"Crimmigration" and the Right to Counsel at the Border Between Civil and Criminal Proceedings

Christopher N. Lasch[*]

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* Assistant Professor, University of Denver Sturm College of Law; J.D., Yale Law School; B.A., Columbia College. As always, I owe a debt to others, though any errors or missteps remaining in these pages are my own. My thanks go first and foremost to Professor James Tomkovicz and the members of the *Iowa Law Review* for inviting me to participate in this Symposium. Members of the Rocky Mountain Collective on Race, Place, and Law, and in particular Robin Walker Sterling, provided essential support for this piece and contributed greatly to the development of my ideas. Michael Wishnie offered inspiring suggestions, as is his way. Many of them appear here, with little alteration; I regret my inability to incorporate all of his valuable insights. Alison Blackwell provided essential and timely research assistance.

INTRODUCTION

The Supreme Court recently discovered,[1] in its 2010 decision in *Padilla v. Kentucky*,[2] what I have termed the "right to effective 'crimmigration' counsel"[3]—the right to effective advice concerning the potential immigration consequences of a criminal conviction. The decision was grounded in the Court's recognition of a central reality of modern immigration law, the intertwining of the criminal and immigration law systems that scholars have labeled "crimmigration."[4] The *Padilla* Court noted the explosion, particularly since 1996, in the use of criminal convictions as a ground for deportation,[5] and a narrowing of the grounds for discretionary relief from deportation over the same recent span of history.[6] The rise of

1. The Supreme Court claims not to "invent" new constitutional rules. Instead, the Court "discovers," one decision at a time, what the Constitution has always required. *See* Danforth v. Minnesota, 552 U.S. 264, 269–71 (2008) (describing new constitutional rules as prescribed by the Constitution and not "of [the Court's] own devising"). Indeed, at least two state courts "discovered" the constitutional right I discuss here before the Supreme Court did. People v. Pozo, 746 P.2d 523, 527–29 (Colo. 1987); State v. Paredez, 101 P.3d 799, 805 (N.M 2004).

2. Padilla v. Kentucky, 559 U.S. 356 (2010). I discuss the facts of *Padilla* in greater detail in a separate publication. Christopher N. Lasch, *Redress in State Postconviction Proceedings for Ineffective Crimmigration Counsel*, 63 DEPAUL L. REV. (forthcoming 2014). The case centered on Jose Padilla's claim that his criminal lawyer misadvised him concerning the immigration consequences of a guilty plea. Padilla, a lawful permanent resident, was arrested when a search of the eighteen-wheeler he was driving revealed over a thousand pounds of marijuana. Joint App., *Padilla*, 559 U.S. 356 (No. 08-651), 2009 WL 1499270, at *47–48 (indictment). Although Padilla was initially released on bond, he was later held without bail on the belief he was "an illegal alien and is awaiting deportation by the Federal authorities." *Id.* at *43 (order); *see also* Brief of Petitioner at 8–9, *Padilla*, 559 U.S. 356 (No. 08-651), 2009 WL 1497552, at *8–9. After a year in jail, Padilla pled guilty to the felony charge of trafficking in marijuana and misdemeanor charges of possession of marijuana and possession of drug paraphernalia. *See* Padilla v. Commonwealth, 381 S.W.3d 322, 327 (Ky. Ct. App. 2012); Joint App., *supra*, at *57–60 (order); Brief of Petitioner, *supra*, at 9. He did so on the advice of his counsel, who told Padilla that he "did not have to worry about immigration status since he had been in the country so long." Joint App., *supra*, at *72 (RCr. 11.42 motion). This was wrong—Padilla's plea rendered him deportable. *Id.* (citing 8 U.S.C. § 1227(a)(2)(B)(i) and its predecessor statute).

3. Lasch, *supra* note 2. The term "crimmigration" was coined by Juliet Stumpf in 2006, and crimmigration scholarship represents an important body of work addressing the intersection of criminal and immigration law. *Id.* (citing, *inter alia*, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006)).

4. *See supra* note 3.

5. I use the term "deportation" rather than the sanitizing term "removal," introduced with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, because "deport" takes a human object, while "remove" usually takes an inanimate object and obscures the human reality of deportation. *Cf.* Rachel Weiner, *AP Drops "Illegal Immigrant" from Stylebook*, WASH. POST (April 2, 2013, 4:07 PM), www.washingtonpost.com/blogs/post-politics/wp/2013/04/02/ap-drops-illegal-immigrant-from-stylebook/ (explaining the abandonment of the term "illegal immigrant" on the grounds that "human beings are not themselves illegal, their actions are").

6. *Padilla*, 559 U.S. at 360–64. For more exhaustive treatments of *Padilla*, see César Cuauhtémoc García Hernández, Strickland-*Lite:* Padilla*'s Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844 (2013); Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky:

crimmigration convinced the Court that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[7] Because of deportation's "close connection to the criminal process," the Court held it would be wrong to categorize deportation as a "collateral consequence" of a criminal conviction.[8] With this holding, the Court rejected the reasoning of those lower courts (including the Kentucky Supreme Court in Mr. Padilla's case) that had deemed deportation a "collateral consequence" and from there concluded that crimmigration counsel was outside the reach of the Sixth Amendment guarantee of *criminal* counsel.[9]

Padilla stands somewhat uneasily at the border between civil and criminal proceedings. It is a criminal decision about the scope of the Sixth Amendment right to counsel. But *Padilla* is clearly more than a criminal decision, as it is rooted in the criminal justice system's connection to the immigration justice system, which the Supreme Court has insisted (even in *Padilla*) is a civil regime.[10] In these pages, I attempt to map the future of this unusual decision. To do so, I attempt to discern the values it stands for, and from there ascertain the rights it implies. This framework is borrowed from Mitchell Berman's 2004 *Virginia Law Review* article describing "a conceptual distinction between constitutional operative propositions (essentially, judge-interpreted constitutional meaning) and constitutional decision rules (rules that direct courts how to decide whether a given operative proposition has been, or will be, complied with)."[11] This framework is particularly helpful in determining whether the Court's rules are serving their intended purposes.[12] The question of the fit between an operative proposition and the

The Challenging Construction of the Fifth-and-a-Half Amendment, 58 UCLA L. REV. 1461, 1480–94 (2011); and Lasch, *supra* note 2. The expansion of immigration consequences of convictions and the contraction of relief are, of course, not the only manifestations of "crimmigration." *See* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 135–36 & nn.2–4 (2009) (identifying "the increasingly harsh criminal consequences attached to violations of laws regulating migration" and a "rising reliance on criminal law enforcement actors and mechanisms in civil immigration proceedings" in addition to the increased use of deportation "as an adjunct to criminal punishment in cases involving non-citizens").

7. *Padilla*, 559 U.S. at 364 (footnote omitted).

8. *Id.* at 366.

9. *Id.*

10. *Id.* at 365 (citing I.N.S. v. Lopez–Mendoza, 468 U.S. 1032, 1038 (1984)).

11. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 51 (2004) (distinguishing "constitutional decision rules" from "constitutional operative propositions").

12. Berman described his "functional taxonomy" as a "tool" for effectuating the growing appreciation of scholars and courts "that judge-created constitutional doctrine is not identical to judge-interpreted constitutional meaning (or at least *may* not be)." *Id.* at 7–9. He explicitly relied on prior scholarship by, among others, Lawrence Sager (who described the gap between constitutional doctrine and constitutional meaning in terms of "underenforced constitutional norms") and Richard Fallon (who differentiated "constitutional implementation" from interpretation, describing "crafting doctrine or developing standards of review" as practices

decision rule designed to serve it has been asked by Aziz Huq in this way: "Does the work product of the Supreme Court . . . promote the Constitution's goals?"[13]

I find it helpful to visualize the relationship between the constitutional operative proposition and the decision rules[14] meant to implement it (See Figure 1).

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aimed at implementing, rather than interpreting or identifying, constitutional norms). *Id.* at 4–15, 35–36 (citing and quoting Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) and RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 38 (2001)). While I rely on Berman here, the frameworks of scholars like Sager and Fallon could likely be helpful as well. For example, my suggestion (in Part III) that immigration courts should play a role in enforcing the constitutional norms underlying *Padilla* could be supported by Sager's "vision of shared responsibility for the safeguarding of constitutional values" and his view that institutions other than Article III courts play a critical role in enforcing constitutional norms. Sager, *supra*, at 1263–64; *see also* Richard H. Fallon, Jr., *Forward: Implementing the Constitution*, 111 HARV. L. REV. 54, 94–95 (1997) (noting "that within the project of implementing the Constitution . . . courts frequently rely on other branches of government to respect constitutional norms that are judicially underenforced").

13. Aziz Z. Huq, *The Institution Matching Canon*, 106 NW. U. L. REV. 417, 419 (2012).

14. This visualization of Berman's theoretical framework reveals an important feature of the construct. To the extent that the operative proposition represents a constitutional "right," and the decision rules implementing the operative proposition represent the "remedy," we should remain mindful of the fact that "rights and remedies are inextricably intertwined. Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence." Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999). Thus, where an operative proposition is insufficiently implemented by decision rules this may be attributable to poorly designed decision rules (inadequate remedies), but it also may be true that the operative proposition (constitutional right) has not been honestly articulated. Visually, the space occupied by the operative principle may not be as large as previously imagined. As an example, scholars have persuasively demonstrated that the decision rule of *Manson v. Brathwaite*, 432 U.S. 98 (1977), fails to live up to its operative proposition—fairness and reliability in pretrial identification procedures. *See* Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 131–46 (2006). Their proposed solution was to revise the decision rule to more accurately map the operative proposition. A more cynical response (that I do not endorse) would be to suggest that the failure was in the overly ambitious articulation of the operative principle, and could be rectified by a remapping that constricts the operative principle. *See generally* Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049 (2013) (suggesting the right to counsel has been asked to do too much work in effectuating criminal justice norms).

Recognizing the inextricable two-way relationship between operative proposition and decision rules does not, in my view, eliminate the utility of Berman's framework. Instead, it means that both the operative proposition (representing our constitutional aspirations) and the decision rules implementing it (representing current reality) are appropriate sites for normative contests. *See infra* Part I.A (noting shift in the operative proposition underlying the Court's right-to-counsel jurisprudence); Part I.C (discussing *Gideon*'s "unfulfilled promise"); Part II.A (discussing the ongoing interpretive battles over *Padilla*'s underlying meaning).

