CRIMINAL IMMIGRATION LAW: THE REALITY OF CRIMINAL DEFENSE AFTER THE ADOPTION OF THE BROADER INTERPRETTION OF *PADILLA* AND AN INTEGRATED PRACTICE SOLUTION

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In 2011, Samuel Baltazar pled guilty in a Delaware state court to a misdemeanor charge of endangering the welfare of a child.[1] He successfully completed his sentence and the State discharged him one year after his plea.[2] In the spring of 2013, Baltazar received notice of the initiation of removal proceedings based on his plea to the criminal charge.[3] Samuel Baltazar was a permanent resident who had been legally present in the United States since his emigration from Guatemala in 1985.[4] He was unaware that his guilty plea would lead to mandatory immigration proceedings and ultimately his removal from the United States, his home, his family, and his friends.[5] In 2014, prior to the hearing in the Delaware Supreme Court of his appeal seeking post-conviction relief based on his attorney's failure to properly advise Baltazar of the immigration consequences of his guilty plea, Baltazar was removed from the United States and returned to Guatemala.[6]

Due to the frequency of events like those revolving around Samuel Baltazar, immigration is at the center of many discussions throughout the country, both within the judicial system and as part of broader governmental policymaking.[7] While many of these discussions focus on the existence of noncitizens who are illegally present in the United States,[8] other scenarios,

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[1] State v. Baltazar, 2014 WL 606334, at *1 (Del. Super. Ct. Feb. 5, 2015).

[2] *Id.*

[3] *Id.*

[4] Answering Brief for the State of Delaware at *5, Baltazar v. State, 2015 WL 257334 (Del. Jan. 20, 2015) (No. 92, 2014).

[5] *Baltazar*, 2014 WL 606334, at *1.

[6] Letter from Appellant, Baltazar v. State, 2015 WL 257334 (Del. Jan. 20, 2015) (No. 92, 2014).

[7] *See generally* Padilla v. Kentucky, 559 U.S. 356 (2010); Lindsay VanGilder, *Ineffective Assistance of Counsel Under* People v. Pozo*: Advising Non-Citizen Criminal Defendants of Possible Immigration Consequences in Criminal Plea Agreements*, 80 U. COLO. L. REV. 793 (2009).

[8] *See* generally JOHN F. SIMANSKI, DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013 (2014*), http:*//www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf. In *Impossible Subjects: Illegal Aliens and Alien Citizens*, author Leti Volpp surveys several books on the development of the term and concept of "illegal immigrants." *See generally* Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595 (2005). The author illustrates the controversial aspects of the use of the term as well as the public's focus on the issue. *Id.* The article points out that "[i]llegal and legal are mutable categories in immigration law." *Id.* at 1615. Thus, while the public focuses on the

such as the one presented above, remind us that those who are legally present also face similar legal issues and complications.[9] The importance of addressing issues facing legally present individuals is emphasized by the large number of such individuals present in the United States.[10] Though there were an estimated 11.4 million immigrants present without authorization in the United States in 2012, there were also an estimated 22.7 million legal residents in the United States at that time.[11]

Legal residents, like Samuel Baltazar, are often not as vividly discussed in the matter of immigration, though they are just as affected by the policy and judicial decisions made by the United States government and courts.[12] Past changes to immigration laws defining the offenses which render a noncitizen removable from the United States provide very limited opportunities for discretionary relief from removal proceedings.[13] This

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presence of illegal immigrants in this nation and sees this portion of noncitizens to be the pressing and bigger issue to be resolved, "the characterizations of immigrants as 'legal' and 'illegal' are not only always subject to change, they also do not tell us anything about the desirability of the persons so constructed." *Id.* at 1615-16. This again emphasizes the importance of looking at *both* legal and illegal immigrants when addressing the issue of immigration since the status of a legal immigrant could easily, through reform or other change, be transformed to that of illegal immigrant and vice versa. Accordingly, the focus of the public while being centered on the presence of illegal immigrants and the issues related to such illegal presence, should rather be focused on immigration as an issue not separating the immigrant population in these mutable categories.

[9] *See Baltazar*, 2014 WL 606334, at *1.

[10] In addition to the large number of legal immigrants, the mutability of the status provides great cause to address legal immigrants to the same degree as illegal aliens. *See* Volpp, *supra* note 8, at 1615.

[11] BRYAN BAKER & NANCY RYTINA, DEP'T OF HOMELAND SEC., ESTIMATE OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012 2-3 (2013), *http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf.* This large group of legal residents can be separated into three categories. *Id.* at 1. First, there are legal resident immigrants, which refers to those individuals present as legal permanent residents. *Id.* Second, there are refugees or asylees. *Id.* Last, there are legal resident nonimmigrants, accounting for an estimated population of 1.9 million, which includes those individuals present for longer than two months for the purposes of schooling, work, and exchange visits. *Id.* at 1, 3.

[12] *See* Hon. Dana Leigh Marks & Hon. Denise Noonan Slavin, *A View Through the Looking Glass: How Crimes Appear From the Immigration Court Perspective*, 39 FORDHAM URB. L.J. 91, 94 (2011); Volpp, *supra* note 8. at 1615-16.

[13] Padilla v. Kentucky, 559 U.S. 356, 363-64 (2010); *see also* Volpp, *supra* note 8, at 1600-01. Volpp addresses the history of immigration in the United States and the development of reform and its impact in his note. Starting his immigration journey in the early years of the nation, he explains that before 1920, deportation was very rare. *Id.* at 1600. Volpp explains that the Johnson-Reed Immigration Act passed in 1924 eliminated a statute of limitations that previously barred deportation proceedings initiated more than five years after the illegal entry and it also creates unauthorized entry to the United States as a criminal offense rather than simply a deportable offense as it had previously been designated. *Id.* at 1601. Prior to the act, deportation was only to correct by extracting those that never had a legal right to enter the country in the first place and did not provide for any other substantive grounds. *Id.* at 1600. Today, deportation is a much more often used mechanism with a broad applicability. *Id.* at 1601. This was in large part provided through elimination of any statute of limitations on government proceedings for deportation and the creation of other substantive offenses that

