Seattle Journal for Social Justice

Volume 11
Issue 3 *11.3*

Article 5

11-1-2013

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Recommended Citation

Zeidman, Steven (2013) "GIDEON: LOOKING BACKWARD, LOOKING FORWARD, LOOKING IN THE MIRROR," *Seattle Journal for Social Justice*: Vol. 11: Iss. 3, Article 5.
Available at: http://digitalcommons.law.seattleu.edu/sjsj/vol11/iss3/5

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GIDEON: LOOKING BACKWARD, LOOKING FORWARD, LOOKING IN THE MIRROR

Steven Zeidman*

I. INTRODUCTION

People concerned about the rights of poor people who have been charged with crime talk longingly and despairingly about "the promise of *Gideon*."[1] If you "google" that phrase you will find countless references dating back to, well, *Gideon*.[2] Various lawsuits, myriad commissions, and numerous law review articles since time immemorial have detailed the crisis in indigent

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[1] Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (overruling Betts v. Brady, 316 U.S. 455 (1942), and holding that the Sixth Amendment right to counsel is a fundamental right that applies to the states through the Fourteenth Amendment's due process clause and guarantees indigent defendants the right to counsel in all felony cases).

[2] *See, e.g.*, Richard D. Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986) [hereinafter *The Emperor* Gideon]; Note, Gideon*'s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062 (2000); Evitts v. Lucey, 469 U.S. 387, 397 (1985) ("[T]he promise of *Gideon* that a criminal defendant has a right to counsel at trial[.]"); STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), *available at* http://www.americanbar.org/content /dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [hereinafter *GIDEON'S* BROKEN PROMISE]; Editorial, Gideon*'s Promise, Still Unkept*, N.Y. TIMES, Mar. 18, 1993, at A22; Anthony Lewis, *The Silencing of* Gideon*'s Trumpet*, N.Y. TIMES MAG., Apr. 20, 2003 ("endless failures to bring the promise of *Gideon* to life").

defense.[3] In fact, reference to "the promise of *Gideon*" is usually immediately preceded by reference to "the crisis in indigent defense."[4]

The oft-chronicled "problem" and "crisis" of indigent defense is usually cast as one of resources—either defense attorneys are not being provided at

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[3] *See, e.g.*, Duncan v. State of Michigan, 791 N.W.2d 713 (Mich. 2010); Hurell-Harring v. State of New York, 930 N.E.2d 217, 225–27 (2010); AM. BAR ASS'N., *GIDEON* UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING 3 (1982), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/gideonundone.authcheckdam.pdf [hereinafter CRISIS IN INDIGENT DEFENSE FUNDING]; COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 34 (2006) ("The crisis in indigent representation in this state is a well documented fact. The time for action is now."), *available at* http://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.; STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, NATIONAL INDIGENT DEFENSE REFORM: THE SOLUTION IS MULTIFACETED (2012), *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/135757 4231NIDR_ Solution.pdf [hereinafter ABA NAT'L INDIGENT DEFENSE REFORM]; Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 427 (2009) ("For years, scholars have documented the national crisis in indigent defense and its many tragic implications, and yet the crisis persists."); Paul Marcus & Mary Sue Backus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006).

[4] *See, e.g.*, *GIDEON*'S BROKEN PROMISE, *supra* note 2, at 38 ("[I]ndigent defense in the United States remains in a state of crisis . . . When we fail to deliver on the promise of *Gideon* . . . the integrity of the criminal justice system is eroded and the legitimacy of criminal convictions is called into question."); Wayne A. Logan, *Litigating the Ghost of* Gideon *in Florida: Separation of Powers as a Tool to Achieve Indigent Defense Reform*, 75 MO. L. REV. 885, 885 (2010) ("Today, the promise long ago heralded by Clarence Gideon's successful appeal goes unfulfilled, as public indigent defense systems nationwide operate in perpetual crisis mode."); Bill Piatt, *Reinventing the Wheel: Constructing Ethical Approaches to State Indigent Legal Defense Systems*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 372, 374–75 (2012) ("Forty years later, *Gideon*'s potential influence has been characterized as a broken promise. Attorney General Eric Holder recently characterized our indigent-defense systems as a 'crisis.'"); Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System*, CHAMPION, June 2012, at 38, 43 ("The academic literature has taken note of this [indigent defense] crisis and is filled with titles of articles such as Gideon's *Muted Trumpet,* Gideon's *Promise Unfulfilled,* Gideon *at 40: Facing the Crisis, Fulfilling the Promise, The Silence of* Gideon's *Trumpet, Keeping* Gideon *from Being Blown Away,* and *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*.") (footnotes omitted).

critical stages of the case, or they are so under-resourced that they are unable to provide truly effective assistance.[5] Whether viewed as actual or constructive denials of the right to counsel, these critical issues are but preliminary matters to analyze when confronting the failed promise of *Gideon*. While it is of course necessary to demand that fully resourced attorneys be made available for all who are accused of crime,[6] that in and of itself is not sufficient to fulfill the promise of *Gideon*.

In *Gideon*, Justice Black wrote that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[7] It seems clear that Clarence Earl Gideon wanted an attorney to represent him *at trial*.[8] Indeed, after being forced to defend himself at his first trial,[9] and despite doing so "about as well as could be

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[5] *See, e.g.*, CRISIS IN INDIGENT DEFENSE FUNDING, *supra* note 3, at 3 ("The financing of criminal defense services for indigents is generally inadequate[.]"); *The Emperor* Gideon, *supra* note 2, at 627 ("[T]he severity of the underfunding of those agencies providing defense counsel to the indigent seriously endangers the sixth amendment guarantee to effective assistance of counsel."); Norman Lefstein, *In Search of* Gideon*'s Promise: Lessons From England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 838 (2004) ("[T]here is abundant evidence that systems of indigent defense routinely fail to assure fairness because of under-funding and other problems."). In *Strickland v. Washington*, the Court held that "'the right to counsel is the right to the effective assistance of counsel.'" 466 U.S. 668 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

[6] In *Argersinger v. Hamlin*, the Court extended *Gideon'*s reach to all cases where the accused faced the possibility of incarceration. 407 U.S. 25, 37 (1972).

[7] Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (emphasis added).

[8] Gideon wrote,

> It makes no difference how old I am or what color I am or what church I belong too if any. The question is I did not get a fair trial. The question is very simple. I requested the court to appoint me attorney and the court refused. All countrys try to give there Citizens a fair trial and see to it that they have counsel.

Reply to Response to Petition for Writ of Certiorari, Gideon v. Cochran, No. 890 Misc. (Oct. 1961), *available at* http://www.ct.gov/ocpd/cwp/view.asp?a=4087&q=479204.

[9] *See Gideon*, 372 U.S. at 792. Twenty years before Gideon first stood trial, the Supreme Court rejected an absolute constitutional guarantee of counsel for indigent

expected from a layman,"[10] Gideon was found guilty of breaking and entering into a Florida pool hall and taking money from a cigarette vending machine and juke box; he then was sentenced to five years in state prison.[11] Subsequently, at his retrial, when he was finally represented by counsel, the jury acquitted Gideon after one hour of deliberations.[12]

The truth, or irony, is that even as attorneys are being provided more and more often, their representation usually consists of facilitating guilty pleas, not litigating trials.[13] Even the United States Supreme Court recently acknowledged that the prevailing, dominant mode of criminal defense representation is entering guilty pleas.[14] The undeniable truth is that

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defendants in noncapital cases. *See* Betts v. Brady, 316 U.S. 455, 462, 471–72 (1942) (holding that due process required appointment of counsel in noncapital cases only where circumstances of a particular case demonstrated that indigent defendant would otherwise be denied fundamental fairness).

