

## **PADILLA’S BROKEN PROMISE: PENNSYLVANIA CASE STUDY**

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*In 2010, the Supreme Court held in *Padilla v. Kentucky* that criminal defense attorneys have a constitutional obligation to advise noncitizen clients of the immigration consequences of a guilty plea in criminal court proceedings. Though it has been over a decade since the decision, little research has been done regarding Padilla’s implementation by defense counsel on a statewide level. This Article provides findings from a case study on Padilla advising in Pennsylvania. Pennsylvania is unique because its state courts have interpreted Padilla narrowly and permit immigration advisals that would be deemed constitutionally deficient in other jurisdictions. Pennsylvania also does not have a state-funded public defense system, which means standards for indigent representation vary by county.*

*Interviews with public defenders and prosecutors in Pennsylvania reveal significant variation in the scope of advice provided to noncitizens in criminal court proceedings and the willingness of district attorney offices to consider immigration status during plea negotiations. Each Pennsylvania county has an individual method of identifying noncitizen clients, analyzing immigration consequences, warning clients of these adverse consequences, and negotiating with district attorneys. The scope of advice provided to noncitizens and counsel’s understanding of their Padilla obligations vary considerably in both content and scope. Counties suffer from Pennsylvania’s systemic failure to provide adequate funding to public defense offices to ensure that they can effectively comply with Padilla—a problem that is especially salient in a state with limited postconviction remedies for those who receive deficient advice. Based on these findings, this Article offers various policy recommendations that would improve the criminal defense representation of noncitizens in Pennsylvania. While these findings and recommendations are specific to Pennsylvania, they are relevant to nationwide research on Padilla’s impact and what can be done to promote immigration-conscious criminal defense advocacy.*

### INTRODUCTION

In 2010, the Supreme Court issued a groundbreaking decision in *Padilla v. Kentucky*, holding that criminal defense attorneys have a constitutional

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obligation to advise noncitizens<sup>2</sup> of the potential immigration consequences of a criminal conviction prior to taking a plea.<sup>3</sup> The Court recognized that changes in immigration law “dramatically raised the stakes” of a noncitizen’s criminal charges. Banishment or exile from the country is not a mere “collateral consequence” of criminal conduct; rather “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.”<sup>4</sup> As such, the Sixth Amendment’s guarantee of effective assistance of counsel requires that noncitizens be provided accurate information about the potential immigration consequences of a guilty plea. The Court acknowledged that immigration law is complex, and the deportation consequences of a plea may not always be clear. In those cases, a criminal defense attorney “need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”<sup>5</sup> But in cases where the deportation consequence *is* clear, “the duty to give correct advice is equally clear.”<sup>6</sup> The Court also encouraged defense counsel to “plea bargain creatively with the prosecutor” to craft a conviction and sentence that satisfy the interests of both parties while reducing the likelihood of deportation.<sup>7</sup>

Since *Padilla*, federal and state court decisions have interpreted its scope, producing a body of case law that holds significant implications for the provision of public defense services across the country.<sup>8</sup> At the same time, legal scholars, policy makers, and public defender offices have thought creatively about how best to fulfill *Padilla*’s mandate.<sup>9</sup> Solutions have varied:

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<sup>2</sup> This article uses the term “noncitizen” to refer to anyone who is not a U.S. citizen. This includes long-time lawful permanent residents (LPRs), people in the country on visas, refugees, asylum seekers, individuals with DACA or Temporary Protected Status, and individuals with no immigration status.

<sup>3</sup> *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

<sup>4</sup> *Id.* at 364.

<sup>5</sup> *Id.* at 369.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 373.

<sup>8</sup> See *infra* Sections I & I.A.

<sup>9</sup> See, e.g. Ingrid Eagly et. al, *Restructuring Public Defense After Padilla*, 74 STAN. L. REV. 1, 73 (2022) (“County boards of supervisors have begun to recognize that more funding is needed for offices to hire additional experts and support staff for immigrant consultations.”); Maureen A. Sweeney, *Where Do We Go from Padilla v. Kentucky? Thoughts on Implementation and Future Direction*, 45 NEW ENG. L. REV. 353, 367 (2011) (“Local chapters of the American Immigration Lawyers Association (“AILA”) would be a good place to begin to find attorneys with expertise in immigration consequences, and the chapters’ pro bono coordinators may be interested in working with public defenders to ensure access to quality advice.”); César Cuauhtémoc García Hernández, *Criminal*

some states have created statewide or regional *Padilla* resources and hired immigration experts to train and consult with public defense offices.<sup>10</sup> Other states and counties have contracted with non-profits and private immigration lawyers to help public defenders fulfill their *Padilla* obligations.<sup>11</sup> And some individual offices, such as the Bronx Defenders, have pioneered models of holistic defense, employing immigration attorneys and social workers within their public defense offices to integrate criminal and immigration representation.<sup>12</sup>

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*Defense After Padilla v. Kentucky*, 26 GEO. IMM. L. J. 475, 487–88 (2012) (“For criminal defense attorneys, therefore, the critical question is how to determine whether *Padilla* applies to a particular attorney-client relationship . . . *Padilla* requires criminal defense attorneys to engage in two lines of inquiry: (1) they must investigate a client’s citizenship status and (2) determine whether a client will be removable if convicted.”); Ronald F. Wright, *Padilla and the Delivery of Integrated Criminal Defense*, 58 U.C.L.A. L. REV. 1515, 1535 (2011) (“The *Padilla* decision seems to be spurring some growth in the training opportunities for defense attorneys to learn the basics of immigration law . . . it seems reasonable to expect that consultations between defense attorneys and immigration attorneys will increase in the aftermath of *Padilla*.”).

- <sup>10</sup> For example, New York State’s Office of Indigent Legal Services created a statewide network of Regional Immigration Assistance Centers (“RIACs”) staffed by attorneys with expertise in immigration law to provide advisals in criminal, appellate, post-conviction, and family court. See *RIAC General Information*, <https://www.ils.ny.gov/node/204/riac-general-information> [ <https://perma.cc/ZP28-HKJC>] New York is broken into six regions each with their own RIAC: Western New York, Central New York, Northern New York, Hudson Valley, New York City, and Long Island. *Id.* Regional offices assist county public defender offices with providing competent advice to noncitizens while recognizing that many defender offices cannot hire in-house experts themselves. *Id.* Similarly, Massachusetts, which has a state-wide public defense system, has an Immigration Impact Unit which serves as a state-wide resource for court-appointed attorneys to advise noncitizens about immigration consequences and help mitigate those consequences where possible. See Comm. for Pub. Council, *Immigration Impact Unit Homepage*, [https://www.publiccounsel.net/iuu\\_](https://www.publiccounsel.net/iuu_) (last visited Aug. 13, 2023) [<https://perma.cc/S5YD-2SAV>].
- <sup>11</sup> In Texas, the Texas Indigent Defense Commission funds in-house immigration attorneys in several counties; in more rural and smaller counties, it finances a program called myPadilla, an online platform that provides training, intake forms, individual written advisals, and consultations with remote immigration attorneys. See Press Release, Hays County, County Accepts Grant to Implement Padilla Pilot Program to Assist Defense Attorneys (Sept. 27, 2019), <https://hayscountytexas.com/2019/09/27/county-accepts-grant-to-implement-padilla-pilot-program-to-assist-defense-attorneys/> [<https://perma.cc/93XW-97WN>]. In California, some counties contract with private immigration counsel and others with the San-Francisco-based non-profit the Immigrant Legal Resource Center (ILRC) to assist public defenders in fulfilling their *Padilla* obligations. Eagly, *supra* note 9, at 32–34.
- <sup>12</sup> McGregor Smyth, “Collateral” No More: *The Practical Imperative for Holistic Defense in a Post-Padilla World . . . Or, How to Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139, 167 (2011) (describing the Bronx Defenders’ holistic defense model as a robust vision of the defense function); Andrés Dae Keun Kwon, Comment, *Defending Criminal(ized) “Aliens” After Padilla: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034, 1076–94 (2016) (discussing the holistic defense practices at the Bronx Defenders and the Office of the Alameda County Public Defender, which employ immigration attorneys both as part of their

Despite *Padilla's* impact, little empirical research has been done as to how defense attorneys have fulfilled their *Padilla* obligation since 2010. To date, the only state-level empirical study of public defender representation in the post-*Padilla* era has been conducted in California, the state with the largest immigrant population in the country.<sup>13</sup> This 2022 study assessed the structure of California's county public defense system and the various models (or lack thereof) that California counties employ to provide *Padilla* advisals, including in-house immigration experts, contracting with outside immigration experts or non-profits, and informally consulting with internal public defenders.<sup>14</sup> This research revealed a patchwork system across California, and called for additional resources for increased training, more immigration experts, and state and federal funding for immigrant defense services to improve the representation of noncitizens.<sup>15</sup> Finally, this study addressed numerous areas for future research on post-*Padilla* practices nationwide and the role of criminal prosecutors in case resolution for noncitizens.<sup>16</sup>

This Article presents a novel case study of *Padilla* practices in Pennsylvania, a state where about one in fourteen residents is foreign born, and about half of those—approximately 419,000 people—are at risk of deportation.<sup>17</sup> Our research team chose to study Pennsylvania because of its

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criminal defense services and to provide direct representation in immigration court); ANDRÉS DAE KEUN KWON, DEFEND L.A.: TRANSFORMING PUBLIC DEFENSE IN THE ERA OF MASS DEPORTATION, ACLU FOUND OF S. CAL. 1–3 (2018), [https://www.aclusocal.org/sites/default/files/aclu\\_social\\_defend\\_la.pdf](https://www.aclusocal.org/sites/default/files/aclu_social_defend_la.pdf) [<https://perma.cc/9BWJ-BRNV>] (calling for increased funding and staffing of in-house immigration experts in the Los Angeles County Public Defender's Office).

<sup>13</sup> Eagly, *supra* note 9, at 7–8.

<sup>14</sup> *Id.* at 27–40.

<sup>15</sup> *Id.* at 70–74.

<sup>16</sup> *Id.* at 10, 64 n.313.

<sup>17</sup> U.S. Census Bureau, QuickFacts Pennsylvania (2022), <https://www.census.gov/quickfacts/fact/table/PA/PST04522> [<https://perma.cc/QKN7-SSAJ>]; *Profile of the foreign-born population in Philadelphia, Pennsylvania*, VERA INST. (2023), <https://www.vera.org/downloads/publications/profile-of-foreign-born-population-philadelphia.pdf>; *Immigrants in Pennsylvania*, AM. IMMIGR. COUNCIL (2020) [https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants\\_in\\_pennsylvania.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_pennsylvania.pdf) [<https://perma.cc/PQM7-W2X8>]. The terms “immigrant” and “foreign born” are used interchangeably in many fact sheets; both terms generally refer to individuals who were not U.S. citizens at birth (born outside of the U.S., Puerto Rico or other U.S. territories and whose parents are not U.S. citizens). The foreign born include naturalized U.S. citizens, legal permanent residents, temporary residents, refugees and asylees, and others. Both noncitizens and naturalized citizens can be at risk of deportation (for naturalized citizens, they first go through a denaturalization process).

growing immigrant population,<sup>18</sup> its state courts' narrow interpretation of *Padilla* obligations, its highly localized, county-based public defender system, recent calls to allocate state resources to address the significant funding disparities between counties,<sup>19</sup> and Pennsylvania's limited post-conviction remedies for individuals who receive constitutionally-deficient representation.<sup>20</sup> A study of this kind has never been conducted in Pennsylvania.

Our empirical study included interviews in 2023 with public defenders, private defense counsel, and prosecutors throughout the state.<sup>21</sup> Though Pennsylvania has sixty-seven counties, our study focused on twenty counties with the largest immigrant communities: Allegheny, Berks, Bucks, Butler, Centre, Chester, Cumberland, Dauphin, Delaware, Erie, Lancaster, Lebanon, Lehigh, Luzerne, Monroe, Montgomery, Northampton, Philadelphia, Pike, and York.<sup>22</sup> While the measure of "immigrant communities" or "foreign born" populations is not a precise metric, as it includes both noncitizens and naturalized citizens, it was helpful to focus the project to areas where its impact might be most relevant.

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<sup>18</sup> Migration Policy Institute, *Pennsylvania State Immigration Data Profile*, <https://www.migrationpolicy.org/data/state-profiles/state/demographics/PA> [<https://perma.cc/3PXP-SW2>] (last visited Aug. 14, 2023) (showing an 84.7% increase in Pennsylvania's foreign-born population between 2000 and 2021).

<sup>19</sup> Danielle Ohl, *Pa. doesn't fund public defense. Shapiro's budget would change that.*, SPOTLIGHT PA (Apr. 26, 2023), <https://www.spotlightpa.org/news/2023/04/pa-public-defense-gov-shapiro/> [<https://perma.cc/9UWT-23PA>] (describing how Pennsylvania counties currently fund the constitutional right to counsel for indigent individuals on their own, but that Pennsylvania Governor Josh Shapiro's proposed \$10 million in state funding to support the counties would be the most funding the state has ever dedicated to supporting the Sixth Amendment right to counsel in criminal proceedings).

<sup>20</sup> As discussed *infra*, in Pennsylvania, the only avenue to raise claims of ineffective assistance of counsel due to a *Padilla* violation is via a petition for post-conviction relief, which has strict custodial and temporal limitations. *See* Commonwealth v. Descardes, 136 A.3d 493, 503 (Pa. 2016).

<sup>21</sup> The research team sought and received an exemption from the Institutional Review Board ("IRB") to conduct in-person interviews with these individuals in February 2023.

<sup>22</sup> Inst. for Immigr. Rsch., *Immigrants in Pittsburgh, Pennsylvania*, GEORGE MASON UNIV. (2018), [https://d101vc9winf8ln.cloudfront.net/documents/36043/original/Pittsburgh\\_iDod\\_Fact\\_Sheet.pdf?1593472928](https://d101vc9winf8ln.cloudfront.net/documents/36043/original/Pittsburgh_iDod_Fact_Sheet.pdf?1593472928) [<https://perma.cc/XL9U-6GBD>]; U.S. Census Bureau, *QuickFacts Pennsylvania* (2022), <https://www.census.gov/quickfacts/geo/chart/philadelphiacountypennsylvania,philadelphiacitypennsylvania,PA/POP645222> [<https://perma.cc/UF5Z-U98Y>]. The decision of which counties to focus on for interviews was also informed by conversations with local practitioners and other legal stakeholders. While Lackawanna and Mountour counties also have significant immigration populations, we prioritized counties that stakeholders suggested. Pike County was included on our list, but we were unable to conduct interviews with any public defenders or prosecutors from Pike County.

## MAP OF PENNSYLVANIA COUNTIES STUDIED



All interview participants provided consent prior to their interview and elected one of three levels of participation: full identification (name, title, and county), partial identification (general title – public defender or prosecutor and county), and de-identification (no title, name, or identifying information should be shared, but the content of interviews is included in an anonymous manner). The authors decided to only partially identify those who opted for full or partial identification for the purposes of this Article.<sup>23</sup> We asked the same general questions to all public defenders, a modified set of public defender questions to private defense attorneys, and a separate set of questions to all prosecutors. The questions for public defenders and prosecutors are provided in the attached Appendix.<sup>24</sup>

Our research revealed significant variation in the scope of advice provided to noncitizens in criminal court proceedings<sup>25</sup> and the willingness of district attorney offices to consider immigration status during plea

<sup>23</sup> Information obtained in interviews with de-identified individuals is included in this report but is not connected with a particular individual or county.

<sup>24</sup> After conducting initial interviews, we added additional questions to the standard interview form based on participant feedback.

<sup>25</sup> We use the phrase “noncitizen in criminal court proceedings” rather than “defendant” as part of an effort to humanize the individual while also being clear that this person faces risks of potential immigration consequences arising from the criminal court process.

negotiations. Each Pennsylvania county has its own method of identifying noncitizen clients, analyzing the potential immigration consequences of a client's charges and plea options, providing clients with warnings about those consequences, and negotiating with district attorneys. The scope of advice provided to noncitizens varied greatly, ranging from a general warning that there may be immigration consequences to a specific analysis of what those consequences would be. The interviews revealed a systemic failure to provide adequate funding to public defense offices to ensure that they can effectively comply with their obligations under *Padilla*. Moreover, Pennsylvania courts' narrow interpretation of defense counsel's obligations under *Padilla*, along with the limited availability of postconviction relief, result in noncitizens receiving fewer constitutional protections in Pennsylvania criminal court proceedings compared to those in neighboring states.<sup>26</sup> Finally, interviews with prosecutors revealed widespread variation in the treatment of immigration status during plea negotiations and a lack of transparency in prosecution policies.

This project was developed by a student and faculty team at the University of Pennsylvania Carey Law School in consultation with Immigration Counsel at the Defender Association of Philadelphia ("Defender Association"). Part I of this Article discusses *Padilla*, the subsequent development of case law in Pennsylvania interpreting *Padilla*'s obligations, and *Padilla*'s implications for prosecution practices. Part II provides a brief overview of the structure and funding of Pennsylvania's public defense system. Part III discusses the study's findings and analyzes the ways in which public defenders identify noncitizens in need of immigration advice, the scope of warnings provided to noncitizens in criminal court proceedings, how public defenders gather information about immigration consequences, resource gaps in public defense offices, and the limited post-conviction remedies available when one receives constitutionally deficient *Padilla* advice. Part IV discusses prosecution practices as they relate to the consideration of immigration status during plea negotiations. Part V discusses areas for further research. Finally, Part VI offers policy recommendations to ensure noncitizens' constitutional rights are protected in criminal court proceedings.

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<sup>26</sup> See *infra* Sections I.A & III.E.

I. *PADILLA V. KENTUCKY* – A LANDMARK DECISION

In 2010, the Supreme Court decided *Padilla v. Kentucky*, a landmark case holding that defense attorneys in criminal cases were required under the Sixth and Fourteenth Amendments to advise their clients of adverse immigration consequences that could result from a criminal plea.<sup>27</sup> The petitioner in the case, Jose Padilla, had been a lawful permanent resident of the United States for more than 40 years and faced deportation after pleading guilty to transportation of marijuana in Kentucky.<sup>28</sup> Mr. Padilla sought postconviction relief, claiming he had suffered ineffective assistance of counsel because his lawyer (1) failed to advise him of the immigration consequences of his plea; and (2) incorrectly told him that he “did not have to worry about immigration status since he had been in the country so long.”<sup>29</sup> Based on his lawyer’s advice, Mr. Padilla pleaded guilty. In post-conviction proceedings, he stated that if he had not received incorrect advice from his lawyer, he would not have pleaded guilty but would have gone to trial.<sup>30</sup>

The Supreme Court considered whether the Sixth Amendment right to competent counsel in criminal proceedings required Mr. Padilla’s lawyer “to advise him that the offense to which he was pleading guilty would result in his removal from [the United States].”<sup>31</sup> In rendering its decision, the Court noted the changes in the immigration landscape and the “steady expansion of deportable offenses.”<sup>32</sup> Over the years, Congress had passed several amendments to the Immigration and Nationality Act (“INA”) that made deportation and detention pending deportation presumptively mandatory and severely limited immigration judges’ discretion to grant relief from deportation.<sup>33</sup> Observing that these changes in immigration law had “dramatically raised the stakes of a noncitizen’s criminal conviction,” the Supreme Court concluded that “deportation is an integral part—indeed,

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<sup>27</sup> 559 U.S. at 364, 374.

<sup>28</sup> *Id.* at 359.

<sup>29</sup> *Id.* (citations omitted).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 360.

<sup>32</sup> *Id.* at 360–63.

<sup>33</sup> *Id.* at 363–64; see Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342-44, 7347, 102 Stat. 4181, 4469-72; Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546; see also Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936–43 (2000) (summarizing the 1996 changes in immigration law).



sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”<sup>34</sup> Because removal is “a particularly severe ‘penalty’”—and one “‘most difficult’ to divorce” from the criminal conviction itself—the Court found that advice regarding deportation fell within the Sixth Amendment’s ambit.<sup>35</sup> As such, *Strickland v. Washington*’s two-prong inquiry regarding ineffective assistance of counsel applied to Mr. Padilla’s claim for post-conviction relief.<sup>36</sup>

Ultimately, the Supreme Court deemed the advice Mr. Padilla had received from his counsel constitutionally defective. It recognized that prevailing professional norms supported the view that criminal lawyers must advise their clients of the risk of deportation.<sup>37</sup> This was groundbreaking for two reasons. First, it created an affirmative obligation to advise. *Padilla* held that defense attorneys had a constitutional duty to counsel noncitizens about the potential immigration consequences of a guilty plea. The Court instructed: “when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.”<sup>38</sup> The *Padilla* Court specifically refused to limit its holding to affirmative misadvice, noting that both incorrect advice and no advice are constitutionally deficient.<sup>39</sup> Relatedly, the Court recognized that the duty to advise applies *both* to future charges of removability as well as to eligibility for discretionary forms of relief that may prevent one’s removal.<sup>40</sup>

Second, *Padilla* recognized an obligation for immigration-conscious advocacy during plea negotiations. The Court held that defense counsel must consider potential immigration consequences as a vital part of effectively advising a client of the advantages and disadvantages of a plea

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<sup>34</sup> 559 U.S. at 364.

<sup>35</sup> *Id.* at 365–66.

<sup>36</sup> *Id.* at 366; *see Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984) (holding that constitutionally-defective assistance of counsel means (1) counsel’s performance was deficient such that it “fell below an objective standard of reasonableness” and (2) there was “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”).

<sup>37</sup> The Court left the question of whether the deficient performance prejudiced Mr. Padilla for the Kentucky courts to consider in the first instance. *Padilla*, 559 U.S. at 374.

<sup>38</sup> *Id.* at 357.

<sup>39</sup> *Id.* at 370 (“[T]here is no relevant difference between an act of commission and an act of omission in this context.”) (internal citation omitted).