"dramatically rais[ed] the stakes of a noncitizen's criminal conviction."[14] The great impact of the current immigration law's response to criminal charges on the community of noncitizens is demonstrated by the number of impacted individuals every year. In 2013, the number of noncitizens removed from the United States was at an all-time high of 438,421.[15] Out of this total number of individuals, 198,394 removals were based on criminal status.[16] In 2010, 96% of all immigrants federally charged with a crime were convicted.[17]

Convictions can occur through the charge by a jury or by taking a plea as a result of plea bargaining.[18] While a conviction by a jury provides for the finding of guilt by a group of peers, the taking of a plea is a decision made by the defendant based on the certainty of the charges in the plea presented by the prosecutor and the desire to avoid trial.[19] Due to large caseloads and the quicker process of plea bargaining, criminal defense attorneys often spend more time dedicated to the plea bargaining process than they do to actual trials.[20] In the plea process, prosecutors generally have the ability to make offers that a defendant can either choose to take, or not take and face

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provide a noncitizen deportable aside from unauthorized entry. *Id.* Thus, due to the rise of the use of deportation as a mechanism, a decline in discretionary avenues to seek relief from this mechanism is of great importance and explains why the Court addresses the issue in *Padilla* and provides for the importance of considering immigration consequences as integral to criminal sentencing. *Padilla*, 559 U.S. at 364.

[14] *Padilla*, 559 U.S. at 364. The Court's explanation of the importance of immigration as a consideration in sentencing shows its sympathy to the harshness of the process and demonstrates the reasoning behind the justices' willingness to hear the case and decide the matter. The Court explains that in the past, there were no criminal offenses that provided for automatic deportation, and both attorney generals and immigration court judges had the chance to recommend that certain aliens not be removed in a proceeding referred to as JRAD (Judicial Recommendation Against Deportation). *Id.* at 362. However, there are near to no avenues of relief available today. *Id.* at 363-64. This illustration of the current legislation by the Court could provide further insight into its intentions and sympathies in deciding *Padilla.*

[15] SIMANSKI, *supra* note 8, at 6.

[16] *Id.*

[17] EXEC. OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT (2010), http://www.justice.gov/usao/reading_room/reports/asr2010/10statrpt.pdf.

[18] In 2010, 91% of those charged in the District Courts of the United States actually resolved their cases by entering a plea rather than as a result of a trial. MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, NCJ239913, FEDERAL JUSTICE STATISTICS, 2010 20 (2013), http://www.bjs.gov/content/pub/pdf/fjs10.pdf. In 2013, scholars have even estimated the number to be as high as 96%. Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study Of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 12 (2013). Therefore, under the percentage as presented by these authors, out of the 96% of noncitizens convicted in federal courts, as presented *supra* note 17, around 96% did so by taking a guilty plea providing for a very small percentage that in fact litigated their case to establish their innocence.

[19] *See, e.g.,* Bruce A. Green, *The Right to Plea Bargain with Competent Counsel After* Cooper *and* Frye: *Is the Supreme Court Making the Ordinary Criminal Process "Too Long, Too Expensive, and Unpredictable…In Pursuit of Perfect Justice?"*, 51 DUQ. L. REV. 735, 737 (2013).

[20] *Id.*

a trial.[21] Thus, plea bargaining is often less of a bargaining process than it is a take-it-or-leave-it offer that if declined, results in a trial.[22] Thus, many "[d]efendants, including some who are innocent, ordinarily take the offer, because the stakes are so high: the risk of a conviction after trial is unacceptable given the relative harshness of the prison sentences that . . . [could] follow."[23] Consequently, in 2010, 91% of all felony charges brought in the United States district courts resulted in the resolution of a guilty plea.[24] When the defendant is a noncitizen, the higher stakes of potential removal from the United States make a plea agreement even more desirable.[25] Accordingly, those pleas are often taken not as a result of guilt and an admission thereof, but rather out of fear of what could be if a different choice were made.[26] In addition, the process that governs the general plea bargain is not very regulated and often leads to coercion.[27]

The prevalence of criminal charges ending with guilty pleas and the high number of nonimmigrants removed from the United States as a result of criminal convictions led to the United States Supreme Court's decision in *Padilla v. Kentucky*.[28] This decision is often referred to as a transformation of the rights afforded to noncitizens in the criminal justice system.[29] This note begins in Part I by introducing the Sixth Amendment right to effective counsel with regard to the plea bargaining process and resulting immigration consequences prior to the Supreme Court's decision in *Padilla*. In Part II, this note discusses the Court's decision in *Padilla* and explores the lower courts' support of the broad interpretation of the holding. Part III argues that the Court's majority likely did not intend to impose a duty on attorneys as broad as many lower courts and scholars have since interpreted it. Part IV assumes that the Court *did* intend to impose a broader duty on attorneys, and evaluates the requirements under such a duty. Part V explains the implications this broader interpretation has on criminal defense practice. Finally, Part VI proposes a joint practice solution to the problem.

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[21] Green, *supra* note 19, at 737.
[22] *Id*.
[23] *Id.* at 737-38.
[24] MOTIVANS, *supra* note18.
[25] Green, *supra* note 19, at 737.
[26] *See id.*, at 738. This undesirable result was explored in detail in a study, which was published in the journal article *The Innocent Defendant's Dilemma: An Innovative Empirical Study Of Plea Bargaining's Innocence Problem*. *See generally* Dervan & Edkins, *supra* note 18. The study presented in the journal article was an extensive empirical study that, through large samples of students, established that "more than half of the innocent participants were willing to falsely admit guilt in return for a benefit." *Id.* at 1. These findings support a conclusion that the Supreme Court in its decision in *Padilla* did not in fact intend to create the broader duty as often interpreted since the duty does not address the actual issue underlying the flawed representation, but rather a consequence of other issues in our justice system, as is further explored in Part III. *See* Padilla v. Kentucky, 559 U.S. 356, 374 (2010).
[27] Green*, supra* note 19*,* at 738.
[28] *See* Steven Zeidman, Padilla v. Kentucky: *Sound and Fury, or Transformative Impact*, 39 FORDHAM URB. L.J. 203, 203 (2011).
[29] *Id.*