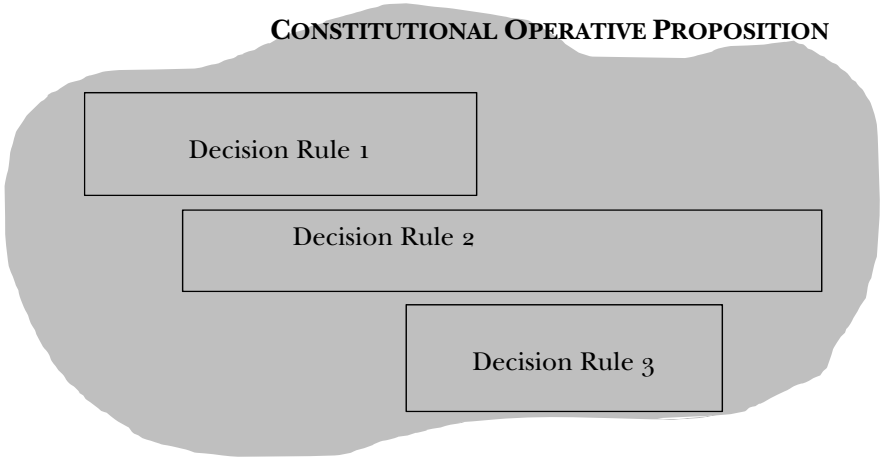

Figure 1.

The questions I hope to answer here are these: Does the *Padilla* rule adequately serve the constitutional values that the *Padilla* decision recognizes? And if not, how should we move beyond *Padilla* to a rule or set of rules that will promote those constitutional values?

Part I examines the Court's jurisprudence on the *criminal* right to counsel.[15] Half a century's experience with *Gideon* is helpful in mapping the future of *Padilla,* a decision that has been called a "*Gideon* for immigrants."[16] I first examine what the Supreme Court has said about the Constitution's operative proposition protected by *Gideon* and its progeny[17] and the decision rules the Court has put in place in those decisions to implement the operative proposition.[18] I then examine the disconnect between the

15. This Essay draws on, and seeks to derive lessons about constitutional norms and decision rules from the development of criminal right to counsel jurisprudence. An examination of right to counsel jurisprudence in civil proceedings (including juvenile proceedings, commitment proceedings, proceedings to terminate parental rights, and contempt proceedings) would likely be of great value to the project of elaborating the constitutional norms served by the right to counsel and envisioning implementing rules. *See generally* Ingrid V. Eagly, Gideon*'s Migration*, 122 YALE L.J. 2282, 2301–05 (discussing "civil *Gideon*" possibilities for developing the right to counsel in at least some immigration cases).

16. *See* Maria Teresa Rojas, *A "*Gideon *Decision" for Immigrants*, OPEN SOC'Y FOUND. BLOG (Apr. 7, 2010), http://blog.soros.org/2010/04/a-gideon-for-immigrants/; *see also* Duncan Fulton, Comment, *Emergence of a Deportation* Gideon*?: The Impact of* Padilla v. Kentucky *on Right to Counsel Jurisprudence*, 86 TUL. L. REV. 219, 245 (2011) (arguing that *Padilla* "progresses the argument that the Court should recognize a categorical right to counsel in deportation proceedings").

17. *See infra* Part I.A.

18. *See infra* Part I.B.

operative proposition and the decision rules—a gap more familiarly known as *Gideon*'s "unfulfilled promise."[19]

In Part II, I turn to what has aptly been termed "*Padilla*'s promise,"[20] attempting to discern how the lessons learned through an examination of *Gideon*'s history inform what a decision rule for *Padilla*'s values might look like. First, of course, it is necessary to ascertain what exactly *Padilla* stands for: What is the operative proposition underlying *Padilla*?[21] With that in hand, I finally address the question of whether the *Padilla* rule is sufficient as a "decision rule" or whether additional rules may need to be put in place.[22] The development of additional constitutional rules over time to implement the constitutional values underlying the *criminal* right to counsel presages a likely future of decision rules beyond the *Padilla* rule to implement the values the *Padilla* decision recognizes.

In Part III, I conclude that additional rules are needed and offer my prescription for what at least one of those rules should look like.

I. *GIDEON*'S OPERATIVE PROPOSITION AND THE COURT'S DECISION RULES IMPLEMENTING IT

A Cook's tour through the history of the right to counsel in criminal cases reveals it is unlikely that a single decision rule, such as *Padilla*, will suffice to serve the values such a rule is designed to protect. One might have thought that *Gideon v. Wainwright*, the Court's seminal 1963 decision holding that the Sixth Amendment right to appointed defense counsel applied to the states, would be sufficiently clear to end litigation over the right to counsel.[23] But *Gideon*'s first fifty years have shown surprising instability. Even the operative principle underlying the Sixth Amendment right to counsel in criminal cases has proven volatile, with decisions after *Gideon* ultimately expanding the operative principle from one valuing fair *trials* to one valuing fair *process*. The decision rules protecting the right to criminal counsel have also expanded significantly, though not necessarily in parallel with the expansion of the operative principle.

A. *THE OPERATIVE PROPOSITION: DOES THE RIGHT TO COUNSEL PROTECT MORE THAN THE FAIRNESS OF A CRIMINAL TRIAL?*

Gideon and its immediate progeny were clear: the purpose of the right to counsel in a criminal case, located in the Sixth Amendment with other trial-protecting constitutional provisions, was to protect the accused's right to a fair trial. The Court in *Gideon* wrote:

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19. *E.g.*, Erwin Chemerinsky, *Lessons from* Gideon, 122 YALE L.J. 2676, 2693 (2013).

20. Yolanda Vázquez, *Realizing* Padilla*'s Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 39 FORDHAM URB. L.J. 169, 190 (2011).

21. *See infra* Part II.A.

22. *See infra* Part II.B.

23. Gideon v. Wainwright, 372 U.S. 335 (1963).

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.[24]

And shortly after *Gideon* the Court described its right-to-counsel cases as requiring an inquiry into whether counsel's presence at a particular stage of the proceedings is "necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."[25]

The Court continued to emphasize fair trials. In 1984, a generation after *Gideon,* the Court observed "that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial."[26] That same year, in *Strickland v. Washington*, the Court recognized that the right to counsel protects the accuracy of capital sentencing proceedings, not just trial outcomes.[27] But the Court was quick to point out that it was following in the tradition of decisions like *Gideon* that held the Sixth Amendment right to counsel essential to protect the right to a fair trial.[28] The Court noted that a capital sentencing is "sufficiently like a trial" that the same standard for constitutionally effective assistance would apply there.[29] It did this while reserving the possibility that a non-capital sentencing might require a different standard.[30]

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24. *Id.* at 344. The Court's linking of the right to counsel with the right to a fair trial was essential to its holding. Extending the Sixth Amendment right to counsel to the states via Fourteenth Amendment "incorporation" required a finding that the counsel right was fundamental to a fair trial. *Id.* at 342 ("We accept *Betts v. Brady*'s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.").

25. United States v. Wade, 388 U.S. 218, 227 (1967) (holding that the right to counsel extends to a post-indictment lineup).

26. United States v. Cronic, 466 U.S. 648, 658 (1984).

27. Strickland v. Washington, 466 U.S. 668, 686–87 (1984).

28. *Id.* at 684 ("In a long line of cases that includes *Powell v. Alabama*, 287 U.S. 45 (1932), *Johnson v. Zerbst*, 304 U.S. 458 (1938), and *Gideon v. Wainwright*, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.").

29. *Id.* at 686–87 ("A capital sentencing proceeding like the one involved in this case . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision, that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision." (citations omitted)).

30. *Id.* at 686 ("We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and

To this point, the operative principle of the right to criminal counsel was to guarantee a fair trial. In the years following *Strickland*, though, the right to effective assistance of counsel was broadened to several categories of proceedings that arguably recognized an operative principle underlying the right to counsel that went beyond the fairness of a trial or trial-like proceedings. In *Hill v. Lockhart*, decided the year after *Strickland*, the Court indicated that the Sixth Amendment right to effective counsel pertained not only to trials, but to negotiated guilty pleas.[31] William Lloyd Hill pleaded guilty and received a thirty-five-year sentence; he sought habeas corpus relief when he learned his attorney erroneously calculated his parole eligibility date to be about five years sooner than it was.[32] The Court, while noting that *Strickland*'s test for effective assistance "was premised in part on the similarity between [a capital sentencing] proceeding and the usual criminal trial," nonetheless decided "the same two-part standard seems to us applicable to ineffective-assistance claims arising out of the plea process."[33] The *Strickland* ineffectiveness standard was soon extended to counsel's performance with respect to pursuing pretrial suppression motions.[34] The standard has also been applied in non-capital sentencing proceedings,[35] despite *Strickland*'s suggestion that non-capital sentencing might not implicate a fair trial.[36] These decisions suggested the constitutional value underlying the right to counsel in criminal cases is more expansive than simply protecting the right to a fair trial.

The Court's 2012 decisions in *Lafler v. Cooper* and *Missouri v. Frye* completely put to rest any notion that the right to counsel is solely in service of the fair trial right.[37] *Lafler* and *Frye* exemplified the Court's increasingly rare decisions calibrating constitutional norms not to abstract theoretical notions but to actual practices. In particular, these two decisions recognized the predominant importance of plea negotiations in today's criminal justice system.[38]

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hence may require a different approach to the definition of constitutionally effective assistance.").

31. Hill v. Lockhart, 474 U.S. 52, 56–57 (1985).

32. *Id.* at 53–55.

33. *Id.* at 57.

34. Kimmelman v. Morrison, 477 U.S. 365, 374–75 (1986).

35. Glover v. United States, 531 U.S. 198, 202 (2001). *But see* Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1070, 1082 (2009) (arguing that "the standards for what constitutes ineffective assistance of counsel during a non-capital sentencing proceeding are underdeveloped" because *Glover* "explicitly limited its holding to mandatory sentencing regimes").

36. *See supra* note 29 and accompanying text.

37. Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012).

38. "[T]he right to adequate assistance of counsel," held the Court, "cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Lafler*, 132 S. Ct. at 1388.

