The *Padilla* Wrecking Ball: Advocating for Change in Post-*Padilla* Jurisprudence to Address What Really Ails the Immigration System's Treatment of Noncitizen Defendants in the Post-Conviction Context

Daniel McDermott [a1]

I. INTRODUCTION

Waxing poetic about the irony of the bad in life that tends to accompany the good, a philosopher once opined, "every rose has its thorn."[1] Just as a rose looks beautiful only until one feels the prick of its thorns, oftentimes Supreme Court cases that look 'beautiful' at first glance turn out to be 'thornier' than they appear. On March 31, 2010, the United States Supreme Court issued its decision in *Padilla v. Kentucky*[2]. While *Padilla* appeared to be a 'beautiful' decision for noncitizen criminal defendants, it has proven to be a 'thorny' case for those who hope to rely on the decision as a means to obtaining post-conviction relief.

When the United States Supreme Court handed down its decision in *Padilla v. Kentucky* public interest advocates across the country celebrated the momentous decision, hailing it as one of the twenty-first century's greatest rulings. The Court's decision in *Padilla* finally "recognized what professional norms have required for at least the last two decades," which is that attorneys negotiating pleas for their clients must advise their clients regarding deportation consequences.[3] Hindsight has shown, however, that in the post-conviction context *Padilla* is a much more limited decision than anyone seemed to appreciate at the time; it is a decision that has drawn both accolades and ire in the years since its announcement. The driving force behind the uncertainty that sur-

[a1] J.D. Candidate, December 2013, University of Miami School of Law. I would like to thank Professor Rebecca Sharpless for the guidance and direction she provided. I would also like to thank my family and friends for their constant support, and for the time spent discussing this article.

1. BRETT MICHAELS, *Every Rose Has Its Thorn*, *on* OPEN UP AND SAY. . . AHH! (Capitol Records 1988).

2. Padilla v. Kentucky, 559 U.S. 356 (2010).

3. Rebecca Sharpless & Andrew Stanton, *Teague New Rules Must Apply In Initial Review Collateral Proceedings: The Teachings Of Padilla, Chaidez, and Martinez*, 67 U. MIAMI L. REV 301 (2013) (citing *Padilla*, 559 U.S. at 367).

rounds *Padilla* on the post-conviction landscape is the fact that, while most agree that *Padilla* addressed a necessary issue, state and lower federal courts have been unable to crystalize exactly what proposition *Padilla* stands for. To understand the complicated post-conviction quagmire that is the *Padilla* decision, this paper will first provide a brief overview of the three legal undercurrents[4] that converged to give birth to what some originally hailed as the completion of the *Gideon v. Wainwright* line of right to counsel cases: (1) the change in the immigration system's treatment of noncitizens convicted of relatively minor offenses; (2) the exponential growth of plea bargains in place of jury trial; and (3) the evolution of the "ineffective assistance of counsel doctrine."[5]

After providing the jurisprudential context in which *Padilla* should be read and a brief overview of the majority, concurring, and dissenting opinions,[6] this paper will illustrate *Padilla's* inadequacies in the post-conviction context through a case study of how the decision was implemented by Florida courts.[7] To help explain these results—ones seemingly contrary to the plain language of the *Padilla* decision—this paper will next look at the *Padilla* case on remand, and explore why the facts of the case itself make it such an anomaly.[8] By examining the Kentucky Court of Appeals' reasoning for vacating Mr. Padilla's sentence, this paper will show just how little the United States Supreme Court's decision actually did to assist noncitizen litigants seeking post-conviction relief based on ineffective assistance of counsel (hereinafter "IAC") claims under the *Strickland/Hill* line of IAC cases. While noncitizen defendants can now base IAC claims on their attorneys' failure to advise them of the deportation consequences of accepting a plea, they will still have to show that "a decision to reject the plea bargain would have been rational under the circumstances."[9] Given that "longer sentences exist on the books largely for bargaining purposes,"[10] meeting this rationality standard will oftentimes be difficult, if not impossible. In fact, the United States Supreme Court has even recognized that the nature of our criminal justice system results in "individuals who accept a plea bar-

4. *See infra* Section II. A-D.

5. Lafler v. Cooper, 132 S. Ct. 1376, 1390 (2012) (Scalia, J., dissenting).

6. *See infra* Section III.

7. *See infra* Section IV.A.1.

8. *See infra* Section IV.A.2.

9. Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (citing Roe v. Flores-Ortega, 528 U.S 470, 480, 486 (2000)).

10. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

gain[s] receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial."[11] In a system that seeks to make the rejection of plea bargain irrational—regardless of culpability—many noncitizen defendants will never be able to benefit from *Padilla* as they will be unable to satisfy the second prong of the *Strickland/Hill* test.

Finally, this paper will analyze alternative and supplemental approaches to the one taken by the Court in *Padilla*, as well as possible remedies to reinforce *Padilla's* effectiveness in the post-conviction context.[12] Justice Scalia's approach will be analyzed first, considering both the practicality and effectiveness of implementation, as well as the problems that would exist if the Court were to take a hands-off approach with the hope that Congress will act.[13] Should the Court desire a more proactive approach than the one advocated for by Justice Scalia,[14] this paper concludes by proposing the framework for a set of "Padilla Warnings"; these proposed warnings would, in addition to relying on Sixth Amendment IAC doctrine, be based also on Fifth and Fourteenth Amendment Due Process jurisprudence in order to protect both noncitizen defendants' Due Process rights and the finality of plea agreements.[15] *Miranda v. Arizona* will serve as a template for the use of prophylactic measures to address an issue that cuts across multiple doctrines, in order to disrupt current laws as minimally as possible. While the *Miranda* decision has elicited much criticism for the perceived ineffectiveness of its "stock warnings," the decision will be relied upon only to illustrate the Court's willingness to craft an overly broad, "prophylactic" rule for multi-doctrinal issues like the one before the Court in *Padilla*.[16] It is the hope of this author to highlight the fact that *Padilla* does not cut broadly enough to serve as a viable tool for noncitizen defendants to obtain post-conviction relief and to promote action to remedy what ails *Padilla* and its progeny in the post-conviction context.

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11. *Id*.

12. *See infra* Section IV.B.

13. *See infra* Section IV.B.2.

14. This author in no way, shape, or form agrees with Justice Scalia's ultimate conclusion in *Padilla*. Scalia's analysis of the using Sixth Amendment Ineffective Assistance of Counsel doctrine to reach the Court's conclusion, however, recognized the underlying causes of the problems that noncitizens have faced when trying to use *Padilla* to obtain post-conviction relief.

15. *See infra* Section IV.B.3.

16. Vivian Chang, *Where Do We Go From Here: Plea Colloquy Warnings and Immigration Consequences Post-Padilla*, 45 U. MICH. J. L. REFORM 189, 216 (2011).

II. BACKGROUND

A. The Growth of "Crimmigration"

The legislative changes that have given rise to a need for a case like *Padilla* are a rather modern advent. Prior to 1917, the conception of "immigration law" was generally limited to excluding those persons, which Congress found to be undesirable, from entering the United States.[17] This class included prostitutes, felons, and those convicted of misdemeanors involving moral turpitude.[18] The classes of excludable criminals were significantly smaller than today because of the narrow field of crimes constituting felonies at common law (as opposed to our ever-expanding class of statutorily created felonies). Though there are some examples of early American deportation cases, up until the twentieth century, immigration laws acted mostly as barriers to entry in contrast to the catapults employed today to cast those found to be "undesirable" back to every far-reaching corner of the globe.[19] The body of law related to immigration was drastically altered in 1917, however, with the passage of the Immigration and Nationality Act of 1917 (hereinafter "1917 Act"), which made "classes of noncitizens deportable based on conduct committed on American soil."[20]

Though the 1917 Act laid the foundation for the modern conception of immigration law, it was not the broad-sweeping, proverbial padlock on America's front door that we see today; rather, the intention of legislators was only to protect against those previously admitted aliens who later proved to have a "criminal heart and a criminal tendency."[21] Courts and the legislature, both at the time of the passage of the 1917 Act and over the course of the subsequent half-century, recognized that "forfeiture for misconduct of a residence in this country . . . is a penalty" and the "stakes are considerable for the individual" subject to deportation.[22] In accordance with a recognition of the high stakes involved in deportation, the 1917 Act included what the *Padilla* majority referred to as "a critically important procedural protection to minimize the

17. Padilla v. Kentucky, 559 U.S. 356, 360 (2010).

18. *Id*. (discussing the Act of Mar. 3, 1875 that barred convicts and prostitutes from entering the country, and the subsequent 1891 expansion of the list of excludable offenses to include persons "who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.") (internal citations omitted)).

19. Bugajewitz v. Adams, 228 U.S. 585, 608 (1913).

20. Lafler v. Cooper, 132 S. Ct. 1376, 1379 (Scalia, J., dissenting).

21. Fong Haw Tan v. Phelan, 333 U.S. 6, 9 (1948).

22. *Id*.

risk of unjust deportation": the judicial recommendation against deportation, or JRAD.[23] With JRAD, at "the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation "that such alien shall not be deported."[24] When JRAD was exercised to prevent deportation, it was binding upon the executive, as it was "consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation."[25] JRAD, along with the discretion vested in the Attorney General to grant deportation relief, provided a safety net that prevented anything akin to "such creature as an automatically deportable offense."[26]

Since the passage of the 1917 Act, the automatic deportation safety nets have been slowly whittled away by Congressional acts; however, they "all pale in comparison to the 1996 passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)."[27] While the IIRIRA was the fat lady singing to signal the end to discretionary relief for many noncitizen criminal litigants, the erosion actually began with the 1952 Immigration and Nationality Act (INA), which limited the reach of JRAD.[28] Almost forty years after the passage of the INA, JRAD met its final and complete demise when "Congress entirely eliminated it."[29] Finally, Congress removed much of the Attorney General's discretion by passing the IIRIRA, which "eliminated the 212(c) waiver"[30] and "eliminated suspension of deportation."[31] In addition to stripping the Attorney General's discretion, the IIRIRA also "dramatically increased the grounds of removal, especially by expanding the definition of an 'aggravated felony.'"[32] These congressionally mandated reductions in discretionary relief mean that deportation "is

23. Padilla v. Kentucky, 559 U.S. 356, 361 (2010).

24. *Id*.

25. *Id*. at 362 (quoting Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986)).

26. *Id.*

27. Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1344 (2011).

28. *Padilla*, 559 U.S. at 363.

29. *Id*.

30. The 212(c) waiver "allowed immigration judges to provide discretionary relief to permanent residents facing deportation based on criminal convictions." Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 146-7 (2012).

31. *Id*. (explaining that the suspension of deportation was a "form of discretionary relief that allowed an alien to remain in the U.S. by showing extreme hardship to herself or to a U.S. citizen or permanent resident spouse, parent or child.").

32. *Id*. at 135.

now virtually inevitable for a vast number of noncitizens convicted of crimes."[33] It is in the context of this new system of "crimmigration" that *Padilla's* immigration issues must be viewed to appreciate why the need for a case like *Padilla* is a relatively modern phenomenon, and a departure from prior case law was necessary.[34]

B. Making Effective Assistance of Counsel Fit the Modern Judiciary

Beginning with the Supreme Court's ruling in *Gideon v. Wainwright* that "the Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a criminal case,"[35] the last fifty years have seen an explosion of doctrinal law aimed at defining exactly what protections the Sixth Amendment provides. While *Gideon* focused not on the quality of the assistance of counsel, but rather on the right to have *any* counsel, most modern arguments arising out of the Sixth Amendment focus on whether the assistance was effective,[36] and at what stage of proceedings the right applies.[37] Two things are clear in Sixth Amendment Doctrine: 1) "The right to counsel is the right to effective assistance of counsel," and 2) the "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings."[38]

Less clear is what counsel must do to be considered "effective" and what constitutes a "critical stage."[39] As to the latter issue, the *Padilla* court reemphasized its holding in *Hill v. Lockhart* that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[40] The issue of "critical stage" was not in debate in *Padilla* as the alleged instance of ineffectiveness arose from the plea negotiation stage.[41] Less clear, however, was whether the Sixth Amendment right to the effective assistance of counsel

33. *Padilla*, 559 U.S. at 360.