<sup>40</sup> *Id.* at 368 (“Likewise, we have recognized that ‘preserving the possibility of discretionary relief from deportation . . . ‘would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.’”).

during the plea bargaining stage.<sup>41</sup> Because deportation is an “integral part” of the penalty that may be imposed on a noncitizen as a result of a guilty plea, “informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process.”<sup>42</sup> *Padilla* thus encouraged defense counsel to “plea bargain creatively with the prosecutor” to craft a conviction and sentence that satisfies the interests of both parties while also reducing the likelihood of future deportation.<sup>43</sup>

But like *Gideon v. Wainwright* and other Sixth Amendment progeny, *Padilla* provided states and public defense offices with no guidance regarding how to implement its holding at the local level. And as the Supreme Court recognized, assessing the immigration consequences of criminal charges can be complicated.

First, the traditional misdemeanor and felony grading provisions in criminal court proceedings do not easily translate to the immigration system. Misdemeanors—even summary offenses—sometimes carry more serious immigration consequences than felonies.<sup>44</sup> As a result, what may seem to be a successful outcome for a client from a criminal perspective can in fact be the opposite from an immigration perspective.<sup>45</sup>

Consider, for example, the case of an individual—we’ll call him Mr. M—who immigrates to the United States as a lawful permanent resident (LPR)

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41 *Id.* at 371 (“It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the *Strickland* analysis.”) (internal quotation omitted); *see also* Hill v. Lockhart, 474 U.S. 52, 58–59 (1985) (holding the Sixth Amendment right to effective assistance of counsel applies at the plea-bargaining stage).

42 559 U.S. at 364, 373.

43 *Id.* at 373.

44 For instance, simple assault under 18 Pa. C.S. § 2701(a)(3), which is typically graded as a second-degree misdemeanor under Pennsylvania law, is an “aggravated felony” under immigration law that leads to near-mandatory deportation if the sentence for that crime is a year or more. *Singh v. Gonzales*, 432 F.3d 533, 540 (3d Cir. 2006). Felony criminal trespass in the third degree under 18 Pa. C.S. § 3503(a), however, is not an aggravated felony or crime involving moral turpitude (CIMT), as it neither requires the use or threatened use of force nor the intent to commit a CIMT at the time the trespass occurred. *See Matter of M-*, 2 I. & N. Dec. 721, 723 (B.I.A. 1946) (holding that the crime of third-degree burglary, in violation of New York Penal Law, is not a crime of moral turpitude because there is nothing “inherently immoral, base, or depraved in unlawfully breaking and entering.”); *Matter of Esfandiary*, 16 I. & N. Dec. 659 (B.I.A. 1979) (finding that respondent’s conviction of malicious trespass under Florida law was a crime involving moral turpitude because his conviction required a finding of intent to commit petit larceny, a crime involving moral turpitude under INA § 241(a)(4)). Similar discord between the criminal and immigration consequences of particular convictions abounds in Pennsylvania.

45 The intersection of criminal and immigration law is often called “cimmigration” law. *See* Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM.U. L.REV. 367, 380–81 (2006) (introducing the term “cimmigration” to describe the convergence of immigration and criminal law as its own area of practice and study).

at the age of five. Mr. M does not remember his birth country and considers the United States his home. He eventually graduates from college and builds a family here. In his twenties, Mr. M begins to struggle with mental illness. He notices that marijuana calms him. On two occasions, he is charged with possession of small amounts of marijuana (less than 30 grams) under 35 Pa. Stat. § 780-113(31). Not knowing these convictions carry dire immigration consequences, Mr. M agrees to plead guilty to the charges. He is ordered to pay fines only. A few years later, however, Mr. M is arrested by Immigration and Customs Enforcement (“ICE”), placed in removal proceedings, held in immigration detention for over a year, and ultimately stripped of his immigration status. At the age of 35, he is deported to a country that he no longer knows and permanently separated from his mother, father, siblings, wife, and two young children. Mr. M’s story is not unique; noncitizens are regularly ripped away from their families as an unforeseen secondary and often disproportionate punishment to a criminal offense.

Second, assessing the immigration consequences of a criminal charge is an individualized inquiry, one which involves considering a client’s particular immigration history, current status, eligibility for immigration relief, past history of criminal activity (if any), and future goals in the United States to determine which consequences their criminal charges impart. Under the INA, certain categories of crimes convey statutory immigration consequences that include, but are not limited to: inadmissibility,<sup>46</sup> deportability,<sup>47</sup> exclusion from certain types of protection from removal,<sup>48</sup> and mandatory detention during removal proceedings.<sup>49</sup> These categories of crimes are broad, often amorphous, and sometimes defined only by case

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<sup>46</sup> The term “inadmissible” refers to individuals who are barred by statute from obtaining immigration status in the U.S. or certain lawful permanent residents (LPRs) who travel internationally and are subject to removal upon their return to the U.S. border. *See* 8 U.S.C. § 1182 (grounds of inadmissibility); 8 U.S.C. § 1101(a)(13)(C) (listing circumstances when LPRs can be considered as seeking “admission” to the U.S. upon return from travel abroad).

<sup>47</sup> The term “deportable” refers to individuals who have been lawfully admitted to the U.S. (e.g., those who have lawful permanent residence or who are in the country on an immigration visa) and who are eligible to be removed from the U.S., regardless of whether they simultaneously qualify for relief or protection from removal. *See* 8 U.S.C. § 1227 (grounds of deportability).

<sup>48</sup> For example, an individual who has been convicted of a misdemeanor or felony that constitutes a “particularly serious crime” under immigration law is barred from asylum and other forms of humanitarian protection. *See* 8 U.S.C. § 1158(b)(2)(A)(ii), § 1231(b)(3)(B).

<sup>49</sup> While 8 U.S.C. § 1226(a) authorizes the detention of noncitizens pending removal proceedings, most individuals can request release from immigration detention on a bond or on their own recognizance. However, 8 U.S.C. § 1226(c) generally requires the detention of noncitizens who are removable because of certain criminal activity. Individuals subject to mandatory detention are normally not eligible to even request an individualized custody hearing in front of an immigration judge.

law. For instance, if a crime is categorized as a “crime involving moral turpitude” (CIMT), a conviction of that offense will typically render a noncitizen who has not been lawfully admitted to the United States statutorily ineligible for lawful status (such as permanent residence); if one is *already* a permanent resident or otherwise in lawful status, it could render them deportable and removable from the United States.<sup>50</sup> If an offense qualifies as an “aggravated felony,” perhaps the most serious designation under United States immigration law, a noncitizen—even one who has been lawfully admitted—is presumptively deportable, barred from most forms of immigration relief, subject to mandatory detention and, if removed, faces a lifetime ban on reentry to the country.<sup>51</sup>

A complete *Padilla* advisal, then, involves determining a noncitizen’s immigration status, identifying the categories of offenses (aggravated felonies, CIMTs, and so on) that will most impact their ability to remain in the United States, analyzing which, if any, of the criminal charges they face fall into those categories, and then working to avoid conviction of the most dangerous charges through plea bargaining. Each step must be undertaken cautiously, with options evaluated and re-evaluated throughout the negotiation process. Even after counsel successfully analyzes the crimes charged, attorneys and clients must be careful to avoid other common pitfalls. For example, certain factual admissions can have unintended immigration consequences; under immigration law, admitting sufficient facts to constitute guilt is enough to qualify as a “conviction” for immigration purposes, regardless of whether a

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<sup>50</sup> For a more thorough review of CIMTs, see Kathy Brady, *All Those Rules About Crimes Involving Moral Turpitude*, IMMIGRANT LEGAL RES. CTR. 1–5 (June 2020), [https://www.ilrc.org/sites/default/files/resources/all\\_those\\_rules\\_cimt\\_june\\_2020.pdf](https://www.ilrc.org/sites/default/files/resources/all_those_rules_cimt_june_2020.pdf) [<https://perma.cc/Y7WW-JLFS>] (summarizing rules about crimes involving moral turpitude, the technical term for a category of criminal offenses that can make a noncitizen deportable, inadmissible, and/or barred from relief).

<sup>51</sup> 8 U.S.C. § 1101(a)(43) lists the types of convictions that can constitute “aggravated felonies” under immigration law. See also *Aggravated Felonies: An Overview*, AM. IMMIGR. COUNCIL (Mar. 16, 2021), [https://www.americanimmigrationcouncil.org/sites/default/files/research/aggravated\\_felonies\\_an\\_overview\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/aggravated_felonies_an_overview_0.pdf) [<https://perma.cc/DV3V-GUVY>] (“Today, the definition of ‘aggravated felony’ covers more than thirty types of offenses, including simple battery, theft, filing a false tax return, and failing to appear in court.”). Other types of crimes, such as firearms offenses, crimes of domestic violence, crimes against children, and controlled substance offenses (among others) can also lead to deportability or inadmissibility under the law. See generally 8 U.S.C. § 1182(a)(2)-(3) (criminal and security related grounds for inadmissibility); 8 U.S.C. § 1227(a)(2), (4) (criminal and security related grounds for deportability). For some categories of crimes, immigration consequences are automatic, regardless of the sentence imposed. For other categories, the length of the potential sentence, the actual sentence, or the cumulative time imprisoned triggers the consequence.

final conviction is entered in criminal court.<sup>52</sup> Further, even offenses that do not *statutorily* impart inadmissibility and/or deportability can nonetheless have serious discretionary consequences. For instance, a noncitizen seeking to apply for United States citizenship must demonstrate at least five years of “good moral character” in order for their application to be granted.<sup>53</sup> Under recent case law, conviction of certain crimes, including two or more offenses for “driving under the influence,” creates a presumption that a noncitizen seeking to naturalize is not of good character.<sup>54</sup> Given that obtaining citizenship is the only way to fully protect oneself from deportation, accepting a plea to an offense that delays naturalization can itself be a life-altering event.<sup>55</sup>

Thus, the wide variety of immigration consequences defined in the INA function alongside the criminal legal system to impose consequences on noncitizens through detention, ineligibility for immigration relief, and possible deportation stemming from underlying criminal contact. *Padilla* described in detail the severity of the deportation risks facing noncitizens, recognizing—and demanding that players in the criminal legal system likewise acknowledge—the comingling of the immigration and criminal consequences.

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<sup>52</sup> The INA defines “conviction” as “a formal judgment of guilt of the [noncitizen] entered by a court or, if adjudication of guilt has been withheld, where— (i) a judge or jury has found the [noncitizen] guilty or the [noncitizen] has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the [noncitizen’s] liberty to be imposed.” See 8 U.S.C. § 1101(a)(48). Further, under 8 U.S.C. § 1182(a)(2)(A)(i), an individual who “admits having committed, or who admits committing acts with constitute the essential elements” of a CIMT or controlled substance offense can be deemed “inadmissible.”

<sup>53</sup> 8 U.S.C. § 1427(a).

<sup>54</sup> *Matter of Castillo-Perez*, 27 I. & N. Dec. 664 (A.G. 2019) (finding two or more convictions for driving under the influence establishes a presumption that the noncitizen lacks good moral character under 8 U.S.C. § 1101(f)).

<sup>55</sup> *But see Denaturalization and Revocation of Naturalization Practice Advisory*, IMMIGRANT LEGAL RES. CTR. 2 (Feb. 2020), [https://www.ilrc.org/sites/default/files/resources/denaturalization\\_pa.pdf](https://www.ilrc.org/sites/default/files/resources/denaturalization_pa.pdf) [<https://perma.cc/4MYP-MBF3>] (describing how a naturalized U.S. citizen can have their citizenship revoked if the government can prove in a civil federal court proceeding, or in a comparable criminal case, that the citizen was not qualified for naturalization at the time it was granted). See also 8 U.S.C. § 1451(a) (illegal procurement, or concealment, or willful misrepresentation denaturalization provision); 18 U.S.C. § 1425 (criminal revocation provision for convictions for naturalization fraud); 8 U.S.C. § 1440(c) (wartime military service denaturalization provision).

## A. PADILLA'S SCOPE

Following *Padilla*, a series of cases in federal and state courts addressed the decision's retroactive applicability and its scope. In 2013, the Supreme Court held that *Padilla* was a "new rule" that "altered the law in most jurisdictions" and thus the Sixth Amendment right to advice on the immigration consequences of a guilty plea did not apply retroactively to pleas entered before March 2010.<sup>56</sup> In 2017, the high Court clarified in *Lee v. United States* that when considering prejudice in *Padilla* claims, the inquiry is whether there is a "reasonable probability that, but for counsel's errors, [the accused] would not have pleaded guilty and would have insisted on going to trial."<sup>57</sup> *Lee* built upon case law requiring effective assistance of counsel during plea negotiations.<sup>58</sup> *Lee* clarified that the question is not whether a noncitizen could have secured a resolution that avoided deportation; rather, it is whether they received constitutionally inadequate advice when deciding to give up their right to a trial.<sup>59</sup> The emphasis on decision-making in plea bargaining, rather than the success of avoiding deportation, confirmed that all noncitizens, including those who are undocumented, are entitled to constitutionally adequate immigration advisals before entering pleas.<sup>60</sup>

The American Bar Association's standards for defense counsel now reflect the common acceptance of *Padilla* advice and advocacy as part of national professional norms. The ABA standards instruct defense counsel to identify, investigate, and advise clients of collateral consequences and to

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<sup>56</sup> *Chaidez v. United States*, 568 U.S. 342, 344–47 (2013). However, *Padilla* may be applied retroactively in jurisdictions that had required immigration advisals under the Sixth Amendment or state constitutions prior to *Padilla*. See Kate Lebeaux, Note, *Padilla Retroactivity on State Law Grounds*, 94 B.U. L. REV. 1651, 1653–54 (2014) (finding *Padilla* obligations retroactive in Massachusetts and New Mexico due to state court decisions that pre-date *Padilla*).

<sup>57</sup> 137 S. Ct. 1958, 1965 (2017) (quoting *Hill*, 474 U.S. at 59).

<sup>58</sup> See *Missouri v. Frye*, 566 U.S. 134, 140, 143–44 (2012) (holding the Sixth Amendment requires effective assistance of counsel during plea negotiations); *Lafler v. Cooper*, 566 U.S. 156, 166, 173–74 (2012) (finding a Sixth Amendment violation when individual proceeded to trial based on defense counsel's erroneous advice to reject a plea and received a greater consequence as a result).

<sup>59</sup> 137 S. Ct. at 1966–69 (acknowledging Mr. Lee had limited chances of success at trial, but that if he had been properly advised, he rationally would have rejected the plea "in favor of throwing a 'Hail Mary' at trial" for even the slim chance of avoiding deportation).

<sup>60</sup> Prior to *Lee*, some argued *Padilla* should not apply to undocumented individuals, as they are already removable due to their lack of immigration status and thus, the argument went, could not be prejudiced by inadequate immigration advice when pleading guilty. See, e.g., *United States v. Batamula*, 823 F.3d 237, 243 (5th Cir. 2016) ("The record conclusively established that he was deportable before his guilty plea, and he remained so afterward. Thus, his prejudice claim is frivolous."). But see *State v. Nunez-Diaz*, 444 P.3d 250, 254–55 (Ariz. 2019) (recognizing *Lee* abrogated *Batamula* and finding prejudice because the noncitizen was not informed his guilty plea would bar him from discretionary relief from removal and the ability to reenter the country).

“seek assistance” from individuals with specialized knowledge in order “to be adequately informed as to the existence and details of relevant collateral consequences.”<sup>61</sup> ABA standards specifically enshrine *Padilla*’s dual advice and advocacy prongs, stating “counsel should investigate and identify particular immigration consequences that might follow possible criminal dispositions” and “advise the client of all such possible consequences and determine with the client the best course for the client’s interests and how to pursue it.”<sup>62</sup>

Yet there remains some disagreement about how much advice *Padilla* requires. *Padilla* introduced a two-tiered analytical framework for immigration advisals based on whether immigration consequences are clear under the statute. The Court held that when immigration consequences are clear—for example, when a conviction clearly constitutes an aggravated felony—“the duty to give correct advice is equally clear.”<sup>63</sup> However, when the law is not “succinct and straightforward”—for example, when the immigration statute is poorly defined or the consequences hinge on an immigration judge’s discretionary assessment—then a more general warning may suffice.<sup>64</sup> *Padilla* also clarified that there is no legal difference between affirmative misadvice and no advice. When immigration consequences can be determined “simply from reading the text of the statute,” failure to warn of removal consequences is constitutionally deficient because “there is no relevant difference between an act of commission and an act of omission.”<sup>65</sup>

Post-*Padilla*, most courts have held that when immigration consequences can be discerned from the plain language of the statute, a general warning that immigration consequences are “possible” is insufficient. As the Ninth Circuit has written, “[a] criminal defendant who faces almost certain deportation is entitled to know more than that it is *possible* that a guilty plea

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61 ABA CRIM. JUST. STANDARDS: DEF. FUNCTION § 4-5.4 (AM. BAR ASS’N, 4th ed. 2017).

62 *Id.* at § 4–5.5.

63 559 U.S. at 369.

64 *Id.*

65 *Id.* at 368–70 (internal quotation marks omitted); see also Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 124, 148 (2009) (arguing in favor of a constitutional mandate that requires a complete and full disclosure about the serious collateral consequences of guilty pleas); Yolanda Vázquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31, 51–52 (2010) (commenting that jurisdictions that only penalized misadvice “inadvertently support[ed] a ‘Don’t Tell’ policy” that incentivized “attorney[s] to remain silent”).

could lead to removal; he is entitled to know that it is a virtual certainty.”<sup>66</sup> The Second, Fifth, and Fourth Circuits and most state courts agree.<sup>67</sup>

But when immigration statutes are not clear, courts have upheld more general warnings as constitutionally sufficient under *Padilla*'s two-tiered analysis. For example, the Illinois Supreme Court found that even if *Padilla* required a “minimal view of the caselaw” to determine whether a plea would trigger immigration consequences, because federal authorities are not clear on whether burglary under Illinois state law is a “crime involving moral turpitude,” “counsel need only advise a defendant that [t]his plea ‘may’ have immigration consequences.”<sup>68</sup> Similarly, the Georgia Supreme Court held that immigration statutes do not clearly define “suspension” of imprisonment and how it applies in cases when the court orders only probation.<sup>69</sup> Thus, the court held, defense counsel’s advice that his noncitizen client “could be” deported (rather than “would be” deported) was not ineffective.<sup>70</sup>

Finally, courts have disagreed about whether a plea colloquy can cure an attorney’s inadequate immigration advice. In some cases, even if noncitizens receive constitutionally deficient representation, immigration warnings through written plea agreements or during plea colloquies can undermine an argument of prejudice.<sup>71</sup> For example, in *United States v. Fazio*, the Third Circuit found that an error in defense counsel’s advice could be remedied by the District Court’s “in-depth colloquy and the language of the plea

<sup>66</sup> *United States v. Bonilla*, 637 F.3d 980, 984 (9th Cir. 2011).

<sup>67</sup> *See United States v. Swaby*, 855 F.3d 233, 240 (4th Cir. 2017) (“Effective representation by counsel requires that counsel provide correct advice when the deportation consequences are clear.”); *United States v. Urias-Marrufo*, 744 F.3d 361, 366 (5th Cir. 2014) (“[D]efense counsel has an obligation under the Sixth Amendment to inform his noncitizen client ‘that the offense to which he was pleading guilty would result in his removal from this country.’”); *United States v. Al Halabi*, 633 F. App’x. 801, 803 (2d Cir. 2015) (“[W]here the law clearly dictates that removal is presumptively mandatory, a defense attorney’s failure to advise his client of that fact falls below an objective standard of reasonableness.”); *see also State v. Gaitan*, 37 A.3d 1089, 1113–14 (N.J. 2012); *Budziszewski v. Comm’r of Corr.*, 142 A.3d 243, 246–47 (Conn. 2016); *Commonwealth v. DeJesus*, 9 N.E.3d 789, 794 (Mass. 2014); *Encarnacion v. State*, 763 S.E.2d 463, 466 (Ga. 2014); *State v. Sandoval*, 249 P.3d 1015, 1020 (Wash. 2011) (en banc); *State v. Kostyuchenko*, 8 N.E.3d 353, 357 (Ohio Ct. App. 2014) (per curiam); *State v. Nkiam*, 778 S.E.2d 863, 869–70 (N.C. Ct. App. 2015) (all holding same). As noted in the next section, Pennsylvania is among the minority of states that do not require clear warnings for clear consequences.

<sup>68</sup> *People v. Valdez*, 67 N.E.3d 233, 240 (Ill. 2016).

<sup>69</sup> *State v. Aduka*, 812 S.E.2d 266, 267–70 (Ga. 2018).

<sup>70</sup> *Id.*

<sup>71</sup> *See, e.g., United States v. Fazio*, 795 F.3d 421, 427 (3d Cir. 2015); *United States v. Newman*, 805 F.3d 1143, 1147 (D.D.C. 2015); *United States v. Kayode*, 777 F.3d 719, 728–29 (5th Cir. 2014).



agreement itself.”<sup>72</sup> In that case, plea counsel informed Mr. Fazio that there “could be immigration consequences” if he pleaded guilty, but failed to inform him that the plea made him subject to automatic deportation.<sup>73</sup> The Third Circuit held that because Mr. Fazio did not present evidence that his decision-making process would have been different with correct advice, the plea agreement and in-court affirmation that he wished to “plead guilty regardless of any immigration consequences that his plea may entail, even if the consequence is his automatic removal” cured his counsel’s error.<sup>74</sup>

However, other courts have maintained *Padilla*’s affirmative duty on defense counsel and afforded plea colloquies and generic warnings less weight. The Fifth Circuit has recognized that while the question of whether a plea was “knowing and voluntary” is intertwined with the Sixth Amendment’s promise of effective assistance of counsel, the issues are distinct.<sup>75</sup> “It is counsel’s duty, not the court’s, to warn of certain immigration consequences, and counsel’s failure cannot be saved by a plea colloquy.”<sup>76</sup> The Fourth, Eighth and Ninth Circuits have held that though district courts can cure an attorney’s incorrect advice by *accurately* informing the accused of the immigration consequences of their plea, when the consequences are clear, “general and equivocal” warnings in plea colloquies cannot cure misadvice.<sup>77</sup>

### 1. *Padilla* in Pennsylvania State Court

Pennsylvania, like all states, has been forced to consider *Padilla*’s impact on defense practices and what constitutes constitutionally effective

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<sup>72</sup> 795 F.3d at 427. Notably, the Federal Rules of Criminal Procedure have much more robust requirements for judicial warnings during plea hearings than found at the city, county, and state court levels.

