CONSIDERING THE SCOPE OF ADVISAL DUTIES UNDER PADILLA

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ABSTRACT

In Padilla v. Kentucky, the Supreme Court recognized the complexity and severity of immigration penalties triggered by criminal convictions and held that defense attorneys are obligated to advise clients of such consequences. In so doing, the Court explained that specific advice is required when a consequence is clear; at the same time, it acknowledged it is not always possible to ascertain the consequences of a criminal disposition and, when that is the case, counsel’s duty is more limited. The Court did not, however, elaborate on the circumstances in which the duty might be limited or explain what advice defense counsel owes a noncitizen defendant even under that limited duty. As post-Padilla practice has demonstrated, a more developed understanding of the extent of the duty to advise noncitizen defendants is now essential.

This Article explains how the Padilla opinion provides direction on the scope of a defense attorney’s duty vis-à-vis noncitizen clients and argues that reading the “clear consequence” comment in light of the decision’s roots and rationale offers the necessary guidance. After parsing the Court’s statements, this Article looks at the concrete questions about an attorney’s duties that have arisen in lower courts in Padilla’s wake. This inquiry shows that, where Padilla is interpreted narrowly, it seriously undermines noncitizen defendants’ Sixth Amendment rights. This Article then places the “clear consequence” discussion in context by considering the Padilla opinion as a whole and concludes by proposing an analytical approach that accounts for the directives that run throughout the opinion. Ultimately, understanding the basis of the decision and the practical problems that result from a narrow interpretation make clear that defense attorneys must advise noncitizen clients as specifically as research allows in order to adequately inform them about the immigration consequences of contemplated criminal dispositions.

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INTRODUCTION

Legal counsel is like medical advice. Clients, like patients, seek it when uncomfortable and in a bad situation. They want it when they can’t resolve or even understand the problem. To get it, they have to discuss an uncomfortably personal matter with a professional they just met and simply trust, as a matter of faith, that the advice is correct. Worst of all, the consequences of decisions made pursuant to that advice are often severe and irreversible.

For these reasons, doctors must advise patients about serious effects of suggested treatments, whether those effects are death, dementia, or something somewhat less.1 Lawyers, similarly, must apprise clients

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of serious consequences of a contemplated course of action, whether it is capital punishment, life in prison, or something somewhat less.

In *Padilla v. Kentucky*, the Supreme Court recognized this, holding that the defendant was entitled to be advised that his plea would make him deportable before deciding whether to swallow that bitter pill.\(^2\) *Padilla* made clear that defense attorneys are constitutionally required to advise noncitizens of the serious side effects—there immigration consequences—of criminal convictions.\(^3\) Less clear after this decision—but critically important—is the extent of the advisal duty under *Padilla*.

Though *Padilla* was not the first time the Supreme Court recognized the severity of penalties under immigration law,\(^4\) the 2010 decision represented the culmination of decades-long advocacy drawing attention to the increasingly harsh immigration consequences resulting from criminal convictions.\(^5\) This historic decision was also a beginning; although professional standards had long required such advice, the advisal duty under *Padilla* had yet to take shape. Since then, advocates, scholars, prosecutors, and judges have had to consider what this decision means for client counseling.

In the year following *Padilla*, several major issues have emerged consistently in state trial courts and federal district courts, primarily in the context of defendants seeking to vacate convictions incurred without being advised of the immigration consequences.\(^6\) The questions surfaced...

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\(^2\) 130 S. Ct. 1473, 1484 (2010) (finding that advice to client that a guilty plea makes client eligible for deportation is obligatory under the Sixth Amendment duty to provide effective assistance of counsel).

\(^3\) *Id.*

\(^4\) See, e.g., INS v. St. Cyr, 533 U.S. 289, 322 (2001) (“There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.”); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) (refusing to subject noncitizen to the “high and momentous” stakes of deportation proceedings, which “can be the equivalent of banishment or exile”); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (describing deportation as loss “of all that makes life worth living”); Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (describing deportation as a “penalty” and “punishment”).


\(^6\) Such motions seek to vacate convictions that were the result of pleas entered in which the defendant was not advised of the immigration consequences of their conviction, as required by *Padilla*. Post-conviction relief motions have been brought through a variety of mechanisms, including state post-conviction procedures, writs of coram nobis, and writs of habeas corpus. See, e.g., United States v. Hong., No. 10-6294, 2011 WL 3805763 (10th Cir. Aug. 30, 2011); Chaidez v. United States, No. 10-3623, 2011 U.S. App. LEXIS 17546 (7th Cir. Aug. 23, 2011); Orozco v. United States, 645 F.3d 630 (3d Cir. 2011); United States v. Bonilla, 637 F.3d 980 (9th Cir. 2011); United States v. Dass, No. 05-140, 2011 U.S. Dist. LEXIS 76506 (D. Minn. July 14, 2011); Marroquin v. United States, No. M-10-156, 2011 U.S. Dist. LEXIS 11406 (S.D. Tex. Feb. 4, 2011); Chhabra v. United States, No. 09-CV-1028, 2010 U.S. Dist. LEXIS 118167 (S.D.N.Y. 2010).
ing in lower courts—most commonly regarding retroactivity—how to prove prejudice as a result of an attorney’s failure to comply with this duty—were not explicitly addressed in thePadillaopinion and have thus far drawn the most attention in scholarship and litigation addressing the decision’s implementation. Teed up, but relatively unexplored, is an issue raised, but not directly answered by the Padilla Court:

Nov. 3, 2010); Commonwealth v. Clarke, 949 N.E.2d 892 (Mass. 2011); State v. Sandoval, 249 P.3d 1015 (Wash. 2011). Other less common Padilla-based motions include plea- and sentence withdrawals.

7 The issue of retroactivity emerged quickly and sharply among these decisions. A few higher courts have weighed in on this matter. See, e.g., Hong, 2011 WL 3805763 (finding Padilla not retroactively applicable); Chaidez, 2011 U.S. App. LEXIS 17546 (finding Padilla not retroactively applicable to cases on collateral review); Orocio, 645 F.3d 630 (finding Padilla to apply retroactively); Clarke, 949 N.E.2d 892 (same); Sandoval, 249 P.3d 1015 (same); see also Marroquin, 2011 U.S. Dist. LEXIS 11406 (noting that a majority of courts find Padilla to be retroactive). It is, however, not settled law in most jurisdictions. Dass, 2011 U.S. Dist. LEXIS 76506, at *8–9 (collecting cases and noting that “[c]ourts considering the question of Padilla’s retroactive application have reached conflicting results”); Chhabra, 2010 U.S. Dist. LEXIS 118167 (noting split of authority without deciding on issue). But see Marroquin, 2011 U.S. Dist. LEXIS 11406, at *6 (concluding that “a majority of courts have found that Padilla is simply the application of an old rule” and agreeing “that Padilla’s holding applies retroactively”).

8 See infra Part I.A (explaining prejudice inquiry). Prejudice issues have drawn significant discussion following Padilla because, although Padilla sought post-conviction relief (PCR) for ineffective assistance of counsel, the Supreme Court ruled only on the deficiency prong of this test and remanded the case to the trial court to address the merits of the prejudice prong. Padilla, 130 S. Ct. at 1483–84 (leaving prejudice prong “to the Kentucky courts to consider in the first instance”). As such, lower courts adjudicating Padilla-based post-conviction motions have had to consider, in the first instance, prejudice-related issues. One of these issues is how defendants who were not advised of the immigration consequences of a contemplated plea agreement establish prejudice—that they would not have accepted that plea agreement if counsel had advised them of the immigration consequences of the plea. Compare Orocio, 2011 U.S. App. LEXIS 13214, and Clarke, 949 N.E.2d at 906 (holding that prejudice may be established by showing that counsel would have been able to negotiate a more favorable plea with respect to immigration consequences), with Preemo v. Moore, 131 S. Ct. 733,745 (2011) (rejecting notion that this articulation of prejudice has been “clearly established” under federal law). See generally Jenny Roberts, Proving Prejudice, Post-Padilla, 54 HOW. L.J. 693 (2011). A second issue is the impact of a general court-advisal on the prejudice inquiry. Compare People v. Garcia, 907 N.Y.S.2d 398, 407 (N.Y. Sup. Ct. 2010) (“Court’s general warning will not automatically cure counsel’s failure nor erase the consequent prejudice.”), with Marroquin, 2011 WL 488985 (finding no prejudice where judge had provided some indication of immigration consequences).

Indeed, the scope of the Padilla duty appears to have been a difficult point for the Court; divergence on this issue resulted in a separate concurrence from Justice Alito and a response by the majority, revealing the intra-Court dialogue on this issue. Initially describing the duty, the Padilla majority drew on professional standards to find that defense attorneys are obligated to advise clients of immigration consequences. When a consequence is clear, the Court explained, specific advice is required. At the same time, the Court acknowledged that the task might be difficult, ascertaining the consequence of a plea is not always possible, and, in those cases, counsel’s duty is more limited. The Padilla Court did not, however, elaborate on the circumstances in which the duty might be limited, nor did it detail the counseling obligations that inhere when advising any noncitizen defendant about the immigration consequences of a contemplated disposition. As such, the scope of the duty described in Padilla remains to be fleshed out.

This Article explains how the Padilla opinion provides guidance on scope far beyond the dialogue on clarity and argues that, considered in light of the decision as a whole, the advisal duty must be understood as fact-tailored and information-generating. This explanation proceeds in four parts. First, in Part I, it begins with the Padilla decision and examines the exchange between the majority and concurring Justices. Closely reading the Court’s resolution of this divergence reveals that the discussion of clear consequences does not limit the duty to research and advise where law is complex or unsettled; rather, it affects the specificity and certainty of the advice that a defense attorney is able to provide. Part II looks at questions of scope emerging in lower courts in order to understand the concrete questions that arise and how lower courts have answered them in the immediate wake of Padilla. It shows how,

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11 Compare Padilla, 130 S. Ct. at 1473 (majority opinion), with id. at 1487 (Alito, J., concurring).
12 Padilla, 130 S. Ct. at 1482–83.
13 Id. at 1483.
14 Id.
15 Id.
16 As discussed infra Part II, analyzing the broader question of scope requires consideration of three more pointed questions: First, what immigration consequences will be considered? Second, how does one know if the immigration consequences are not clear or straightforward? Third, if the consequences are not clear, then what does the Padilla duty look like?
17 Each of these questions warrants additional consideration and analysis. This Article does not fully address these questions; instead, it (1) identifies and clarifies the concrete issues that arise when considering the scope of the Padilla duty (in particular, the duty to advise in light of...
where lower courts analyze the scope of Padilla too narrowly and fail to incorporate the guidance that runs throughout the opinion, it seriously undermines the Sixth Amendment protection. In Part III, this Article considers the Padilla opinion as a whole, examining its roots and rationale, in order to situate the “clear consequence” discussion in context. Finally, Part IV concludes by proposing an analytical approach that accounts for directives running throughout the opinion and considers potential concerns with this approach. Ultimately, understanding the legal and factual context of the decision makes clear that defense attorneys must advise noncitizen clients as specifically as research allows in order to adequately inform them about the immigration consequences of contemplated plea agreements.

