ACTUALLY, *PADILLA* DOES APPLY TO UNDOCUMENTED DEFENDANTS

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Introduction

In *Strickland v. Washington*, the United States Supreme Court famously established a two-pronged test for determining whether criminal defendants were denied their constitutional right to the effective assistance of counsel. First, the *Strickland* Court held that defendants "must show that counsel's performance was deficient"[1] by demonstrating that the quality of their attorney's representation "fell below an objective standard of reasonableness."[2] Second, the Court held that defendants "must show that the deficient performance prejudiced the defense"[3] by proving that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[4] Crucially, defendants who claim that they received ineffective assistance of counsel must satisfy both prongs – deficiency and prejudice – in order to prevail.

Nearly three decades after deciding *Strickland*, the Supreme Court decided the landmark criminal procedure case *Padilla v. Kentucky*, which extended *Strickland*'s basic framework to deficient advice concerning immigration consequences. *Padilla*'s essential holding was that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."[5] Thus, *Padilla* clarified that lawyers perform deficiently when they fail to advise non-citizen defendants of the potential immigration consequences of pleading guilty to a crime, satisfying *Strickland*'s "deficiency" prong. Similarly, in keeping with *Strickland*'s "prejudice" prong, the *Padilla* Court held that non-citizen defendants who accept guilty pleas on the basis of incompetent immigration advice are entitled to withdraw their pleas if they can "convince the court that a decision to reject the plea bargain would have been rational under the circumstances."[6] Thus, like other defendants who are harmed by incompetent counsel, *Padilla* established that non-citizen defendants who were prejudiced by their attorneys' failure to render competent immigration counsel are entitled to withdraw their guilty pleas and proceed to trial instead.

While the full scope of the Supreme Court's decision in *Padilla* remains uncertain,[7] its constitutional mandate was anything but. "It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel,'" the *Padilla* Court proclaimed.[8] Astoundingly, however, despite the apparent clarity of this holding, whether *all* non-citizens are entitled to seek post-conviction

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[1] Strickland v. Washington, 466 U.S. 668, 687 (1984).
[2] *Id.* at 688.
[3] *Id.* at 687.
[4] *Id.* at 703.
[5] Padilla v. Kentucky, 559 U.S. 356, 357 (2010).
[6] *Id.* at 372.
[7] *See generally*, Lilia S. Stantcheva, *Padilla v. Kentucky: How Much Advice Is Enough?* 89 N.Y.U. L. Rev. 1836 (2014).
[8] *Padilla*, 559 U.S. at 374, quoting McMann v. Richardson, 397 U.S. 759, 771 (1971).

relief on the basis that they received incompetent immigration counsel has recently become an open question.

To date, a nearly unanimous line of authority that includes two U.S. Circuit Courts of Appeals, seven U.S. District Courts, trial and appellate courts in four states, and at least one academic scholar has concluded in some form or fashion that "*Padilla* applies only to those who were present in the country lawfully at the time of the plea."[9] Specifically, these authorities have reasoned that because "a guilty plea does not increase the risk of deportation" for undocumented defendants,[10] "in a situation where a defendant seeks to withdraw a plea based on *Padilla*, and alleges lack of knowledge of the risk of deportation, prejudice cannot be established[.]"[11] In other words, these authorities conclude, regardless of either the breadth or the magnitude of their counsel's incompetent immigration advice, undocumented defendants are never entitled to relief under *Padilla* because they are categorically incapable of satisfying *Padilla*'s "prejudice" prong.

This conclusion notwithstanding, however, *Padilla* does apply to undocumented defendants. For the reasons provided in this Article, the reasoning of those authorities that have reached a contrary conclusion suffers from four fatal flaws.

This Article proceeds in six parts. Part I summarizes the authorities that have concluded that *Padilla* does not apply to undocumented defendants. Part II explains why this conclusion neglects the legal and practical reality that a guilty plea frequently increases the risk of deportation for the undocumented.[12] Part III expounds upon this concern by observing that regardless of the fact that there are myriad situations in which a guilty plea can cause an undocumented defendant to be deported who otherwise would not have been, the test for prejudice under *Padilla* is *not* whether a non-citizen defendant would have been deported anyway; instead, the applicable test is whether "a decision to reject the plea bargain would have been rational under the circumstances."[13] Part IV adds that the contention that *Padilla* does not protect undocumented defendants undermines the underlying purpose of the right to effective assistance of counsel itself: to prevent inaccurate convictions. Part V observes that *Padilla* held without equivocation that: "It is our responsibility under the Constitution to ensure *that no criminal defendant—whether a citizen or not*—is left to the 'mercies of incompetent counsel.'"[14] Because this holding expressly includes undocumented defendants, Part V contends, lower courts lack the authority to ignore it. In closing, Part VI concludes that future courts should reject the prevailing view that *Padilla* does not apply to undocumented defendants and should

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[9] Joseph v. State, 107 So.3d 492, 492 (Fla. Dist. Ct. App. 2013).
[10] Garcia v. State, 425 S.W.3d 248, 261 n.8 (Tenn.2013).
[11] Rosario v. State, 165 So. 3d 672, 672 (Fla. Dist. Ct. App. 2015; citing Ibarra v. State, 125 So.3d 820, 821 (Fla. 4th DCA 2013)).
[12] *Garcia,* 425 So.3d at 261 n.8.
[13] *Padilla*, 559 U.S. at 372.
[14] *Id.* at 374 (emphasis added).

hold instead that undocumented defendants' *Padilla* claims must be carefully reviewed for prejudice on a case-by-case basis.

I. Authorities Concluding that *Padilla* Does Not Apply to Undocumented Defendants

Despite the ostensible clarity of *Padilla*'s charge that "[i]t is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel,'" a rapidly growing line of authority has embraced some variation of the holding that "*Padilla* applies only to those who were present in the country lawfully at the time of the plea."[15] Notably, this view also is not quarantined to specific circuits, geographical locales, or even ideologies. In virtually every instance, reviewing authorities have concluded that because "a guilty plea does not increase the risk of deportation" for undocumented defendants, such defendants are categorically incapable of establishing the legal "prejudice" that *Padilla* requires in order to obtain relief.[16]

Perhaps a symptom of "the immigration system's potential tolerance for representation that fails to meet any minimum bar of competence,"[17] or, conceivably, an offshoot of the judiciary's traditional "refus[al] to engage in the constitutional analysis that would apply if [a law] affected citizens,"[18] current proponents of the view that *Padilla* does not apply to undocumented defendants span the nation. Authorities embracing this view include the U.S. Court of Appeals for the Fourth[19] and Eleventh[20] Circuits, U.S. District Courts in Georgia,[21] Hawaii,[22] Illinois,[23] Kansas,[24] Minnesota,[25] Nebraska,[26]

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[15] *Joseph*, 107 So.3d at 492.

[16] *Garcia,* 425 So.3d at 261 n.8.

[17] Ingrid V. Eagly, *Gideon's Migration*, 122 Yale L.J 2282, 2311 (2013).

[18] Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 Temp. L. Rev. 637, 653 (2012).

[19] *See* United States v. Sinclair, No. 409-4906, 2011 WL 263683, at *675 (4th Cir. Jan. 28, 2011) (holding "Sinclair's substantial rights were unaffected because he was an illegal alien and therefore his guilty plea had no bearing on his deportability").

[20] *See* Gutierrez v. United States, No. 13-10990, 560 Fed. Appx. 924, at *927 (11th Cir. Mar. 26, 2014) *cert. denied*, 135 S. Ct. 302 (2014).

[21] *See* Cadet v. United States, No. 1:11-CR-113-WBH-LTW, 2012 WL 7061444, at *2 (N.D. Ga. May 29, 2012) report and recommendation adopted as modified, No. 1:11-CR-113-WBH, 2013 WL 504821 (N.D. Ga. Feb. 8, 2013) ("Movant cannot show that he was prejudiced by Moran's allegedly erroneous advice that he would not be deported if he pled guilty because Movant was subject to deportation as an illegal alien regardless of whether he was convicted in this case. Movant was not a legal resident of the U.S. when he committed the crime to which he pled guilty, (Movant's Pretrial Services Report, Feb. 22, 2011; Movant's PSR.) Movant therefore was subject to deportation even if he had been acquitted after a trial or even if he had never been indicted. Thus, Moran's allegedly erroneous advice that Movant contends caused him to plead guilty could not have prejudiced him because he faced deportation no matter what happened in this case."); Limones v. United States, 2011 WL 1157371, at *5 (N.D. Ga., Mar. 29, 2011), also citing United States v. Gutierrez Martinez, Nos. 10–2553–ADM, 07–91(5)–ADM/FLN, 2010 WL 5266490, at *4 (D. Minn. Dec. 17, 2010) (holding no showing of prejudice based on attorney's failure to warn of deportation conse-

and Texas,[27] Texas's highest criminal court,[28] Tennessee's Supreme Court[29] and its Court of Criminal Appeals,[30] nearly half a dozen Florida courts,[31] one New York state trial court,[32] Attorneys General representing the States of Massachusetts,[33] Washington,[34] Wisconsin[35] and Texas,[36] and, finally, "[a]t

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quences where, inter alia, defendant was an illegal alien and would have been deported anyway).

[22] *See* United States v. Aceves, No. CIV. 10-00738 SOM, 2011 WL 976706, at *5 (D. Haw. Mar. 17, 2011) (not designated for publication) (holding that § 2255 movant who was an illegal alien "would not have been transformed into a legal resident . . . even if he had [gone to trial and] been acquitted" and, thus, "it was not his conviction that made him removable").

[23] *See* Mudahinyuka v. United States, No. 10 C 5812, 2011 WL 528804, at *4 (N.D. I11. Feb. 7, 2011) (not designated for publication).

[24] *See* United States v. Perea, Nos. CIV.A. 11-2218-KHV, 08–20160–08–KHV, 2012 WL 851185, at *5 n.4 (D. Kan. Mar. 8, 2012) (not designated for publication) ("In light of the fact that defendant was already subject to deportation [as an illegal alien], he has not shown how he could have rationally rejected the plea agreement, proceeded to trial and subjected himself to a maximum term of life in prison.");

[25] *See Gutierrez Martinez*, 2010 WL 5266490, at *4 (D. Minn. Dec. 17, 2010) (finding no prejudice where the defendant was an illegal alien subject to deportation prior to and after the guilty plea).

[26] *See* United States v. Perez, No. 8:02CR296, 2010 WL 4643033, at *3 (D. Neb. Nov. 9, 2010) (holding no prejudice where defendant was already subject to deportation); United States v. Juan Correa–Gutierrez, 8:08CR267, 2011 U.S. Dist. LEXIS 53017, at *3 (D. Neb. May 17, 2011).

[27] *See* United States v. Serrato, Nos. H–12–2018, H–11–0169, 2012 WL 2958249, at *1, (S.D. Tex. July 18, '2012) (holding that "[d]efendant's substantial rights were unaffected by counsel's alleged failure to advise because Defendant is an illegal alien and therefore his guilty plea had no bearing on his deportability").

[28] *See* State v. Guerrero, 400 S.W.3d 576, 588–89 (Tex. Crim. App. 2013) ("Unlike Jose Padilla, appellee was an undocumented immigrant and was deportable for that reason alone, both in 1998 and today. Had appellee gone to trial with counsel and been acquitted he would not have been transformed into a legal resident. He could have been deported immediately after walking out of the criminal courthouse. The prospect of removal therefore could not reasonably have affected his decision to waive counsel and plead guilty.").

[29] *See Garcia*, 425 S.W.3d at 261 n.8 ("[C]ourts have consistently held that an illegal alien who pleads guilty cannot establish prejudice, even if defense counsel failed to provide advice about the deportation consequences of the plea as *Padilla* requires, because a guilty plea does not increase the risk of deportation for such a person.").