In each case, the defendant raised a claim that but for counsel's ineffective assistance, the defendant would have accepted a plea offer on terms more favorable than those ultimately obtained. Galin Frye sought relief from a felony conviction and three-year prison sentence on the grounds that his trial counsel failed to convey the terms of a more favorable plea offer (a misdemeanor conviction and a ninety-day jail sentence) to him.[39] Blaine Lafler's counsel, on the other hand, did convey a plea offer to him. Facing a mandatory minimum of 185 to 360 months' imprisonment if convicted, Lafler nonetheless rejected an offer that would have resulted in a sentence of fifty-one to eighty-five months, based on his attorney's incorrect suggestion that Lafler could not be convicted at trial.[40]

The Court had no trouble concluding the Sixth Amendment right to counsel was implicated in both instances, even though in both cases the argument was made that despite counsel's deficient performance, a fair trial was still available (and conducted, in Lafler's case).[41] The Court roundly rejected the emphasis on fair trial, holding that perceiving the Sixth Amendment's purpose as guaranteeing a fair trial "fails to comprehend the full scope of the Sixth Amendment's protections."[42] For the Court in these cases, "the question [was] not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it."[43]

Motivating the Court's shift in focus from fair trial to fair process was a realistic assessment of how today's criminal justice system functions. The "simple reality," observed the Court, is that plea bargaining, not trials, are the norm:[44] "[C]riminal justice today is for the most part a system of pleas, not a system of trials."[45] The Sixth Amendment guarantee of adequate counsel in criminal cases, the Court concluded, "cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences."[46]

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39. *Frye*, 132 S. Ct. at 1404–05.

40. *Lafler*, 132 S. Ct. at 1383.

41. *Frye*, 132 S. Ct. at 1407; *Lafler*, 132 S. Ct. at 1383 (noting that "after the plea offer had been rejected [by Lafler], there was a full and fair trial before a jury").

42. *Lafler*, 132 S. Ct. at 1387.

43. *Id.* at 1388. The Court cited *Kimmelman v. Morrison* as precedent for the notion that a fair trial would not cure pretrial ineffective assistance. *Id.* (citing Kimmelman v. Morrison, 477 U.S. 365, 380 (1986)). The *Kimmelman* Court "decline[d] to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." *Kimmelman*, 477 U.S. at 380.

44. *Frye*, 132 S. Ct. at 1407 (noting "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, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages").

45. *Lafler*, 132 S. Ct. at 1388 (citing *Frye*, 132 S. Ct. at 1407). The *Frye* Court noted that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Frye*, 132 S. Ct. at 1407.

46. *Lafler*, 132 S. Ct. at 1388 (citing *Frye*, 132 S. Ct. at 1407).

From 1985 on, then, the Court greatly expanded the constitutional operative proposition served by the Sixth Amendment guarantee of counsel in criminal cases. Ultimately, in 2012, the Court explicitly discarded the notion that the right to counsel in criminal cases serves only to ensure a fair trial.

B. Decision Rules Implementing the Right to Counsel in Criminal Cases

There have been many decisions concerning the scope of the Sixth Amendment right to counsel in criminal cases, and nearly as many decision rules. Mapping all of them is not my purpose here. Rather, an examination of three decision rules implementing the Sixth Amendment's operative proposition will prove useful in sketching the future of *Padilla*'s development. Each of these three decision rules expanded the implementation of the Sixth Amendment, extending the reach of the Constitution into new substantive areas and new procedural settings.

1. *Gideon v. Wainwright* (1963)

Prior to *Gideon,* whether or not a federal constitutional right to counsel obtained in state criminal prosecutions was governed by two distinct tests. In capital cases, under *Powell v. Alabama,* the right to counsel was guaranteed.[47] Non-capital cases were subject to the Court's "special circumstances" rule, announced in *Betts v. Brady*, according to which no right to counsel was recognized unless the facts of the particular case were such that denial of counsel would be "a denial of fundamental fairness, shocking to the universal sense of justice."[48]

Gideon replaced these decision rules with a seemingly straightforward rule. The Sixth Amendment right to counsel in criminal cases, which the Court had construed "to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived,"[49] would be applicable to the states via the Due Process Clause of the Fourteenth Amendment.[50] The Court thus adopted the already existing rule for providing counsel in federal cases, but extended it to a new forum, state courts.

2. *Strickland v. Washington* (1984)

The *Gideon* rule was essentially a rule for state trial courts. The right to counsel it established could be directly vindicated in a state trial court upon an accused's requesting court-appointed counsel. But the *Gideon* rule only

47. Powell v. Alabama, 287 U.S. 45 (1932).

48. Betts v. Brady, 316 U.S. 455, 462 (1942).

49. Gideon v. Wainwright, 372 U.S. 335, 340 (1963) (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).

50. *Id.* at 342–45.

specified that "counsel must be provided,"[51] and said nothing about whether counsel's performance must live up to any particular standard.

In 1984, a generation after *Gideon,* the Court in *Strickland v. Washington* established the now familiar two-part test for ineffective assistance of counsel.[52] *Strickland* requires a defendant to prove not only that trial counsel's performance was deficient, but also "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[53]

The significance of *Strickland* is twofold. First, *Strickland* expanded the substantive content of the right to counsel.[54] A trial court might comply with *Gideon* by appointing counsel, yet the Sixth Amendment right to counsel might still be violated if counsel performed deficiently.

Second, *Strickland* extended (as *Gideon* had) the procedural context in which the right to counsel could be vindicated. The *Strickland* rule realistically cannot be applied on direct review, and must await postconviction proceedings for its application. The first prong of the test requires an assessment of trial counsel's performance, and *Strickland* cautioned that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"[55] Ordinarily, the record developed in the trial court will not be adequate for assessing trial counsel's strategy.[56] The second prong of the *Strickland* test accordingly presumes a conviction (indicating the test was not intended for use in the trial court) and accords a measure of finality to the conviction.[57]

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51. *Id.* at 340.

52. Strickland v. Washington, 466 U.S. 668 (1984).

53. *Id.* at 694.

54. The Court had said as early as 1970 "that the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). Until *Strickland,* though, the Court had not announced a decision rule for vindicating this right.

55. *Strickland*, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

56. Massaro v. United States, 538 U.S. 500, 505 (2003). The Court in *Massaro* held that ineffectiveness claims typically should not be raised until postconviction proceedings. *See id.* at 508. Noting that "[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time," the Court held that penalizing litigants for not raising ineffectiveness on direct appeal "would have the opposite effect, creating the risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the factual predicate for the claim." *Id.* at 504 (alteration in original) (quoting Guinan v. United States, 6 F.3d 468, 474 (7th Cir. 1993) (Easterbrook, J., concurring)).

57. *Strickland*, 466 U.S. at 691–96. As noted above, the Court had announced a right to effective assistance of counsel before *Strickland. See supra* notes 24–25 and accompanying text. In several cases preceding *Strickland*, the Court announced decision rules that could be applied on direct review, recognizing that the Sixth Amendment might be violated even where counsel was provided. *See Holloway v. Arkansas*, 435 U.S. 475 (1978) (automatic reversal where trial

Whereas *Gideon* created a right to counsel that could be vindicated in the trial court or on direct review where appointment of counsel was denied altogether, *Strickland* announced a decision rule for assessing violations of the right to *effective* trial counsel and envisioned a distinct forum (postconviction review) for vindicating that right.[58]

3. *Martinez v. Ryan* (2012)

The Court's 2012 decision in *Martinez v. Ryan* offered a third expansion of rules protecting the right to counsel.[59] While *Strickland* added a protective layer around the *Gideon* right to counsel by allowing litigation in postconviction proceedings of *trial* counsel's effectiveness, *Martinez* protects the *Strickland* right in cases where *postconviction* counsel is ineffective or absent. The Court granted certiorari to determine whether there is a constitutional right to postconviction counsel where postconviction proceedings are the first opportunity to raise a claim of trial counsel's ineffectiveness.[60] Instead of reaching that question, the Court created an additional decision rule protecting the values served by the right to counsel. Where state postconviction proceedings are the first opportunity to raise a *Strickland* claim of trial counsel ineffectiveness, *Martinez* excuses (in federal habeas proceedings) the failure to raise such a claim if it was caused by ineffective or absent counsel in postconviction proceedings.[61]

The decision rules discussed here are visualized in Figure 2. Each new rule represents the Court's attempt to map decision rules to cover the constitutional operative proposition of the Sixth Amendment. Finding *Betts* insufficiently implemented the operative proposition, the Court announced *Gideon*. *Gideon* could be vindicated in the trial court itself or on direct review. But ultimately the Court was forced to acknowledge that *Gideon* itself did not adequately serve the operative proposition underlying the right to counsel. With *Strickland*, the Court articulated a test for determining when counsel, although present, was not living up to the constitutional values represented

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court does not take adequate steps to reduce risk of ineffective assistance due to conflict of interest); *Geders v. United States*, 425 U.S. 80 (1976) (reversing where trial court forbade counsel from consulting with defendant during overnight recess); *Herring v. New York*, 422 U.S. 853, 865 (1975) (reversing where counsel was not permitted to present summation at close of bench trial, holding that rule denied defendant "the assistance of counsel that the Constitution guarantees"). Until *Strickland*, though, "[t]he Court ha[d] not elaborated on the meaning of the constitutional requirement of effective assistance in . . . cases . . . presenting claims of 'actual ineffectiveness.'" *Strickland*, 466 U.S. at 686.

58. *Frye* and *Padilla* exemplify the application of *Strickland*'s test for effective assistance in postconviction review proceedings. *See supra* notes 3–11, 39–46. In both cases, the Supreme Court accepted certiorari review from the state postconviction track. In *Lafler,* the Court accepted certiorari from federal habeas review of the state court judgment. *See supra* note 46.

59. Martinez v. Ryan, 132 S. Ct. 1309 (2012).

60. *See id.* at 1315; *see also id.* at 1326 (Thomas, J., dissenting).

61. For a more thorough explication and analysis of *Martinez*, see Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839 (2013).

by the Sixth Amendment. The operative principle of the Sixth Amendment was now protected by the *Gideon* decision rule on direct review, and by the *Strickland* decision rule on postconviction review. But ineffective or absent counsel in postconviction proceedings (typically the only forum for raising claims of ineffective trial counsel) could render the *Gideon* and *Strickland* rules underprotective of the right to counsel. In *Martinez*, the Court determined that the right to effective trial counsel is a sufficiently important constitutional value that the ability to raise claims of ineffective assistance of trial counsel must itself be protected.

