Extending Gideon's Promise to Those Unknowingly Facing Deportation: Does a Noncitizen Have a Right to Counsel When Facing Charges That Do Not Carry Jail Time, But Nevertheless Constitute a Deportable Offense?

Stephanie M. Poucher

I. Introduction

Over the past few decades, the United States Congress has vastly expanded the category of offenses for which noncitizens can be deported. This, compounded with Congress' policies that place greater limits on agency discretion to cancel deportations, has resulted in the mass expulsion of noncitizens throughout the United States. Many are deported after pleading guilty to minor offenses without the advice of counsel[1] and without any warning that their pleas might result in deportation. Today, pleading guilty to many minor offenses, for which the Sixth Amendment of the United States Constitution's guarantee of the right to counsel might not apply,[2] a noncitizen[3] may face deportation with no possibility of discretionary relief.[4] Should the noncitizen be deported, that person cannot apply to reenter the United States for ten years.[5]

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[1] Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 586 (2011).

[2] Many states have interpreted the United States Supreme Court's rulings in *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Coleman v. Alabama*, 399 U.S. 1 (1970) to mean that only criminal defendants facing the possibility of imprisonment must be represented by counsel. *See, e.g.,* VA. CODE ANN. §19.2-160 (2011) (allowing the court not to appoint counsel if it certifies in writing that it will not impose incarceration for the offense charged). Thus, even when a defendant is charged with a crime to which imprisonment attaches, that defendant is not entitled to court appointed counsel should the government waive jail time, which forecloses the possibility of imprisonment. *See Scott v. Illinois*, 440 U.S. 367, 382 (1979) (Brennan, J., dissenting) (explaining that the plurality's "actual imprisonment" standard would deprive many defendants the right to counsel in criminal cases in which imprisonment is "authorized" but not sought).

[3] Congress describes two types of proceedings: "exclusion" proceedings, which through legal fiction assumes that a person who was not legally admitted into the United States *was never there to begin with*, and "deportation" proceedings. Thus, an "exclusion" proceeding is a determination of whether to admit an arriving noncitizen, while a "deportation" proceeding is a determination of whether to expel a resident alien.

[4] Unless the respondent can establish seven years of continuous residence in the United States before the offense triggering deportability occurred, or that the person is otherwise eligible for asylum. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, PUB. L. NO. 104-208, div. C, tit. III, § 304(a)(3), 110 Stat. 3009-546, 3009-594 (codified as amended at 8 U.S.C. § 1229b(a)(2) (2006)).

[5] A controlled substance conviction, for example, is grounds for deportation. Immigration & Nationality Act (INA) § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (2006). After ten years, you can only reenter the United States if a consular official finds you have been rehabilitated. *Id.*

Many noncitizens are navigating this ever more complicated area of the law alone; noncitizens, including legal resident aliens, are not entitled to counsel in deportation hearings.[6] The presence of counsel in deportation hearings, however, is critical for a fair and just resolution. A recent study found that 97 percent of unrepresented detainees were unsuccessful in their removal proceedings, while 74 percent of non-detained, represented noncitizens successfully stayed in the United States.[7] "Under contemporary law, if a noncitizen has committed a removable offense after [1996], 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."[8] Thus, because nearly all criminal charges are resolved through plea agreements,[9] and navigating immigration court without counsel usually results in deportation, an indigent defendant's knowledge of deportation as a potential consequence, regardless of whether the charged offense mandates incarceration, is imperative to her making a voluntary and informed plea decision.

Since the 1930s, the U.S. Supreme Court has expanded the Sixth Amendment's Right to Counsel Clause's guarantees,[10] finally limiting its expansion in *Scott v. Illinois*[11] to only those facing possible incarceration. At the time when the Court issued the *Scott* decision in 1979,

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[6] *See, e.g.,* Orehhova v. Gonzales, 417 F.3d 48 (1st Cir. 2005) (holding that there is no Sixth Amendment right to counsel in removal proceedings); United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003) ("As deportation proceedings are civil in nature, aliens in such proceedings are not protected by the Sixth Amendment right to counsel.").

[7] New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 33 CARDOZO L. REV. 357, 363-364 (2011) (hereinafter Counsel in Immigration Proceedings Study).

[8] Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (Stevens, J.); *see* 8 U.S.C. §1229b.