I. THE PADILLA COURT: DIALOGUE ON SCOPE OF ADVISAL

This first Part situates Padilla in the context of advisal duties generally and then considers the Padilla Court’s discussion of scope, focusing particularly on the exchange between the Padilla majority and Justice Alito, concurring, about how defense attorneys may fulfill this obligation when faced with unclear law. It begins with an overview of the Padilla case and explains the duty to advise as set forth in the majority opinion. It then describes Justice Alito’s concerns about this advisal duty and the majority’s response to his distinct concerns, which illuminates the contours of this obligation in different contexts.

A. The Pre-Padilla Landscape

A defendant’s right to advice from an attorney derives from the Sixth Amendment right to counsel. This entitlement guarantees that criminal defendants are not only represented, but also receive meaningful assistance from counsel.18 As the Supreme Court explained the rationale in Strickland v. Washington, a defendant’s entitlement to “effective assistance” of counsel provides defendants the benefit of counsel’s skill and knowledge in order to ensure a fair and just system.19 In Strick-
land, the Court established that the requirements for “effective assistance” in any particular case depend on the circumstances of the case and the client, and the inquiry turns on whether the attorney’s performance was reasonable in light of professional norms. Since this rule was articulated in 1984, it has served as the standard for determining whether defense counsel has satisfied a defendant’s constitutional entitlement to effective assistance. Under this precedent, it has been established that the right to effective assistance entitles defendants to, inter alia, advice regarding critical decisions like whether to accept a plea bargain.

If a defense attorney’s performance falls below Strickland’s standard and is therefore ineffective, a defendant may seek to vacate his or her conviction by filing a motion for post-conviction relief (PCR). The two-prong test for PCR claims based on attorney ineffectiveness, also set forth in Strickland, requires that the defendant prove both deficiency and prejudice; that is, a defendant must demonstrate that the attorney erred or failed to perform an essential duty and additionally show that the result would have been different had the defendant received effective assistance of counsel.

Where the ineffectiveness occurs in the case of a defendant who ultimately accepts a plea agreement, that defendant may demonstrate prejudice by showing “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” In that case, “a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.”

It has long been recognized that serious immigration consequences result from criminal convictions. Even so, for many years, courts held

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20 See id. at 668.
21 See id. at 690.
22 Id. at 690.
24 Although the prejudice, as first articulated in Strickland, was based on the defendant having received a different (worse) outcome at trial, the trial-focused inquiry is inapplicable for the many claims of ineffective assistance of counsel in the course of negotiating guilty pleas. In those cases, which account for nearly ninety-five percent of criminal convictions, Padilla, 130 S. Ct. at 1485, prejudice cannot be judged based on whether the outcome of the trial would have been different.
25 Hill, 474 U.S. at 58 (applying Strickland to PCR claims in the plea-bargaining context).
27 Padilla, 130 S. Ct. at 1480 n.9.
that the Sixth Amendment required defense attorneys to advise clients only of “direct” consequences of convictions.\(^{28}\) Considering immigration consequences to be “collateral” to the conviction, many courts did not view this type of advice as part of an attorney’s Sixth Amendment duty.\(^{29}\) As a result, PCR motions on this basis were generally found to be legally insufficient because immigration consequences were “collateral” and not “direct” consequences of the criminal conviction. In \textit{Padilla}, however, the Supreme Court rejected the collateral–direct distinction as determinative of the advice a defendant is due.\(^{30}\)

\textbf{B. \textit{The Padilla Decision}}

In \textit{Padilla}, the Supreme Court held that defendants are constitutionally entitled to advice about the immigration consequences of contemplated criminal convictions.\(^{31}\) This decision involved defendant Jose Padilla’s claim for PCR from a 2002 conviction, in Kentucky State Court, for marijuana trafficking.\(^{32}\) At the time of his conviction, Padilla had been a lawful permanent resident who had lived in the United States for forty years. On the advice of his defense attorney, he pleaded guilty to possession of marijuana, possession of drug paraphernalia, and marijuana trafficking.\(^{33}\) He asked his attorney about the impact of this plea on his immigration status, but was told that he would not be deported because he had been in the country for so long.\(^{34}\) Unbeknownst to Padilla, this conviction rendered him not only deportable, but also ineligible for discretionary relief under federal immigration law.\(^{35}\) Accordingly, he was placed into deportation proceedings at the conclusion of his criminal sentence. Thereafter, he filed a PCR motion in Kentucky State Court seeking to vacate his conviction on the basis of having received ineffective assistance of counsel. The trial court denied his motion and the Supreme Court of Kentucky affirmed the trial court’s denial on the ground that defense attorneys had no duty to advise their clients of immigration consequences because those consequences were collateral to

\(^{28}\) See \textit{id.} at 1481 (describing the guiding principle in many state courts).
\(^{29}\) See \textit{id.} at 1481 n.9 (collecting cases from various states).
\(^{30}\) Id. at 1481.
\(^{31}\) Id. at 1483.
\(^{32}\) Id. at 1477.
\(^{35}\) \textit{Padilla}, 130 S. Ct. at 1483 (explaining that the conviction triggered automatic and mandatory deportability).
the criminal conviction. Padilla appealed this decision to the United States Supreme Court.

Evaluating Padilla’s claim under Strickland, the Court drew on precedent regarding the duty of defense attorneys when advising defendants and explained that attorneys’ obligations are “necessarily linked to the practice and expectations of the legal community.” In so doing, it reaffirmed that “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” The Court then surveyed the landscape of professional guidance, finding it to be indicative of professional norms and ultimately concluded that defense attorneys were expected to advise noncitizen clients of immigration consequences. Taking into account the historical trend toward increasingly severe immigration laws that have restricted or extinguished the opportunity for discretionary relief, the Court found that “[t]hese changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction” such that it is reasonable to expect defense attorneys to advise noncitizen clients of the risk of incurring such penalties.

Ultimately, the Court held that Padilla’s defense attorney was deficient for failing to advise him that the drug trafficking conviction would make him deportable. This, the Court said, was an easy case. Recognizing that defense attorneys have an affirmative duty to advise clients of immigration consequences, the Court also acknowledged the complexity of immigration law and that it would not always be so easy to ascertain the consequences to the defendant. Responding to concerns raised in Justice Alito’s concurrence, the majority explained that “[t]here will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain.” In those cases, “[w]hen the law is not succinct and straightforward,” a defense attorney’s duty is more limited. There, when the law is unclear, the attorney must advise his or her client of the “risk of ad-

36 Id. at 1478, 1481; 253 S.W.3d at 485 (“As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel’s failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief. In neither instance is the matter required to be addressed by counsel, and so an attorney’s failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under Strickland v. Washington.”).
37 Padilla, 130 S. Ct. at 1482.
38 Id.
39 Id.
40 Id. at 1482–83.
41 Id. at 1478–80.
42 Id. at 1483 (“[T]his is not a hard case in which to find deficiency.”).
43 Id.
44 Id.
45 Id.
verse immigration consequences,” but the specificity of the advice is necessarily of a different nature and scope.46

C. Justice Alito’s Concurrence

Justice Alito, concurring, resisted requiring affirmative advice about immigration consequences.47 In his view, providing advice about immigration consequences would be too difficult and burdensome a task to impose on criminal defense attorneys because it necessitates inquiry into a complex, sometimes unsettled area of law in which they do not possess expertise.48 Unsatisfied with the Court’s provision for instances where immigration consequences may be unascertainable,49 he predicted confusion among lower courts faced with a “halfway” advisal requirement.50

His anxiety about defense attorneys’ ability to provide this advice can be understood as two sets of concerns. The first relates to complexity; it is based on defense attorneys’ unfamiliarity with immigration law generally51 and the degree of nuance necessary to determine consequences that result from the interaction of federal, state, and administrative law.52 Discussing this set of concerns, Justice Alito argued that it is

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46 Id. at 1483 n.10 (“Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel’s advice.”).
47 Id. at 1487 (Alito, J., concurring).
48 Id. at 1488 (Alito, J., concurring) (“The Court’s new approach is particularly problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex.”); id. at 1487–88 (Alito, J., concurring) (“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.”); id. at 1490 (Alito, J., concurring).
49 Id. at 1483 (Alito, J., concurring) (noting, in response to Justice Alito’s concern, that the specificity of the advice required of counsel would depend on the clarity and certainty of the law with regard to such consequences).
50 Id. at 1487 (Alito, J., concurring) (“This vague, halfway test will lead to much confusion and needless litigation.”).
51 Id. at 1488–90 (Alito, J., concurring) (explaining that “many criminal defense attorneys have little understanding of immigration law” and that terms used in the immigration statute, the Immigration and Nationality Act, may be “ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law”).
52 Id. at 1490 (Alito, J., concurring) (“The task of offering advice about the immigration consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with which immigration law changes; different rules governing the immigration consequences of juvenile, first-offender, and foreign convictions; and the relationship between the ‘length and type of sentence’ and the determination ‘whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen . . . .’” (alteration in original) (citation omitted) (quoting IMMIGR. LAW & CRIMES § 2:1)).
not always easy to determine if a criminal conviction will be considered a “crime involving moral turpitude” or an “aggravated felony” because these are terms of art under federal immigration law and so require careful research into case law. The second set of concerns relates to questions within criminal immigration law that are not yet ascertainable; that is, situations where even an attorney versed in the terms and having done thorough research, finds that the consequence cannot be conclusively determined. In light of both sets of concerns, Justice Alito diverges from the Court and writes separately to say that “a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney’s expertise.” Rather, in his view, the attorney need only advise the client that the plea may carry immigration consequences and that the client should consult with an immigration specialist.

