

WHY PADILLA DOESN'T MATTER (MUCH)

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The U.S. Supreme Court's decision in Padilla v. Kentucky heralds a formal breakthrough in the representation provided to immigrants charged with crimes that trigger deportation, and the decision may signal as well the Court's recognition of plea bargaining's dominant role in criminal adjudication. There are good reasons to worry, however, that Padilla's practical impact will be modest, and for many noncitizen criminal defendants, including probably Jose Padilla himself, nonexistent. The Padilla Court suggested that it expected attorneys to use their newly required awareness of law triggering deportation upon a criminal conviction to inform plea bargain negotiation and even change criminal or immigration law outcomes through creative bargains. But the problem for many noncitizen defendants like Mr. Padilla is not simply—and not primarily—their lawyers' unfamiliarity with immigration law, for which Padilla's mandate is a remedy. It is, in many cases, the content of the substantive criminal law, of sentencing law, and of limited procedural possibilities for avoiding immigration law's consequences. None of that law changes with Padilla. Moreover, the widespread, enduring inadequacies of indigent criminal defense in American courts are unaffected by Padilla. As a result, defense lawyers' abilities to negotiate favorable immigration outcomes for clients are diminished even when the substantive law provides a possibility for doing so.

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INTRODUCTION

The U.S. Supreme Court, in *Padilla v. Kentucky*,¹ held that a criminal defense attorney who fails to advise a noncitizen client of his nearly certain deportation that will follow from his guilty plea renders assistance that fails

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

to meet the constitutional standard of objective reasonableness. That failure could provide a basis for vacating the plea and conviction under the Sixth Amendment's ineffective assistance doctrine² if that unreasonable representation results in prejudice to the client, an issue the Court did not reach in Mr. Padilla's case. The decision is notable in part simply for the Court's explicit recognition, and pointed description, of the punitive turn that American immigration law took in the twentieth century.³ Over the past hundred years, immigration status has become much more closely linked to the criminal law; procedural protections preceding deportation have been reduced; and deportation has become a much more common possibility for legal residents even with permanent resident status. More practically, *Padilla* notably raises the bar for minimally adequate representation that noncitizen criminal defendants must receive in the adjudication process. At least with regard to the roughly 100,000 noncitizen defendants⁴ charged by American prosecutors annually with deportable offenses, it expands with fairly bright-line specificity the additional substantive legal expertise that attorneys must possess to adequately represent criminal clients, extending and strengthening the promise made in *Gideon v. Wainwright*⁵ and *Strickland v. Washington*⁶ of competent defense counsel. And its rationale quite plausibly could extend to comparable obligations to nonimmigrant, citizen defendants.⁷

The Court and many criminal justice scholars see the *Padilla* decision as a potentially important, even dramatic, change in the law with significant practical consequences. *Padilla* for the first time specified that constitutionally adequate representation requires lawyers to advise clients on a civil law consequence that follows, collaterally but nearly certainly, from a criminal conviction. Scholars and the Court both foresee that this new constitutional

2. *Strickland v. Washington*, 466 U.S. 668 (1984), held that the Sixth Amendment's right to counsel is violated when a defense attorney's representation is so "deficient" that it falls below "an objective standard of reasonableness," if that deficient performance "prejudice[s] the defense" to the degree that defendant is "deprive[d] . . . of a fair trial," and if it "undermine[s] confidence in the outcome" of the litigation. *Id.* at 687–88, 694; see also *Hill v. Lockhart*, 474 U.S. 52 (1985) (applying *Strickland* to the guilty-plea context).

3. *Padilla*, 130 S. Ct. at 1478–80.

4. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, at tbl.4.46 (2009), <http://www.albany.edu/sourcebook/pdf/t4462009.pdf> (stating that 128,345 aliens were located by Immigration and Customs Enforcement in 2009 and deported for criminal status); OFFICE OF IMMIGRATION STATISTICS, 2008 YEARBOOK OF IMMIGRATION STATISTICS 102 tbl.37 (2009) (stating that 97,133 aliens were removed for criminal status out of 358,886 total removals in 2008).

5. 372 U.S. 335 (1963) (holding that the Sixth Amendment's right to assistance of counsel applies to the states through the Fourteenth Amendment and that an indigent criminal defendant charged with a felony has the right to have counsel appointed for him at the state's expense).

6. 466 U.S. 668.

7. See cases cited *infra* note 11.

and professional obligation may have two significant practical consequences, one intended by the *Padilla* majority and one implicitly denied. The majority opinion predicts and intends that the *Padilla* rule will change the substantive outcomes of plea bargaining between prosecutors and the defense; criminal lawyers who formerly may have been unaware of immigration law consequences of a criminal disposition will now bargain in light of those consequences.⁸ The second consequence regards collateral effects of convictions beyond immigration law, of which there are many. The Court's dissenters worried about what some scholars and leading members of the bar hope for and predict from *Padilla* (and have long sought by policy means other than constitutional doctrine): The decision is the first step in requiring criminal defense counsel to advise clients of the many serious and largely unavoidable collateral consequences of criminal convictions.⁹

I want to suggest some reasons to be less optimistic about *Padilla*'s practical impact on both plea bargaining and client counseling regarding collateral consequences of criminal convictions, at least with regard to the fate of the many defendants situated roughly like Mr. Padilla. *Padilla* requires counsel to advise clients whether a conviction triggers mandatory deportation under certain immigration laws. It does not require counsel to negotiate a disposition that avoids that consequence, and it is far from clear how plausible that goal would be in many cases, even for especially competent counsel. For noncitizen defendants at risk of collateral consequences such as deportation, having a lawyer who is aware of laws governing those consequences is a necessary first step, but it is unlikely in many cases to be a sufficient one, and *Padilla* does not change that. The problem for defendants like Mr. Padilla who face grave collateral consequences after conviction is the substantive criminal law and sentencing law, the civil law regimes that create collateral consequences, and, at least in immigration law, the limited procedural possibilities for avoiding or mitigating those consequences. None of that law changes with *Padilla*. Moreover, defense lawyers' abilities to negotiate optimal outcomes for clients

8. 130 S. Ct. at 1486 (noting that counsel informed of immigration law "may be able to plea bargain creatively . . . [to] avoid[] a conviction" that triggers deportation).

9. *Id.* at 1494 (Scalia, J., dissenting). For early scholarly reactions, see Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection* (Univ. of Pa. Law Sch. Pub. Law & Legal Theory Research Paper Series, Research Paper No. 10-33, 2010), available at <http://ssrn.com/abstract=1694111> (emphasizing *Padilla* as a "landmark" and "watershed" decision with regard to plea bargaining regulation); Gabriel J. Chin & Margaret Colgate Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, 25 CRIM. JUST. 21 (2010) (describing *Padilla* as an important step in leading defense counsel to advise clients on a wide range of collateral consequences to criminal convictions); Peter L. Markowitz, *Deportation Is Different* (Cardozo Sch. of Law Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 308, 2010), available at <http://ssrn.com/abstract=1666788> (describing the significance of *Padilla* for immigration law).

are not notably improved. The pervasive inadequacies of indigent criminal defense, especially in state courts, are unaffected by *Padilla* (and are likely growing worse with recession-triggered state budget cuts). For appointed counsel and the state and local entities that pay them, *Padilla* is an unfunded mandate: Defense lawyers now must know more immigration law in addition to criminal law. As a matter of professionalism and ethics, that was true once immigration law reform tied deportation much more directly to criminal convictions, a development reflected in various state rules and professional standards requiring lawyers to advise clients on collateral consequences.¹⁰

Moreover, as others have noted and embraced, *Padilla*'s logic extends to the serious collateral consequences created by other bodies of law in recent decades. Professional standards urge defense attorneys to advise clients on those consequences as well and implicitly to seek plea bargains with those consequences in mind. These additional obligations for competent attorneys are worthy aspirations but also substantial challenges in settings where public defenders and appointed counsel often lack the resources or training to provide the basics of good criminal defense representation.