[30] *See* Rigoberto v. State, No. M2011–02690–CCA–R3–PC, 2012 WL 6115530, *6 (Tenn. Crim. App. Dec. 10, 2012) ("[An] illegal alien . . . deportable for that reason alone . . . cannot show prejudice because he cannot demonstrate that his deportability status was a consequence of his guilty pleas.").

[31] *See Rosario*, 2015 WL 71820 at *1 ("[I]n a situation where a defendant seeks to withdraw a plea based on Padilla, and alleges lack of knowledge of the risk of deportation, prejudice cannot be established if the defendant was present in the country unlawfully or was otherwise subject to removal."); Ibarra v. State, 125 So. 3d 820, 821 (Fla. Dist. Ct. App. 2013); Ioselli v. State, 122 So.3d 388, 390 (Fla. Dist. Ct. App. 2013); Joseph v. State, 107 So.3d 492 (Fla. Dist. Ct. App. 2013).

[32] *See* People v. Garcia, 32 Misc. 3d 1232(A), 936 N.Y.S.2d 60, at *3–4 (Sup. Ct. 2011) ("At the time the defendant entered her plea she was not, and had never been, a lawful resident of the United States . . . . Accordingly, it is apparent that even had the defendant chosen to proceed to trial and been acquitted, she would nonetheless have been subject to removal.")

[33] *See* Brief for Appellee at 28, Commonwealth v. Rua, No. 2014-P-1623, 2015 WL 1259975 (Mass. App. Ct. 2015) ("[S]tate and federal 'courts have consistently held that an illegal alien who pleads guilty cannot establish prejudice." . . . [A]n "undocumented defendant" cannot establish prejudice if he has 'offered no evidence that his fate would have been different if defense counsel had' secured a different disposition.") (quoting Com. v. Marinho,

least one scholar."[37] In fact, at present, the conclusion that undocumented defendants are not entitled to relief under *Padilla* appears to be all but unanimous across the courts that have considered it, with only courts in Massachusetts,[38] Colorado,[39] and, to a lesser extent, California,[40] acknowledging even the *possibility* that undocumented defendants could be capable of bringing successful *Padilla* claims. To date, only a single New York trial

981 N.E.2d 648, 662 (Mass. 2013). The author is aware that Massachusetts refers to itself as a commonwealth, not a state.

[34] *See* Brief for Respondent at 13, State of Washington v. Ramos, No. 90549-5, 2015 WL 1265723 (Wash. Feb. 5, 2015) ("[P]etitioner has not shown that he was lawfully in the United States at the time of his guilty plea. As such, he has failed to establish the applicability of Padilla.").

[35] *See* Brief for Plaintiff-Respondent at 15–16, State of Wisconsin v. Ortiz-Mondragon, No. 2013AP2435-CR, 2015 WL 790083 (Wis. Feb. 9, 2015) ("If Ortiz-Mondragon was in the United States illegally or otherwise subject to immigration action, he would not be able to establish prejudice under Strickland and Padilla."); Brief for Plaintiff-Respondent-Petitioner at 21, State of Wisconsin v. Shata, No. 2013AP1437-CR, 2015 WL 566330 (Wis. Jan. 27, 2015) ("If . . . Shata is in the United States illegally or otherwise subject to deportation, he cannot establish prejudice under *Strickland* and *Padilla*.").

[36] *See* Merits Brief for State of Texas at 11, Ex Parte Paulino VELASQUEZ-HERNANDEZ, 2014 WL 1092811 (Tex.App. Mar. 17, 2014) ("[A]pplicant was already subject to removal at the time of his plea and has failed to establish otherwise. Thus *Padilla* does not control.").

[37] *See Reyes*, *supra* note 18 at 695 n.457 ("At least one scholar has already suggested that the holding of Padilla has little applicabililty [sic] to undocumented noncitizens") (citing César Cuauhtémoc García Hernández, Padilla v. Kentucky*'s Inapplicability to Undocumented and Non-Immigrant Visitors*, 39 RUTGERS L. REC. 47, 52 (2012) ("Padilla's advice mandate . . . does not apply to undocumented individuals and non-immigrants facing criminal charges. . . . [An attorney's] failure to provide such advice [to undocumented individuals and non-immigrants facing criminal charges] would be harmless, since the end result – forced removal - would be the same."). *See also* Craig Estinbaum, Effective Plea Bargains For NonCitizens, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2498701 ("Even among persons without legal status who have some cognizable claim for immigration relief, their immigration statuses are uncertain at best.").

[38] *See* Com. v. Marinho, 981 N.E.2d 648, 662 (Mass. 2013) ("The reality of the defendant's status as an undocumented person living in the United States was that he was deportable per se on account of his unlawful status."); *Reyes*, *supra* note 18 at 662 n.21 ("[However], [o]ur consideration of the defendant's undocumented status in no way implies that an undocumented defendant can never successfully state a claim of ineffective assistance of counsel. New avenues may open in the ever-changing field of immigration law that change the legal landscape for undocumented people. We simply ask that undocumented defendants address the issue of their particular status and how different performance of counsel could have led to a better outcome.").

[39] *See* People v. Rivas-Landa, No. 13SC663, 2014 WL 505209, at *13 (Colo. App. 2013), *available at* http://immigrantdefenseproject.org/wp-content/uploads/2012/04/Rivas-Landa.pdf, *archived at* perma.cc/LS8V-SGLT ("We conclude that defendant has asserted facts that if true would satisfy the prejudice prong of the Strickland standard. Therefore, she is entitled to a hearing on her motion.").

[40] *See* People v. Richey, No. G046919, 2013 WL 1402354, at *3 (Cal. Ct. App. Apr. 8, 2013) (Holding that because defendant was undocumented, "she would still be subject to deportation due to her status as an undocumented immigrant. Therefore, we fail to see how she could have been prejudiced by her attorney's actions." but citing *Marinho*, 981 N.E.2d at 662 n.21, for the proposition that such a claim may be possible).

court has ever actually afforded relief to an undocumented defendant based on *Padilla*.[41]

Surprisingly, the conclusion that *Padilla* does not apply to undocumented defendants even enjoys support from the lawyers who argued *Padilla* itself—giving the appearance that this view spans the ideological spectrum as well.[42] Despite such an impressive array of authorities concluding that *Padilla*'s protections do not extend to undocumented defendants, however, for the reasons provided in Parts II-V of this Article, every authority that has embraced this view is mistaken, and plainly so.

II. A Guilty Plea Frequently Increases the Risk That an Undocumented Defendant Will Be Deported

As catalogued above, an extensive combination of courts, academics, and even prominent immigrants' rights advocates have concluded that undocumented defendants are categorically incapable of proving prejudice under *Padilla*. Specifically, these authorities have reasoned that because undocumented defendants will be deported regardless of the outcome of their criminal cases, whether or not a defendant received incompetent immigration counsel "would [inevitably] be harmless, since the end result – forced removal – would be the same."[43]

Strikingly, however, the assumption that all undocumented defendants will always be deported whether or not they plead guilty is based on a premise that is both factually flawed and legally misguided. Most troublingly, it fails to recognize that a tremendous number of undocumented immigrants are eligible for relief from deportation—at least provided that they steer clear of certain criminal convictions. For example, all undocumented immigrants are potentially eligible for relief from deportation through prosecutorial discretion no matter their immigration status. Additionally, the overwhelming majority of undocumented immigrants are facially eligible to apply for relief from deportation under the Convention Against Torture. Furthermore, some undocumented immigrants are eligible for an "adjustment of status" that would render them non-deportable, while others are

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[41] *See* People v. Burgos, 950 N.Y.S.2d 428, 441–42 (N.Y. Gen. Term 2012) ("[I]n this case, there is no question that deportation was a direct consequence of defendant's guilty plea. Defendant's plea to a drug felony immediately and permanently deprived him of any avenue by which he could avoid deportation namely, by seeking an adjustment of status to that of an LPR or by cancellation of removal. The elimination of defendant's eligibility for these remedies rendered defendant subject to deportation without recourse, and therefore had direct deportation consequences for him. Thus, defendant's claim in this case is within the scope of Padilla.").

[42] Brief of Petitioner at 17-18, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) No. 08-651, 2009 WL 2917817 at 17 ("[O]nly lawfully admitted immigrants can plausibly allege prejudice from conviction of a deportable offense. Illegal aliens generally cannot, absent a colorable pending or future claim to legal immigration status, because illegal presence is grounds for removal independent of the conviction.").

[43] César Cuauhtémoc García Hernández, *Padilla v. Kentucky's Inapplicability to Undocumented and Non-Immigrant Visitors*, 39 Rutgers L. Rec. 47, 52 (2012).

eligible for relief from deportation if they fall into one of several specifically enumerated federal exemptions. Additionally, as a matter of current executive policy, the present presidential administration has exempted approximately 4.9 million undocumented immigrants from deportation proceedings as a matter of course.

Crucially, however, a criminal conviction can compromise an undocumented defendant's opportunity to avoid being deported in each of these situations. Accordingly, accepting a guilty plea on the basis of deficient immigration counsel can frequently cause an undocumented defendant to suffer irreversible legal prejudice with respect to his or her immigration status. Thus, it is not remotely true that "a guilty plea does not increase the risk of deportation" for undocumented defendants.[44] To the contrary, this conclusion is demonstrably false with respect to millions of undocumented immigrants in the United States, and with respect to a massive slate of approximately 4.9 million undocumented immigrants in particular.[45]

A. All Undocumented Immigrants are Always Eligible for Discretionary Relief

In the United States, the deportation process exists wholly within the province of the federal government, and the authority to institute deportation proceedings is vested exclusively in the Executive Branch.[46] Additionally, as a general matter, longstanding precedent entrusts to the Executive Branch's "absolute discretion" all decisions "not to prosecute or enforce, whether through civil or criminal process."[47] Accordingly, all undocumented immigrants are potentially eligible for relief from deportation through the Executive Branch's use of prosecutorial discretion.[48]

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[44] *Garcia*, 425 S.W.3d at 262.

[45] *Executive Actions on Immigration,* U.S. Citizenship and Immigration Services, (Apr. 15, 2015), *available at* http://www.uscis.gov/immigrationaction, *archived at* https://perma.cc/J8YY-7EUP ("Preliminary estimates show that roughly 4.9 million individuals may be eligible for the initiatives announced by the President.").

[46] *See, e.g.,* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) ("The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come into this country, and to have its declared policy in that regard enforced exclusively through executive orders, without judicial intervention, is settled by our previous adjudications"). *See also* 8 U.S.C. § 1103.

[47] Heckler v. Chaney 470 U.S. 821, 831 (1985) (citing United States v. Batchelder, 442 U.S. 114, 123-124, (1979); United States v. Nixon, 418 U.S. 683, 693 (1974); Vaca v. Sipes, 386 U.S. 171, 182 (1967); Confiscation Cases, 7 Wall. 454 (1869)). With respect to an *agency*'s decision not to initiate a prosecution, however – as compared with a "decision of a prosecutor in the Executive Branch not to indict" – the scope of executive discretion is only subject to a "general presumption of unreviewability" that may not be absolute from a constitutional perspective. *Id.* at 832-34. As a matter of statutory law, however, Congress has vested all enforcement authority over immigration enforcement within the Executive Branch as well. *See generally*, 8 U.S.C. § 1103.