D. Majority Response to Justice Alito’s Concurrence

Faced with the multiple concerns expressed by Justice Alito, the majority responded to his concerns—complexity and uncertainty—in different ways, incorporating accommodation for the latter in the majority opinion. The majority did not limit the duty to investigate consequences for counsel who is faced with legal complexity; it does, however, account for Justice Alito’s worry that counsel would be unable to provide specific advice where the immigration consequences are truly uncertain.
As to Justice Alito’s first concern—the scope of the duty when faced with complexity—the majority did not back off.\(^\text{59}\) Neither the rigor of more specialized research nor unfamiliarity with terms of art appears as limitations on the *Padilla* duty. In fact, the Court recognized that immigration law is a legal specialty of its own and not one necessarily familiar to the average defense attorney.\(^\text{60}\) Nonetheless, it found that the severity of the consequences to defendants made it incumbent on attorneys to familiarize themselves with the law and competently advise their clients.\(^\text{61}\) Given this, the majority acknowledged that there are some circumstances where the state of law on the immigration consequences of a particular conviction may be “unclear or uncertain.”\(^\text{62}\) In those situations, the majority explained, less specific advice might suffice.\(^\text{63}\)

It is difficult to know exactly what the Court meant when discussing contexts in which less specific advice might be acceptable. However, given the majority’s distinct responses to the complexity and the clarity concerns, it is evident that the difficult legal research\(^\text{64}\) at the core of Justice Alito’s anxiety is not, on the basis of difficulty, removed from the ambit of the *Padilla*-required duty. The *Padilla* case makes clear that, if concrete consequences can be determined, specific advice about the consequences is required even if precision is necessary.\(^\text{65}\) Possible situations in which the consequences are not clear or straightforward might be those where, for example, the degree of seriousness of the injury associated with the charge may impact whether or not the conviction will be considered a CIMT.\(^\text{66}\) Ultimately, however, as the lower court decisions discussed below illustrate, focusing on the “clear consequences” dialogue in isolation leaves much undefined about the hole it seems to open. Too narrow a focus, at times resulting in a halfway advisal test, has led to the very problems that Justice Alito predicted. However, this need not be the case. As Part III of this Article goes on to explain, the majority’s guarded response to his concerns may

\(^{\text{59}}\) *Id.* at 1483 n.10.

\(^{\text{60}}\) *Id.* (“Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it.”).

\(^{\text{61}}\) *Id.* at 1483 n.10.

\(^{\text{62}}\) *Id.* at 1483 (recognizing that “immigration law can be complex” and that defenders “may not be well versed in it”).

\(^{\text{63}}\) *Id.*

\(^{\text{64}}\) *Id.* at 1488 (Alito, J., concurring) (arguing that it is “not easy” to determine whether a conviction is considered a CIMT or an aggravated felony).

\(^{\text{65}}\) *Id.* at 1483.

\(^{\text{66}}\) See, e.g., *Id.* at 1489 (Alito, J., concurring) (providing example of uncertainty in guidance by quoting an ABA guidebook that explains that “[r]eckless assault coupled with an element of injury, but not serious injury, is *probably* not a CIMT.” (internal quotation marks omitted) (quoting ROBERT JAMES McWHIRTER, THE CRIMINAL LAWYER’S GUIDE TO IMMIGRATION LAW 134 (2d ed. 2006))).
be due to the fact that the “clear consequence” discussion intends far less of a distinction than it at first appears and that reading it in context, within the opinion as a whole, provides critical guidance for implementation.

II. **PADILLA IN THE LOWER COURTS: CONSIDERING THE SCOPE OF ADVISAL**

Putting *Padilla* into practice has required lower courts to consider a multitude of questions that relate, to varying degrees, to the “clear consequence” discussion. From these decisions, several distinct but interrelated questions of scope emerge:

1. What immigration consequences will be considered?
2. How do you know if immigration consequences are clear?
3. What advice is required if the consequences are not clear?

Together, decisions on these issues show that analysis—and even operative questions—related to scope are unsettled and that, thinking

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67 Admittedly, these questions are quite distinct and deserving of separate and thorough analyses. These are discussed as matters of scope falling within the clear consequence discussion because, in lower court decisions, the answers to both questions are often discussed together and, additionally, the answers may bleed together. See, e.g., *Dianov v. United States*, No. 08-CV-3184, 2010 U.S. Dist. LEXIS 59723, at *35 n.20 (S.D.N.Y. June 15, 2010). An example is that, in answering whether advice about obtaining a discretionary waiver of deportation was required under *Padilla* (which would fall under question (1)), the court in *Dianov* said that counsel was not required to provide this advice because the “the mechanics and availability of a Section 212(h) hardship waiver in the case of a non–[lawful permanent resident],” *id.*, were not clear (apparently meaning difficult to ascertain, which would be question (2)). Note, however, that the advice provided by the defendant’s lawyer in *Dianov* was arguably misadvice. See *id.* at *35.

68 The discussion in this Part is meant to illustrate the various issues and approaches taken by lower courts, but does not purport to provide a comprehensive survey of post-*Padilla* decisions. A nationwide—or even state-by-state—comparison would be additionally complicated by the way in which variations among state procedures and procedural vehicles permit or foreclose certain claims. Compare *N.Y. CRIM. PROC. LAW § 440.10* (Consol. 2011) (providing for PCR motions to vacate state convictions without time-limitation or custody requirement), with *State v. Delgado*, No. A-3276-08T4, 2010 N.J. Super. Unpub. LEXIS 2790 (App. Div. Nov. 18, 2010) (allowing post-*Padilla* PCR claim despite time limitation on New Jersey PCR vehicle based on fundamental injustice exception), and *State v. Truong*, Nos. CR-96-1681 & CR-96-907, 2010 Me. Super. LEXIS 104 (July 30, 2010) (“[T]he Maine Rules of Criminal Procedure do not provide a post conviction procedural avenue for a noncitizen facing deportation as a collateral consequence of their criminal conviction.”).

through these questions for the first time, courts have come down all across an interpretative spectrum. At one end, the scope has been construed narrowly and limited to the circumstances of an easy case like Padilla’s. At the other end, the inquiry is fact-specific, asking whether the attorney considered the immigration consequences that would be relevant to the defendant and whether that attorney gave the most specific advice possible. This Part describes how lower courts have approached the scope inquiry as a means to understand the types of practical questions that arise and what aspects of Padilla courts have used as guidance. It reveals that in some cases, courts have focused too narrowly on the majority–concurrence exchange without considering the opinion’s broader guidance, thus exposing a troubling omission that seriously undermines the Sixth Amendment protection to which noncitizens are entitled.

A. Which Immigration Consequences Will Be Considered?

The first question related to the scope of the Padilla duty requires consideration of which adverse immigration consequences fall within the ambit of its advisal requirement. This question arises because there are a variety of kinds of adverse immigration consequences that result from a criminal conviction, the major ones being deportability, inadmissibility, eligibility for relief, and the adverse impact on or denial of

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70 See infra Parts II.A–B. It must be noted, however, that written decisions tell only part of this story. A significant number of Padilla-based PCR motions are resolved through consensual vacatur. It is logical, and early reports from practitioners bear this out, to assume that consent-based vacatur presents strong Padilla claims. See Notes from Practitioner’s Roundtable Discussion of Post-Padilla Practice (May 3, 2011) (on file with author). The practice of obtaining consent-based vacatur absent a potentially significant number of strong Padilla claims from the body of written decisions. Even more important than the number of these ostensibly-likely-to-prevail Padilla claims is their strength; removing this set of cases from judicial consideration may well skew the case law on this and other Padilla issues. Cf. Roberts, supra note 8 (pointing out a similar distorting effect in case law on deficiency under Padilla when a large number of Padilla cases are dismissed on prejudice grounds).

71 Padilla, 130 S. Ct. at 1483 (“This is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.”).

72 See People v. Miranda, 540 N.E.2d 1008, 1013–14 (Ill. App. Ct. 2d Dist. 1989) (detailing, pre-Padilla, the many harsh potential immigration consequences that severely affect noncitizens, including inadmissibility, ineligibility for discretionary relief, denials of waivers of deportability or excludability, bars to establishing good moral character (and, as a consequence of this bar, ineligibility for voluntary departure)).

73 Although the Court in Padilla spoke directly to discretionary relief as being included within the norms, Padilla, 130 S. Ct. at 1482 (linking penalty from drug conviction to loss of discretionary relief), not all courts have followed the Court’s direction.
naturalization. The consequence Jose Padilla faced, of course, was deportability: he was placed directly into removal proceedings as a result of his conviction. Many noncitizens, however, experience adverse immigration consequences even where they are not rendered deportable because criminal convictions made them inadmissible. While inadmissibility does not directly trigger removal proceedings, the statute makes it so that the inadmissible person will not be permitted to lawfully enter the United States. This means that, if an inadmissible individual were to travel outside the country, that person may well find him or herself in the same situation as Jose Padilla because that individual will be denied admission to the United States and accordingly end up in removal proceedings. In other cases, noncitizens incur adverse consequences

74 These appear to be generally accepted as major categories of adverse immigration consequences. See, e.g., OHIO REV. CODE ANN. § 2943.031 (West 2011) (mandating trial court advisal of possible deportation, exclusion, or denial of naturalization); Plea Advisal Form, Los Angeles Superior Court (“I understand that if I am not a citizen of the United States the conviction for the offense charged will have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States,” quoted in Falcon v. D.H.S., No. SACV 07-66, 2010 U.S. Dist. LEXIS 140072, at *6 (C.D. Cal. Nov. 29, 2010)); Neufville v. State, 13 A.3d 607, 613 (R.I. 2011) (approving and quoting Machado v. State, 839 A.2d 509 (R.I. 2003), which had held that, under the Rhode Island advisal law, “neither a generalized reference to potential immigration consequences nor an advisement of deportation alone gives adequate notice to an alien defendant of the possibility of exclusion or denial of naturalization,” id. at 513).

75 Padilla, 130 S. Ct. at 1477. A noncitizen may be placed into removal proceedings on the basis of a criminal conviction if the criminal conviction fits into the category of removable offenses defined by the INA. See 8 U.S.C.A. § 1227(a)(2) (West 2011) (grounds for deportability); id. § 1182(a)(2) (grounds for inadmissibility).