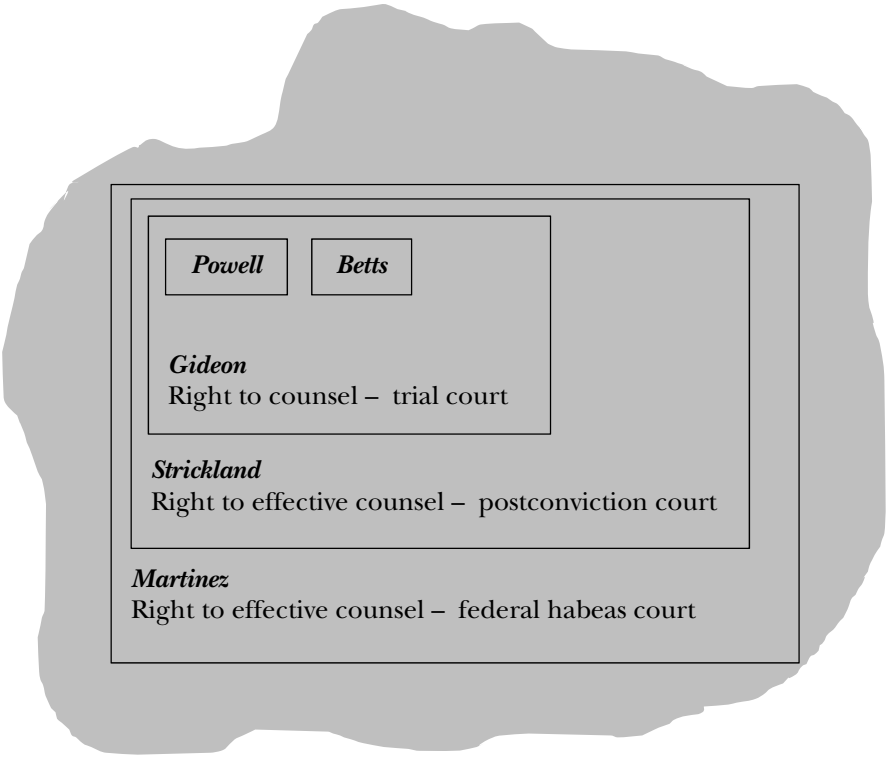

Figure 2.

C. THE GAP BETWEEN OPERATIVE PROPOSITION AND DECISION RULES: GIDEON*'S UNFULFILLED PROMISE*

As we have just seen, Berman's framework permits a visualization of the territory represented by the constitutional operative proposition and the mapping of that territory by the decision rules fashioned by the Court.[62] But while *Gideon*, *Strickland*, and *Martinez* may represent the Court's attempt to map that ground,[63] the widespread acknowledgment of an indigent defense crisis in the United States[64] has made references to *Gideon*'s "unfulfilled promise" commonplace[65] and suggests a different picture (see Figure 3).

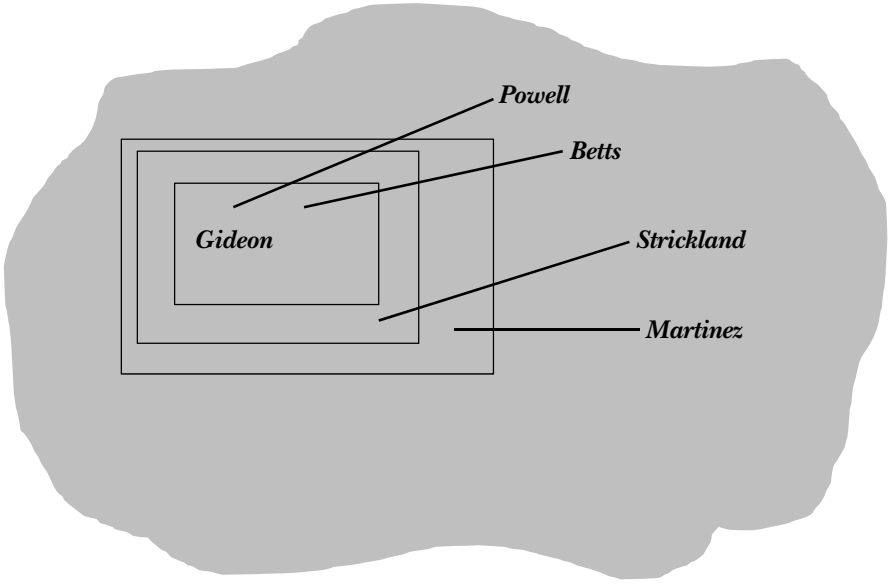

Figure 3.

62. *See* Figure 2.

63. *But see infra* note 66 (noting criticism of *Strickland*); Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2431 (2013) (arguing that "*Martinez* will make little difference in either the enforcement of the right to the effective assistance of counsel or the provision of competent representation in state criminal cases").

64. *E.g.*, Cara H. Drinan, *Getting Real About* Gideon*: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1312–15 (2013) [hereinafter Drinan, *Getting Real*] (documenting "fifty years of 'crisis'"); Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487, 489 (2010) [hereinafter Drinan, *National Right*]; Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316 (2013).

65. *E.g.*, John H. Blume & Sheri Lynn Johnson, Gideon *Exceptionalism?*, 122 YALE L.J. 2126, 2126 (2013); David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2602 (2013); Jonathan Rapping, *Redefining Success as a Public Defender: A Rallying Cry for Those Most Committed to* Gideon*'s Promise*, CHAMPION, June 2012, at 30, 36.

While commentators differ in their assessment of where the gap between the Court's decision rules and the constitutional operative proposition exists,[66] many describe the chief source of *Gideon*'s unfulfilled promise as a gap in funding.[67] The *Gideon* decision rule, of course, does not speak to funding,[68] and for this reason has been labeled an "unfunded mandate" on the states.[69] While some have taken a dim view of the prospect

66. Many scholars have faulted the *Strickland* test as being insufficiently protective of the right to counsel. *E.g.*, Blume & Johnson, *supra* note 65, at 2129, 2137–43 (arguing that "the law of ineffective assistance of counsel renders *Gideon*'s 'shining city' illusory for many defendants"); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2170 (2013) (arguing that "[c]onvictions and death sentences have been upheld despite [attorney] incompetence because twenty-one years after *Gideon*, [in *Strickland*] the Supreme Court eroded the reach of *Gideon* by applying presumptions—even in the face of facts to the contrary—that lawyers are competent and make strategic decisions"); Chemerinsky, *supra* note 19, at 2685 *et seq.* (assigning as one of two core reasons for *Gideon*'s failed promise that "the Court created a test for ineffective assistance of counsel that makes it very difficult for a convicted individual to get relief, even when counsel's performance is quite deficient"); *see also* Pamela R. Metzger, *Fear of Adversariness: Using* Gideon *to Restrict Defendants' Invocation of Adversary Procedures*, 122 YALE L.J. 2550, 2552–59 (2013) (arguing that because *Gideon* allocates power to attorneys rather than defendants, and *Strickland* renders the exercise of that power all but unreviewable, these decision rules show that the "Court is deeply afraid of the Sixth Amendment's true power").

Others offer different explanations for the gap between *Gideon*'s promise and reality. *E.g.*, Donald A. Dripps, *Why* Gideon *Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 894 (2013) (arguing that vindicating *Gideon* would require "both a commitment of resources to the defense function *and* effective regulation of the plea bargaining process" (emphasis added)); Carol S. Steiker, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2700 (2013) (identifying, as "structural problems that undergird the country's indigent defense crisis," not only insufficient funding, but also "[t]he lack of adequate organization, training, and oversight of indigent defense lawyers by experienced leaders; the lack of crucial independence from the political and judicial branches that many such lawyers and public defense organizations face; and the absence of a robust culture of client-centered, zealous advocacy").

Still others suggest that the operative proposition thought to underlie the Sixth Amendment right to counsel—ensuring fair trials and (after *Lafler* and *Frye*) fair plea bargains—is too much weight for the right to counsel to bear. Natapoff, *supra* note 14.

67. *E.g.*, Chemerinsky, *supra* note 19, at 2685–86, 2691–92; Drinan, *Getting Real*, *supra* note 64, at 1312–13 (arguing that while "there are as many factors contributing to the indigent defense crisis as there are symptoms of it," lack of resources is the bottom-line concern).

68. The *Strickland* rule likewise does not speak to funding; indeed *Strickland*'s exclusive focus on actual attorney performance "leaves no room" for an assessment of the adequacy of resources available to counsel. Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1205–06 (2013) (quoting William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 21 (1997)).

69. Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104, 132 (2009) (describing the Sixth Amendment right to counsel "as an unfunded mandate . . . imposed on state governments" (citing Gideon v. Wainwright, 372 U.S. 335, 344 (1963))); Chemerinsky, *supra* note 19, at 2685. The "unfunded mandate" criticism of *Gideon* seems to explain, at least in part, the Court's refusal to answer the question presented on certiorari in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012)—whether there is a constitutional right to counsel in state postconviction proceedings where such proceedings offer the first opportunity to raise a claim of ineffective assistance of counsel. It is noteworthy

that *Gideon* will ever be adequately resourced, others have attempted to vindicate *Gideon*'s "unfunded mandate" through civil litigation, seeking injunctive relief to prevent Sixth Amendment violations threatened by underfunding.[70] Such litigation essentially seeks the establishment or recognition of a new decision rule to effectuate the Sixth Amendment's operative proposition.[71] In a recent case, a federal judge found the public defender systems of two Washington cities had "systemic flaws that deprive indigent criminal defendants of their Sixth Amendment right to the assistance of counsel," in part because the cities "knowingly underfunded their public defense system."[72] The court found that the funding "left the defenders compensated at such a paltry level that even a brief meeting at the outset of the representation would likely make the venture unprofitable. And the Cities knew it."[73] Averaged over the caseload handled by these contract defenders, the contract provided for a monthly amount of between

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that the *Martinez* Court did not recognize a right to postconviction counsel for this purpose, but instead protected such claims against procedural default when litigated in *federal habeas*. Arguably, the *Martinez* decision rule avoids the unfunded-mandate problems attendant to the *Gideon* rule and its implementation. While states have no choice after *Gideon* but to provide counsel for criminal defendants, they do retain a choice after *Martinez* as to whether to provide *postconviction* counsel for the purpose of raising ineffectiveness of trial counsel. This point was made explicitly in the Court's opinion:

> The holding here ought not to put a significant strain on state resources. . . .
>
> This is but one of the differences between a constitutional ruling and the equitable ruling of this case. A constitutional ruling would . . . require the appointment of counsel in initial-review collateral proceedings; it would impose the same system of appointing counsel in every State; and it would require a reversal in all state collateral cases on direct review from state courts if the States' system of appointing counsel did not conform to the constitutional rule. An equitable ruling, by contrast . . . permits a State to elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings.