[10] *Gideon*, 372 U.S. at 792–93.

[11] *See* ANTHONY LEWIS, *GIDEON*'S TRUMPET 7, 244–45 (1964).

[12] *See id.* at 249.

[13] *See, e.g.*, Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 991 (1983) ("[O]ur accusatorial ideals have been so perverted by plea bargaining that American officials commonly expect . . . an unqualified affirmation of guilt."); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1138 (2011) [hereinafter Bibas, *Regulating the Plea-Bargaining Market*] ("[T]oday, 95 percent of criminal convictions result from guilty pleas and only 5 percent result from trials. Plea bargaining is no longer a negligible exception to the norm of trials; it is the norm.") (footnote omitted); Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409 (2008) ("Plea bargaining now dominates the day-to-day operation of the American criminal justice system; about ninety-five percent of convictions are obtained by way of a guilty plea.") (footnote omitted).

[14] Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials."); Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process . . . that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."); *see also* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) ("[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.").

Gideon's original request for a lawyer to be appointed to represent him at trial has devolved into lawyers appointed to simply negotiate plea bargains.

This essay argues that the single-minded attention given to increasing resources as the external cure for what ailed Clarence Earl Gideon obscures a long overdue examination of what it is that public defenders actually do on behalf of their clients. All too often, public defenders and advocates for indigent defendants point fingers when asked about the indigent defense crisis—the government will not pony up sufficient funds, the legislature criminalizes too many things, the police department makes too many quality-of-life and zero tolerance arrests, the prosecution too rarely declines to prosecute, the judges seldom dismiss, etc.[15] All of these accusations are legitimate and contribute mightily to the "crisis." Nevertheless, public defenders must also look inward and ask how, if at all, they contribute to *Gideon's* failed promise and how they might change for the better. In 2010, the Department of Justice convened a national symposium on indigent defense entitled, "Looking Backward, Looking Forward,"[16] harkening back to a similar symposium held in 1999.[17] It is now time for public defenders to look in the mirror.

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[15] *See, e.g.*, ABA NAT'L INDIGENT DEFENSE REFORM, *supra* note 3, at 5 ("Overreliance upon the criminal justice system as an instrument of social and regulatory control, absence of administrative support structures, and insufficient funding streams have left the assurance of *Gideon* fundamentally unfulfilled."); THE SPANGENGBERG GRP., STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE'S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES 162 (2006), *available at* http://www.courts.state.ny.us/ip/indigentdefensecommission/SpangenbergGroupReport.pdf.

[16] U.S. DEP'T OF JUSTICE, NATIONAL SYMPOSIUM ON INDIGENT DEFENSE: LOOKING BACK, LOOKING FORWARD, 2000–2010 (Feb. 18–19, 2010), *available at* http://www.nij.gov/nij/topics/courts/indigent-defense/2010-symposium/national-symposium-2010-program.pdf.

[17] U.S. DEP'T OF JUSTICE, NATIONAL SYMPOSIUM ON INDIGENT DEFENSE, IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS (Feb. 25–26 1999), *available at* http://www.sado.org/fees/icjs.pdf.

II. THE RELATIONSHIP BETWEEN PLEA BARGAINING AND DEFENSE COUNSEL

Much has been written about the prevalence of guilty pleas in criminal court.[18] Consciously, as well as subconsciously, it behooves judges, prosecutors, and, yes, defense counsel, to swiftly dispose of cases and thereby maintain more manageable caseloads. Along the way, institutional players develop a shared sense of what any given case is worth and operate collaboratively according to their understanding of the going rate.[19] Defense attorneys also engage in their own version of triage by sorting out which cases require more resources and relegating others to the trash heap of plea-bargaining.[20]

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[18] *See, e.g.*, U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2011 3 (2012) ("The vast majority of convicted defendants plead guilty. In fiscal year 2011, more than 96 percent of all offenders did so, a rate that has been largely the same for ten years."), *available at* http://www.fpd-ohn.org/sites/default/files/files/2012October%20Overview%20of%20Federal%20Criminal%20Cases%20FY%202011.pdf; H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 78 (2011) ("[P]lea bargaining now accounts for an overwhelming majority of case dispositions[.]"); O'Hear, *supra* note 13; Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 13; Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) ("[P]lea bargaining is . . . not some adjunct to the criminal justice system; it *is* the criminal justice system.").

[19] *See, e.g.*, MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 158–59 (1979) ("This concept of the worth of a case has considerable significance for criminal justice officials. By establishing the worth of a case, both the prosecutor and defense attorney know how to treat it . . . . [W]hen pressed to specify how they evaluate the 'worth' of a case, [prosecutors and defense attorneys] claim to know it intuitively."); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1146 (2008) ("Bargains are struck according to 'going rates'—known and somewhat fixed starting-point prices."); O'Hear, *supra* note 13, at 415–17 (discussing the "impersonal, rapid-fire nature of . . . routine case processing," in which cases are resolved "by reference to shared understandings as to the 'worth' of various generic case types"); Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 13, at 2481 ("[Defense attorneys] develop a feel for cases and can gauge the going rate for particular types of crimes and defendants.").

[20] *See, e.g.*, John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1225 (1994) (arguing that public defender's work in lower courts "is better described by

While many have critiqued the reliance on pleas, and the lack of adversarialness[21] that characterize criminal courts, it is time to carefully analyze the specific role defense counsel plays in the plea juggernaut. Imagine that the ongoing cry for more resources was addressed, and public defender offices were suddenly flush. What, if anything, would defense lawyers actually do differently? While more resources would certainly mean fewer clients per attorney, would that, in and of itself, mean *Gideon's* promise had been realized? Would it yield trial representation of the sort that directly benefitted Gideon?

More than forty years ago, Jonathan Casper, in probably the first so-called "consumer perspective" study of indigent defense, asked the accused what they thought of their lawyers.[22] His findings—defendants felt like their

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the medical/disaster theory of allocation in chaos—triage"); John B. Mitchell, *In (Slightly Uncomfortable) Defense of "Triage" by Public Defenders*, 39 VAL. U. L. REV. 925 (2005); People v. Jones, 186 Cal. App. 4th 216, 242 (Cal. Ct. App. 2010) (holding that defense counsel provided ineffective assistance where he "prioritize[d]" his cases due to excessive caseload of sole investigator made available to him by county and, in the instant case, failed to promptly investigate availability of percipient witnesses, and by not requesting permission to withdraw for lack of investigative resources) (internal quotation marks omitted).

[21] *See, e.g.*, Alschuler, *supra* note 13, at 932–34; Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2121 (1998).

> But if plea bargaining grows out of an adversarial ideology, its widespread practice has resulted in the development of a system of justice that actually looks, to most defendants, far more like what American lawyers would call an inquisitorial system than like the idealized model of adversary justice described in the textbooks.

Id.; O'Hear, *supra* note 13, at 426 ("[I]n many jurisdictions, Gerald Lynch's characterization of plea bargaining [is] apt: administrative justice has replaced adversarial and the prosecutor now occupies the primary role in adjudicating guilt and setting punishments. In plea bargaining, then, the prosecutor may be perceived by defendants . . . as the key decisionmaker.").

[22] JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE (1972).

lawyers focused primarily, if not exclusively, on guilty pleas[23]—have been replicated repeatedly over the past several decades.[24] The plea mentality and directive is deeply entrenched.[25] Unless and until that institutional norm is changed,[26] you can add lawyers and reduce caseloads, but still not achieve

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[23] *Id.* at 106 ("Most of the men reported that among the first words uttered by their public defender were: 'I can get you [out] if you plead guilty.'").