76 A noncitizen who is seeking admission to the country may be excluded and placed into removal proceedings if that noncitizen is considered inadmissible under the INA. Id. § 1182(a)(2) (providing that noncitizens who are convicted of (and, in some cases, who simply admit to) specified crimes are inadmissible, see, e.g., id. § 1182(a)(2)(A) (“Any alien convicted of, or who admits having committed, of who admits committing acts which constitute the essential elements of [a CIMT, attempt to commit a CIMT, or a controlled substance violation] is inadmissible.”); People v Muniz, 907 N.Y.S.2d 387, 389 (Sup. Ct. 2010) (“While deportation would not be a consequence of his plea, as an undocumented immigrant, a plea to [a controlled substance offense] would render him inadmissible or unable to obtain lawful status in the United States pursuant to 8 U.S.C. § 1182(a)(2)(A)(II) . . . .”)); see also id. (explaining that, in the context of pleas to drug charges, inadmissibility results from the admission of drug use, meaning the plea alone, “even if that plea were later vacated and the charges dismissed”)

77 8 U.S.C.A. § 1101(a)(13)(A) (“The terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization.”). The term “admission” replaced the concept of “entry,” which was the term used prior to the 1996 amendments to the INA. IRA J. KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK 55 (12th ed. 2010).

78 When an inadmissible individual (even one who had initially lawful status in the United States) leaves the country for a certain amount of time and returns (for example, upon their return from certain trips, 8 U.S.C.A. § 1101(a)(13)(C), or when seeking to adjust their status, see In re Rodarte-Roman, 23 I. & N. Dec. 905, 908 (B.I.A. 2006)), that person may be denied lawful readmission and placed in removal proceedings. See, e.g., Gudiel-Soto v. United States, 761 F. Supp. 2d 234 (D.N.J. 2011) (adjudicating Padilla-based PCR motion of individual who was placed in deportation proceedings after returning from a trip and being found inadmissible); Ex
where, for example, the individual is prevented from naturalizing due to a criminal conviction or rendered ineligible for discretionary relief. Given this, courts have had to consider which of the multiple kinds of adverse immigration consequences fall within the ambit of Padilla-required advice.

On one side of the spectrum, courts faced with questions about the specific advice that attorneys must provide to noncitizen clients have begun by comparing the case before them with that of Jose Padilla. Courts construing the Padilla duty narrowly, by reference only to that easy set of facts, have found that the cognizable consequence is deportability. In those cases, courts have pointed to the “clear consequence” discussion when declining to find that Padilla applies when attorneys failed to advise defendants of consequences like ineligibility for certain waivers, bars to discretionary relief, and becoming subject to expe-


79 In order to become naturalized, a noncitizen must establish good moral character and some criminal convictions adversely affect their ability to do so. 8 U.S.C. § 1427(a)(3) (2006) (providing that naturalization applicants are ineligible if they have been convicted of a crime that precludes them from establishing good moral character under section 101(f) of the INA, 8 U.S.C.A. 1101(f)). Section 316(e) of the INA, 8 U.S.C. § 1427(e), also allows the Attorney General to consider criminal convictions dating back more than five years. See, e.g., Baruwa v. Caterisano, No. DKC-09-1278, 2010 U.S. Dist. LEXIS 60185 (D. Md. June 17, 2010). Aside from meeting the statutory criteria, applicants must also warrant a favorable exercise of discretion, at which point past convictions may also be considered. See In re Turcotte, 12 I. & N. Dec. 206 (B.I.A. 1967) (considering criminal conviction in discretionary determination).

80 Deportable noncitizens may be eligible for various kinds of discretionary relief. Certain criminal convictions, however, can render a noncitizen categorically ineligible for, or may severely diminish their likelihood of obtaining, that relief. One example of such discretionary relief is voluntary departure, which allows a noncitizen to voluntarily leave the country, thereby avoiding a deportation order and the accompanying decade-long bar on returning to the United States. See 8 U.S.C. § 1229c (providing that voluntary departure applicants are ineligible if they have been convicted of certain crimes, including crimes that precludes them from establishing good moral character under section 101(f) of the INA, 8 U.S.C.A. § 1101(f)).

81 See, e.g., United States v. Orocio, 645 F.3d 630, 641 (3d Cir. 2011) (“The facts of Padilla closely mirror those presented here, and we therefore hold that Mr. Orocio’s affidavit sufficiently alleges that his counsel was constitutionally deficient.”); Bailey v. United States, Nos. 10-CV-324A, 96-CR-105A, 2010 U.S. Dist. LEXIS 88205, at *7 (W.D.N.Y. Aug. 25, 2010) (“Although the link between perjury and moral turpitude appears to have existed in immigration-related case law for decades, this case lacks the level of statutory clarity that was present in Padilla.” (citation omitted)).

82 See, e.g., People v. Ebrahim, No. 08-W21, 2010 N.Y. Misc. LEXIS 4859, at *8–9 (Sup. Ct. Sept. 30, 2010) (“[T]he Assistant Attorney General ‘strenuously argued that the Defendant’s convictions constitute crimes involving ‘moral turpitude’ which, even though meeting the definition of an ‘aggravated felony’ are nonetheless subject to discretionary deportation. This Court cannot conclude as a matter of law that the characterization of an offense as ‘deportable,’ without more, affirmatively dictates that ‘the deportation consequence (of the plea) is truly clear,’ . . . as required by Padilla.” (citation omitted)).

83 See, e.g., Diunov v. United States, No. 08-CV-3184, 2010 U.S. Dist. LEXIS 59723, at *34–35 n.20 (S.D.N.Y. June 15, 2010) (“[T]he mechanics and availability of a Section 212(h) hardship waiver in the case of a non-LPR does not fall into that category of cases where the
dited removal proceedings, the initiation of which forecloses the opportunity to have a hearing before an immigration judge.\textsuperscript{85} One outlier court even indicated that deportability is not clear enough to require an advisory unless the deportability triggered is absolute, meaning that the consequence is not truly clear unless it renders the defendant both deportable and also barred from any form of discretionary relief.\textsuperscript{86}

On the other side of the spectrum, courts have found defense attorneys deficient when they failed to provide advice regarding immigration consequences in situations that are more complex than Jose Padilla’s. Consistent with the \textit{Padilla} Court’s characterization of the duty as “[p]reserving the client’s right to remain in the United States,”\textsuperscript{87} these courts have interpreted the \textit{Padilla} duty to encompass advice that convictions would, for example, render defendants inadmissible,\textsuperscript{88} bar them from naturalizing,\textsuperscript{89} and adversely impact their chance of obtaining var-

\textsuperscript{84} See, e.g., United States v. Randazzo, No. 11-2411, 2011 U.S. Dist. LEXIS 49137, at *20–21 n.7 (E.D. Pa. May 6, 2011) (considering \textit{Padilla}-based PCR claim alleging that counsel was ineffective for failing to advise the defendant about sentence structure that would preserve discretionary relief in case where conviction rendered defendant mandatorily deportable and “reject[ing the defendant’s] suggestion that \textit{Padilla} should be read more broadly to create a general right to complete and accurate counseling at sentencing”).

\textsuperscript{85} See, e.g., Diunov, 2010 U.S. Dist. LEXIS 59723, at *40–41 (finding that failure to advise that expedited removal proceedings could be initiated under section 238(b) of the INA, 8 U.S.C. § 1228(b), was not deficient under \textit{Padilla}).

\textsuperscript{86} Ebrahim, 2010 N.Y. Misc. LEXIS 4859.


\textsuperscript{88} See, e.g., Gudiel-Soto v. United States, 761 F. Supp. 2d 234, 238 (D.N.J. 2011) (“Whether a person is removed from the United States or prevented from coming back in makes very little difference in that regard; he is ‘exiled’ either way.”); State v. Delgado, No. A-3276-08T4, 2010 N.J. Super. Unpub. LEXIS 2790 (App. Div. Nov. 18, 2010) (finding allegations sufficient to warrant evidentiary hearing where defendant challenged conviction that had rendered him inadmissible and thus unable to adjust status); \textit{Ex parte} Tanklevskaya, No. 01-10-00627-CR, 2011 Tex. App. LEXIS 4034, at *25–26 (1st Dist. May 26, 2011) (finding deficiency where defendant’s attorney “did not inform her that her inadmissibility and subsequent removal was ‘virtually certain’ and ‘presumptively mandatory’”); see also Sandoval v. Holder, 641 F.3d 982, 987–88 (8th Cir. 2011) (appearing to view inadmissibility as required under \textit{Padilla}); People v. Garcia, 907 N.Y.S.2d 398, 401 n.5 (Sup. Ct. 2010) ("[T]he Court does not doubt that he would never have traveled outside the United States had he been correctly advised that his 2008 controlled substance conviction rendered him both deportable and inadmissible.").

rious waivers to deportability. As one court explained the rationale, “[w]hether a person is removed from the United States or prevented from coming back in makes very little difference in that regard; he is ‘exiled’ either way.”

The tenor of Padilla and the logic of these decisions show why the advisal duty cannot be limited to advice about only the consequence of deportation. Seven justices appear to share the view that the norm includes, at a minimum, advice about the impact of a plea on a noncitizen defendant’s eligibility for relief from removal. This is because, as Justice Alito correctly noted, failure to provide advice about other relevant immigration consequences can result in the very same penalty of deportation in, for example, cases when noncitizens who have unknowingly been rendered inadmissible by a criminal conviction and return from travel abroad or try to adjust status, though the convictions may not trigger deportability, unknowing defendants end up in deportation proceedings as a result nonetheless. Reflecting on these decisions, it is apparent that even when courts interpret Padilla to require advice only about deportation-triggering pleas, the duty incumbent on the defense attorney does, as a practical matter, require the defense attorney to provide more comprehensive, tailored advice.

B. When Is a Consequence Not “Clear” and What Advice Is Required Then?

Additional implementation difficulties arise because the Padilla opinion does not concretely explain how to know if a consequence is clear. Although the Court indicated that deportability in the statute

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91 Gudiel-Soto, 761 F. Supp. 2d at 238. In a similar vein, discussing a case in which a defendant was deprived of the opportunity to seek a discretionary waiver of inadmissibility, the Second Circuit noted the importance of accurate legal advice to guard against such devastating consequences. See United States v. Cerna, 603 F.3d 32, 35–36 (2d Cir. 2010). The Eighth Circuit likewise appears to view inadmissibility as a severe consequence falling under the penumbra of the Padilla advisal. See Sandoval, 641 F.3d 982.