I. THE RIGHT TO EFFECTIVE COUNSEL PRE-*PADILLA*

The right of a criminal defendant to effective counsel was found by the Supreme Court to be part of a defendant's protections afforded under the Sixth Amendment of the United States Constitution prior to the Court's decision in *Padilla*.[30] In *Strickland v. Washington*, the Court stated that the effectiveness of counsel was to be based on "the range of competence demanded of attorneys in criminal cases."[31] A defendant has the ability to challenge the effectiveness of the assistance of counsel by establishing that his legal representation was deficient and that this deficiency resulted in prejudice to his defense.[32] Accordingly, the Court found this protection to also apply in the realm of guilty pleas in the criminal justice process as well.[33] However, the analysis for a claim of a Sixth Amendment violation based on ineffective counsel during the process of the entering a guilty plea differs in that a defendant also has to prove that, absent this deficient representation, he would have declined the plea and requested a trial.[34]

Prior to *Padilla*, there was a split among the lower courts as to the applicability of the right to effective counsel in reference to immigration consequences resulting from guilty pleas and convictions in general.[35] While the Supreme Court never defined a distinction between the consequences resulting from criminal convictions,[36] lower courts, in an attempt to resolve the issue, established the collateral consequences doctrine.[37] This doctrine divides the consequences following a criminal conviction into direct and collateral consequences.[38] Direct consequences are those that are necessary to consider in the sentencing or pleading of a defendant while collateral consequences are "those matters not within the sentencing authority of the state trial court."[39] In dividing consequences into these two categories, many courts found immigration consequences to be collateral consequences that were not encompassed by the obligations found under the Sixth Amendment right to effective counsel.[40] Therefore, ineffective counsel claims based on failure to inform of immigration consequences were rendered meritless under the Sixth Amendment.[41] Accordingly, noncitizen defendants would lose their ineffective counsel claims due to courts finding that a reasonably competent

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[30] Yolanda Vázquez, *Realizing* Padilla's *Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 39 FORDHAM URB. L.J. 169, 172 (2011).

[31] Strickland v. Washington, 466 U.S. 668, 687 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

[32] Vázquez, *supra* note 30, at 172.

[33] *Id.* at 173.

[34] *Id.*

[35] *Id.* at 173-74.

[36] *Id.* at 174.

[37] *Id.*

[38] Vázquez, *supra* note 30, at 174.

[39] Padilla v. Kentucky, 559 U.S. 356, 364 (2010).

[40] Vázquez, *supra* note 30, at 174.

[41] *Id.*

attorney would not advise the defendant of the collateral consequences of a plea, consequently excluding immigration consequences from satisfying this initial threshold.[42]

II. *KENTUCKY V. PADILLA*, "CLEAR AND SUCCINCT" IMMIGRATION LAW

The case presented to the Supreme Court in 2009 was that of José Padilla.[43] Padilla, a native of Honduras, was a permanent resident of the United States for forty years who served in the United States military at the time of the initiation of his case.[44] In 2002, Padilla pled guilty in Kentucky state court to, among other charges, a charge of trafficking marijuana.[45] He applied for post-conviction relief in 2004 claiming ineffective counsel, arguing that his attorney did not advise him of the possibility of immigration consequences as a result of his criminal plea.[46] In fact, Padilla's attorney had assured him that he would have no reason to worry about immigration consequences since he had been in the country for so many years.[47] The Kentucky Supreme Court denied Padilla's motion for post-conviction relief.[48] The court found that the Sixth Amendment did not protect the right of criminal defendants to receive correct advice concerning immigration proceedings resulting from criminal guilty pleas.[49] The Kentucky Supreme Court neither found a right to receive advice in reference to immigration consequences in general nor a right for that advice to be correct, even if given.[50]

Padilla's case reached the United States Supreme Court on appeal in 2009.[51] In its decision, the Supreme Court, as an initial matter, addressed the split that developed in the lower courts concerning the collateral consequences doctrine.[52] The Court explained the necessity of resolving the split by emphasizing the rise of immigrants in the United States and the steady decline of protections and appeal opportunities in the deportation process.[53] The Court then declared that, as a general matter, it had never found such a distinction to exist for the purpose of effective counsel claims.[54] In the view of the majority, "deportation [was] an integral part . . . of the penalty" in criminal cases.[55] Accordingly, it resolved the split by declining

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[42] Vázquez, *supra* note 30, at 174.
[43] *Padilla*, 559 U.S. at 359.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Padilla*, 559 U.S. at 359.
[50] *Id.* at 360.
[51] *Id.*
[52] *Id.* at 365.
[53] *Id.* at 360.
[54] *Id.* at 365.
[55] *Padilla, 559 U.S. at 364*.

to support a finding of the collateral consequences doctrine in the matter of deportation.[56]

The Court then turned to whether counsel in Padilla's case was in fact ineffective.[57] It examined the question based on the standards provided by "the practice and expectations of the legal community."[58] The Court established that professional norms of effective counsel include advising a noncitizen client of the risk of deportation.[59] However, the majority did not stop their announcement of criminal defense attorneys' duties at the duty to inform a client of the *risk* of immigration consequences.[60] While the majority admitted that "immigration law can be complex, and . . . a legal specialty of its own,"[61] in the particular case of Padilla, the Court found the consequence of near automatic removal to have been "succinct, clear and explicit" in the applicable immigration statute.[62] Thus, the Court announced that counsel could have determined the removal consequence by merely reading the applicable statute.[63] The Court found that in reading the statute, counsel would have determined that the advice ultimately given to Padilla was incorrect.[64] Accordingly, the Court concluded that "when the deportation consequence is truly clear, as it was in . . . [Padilla's] case, the duty to give correct advice is equally clear."[65] However, the majority also explained that in many cases where the law is not clear, criminal defense attorneys have a narrower duty.[66] In those instances, they solely have the duty to advise of the *risk* of deportation to comply with their duty under the Sixth Amendment.[67]

Since this decision, many lower federal courts have interpreted *Padilla* to provide for the broader duty as expressed by the court under its "clear and succinct" analysis rather than the narrower duty of advising of the risk.[68] In