[48] *Reyes*, *supra* note 18, at 692 ("'Deportation law allows immense prosecutorial discretion.'" (quoting Daniel Kanstroom, *Deportation Nation: Outsiders in American History*, 230 (2007) (internal alteration omitted)); *Padilla*, 559 U.S. at 363–64 ("Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these

Crucially, however, a criminal conviction significantly decreases the likelihood that the Executive Branch will exercise its prosecutorial discretion to close or decline to institute deportation proceedings.[49] Thus, with respect to undocumented defendants who would or could have benefited from prosecutorial discretion absent a criminal conviction, the notion that "a guilty plea does not increase the risk of deportation" relief is false.[50]

Notably, under current executive policy, the exercise of prosecutorial discretion also is not merely an option; instead, it is an affirmative obligation with regard to a large subset of the undocumented immigrant population.[51] Thus, even if a defendant is legally deportable, as a matter of practical reality, a defendant "will not be deported if the immigration authorities decide not to place him in removal proceedings."[52] Consequently, there is never a guarantee that *any* undocumented defendant—much less *every* undocumented defendant—will be deported regardless of the outcome of his or her criminal case.[53]

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amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses."); *Shata*, 2015 WL 4112673 at *14 ("[P]rosecutorial discretion and the current administration's immigration policies provide possible avenues for deportable aliens to avoid deportation."). *See also* Jeh Charles Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, at 2 (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf, *archived at* https://perma.cc/R393-HSUX ("Due to limited resources, DHS . . . cannot respond to all immigration violations or remove all persons illegally in the United States. . . . DHS may exercise prosecutorial discretion at any stage of an enforcement proceeding . . . ").

[49] Memorandum from the Director of U.S. Immigration and Customs Enforcement to All Field Office Directors, (June 17, 2011) (on file with the U.S. Immigration and Customs Enforcement), *available at* https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf, *archived at* https://perma.cc/2TJR-3HAH ("When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants").

[50] *Garcia*, 425 S.W.3d at 262 n.8.

[51] *See Shata*, 868 N.W.2d at 109 ("Indeed, the secretary of the United States Department of Homeland Security ("DHS") recently explained that the DHS, which is 'responsible for enforcing the nation's immigration laws' *must exercise prosecutorial discretion* in the enforcement of the law." Jeh Charles Johnson, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at 2 (Nov. 20, 2014) (emphasis added), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf *archived at* http://perma.cc/WA6A-45ET. ("Due to limited resources, DHS . . . cannot respond to all immigration violations or remove all persons illegally in the United States."); *Shata*, 868 N.W.2d at 109 ("DHS may exercise prosecutorial discretion at any stage of an enforcement proceeding."); *see also* Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), *available a*t http:// www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf, *archived at* http://perma.cc/4TAZ-2GLH.

[52] *Id*. at 780.

[53] *Padilla*, 559 U.S. at 363–64 ("Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses."); *Shata*, 868 N.W.2d at 108 ("Prosecutorial discretion and the current administra-

Given this framework, concluding that an undocumented defendant cannot demonstrate prejudice under *Padilla* because he or she would have been deported anyway represents little more than judicial fortune-telling.[54] As such, no court—and especially no state court—should be in the business of foreclosing a defendant's right to effective assistance of counsel based on mere speculation that the defendant would ultimately have been deported no matter what.[55] Instead, if a defendant can make a credible showing that he or she could have benefited from prosecutorial discretion absent a criminal conviction, then such a showing may well be sufficient to demonstrate that a decision to reject a plea bargain would have been rational under the circumstances.

B. Most Undocumented Immigrants are Eligible to Apply for Relief from Deportation Under the Convention Against Torture

In addition to the ever-present potential to avoid deportation through prosecutorial discretion, virtually all undocumented defendants are facially eligible to apply for relief from deportation under the United Nations Convention Against Torture.[56] The United States became a signatory to the Convention Against Torture in 1988,[57] and Congress subsequently codified its mandates through implementing legislation.[58] In pertinent part, "Article 3 of the Convention provides that '[n]o State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.'"[59] Thus, as a general matter, any undocumented defendant who qualifies for relief under the Convention Against Torture will not be deported.

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tion's immigration policies provide possible avenues for deportable aliens to avoid deportation.").

[54] This, of course, does not relieve defense counsel of his or her obligation to provide non-defendants competent immigration advice concerning the likelihood of any particular outcome. Even in the face of uncertainty, a generalized warning is plainly insufficient when professional norms call for greater specificity.

[55] *See, e.g.*, DeBartolo v. United States, 790 F.3d 775, 780 (7th Cir. 2015) (noting, *inter alia*, "the disarray in the enforcement of U.S. immigration law" and the "significant under-enforcement of the immigration laws" against individuals who are legally deportable).

[56] The Department of Homeland Security takes the position that as a legal matter, the Convention Against Torture does not afford any individual "relief" from removal because it merely imposes a restriction on the place to which an alien may be removed and does not constitute affirmative permission to remain in the United States. Generally speaking, however, the Convention Against Torture is thought of as providing "relief" by attorneys and defendants alike. Admittedly, however, such relief is rare: in practice, less than 1% of noncitizens secure Convention Against Torture relief in immigration court.

[57] *See Zheng v. Ashcroft*, 332 F.3d 1186, 1192 (9th Cir. 2003) ("President Reagan signed the Convention on April 18, 1988.")

[58] *See* § 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998; 8 C.F.R. § 1208.18 (2015).

[59] *Zheng*, 332 F.3d at 1198 n.7 (quoting Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 102 Stat. 382, 1465 U.N.T.S. 85 at 1028).

Significantly, however, "8 U.S.C. § 1252(a)(2)(C)[,] . . . [which is] sometimes known as the 'criminal alien bar,' precludes judicial 'review [of] any final order of removal,' including applications for [Convention Against Torture] relief, 'against an alien who is removable by reason of having committed' an aggravated felony."[60] Consequently, the immigration status of an undocumented defendant who is eligible for Convention Against Torture relief is plainly prejudiced under circumstances when he or she accepts a guilty plea to an aggravated felony. Thus, the conclusion that "a guilty plea does not increase the risk of deportation"[61] for an undocumented defendant who would otherwise have been eligible for relief under the Convention Against Torture is demonstrably erroneous as well.

C. Many Undocumented Immigrants have Individualized Circumstances that Render Them Non-Deportable

Notably, many undocumented individuals are also eligible to become Legal Permanent Residents by seeking an "adjustment" of their immigration status—particularly if they have a close family member who is a U.S. Citizen or a Legal Permanent Resident.[62] Significantly, however, such "[a]djustment is precluded for individuals convicted of a wide range of crimes."[63] Consequently, to avoid being deported, it is essential for such individuals to steer clear of certain criminal convictions. Thus, undocumented defendants who would have qualified to adjust their immigration status but for having entered a guilty plea suffer clear and demonstrable prejudice as well.[64]

Further, in many specific instances,[65] an undocumented defendant who would otherwise be deportable can also avoid deportation if he or she:

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[60] *Gallimore v. Holder*, 715 F.3d 687, 690 (8th Cir. 2013) (quoting *Brikova v. Holder*, 699 F.3d 1005, 1008 (8th Cir. 2012)).

[61] *Garcia*, 425 S.W.3d at 262 n.8.

[62] U.S. Citizenship and Immigration Services, Green Card for an Immediate Relative of a U.S. Citizen, http://www.uscis.gov/green-card/green-card-through-family/green-card-immediate-relative-us-citizen (last visited Nov. 2, 2015), *archived at* http://perma.cc/WX28-AV6J; Cuauhtémoc García Hernández, *supra* note 43, at 52 (noting that INA § 245(a)(2011) and 8 U.S.C. § 1255(a) (2011) "authoriz[e] the adjustment of status to that of lawful permanent resident to noncitizens who have been admitted into the United States, a category that includes non-immigrants")); INA § 245(i), 8 U.S.C. § 1255(i) (providing the same for some entrants without inspection).

[63] Cuauhtémoc García Hernández, *supra* note 43, at 52 (citing INA § 245(a), 8 U.S.C. § 1255(a); INA § 212(a)(2) (2010); 8 U.S.C. § 1182(a)(2), (2010)).

[64] Again, however, establishing prejudice under *Padilla* does *not* require establishing prejudice to one's immigration status; if a defendant would have rejected a plea and gone to trial had he been privy to competent counsel, then he has met the standard for ineffective assistance of counsel.

[65] *See* Immigrant Legal Resource Center, *§ N.17 Immigration Relief Toolkit For Criminal Defenders*, http://www.ilrc.org/files/documents/ilrc-relief_toolkit-2013-02_22.pdf, *archived at* http://perma.cc/CN5A-KRGT.

(1) was a victim of certain crimes, especially crimes involving human trafficking and sexual violence;[66]
(2) has a child or a parent who has been battered or abused by a U.S. citizen or a Legal Permanent Resident;[67]
(3) has lived in the United States for at least ten consecutive years and has a parent, spouse or child who is a Legal Permanent Resident;[68]
(4) was a victim of rape, incest, domestic violence, assault, kidnapping, false imprisonment, extortion, obstruction of justice, sexual assault, or abuse and cooperates in the investigation or prosecution of the crime;[69]
(5) is under the jurisdiction of a delinquency, dependency, or probate court and cannot be returned to a parent, either in the United States or elsewhere, due to abuse, neglect or abandonment;[70]
(6) is eligible to apply for legal permanent residency on a family or Violence Against Women Act visa and is inadmissible for a specified low-level crime;[71]
(7) has been pardoned for an offense affecting his or her immigration status,[72]
(8) has received deportation relief as a result of a civil settlement,[73] or
(9) satisfies other statutory requirements for cancellation of removal.[74]

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[66] *See Victims of Human Trafficking & Other Crimes*, U.S. Citizenship and Immigration Services, (Dec. 10, 2014), *available at* http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes, *archived at* https://perma.cc/GCD6-3ZSA.

[67] *See Green Card for an Immediate Relative of a U.S. Citizen*, U.S. Citizenship and Immigration Services, (Feb. 18, 2016), https://www.uscis.gov/green-card/green-card-through-family/green-card-immediate-relative-us-citizen, *archived at* https://perma.cc/DY42-NCDY.

[68] *See* INA §240A(b); *see also Cancelation of Removal for Non-Permanent Residents*, University of Miami School of Law Immigration Clinic, *available at* http://media.law.miami.edu/clinics/pdf/2013/immigration-Cancellation-Removal-non-LPR.pdf, *archived at* https://perma.cc/8RHG-74VV.

[69] *U Visa Law Enforcement Certification Resource Guide*, The Department of Homeland Security, *available at* https://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf ("Individuals currently in removal proceedings or with final orders of removal may still apply for a U visa. Absent special circumstances or aggravating factors, it is against U.S. Immigration and Customs Enforcement (ICE) policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime."), *archived at* https://perma.cc/YUR2-KZWR.

[70] *See* INA § 203(b)(4); INA § 101(a)(27)(J); *see also Eligibility Status for SIJ,* U.S. Immigration Services, (June 12, 2011), *available at* https://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij, *archived at* https://perma.cc/89PY-WYAH.

[71] *See* INA 212(h)(2); *see also* Practice Advisory, Legal Action Center, American Immigration Council, §212(h) Eligibility: Case Law and Potential Arguments, *available at* http://www.legalactioncenter.org/sites/default/files/212elig.pdf, *archived at* https://perma.cc/M6BP-GMTT.

[72] *See* Josh Gerstein, *Obama Issues Rare Immigration-Related Pardon*, POLITICO (March 2, 2013), http://www.politico.com/blogs/under-the-radar/2013/03/obama-issues-rare-immigrationrelated-pardon-158297.html, *archived at* http://perma.cc/8PMF-U8UP.