92 Padilla, 130 S. Ct. at 1483.

93 Id. at 1491; see also, e.g., Tanklevskaya, 2011 Tex. App. LEXIS 4034, at *25–26.

94 See, e.g., Vartelas v. Holder, 620 F.3d 108, (2d Cir. 2010), cert. granted, 80 U.S.L.W. 3179 (U.S. Sept. 27, 2011) (No. 10-1211); Camins v. Gonzales, 500 F.3d 872 (9th Cir. 2007); Olatunji v. Ashcroft, 387 F.3d 383 (4th Cir. 2004). In Camins and Olatunji, each court applied principles of retroactivity to ameliorate this result for each of the respective petitioners.

95 Justice Alito flagged this as a concern as well. See Padilla, 130 S. Ct. at 1490–91 (Alito, J., concurring). However, it is only a concern if the clear consequence discussion is indeed construed
was one indication, it did not address all of the possible ways that a consequence could be “clear” or what would signal that a consequence is unclear. The second scope question, then, is how to determine when a consequence is not clear and the extent of advice due a defendant in that case.96

This question arises because determining the immigration consequences of criminal conviction requires understanding the way that a conviction, which is most commonly based on state law, will be treated under federal immigration law. In many cases, the immigration consequences of a criminal disposition are easy to determine.97 For other convictions, however, the inquiry may “not [be] an easy task”98 for several reasons. Initially, some criminal defense attorneys may experience difficulty due to their unfamiliarity with immigration law, which, like any legal specialty, involves terms of art.99 Difficulty may also arise because determining the immigration consequences of a conviction requires analyzing the interaction between discrete bodies of law—either state or federal criminal law and federal immigration law; this calculus is additionally complicated by the fact that the federal immigration law may vary between the Board of Immigration Appeals (BIA) and the relevant federal circuit.100 Moreover, immigration law operates primarily through an administrative system and this area of law has historically been somewhat shrouded.101 For these reasons, the necessary factual research and legal inquiry can be complex and, consequently, requires precision. Despite this complexity, however, clear answers are frequently ascertainable.

_Padilla_ itself shows that a consequence is clear when it is written into statute.102 On that basis, most courts recognize that the consequences of aggravated felonies and controlled substance convictions are

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96 These questions must be considered together because, as elaborated in Parts III and IV infra, the degree of specificity with which a consequence can be determined necessarily affects the extent of the advice due, and therefore, the answers to both can be derived through a single analytical approach. See infra Part IV.

97 Defender Amicus, supra note 5, at *23 (explaining that in many cases, determination of the immigration consequences is relatively straightforward).

98 Padilla, 130 S. Ct. at 1488 (Alito, J., concurring).

99 Id. at 1489 (Alito, J., concurring); see also id. at 1483 (majority opinion) (discussing immigration law as a specialty in which criminal defense attorneys may not be well-versed).

100 Id. at 1490 (Alito, J., concurring).

101 See Katie R. Eyer, _Administrative Adjudication and the Rule of Law_, 60 ADMIN. L. REV. 647, 681 (2008) (“Despite the BIA’s robust history of adjudicative lawmaking, the BIA’s role as a precedent-setting body has been the subject of comparatively little scholarship. . . . [L]ittle attention has been paid . . . to the Board’s role as an expositor of immigration law.”).

clear from the text of the Immigration and Nationality Act (INA).\textsuperscript{103} Narrower decisions, however, have suggested that the consequence must be explicit in the INA in order for the court to find it clear, even if it had long been apparent in federal case law.\textsuperscript{104} In one case, the court found that even explicit reference in the INA was not sufficient to make the consequence clear if, to determine the consequence, the attorney would have to read several statutory provisions together.\textsuperscript{105} In yet another case, a New York State judge found that, despite the fact that the charge to which the defendant pleaded was an aggravated felony, and so made him deportable by statute, the absence of a statutory definition of “deportable” meant that the consequence was not truly clear.\textsuperscript{106}

Where, however, the impact is equally clear in the statute, but relates to consequences other than directly-triggered deportability, some courts have strayed from the general equation of statutory explicitness and clarity of the consequence.\textsuperscript{107} In \textit{United States v. Diunov}, for example, the district court considered whether the defendant was entitled to correct advice about the availability of a hardship-based waiver of deportability when considering pleading to a particular criminal charge.\textsuperscript{108} Rejecting the argument that counsel was deficient for failing to accurately advise his client on this issue, the Court held that the “mechanics and availability” of this waiver were not sufficiently clear to be required

\textsuperscript{103} See, \textit{e.g.}, Orocio, 645 F.3d 630; Santos-Sanchez v. United States, No. 5:06-cv-153, 2011 U.S. Dist. LEXIS 95442 (S.D. Tex. April 23, 2011) (considering PCR case after it was remanded by the Supreme Court following \textit{Padilla}). \textit{But see} \textit{Diunov} v. United States, No. 08-CV-3184, 2010 U.S. Dist. LEXIS 59723, at *35 n.20 (S.D.N.Y. June 15, 2010).

\textsuperscript{104} See, \textit{e.g.}, Bailey v. United States, Nos. 10-CV-324A & 96-CR-105A, 2010 U.S. Dist. LEXIS 88205, at *7 (W.D.N.Y. Aug. 25, 2010) (“Although the link between perjury and moral turpitude appears to have existed in immigration-related case law for decades, this case lacks the level of statutory clarity that was present in \textit{Padilla}.” (citation omitted) (citing \textit{Petition of Moy Wing Yin,} 167 F. Supp. 828, 830 (S.D.N.Y. 1958))).

\textsuperscript{105} People v. Rampersaud, No. 08-1506, 2011 N.Y. Misc. LEXIS 2355, at *3 (Cty. Ct. 2011) (“An examination of several distinct sections of the immigration statute, read together, tends to support Defendant’s view, although the fact that several separate statutory sections must be examined and analyzed in order to reach such a conclusion may well belie Defendant’s contention.”).

\textsuperscript{106} People v. Ebrahim, No. 08-W21, 2010 N.Y. Misc. LEXIS 4859, at *8–9 (Sup. Ct. Sept. 30, 2010) (“This Court cannot conclude as a matter of law that the characterization of an offense as ‘deportable,’ without more, affirmatively dictates that ‘the deportation consequence (of the plea) is truly clear,’ . . . as required by \textit{Padilla}.”).

\textsuperscript{107} See, \textit{e.g.}, \textit{Diunov}, 2010 U.S. Dist. LEXIS 59723, at *35 n.20 (finding mechanics and availability of section 212(h) waiver unclear); \textit{see also} id. at *40 (finding that the defense attorney’s failure to advise client that client’s plea could subject her to expedited removal proceedings—which would foreclose the opportunity to seek a waiver—was not required by \textit{Padilla} because, although the INA procedure was clear, it would be within the Attorney General’s discretion to invoke this stripped-down removal procedure).

\textsuperscript{108} \textit{Id.} Although the district court rejected this argument, \textit{id.} at *36–37, \textit{Diunov} in fact appeared to be a case of misadvice because the defense attorney did provide advice about the hardship waiver, but misstated a factor that was critical—and likely determinative—as to whether or not she would have been eligible.
under Padilla. In this case, however, the issue on which the defense attorney erred was clear in the statutory text, as well as in case law from the BIA and the governing circuit.

Decisions on the other side of the interpretive spectrum reflect the understanding that immigration consequences may be clear even if it is necessary to look beyond the text of the INA to determine the effect. Their discussion of the Padilla duty makes plain that consulting case law—be it Article III or administrative—is compulsory. Further, the post-Padilla jurisprudence reveals that there is, in fact, a multiplicity of sources on which the courts themselves draw, suggesting that it is reasonable to expect defense counsel to consult a variety of legal resources in addition to case law on immigration consequences. Across the interpretive spectrum, courts cite to the many resources available to defenders as a means of determining the immigration consequences of a particular conviction and to understand terms of art that, in the abstract, might appear unclear.

Ultimately, surveying Padilla decisions reveals that, a bit ironically, decisions finding immigration consequences are not clear are often themselves unclear and frequently unexplained, with little indication of what might make a consequence sufficiently clear. In addition, the

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109 Id. at *35 (considering clarity of eligibility for a waiver that turned on which individual had to experience requisite hardship).
110 8 U.S.C.A. § 1182(h) (West 2011); Chiaramonte v. INS, 626 F.2d 1093, 1100 (2d Cir. 1980); In re Cervantes-Gonzales, 22 I. & N. Dec. 565, 566, 584 (B.I.A. 1999) (setting forth factors for establishing extreme hardship). This finding in Diunov may simply have resulted from the fact that the materiality of this distinction was not before the court; the opinion notes that the petitioner failed to explain how either her eligibility for the waiver or her likelihood of obtaining it would have been affected by the distinction regarding the person to whom the hardship had to accrue. Id. at *39.
111 See, e.g., Nunez-Reyes v. Holder, 646 F.3d 684 (9th Cir. 2011) (en banc) (noting that it expected defense attorneys to comply with their Padilla duties informed with knowledge of recent case law on immigration consequences of not only set convictions, but also expunged convictions); Ellis v. United States, No. 10-CV-4017, 2011 U.S. Dist. LEXIS 60268 (E.D.N.Y. June 3, 2011) (discussed in greater detail infra Part IV); see also State v. Sandoval, 249 P.3d 1015, 1019–20 (Wash. 2011).
112 See supra note 111. Opinions in this vein generally contain little analysis of the “clear consequence” discussion because the court simply identifies the consequence and moves on.
113 For example, in People v. Bevans, No. 20704V-2008, 2011 N.Y. Misc. LEXIS 1082 (Sup. Ct. Jan. 31, 2011), the court explicitly linked the defense attorney’s duty to research and investigate the consequences of a plea with the wide range of available resources in which the attorney might fulfill this duty. Id. at *13. The court explained that in New York State, defenders can call a hotline for free expert advice or consult a website with information on the consequences of convictions in New York State. Id. (explaining that the Immigrant Defense Project provides “easily accessible charts that show whether a particular New York Penal Law crime constitutes an ‘aggravated felony,’ a ‘crime involving moral turpitude,’ or provides the government some ‘other ground’ for deportation, such as a ‘controlled substance offense’ or a ‘firearm offense’”).
inattention to the advice required even where a consequence is found to be “not clear” is troubling, particularly where, in some cases, courts have found that ambiguity nearly extinguishes the *Padilla* duty to provide specific advice. The lack of systematic analysis in this regard hints at courts’ own discomfort with immigration law, which is an understandable unease for courts that do not generally adjudicate such matters. Even so, resolving this by introducing unprincipled distinctions will only create the confusing halfway test that Justice Alito feared and, as the next Part explains, oversimplifies the question of scope. The proper approach, as the following Parts explain, interprets the “clear consequences” discussion consistently with *Padilla*’s roots and rationale.