34. Markowitz, *supra* note 27, at 1316.

35. Turner v. Rogers, 131 S. Ct. 2507, 2516 (2011).

36. *See generally* Strickland v. Washington, 466 U.S. 668 (1984).

37. *See generally* Montejo v. Louisiana, 556 U.S. 778 (2009); Hill v. Lockhart, 474 U.S. 52 (1985).

38. Missouri v. Frye, 132 S. Ct. 1399 (2012) (citing Montejo v. Louisiana*,* 556 U.S. 778, 786 (2009) and Strickland v. Washington*,* 466 U.S. 668, 686 (1984)).

39. *See Frye*, 132 S. Ct. 1399; Lafler v. Cooper, 132 S. Ct. 1376 (2012); Padilla v. Kentucky, 559 U.S. 356, 359-60 (2010).

40. *Padilla*, 559 U.S. at 373.

41. *Id*. at 374.

existed with regards to the deportation consequences arising from a negotiated plea, because traditionally collateral consequences (which most courts held deportation to be) were "outside the scope of representation required by the Sixth Amendment."[42] Rather than reaching the issue of whether deportation was a collateral consequence, however, the court held instead that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."[43] This allowed the Court to sidestep the direct/collateral distinction, and instead proceed to its analysis of what must be done with regards to warning of deportation consequences in order for counsel's assistance to be deemed effective.[44]

In *Strickland v. Washington* the United States Supreme Court enunciated the two-prong test that courts use today to determine whether a litigant is entitled to relief on a Sixth Amendment effective assistance of counsel theory; the first prong looks at whether the assistance was deficient and, if it was deficient, the second prong looks to whether the defendant was prejudiced by the deficiency.[45] Establishing that counsel was ineffective requires a showing "that counsel's representation fell below an objective standard of reasonableness."[46] The Supreme Court has "recognized that [p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable."[47] If the first prong is met, courts proceed to the prejudice prong whereby they must determine if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[48] It was under this analysis that the court in *Padilla*, without reaching the prejudice prong, used the first prong to enunciate the rule that, in order to be constitutionally sufficient, "counsel must inform her client whether his plea carries a risk of deportation."[49]

C. A System of Pleas, Not of Trials

While thoughts of the criminal justice system conjure images

42. *Id*. at 365.
43. *Id*. at 366.
44. *Id*.
45. Strickland v. Washington*,* 466 U.S. 668, 686 (1984).
46. Hill v. Lockhart, 474 U.S. 52, 57 (1985).
47. *Padilla*, 559 U.S. at 367 (internal citations omitted).
48. *Strickland,* 466 U.S. at 694.
49. *Padilla*, 559 U.S. at 356.

of courtroom theatrics and climactic jury trials, in reality such occurrences are the exception as opposed to the rule. Writing for the majority in *Lafler v. Cooper*, Justice Kennedy commented, "criminal justice today is for the most part a system of pleas, not a system of trials."[50] Supporting Kennedy's position is the fact that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[51] This shift in the criminal adjudication process is not due to a mere coincidence, but rather is result of legislatively enacted longer sentences that "exist on the books largely for bargaining purposes."[52] Given this ideological shift, Kennedy rejected the argument that the "guarantee of a fair trial [is] a backstop that inoculates any errors in the pretrial process."[53] Kennedy analogized the modern plea bargain construct to "horse trading between prosecutor and defense counsel," used to determine "who goes to jail and for how long."[54] This modern system, as Kennedy noted, "often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial."[55] This result is justified based on the fact that defendants are able to mitigate the risks of long prison sentences, while prosecutors are able to achieve higher conviction rates than if all defendants proceeded to trial.[56] Consequently, this also means, however, that "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."[57]

With the vast majority of criminal cases being resolved via plea bargain, the judiciary has been left to grapple with the applicability of the Sixth Amendment right to effective assistance of counsel to many proceedings ancillary to the trial itself.[58] As Ken-

50. Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012).

51. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

52. *Id*.

53. *Id*.

54. *Id*.

55. *Id*.

56. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1909 (June 1992) (explaining "the parties to these settlements trade various risks and entitlements: the defendant relinquishes the right to go to trial (along with any chance of acquittal), while the prosecutor gives up the entitlement to seek the highest sentence or pursue the most serious charges possible. . . . On the other hand, everyone who pleads guilty is, by definition, convicted, while a substantial minority of those who go to trial are acquitted.") (footnote omitted).

57. *Frye*, 132 S. Ct. at 1407.

58. *See generally Frye*, 132 S. Ct. 1399; *Lafler*, 132 S. Ct. 1376; Padilla v. Kentucky, 559 U.S. 356 (2010); Hill v. Lockhart, 474 U.S. 52 (1985).

nedy pointed out, the plea bargain stage often will be the "only stage when legal aid and advice would help" the accused.[59] This challenge extends not only to cases that result in a plea bargain, but also to cases that proceed to trial because an agreed upon plea agreement could not be reached.[60] Also afoot are concerns regarding the voluntariness of pleas such that, when the court accepts the pleas, the procedures used do not violate the Due Process Clauses of the Fifth and Fourteenth Amendments.[61] As Justice Scalia recognized in his dissent in *Lafler v. Cooper*, the Supreme Court, for the last decade, has been developing "a whole new field of constitutionalized criminal procedure: plea-bargaining law," in its attempt to fit centuries old Constitutional protections into a modern system of mass, plea-based adjudication.[62] As the Supreme Court has acknowledged, "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences"; in addition to falling within the immigration context, *Padilla* must also be viewed as a part of this developing body of "plea-bargaining law."[63] It is this multi-doctrinal aspect of *Padilla* that makes it such a fascinating, yet confounding case.

D. The Convergence in Padilla v. Kentucky

The facts giving rise to *Padilla v. Kentucky* are rather straightforward. Jose Padilla was a native of Honduras who had been a lawful permanent resident in the United States for more than forty years.[64] Mr. Padilla was arrested in Kentucky for transporting marijuana in his tractor-trailer[65] and pleaded guilty to the charges, making him automatically deportable under 8 U.S.C. § 1227(a)(2)(B)(i).[66] Mr. Padilla sought post-conviction relief with the Kentucky Supreme Court, arguing ineffective assistance of counsel because he "relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation

59. *Frye*, 132 S. Ct. at 1407.

60. *Lafler*, 132 S. Ct. at 1386 (Stevens, J., explaining that "even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.").

61. *Padilla*, 559 U.S. at 391 (Scalia, J. dissenting).

62. *Lafler*, 132 S. Ct. at 1391 (Scalia, J. dissenting).

63. *Lafler*, 132 S. Ct. at 1388.

64. *Padilla*, 559 U.S. at 359.

65. *Id*.

66. *Id*.

virtually mandatory."[67] Mr. Padilla alleged that his counsel "not only failed to advise him of this consequence prior to his entering the plea, but also told him that he did not have to worry about immigration status since he had been in the country so long."[68]

The Kentucky Supreme Court denied Mr. Padilla's post-conviction relief without evidentiary hearing, basing its decision on the premise that "the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a 'collateral' consequence of his conviction."[69] The United States Supreme Court granted certiorari to address the question of whether Mr. Padilla's counsel had an obligation to advise Padilla that his pleading guilty would result in automatic deportation.[70] The court agreed "with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation"; however, the Court did not reach the issue of whether Mr. Padilla had been prejudiced by counsel's ineffectiveness as it had not been passed on by the court below, and instead left this issue for the Kentucky courts to decide on remand.[71]

The court's decision was founded on the rationale that deportation arising out of a criminal conviction is ill-suited to be categorized as either a direct or collateral consequence, therefore "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."[72] The Court extended its holding, that "to satisfy this responsibility [of effective assistance] . . . counsel must inform her client whether his plea carries a risk of deportation," to both cases where there is affirmative misadvise and cases where counsel fails to warn of deportation risks.[73] While the Court relied on the Sixth Amendment in reaching its decision, the case had implications far beyond the right to effective assistance of counsel.[74] *Padilla v. Kentucky* represents the convergence of several bodies of law into one complex decision: Sixth Amendment IAC doctrine,[75] "plea-bargaining law,"[76] immi-

67. *Id*. at 359.
68. *Id*.
69. *Id*. at 359-60.
70. *Padilla*, 559 U.S. at 360.
71. *Id*.
72. *Id*. at 366.
73. *Id*. at 370-74.
74. *Id*. at 373.
75. *Id*.
76. Lafler v. Cooper, 132 S. Ct. 1376, 1391 (2012) (Scalia, J. dissenting).

gration doctrine,[77] and voluntariness doctrine under Due Process Clauses of the Fifth and Fourteenth Amendments.[78]

III. STATEMENT OF THE CASE

A. The Majority

Justice Stevens authored the majority opinion in *Padilla v. Kentucky*, and was joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor. The decision also included a concurrence by Justice Alito, joined by Chief Justice Roberts, and, as all truly significant Supreme Court decisions should, a dissent penned by Justice Scalia, to which Justice Thomas joined. While there were some points of commonality between the Justices, the methodologies used could not have been more divergent. Despite the conflict amongst the Justices, the Court managed to assemble a five-member majority to enunciate the rule that "Padilla was constitutionally entitled to advice from his lawyer that pleading guilty would make him deportable."[79]

The majority opinion seemed to recognize the fact that the *Padilla* case implicated much more than a run-of-the-mill *Strickland* case would, acknowledging that the case concerned "Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country."[80] Because of the multitude of issues wrapped into one case, the Court had to not only address each issue, but also attempt to do so in a way that would not undermine the doctrinal law currently in place in each respective area of the law. Perhaps in an attempt to corral the reach of the Court's Fifth, Sixth, and Fourteenth Amendment holdings in the case, Justice Stevens began the majority opinion with a discourse of "landscape of federal immigration law,"[81] ultimately concluding that "changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction."[82]

After meticulously detailing the changes in the immigration law over the last half-century, Justice Stevens used these changes to justify the position of the Court that "as a matter of federal law,

77. Markowitz, *supra* note 27, at 1334.

78. *Padilla*, 559 U.S. at 39 (Scalia, J. dissenting).

79. Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 101 (2011).

80. *Padilla*, 559 U.S. at 374.

81. *Id*. at 360.

82. *Id*. at 364.

deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[83] The Stevens-led majority then turned its attention to the argument that deportation warnings do not qualify for effective assistance of counsel because they are "collateral consequences." The Court concluded that because "deportation is a particularly severe penalty," advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."[84] By refusing to analyze the case through a collateral consequences lens, Stevens essentially merged the IAC issues, the deportation issues, and the plea bargain issues into one question that the Court could address:

> In providing the effective assistance guaranteed by the Sixth Amendment, does defense counsel never have a duty to investigate and advise a noncitizen client whether the offense to which he is pleading guilty will result in his deportation?[85]

After consolidating the issues into one that could be addressed simultaneously, the court undertook a prong-one *Strickland* analysis with regards to Mr. Padilla's case.

The Court *Padilla*, using a *Strickland* analysis, focused only on the first prong of the test, which asks, "whether counsel's representation fell below an objective standard of reasonableness."[86] In holding that Mr. Padilla's counsel's representation did fall below this objective standard of reasonableness, the Court gave Constitutional teeth to an obligation of competent legal counsel that "professional norms have required for at least the last two decades."[87] Even though these professional norms had existed for quite some time, the Court, nonetheless, held in a subsequent opinion that *Padilla* announced a new rule.[88] The Court reasoned that the rule of *Padilla*, that "the failure to advise about a noncriminal consequence could violate the Sixth Amendment[,] would not have been—in fact, was not—'apparent to all reasonable jurists prior to our decision.'"[89] The impact of this new rule on accused noncitizens in future proceedings should not be under-

83. *Id*.