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[56] *Padilla*, 559 U.S. at 365.
[57] *Id.* at 366.
[58] *Id.*
[59] *Id.* at 367.
[60] *Id.*
[61] *Id.* at 369.
[62] *Padilla*, 559 U.S. at 368.
[63] *Id.*
[64] *See id.*
[65] *Id.* at 369.
[66] *Id*. at 374.
[67] *Id.*
[68] *See, e.g.*, United States v. Bonilla, 637 F.3d 980, 984 (3d Cir. 2011). Note that there are, however, other lower courts that have found *Padilla v. Kentucky* to have only established the narrower duty. One example is the decision of the United States District Court for the Middle District of Florida in *LLanes v. United States*, No. 8:11–cv–682–T–23TBM, 2011 WL 2473233, at *1 (M.D. Fla. June 22, 2011). In his post-conviction appeal, the defendant in this case relied on *Padilla* to argue that he did not receive adequate counsel. *Id.* The court decided the matter on different grounds, but announced its understanding of the *Padilla* duty. *Id.* The court stated that "[Padilla] holds that counsel must inform her client whether his plea carries a risk of deportation," without mentioning the broader duty as interpreted by lower courts such as the court in *Bonilla*. *Id.* (quoting Padilla v. Kentucky, 559 U.S. 356, 373 (2010)). Furthermore, note that a later decision by the United States Supreme Court itself solely refers

United States v. Bonilla, the United States Court of Appeals for the Ninth Circuit relied on the broader duty in its analysis of the case before it.[69] The court explained that "[a] criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty."[70] Many state courts have also found the broad duty to be the standard established by *Padilla*. In a decision by the Supreme Judicial Court of Massachusetts, the court interpreted *Padilla* to mean that "[c]ounsel . . . was obligated to provide to his client, in language that the client could comprehend, the information that presumptively mandatory deportation would have been the legal consequence of pleading guilty."[71] Although these two decisions only represent a few lower court decisions, they demonstrate definite support of a broader duty interpretation of the Supreme Court decision in *Padilla*.

III. THE APPARENT NEW DUTY OF CRIMINAL DEFENSE ATTORNEYS

Aside from the Court's brief announcement of a higher "clear and succinct" standard, the Court did not further address the general duty of defense attorneys in reference to clear immigration law.[72] The majority solely went on to decide the matter in the particular case of Padilla based on the immigration statute and the specific criminal conviction.[73] However, despite this brief mention of the higher standard, many scholars and lower courts have adopted this standard and attempted to interpret and apply it.[74] When examining the Court's decision, the origin of this broader duty is found more in the concurrence of Justice Alito than in the actual majority opinion.[75] In his concurrence, Justice Alito pointed out the magnitude of the particular finding in *Padilla*.[76] He emphasized the practical difficulties accompanying the "vague, half way test" of giving advice as to the precise consequences and voiced his concerns and disagreement with the standard mentioned and applied by the majority in the particular case of José Padilla.[77] Justice Alito further stressed the gravity of the majority decision and politely criticized the lack of recognition of the same by the majority.[78]

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back to this narrower duty. *See* discussion *infra* Part III; Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

[69] *See Bonilla*, 637 F.3d at 984.

[70] *Id.*

[71] Commonwealth v. DeJesus, 9 N.E.3d 789, 795 (Mass. 2014).

[72] *See Padilla*, 559 U.S. at 374.

[73] *Id.*

[74] *See, e.g.*, Colleen A. Connolly, *Sliding Down the Slippery Slope of the Sixth Amendment: Arguments for Interpreting* Padilla v. Kentucky *Narrowly and Limiting the Burden It Places on the Criminal Justice System*, 77 BROOK. L. REV. 745, 759 (2012).

[75] *Padilla*, 559 U.S. at 375 (Alito, J., concurring).

[76] *Id.*

[77] *Id.* at 375.

[78] *Id.*

Accordingly, while the majority seemed to provide for the right to effective counsel to entail the broader duty in *Padilla* when the law was "succinct and clear," it did not further mention this duty, but rather, it re-emphasized the narrower duty of advising of the risk of immigration consequences.[79] It is in fact Justice Alito's concurrence that more clearly pointed out the general rule that the majority seemed to establish in reference to the rights of noncitizen criminal defendants.[80] This seems to indicate that the majority may not, after all, have intended to create this general broad duty, but rather, that it was defining the narrower duty and simply deciding this way only for *Padilla* due to the extreme circumstances presented in his case.

However, despite these indications, scholars as well as lower courts interpret *Padilla* as requiring advice as to the extent of the consequences of deportation if the law is clear and succinct, in addition to the duty to advise of the risk.[81] It could be argued that the majority did intend to provide the broader duty as an attempt to provide relief from deportation that Congress, through legislation in the 20th century, took away by eliminating avenues of discretionary relief.[82] Through this elimination, many individuals, such as José Padilla and Samuel Baltazar, who have spent most of their lives in the United States as permanent residents, are faced with the harsh consequence of deportation. By providing an elaborated summary and explanation of Congress' actions and approaching the specific case of Padilla in a favorable manner, the Court may have been demonstrating its sympathy for those individuals and possibly tried to provide the relief no longer provided by Congress.

On the other hand, the argument that the majority did not intend to create the broader duty in general, but rather, was deciding the specific case of Padilla is supported by the Court's later decision in *Chaidez v. United States*.[83] In its decision in *Chaidez* in 2013, the Court limited the applicability of *Padilla* by refusing to apply *Padilla*'s general premise retroactively.[84] In explaining its decision, the only duty referred to by the majority is "that the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea."[85] This supports the conclusion that the broad duty was not intended as a general

[79] *Padilla*, 559 U.S. at 374.

[80] *See id.* at 375.

[81] *See*, *e.g.,* Erich C. Straub & Davorin J. Odrcic, *Duty to Advise Noncitizens*, 83 WIS. LAW., Aug. 2010, at 6; Nicole Sykes, Padilla v. Kentucky*: The Criminal Defense Attorney's Obligation to Warn of Immigration Consequences of Criminal Conviction*, 28 GA. ST. U. L. REV. 891,902 (2012).

[82] *See* SIMANSKI, *supra* note 8 (explaining the Court's analysis of the change in immigration legislation and its harsh effect on deportable immigrants).

[83] *See* Chaidez v. United States, 133 S.Ct. 1103, 1108 (2013). In *Chaidez*, the majority found that *Padilla* defined a new rule when it found immigration consequences to not be "categorically removed from the scope of the Sixth Amendment right to counsel" and was therefore not retroactively applicable. *Id.* at 1108.