III. BEYOND THE “CLEAR CONSEQUENCE” EXCHANGE: GUIDANCE FROM THE *PADILLA* DECISION

The previous Part explains the problem: the practical difficulties and confusion created when the “clear consequence” discussion is interpreted to articulate a rigid rule or “halfway test” for constitutionally required advice. This Part aims to solve that problem by demonstrating how the majority discussion of clear consequences, when read to accord with the decision’s roots and rationale, provides additional guidance on the scope of advisal duties under *Padilla*. Neither the source nor the logic, of course, are unique to immigration advice and so, after looking closely at the *Padilla* Court’s discussion of each, this Part considers how this shapes defense counsel’s duty when counseling clients in other contexts.

A. Source of the Padilla Duty

Though *Padilla* was a momentous decision, it did not create a new rule for defense attorneys; rather, it articulated a duty arising under the *Strickland* standard.\(^\text{115}\) Therefore, knowing a bit more about *Strickland* is essential to correctly interpret the *Padilla* duty. As explained in Part I, *Strickland* has long served as the standard for determining whether a defendant has received effective assistance of counsel; constitutionally, representation is judged based on reasonableness in light of professional norms.\(^\text{116}\) The Court has time and again described this standard as context-specific and one ill-suited to rigid rules.\(^\text{117}\) Although it serves as a

\(^\text{115}\) See also *Padilla* v. Kentucky, 130 S. Ct. 1473, 1482 (2010).
\(^\text{117}\) *Strickland*, 466 U.S. at 688–89 (“No particular set of detailed rules . . . can satisfactorily take account of the variety of circumstances faced by defense counsel . . . .”); id. at 688 (“From
measure of attorney performance, it is fundamentally a client-focused doctrine intended to ensure that the adversarial criminal process is fair to the defendant. The fact that Padilla is derived from Strickland means that the Padilla advisal duty must similarly be interpreted by reference to professional norms.

Advisal duties under Strickland serve to facilitate a defendant’s informed consideration so that he or she does not waive a constitutional right without understanding the implications. For that reason, courts evaluating the adequacy of defense attorney counseling focus on whether the defendant was genuinely informed of the consequences of a decision rather than whether the attorney satisfied a bright-line advisal rule. A common thread running throughout case law on advisal obli-
gations in various contexts is the understanding that informed consideration is the goal.123

In *Keys v. United States*, for example, the Eighth Circuit considered the scope of a defense attorney’s duty to inform a defendant of the right to appeal.124 In *Keys*, the defense attorney informed Keys of his right to appeal and Keys declined.125 The government then appealed and the defense attorney never returned to inform Keys of his right to cross-appeal.126 This, the *Keys* court held, was ineffective assistance because, although the defense attorney had complied with the basic advisal requirement, the end result was that Keys lacked the information about this entitlement that might be essential to his particular case.127 Thus, the focus was on whether the defense attorney had ensured that the defendant was sufficiently informed about the right waived.

Similarly, in *Boria v. Keane*, the Second Circuit considered the scope of a defense attorney’s duty to inform the defendant of a plea offer and found that merely notifying the defendant of the plea offer is insufficient, even when the defendant had refused to consider pleading guilty.128 Looking to defender guides as indicia of professional norms, the *Boria* court found that *Strickland* required something more than simply advising the defendant that a plea offer was on the table: instead, the defense attorney had an obligation to learn about the specifics of the case, circumstances, and laws, and provide an informed opinion about the actual impact of the decision to plead.129 There, too, the focus was on whether the defense attorney had been diligent in making sure that the defendant was fully informed about the implications of his decision.

In *Roe v. Flores-Ortega*, the Supreme Court likewise focused on the client and the context, ultimately refusing to impose a bright-line rule.130 There, the Court held that the defense attorney was not automatically ineffective for failure to consult with her client about appealing.131 Instead, the question of whether or not the attorney fulfilled her duty to the client, vis-à-vis his right to appeal, was a fact-based question to be determined based on what was important to the client.132 Similar examples abound in *Strickland*-based case law which, in broad strokes,

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123 See supra note 121.
124 Keys, 545 F.3d at 646.
125 Id. at 647.
126 Id.
127 Id.
129 Id.
131 Id. at 480.
132 Id.
demonstrate that advisal duties exist to ensure that clients are meaningfully informed about the content of rights. Because perfunctory notice cannot accomplish this, *Padilla* cannot be satisfied by a simple warning of deportability. Since informed consideration is the goal, *Strickland* compels context-specific advice about immigration consequences that bear on a defendant’s assessment of a contemplated plea.

A second teaching from a close read of *Padilla* is that, as a *Strickland*-based decision, questions of scope not addressed in the opinion are answerable by reference to professional norms. This same inquiry sheds light on both the scope of consequences to which defense attorneys should attend and the investigation an attorney must undertake to determine the consequences to a particular defendant. Applying this standard to determine the advice that Jose Padilla was due, the Court looked to—and relied on—defender resources as indicative of prevailing professional norms. As the final Part explains, a closer look at these guides offers two important clues: first, it shows that defense attorneys are expected to advise clients of various types of adverse immigration consequences resulting from pleas, and second, that this advisal requirement exists as an integral part of the broader duty to counsel clients on the advantages and disadvantages of a contemplated plea.

Third and finally, *Strickland* precedent provides guidance on the second question of scope—the extent of research required—through precedent on the duty to investigate. Under *Strickland*, it is established that investigation, through research into law and fact, is fundamental to the efficacy of counsel because information about legal options and vulnerabilities are necessary to make strategic choices through the process. *Strickland*’s reasonableness rule logically limits this investigation; counsel is not required to investigate every possible defense or legal claim because practical considerations, like resource constraints and simple utility, are relevant as well. However, informed choices are key. Even a decision to cease investigation must be a choice informed

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133 *See infra* Part IV.B.
135 *See infra* Part IV.A (discussing sources cited at Padilla, 130 S. Ct. at 1482-83).
136 *See infra* Part IV.A (discussing defender manuals).
137 *Strickland* v. Washington, 466 U.S. 668, 691 (1984) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").
138 *Id.* at 690–91 (explaining that informed choices must underlie decisions to proceed or dispense with certain lines of defense); United States v. Conley, 349 F.3d 837, 841 (5th Cir. 2003) (finding ineffective assistance where counsel failed to properly calculate sentence and so missed opportunity to object and appeal); United States v. Krboyan, Nos. 02-cr-05438, 10-cv-02016, 2011 U.S. Dist. LEXIS 57073 (E.D. Cal. May 27, 2011) (finding deficiency where counsel did nothing at sentencing after becoming aware of immigration consequences of client’s plea).
by preliminary investigation into the facts and law,\textsuperscript{139} and adequate legal research requires looking at the relevant statute and case law.\textsuperscript{140} Ultimately, referring back to basic standards for representation is useful for incorporating the \textit{Padilla} duty into practice and essential to properly implement the decision’s mandate.

B. \textit{Rationale Underlying the Padilla Duty}

The rationale underlying \textit{Padilla} is also significant to an inquiry into its scope. In \textit{Padilla}, the Court found that information about immigration consequences was essential to the legitimacy of a plea.\textsuperscript{141} In fact, the Court said that this information is so critical that it must be on the table for the defendant and may well be a factor in the plea negotiating process amongst all parties.\textsuperscript{142} A defense attorney’s understanding of the various consequences flowing from the offenses, to which the defendant may plead, the Court explained, is essential to facilitate “informed consideration” during the plea-bargaining process.\textsuperscript{143} As the Court conceived it, attorneys must possess enough knowledge to not only “avoid[,] a conviction for an offense that automatically triggers the removal consequence,” but also “plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation.”\textsuperscript{144} This understanding reveals why the duty must encompass a spectrum of immigration consequences; were mere notice of deportability sufficient to satisfy this duty, information about immigration consequences would have a far smaller impact on the plea bargaining process. Informed consideration, therefore, necessarily has to include more than simply deciding whether or not to accept a deportability-triggering plea, particularly where it may be possible for a client to plead to alternative charges resulting in a range of \textit{lesser} adverse immigration consequences.

So important was this information-generating principle that the \textit{Padilla} Court declined the opportunity to rule on more limited grounds.\textsuperscript{145} A narrower ruling would have been foreseeable and simple, as it would merely answer the question presented on appeal. In the un-

\begin{footnotesize}
\textsuperscript{139} \textit{Strickland}, 466 U.S. at 690-91 (explaining that an attorney’s decision not to a investigate a particular aspect of case must be the product of a reasonable strategic choice).

\textsuperscript{140} Baldayaque v. United States, 338 F.3d 145, 152 (2d Cir. 2003) (finding instance of extraordinary incompetence where attorney did not conduct legal research).

\textsuperscript{141} \textit{Padilla} v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

\textsuperscript{142} \textit{Id.} (explaining how defense attorneys and prosecutors, informed of possible immigration consequences, can more effectively work within the plea bargaining process).

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.} (emphasis added).

\textsuperscript{145} \textit{Id.} at 1484.
\end{footnotesize}
derlying case, the Kentucky Supreme Court held that even the affirmative misadvice by Jose Padilla’s counsel did not constitute ineffective assistance. The Supreme Court could have simply answered the question presented and held that misadvice regarding immigration consequences was constitutionally deficient. Instead, it went further and enunciated an information-generating standard.

Rejecting the Solicitor General’s invitation to limit the holding to misadvice, the Court explained that the result of such a rule would be “absurd” for two reasons. First, it would “give counsel an incentive to remain silent on matters of great importance” and this “would be fundamentally at odds with the critical obligation of counsel to advise the client of ‘the advantages and disadvantages of a plea agreement.’” Second, it would conflict with defendants’ expectation of counsel and operate to deprive defendants “least able to represent themselves the most rudimentary advice on deportation even when it is readily available.” For a client facing such consequences, the Court explained, there is no relevant difference between misadvising the client about the risk of deportation and omitting advice about the risks of a contemplated plea because either case subjects an unwitting client to the same severe consequences. This rationale makes clear that advice under Padilla must provide noncitizen defendants accurate information about the impact of a conviction on their immigration status and serves as guidance for lower courts considering questions of implementation.