[24] *See, e.g.*, Robert J. Aalberts et al., *Public Defender's Conundrum: Signaling Professionalism and Quality in the Absence of Price*, 39 SAN DIEGO L. REV. 525, 528 (2002) ("[T]his Essay confirms, in line with previous research from other locales, that criminal defendants . . . who are represented by privately retained lawyers are the most satisfied with their legal representation. Conversely, defendants who are represented by public defenders are the least satisfied."); Alan F. Arcuri, *Lawyers, Judges, and Plea Bargaining: Some New Data on Inmates' Views*, 4 INT'L J. CRIMINOLOGY & PENOLOGY 177, 183 (1976) (defendants "reported that they were pressured into pleading guilty."); Edward J. Berger & Roger Handberg, Jr., *Symbolic Justice: Disappointed Clients' Views of Their Attorneys*, 2 CRIM. JUST. REV. 113, 115 (1977); Marcus T. Boccaccini et al., *Development and Effects of Client Trust in Criminal Defense Attorneys: The Congruence Model of Trust Development*, 22 BEHAV. SCI. & L. 197 (2004); Stewart O'Brien et al., *The Criminal Lawyer: The Defendant's Perspective*, 5 AM. J. CRIM. L. 283 (1977); Glen Wilkerson, *Public Defenders as Their Clients See Them*, 1 AM. J. CRIM. L. 141, 143 (1972) ("Real or imagined pressure to plead guilty is a frequent complaint of defender clients.").

[25] O'Hear, *supra* note 13, at 409 ("[D]espite the strenuous objections of prominent academic commentators, plea bargaining seems to be growing only more entrenched over time.") (footnote omitted); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 718 (2006) ("Notwithstanding the continuing controversy about threshold questions of fairness and legality, plea bargaining exists as a well-entrenched institution.").

[26] *See generally* MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS (1978) (discussing the socialization process by which defense attorneys and prosecutors adapt to the institutional norm of plea bargaining); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2476 (2004) [hereinafter Bibas, *Outside the Shadow*] ("[P]lea bargaining is a secret area of law, unlike trials, which have clear rules. In plea bargaining, it is easier for inexperienced lawyers to fall afoul of unwritten norms by pushing too hard, not hard enough, or not in the right way."); Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 20–23 (1967) (describing how the organizational pressures of criminal courts cause defense attorneys to abandon their duty of zealous advocacy and, in turn, become bureaucratic "agent-mediators" who are focused on "strategies which tend to lead to a plea"); George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000) (arguing

"the promise of *Gideon*" as envisioned by Gideon himself—a lawyer to represent the accused at trial.

It may well be the case that the original promise of *Gideon*, or at least the original appeal by Gideon himself for a lawyer to represent him at trial, is unattainable. Given the deep-rooted and intractable predominance of pleas, perhaps the promise of *Gideon* should be re-imagined. Perhaps the appropriate way to analyze the promise of *Gideon* is to ask if lawyers for the accused are providing truly meaningful representation during the plea bargaining process.

III. A GROWING AWARENESS OF EFFECTIVE ASSISTANCE OF COUNSEL IN PLEA BARGAINING

A trilogy of recent cases undeniably reveals that criminal defense counseling is on the Supreme Court's radar.[27] At the heart of *Padilla*, *Lafler*, and *Frye* is the advice, or lack thereof, provided by a criminal defense lawyer to a client.[28] For years, when reviewing ineffective assistance of counsel claims, courts focused almost exclusively on trials (not surprisingly, given *Gideon* itself); they examined the attorney's preparation for, and performance at, trial.[29] More recently, courts have

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that the rise of plea bargaining in modern American criminal procedure was driven by the institutional interests of prosecutors and judges).

[27] *See* Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012); Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

[28] *See infra* Part B.

[29] *See, e.g.*, Lockhart v. Fretwell, 506 U.S. 364, 369 (1993) ("'[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.'") (quoting United States v. Cronic 466 U.S. 648, 658 (1984)); Nix v. Whiteside, 475 U.S. 157, 175 (1986) ("[T]he 'benchmark' of an ineffective assistance claim is the fairness of the *adversary proceeding*[.]") (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)); *Strickland*, 466 U.S. at 684 ("[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a *fair trial*.")

started to evaluate, from ethical and constitutional vantage points, the things public defenders actually do day-to-day—advise about guilty pleas.[30] Courts are expressing interest in the previously sacrosanct area of lawyer/client conversations and are asking defense attorneys about the nature and quality of their advice.[31] Put another way, courts are now examining what the defense attorney said to her client, and when she said it.

A. Boria v. Keane

One of the first cases to navigate these uncharted waters was *Boria v. Keane* from the Second Circuit.[32] *Boria* wrestled with the defense attorney's duty to advise; specifically, the lawyer's responsibility to offer an informed opinion on the wisdom of accepting or rejecting a plea.[33]

Oscar Boria was offered a plea with a sentence of one to three years in prison.[34] He rejected the plea, went to trial, was convicted, and was sentenced to twenty years to life in prison.[35] On appeal, he claimed ineffective assistance of counsel based on his lawyer's apparent neutrality; that is, his attorney's failure to offer an opinion as to whether Boria should plead guilty or opt for a trial.[36]

In finding that counsel was ineffective, the Court relied on, and in effect constitutionalized, certain ethical rules from the Model Code of Professional Responsibility and the American Bar Association (ABA)

(emphasis added). *See generally* Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 844–47 (1998).

[30] *See, e.g.*, *Padilla*, 130 S. Ct. at 1482; *Frye*, 132 S. Ct. at 1408.

[31] *See, e.g.*, *Padilla*, 130 S. Ct. at 1482; *Lafler*, 132 S. Ct. at 1384.

[32] Boria v. Keane, 99 F.3d 492 (2d Cir. 1996).

[33] *Id.* at 496 ("There seems to be no Second Circuit decision dealing with the precise question of a criminal defense lawyer's duty when a defendant's best interests clearly require that a proffered plea bargain be accepted, but the defendant, professing innocence, refuses to consider the matter.").

[34] *Id.* at 494–95.

[35] *Id.* at 495.

[36] *See id.*

Standards on Criminal Justice.[37] This holding was remarkable because while it was always apparent that the ethical rules were protective of defendants' rights, appellate courts tended to dismiss them as "merely" aspirational and lacking constitutional heft.[38] Now appellate courts, right up to the Supreme Court, are engaging in careful review of these aspirational standards and imbuing them with constitutional gravitas, making them part of the required components of the Sixth Amendment's guarantee of the effective assistance of counsel.[39]

While all lawyers should, of course, be familiar with their ethical obligations, particularly those most germane to their practice, defense lawyers now have additional motivation to brush up on the rules of professional responsibility. It is more likely than ever before that, at some point in her career, a public defender will be called to testify in a post-conviction proceeding about her counseling and her familiarity with the relevant ethical standards.[40] Also, defense attorneys can better serve their clients by relying on these and other not-yet-constitutionalized ethical rules

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[37] *Id.* ("The American Bar Association's standard on the precise question before us is simply stated in its Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992): 'A defense lawyer in a criminal case has the duty to advise his client on whether a particular plea to a charge appears to be desirable.'").

[38] *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . are guides to determining what is reasonable, but they are only guides."); U.S. v. Decoster, 624 F.2d 196, 205 (D.C. Cir. 1976) ("[The ABA Standards] constitute a 'blend of description of function, functional guidelines, ethical guidelines, and recommended techniques,' a mixture of the aspirational and the obligatory."); Kizer v. Davis, 369 N.E.2d 439, 444 (Ind. Ct. App. 1977) ("[T]he Ethical Considerations are 'aspirational' goals only.").

[39] *See, e.g.*, Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010) ("The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.") (citing ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-5.1(a) (3d ed. 1993) and ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 14-3.2(f) (3d ed. 1999)).