In Part I, I recount the Court's aspirations that *Padilla* will lead to plea agreements for immigrant clients that bargain around the deportation consequences attached to many convictions and then suggest reasons why, in many cases, that is unlikely to occur. Using Mr. Padilla's situation as an example, I first argue that in many cases the substantive law will present few possibilities for crafting plea bargains to avoid deportation. I then argue that the policies and incentives of state and federal prosecutors will often prevent improved plea bargaining outcomes for defendants at risk of deportation even in situations permitted by the substantive law. Part II then highlights a different restraint likely to undermine *Padilla*'s effectiveness at improving defense representation: the

10. Many states require trial judges to advise defendants of possible immigration consequences that may result from convictions before acceptance of guilty pleas. See, e.g., ALASKA R. CRIM. PROC. 11(c)(3)(C) (2010); CAL. PENAL CODE § 1016.5 (West 2008); CONN. GEN. STAT. ANN. § 54-1j (West 2009); D.C. CODE § 16-713 (LexisNexis 2001); FLA. R. CRIM. PROC. 3.172(c)(8) (2011); GA. CODE ANN. § 17-7-93(c) (2008); HAW. REV. STAT. ANN. § 802E-2 (LexisNexis 2007); MD. R. CRIM. PROC. 4-242 (2011); MASS. GEN. LAWS ANN. ch. 278, § 29D (West 2002 & Supp. 2011); MINN. R. CRIM. PROC. 15.01 (2010); N.M. R. CRIM. FORM 9-406 (2009); N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2002 & Supp. 2011); N.C. GEN. STAT. § 15A-1022 (2010); OHIO REV. CODE ANN. § 2943.031 (West 2006); OR. REV. STAT. § 135.385 (2009); R.I. GEN. LAWS § 12-12-22 (Supp. 2010); TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (West 2009 & Supp. 2010); WASH. REV. CODE ANN. § 10.40.200 (West 2002); WIS. STAT. § 971.08 (2011); see also ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3.2 (3d ed. 2007) (recommending a defense counsel duty to fully advise defendants of deportation consequences of a conviction before guilty pleas); ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS § 19-2.3 (3d ed. 2007) (recommending a trial court's duty to do the same).

conditions of indigent defense provision in many localities, which restrict attorneys' capacity to creatively negotiate pleas for their clients and perhaps to maintain more than a limited, general awareness of immigration law. That limited knowledge may be sufficient to meet *Padilla's* mandate of alerting clients to deportation risks yet insufficient as a basis for creative, optimal bargaining with the constraints of immigration law, criminal law, and limited defense resources.

I. PADILLA CRIMINAL LAW RESTRAINTS ON PLEA BARGAINING

A. *Padilla's* Bold Step on Counsel's Duty and Bold Hope for Bargaining

At least three doctrinal barriers stood in the way of the *Padilla* holding expanding the right to counsel. The first was that deportation does not arise from criminal law, nor is it administered by the criminal court, the prosecutor, or the defense attorney (unless private counsel happens to be retained for both criminal and immigration litigation). This was the crux of the collateral-consequences argument: Defense counsel should be responsible only for consequences flowing directly from the prosecution, meaning consequences that are a function of applicable criminal law. The second was the high value granted to finality of judgments;¹¹ *Padilla* provides an additional ground for defendants to challenge criminal judgments based upon guilty pleas, which, as the Court noted, are much less often, and less successfully, challenged than convictions resulting from trial verdicts. Finally, the formalist understanding of the Sixth Amendment criminal entitlements adopted by Justices Scalia and Thomas would limit the right to counsel (and other Sixth Amendment rights) only to trial;¹² defendants who plead guilty, on this view, should have no more right to particular advice or services from their attorneys than they do to obtain disclosure of impeachment evidence against state witnesses or to confront and compel witnesses outside of trial.

Padilla is significant, as Stephanos Bibas has described in detail,¹³ for the Court's new recognition of the dominance of plea bargaining as the ordinary mode of criminal case disposition and for its understanding of the nature of plea bargaining. The Court acknowledged that a criminal charge is often not a simple, binary, factual inquiry of guilty or not guilty; prosecutors often select from a range of plausible offenses, and in the bargaining process, the parties

11. *Padilla*, 130 S. Ct. at 1484–85.

12. *Id.* at 1494–97 (Scalia, J., dissenting).

13. Bibas, *supra* note 9, at 137.

may have multiple ways to adjust those charges for a normatively appropriate disposition. Justice Stevens wrote for the majority:

[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.¹⁴

Note the picture of opposing attorneys who “bargain creatively” to “craft” a disposition with consequences they manipulate—substituting one criminal charge for another, structuring convictions to avoid or trigger collateral effects like deportation, and (implicitly) selecting among a range of possible criminal punishments. And this sort of negotiation can be accomplished with only “rudimentary understanding” of immigration law (or, more broadly, other noncriminal law defining collateral consequences).

The picture here is one familiar in sophisticated settings of both criminal and civil representation. Corporate transactional lawyers pay attention to regulatory and tax implications of mergers between firms; attorneys for corporate criminal defendants seek settlements that substitute civil sanctions and terms that prevent exclusion of firms from bidding on government contracts or of individuals from working in, say, the securities, banking, or insurance industries.¹⁵ But the ability of attorneys to manage disparate consequences arising from a single legal issue or transaction depends not only on the attorneys’ skill—rudimentary knowledge may or may not be sufficient—but on the options made available under the relevant substantive law that defines the

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

15. See Bibas, *supra* note 9, at 147–49 (noting attorneys’ duty to consider a full range of consequences in legal representation); Chin & Love, *supra* note 9, at 25, 29 (providing a partial list of such collateral consequences of conviction under various federal statutes).

possibilities for both the primary task—the criminal charge—and the collateral consequences.

B. Limits on Bargaining Around Deportation

In some cases, there may be a wide range of criminal charging options. Criminal law frequently—and notoriously—provides multiple statutes that apply to a single, discrete act. The same conduct might fit both a broader and a more specific offense definition,¹⁶ fit two functionally identical offenses that nonetheless carry different sentences,¹⁷ or give rise to liability under several different statutes (such as theft with a firearm, possession of an unregistered firearm, and possession of a firearm by a convicted felon). Moreover, sentencing options commonly vary depending on prosecutors' invocation of sentence enhancement provisions, such as commission of certain crimes within restricted areas (for example, drug sales within a certain distance from a school) or an offender's prior criminal record. In corporate settings governed by federal law, substantial civil penalties (say, fines imposed by an agency such as the EPA or the SEC) are commonly substituted for criminal liability. The criminal law options interact with options created by the law defining collateral consequences, such as immigration law. As the *Padilla* Court noted, not all criminal convictions trigger automatic deportation.¹⁸

Yet the widespread and routine nature of criminal charging flexibility and the complexity of deportation statutes do not mean that creative lawyers have a range of options for every case. Immigration law's increasingly punitive severity in recent decades has left many fewer offenses that do not trigger mandatory deportation, and the facts of a routine case like Mr. Padilla's may provide no realistic options for avoiding immigration law's harsh mandates.