The additional guidance discussed in this Part is an important indication about how the duty should be implemented. Situating this advisal within the context of client counseling standards generally, as the Court did, demonstrates that counsel’s obligation under Padilla must be understood as information-generating and fact-specific. With this in mind, the next Part revisits the scope-related questions that have arisen throughout the past year and proposes an analytical approach to achieve the Padilla directive for constitutionally required advice.

146 Id.
147 Id. (quoting Libretti v. United States, 516 U.S. 29, 50–51 (1995)).
148 Id.
149 Id. (finding no practical relevance to distinction “between an act of commission and an act of omission”).
150 See supra Part II.
IV. (Re)Considering the Scope of the Padilla Advisal Duty

Situating the Padilla duty in the context of its source and rationale elucidates a defense attorney’s obligation when faced with difficult legal questions. As important, it points to a faithful, coherent approach to the practical questions that have arisen since the Padilla decision. Simply put, it shows that defense attorneys must investigate and research the law using available resources and then advise noncitizen defendants about immigration consequences at the level of specificity that research permits.\footnote{See, e.g., United States v. Kwan, 407 F.3d 1005, 1016 (9th Cir. 2005) (“It is a basic rule of professional conduct that a lawyer must maintain competence by keeping abreast of changes in the law and its practice.”); see also Model Rules of Prof’l Conduct R. 1.1 cmt. 2 (2010) (“Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.”).} Within this approach, there is no decision point at which an attorney has to determine whether a consequence is clear or unclear; thus, this analysis solves the problems that arise when the “clear consequence” discussion is interpreted to create a halfway advisal test.\footnote{See supra notes 101–107 and accompanying text.} This final Part applies this analytical framework to the questions that lower courts have confronted and, finally, grapples with potential criticism of this approach.

A. Redux: Which Immigration Consequences Will Be Considered?

With the Strickland framework in mind, the inquiry into which immigration consequences fall within the ambit of Padilla is at once simpler and more complex. It is simpler because Strickland requires an attorney to make an individualized investigation into the particular concerns of the defendant. Therefore, it need not be decided whether advice regarding each discrete consequence—deportability, inadmissibility,\footnote{See supra note 76 (explaining inadmissibility).} the adverse impact on naturalization applications,\footnote{See supra note 79 (explaining how criminal convictions can adversely impact naturalization applications).} or ineligibility for discretionary relief\footnote{See supra note 80 (explaining some of the ways in which a criminal conviction can adversely impact the opportunity to obtain discretionary relief).}—is required, in the abstract, by Padilla. Such bright-line rules, it has long been said, would be ill-suited to this in-
Answering the question is, however, more complex because it requires deeper analysis of whether the defendant is truly informed of the important benefits and relief options he or she stands to lose.

Professional guidance, the Court has made clear, provides powerful indication of professional norms. Consulting this guidance—the very sources on which the Padilla Court relied—reveals that professional norms require attorneys to provide advice about a range of immigration consequences. The U.S. Department of Justice’s Compendium of Standards, for example, directs defense attorneys to:

- “[D]isclose to the defendant at the earliest feasible opportunity any . . . other matter that might be relevant to the defendant’s selection of counsel to represent him or her or counsel’s continuing representation;”
- “[M]ake sure the client is fully aware of . . . the other potential effects of conviction upon immigration status;”
- Convey the advantages and disadvantages of a contemplated plea agreement (including the risk of resulting confinement and rights waived);


159 Office of Justice Programs, supra note 158, at D10.

160 Id. at H2.

161 Id.
Investigate and explore alternative negotiated dispositions;\textsuperscript{162} and

Inform the client about procedures for expunging or sealing records of conviction.\textsuperscript{163}

The American Bar Association Standards similarly require counsel to advise a client about the full set of immigration consequences relevant to evaluate a potential plea.\textsuperscript{164} Indeed, many of the sources the \textit{Padilla} Court cited as indicative of professional norms make plain that attorneys are expected to provide advice about considerations and consequences important to the client.\textsuperscript{165}

Several sources relied on in \textit{Padilla} explicitly break out different types of consequences—including deportability, inadmissibility, bars to naturalization, and mandatory detention—and explain that defense attorneys must have a full picture of a client’s immigration situation to fulfill their duty as an advocate and advisor.\textsuperscript{166} One article explains:

Defense counsel must have knowledge of all the potential immigration consequences so that the client can make an informed decision as to how to proceed. What may be a great plea deal for a U.S. citizen may not be a good deal for a noncitizen. Additionally, defense counsel’s knowledge of immigration law may also result in working out a deal with the prosecutor that will avoid any adverse immigration consequences. Knowledge of the immigration consequences will allow defense counsel to seek a creative solution to minimize or negate the impact of any criminal conviction.\textsuperscript{167}

It appears that Justice Stevens drew directly from this article when explaining that the informed consideration resulting from \textit{Padilla} advisals would allow defense attorneys to “plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation.”\textsuperscript{168}

\textsuperscript{162} \textit{id.}

\textsuperscript{163} \textit{id. at J8}.

\textsuperscript{164} \textsc{ABA Standards for Criminal Justice, Pleas of Guilty}, \textit{supra} note 158, at 116 (standard 14-3.2(f)).

\textsuperscript{165} Defender Amicus, \textit{supra} note 5, at *8–9; \textsc{ABA Standards, Defense Function}, \textit{supra} note 158, 4-5.1(a) (“After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.”); Chin & Holmes, \textit{supra} note 120, at 715 (“No intelligent plea decision can be made by either lawyer or client without full understanding of the possible consequences of a conviction.”); Bratton & Keyes, \textit{supra} note 158 (explaining that attorneys must be fully informed of potential consequences and “[m]any states, including California, New York, and Ohio, have enacted statutes that require a judge to inform a noncitizen criminal defendant of the potential consequences of a criminal conviction”).


\textsuperscript{167} Bratton & Keyes, \textit{supra} note 158, at 61; \textit{see also} Defender Amicus, \textit{supra} note 5, at *4–15.

\textsuperscript{168} \textit{Padilla}, 130 S.Ct. at 1486.
Immigration-specific guidance aside, professional guidance for client-counseling and negotiation generally yields the same result, showing that advice about the serious consequences critical to the client is key. These guides explain why and how these considerations impact a defense attorney’s practice from the early stages of representation. Attorneys must advise the client early on because these consequences will likely impact a plea negotiation strategy. For a noncitizen client, it is easy to see why. A noncitizen defendant, when apprised of an adverse immigration consequence, will inevitably ask about alternatives. An informed attorney may be able to greatly diminish adverse immigration consequences by getting an alternate (immigration-neutral) plea or through an action as simple as putting on record the amount of marijuana underlying a possession conviction. The way that this plays out is consistent with defense attorney duties generally and Padilla specifically, which seeks informed pleas and encourages actors within the criminal justice system to recognize the immigration penalties when crafting a plea agreement.

Applying the information-generating principle driving Padilla additionally shows that narrowly interpreting the advisal duty would conflict with the decision’s purpose. As even Justice Alito recognized, receiving only partial information about adverse immigration consequences can be affirmatively harmful for many noncitizen defendants. Consider, for instance, a lawful permanent resident who pleads guilty to possession of a small amount of marijuana (under thirty grams) under New York State’s penal law. Although this individual is not...

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169 See, e.g., ABA STANDARDS, DEFENSE FUNCTION, supra note 158, 4-5.1 & 4-6.2 (requiring defender to investigate all relevant facts, advise client with complete candor about all aspects of case, including estimated outcomes and plea negotiations); Nat’l Legal Aid & Defender Ass’n, supra note 158, Guideline 6.2 (directing defenders to gain a full understanding of the concessions to which clients will agree, the ways that outcomes may impact a client, and available options before entering into plea negotiations); see also Model Rules of Prof’l Conduct R. 2.1 cmt. (explaining that “[p]urely technical legal advice . . . can sometimes be inadequate” and that defense attorneys should provide advice about the practical impact of a course of action).

170 See, e.g., ABA STANDARDS, DEFENSE FUNCTION, supra note 158, 4-4.1, 4-5.1, 4-6.1 & 4-6.2 (requiring defense counsel to interview defendants early on to elicit all legally relevant information, advise their client about options for disposition, and use this information to explore options like dispositions without trial); Nat’l Legal Aid & Defender Ass’n, supra note 158, Guideline 6.3 (“Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages and the potential consequences of the agreement.”).

171 As explained infra note 175 and accompanying text, a noncitizen defendant with a record of conviction demonstrating that the amount of marijuana possessed was less than thirty grams is far better off than if the conviction were unspecific as to the quantity of marijuana possessed.

172 See Office of Immigration Litig., supra note 69, at ii–iii (explaining importance of being informed about discretionary relief and waivers).

173 Padilla v. Kentucky, 130 S. Ct. 1473, 1491 (2010) (Alito, J. concurring); see also id. at 1484 (majority) (noting the absurdity of counsel remaining silent on such important issues).

174 N.Y. Penal Law § 221.05 (Consol. 2011) (unlawful possession of marijuana).
directly deportable as a result of the plea, he or she would be considered inadmissible by federal immigration authorities. This inadmissibility would trigger removal proceedings on return from any trip abroad that lasted longer than six months. With information up front, defendants can make decisions that are rational for them, even ultimately choosing to plead to an inadmissibility-triggering offense if perhaps he or she decided that travel abroad was not a significant concern. By the same token, another noncitizen, perhaps with their whole family in another country, might prefer to fight the charge rather than incur this penalty. Either way, however, without information about this serious consequence, a noncitizen defendant is deprived of critical information about the impact of the plea and the waiver of their right to trial.

B. Redux: When Is a Consequence Not “Clear” and What Advice Is Required Then?

Situating the “clear consequence” discussion in context also provides guidance about counsel’s duty to investigate immigration consequences and client-counseling obligations when the impact of a conviction is uncertain. Most significantly, understanding Padilla’s source and rationale reveals that uncertainty as to immigration consequences affects the extent of the advice that counsel will be able to provide. It does not diminish the obligation to research consequences and advise the defendant to the extent possible.