[9] Indeed, over ninety percent of criminal convictions result from guilty pleas, thus advising clients whether to plead guilty and on what terms is one of the most important functions of a criminal defense attorney. Gabriel J. Chin & Richard W. Holmes Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 697-98 (2002); Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 2003, at 450 tbl.5.46 (2005).

[10] *See* discussion *infra* Part II.

[11] 440 U.S. 367 (1979).

however, there were far fewer offenses triggering deportation,[12] and agencies had greater discretion in canceling pending deportations.[13] Recently, in *Padilla v. Kentucky*,[14] the United States Supreme Court held that deportation is a "penalty" intimately intertwined with criminal convictions or convictions to which deportation attaches, even if it is carried out by a different governmental agency.[15]

This paper argues that, taken together, the *Padilla* and *Scott* holdings, government policies, and applicable codes of ethics may provide a noncitizen with a Sixth Amendment right to counsel when facing possible deportation even if the offense charged does not authorize incarceration. Although the holding in *Padilla* is limited,[16] it provides a basis for challenging the current apertures in a person's right to appointed counsel.

II. The Current Role of the Judiciary: A Cursory and Sometimes Absent Warning

Although federal judges must ensure that defendants are aware of the deportation consequences that may attach to a guilty or nolo contendere plea during the plea colloquy,[17] less than half of state judges are similarly obligated.[18] Even if a defendant is advised during his plea

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[12] *See* INS v. St. Cyr, 533 U.S. 289, 295-96 (noting that "in the period between 1989 and 1995 alone, §212(c) relief [a common form of discretionary relief available to lawful permanent residents] was granted to over 10,000 aliens," or more than half of those eligible); Clapman, *supra* note 1, at 591 ("In 1988, Congress expanded the range of deportable crimes by creating a category of "aggravated felonies" that included murder, drug trafficking, and firearms trafficking. In 1990, Congress: (1) expanded this category to include any crime of violence for which the sentence was at least five years; (2) barred noncitizens with an aggravated felony conviction from receiving most forms of relief from deportation—even asylum and other fear-based relief; (3) removed all discretionary relief for those who had served more than five years for an aggravated felony conviction; and (4) eliminated the JRAD.").

[13] *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 402-3 (2006).

[14] 559 U.S. 356 (2010).

[15] *Id.* at 1481 (citing *U.S. v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982)).

[16] *See, e.g.,*Vivian Chang, *Where Do We Go from Here: Plea Colloquy Warnings and Immigration Consequences Post-Padilla*, 45 U. MICH. J. L. REFORM 189, 202 (2011) ("Padilla's holding, although progressive, does not go far enough to protect the rights of non-citizen defendants in the criminal justice system; standing alone, it may not have much of a practical effect."); Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393 (2011).

[17] *See* Committee Notes FED. R. CRIM. P. 11(b)(1)(O) (mandating a "generic warning [regarding immigration consequences] . . . .[be] provid[ed] to every defendant . . . .").

[18] *See, e.g.,* James C. McKinley Jr., *Judges Must Warn About Deportation, New York Appeals Court Rules*, The New York Times (Nov. 19, 2013) http://nyti.ms/1o1N0cv (explaining that although twenty states require judges to issue warnings about possible deportation consequences, "failing to give the warning carrie[s] no consequence, and judges

colloquy, vacating a guilty plea because of a judge's failure to advise a defendant of possible deportation consequences is a difficult hurdle to overcome.[19] Moreover, because most criminal laws are state laws, a noncitizen's pleading guilty to a petty, but deportable offense, will likely be in a state court.[20] Thus, in many situations, noncitizens are never informed of possible deportation consequences.

Though some trial courts do advise defendants of possible deportation consequences, a trial court's plea colloquy, nevertheless, does not sufficiently advise a defendant of possible deportation consequences and should not be considered as a substitute for the more thorough advice of competent counsel.[21] As this paper proposes, the best solution to this problem would be to attack the issue from both ends: state courts should provide greater remedies to defendants facing possible deportation for having their pleas overturned in the situations in which they are not fully informed of the deportation consequences of their pleas, at the federal or state level, and to concurrently expand a noncitizen's right to counsel.[22]

III. The Foundation of the U.S. Constitution's Guarantee That Any Person Facing Possible Loss of Liberty Has The Right To Counsel: *Gideon* and its Progeny

The Sixth Amendment to the United States Constitution, ratified in 1791, states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel

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sometimes skip it."); Andrew M. Rosenthal et al., *A Judge's Duty to Warn About Deportation*, The New York Times (Dec. 13, 2013) http://nyti.ms/1siNFYa (explaining that there are approximately twenty states that require state court judges to inform a defendant of possible deportation consequences, adding that enforcement has "frequently been overlooked").