<sup>73</sup> *Id.* at 424.

<sup>74</sup> *Id.* at 428.

<sup>75</sup> 744 F.3d at 365–69.

<sup>76</sup> *Id.* at 369.

<sup>77</sup> See *United States v. Akinsade*, 686 F.3d 248, 254 (4th Cir. 2012) (“[a] general and equivocal admonishment is insufficient to correct counsel’s affirmative misadvice”); *United States v. Murillo*, 927 F.3d 808, 811, 815 (4th Cir. 2019) (holding warnings in a plea agreement and oral affirmations of a desire to plead “even if” there are immigration consequences does not cure an attorney’s misadvice of a “mere possibility” of removal when a plea resulted in mandatory deportation); *United States v. Rodriguez-Vega*, 797 F.3d 781, 790, 790 n.9 (9th Cir. 2015) (affording plea colloquy “little weight” because “[w]arning of the possibility of a dire consequence is no substitute for warning of its virtual certainty”); *Dat v. United States*, 920 F.3d 1192, 1195–96 (8th Cir. 2019) (finding neither the plea agreement that indicated there “may be” immigration consequences nor a plea hearing discussion affirming the conviction “could affect” immigration status could remedy an attorney’s misadvice).

representation for noncitizens in criminal proceedings. Prior to *Padilla*, Pennsylvania courts considered deportation as just one of many “collateral consequences” that could accompany a criminal case, and found that attorneys were not ineffective for failing to advise clients of the possibility that their plea bargains could lead to removal.<sup>78</sup> *Padilla* changed how Pennsylvania courts interpreted the obligation on defense attorneys by recognizing that immigration was not a mere “collateral consequence,” but an inextricable part of the penalty imposed.<sup>79</sup> Yet over the past decade, Pennsylvania case law has narrowed the scope of *Padilla* and misapprehended its basic holdings. This has not only sewn confusion among defense attorneys throughout the Commonwealth, but also undermined the quality of advice and advocacy provided by defense counsel.

First, in *Commonwealth v. Wah*, the Superior Court held that defense counsel may fulfill their *Padilla* obligations by referring noncitizen clients to consult with immigration counsel.<sup>80</sup> In that case, Mr. Wah had pled guilty to Medicaid fraud and forgery for overbilling \$19,603. Defense counsel warned him merely that there “could be deportation consequences as a result of his plea,” suggested he seek the advice of an immigration attorney, and confirmed that Mr. Wah did.<sup>81</sup> After sentencing, Mr. Wah filed a petition for post-conviction relief, arguing his defense counsel improperly delegated his duty because a cursory examination of the federal immigration statute shows that his fraud conviction constitutes an “aggravated felony,” making Mr. Wah removable.<sup>82</sup> The Superior Court found counsel’s actions constitutionally sufficient, holding that Mr. Wah’s attorney “[had] acted within the range of professionally competent assistance when he recommended that appellant seek the advice of an expert in immigration law.”<sup>83</sup>

*Wah*’s holding that defense counsel can delegate their *Padilla* obligations to competent immigration experts is banal on its face. While defense counsel may execute their duties in a number of ways and ABA standards encourage

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78 *Commonwealth v. Frometa*, 555 A.2d 92, 92–93 (Pa. 1989) (describing how deportation is “but one of a host of collateral consequences of pleading guilty”).

79 559 U.S. at 365–66.

80 42 A.3d 335, 341 (Pa. Super. Ct. 2012).

81 *Id.* at 340.

82 *Id.*; see 8 U.S.C. § 1101(a)(43)(M)(i) (stating that “an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000” constitutes an aggravated felony); 8 U.S.C. § 1227(a)(2)(A)(iii) (“Any [noncitizen] who is convicted of an aggravated felony at any time after admission is deportable.”).

83 42 A.3d at 341.

“consultation or association with an immigration law expert or knowledgeable advocate,”<sup>84</sup> the issue is far more complicated for public defenders representing indigent clients who, by definition, do not have the means to pay for an attorney.<sup>85</sup> Public defenders cannot delegate their *Padilla* advisals to private immigration counsel whom they know their clients cannot afford; doing so ignores the reason their clients qualify for indigent defense services in the first place. *Padilla* advice is part and parcel of constitutionally effective defense representation that public defense offices are required to provide and fund. Moreover, when defense counsel outsource the provision of immigration advice to private attorneys, they fail to develop the personal knowledge of the immigration consequences that is essential to effective plea bargaining.<sup>86</sup> This further prejudices clients, leaving them in a weaker position to resolve their cases in a way that recognizes the holistic penalties they face.

Second, Pennsylvania is one of the few jurisdictions that has strayed from *Padilla*’s central holding that when deportation consequences are clear, the duty to give correct advice is equally clear.<sup>87</sup> In *Commonwealth v. Escobar* and *Commonwealth v. McDermitt*, the Pennsylvania Superior Court eschewed *Padilla*’s basic requirement that defense counsel analyze and advise on the potential legal consequences under the statute. Instead, the Court unnecessarily inserted a hypothetical question about whether federal immigration officials will *actually* take enforcement action.<sup>88</sup>

In separate cases, Mr. Escobar and Mr. McDermitt pleaded guilty to possession with intent to deliver a controlled substance. Mr. Escobar’s attorney told him that he faced a “substantial deportation risk” and it was “likely and possible” that deportation proceedings would be initiated against him if he pleaded guilty.<sup>89</sup> Mr. McDermitt’s counsel merely informed him

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<sup>84</sup> ABA CRIM. JUST. STANDARDS: DEF. FUNCTION § 4-5.5 (AM. BAR ASS’N, 4th ed. 2017).

<sup>85</sup> Indigent immigrants do not have a right to free counsel in immigration court. *See* 8 U.S.C. § 1362 (“In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose.”).

<sup>86</sup> *Padilla* explicitly encouraged defense counsel to “plea bargain creatively . . . in order to craft a conviction and sentence that reduce the likelihood of deportation.” 559 U.S. at 373. To do this, a lawyer must understand their client’s immigration status, potential eligibility for immigration relief, the *actual* consequences of a given charge, and immigration neutral alternative pleas and sentences. If they cannot, it is unlikely they will fulfill their Sixth Amendment obligations.

<sup>87</sup> *Id.* at 360.

<sup>88</sup> *Commonwealth v. Escobar*, 70 A.3d 838, 840 (Pa. Super. Ct. 2013), *appeal denied*, 86 A.3d 232 (2014); *Commonwealth v. McDermitt*, 66 A.3d 810, 814 (Pa. Super. Ct. 2013).

<sup>89</sup> 70 A.3d at 840.

that his conviction would render him “deportable.”<sup>90</sup> This advice was correct, as both Escobar and McDermitt’s convictions constituted aggravated felonies.<sup>91</sup> Both were indeed placed in removal proceedings, and both subsequently filed petitions for post-conviction relief arguing their counsel’s advice should have been more conclusive. The Pennsylvania Superior Court agreed that their convictions clearly made them *deportable* under a statute that is “succinct and straightforward,” and found defense counsel’s warnings of a risk of deportation were sufficient.<sup>92</sup> But the Court unnecessarily went a step further, commenting that because there was no way for counsel to know for certain whether immigration officials would, in fact, initiate deportation proceedings, immigration consequences are never truly clear. Thus, the Court concluded, more general warnings of the risk of deportation likely satisfy *Padilla*.<sup>93</sup>

*Escobar* and *McDermitt* misconstrue *Padilla*’s central holdings. *Padilla* does not require defense counsel to predict how the federal government will use their resources; it merely requires that defense counsel provide their client with accurate legal information. That information includes whether immigration authorities *could* begin deportation proceedings against the noncitizen (regardless of whether they actually do so) as well as whether the entry of a guilty plea will statutorily bar a noncitizen from eligibility for various forms of immigration relief.<sup>94</sup> To the extent Mr. Escobar’s and Mr. McDermitt’s counsel failed to inform them that their convictions clearly barred them from pursuing discretionary relief from deportation, their advice was constitutionally incomplete on that basis alone.

*Escobar* and *McDermitt* set Pennsylvania apart as a jurisdiction that permits less precise advice than many neighboring jurisdictions.<sup>95</sup> New Jersey, West

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<sup>90</sup> 66 A.3d at 814.

<sup>91</sup> The relevant immigration statute in these cases, 8 U.S.C. § 1227(a)(2)(B)(i), was the same statute at issue in Mr. Padilla’s case and reads “[a]ny [noncitizen] who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State . . . relating to a controlled substance . . . is deportable.”

<sup>92</sup> 70 A.3d at 841.

<sup>93</sup> *Id.* at 842 (rejecting the notion that under *Padilla* “plea counsel should know and state with certainty that the federal government will, in fact, initiate deportation proceedings” in holding that the advice given by Escobar’s counsel “was within the range of competence demanded of attorneys in criminal cases”).

<sup>94</sup> See 559 U.S. at 358 (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)) (recognizing the importance of “[p]reserving the . . . right to remain in the United States” and “preserving the possibility of discretionary relief from deportation”).

<sup>95</sup> In *Commonwealth v. Forde*, No. 446 MDA 2016, 2017 WL 368005 (Pa. Super. Ct. Jan. 25, 2017), the Superior Court adopted a lower court decision recognizing that *Escobar* and *McDermitt* were at

Virginia, Virginia, Ohio, and New York all adhere to *Padilla*'s "clear consequences require clear advice" doctrine.<sup>96</sup> Virginia has gone still farther, requiring defense attorneys to inquire about the precise nature of a client's immigration status, determine the potential negative immigration consequences arising from a conviction and sentence, broach the subject with the prosecutor, and discuss with the client the likely immigration consequences of accepting a plea.<sup>97</sup>

Pennsylvania courts' interpretation of *Padilla* has thus substantially undermined its central holdings, resulting in noncitizens in Pennsylvania receiving less robust defense than what they are constitutionally entitled to in other jurisdictions. Pennsylvania's noncitizen residents are not guaranteed clear warnings of the immigration consequences of a guilty plea, even when the consequences are clear under the statute or easily determined with minimal legal research. Because Pennsylvania courts do not hold defense counsel to *Padilla*'s "clear warnings of clear consequences" standards, attorneys have less incentive to determine the *actual* consequences of a conviction, which is necessary to provide effective assistance of counsel during plea bargaining. Further, it appears that Pennsylvania only vindicates

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odds with *Padilla* standards in other jurisdictions, stating "[w]ere it this court's job to dispose of petitioner's ineffective assistance of counsel claim based solely upon the U.S. Supreme Court's decision in *Padilla*—prior to our Superior Court's narrow interpretation in *Wah, McDermitt and Escobar*—I would have found counsel to have been ineffective under *Padilla*, as have the courts of so many other jurisdictions." *Id.* at \*16 (adopting *Commonwealth v. Forde*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 5, \*36 (Dauphin Cnty. C.P. 2016)). However, the lower court judge felt bound by precedent. *Id.* The Superior Court upheld the denial of ineffective assistance despite defense counsel admitting he only advised his client that deportation consequences were a "possibility," but not that he was subject to mandatory deportation. *Id.*

<sup>96</sup> *State v. Hutton*, 776 S.E.2d 621, 638 (W. Va. 2015) (applying *Padilla* to require defense counsel to warn an immigrant client of the risk of being deported in accepting a guilty plea "[w]hen the deportation consequence is succinct, clear, and explicit under the applicable law"; *Gaitan*, 37 A.3d at 1108 (reaffirming *Padilla* and holding that in instances when "the deportation consequences are clear, a defendant must be warned that he or she will be deported"); *State v. Romero*, 129 N.E.3d 404, 419 (Ohio 2019) (where a client has "plainly expressed that he understood he could be deported" after consulting with defense counsel regarding a plea deal, there is no claim for ineffective assistance of counsel); *Zemene v. Clarke*, 768 S.E.2d 684, 690 (Va. 2015) (holding defense counsel "fell below an objective standard of reasonableness" because counsel took no effort to determine his client's immigration status and did not discuss the likelihood that accepting a plea agreement for petit larceny and a sentence to twelve months would result in the client losing his permanent resident status); *People v. Abdallah*, 153 A.D.3d 1424, 1426 (N.Y. App. Div. 2017) (finding that "defense counsel incorrectly advised the defendant that his plea of guilty to grand larceny in the second degree would preserve his eligibility to apply for a cancellation of removal" in vacating defendant's deportation order).

<sup>97</sup> 768 S.E.2d at 690.

the rights of noncitizens in cases involving affirmative misadvice.<sup>98</sup> This invites the “absurd result” *Padilla* explicitly rejected—attorneys are incentivized to remain silent rather than provide advice that may be wrong.<sup>99</sup> As a result, lawyers who diligently research immigration consequences but make a mistake may be subjected to ineffective assistance claims, while their less diligent colleagues rest easy under the cover of their vague warnings.<sup>100</sup>

## B. POST-PADILLA IMPACT ON PROSECUTION PRACTICES

Though *Padilla* primarily focused on the constitutional obligations of defense attorneys, the Supreme Court also highlighted the important role that prosecutors play in criminal proceedings involving noncitizens.<sup>101</sup> The Court described how immigration-conscious plea negotiations can be beneficial to both the noncitizen and the State, as the threat of immigration

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<sup>98</sup> In *Commonwealth v. Velazquez*, the Superior Court found ineffective assistance of counsel when defense counsel had advised Mr. Velazquez that a guilty plea to Simple Assault under 18 Pa. C.S. § 2701(a)(3) would not adversely impact his immigration status contrary to Third Circuit precedent that had determined that assault under that subsection constituted an aggravated felony under immigration law. 216 A.3d 1146, 1152 (Pa. Super. Ct. 2019) (citing 432 F.3d at 540). The Superior Court found that the general warnings of potential immigration consequences in oral and written plea colloquies were insufficient in this case because Mr. Velazquez’s counsel had affirmatively misadvised him that such concerns were unwarranted. 216 A.3d at 1152.

<sup>99</sup> See 559 U.S. at 370 (“[T]here is no relevant difference between an act of commission and an act of omission in this context.”) (internal citation omitted).

<sup>100</sup> See Eagly, *supra* note 9, at 21–22 (noting that California Supreme Court precedent prior to *Padilla* lead to absurd results because “defense lawyers who never ventured to advise their clients [about the possibility of immigration consequences from criminal proceedings] could dispose of their obligations, while their colleagues who diligently conducted research but made an error would fall below the minimum standard of competence [under *Strickland*]”); Vázquez, *supra* note 65 (describing the “Don’t Tell” policies of certain jurisdictions whereby “[c]ourts hold that the attorney who gives no advice [regarding the immigration consequences of criminal proceedings] cannot be found to be ineffective, but the attorney who chooses to give advice can be found to be ineffective according to the Sixth Amendment”); Roberts, *supra* note 65 (criticizing incentives within the public defense system whereby criminal defense attorneys are “less likely to warn defendants [of immigration consequences from criminal proceedings] since erroneous information may threaten the finality of any guilty plea or have other negative consequences”). It is important to note that Pennsylvania applies this standard to all types of collateral consequences despite recognizing that *Padilla* eliminated the direct versus collateral inquiry with respect to deportation. See *Commonwealth v. Barndt*, 74 A.3d 185, 198 (Pa. 2013) (“[E]rroneous legal advice by counsel regarding the consequences of a plea, whether the consequence is classified as collateral or direct, may constitute a basis for PCRA relief.”); *Commonwealth v. Abraham*, 62 A.3d 343, 346–48 (Pa. 2012), *cert. denied sub nom Abraham v. Pennsylvania*, 133 S. Ct. 1504 (2013) (describing how *Padilla* abrogated the direct versus collateral inquiry with respect to deportation).

<sup>101</sup> 559 U.S. at 373 (“Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively . . . in order to craft a conviction and sentence that reduce the likelihood of deportation.”).

consequences incentivizes noncitizens to “plead guilty to an offense that does not mandate [an immigration] penalty in exchange for a dismissal of a charge that does.”<sup>102</sup> While the responsibility to advise noncitizens about possible immigration consequences and advocate on the individual’s behalf based on those interests rests on defense counsel, the ability to mitigate the potential immigration harms requires cooperation by the prosecutor. This section will describe the important role that prosecutors play or can play in ameliorating disproportionate harms noncitizens face from the criminal legal system.

First, as the Supreme Court has recognized, a prosecutor’s “interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”<sup>103</sup> The ABA standards for prosecutors affirm that the “primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”<sup>104</sup> These obligations include a duty to “consider collateral consequences of a conviction before entering into a disposition agreement.”<sup>105</sup> And in choosing how to charge and what types of pleas to offer, prosecutors are to consider the accused’s circumstances and “whether the authorized or likely punishment or collateral consequences are *disproportionate* in relation to the particular offense or the offender.”<sup>106</sup> Thus, prosecutors not only have the authority to consider and balance potential collateral consequences, but are encouraged to do so in the interest of justice.

Some continue to argue that “collateral consequences” are outside the scope of the criminal system when assessing criminal consequences and that it would be “unfair” to citizens to offer alternative pleas and sentences to

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<sup>102</sup> *Id.*

<sup>103</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935). While the authors of this Article do not necessarily align with the definition of “justice” commonly used in the criminal legal system, we use it to frame how prosecutors and defense counsel can seek to ameliorate the harms that noncitizens experience at disproportionate levels from contact with the criminal legal system. “Justice,” as it is commonly understood by our existing criminal legal system, often centers around a person allegedly causing harm and then facing some form of punishment. It is important to recognize community concerns for seeking “justice” and to challenge existing notions that “punishment” will actually reduce harm or help seek accountability. For further reading on the subject, see Shana Agid et al., *Resource Guide for Teaching and Learning About Abolition*, Critical Resistance (June 25, 2021), <https://criticalresistance.org/resources/a-resource-guide-for-teaching-learning-abolition-2020-21/> [<https://perma.cc/4WPP-HNEM>].

<sup>104</sup> AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS: PROSECUTION FUNCTION § 3-12 (4th ed., 2017).

<sup>105</sup> *Id.* at § 3-5.6(c).

<sup>106</sup> *Id.* at § 3-4.4(a); see also Talia Peleg, *The Call for the Progressive Prosecutor*, 36 GEO. IMMIGR. L.J. 141, 175 (2021) (citing *Berger*, 295 U.S. at 88).

noncitizens.<sup>107</sup> These concerns are misplaced. *Padilla* clarified that deportation is not a mere collateral consequence but “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.”<sup>108</sup> In pursuit of “justice,” then, prosecutors must consider the immigration penalty that will be imposed on noncitizens in addition to whatever criminal penalty applies. The related concern that it is “unfair” to extend a modified plea offer to a noncitizen that differs in any way from what would be offered to a similarly-situated citizen invokes a narrow perception of “fairness” because it “evaluates the quality of a plea based on the individual components of the deal instead of the totality of its outcome.”<sup>109</sup> A noncitizen may negotiate an “immigration neutral” outcome that carries a harsher sentence or a plea to a more serious crime in exchange for mitigating harmful immigration consequences, whereas a similarly-charged citizen may accept a plea to a crime of a reduced grade because they know it does not carry any threat of additional penalties.<sup>110</sup>

Requiring prosecutors to consider immigration consequences as part of the penalty ensures that noncitizens and citizens are treated *more*, not less,

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<sup>107</sup> See Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 34 (Nov. 2012) (describing how twelve participants in a Kings County survey expressed “that it was unfair to offer a noncitizen a plea deal that differed in any way from what they would offer a similarly situated citizen; many of the respondents suggested this would be favoring noncitizens over citizens”); see also NAT’L DIST. ATT’Y ASS’N, NATIONAL PROSECUTION STANDARDS § 5-1.4 (3d ed. 2009) (“In considering whether to offer a plea agreement to a defendant, the prosecutor should not take into account the defendant’s race, religion, sex, sexual orientation, national origin, or political association or belief, unless legally relevant to the criminal conduct charged.”).

<sup>108</sup> 559 U.S. at 364.

<sup>109</sup> Altman, *supra* note 107, at 34; Mattie Armstrong & Rose Cahn, *Immigration-Related Prosecutorial Considerations Do Not Violate the Equal Protection Rights of Citizens*, IMMIGRANT LEGAL RES. CTR. (Apr. 2020) (describing how a noncitizen and citizen, each with the same culpability, could receive the same conviction and sentence and a citizen might walk out of jail free and return to his family, whereas a noncitizen might be immediately apprehended and transferred to an ICE detention facility where he faces the threat of deportation). In considering “fairness”, it is important to also acknowledge that the existing criminal legal system disproportionately impacts people of color, particularly Black people, as well as other marginalized communities. See Elizabeth Hinton et. al, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. JUST. (May 2018), <http://vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> (describing how “one in three [B]lack men can expect to be incarcerated in his lifetime, compared to one in six Latino men and one in 17 white men”); The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (Apr. 19, 2018), <https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/> (“The United States in effect operates two distinct criminal justice systems: one for wealthy people and another for poor people and people of color.”).

<sup>110</sup> Altman, *supra* note 107, at 34 (describing how an alternative plea is not necessarily a lesser plea).



similarly in the criminal justice system. When district attorneys consider immigration consequences as a mitigating factor in plea negotiations, they help to avoid situations where two individuals, one a citizen and one a noncitizen, receive identical criminal penalties although one (the noncitizen) faces the additional, lifelong risk of permanent banishment from the United States. Offering more holistically equal pleas to noncitizens is also not difficult. Minor adjustments to plea agreements and sentencing structures can allow noncitizens to plead to more significant charges, spend more time in jail, and/or accept additional conditions or longer terms of supervised release (among other penalties) in order to avoid deportation.<sup>111</sup> And it is important to remember that prosecutors carry broad discretion in offering immigration-neutral plea bargains that promote a fairer justice system. Should they wish to modify all plea agreements to be identical for citizens and noncitizens alike, in an immigration neutral way, they are free to do so.