[73] *See* Julia Preston, *Settlement for a Shackled Pregnant Woman*, N.Y. TIMES, October 18, 2013, http://www.nytimes.com/2013/10/18/us/settlement-for-a-shackled-pregnant-woman.html?_r=0 *archived at* perma.cc/2QEQ-XKDF; http://nashvillecitypaper.com/content/city-news/federal-judge-recommends-visa-juana-villegas, *archived at* http://perma.cc/P6P2-NVC4.

[74] *See* 8 U.S.C.A. § 1229b (West 2008). To be eligible for cancellation of removal, one would have had to show: (1) he had been physically present in the United States for a continu-

Importantly, however, depending on a defendant's individual circumstances, a conviction for a certain criminal offense may permanently disqualify the defendant from relief to which he or she would otherwise have been eligible.[75] Thus, whether a guilty plea increases a particular defendant's risk of being deported varies widely based on the circumstances of the defendant's case. As such, the unqualified conclusion that "a guilty plea does not increase the risk of deportation"[76] for any undocumented defendant in any case is simply wrong. Instead, determining whether a guilty plea has prejudiced a specific defendant's immigration status requires careful consideration on a case-by-case basis.

D. Under Current Federal Executive Policy, Millions of Undocumented Immigrants have been Exempted from Deportation

Notably, under current federal executive policy, millions of undocumented immigrants have also been wholly exempted from deportation as a matter of course.[77] Most significantly, since 2010, more than two million undocumented individuals have been granted indefinite immunity from deportation under President Obama's Deferred Action for Childhood Arrivals (DACA) program.[78] Importantly, however, one of the many criteria for DACA eligibility is that applicants "[h]ave not been convicted of a felony, significant misdemeanor, [or] three or more other misdemeanors[.]"[79] Consequently, any undocumented – but DACA-eligible – defendant who pleads guilty to a felony, a significant misdemeanor, or any third misdemeanor after receiving incompetent immigration advice will quickly discover just how wrong courts have been in concluding that "a guilty plea

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ous period of not less than ten years; (2) he was a person of good moral character during such period; (3) he had not been convicted of certain crimes; and (4) removal would result in exceptional and unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. Torres v. United States, No. C10-5896BHS, 2011 WL 5025148, at *6 (W.D. Wash. Oct. 21, 2011), *aff'd*, 563 Fed. Appx. 538 (9th Cir. 2014).

[75] *See, e.g.*, INA §212(a)(2); §237(a)(2); §237(a)(3); INA 212(h)(2); 8 C.F.R. 1212.7(d); Matter of Jean, 23 I&N Dec. 373, 383 (BIA 2002).

[76] Garcia v. State, 425 S.W.3d 248, 266 n.8 (Tenn. 2013).

[77] Memorandum from Secretary of Homeland Security Janet Napolitano to Acting Commissioner U.S. Customs and Border Protection David Aguilar (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf, *archived at* http://perma.cc/KZ95-36E5.

[78] Center for American Progress, *How DACA Has Improved the Lives of Undocumented Young People*, *available at* https://www.americanprogress.org/issues/immigration/report/2014/11/19/101868/how-daca-has-improved-the-lives-of-undocumented-young-people/, *archived at* https://perma.cc/H9Z2-RJYP ("Around 1.2 million undocumented young people were immediately eligible for the DACA program when it began, but an additional 426,000 could apply if they met further qualifications. Another 473,000 children, who are currently younger than 15 years old, will age into the program.").

[79] Department of Homeland Security, Deferred Action for Childhood Arrivals *available at* http://www.dhs.gov/deferred-action-childhood-arrivals (last visited Nov. 2, 2015), *archived at* http://perma.cc/6WJA-K3PE.

does not increase the risk of deportation" for any undocumented person.[80] Moreover, if the Obama Administration is successful in obtaining judicial approval to expand DACA to include undocumented parents of U.S. citizens and legal permanent residents as well, then this concern may soon apply to as many as 4.9 million people.[81]

Considering the many forms of deportation relief that are available to undocumented defendants, it is clear that the categorical assumption that "a guilty plea does not increase the risk of deportation" for undocumented defendants[82] is both legally and factually mistaken in many instances. To the contrary, for any of the many reasons expressed above, "it is not at all certain that [a particular undocumented defendant] will *ever* be deported"[83] in *any* instance. Moreover, in nearly all cases, a guilty plea increases the likelihood that an undocumented defendant will be subjected to deportation proceedings, creating a strong possibility that incompetent immigration counsel in a given case could have been prejudicial.

III. The Test for Prejudice Under *Padilla* Is *Not* Whether a Defendant Would Have Been Deported Anyway. Instead, It Is Whether Rejecting the Plea Bargain Would Have Been Rational Under the Circumstances

If an undocumented defendant is either affirmatively misadvised or is not provided any advice at all concerning the effect of a guilty plea on his or her deportability, then there is little doubt that *Strickland*'s first prong is satisfied.[84] *Padilla*'s holding in this regard was unambiguous.[85] On this

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[80] *Garcia,* 425 S.W.3d at 266 n.8.

[81] U.S. Citizenship and Immigration Services, Executive Actions on Immigration *available at* http://www.uscis.gov/immigrationaction (last visited Nov. 2, 2015), *archived at* http://perma.cc/2M94-6JNN.

[82] *Garcia,* 425 S.W.3d at 266 n.8.

[83] Gutierrez v. United States, No. 1:07-CR-0051-JEC-RGV, 2013 WL 593796, at *5 (N.D. Ga. Feb. 15, 2013) (emphasis added), *aff'd*, 560 Fed. Appx. 924 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 302, 190 L. Ed. 2d 219 (2014).

[84] *Padilla*, 559 U.S. at 370 ("[T]here is no relevant difference 'between an act of commission and an act of omission' in th[e] context [of an ineffective assistance of counsel claim]. . . . A holding limited to affirmative misadvice would invite [ ] absurd results."). *See also Padilla* 559 U.S. 356, 375–84, (Alito, J., concurring) ("[A] criminal defense attorney fails to provide effective assistance within the meaning of *Strickland* if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. . . . several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.") (citation omitted). *Brown v. Perini*, 718 F.2d 784, n.789 (6th Cir. 1983) (stating "[w]hen the misadvice of the lawyer is so gross as to amount to a denial of the constitutional right to the effective assistance of counsel, leading the defendant to enter an improvident plea, striking the sentence and permitting a withdrawal of the plea seems only a necessary consequence of the deprivation of the right to counsel"). *Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988) abrogated by *Padilla*, 559 U.S. 356 (2010) ("[G]ross misadvice concerning parole eligibility can amount to ineffective assistance of counsel.").

[85] *Id.*

point—even among those courts that have concluded that *Padilla* does not apply to undocumented defendants—there is no dispute.[86]

Instead, courts have expressed skepticism about undocumented defendants' ability to satisfy *Strickland*'s second prong – legal prejudice – with most concluding that undocumented defendants are categorically incapable of demonstrating prejudice as a result of having received incompetent immigration counsel.[87] Specifically, these courts have reasoned that because undocumented defendants are subject to being deported regardless of a criminal conviction, they can never demonstrate that they were prejudiced as a consequence of having received sub-standard immigration advice. Given the multitude of scenarios in which an undocumented defendant might reasonably have eschewed a plea bargain and proceeded to trial but for having received incompetent immigration counsel, however, this reasoning is unpersuasive. Accordingly, it should be rejected outright.

In typical situations, the test for prejudice in the context of a plea bargain is whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial."[88] In the context of deficient immigration counsel, however, the test is whether "a decision to reject the plea bargain would have been rational under the circumstances."[89] It is not yet clear whether, or to what extent, there is a substantive difference between these standards,[90] and indeed, the Government occasionally "wobbles between the two standards for allowing the withdrawal of one's guilty plea upon belated discovery of the deportation threat."[91] What is clear, however, is that the test for prejudice under *Padilla* is *not* whether a defendant would have been deported anyway. Instead, it is whether the defendant would rationally have rejected the offered plea bargain and either proceeded to trial[92] or negotiated

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[86] *See, e.g., Garcia* 425 S.W.3d at 261 n.8 (Tenn. 2013) ("Defense counsel's obligation under *Padilla* to advise about the deportation consequences of a guilty plea does not depend upon the defendant's legal or illegal alien status.").

[87] *See, e.g., id.* ("However, courts have consistently held that an illegal alien who pleads guilty cannot establish prejudice, even if defense counsel failed to provide advice about the deportation consequences of the plea as *Padilla* requires, because a guilty plea does not increase the risk of deportation for such a person.").

[88] Hill v. Lockhart, 474 U.S. 52, 59 (1985).

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

[90] *Compare* DeBartolo v. United States, No. 14-3579, 2015 WL 3915604, at *2 (7th Cir. June 26, 2015) ("If the two verbal formulas are substantively different, the difference is that the "reasonable probability" formula asks only what the defendant would have done had he known he faced deportation, while the 'rational under the circumstances' formula asks what he'd have done were he a reasonable person."), *with* Gutierrez v. United States, 560 Fed. Appx. 924, 927 (11th Cir.) *cert. denied*, (2014) (holding that a defendant must satisfy both formulas).

[91] *DeBartolo*, 2015 WL 3915604 at *2.

[92] United States v. Orocio, 645 F.3d 630, 643 (3d Cir.2011) ("The Supreme Court, however, requires only that a defendant could have rationally gone to trial in the first place, and it has never required an affirmative demonstration of likely acquittal at such a trial as the sine qua non of prejudice. *See Hill*, 474 U.S. at 59. To the extent that we have previously interpreted Hill to require such a showing, the Supreme Court's intervening decision in Padilla (of which the District Court did not have the benefit) has made it clear that that is not appropriate.

an alternative plea bargain[93] if the defendant had received the competent immigration counsel to which all immigrants are constitutionally entitled.

With this reality in mind, courts have erred significantly in focusing exclusively on a defendant's pre-plea deportability in order to determine prejudice, rather than focusing more broadly on whether rejecting a plea bargain would have been rational under the circumstances. In many instances, undocumented defendants who would have been subject to deportation regardless of their guilty pleas may well have declined to plead guilty and proceeded to trial instead if they had received the competent immigration advice that the Sixth Amendment requires.[94] In fact, the potential number of scenarios in which an undocumented defendant who accepts a guilty plea could be prejudiced by deficient immigration counsel is enormous. As illustrated by the examples that follow, instances in which prejudice could arise run the gamut from situations in which a defendant is erroneously told that he will *not* be deported to situations in which a defendant is erroneously told that he definitely *will* be deported—while also applying to any number of situations in between.

Instead, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances," *Padilla*, 130 S. Ct. at 1485, and a rational decision not to plead guilty does not focus solely on whether a defendant would have been found guilty at trial—*Padilla* reiterated that an alien defendant might rationally be more concerned with removal than with a term of imprisonment, *see Padilla*, 130 S. Ct. at 1483 (recognizing that " '[p]reserving a client's right to remain in the United States may be more important to the client than any potential jail sentence' " (quoting *St. Cyr*, 533 U.S. at 323, 121 S. Ct. 2271)). "), *abrogated by* on other grounds by Chaidez v. United States, 133 S. Ct. 1103, 185 (2013). The Third Circuit Court of Appeals appears to have held that the venerable *Hill v. Lockhart* test had been supplanted with respect to guilty pleas in cases involving deportation, explaining that the Padilla Court had written that "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."). *See also* DeBartolo v. United States, No. 3:11-CR-28 RM, 2014 WL 5431228, at *3 (N.D. Ind. Oct. 23, 2014) *rev'd on other grounds*, No. 14-3579, 2015 WL 3915604 (7th Cir. June 26, 2015).