84. *Id*. at 366.

85. *See* Brief of Petitioner-Appellant at i, Padilla v. Kentucky, 559 U.S. 356 (2010) (No. 08-651).

86. *Padilla*, 559 U.S. at 366.

87. Sharpless & Stanton, *supra* note 3.

88. Chaidez v. United States, 133 S. Ct. 1103 (2013).

89. *Id*. at 1111 (citing Lambrix v. Singletary, 520 U. S. 518 (1997)).

stated, as the *Padilla* opinion requires "defense attorneys to counsel their noncitizen clients about the immigration consequences of a plea."[90]

The Court did not however, address the question presented in the second *Strickland* prong—whether Mr. Padilla could "demonstrate prejudice as a result" of counsel's representation falling below an objective standard of reasonableness, and instead left this issue for the Kentucky Supreme Court to decide on remand.[91] The Court did note that for Mr. Padilla to meet the second prong he would have to show that "a decision to reject the plea bargain would have been rational under the circumstances."[92] Given that the issue before the Court in *Padilla* dealt only with the first prong of *Strickland*, it is unsurprising that the Court did not address the issue of prejudice. While in theory, noncitizen defendants in this post-*Padilla* legal landscape should be advised about the deportation consequences of accepting a plea bargain, *Padilla* itself does little for those individuals who do not receive the Constitutionally mandated level of advisement. Thus, if there is a breakdown in the process and an attorney fails to meet his professional obligation of advising his client about the deportation consequences of entering into a plea agreement, it is going to be extremely difficult, if not impossible, for the aggrieved noncitizen defendant to obtain any relief through post-conviction proceedings.

In answering the question of whether the failure of counsel to advise a noncitizen of the deportation consequences of a plea came within *Strickland's* first prong, the Court left a trail of precedents and ambiguities that have led to the difficulties that this paper's analysis will discuss in greater detail. The rules articulated in *Padilla* include: 1) counsel has a duty "to provide her client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the *Strickland* analysis,"[93] 2) "[w]hen the law is not succinct and straightforward a criminal defense attorney" must "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences,[94]" 3) "when the deportation consequence is truly clear . . .

90. Sharpless & Stanton, *supra* note 3.

91. Padilla, 559 U.S. at 374.

92. Padilla v. Kentucky, 559 U.S. 356, 375 (2010) (citing Roe v. Flores-Ortega, 528 U.S. 470, 480, 486 (2000)).

93. *Id*. at 371 (quoting Hill v. Lockhart, 474 U.S. 52, 62 (1985)).

94. *Id*. at 369.

the duty to give correct advice is equally clear,[95]" and 4) "a distinction between direct and collateral consequences" will not be used "to define the scope of constitutionally reasonable professional assistance required under *Strickland*."[96]

B. Justice Alito's Concurrence

In his concurrence joined by Chief Justice Roberts, Justice Alito "grudgingly recognized a lawyer's duty to warn the client that a guilty plea 'may have adverse immigration consequences.'"[97] Though he adopted the decision of the majority, Justice Alito wrote a separate concurring opinion because he was "worried that this obligation might apply to 'a wide variety of consequences other than conviction and sentencing" about which criminal defense lawyers have little or no expertise."[98] The only requirement that the concurrence would have imparted on attorneys is that they must "(1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney."[99] Justice Alito found the majority's decision to be a "vague, halfway test [that would] lead to much confusion and needless litigation."[100]

Alito's concern came about because of what he viewed as the majority's abrogation of the unanimous rule of federal courts that counsel "generally need only advise a client about the direct consequences of a criminal conviction."[101] Justice Alito viewed the collateral consequence rule as demonstrating what he referred to as "an important truth," that:

> Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.[102]

Alito argued that there are many consequences that are serious,

95. *Id*.
96. *Id*. at 365.
97. Love, *supra* note 79, at 104.
98. *Id*.
99. *Padilla*, 559 U.S. at 375 (Alito, J. concurring).
100. *Id*.
101. *Id*. at 375-376.
102. *Id*. at 376.

but that do not necessarily implicate Sixth Amendment right to counsel.[103]

An area of agreement between the concurrence and majority is the fact that determining which crimes are or are not deportable offenses is extremely difficult. Justice Alito pointed to the fact that "[d]efense counsel who consults a guidebook on whether a particular crime is an "aggravated felony" will often find that the answer is not "easily ascertained."[104] Alito was very concerned, however, about the burden the majority was placing on counsel by finding that, depending on how difficult the immigration consequences were to ascertain, the Sixth Amendment required a warning in an area that is so confusing and convoluted.[105] He found four problematic points about the varying requirement rule enunciated by the majority: 1) "it will not always be easy to tell whether a particular statutory provision is succinct, clear, and explicit," 2) "if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled," 3) "the Court's rigid constitutional rule could inadvertently 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," and 4) the fact that "[t]his Court decided *Strickland* in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's Sixth Amendment right to counsel."[106]

In Alito's view, the majority opinion represented a dramatic expansion "of the scope of criminal defense counsel's duties under the Sixth Amendment."[107] Despite disagreeing with the sheer scope of the majority's holding, Justice Alito did concur with the opinion that the Sixth Amendment was implicated where counsel gives affirmative misadvice, or fails to give advice where he realizes that his client is a noncitizen, and that a conviction may have an impact on his immigration status.[108] The concurrence would have tailored a much narrower rule whereby a noncitizen defendant's "Sixth Amendment right to counsel [would be] satisfied if

103. *Id*. at 376-77.
104. *Id*. at 376.
105. *Padilla*, 599 U.S. at 376-77.
106. *Id*. at 378.
107. *Id*. at 378-79.
108. *Id*. at 381-83

defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject."[109]

C. Scalia's Dissent: Staunch Conservativeness or Practical Reasoning?

True to his conservative roots, Justice Scalia thought that the judiciary should not interfere in the *Padilla* case, and instead leave it to Congress. Like Alito's concurrence, Justice Scalia's dissent dismissed the majority's description of deportation as "unique," and expressed concern over the ability to limit the holding to ones like the case at issue.[110] Where Justices Scalia and Thomas differed from the concurring Justices was in the fact that Scalia and Thomas did not believe that counsel had any constitutional duty to advise noncitizen clients of immigration implications, and rather thought if that duty rested anywhere it was with the courts.[111] Justice Scalia found the majority to be reading the Constitution to fit the needs of the case, and likened the majority's constitutional construction to "swinging a sledge where a tack hammer is needed."[112] While the conclusion of Justice Scalia's dissent is out of touch with the realities of the modern criminal justice system that Stevens detailed, his reasons for objecting to the use of the Sixth Amendment as the tool by which the majority crafted the *Padilla* decision are the same reasons that *Padilla* has little effectiveness in the post-conviction context.

Justice Scalia's first sentence after his introductory paragraph is very telling with regards to how he viewed this case. Scalia proffered "[t]he Sixth Amendment guarantees the accused a lawyer 'for his defense' against a 'criminal prosecutio[n]'—not for sound advice about the collateral consequences of conviction."[113] This sentence would suggest that Justice Scalia read the majority's opinion the same way that Justice Alito did; Scalia all but acknowledged that he viewed the *Padilla* case as standing for the proposition that ineffective assistance of counsel can be based on collateral consequences. Though the majority sought for

109. *Id*. at 387.
110. Love, *supra* note 79, at 104.
111. *Id*. at 104-105.
112. *Padilla*, 559 U.S. at 388 (Scalia, J. dissenting).
113. *Id*.

Padilla to have a limited reach, Scalia envisioned a new post-conviction landscape where defense attorneys would constantly concoct new Sixth Amendment omissions to invalidate pleas.[114] After implying that he questioned the validity of *Gideon v. Wainwright* and *Strickland v. Washington*,[115] Scalia argued that the effective assistance of counsel doctrine should not be extended beyond its textual limitations to criminal proceedings as "[t]here is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand."[116] While this paper does not address whether retreating from the collateral consequences doctrine would be a beneficial or detrimental shift in IAC jurisprudence, the Court was clearly trying to limit this case's impact on the collateral consequence doctrine, stating only that the "collateral versus direct distinction is ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation."[117] Scalia, like Justice Alito, did not believe however, that the majority could reach the result that it did without implicating the collateral consequence doctrine. Regardless of the majority's intent, by basing its holding solely on the Sixth Amendment, the majority in *Padilla*, as one commentator noted, arguably "ripped the foundations" from the collateral/direct consequence distinction and "effectively undermined any future application of the 'collateral/direct' consequences distinction in the Sixth Amendment context."[118]

Before concluding his dissent, Justice Scalia alluded to the fact that a concern about voluntariness "properly relates to the Due Process Clauses of the Fifth and Fourteenth Amendments, not to the Sixth Amendment."[119] While correct, Scalia's admission

114. *Id*. at 391 (Scalia proffered that the *Padilla* decision would lead to "years of elaboration upon these new issues in the lower courts, prompted by the defense bar's devising of ever-expanding categories of plea-invalidating misadvise and failures to warn.").

115. *Id*. at 389 ("even assuming the validity of these holdings. . .").

116. *Id*. at 390.

117. *Padilla*, 559 U.S. at 366 (the Court noted further that "the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.").

118. McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 How. L. J. 795, 798 (2011).

119. *Padilla*, 559 U.S. 392 (Scalia, J. dissenting).

was odd in the sense that Mr. Padilla did not raise a voluntariness argument, and neither the majority nor the concurrence did more than mention voluntariness in passing. Scalia seemed to try to qualify that comment in a footnote by indicating that he "did not mean to suggest that the Due Process Clause would surely provide relief."[120] But even his footnote leaves one to wonder whether this statement provides evidence of something greater than a mere dismissal of the concurring opinion by Justice Alito. Adding to the level of curiosity created by Scalia's mention of Fifth and Fourteenth Amendment Due Process was the final sentence in the footnote, which read "[w]hatever the outcome, however, the effect of misadvice regarding such consequences upon the validity of a guilty plea should be analyzed under the Due Process Clause."[121] While Scalia's opinion in dissent aligned with his reputation as being one of the "most politically conservative Justices on the United States Supreme Court,"[122] and one "hostile to the rights of criminal defendants,"[123] his opinion may also have cracked the door to a different methodology that could be used to address the post-conviction issues left unresolved in the wake of *Padilla v. Kentucky*.

IV. ANALYSIS

A. Padilla's Flaws: What Hindsight Has Shown Us About the True Impact of the Decision in the Post-Conviction Context

1. Florida: A Post-Padilla Post-Conviction Case Study

While both state and federal jurisdictions around the country have varied in their treatment of cases implicating *Padilla* issues in the post-conviction context, Florida illustrates almost perfectly the difficulties facing noncitizen defendants seeking post-conviction relief based upon the *Padilla* decision. Up until November of 2012,[124] depending on the Florida district that a noncitizen defendant found himself in, his *Padilla* protections would vary dramatically. Just as Mr. Padilla had to prove prejudice once his case was remanded to Kentucky, Florida litigants must prove prejudice as

120. *Id*. at 391 n.1.

121. *Id*.

122. Joanmarie Ilaria Davoli, *Justice Scalia For The Defense?*, 40 U. BALT. L. REV. 687 (2011).

123. *Id*.

124. *See* Hernandez v. State, 37 Fla. L. Weekly S 730, 2012 FLA. LEXIS 2416 (Fla. Nov. 21, 2012).

well; however, in many Florida districts a litigant was *per se* not prejudiced when he entered, and the court accepted, his plea.[125] The following discussion of the Florida courts' struggles to uniformly apply the Supreme Court's mandate in *Padilla v. Kentucky* is intended to illustrate just how problematic of a decision it really is when it comes to individuals seeking post-conviction relief.