Second, informed consideration of immigration consequences during plea negotiations can benefit the State.<sup>112</sup> In exchange for enabling noncitizens to take responsibility for criminal activity while avoiding disproportionate penalties, prosecutors benefit from noncitizens having increased incentives to reach and accept a prompt plea agreement. Immigration-conscious plea negotiations also promote the finality of plea agreements.<sup>113</sup> When noncitizens do not receive adequate *Padilla* warnings, they often collaterally attack the underlying plea through an ineffective assistance of counsel claim.<sup>114</sup> When a plea has been obtained after creative negotiations about immigration consequences, it is less likely to be challenged, something that benefits both the prosecutor and the court system.<sup>115</sup>

Recently, there have been growing calls for district attorney offices to reconsider their role in accounting for immigration consequences during the plea bargaining process, as well as the ways in which they may have contributed to the criminalization and deportation of noncitizens.<sup>116</sup> Some

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<sup>111</sup> See 42 Pa. C.S. § 9721(a) (describing how the court can consider and select one or more of the following alternatives to impose in a consecutive or concurrent form during sentencing: probation, a determination of guilt without further penalty, partial confinement, total confinement, or a fine); 42 Pa. C.S. § 9721(b) (listing general principles a court should follow with respect to sentencing).

<sup>112</sup> See 559 U.S. at 373 (“By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.”).

<sup>113</sup> Altman, *supra* note 107, at 38.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See generally Peleg, *supra* note 106.

advocates have suggested state legislation that would require prosecutors to consider immigration status in reaching a resolution in each case. California became the first state to pass such a law in 2016.<sup>117</sup> In addition, some district attorneys have responded by crafting individualized policies<sup>118</sup> for their offices to address immigration consequences on a case-by-case basis, either through offering pleas to immigration-safe criminal statutes, altering the sentencing aspects of plea agreements, amending the language in court documents to reduce the risk of those documents being used against the noncitizen in future removal proceedings, or some combination of those strategies.<sup>119</sup>

While these developments are encouraging and represent critical steps in the effort to create a fairer, more immigration-conscious criminal justice system, further research is needed to determine the impact of such changes on actual prosecutorial practices and plea bargains.<sup>120</sup> This Article seeks to share information obtained from local county prosecutors in Pennsylvania about how they employ their discretion to consider the immigration consequences of contact with the criminal legal system. Further study is needed at a statewide and national level to better understand how prosecutors apply their discretion and its impact on noncitizens in criminal court proceedings.

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<sup>117</sup> See *id.* at 183; CAL. PENAL CODE § 1016.3(b) (West 2021).

<sup>118</sup> For example, following *Padilla*, the District Attorney's office in Alameda County, California adopted a policy for prosecutors to consider deportation consequences if they would be "disproportionate to the charged conduct in structuring a plea." Ingrid Eagly, *Immigrant Protective Policies in Criminal Justice* 95 *Tex. L. Rev.* 245, 268 (2016). Similarly, Brooklyn District Attorney Eric Gonzalez instructed his staff to "consider immigration consequences and to offer, where possible, immigration neutral dispositions that 'neither jeopardize[] public safety nor lead[] to removal or to any other disproportionate collateral consequence.'" Hillary Blout, et. al., *The Prosecutor's Role in the Current Immigration Landscape*, *CRIM. JUST.* 35, 39 (Winter 2018). In Baltimore, the state's attorney, Marilyn Mosby, "instructed the office's prosecutors 'to ensure that there are only minor consequences for minor crimes' by 'considering the unintended collateral consequences that our decisions have on our immigrant population.'" *Id.*

<sup>119</sup> Peleg, *supra* note 106, at 193, 197; see also Eagly, *supra* note 118, 300–301 (2016) (describing how some prosecutors' offices in California have operated under a "fair punishment approach" where they consider deportation consequences as part of the overall punishment for the offense and accordingly weigh this during plea negotiations).

<sup>120</sup> Specifically, the authors acknowledge that legislation and/or office policies requiring prosecutors to consider immigration status could, in certain localities, perversely result in noncitizens being targeted for increased penalties. See Elisha Jain, *Prosecuting Collateral Consequences*, 104 *GEO. L.J.* 1197, 1200 (2016) ("[P]rosecutors have powerful incentives to 'prosecute' collateral consequences—meaning that they at times use their vast and unreviewable discretion over the criminal justice system to shape civil outcomes.").

## II. THE STRUCTURE AND FUNDING OF PENNSYLVANIA'S PUBLIC DEFENSE SYSTEM

In *Gideon v. Wainwright*, the United States Supreme Court held that the Sixth Amendment right to counsel and the Fourteenth Amendment Due Process Clause mandate that federal and state governments provide free counsel for individuals who cannot afford counsel in felony cases as a “fundamental right [which is] essential to a fair trial.”<sup>121</sup> Over the years, the Court extended this Sixth Amendment right to counsel to include juvenile delinquency proceedings, misdemeanors, and petty offenses that could lead to jail time.<sup>122</sup> However, *Gideon* and its progeny continue to be a federally “unfunded mandate.”<sup>123</sup> States decide who is entitled to free legal defense, how they will structure and fund their indigent defense services, and which entities (if any) will oversee the provision of services to ensure the state is complying with its constitutional duties.<sup>124</sup> This section will review how Pennsylvania has made these decisions.

Prior to *Gideon*, defense for indigent individuals charged with crimes in Pennsylvania was provided solely by individual court orders or, in Philadelphia, by a non-profit called the Defender Association of Philadelphia.<sup>125</sup> Founded in 1934 by a group of lawyers, the Defender Association was initially funded through membership dues and contributions from private individuals and charitable organizations.<sup>126</sup> It was run by an unsalaried Board of Directors and a limited full-time paid staff, with

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<sup>121</sup> *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963).

<sup>122</sup> See *In re Gault*, 387 U.S. 1, 4 (1967) (expanding right to counsel in juvenile delinquency proceedings); *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) (expanding right to counsel for misdemeanors and petty offenses that lead to imprisonment). *But see* *Scott v. Illinois*, 440 U.S. 373–74 (1979) (holding that counsel is not required to be appointed where indigent defendants do not face prison time).

<sup>123</sup> Erwin Chemerinsky, Remarks, *Lessons from Gideon*, 122 YALE L.J. 2676, 2680 (2013) (criticizing *Padilla* as an “unfunded mandate on state governments without any enforcement mechanism”).

<sup>124</sup> See Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113, 122 (2020) (assessing state management of public defender offices through the executive branch, judicial branch, or by delegating management to local governance).

<sup>125</sup> Editors, *Legal Aid to Indigent Criminal Defendants in Philadelphia and New Jersey*, 107 U. PA. L. REV. 812, 836–43 (1959) (discussing the history, staffing, and structure of the Defender Association). Prior to 1934, courts randomly ordered attorneys to represent indigent individuals charged with crimes without compensation and without considering the attorney’s knowledge or ability to provide such representation. Def.’s Ass’n of Phila., *Our Mission* (2019), <https://phillydefenders.org/about/> [<https://perma.cc/TNR2-2EXH>]. Initially founded as the Philadelphia Volunteer Defender Association, the organization was renamed in 1958 as the Defender Association of Philadelphia.

<sup>126</sup> *Legal Aid to Indigent Criminal Defendants in Philadelphia and New Jersey*, *supra* note 125, at 836–43.

assistance from rotating volunteer lawyers from large Philadelphia law firms and interns from local law schools.<sup>127</sup>

After *Gideon*, Pennsylvania amended Article 1, Section 9 of its constitution and passed the Pennsylvania Public Defender Act.<sup>128</sup> The Act established a public defender in each county except the County of Philadelphia, and laid out the basic requirement that public defense offices provide “representation for persons who have been charged with an indictable offense or with being a juvenile delinquent [and] who for lack of sufficient funds are unable to obtain legal counsel.”<sup>129</sup> Soon after, the Defender Association signed a contract with the City of Philadelphia, and formally assumed the role of the public defender for that county.<sup>130</sup>

The Pennsylvania Public Defender Act requires each county to operate a public defense office, but gives counties significant latitude in defining the structure and scope of their services. Most counties in Pennsylvania have a mixture of full-time and part-time staff comprised of both lawyers and non-lawyers.<sup>131</sup> Public defense offices also can contract with private criminal attorneys in addition to or in lieu of assistant public defenders.<sup>132</sup> And each county has discretion for how it determines which clients “lack . . . sufficient funds” to afford an attorney and, thus, qualify for free legal services.<sup>133</sup> But with great discretion comes great responsibility: the Pennsylvania legislature also saddled counties with the job of funding indigent criminal defense services, with no guidance, oversight, or financial assistance from the Commonwealth.

Prior to July 2023, Pennsylvania remained the only state in the nation that provided no direct state funding for the administration of indigent defense.<sup>134</sup> Instead, 100% of funding for indigent defense services was

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<sup>127</sup> *Id.* at 839. The Association initiated its arrangement with the University of Pennsylvania Law School to have law students work in their office for academic credit in 1949. A similar arrangement was made with the Law School of Temple University in 1953. *Id.*

<sup>128</sup> See PA. CONST. art I, § 9 (“Rights of the accused in criminal prosecutions.”); PA. CONST. art IX, § 4 (providing that county officers shall consist of public defenders who shall be appointed); 16 PA. STAT. §§ 9960.1–9960.13 (providing for the appointment and funding of public defenders throughout the Commonwealth of Pennsylvania).

<sup>129</sup> PUBLIC DEFENDER ACT of Dec. 2, 1968, P.L. 1144, No. 358.

<sup>130</sup> See *In re Articles of Incorporation of Def. Ass’n of Phila.*, 307 A.2d 906, 907-09 (Pa. 1973) (discussing the funding history and contract negotiations in 1968–1969).

<sup>131</sup> 16 PA. STAT. § 9960.5.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> In 2021, the Legislative Budget and Finance Committee noted: “Pennsylvania and South Dakota are the only two states that generally provide no state funding for the administration of indigent

provided through county budgets.<sup>135</sup> The only exceptions were a 2019 one-time allotment of \$500,000 to partially reimburse counties' costs related to indigent criminal defense in capital cases, and a 2022 allocation of \$100,000 for indigent criminal defense training.<sup>136</sup>

The lack of assistance and oversight at the state level and Pennsylvania's highly-localized public defense funding structure has led to significant disparities in the funding, provision, and quality of legal representation across individual counties.<sup>137</sup> In fiscal year 2023, for example, *per capita* expenditures on public defense ranged anywhere from \$38.18 in Philadelphia County to \$16.83 in Dauphin County and just \$9.61 in Allegheny County (which includes Pittsburgh); Northampton County, which spent the least of any locality in our study, spent just \$5.95 on a *per capita* basis.<sup>138</sup> For context, the national average *per capita* spending for public defense is \$19.82.<sup>139</sup> Counties also use different criteria to determine who qualifies for a public defender.<sup>140</sup> While twenty-three counties use the federal poverty guidelines to determine eligibility, others use more holistic approaches that consider the type of charge(s) and the individual's resources and circumstances to decide whether free counsel is merited.<sup>141</sup> In addition, because no statewide standards exist regarding public defender workloads,

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criminal defense services." LEGISLATIVE BUDGET AND FINANCE COMMITTEE, PENNSYLVANIA GENERAL ASSEMBLY, REPORT: PENNSYLVANIA INDIGENT CRIMINAL DEFENSE SERVICES FUNDING AND CASELOADS, H.R. 2019-619, at 20 (Oct. 2021), <http://lbfc.legis.state.pa.us/Resources/Documents/Reports/701.pdf>. However, according to a March 2023 report by the Sixth Amendment Center, Pennsylvania was the only state to rely on county funding for 100% of its indigent defense budget; South Dakota relied on counties for 96.5% of funding. David Carroll and Aditi Goel, Sixth Amendment Center, *The State of the Nation on Gideon's 60th Anniversary* (Mar. 14, 2023), <https://sixthamendment.org/the-state-of-the-nation-on-gideon-60th-anniversary/> [<https://perma.cc/H9L8-LNQM>].

<sup>135</sup> See LEGISLATIVE BUDGET AND FINANCE COMMITTEE, *supra* note 134, at 16–17.

<sup>136</sup> The \$500,000 allotment was provided as grants administered through the Pennsylvania Commission on Crime and Delinquency (PCCD) and counties had to apply for reimbursement of specific expenses related to capital defense. In the end, the Commonwealth reimbursed counties a total of \$439,969 in 2020 and 2021 combined. See LEGISLATIVE BUDGET AND FINANCE COMMITTEE, *supra* note 134, at 16–17. The 2022 allotment of \$100,000 for training was also distributed via grants administered by the PCCD. See 72 Pa. Stat. Ann. § 1712-F.1(1)(viii).

<sup>137</sup> James Boyle, *Pa. Gov. Calls for State-Level Public Defender Funding*, LAW 360 (Mar. 22, 2023) <https://www.law360.com/articles/1588681/pa-gov-calls-for-state-level-public-defender-funding> [<https://perma.cc/GKX4-H929>].

<sup>138</sup> Table 1 (calculating the per capita public defense expenditures by counties in the study based on the county budget for fiscal year 2023 public defense expenditures divided by the most recent population estimates from the U.S. Census Bureau from July 1, 2022).

<sup>139</sup> See Carrol and Goel, *supra* note 134.

<sup>140</sup> LEGISLATIVE BUDGET AND FINANCE COMMITTEE, *supra* note 134, at 83.

<sup>141</sup> *Id.*

individual attorney caseloads—as well as the amount each county spends per case—vary significantly.<sup>142</sup> High caseloads and insufficient resources have led to lawsuits, most notably against Luzerne County, where a recent class action argued that gross and chronic underfunding of the county’s public defender led to widespread violations of the constitutional right to counsel.<sup>143</sup>

The following chart provides the total adult criminal cases involving a public defender for each Pennsylvania county from 2019, the *per capita* expenditure on public defense by county from 2019 and 2023, and the attorney staff data from 2023 by county for each locality included in this study:

TABLE 1: PUBLIC DEFENDER CASELOADS AND EXPENDITURES FOR COUNTIES INTERVIEWED<sup>144</sup>

<b>County</b>	<b>Caseload (CY 2019)<sup>145</sup></b>	<b>Per Capita Expenditure (CY 2019)</b>	<b>Per Capita Expenditure (FY 2023)</b>	<b>Attorney Staff (2023)</b>
Allegheny	13,281	\$7.68	\$9.61	Unknown
Berks	3,813	\$8.10	\$9.95	21
Bucks	2,638	\$6.51	\$8.21	25
Butler	1,200	\$5.73	\$7.13	7
Centre	855	\$7.26	\$8.22	7
Chester	2,472	\$7.83	\$9.21	32

<sup>142</sup> *Id.* at 35–37.

<sup>143</sup> *Kuren v. Luzerne County*, 146 A.3d 715 (Pa. 2016) (recognizing that public defender clients have the right to sue counties to force them to provide adequate funding to their public defense offices).

<sup>144</sup> Statistics from 2019 are obtained from the LEGISLATIVE BUDGET AND FINANCE COMMITTEE, *supra* note 134, at 32–37, 41–43, 85–86. Statistics regarding per capita expenditures from 2023 were calculated by the researchers by reviewing each county’s budget from fiscal year 2023, identifying the total public defense expenditures, and dividing that number by the population estimates from July 1, 2022 for each county available on the U.S. Census Bureau website. The attorney staff statistics were obtained and shared through Right To Know Requests seeking the most recent information on the number of public defenders in each county’s office. The Right to Know requests were filed on approximately August 31, 2023 by the ACLU of Pennsylvania and shared with the research team.

<sup>145</sup> “Caseload” refers to the total adult criminal cases involving a Public Defender in each county. *See* LEGISLATIVE BUDGET AND FINANCE COMMITTEE, *supra* note 134, at 41–43. Statistics from 2019 were used rather than those from 2020, as total cases handled and completed dropped significantly in 2020, likely due to pandemic-related court and office closures.

Cumberland	2,135	\$6.10	\$9.03	11
Dauphin	4,770	\$14.46	\$16.83	20.7
Delaware	Unavailable	\$7.33	\$9.00	45
Erie	2,206	\$5.56	\$7.70	12.8
Lancaster	2,886	\$6.37	\$6.25	19
Lebanon	1,295	\$5.90	Unavailable	4.5
Lehigh	2,449	\$7.31	\$8.96	17.7
Luzerne	3,739	\$7.53	\$8.55	17.5
Monroe	1,471	\$11.72	\$14.04	11
Montgomery	5,085	\$6.81	\$8.49	41.7
Northampton	1,618	Unavailable	\$5.95	13
Philadelphia	23,748	\$30.20	\$38.18	234
Pike	311	\$6.40	\$9.99	3.8
York	3,825	\$7.47	\$10.15	25.5

In response to these grave disparities, in March 2023, Pennsylvania Governor Josh Shapiro proposed allocating \$10 million in the 2023–2024 state budget to help fund Pennsylvania’s indigent defense system.<sup>146</sup> In August 2023, the Pennsylvania legislature passed a budget bill that included \$7.5 million to fund indigent defense—a first in Pennsylvania state history.<sup>147</sup> While advocates and public defense offices across the state welcomed this news as a step in the right direction, the budget still leaves Pennsylvania counties to pick up most of the tab, ensuring that disparities in the access to

<sup>146</sup> Danielle Ohl, *supra* note 19.

<sup>147</sup> Press Release, Governor Josh Shapiro, Governor Shapiro Signs Into Law Commonsense Budget that Makes Historic Investments to Create a Stronger Economy, Safer and Healthier Communities, and Better Schools, (Aug. 3, 2023), <https://www.governor.pa.gov/newsroom/governor-shapiro-signs-into-law-commonsense-budget-that-makes-historic-investments-to-create-a-stronger-economy-safer-and-healthier-communities-and-better-schools/#:~:text=%247.5%20million%20to%20fund%20indigent,for%20it%20on%20their%20own> [https://perma.cc/DPT5-RUGA].

counsel—and the quality of that counsel, once provided—will continue. According to David Carroll, Executive Director of the Sixth Amendment Center, Pennsylvania counties currently expend approximately \$125.5 million on indigent defense; Philadelphia’s Defender Association alone has a budget of almost \$50 million.<sup>148</sup> The new state funding is thus a small, even if significant, drop in the bucket. Most states, by comparison, take on at least 85% of all public defense costs, and many of Pennsylvania’s neighbors fully cover indigent defense services to ensure more equitable access to high-quality public defense.<sup>149</sup> For example, Ohio recently allocated approximately \$336 million dollars in their Biennial State Budget, which allowed the state to reimburse counties at a rate of 100% in 2022 and 90% in 2023.<sup>150</sup>

Pennsylvania’s highly localized and underfunded county public defense offices thus struggle to fulfill their constitutional duty to provide effective representation to their clients. But given the additional constitutional obligations defense counsel have in cases involving noncitizens, it is important to consider how the structure and funding impact a particularly vulnerable subset of the population. This next section discusses findings from interviews with defense counsel across the state regarding their representation of noncitizens and the challenges they face.

### III. PADILLA PRACTICES IN PENNSYLVANIA PUBLIC DEFENSE OFFICES

Pennsylvania’s county-based public defense system results in each county having distinct practices and standards for how they fulfill their constitutional obligations to their clients, including those who are noncitizens. Our research team’s interviews with public defenders and private defense counsel revealed significant variation in how attorneys identify noncitizen clients, the specificity of the advice provided to them, and counsels’ understanding of

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<sup>148</sup> Ohl, *supra* note 146.

<sup>149</sup> For a comprehensive overview of the structure and funding of indigent defense systems for each state, see David Carroll, *Right to Counsel Services in the 50 States: An Indigent Defense Reference Guide for Policymakers* (Mar. 2017), <https://www.in.gov/publicdefender/files/Right-to-Counsel-Services-in-the-50-States.pdf> [<https://perma.cc/7AHL-TGMY>]; see also Joe, *supra* note 124, at 122 (assessing state management of public defender offices through the executive branch, judicial branch, or local governance).

<sup>150</sup> See Memorandum from Timothy Young, State Public Defender, to County Officials (Jan. 30, 2023), [https://opd.ohio.gov/static/CountyResources/Reimbursement/OPD\\_Memo\\_Reimbursement\\_and\\_Financial\\_Disclosure\\_Update.pdf](https://opd.ohio.gov/static/CountyResources/Reimbursement/OPD_Memo_Reimbursement_and_Financial_Disclosure_Update.pdf); see also Carroll, *supra* note 149, at 100–01.



their obligations to provide immigration warnings to noncitizen clients in criminal court proceedings.<sup>151</sup> Each participant in this study was well-intentioned and honest about their commitment to providing quality representation to their clients, as well as about the real challenges they face due to a lack of resources, training, and support. The intention in analyzing these practices is not to cast doubt on the ability or quality of the representation provided by individual attorneys, but rather to identify the structural barriers defense counsel face in their day-to-day work, as well as the systemic shortcomings that prevent them from providing constitutionally adequate representation.

#### A. IDENTIFYING THOSE WHO GET *PADILLA* WARNINGS

Every public defense office interviewed described some method for identifying noncitizens who require immigration warnings, but most did not have a formal policy or uniform way of doing so. The practices used to identify noncitizen clients included: direct questioning by an attorney (during an intake or otherwise); relying on individuals to self-identify; written questions on an application form for public defense services; and reliance on the criminal complaint for information about where a person was born. The methods described are by no means an exhaustive list of the ways in which counties identify noncitizens. They are also not mutually exclusive; many offices engage in several of these practices.

Every county interviewed said that they identify noncitizens through some form of questioning during legal meetings or interviews.<sup>152</sup> When this conversation occurred, and whether it was during an intake process or at a later stage in the representation, varied by county. For example, the Berks County participant described how immigration issues are typically identified in a conversation regarding plea offers, because that is when (this individual felt) an impacted individual should be advised accordingly.<sup>153</sup> In Allegheny County, the public defender's office seeks to identify potential immigration issues at an earlier stage, and thus asks everyone whether they were born in

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<sup>151</sup> Our research is current as of the date referenced in the footnote of the interview. It is possible that changes have occurred since the interview date of which we are not aware.