[93] *See, e.g.,* Kovacs v. United States, 744 F.3d 44, 53 (2d Cir. 2014) (finding that a defendant "made a showing of prejudice based on his ability to negotiate an alternative plea"); United States v. Rodriguez-Vega, No. 13-56415, 2015 WL 4773519, at *4 (9th Cir. Aug. 14, 2015) ("A petitioner may demonstrate that there existed a reasonable probability of negotiating a better plea by identifying cases indicating a willingness by the government to permit defendants charged with the same or a substantially similar crime to plead guilty to a non-removable offense.").

[94] Courts that eschew individualized consideration of a defendant's circumstances and categorically bar undocumented defendants from relief on the basis of *Padilla* claims miss this crucial point. Other courts, however, have correctly recognized that a defendant's individualized circumstances may warrant relief. *See, e.g.,* People v. Rivas-Landa, *supra* note 39 ("We conclude that defendant has asserted facts that if true would satisfy the prejudice prong of the *Strickland* standard. Therefore, she is entitled to a hearing on her motion."); *Burgos*, 37 Misc. 3d 394, 407–08 (Sup. Ct. 2012) ("[I]n this case, there is no question that deportation was a direct consequence of defendant's guilty plea. Defendant's plea to a drug felony immediately and permanently deprived him of any avenue by which he could avoid deportation namely, by seeking an adjustment of status to that of an LPR or by cancellation of removal. The elimination of defendant's eligibility for these remedies rendered defendant subject to deportation without recourse, and therefore had direct deportation consequences for him. Thus, defendant's claim in this case is within the scope of *Padilla*.").

A. When There is No Mention of Deportation Consequences

To illustrate one example of a situation in which an undocumented defendant might be prejudiced under the framework established by *Padilla*, consider what is likely the most common scenario involving deficient immigration counsel: a situation in which a defendant is offered a specific sentence in exchange for a guilty plea that includes no mention of immigration consequences at all.[95] If placed in such a situation, an undocumented defendant may well believe—incorrectly—that he will not be deported if he pleads guilty because the offered plea bargain does not mention that deportation will be part of his punishment. Although incorrect, this belief also advances from conceivable to plausible once his attorney advises him to accept the plea and similarly fails to mention that he will be deported after he does so. Consequently, a defendant who finds himself in such a scenario may well choose to accept the guilty plea solely because—as he understands his situation—pleading guilty will not result in deportation. Had he been counseled that he likely would be deported *whether he pleads guilty or not*, however, then he may reasonably have decided to reject the plea bargain and dispute the charges against him[96] or sought an immigration-safe plea bargain instead. This, of course, is the essence of the legal prejudice that *Padilla* aimed to prevent.

Of note, this scenario is also far from hypothetical, as indicated by the fact that "noncitizens commonly plead guilty to petty offenses without knowing that deportation . . . will result."[97] Indeed, there is reason to believe that undocumented defendants who are accused of misdemeanors or promised immediate release from jail if they plead guilty are thrust into this scenario all too frequently, causing many defendants to decline to contest charges against them based solely on the incorrect assumption that pleading guilty will allow them to avoid being deported.[98] Moreover, this situation

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[95] This is the scenario that occurred in *Padilla* itself.

[96] *See* Jennifer H. Berman, *Padilla v. Kentucky: Overcoming Teague's "Watershed" Exception to Non-Retroactivity,* 15 U. Pa. J. Const. L. 667 (2014) ("If armed with the knowledge that a conviction is almost certain to land a defendant in immigration court, a defendant may very well choose to risk going to trial rather than accept a plea deal offering a reduced sentence."). *Cf.* Eagly, *supra* note 17, at 2296 ("The prominence of the immigration concern may also influence clients to go to trial in the hope of an acquittal, rather than accept a plea that would foreclose the ability to remain in the country.").

[97] Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 Cardozo L. Rev. 1751, 1776 (2013).

[98] Cade, *supra* note 97 ("The misdemeanor system works poorly for all defendants, but noncitizens may fare worst of all. First, the institutional features of the system make it unlikely that noncitizens will be adequately informed about whether pleas affect their ability to remain in the United States. In spite of *Padilla*'s mandate, noncitizens commonly plead guilty to petty offenses without knowing that deportation (and mandatory detention, or, at the least, a prohibitively high immigration bond) will result."); *Id.* at 1780 ("Even where judges issue general, pro forma advisals that criminal convictions may carry immigration consequences, or offer defendants the option of continuing the case to speak with an attorney, those who are subject to pretrial detention rarely choose to delay if they can plead right away to a disposition with a lenient criminal sanction. Not yet knowing the actual immigration consequences of seemingly

becomes especially likely when undocumented defendants are represented by appointed counsel or other overburdened attorneys, who in many cases "simply do not have time to learn much about their clients' personal circumstances and immigration situations."[99] Undocumented defendants may also find themselves in this situation because their attorney maintains a high-volume practice that carries an incentive "to plead cases out as quickly as possible," and hence, does not take the time for extensive (or any) attorney-client communication.[100]

Under circumstances when an undocumented defendant accepts a plea bargain based entirely on the false assumption—bolstered by his attorney's constitutionally deficient silence—that he will not be deported, it can hardly be disputed that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial."[101] Further, "a decision to reject the plea bargain would" – or, at the very least, could – "have been rational under [such] circumstances."[102] Thus, straightforward application of *Padilla* compels the conclusion that defendants who were thrust into such a scenario are entitled to withdraw their guilty pleas and proceed to trial instead.[103] Any court that has reached a contrary conclusion has either misunderstood the inquiry or misapplied the law.

B. When an Undocumented Defendant is Affirmatively Misadvised that He Definitely Will Not *be Deported*

Consider, also, another scenario that is alleged with some frequency: a situation in which an undocumented defendant accepts a guilty plea after

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minor charges, and offered the opportunity to conclude the criminal case, misdemeanor defendants plead in haste.").

[99] *Id.* at 1780–81; *See also id*. at 1786 ("If overburdened defenders in petty cases already lack the time to adequately investigate and litigate defenses, they will also find it difficult to make the additional effort to carefully assess alternate immigration-safe pleas or to discover and marshal client equities sufficient to convince the prosecutor to deviate from her usual categorical approach to plea negotiation.") (citing Robert C. Boruchowitz et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* 11, 30-31 (2009), *available at* http://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808, *archived at* perma.cc/5VLL-JMXU ("[A]cross the country[,] defenders do not have enough time to see their clients or to prepare their cases adequately, there are no witness interviews or investigations, they cannot do the legal research required or prepare appropriate motions, and their ability to take cases to trial is compromised."); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: A National Crisis*, 57 HASTINGS L.J. 1031, 1081–82 (2006) (explaining that an attorney with a large misdemeanor caseload "simply does not have the time or the resources to investigate, prepare, or communicate adequately with the client so that the client can make an informed decision and the attorney can advocate zealously for his client's best interests" and that "overburdened defense attorneys cannot spend enough time to dig up all possible defenses") (citation omitted).

[100] Cade, *supra* note 97, at 1788 (citing Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2464, 2477 (2004)).

[101] *Hill*, 474 U.S. at 59.

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

[103] *Cf.* United States v. Akinsade, 686 F.3d 248, 256 (4th Cir. 2012) ("[C]ounsel's affirmative misrepresentations that the crime at issue was non-deportable [were] prejudic[ial].").

being affirmatively—but erroneously—advised that if he pleads guilty, then he definitely will *not* be deported.[104] In this scenario, the defendant's reliance on his attorney's deficient advice is even more understandable. Here, the defendant is not merely assuming that he will not be deported based on his attorney's silence; instead, his attorney *has actively counseled him* that he will not be deported if he pleads guilty. By any metric, a defendant who accepts a guilty plea as a consequence of such affirmative misadvice—only to learn later on that he is to be deported anyway—has suffered serious prejudice in the form of a criminal conviction due to his counsel's incompetence.

This sort of bait-and-switch—which, incidentally, occurred in *Padilla* itself—represents a classic case of ineffective assistance of counsel.[105] Indeed, on this point, even the two concurring Justices in *Padilla* enthusiastically agreed. As Justice Alito explained:

> when a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable[,] . . . it seems hard to say that the plea was entered with the advice of constitutionally competent counsel—or that it embodies a voluntary and intelligent decision to forsake constitutional rights [at all].[106]

Consequently, if an undocumented defendant proves that he accepted a guilty plea solely on the basis of his counsel's false assurance that he would not be deported if he did so, then it is simply not possible to conclude that he has not suffered legal prejudice.

Even when presented with precisely this scenario, however, several courts have inexplicably rejected this conclusion. In so doing, they have held that a defendant who finds himself in such a situation cannot establish prejudice because his decision to rely on his attorney's misadvice was "unjustified and illegitimate,"[107] or else, have held in some manner that his attorney's misadvice "could not have prejudiced [him] because he faced

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[104] *See, e.g.*, *Ibarra*, 125 So. 3d at 821 (describning scenario in which an undocumented defendant alleged that he accepted a guilty plea on the basis of his attorney's "advice that he would not be deported"); Gutierrez v. United States, 560 Fed. Appx. 924, 926 (11th Cir.) *cert. denied* (2014) ("Mr. Gutierrez claims . . . that his attorney affirmatively told him that he would not face mandatory deportation."); Cadet v. United States, No. 1:11-CR-113-WBH-LTW, 2012 WL 7061444, at *1 (N.D. Ga. May 29, 2012) report and recommendation adopted as modified, No. 1:11-CR-113-WBH, 2013 WL 504821 (N.D. Ga. Feb. 8, 2013) ("[Defendant] specifically alleges that [his attorney] told him that because he had lived in the U.S. for a long period of time, 'deportation would not be an issue for him' if he pled guilty in this case.").

[105] As the dissenting opinion in *Padilla*'s case before the Kentucky Supreme Court poignantly observed: "Counsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all. Common sense dictates that such deficient lawyering goes to effectiveness." Com. v. Padilla, 253 S.W.3d 482, 485 (Ky. 2008) (Cunningham, J., dissenting) *rev'd and remanded sub nom.*

[106] *Padilla*, 559 U.S. at 385-86 (Alito, J., concurring).

[107] *Ibarra*, 125 So. 3d at 821.

deportation no matter what."[108] The errors inherent in such conclusions, however, are easily exposed, and they are entirely without merit.

Certainly, most lawyers and immigration judges are aware that many undocumented defendants are deportable regardless of whether or not they accept a guilty plea.[109] In contrast, however, undocumented defendants whose own attorneys have affirmatively advised them that they will not be deported if they accept a guilty plea quite reasonably may not. To reject this view would effectively require a holding that undocumented defendants should have been aware that their attorneys' advice was incompetent and disregarded it accordingly. Embracing that view, however, would make a mockery of the right to counsel itself. In our justice system, attorneys are expected to know the law and to provide competent advice to their clients, and their clients are entitled to rely upon it. A justice system that rejected such threshold principles would cease to be recognizable as such, and this reality remains true for both citizen defendants and undocumented defendants alike.

Stated differently: it is black letter law that "an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered."[110] Thus, the notion that an undocumented defendant's reliance on his attorney's erroneous immigration advice cannot be deemed prejudicial because such reliance was "unjustified and illegitimate" represents a profound misapplication of settled precedent.[111] Moreover, it effectively represents a holding that the fundamental tenet that defendants are "entitled to rely upon" the advice of their attorneys does not apply to the undocumented,[112] and that undocumented defendants must know the law better than their own attorneys.

Furthermore, a defendant's well-established right to rely on his counsel's advice is not diminished in any way because that advice turned out to be spectacularly wrong. In fact, to the contrary, an attorney's glaring incompetence should give rise to far greater skepticism about the soundness of the defendant's representation as a whole, since "incompetent advice . . . call[s] the fairness and integrity of the criminal proceeding itself into question."[113] Simply put: it is "*counsel's* skill and knowledge"—not a defendant's—that "is necessary to accord defendants the 'ample opportunity to meet the case

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[108] *Cadet v. United States*, No. 1:11-CR-113-WBH-LTW, 2012 WL 7061444, at *2 .