16. See, e.g., *Dixon v. State*, 596 S.E.2d 147 (Ga. 2004) (reversing an aggravated child molestation charge because the conduct in question fit the legislative definition of misdemeanor statutory rape); *State v. Peters*, 525 N.W.2d 854 (Iowa 1994) (affirming that a charge for driving a snowmobile while under the influence of alcohol was proper under both IOWA CODE § 321J.2, which prohibited such conduct for “motor vehicle[s],” and IOWA CODE § 321G.13(3), which specified “all-terrain vehicle[s] or snowmobile[s],” even though the latter, more specific offense carries different punishments).

17. *United States v. Batchelder*, 442 U.S. 114 (1979) (finding no constitutional problem in a case in which two statutes prohibited convicted felons from possessing firearms—one with a two-year maximum sentence and the other with a five-year maximum—and the prosecutor elected to charge the defendant under the statute that carries a longer sentence).

18. See, e.g., *Padilla*, 130 S. Ct. at 1483 (noting that, in contrast to the statute that made Mr. Padilla's deportation nearly automatic after conviction, there are “numerous situations in which the deportation consequences of a particular plea are unclear or uncertain”).

Jose Padilla, born in Honduras in 1950, immigrated to the United States as a child in the 1960s and lived there ever since; he served in the U.S. military in Vietnam. Mr. Padilla was a fifty-five-year-old commercial truck driver and permanent legal resident of the United States—he lived with his family in California—when his truck was stopped at a weigh station in Hardin County, Kentucky, in September 2001. He consented to a search of his truck, which turned up twenty-three styrofoam containers holding one thousand pounds (about 453 kilograms) of marijuana.¹⁹

On these facts, prosecutors had options—but, as it turns out, probably not realistic ones that are meaningful for structuring the conviction to avoid mandatory deportation. The first choice was jurisdictional; both federal and state prosecutors could have charged Mr. Padilla with a felony drug trafficking offense. I explore Mr. Padilla's likely fate in federal court below, but it is a virtual certainty that federal prosecution would not have improved his fate.²⁰

Hardin County prosecutors' options for selecting charges against Mr. Padilla are found in the Kentucky Penal Code in Chapter 218A, which lists all of the state's controlled-substance crimes. Marijuana is a Schedule I controlled substance under Kentucky law, as it is under federal and other state laws.²¹ Hardin County prosecutors charged Mr. Padilla under what is clearly the most appropriate Kentucky statute, Section 218A.1421, captioned "trafficking in marijuana." It states simply, "[a] person is guilty of trafficking in marijuana when he knowingly and unlawfully traffics in marijuana."²² Elsewhere in the code "traffic" is defined as "distribute, dispense or sell, transfer or possess with intent" to do so,²³ and the last paragraph in Section 1421 specifies the definition of trafficking in a way to provide little help for Mr. Padilla: "The unlawful possession by any person of eight (8) or more ounces of marijuana shall be prima facie evidence that the person possessed the marijuana with the intent to sell or

19. Editorial, *Crime and Banishment*, WASH. POST, Oct. 13, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/12/AR2009101202441.html>.

20. If state prosecutors are willing to charge and convict an offender, federal prosecutors, following a long-established practice, often decline to bring federal charges when the state imposes adequate punishment. *Principles of Federal Prosecution*, UNITED STATES ATTORNEYS' MANUAL § 9-27.240, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm#9-27.240 (last visited June 15, 2011). For a specific example of statistics on one federal district's declination in favor of state prosecution, see Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 293 (1998) (noting that in a forty-two-month period, federal officials declined three thousand drug cases that state prosecutors agreed to handle).

21. KY. REV. STAT. ANN. § 218A.050 (West 2010).

22. *Id.* § 218A.1421(1).

23. *Id.* § 218A.1431.

transfer it.”²⁴ The statute provides three different levels for this marijuana trafficking offense: trafficking in less than eight ounces is a misdemeanor; more than eight ounces but less than five pounds is a class D felony; more than five pounds is a class C felony, which carries a sentencing range—for a first offense—of five-to-ten years.²⁵ No other provisions in Chapter 218 (nor in Title L of the Kentucky Penal Code) plausibly apply to Mr. Padilla’s conduct, except for Section 1422, which makes possession of any amount of marijuana a misdemeanor. Other controlled-substance offenses apply specifically to possession of or trafficking in other drugs, or apply to circumstances not applicable to Mr. Padilla, such as trafficking near a school, theft of drugs, or cultivation of marijuana.

There was, in short, no plausible alternative in the Kentucky Penal Code to a felony charge of marijuana trafficking under Section 1421 without wildly mischaracterizing the facts of Mr. Padilla’s case.²⁶ (That in fact was the conclusion of the Kentucky prosecutors handling Mr. Padilla’s case on remand in 2010.)²⁷ In light of that lack of charging alternatives, the prospects for crafting a charge and disposition that would avoid deportation were effectively nonexistent. Even if Mr. Padilla’s attorney and the Hardin County prosecutor had been bargaining with an awareness of the deportation provisions of federal immigration law—and even if the prosecutor had been inclined to agree to a disposition that reduced Mr. Padilla’s odds for deportation—no options for doing so existed, because no option would prevent deportation except politically impossible ones—nonprosecution or charging only with misdemeanor possession. A felony conviction for “illicit trafficking in a controlled substance” is an aggravated felony under 8 U.S.C. § 1101(a),²⁸ a category of offense that makes offenders subject to mandatory deportation.²⁹ For felonies defined in this aggravated category (unlike other felonies), federal law denies the U.S. Attorney General any authority to cancel removal orders for permanent residents, meaning that deportation for those convicted of aggravated felonies is truly mandatory.³⁰

24. *Id.* § 218A.1421.

25. Mr. Padilla was charged under KY. REV. STAT. ANN. § 218A.1421(1), (4)(a). Brief for Petitioner at 9, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 1497552, at *9.

26. The record does not indicate that Mr. Padilla faced state collateral consequences defined within Chapter 218—forfeiture of related property or paying the costs of disposing of the drugs. KY. REV. STAT. ANN. § 218A.141 (disposal costs); *id.* §§ 405–460 (forfeiture).

27. Telephone Interview With Eric Carr, Assistant Commonwealth Attorney, 9th Judicial Circuit, Ky. (Jan. 10, 2011).

28. 8 U.S.C. § 1101(a)(43)(B) (2002).

29. *Id.* § 1227(a)(2)(a)(iii).

30. See *id.* § 1229b(a) (providing the Attorney General’s authority to cancel removal for permanent residents); *id.* § 1229b(a)–(c) (declaring individuals convicted of aggravated felonies

In sum, Mr. Padilla's case is an example of one in which no amount of creative negotiation between well-informed attorneys is likely to yield a disposition that avoids triggering automatic deportation. Mr. Padilla's lawyer's challenge to the constitutionality of the truck search failed; the facts are simple, effectively indisputable, and overwhelmingly in favor of guilt, making the prospect of trial acquittal unrealistic.³¹ Kentucky law—like federal law and probably every state criminal code—provides no plausible statutory options for charging the conduct of transporting one thousand pounds of marijuana as anything other than a felony drug trafficking offense. And federal immigration law provides not even the prospect of the Attorney General's discretionary cancellation of removal for a noncitizen convicted of a drug trafficking offense (and many other nonviolent offenses).