<sup>152</sup> See, e.g., Interview with Public Defender from Delaware County (Mar. 14, 2023) (describing how attorneys ask their clients about immigration status); Interview with Public Defender from Lancaster County (Mar. 20, 2023) (describing how attorneys identify noncitizen clients from speaking with them).

<sup>153</sup> Interview with Public Defender from Berks County (Apr. 4, 2023).

Allegheny County during their intake.<sup>154</sup> Similarly, in Dauphin County, intake paralegals typically ask initial questions about immigration status.<sup>155</sup>

Many participants, including those from Berks, Cumberland, and Montgomery counties, reported initial hesitation among clients in identifying themselves as noncitizens, even when asked.<sup>156</sup> To respond to these concerns, some offices described practices wherein attorneys explained why they were asking for immigration information, and how the goal of obtaining this information was to help represent the client as effectively as possible.<sup>157</sup> In Lehigh County, the participant described how asking about immigration status is one of the first questions in initial meetings, but the attorney is careful to explain why this helps them better understand a client's specific needs.<sup>158</sup>

Another common means of identifying noncitizen clients is through questions on the application form for public defense services.<sup>159</sup> In Dauphin County, for example, the public defense services application requests information about whether a person is a United States citizen and, if not, in what country they were born. When clients indicate they are not United States citizens, Dauphin County attorneys then consider and analyze the immigration consequences of the client's particular case.<sup>160</sup> Allegheny County's form asks this more indirectly, inquiring as to whether a prospective client was born in Allegheny County; a negative response then prompts

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<sup>154</sup> Interview with Public Defender from Allegheny County (Mar. 27, 2023).

<sup>155</sup> Interview with Public Defender from Dauphin County (Mar. 17, 2023).

<sup>156</sup> See Interview with Public Defender from Berks County (Apr. 4, 2023) (describing how the participant believed that undocumented individuals in the U.S. might not be forthcoming about their immigration status, even when attorneys asked them to be); Interview with Public Defender from Cumberland County (Mar. 31, 2023) (detailing how this attorney tries to explain why they are asking clients about their immigration status, so that it does not appear that they are doing so for an improper purpose); Interview with Public Defender from Montgomery County (Mar. 30, 2023) (stating that the participant typically explains why questions about a client's immigration status are relevant, how they approach representation holistically, and that immigration status does not affect their eligibility for representation).

<sup>157</sup> See Interview with Public Defender from Cumberland County (Mar. 31, 2023) (describing discussions with clients about potential immigration impacts of criminal charges).

<sup>158</sup> Interview with Public Defender from Lehigh County (Apr. 17, 2023).

<sup>159</sup> See, e.g., Lehigh County, Application for Public Defender, <https://home.lehighcounty.org/PublicDefender/OnlineApplication/Application/english> [<https://perma.cc/KV72-SBFK>].

<sup>160</sup> Interview with Public Defender from Dauphin County (Mar. 17, 2023); see also Interview with Public Defender from Erie County (Apr. 11, 2023) (describing how Erie County's application form was updated after 2010 to include a question about immigration status). *But see* Interview with Public Defender from Montgomery County (Mar. 30, 2023) (noting that Montgomery County's application explicitly fails to inquire about a client's immigration status).

further inquiry into citizenship.<sup>161</sup> Attorneys in other localities, such as Lehigh County, preferred to ask about citizenship status in person to foster client trust.<sup>162</sup> Lehigh County public defenders are instructed to ask clients about their immigration status during one-on-one interviews at the commencement of representation.<sup>163</sup>

Some offices relied on other practices for identifying noncitizens, including looking to the person's criminal complaint, referring to interviews conducted by social work staff, or relying on noncitizens to self-identify. Participants from Cumberland and Lancaster counties described how the criminal complaint lists the accused's place of birth or other relevant information, providing attorneys a starting point in identifying potential noncitizens.<sup>164</sup> Other localities, including Berks, Delaware, and Butler counties, rely on noncitizen clients to self-identify in conjunction with other methods of asking clients about their immigration status.<sup>165</sup> Finally, some offices, including Berks County, obtain this information through other means including mitigation reports produced by social work staff.<sup>166</sup>

A number of counties, including Berks, Butler, Cumberland, Lancaster, and Monroe, acknowledged that because their offices do not have a written policy governing immigration consults, methods to identify noncitizen clients depended, to some extent, on the individual attorney.<sup>167</sup> Absent a stated

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<sup>161</sup> Allegheny County, *Public Defenders Office – Client Qualification Form*, [https://onbase.alleghenycounty.us/AppNet\\_Ext/UnityForm.aspx?key=UFKey](https://onbase.alleghenycounty.us/AppNet_Ext/UnityForm.aspx?key=UFKey) [<https://perma.cc/82CE-5AJ4>]; Interview with Public Defender from Allegheny County (Mar. 27, 2023).

<sup>162</sup> Interview with Public Defender from Lehigh County (Apr. 17, 2023).

<sup>163</sup> *Id.*

<sup>164</sup> *See* Interview with Public Defender from Cumberland County (Mar. 31, 2023) (explaining that the attorney will first look at the client's place of birth); Interview with Public Defender from Lancaster County (Mar. 20, 2023) (describing how some information is identified on the complaint form itself, which prompts attorneys to ask clients additional questions about immigration status); Interview with De-Identified Participant (Mar. 24, 2023) (describing how one starting place is by looking at the client's place of birth).

<sup>165</sup> *See* Interview with Public Defender from Berks County (Apr. 4, 2023) (observing that while some clients self-identify, others are less forthcoming even when asked due to concerns); Interview with Public Defender from Delaware County (Mar. 14, 2023) (self-identification and asking); Interview with De-identified Participant (Mar. 28, 2023) (self-identification and intake); Interview with Public Defender from Butler County (Dec. 5, 2023) (describing how they largely rely on the client to tell the attorney about citizenship status unless something triggers them to ask).

<sup>166</sup> *See, e.g.*, Interview with Public Defender from Berks County (Apr. 4, 2023) (describing how mitigation reports often include details about where a person was born and their family history, which can be a way of identifying immigration status).

<sup>167</sup> *See id.* (outlining how Berks County does not have a general policy beyond what is mandated by the rules of ethics and case law); Interview with Public Defender from Cumberland County (Mar. 31,

policy, the reported methods for obtaining information about a person's immigration status undoubtedly contain some sample bias. The participants may not be aware of what each attorney in their office does on a day-to-day basis.

On the other hand, other counties, including Erie, Lehigh, Philadelphia, and Allegheny, did report a policy to ask about immigration status.<sup>168</sup> Philadelphia and Allegheny counties appear to have the most robust policies and resources for identifying noncitizens and providing detailed advice as to the immigration consequences of criminal convictions. Both offices have staff members designated as partially responsible for supporting other public defenders in their offices in providing effective analysis and advice about immigration consequences to noncitizen clients.<sup>169</sup>

In Philadelphia, the Defender Association has two part-time staff members who are immigration attorneys and three appellate attorneys who assist in analyzing immigration consequences. These five individuals train trial attorneys to affirmatively ask every client where they were born and what immigration status they have in the United States.<sup>170</sup> If the person was not born in the United States, trial attorneys are asked to provide a referral

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2023) (describing how the participant does not know if his office has a policy "per se," but that attorneys always try to understand collateral immigration consequences and consult with immigration attorneys on thorny issues); Interview with Public Defender from Lancaster County (Mar. 20, 2023) (reporting that though there is no written policy, staff members in their office do find out about the legal status of their clients and then proceed from there); Interview with Public Defender from Monroe County (Apr. 17, 2023) (stating that the office has no formal policy about how to advise noncitizens); *see also* Interview with Public Defender from Delaware County (Mar. 14, 2023) (explaining that Delaware County did not have a policy prior to the hiring of the office's new Chief Public Defender; as of 2023, the office is still working on developing a policy); Interview with Public Defender from Butler County (Dec. 5, 2023) (describing how they do not have a specific written policy). Two other counties reported no written policy but requested to remain anonymous in their interviews.

<sup>168</sup> *See* Interview with Public Defender from Erie County (Apr. 11, 2023) (noting how the office has a policy regarding inquiring as to one's immigration status and how to conduct *Padilla* consultations); Interview with Public Defender from Lehigh County (Apr. 17, 2023) (describing a policy to ask clients about immigration status); Interview with Public Defender from Philadelphia (Mar. 28, 2023); Interview with Public Defender from Allegheny County (Mar. 27, 2023) (noting recent rollout of official policy).

<sup>169</sup> Interview with Public Defender from Philadelphia (Mar. 28, 2023) (noting how the Defender Association of Philadelphia has (1) an Immigration Specialist who works part time at the Defender and part time at the Nationalities Service Center, a local non-profit organization, and (2) three experienced appellate attorneys who have developed immigration expertise and assist in drafting memos analyzing the immigration consequences of criminal charges); Interview with Public Defender from Allegheny County (Mar. 27, 2023).

<sup>170</sup> *Id.*

form to the immigration group.<sup>171</sup> Similarly, in Allegheny County, four public defenders are designated as immigration experts and provide support in analyzing the immigration consequences of criminal charges.<sup>172</sup> However, none of these individuals are primarily an immigration attorney and all carry criminal caseloads in addition to their duties as immigration advocates.<sup>173</sup> As stated above, Allegheny County has a policy of assessing all clients for citizenship by asking if individuals were born and raised in Allegheny County both on their application form and orally.<sup>174</sup> If they were not, the interviewer asks to clarify where the client was born. Allegheny recently also formalized an internal policy of flagging all foreign-born clients for their immigration group through a referral form.<sup>175</sup>

The wide range of practices employed by public defenders to identify noncitizen clients shows little uniformity in how or whether noncitizens are identified as such by their criminal counsel. It is also unclear *when* such identification takes place. Early identification of noncitizen clients is vital so that a defense attorney can identify the client's specific immigration status, assess the charges they face, provide clients the immigration advice they need to weigh and consider their options, and allow counsel to participate in efforts to stem potential consequences by researching and attempting to negotiate safer alternative pleas or sentencing structures with the prosecutor. As this research confirmed, soliciting immigration-safe offers from district attorneys in Pennsylvania is often a difficult process, one that necessitates providing extensive mitigation information about the client and engaging in prolonged plea negotiations with the prosecutor.<sup>176</sup> Failure of defense counsel to promptly identify noncitizens can impede an attorney's ability to engage in effective plea negotiations, and may deprive clients of the opportunity to assist in these efforts and fully weigh their options.

Additionally, solely relying on client self-identification can produce inaccurate assessments. Some noncitizens misunderstand their own

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<sup>171</sup> *Id.*

<sup>172</sup> Interview with Public Defender from Allegheny County (Mar. 27. 2023).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*; see also Client Qualification Form, *supra* note 161.

<sup>175</sup> See Interview with Public Defender from Allegheny County (Mar. 27. 2023); Client Qualification Form, *supra* note 161.

<sup>176</sup> Many prosecutors require "mitigation information" before extending more favorable plea offers. This mitigation information can include details regarding employment history, family ties in the U.S., community involvement, fear of returning to their home country, and details of mental health issues, if present. Compiling this information often requires several interviews with a noncitizen and their family members, as well as the collection of documentation, letters of support, and other evidence.

immigration status; many children with United States citizen siblings and parents may believe they hold citizenship simply because everyone in their family does. Others might equate legal permanent residence with citizenship, or erroneously think that because they came here at a certain age or time, they cannot face deportation. Others may not volunteer information because they fear doing so will put them in jeopardy. As a result, if attorneys do not err on the side of caution—by systematically screening for any client born outside the United States,<sup>177</sup> asking more detailed questions about immigration status, or requesting the client provide documentation of their status<sup>178</sup>—it is likely that some noncitizens will go unnoticed.

Regardless of the method used, identifying whether someone is a noncitizen and in need of advice about potential immigration consequences is the necessary first step. The next step is analyzing what the potential immigration consequences for the individual might be, providing warnings, and then attempting to mitigate those potential consequences.

#### B. HOW OFFICES PROVIDE IMMIGRATION WARNINGS

Once a client is identified as a noncitizen and entitled to an immigration warning prior to taking a plea or going to trial, county practices varied even more significantly in terms of the manner of providing that warning, the scope of the advice given, and who, in particular, was responsible for providing it. Table 2 describes the range of practices for advising noncitizen clients about immigration consequences reported by interview participants.

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<sup>177</sup> The most well-resourced offices surveyed in this study—Philadelphia and Allegheny County—both report that they refer clients for immigration advisals whenever they were born outside the U.S., even if they report current U.S. citizenship. Where American citizenship is reported, attorneys make efforts to confirm citizenship; if they cannot, they proceed as though the client is a noncitizen.

<sup>178</sup> More detailed questioning to fully understand a client's immigration status could include inquiries about the process through which the person received their citizenship (to verify, for example, that they remember an immigration interview and taking an oath of citizenship), requests for copies of passports or certificates of naturalization, and conversations with family members (where authorized).

TABLE 2: RANGE OF PRACTICES FOR IMMIGRATION ADVISING

<b>County</b>	<b>Immigration Specialist(s) on Staff</b>	<b>Internal Consult with Experienced Practitioners</b>	<b>External Consult with Private Attorney</b>	<b>General Warning</b>
Allegheny	X	X		
Berks		X	X	X
Bucks			X	X
Butler				X
Centre			X	X
Chester			X	X
Cumberla nd			X	
Dauphin		X	X	X
Delaware			X	
Erie		X	X	
Lancaster		X	X	
Lebanon				X
Lehigh		X	X	
Luzerne			X	X
Monroe			X	X
Montgom ery		X	X	
Northamp ton		X	X	X
Philadelp hia	X	X		
Pike	Unavailable			
York		X	X	

As described *supra*, only two offices—Allegheny and Philadelphia—have attorneys on staff officially recognized as immigration specialists and responsible for supporting other attorneys in analyzing potential immigration

consequences.<sup>179</sup> Even within those offices, the immigration specialists all had other responsibilities. Allegheny County has four public defenders who work on an “Immigration Consequences Group” as part of their job.<sup>180</sup> These are not full-time positions; each attorney also managed a reduced caseload in addition to their immigration consulting duties.<sup>181</sup> For instance, one of the attorneys handles fifty trial cases in addition to her work on the Immigration Consequences Group, rather than the eighty cases trial attorneys in her office normally handle.

The Philadelphia Defender Association, likewise, has an immigration group that consists of five attorneys. Two of these individuals are immigration attorneys who work part-time (twenty-four hours a week) at the Defender Association and part-time (sixteen hours a week) at the non-profit advocacy organization the Nationalities Service Center. These two attorneys are responsible for the majority of *Padilla* advisals at the Defender Association and carry individual immigration caseloads at the Nationalities Service Center. The remaining three attorneys in the immigration group work in the Appellate Unit of the Defender Association and assist with immigration consults in addition to their work on criminal appeals.<sup>182</sup> The Defender Association is the only office interviewed that had an immigration attorney on staff (even part-time). Yet the Philadelphia immigration group does not have the capacity to personally meet with all noncitizen clients; to assist clients with whom the immigration attorneys cannot personally meet, they provide resources and advice to their colleagues on cases involving noncitizens.<sup>183</sup> The immigration group also prepares written memoranda for trial attorneys in which they analyze the immigration consequences of the charges a noncitizen faces, suggest immigration-safe plea options, and

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<sup>179</sup> Interview with Public Defender from Allegheny County (Mar. 27, 2023); Interview with Public Defender from Philadelphia (Mar. 28, 2023).

<sup>180</sup> Interview with Public Defender from Allegheny County (Mar. 27, 2023).

<sup>181</sup> *Id.*

<sup>182</sup> Interview with Public Defender from Philadelphia (Mar. 28, 2023); Follow Up Email Correspondence with Public Defender from Philadelphia (Feb. 29, 2024).

<sup>183</sup> *Id.* The Defender Association of Philadelphia operates on a horizontal representation structure, meaning that multiple lawyers represent a given client at different stages of the case. The ABA has found that when public defense providers rely on “horizontal” systems of representation, it is usually because there are too many cases for which the public defense provider is responsible. See *Eight Guidelines of Public Defense Related to Excessive Workloads*, AM. BAR ASS’N at 9 (Aug. 2009), [https://dids.nv.gov/uploadedFiles/didsnvgov/content/Resources/ABAEightGuidelinesofPublicDefenseRelatedtoExcessiveWorkloads\(1\).pdf](https://dids.nv.gov/uploadedFiles/didsnvgov/content/Resources/ABAEightGuidelinesofPublicDefenseRelatedtoExcessiveWorkloads(1).pdf) [<https://perma.cc/5G9T-27AQ>]. Given the complexities of immigration law and the discomfort individuals may feel identifying themselves as noncitizens to public defense attorneys, this method poses even greater challenges to ensuring clients have access to competent immigration advice at all stages of the process.



provide support in plea negotiations.<sup>184</sup> Similarly, in Allegheny County, once an immigration referral form has been sent to the Immigration Consequences Group, the team gathers additional information and prepares a formal memorandum, which includes suggestions for alternative plea bargains.<sup>185</sup>

In other counties, public defenders contact external private immigration counsel for advice regarding specific cases, and then communicate that advice to their clients.<sup>186</sup> Immigration attorneys are frequently asked to perform this service on a *pro bono* basis.<sup>187</sup> Of the counties that rely on external consultations, only York and Delaware counties described procedures in which the Court or the public defender's office is able to pay for immigration consultations.<sup>188</sup> In Delaware County, if an individual needs more detailed immigration advice, the office is normally able to pay for that advice through their expert budget; in York County, however, attorneys must file petitions with the Court requesting funding for immigration consultations.<sup>189</sup> In such situations, stakeholders working with finite and often limited budgets must balance the needs of noncitizens who require *Padilla* consultations with other more general needs, creating tensions that can reverberate throughout the criminal justice system as a whole.<sup>190</sup>

While consulting external immigration attorneys can be helpful in particularly complex cases—as doing so ensures that a client receives

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<sup>184</sup> Interview with Public Defender from Philadelphia (Mar. 28, 2023); Follow Up Email Correspondence with Public Defender from Philadelphia (Feb. 29, 2024).

<sup>185</sup> See Interview with Public Defender from Allegheny County (Mar. 27, 2023) (describing how the immigration team will try to verify status, determine if the individual has family in the U.S., etc.).

<sup>186</sup> See, e.g., Interview with Public Defender from Berks County (Apr. 4, 2023) (describing how their office has access to immigration attorneys locally that will advise attorneys on a case-by-case basis via phone); Interview with Public Defender from Cumberland County (Mar. 31, 2023) (detailing how they generally try to reach out to immigration attorneys with questions).

<sup>187</sup> A public defender in Berks County described maintaining connections in the community with immigration attorneys who are willing to provide information and advice *pro bono* through a phone call. See Interview with Public Defender from Berks County (Apr. 4, 2023); see also Interview with Public Defender from Lebanon County (June 19, 2023) (describing how every client in Lebanon County is asked about their citizenship status or where they were born, and subsequently receives a general warning and advice to consult with an immigration attorney—clients are typically referred to one of two local practitioners).

<sup>188</sup> Interview with Public Defender from York County (Mar. 14, 2023); Interview with Public Defender from Delaware County (Mar. 14, 2023).

<sup>189</sup> Interview with Public Defender from Delaware County (Mar. 14, 2023); Interview with Public Defender from York County (Mar. 14, 2023). If granted, this funding enables the private attorney to seek more detailed information from the client and provide individualized advice, often in the form of a memorandum.

<sup>190</sup> Interview with Public Defender from Delaware County (Mar. 14, 2023); Interview with Public Defender from York County (Mar. 14, 2023).

accurate, individualized *Padilla* advice from an expert in immigration law—it has numerous drawbacks. First, excluding the public defender from the immigration consultation prevents that attorney from being privy to crucial information that could improve the plea-bargaining process. It also stymies on-the-job learning and the ability of public defenders to identify, understand, and communicate the immigration consequences of criminal charges to their noncitizen clients.

The ability of a county to consult with private immigration attorneys is also precarious, as it depends on an individual public defender's connections in the community (which not all public defenders or counties possess), an indigent client's ability to pay for an immigration consultation if the county will not provide it, the availability of immigration attorneys in the area, and/or the willingness of immigration attorneys to provide free advice. For instance, in York County, public defenders expressed concern that should the one immigration attorney they consult choose to move, they would be left with no way to provide immigration consultations to noncitizens in their county.<sup>191</sup>

Some offices described even more informal methods of providing immigration advice. Public defenders in Lehigh County, for example, reported that they rely on colleagues for advice, utilizing an “open door policy” in which junior attorneys can discuss immigration-related questions with their supervisors.<sup>192</sup> Montgomery County outlined a model in which one public defender volunteered to “remain current with case law, current with [immigration related] procedures,” so as to serve as a point person their colleagues could approach for immigration advice.<sup>193</sup> But the Montgomery County office has not had an attorney in this role for several months. In their absence, the office has relied on the Appellate Unit (which attempts to remain

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<sup>191</sup> Interview with Public Defender from York County (Mar. 14, 2023); *see also* Interview with Public Defender from Berks County (Apr. 4, 2023) (reporting that this particular public defender has a wealth of resources in the legal community to help understand the collateral consequences of criminal cases, although the office generally relies on three attorneys for immigration consultations who have been identified by the bar association); Interview with Public Defender from Montgomery County (Mar. 30, 2023) (describing how the attorneys called on for immigration advice are usually contacts with whom the participant has personal relationships and feels comfortable asking for “favors”).

<sup>192</sup> Interview with Public Defender from Lehigh County (Apr. 17, 2023).