[84] *Id.* at 1105.

[85] *Id.*

rule. The Supreme Court has not addressed its "clear and succinct" rule since *Padilla* and some lower courts have struggled to apply the new standard when trying to establish when immigration law requires a criminal defense attorney to exercise this higher duty.[86]

Additionally, while scholars and many lower courts seem to interpret the *Padilla* decision as providing for this broad duty, there are still courts and jurisdictions which do not interpret the higher duty as the governing law. In the case of Samuel Baltazar, the Delaware trial court denied Baltazar's claim of ineffective counsel and found that Baltazar's defense attorney had adequately represented him.[87] The attorney informed Baltazar of the risk of deportation, the Plea Agreement form provided "(defendant) understands that this plea may affect his immigration status," and the Truth in Sentencing form signed by Baltazar stated "[n]on-citizens: Are you aware that conviction of a criminal charge may result in deportation/ removal, exclusion from the United States, or denial of naturalization?"[88] The State of Delaware, in its answer to the appeal now in front of the Delaware Supreme Court, mentions the Supreme Court's decision in *Padilla* and points out that *some* jurisdictions have interpreted the duty as defined in the case to be an affirmative duty to advise of the exact consequences when the law is clear.[89] However, the State then continues to argue that even in those jurisdictions that have adopted the broader interpretation of *Padilla*, the term "child abuse," which is clearly a deportable charge, was not conclusive or clear enough to provide for the elevation of the duty to this higher standard.[90] Thus, the State, in its brief, argues that Baltazar's attorney would have been required to establish whether the charge in the case was in fact child abuse, which in the eyes of the State provided for the law not to fall within the "clear and succinct" group, triggering the higher standard.[91] Accordingly, while an examination of the Immigration and Nationality Act makes apparent that the offense to which Baltazar pled was a deportable offense that his attorney would have had a duty to accurately advise him under the broader standard,[92]

[86] Connolly, *supra* note 74, at 768-69. This note explores a decision in which the court found that the law was in fact not clear when the defendant's crime would not in fact be classified as an "aggravated felony," which the court found to be enough evidence to provide that the law was not clear. *Id.* at 769. However, as explored *infra* note 89, the analysis, as adopted by the court, described in this note presents several issues when considering the often-differing terms used in immigration and state statutes. This in turn would then suggest that an immigration law in fact is never clear since the terms used in the statute could always carry a different meaning and would thus never be reliable on their face alone. Therefore, the broader duty, if intended, would in fact never be triggered again suggesting that the Court only intended to decide the specific case before it in *Padilla* rather than create a broad generally applicable duty.

[87] Answering Brief for the State of Delaware, *supra* note 4, at *5.

[88] *Id.* at *4.

[89] *Id.* at *14.

[90] *Id.* at *15.

[91] *Id.* at *16-17.

[92] 8 U.S.C. §1227(a)(2)(E) (2008).

this standard is nowhere near as clearly established in the *Padilla* decision or among lower courts as is often claimed.[93]

Furthermore, while Baltazar's case clearly illustrates the continuing struggle with ascertaining the correct reading of the majority decision of the Court in 2010, it also again emphasizes the struggle of those courts that attempt to implement the higher duty.[94] Those jurisdictions are faced with just as much of a dilemma when trying to establish which measures a criminal defense attorney is constitutionally required to take to establish whether a law is in fact succinct and clear, and as a result, requires a more detailed form of advice.[95]

Since the broader interpretation of the duty under *Padilla* is not actually as prevalent as it seems at first glance, one begins to wonder if this newly announced broad duty, which opens doors for professional malpractice suits and ineffective counsel claims, will in fact remedy the cause of the issue rather than simply remedying a consequence of a deeper issue.[96] This in turn provides support for a finding that the majority did not intend to create the broad rule as a general standard. If the norm of advising a defendant of the exact immigration consequences already prevailed among defense attorneys prior to *Padilla,* as suggested by the majority opinion of the Court,[97] the problem actually underlying the inadequate protection of noncitizens' rights in the process is not in fact served by constitutionalizing this new duty.[98] Assuming that the norm among legal professionals already entailed this advice, the decision in *Padilla*, interpreted as a milestone of case law for noncitizens, then provides for no additional protection. It then solely constitutionalized ethical norms already followed by the majority of practitioners in the nation.[99] Thus, relying on this conclusion, the broader interpretation of the duty would provide no further protection to noncitizen

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[93] *See generally* Padilla v. Kentucky, 559 U.S. 356 (2010).

[94] *See* State v. Baltazar, 2014 WL 606334, at *1 (Del. Super. Ct. Feb. 5, 2015).

[95] *Id.* The state, in its brief, *s*hows the difficulty and difference in opinion between the parties in what is or is not a clear immigration law by describing the applicable immigration statute as not being clear when the attorney would have had to establish what "child abuse" entails. Answering Brief for the State of Delaware, *supra* note 4, at *15. This is further illustrated by the many scholars and practitioners that emphasize the difference in the meaning of terms used in both immigration law and criminal statutes as suggesting the immigration statutes are never truly clear since they would always require additional research to investigate the meaning of the term under the immigration statute and a comparison to the applicable criminal statute. *See* Vivian Chang, *Where do we go from here: Plea Colloquy Warnings and Immigration Consequences Post-*Padilla, 45 U. MICH. J.L. REFORM 189, 205-06 (2011). Accordingly, even those jurisdictions taking on the task of applying the broader interpretation are left without much guidance. The attorneys in those jurisdictions, without much guidance, are thus likely to provide for either ineffective counsel or an over inclusive advising with the risk of providing inaccurate information in a field that is not their expertise. *See* César Cuauhtémoc García Hernández, *Criminal Defense After* Padilla v. Kentucky, 26 GEO. IMMIGR. L.J. 475, 479 (2012).

[96] Zeidman, *supra* note 28, at 206-07.

[97] *Padilla*, 559 U.S. at 372.

[98] Zeidman, *supra* note 28, at 209.

[99] *Id.* at 208.

defendants, which again suggests that it was likely not intended by the majority as a result.