Mr. Padilla cooperated with federal investigators after his arrest. He agreed to complete the drug delivery as part of a sting operation targeting the buyers, but the buyers never showed. For that cooperation (and probably due to state prosecutors' announced intention to prosecute), federal officials agreed not to charge him.³² Had his cooperation been more valuable to enforcement officials, Mr. Padilla might have been able to receive the extremely generous disposition (nonprosecution or a misdemeanor charge) it would have taken to avoid deportation; those circumstances will occasionally exist for others, giving lawyers something to work with in an effort to prevent removal. Mr. Padilla could have faced a conspiracy charge instead of, or in addition to, the trafficking offense, although under Kentucky law that carries the same sentence as the underlying trafficking crime,³³ and under federal law that offense seems to fit in the aggravated felony definition as well.³⁴

Had federal instead of state prosecutors charged Mr. Padilla, he would likely have fared no better, again holding aside a generous quid pro quo for valuable cooperation. Under federal law, the standard and most likely offense would be possession with intent to distribute (essentially trafficking) marijuana under 18 U.S.C. § 841(a), which is clearly an aggravated felony under

ineligible for the cancellation remedy); see also DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 10:23 (2008) (describing the same).

31. This is the challenge of Mr. Padilla's still-unresolved ineffective assistance claim on remand. The Supreme Court found his lawyer's performance deficient, but Mr. Padilla must still prove he was prejudiced by the deficiency. The challenge is to argue that, had knowledge of the deportation risk prompted a decision to go to trial instead of to plead guilty, the outcome would likely have been different. Telephone Interview With Eric Carr, *supra* note 5.

32. *Id.*

33. KY. REV. STAT. ANN. §§ 218A.1402; 532.020 (West 2010) (defining the sentencing range for a class C felony as five to ten years and for a class D felony as one to five years).

34. "Aggravated felony" is defined in 8 U.S.C. § 1101(a)(43) to include "illicit trafficking in a controlled substance."

8 U.S.C. § 1101 regardless of the specific sentence. Even with no prior criminal record and no aggravating factors such as weapon possession, the federal sentencing guidelines would likely recommend a sentence of sixty-three to seventy-eight months.³⁵

Perhaps more importantly, even if the substantive criminal law and immigration law provided more plausible bases for constructing a disposition that accurately reflected the criminal conduct but avoided deportation, it is far from clear how willing state or federal prosecutors would be to pursue that goal. The compelling equities of a case such as Mr. Padilla's—a middle-aged legal resident for decades, with a family, a good job, and no prior offenses—are grounds for hope that many prosecutors would seek such a disposition if it were plausibly available. And indeed the prosecutor presently handling Mr. Padilla's case strongly favors nondeportation, though not at the cost of dismissing the prosecution of such a substantial offense.³⁶ But the sympathetic appeal of Mr. Padilla's life story notwithstanding, there are strong reasons to be doubtful.

One source for that doubt arises from Department of Justice policy regarding criminal prosecution and deportation. The Department's policy is to "deport all criminal aliens as expeditiously as possible" and thus "[a]ll deportable criminal aliens should be deported unless extraordinary circumstances exist."³⁷ Prosecutors lack authority to promise nondeportation in a plea agreement without authorization from the Department of Homeland Security,³⁸ although they may facilitate deportation by offering a sentencing discount in exchange for a defendant's consent to removal.³⁹ The sentencing discount policy originated in federal prosecutors' "fast-track" prosecution policy of the last two decades. Under that policy, initiated by the Justice Department and endorsed by Congress in the PROTECT Act,⁴⁰ deportable defendants are offered a sentence discount in exchange for quickly pleading guilty and consenting to deportation.⁴¹ Details of the agreement terms have varied some across districts,

35. Possession of four hundred to seven hundred kilograms of marijuana earns a base offense level of twenty-eight under U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2010), which would probably be reduced by two points by pleading guilty and accepting responsibility. *Id.* § 3E1.1. An offense level of twenty-six with no prior criminal history yields a recommended sentencing range of sixty-three to seventy-eight months. *Id.* ch. 5, pt. A, at 401.

36. This is the view of Assistant Commonwealth Attorney Eric Carr, who is prosecuting Mr. Padilla's case on remand in 2010–11. Telephone Interview With Eric Carr, *supra* note 5.

37. Memorandum From the Attorney General to All Federal Prosecutors on Deportation of Criminal Aliens (Apr. 28, 1995), reprinted in U.S. DEPT OF JUSTICE, CRIMINAL RESOURCE MANUAL 1920; see also UNITED STATES ATTORNEYS' MANUAL § 9-73.510 (2010).

38. UNITED STATES ATTORNEYS' MANUAL § 9-73.520; see also 28 C.F.R. 0.197 (2011).

39. UNITED STATES ATTORNEYS' MANUAL § 9-73.520.

40. PROTECT Act, Pub. L. 108-21, 117 Stat. 650, S. 151 (2003).

41. For an account of the original fast-track program, see Bersin & Feigin, *supra* note 20, at 301.

but the common model requires defendants to waive indictment, most discovery, motions, pre-sentence report, and any challenge to deportation.⁴²

Fast-track programs originated against a background of dramatic increases in illegal-entry crimes in the southwestern United States and drug crimes by both legal resident immigrants and illegal entrants. The fast-track policy was one of the responses to the rising caseloads in federal districts that bordered Mexico in Arizona and California. Another response was arranging prosecution of more drug offenses in state courts.⁴³ Alan Bersin, the U.S. Attorney in the Southern District of California in the 1990s who developed the fast-track policy and other strategies for addressing his district's rising caseloads, has offered some telling insights about federal priorities that likely continue to inform any charging policies, plea negotiations, and deportation decisions in drug cases.⁴⁴ Until the early 1990s, federal prosecutors resolved simple illegal-entry cases and smaller-quantity drug cases involving illegal entrants with only deportation, or with a misdemeanor conviction plus deportation. To increase deterrence, however, Bersin's office in the Southern District of California convinced state prosecutors to prosecute thousands of drug cases formerly left to federal officials and to charge them as felonies when possible, because a felony conviction meant that, if deported offenders ever reentered the country, they could be prosecuted more severely under 8 U.S.C. § 1326, which imposes up to twenty years of imprisonment for unauthorized reentry by removed aliens who committed aggravated felonies. For some smaller-quantity (less than 125 pounds) marijuana offenders without U.S. citizenship and with no criminal record, federal prosecutors referred the case to immigration courts, which would order deportation of even legal resident immigrants. Finally, for some offenders, federal prosecutors devised fast-track prosecutions that sought federal felony convictions but granted sentencing discounts in exchange for quick process and uncontested deportation.⁴⁵

This multifaceted policymaking by federal prosecutors on the one hand confirms that prosecutors often have a range of options for charging, or not

42. The Supreme Court confirmed the waivability of some constitutional discovery rights in the context of fast-track plea agreements in *United States v. Ruiz*, 536 U.S. 622 (2002). Ruiz was charged under 21 U.S.C. § 952 with importing marijuana into the United States as she attempted to enter California from Mexico in a vehicle carrying thirty kilograms of marijuana (less than a tenth of the quantity Mr. Padilla transported). The quantity she was caught with exposed her to a maximum five-year sentence, 21 U.S.C. §§ 960, 841 (2010), although the Sentencing Guidelines recommendation was eighteen to twenty-four months. The prosecutors offered an additional sentencing discount down to a range of twelve to eighteen months if she agreed to all the waivers noted above and quickly pleaded guilty. *Ruiz*, 536 U.S. 622.