[19] *See* People v. Peque, 3 N.E.3d 617 (N.Y. 2013) (holding that "in order to withdraw or obtain vacatur of a plea, a defendant must show that there is a reasonable probability that he or she would not have pleaded guilty and would have gone to trial had the trial court informed the defendant of potential deportation.").

[20] *See, e.g.,* President William Clinton, President's Speech on Anticrime Legislation 1994 WL 45023, at 6-7 (Feb. 16, 1994) ("And then we have to recognize, as all of you know, that most laws—criminal laws—are state laws and most criminal law enforcement is done by local police officials.").

[21] Danielle M. Lang, Padilla v. Kentucky: *The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful Padilla Claims*, 121 YALE L.J. 944, 944 (2012) ("In the plea context, the court and defense counsel serve complementary but distinct functions in our constitutional structure; neither can replace the other, and the failure of either court or counsel constitutes a breakdown in our system.").

[22] This paper focuses primarily on expanding a noncitizen defendant's right to counsel. For a discussion on plea colloquies, see Chang, *supra* note 16.

for his defence."[23] Until the 1930s, the United States Supreme Court interpreted this language narrowly, finding that it only prohibited states from denying the accused a defense attorney at trial.[24] In *Powell v. Alabama*,[25] however, the Court found that the Sixth Amendment placed upon the states the affirmative duty to provide defense attorneys to indigent defendants in capital trials.

In 1963, *Gideon v. Wainwright*[26] extended the scope of the Sixth Amendment's guarantee of a defendant's right to counsel, holding that the Sixth and Fourteenth Amendments place the affirmative duty on states to provide counsel to indigent criminal defendants charged with a felony. Justice Black, writing for a unanimous Court, noted that the right to counsel was "fundamental and essential to fair trials."[27] Expanding this right further in 1972, the Court in *Argersinger v. Hamlin*[28] held that *any* defendant charged with a crime punishable by imprisonment had the right to counsel, regardless of whether he is charged with a misdemeanor or felony. This decision, compounded with the Fourteenth Amendment's Due Process Clause,[29] granted both citizen and noncitizen defendants the right to counsel.

In *Scott*, a 5–4 opinion, the Court found that indigent defendants not exposed to possible incarceration have no Sixth Amendment right to counsel, thus explicitly limiting the Court's holding in *Argersinger*. Additionally, the Court drew a clear distinction for Sixth Amendment Right to counsel protection between charges that merely carried a potential punishment of a fine

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[23] U.S. CONST. amend. VI.
[24] *See, e.g.,* Scott v. Illinois, 440 U.S. at 370 ("There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense."); Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right*, 29 AM. CRIM. L. REV. 35, 41-42 (1991) (explaining that, at the time it was written, the Sixth Amendment's guarantee of a right to counsel was merely the right to retain a lawyer of choice at one's own expense).
[25] 287 U.S. 45 (1932).
[26] 372 U.S. 335 (1963).
[27] *Id*. at 344.
[28] 407 U.S. 25 (1972).
[29] U.S. CONST. amend. XIV (". . . nor shall any state deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws.") (emphasis added).

and those that carried incarceration. Writing for the majority, Justice Rehnquist noted that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment."[30] As Justice Powell noted in his concurrence in both *Argersinger* and *Scott*, however, fines and incarceration are merely two extremes on a spectrum of significance.[31] Justice Rehnquist's position is a distinction that is made without a clear difference; as Justice Powell noted, [32] the consequences of a criminal conviction are many, some potentially more serious than imprisonment.