Despite the United States Supreme Court's recognition of the magnitude of the impacts that deportation can have on a litigant, multiple Florida districts, up until recently,[126] had been able to virtually neutralize *Padilla's* impact in the post-conviction context. In concluding that Mr. Padilla did not receive his constitutionally protected right to the effective assistance of counsel, Justice Stevens stated that "[t]he severity of deportation—the 'equivalent of banishment or exile,'—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation."[127] While this language suggests that the *Padilla* majority's objective was to ensure that all noncitizen defendants be made aware of the risk of deportation prior to pleading, the fact that the *Strickland/Hill* two-part test is the measure by which ineffective assistance is determined has made obtaining relief under *Padilla*, where a noncitizens defendant was not advised of the deportation consequences prior to accepting a plea bargain, virtually impossible. Case-in-point is the now-reversed Florida Fourth District Court of Appeal case, which held that the prejudice-prong of the *Strickland* test could never be met under a *Padilla* rationale as long as the litigant was given a generic warning by the court because "the court's Rule 3.172(c)(8) deportation warning in the plea colloquy cures any prejudice arising from counsel's alleged misadvice."[128] Thus, prior to *Flores v. State* being overruled by the Florida Supreme Court, a noncitizen defendant in the Florida Fourth District could NEVER succeed on a *Padilla* post-conviction claim, as long the court gave the deportation warning found in Rule 3.172(c)(8).[129]

It was at the time of the *Flores* decision, and still is, the stan-

125. *See* Flores v. State, 57 So. 3d 218 (Fla. Dist. Ct. App. 2010).

126. *See generally Hernandez*, 37 Fla. L. Weekly S 730, 2012 FLA. LEXIS 2416.

127. Padilla v. Kentucky, 559 U.S. 356, 373-74, 1486 (2010) (citations omitted).

128. *See generally Flores*, 57 So. 3d at 218 (Reversed by *Hernandez*, 37 Fla. L. Weekly S 730, 2012 FLA. LEXIS 2416).

129. FLA. R. CRIM. P. 3.172(c)(8) instructs that the trial court must warn the defendant "that if he or she pleads guilty or nolo contendere, 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. It shall not be necessary for the trial judge to inquire as to whether the

dard procedure in all Florida plea colloquies for the court to give the deportation warning, whether it is of any relevance or not, in order to insulate the pleas from post-sentencing attack via Rule 3.850 motion.[130] Thus, the Florida Fourth District Court of Appeal was able to render meaningless the holding in *Padilla v. Kentucky* for those noncitizen defendants that had already entered into plea agreements and been sentenced. For individuals seeking post-conviction relief, *Padilla* was reduced from a landmark IAC case to a mere glimmer of hope for relief on the off chance that the trial court judge failed to hurriedly read a standardized warning that the defendant "may" be subject to deportation. Then, even if the judge failed to give the deportation warning, these noncitizens would still have had to show, based on the *Padilla* opinion itself, that "a decision to reject the plea bargain would have been rational under the circumstances."[131] The Florida Fourth District Court of Appeal was not alone in its treatment of prejudice-prong *Padilla* inquiries, and in fact, many other state and federal courts that have considered issues similar to those in *Flores* have "considered the plea colloquy to be significant, if not controlling, evidence weighing against a finding of prejudice."[132]

Illustrating the lack of a coherent prejudice-prong framework in the post-*Padilla* legal landscape, and in contrast to the Fourth District's approach to the prejudice prong under a *Strickland*/*Padilla* analysis, the Florida Third District held that a plea colloquy warning does not cure all prejudice. The court reasoned "*Padilla* does not turn on the fact that the Kentucky trial court and plea colloquy failed to include a 'may subject you to deportation' type of warning."[133] In *Hernandez v. State*, the Third District

defendant is a United States citizen, as this admonition shall be given to all defendants in all cases."

130. FLA. R. CRIM. P. 3.850 states that the "following grounds may be claims for relief from judgment or release from custody by a person who has been tried and found guilty or has entered a plea of guilty or nolo contendere before a court established by the laws of Florida: (1) The judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida. (2) The court did not have jurisdiction to enter the judgment. (3) The court did not have jurisdiction to impose the sentence. (4) The sentence exceeded the maximum authorized by law. (5) The plea was involuntary. (6) The judgment or sentence is otherwise subject to collateral attack."

131. *Padilla*, 559 U.S. at 372 (citing Roe v. Flores-Ortega, 528 U.S. 470, 480, 486 (2000)).

132. Danielle M. Lang, *Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendants' Ability To Bring Successful Padilla Claims*, 121 YALE L. J. 944, 975 (2012).

133. Hernandez v. State, 61 So. 3d 1144, 1151 (Fla. Dist. Ct. App. 2011).

departed from its sister court in the Fourth District because of the "significant change in this body of law, and in criminal practice" caused by the *Padilla* decision.[134] The effect of the divergent interpretations of *Padilla* by the Florida Third and Fourth Districts meant that a defendant in the Fourth District could have been affirmatively misadvised about the deportation consequences of a plea, yet unable to obtain any relief provided that the standard plea colloquy warning was given; however, the same defendant would have been able to have his plea vacated in the Third District, provided that he could show that "a decision to reject the plea bargain would have been rational under the circumstances."[135]

In November of 2012, the Florida Supreme Court settled the conflict between the Third and Fourth Districts' interpretations when it issued, by per curium opinion, its ruling in *Hernandez v. State*.[136] Answering the questions certified to be of great public importance, the court adopted the Third District's view of the issue, holding first, "the trial court's warning to a defendant that 'the plea may subject him or her to deportation,' as required by Florida Rule of Criminal Procedure 3.172(c)(8), does not preclude a finding of ineffective assistance of counsel," and second, "the United States Supreme Court's holding in *Padilla* does not apply retroactively."[137] The court reasoned that while "the colloquy required by rule 3.172(c)(8) may refute a defendant's post-conviction claim that he had no knowledge that a plea could have possible immigration consequences . . . it cannot by itself refute a claim that he was unaware of presumptively mandatory consequences."[138] In upholding the Third District's interpretation, the Florida Supreme Court ensured that a generic, equivocal warning would not be allowed circumvent *Padilla's* purpose, which was to "ensure 'accurate legal advice for noncitizens accused of crimes,' and to bring 'informed consideration of possible deportation into the plea-bargaining process.'"[139]

In resolving the Florida circuit split, the Florida Supreme Court's basis for doing so was the equivocality of the warning contained in Rule 3.172(c)(8). The Florida Supreme Court, as have

134. *Id*.

135. *Padilla*, 559 U.S. at 372 (citing *Roe* v. *Flores-Ortega*, 528 U.S. 470, 480, 486 (2000)).

136. *Hernandez*, 37 Fla. L. Weekly S 730, 2012 FLA. LEXIS 2416 (Nov. 21, 2012).

137. *Id*. at 2.

138. *Id*. at 10-11.

139. *Id*. at 12.

the majority of state and federal courts that have examined similar warnings, "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."[140] The focus of these inquires suggests that a definite, unequivocal judicial warning may suffice to bring about a per se presumption of lack of prejudice. Further, the Florida Supreme Court made abundantly clear that even equivocal warnings like the one in the plea "colloquy required by rule 3.172(c)(8) may refute a defendant's post-conviction claim that he had no knowledge that a plea could have possible immigration consequences."[141] Similar cases that severely limit Padilla's reach in the post-conviction context are likely to recur as long as Sixth Amendment IAC claims are the only potential avenues to relief that noncitizen defendants have at their disposal if they unknowingly sign away their right to remain in the United States of America as part of a plea bargain.

The protection that the majority in *Padilla* sought to provide was not only a noble one, but was, in this author's opinion, necessary in light of the 1996 "changes to our immigration law [that] dramatically raised the stakes of a noncitizen's criminal conviction."[142] But as Justice Scalia stated, "[t]he Constitution . . . is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed."[143] In *Padilla*, the Court appears to have been forced to swing an ineffective assistance of counsel constitutional sledge because the case involved several, overlapping issues, to wit, the Court's "longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand."[144] By use of its IAC sledge, however, the Court, contrary to its own intent, arguably "ripped the foundations" from the collateral/direct consequence distinction and "effectively undermined any future application of the 'collateral/direct' consequences distinction in the Sixth Amendment context."[145]

Justice Scalia's belief, that judicial intervention was unneces-

140. Lang, *supra* note 132, at 978.

141. Hernandez v. State, 37 Fla. L. Weekly S 730, 2012 FLA. LEXIS 2416, at *10 (Fla. Nov. 21, 2012).

142. Padilla v. Kentucky, 559 U.S. 356, 364 (2010).

143. *Padilla*, 559 U.S. at 388 (Scalia, J. dissenting).

144. *Padilla*, 559 U.S. at 374.

145. *See* Smyth, *supra*, note 118.

sary in *Padilla,* shows a lack of appreciation for the modern concerns resulting from the evolution of America's immigration system, which Justice Stevens methodically outlined in the majority opinion. Be that as it may, Justice Scalia was correct in his assessment that "[s]tatutory provisions [could have] remed[ied] these concerns in a more targeted fashion, and without producing permanent, and legislatively irreparable, overkill."[146] In fact, one could advance a serious argument that all that was really needed was a legislative tack hammer in the form of legislation reinstating JRAD.[147] This is not to say that requiring attorneys to advise their clients about the deportation consequences of entering pleas is not a critically important objective, and one that the Court should absolutely require. Given Justice Stevens' long dissertation regarding the legislative actions that have led us to this point in our immigration system's evolution, however, it would appear that the Court was acting, at least in part, to protect noncitizens that have already unknowingly signed away their right to remain in the U.S. If this immensely important social objective was, in fact, part of what the Court sought to protect in *Padilla*, and the Court continues to rely solely on Sixth Amendment IAC methodology, results like those observed in Florida are likely to recur in multiple jurisdictions, and in a variety of forms. Noncitizen defendants who receive constitutionally deficient advisement essentially have no remedy in the event that they are aggrieved. While *Padilla* should help to ensure that fewer individuals end up in Mr. Padilla's position in the first place, the decision fails to provide a viable source of relief for individuals who do end up in situations similar to Mr. Padilla's.

2. Prejudice? What Prejudice?

Because Padilla was decided using a *Strickland/Hill* analysis, even once a Defendant is able to assert a *Padilla* ineffective assistance of counsel claim—in the sense that *Strickland's* first prong is met—the defendant must still make a showing of prejudice to obtain relief.[148] Because "[i]t takes two prongs to make a successful ineffective-assistance claim," the only way to create "a well-developed precedential body of law about failures-to-warn" would be for "at least some defendants [to] manage to get past the

146. *Padilla*, 559 U.S. at 389 (Scalia, J. dissenting).

147. *Id*.

148. *Padilla*, 559 U.S. at 363; Hill v. Lockhart, 474 U.S. 52, 57 (1985).

high hurdle of the prejudice prong."[149] While there may be an occasional case in which the prejudice hurdle is cleared, such cases will presumably be few and between. In fact, even after the United States Supreme Court's issued its decision in *Padilla* it remained unclear as to whether the decision would actually enable Mr. Padilla to have his conviction vacated on remand.[150] If *Padilla* truly was a landmark "immigration case"—as opposed to an IAC or plea bargain case—an outcome in which Mr. Padilla is unable to obtain relief, despite having (1) received constitutionally deficient counsel, and (2) having been deported as a result thereof, would seem counter-intuitive. The mere possibility of such a seemingly pervert result is illustrative of the difficulties that individuals who do not receive immigration advice face, and is the result of using an imperfect IAC tool to both prevent future wrongs from occurring, and remedy wrongs that have already occurred.