43. See Bersin & Feigin, *supra* note 20.

44. *Id.*

45. *Id.*

charging, offenders. But virtually every feature of the government's policy choices cuts against the idea that prosecutors are willing to craft dispositions for large-scale drug transporters like Mr. Padilla so as to reduce his risk of deportation. On the contrary, this history suggests that, while prosecutors might trade criminal sanctions in exchange for deportation, they have little interest in helping defendants avoid deportation, especially if that avoidance requires, under federal immigration law, reducing a defendant's criminal charges. That policy priority is in accord with Justice Department policy noted above and with federal law that requires deportation of felons.⁴⁶ Federal prosecutors' typical policy goal is to obtain a felony conviction (sometimes provided by state prosecutions) that makes future deportation easier, not to craft dispositions that avoid deportation. The emphasis is on fast and standardized process, which cuts against ambitions of defense attorneys who want to seek a carefully crafted deal in light of the equitable appeal of their clients' circumstances.

This is not to say that there is no hope for the ideal of crafting dispositions so as to avoid deportation. Federal districts with fast-track policies are usually those that face special burdens of caseloads; other jurisdictions might adopt different policies under different circumstances. Furthermore, it is surely true that not all discretionary actions by front-line prosecutors necessarily accord with formal departmental policy, and even the policy makes exceptions for cases involving "exceptional circumstances."⁴⁷ But that is scant basis for hope that even the appealing circumstances of Mr. Padilla's case would prompt prosecutorial acquiescence to a bargain that undersold a large-quantity drug offense to avoid aggravated-felony status and its consequence of mandatory deportation.

However, it seems unlikely that any jurisdiction, state or federal, would substantially reduce or forgo felony drug charges when presented with a case, supported by strong evidence, of large quantities of illicit drugs. Consider more closely the interests of a state jurisdiction handling a case like Mr. Padilla's, once local prosecutors and defense attorneys are aware of the mandates of federal immigration law. Every state professes an interest in punishing large-quantity drug offenders. On the other hand, incarcerating an offender like Mr. Padilla is expensive; annual incarceration costs per inmate can run about \$25,000 a

46. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010) (summarizing federal statutes that eliminate discretion of courts and the Attorney General to prevent deportation of many offenses (citing 8 U.S.C. §§ 1101(a)(43)(B), 1228, 1229b, 1251(a)-(b) (2006))).

47. See Memorandum From John Ashcroft, Att'y Gen., to All Federal Prosecutors Regarding Policy on Charging of Criminal Defendants (Sept. 22, 2003); see also Memorandum From David W. Ogden, Deputy Att'y Gen. to All United States Attorneys (May 29, 2009).

year.⁴⁸ State prisons incarcerated 74,000 aliens and local jails housed another 147,000 in 2003; state governments receive some federal reimbursement of those costs under the State Criminal Alien Assistance Program, but reimbursements covered less than 25 percent of costs in 2003, and in recent years reimbursements have declined as alien inmates and costs increased.⁴⁹

With greater appreciation of federal immigration law's tough deportation mandates, however, states like Kentucky may recognize an alternative. They may well be interested in trading the costly punishment of incarceration for the free (to the state) punishment of deportation administered by federal officials. Both sanctions deter offenders—deportation often much more than incarceration—and both incapacitate the offender from repeat offenses within the state. On that view, the bargains that Kentucky officials are likely to pursue are not ones that avoid deportation—they are ones that speed up deportation to reduce state incarceration costs. It is in both state and federal officials' interests to do so: Federal officials pay the costs of detaining aliens pending deportation if proceedings do not occur while offenders are in state prisons, and states save prison costs if offenders are removed before their sentences are complete.

Nonetheless, given the nature of bureaucracies and the diverse institutional actors involved, these incentives may not result in all officials consistently seeking those cost savings. State prosecutors typically have little regular interaction with federal immigration officials, and indeed as a practical matter may be unable to coordinate with them on specific cases. (The prosecutors in Mr. Padilla's district report that federal immigration officials are consistently unresponsive to their inquiries about individual immigrant defendants, so they have never coordinated a criminal disposition with immigration officials.⁵⁰) At times, the federal government has been slow to carry out deportation proceedings against felon aliens in state prisons.⁵¹ And communicating with federal immigration officials about an inmate's citizenship status or release date may not be a priority for, say, local jail administrators—though one study found local cooperation with federal authorities to be fairly significant.⁵² Likewise, local

48. See Annual Determination of Average Cost of Incarceration, 74 Fed. Reg. 33279 (July 10, 2009) (Bureau of Prisons notice) (reporting that the annual cost of incarcerating a federal inmate in fiscal year 2008 was \$25,895); James J. Stepahn, *State Prison Expenditures 2001*, BUREAU OF JUSTICE STATISTICS (NCJ 202949) (2004), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=16> (reporting that the average annual operating cost per state inmate in 2001 was \$22,650).

49. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-337R, INFORMATION ON CRIMINAL ALIENS INCARCERATED IN FEDERAL AND STATE PRISONS AND LOCAL JAILS 19, 23, 25, 29 (2005).

50. Telephone Interview With Eric Carr, *supra* note 5.

51. U.S. GOV'T ACCOUNTABILITY OFFICE, T-GGD-99-47, INS'S EFFORTS TO IDENTIFY AND REMOVE IMPRISONED ALIENS CONTINUES TO NEED IMPROVEMENT (1999).

52. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT REPORT 07-07, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED

prosecutors, who are not directly responsible for state prison budgets, may not make it a priority to minimize state costs of incarcerating alien offenders by facilitating deportation, especially if that means forgoing well-grounded felony charges or reducing a standard sentence term. And political environments vary across localities; there is evidence that a few localities follow their local political sentiment to minimize assistance for federal efforts to remove aliens,⁵³ although in others local prosecutors adopt pro-deportation policies that mimic federal policy. As a matter of policy, the Department of Homeland Security discourages state prosecutors from negotiating dispositions that avoid triggering deportation.⁵⁴ In sum, prospects are probably intermittent at best that state prosecutors will be actively inclined toward crafting bargains that would reduce the odds of deportation, even in cases where plausible plea bargain options exist for such a disposition.

II. PADILLA AND THE QUALITY OF INDIGENT DEFENSE COUNSEL

Holding aside the large number of cases that probably resemble Mr. Padilla's in presenting few possibilities for crafting plea bargains to avoid deportation, and holding aside also the likely inclination of many prosecutors to facilitate rather than undermine removal of criminal aliens, another barrier remains to hopes that the *Padilla* doctrine will transform defense representation for immigrant defendants—and, more broadly, all defendants facing significant collateral consequences from conviction. *Padilla* in effect mandates that criminal defense counsel be aware of immigration law,⁵⁵ so that they can make their clients aware of deportation risks. But *Padilla* does not mandate or compel defense counsel to zealously and creatively represent their clients. *Padilla* remains a mere refinement of the ineffective assistance doctrine first defined in *Strickland v. Washington*,⁵⁶ a doctrine under which state and federal

STATES (Jan. 2007) (reporting surveys of federal, state, and local officials that found local officials to be largely cooperative with federal removal efforts). This study focused on local officials' responsiveness to federal inquiries, not federal receptiveness to local inquiries.