Finally in 2010, the Court found that defense attorneys must advise non-citizen clients about the possible deportation consequences of a guilty plea, thus extending criminal defendants' Sixth Amendment right to counsel.[33] Many immigration scholars have proffered that *Padilla* challenges the distinction courts have historically drawn between incarceration and other "collateral" consequences of being found guilty.[34] Similarly, many understand *Padilla* as providing an avenue to broaden the scope of *Gideon* and the Sixth Amendment to require states to appoint counsel for those facing the threat of possible deportation, regardless of whether they face possible incarceration.[35]

III. The Right To Effective Counsel: *Strickland v. Washington* and *Janvier v. United States*

Today, the Model Rules of Professional Conduct ("MRPC"), which many states have adopted, provides lawyers with minimum standards of professional conduct while representing clients. A defense attorney, therefore, to ensure that her representation comports with the

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[30] *Scott*, 440 U.S. at 373.
[31] *Id*. at 374 (Powell, J., concurring) ("[T]he drawing of a line based on whether there is imprisonment (even for overnight) can have the practical effect of precluding provision of counsel in other types of cases in which conviction can have more serious consequences.").
[32] *Id.*
[33] *Padilla*, 559 U.S. at 369 ("when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.").
[34] *See e.g.,* Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1316 (2011).
[35] *See* Clapman, *supra* note 1, at 618.

MRPC's standards, must inform noncitizen clients of possible deportation consequences resulting from a criminal conviction or guilty plea.[36] This presents a gap in the criminal justice system: if court-appointed lawyers have an affirmative duty to inform their indigent, noncitizen clients of possible deportation consequences, does the legal profession now have the affirmative duty to provide counsel to those noncitizens not facing possible incarceration (and thus not Constitutionally entitled to counsel), but facing possible deportation nevertheless? An examination of the MRPC Rule 1.1, *Strickland* and *Janvier* considering *Padilla* suggests the answer is *yes*.

A. A Lawyer's Duty to Provide Competent Representation pre-Padilla

The MRPC Rule 1.1(1) provides that, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Although the Court finds that the American Bar Association's code of conduct can be "guides," failure to comply with these guidelines is not dispositive of an attorney's ineffectiveness. In *Strickland v. Washington,*[37] however, the Court elaborated on this standard, concluding that the Sixth Amendment granted a criminal defendant the right to "effective" assistance of counsel.[38] According to the Supreme Court, a defendant's right to counsel attaches at the first formal hearing.[39] Defendants, however, are only constitutionally entitled to have counsel present at "critical stages" of prosecution.[40] The Court has found that the "critical stages" include: "proceedings between an individual and agents

[36] Padilla, 559 U.S. at 369.
[37] 466 U.S. 668 (1984).
[38] *Id*. at 686.
[39] *See* McNeil v. Wisconsin, 501 U.S. 171, 180-81 (2008) ("The Sixth Amendment right to counsel attaches at the first formal proceeding against an accused . . . .").
[40] *Id*. at 212.

of the State . . . that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems . . . or in meeting his adversary . . . .'"[41]

Under the *Strickland* standard, it is extremely difficult for a defendant to prevail in a habeas claim.[42] To prevail, a defendant must show that (1) the attorney's performance "fell below an objective standard of reasonableness;"[43] and (2) this sub-par performance was serious enough to adversely affect the outcome of the trial.[44]

Following *Strickland*, and despite its difficult standards,[45] several courts have held that an attorney's failure to advise his client about the potential for deportation can render a guilty plea involuntary.[46] Specifically, in 2002, the United States Court of Appeals for the Second Circuit held, in *United States v. Couto,*[47] that an affirmative misrepresentation of immigration consequences violated the standards set forth in *Strickland*.[48] In a more recent case, cited favorably by the Supreme Court in *Padilla*, the Second Circuit found that the right to effective counsel applied to Judicial Recommendation Against Deportation[49] ("JRAD") requests or to the lack thereof.[50] According to the Supreme Court, because of JRAD, "from 1917 forward, there was no such creature as an automatically deportable offense."[51] Thus, the Supreme Court agreed