What, then, does adequate research look like? Ellis v. United States contains perhaps the most thorough articulation thus far of a reasonable, practical inquiry into the immigration consequences of a criminal conviction. There, the district court considered a claim for PCR brought

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175 8 U.S.C.A. § 1227(a)(2)(B)(i) (West 2011) (excepting, from the controlled substance grounds for deportability, convictions for “a single offense involving possession for one’s own use of thirty grams or less of marijuana”).
176 8 U.S.C.A. § 1182(a)(2)(A)(i) (“[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . . a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.”).
177 See, e.g., In re Reynolds, 2006 WL 3485725 (No. A29-798-037) (B.I.A. Oct. 11, 2006) (returning LPR placed in removal proceedings and charged with inadmissibility on the basis of convictions for § 221.05, notwithstanding their status under state law as noncriminal violations).
178 See supra Part III.
179 See supra Part III.
180 Ellis v. United States, No. 10-CV-4017, 2011 U.S. Dist. LEXIS 60268, at *4 (E.D.N.Y. June 3, 2011) (considering conviction under 18 U.S.C. § 3, which provides that “[w]hoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact”).
by defendant Adrian Ellis, who was deportable because of a conviction for accessory after the fact.\textsuperscript{181} Ellis argued that his attorney was ineffective for failing to advise him that his plea would render him deportable with no possibility for relief.\textsuperscript{182} Determining whether Ellis’s attorney was ineffective—i.e., whether the attorney would have been required to advise Ellis, in 1997, of the consequences of his plea—the district court traced a course of research that would be reasonable for an attorney researching this question.\textsuperscript{183} Ultimately, the district court found that the relevant law was “not succinct and straightforward” at the time of the plea and that, therefore, his attorney was only required to advise him of the risk of adverse immigration consequences.\textsuperscript{184}

The inquiry outlined in \textit{Ellis} contained several steps. First, the district court examined multiple sections of the INA and concluded that the consequence of a conviction for accessory after the fact was not specifically defined in the statute.\textsuperscript{185} This alone did not render the consequence unclear. Second, the district court researched case law in various federal court circuits and from the BIA to determine whether either courts or the BIA had discussed the impact of this conviction.\textsuperscript{186} This research entailed employing analogies, requiring the researcher to look for discussion of the immigration consequences of convictions under similar penal laws from other states.\textsuperscript{187} Third, after finding that there was no on-point federal or BIA case in 1997, the court inquired further, proceeding to consider what reasonable minds would have concluded when faced with this inquiry in the first instance.\textsuperscript{188} Ultimately, the district court considered the implications of post-1997 divergence on precisely this issue, between split circuit courts and the BIA, and found this indicative of the general ambiguity about the impact of this conviction.\textsuperscript{189} The court notes that the absence of a clear answer at each step does not alone “necessarily compel the conclusion that the law on this issue was

\begin{itemize}
\item \textsuperscript{181} \textit{Id.} at *2–4. (In fact, Ellis had already been ordered deported on the basis of this conviction.)
\item \textsuperscript{182} In fact, the defendant argued that his attorney specifically told him, pre-plea, that he would not be deported and, post-plea, that the conviction was not an aggravated felony. \textit{Id.} at *27–28.
\item \textsuperscript{183} See generally \textit{id.}
\item \textsuperscript{184} \textit{Id.} at *43.
\item \textsuperscript{185} Although the INA specified that offenses relating to obstruction of justice would be considered aggravated felonies and that aggravated felons were subject to automatic deportation, the statute did not explicitly state that a conviction for accessory-after-the-fact would be considered obstruction of justice. \textit{Id.} at *29–32.
\item \textsuperscript{186} \textit{Id.} at *31–44.
\item \textsuperscript{187} The inquiry into applicable case law involves analogizing the charge at issue with charges under similar penal laws of other states, a necessary component of research on the immigration consequences of a criminal conviction. \textit{Id.} at *32–33 n.9.
\item \textsuperscript{188} \textit{Id.} at *30 (“Of course, the absence of a reported case holding that the offense of accessory after the fact relates to obstruction of justice does not necessarily compel the conclusion that the law on this issue was unclear.”).
\item \textsuperscript{189} \textit{Id.} at *31–44.
\end{itemize}
Although the requisite research will inevitably vary depending on the question, the course of research in the *Ellis* decision is instructive because it demonstrates, of an inquiry into immigration consequences, a level of legal research that is consistent with professional norms. It is precisely this type and depth of legal research for which attorneys are trained and this is, in fact, one of the key skills attorneys should use when advising and advocating for their client.191

In the end, the *Ellis* court’s resolution of the deficiency claim could have done more to ensure a defendant’s rights under *Padilla*. On one hand, the decision models thorough legal research required of defense attorneys when faced with complex questions about uncertain consequences;192 on the other hand, it does not quite effectuate the information-generating standard that *Padilla* set forth.

As the *Ellis* court explained, when Ellis’ attorney was investigating the case, he did not have the benefit of on-point case law regarding the immigration consequences of such a conviction.193 Even at the time of Ellis’ plea, however, there was some indication that the conviction could be conceived as obstructing justice, which could be considered an aggravated felony and therefore subject him to mandatory deportation.194 However, it is not the case that “every offense that, by its nature, would tend to ‘obstruct justice’ is an offense that should properly be classified as ‘obstruction of justice.’”195 The absence of on-point case law and the existence of clear links between the accessory after the fact charge and obstruction of justice categorization, generally, should have led counsel to conclude that it was at least ambiguous as to whether

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190 Id. at *30.
191 *Model Rules of Prof’l Conduct* R. 1.1 cmt. (“Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. . . . To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”).
192 The court’s inquiry into the consequences, as apparent in 1997 case law, describes thorough investigation. Absent from the opinion, however, is any indication that the defense attorney conducted similar research when arriving at the conclusion that subsequently proved wrong.
194 See, e.g., United States v. Cefalu, 85 F.3d 964, 968 (2d Cir. 1996) (listing accessory after the fact as one of a “variety of obstruction [of justice] offenses”); United States v. Barlow, 470 F.2d 1245, 1252–53 (D.C. Cir. 1972) (“The gist of being an accessory after the fact lies essentially in obstructing justice by rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime. Evidence of this offense is most frequently found in acts which harbor, protect and conceal the individual criminal such as by driving him away after he commits a murder.”).
accessory after the fact was an aggravated felony. Rejecting the deficiency claim, the Ellis court acknowledging this uncertainty, noting that, “[g]iven the ambiguity surrounding this area of law at the time [defendant] pleaded guilty, [defendant’s] attorney may have better served [defendant] by giving him less definite advice about the immigration consequences of his conviction.”196 Certainly, less definite advice would have better served the defendant by more accurately informing him; at the same time, greater specificity—being up front about the existence and nature of the ambiguity—would have more fully informed the defendant when contemplating the plea. Therefore, a better standard would incentivize useful specificity by requiring the defense attorney to have conveyed information about consequences, uncertainty included, to the defendant. It is this level of information-sharing that, regardless of the certainty of the consequence, will truly facilitate informed consideration at crucial decision points.

C. Drawbacks

Admittedly, complying with the Padilla duty has costs; adequately advising clients about immigration consequences requires factual investigation, legal research, and up-to-date knowledge of immigration law. The obvious rejoinder to this Article’s approach tracks Justice Alito’s concerns about the burden on defense attorneys and the criminal justice system in general. However, the concern easily assumes inflated proportions when considering compliance in the abstract. In practice, it is significantly less burdensome because of how it is carried out and since the ease of compliance increases proportionally with time.

In most cases, complying with Padilla requires minimal investigation and research. As amici defender organizations affirmed, “for most defendants, the determination as to whether a crime is a deportable one can be made with a straightforward inquiry into the immigration statute or caselaw.”197 Even inquiries that require more detailed investigation may draw much from information already at attorneys’ disposal—from same set of facts necessary to counsel clients about the sentence and other aspects of contemplated dispositions. Where more thorough legal research is necessary, this likewise draws on a set of skills and databases with which defense attorneys are already proficient.198 And, finally, the common need for this information, within the defender community,

196 Ellis, 2011 U.S. Dist. LEXIS 60268, at *44.
197 Defender Amicus, supra note 5, at *23.
198 Courses of research like that outlined in Ellis may be conducted through computerized legal databases like Westlaw and LexisNexis, which defense attorneys already use to conduct legal research.
has resulted in the creation of easily accessible resources that elucidate
the immigration consequences of criminal convictions. Therefore, the
burden of this additional research is relatively low and its marginal utili-
ty is high.

One final note about the burden-based criticism of Padilla: the in-
formation-generating advisal sets in motion a victorious cycle, thereby
creating a foundation of information that is beneficial to many in the
criminal justice system. As defense counsel familiarize themselves with
immigration-related terms of art and law, it will become part of their
regular vocabulary. With practice, asking the right factual questions will
become a matter of course and legal research will become easier and
faster. Moreover, by bringing into view the full panoply of immigration
consequences, prosecutors and judges, as well as defense attorneys and
defendants, will be aware of the real consequences of dispositions and,
therefore, ensure the legitimacy of future pleas.

CONCLUSION

At this point, recognition of Padilla’s scope comes at a crucial
time, as courts and defense counsel find that the resolution of scope
questions affects multiple stages of practice. As it stands now, consider-
ation of these issues has not yet coalesced on the fundamental questions,
much yet developed a reasoned analytical approach. This Article out-
lines a way forward in both of these endeavors.

The Padilla opinion did not elaborate on counsel’s duty when im-
migration consequences were less clear than in the case of Jose Padilla;
however, reading the “clear consequence” discussion in light of the
decision’s root and rationale provides the necessary guidance. Lawyers,
like doctors, have an affirmative obligation to adequately inform their
clients about serious effects of criminal convictions to the extent and
with the specificity possible. Recognizing that the Padilla opinion
speaks on scope outside of the dialogue on clarity compels this under-
standing and undergirds the approach described in this Article. A lesser
standard would not only seriously undermine the Sixth Amendment
protection to which noncitizen defendants are entitled, but would con-
fuse with the concept of a truly informed plea agreement.

199 Defender Amicus, supra note 5, at *24–40 (detailing the range of resources available to
defenders and concluding that “[n]o competent practitioner can plausibly assert that it is an undue
burden to make use of these readily-available resources”).