[40] *See, e.g.*, Boria v. Keane, 99 F.3d 492 (2d Cir. 1996) (involving a defense attorney called to testify at hearing on defendant's motion to vacate conviction).

in the face of judges urging them to move faster or handle more cases.[41] Ultimately, the court's interest in counseling should serve as a trigger for defense attorneys to think even harder about counseling and advice giving—in other words, about what it means to be a lawyer for poor people accused of crime.

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[41] For example, many public defenders carry staggering caseloads. *See, e.g.*, *GIDEON*'S BROKEN PROMISE, *supra* note 2, at 17–18. Perhaps now those attorneys will be able to cite ethical rules and guidelines to prevent judges from ordering them to take on more clients. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004) (requiring that "competent representation" be provided, consisting of "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"); MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 2 (2004) ("A lawyer's work load must be controlled so that each matter can be handled competently."); AM. BAR ASS'N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS 4 (2009) (declaring, in "Guideline 1," that public defense providers should "avoid[] excessive lawyer workloads and the adverse impact that such workloads have on providing quality legal representation to all clients"), *available at* http://www.defensenet.org/ABA%20Eight%20Guidelines%20of%20Public%20Defense%20Related%20to%20Excessive%20Workloads.pdf; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006) ("If a lawyer's workload is such that the lawyer is unable to provide competent and diligent representation to existing or potential clients, the lawyer should not accept new clients."). *See generally* NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS (2011), *available at* http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf. A recent ruling by the Missouri Supreme Court illustrates the growing relevance of ethical duties in the context of Sixth Amendment ineffective assistance claims. *See* State *ex rel*. Mo. Pub. Defender Comm'n v. Waters, 370 S.W.3d 592, 607–08 (Mo. 2012) (holding that a judge may not appoint counsel when the judge is aware that, for whatever reason, counsel is unable to provide effective representation). In *Waters*, the Missouri High Court ruled that a trial judge exceeded his authority by forcing the state public defender's office to represent a defendant in contravention of an agency rule permitting the state defender office to decline additional appointments when the office's excessive caseload prevented it from providing competent and effective representation to any additional defendants. *Id.* at 612. The court held and reaffirmed that "the Sixth Amendment and [the state] Court's ethics rules require that a court consider the issue of counsel's competency, and that counsel consider whether accepting an appointment will cause counsel to violate the Sixth Amendment and ethical rules, before determining whether to accept or challenge an appointment." *Id.* at 609. In so holding, the court explained that counsel violates the "ethical duty to provide effective assistance of counsel" when "she accepts a case that results in a caseload so high it impairs her ability to provide competent representation, to act with reasonable diligence, and to keep the client reasonably informed." *Id.* at 607.

B. Padilla v. Kentucky, Lafler v. Cooper, and Missouri v. Frye

The Supreme Court's interest in the substance of defense lawyer counseling is evident in *Padilla v. Kentucky*,[42] *Lafler v. Cooper*,[43] and *Missouri v. Frye*.[44] On their face, the holdings in these cases are far from earth-shattering. Each case required the Court to look deep into the attorney's counseling. Notably, the Court's analyses were not based on reviews of trial transcripts, but rather on examinations of the lawyers' testimony at post-conviction proceedings concerning their conversations with their clients.

1. Padilla v. Kentucky

In *Padilla*,[45] the Court held, essentially, that defense counsel must provide her clients with adequate immigration-impact advice regarding a given plea offer.[46] As a result, many public defender offices now have immigration specialists on staff, twenty-four hour immigration hotlines are appearing, immigration manuals are proliferating, and *Padilla*-inspired trainings are everywhere.[47] It certainly appears that the defense bar is responding in a literal way to *Padilla*.

Padilla's most important potential effect lies not in its specific holding that defense lawyers must provide adequate immigration advice, or even in the oft-expressed hope that courts will expand *Padilla*'s logic and require

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[42] 130 S. Ct. 1473 (2010).
[43] 132 S. Ct. 1376 (2012).
[44] 132 S. Ct. 1399 (2012).
[45] *Padilla*, 130 S. Ct. at 1473.
[46] *See id.* at 1486. ("To satisfy . . . [the Sixth Amendment right to effective assistance of counsel], we now hold that counsel must inform her client whether his plea carries a risk of deportation.").
[47] *See, e.g.*, Malia Brink, *A Gauntlet Thrown: The Transformative Potential of* Padilla v. Kentucky, 39 FORDHAM URB. L.J. 39, 61–62 (2011); Steven Zeidman, Padilla v. Kentucky*: Sound and Fury, or Transformative Impact*, 39 FORDHAM URB. L.J. 203, 203–04 (2012).

defense attorneys to provide adequate advice on a range of consequences that attach to a guilty plea (e.g., sex offender registration, eligibility for loans and licenses, etc.).[48] Rather, *Padilla*'s greatest potential impact lies in how it can, should, and must change longstanding bad habits of providing less than fully effective counseling.

For starters, consider the time-honored practice known derisively as "meet 'em, greet 'em, and plead 'em"—the defense lawyers' practice of entering guilty pleas on their clients' behalf after having "met" their clients only twenty minutes earlier, for all of ten minutes.[49] "Meet and plead" was

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[48] *See, e.g.*, Margaret Love & Gabriel J. Chin, *The "Major Upheaval" of* Padilla v. Kentucky*: Extending the Right to Counsel to the Collateral Consequences of Conviction*, 25 CRIM. JUST. 36, 41–42 (2010) ("[I]t seems likely that . . . efforts will be made to expand the category of indirect consequences requiring a '*Padilla* advisory' . . . . Sex offender registration and residency requirements come to mind."); *id.* at 41 ("Justice Stevens' opinion specifically left open the possibility that its holding might extend to other indirect consequences of a plea[.]"); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 321 (2012) ("As the nascent post-*Padilla* misdemeanor jurisprudence develops, it will send a message to defenders that warnings about deportation, and possibly other severe collateral consequences, are not only mandated in all levels of cases, but that the failure to warn is most likely going to prejudice the misdemeanor client."); McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 809 (2011) ("Even a cursory reading of *Padilla* begs an inquiry into its application to other so-called 'collateral consequences'[.]").

[49] *See, e.g.*, James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 205 n.156 (2012) ("[C]ommentators have noted a tendency . . . for underresourced defense to plead too many cases—a phenomenon deemed 'meet 'em, greet 'em, and plead 'em.'") (quoting Deborah L. Rhodes, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1793 (2001)); Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 975 (2012) ("To manage their crushing workloads, defense lawyers very often 'meet 'em and plead 'em,' pressing their clients to plead guilty immediately before doing any investigation."); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 473–74 (2007) ("In many jurisdictions, a practice known as 'meet 'em and plead 'em' has become commonplace.").

always an apparent ethical violation.[50] Now, it seems that "meet and plead" is a de facto violation of *Padilla* and, accordingly, a constitutional violation of the right to the effective assistance of counsel.

Padilla constitutionalized aspects of defense lawyering that had previously been relegated to ethical/aspirational standards, so-called "best practices."[51] Notably, the Court did not carve out a special rule or exemption saying that this constitutional requirement of adequate advice is inapplicable if the lawyer practices in a high-volume criminal court, if the charges are comparatively minor, or if the moment in time is at the accused's initial arraignment or appearance before a judge.[52]

In light of *Padilla*, can a defense attorney provide constitutionally adequate immigration advice after only just having met her client? At that moment in time, can a lawyer actually know the immigration consequences of a plea offer, and can she actually know her client's immigration status? After all, in many cases the accused is unaware, uncertain, or even wrong about his present immigration situation. As the Court noted in *Padilla*, immigration law is fluid, complex, and constantly changing.[53] Surely, it is risky and foolhardy for defense counsel to assume up-to-date knowledge of immigration law at any given moment, and defense counsel should demand time to speak with experts, research the law, and take whatever steps are necessary to ensure full awareness of the consequences of any plea. Given

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[50] *See* ABA CRIMINAL JUSTICE STANDARDS, PLEAS OF GUILTY § 14-3.2 (1993) [hereinafter PLEAS OF GUILTY] ("Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed."); ABA CRIMINAL JUSTICE STANDARDS, DEFENSE FUNCTION § 4-6.1 (1993) ("Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed[.]").