[109] Overburdened attorneys may represent an exception to this general rule, however. *See* Cade, *supra* note 97, at 1780–81 ("[T]he majority of public defenders who represent misdemeanor defendants are overburdened, inexperienced, and subjected to significant pressure from prosecutors and judges to encourage rapid pleas. Overburdened attorneys simply do not have time to learn much about their clients' personal circumstances and immigration situations. Many mistakenly believe that most petty offenses do not carry immigration consequences.").

[110] Von Moltke v. Gillies, 332 U.S. 708 (1948).

[111] *Ibarra*, 125 So. 3d at 821.

[112] *Von Moltke,* 332 U.S. at 721.

[113] *Padilla*, 559 U.S. at 385 (Alito, J., concurring).

of the prosecution' to which they are entitled."[114] Defendants, for their part, are neither expected nor required to know anything.[115] Moreover, a defendant's ability to rely on his counsel's advice is especially important when defendants are non-citizens, given that non-citizens are disproportionately likely to have limited English proficiency that renders them unable to understand their interactions with prosecutors and the court.[116]

Equally unsupportable is the notion that erroneous immigration advice "could not have prejudiced [an undocumented defendant] because he faced deportation no matter what."[117] In addition to being plainly inaccurate in any number of circumstances, *see* Part II, *supra*, this conclusion is a classic *non-sequitur* in that it fails to recognize that prejudice in this scenario manifests itself not in *deportation*, but in the form of a *criminal conviction* that would not otherwise have been entered. When an undocumented defendant is erroneously counseled that he will not be deported if he accepts a guilty plea, and when he then accepts a guilty plea on that basis alone, it makes no difference whether he would have been deported no matter what. What matters in this situation—indeed, the only thing that matters—is that the defendant would have made a different decision if he had received the competent immigration counsel to which he was constitutionally entitled.[118]

Admittedly, however, it is unlikely that an overwhelming number of attorneys have in fact counseled undocumented defendants that they will not be deported if they accept a guilty plea. Consequently, several courts have—perhaps reasonably—looked upon such claims with heightened skepticism. For example, judges have rejected such claims under circumstances when an undocumented defendant "was already the subject of removal proceedings before he was indicted,"[119] and where the record of the defendant's plea colloquy reflected that the defendant had "affirmatively acknowledged

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[114] *Strickland*, 466 U.S. at 685 (1984) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942)).

[115] *But see* People v. Garcia, 936 N.Y.S.2d 60 (Sup. Ct. 2011) ("All individuals entering or remaining unlawfully in the United States are presumed to know that such conduct renders them deportable. *See generally*, 8 USC 1182[a][6][A][I]; People v. Mercado, 1741–2000, NYLJ 1202499022183 at 1 (Sup Ct. Bx County, 2011), citing *cf.*, Hamburg–American Steam Packet Co. v. United States, 250 F 747, 758 (2d Cir. 1918).")

[116] Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. Rev. 999, 999-1001 (2007) (discussing significant increases in the number of immigrants with limited English proficiency among the clients served by poverty lawyers and observing that "language diversity increasingly jeopardizes life and liberty interests, particularly of poor people"); *Reyes*, *supra* note 18, at 681 ("English proficiency may also be a factor that further disadvantages [non-citizens] during criminal proceedings and increases their chances of conviction.") (citing Lupe S. Salinas & Janelle Martinez, *The Right to Confrontation Compromised: Monolingual Jurists Subjectively Assessing the English-Language Abilities of Spanish-Dominant Accused*, 18 Am. U. J. Gender Soc. Pol'y & L. 543 (2010)).

[117] *Cadet,* 2012 WL 7061444 at *2.

[118] *See, e.g.*, United States v. Orocio, 645 F.3d 630, 645 (3d Cir. 2011) (abrogated on other grounds by Chaidez v. United States, 133 S. Ct. 1103 (2013)) ("We disagree with this assessment. . . . Mr. Orocio's guilty plea does not end the Hill inquiry because, had he not pled guilty, there would not have been any acknowledgement of guilt").

[119] United States v. Aceves, No. CIV. 10-00738 SOM, 2011 WL 976706, at *4 (D. Haw. Mar. 17, 2011).

his understanding that his plea 'could definitely make it difficult, if not impossible, for him to successfully stay legally in the United States' " before he pleaded guilty.[120] If, however, an undocumented defendant can truly demonstrate to a reviewing court's satisfaction both: (1) that he was counseled to accept a guilty plea because doing so would not result in deportation, and (2) that he accepted the offered guilty plea as a result of that deficient advice, then there is no doubt that that he has met both of *Padilla*'s requirements. Under such a scenario, counsel's incompetence is plain, the resulting prejudice is clear, and both of *Strickland*'s prongs, as refined by *Padilla*, have been satisfied.

C. When an Undocumented Defendant is Affirmatively Misadvised that He Definitely Will *be Deported*

Notably, prejudice can also result at precisely the opposite end of the spectrum as well: circumstances in which an undocumented defendant is erroneously counseled that he definitely *will* be deported regardless of whether or not he pleads guilty, when in reality, he may not be.[121] As explained in Part II, there are actually many situations in which undocumented defendants may be eligible for relief from deportation so long as they avoid a criminal conviction. If deprived of competent immigration counsel, however, even innocent defendants may decide to plead guilty when they otherwise would have opted to risk a trial or sought a more favorable plea agreement instead.[122] In fact, receiving incompetent counsel in such a situa-

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[120] United States v. Hernandez-Monreal, 404 Fed. Appx. 714, 715 (4th Cir. 2010). *See also* People v. Richey, No. G046919, 2013 WL 1402354, at *2 (Cal. Ct. App. Apr. 8, 2013) (holding that defendants was adequately advised where "her attorney also went over the immigration consequences of her plea with her," where she acknowledged that she read over her plea agreement with her attorney, and received an admonishment about her deportability from the court); Correa-Gutierrez v. United States, 455 Fed. Appx. 722, 723 (8th Cir. 2012) ("The record conclusively establishes that Correa-Gutierrez did not meet his burden to show ineffective assistance of his trial counsel or resulting prejudice: the PSR indicated a likelihood that Correa-Gutierrez would be deported if convicted; Correa-Gutierrez confirmed that he had read the PSR, discussed it with his counsel, and understood it; and Correa-Gutierrez never moved to withdraw his guilty plea.").

[121] Defense practitioners should, of course, give strong warnings whenever a conviction warrants it. Effective counsel may, for example, advise a defendant that a particular conviction would render him removable, but that he would nonetheless be eligible to avoid actually being deported based on a particular avenue of relief.

[122] Deprived of adequate information counsel, "many innocent individuals [may] have accepted guilty pleas simply because the risk and inconvenience of going to trial were much greater than the [perceived] consequences resulting from the given plea deal." *See* Berman, *supra* note 96. Moreover, for innocent undocumented defendants who are eligible for relief from deportation, the problem may even be significantly worse than that, because "[n]oncitizens placed under immigration detainers at booking, or who fear ICE contact in pretrial detention, have a tremendous incentive to plead guilty as quickly as possible[,] . . . even if they are innocent" because a guilty plea may be their only opportunity to obtain release before ICE is able to take them into custody and initiate removal proceedings. *See* Cade, *supra* note 97, at 1776; Juan C. Quevedo, *The Troubling Case(s) of Noncitizens: Immigration Enforcement Through the Criminal Justice System and the Effect on Families*, 10 TENN. J.L. & POL'Y 386, 396 (2015) (noting that "noncitizens do take pleas motivated by avoiding ICE

tion presents an especially heightened risk of prejudice, because "the threat of removal provides a[ ] . . . powerful incentive to go to trial if a plea would result in removal."[123] In other words, if an undocumented defendant has even a small chance of avoiding deportation, then it is likely that "[t]he prominence of the immigration concern [would have] influence[d the defendant] to go to trial in the hope of an acquittal, rather than accept a plea that would foreclose the ability to remain in the country."[124]

Without a doubt, such a showing is sufficient to satisfy *Padilla*'s constitutional standard for prejudice.[125] Thus, this scenario, too, compels a finding that *Padilla*'s deficiency and prejudice prongs have been satisfied. Additionally, given the large number of criminal defense attorneys who lack constitutionally adequate knowledge of immigration law, there is strong reason to

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detection."); *cf.* People v. Cristache, 907 N.Y.S.2d 833, 846 (Crim. Ct. 2010) ("Far from being "deficient," plea counsel's strategy, judged by an "objective standard of reasonableness," effectively placed defendant in the best position to avoid actual deportation.") (internal citation omitted). Additionally, a defendant in such a situation might plead guilty for any number of other reasons as well. For example, such a defendant may enter a guilty plea to avoid the expense, stress, or embarrassment of a trial, to serve a sentence that allows him to remain near his family before being deported; *DeBartolo*, 2015 WL 3915604, at *4 (7th Cir. June 26, 2015) (noting that a defendant "might even have preferred a lengthy prison term in the United States to a shorter prison term that would lead more quickly to deportation, because the lengthy prison term would at least keep him in the same country as his family, facilitating frequent visits by family members, which is important to prisoners. Separation from his family may have been a big concern to him if deported, as his children, having been born in the United States and presumably not knowing Italian, would not be likely to follow him to Italy"). *See also Padilla*, 559 U.S. at 373 ("By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence."). Others still may accept a guilty plea because the charges seem minor and contesting them seems futile.

[123] *Orocio*, 645 F.3d at 645, *abrogated on other grounds by* Chaidez v. United States, 133 S. Ct. 1103 (2013). *See also* INS v. St. Cyr, 533 U.S. 289, 322 (2001) (observing that it is "well-documented" that "an alien charged with a crime . . . would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial") (quoting Magana-Pizano v. INS, 200 F.3d 603, 612 (9th Cir. 1999); Brief of Petitioner at 33, Padilla v. Commonwealth of Kentucky, 2009 WL 1497552 (2009) ("Avoiding deportation is often more critical to a defendant than avoiding incarceration or other direct consequences.").

[124] Flo Messier, *Alien Defendants in Criminal Proceedings: Justice Shrugs*, 36 Am. Crim. L. Rev. 1395, 1415 (1999) ("When accepting a plea offer could lead to deportation, defendants often choose to go to trial. Because the alien defendant has little to lose by rejecting a plea offer that will result in his deportation, courts are burdened with many trials for charges that would have been otherwise settled in plea bargains."). *See also* Eagly, *supra* note 17. *Cf.* Song v. United States, No. Cr–98–0806–DOC, 2011 WL 2533184, at *4 (C.D. Cal. June 27, 2011) (finding that there was a reasonable probability that lawful permanent resident who provided principal means of financial support to U.S. citizen wife and two U.S. citizen children would have decided against pleading guilty had he received adequate counsel concerning immigration consequences).

[125] People v. Burgos, 950 N.Y.S.2d 428, 438–39 (Sup. Ct. 2012) ("[A]ll that a defendant need demonstrate is that a decision to reject the plea offer and take a chance, however slim, of being acquitted after trial would have been rational.") (internal citations omitted).

fear that undocumented defendants are misadvised about their potential eligibility for deportation relief with regularity.[126]

Taken together, these scenarios evidence the inescapable conclusion that "[e]ven for clients without current lawful status, [competent] counsel can play a role in preventing deportation."[127] As demonstrated above, there are many situations in which undocumented defendants may have rationally rejected a guilty plea if they had been afforded the competent immigration advice to which they are supposed to be constitutionally entitled. Additionally, due to significant language barriers that often exist between non-citizen defendants and their attorneys,[128] any of these scenarios could conceivably arise simply due to attorney-client miscommunication.