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[41] *Id*. at 212 n.16.
[42] Primus, Eve Brensike, *The Illusory Right to Counsel*, 37 OHIO N. U. L. REV. 597, 609 (2011) ("[T]he *Strickland v. Washington* standard that is currently used to assess a trial attorney's effectiveness makes it incredibly difficult for the defendant to prevail.").
[43] *Strickland*, 466 U.S. at 690.
[44] *Id*. at 687-88.
[45] *Padilla*, 559 U.S. at 371 (stating that "[s]urmounting Strickland's high bar is never an easy task").
[46] *See, e.g.,* United States v. Kwan, 407 F.3d 1005 (9th Cir. 2005); United States v. Couto, 311 F.3d 179 (2d Cir. 2002); Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988); United States v. Russell, 686 F.2d 35 (D.C. Cir. 1982).
[47] *Couto,* 311 F.3d 179, 188 (2d Cir. 2002).
[48] *Id.*
[49] JRAD originated in the 1917 Immigration Act. It provided that at the time of sentencing (or within thirty days thereafter), the sentencing judge had the power to recommend that, "such alien shall not be deported." Immigration Act of 1917, PUB. L. NO. 64-301, § 19, 39 Stat. 874, 890, *repealed by* Immigration Act of 1990, PUB. L. NO. 101-649, § 505, 104 Stat. 4978, 5050. This gave the judge discretion to determine whether the particular conviction should be disregarded as a basis for deportation.
[50] *Padilla*, 559 U.S. at 363 (citing Janvier v. United States, 793 F. 2d 449 (1986)).
[51] *Id*. at 362.

with the Second Circuit in *Janvier* that deportation consequences are "a central issue to be resolved during the sentencing process—not merely a collateral matter outside the scope of counsel's duty to provide effective representation."[52]

After several years of limiting the reach of JRAD hearings, however, Congress eliminated JRAD in 1990.[53] Since then, recognizing the increase in convictions carrying mandatory deportation consequences, the elimination of the JRAD option, and the increasing limitations of other forms of discretionary relief, the system has rendered deportation virtually inevitable.[54] As a result, the question of whether a lawyer, without the safeguards of JRAD, has an ethical duty to inform his client of possible deportation consequences persists. The Court's holding in *Padilla* resolved that not only does a lawyer have a duty to accurately counsel a client about possible consequences, but that a lawyer also has the affirmative duty to inform a client of possible deportation consequences with "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[55]

B. Post-Padilla*: Faulty Advice vs. No Advice*

In its ruling, the *Padilla* Court placed an affirmative duty on attorneys to inform their clients about possible deportation consequences, reasoning that:

> A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'[56]

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[52] *Id*. at 363.
[53] Immigration Act of 1990, PUB. L. NO. 101-649, § 505, 104 Stat. 4978, 5050.
[54] Kanstroom, Daniel, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1487 (2011).
[55] MODEL RULES OF PROF'L CONDUCT R. 1.1(1)
[56] *Padilla*, 559 U.S. at 370 (quoting Libretti v. United States, 516 U.S. 29, 50–51 (1995)).

Under this reasoning, a defense attorney has not fulfilled her duty to her client until she has researched and competently advised her client of the possible consequences of a guilty plea or verdict. Failing to fulfill this "quintessential" duty "clearly satisfies the first prong of the *Strickland* analysis."[57] When an indigent defendant is not entitled to counsel, she will never receive advice on this "matter[] of great importance."[58] Thus, the affirmative duty to inform a defendant of possible deportation consequences goes unfulfilled.[59]

IV. Extending *Gideon*'s Promise Considering *Padilla* and *St. Cyr*: An Analysis of Heightened Need for Courts to inform Non-citizens Not Eligible for Court Appointed Counsel of the Possible Consequences of His or Her Guilty Plea

a. The Increase in Deportable Crimes and the Heightened Need For Counsel

Over the last decade, the Department of Homeland Security ("DHS") has deported more people for criminal activity than any other time in United States history: between 1908 and 1980, the United States deported 48,330 individuals based on criminal history—in 2004 alone, the government deported 42,510 individuals based on their criminal history.[60]

In her article entitled "Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation,"[61] Alice Clapman offers this common scenario: Sarah, a 17-year-old student, who for the past six years has been living as a legal resident in Virginia, is a passenger in a car that is pulled over. The police search the car and find 35 grams of marijuana. Although the drugs belong to the driver, the Commonwealth charges both the driver and Sarah with possession.[62] Because Sarah is a first