[51] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010) (citing, *inter alia*, PLEAS OF GUILTY § 14-3.2(f) and ABA CRIMINAL JUSTICE STANDARDS, PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-5.1(a)).

[52] *See id.* at 1486 (holding, without qualification, that "counsel must inform her client whether his plea carries a risk of deportation").

[53] *Id.* at 1483 ("Immigration law can be complex, and it is a legal specialty of its own.").

the Court's explicit reference to, and reliance on, ethical standards at the root of its holding in *Padilla*, it is worth noting that recent ABA Standards for Criminal Justice call for more careful, time-consuming consideration of plea offers.[54] ABA Standard 14-1.3(a) provides that "[a] defendant with counsel should not be required to enter a plea if counsel makes a reasonable request for additional time to represent the client's best interests."[55] Post-*Padilla*, it seems that every request for additional time made at the accused's arraignment[56] is presumptively "reasonable," if not mandatory.[57]

Further, defense counsel can seldom, if ever, be sure that she has an accurate picture of her client's immigration situation after just having met the client. Virtually every text and article written about the initial interview in criminal cases, especially interviews involving a free, government-appointed attorney, highlights the inherent distrust between client and

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[54] PLEAS OF GUILTY § 14-3.2(f) ("To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.").

[55] *Id.* § 14-1.3(a).

[56] For constitutional purposes, the term *arraignment* "refers to the defendant's initial appearance before a judicial officer, the point at which the magistrate informs the defendant of the charges against him and sets the terms of pretrial release," and at which the accused is guaranteed the Sixth Amendment right to counsel. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.3(a) (3d. ed. 2012); *see also* Rothgery v. Gillespie Cnty., 554 U.S. 191, 198 (2008) ("We have, for purposes of the right to counsel, pegged commencement to the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.") (citations omitted) (internal quotation marks omitted).

[57] In New York City, for instance, almost 70 percent of misdemeanor cases get disposed of at the initial appearance, mostly through a guilty plea. *See, e.g.*, ROBERT C. BORUCHOWITZ, ET AL., NAT'L ASSOC. OF CRIMINAL DEFENSE LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 8 (2009); CRIMINAL COURT OF THE CITY OF N.Y., ANNUAL REPORT 2011 29 (2012) ("Citywide, slightly less than half of *all case filings* were disposed of at their initial court appearance.") (emphasis added), *available at* http://www.nycourts.gov/courts/nyc/criminal/AnnualReport2011.pdf.

lawyer.[58] It takes time before someone charged with a crime, who is already in a traumatic situation, will divulge sensitive and potentially harmful information. Trust must be earned and developed over time; it cannot happen in the typical ten or fifteen-minute arraignment interview.[59]

Some have suggested the use of a "checklist" as a best-practices response to *Padilla*.[60] In other words, at every initial interview, whether there is

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[58] *See, e.g.*, ANTHONY G. AMSTERDAM, AM. LAW INST. & AM. BAR ASSOC., TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES 108 (1988) ("As far as the client is concerned, the lawyer is 'the law,' along with the police and the judge; the client has no reason to believe that the lawyer is on *the client's* side. S/he will distrust the lawyer even more if the client is indigent and the lawyer is court-appointed."); *The Emperor* Gideon, *supra* note 2, at 667 ("The indigent defendant may view his defender at first with suspicion since the same source of funds that is paying the police to arrest him and the prosecutor to prosecute him . . . is also paying for his counsel."); Bibas, *Outside the Shadow*, *supra* note 26, at 2478 ("[C]lients still believe the adage that you get what you pay for. Defendants trust appointed counsel less[.]"); Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J. L. & POL'Y 83, 119 (2003) ("Once a lawyer has undertaken to represent an accused, it is often difficult to establish a relationship of trust and confidence.").

[59] *See, e.g.*, *The Emperor* Gideon, *supra* note 2, at 667 ("The defender needs to win over the trust and confidence of the defendant, but the hurried attorney anxiously wishing to conclude the interview so that he can go to the next court and see other defendants[] is not likely to invite and encourage his client's trust."); O'Hear, *supra* note 13, at 447–48 ("[C]ase volumes and economic constraints often leave defense counsel with no more than a few minutes to interact with many of their clients before court appearances—nowhere near enough time to establish a relationship of trust with the client[.]"); AMSTERDAM, *supra* note 58, at 108 ("Counsel will seldom find that it is possible to overcome [a client's distrust] . . . merely by promising the client that counsel intends to work assiduously in the client's behalf; rather, counsel must actually *do* something for the client."); *see also id.* at 105 ("The lawyer's primary objective in the initial interview . . . is the establishment of an attorney-client relationship grounded on mutual confidence, trust, and respect.").

[60] *E.g.*, Brink, *supra* note 47, at 62 ("Further steps need to be taken to extend *Padilla* to other collateral consequences. Steps . . . include the development of charts and databases of collateral consequences, including summaries of their applicability, as well as trainings and checklists.") (citing Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 690 (2011) (listing checklist of questions an attorney should ask a client to determine potential collateral consequences); Smyth, *supra* note 48, at 835 ("From building client relationships to developing checklists, [a forthcoming article] will use the lessons and leverage of *Padilla* as a part of a robust vision of holistic defense practice.").

seemingly any reason to question the accused's citizenship, counsel should ask and record the response in a checklist.[61] While it may well be advisable to ask in every case, merely asking does not mean that the lawyer will get accurate information. In any event, what if the client equivocates or doesn't seem certain? Actually, what if the client does seem sure of his immigration status? Should defense counsel stop there and check the box on the form, or should counsel engage in a searching inquiry to satisfy concerns about his/her client's situation?[62] Moreover, were counsel to try to so ascertain, could he/she do it at the typical hurried and pressure-filled initial interview, having just met his/her client for the first time? While checklists may be useful, they do not mitigate the pernicious effects of "meet, greet, and plead," and are at best a de minimus response to *Padilla*.[63]

Many rightfully and fervently hope that *Padilla*'s call for adequate immigration advice will soon be extended by courts to a host of other potential consequences of a guilty plea.[64] If that dream does come true, it will make arraignment pleas that much more unconstitutional—a lawyer could not possibly stay completely informed about such an extensive and burgeoning body of law. In any case, defense attorneys need not wait for courts to extend *Padilla*. Instead, criminal defense lawyers should incorporate *Padilla*'s underlying rationale into their representation in concrete ways, such as by eschewing any pleas until they are in a position to

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[61] *See* Chin, *supra* note 60, at 690.

[62] *See* People v. McLartey, 32 Misc. 3d 1201(A), 2011 WL 2518628 (N.Y. Sup. Ct. June 22, 2011). In *People v. McLartey*, the court held that *Padilla* "does not require an attorney to counsel a client professing to be a citizen of immigration consequences" of taking a plea. *Id.* at *3.

[63] In fact, the one thing a checklist does very well is insulate a conviction from post-conviction claims that counsel failed to discuss immigration consequences with her client. While that is certainly of great value to the prosecution and the judge, it is of dubious value to the accused.