<sup>193</sup> Interview with Public Defender from Montgomery County (Mar. 30, 2023).

up to date on immigration law) or called on seasoned private practitioners to evaluate immigration consequences on an ad-hoc basis.<sup>194</sup>

Asking already overburdened public defenders to take on additional volunteer duties, without remuneration or reduction of their pre-existing caseloads, appears to have haphazard and unsustainable results. It is Pennsylvania itself that is ultimately responsible for ensuring indigent residents receive effective representation, which is guaranteed by both the federal and state constitutions. It is the Commonwealth, then, that should be providing public defenders with the resources necessary to fulfill their duties competently and reliably.

### C. VARIATION IN THE TYPE AND QUALITY OF *PADILLA* ADVISALS

Interviews with public defenders also revealed how the level of specificity included in immigration warnings varies greatly county-by-county. Very few counties provide detailed warnings about whether a given crime would impart specific immigration consequences (e.g., whether the crime is a CIMT that would render one inadmissible, or an aggravated felony that would make a client deportable), and few have established procedures for working with noncitizens.<sup>195</sup> Most counties only provide general immigration warnings and then refer clients to an immigration attorney.<sup>196</sup> Most also explained that

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<sup>194</sup> *Id.* While the participant from Montgomery County said that the Appellate Unit is attempting to remain current on immigration matters, they noted that doing so is challenging given the attorneys' high caseloads and the ever-changing nature of immigration law. The participant had never asked the Appellate Unit for a memorandum analyzing the immigration consequences in an individual client's case.

<sup>195</sup> *See, e.g.*, Interview with Allegheny County Public Defender (Mar. 27, 2023) (describing how the Immigration Consequences Group produces a memo before a client's pretrial conference about the immigration consequences of the charges at hand); Interview with Public Defender from Centre County (July 28, 2023) (stating that while attorneys in Centre County provide general immigration warnings to noncitizens, they also encourage clients to consult with an immigration attorney and then work with that person to achieve an immigration-neutral case disposition); Interview with Public Defender from Lehigh County (Apr. 17, 2023) (explaining how attorneys conduct research and consult internally to determine immigration consequences, then utilize the expertise of external immigration attorneys if needed); Interview with Public Defender from Philadelphia (Mar. 28, 2023) (describing how defense attorneys are reminded not to resolve cases without (1) understanding the immigration consequences of the charges at hand; (2) advising their client of those consequences; and (3) trying to negotiate an immigration-friendly outcome).

<sup>196</sup> *See, e.g.*, Interview with Public Defender from Dauphin County (Mar. 17, 2023) (noting that though attorneys flag immigration issues, they also advise noncitizen clients to consult with an immigration attorney if they do not already have one); Written Responses by Public Defender from Bucks County (June 30, 2023) (stating that attorneys tell noncitizen clients that criminal convictions could have adverse consequences on their ability to remain in the U.S.); Interview with Berks County

they typically only advised noncitizen clients about whether a conviction of a particular charge would trigger the initiation of removal proceedings; few described any process for analyzing whether charged crimes would impact the forms of relief or defenses to deportation available to a client.<sup>197</sup> Finally, some attorney participants described concerns—especially given the lack of resources—about ever being comfortable or competent in determining when a noncitizen might face immigration consequences, let alone what those consequences might be.<sup>198</sup>

### 1. *Pennsylvania Case Law Influences Padilla Performance*

Some of the variation in *Padilla* practices stems from confusion about what is constitutionally required given Pennsylvania state courts' narrow interpretation of *Padilla* in ineffective assistance of counsel claims. As discussed *supra*, *Padilla* contained a two-part holding: (1) defense attorneys have a constitutional obligation to advise noncitizens in criminal court proceedings about immigration consequences; and (2) *Padilla* requires effective assistance of counsel during plea negotiations.<sup>199</sup> Yet interviews with Pennsylvania public defenders revealed significant variation in attorneys' understanding of the content of the immigration warnings they were required to provide. This varied understanding, in turn, informed whether public defenders engaged in immigration-conscious advocacy in plea bargaining.

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Public Defender (Apr. 4, 2023) (clarifying how public defenders in that county advise noncitizen clients to consult with immigration attorneys and, where criminal and immigration attorneys do connect, it is generally through a phone call only); Interview with Public Defender from Lebanon County (June 19, 2023) (stating that generally, attorneys tell noncitizen clients that they do not specialize in immigration law and the clients should consult with an immigration attorney before their cases end); Interview with Public Defender from Butler County (Dec. 5, 2023) (describing how they advise clients to be aware of immigration consequences, but that they do not have the resources to provide more specific advice about the ramifications for an immigration case).

<sup>197</sup> One participant described how most of their clients are undocumented, which leaves them with the feeling that there is not much that can be done for them in an immigration sense. As a result, the participant focuses on the client's criminal charges first, and worries about any immigration consequences second. Interview with De-identified Participant (Mar. 28, 2023). Another participant described how it is less important for undocumented individuals to have immigration consultations, though such consultations can be extremely useful to permanent residents and those with pending citizenship applications. Interview with Public Defender from Lancaster County (Mar. 20, 2023).

<sup>198</sup> See Interview with Public Defender from Lebanon County (June 19, 2023) (describing how the participant feels like no amount of training would make them confident enough to tell a client that they will be "fine" if convicted of a given crime). This participant did say that having a "cimmigration" expert on staff would be helpful during the consultation *and* plea negotiation stage.

<sup>199</sup> 559 U.S. at 373.

Many attorneys described *Padilla* obligations in Pennsylvania as “bare bones.”<sup>200</sup> While every participant took *Padilla* and the responsibilities that come along with it seriously,<sup>201</sup> several participants understood that in Pennsylvania, if you generally advise your client that a certain plea *could* result in immigration consequences, then you have fulfilled your responsibilities under state case law.<sup>202</sup> However, of the attorneys who viewed their obligations under *Padilla* most narrowly, many also felt that those obligations were insufficient.<sup>203</sup>

Many of the attorneys who described Pennsylvania’s *Padilla* obligations as limited also expressed a desire for additional resources to provide their clients with more specific information about how certain convictions would, or could, affect their immigration status. For instance, one attorney who thought that Pennsylvania’s standards were insufficient believed *Padilla* imposed an obligation on attorneys to take, or at least attempt to take, mitigating steps to ensure a client is not deportable or inadmissible following a guilty plea.<sup>204</sup> Another attorney believed criminal defense attorneys should be required to have more detailed knowledge of immigration law generally, as well as of the specific consequences that could arise from specific

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<sup>200</sup> Interview with Public Defender from Lancaster County (Mar. 20, 2023); *see also* Interview with Public Defender from Allegheny County (Mar. 27, 2023) (*Padilla* is “so weak”); Interview with De-identified Participant (Apr. 11, 2023) (describing *Padilla*’s requirements as the “bare minimum”).

<sup>201</sup> *See, e.g.*, Interview with Public Defender from Cumberland County (Mar. 31, 2023) (expressing views that immigration is perhaps the most serious collateral consequence, because it could result in a noncitizen being deported, facing harm in their home country, and/or being separated from their family members).

<sup>202</sup> Interview with Public Defender from Monroe County (Apr. 17, 2023) (describing how *Padilla* suggests that attorneys need a working knowledge of immigration law, but the Pennsylvania Superior Court has indicated it is sufficient to warn clients generally about the possibility of immigration consequences and that the individual should seek immigration counsel); Interview with Public Defender from Berks County (Apr. 4, 2023) (noting that defense attorneys need not advise a client about exactly how specific case decisions will affect them in the future, even if an attorney must know, generally speaking, what types of charges will impact a noncitizen’s immigration status. This attorney described how simply telling a client that he or she “could be deported” for a given conviction is insufficient).

<sup>203</sup> *See, e.g.*, Interview with Public Defender from Allegheny County (Mar. 27, 2023) (describing the *Padilla* standard as “weak”); Interview with Public Defender from Philadelphia (Mar. 28, 2023) (observing that *Padilla*’s obligations are more expansive than the courts have interpreted them to be); Interview with Public Defender from Monroe County (Apr. 17, 2023) (opining that *Padilla* should be more expansive and that attorneys must be aware of the immigration consequences their clients may face or attempt to discern them through research).

<sup>204</sup> Interview with Public Defender from Allegheny County (Mar. 27, 2023).

convictions.<sup>205</sup> Still other attorneys expressed a desire to do more than provide just general warnings, but lamented the lack of resources that prevented them from doing so.<sup>206</sup>

Conversely, some attorneys expressed concern about the implications of a more expansive reading of *Padilla*. A participant from Erie County noted their hesitation about increasing the obligations of public defenders who are already overburdened by high caseloads, busy schedules, and a difficult work-life balance.<sup>207</sup> Many attorneys also maintained that they are criminal attorneys and not immigration attorneys, and thus should not be tasked with interpreting the finer details of immigration law.<sup>208</sup>

On the other hand, some attorneys opined that *Padilla* is more expansive than many believe. The participant representing Montgomery County stated that *Padilla* “terrifies us” because it is more far-reaching than many attorneys in Pennsylvania presume.<sup>209</sup> They described feeling that attorneys have an obligation to remain up-to-date about immigration law and be definitive in their advice; this is frightening, they noted, because it assumes an expertise that is difficult for criminal counsel to possess on their own.<sup>210</sup> This participant likened asking criminal defense attorneys to be experts on immigration law to an orthopedic surgeon delivering a baby; there is a difference between being an orthopedist and being an OBGYN.<sup>211</sup>

The participants from Lehigh, Philadelphia, and Allegheny Counties also described reading *Padilla* broadly.<sup>212</sup> An attorney from Lehigh County understood *Padilla* as requiring attorneys to have a general understanding of immigration statuses, research the specific immigration consequences that could result from a criminal conviction, and then assist their clients in making informed decisions.<sup>213</sup> This attorney believed that public defenders must advise clients about whether and how the immigration consequences of a

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<sup>205</sup> Interview with De-identified Participant (Mar. 24, 2023) (stating that defense attorneys should have the same knowledge about criminal consequences as they have about immigration consequences); Interview with Public Defender from Lancaster County (Mar. 20, 2023) (describing the holding in *Padilla* as “unhelpful,” noting that it has prompted many questions from defense attorneys, and reporting that counsel must be prepared to provide answers to their clients about which case options will produce the best results and why).

<sup>206</sup> Interview with De-identified Participant (Mar. 28, 2023).

<sup>207</sup> Interview with Public Defender from Erie County (Apr. 11, 2023).

<sup>208</sup> *Id.*; Interview with Public Defender from Lehigh County (Apr. 17, 2023); Interview with Public Defender from Lebanon County (June 19, 2023).

<sup>209</sup> Interview with Public Defender from Montgomery County (Mar. 30, 2023).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *See, e.g.*, Interview with Public Defender from Lehigh County (Apr. 17, 2023).

<sup>213</sup> *Id.*

criminal conviction will make one deportable and/or bar them from returning to the United States after a voluntary trip abroad or forced removal.<sup>214</sup> Similarly, the participant from Allegheny County stated that *Padilla* requires her to inform clients of immigration consequences *and also* determine whether there are mitigating steps she can take to ensure a client does not become deportable or inadmissible.<sup>215</sup> In Philadelphia, the participant described how their office has defined *Padilla*'s obligations to mean that you must provide accurate advice on every charge and attempt to avoid any adverse immigration consequences.<sup>216</sup> This participant also believed *Padilla* requires defense attorneys to negotiate plea bargains that mitigate negative immigration consequences.<sup>217</sup>

## 2. *Vague Advice Results in Limited Advocacy*

Confusion about *Padilla*'s advice requirements informs how Pennsylvania counties provide resources for this issue at the local level. It also informs how and whether attorneys engage in immigration-conscious plea advocacy. The Sixth Amendment requires effective assistance of counsel during plea negotiations.<sup>218</sup> *Padilla* clarified that for noncitizens, that means defense counsel must both advise *and* advocate for their clients through plea bargaining, based on their understanding of potential immigration consequences and how to best mitigate their client's concerns.<sup>219</sup>

Defense lawyers in Pennsylvania who feel they have fulfilled their *Padilla* obligations by providing a general warning and/or referral to an immigration attorney are unlikely to possess sufficient information to effectively negotiate a plea or create a sentence structure that reduces potential immigration harms. They are less likely to research the actual consequences of a given charge, to inquire about an individual's specific immigration status, their history in and ties to the United States, and the potential forms of immigration relief for which they may be eligible. Without this information, defense attorneys cannot have even the "most rudimentary understanding of the deportation consequences of a particular criminal

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<sup>214</sup> *Id.* This attorney also believed public defenders should advise clients to speak to an immigration attorney about how to navigate their individual situations.

<sup>215</sup> Interview with Public Defender from Allegheny County (Mar. 27, 2023).

<sup>216</sup> Interview with Public Defender from Philadelphia (Mar. 28, 2023).

<sup>217</sup> *Id.*

<sup>218</sup> 559 U.S. at 366–67; *see* 566 U.S. at 141 (holding the Sixth Amendment requires effective assistance of counsel during plea negotiations); 566 U.S. at 156 (finding a Sixth Amendment violation when individual proceeded to trial based on defense counsel's erroneous advice to reject a plea).

<sup>219</sup> 559 U.S. at 357–73.

offense [to] be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation . . . .<sup>220</sup>

All the defense participants in this study were very dedicated to their clients and understood the gravity of immigration consequences for the noncitizens they represented. Many also felt burdened by the lack of resources available to them, as well as the complexities of navigating a completely distinct area of law. Some expressed concern about being able to zealously advocate for their client if they do not understand the specific immigration consequences of a given disposition. Others appeared to rely on Pennsylvania Superior Court decisions suggesting that mere general warnings and referrals to private immigration attorneys may be sufficient—even when a more conclusive answer is readily available. Few seemed to acknowledge that lacking a detailed understanding of their client's situation and the specific immigration consequences they faced hindered their ability to be effective attorneys during plea negotiations.

It is unrealistic to expect public defenders to fulfill additional constitutional requirements without additional resources. This research has shown the importance of continuing education and increased funding for public defense offices to ensure attorneys can consistently provide immigration-conscious advice and plea advocacy to noncitizen clients across the state. The amount and quality of advice a noncitizen client receives about the immigration consequences of a given offense should not vary based on the county in which they reside or in which they are charged with a crime. Instead, Pennsylvania should provide sufficient resources so that all counties can provide the same level of detailed advice and counsel to each noncitizen in criminal court proceedings. Anything less results in unequal access to the constitutional right to effective assistance of counsel.<sup>221</sup> Further, the Commonwealth and counties must provide adequate resources for public defenders to comply with prevailing professional standards and fulfill both the advice and plea advocacy prongs of *Padilla*. Failure to do so results in public defenders providing constitutionally inadequate representation.

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<sup>220</sup> *Id.* at 373; *see e.g.*, Interview with Public Defender from Butler County (Dec. 5, 2023) (describing how with more resources, they would be able to better advocate for clients to circumvent immigration consequences during plea negotiations).

<sup>221</sup> Funding structures that result in violations of state and federal constitutional rights can be subject to legal challenges. For example, in February of 2023, a Pennsylvania judge found that Pennsylvania's education funding structure is unconstitutionally inequitable and must be reformed. *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 2023 WL 4285737 (Pa. Commw., 2023).



#### D. COMMON MISCONCEPTIONS AMONG PUBLIC DEFENDERS

In addition to wide variation in practices for identifying noncitizen clients and providing immigration warnings and advocacy, the research team identified several common misconceptions about the immigration system and the existing resources available.<sup>222</sup> These misconceptions included:

- A conviction for a crime that is lower than a misdemeanor in the third degree will not affect your immigration status; and
- There is not much a public defender can do help individuals without lawful immigration status avoid immigration consequences as a result of any convictions.

These misconceptions demonstrate an incomplete understanding of the immigration system and a failure of the criminal defense and immigration bar to effectively collaborate in ways that benefit the communities they serve. These misconceptions are also dangerous if they inform defense practices and attorney representation of noncitizen clients. We will unpack and clarify each.

##### 1. *False: Anything Below a Third-Degree Misdemeanor Will Not Affect a Person's Immigration Status*

One common misconception that arose during interviews was that a conviction for anything below a misdemeanor in the third degree will not impact a person's immigration status.<sup>223</sup> In Pennsylvania, a misdemeanor in the third degree carries a maximum sentence of not more than one year in jail.<sup>224</sup> Some common examples of third-degree misdemeanors include: disorderly conduct (in some circumstances),<sup>225</sup> loitering and prowling at

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<sup>222</sup> For example, the Defender Association of Philadelphia maintains and updates a chart detailing the immigration consequences of many Pennsylvania criminal offenses. *Guide to Representing Non-Citizen Criminal Defendants in Pennsylvania*, DEF. ASS'N. OF PHILA. (Sept. 2023), <https://www.immigrantdefenseproject.org/wp-content/uploads/Guide-to-Representing-Non-Citizen-Criminal-Defendants-in-Pennsylvania-September-2023-Searchable.pdf> [https://perma.cc/6R5J-JUH2]. That chart is publicly available, but some attorneys indicated that they had not heard of the resource or did not have access to it. This highlights the difficulties involved in training criminal attorneys throughout the Commonwealth to (1) access available resources that identify the immigration consequences of Pennsylvania crimes; and (2) effectively utilize those resources once they have them in hand.

<sup>223</sup> The classes of offenses in Pennsylvania's criminal code are found at 18 PA. STAT. AND CONS. STAT. ANN. § 106 (West 2023). The sentencing provisions are found at 18 PA. STAT. AND CONS. STAT. ANN. §§ 1101-05 (West 2023).

<sup>224</sup> 18 PA. STAT. AND CONS. STAT. ANN. § 1104(3) (West 2023).

<sup>225</sup> 18 PA. STAT. AND CONS. STAT. ANN. § 5503(b) (West 2023).

nighttime,<sup>226</sup> and debt pooling.<sup>227</sup> Even more minor offenses, called summary offenses, carry a maximum penalty of ninety days of jail time, though such convictions often result only in a fine.<sup>228</sup>

Many public defenders were familiar with aspects of immigration law, including a section of the INA stating that a CIMT that is committed within five years of entry to the United States and is “punishable by a year or more” is a ground of deportability.<sup>229</sup> Many non-immigration attorneys latch onto this one-year limitation and believe that, because a third-degree misdemeanor carries a maximum penalty of not more than a year in jail, and a summary offense carries an even smaller penalty, the client is “safe” for immigration purposes. However, while such convictions may not trigger immigration consequences that hinge on sentence length, they could still impact deportability, inadmissibility, and/or ineligibility for immigration relief—in other words, serious and life-altering immigration consequences.<sup>230</sup>

For example, retail theft in Pennsylvania, as defined by § 3929 in Title 18 of the Pennsylvania Consolidated Statutes, can constitute either a summary offense, misdemeanors of various degrees, or a felony.<sup>231</sup> Retail theft is a summary offense when “the offense is a first offense and the value of the merchandise is less than \$150.”<sup>232</sup> Generally, indigent individuals have a constitutional right to counsel for summary offenses when there is an actual likelihood that they will be imprisoned.<sup>233</sup> But because it is commonly

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<sup>226</sup> 18 PA. STAT. AND CONS. STAT. ANN. § 5506 (West 2023).

<sup>227</sup> 18 PA. STAT. AND CONS. STAT. ANN. § 7312(a) (West 2023).

<sup>228</sup> 18 PA. STAT. AND CONS. STAT. ANN. § 1105 (West 2023); *Summary Offenses in Pennsylvania*, COMMUNITY LEGAL SERVICES (Apr. 22, 2014), <https://clsphila.org/employment/summary-offenses-in-pennsylvania/> [<https://perma.cc/YN55-UUGK>].

<sup>229</sup> 8 U.S.C. § 1227(2)(A)(i).

<sup>230</sup> Conviction of two or more CIMTs, regardless of the sentence imposed, is grounds for deportability. 8 U.S.C. § 1227(a)(2)(A)(ii). A conviction, or even a mere admission, of a CIMT can be grounds for inadmissibility unless it falls under the petty offense exception. 8 U.S.C. § 1182(a)(2)(A)(i)(I). A conviction of or admission to a CIMT can also automatically bar individuals from certain forms of relief and subject them to mandatory immigration detention. *See Brady, supra* note 50.

<sup>231</sup> 18 PA. STAT. AND CONS. STAT. ANN. § 3929(b) (West 2023). A summary offense for retail theft is defined as “[T]ak[ing] possession of, carr[ying]away, transfer[ring] or caus[ing] to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof.” 18 PA. STAT. AND CONS. STAT. ANN. 3929(a)(1) (West 2023).

<sup>232</sup> 18 PA. STAT. AND CONS. STAT. ANN. § 3929(b)(1)(i) (West 2023).

<sup>233</sup> *See* PA. R. CRIM. P. 122 (describing how counsel shall be appointed in all summary cases for indigent individuals when there is a likelihood that imprisonment will be imposed).

understood that no jail sentence will be imposed for summary retail theft, individuals charged with this offense are typically not appointed counsel.<sup>234</sup>

However, in *Matter of Diaz-Lizarraga*, the Board of Immigration Appeals (“BIA”) found that a retail theft offense qualifies as a CIMT if it “embodies a mainstream, contemporary understanding of theft, which requires an intent to deprive the owner of his property either permanently or under circumstances where the owner’s property rights are substantially eroded.”<sup>235</sup> Although Pennsylvania’s Criminal Code definition of “deprive” includes withholding of property for an extended period to appropriate its value (whether or not doing so constitutes a permanent taking), *Diaz-Lizarraga* held that theft offenses can constitute CIMTs even if they involve less than a permanent deprivation.<sup>236</sup> While advocates could argue that a person found guilty of retail theft did not have the intent to permanently deprive or substantially erode the property rights of another, under *Diaz-Lizarraga* a Pennsylvania retail theft conviction is likely to constitute a CIMT.<sup>237</sup>

Similarly, Pennsylvania penalizes simple possession of thirty grams or less of marijuana as an ungraded misdemeanor.<sup>238</sup> This offense is punishable by a maximum sentence of thirty days imprisonment or a fine not exceeding \$500 (or both), but frequently only carries a sentence of probation. A conviction under this statute is not a CIMT or an aggravated felony but is likely a controlled substance offense that poses other potential immigration problems.<sup>239</sup> Controlled substance offenses are both grounds of inadmissibility and deportability.<sup>240</sup> While there is a one-time, first-offense exception for possession of thirty grams or less of marijuana under the grounds of deportability, the grounds of inadmissibility do not include any similar exceptions.<sup>241</sup>

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<sup>234</sup> See *Conversations with Practitioners in Philadelphia and Surrounding Counties* (Apr. 2023); PA. R. CRIM. P. 122; 407 U.S. at 36–37 (holding that indigent individuals have a constitutional right to representation in all cases where they may face imprisonment, including misdemeanor or petty offense cases). Over the years, the case law relating to the right to counsel has evolved to reflect an “actual imprisonment” standard, not just a “threat of imprisonment” standard. See 440 U.S. at 373–74 (holding that the accused had no right to state-appointed counsel because the sole sentence actually imposed was a \$50 fine, even though the governing statute authorized a sentence of up to one year).