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[57] *Id*. at 371.
[58] *Id*.
[59] *See supra* Part II (discussing the current role of the judiciary during plea a colloquy).
[60] Immigration & Naturalization Serv., U.S. Dep't of Justice, 1997 Statistical Yearbook of the Immigration and Naturalization Service 187 tbl. 67 (1999); Office of Immigration Statistics, U.S. Dep't of Homeland Sec., 2004 Yearbook of Immigration Statistics 161 tbl. 42 (2006).
[61] *See* Clapman, *supra* note 1, at 585.
[62] *See Id.* at 586, n. 1 (stating that according to criminal defense attorney Daniel Voss, the scenario in which all occupants of a vehicle are charged with possession for a single bag of drugs is "typical").

time offender, the prosecutor offers that if she enters a plea of guilty, she will receive a deferred adjudication; if she stays out of trouble for six months, the court will dismiss the charges against her. Because the Commonwealth is waiving jail time, however, she is not entitled to a court-appointed attorney. If she cannot obtain counsel, no one will advise Sarah that by pleading guilty, even if the charges are eventually dropped, she will now have a record of "conviction" that may subject her to deportation.

This situation is a reality for many legal residents living in the United States. Although the DHS has not disclosed specifically the number of citizens who have been deported for minor offenses, statistics from its Secure Communities program, one of several DHS programs, reveal that DHS is deporting over ten thousand individuals for minor convictions every year through this one program alone.[63] Petty theft cases, such as turnstile-jumping,[64] for example, are considered crimes involving moral turpitude and thus a basis for deportation.[65] Other crimes deemed crimes involving moral turpitude include stolen bus transfers,[66] public urination,[67] and other minor offenses.[68] These crimes often do not entitle an indigent defendant to counsel, yet pleading guilty to these offenses may result in deportation. Indeed, according to a Secure Communities Task Force representative, "immigrants often plead guilty to minor offenses

[63] U.S. Immigration & Customs Enforcement, Secure Communities: IDENT/IAFIS Interoperability, Monthly Statistics Through September 30, 2011, at 2, 4 (2011).
[64] *See* Johnson v. Holder, 413 F. App'x 435 (3d Cir. 2010) (involving a noncitizen placed in deportation proceedings, and detained for three years and counting, based on convictions for "turnstile-jumping"), vacated in part as moot, 2011 U.S. App. LEXIS 2593 (3d Cir. Feb. 9, 2011).
[65] In the mid-1990s, Congress expanded the offenses it considered "deportable," including several non-violent crimes. The Antiterrorism and Effective Death Penalty Act of 1996 broadened the expanded the government's ability to deport someone for a single conviction of a crime "involving moral turpitude," including offenses punishable by a year or more of imprisonment, regardless if the person is *actually* sentenced to the year. *See* INA § 241(a)(2)(A)(i)(II) (codified as amended at 8 U.S.C. § 1227(a)(2)(A)(i)(II) (2006)).
[66] *See* Michel v. INS, 206 F.3d 253 (2d Cir. 2000).
[67] *See Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, HUMAN RIGHTS WATCH 54 (July 2007), http://www.hrw.org/sites/default/files/reports/us0707_web.pdf.
[68] *See Id.* at 23 (e.g., public display of one's buttocks ("mooning")).

without understanding that those guilty pleas may result in deportation."[69] Noncitizens plead guilty *without even realizing that their liberty is at stake.*

In *INS v. St. Cyr,*[70] the Supreme Court held that the 1996 amendments eliminating discretionary relief for individuals convicted with drug trafficking did not apply retroactively to individuals charged before 1996.[71] Finding that "alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions," the Court reasoned that a system in which defendants could plead guilty, effectively "grant[ing] the government numerous tangible benefits" that can be altered at any time, would be fundamentally unfair.[72] Because the defendants in *St. Cyr* entered their guilty pleas with certain legal expectations, those consequences could not be changed retroactively without violating fundamental concepts of fairness.[73]

The Court in *St. Cyr* made clear that holding a defendant accountable for severe consequences that he did not foresee when entering his guilty plea is unfair. In so holding, the Court considered why noncitizens negotiate and accept government plea offers:

> [The Defendant] entered into extensive plea negotiations with the government, the sole purpose of which was to ensure that "he got less than five years to avoid what would have been a statutory bar on 212(c) relief." . . . Relying upon settled practice, the advice of counsel, and perhaps even assurances in open court that the entry of the plea would not foreclose § 212(c) relief, a great number of defendants in [Defendants'] position agreed to plead guilty. Now that prosecutors have received the benefit of these plea agreements, agreements that were likely facilitated by the aliens' belief in their continued eligibility for § 212(c) relief, it would surely be contrary to "familiar considerations of fair notice, reasonable reliance, and settled expectations, to hold that IIRIRA's subsequent restrictions deprive them of any possibility of such relief."[74]