[64] *See supra* note 52 and accompanying text.

give constitutionally adequate advice on a range of issues confronting their clients.[65]

The assembly-line nature of criminal courts was decried decades ago by Justice Harlan in *Argersinger v. Hamlin*,[66] "[T]here is evidence of the prejudice which results to misdemeanor defendants from this 'assembly line justice.'"[67] Guilty pleas entered at the accused's arraignment, or initial appearance before a judge, are the single greatest and ongoing manifestation of mechanized justice. *Padilla* presents an opportunity, if not a necessity, for defense lawyers to get off the assembly line.

It may now be the case that defense attorneys have the Supreme Court's imprimatur to bolster their efforts to provide truly effective assistance during the plea bargaining stage. The recent cases of *Lafler v. Cooper*[68] and *Missouri v. Frye*[69] further present unique and overdue opportunities for change. While *Padilla* dictates that defense attorneys think carefully about

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[65] *See* Smith v. Bank of America, 865 F. Supp. 2d 298 (E.D.N.Y. 2012). This recent federal case highlights the extent of consequences that flow from an arrest, let alone a conviction, and the need for defense attorneys to be sure they are prepared to help their clients assess the wisdom of accepting or rejecting a proffered disposition. *See id.* In *Smith v. Bank of America*, Jennifer Smith, a temporary bank employee was encouraged by her employer to apply for full-time employment. *Id.* at 301. She did so, and informed her supervisor that she had previously been arrested and charged with petty larceny and that the charges had been dismissed pursuant to an Adjournment in Contemplation of Dismissal (ACD). *Id.*; N.Y. CODE CRIM. PROC. § 170.55 (2012). Ms. Smith was offered the job, but then received a letter from the bank saying she was ineligible for employment because of "information regarding her criminal history obtained from a [FBI] background check." *Smith*, 865 F. Supp. 2d at 301. That background check revealed that she had been arrested and charged with petty larceny and that she had received an ACD. *Id.* The Court found that Ms. Smith had properly been denied the job based on federal laws that restrict the ability of banks to hire people who have been accused or convicted of certain crimes, including petty larceny. *Id.* at 306. The case should serve as a cautionary tale for all defense attorneys that even dispositions without an admission of guilt can have disastrous affects, and counsel must be sure they have taken the time to uncover all potential ramifications of any disposition, even those that do not require a guilty plea.

[66] 407 U.S. 25 (1972).

[67] *Id.* at 36.

[68] 132 S. Ct. 1376 (2012).

[69] 132 S. Ct. 1399 (2012).

how they advise their clients concerning the immigration impact of a plea, *Lafler* and *Frye* present a broader mandate—defense attorneys must think harder about how they advise their clients about plea offers in general.

2. Lafler v. Cooper

For starters, in *Lafler*, the Court succinctly acknowledged "[c]riminal justice today is for the most part a system of pleas, not a system of trials."[70] While most people familiar with the criminal court were already aware of that reality, it is significant for the Court to make such a pronouncement from its bully pulpit. *Lafler* and *Frye* are cases filled with practical considerations that flow from the recognition that pleas rule the day. *Lafler*[71] and *Frye*[72] relied on statistics regarding the prevalence of plea-bargaining, and the dissent in both cases emphasized that the decisions would open the floodgates to more guilty plea-related litigation.[73]

In *Lafler*, the accused was charged with assault with intent to murder and with other offenses.[74] The prosecution alleged that the defendant pointed a gun at the victim's head, fired and missed, and then chased her down the street, firing repeatedly and shooting her in the hip, abdomen, and rear end.[75] The prosecution offered a plea with a sentence of fifty-one to eighty-five months in prison.[76] Although the defendant had already expressed a

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[70] *Lafler*, 132 S. Ct. at 1388.
[71] *Id.* ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").
[72] *See Frye*, 132 S. Ct. at 1407 (citing DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl 5.22.2009).
[73] *See Lafler*, 132 S. Ct. at 1392 (Scalia, J., dissenting) ("Today's opinions deal with only two aspects of counsel's plea-bargaining inadequacy, and leave other aspects (who knows what they might be?) to be worked out in further constitutional litigation that will burden the criminal process."); *Frye*, 132 S. Ct. at 1413 (Scalia, J., dissenting) ("[A]fter today's opinions there will be cases galore . . . that will emerge, many years hence, from our newly created constitutional field of plea-bargaining law.").
[74] *Lafler*, 132 S. Ct. at 1383 (majority opinion).
[75] *Id.*
[76] *Id.*

willingness to plead, he was dissuaded from doing because of his attorney's erroneous counseling; his attorney had the mistaken belief that the prosecution would not, as a matter of law, be able to establish the requisite intent to murder because the victim had been shot below the waist.[77] As a result of this counseling, the defendant rejected the plea offer and went to trial.[78] He was convicted and sentenced to 185 to 360 months.[79]

The Supreme Court held that the constitutional guarantee of effective assistance of counsel requires that the lawyer provide accurate legal advice.[80] This part of the holding hardly seems extraordinary.[81] Put simply,

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[77] *See id.*
[78] *See id.*
[79] *Id.*
[80] *See id.* at 1385 ("The constitutional guarantee [of effective assistance of counsel] applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice."); *id.* at 1384 ("During plea negotiations defendants are entitled to the effective assistance of competent counsel . . . . In the context of pleas a defendant [claiming ineffective assistance of counsel] must show the outcome of the plea process would have been different with *competent advice*.") (emphasis added) (internal quotation marks omitted); *see also* Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010) ("The importance of accurate legal advice for noncitizens accused of crimes has never been more important.").
[81] *Lafler* is notable, though, for the Court's application of the prejudice prong of the *Strickland* analysis to the unique facts before it, and for the remedy that it fashioned. *See generally Lafler*, 132 S. Ct. at 1385. Unlike most Sixth Amendment claims previously heard by the Court, *Lafler* involved ineffective assistance that "led not to an offer's acceptance but to its rejection," and, in turn, to a trial resulting in a conviction. *Id.* The government argued that an accused who rejects a plea offer and later receives a fair trial was foreclosed from getting relief. *See id.* at 1385–88. The Court, however, explained that the Sixth Amendment "requires effective assistance of counsel at critical stages of a criminal proceeding," and stated that it "is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." *Id.* at 1388 (quoting *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012)). Indeed, "[f]ar from curing the error [i.e., the incorrect legal advice that caused Mr. Cooper to reject the plea], the trial caused the injury from the error." *Id.* at 1386. Thus, the Court held that where deficient advice leads to the rejection of an offer,

> [A] defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the

how could a lawyer have provided effective assistance if the advice she gave was inaccurate? The Court's holding, on its face, actually has little bearing on indigent defense practice. It is hardly a leap of faith to assume that every lawyer for poor people accused of crimes was already aware that the legal advice he/she provides to an indigent client should be accurate.

However, there is more to the Court's opinion than its ruling that there had been ineffective assistance of counsel. It was actually Justice Scalia, in his dissent, who flagged the unanswered questions of the majority's decision.[82] First, after noting that ineffective assistance claims now apply to plea bargaining, he cited to the following language from the majority opinion in *Frye*: "The inquiry then becomes how to define the duty and responsibilities of defense counsel in the plea bargain process. This is a difficult question."[83] Scalia further wrote, "[t]oday's opinions deal with only two aspects of counsel's plea-bargaining inadequacy,[84] and leave other aspects [who knows what they might be?] to be worked out in further constitutional litigation."[85] Justice Scalia highlights the right questions:

> court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it . . .), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id. at 1385. On the record before it, the Court concluded that an ineffective assistance of counsel claim had been established. *Id.* at 1386. The remedy, then, was for the government to "reoffer the plea agreement." *Id.* at 1391. Assuming the defendant accepts the offer, the trial court would then have the discretion to accept or reject the plea. *Id.*

[82] In an apparent effort to fully air his displeasure with the majority, Justice Scalia took the extraordinary step of reading his dissents in *Lafler* and *Frye* from the bench. *See* Adam Liptak, *Justices' Ruling Expands Rights of Accused in Plea Bargains*, N.Y. TIMES, Mar. 22, 2012, at A1.