As examined in the beginning of this note, the majority of criminal cases in the United States, whether concerning citizen or noncitizen defendants, are resolved by plea bargains.[100] Generally, this is due to the pressure of risking a conviction, but it provides for quicker dissolution of a case, which is often necessary for court-appointed attorneys with extreme caseloads.[101] Thus, while some jurisdictions now interpret a broad constitutional duty for criminal defense attorneys, "overwhelming caseloads [will] prohibit public defenders [and other appointed counsel] from meeting their *Padilla*-imposed constitutional counseling obligations,"[102] which does not resolve the heart of the issue. Accordingly, if the Court intended the broader interpretation of *Padilla,* it has now imposed an additional obligation on criminal defense attorneys, leading to a possible slowing of the plea bargaining process while not addressing the underlying issue of the prevalence and assumed necessity of the high volume of cases being resolved by plea bargains.[103] It is likely that this new obligation will cause attorneys to invest more time and money into the inquiry concerning the possibility of immigration consequences rather than investing the time to address the actual accusation, investigating the constitutionality of the underlying actions and charges, and best representing the client as a criminal defendant, rather than a noncitizen with possible immigration consequences to advise of.[104]

Another aspect leading to the conclusion that the broad duty only addresses a consequence of, not the cause of, poor representation is the issue of consequences for incompliant attorneys. While a defendant, if he can prove the prongs of ineffective counsel, may have his or her plea vacated and return to square one, the duty may not have an impact on the representation of noncitizens at all. Generally, no serious consequences arise for those attorneys ineffectively representing noncitizens[105] and the threshold for an ineffective counsel claim can often be hard to meet.[106] Thus, the broader standard does not fix the issues of the system, but rather addresses one of the effects of other issues present.

Overall, the above mentioned considerations lead to the conclusion that the majority did not intend to create the broad duty as interpreted by scholars and some lower courts, but was in fact solely constitutionalizing the duty to advise of the risk of immigration consequences and deciding the specific case of *Padilla*.

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[100] *See* Green, *supra* note 19, at 737-38.
[101] Zeidman, *supra* note 28, at 207.
[102] *Id.* at 211.
[103] *Id.* at 214-15.
[104] *Id.* at 215-16.
[105] Green, *supra* note 19, at 758.
[106] Zeidman, *supra* note 28, at 212.

IV. Requirements Under the Current Interpretation of the Duty

Assuming the broader duty was in fact intended and is the standard to be applied to current cases, it is vital to establish what this duty requires a criminal defense attorney to do when representing his noncitizen clients. The issue to address first is the extent of the duty in establishing a client's immigration status.[107] At first glance, this part of the inquiry seems easily addressable since an attorney would solely have to establish whether a client is a citizen or not.[108] However, there are many types of noncitizens and also many clients that may state their citizenship status in ways that do not accurately reflect their legal status in the United States.[109] Furthermore, even when a client informs a criminal defense attorney that he is not a citizen, there are many different noncitizen statuses that the client could potentially carry, which can possibly change the effects of a guilty plea.[110] Thus, a criminal defense attorney has to request sufficient information and possible documentation from a client and must compare the information to the corresponding portion of the immigration statutes to establish the exact status of the client.[111] Accordingly, this can turn into a rather extensive search into the client's history and current position.

Once the attorney establishes whether a client is within the population facing immigration consequences for certain offenses, the attorney then has to research whether the particular offense would have such consequences.[112] This task again presents several hurdles for a criminal defense attorney. While, as the majority in *Padilla* seems to suggest, a simple look at the governing law will provide whether a law is succinct and clear, immigration law is often much more difficult to decipher for a professional whose primary focus does not revolve around the practice of this type of litigation.[113] A statute may seem on its face as though a certain consequence would be almost mandatory, as the majority found in the case of *Padilla*, but the differences in the definition of terms in immigration law and in most state codes provide for significant difficulties in this endeavor.[114] In *Padilla*, the Court found that the portion of the relevant act applicable to Padilla's deportation clearly stated that his deportation would be "presumptively mandatory" by providing that "[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation . . . relating to controlled substances . . . is deportable."[115] However, when evaluating the statute more closely in reference to these "succinct, clear and explicit" deportation consequences, it

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[107] Straub & Odrcic, *supra* note 81, at 67.

[108] *Id.*

[109] *See id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* at 68.

[113] *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 368 (2010); Straub & Odrcic, *supra* note 81, at 63.

[114] Straub & Odrcic, *supra* note 81, at 64.

[115] *Padilla*, 559 U.S. at 368 (quoting 8 U.S.C. § 1227 (a)(2)(B)(i)).

becomes apparent that certain terms, such as the term "conviction" in the relevant statute in *Padilla*, do not necessarily carry the same meaning as they do in state and federal criminal statutes.[116] Thus, again, the standard as mentioned by the majority in *Padilla* requires additional research by a criminal defense attorney in an area of law not familiar to him.[117]

If the attorney decides that the law is not "clear and succinct," he would then conclude that he is solely required to inform the client of the *risk* of deportation.[118] If the defense attorney should in fact try to differentiate between those charges clearly leading to deportation and those that do not, it is likely that the attorney will "over-advis[e] individuals charged with some crimes and under-advis[e] individuals charged with others."[119] For example, while crimes related to controlled substances seem to provide for the broad duty based on the clarity of the governing immigration statute despite the fact that deportation may not actually follow, crimes involving moral turpitude are sparingly defined and will lead to no more than a duty to advise of a risk of deportation.[120] Furthermore, should the attorney, in his attempt to ascertain which advice he is under the duty to provide, decide that the law is not "clear, succinct and explicit" and thus solely provide a general warning of a risk, he is risking a future post-conviction claim of ineffective counsel in reference to his performance.[121] Accordingly, to adequately ensure that such a result is avoided, defense attorneys will likely feel compelled to generally provide advice regarding the explicit consequences faced.[122] This in turn presents the final hurdle to the constitutionally adequate representation of noncitizens as indicated by the Court in *Padilla*: correct advice.[123]