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[69] U.S. Dep't of Homeland Sec., Task Force on Secure Communities Findings and Recommendations 19, 20 (2011).
[70] 533 U.S. 289 (2001).
[71] *Id*. at 305.
[72] *Id.* at 323 ("The potential for unfairness in the retroactive application of IIRIRA § 304(b) to people like [the defendants] is significant and manifest.").
[73] *Id.*
[74] *St. Cyr*, 533 U.S. at 323-24 (internal citations omitted).

Noting that for noncitizens avoiding possible deportation is the driving factor in plea bargaining, the Court held that the government could not enforce these new deportation consequences retroactively.

b. A Noncitizen Who Enters a Plea of Guilty Does So Involuntarily If She Has Not Been Advised of Possible Deportation Consequences

The *Scott* Court emphasized the Court's holding in *Argersinger*, stating that "we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel."[75] The *Scott* Court based its holding on the *Argersinger* Court's repeated reference to the "loss of liberty."[76] Since *Argersinger* and *Scott*, however, the frequency and consequences of deportation have become more severe and much more common. Today, not only is deportation much more likely, it is akin to incarceration and is certainly a deprivation of liberty. Indeed, in *Ng Fung Ho v. White*,[77] the Court found that, "[d]eportation may result [] in loss of both property and life; or of all that makes life worth living."[78]

Because it is considered a civil action, removal proceedings are not subject to a constitutional limit on disproportionate punishment.[79] Many criminal justice norms, however, have been applied to the deportation process.[80] Through many legal fictions,[81] courts have

[75] *Scott*, 440 U.S. at 373.
[76] *Id*.
[77] 259 U.S. 276 (1922).
[78] *Id*. at 284.
[79] Brines v. INS, 192 F.3d 1320, 1323 (9th Cir. 1999).
[80] Among these are the increased criminalization of immigration violations, severity of consequences, preventative detention, involvement of local and state law enforcement officers. Deportation hearings have also been afforded several "criminal" rights, such as the right to effective assistance of counsel, the rule of lenity, the void for vagueness doctrine, and the exclusionary rule. *See* Markowitz, *supra* note 34, at 1316.
[81] *Id.* at 1318 ("[C]ourts twist themselves in knots, using legal fiction heaped upon legal fiction, to make the criminal square pegs fit in the civil round holes is the best evidence of the doctrinal incoherence that currently exists in courts' treatment of the nature of deportation proceedings.").

recognized that deportation is different from other civil proceedings and have accordingly applied to it several of the protections traditionally afforded to criminal defendants.[82] Although deportation hearings have some of the same legal protections afforded to criminal proceedings, however, many disconnects remain. "The oddity of a right to effective assistance, without the corresponding right to any assistance at all, is perhaps the clearest example of doctrinal incoherence in the courts' treatment of the nature of removal proceedings."[83]

The distinction between civil and criminal proceedings is a critical one: it determines whether a consequence is collateral or non-collateral.[84] The need for this distinction is a product of lower courts attempting to define the scope of the Supreme Court's holding that "a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the [direct] consequences."[85] Accordingly, lower courts adhere to the principle that a defendant must be appraised of the direct, but not the collateral consequences, of a plea before a he pleads guilty to a crime.[86] If a defendant is not informed of these consequences, he is considered to have made his plea involuntarily.[87]

Traditional Supreme Court jurisprudence has classified deportation as a civil matter, and thus a collateral consequence of a guilty plea. *Padilla*, however, diverges from deportation's traditional label. Although the Court declared deportation a "civil" matter, it placed upon it a