<sup>235</sup> 26 I. & N. Dec. 847, 854 (B.I.A. 2016).

<sup>236</sup> *Id.* at 855; see also *Thakker v. Att’y Gen. U.S.*, 837 F. App’x 75, 79 (3d Cir. 2020).

<sup>237</sup> 26 I. & N. Dec. at 854.

<sup>238</sup> 35 PA. STAT. AND CONS. STAT. § 780-113(a)(31) (West 2014).

<sup>239</sup> 8 U.S.C. § 1182(a)(2)(A)(i)(II) (controlled substance offense for inadmissibility); 8 U.S.C. § 1227(a)(2)(B) (controlled substance offenses for deportability).

<sup>240</sup> 8 U.S.C. § 1182(a)(2)(A)(i)(II); 8 U.S.C. § 1227(a)(2)(B).

<sup>241</sup> 8 U.S.C. § 1227(a)(2)(B)(i).

Thus, there are no bright line rules about whether a charge will or will not pose immigration consequences if it is less than a third-degree misdemeanor. How and whether a given charge will impact a noncitizen requires an individualized assessment of their specific immigration status, their prior criminal history, and their potential defenses to deportation.

2. *False: There Is Not Much a Public Defender Can Do to Help An Undocumented Noncitizen Avoid Immigration Consequences*

Another common misconception is that there is nothing that a defense attorney can do to help a person who does not have immigration status. Criminal convictions can constitute grounds for deportability or inadmissibility, and ICE can, and often does, initiate removal proceedings when problematic convictions occur. Convictions can also bar certain defenses against removal. For undocumented noncitizens who are removable for lack of immigration status alone, a criminal arrest may bring that person to ICE's attention and proximately cause the initiation of removal proceedings. But while it may be true that there is little defense attorneys can do to avoid *initiation* of removal proceedings for undocumented clients, knowledge of the immigration consequences of criminal convictions is still critical to preserving the individual's eligibility for *relief* from removal.

Given the complex nature of immigration law, it is difficult for those who have not practiced in that field to understand the multitude of ways in which *any* contact with the criminal legal system can trigger immigration consequences. Yet few public defense offices in Pennsylvania have reliable access to immigration counsel.<sup>242</sup> This section will describe several examples of how criminal convictions can impact undocumented noncitizens and the role defense counsel can play in mitigating these consequences.

First, criminal convictions can render a person ineligible for certain defenses to removal. For example, to apply for "cancellation of removal"—a common defense to removal for undocumented noncitizens in deportation proceedings who are long-time residents with a spouse, children, or parents who are United States citizens or lawful permanent residents—one must show, among other things, that they have been a person of "good moral character" for the ten years preceding their cancellation application.<sup>243</sup> But many crimes automatically bar individuals from establishing this good moral

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<sup>242</sup> Of the counties that participated in the study, only the Defender Association of Philadelphia had a part-time immigration lawyer on staff.

<sup>243</sup> 8 U.S.C. § 1229(b).

character, including: conviction of or admission to a CIMT, a controlled substance violation, incarceration for 180 days or more, and conviction of two or more offenses with a combined sentence of five or more years in jail.<sup>244</sup>

Similarly, convictions can impact an individual's eligibility for asylum.<sup>245</sup> Even if a noncitizen faces certain persecution in their home country, individuals who are convicted of a "particularly serious crime"—which includes any conviction for an aggravated felony—are barred from receiving asylum.<sup>246</sup> While this could be a conviction for something as serious as murder, it also could be a conviction under Pennsylvania law for theft by unlawful taking if a person was sentenced to a year or more of imprisonment.<sup>247</sup>

Second, criminal convictions can have future consequences that are not immediately apparent. Noncitizen clients who later marry United States citizens or lawful permanent residents may be barred from adjusting their status to become a lawful permanent resident or naturalizing to become a United States citizen due to prior criminal contact.<sup>248</sup> And even if a noncitizen client agrees to deportation, unlawful reentry into the country after a crime constituting an "aggravated felony" can result in severe federal criminal penalties.<sup>249</sup>

Finally, prior contact with the criminal legal system can make some individuals subject to mandatory detention in immigration custody if they are arrested by ICE.<sup>250</sup> People under mandatory detention are not entitled to a bond hearing (the equivalent of a bail hearing in criminal court) and must remain in custody during the entirety of their removal proceedings, which can last for months or even years.<sup>251</sup> Even some minor CIMTs or

<sup>244</sup> 8 U.S.C. §§ 1101(f)(3), (f)(7).

<sup>245</sup> 8 U.S.C. § 1158(b). Asylum is available to undocumented individuals in removal proceedings, among other noncitizens. It is granted to applicants who meet the international definition of a "refugee," which is defined as a person who is unable or unwilling to return to his or her home country, and cannot obtain protection in that country, due to past persecution or a well-founded fear of being persecuted in the future on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 U.S.C. § 1101(a)(42)(A) (defining "refugee").

<sup>246</sup> 8 U.S.C. § 1158(b)(2)(B)(i)-(ii) (stating that, for asylum purposes, a felony or misdemeanor that qualifies as an aggravated felony is a "particularly serious crime").

<sup>247</sup> 18 PA. STAT. AND CONS. STAT. § 3921(a) (West 2023); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007); *K.A. v. Att'y Gen. U.S.*, 997 F.3d 99 (3d Cir. 2021).

<sup>248</sup> 8 U.S.C. § 1255(c).

<sup>249</sup> 8 U.S.C. § 1326(b).

<sup>250</sup> 8 U.S.C. § 1226(c).

<sup>251</sup> *Is My Client Subject to Mandatory Detention? How Advances in ICE Hold Policies Will Reduce Those Subject to Mandatory Detention*, IMMIGRANT LEGAL RES. CTR. (2014),

drug convictions can trigger mandatory detention.<sup>252</sup> Avoiding convictions that trigger mandatory immigration detention improves a client's ability to remain with family during their removal proceedings, find a lawyer to represent them, and, ultimately, secure relief from removal.<sup>253</sup> Defense attorneys thus have a significant role to play in recognizing and avoiding convictions that result in automatic bars to defenses to removal, preserving eligibility for future immigration benefits, and increasing the likelihood of relief from removal.

These significant misconceptions among public defenders reveal the importance of increased training about “cimmigration” matters, as well as the need for additional resources to assist defense attorneys in advocating for their noncitizen clients. Public defenders do difficult work in an often hostile and underfunded environment. The practices and misconceptions described above demonstrate a failure at both the state and county levels to fund necessary resources for indigent public defense.

#### E. POST-CONVICTION RELIEF IN PENNSYLVANIA

Interviews with private and public defense counsel and review of Pennsylvania case law highlighted how Pennsylvania's failure to provide immigration resources to public defenders up front cannot be adequately redressed during post-conviction review. In Pennsylvania, the only mechanism for challenging a prior conviction based on a constitutional violation—including a *Padilla* violation or any claim of ineffective assistance of counsel—is through a petition for post-conviction relief.<sup>254</sup> But Pennsylvania's Post Conviction Relief Act (PCRA) has strict custodial and temporal limitations that make obtaining such relief, especially for *Padilla* violations, exceedingly difficult. Some public defense offices do not provide

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[https://www.ilrc.org/sites/default/files/resources/mandatory\\_detention\\_ice\\_hold\\_policy\\_handout.pdf](https://www.ilrc.org/sites/default/files/resources/mandatory_detention_ice_hold_policy_handout.pdf) [<https://perma.cc/2RFC-VDK9>].

<sup>252</sup> *Id.*; 8 U.S.C. § 1226(c).

<sup>253</sup> Ingrid Eagly & Steven Shafer, *Special Report: Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/access\\_to\\_counsel\\_in\\_immigration\\_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf) [<https://perma.cc/DMF8-UKWG>] (describing how only 14% of detained immigrants obtained legal counsel as compared with two thirds of non-detained immigrants, and that detained immigrants with representation were 11 times more likely to pursue an application for relief from deportation than those without a lawyer and twice as likely to obtain relief than those without a lawyer).

<sup>254</sup> 42 PA. STAT. AND CONS. STAT. ANN. § 9543 (West 2018); *Descardes*, 136 A.3d at 503; Thomas M. Place, *The Pennsylvania Post-Conviction Relief Act—Recent Developments*, 89 PA. BAR ASS'N Q. 178 (2018) (describing how Pennsylvania's Post Conviction Relief Act establishes the sole means of obtaining state relief following conviction and sentencing).

direct assistance with post-conviction relief,<sup>255</sup> while others assist only when they are appointed as counsel.<sup>256</sup> Interviews with these public defenders and with private defense attorneys revealed the restrictive nature of PCRA and the common grounds for bringing immigration-related PCRA claims.<sup>257</sup>

In Pennsylvania a person is generally only eligible for post-conviction relief while under some form of state or county custody; those who have finished their period of incarceration, are no longer in state custody, and/or who have completed their probation and parole can no longer obtain relief under the PCRA.<sup>258</sup> This means that if a person files a post-conviction relief petition while detained in criminal custody, but subsequently completes their period of incarceration and/or supervision before their claim is adjudicated, that person is no longer eligible for relief.<sup>259</sup> The PCRA's statute of limitations provides a second restrictive barrier: petition for post-conviction relief in Pennsylvania must be filed within one year of the date of a final judgment.<sup>260</sup> This timeline is stricter than most states. In New Jersey, for example, individuals have five years from final judgement to seek post-conviction relief,<sup>261</sup> and in Maryland, a person has ten years from the date the sentence was imposed.<sup>262</sup>

Strict custodial requirements and temporal limitations are ill-suited to claims of *Padilla* violations, as many noncitizens will not become aware of

<sup>255</sup> See Interview with Public Defender from Philadelphia (Mar. 28, 2023) (describing how the Defender Association generally does not handle immigration-related PCRA claims).

<sup>256</sup> Interview with Public Defender from York County (Mar. 14, 2023); Interview with Public Defender from Lebanon County (June 19, 2023); Interview with Public Defender from Centre County (July 28, 2023).

<sup>257</sup> See Interview with Private Defense Attorney from York County (Apr. 10, 2023) (describing how this has changed due to intervening case law); Interview with Private Defense Attorney from Philadelphia (June 2, 2023) (describing how he brings PCRA petitions when criminal counsel failed to advocate for an immigration neutral alternative, even though one was available).

<sup>258</sup> 42 PA. STAT. AND CONS. STAT. ANN. § 9543(a)(1) (West 2018).

<sup>259</sup> See *id.* (eligibility for relief is determined at the time relief is granted); *Commonwealth v. Fields*, 197 A.3d 1217, 1223 (Pa. Super. Ct. 2018).

<sup>260</sup> 42 PA. STAT. AND CONS. STAT. ANN. § 9545 (West 2018). Limited exceptions to the one-year statute of limitations include (1) failure to raise a claim previously due to government interference in violation of the U.S. Constitution or the Constitution or laws of Pennsylvania; (2) the presence of facts that were previously unknown and not obtainable with due diligence; or (3) the existence of a newly recognized constitutional right that has been held to be retroactive.

<sup>261</sup> See N.J. STAT. ANN. § 3:22-1 (West 2023) (superior court); N.J. STAT. ANN. § 7:10-2 (West 2023) (municipal court); see also VA. CODE ANN. § 8.01-654 (West 2021) (providing a person with two years from their trial court final judgment or one year from direct appeal, whichever is later, to seek post-conviction relief); D.C. CODE ANN. § 23-110 (West 2009) (placing no statute of limitations on those seeking relief).

<sup>262</sup> MD. CODE ANN., CRIM. PROC. § 7-101 (West 2013) *et seq.* (allowing for filing ten years from the date the sentence was imposed, so long as that was after October 1, 1995).

their defense counsel's inadequate *Padilla* advice until *after* they serve their state criminal penalties.<sup>263</sup> What is more, the immigration consequences of criminal convictions themselves have no statute of limitations. A deportable criminal conviction remains so indefinitely, and noncitizens can be—and often are—placed into removal proceedings years or decades following a problematic criminal case outcome.

Further, under the PCRA, individuals are only able to bring challenges to convictions as Pennsylvania law defines them.<sup>264</sup> In some cases, admission to sufficient elements or facts of a crime can trigger immigration consequences, even if those admissions do not result in a conviction under Pennsylvania criminal law. Nor do expungements cure convictions; even convictions expunged via state rehabilitation initiatives still constitute “convictions” for immigration purposes.<sup>265</sup> In these circumstances, PCRA petitions based on *Padilla* violations are of no use, since an expunged conviction is no longer a “conviction” under state law.

The difficulty in successfully remedying prior ineffective assistance of counsel in Pennsylvania makes it all the more important for noncitizens to have access to effective and accurate *Padilla* advice and advocacy in the first place. Constitutionally adequate representation is what *Padilla* requires:

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the “mercies of incompetent counsel.” To satisfy this responsibility, we now hold that counsel must

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<sup>263</sup> Most traditional post-conviction relief mechanisms are ill-suited vehicles for *Padilla* relief because they are tailored for individuals who wish to challenge their ongoing incarceration or supervision. See Gray Proctor & Nancy J. King, *Post Padilla: Padilla's Puzzles for Review in State and Federal Courts*, 23 FED. SENT'G REP. 239, 239–43 (2011) (describing the procedural hurdles, filing deadlines, and bars to successive petitions that “allow courts to dispose of many *Padilla* claims without reaching the merits”); Greta Wiessner, *Ineffective Assistance of Padilla: Effectuating the Constitutional Right to Criminal Counsel*, 167 U. PA. L. REV. 463, 478–82 (2019) (explaining the limitations of habeas corpus petitions, post-conviction relief statutes, direct appeal, and writs of coram nobis in raising claims of ineffective assistance of counsel under *Padilla*).

<sup>264</sup> Relief under the PCRA is only available for convictions or sentences that resulted from a violation of the U.S. or State Constitutions, ineffective assistance of counsel, inducement, improper obstruction by government officials, previously unavailable exculpatory evidence, imposition of a sentence greater than the lawful maximum, or a proceeding by a tribunal without jurisdiction. 42 PA. STAT. AND CONS. STAT. ANN. § 9543(a)(2) (West 2018).

<sup>265</sup> Immigration law only recognizes post-conviction relief granted on constitutional grounds. Plea vacatur, rehabilitation measures, and sentence modifications done purportedly for immigration benefits generally have no impact. See *Matter of Pickering*, 23 I. & N. Dec. 621, 624 (B.I.A. 2003) (finding vacated prior state court convictions are still convictions for immigration purposes if vacated solely “for reasons unrelated to the merits of the underlying criminal proceedings.”); *Matter of Thomas & Matter of Thompson*, 27 I. & N. Dec. 674 (A.G. 2019).



inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.<sup>266</sup>

Overall, the practices described by participants in this study demonstrated a strong commitment to responding to *Padilla's* mandate, but insufficient public resources hampered them from doing so effectively. As described *supra*, many counties currently provide only some form of general advice to noncitizens and/or do not have a formal office procedure for how to provide immigration warnings. While general warnings may be upheld as sufficient by Pennsylvania state courts in post-conviction relief petitions, most jurisdictions in the United States would find this level of *Padilla* advice unconstitutional. Further, the failure of counties and the Commonwealth to provide the resources required for public defenders to give detailed and accurate *Padilla* advice necessarily prevents attorneys from fulfilling their constitutional obligations to effectively plea bargain. It is difficult to imagine how a lawyer who does not have the tools, resources, or time to fully understand their client's immigration status and the immigration risks they face can be effective in plea negotiations or assist their clients in making informed decisions.

#### IV. PENNSYLVANIA PROSECUTORS' CONSIDERATION OF IMMIGRATION STATUS

Understanding how defense attorneys approach *Padilla* advice in any jurisdiction would be incomplete without understanding the role prosecutors play in cases involving noncitizens. As discussed *supra*, prosecutors play an integral role in determining whether someone will be subject to the immigration removal system.<sup>267</sup> In criminal court, both at the federal and state level, more than 90 percent of convictions are the result of guilty pleas rather than trials.<sup>268</sup> Because the overwhelming majority of cases are resolved by plea bargains, and because prosecutors have significant discretion in charging, prosecutors wield powerful influence in the immigration outcomes for an individual accused of a crime. And defense counsel's ability and willingness to heed *Padilla's* call to "plea bargain

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<sup>266</sup> 559 U.S. at 374.

<sup>267</sup> Ingrid Eagly, *Immigrant Protective Policies in Criminal Justice*, 37 IMMIGR. & NAT'Y L. REV. 279, 299 (2016).

<sup>268</sup> Ram Subramanian et. al., *In the Shadows: Review of the Research on Plea Bargaining*, VERA INST. OF JUST., iii (Sept. 2020).

creatively” depends largely on the prosecutor’s receptiveness to such negotiation.

Interviews with Pennsylvania prosecutors revealed significant variation in how different district attorney offices consider immigration status during charging, plea negotiations, and sentencing.<sup>269</sup> Some offices have explicit policies governing how assistant district attorneys should consider an individual’s immigration status. Others have no formal policies, leaving individual assistant district attorneys with significant discretion. This section highlights key takeaways from interviews with prosecutors throughout Pennsylvania, including whether and how immigration status is considered as a mitigating, neutral, or aggravating factor and how prosecutors consider immigration status when determining eligibility for pretrial diversionary programs.

#### A. IMMIGRATION STATUS: MITIGATING, NEUTRAL, OR AGGRAVATING FACTOR

Following the Supreme Court’s decision in *Padilla*, there has been ongoing discussion around whether (and if so, how) prosecutors should consider immigration status during plea negotiations. Many organizations and individuals have pushed for district attorney offices to require line prosecutors to consider immigration consequences, offer plea bargains that mitigate those consequences, and better protect noncitizens from the disproportionate penalty of deportation in the interest of justice.<sup>270</sup>

Because of the highly localized system of prosecution in Pennsylvania, we sought to better understand different counties’ prosecution practices and how district attorneys in each locality considered immigration status as a mitigating, neutral, or aggravating factor during plea negotiations. Early in our interviews, it became apparent that many offices did not have any formal policies in place for how, if, or when to consider immigration status in plea negotiation. To address these issues, our team asked participants a series of questions on several topics that included but were not limited to: (1) which

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<sup>269</sup> As of the date of publication, we completed interviews in 2023 with prosecutors from nine counties. The information in this section is from 2023 and is subject to change with new elected district attorneys. Further research is needed to better understand how each office functions across the Commonwealth.

<sup>270</sup> Armstrong & Cahn, *supra* note 109 (advocating for office-wide policies that create flexible guidelines that allow consideration of immigration consequences in criminal cases, weigh the individualized circumstances of the accused, and evaluate the impact of that person’s deportation on their community).

factors prosecutors consider during plea negotiations; (2) how district attorneys determine eligibility for certain diversion programs; and (3) how prosecutors feel personally about considering immigration consequences as part of a noncitizen's penalty in criminal proceedings.

### 1. *Mitigating Factor*

While few district attorney offices in Pennsylvania had express policies regarding how to consider immigration status in criminal proceedings, there were several exceptions to this rule. Philadelphia, the city and county with the largest and most diverse immigrant population in the state,<sup>271</sup> was also home to the district attorney office with the most robust policy regarding how to consider immigration status.<sup>272</sup> The Philadelphia District Attorney has a stated policy of “immigration neutrality,” and claims to tailor prosecutions so that noncitizens in criminal court proceedings are not subjected to disproportionately harsh holistic consequences.<sup>273</sup> The District Attorney's Office states that it “believe[s] low-level and nonviolent crimes should not lead to deportation or necessarily risk one's immigration status.”<sup>274</sup> In addition, the Office specifically employs an internal Immigration Counsel who is tasked with evaluating each case involving a noncitizen and determining if there is a just, immigration-neutral outcome that still serves the interests of the Commonwealth and any potential victims.

In an interview for this study, the Immigration Counsel at the Philadelphia District Attorney's Office described some of the small, discretionary steps prosecutors can take to reduce immigration consequences. They noted, for instance, that individuals pleading guilty in Pennsylvania courts must accept a certain statement of facts for which they are found guilty beyond a reasonable doubt; that statement then becomes part of the record of conviction.<sup>275</sup> The Immigration Counsel described how prosecutors can agree to a guilty plea that references only the specific language of a statute, instead of one that involves admitting a certain set of

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<sup>271</sup> More than one out of ten people living in Philadelphia are immigrants. *Profile of foreign-born population in Philadelphia, Pennsylvania*, VERA INST. OF JUST. (2023), <https://www.vera.org/downloads/publications/profile-of-foreign-born-population-philadelphia.pdf> [<https://perma.cc/E9TB-ZAEQ>].

<sup>272</sup> *Safety & Justice: Immigration Counsel*, PHILA. DIST. ATT'YS OFF. (2023), <https://phillyda.org/safety-and-justice/special-cases/immigrant-cases/> [<https://perma.cc/CB7A-SYMZ>].