While Mr. Padilla was, as we now know, able to have his plea vacated upon remand to Kentucky,[151] such a result was anything but clear prior to the Kentucky Court of Appeals actually issuing its opinion. The United States Supreme Court, because of the limited scope of the issue that it was presented for review, expressed no opinion as to whether or not Mr. Padilla had put forth a showing of prejudice sufficient to be entitled to *Strickland*/*Hill* relief. The court stated, "[w]hether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result [of counsel's ineffectiveness], a question we do not reach because it was not passed on below."[152] On remand, due to the applicability of IAC claims in the context of an attorney's failure to adequately advise his or her client of the deportation consequences of entering into a negotiated plea, Mr. Padilla would have to meet the *Hill v. Lockhart* standard for establishing prejudice. In order for Mr. Padilla to satisfy the prejudice requirement, he would have to "show that there [was] a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[153] Such "predictions of the outcome at a

149. Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 How. L.J. 693, 709-10 (2011).

150. Padilla v. Commonwealth, 381 S.W.3d 322 (Ky. 2012); *See*, *e.g.*, Roberts, *supra*, note 149, at 719.

151. It is worth noting that Kentucky Supreme Court review is still a viable option because, at the time of this paper, the case has only made its way through the court of appeals. *See generally Padilla*, 381 S.W. 3d 322.

152. *Padilla*, 559 U.S. at 374-75.

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

possible trial," however, "should be made objectively, without regard for the 'idiosyncrasies of the particular decision maker.'"[154] Due to the objective nature of this inquiry, Mr. Padilla would have to "convince the court that a decision to reject the plea bargain would have been rational under the circumstances."[155]

While it is improbable that anyone would call Mr. Padilla "lucky,"[156] the facts of his case perfectly enabled him to satisfy the *Hill* standard by making an objective showing that "a decision to reject the plea bargain would have been rational under the circumstances."[157] In addressing Mr. Padilla's prejudice-prong showing, the Kentucky Court of Appeals first went through the specific facts of Mr. Padilla's case, which it would weigh in deciding whether "reject[ing] the plea offer and insist[ing] on a trial would have been rational under the circumstances."[158] The Kentucky Court of Appeals relied heavily on the following factors in reaching its conclusion that rejecting the plea would have been rational:

> 1) "Padilla testified that he had no knowledge that he was transporting boxes of marijuana,"[159]
> 2) "[Mr. Padilla] had no right to inspect the load's contents and checked only for its quantity and weight,"[160]
> 3) "Padilla testified that he pleaded guilty only because his wife, Ingrid, and daughter, Yoshii, were distraught over his potential prison sentence,"[161]
> 4) "When asked if he would have pleaded guilty if he had been properly informed that he would be deported, Padilla responded that he would have insisted on a trial because deportation was the same as 'putting a gun' to his head,"[162]
> 5) "Ingrid testified that she spoke to Padilla's trial counsel regarding Padilla's possible deportation and he informed her that deportation was not an issue because of Padilla's military service and he had lived in the United States for

154. *Id*. at 59-60 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

155. Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (citing Roe v. Flores-Ortega, 528 U.S. 470, 480, 486 (2000)).

156. *See generally Padilla*, 559 U.S. at 374-75 (Mr. Padilla was caught with a load of marijuana, spent the ten years of his life trying to fight deportation, and, not only had counsel that not only failed to advise him of the deportation consequences, also had a deal that the Kentucky Court of Appeals criticized as not being a good deal).

157. *Id.* at 372

158. *Padilla*, 381 S.W.3d at 328.

159. *Id*. at 327.

160. *Id*.

161. *Id*.

162. *Id*. at 328.

> over forty years,"[163]
> 6) Padilla's wife "testified that on the trial date, Padilla's trial counsel urged her to persuade Padilla to accept the plea offer [but] . . . [i]f she had been informed that Padilla would be deported, she would have advised him to reject the offer,"[164] and
> 7) "Padilla's plea bargain was not as favorable as he believed."[165]

All of these factors heavily pointed in favor of the court's finding that it would have been rational for Mr. Padilla to reject his plea offer and proceed to trial.

The facts of Mr. Padilla's case set it apart from the vast majority of ineffective assistance of counsel claims in the immigration realm. It is likely that most noncitizen defendants would put forth similar arguments to those relied on by Mr. Padilla, and would have family or friends testify that, but for a deficient deportation warning, the defendant would have proceeded to trial. While the court certainly took these factors into account, and such factual assertions are, ostensibly, necessary to obtain *Padilla* relief,[166] they do not appear to be the factors that carried the day in the *Padilla* decision. The test for establishing whether a defendant was prejudiced focuses on whether there exists "a reasonable probability that, but for counsel's errors," he would have refused to "plead guilty and would have insisted on going to trial."[167] The crux of the Kentucky court's decision, however, seemed to be Mr. Padilla's probability of success had he gone to trial, combined with his unusually harsh sentence and immigration consequences. The Kentucky Court noted that, "although not the exclusive factor when determining whether a particular defendant's decision to insist on a trial would have been rational, the immigration consequences of a guilty plea can be the predominate factor."[168]

While Mr. Padilla was able to show prejudice, this does not ameliorate the fact that, because *Padilla v. Kentucky* was decided by extending the IAC doctrine to constitutionally require counsel to advise noncitizen defendants about the deportation conse-

163. *Id*.

164. *Padilla*, 381 S.W.3d at 328.

165. *Id*. at 330.

166. *Id.* at 328 (these factors all support the requirement that "Padilla had to demonstrate that he rationally would have insisted on a trial, not that an acquittal at trial was likely.").

167. Hill v. Lockhart, 474 U.S. 52, 57 (1985).

168. *Padilla,* 559 U.S. at 329.

quences of their plea, the prejudice analysis will almost always render the *Padilla* decision a non-starter in the post-conviction context. In fact, a closer reading of the Kentucky Court of Appeals' decision reveals that Mr. Padilla's case was an exceptional one factually. First, the court found that a "reasonable jury could find that Padilla was unaware that the load he transported contained marijuana and acquit him of the deportable offense."[169] Because the trafficking offense for which Mr. Padilla was charged required a "knowingly" *mens rea*,[170] his defense, that as a truck driver he did not know what cargo he was carrying, was actually a plausible one. Many defendants charged with drug possession surely assert a similar defense, but the United States Supreme Court has explicitly approved of Mr. Padilla's argument as a viable defense to knowingly—one that applies specifically to delivery drivers—delivering cargo that turns out to be contraband.[171] This fact weighed heavily in favor of the view that, from a probability of success standpoint, Mr. Padilla's decision to proceed to trial would have been rational.

The second factor that made Padilla an exceptional case—one arguably even more important than Mr. Padilla's probability of success—was the fact that his "plea bargain was not as favorable as he believed."[172] The court illustrated the plea's lack of favorability to Mr. Padilla as follows:

> Although, if tried and convicted, he faced a maximum of ten-years' incarceration, under the plea agreement he was sentenced to ten-years' imprisonment, with five years to serve and five years probated. Based on the testimony at the RCr 11.42 hearing, Padilla accepted the offer on the day of trial only because he believed he would be not be deported and released on parole. However, Padilla would later learn that he faced deportation, was not eligible for parole, and was required to serve his entire sentence.[173]

Mr. Padilla, in effect, accepted the highest possible sentence that he could have received had he proceeded to trial and been found guilty. Thus, Mr. Padilla, in a very literal sense, would have had

169. *Id*. at 330.

170. *Id*. at 330 n.3.

171. *See* United States v. X-Citement Video, 513 U.S. 64, 69 (1994) (holding "a Federal Express courier who delivers a box in which the shipper has declared the contents to be 'film'" does not "'knowingly transports' such film" if it turns out to be contraband).

172. *Padilla*, 381 S.W.3d at 330.

173. *Id*.

nothing to lose had he gone to trial. He was essentially left to choose between the following two options: First, proceed to trial where he could possibly receive a sentence of ten years in prison and deportation, but with at least a chance of acquittal whereby he would not be deported; or Second, accept the plea and receive ten years in prison and automatic deportation with no chance of acquittal or the ability to remain in the United States.

Hindsight reveals that Mr. Padilla's counsel's poorly negotiated plea agreement left Mr. Padilla with a Hobson's choice. Because Mr. Padilla lacked more than one viable option, and the United States Supreme Court did not reach the prejudice issue "because it was not passed on below,"[174] the outcome of *Padilla* has no precedential value with regards to post-conviction prejudice prong jurisprudence. This is hardly a surprise given that *Padilla* was a prong-one *Strickland/Hill* case. That being said, the factual exceptionalness of *Padilla's* case has left states and lower federal courts to grapple with what sort of facts are needed to satisfy the prejudice requirement in a deportation warning based IAC claim.[175] In a world of mass-plea bargaining, *Padilla* is not the norm; rather, most litigants who choose to reject plea bargains risk "huge penalties [by] going to trial."[176] But in Padilla's case, the plea that he accepted was in conflict with the presumption that the "'mutuality of advantage' supposedly makes plea bargaining rational, fair, and efficient."[177] Mr. Padilla's plea was anything but fair and rational; rather, it supports those who reject the assumption that "good information and competent counsel would suffice to ensure rational, orderly, trial-based bargaining."[178] While Justice Stevens was of the opinion that lower courts would have little difficulty in undertaking run-of-the-mill prong-two prejudice analyses,[179] the "severity of deportation—"the equivalent of banishment or exile," adds a unique new counterweight onto the scales of justice that are used to undertake prong-two *Strickland/Hill*

174. Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

175. *See*, *e.g.*, Hernandez v. State, 61 So. 3d 1144 (Fla. Dist. Ct. App. 2011); *contra* Flores v. State, 57 So. 3d 218 (Fla. Dist. Ct. App. 2010).

176. Stephanos Bibas, *Regulating The Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1119 (2011).

177. *Id*. at 1124.

178. *Id*. at 1127.

179. Padilla v. Kentucky, 559 U.S. 356, 372 (2010) ("There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit.").

analyses.[180]

While the Kentucky Court of Appeals' decision certainly benefitted Mr. Padilla, a question remains as to how the court would have dealt with cases like the ones that the Florida districts split over.[181] How would the Kentucky court, or any other lower court applying *Padilla*, have dealt with Gabriel A. Hernandez? Mr. Hernandez sold LSD to a confidential informant, but pled out to only "one year of probation (with a possibility of termination after six months), completion of a substance abuse assessment and any recommended treatment, and the payment of $ 451.00 in costs" when he was facing a "maximum sentence of fifteen years in state prison."[182] Given that Mr. Hernandez received only six months of probation when he was facing fifteen years in prison, would it "have been rational under the circumstances" for him to have rejected the plea bargain if he had been informed about the deportation consequence?[183] Would the fact that Mr. Hernandez, just nineteen years old, was "born in Nicaragua, but entered the United States with his mother when he was under two years of age" be enough to tip the prejudice inquiry in his favor?[184]

How would the Kentucky court on remand have dealt with Jose Martinez Flores, who was charged with possession of cocaine and DUI and was facing a maximum sentence of five years but "entered a negotiated plea to a lesser misdemeanor offense of possession of drug paraphernalia and was sentenced to time served."[185] Like Mr. Hernandez, Mr. Flores's actual sentence was very lenient compared to what he was facing with regards to the potential prison sentence. Thus, how would a lower court decide if it would "have been rational under the circumstances" for Mr. Flores to have rejected the plea bargain if he had been informed about the deportation consequence?[186] Does the fact that Mr. Flores, a Mexican citizen, "married his [American] wife in 2001 about seven years before the hearing,"[187] tip the prejudice scale in his favor? Or perhaps the fact that Mr. Flores and his wife have three

180. *Id*.