Martinez, 132 S. Ct. at 1319–20.

70. *See generally* King, *supra* note 63, at 2457–58 (noting that class-action litigation such as that recently undertaken in Michigan seeks to establish that the Sixth Amendment "prohibit[s] deficiencies in delivery systems that pose a high probability of compromising effective assistance"); Lucas, *supra* note 68, at 1216–20; Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005).

71. *See* King, *supra* note 63, at 2457–58; Lucas, *supra* note 68, at 1216–20; *Effectively Ineffective:*, *supra* note 70.

72. Wilbur v. City of Mount Vernon, No. C11-1100RSL, 2013 WL 6275319, at *7 & n.12 (W.D. Wash. Dec. 4, 2013); *see also* State v. Peart, 621 So. 2d 780, 788–90 (La. 1993) (describing underfunded indigent defense system and concluding "that because of the excessive caseloads and the insufficient support with which their attorneys must work, indigent defendants in [the jurisdiction] are generally not provided with the effective assistance of counsel the constitution requires"); State v. Young, 172 P.3d 138, 141 (N.M. 2007) (finding capital defense counsel inadequately compensated were not likely to provide constitutionally adequate counsel).

73. *Wilbur*, 2013 WL 6275319, at *7.

ten and sixteen dollars per case.[74] Excessive caseloads and grossly insufficient funding are, for many defender systems, the norm.[75]

II. *PADILLA*'S OPERATIVE PROPOSITION AND THE COURT'S DECISION RULE IMPLEMENTING IT

In considering the future of the right to effective crimmigration counsel, there are many lessons that can be drawn from the history of the criminal right to counsel just sketched. The most obvious is that the *Padilla* decision rule is not likely to be sufficiently protective of whatever operative proposition underlies it; one need look no further than the Court's addition, with *Martinez v. Ryan*, of a decision rule protective of the right to counsel to understand that. But in order to understand what the path forward should look like, it is first essential to understand just exactly what it is *Padilla* stands for: What is the constitutional operative proposition? After answering that question, we can then turn to an analysis of the gap (if any) between *Padilla*'s decision rule and that operative proposition, and consider what additional decision rules might be needed.

A. *THE OPERATIVE PROPOSITION—PROTECTING AGAINST UNWITTING DEPORTATIONS*

Padilla does not lend itself to a simple understanding of its constitutional operative proposition. For one thing, the Court was not textually explicit about the proposition. It did not, as it had in *Gideon* by referencing counsel's function in protecting a fair trial, explicitly explain what constitutional values the right to counsel was meant to serve in the crimmigration counsel context.

Scholars have already offered many interpretations of what *Padilla* tells us about the Constitution's underlying values. Notably absent thus far has been any expressed hope that *Padilla* represents a "race case"—a case representing a constitutional value of eradicating race discrimination—in the way that *Gideon* arguably did.[76] A history of racial disparity in immigration enforcement[77] calls out for expression of such a constitutional

74. *Id.* at *7 & n.12.

75. *See, e.g.*, Rodney Uphoff, *Foreword, Broke and Broken: Can We Fix Our State Indigent Defense System?*, 75 MO. L. REV. 667 (2010); Erin V. Everett, Comment, *Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step in to Solve Mississippi's Indigent Defense Crisis*, 74 MISS. L.J. 213 (2004); Marc Sackin, Note, *Applying* United States v. Stein *to New York's Indigent Defense Crisis: Show the Poor Some Love Too*, 73 BROOK. L. REV. 299, 299–305 (2007).

76. *See* Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2239 (2013) (describing *Gideon* as "a race case, in that *Gideon* and the Court's other criminal procedure cases of the era were concerned with institutional racism," but concluding that a right to counsel cannot, by itself, remedy racial discrimination in the criminal justice system).

77. *E.g.*, KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 13–53 (2004) (describing the relationship, throughout United States history, between immigration enforcement and racial subordination); Gabriel J. Chin, *Segregation's Last*

norm, but even scholars who find support for an "immigration *Gideon*" in the *Padilla* decision do not go so far as to claim *Padilla* springs from anti-discrimination principles.[78] Whereas the absence of textual support did not prevent classifying *Gideon* as a "race case" given its context in the Warren Court's jurisprudence,[79] *Padilla* is less likely to be similarly classified as a race case. The Roberts Court is, quite simply, not the Warren Court.[80]

Instead, scholars have read into *Padilla* a variety of normative signals. Some have argued *Padilla* speaks to the Constitution's values with respect to criminal proceedings. Alice Clapman and John D. King, for example, argue that *Padilla* informs us that imprisonment is not the Constitution's *sine qua non* for triggering the right to counsel in criminal cases, but rather serves only as a "proxy for a deprivation so severe that it could only be imposed after a full adversarial process."[81] Others read *Padilla* as imposing procedural barriers to deportation.[82] And a significant group of scholars sees *Padilla* as

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Stronghold: Race Discrimination and the Constitutional Law of Immigration, 46 UCLA L. REV. 1 (1998) (describing the roots of immigration law's plenary power doctrine, which permits racial discrimination, in nineteenth century race-based laws).

78. *See, e.g.*, Kevin R. Johnson, *An Immigration* Gideon *for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013). Johnson cites "the racially disparate pattern of immigration enforcement, which results in racial disparities in the group of noncitizens placed in removal proceedings" as a reason to be particularly concerned about the risk of error in immigration proceedings when applying the flexible due process test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether there is a Due Process right to counsel in removal proceedings. *Id.* at 2410–11. Johnson finds support for a Due Process right to counsel in the *Padilla* decision, but not because of any claim that *Padilla* represents anti-discrimination values. Rather, Johnson cites *Padilla*'s recognition of deportation's severity in evaluating the first *Mathews* factor (the private interest at stake). *Id.* at 2406.

79. *See supra* note 76 and accompanying text.

80. Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 72 (2012) (noting that "decisions of the Roberts Court strike down laws that protect minorities against discrimination with a kind of energy they do not bring to striking down laws that reflect 'prejudice against discrete and insular minorities,' at least where issues of race are concerned" (citation omitted)). Indeed, César Cuauhtémoc García Hernández suggests disappointment in *Padilla* may be justified by more than a mere absence of expressed anti-discrimination norms, describing *Padilla* as implementing a "*Strickland*-lite" standard and identifying *Padilla* as possibly belonging to a history in which "constitutional norms have been relaxed or altogether ignored when it comes to processing immigrants." García Hernández, *supra* note 6, at 927.

81. Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 607–08 (2011); *see* Eagly, *supra* note 15, at 2301; John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 36–39 (2013).

82. *E.g.*, García Hernández, *supra* note 6, at 848 ("*Padilla* offers a layer of procedural protection between life in a place [noncitizen criminal defendants] know and life in a place they hope to avoid."); *accord* Aarti Kohli, *Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens*, 2 CALIF. L. REV. CIRCUIT 1, 4 (2011) (arguing that "*Padilla* and *Carachuri-Rosendo* . . . signal[] that our deportation laws are unduly harsh" and "create a necessary layer of procedural protections for noncitizens"); *cf.* Anne R. Traum, *Constitutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491, 529–30 (2011) (interpreting *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) and other recent Supreme Court cases as having a substantive component that "protects immigrants who have negotiated

signaling a breach in the Court's previous bright-line demarcation between civil proceedings (including immigration proceedings) and criminal ones.[83] Daniel Kanstroom, for example, in a searching analysis of *Padilla* suggests "the Court straddle[d] the civil/criminal and punitive/regulatory lines in its understanding of deportation," producing "a new constitutional norm" describing "the constitutional status of *post-entry social control deportation*."[84] The variance in scholars' understandings of *Padilla* reminds us that the search for a constitutional operative proposition is normatively consequential: as Kanstroom has said, "the interpretation of *Padilla* matters greatly."[85]

I join those who view *Padilla* as expressing a constitutional norm that protects immigrants against deportation. Although *Padilla*'s decision rule is narrowly described in terms of what a criminal defense attorney must do in defending a criminal case, *Padilla*'s concern is not limited to the validity of the guilty plea. Instead, what drives *Padilla* is the unfairness of a deportation based on an unwitting guilty plea in a criminal case. The operative proposition thus encompasses fairness in *both* criminal proceedings and the immigration proceedings that "virtually inevitabl[y]"[86] follow. *Padilla*'s focus on fairness in the criminal proceedings, though, is used as a proxy for its chief concern, which is fairness in deportation.

The text of *Padilla* supports this understanding. The aspect of the rise of crimmigration that seems to have most concerned the Court was the narrowing of discretionary relief rendering the "'drastic measure' of deportation or removal . . . now virtually inevitable for a vast number of noncitizens convicted of crimes."[87] The court included the "virtually inevitable" language at both the beginning and end of its account of the "changes to our immigration law [that] have dramatically raised the stakes of a noncitizen's criminal conviction."[88] The direct pipeline from criminal conviction to deportation seems to have been essential to the Court's holding.

This makes sense: the *Padilla* rule should be understood as *shifting responsibility* onto the shoulders of criminal defense counsel, responsibility that would ordinarily, before the "changes to our immigration law"

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criminal cases to avoid certain deportation consequences" and reading *Padilla* as consistent with this). The importance of this position is its understanding of *Padilla* as rooted in an immigrant-protective value, even though its expression is a rule of criminal procedure.

83. *E.g.*, Elizabeth A. Rossi, *Revisiting* INS v. Lopez-Mendoza*: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477, 501 & n.124 (2013) (noting scholars' arguments "that the Court's view of deportation as civil is changing").

