § 292, 8 U.S.C. § 1362 (2006).

213. Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 136-37 (2008).

214. Travis Packer, *Non-Citizens with Mental Disabilities: The Need for Better Care in Detention and in Court*, IMMIGR. POL'Y CTR. 8 (Nov. 2010), http://www.ilw.com/articles/2011,0224-packer.pdf.

215. *See* HUMAN RTS. WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES (2009), *available at* http://www.hrw.org/sites/default/files/reports/us1209web.pdf.

216. Packer, *supra* note 214, at 8.

Immigration Representation Study Group and the Vera Institute of Justice found that among noncitizens not in detention, 74% of those with lawyers obtained a positive result whereas only 13% of those unrepresented had a successful outcome.[217] And among those in immigration detention, 18% of those represented had a successful outcome, compared with 3% of those unrepresented.[218]

While the advice of defense counsel concerning the possible immigration consequences of guilty pleas cannot substitute for representation in removal proceedings, noncitizens' lack of access to counsel in those proceedings heightens the importance of providing forewarning of immigration consequences before noncitizens subject to the criminal justice system plead guilty. Furthermore, to the extent that defense counsel can negotiate plea agreements that enable more favorable immigration consequences, that lawyer may provide the only legal assistance that a noncitizen can or will access with regard to his or her immigration status. As Justice Stevens wrote in *Padilla* in rejecting the affirmative misadvice rule, declining to require defense counsel to advise noncitizen criminal defendants that a guilty plea may expose them to removal "would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available."[219]

Taken together, these factors—the vast number of criminal convictions obtained by pleas, the harshness of the immigration laws with regard to deportation of those convicted of crimes, and the lack of access to counsel in removal proceedings—highlight the vital importance of maintaining the robust protection of the individual right to counsel of noncitizens in the plea process and ensuring that it is not circumvented by a significantly weaker plea colloquy warning.

217. KATZMANN IMMIGRATION REPRESENTATION STUDY GRP. & VERA INST. OF JUSTICE, THE NEW YORK IMMIGRATION REPRESENTATION STUDY PRELIMINARY FINDINGS (May 3, 2010), *available at* http://www.nylj.com/nylawyer/adgifs/decisions/050411immigrant.pdf.

218. *Id.* While this study and other studies are compelling when combined with the knowledge of how complicated U.S. immigration law is, the possibility remains that at least part of the disparity in results is due to selection bias rather than effectiveness of legal assistance. That is, it is possible that only immigrants with viable claims seek out legal assistance. *See generally* D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE. L.J. (forthcoming 2012), *available at* http://ssrn.com/abstract=1708664 (exploring the limited evidentiary value of correlation studies in evaluating the effectiveness of legal representation).

219. 130 S. Ct. 1473, 1484 (2010).

VI. FINAL STRATEGIC CONSIDERATIONS

This Part concludes with a few strategic insights regarding how appellate litigators who take on clients with viable *Padilla* claims can approach the questions raised in this Note and use these arguments in their clients' cases. Litigators can make several different arguments regarding the use of plea colloquies under the second prong of the *Strickland* test. First, relying on the need to maintain the distinct roles of courts and counsel under the Fifth and Sixth Amendments, litigators may argue for the strong rule that the plea colloquy should not be considered whatsoever in determining whether or not there is prejudice. There are certain contexts in which the Court has recognized presumptions of prejudice in the context of the Sixth Amendment.[220] In certain circumstances, such as where defendant's counsel has an "actual conflict of interest," the Court has recognized that prejudice "is so likely that case-by-case inquiry into prejudice is not worth the cost."[221] Analogizing to these presumptions, litigators can argue for a more limited presumption that court plea colloquies do not have a significant enough effect on a defendant's choice of whether to plead to be relevant to the prejudice prong. In other words, litigators can argue that plea colloquies are such poor evidence of whether or not the defendant was prejudiced that the case-by-case inquiry is "not worth the cost." Such a presumption would not only better serve the fact-finding process of the prejudice analysis, since plea colloquies are formalistic and rarely influence defendants, but would also serve the larger goal of maintaining the distinct roles of court and counsel in our system.

In the alternative, litigators can argue that while courts can consider the plea colloquy in their analysis, the plea colloquy should be given little weight given the concerns discussed above. Finally, if litigators lose on those two primary arguments, they should continue to press for, at minimum, the weaker rule that there should be no per se bar on prejudice based on a general court warning.

The best fact pattern for a strategic assault on the tendency of courts to consider plea colloquies under the second prong of *Strickland* is affirmative misadvice from counsel coupled with a general warning from the court. In that scenario, the insufficiency of the court's general warning, when placed alongside more specific, but incorrect, advice from counsel, should be manifest.

220. *See* Strickland v. Washington, 466 U.S. 668, 692 (1984) (observing that prejudice is presumed where there is "actual or constructive denial of the assistance of counsel altogether," in cases involving "various kinds of state interference," and where "counsel is burdened by an actual conflict of interest").

221. *Id.*

After establishing the inability of plea colloquies to cure ineffective assistance of counsel in that scenario, arguing their insufficiency where counsel is silent should be easier to accomplish.

Finally, impact litigators seeking broad structural change and the robust enforcement of *Padilla* must consider how to shape a litigation strategy that integrates the prejudice concern identified in this Note with the other unresolved issues of *Padilla* discussed in Part III. The most urgent other issues arising from *Padilla*—both of which are discussed in Part III and are already circulating in the courts—are: (1) the question of *Padilla*'s retroactive application to pleas finalized before the March 2010 decision, and (2) *Padilla*'s applicability to other collateral consequences of convictions such as sex offender registration and civil commitment. These litigation questions will determine how broadly *Padilla* will apply. Courts are likely to resist the expansion of *Padilla* for fear of opening the floodgates to an overwhelming number of cases and interrupting the finality of judgments.[222] Therefore, litigators will have to make the difficult decision of which issue to attack first, which may affect the success of later claims. For the reasons discussed above, I argue that addressing the use of plea colloquies under the prejudice prong may be an appropriate first step. It will have serious implications for past claims as well as future ones.

CONCLUSION

The lower courts' use of plea colloquy warnings to bar findings of prejudice in *Padilla* claims threatens to undermine the robust right to counsel recognized in *Padilla* and replace it with a generic, nonindividualized warning given moments before the defendant enters his plea. The court in the plea colloquy, required by the Fifth Amendment, and defense counsel under the Sixth Amendment serve fundamentally different purposes in our constitutional scheme. As Sixth Amendment jurisprudence has established, the right to counsel is "indispensable"[223] to a fair adversarial system. The role of defense counsel is to investigate, advise, and counsel her client through every phase of the criminal process. The court, as a neutral arbiter, cannot fulfill this role. The language, logic, and history of *Padilla* all counsel against allowing simple plea colloquies to "cure" *Padilla* violations. As the Supreme Court did in *Gideon*, courts should continue to reject the premise that they can fulfill the role of

222. *See* Chin & Holmes, *supra* note 40, at 736 (arguing that the floodgates concern was one of the primary motivations for the lower courts' adoption of the collateral consequences rule).

223. Maine v. Moulton, 474 U.S. 159, 168 (1985).

defense counsel in ensuring a fair criminal process, be it at the plea stage, where most convictions occur, or at trial. Litigators must remain attentive to this issue so that the fruits of *Padilla* do not go to waste.