[83] *Lafler*, 132 S. Ct. at 1391 (Scalia, J., dissenting) (quoting *Frye*, 132 S. Ct. 1399, 1408 (2012)).

[84] The two aspects being that attorneys must know basic law (*Lafler)* and must convey to the accused all plea offers advanced by the prosecution (*Frye*).

[85] *Lafler***,** 132 S. Ct. at 1392 (Scalia, J. dissenting).

How will the duties and responsibilities of defense counsel in the plea process be defined? And what might be other types of plea-bargaining inadequacy? Defense lawyers serving indigent clients must seize the moment and begin to frame and answer those vital questions.

Justice Scalia, by referring to the "whole new boutique of constitutional jurisprudence ["plea-bargaining law"],"[86] signals the potential reach of *Lafler*. He criticizes the majority for opening up a Pandora's Box of plea bargaining litigation and for the speculative nature of its tests, or lack thereof, for what constitutes effective assistance in plea bargaining.[87] He, along with Justice Alito,[88] warns that the failure to define the parameters of effective assistance in plea-bargaining will lead to years of litigation.[89]

3. Missouri v. Frye

In *Frye*, the accused was charged with driving with a revoked license.[90] Due to prior convictions for the same offense, the new charges were raised to the felony level, and the defendant faced four years in prison.[91] The prosecution offered a misdemeanor plea with a recommended ninety-day jail sentence.[92] The defense attorney failed to relay this offer to his client, and after a series of intervening events (e.g., a rearrest), the defendant eventually was sentenced to four years in prison.[93]

As with *Lafler*, the Court's literal holding is far from novel and will likely have very little impact on criminal defense attorneys.[94] One has to

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[86] *Id.* at 1398.
[87] *See id.* at 1392.
[88] *Id.* at 1398 (Alito, J., dissenting).
[89] *See id.* at 1392 (Scalia, J. dissenting).
[90] Missouri v. Frye, 132 S. Ct. 1399, 1404 (2012).
[91] *Id.*
[92] *Id.*
[93] *Id.* at 1404–05.
[94] Like its companion case, *Frye* is notable for the Court's application of the *Strickland* prejudice prong in the context of ineffective assistance claims relating to plea offers. *Id.* at 1410–11. In *Frye*, defense counsel's deficient performance—not communicating the

assume that most defense lawyers were already well aware that they should tell their clients of plea offers proposed by the prosecution, especially when the offers include reducing a felony charge to a misdemeanor plea.

Once again, the Court's decision is more significant for the possibilities it suggests. Here is where the majority pens the words quoted by Justice Scalia in his dissent in *Lafler*: "The inquiry then becomes how to define the duty and responsibilities of defense counsel in the plea bargain process. This is a difficult question."[95] Yet, even as the Court explicitly recognizes the difficulty of that inquiry, it chooses to leave answers to that "difficult question" for another day, stating, "[t]his case presents neither the necessity nor the occasion to define the duties of defense counsel in these respects, however."[96]

Nevertheless, the Court does send a signal, or a hint, about where to look for answers to the "question" when it notes that the ABA standards, along with the Model Rules of Professional Conduct, are "important guides."[97] In

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plea offer—caused the offer to lapse. *See id.* at 1404. The question, under *Strickland*, then "bec[ame] what, if any, prejudice resulted from the breach of duty." *Id.* at 1409. The Court held that:

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected [as was the case in *Lafler*] because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law.

Id. The Court thus remanded the case for the Missouri Court of Appeals to determine whether the plea offer would have been adhered to by the prosecution and accepted by the trial court. *Id.* at 1411.

[95] *Id.* at 1408.

[96] *Id.*

[97] *Id.*

fact, the Court effectively constitutionalized certain ABA standards.[98] That result leads naturally to questions about the potential constitutional implications of other related standards, and the ways they could answer the "difficult question." For example, harkening back to the blight of "meet 'em, greet 'em, and plead 'em," defense lawyers must reconsider the value of Standard 4-6.1: "Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced."[99] Lawyers for poor people accused of crime must take Justice Kennedy's advice by looking to the ABA standards as "important guides" for counsel's obligations in plea-bargaining,[100] and aim to see more aspirational standards become imbued with constitutional significance.

Taken literally, the sum total of *Padilla*, *Lafler*, and *Frye* is that defense lawyers must: (1) provide adequate immigration impact advice; (2) attain and convey knowledge of the basic law involved in the particular case; and (3) communicate plea offers to their clients.[101] This is not momentous. The potential those cases present, however, is for defense lawyers to recognize the ways the court is now considering ethical standards and making them part and parcel of the requirements of effective assistance of counsel, and to

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[98] *See id.* ("The American Bar Association recommends defense counsel 'promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney[.]'") (quoting ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 14-3.2(a) (3d ed. 1999)).

[99] ABA CRIMINAL JUSTICE STANDARDS, DEFENSE FUNCTION § 4-6.1 (1993).

[100] *See Frye*, 132 S. Ct. at 1408.

[101] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (holding that defense counsel must inform client whether plea carries risk of deportation); Lafler v. Cooper, 132 S. Ct. 1376, 1383–88 (2012) (holding, in part, that Sixth Amendment right to effective assistance of counsel protects client against deficient advice during plea negotiations); *Frye*, 132 S. Ct. at 1408 (holding that defense counsel must communicate formal plea offers to client).

answer the large and practical question of what constitutes ethical and constitutional advice regarding whether to accept or reject a plea.

IV. REFINING, EXPANDING, AND DEFINING EFFECTIVE ASSISTANCE IN PLEA BARGAINING

Defense lawyers, in addition to answering the question about the parameters of effective assistance in the plea bargaining context, should look to see what kinds of issues and litigation were imagined by Justice Scalia when he opined that the majority decisions in *Lafler* and *Frye* would yield endless lawsuits about the quality of defense lawyering.[102] Even in *Padilla*, Justice Scalia referred to the "innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning [regarding deportation] was really given."[103] More specifically, with regard to *Lafler* and *Frye*, he observed that the majority left much to be "worked out" in further litigation, "which you can be sure there will be plenty of."[104] Justice Scalia's prediction of further litigation is on the mark. While *Padilla*, *Lafler*, and *Frye* require defense counsel to provide adequate advice, they say practically nothing about the dimensions and context of this critically important, sensitive, and constitutionally required function. Lawyers defending indigent clients must now think critically about the what, where, how, and when of the vital and essential task of counseling.

One area of inquiry that grows organically from the court's foray into plea-bargaining and advice-giving is the nature and quality of the advice; moving beyond the checklist to assess quality.[105] As Justice Kennedy said in

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[102] *See Lafler*, 132 S. Ct. at 1391–92 (Scalia, J., dissenting).
[103] *Padilla*, 130 S. Ct. at 1496 (Scalia, J., dissenting).
[104] Liptak, *supra* note 82.
[105] Two cases serve to illustrate the types of claims now becoming prevalent wherein the defendant claims ineffective assistance based on the advice he received regarding accepting a plea or opting for a trial. In *U.S. v. Pitcher*, the court analyzed defense counsel's advice and what the District Court termed his "unreasonably optimistic assessment" of trial prospects. U.S. v. Pitcher, 559 F.3d 120, 121 (2d Cir. 2009).