84. Kanstroom, *supra* note 6, at 1472–73.

85. *Id.* at 1477.

86. Padilla v. Kentucky, 559 U.S. 356, 360 (2010).

87. *Id.* (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

88. *Id.* at 364.

described by the *Padilla* Court, have been located somewhere in the immigration justice system—with the immigration judge, Attorney General, or perhaps with immigration counsel.[89] The elimination of discretionary relief possibilities in the immigration system caused the Court to effectively shift the responsibility for *protecting against deportation* into the criminal justice system.

The Court also cited approvingly two circuit court decisions predating the dramatic constriction of discretionary relief. The Second Circuit in *Janvier v. United States*[90] and the Fifth Circuit in *United States v. Castro*[91] each had held that criminal defense counsel's failure to request a "judicial recommendation against deportation" ("JRAD") could constitute ineffective assistance in violation of the Sixth Amendment right to counsel.[92] The JRAD was available during a time when the Attorney General and immigration judges still had the ability to grant discretionary relief.[93] Thus, as the *Padilla* Court noted, while the JRAD existed there was no automatic pipeline from a criminal judgment to deportation.[94] The Court's endorsement of *Janvier* and *Castro*, then, cannot be justified on the same logic as justified the holding in *Padilla*. But a JRAD *guaranteed* non-deportation,[95] and was therefore a reverse pipeline of sorts. The value, then, that can be gleaned from *Padilla*'s holding *and* its reliance on *Janvier* and *Castro* is that an immigrant should not be deprived of opportunities to avoid deportation that are solely available in the criminal proceeding. *Padilla* is thus squarely focused on protecting against deportation.

The remedies afforded in *Janvier* and *Castro* support this interpretation of *Padilla*. With the pipeline effect of today's immigration system, the only way to remedy deportation consequences that should have been avoided in the criminal proceedings is to vacate the conviction itself.[96] But in *Janvier* and *Castro*, the remedy was quite different. In each case, the circuit court remanded with instructions for the district court (if ineffective assistance were found) to vacate the *sentence* and re-sentence, if appropriate, with a

89. Immigrants have a right to immigration counsel, but only at their own expense. 8 U.S.C. § 1362 (2012).

90. Janvier v. United States, 793 F.2d 449 (2d Cir. 1986).

91. United States v. Castro, 26 F.3d 557 (5th Cir. 1994).

92. *Padilla*, 559 U.S. at 361–62.

93. *Id.* at 363–64 (noting curtailment of discretionary relief in 1996).

94. *Id.* at 362 ("Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.").

95. *Id.* at 361–62.

96. Because his conviction exposed him to deportation, this was the relief Padilla sought. Joint App., Padilla v. Kentucky, No. 08-651, 2009 WL 1499270, at *71–*74 (Ky. May 26, 2009) (KY. R. CRIM. P. 11.42 motion).

JRAD.[97] The remedy in these cases was tailored to the harm, which was not infirmity in the criminal conviction, but the deportation consequence itself.

Padilla is not, of course, concerned with protecting *all* immigrants against *all* deportations. *Padilla*'s use of the *Strickland* test—and with a particular instantiation of the test, the variation on *Strickland* employed in *Hill v. Lockhart*[98]—reveals that *Padilla*'s concern is with deportations that are rendered unfair because an immigrant unwittingly loses an opportunity to avoid deportation. The Court relied on *Hill* sparingly, but tellingly. *Padilla* described *Hill* as "long recognized" precedent establishing "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."[99] More importantly, in rejecting a holding limited to counsel's misadvice, *Padilla* cited Justice White's concurrence in *Hill* as support for the proposition that "[i]t is quintessentially the duty of counsel to provide her client with *available advice* about an issue like deportation."[100]

In *Hill*, the Court had applied the *Strickland* test to decide whether a guilty plea should be vacated based upon a defendant's allegation that he pled guilty in reliance upon his counsel's misadvice as to parole eligibility.[101] Because the *Hill* Court could not assess Hill's ineffectiveness claim in terms of the fair trial operative principle,[102] it viewed the claim against the backdrop of jurisprudence establishing that a guilty plea must be knowing, voluntary, and intelligent.[103] The *Hill* Court superimposed the *Strickland* standard on this background, holding that "a defendant who pleads guilty upon the advice of counsel 'may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel'" was constitutionally ineffective.[104]

The ultimate value that *Padilla* expresses, then, is that immigrants charged with crimes implicating deportation should be well-informed about their available options; a guilty plea under such circumstances should be knowing, intelligent, and voluntary. *Padilla*, and the cases it relied upon, thus should be understood as expressing a constitutional norm that is protective against unwitting deportation.

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97. United States v. Castro, 26 F.3d 557, 563 (5th Cir. 1994); Janvier v. United States, 793 F.2d 449, 455–56 (2d Cir. 1986).

98. Hill v. Lockhart, 474 U.S. 52 (1985).

99. *Padilla*, 559 U.S. at 373 (citing *Hill*, 474 U.S. at 57).

100. *Id.* at 371 (emphasis added) (citing *Hill*, 474 U.S. at 62 (White, J., concurring)).

101. *Hill*, 474 U.S. at 53, 57.

102. *See supra* Part I.A.

103. *Hill*, 474 U.S. at 56 (citing North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

104. *Id.* at 56–57 (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)).

B. DECISION RULES: WILL PADILLA*'S PROMISE BE FULFILLED?*

Padilla has been rightly haled as bringing a needed dose of realism to constitutional doctrine.[105] But regardless of what one interprets its operative proposition to be, it appears likely that *Padilla* will need to be supplemented by additional decision rules. The evolution of decision rules implementing the criminal right to counsel[106] suggests how the crimmigration counsel right announced in *Padilla* might evolve. It is first important to note that the crimmigration counsel right was declared in a decision that is analogous not to *Gideon*, but to *Strickland*. *Padilla* did not so much establish a right to counsel as it established a right to litigate trial counsel's effectiveness (with respect to crimmigration counsel) in a postconviction setting. If one considers *Padilla* to be the equivalent of the *Strickland* decision, one is left to wonder: What does the underlying *Gideon*-like rule look like? And what will the *Martinez*-like rule look like?

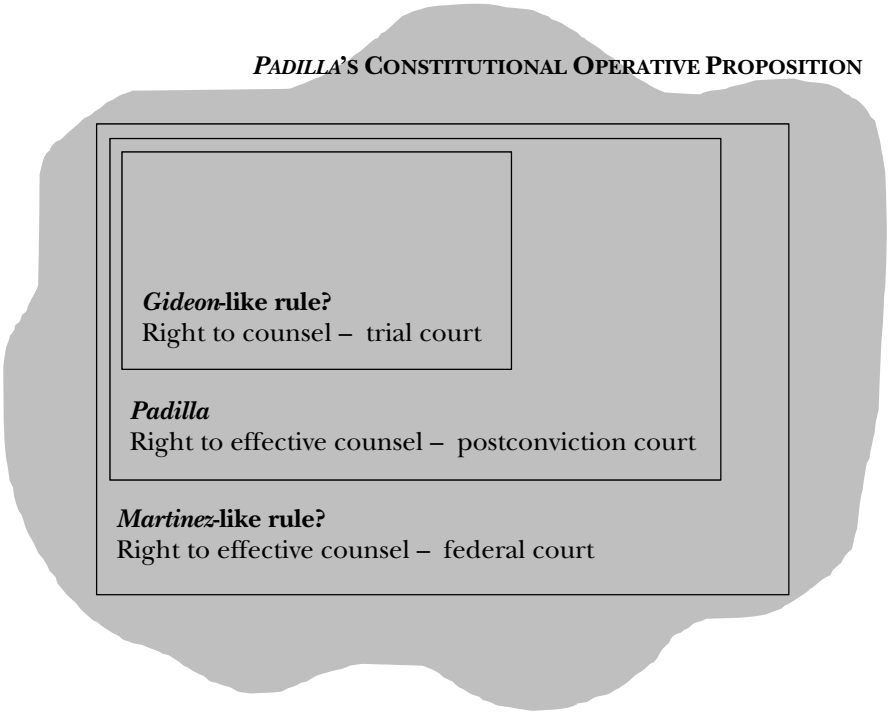

Figure 4.

105. *E.g.*, Kanstroom, *supra* note 6, at 1466 ("*Padilla*, though essentially a criminal case, embodies a refreshingly realist interpretation of contemporary crime-based deportation.").

106. *See supra* Fig. 2.

Alice Clapman has offered one answer to the first question. Clapman sees *Padilla*'s operative principle as destroying, in the criminal justice system, a bright-line rule viewing incarceration as the only justification for the right to counsel.[107] Clapman proposes that criminal courts should recognize a Sixth Amendment right to counsel when a criminal defendant faces charges that could lead to deportation.[108] This decision rule, delineating the universe of cases in which the right to crimmigration counsel (and therefore the *Padilla* right to effective crimmigration counsel) attaches, would stand in relation to *Padilla* in the same way *Gideon* stands in relation to *Strickland*. Below, I will propose a rule that perhaps occupies a *Martinez*-like space in the landscape of *Padilla*.[109]

The broader task, of course, is simply to determine whether *Padilla*'s decision rule adequately maps its operative proposition, and if it does not, to identify additional decision rules to help cover the ground. Those who see *Padilla* as expressing a norm relating to immigration proceedings have proposed a panoply of decision rules that could be implicated, including recognizing a right to counsel in immigration proceedings.[110] Like these scholars, I believe *Padilla*'s decision rule—calling for the application of the *Strickland* test in postconviction proceedings—is ineffective to vindicate *Padilla*'s operative constitutional proposition. This is true for a number of reasons.

First, the unfunded mandate problem of *Gideon*[111] is persistent and even amplified with *Padilla*. Indeed, *Padilla* looks a lot like *Gideon* in this way: just as *Gideon* took an already-existing decision rule (the rule describing the right-to-counsel in federal criminal cases) and imposed it on the states, *Padilla* takes the *Strickland* rule and imposes it on the states in new

107. *See* Clapman, *supra* note 81.

108. *Id.* at 608–09.

109. *See infra* Part III.