181. *See*, *e.g.*, *Hernandez*, 61 So. 3d 1144; *contra Flores*, 57 So. 3d 218.

182. *Hernandez*, 61 So. 3d at 1146.

183. *Padilla*, 559 U.S. at 372 (citing Roe v. Flores-Ortega, 528 U.S. 470, 480, 486 (2000)).

184. *Hernandez*, 61 So. 3d at 1146.

185. *Flores*, 57 So. 3d at 218; FLA. STAT. §§ 775.082(3)(d) and 893.13(6)(a).

186. *Padilla*, 559 U.S. at 372 (citing Roe v. Flores-Ortega, 528 U.S. 470, 480, 486 (2000)).

187. *Flores*, 57 So. 3d 218, n.2.

children together is enough to show that it would have been rational to reject the plea?

While Justice Stevens was correct in that lower courts are "now quite experienced with applying *Strickland*," his statement fails to account for the fact that deportation is a "unique . . . [and] 'particularly severe' penalty."[188] Further, prior to the Court's decision in *Padilla*, "only two state courts held that an attorney could violate the Sixth Amendment by failing to inform a client about deportation risks or other collateral consequences of a guilty plea."[189] Given that courts by and large lack experience in applying Strickland's prong-two analysis, it is not surprising that the Florida District Courts of Appeal courts reached opposite results in *Flores* and *Hernandez*. These cases provide much more common examples of the plea-bargain process, and are indicative of the system whereby "prosecutors threaten inflated post-trial sentences to induce pleas" and "defendants are less free to test their guilt at trial."[190] But in cases like these, lower courts are still in the dark as to how a prong-two prejudice analysis should be conducted in the *Padilla* context. Can a noncitizen defendant ever succeed in a prong-two prejudice inquiry if, rather than serving time in prison, they just receive probation? What if they are married and their spouse is a U.S. citizens? What if they own a business in the United States? What if they have children who are American citizens by virtue of having been born in the United States to an American mother? Lower courts have less experience in dealing with these issues than Justice Stevens suggests because, prior to *Padilla*, these issues were never factors that would be weighed in an IAC prong-two prejudice inquiry. Thus, these questions will linger, and circuit splits are likely, until congressional or judicial action addresses the prong-two prejudice issues in the immigration context.

The Court used strong language when it recognized that "[t]he severity of deportation—'the equivalent of banishment or exile'—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation."[191] Further, the Court even went so far as to declare that "[i]t is [the Court's] responsibility under the Constitution to ensure that no criminal

188. Chaidez v. United States, 133 S. Ct. 1103, 1110 (2013).

189. *Id*. at 1109.

190. Bibas, *supra,* note 176, at 1128.

191. *Padilla*, 559 U.S. at 373 (citing Delgadillo v. Carmichael, 332 U.S. 388, 390-91 (1947)).

defendant—whether a citizen or not—is left to the "mercies of incompetent counsel."[192] This judicial responsibility has two components in the deportation warning context: (1) ensuring that future noncitizen litigants do not fall victim to incompetent counsel, and (2) providing an avenue to obtain redress for those noncitizen litigants who do fall victim to incompetent counsel. While *Padilla* was a momentous step in the right direction as to the first component, for the Court to fully meet its formidable responsibility, it must do more to ensure that noncitizens like Mr. Hernandez, Mr. Flores, and Mr. Padilla are all able to obtain relief, regardless of the state or federal district. Until *Strickland's* prong-two prejudice inquiry is dealt with in the *Padilla* context, the Court is not fully meeting its "responsibilit[ies] under the Constitution."[193]

B. Proposed Solutions to Achieve Padilla's Goals in the Post-Conviction Context

1. Determining the Body of Law at Which *Padilla* is Aimed

In untangling how *Padilla* can be utilized in the post-conviction context, and in order to construct a more effective solution than the current *Padilla* doctrine provides, it is important to determine what issue the Court's holding is aimed at remedying. By recognizing that *Padilla's* undercurrents include IAC issues, immigration issues, collateral consequence issues, issues owing to our "system of pleas," and perhaps even voluntariness issues, more precise tools can be used instead of "swinging a sledge" to try to deal with them together.[194] *Padilla* was a unique case in the sense that it was addressing the important immigration issue of deporting noncitizens who enter plea agreements for minor offenses, but did so based on Sixth Amendment IAC doctrine. This is part of the reason that Justice Alito concurred rather than joining the majority, and part of the reason that Justice Scalia dissented. Prior to *Padilla*, there was a substantial body of law owing to the direct/collateral consequence distinction, and the concurring and dissenting Justices were concerned that the result of *Padilla* would be to completely eviscerate "the longstanding and unanimous position of the lower federal courts with respect to the

192. *Id*.
193. *Id*.
194. Padilla v. Kentucky, 559 U.S. 356, 388 (2010) (Scalia, J., dissenting).

scope of criminal defense counsel's duty to advise on collateral consequences."[195] While the Court could have declared that deportation is a direct consequence in order to corral the effect of *Padilla* on the collateral/direct consequence distinction in IAC doctrine, it did not do so, giving rise to the non-joining Justices' concerns.

Aside from the direct/collateral consequence distinction, if *Padilla* is properly viewed as just another case in continuing line of IAC doctrine, the prejudice issue will likely need to be explored in greater depth for the decision to have any teeth. If one views the *Padilla* "decision as applying 'a well-established rule of law in a new way based on the specific facts of a particular case,'" the lack of a coherent framework for a prong-two prejudice analysis in the *Padilla* context will render the decision of little value to aggrieved noncitizens trying to use the Supreme Court's holding in post-conviction proceedings.[196] A case that provides virtually no remedy to individuals who have had their Sixth Amendment rights violated surely cannot be the culmination of, or even a triumph within, the *Gideon v. Wainwright* line of cases unless the prejudice issue is addressed in subsequent cases. The reason for this lack of value to post-conviction litigants is the nature of our criminal justice system, in which "longer sentences exist on the books largely for bargaining purposes."[197] While laws with this aim are generally justified on judicial economy grounds, they have also have an unintended impact in that they make meeting the rationality standard of the prejudice analysis difficult, if not impossible. In a criminal justice system where "individuals who accept a plea bargain[s] receiv[e] shorter sentences than other individuals who are less morally culpable but take a chance and go to trial,"[198] requiring noncitizen defendants to show that it would have been objectively rational to reject a plea and go to trial is an increasingly difficult proposition. Finally, *Padilla* contains language that implies that it is, at least in part, a judicial response to the evolution of the immigration system in the U.S., and more specifically to the fact that "[t]he 'drastic measure' of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes."[199] While this evolution—an

195. *Id*. at 1492 (Alito, J., concurring).

196. Gray Proctor & Nancy King, *Post Padilla: Padilla's Puzzles For Review in State And Federal Courts*, 23 FED. SENT. R. 239, 240 (2011).

197. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

198. *Id*.

199. *Padilla*, 559 U.S. at 360.

evolution that Stevens meticulously outlined—is a creature of statute, the *Padilla* decision does not deal with the underlying legislation. Rather, Stevens noted that because of this statutory evolution, the "importance of accurate legal advice for noncitizens accused of crimes has never been more important."[200] Because Congress has such broad powers in the context of immigration,[201] legislation in this area will generally be upheld, provided that Congress utilizes "constitutionally permissible means of implementing that power."[202] In *Padilla*, however, this legislative evolution spilled over into the IAC context, allowing Stevens to address an immigration issue without any actual immigration legislation being challenged. By outlining this evolution, then explaining that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes,"[203] it is clear that Stevens was mindful that *Padilla* was, in addition to an IAC case, also a case about the state of the U.S. immigration and criminal justice systems.

Because *Padilla* was a multi-doctrinally reaching case, and was resolved exclusively through the Sixth Amendment IAC jurisprudence, additional work in this body of law remains to be done. In order for the Court to meet its responsibility to noncitizens that do not receive constitutionally competent counsel in the plea bargain context, further development of what *Padilla* started must be completed in order to address the other concerns implicated in the case. While *Padilla* was based on Sixth Amendment jurisprudence alone, this article will advocate for the use of a *Miranda*-type[204] overly broad, prophylactic approach. This proposal would, in this author's opinion, provide a better remedy in the post-conviction context than *Padilla* for individuals that do not receive their *Padilla*-mandated level of counsel.

2. Scalia's Approach: Stating the Obvious to Avoid Taking Action

Justice Scalia, though doing so in dissent, clearly and succinctly identified the most effective method for achieving meaningful change—in the post-conviction context—in the body of law

200. *Id*. at 364.
201. Wong Wing v. United States, 163 U.S. 228, 235 (1896).
202. INS v. Chadha, 462 U.S. 919, 941-42 (1983).
203. *Padilla*, 559 U.S. at 364.
204. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

that *Padilla* addressed. Scalia can be a polarizing figure, and in many instances has drawn the scorn of legal scholars for what CNN described as Scalia's "bold disagreement, conservative arguments, pointed questions and the occasional crude hand gesture."[205] Scalia's textualist approach to constitutional interpretation and his "adherence to the original meaning of the Constitution sometimes results in holdings that negatively impact the accused,"[206] leading one commentator to refer to him as an "increasingly intolerant and intolerable blowhard: a pompous celebrant of his own virtue and rectitude."[207] While Scalia's dissent in *Padilla* certainly aligns with his conservative values,[208] his approach and rationale seem to be based, at least in part, on simple practicality as opposed to his conservative ideology. Scalia's dissent centered on his opinion that "[s]tatutory provisions [could have remedied] these concerns in a more targeted fashion, and without producing permanent, and legislatively irreparable, overkill."[209] While it is debatable[210] whether or not the *Padilla* decision produced "permanent, and legislatively irreparable, overkill,"[211] Justice Scalia's opinion that Congress could have remedied the concerns in a more targeted fashion could not have been more accurate. In fact, by merely reinstating JRAD or pre-IIRIRA discretion in the Attorney General, Congress could have all but abrogated the need for *Padilla*. This is not to minimize the value of requiring that counsel advise clients about the deportation consequences of entering into a plea; rather, it just suggests that if Mr. Padilla, Ms. Chaidez, Mr. Flores, or Mr. Hernandez could have sought relief through either JRAD or from the attorney gen-

205. Jamie Gumbrecht, *Even in dissent, Scalia stirs controversy*, CNN (July 18, 2012) http://www.cnn.com/2012/07/18/justice/antonin-scalia-profile/index.html (last viewed Jan. 16, 2013).

206. Davoli, *supra*, note 122, at 693.

207. Gumbrecht, *supra*, note 210 (quoting Paul Campos, *Antonin Scalia, ranting old man*, SALON (June 25, 2012) http://www.salon.com/2012/06/25/antonin_scalia_ranting_old_man/).

208. *See generally id.*

209. Padilla v. Kentucky, 559 U.S. 356, 389 (2010) (Scalia, J., dissenting).

210. Bibas, *supra,* note 176, at 1128 (Arguing that "increased transparency and disclosure may have a different effect on legislatures. If full disclosure of overly harsh collateral consequences causes many defendants to balk at pleading guilty, prosecutors may press for reforms. They may urge legislatures either to curtail collateral consequences, or at least to make them waivable as part of plea bargains, to avoid gumming up the plea-bargaining assembly line. Alternatively, they may press legislatures to give them even bigger sticks with which to threaten higher post-trial penalties and so coerce pleas.").

211. *Padilla*, 559 U.S. at 389 (Scalia, J., dissenting).

eral, they would not have been before the respective Courts in the first place.