V. THE IMPLICATIONS OF THIS NEW REQUIREMENT

There are several consequences resulting from the broader duty as interpreted following the decision in *Padilla*. The most obvious result of the newly found requirements, the understanding and interpreting of immigration law by criminal defense attorneys, provides for the necessity of defense attorneys to do research, receive training and collaborate with immigration attorneys to ensure the fulfillment of their duty. Since most criminal defense attorneys are not well versed in immigration law, they will have to employ additional resources to completely understand the consequences and implications of those complex statutes.[124] While the Court in *Padilla* stated that the prevailing professional norm, based on standards as described by organizations such as the American Bar Association, already supported such

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[116] *See Padilla*, 559 U.S. at 368-69; Straub & Odrcic, *supra* note 81, at 64.
[117] *Padilla*, 559 U.S. at 369.
[118] *Id*.
[119] Hernández, *supra* note 95.
[120] *Id.*
[121] *See Padilla*, 559 U.S. at 369.
[122] *See* Sykes, *supra* note 81, at 914.
[123] *Padilla*, 559 U.S. at 369.
[124] Sykes, supra note 81, at 914.

a duty prior to its decision, , the reality at the time of the decision was that those standards were anything but prevailing practice.[125] Accordingly, attorneys have to *now* acquire the knowledge to meet the constitutionally required norm of adequate representation.[126] While this can be in part accomplished by self-studies of materials established to aide in the understanding of immigration law, most attorneys will likely have to attend trainings on the specific topic.[127]

In general, trainings in the form of continuing legal education seminars are already expected within the state bar communities in order for attorneys to provide adequate representation to their clients.[128] However, in many areas of the country, the majority of those trainings do not center on immigration consequences from criminal convictions. When examining, for example, the course offerings of the United States Department of Justice's Office of Legal Education, which provides training for United States Attorneys, there was not one course offering on the topic among the 128 courses offered in the fiscal year of 2014.[129] Furthermore, while a brief filed by the National Association of Criminal Defense Lawyers and similar organizations in support of Padilla's claim in front of the Supreme Court provided that there were trainings held in over 43 states at the time of the litigation of *Padilla*, a closer look at the list of trainings clarifies quickly that, depending on the geographical location of a particular defense attorney, these types of trainings were extremely limited.[130] In the list provided by the amici, many states, such as Delaware and Idaho for example, only show one training found by the associations at the time.[131] The only training listed for Delaware took place in 1999, while *Padilla* was not litigated and this list not provided until 2009.[132] While it is very likely that more written resources and likely more training opportunities are now provided in the wake of *Padilla*,[133] availability of those trainings, especially in nonmetropolitan areas, is still a consideration to necessarily address when even those organizations in support of Padilla's claim in 2009 were only able to provide data on very limited offerings.[134]

Requiring defense attorneys to complete this additional research as well as attend trainings should not be underestimated. Furthermore, even those

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[125] *Padilla*, 559 U.S. at 367; Zeidman, *supra* note 28, at 206.

[126] Sykes, *supra* note 81, at 914.

[127] *Id.*

[128] *See* Delaware State Courts, Commission on Continuing Legal Education of the Supreme Court of Delaware*, Continuing Legal Education Rules* (2004), http://courts.delaware.gov/cle/rules.stm.

[129] United States Dep't of Justice, Offices of the United States Attorneys, *FY-2014 Calendar*, http://www.justice.gov/usao/training/course-offerings/schedule.

[130] Brief of the Nat'l Ass'n of Criminal Defense Lawyers et. al. at *26, Padilla v. Kentucky, 559 U.S. 356 (2010) (No. 08-651), 2009 WL 1567356.

[131] Brief of the Nat'l Ass'n of Criminal Defense Lawyers et. al., *supra* note 130, at *26.

[132] *Id.*

[133] *See, e.g., Criminal Defense*, IMMIGRANT DEF. PROJECT, http://immigrantdefenseproject.org/criminal-defense.

[134] *See* Brief of the Nat'l Ass'n of Criminal Defense Lawyers et. al., *supra* note 130, at *25-32.

resources only provide them with a mere glimpse at such a complicated field as immigration, necessitating additional time commitments for the representation of noncitizens, including having to possibly inquire with immigration law colleagues if the immigration statute or case law is too complex. As stated by one scholar, "[f]or public defenders [and other appointed criminal defense counsel] with a burdensome caseload . . . [this comprehensive service plan of providing representation to noncitizens that includes self-education and actively fostering collaboration with immigration attorneys] will be [a] daunting [task]."[135]

While the criminal justice process in a *regular* criminal proceeding is already generally "too long, too expensive, and unpredictable" as Justice Scalia described it,[136] the additional *burdens* on criminal defense attorneys as described above will likely further increase the cost and time of the process for noncitizen defendants.[137] Although, as suggested by one scholar, the effectiveness of counsel is solely measured by professional norms with which the attorney had to comply already,[138] the fact that "the prevailing professional norm [isn't] actually prevailing" leads to the assumption that the constitutional recognition of the requirement to actually inform of the precise consequences will present an additional burden.[139] Accordingly, the broader duty will likely lead to the appointment of counsel who are reluctant to take on the additional task of representing a noncitizen when presented with the additional time and work. Furthermore, this may also have implications on whether a private attorney will be willing or feel comfortable with representing a noncitizen criminal defendant. Private attorneys may decline to take on a noncitizen defendant out of fear of being too uninformed concerning the immigration statutes or may be scared away by the additional time and money commitment necessary for proper representation. Additionally, should private counsel choose to take on the additional challenge, a higher fee would probably be charged as a result of the additional work faced by the attorney. This, in turn, while providing that counsel who are unaware or uninformed of immigration consequences will less likely represent noncitizen defendants, may provide for a smaller private defense counsel pool for a noncitizen defendant from which to select representation. Accordingly, the newly established broad duty will probably have negative consequences for noncitizen defendants seeking private representation.