110. Many have argued, based on *Padilla,* for a right to counsel in deportation proceedings. *See* Eagly, *supra* note 15, at 2300–05 (citing authorities supporting the right to immigration counsel). Others have argued that *Padilla* supports importing other criminal procedure rights into immigration proceedings. *E.g.*, Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261 (2013) (arguing, based in part upon *Padilla*, for application of Eighth Amendment "cruel and unusual punishment" doctrine in immigration proceedings); Kohli, *supra* note 82, at 10 (arguing that "*Padilla* opened a door that many scholars thought was barred shut" and could "lead to the imposition of procedural safeguards on deportation proceedings" such as the right to appointed counsel, the application of the exclusionary rule, and procedural safeguards on detention that are not currently in place); Rossi, *supra* note 83 (arguing exclusionary rule should apply in deportation proceedings); Maureen Sweeney & Hillary Scholten, *Penalty and Proportionality in Deportation for Crimes*, 31 ST. LOUIS U. PUB. L. REV. 11, 12–13 (arguing criminal law doctrine of proportionality should apply in immigration proceedings); Adriane Meneses, Comment, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment*, 14 SCHOLAR 767, 829–40 (2012) (suggesting *Padilla* allows application of criminal *ex post facto* doctrine in immigration proceedings).

111. *See supra* notes 67–68 and accompanying text.

circumstances.[112] Certainly there is much that can be done and is being done to make good on *Padilla*'s promise.[113] But given that the political will seems to be lacking to fully fund the *Gideon* right,[114] and that on the fiftieth anniversary of *Gideon* we are still discussing its as yet "unfulfilled promise,"[115] it can hardly be expected that adding an additional obligation to *Gideon*'s army—that of providing effective crimmigration advice—will be readily accomplished.[116]

Second, the *Padilla* decision rule adopts the *Strickland* test, which has already proved to be an ineffective way to assess ineffectiveness.[117] Indeed, the *Padilla* test, with its "two-tiered" test for ineffectiveness, will arguably be *less* effective than *Strickland* has been in enforcing the right to effective assistance.[118]

Third, the *Padilla* rule does not expand the Sixth Amendment guarantee of appointment of counsel. Instead, *Padilla* holds only that in those cases where appointment is guaranteed, the Constitution also requires effective crimmigration counsel. The *Padilla* rule, rooted as it is in the Sixth Amendment, is insufficiently broad to encompass petty offenses for which

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112. *See* Chaidez v. United States, 133 S. Ct. 1103, 1107 (2013) (suggesting that *Padilla* "impose[d] a new obligation"). *But see* Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (noting that for 15 years prior to *Padilla* "professional norms . . . generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea"). *Padilla* also operates as an unfunded mandate on the states by creating a constitutional right that states must adjudicate, even though the right is rooted in a consequence that is experienced only in federal immigration proceedings. Put another way, it is likely that some *Padilla* litigants would not care to litigate the validity of their criminal convictions but for the consequences in immigration proceedings. *Padilla* foists litigation onto state courts in such cases.

113. *See* Eagly, *supra* note 15, at 2305–14 (delineating what might be required to "[build] an [i]mmigration *Gideon*"); Vázquez, *supra* note 20, at 192–200 (describing measures to implement *Padilla*).

114. Chemerinsky, *supra* note 19, at 2693 (doubting that proposals to fund public defender systems will make a difference, because "neither courts nor legislatures seem inclined to deal with the problem in representation for criminal defendants").

115. *See supra* Part I.C.

116. *See* King, *supra* note 81, at 38–39 ("Padilla has added to the burden for these public defenders and court-appointed lawyers . . . . Without some accommodation or incentives to accompany any formal systemic reform, it is hard to imagine the practice on the ground improving in any meaningful sense."). Eagly describes some of the approaches public defender offices have taken to try to meet their *Padilla* obligation. Eagly, *supra* note 15, at 2294–95. One potential solution to overburdening already burdened public defenders would be to permit the appointment of immigration counsel to assist criminal counsel in providing crimmigration advice. *Cf.* Scott R. Grubman, *I Want My (Immigration) Lawyer!: The Necessity of Court-Appointed Immigration Counsel in Criminal Prosecutions after* Padilla v. Kentucky, 12 NEV. L.J. 364 (2012) (advocating for immigration counsel to be required where immigration advice is not clear).

117. *See generally supra* note 68.

118. *See generally* García Hernández, *supra* note 6; Vázquez, *supra* note 20. Grubman's proposal would conceivably address this gap between the *Strickland* and "*Strickland*-lite" decision rules. *See generally* Grubman, *supra* note 116; García Hernández, *supra* note 6.

jail was not an available punishment, but which nonetheless have immigration consequences.[119]

Fourth, if *Padilla* is analogous to *Strickland*, it is also worth wondering whether a *Martinez*-like rule will follow and provide additional protection to the *Padilla* right. The challenges facing litigants attempting to raise *Padilla* claims in state postconviction proceedings are formidable, going well beyond the problem addressed by *Martinez* (the unavailability of effective postconviction counsel).[120]

For example, criminal procedure doctrines that exist to serve the state's interest in the finality of criminal judgments may be ill suited to the crimmigration context and may pose undue barriers to litigating *Padilla* claims. The most current and pervasive battle being waged at present concerns the application of anti-retroactivity rules in state postconviction proceedings: many states use the *Teague* anti-retroactivity rule in their state postconviction proceedings, which will mean many *Padilla* claims will be denied on retroactivity grounds.[121] Recent data show the number of immigrants facing deportation proceedings as a result of a conviction predating *Padilla* is high, and retroactivity and statute of limitations doctrines[122] will pose significant obstacles for a great number of these people. Over 50,000 people in a recent sixteen-month period were the subject of an immigration detainer based on criminal convictions more than five years old, and nearly 25,000 people were subject to detainers based on convictions more than ten years old.[123]

Also, expungement or sealing of records, or a dismissal after successful diversion may deprive state courts of jurisdiction over the criminal matter, even though a guilty plea or conviction that has been expunged, sealed, or dismissed may continue to have immigration consequences.[124]

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119. This argues in favor of the rule Alice Clapman proposes. *See supra* note 81 and accompanying text.

120. Just as education and resources pose a barrier to effective crimmigration counsel at trial, they may be expected to affect the availability of effective crimmigration *postconviction* counsel to raise *Padilla* claims. *See supra* Part I.C.

121. Teague v. Lane, 489 U.S. 288, 310 (1989) (holding that "new" rules of criminal procedure are not given retroactive effect); *see* Chaidez v. United States, 133 S. Ct. 1103, 1105 (2013) (finding that *Padilla* would not be retroactively applied to convictions that are final before *Padilla*'s announcement); Miller v. State, 77 A.3d 1030, 1036–37, 1045 (Md. 2013) (finding a *Padilla* claim "not redressable" after *Chaidez*). *But see* Commonwealth v. Sylvain, 995 N.E.2d 760, 762, 770–71 (Mass. 2013) (granting redress to the *Padilla* claim, as a matter of state law, despite the fact that the litigant's conviction was final before *Padilla* was decided).

122. *See* Rodriguez v. State, No. M2011-01485-CCA-R3-PC, 2013 WL 59449, at *4 (Tenn. Crim. App. Jan. 7, 2013), *appeal granted* (June 12, 2013) (holding, as an alternative ground for denying relief, that the *Padilla* claim was barred by state statute of limitations on postconviction relief).

123. *Few ICE Detainers Target Serious Criminals*, TRACIMMIGRATION (Sept. 17, 2013), http://trac.syr.edu/immigration/reports/330.

124. *See* César Cuauhtémoc García Hernández, *Criminal Defense After* Padilla v. Kentucky, 26 GEO. IMMIGR. L.J. 475, 519 (2012) (noting that the INA was amended in 1996 to permit dispositions not considered a conviction under state law to count as convictions for purposes of

Finally, immigration courts are not required to stay deportation proceedings while a *Padilla* challenge to a conviction is litigated in state court.[125]

These barriers, specific to the raising and litigating of *Padilla* claims in state postconviction proceedings (but not present for "ordinary" *Strickland* claims), demonstrate the problem inherent in having a criminally oriented decision rule (like *Padilla*'s) serve a constitutional norm that is focused on consequences that take place in immigration proceedings. Despite *Padilla,* the criminal justice system is replete with rules (such as statutes of limitations and anti-retroactivity rules) that were not designed to serve the constitutional operative principle that *Padilla* is aimed to serve.

The fit between *Padilla*'s operative proposition (even narrowly construed) and the decision rule of *Padilla* is far looser than the fit between the Sixth Amendment's operative proposition and the decision rules of *Gideon* and its progeny. Without additional decision rules, then, *Padilla*'s promise—like *Gideon*'s before it—is likely to remain unfulfilled.

III. A PROPOSED DECISION RULE TO IMPLEMENT *PADILLA*'S OPERATIVE PROPOSITION

The following decision rule is an example of a rule that could be adopted to map some (but not all) of the disparity between *Padilla*'s decision rule and its constitutional operative proposition:

No criminal conviction obtained as a result of a guilty plea may be used against the respondent in immigration proceedings for any purpose unless the government can establish either:

(a) the respondent:

(1) was represented by counsel in the criminal proceedings; *and*

(2) is either

(A) able to have the merits of a *Padilla* claim subjected to one full round of review in state court (including certiorari to the United States Supreme Court); *or*

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deportation); *see also Rodriguez*, 2013 WL 59449, at *2–3 (holding that the *Padilla* claim could not be brought where the criminal case had been expunged); *cf.* Kazadi v. People, 291 P.3d 16, 18 (Colo. 2012) (en banc) (holding that the deferred judgment, where the sentence had not been imposed, could not be attacked by a Colorado Rule of Criminal Procedure 35(c) motion, but could be the subject of a motion to withdraw a guilty plea pursuant to Colorado Rule of Criminal Procedure 32(d)).

125. Indeed immigration proceedings need not be stayed even during the *direct appeal* of a criminal conviction. *See* United States v. Saenz-Gomez, 472 F.3d 791, 793–94 (10th Cir. 2007). *But see* Orabi v. Attorney Gen. of the United States, 738 F.3d 535, 540–43 (3d Cir. 2014) (describing circuit split on this question). There are other reasons deportation based on a faulty plea might evade review in the criminal justice system. *See generally* Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475 (2013) (detailing the ways in which the federal government accomplishes deportation without formal immigration proceedings).