Though only Justice Scalia's opinion addressed it directly, it would seem as though the majority recognized that the problem it was addressing in *Padilla* was one that legislation may have been better suited to address, or at the very least recognized that the problem had been caused by Congressional action.[212] Recognition that the problems addressed in *Padilla* grew out of Congress's dramatic overhaul of our immigration system is evidenced by Justice Stevens tracing the legislative evolution of the immigration in the U.S. over the last century, ultimately leading to an immigration regime where "discretionary relief is not available for an offense related to trafficking in a controlled substance."[213] For Justice Stevens, the modern immigration system began to take shape with the passage of the 1917 Act, which he thought brought radical changes.[214] Of particular interest to Stevens, however, was a specific safety measure included in the Act, which his majority opinion described in great detail:

> While the 1917 Act was "radical" because it authorized deportation as a consequence of certain convictions, the Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation "that such alien shall not be deported." . . . This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was "consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation," Janvier v. United States, 793 F.2d 449, 452 (CA2 1986). Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.[215]

This JRAD protection was, however, eliminated by Congress in

212. *Padilla*, 559 U.S. at 360 (Stevens, J., recognizing that, because of congressional action, the "landscape of federal immigration law has changed dramatically over the last 90 years.").

213. *Id*. at 364.

214. *Id.* at 361.

215. *Id.*

1990.[216] Further stripping noncitizen defendants of protections from deportation, Congress eliminated the Attorney General's ability to grant discretionary relief when it passed the IIRIRA.[217]

The majority was concerned that in this new post-IIRIRA era if a noncitizen commits a removable offense, his removal is practically inevitable.[218] It was because of these changes that Mr. Padilla was unable to receive any relief, discretionary or otherwise, despite having been a lawful permanent resident of the United States for more than 40 years and serving in the U. S. Armed Forces during the Vietnam War.[219] The majority seemed to imply that but for these Congressional changes, there would have been no need to expand its effective assistance of counsel doctrine to cover deportation warnings.[220] This is where Scalia's point of contention with the Stevens' majority opinion lies; Scalia criticized the majority's use of the Sixth Amendment as an "all-purpose tool for judicial construction," rather than to guarantee "the accused a lawyer 'for his defense' against a "criminal prosecution[n]."[221]

Scalia discussed several measures that Congress could undertake to address the underlying issues that gave rise to the need for *Padilla*, such as "specify[ing] which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given."[222] Scalia's other suggestion for how Congress may address the matter through legislation seems to more accurately reflect that the *Padilla* case is not as much about IAC as it is about counteracting the legislative overhaul of the immigration system in the U.S. Scalia proffered that Congress could further shape immigration law by passing legislation mandating "that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel's misad-

216. *Id*. at 363.
217. *Id*.
218. *Padilla,* 559 U.S. at 363.
219. *Id*. at 359.
220. *See id*. at 364 ("These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.").
221. *Id*. at 388 (Scalia, J., dissenting).
222. *Id*. at 392.

vice regarding removal consequences."[223] This conception, while failing to address unadvised noncitizens or mandate a certain constitutional level of advisement, would at least provide some sort of remedy in the post-conviction context to misadvised noncitizen defendants. The advantage to such an approach is that ambiguity would no longer exist as to the impact of *Padilla* on the collateral/direct consequence distinction. The merits of the direct/collateral distinction in IAC doctrine will be left for other scholars to debate; however, it was clear in *Padilla* that none of the factions of Justices were ready to completely upend of the use of the distinction when determining the scope of an attorney's duties under the Sixth Amendment. For legislation like the kind discussed by Scalia to be an adequate substitute or supplement to *Padilla*, however, it would have to cut broad enough to include both unadvised and misadvised noncitizen defendants. If passed, such legislation would provide a better avenue to relief than aggrieved individuals have now under a *Strickland*/*Hill*/*Padilla* based claim. Further, it would protect the integrity of the underlying conviction by shifting the focus from the conviction in general to just to the immigration consequences. Given the Court's "fundamental interest in the finality of guilty pleas," a law that protects noncitizen defendants without undermining the finality of guilty pleas would seem preferable.[224]

Though none of the opinions address it, another way Congress could deal with the problem of near-automatic deportation for unadvised or misadvised noncitizen defendants, and one that the majority would presumably support,[225] would be for Congress to simply repeal the IIRIRA, or at least the part that eliminated the Attorney General's discretion, along with the 1990 legislation that eliminated JRAD. Like Scalia's aforementioned proposal, legislation accomplishing these goals would again focus on the deportation, not the underlying conviction that caused the deportation. A peculiarity with the current doctrine, at least in the post-conviction context, is that while *Padilla*-type arguments are used to invalidate convictions, most litigants really only seek to avoid removal. In fact, in many of the cases that have dealt with *Padilla* issues the defendants have already served their sentences and

223. *Padilla*, 559 U.S. at 392 (Scalia, J., dissenting).

224. Hill v. Lockhart, 474 U.S. 52, 59 (1985) (citing United States v. Timmreck, 441 U.S. 780 (1979)).

225. *Padilla*, 559 U.S. at 360 (Stevens, J., discussing the impact that the 1990 Act and the IIRIRA have had on noncitizens convicted of removable offenses.).

returned to their daily lives, only to be deported years later.[226] This is why Justice Scalia's assertion that the majority was "swinging a sledge where a tack hammer [was] needed" may have had at least some merit to it.[227] In effect, *Padilla* represents a major upheaval in IAC jurisprudence, despite the fact that all noncitizen defendants really hope to accomplish is to avoid removal.

Though the Court has a history of stepping in where Congressional action is determined to be unconstitutional, and striking down legislation, the laws at that led to the need for a case like *Padilla* are not conducive to such action, even if the validity of the subject immigration legislation were ever to come before the Court. Congress has plenary power, subject only to "important constitutional limitations,"[228] to determine whether certain noncitizens will be allowed to enter or remain in the United States.[229] Because the IIRIRA and other Congressional actions do not appear to raise separation of powers,[230] Due Process,[231] Equal Protection, or any other apparent Constitutional concerns, the Court would have to stretch to make another doctrinal body of law fit, or start down a new path altogether. It seems unlikely that the Court would be willing to cause such turbulence in an attempt to remedy the already pervasive turmoil that exists within the body of law where the criminal justice system and the immigration system converge, or the "crimmigration"[232] doctrine as one scholar

226. *See*, *e.g.*, Hernandez v. State, 37 Fla. L. Weekly S 730, 2012 FLA. LEXIS 2416 (Fla. Nov. 21, 2012) (Despite the fact that Mr. Hernandez was denied relief because his claim predated Padilla, the Court explained that not only had Mr. Hernandez served out his punishment, but he had also "gone on to attain a number of achievements—a Bachelor of Arts Degree in 2005, and gainful employment as a computer network administrator for a Miami bank group.").

227. *Padilla*, 559 U.S. at 388 (Scalia, J., dissenting).

228. Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

229. Chew Heong v. United States, 112 U.S. 536 (1884).

230. U.S. CONST. ART. I, § 8, States that "Congress shall have power to . . . provide for the common defense and general welfare of the United States . . . [and] establish a uniform rule of naturalization." Reading these clauses in conjunction with the Necessary and Proper Clause found in the final clause of ART. I, § 8, it would be difficult, if not impossible, to attack the legislation on a lack of power, or separation of powers theory.

231. While the Due Process Clauses of the Fifth and Fourteenth Amendments can be used in the plea-bargain context on a voluntariness theory, trying to use them to invalidate the immigration legislation entirely does not work due to the fact that there is a comprehensive immigration scheme, made up of both Article III and non-Article III courts, in place to ensure Due Process. The voluntariness theory applies only to a waiver of the rights provided by the scheme, but is not applicable in a context other than plea-bargaining.

232. Markowitz, *supra* note 27, at 1316.

termed this area of overlap. Thus, if a repeal of the IIRIRA, 1990 Act, or any of the other pieces of legislation that make up the body of the U.S. immigration system are going to take place, such a repeal will have to come from the legislature, not the judiciary.

Scalia is correct in the sense that Congressional action would seem to afford the most targeted, effective route to achieve change in the post-conviction context of *Padilla*; however, this is just stating the obvious, and it completely fails to acknowledge the drawbacks of waiting for Congress to act. First, such action depends on the will of the people, and as we have seen with other social issues such as segregation, same-sex marriage, and women's suffrage to name a few, the will of the majority does not always effectively protect the minority. Adding to such concerns is the fact that political in-fighting and partisan politics have reached new heights in recent years—especially in the immigration arena—so relying on Congress to act in any sort of expeditious manner is likely to prove a defeating proposition. Given its holding in *Padilla*, the court was apparently concerned about the ability or willingness of Congress to protect the minority, and felt that acting as it did may in fact, have been necessary to protect the rights of noncitizen defendants. If this was the Court's concern, perhaps the Court did not err by using a sledge where a tack hammer would have sufficed; rather, it is possible that the Court only used a sledge where a wrecking ball was needed to ensure that noncitizen defendants get the constitutionally mandated level or advisement, while providing a remedy in the event that they do not.

3. *Miranda v. Arizona*: A Model for the Wrecking Ball?

In continuing down the path that the Court began in *Padilla v. Kentucky*, and in order to reinforce the protections that the IAC doctrine provides for individuals raising *Padilla* based challenges for post-conviction relief, this article proposes an overly-broad prophylactic holding, similar in structure to the Court's holding in *Miranda v. Arizona*. The aim of such a holding would be to ensure that the advisement of noncitizen defendants as to the deportation consequences of taking a plea bargain continues, while providing a remedy where counsel fails to advise their client of these deportation consequences, and at the same time, causing as little turmoil in Sixth Amendment jurisprudence as possible.[233] In delivering its *Miranda* decision, the Court sought to "give concrete

233. Miranda v. Arizona, 384 U.S. 436 (1966).

constitutional guidelines for law enforcement agencies and courts to follow."[234] There is a very real need for concrete constitutional guidelines for courts and lawyers to follow in the wake of the 1990s immigration reforms and the post-*Padilla* decisions, and it will take a decision as complex and far reaching as the one in *Miranda* to protect both noncitizen defendants before entering pleas, and noncitizen defendants that enter pleas due to constitutionally deficient counsel. Just as the *Miranda* decision did "not preclude legislative solutions that differed from the prescribed *Miranda* warnings but which were at least as effective,"[235] the Court should craft a decision that would allow for Congress to pass measures that would be at least as effective as those that the Court enunciates in its holding.

Miranda provides a template for how a prophylactic *Padilla* opinion could be structured. Just as the *Miranda* decision was founded, in part, upon Fifth and Fourteenth Amendment concerns, the Supreme Court would be wise to base any subsequent, prophylactic *Padilla* ruling on these two Amendments as well.[236] Despite the fact that he tried to qualify his mentioning of the Due Process Clauses by adding a footnote saying an argument founded in Due Process jurisprudence would likely fail, Justice Scalia was absolutely right in acknowledging that there was concern about the "voluntariness of *Padilla's* guilty plea" and such "concern properly relates to the Due Process Clauses of the Fifth and Fourteenth Amendments."[237] Justice Scalia even went so far as to conclude his qualifying footnote by stating, "[w]hatever the outcome, however, the effect of misadvice regarding such consequences upon the validity of a guilty plea should be analyzed under the Due Process Clause."[238]

While *Miranda* and *Padilla* prophylactic-type opinions may be able to rely on the same Amendments, the difference is what clause of the Fifth Amendment is pertinent to the respective in cases. In *Miranda*, the Fifth Amendment clause of interest was "nor shall be compelled in any criminal case to be a witness against himself"; in the proposal this article suggests the relevant

234. *Id*. at 441-42.

235. Dickerson v. United States, 530 U.S. 428, 440 (2000).

236. *Id*. at 433 ("Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be ad- mitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment.").

237. *Padilla*, 559 U.S. at 391 (Scalia, J., dissenting).