VI. SOLUTION TO THE PROBLEM UNDER THE CURRENT INTERPRETATION

Should the Court in *Padilla* have in fact intended to provide the higher duty despite its sparse mention and the many implications leading to a contrary conclusion, this note suggests that it would be beneficial in areas of

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[135] Sykes, *supra* note 81, at 913.
[136] Lafler v. Cooper, 132A S.Ct. 1376, 1391 (2012) (Scalia, J., dissenting).
[137] Green, *supra* note 19, at 735.
[138] *Id.* at 747.
[139] Zeidman, *supra* note 28, at 206-07.

the country where the noncitizen population is of significant size for a new area of practice to develop. Several scholars have suggested solutions to the issue now faced by criminal defense attorneys in establishing how to best address their obligation and fulfill their constitutional duty.[140] One author suggests and provides examples of collaboration of criminal defense attorneys with immigration attorneys.[141] Those collaborations could come in several forms, such as service plans for criminal defense attorneys or public defenders offices with immigration law organizations or immigration attorneys or bringing on in-house immigration attorneys to direct such questions to, all of which the author refers as "Immigration Service Plans".[142]

However, there are several issues and disadvantages that could stem from those solutions described that would be avoided or more effectively addressed by a new practice field of criminal immigration law. Absent any type of service plan, a criminal defense attorney will likely quickly lose the sympathy of his often contacted immigration law colleagues should he seek their collegial advice on immigration matters frequently.[143] One scholar suggests the establishment of payment arrangements between immigration and criminal attorneys as a solution to this issue.[144] However, this could eventually turn into a costly endeavor in its practical realization when considering aspects such as the time necessary for conflict checks and fee arrangements for every individual case.[145] Furthermore, while the establishment of an in-house immigration attorney position would solve this issue, such a position brings with it much cost itself and would likely only be feasible for large firms capable of supporting such an increase in staff.[146] Finally, the solutions presented by this author as well as others do not address the fact that when referring to an in-house immigration attorney or contracting out the immigration question or client, the criminal defense attorney is always forced to rely on the skill and knowledge of another attorney and has to be able to trust and rely on this other attorney to fulfill a duty he is presumptively constitutionally obligated to fulfill. While the United States Supreme Court has not addressed the issue of deferring to an immigration specialist in the endeavor to fulfill the duty to advise, several state court decisions have struggled with the matter, clarifying the problems presented by the solutions suggested by other authors.[147] Colleen Connolly in her note titled *Sliding down the slippery slope of the Sixth Amendment: Arguments for Interpreting* Padilla v. Kentucky *Narrowly and Limiting the Burden it Places on the Criminal Justice System* illustrates two lower court decisions in which those courts struggled with the effectiveness of defense

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[140] *See, e.g.,* Sykes, *supra* note 81, at 916-17; Straub & Odrcic, *supra* note 81, at 67-68.

[141] Sykes, *supra* note 81, at 916-17.

[142] *Id.* at 917.

[143] *See* Ronald F. Wright, Padilla *and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1535-36 (2011).

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] Connolly, *supra* note 74, at 773-76.

counsel when the attorneys referred their clients to immigration specialists to provide proper immigration advice.[148] The lower court decisions were based on the very specific information provided by the attorneys to the claimants in the particular cases.[149] The court for the Southern District of Florida found that the claimant's counsel had been effective when she advised the claimant but directed the claimant to speak to an immigration attorney for additional counseling.[150] However, the New York Supreme Court for the County of Kings found the claimant's counsel to have been ineffective when the defense attorney did not provide any advice himself due to his claim of lack of sufficient knowledge of immigration law and did not facilitate the contact between the claimant and the immigration attorney, but simply suggested for the claimant to seek the advice of an immigration specialist.[151] These cases, while only representing two particular court decisions, illustrate the issues accompanied by the deferring of noncitizen clients to immigration attorneys and the possibility of appeals based on ineffective counsel claims as a consequence.

To address the issues accompanying existing solutions for criminal defense attorneys, this note suggests that in certain areas of the country where the issue of effectively representing noncitizens for criminal charges is found often, a new area of practice could be the most effective path to the fulfillment of the constitutional obligation as well as the most cost effective solution for a criminal defense attorney or even for public defender's offices. While this solution will likely not be as beneficial in other areas of the country or for a majority of criminal defense attorneys, it may prove advantageous to those often encountering the representation of this special class. Furthermore, it would likely provide the best representation for those individuals. If an area of criminal immigration law were to establish, a criminal defense attorney could further his education and focus additional time and resources to establish extensive knowledge of criminal as well as immigration law and make the intersection and interaction of the two areas of law a focus of his practice. This would allow him to create a niche practice in which he could provide noncitizens with the representation needed for best advancing their interests.

Since even immigration specialists that teach immigration law to firms and public defenders around the country appreciate the complexity of immigration law and advise attorneys to seek advice from an expert on anything but the most simple immigration issues,[152] an attorney practicing in this newly designed area of law would be capable of advancing the interests of his clients without the need of seeking further costly advice from colleagues and would avoid the risk of receiving false or lacking advice solely relying on another attorney's skills. While this practice of law would

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[148] Connolly, *supra* note 74, at 773-76.

[149] *Id.* at 775.

[150] *Id.*

[151] *Id.*

[152] Wright, *supra* note 143, at 1535.

require a study of both criminal law and the complex immigration law, it would provide those attorneys with the ability to competently and effectively represent their clients. In addition to the benefits to both defendants and attorneys of more reliable information, this new area of legal practice would provide those attorneys with the ability to charge a higher fee for their specialized defense of noncitizen defendants facing not only criminal charges but the risk of being removed from the country and their friends and family. Due to the high stakes of those defendants, they might very well be willing to pay extra for the competent representation. Additionally, those attorneys would not have to defer their clients to other specialists for the immigration component of the criminal defense and would thus be able to prevent their clients from having to retain the services of another attorney as well as avoid paying additional fees.

VII. CONCLUSION

Examining the majority decision of the Supreme Court in *Padilla v. Kentucky* illustrates the practical difficulties arising from the implication of a broader reading of the duty announced, and the fact that since the decision, the Court itself has not addressed the broader reading as interpreted by many, the conclusion that only the narrower duty of advising of the risk of immigration consequences rather than concrete advice as to the exact consequences was intended seems likely.[153] However, under the broader duty, as the decision in *Padilla* is currently interpreted by most scholars and many courts to require, the most effective and safe solution for criminal defense attorneys representing noncitizen defendants is the establishment of a combined criminal and immigration law practice field rather than deferring to immigration colleagues with the risk of not effectively representing their clients.

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[153] *See* Padilla v. Kentucky, 559 U.S. 356, 374 (2010).