In sum, a wide variety of situations exist in which incompetent immigration counsel can prejudice an undocumented defendant by compromising his potential relief from deportation or inducing him to accept a guilty plea when he would otherwise have gone to trial. Given these possibilities, proponents of the view that undocumented defendants can *never* establish that they were prejudiced as a consequence of receiving incompetent immigration advice have relied on a fundamentally flawed understanding of both defendants' decision-making process and *Padilla* itself. In the same vein, it is also worth emphasizing that "[t]he rationality standard set by the United States Supreme Court in *Padilla* does not allow the courts to substitute their judgment for that of the defendant."[129] Thus, perhaps especially in the context of undocumented defendants, courts "should hesitate to speculate on what a defendant would have done in changed circumstances,"[130] and they should promptly cease rejecting all *Padilla* claims made by undocumented defendants as a result.

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[126] *See, e.g.*, Systemic Barriers to Effective Assistance of Counsel in Plea Bargaining http://ilr.law.uiowa.edu/files/ilr.law.uiowa.edu/files/A11_JoyUphoff.pdf (noting the "woefully inadequate advice provided to many [non-citizen] defendants by indigent defenders who lack the time or resources to adequately investigate, analyze, or prepare the defendant's case"); *Immigration is Different: Why Congress Should Guarantee Access to Counsel in All Immigration Matters* ("[T]he representation that many licensed attorneys provide to immigrants is often substandard. In some cases, 'lawyers with little or minimal training and experience in immigration law are also jeopardizing immigrants' status in the United States by providing incompetent or inaccurate legal advice.'"), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2449026).

[127] Eagly, *supra* note 17.

[128] Cade, *supra* note 97, at 1788–89 ("The Legal Services Corporation has recognized lawyering across language differences as the most significant challenge faced by poverty lawyers today. Language and cultural differences complicate investigation of defenses or mitigating circumstances, preparation of testimony or equitable factors, and client counseling at all stages of representation. In short, an attorney who cannot communicate effectively with her client will not be able to competently perform core lawyering tasks.").

[129] People v. Picca, 947 N.Y.S.2d 120, 185.

[130] *DeBartolo*, 2015 WL 3915604 at *3.

IV. The Underlying Purpose of the Right to Effective Assistance of Counsel Is to Prevent Inaccurate Convictions

Disturbingly, the notion that undocumented defendants can never prove that they received ineffective assistance of counsel under *Padilla* due to their presumed inability to demonstrate prejudice also dangerously undermines the primary purpose of the right to effective counsel itself: to prevent inaccurate convictions. Unfortunately, given the severe consequences of deportation, there is also strong reason to be concerned that defendants who are given the erroneous impression that they will be able to remain in the United States if they accept a guilty plea will do so on that basis alone, rather than accepting a plea on the basis of their actual guilt. Consequently, by carving undocumented defendants out of the protection afforded by *Padilla*, courts dramatically increase the risk of wrongful convictions, and they seriously erode public confidence in the accuracy of guilty pleas—especially with respect to misdemeanors and other low-level crimes.[131] Thus, if courts truly care about protecting the innocent and securing *accurate* convictions—rather than simply securing convictions for their own sake—then the growing line of authority concluding that undocumented defendants can never obtain relief under *Padilla* must be rejected immediately.

Of all the procedural protections guaranteed to criminal defendants by the United States Constitution, the right to counsel is perhaps the most celebrated. Famously established as a fundamental right in both state and federal felony cases in *Gideon v. Wainright*,[132] the U.S. Supreme Court has routinely "recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial."[133] As the *Gideon* Court explained: "in our adversary system of criminal justice, any person haled into court . . . cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[134]

Given the "obvious" importance of the right to counsel,[135] it is unsurprising that the Supreme Court has also lauded the right to counsel as both a "bedrock procedural element that is essential to the fairness of a proceeding"[136] and a "watershed" rule of criminal procedure "without which the

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[131] Cade, *supra* note 97, at 1755 ("[P]resumptively deportable noncitizens will face removal proceedings regardless of the outcome of their criminal cases, and the prospect of discretionary relief from removal can be very difficult to assess without the assistance of an immigration expert. As a result, such defendants often believe it futile and not worth the cost to contest minor criminal charges while detained, even if they are innocent, have strong defenses, or have been arrested through racial profiling or other constitutional rights violations."). *See also* Quevedo, *supra* note 122, at 395.

[132] *See generally,* Gideon v. Wainwright, 372 U.S. 335 (1963). Of note, however, the right to counsel does not exist in all criminal cases. It does not apply, for example, to misdemeanors where incarceration is not an option.

[133] *Strickland*, 466 U.S. at 684.

[134] *Gideon*, 372 U.S. at 344.

[135] *Id.*

[136] *Whorton v. Bockting*, 549 U.S. 406, 421 (2007).

likelihood of an accurate conviction is seriously diminished."[137] Indeed, the right to counsel is considered so important that it serves as the benchmark for evaluating the importance of *all* new procedural protections in criminal cases[138]—although after more than half a century, "[t]he Supreme Court has never found a new rule to be of [*Gideon*'s] magnitude, and [it] has instead intimated repeatedly that only *Gideon* itself qualifies" as a rule that is so important that it requires retrospective application.[139] Moreover, the importance accorded to the right to counsel is grounded in the justice system's assumption that counsel plays an essential role in preventing wrongful convictions. When a defendant "is denied representation," the Supreme Court has explained, "the risk of an unreliable verdict is intolerably high."[140] Fortunately, however, at least in theory,[141] "[t]he new rule announced in *Gideon* eliminated this risk."[142]

In the time since *Gideon* was decided, the Supreme Court has extended the right to counsel to pre-trial proceedings that include plea bargaining,[143] and it has also explained that the right to *effective* counsel is guaranteed by the right to counsel itself. As the *Strickland* court explained:

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[137] *Id.*

[138] *Id.* at 419 ("Guidance in answering this question is provided by *Gideon v. Wainwright* to which we have repeatedly referred in discussing the meaning of the Teague exception at issue here.") (citation omitted).

[139] POST PADILLA: PADILLA'S PUZZLES FOR REVIEW IN STATE AND FEDERAL COURTS, 23 Fed. Sent. R. 239, 241 (citing Whorton v. Bockting, 549 U.S. 406, 41–21 (2007)). *See also* Beard v. Banks, 542 U.S. 406, 417 (2004) ("In providing guidance as to what might fall within this exception, we have repeatedly referred to the rule of *Gideon v. Wainwright* (right to counsel), and only to this rule.") (citation omitted). *But see* John L. Holahan & Shauna Faye Kieffer, *Effective Assistance of Counsel Where Pleas Mandate Deportation*, Bench & Bar of Minn. (Aug. 10, 2010), *available at* http://mnbenchbar.com/2010/08/padilla-motions/, *archived at* https://perma.cc/6LY5-WE2P (concluding that *Padilla* is a new watershed rule of criminal procedure because "[a] legal permanent resident is much more likely to plead guilty, even if he is innocent, if he incorrectly believes from counsel's representations that he will be able to remain in the United States").

[140] *Whorton*, 549 U.S. at 419 (citing Mickens v. Taylor, 535 U.S. 162, 166 (2002); United States v. Cronic, 466 U.S. 648, 658–59 (1984); *Gideon*, 372 U.S. at 344–45).

[141] In practice, for a variety of reasons, the impact of *Gideon* has never come anywhere close to reaching its aspirational goals. This result is due in part to the "dismally low constitutional standard" for effective assistance of counsel outlined in *Strickland v. Washington*, *see* Eagly, *supra* note 17, at 2296, as well as a consistently overworked and underfunded system of public defense. *See, e.g.*, Stephen B. Bright, *The Right to Counsel in Death Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right and What We Should Do About It*, 11 J.L. Soc'y 1, 16 (2010); Erwin Chemerinsky, The Case Against the Supreme Court 150 (2014) ("By every measure, then, there are gross inadequacies in the provision of counsel to indigent defendants. The constitutional assurance of the right to counsel is rendered illusory, and innocent people are convicted as a result."). *Cf.* Alan M. Dershowitz, Letters to a Young Lawyer 52 (Basic Books 2001) ("*every* defendant — regardless of his or her probability of guilt, unpopularity or poverty — must be vigorously defended within the rules of ethics. The scandal is not that the rich are zealously defended; it is that the poor and middle class are *not*.").

[142] *Whorton*, 549 U.S at 419.

[143] *Padilla*, 559 U.S. at 373 (stating "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.") (citing *Hill*, 474 U.S. at 57); *see also Richardson*, 397 U.S. at 770–71.

> That a person who happens to be a lawyer is present . . . alongside the accused . . . is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the [proceeding] is fair.[144]

In short, the *Strickland* court held, "'the right to counsel *is* the right to the effective assistance of counsel.'"[145]

As many courts have observed, in the context of immigration, "[t]he right to counsel is a particularly important procedural safeguard because of the grave consequences of removal."[146] Thus, as a matter of practical reality, "many, if not most immigrants, when properly advised by counsel, would choose to vigorously defend themselves before a jury rather than face the automatic immigration consequences of a guilty plea," because for many non-citizens, the specter of deportation is far more daunting than any conviction or prison sentence.[147] It is also well established at this point that "in spite of *Padilla*'s mandate, noncitizens commonly plead guilty to petty offenses without knowing that deportation . . . will result."[148]

The *Padilla* Court understood these concerns. As the majority opinion explained, "the severity of deportation" is currently at its zenith because several recent changes to U.S. immigration law

> have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. . . . [A]s a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be

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[144] *Strickland*, 466 U.S. at 685.

[145] *Id*. at 686 (quoting *Richardson*, 397 U.S. at 771 n.14; *see also Strickland,* 466 U.S. at 711–12 (Marshall, J., dissenting) ("[T]he right to effective assistance of counsel is entailed by the right to counsel, and abridgment of the former is equivalent to abridgment of the latter.").

[146] Leslie v. Attorney Gen. of U.S., 611 F.3d 171, 181 (3d Cir. 2010).

[147] Berman, *supra* note 96, at 671 (citing Brief for National Association of Criminal Defense Lawyers, National Immigration Project of the National Lawyers Guild, Immigrant Legal Resource Center and Immigrant Defense Project as Amici Curiae Supporting Petition for Writ of Certiorari at 10, *Chaidez v. United States*, 133 S. Ct. 1103, No. 11–820 (U.S. Jan. 30, 2012)); *See* Brief of National Association of Criminal Defense Lawyers, National Immigration Project of the National Lawyers Guild, Immigrant Legal Resource Center and Immigrant Defense Project as Amici Curiae Supporting of Petition for Writ of Certiorari at 10, *Chaidez v. United States*, 133 S. Ct. 1103, No. 11–820 (U.S. Jan. 30, 2012) (noting that the immigration consequences of a conviction are often the greatest priority to immigrant clients); *see also Leslie*, 611 F.3d at 181 (describing deportation as a "draconian and unsparing result," and referencing the "grave consequences of removal"); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (noting that deportation "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted").

[148] Cade, *supra* note 97, at 1776.