(B) provided counsel in immigration proceedings for the purpose of litigating such a claim; *or*

(b) the respondent's guilty plea was knowing, voluntary, and intelligent with respect to any immigration consequences of the guilty plea.[126]

This rule would serve *Padilla*'s operative proposition because the immigration court can only rely on a guilty plea where the government can show that the plea was a well-informed decision.[127] For respondents who did not have counsel available to them in the criminal proceeding, the government must establish that the plea was knowing, voluntary, and intelligent.[128] This section of the rule is justified by *Padilla*'s reliance on *Hill v. Lockhart*, which establishes that the application of the ineffectiveness doctrine in guilty plea cases serves the requirement that a plea be made with eyes open.[129]

For respondents who *did* have counsel in the underlying criminal proceedings,[130] the rule is designed to craft a protective layer around the *Padilla* decision rule, just as *Martinez* protects *Strickland*. If the government can demonstrate that the respondent has *not* fallen prey to any of the multiple barriers to having a *Padilla* claim litigated on its merits,[131] then the immigration court can rely on the guilty plea.[132] In such cases, the *Padilla* decision rule can be applied by state courts and the immigration court can defer to the results. If, however, the respondent cannot have the merits of a *Padilla* claim decided, it becomes the obligation of the immigration court to

126. A plea colloquy, in which a court advises a *pro se* defendant that a plea "may" carry immigration consequences would not, in my view, be sufficient to carry this burden. *See* People v. Peque, 3 N.E.3d 617, 637 (N.Y. 2013) (holding, based on *Padilla*, that Due Process requires that "trial courts . . . make all defendants aware that, if they are not United States citizens, their felony guilty pleas may expose them to deportation"). Such a general warning would not serve *Padilla*'s operative principle that a plea be made "with *available advice* about an issue like deportation . . . ." Padilla v. Kentucky, 559 U.S. 356, 371 (emphasis added) (citing Hill v. Lockhart, 474 U.S. 52, 62 (White, J., concurring in judgment)); *see also, e.g.*, Malia Brink, *A Gauntlet Thrown: The Transformative Potential of* Padilla v. Kentucky, 39 FORDHAM URB. L.J. 39, 46–49 (2011) (arguing that general warnings do not satisfy *Padilla*).

At a minimum, I believe a court would need to provide an additional advisement to a *pro se* defendant that if counsel were appointed, counsel would have to give affirmative crimmigration counsel as *Padilla* requires. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (waiver of counsel must be "an intentional relinquishment or abandonment of a known right or privilege").

127. *See supra* Part II.A.

128. *See supra* note 103 and accompanying text. Subsection (b) of the proposed rule would govern cases in which the respondent did not have criminal counsel.

129. *See supra* notes 99–101 and accompanying text.

130. Subsection (a) of the proposed rule would govern cases in which the respondent did have counsel in her criminal case.

131. *See supra* Part II.B.

132. Subsection (a)(2)(A) of the proposed rule would govern cases in which the respondent could litigate a *Padilla* claim on the merits.

decide such a claim.[133] Counsel would be provided in such cases to address *Martinez*'s concern that ineffectiveness claims should be presented by able postconviction counsel.[134]

A decision rule like that proposed here serves *Padilla*'s operative proposition while addressing the gaps created by *Padilla*'s decision rule. It could be read into the definition of "conviction" or "crime" under the Immigration and Nationality Act,[135] since the Act must be read in light of the constitutional principles articulated in *Padilla*.[136] Alternatively, it could

133. Subsection (a)(2)(B) of the proposed rule would govern cases in which the respondent could not litigate the merits of a *Padilla* claim.

134. *See supra* notes 59–61 and accompanying text.

135. Omnibus Consolidated Appropriations Act, 1997, § 322 (codified as amended at 8 U.S.C. § 1101(a)(48)(A) (2012)) (adding Section 101(a)(48) to the Immigration and Nationality Act and defining "conviction" for the purposes of immigration law); *see* 8 U.S.C. § 1227(a)(2)(A) (declaring aliens removable when "convicted of [certain] crimes").

136. The Third Circuit's decision in Castillo v. Attorney Gen., 729 F.3d 296 (3d Cir. 2013), exemplifies what this approach might look like. Bernardo Castillo contested the immigration consequences of his municipal court shoplifting adjudication, which the Board of Immigration Appeals ("BIA") deemed a "conviction" of a "crime" involving moral turpitude. The Third Circuit first remanded for the BIA to consider whether the adjudication was a conviction of a "crime" under INA § 237(a)(2)(A)(ii). *Castillo*, 729 F.3d at 299. The BIA again concluded the municipal court adjudication was a "crime," reasoning that proof beyond a reasonable doubt was required for the adjudication, and therefore it was a "conviction" and *ipso facto* a "crime." *Id.* at 299–301. The Third Circuit disagreed once again, granting Castillo's petition for review and remanding to the BIA for a third round of review. The Third Circuit first examined the BIA's decision in *In re Eslamizar*, 23 I. & N. Dec. 684 (2004), concluding that the BIA had eschewed a "literal" reading of the definition of "conviction" under INA § 101(a)(48)(A)—one that would have included any adjudication of "guilt," even in cases where only a civil fine or sanction was imposed—in favor of a "far more sensible reading . . . [requiring a] . . . "judgment of guilt" in a *criminal proceeding*." *Castillo*, 729 F.3d at 303–04 (citing *Eslamizar*, 23 I. & N. Dec. at 686–87). Critical to the Third Circuit's understanding of *Eslamizar* was the BIA's definition of "criminal proceeding" as "a trial or other proceeding whose purpose is to determine whether the accused committed a crime and which provides the constitutional safeguards normally attendant upon a criminal adjudication." *Castillo*, 729 F.3d at 304 (citing *Eslamizar*, 23 I. & N. Dec. at 687). Other decisions of the BIA, the Third Circuit held, supported an "open-ended inquiry" into whether a criminal proceeding was a " true or genuine criminal proceeding," including "[a]t the very least . . . [a] determination of whether the proceeding's 'purpose is to determine whether the accused committed a crime' and if it 'provides the constitutional safeguards normally attendant upon a criminal adjudication.'" *Castillo*, 729 F.3d at 307 (citations omitted).

The logic of *Castillo* supports application of the rule I propose here in determining whether an adjudication is a "conviction" for "crime" under the INA. *Padilla* clearly announces "constitutional safeguards normally attendant upon a criminal adjudication," and the Third Circuit and the BIA have permitted consideration of the presence or absence of those safeguards in determining what constitutes a "conviction" for "crime."

For a decision holding constitutional principles irrelevant in determining what constitutes a "conviction" for "crime," see Hanna v. Holder, 740 F.3d 379, 391 (6th Cir. 2014) (rejecting argument that INA § 101(a)(48)(A) should be construed in light of *Padilla*).

be imposed by courts as a matter of Due Process to which respondents in immigration proceedings are entitled.[137]

Locating an additional remedy for *Padilla* violations in immigration court has several advantages.[138] First, litigation of *Padilla* violations in immigration court takes place in the forum with the greatest incentive to vindicate the right. State courts provide most of the convictions that form the basis for a deportation, and state courts have little incentive to upset state criminal convictions based on federal immigration consequences. (Put another way, state criminal procedural rules that prevent litigation of a *Padilla* violation may serve a valid state interest since the state has no interest in the immigration litigation). Furthermore, immigration courts may be better equipped to determine when a respondent's plea was intelligently made, given their expertise in immigration law. If the rule proposed here encourages state courts to avoid the merits of a *Padilla* determination, that may be a good thing. State courts may erroneously overestimate the number of cases in which immigration consequences are "not succinct and straightforward"[139] and exacerbate *Padilla*'s "*Strickland*-lite" problem.[140] Finally, requiring state court systems to litigate *Padilla* claims is to some degree an unfunded mandate.[141] As the Supreme Court did in *Martinez v. Ryan*, allowing the underlying values of a right to counsel to be vindicated in a federal forum can avoid burdening state criminal justice systems.

CONCLUSION

Padilla, like *Gideon*, was a monumental step forward in recognizing important constitutional values that should be protected by a right to counsel. But a half century's experience with *Gideon* shows that additional decision rules will be required to fully protect the constitutional values underlying the "crimmigration" right to counsel. Even when supplemented with *Strickland*, *Gideon* proved ineffective to fully vindicate the operative proposition it serves; *Martinez v. Ryan* was a necessary addition to the panoply of decision rules serving the criminal right to counsel.

The *Padilla* rule can expect to fare no better. Additional decision rules, including that outlined in this Essay, will be needed to prevent a similar "unfulfilled promise" of the right to effective crimmigration counsel. Our

137. *Cf.* Kanstroom, *supra* note 6, at 1472–78 (positing a "Fifth-and-a-Half Amendment" that could justify rules for counsel in immigration proceedings). *See generally*, Traum, *supra* note 82 (advocating that additional decision rules implementing *Padilla* in immigration court be rooted not in the Sixth Amendment, but in the Fifth Amendment's Due Process provisions, already applicable in immigration proceedings).

138. In the interests of space, I will leave it to others to raise criticisms of the rule proposed here.

139. Padilla v. Kentucky, 559 U.S. 356, 369 (2010).

140. García Hernández, *supra* note 6, at 850–54.

141. *See supra* note 70 and accompanying text.

experience with *Gideon* should remind us, though, that more than rules will be necessary to vindicate the Constitution's promise.[142]

142. *See supra* note 67. Recently, the New York City Council made $500,000 available to fund a pilot program providing immigration counsel to indigent respondents in proceedings. Mark Hamblett & Jeff Storey, *Pilot Program to Represent Detainees Facing Deportation*, N.Y. L.J., (Sept. 30, 2013), http://www.newyorklawjournal.com/id=1202621275680/Pilot-Program-to-Represent-Detainees-Facing-Deportation. Other non-rule-based remedies could include a revival of practices similar to the JRAD. Although no longer sanctioned by statute, a criminal defense lawyer could request, and a criminal judge could grant, a non-binding recommendation concerning immigration consequences. A statement by the state-court trial judge that a conviction should not, in the court's view, carry adverse immigration consequences could be given effect by an immigration judge in considering discretionary relief or perhaps even in considering whether the state-court adjudication should be considered a "conviction" of "crime" for immigration purposes.