53. See *id.* (describing San Francisco as having a policy of noncooperation with immigration enforcement officials); see also CALIF. PENAL CODE § 1016.5(a) (West 2010) (requiring trial judges to warn noncitizens of possible immigration consequences before accepting a guilty plea so that “the defendant [has] a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware of the possibility of deportation,” which might imply state legislative sympathy with bargains that avoid deportation).

54. NORTON TOOBY, TOOBY'S GUIDE TO CRIMINAL IMMIGRATION LAW 90, 93 (2008).

55. As a practical matter, *Padilla* implies that immigrant defendants should consult with attorneys who specialize in the complex area of immigration law. That is the advice of prominent practitioner manuals. See *id.*

56. 466 U.S. 668 (1984).

courts have created a long track record of finding poor lawyering to be constitutionally adequate.⁵⁷ There is no reason to think *Padilla* will change that judicial track record significantly. Quality defense representation depends much more on the resources that jurisdictions provide to their indigent defense systems (or that paying clients provide to their retained attorneys) than on the Supreme Court's specifications of minimal standards for constitutionally adequate counsel, especially a standard that the Court explicitly defines as one that is highly deferential to defense attorney performance.⁵⁸ There is scant reason to think that courts will use *Padilla* any more than they have used *Strickland* to ensure that defense lawyers make optimal tactical use of the criminal or immigration law that they are now required to know. There are indications that Mr. Padilla's own case provides an example of mediocre but (otherwise) constitutionally adequate lawyering for which inadequate legal knowledge is not the real cause or explanation.

The actual plea bargain that Mr. Padilla accepted suggests that his attorney may well have negotiated for him a far-from-optimal disposition simply in terms of the criminal law, holding deportation issues aside. If Mr. Padilla had gone to trial, he faced a sentencing range under the Kentucky statute of between five and ten years.⁵⁹ Under Kentucky law, he could request jury sentencing and present mitigating evidence in hopes of winning the minimum five-year term.⁶⁰ Further, under Kentucky's law of parole, he would be eligible for parole after serving 20 percent of his sentence;⁶¹ even if he got the maximum ten-year sentence after trial, he would be eligible for parole after two years (much of which he had served in post-arrest detention before his plea, and more of which he would have served before a trial). Mr. Padilla had no prior record that could trigger enhanced sentencing after trial. Yet instead of trial—and prompted by the loss of the motion challenging the search and the state's strong evidence—Mr. Padilla's attorney arranged and urged a guilty plea in exchange for a ten-year sentence, with only the second half of that term served on probation.⁶² (That disposition made him eligible

57. See *id.* at 687–88; *supra* note 1.

58. *Strickland*, 466 U.S. at 681, 689.

59. KY. REV. STAT. ANN. § 218A.1421 (4)(a) (West 2010).

60. See *id.* § 532.055 (jury sentencing).

61. See 501 KY. ADMIN. REGS. 1:030 § 3(c) (2010) (specifying the first parole review after 20 percent of the sentence was served for certain offenses), available at <http://www.lrc.ky.gov/kar/501/001/030.htm>; see also KY REV. STAT. ANN. § 439.340 (authorizing the Parole Board to adopt regulations on parole eligibility).

62. See Brief for Petitioner, *supra* note 25, at 9; see also KY. REV. STAT. ANN. § 532.055 (jury sentencing). Mr. Padilla pled guilty to the felony drug trafficking charge and to two of the three misdemeanor charges.

for parole after one year, most of which he had already served, but the parole board refused to grant parole because of federal officials' immigration hold on him. Mr. Padilla eventually served about thirty-eight months of that five-year sentence, receiving only the standard discount for good behavior.⁶³)

Mr. Padilla, in short, pled to a bargain that gave him a modest discount (at most) compared to what he likely would have gotten after trial. His defense attorney's lack of knowledge about the law seems unlikely to have been the explanation for the terms of a settlement that yielded minimal gain over a trial conviction. The Kentucky criminal law that defined the terms of the plea and trial options in this case was relatively straightforward. Perhaps another lawyer could have negotiated a better sentence bargain than Mr. Padilla's attorney (who was privately retained, not appointed),⁶⁴ but that is hardly obvious. It is surely the case, however, that Mr. Padilla's attorney's performance would have easily passed constitutional scrutiny under *Strickland's* deferential standard, had the Court not added the new mandate in *Padilla* for advice on deportation consequences.

More generally, *Padilla's* expansion of *Strickland's* requirements—even if it is extended to other collateral consequences of convictions—is not the sort of revision to ineffective assistance doctrine that is likely to improve criminal case dispositions for most charged aliens or citizens who suffer from suboptimal representation. Some portion of decisions under *Strickland* and related doctrines that examine subpar defense representation document examples of attorneys whose lack of knowledge of substantive law probably affected their lawyering decisions, their clients' choices, and case outcomes.⁶⁵ But more often the cause of poor defense lawyers is not deficient knowledge of substantive law, but insufficient attorney diligence, especially regarding fact investigation,⁶⁶ which *Padilla* does nothing to address.

Attorneys' lack of diligence reflects in part inevitable variations in professional performance across individuals. But inadequate effort in defense representation is also commonly encouraged by two familiar incentives: insufficient

63. Telephone Interview With Eric Carr, *supra* note 5.

64. *Id.*

65. See, e.g., *Brady v. United States*, 397 U.S. 742 (1970) (holding that the defendant's plea was still "knowing" and valid after the attorney gave incorrect but competent legal advice when he told the defendant, wrongly, that he was eligible for the death penalty).

66. *Slaughter v. Parker*, 450 F.3d 224, 234 (6th Cir. 2006) (affirming the death sentence upon finding that the defense lawyer was not ineffective under *Strickland* even though his deficient performance included not investigating sufficiently to discover his client's real name, medical records documenting his client's brain damage, or a history of child abuse that could have been presented as mitigating evidence), *reh'g en banc denied*, 467 F.3d 511, *cert. denied sub nom. Leonard v. Simpson*, 127 S. Ct. 2914 (2007).

funding for indigent defense representation and local courthouse cultures that encourages minimal rather than zealous representation. Inadequate funding of indigent defense has been widely documented⁶⁷ and in many settings leaves defense attorneys with too many cases and too little time to provide adequate representation.

Studies of courthouse groups who work together repeatedly over months or years find that informal norms set expectations and practical limits on defense lawyers (as well as others) that discourage trials, discovery and investigation, motions practice, and requests for expert assistance.⁶⁸ A recent Texas study found several courts in large cities that repeatedly appoint private attorneys to represent indigent capital defendants despite the attorneys' records of repeated failures to meet filing deadlines, often resulting in defaulted appellate claims for their clients.⁶⁹ Regarding the minority of criminal defendants who privately retain their attorneys, the same local professional culture may

67. See, e.g., NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 49–101 (2009), available at <http://www.constitutionproject.org/pdf/139.pdf>; SPANGENBERG GRP., A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA, at iii (2004) (documenting deficiencies in Virginia's indigent defense system, including statutory fee caps for appointed counsel that were the lowest in the country in 2004); SPANGENBERG GRP., STATE INDIGENT DEFENSE COMMISSIONS, at i (2006) (documenting, inter alia, state fee caps for indigent representation). For an account of an attorney's excessive workload that won judicial acknowledgement and a partial remedy, see *State v. Peart*, 621 So. 2d 780, 791–92 (La. 1993).