Lafler, "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it."[106] What does that entail? How does the lawyer counsel the client, ethically and constitutionally, about whether to accept a plea offer?[107] It must mean more than just conveying an offer and an accurate statement of the law. Is it constitutionally sufficient for the defense lawyer to merely convey immigration impact advice or the details of a plea offer and leave it at that? Would there have been effective assistance in *Padilla* if defense counsel had simply said, "by the way, this plea will get you deported?" Is there any constitutional obligation to try to persuade, or to have engaged in some minimal amount of factual and/or legal investigation before giving advice? If post-*Padilla*, *Lafler*, and *Frye* defense lawyers regularly do provide the

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Although the Circuit Court found for the prosecution, the counseling issue was front and center. *See id.* at 125 ("Although we reverse on the grounds stated, we add that we are wary of endorsing any precedent . . . that might suggest a duty on the part of defense counsel to arm-twist a client who maintains his innocence into pleading guilty."). In *Manley v. Belleque*, the inquiry centered around the adequacy of defense counsel's advice that resulted in his client pleading guilty. Manley v. Belleque, 366 Fed. Appx. 734, 736 (9th Cir. 2010). The takeaway from these and similar recent cases is that the defense lawyer's counseling is no longer insulated from review.

[106] *Lafler*, 132 S. Ct. at 1387.

[107] In addition to thinking about *how* to counsel effectively, defense attorneys should think about which subject matters must be part of the plea discussion. *See, e.g.*, Ebron v. Comm'r of Corr., 307 Conn. 342, 358–59 (Conn. 2012) (finding that defense attorney was ineffective for failing to advise accused about risk of rejecting plea offer and having his "egregious criminal record" surface later in presentence report during open plea); Commonwealth v. Pridham, No. 2011-SC-000126-DG, 2012 WL 5274654, at *9 (Ky. Oct. 25, 2012) (holding an ineffective assistance claim was sufficiently alleged where defense attorney misadvised client that his guilty plea would render him eligible for parole after six years of his thirty-year sentence, when in fact client's period of parole ineligibility extended to twenty years under state violent offender statute). *But see* Commonwealth v. Abraham, 58 A.3d 42 (Pa. 2012) (holding trial counsel not ineffective for failing to advise client that he would lose public employee pension if he pleaded guilty since the loss of defendant's pension was a collateral, not direct, consequence of plea); United States v. Reeves, 695 F.3d 637 (7th Cir. 2012) (holding counsel not required to advise client that guilty plea might be used to enhance defendant's sentence in future case).

requisite immigration advice and convey all plea offers, how should courts evaluate the nature and quality of those acts?

V. EFFECTIVE ASSISTANCE AND COUNSELING BEYOND PLEAS

Growing naturally out of these inquiries are the next wave of counseling issues: assessing what amounts to ethical and constitutional counseling in the wide range of decisions that are made during the course of a criminal case.[108] As of today, the court has focused on counseling about pleas, but the curtain has been pulled back and counseling generally is now under the judicial microscope.

Defense attorneys must consider the nature and quality of the advice they give on all decisions made in the course of their representation. What amounts to effective assistance in the context of advising about the full range of so-called fundamental decisions reserved for the accused—whether to plead, whether to testify, whether to waive a jury, and whether to appeal?[109] Similarly, what are the constitutional contours of advising vis-a-vis strategic or tactical decisions ceded to the lawyer?[110] Ultimately, as

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[108] *See, e.g.*, United States v. Washington, 619 F.3d 1252, 1262 (10th Cir. 2010) (holding counsel's failure to understand basic mechanics of sentencing guidelines and to advise client about consequences at sentencing of his admissions during presentence interview amounted to constitutionally deficient performance under *Strickland v. Washington*).

[109] *See, e.g.*, Jones v. Barnes, 463 U.S. 745, 751 (1983) (recognizing that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead, waive a jury, testify in his or her own behalf, or take an appeal" but holding that appellate counsel need not press every nonfrivolous claim urged by defendant) (citing ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION §§ 4-5.2, 21-2.2 (2d ed. 1980)).

[110] *See, e.g.*, *Jones*, 463 U.S. at 753 n.6 ("The ABA Defense Function Standards provide . . . that, with the exceptions specified above [i.e., regarding fundamental decisions], strategic and tactical decisions are the exclusive province of defense counsel, after consultation with the client."); MODEL RULES OF PROF'L CONDUCT R. 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."); People v. Colville, 979 N.E.2d 1125, 29 (N.Y. 2012) ("This appeal calls upon us to consider how decision making authority is allocated within the attorney-client

courts weigh in on the components of constitutionally effective counseling, they will also have to decide what happens when client and lawyer disagree—what is the appropriate and constitutional allocation of decision-making authority between clients and lawyers in criminal cases?[111]

Heightened attention to counseling in all facets of criminal defense representation should yield tangible benefits in addition to the demise of "meet, greet and plead" lawyering. It seems inevitable that there will be more litigated hearings and trials if defense attorneys comply with the dictates of *Padilla*, *Lafler*, and *Frye*. Although the Court recognized in *Padilla* that it will nevertheless often be in the clients' best interest to plead guilty even if they are advised that they are facing deportation,[112] surely

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relationship with respect to submission of less-included offenses to the jury. Is this decision fundamental—comparable to how to plead and whether to waive a jury, take the stand or appeal—and therefore reserved to the accused, or is it a matter of strategy and tactics, ultimately for the defense attorney to decide?").

[111] *See, e.g.*, Rodney J. Uphoff, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 4–5 (1998) ("Given the mixed guidance provided by legal commentators, case law, and professional standards regarding the proper division of decisionmaking responsibility, lawyers are relatively free to decide for themselves whether they will share decisionmaking power with clients. The question then becomes . . . . [A]re lawyers willing to respect the strategic choices of a client even though they disagree with the client's choice?"); Rodney J. Uphoff, *Who Should Control the Decision To Call A Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763, 796 (2000) ("ABA Standard 4-5.2, entitled 'Control and Direction of the Case,' substantially tracks the division of decisionmaking responsibility between counsel and a criminal defendant set forth in Model Rule 1.2(a) and the majority opinion in *Jones v. Barnes*."); People v. Colville, 909 N.Y.S.2d 463, 473 (N.Y. App. Div. 2010) (characterizing majority's opinion in *Jones v. Barnes* as "adhering to traditional lawyer-centered approach" and Justice Blackmun's concurrence in *Barnes* as "espousing client-centered approach"), *rev'd*, People v. Colville, 979 N.E.2d 1125 (N.Y. 2012).

[112] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) ("By bringing deportation consequences into this [plea-bargaining] process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties . . . . Counsel . . . may be able to plea bargain creatively with the prosecutor in order to a craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequences.").

there will be many situations where the opposite is true. There will be cases where, if fully informed and advised about all the potential adverse consequences of a plea, the accused will opt for a trial, or at least a pretrial hearing, rather than plead guilty.[113] Just maybe then this trilogy of cases will nudge the criminal court toward the adversarial system it theoretically is supposed to be, and Gideon's original plea for lawyers to represent the indigent at trial will move a little closer to realization. The transformative potential is there if lawyers for the poor are willing to look in the mirror and find it.

[113] *See, e.g.*, *id.* at 1483 ("[P]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence."); People v. Picca, 947 N.Y.S.2d 120, 130 (N.Y. App. Div. 2012) (concluding that, had defendant been fully informed of the deportation consequences of a plea, "a decision to reject the plea offer, and take a chance, however slim, of being acquitted after trial, would have been rational"); United States v. Orocio, 645 F.3d 630, 643 (3d Cir. 2011) ("*Padilla* reiterated that an alien defendant might rationally be more concerned with removal than with a term of imprisonment.").