> imposed on noncitizen defendants who plead guilty to specified crimes.[149]

Given this reality, virtually every major immigration-related legal interest group in the United States has expressed concerns that innocent noncitizen defendants who are misadvised about their likely immigration consequences may choose to enter guilty pleas to crimes that they did not commit solely to avoid deportation.[150] Despite these serious concerns, however, several courts have completely dismissed the notion that incompetent immigration counsel increases the risk of inaccurate convictions. In summary fashion, for example, the Fourth Circuit has declared:

> [T]he right recognized in *Padilla* has little, if anything, to do with accuracy in the fact-finding process. *Padilla* violations take place only when a defendant has acknowledged guilt and submitted himself to be sentenced accordingly. When such a defendant is surprised at a later date by the initiation of deportation proceedings that were not forecast by defense counsel, the injustice, while real, nevertheless does not cast doubt on the verity of the defendant's admission of guilt. . . .[151]

As other scholars have observed, though, this conclusion cannot withstand even minimal scrutiny.[152] For one thing, it fails to recognize the reality that "many, if not most" innocent non-citizen defendants are likely to plead guilty to a crime that they did not commit if they believe that doing so will save them from being deported.[153] For another, it completely "ignores the many petitioners' arguments that they pled guilty not because they admitted guilt, but because their attorneys advised them to accept a plea deal to avoid harsher consequences . . . ."[154]

Frustratingly, lower courts' failure to recognize the reality that deficient immigration advice dramatically increases the risk of wrongful convictions is all the more inexcusable in light of the fact that the Supreme Court has recognized that "[t]he severity of deportation" is "an integral part—[and] indeed, sometimes the most important part—of the penalty that may be im-

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[149] *Id.*

[150] *See* Berman, *supra* note 96, at 671 (citing Brief for National Association of Criminal Defense Lawyers, National Immigration Project of the National Lawyers Guild, Immigrant Legal Resource Center and Immigrant Defense Project as Amici Curiae Supporting Petition for Writ of Certiorari at 10, *Chaidez v. United States*, 133 S. Ct. 1103, No. 11–820 (U.S. Jan. 30, 2012)); Brief of National Association of Criminal Defense Lawyers, National Immigration Project of the National Lawyers Guild, Immigrant Legal Resource Center and Immigrant Defense Project as Amici Curiae Supporting of Petition for Writ of Certiorari at 10, *Chaidez v. United States*, 133 S. Ct. 1103, No. 11–820 (U.S. Jan. 30, 2012) (noting that the immigration consequences of a conviction are often the greatest priority to immigrant clients).

[151] United States v. Mathur, 685 F.3d 396, 400 (4th Cir. 2012). The defendant's precise immigration status in *Mathur* is unclear from the record.

[152] *See, e.g.,* Berman, *supra* note 96, at 671.

[153] *Id.*

[154] *Id.*

posed on noncitizen defendants."[155] In many instances, deportation permanently severs parents from children and husbands from wives,[156] meaning that "families disintegrate and children suffer."[157] Further, many undocumented immigrants have little to no connection to their birth country, meaning that deportation cuts them off from the only life they know and the only place where they have the resources, acquaintances, and fundamental skills necessary to survive.[158] Put simply, "[d]eportation is 'a savage penalty,' 'the equivalent of banishment,' often resulting in the 'loss of both property and life, [and] of all that makes life worth living.'"[159]

For these reasons and others, several commentators have recognized the reality that in most instances, non-citizen defendants are likely to view deportation as a far more serious punishment than a conviction that results in incarceration.[160] Crucially, for its part, the *Padilla* Court recognized this

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[155] *Mathur*, 685 F.3d at 400. The defendant's precise immigration status in *Mathur* is unclear from the record. *See also* Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent . . . to a distant land, is punishment, and that oftentimes most severe and cruel."). Of note, "in the English common law . . . nearly all felonies, to which double jeopardy principles originally were limited, were punishable by the critical sentences of death or deportation." *Reyes*, *supra* note 18 at 637 (2012) (quoting United States v. DiFrancesco, 449 U.S. 117, 133 (1980) (citing Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee,* 65 YALE L.J. 339, 342–43 (1956)).

[156] Reyes, *supra* note 18, at 688 (2012) ("In 2006, it was estimated that twenty-one percent of all children living in the United States lived with at least one foreign-born parent. Of the native children with one foreign-born parent, eighty-two percent lived with two parents. In a report in July 2007 (relying on statistics from the 2000 Census), Human Rights Watch estimated that, since enforcement began under the harsh immigration laws of 1996, 1.6 million spouses, children, and parents, many of them U.S. citizens or lawful permanent residents, remained in the United States after their spouses, parents, or children were deported.") (citing FEDERAL INTERAGENCY FORUM ON CHILD & FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING 7 (2007), *available at* http://childstats.gov/pdf/ac2007/ac_07.pdf, *archived at* http://perma.cc/AMT7-5Q3S and HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 44 (2007), *available at* http://www.hrw.org/reports/2007/us0707/us0707web.pdf, *archived at* http://perma.cc/4P24-9MNB).

[157] Reyes, *supra* note 18, at 689 (2012) (citing Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1735 (2009). Indeed, between 1997 and 2007, the majority of deportees were in fact separated from their children. Reyes, *supra* note 18, at 637 (citing INTERNATIONAL HUMAN RIGHTS LAW CLINIC & UNIVERSITY OF CALIFORNIA BERKELEY SCHOOL OF LAW ET AL., IN THE CHILD'S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION (2010), *available at* https://www.law.berkeley.edu/files/Human_Rights_report.pdf, *archived at* https://perma.cc/6QDT-LPSD). Of note, however, the majority of deportees are legal permanent residents.

[158] *See* David C. Koelsch, *Proceed With Caution: Immigration Consequences of Criminal Convictions*, 87 MICH. BAR J. 44, 45 (2008) (describing non-citizen adult who came to the United States at age 3, but after pleading guilty to a deportable offense, was deported "to Russia where she no longer had family and knew no one, didn't speak the language, and had few skills needed to survive").

[159] Brief of Petitioner at 51–52, *Padilla v. Kentucky*, 559 U.S. 356, No. 08–651 (U.S. 2009) (quoting Jordan v. De George, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[160] Reyes, *supra* note 18, at 650–51 ("For lawful permanent residents who are removed from the United States, removal is punishment in the same sense as (or worse than) incarcera-

concern as well, observing that "the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty . . . ."[161] And from the poorly-counseled undocumented defendant's perspective, that is precisely the problem: an undocumented defendant who—due to his attorney's incompetent immigration counsel—erroneously believes that he will avoid being deported by accepting a guilty plea is likely to plead guilty on that basis alone, whether he is guilty of the offense or not. By any reasonable assessment, given society's indisputable interest in obtaining accurate convictions, this is a result that the justice system must seek to avoid.

V. "No Criminal Defendant—Whether a Citizen or Not" Includes Undocumented Criminal Defendants

Finally, and perhaps most importantly, *Padilla* held without equivocation that: "It is our responsibility under the Constitution to ensure *that no criminal defendant—whether a citizen or not*—is left to the 'mercies of incompetent counsel.'"[162] Given both the breadth and the clarity of this holding, there is no justifiable reason to rewrite it to read: "It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or a legal permanent resident, but exempting undocumented immigrants—is left to the mercies of incompetent counsel." Other than unsupported speculation that that is what the Supreme Court *meant* to hold, there is simply no basis for restricting *Padilla*'s holding in this manner. To do so would annul the entire purpose of *Padilla*'s pronouncement concerning the judiciary's broad constitutional duty to ensure the integrity of criminal proceedings, and it would disregard the Court's famously thorough consideration of its holdings in favor of the apparent conclusion that the Justices were unaware that undocumented immigrants even exist.

Notably, even proponents of the view that *Padilla* does not afford any measure of protection to undocumented defendants acknowledge that "the

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tion in the criminal context. Incarceration may be temporary, whereas removal for so-called 'aggravated felonies' generally amounts to permanent banishment from the United States and permanent separation from family members. For this reason, some lawful permanent residents would prefer longer incarceration in order to avoid removal.") (citing *Padilla,* at 1483, and Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 Yale J. On Reg. 47, 50). In fact, because immigration consequences greatly outweigh formally punitive consequences in the vast majority of criminal cases brought against immigrants, prevailing professional norms indicate that the competent attorney "will most likely suggest that [a] noncitizen take every case to trial because a nondeportable resolution is unlikely." *See* Cecelia M. Espenoza, *Crimes of Violence by Non-Citizens and the Immigration Consequences*, Colorado Lawyer, October 26, 1997. *Cf.* Darryl K.Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. Rev. 1393 (2011); Norton Tooby, *Tooby's Guide to Criminal Immigration Law* (Nov. 3, 2015, 10:42 PM), *available at* https://nortontooby.com/free/ToobysGuide.pdf, *archived at* https://perma.cc/QN6X-4YVD ("[T]he criminal defense strategy should be directed primarily to avoiding the immigration consequences, and only secondarily to minimizing the criminal judgment or sentence.").

[161] *Padilla*, 559 U.S. at 373.

[162] *Id.* at 374.

Padilla Court never explicitly limits its holding" in this regard.[163] But even this concession can be characterized as a gross understatement. In reality, the Court's broad pronouncement that "no criminal defendant—whether a citizen or not—[should be] left to the 'mercies of incompetent counsel' "[164] does not merely leave open the "possibility" that *Padilla* applies to the undocumented. Instead, it necessarily includes undocumented defendants, rendering highly suspect the current speculation that the *Padilla* court intended to restrict its holding so dramatically.

Moreover, lest the *Padilla* Court's reference to "no criminal defendant—whether a citizen or not" be mistaken for fanciful dicta, the discerning reader will notice that *Padilla*'s majority consistently refers to "noncitizen" defendants no fewer than fifteen separate times throughout its opinion, with nary a mention of "lawful permanent residents" outside of its recitation of the particular facts of Mr. Padilla's background. Additionally, the same is true of *Padilla*'s concurring opinion, which similarly refers to "noncitizen[s]"[165] instead of legal permanent residents. Given that the term "noncitizen" plainly includes undocumented defendants, the assumption that seven Supreme Court Justices repeatedly overlooked the breadth of that description is farcical. If the Supreme Court had intended to limit its holding in *Padilla* to legal permanent residents alone, then one can safely assume that it would have done so. Thus, unless and until the Supreme Court holds otherwise, lower courts should take the Supreme Court at its word and faithfully apply *Padilla* as instructed. Indeed, they have an affirmative constitutional obligation to do so.[166]

Conclusion

In sum, *Padilla*'s protection against incompetent immigration counsel extends to undocumented defendants. Those courts that have reached a contrary conclusion have made several errors, including: (1) incorrectly assuming that a guilty plea never increases the risk of deportation for undocumented defendants;[167] (2) misunderstanding the test for establishing prejudice under *Padilla*; (3) forgetting that the underlying purpose of the right to effective assistance of counsel is to prevent inaccurate convictions; and (4) improperly narrowing the scope of *Padilla*'s explicit holding that its

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[163] Cuauhtémoc García Hernández, *supra* note 43, at 52.

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

[165] *Padilla*, 559 U.S. at 375 (Alito, J., concurring) ("I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), if the attorney misleads a noncitizen client regarding the removal consequences of a conviction.").

[166] Johnson & Johnston Associates Inc. v. R.E. Serv. Co., 285 F.3d 1046, 1066 (Fed. Cir. 2002) ("The obligation of the lower courts is to adhere to the law as it is announced by the Supreme Court, and in keeping with the Court's stated purposes.") (citing Williams v. United States, 240 F.3d 1019, 1030 (Fed. Cir. 2001) (holding that this court is "strictly bound" to adhere to Supreme Court precedent)).

[167] *Garcia*, 425 S.W.3d at 261 n.8.

protections extend to "noncitizens." With these errors in mind, *Padilla*'s mandate defies the short shrift and simplistic disregard that it has received by courts to this point. Accordingly, future courts should reject the prevailing view that *Padilla* does not apply to undocumented defendants, and they should hold instead that undocumented defendants' *Padilla* claims must be carefully reviewed for prejudice on a case-by-case basis.