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[82] *Id.* at 1316.
[83] *Id.* at 1320.
[84] Although this standard has not been explicitly endorsed by the Supreme Court, every lower court seems to agree that the determination of whether a consequence is collateral is really a question of whether is it civil. *See, e.g., United States v. George,* 869 F.2d 333, 337 (7th Cir. 1989).
[85] Kercheval v. United States, 274 U.S. 220, 223 (1927).
[86] *See, e.g.,* Barajas v. State, 991 P.2d 474, 475-76 (Nev. 1999); Bolware v. State, 995 So. 2d 268 (Fla. 2008); People v. Belliard, 985 N.E.2d 415 (N.Y. 2013).
[87] *See* Brady v. United States, 397 U.S. 742, 755 (1970) ("The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit: '(A) plea of guilty entered by one fully aware of the *direct* consequences . . . .'") (emphasis added).

new caveat: "[deportation] is nevertheless intimately related to the criminal process."[88] Ultimately, the Court concluded that deportation is "uniquely difficult to classify," and acknowledged the difficulty of applying the direct-collateral distinction to it.[89]

Viewing *Padilla* and *St. Cyr* together, a noncitizen has the right to plead guilty with at least a minor understanding of the immigration consequences that attach, and before pleading a noncitizen must be informed by her lawyer about the immigration consequences of her plea. Without counsel, a noncitizen defendant cannot obtain "proper advice" and agree to a plea "with full understanding of the consequences,"[90] rendering his or her plea involuntary. The Court based these holdings on the understanding that deportation is a severe penalty and that it is "'most difficult' to divorce . . . from the conviction in the deportation context." Because "an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney,"[91] it is imperative that defendants facing possible deportation be equipped with counsel so they may negotiate a plea that considers possible deportation consequences, as outlined in *St. Cyr*.

This assertion is consistent with the Court's holding in *Scott*. In *Scott*, the Court reasoned that because imprisonment is more severe than a mere fine, the Sixth Amendment's guarantees extended only to defendants facing possible jail time: "Imprisonment, unlike a fine, involves a complete disruption of normal life, separation from family and friends, absence from employment and very frequently loss of job."[92] Similarly, "[t]he severity of deportation—'the equivalent of banishment or exile,'—only underscores how critical it is for counsel to inform her

[88] *Padilla*, 559 U.S. at 365.
[89] *Id*. at 366.
[90] *Kercheval*, 274 U.S. 220, 223 (1927).
[91] *Brady*, 397 U.S. 742, 748 n.6 (1970).
[92] Clapman, *supra* note 1, at 607-8 (quoting Brief for the United States as Amicus Curiae Supporting Respondents, Argersinger v. Hamlin, 407 U.S. 25 (1972) (No. 70-5015), 1971 WL 126425 at 15).

noncitizen client that he faces a risk of deportation."[93] Today, given the inseparable nature of deportation, criminal convictions, and the loss of liberty that may attach to a finding of guilt, providing counsel to those facing possible deportation is consistent with the reasoning of both *Argersinger* and *Scott*: when liberty is at risk, "[c]ounsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."[94] Noncitizens negotiate plea agreements for petty crimes without a complete understanding of the possible consequences, including the possibility of being deported. Like the defendants in *St. Cyr*, these individuals' agreements with the government are "surely [] contrary to 'familiar considerations of fair notice, reasonable reliance, and settled expectations,'"[95] and thus involuntarily made. These noncitizens are not voluntarily subjecting themselves to possible deportation. They are doing so unknowingly and without ever speaking to an attorney.

V. Conclusion

The Court's holding in *Padilla* is ground-breaking for lawyers and noncitizens facing possible deportation. Many immigrants facing possible deportation, however, continue to fall through the cracks despite this holding. Although *Padilla* places the affirmative duty on defense attorneys to advise their clients about the possible consequences a guilty plea may have on their immigration status, many people who face the same consequences are not afforded this notice. Today, "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important."[96] In fact, as the United States Supreme Court has observed, "[d]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be

[93] *Padilla*, 559 U.S. at 373-74.
[94] *Argersinger*, 407 U.S. at 34.
[95] *St. Cyr*, 533 U.S. at 323-24 (internal citations omitted).
[96] *Padilla*, 559 U.S. at 364.

imposed on noncitizen defendants who plead guilty to specified crimes."[97] Thus, like Gideon and Padilla, many noncitizens stand as the government's adversary without the advice of counsel, ignorant of the possible consequences their pleas may have on their liberty. Because "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel,"[98] those who stand accused of crimes to which deportation attaches are entitled to counsel regardless of whether incarceration is a penalty.

[97] *Id*.
[98] *Id*. at 366.