68. See generally ROY B. FLEMMING, PETER F. NARDULLI & JAMES EISENSTEIN, *THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES* (1992) (providing a large study of lawyers and judges in criminal courts); see SPANGENBERG GRP., STATUS OF INDIGENT DEFENSE IN GEORGIA: A STUDY FOR THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, PART I, at 66–68 (2002), available at <http://www.georgiacourts.org/aoc/press/idc/idchearings/spangenberg.doc> (“As far as experts are concerned, I am as cheap as possible. This is a Chevy operation, not a Mercedes operation. We are under extreme pressure from the county to hold our expenses down.” (quoting a superior court judge in a large urban county)); *id.* at 70 (providing the report of a chief superior court judge in a rural circuit “that he feels acute pressure from the counties to cut back on expenditures on counsel, experts and investigators”). The Report further states the following:

[E]ven attorneys who feel that an investigator or expert would help in their cases are reluctant to file motions securing investigative help a) because it will be a waste of time, as such requests are routinely denied and/or b) because it might annoy judges. In Clayton County, attorneys told us that even in death penalty cases to get approval for investigators was akin to “pulling teeth.”

Id. at 66.

69. Lise Olsen, *Death Row Lawyers Get Paid While Messing Up*, HOUS. CHRON., Apr. 20, 2009, <http://www.chron.com/dispatch/story.mpl/metropolitan/6381687.html> (reporting audits showing that Houston attorney Jerome Godinich, who was appointed to 1638 criminal cases (including 21 capital cases) in Harris County from 2006 to 2009, missed appellate filing deadlines, resulting in defaulted claims for three capital clients; San Antonio attorney Suzanne Kramer missed three state appellate deadlines—and incurred a fine of \$750 from the Texas Court of Criminal Appeals—but was subsequently appointed to another capital case; and Fort Worth attorney Jack V. Strickland, Jr., missed four deadlines in capital cases).

combine with a client's inability to monitor their lawyer effectively in a lawyer-client relationship that is likely to be a one-time arrangement, diminishing the attorney's incentive to perform well in hopes of repeat business.

The *Padilla* holding is not a solution for those sources of deficient lawyering. Legal outcomes surely vary according to the quality of legal representation,⁷⁰ but *Padilla*'s mandate that an attorney have a basic knowledge of a serious ancillary consequence of conviction will not change most outcomes that are worse than a client would have received with a better attorney. The most effective avenue to remedy suboptimal defense lawyering is also an unlikely one: reforming indigent defense systems to bring their resources—and in some cases prosecutor and court resources as well—in line with the case demands of local criminal dockets. Studies regularly document the inadequacy of indigent defense provision,⁷¹ and the success of litigation and strategies of reform is decidedly mixed.⁷² On the other hand, it bears noting that some indigent defense organizations not only provide quality representation generally but have been effective (well before *Padilla*) at developing expertise to improve outcomes for clients (especially those facing misdemeanor charges) by negotiating in light of the range of collateral consequences that follow criminal convictions.⁷³

70. See, e.g., JONATHAN D. CASPER, CRIMINAL COURTS: THE DEFENDANT'S PERSPECTIVE 35 tbl.VI-5 (1978) (stating that 59 percent of public defenders spend less than half an hour with clients); Marty Lieberman, *Investigation of Facts in Preparation for Plea Bargaining*, 1981 ARIZ. ST. L.J. 557, 576 (discussing a study of Phoenix, Arizona, attorneys that found that 47 percent of surveyed defense attorneys did not interview any state witnesses before plea negotiations); Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 759, 762 (1986–87) (finding that appointed defense counsel visited crime scenes in only 12 percent of cases and conducted pretrial interviews of only 21 percent of their witnesses and 25 percent of their clients in homicide cases, and, in non-homicide felonies, attorneys interviewed witnesses in only 4.2 percent of cases and their clients in only 18 percent); Margaret L. Steiner, *Adequacy of Fact Investigation in Criminal Defense Lawyers' Trial Preparation*, 1981 ARIZ. ST. L.J. 523, 534, 537 (discussing a similar study in Phoenix, which found that only 55 percent visited felony crime scenes before trial, and only 31 percent interviewed all prosecution witnesses).

71. See, e.g., ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise>; NAT'L RIGHT TO COUNSEL COMM., *supra* note 67; Stephen Henderson, *Defense Often Inadequate in Four Death-Penalty States*, MCCLATCHY NEWSPAPERS, Jan. 16, 2007, <http://www.mcclatchydc.com/201/story/15397.html> (accompanying four articles in a series regarding the poor quality of legal representation found in a study of eighty death penalty cases from Alabama, Georgia, Mississippi, and Virginia); see also *State ex rel. Mo. Pub. Defender Comm. v. Pratte*, 298 S.W.3d 870 (Mo. 2009) (describing the failure of funding to keep up with the workload of public defenders).

72. Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 429, 432–62 (2009) (describing the mixed success of impact litigation to address inadequate criminal defense systems).

73. See Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry Into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1067–68 (2004) (describing

To be sure, *Padilla* is a small step in the right direction. It seems unlikely to have significant counterproductive effects—say, by draining limited attorney resources from the primary job of criminal defense in order to improve knowledge of immigration law. And for attorneys working with sufficient resources, skill, and commitment, an increased awareness of immigration law clearly can lead, in some cases, to those better outcomes that the Court predicts and many scholars and advocates hope for, at least when the substantive law creates plausible options. But it is for those reasons—the need for capable attorneys and discretion on case settlement terms—that *Padilla* is only a small step, one whose effects will be felt, in all likelihood, in a minority of criminal cases involving noncitizen defendants. If *Padilla*'s principle extends to other collateral consequences that affect citizen defendants (as seems likely),⁷⁴ then its effect will grow accordingly. But that effect will be restrained by the same twin factors of limits on defense representation and restrictive substantive law that defines crimes, sentencing, and collateral penalties. Some collateral penalties are now discretionary, and reform of others, as well as of

effective “holistic” representation practices by various defender offices); McGregor Smyth, *From Collateral to Integral: The Seismic Revolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 HOWARD L.J. (forthcoming 2011) (manuscript at 125 & n.122) (noting the defense offices that successfully take account of collateral effects of convictions to improve outcomes for criminal clients). McGregor Smyth, a managing attorney at Bronx Defenders, notes that his office has routinely improved outcomes for clients for years by taking account of collateral consequences of convictions arising from immigration law and other sources, such as statutes regulating public housing eligibility. His office claims “an immigration-positive outcome” in 80 percent of cases in 2010. The vast majority of these were in misdemeanor cases, which account for 70 percent of New York arrests and 87 percent of convictions in 2010. See Email From McGregor Smyth to author (Apr. 5, 2011) (on file with author). Bronx Defenders has long had a strong representation for innovative and high quality lawyering in a high-volume state court system. It is unclear how widely its success can be replicated, especially in defender offices with even fewer resources or in appointed counsel systems run by judges who do not encourage such representation. But the Holistic Defense Project aids other offices in matching the Bronx Defender example, and it seems clear that causes of poor representation in some localities are not entirely resource-based but are attributable instead to attorney and managerial commitment to optimal representation. HOLISTIC DEFENSE, <http://www.holisticdefense.org> (last visited June 15, 2011). For a comparison supporting the last point, see AMY BACH, *ORDINARY JUSTICE* 11–32, 69–76 (2009) (contrasting the abysmal representation provided in Greene County, Georgia, with the much better representation provided in Houston County, and describing the difference arising in part from strong local leadership).