238. *Id*. at 1496 n. 1.

clause is "nor be deprived of life, liberty, or property, without due process of law."[239] In *Miranda*, the Court refused to:

> presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record.[240]

This article advances the idea that the Court should refuse to presume voluntariness in a noncitizen defendant's plea, absent certain steps being taken to ensure that the plea was "a knowing and intelligent waiver"[241] of the constitutional protections provided to noncitizen defendants. The Court could create a rebuttable presumption that, if a noncitizen defendant has been deported or faces deportation, he has been prejudiced. Under the Voluntariness Doctrine, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[242] The Voluntariness and IAC doctrines have overlapping elements, shown by the Court's pronouncement in *Hill* that "[w]here, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases."[243] Thus, *Padilla* is certainly a case where concerns over the voluntariness of the plea are implicated.

In order for a valid waiver of rights under Fifth and Fourteenth Amendment Due Process jurisprudence, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[244] Further, under *Boykin v. Alabama,* "the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily."[245] In a 2004 case, with Justice Souter writing for the majority, the Court further expanded upon its holding in

239. U.S. CONST. AMEND. V.
240. Miranda v. Arizona, 384 U.S. 436, 498-99 (1966).
241. *Id*.
242. Brady v. United States, 397 U.S. 742, 748 (1970).
243. Hill v. Lockhart, 474 U.S. 52, 56 (1985).
244. Brady v. United States, 397 U.S. 742, 748 (1970).
245. *Id*. at 756 (citing Boykin v. Alabama*,* 395 U.S. 238, 243 (1969)).

Boykin by noting, "when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed."[246] Further, Justice Souter noted, "[w]e do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless."[247] The rationale that the Court has often cited for this treatment towards pleas where a lack of knowledge is shown is that "the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge.[248]

By utilizing the line of cases owing to *Boykin v. Alabama* to address the Court's responsibility to provide an avenue to obtain redress for those noncitizen litigants who fall victim to incompetent counsel, an aggrieved Defendant would not have the Courtroom doors slammed shut by an inability to show that "a decision to reject the plea bargain would have been [objectively] rational under the circumstances."[249] While a voluntariness claim under the Due Process Clauses of the Fifth and Fourteenth Amendments would still require a showing of prejudice, this could be done so by demonstrating it was "reasonably probable he would have gone to trial absent the error."[250] Unlike Padilla's objective inquiry, however, "it is no matter that the choice may have been foolish."[251]

In outlining a broad, prophylactic warning for *Padilla* claims, the Court would have to decide what steps must be taken, and by whom, to ensure that the noncitizen defendant's plea and waiver were knowing and voluntary. In *Miranda*, the Court held that to show the "defendant [had] been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded,"[252] four warnings must be given when a custodial interrogation takes place: "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior

246. United States v. Dominguez Benitez, 542 U.S. 74, 84 n.10 (2004) (citing Boykin v. Alabama, 395 U.S. 238, 243 (1969)).

247. *Id*.

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

249. Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (citing *Roe* v. *Flores-Ortega*, 528 U.S. 470, 480, 486 (2000)).

250. *Dominguez Benitez*, 542 U.S. at 84, n.10 (2004) (citing Boykin v. Alabama, 395 U.S. 238, 243 (1969)).

251. *Id*. at 84.

252. Miranda v. Arizona, 384 U.S. 436, 498-99 (1966).

to any questioning if he so desires."[253] Just as the *Miranda* court determined that these four warnings, or "preventive medicine" as Justice Scalia mockingly referred to them,[254] would provide a remedy to aggrieved litigants deprived of their Sixth Amendment rights, the court in crafting an opinion to combat the immigration issues discussed, must determine what "preventive medicine" would remedy that which ails the post-IIRIRA immigration system.

Because the proposed doctrinal structure of prophylactic *Padilla* warnings would be founded in Fifth and Fourteenth Amendment jurisprudence, in addition to Sixth Amendment jurisprudence, the Court would not be limited to imposing duties only on defense counsel. Parties that may be equally as appropriate as counsel to bear the burden of warning noncitizen defendants of potential deportation implications include the court, prosecuting attorneys, the Executive Office of Immigration Reform, the United States Immigration and Customs Enforcement, or any other of a plethora of court departments or agencies involved in the deportation process.

While the use of Fifth and Fourteenth Amendment Due Process clause would allow for other parties to bear some of the burden, the Court should continue to follow its current *Padilla* doctrine that requires the accused's counsel to inform noncitizen defendants of the deportation consequences of their accepting a plea. Because the warnings have a prospective impact on the level of representation that noncitizens are entitled to in the plea bargain context, *Padilla* itself meets one of the Court's two responsibilities: it ensures that future noncitizen defendants do not fall victim to incompetent counsel. What *Padilla*, by and large, fails to do is provide an avenue to obtain redress for those noncitizen litigants who do fall victim to incompetent counsel, despite the Court's requirements under *Padilla*. By requiring a showing of a certain level of advisement in order to satisfy what I will refer to as the "*Padilla* Warnings," the Court could better address its second responsibility by founding a post-conviction focused, prophylactic ruling in Fifth and Fourteenth Amendment Voluntariness Doctrine under the Due Process Clause, as opposed to Sixth Amendment IAC.

A prophylactic ruling that required the following measures would be better suited than *Padilla* to remedy the post-conviction

253. *Id*. at 479.

254. Dickerson v. United States, 530 U.S. 428, 453 (2000) (Scalia, J., dissenting).

issues that the Court was unable to address in *Padilla*: First, ICE, or another appropriate agency, makes a binding determination of the removal implications of a noncitizen defendant's negotiated plea. Second, such implications must be included in the agreement accepted by the court. Third, the judge accepting the plea must warn the noncitizen defendant of these implications. Finally, the Court must inquire to ensure that the noncitizen defendant's attorney had explained the deportation implications of accepting a plea, and they were the same as those included on the plea agreement. Absent each and every one of these steps being taken to ensure that the plea was "a knowing and intelligent waiver"[255] of the constitutional protections provided to noncitizen defendants, the Court could hold a presumption that the plea was not a voluntary, knowing, and intelligent act done with "sufficient awareness of the relevant circumstances and likely consequences."[256] As to the prejudice prong, the Court could then create a rebuttable presumption that if a noncitizen defendant has been deported or faces deportation, he has been prejudiced.

Such a procedure would seem to afford an effective path to post-conviction relief where counsel does not meet its constitutional burden of counseling noncitizen defendants as to the deportation implications of accepting a plea. Additionally, putting the burden on the parties that are upholding and administering the law conforms with the maxim that "[i]n a free, dynamic society, creativity . . . is fostered by a rule of law that gives people confidence about the legal consequences of their actions."[257] The United State Supreme Court held in *INS v. St. Cyr* that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct . . . [and] settled expectations should not be lightly disrupted."[258] Establishing a four step *Padilla* Warning like the one outlined, would ensure that noncitizen defendants, attorneys, and judges

255. *Id*.

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

257. INS v. St. Cyr, 533 U.S. 289, 316 (2001) (quoting Landgraf v. USI Film Products, 511 U.S. 244, 265-266 (1994)). Though *St. Cyr* dealt with the retroactive application of a procedural change promulgated under the AEDPA and the actual "criminal actions," the concern over a defendant's knowledge and voluntariness in the plea bargain context indicates that the same concern is applicable to "pleading actions." In fact, a lack of knowledge and voluntariness of the direct "legal consequences of their actions" is the primary tool used to gain relief in the plea bargain context. 533 U.S. at 316.

258. *Id*.

would all "know what the law is"[259] and could be confident about "the legal consequences of their actions."[260] Further, this approach would not jeopardize the Court's "fundamental interest in the finality of guilty pleas,"[261] in the IAC context, while still ensuring that the "grave and solemn act" of entering a plea and admitting "in open court that he committed the acts charged in the indictment" is based on the defendant's "voluntary expression of his own choice."[262]

If the Court were to craft a holding such as the one outlined above, it would surely come along with a furious dissent from Justice Scalia, provided that he is still on the bench. After all, it was Justice Scalia who referred to the Court's use of prophylactic measures in *Miranda* as "an immense and frightening antidemocratic power," and one that "does not exist."[263] While Scalia has expressed a fervent disapproval of the Court placing "'prophylactic' restrictions upon Congress and the States,"[264] a holding like the model discussed would be different from the *Miranda/Dickerson* line of cases in the sense that it would not be a case of the Court striking down a congressional act based on conflict with a mere prophylactic holding; rather, it would simply give state and federal courts a tool to use when interpreting cases similar to *Padilla*. While *Dickerson* would make it difficult for Congress to directly overturn or contradict such a ruling, it would still allow state and federal legislatures and courts a tremendous deal of latitude in the event that they choose not to implement the *Padilla* Warning protocols laid out. By merely enunciating a rule whereby a rebuttable presumption of prejudice exists, the individual political bodies would still have full discretion in deciding how to, and whether to, structure procedures that satisfy the outlined *Padilla* Warnings. A Supreme Court Holding like the one outlined would still allow for "legislation that could solve the problems addressed by today's opinions in a more precise and targeted fashion."[265] In fact, if JRAD and/or the attorney general's discretion were reinstated, it would all but nullify the need for the procedure because

259. *Id*.

260. *Id*.

261. Hill v. Lockhart, 474 U.S. 52, 59 (1985) (citing United States v. Timmreck, 441 U.S. 780 (1979)).

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

263. Dickerson v. United States, 530 U.S. 428, 446 (2000) (Scalia, J. dissenting).

264. *Id*.

265. Padilla v. Kentucky, 559 U.S. 356, 392 (2010).

most noncitizen defendants could rely on the legislatively proscribed methods by which to stave off deportation.

Additionally, if the Court ever retreated from its *Padilla* precedent altogether—perhaps because of an ideological shift on the bench regarding the collateral consequence implications of *Padilla*—the prophylactic measures discussed would stand on their own, even without *Padilla*. The only role that *Padilla* serves in the model discussed is that it imparts a constitutional duty on attorneys to advise their clients about the deportation implications of taking a plea bargain. Thus, while a retreat from *Padilla* would have a negative impact on professional norms in the criminal justice context, individuals like Mr. Padilla, Mr. Hernandez, Mr. Flores, and Ms. Chaidez would have some sort of recourse in that the Fifth and Fourteenth Amendment prophylactic measures would still ensure that their pleas were entered knowingly, intelligently, and voluntarily. This is, arguably, more protection than noncitizen defendants in the post-conviction context currently have based on *Padilla*.

While most commentators would agree that *Miranda's* effectiveness has been limited (at best), perhaps its prophylactic framework can be dusted off and used as a template for addressing a vitally important issue. Given the complexities and nuances of trying to navigate IAC doctrine, our modern system of mass adjudication, and immigration, all in one fell swoop, it may take a model such as the one discussed above to address an issue that contains a convergence of so many different bodies of law, without radically altering the individual doctrines in the process. But the difficulties and complexities involved should not discourage the Court from fulfilling its responsibility of providing an avenue to obtain redress for those noncitizen litigants who do fall victim to incompetent counsel.

VI. CONCLUSION

Though every rose does in fact have its thorn, the same philosopher went on to say, "every night has its dawn."[266] Noncitizen defendants who seek relief based on *Padilla* have their prospects of relief shrouded in darkness given the difficulties that most will encounter when trying to show prejudice, but clarity is an achievable goal. Whether by simple Congressional action[267] or judicial

266. Michaels, *supra* note 1.
267. *See supra* Section IV.B.2.

wrecking ball,[268] this paper puts forth several tangible, effective alternatives or remedies to deal with the post-conviction thorns that have been revealed upon closer inspection of the *Padilla* rose. Only time will tell whether the *Padilla* decision itself will be viewed as a building block in the ever-expanding "crimmigration" doctrine, an anomaly within the IAC doctrine, or just another consequence of the mass plea-based system of adjudication in which we live. There is one thing we can be sure of, however: this won't be the last that we hear about the several issues that converged leading up to the Supreme Court's opinion in *Padilla v. Kentucky*.

268. *See infra* Section IV.B.3.