74. *Bauder v. Dep't of Corr. State of Fla.*, 619 F.3d 1272 (11th Cir. 2010) (citing *Padilla*, and affirming the holding that defense counsel's performance was deficient for failing to advise the client before a guilty plea to a sex offense of the prospect for civil commitment following the sentence); *State v. Edwards*, 157 P.3d 56, 64–65 (N.M. Ct. App. 2007) (“[W]e . . . conclude that defense counsel has an affirmative duty to advise a defendant charged with a sex offense that a plea of guilty or no contest will almost certainly subject the defendant to the registration requirements of SORNA.”); *Commonwealth v. Abraham*, 996 A.2d 1090 (Pa. Super. Ct. 2010) (requiring counsel to advise defendant before a guilty plea that conviction triggers loss of vested pension rights); see also Smyth, *supra* note 73 (manuscript at 128–34) (describing criteria by which *Padilla*'s advice requirement does or could apply to other, nondeportation consequences of convictions).

sentencing law, are plausible hopes.⁷⁵ But the degree to which *Padilla* matters will depend to a large degree on the content of those bodies of law, rather than on the decision's expansion of Sixth and Fourteenth Amendments' minimal standards for effective representation.

CONCLUSION

Hope for transformative effect from *Padilla* rests on faith that the Supreme Court's constitutional decisions can transform case level practices of individual attorneys and parties in dispersed, decentralized criminal court systems that already impose conflicting incentives and motivations on defendants, lawyers, and judges. Yet *Strickland v. Washington*'s definition of the ineffective assistance standard was hardly transformative; there is little evidence that the quality of criminal defense representation improved markedly in the quarter century since that decision.⁷⁶ Even *Gideon v. Wainwright* was probably more symbolic than practically transformative. Most states provided some form of felony indigent defense representation at the time of *Gideon* in 1963,⁷⁷ and provision of poorly funded or low-skill counsel—and occasionally no counsel at all—continues in many localities.⁷⁸ There is little reason to expect that *Padilla*'s

75. MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (2006); ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS §§ 19-2.5, 19-2.6 (3d ed. 2004) (recommending in Standards 19-2.5 and 19-2.6 that legislatures limit collateral consequences and create mechanisms such as judicial orders for relief from consequences); NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, THE UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (UCCCA) (2009) (providing a model for a state statute that would require organization of all collateral consequences rules, procedures for their definition, and possibilities for relief through judicial or executive orders), available at http://www.law.upenn.edu/bll/archives/ulc/ucsada/2009_final.htm; Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002).

76. See, e.g., Stephen B. Bright, *Gideon's Reality: After Four Decades, Where Are We?*, 18 CRIM. JUST. 5 (2003); Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 455–60 (1996) (citing cases in which convictions were upheld even though defense lawyers were intoxicated, abusing drugs, or mentally ill).

77. Brief for the State Government Amici Curiae at 2, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155) (noting that thirty-five states in 1962 provided felony indigent defense, and twenty-two states argued for *Gideon*'s eventual holding).

78. See Greg Bluestein, *Dozens of Poor Defendants Still Without Lawyers*, ATLANTA J.-CONST., Sept. 4, 2009, <http://www.ajac.com/news/georgia-politics-elections/dozens-of-poor-defendants-131159.html>; Stephen B. Bright, *The Right to Counsel in Death Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right and What We Should Do About It*, 11 J.L. SOC'Y 1, 10–20 (2010) (describing the inadequacy of some indigent defense systems and recent cases of defendants denied counsel); Bill Rankin, *Judge Testifies in Class-Action Suit From Unrepresented Indigent Defendants*, ATLANTA J.-CONST., Mar. 3, 2010, <http://www.ajc.com/news/georgia-politics-elections/judge-testifies-in-class-345189.html> (providing the trial judge's testimony concerning criminal defendants who appear in hearings

mandate to lawyers to master and communicate more substantive law will be more effective at transforming trial court practice than *Gideon* or *Strickland*.

More broadly, even the Supreme Court's landmark decisions have a complicated and uncertain record of transforming institutions unless they help transform the broader democratic politics regarding those institutions, which they may do only indirectly or even perversely. Michael Klarman has influentially made this argument with respect to *Brown v. Board of Education*—roughly, that *Brown* triggered a political backlash in the South against school integration that hindered *Brown's* enforcement for years, until the regional backlash helped prompt a broader national response and political support for civil rights enforcement.⁷⁹ One could make a roughly analogous argument with respect to the decisions of the Warren and Burger Courts that strengthened the right to a jury trial by extending the right to misdemeanor offenses, improving the fairness of jury selection, and setting minimum-membership and supermajority rules for juries, among other regulations. In the wake of those doctrinal developments, jury trials have continued to decline, to the point now that they render about 2 to 5 percent of criminal judgments in most jurisdictions.⁸⁰

Generally, as lower courts eventually did with school integration and as some examples of prison reform litigation demonstrate, courts are more effective at institutional reform when they engage in ongoing management and supervision of institutions, although even those efforts can be undone if political support for them is not sustained or if political opposition grows sufficiently strong. *Padilla* was not decided at a time of any significant political shift toward support for adequate criminal defense representation nor for moderation of immigration law's most draconian deportation provisions, and the Court's decision shows no sign of triggering broader debate on those issues. The injustice that Mr. Padilla encountered, as is true for many similarly situated legal

in his courtroom without lawyers); Press Release, S. Ctr. for Human Rights, SCHR Settles Lawsuit Filed on Behalf of Hundreds of Poor People Without Lawyers (July 7, 2010), available at <http://www.schr.org/action/resources> (describing the consent order in *Cantuwell v. Crawford* to provide indigent defense in Georgia's Northern Judicial Circuit, where roughly three hundred defendants had been denied any counsel in court appearances).

79. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 290–442 (2004).

80. See, e.g., BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2004, at 2 (NCJ 213476) (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs0404.pdf> (noting that the percentage of convicted federal felony defendants who pled guilty was 96 percent in 2004); BUREAU OF JUSTICE STATISTICS, *supra* note 4, at tbl.5.34 (reporting a 96.3 percent guilty plea rate for felony convictions in federal courts in 2009); BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 450 tbl.5.46 (31st ed. 2003) (documenting a 95 percent guilty plea rate, 3 percent jury trial rate, and 2 percent bench trial rate for felony convictions in state courts in 2000).

immigrants charged with crimes, arose largely from the terms of the substantive law that governed his case. *Padilla v. Kentucky* will only modestly improve the legal representation such defendants receive, and better lawyering or more creative plea bargaining are not up to the task of subverting the severity of America's law of criminal sentencing and collateral consequences.