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> Interview with Immigration Counsel from Philadelphia District Attorney's Office (Mar. 27, 2023).

facts, to reduce the risk of immigration consequences.<sup>276</sup> Then, at sentencing, prosecutors can more specifically address the facts and the means in which they intend to hold a person accountable.<sup>277</sup> This method avoids putting specific factual admissions on the record that immigration authorities may use against a noncitizen in removal proceedings.<sup>278</sup> This is an area where prosecutors have great discretion in crafting a more immigration-neutral plea.

## 2. *Neutral, Aggravating, or Case-By-Case*

Other offices described fewer official policies than Philadelphia, but considered immigration status in extending plea bargains nonetheless. For instance, in Dauphin County, the District Attorney discussed his desire to ensure that a noncitizen does not get a better deal than a citizen, while also striving to prevent unfair deportations for crimes that, in his view, are not serious enough to “warrant[] removal.”<sup>279</sup> His position draws a clear line between violent and non-violent crimes.<sup>280</sup> Generally, almost all plea negotiations, with the exception of very low-level cases in Dauphin, are reviewed personally by the elected District Attorney.<sup>281</sup>

To the contrary, some counties described policies that instructed attorneys to specifically *avoid* consideration of an individual’s immigration status during plea negotiations. For example, in Berks County, while assistant district attorneys are told to analyze every situation on a case-by-case basis, the office generally “want[s] everyone to be treated equally with regard to [their] prosecutions.”<sup>282</sup> Similarly, a prosecutor from Butler County described their willingness to consider an individual’s immigration status or any immigration concerns raised by defense counsel, but said that such issues are generally viewed as neutral factors in plea negotiations.<sup>283</sup> That participant opined that they might be more likely to consider a counteroffer based on immigration concerns if they have a weaker case.<sup>284</sup> Finally, a prosecutor in Lehigh County described his office’s current position

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<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> Interview with District Attorney from Dauphin County (May 17, 2023).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> Interview with Prosecutor from Berks County (Mar. 28, 2023).

<sup>283</sup> Interview with Assistant District Attorney from Butler County (Apr. 4, 2023).

<sup>284</sup> *Id.*

as one in which they do not consider immigration—positively or negatively—in making their plea offers.<sup>285</sup>

Other counties did not have a set policy, and instead described how their broad policy of analyzing every case on a case-by-case basis governed these issues.<sup>286</sup> For instance, in Montgomery County, an assistant district attorney noted that whether an individual's immigration status is considered in plea negotiations—and to what degree—depends on the types of charges involved in the case, the risk the accused poses to the community, and their potential to recidivate.<sup>287</sup> This participant stated that in cases involving undocumented individuals and/or those who are accused of committing violent crimes, lack of status may be an aggravating factor.<sup>288</sup> On the other hand, if the accused has no status but is otherwise hardworking and law-abiding, immigration concerns may serve as a mitigating factor.<sup>289</sup> In Montgomery County, line prosecutors do not need to obtain supervisory approval when making plea offers, implying that each prosecutor has broad discretion in how they handle plea negotiations.<sup>290</sup>

In other counties that did not have a *per se* policy for considering immigration status in one direction or another, participants provided several examples of when immigration status could constitute an aggravating factor in plea negotiations. In Bucks County, for example, an Assistant District Attorney described how immigration status could be an aggravating factor when an individual has been previously deported and/or charged with illegal reentry and is then arrested for the same type of crime.<sup>291</sup>

The methods of “neutrality” or “case-by-case” analysis described in this subsection led to significant variation in prosecution practices among district attorney offices and individual prosecutors in Pennsylvania. An overarching theme from the interviews was a differentiation between violent and non-violent crimes.<sup>292</sup> Furthermore, because of the varied levels of discretion

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<sup>285</sup> Interview with prosecutor from District Attorney from Lehigh County (Apr. 21, 2023).

<sup>286</sup> See Interview with Assistant District Attorney from Montgomery County (Mar. 24, 2023); see also Interview with First Assistant from Cumberland County (Dec. 7, 2023) (describing the general plea approval process in which attorneys must first run the plea by a direct supervisor and then receive sign off from the District Attorney before a plea can go through).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> Interview with Assistant District Attorney from Bucks County (Mar. 21, 2023).

<sup>292</sup> Interview with Assistant District Attorney from Montgomery County (Mar. 24, 2023); Interview with Immigration Counsel from Philadelphia District Attorney's Office (Mar. 27, 2023); Interview with Assistant District Attorney from Dauphin County (May 17, 2023).

afforded to line district attorneys in making plea offers, there is also significant variation in how immigration status is considered by each county and then, within each county, by each individual prosecutor.

## B. NONCITIZEN ELIGIBILITY FOR PRETRIAL DIVERSION PROGRAMS

Prosecutors also displayed varying practices regarding whether immigration status impacted one's eligibility for pretrial diversion programs. Pennsylvania has a pretrial diversion option for first-time offenders called Accelerated Rehabilitative Disposition (ARD), which allows the Commonwealth to suspend prosecution and dismiss charges upon completion of a rehabilitation program.<sup>293</sup> The primary purpose of the ARD program is rehabilitation; when that is achieved, ARD allows for prompt disposition of charges in an efficient and cost-saving manner.<sup>294</sup> The Pennsylvania Supreme Court has issued procedural rules for ARD programs in summary cases, but local judicial districts maintain wide discretion in establishing the administrative requirements for the processing and disposition of matters referred to ARD.<sup>295</sup> Generally, the district attorney is responsible for determining which cases warrant ARD approval.<sup>296</sup>

Our research team hoped to gain a better understanding of noncitizens' eligibility and/or exclusion from ARD programs. Once again, interviews with participants from various district attorney offices revealed widespread variation in how prosecutors determine ARD eligibility. In some counties, one's immigration status has no effect on whether he or she is eligible for ARD.<sup>297</sup> Other counties have indirect restrictions that implicate noncitizens but are not directly targeted at excluding them. In Bucks County, for example, an individual must be licensed (in the United States or elsewhere) at the time they are arrested for driving under the influence (DUI) to qualify for ARD based on that DUI.<sup>298</sup> In other localities, however, prosecutors used

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<sup>293</sup> *County Sentence Walk Through*, PA. OFF. VICTIM SERVS. (2023), [https://pcv.pccd.pa.gov/available-services/Documents/County\\_Walkthrough.pdf](https://pcv.pccd.pa.gov/available-services/Documents/County_Walkthrough.pdf) [<https://perma.cc/ZA6Q-H3MU>].

<sup>294</sup> Pa. R. Crim. P. ch. 3, *Committee Introduction to Chapter 3*.

<sup>295</sup> *Id.*

<sup>296</sup> *Commonwealth v. Lutz*, 495 A.2d 928, 932 (Pa. 1985).

<sup>297</sup> See Interview with Assistant District Attorney from Montgomery County (Mar. 24, 2023) (describing how the office typically avoids considering immigration status when determining who is eligible for ARD); Interview with First Assistant District Attorney from Lehigh County (Apr. 21, 2023) (stating that neither immigration status nor citizenship status are criteria for diversionary programs); Interview with First Assistant District Attorney from Berks County (Mar. 28, 2023) (observing that immigration status is not related to eligibility for ARD).

<sup>298</sup> Interview with Assistant District Attorney from Bucks County (Mar. 21, 2023).

lack of immigration status or involvement in removal proceedings as a reason for excluding noncitizens from ARD.<sup>299</sup> In Monroe County, for instance, “active deportation or unlawful entry proceedings” is a bar to admission for DUI ARD as of May 20, 2020.<sup>300</sup>

## V. AREAS FOR FURTHER RESEARCH

This research should be seen as a starting point for a more comprehensive statewide *Padilla* research project in Pennsylvania. Our study was the first of its kind, and focused—for the reasons noted *supra*—on only the twenty counties in Pennsylvania with largest immigrant populations. While the findings are important, evaluating how *Padilla* warnings are provided across the entire Commonwealth—especially in counties where prosecutors and defense attorneys rarely, if ever, encounter immigrant clients (and thus may have limited knowledge regarding how to handle their cases when they do)—is essential to fully understanding the issues raised in this Article.

In addition, and due to capacity limitations, this project did not survey the noncitizens who are directly impacted by the criminal justice and immigration detention and enforcement systems. These individuals no doubt have critical information to share about how the dearth of *Padilla* resources among Pennsylvania public defense offices has impacted the immigrant community at large. An understanding of their experiences is essential to determining how defense attorneys, prosecutors, the courts, and policymakers can better serve noncitizens across the Commonwealth.

## VI. POLICY RECOMMENDATIONS

Our research team found several areas where there were gaps in resources and/or policies among public defense and prosecution offices in Pennsylvania. This section will discuss existing resource gaps identified by participants and provide policy recommendations to improve the quality of *Padilla* consultations and representation for noncitizens across the Commonwealth. It will also provide policy recommendations for improving prosecutor and court participation in the effort to ensure noncitizens are treated fairly by the criminal legal system.

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<sup>299</sup> See Interview with First Assistant District Attorney from Lehigh County (Apr. 21, 2023) (describing how Northampton County traditionally excludes undocumented citizens and/or some immigrants from ARD consideration).

<sup>300</sup> DUI ARD Policy for the County of Monroe (effective May 20, 2020).

A. ALLOCATE FUNDING FOR *PADILLA* COMPLIANCE AND RELATED RESOURCES THROUGHOUT THE COMMONWEALTH

Most public defense participants in this study felt they had insufficient resources to meet their constitutional obligations to provide immigration advice to noncitizen clients. Most commonly, defense attorneys in Pennsylvania recommended increased funding for staff focused on immigration-related matters, as well as additional support for language access services. While there are many ways to improve criminal defense in Pennsylvania,<sup>301</sup> this section proposes an integrated policy solution that would fund a statewide *Padilla* resource unit.

1. *Allocate specific funding for in-house or contract immigration attorneys at public defense offices with a high volume of cases of noncitizens in criminal court proceedings and create and fund regional assistance centers for counties with smaller noncitizen populations*

Pennsylvania counties that presently have some staff dedicated to in-house immigration advising still do not have sufficient resources to assist all noncitizens, while counties that do not have in-house immigration specialists have few people to turn to for help. Pennsylvania should expand funding for in-house immigration advisors<sup>302</sup> and/or fund regional assistance centers for counties that do not have as high of a need on a daily basis.

Expanding funding for in-house or regional *Padilla* advisors would address concerns about inadequate resources and provide stable immigration-related resources for offices with a high volume of noncitizen clients. New York, which also has a county-based public defender system,

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<sup>301</sup> This Article does not seek to provide recommendations about a broad overhaul of the Pennsylvania public defense system. Instead, the authors seek to identify areas where resource gaps have specifically harmed noncitizens and propose policy recommendations that are both feasible and likely to improve the provision of public defense services to noncitizen clients.

<sup>302</sup> Counties including, Berks, Dauphin, Montgomery, York, and Delaware, all of which do not yet have in-house immigration advisors, expressed a desire to have an immigration lawyer on staff or have a set contract with an immigration lawyer with whom they can consult and who can advise clients directly about what charges could render them deportable, inadmissible and/or ineligible for future immigration relief. *See, e.g.*, Interview with Public Defender from Berks County (Apr. 4, 2023); Interview with Public Defender from Dauphin County (Mar. 17, 2023); Interview with Public Defender from Montgomery County (Mar. 30, 2023). Increased funding would also allow for more in-house advisors in large counties with high populations of noncitizen clients, such as Philadelphia and Allegheny, and enable them to provide increased high quality *Padilla* advice and advocacy to all noncitizen clients.



has a system that can serve as a template for Pennsylvania.<sup>303</sup> In 2016, New York State created Regional Immigration Assistance Centers, known as “RIACs,” that are staffed by attorneys with immigration expertise.<sup>304</sup> These RIACs provide free advising to defense attorneys on immigration consequences in criminal, appellate, post-conviction, and family court matters.<sup>305</sup> There are six centers across the state. Some, like Western New York, encompass many counties, while others, like New York City, cover a smaller geographical area.<sup>306</sup> This manner of providing immigration advice ensures that everyone has access to competent criminal defense counsel regarding immigration consequences even if an individual public defender’s office cannot afford (or does not need) a full time in-house advisor. Counties in Pennsylvania, or the Commonwealth itself, should fund a similar model to ensure immigration-conscious advice and advocacy, which are constitutionally-recognized as an “integral part” of effective defen.<sup>307</sup>

## 2. *In the alternative, create and fund a statewide Padilla Resource Unit*

Not every county in Pennsylvania needs a full-time immigration attorney on staff, but immigration resources must be available to all offices to ensure that noncitizens receive effective advice, informed representation, and fair treatment in the justice system. A statewide *Padilla* unit could employ remote *Padilla* advisors to provide advice and support to noncitizen clients and defense attorneys regarding the immigration consequences of a person’s charges.<sup>308</sup> Such remote resources are particularly vital in smaller or more rural counties where competent immigrant attorneys are often scarce. These remote advisors would serve as reliable experts that public defenders and court-appointed counsel could consult, free of charge, when serving

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<sup>303</sup> RIAC General Information: LS Regional Immigration Assistance Centers, <https://www.ils.ny.gov/node/204/riac-general-information> [<https://perma.cc/9HQ-C-WP64>].

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> See 559 U.S. at 364 (“[A]s a matter of federal law, 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.”); see also ABA CRIM. JUST. STANDARDS: DEF. FUNCTION § 4-5.5(c) (“Public and appointed defenders should develop, or seek funding for, such immigration expertise within their offices.”).

<sup>308</sup> This proposal is modeled in part after the Bronx Defenders, where immigration attorneys are trained to support noncitizen clients and their attorneys as they navigate immigration, criminal, family, and/or civil court proceedings. *Immigration Defense*, THE BRONX DEFS. (2015), <https://www.bronxdefenders.org/our-work/immigration-defense/> [<https://perma.cc/7PJR-EYGH>].

noncitizen clients to ensure they comply with *Padilla*'s mandate.<sup>309</sup> They could also provide additional support and resources to public defense offices with in-house immigration experts.

Texas, for example, uses a combination of in-house *Padilla* advisors in some counties, while other counties rely on MyPadilla, an online resource that provides *Padilla* advice. Texas, like Pennsylvania, has a county-based public defender system, though not all Texas counties have established public defender offices and many rely on paying private attorneys on a case-by-case basis.<sup>310</sup> The Texas Indigent Defense Commission funds in-house *Padilla* advisors in approximately 21 counties.<sup>311</sup> In counties without in-house resources, the Texas Indigent Defense Commission provide grants for counties to contract with MyPadilla, which provides remote written *Padilla* advice to Texas attorneys through an online platform, allowing rural counties and counties that use private appointment systems to provide constitutionally-mandated *Padilla* advice.<sup>312</sup>

A statewide *Padilla* unit could also manage and maintain centralized Pennsylvania-specific crimmigration resources and provide training for defense practitioners across the state. Currently, the Defender Association of Philadelphia maintains a "Guide to Representing Non-Citizen Criminal Defendants in Pennsylvania," which contains a detailed chart analyzing the immigration consequences of most Pennsylvania crimes.<sup>313</sup> However, it appears that many counties either do not have access to that chart or are unaware of how to utilize it. Providing statewide funding to maintain, update, and disseminate this and other resources would ensure that defense counsel across the Commonwealth are better equipped to fulfill their *Padilla*

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<sup>309</sup> In addition, regional *Padilla* advisors could monitor *Padilla* compliance across the Commonwealth, recommend changes to existing policies to promote better representation, and identify funding and resource gaps on a statewide level.

<sup>310</sup> Texas Indigent Defense Commission, Public Defender Primer, <https://www.tidc.texas.gov/media/8d87ba4dc5f2348/public-defender-primer.pdf> [<https://perma.cc/XCR5-D78D>]. As of 2019, only 36 of 254 counties in Texas actually had public defender offices with many other counties relying on paying private attorneys on a case-by-case basis. This model poses additional challenges to ensuring that noncitizens receive adequate *Padilla* advice.

<sup>311</sup> Texas Indigent Defense Commission, Appendix A: FY 2024 Improvement Grant Applications + Supporting Docs, <https://www.tidc.texas.gov/media/nsxlyhzs/appendix-a-fy24newimpgrantapps-revised.pdf> [<https://perma.cc/GFF9-W9S8>].

<sup>312</sup> *Id.*

<sup>313</sup> *Guide to Representing Non-Citizen Criminal Defendants in Pennsylvania*, DEFENDER ASSOC. OF PHILA. (Sept. 2023), <https://www.immigrantdefenseproject.org/wp-content/uploads/Guide-to-Representing-Non-Citizen-Criminal-Defendants-in-Pennsylvania-September-2023-Searchable.pdf> [<https://perma.cc/N6G7-WJ3L>].

obligations. It would also alleviate the burden on the Philadelphia office to provide resources for other counties.

A state-funded unit could also provide training for public defenders. Creating a centralized training hub rather than requiring each of Pennsylvania's sixty-seven counties to create their own trainings would be a more efficient use of scarce resources. Many offices described having only optional trainings for new staff members on immigration matters. Participants also expressed concern about the challenges of addressing immigration issues with clients who may be mistrustful of attorneys and afraid to share details about their immigration status. Providing training to attorneys about crimmigration law and how to best approach these topics in a sensitive, client-centered manner will improve the quality of defense representation, promote client comfort, and ensure that attorneys have the information they need to provide constitutionally adequate representation.

### *3. Fund additional language access and social services for public defenders*

Finally, several counties, including Allegheny, Lancaster, and Montgomery, described the need for additional support with language access.<sup>314</sup> Interviewees raised the need for additional bilingual attorneys or interpreters who are either on staff or consistently available in person; this, they noted, would be far superior to communicating with clients through contract or phone interpreters alone.<sup>315</sup> Many staff members acknowledged that they are better able to provide immigration advice when it is conveyed in a client's native language.<sup>316</sup> This is easier to do when interpreters are consistently available, familiar with defense counsel's work, and able to work around attorneys' and clients' busy schedules.<sup>317</sup> In addition to the practical benefits of having interpreters on staff, the Supreme Court of Pennsylvania has found that the "absence of a needed interpreter" at a critical stage of the criminal process can violate the Sixth Amendment because it obstructs an

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<sup>314</sup> Interview with Public Defender from Allegheny County (Mar. 27, 2023); Interview with Public Defender from Lancaster County (Mar. 20, 2023); Interview with Public Defender from Montgomery County (Mar. 30, 2023).

<sup>315</sup> Interview with Public Defender from Allegheny County (Mar. 27, 2023); Interview with Public Defender from Lancaster County (Mar. 20, 2023); Interview with Public Defender from Montgomery County (Mar. 30, 2023).

<sup>316</sup> *Id.*

<sup>317</sup> Interview with Public Defender from Allegheny County (Mar. 27, 2023); Interview with Public Defender from Lancaster County (Mar. 20, 2023); Interview with Public Defender from Montgomery County (Mar. 30, 2023).

individual's ability to communicate with counsel and constitutes *per se* prejudice.<sup>318</sup>

Funding social work staff can also improve outcomes in public defense work. At least eight of the counties in our study already have social workers on staff,<sup>319</sup> but other counties expressed a desire to have increased funding for social work staff.<sup>320</sup> Studies have shown that embedding social workers in public defense offices can result in overall better outcomes: reduced caseloads for attorneys, increased case dismissals, reduced sentence lengths and the likelihood of incarceration, and ultimately decreased costs for both the state and county.<sup>321</sup> Employing social workers enables public defenders to work alongside advocates who are specially trained in supporting a client's holistic needs, allowing defense attorneys to better advocate for their clients' priorities and assist them in reducing future contact with the court system.

## B. REFORM PENNSYLVANIA'S DRACONIAN PCRA LAWS

While Pennsylvania works to increase funding, resources, and training to better protect the constitutional rights of its noncitizen residents during their trials, plea negotiations, and sentencing, we also recommend that the Commonwealth increase access to remedies for noncitizens who receive inadequate immigration advice.

### 1. *Amend the PCRA statute to provide meaningful relief for noncitizens raising Padilla claims*

Pennsylvania's current post-conviction relief laws are ill-suited to address violations of the rights of noncitizens because of their strict temporal and

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<sup>318</sup> See *Commonwealth v. Diaz*, 226 A.3d 995, 996–97 (Pa. Sup. Ct. 2020) (where accused was not a native English speaker, defense counsel's failure to obtain Spanish interpreter for client on first day of trial was *per se* prejudicial because it obstructed the individual's ability to communicate with counsel during a critical stage).

<sup>319</sup> Right to Know Requests seeking staffing data for each county public defender's office filed by the ACLU of Pennsylvania on approximately August 31, 2023 (documenting that some counties have social workers on staff including Philadelphia (75 social workers), Montgomery (5), Luzerne (3), Lehigh (1), Lancaster (1) Delaware (4), Chester (9), and Bucks (2)).

<sup>320</sup> Interview with De-identified Participant (Apr. 11, 2023).

<sup>321</sup> See Andreea Matei et. al, *Assessing a Social Worker Model of Public Defense: Findings and Lessons Learned from Genesee County, Michigan*, URBAN INST. (Mar. 2021) (assessing the positive impact of the Social Worker Defender Program pilot project on client outcomes in one Michigan county); James M. Anderson et. al, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 821 (2019) (describing how holistic defender offices staffed with civil attorneys and social workers can result in outcomes that reduce incarceration without harming public safety).

custodial requirements.<sup>322</sup> Many immigrants only learn that they were misadvised or did not receive effective advocacy after they are placed in immigration removal proceedings and/or detained by immigration officials, which could be years after the date of their conviction or sentence. As a result, they are often ineligible for post-conviction relief under Pennsylvania's laws regardless of the merits of their claim.

To remedy this, Pennsylvania's legislature should either loosen the existing temporal and custodial requirements of the PCRA or tailor a separate *Padilla*-specific procedure for relief that focuses on the most common types of *Padilla* violations.<sup>323</sup> California has enacted such rule that could provide a model for other states: under Section 1473.7 of the California Penal Code, a person who is no longer in custody or on probation or parole can seek post-conviction relief for an old conviction or sentence if they did not receive information about the immigration consequences of a plea, if their lawyer did not defend them from those consequences through plea bargaining for an alternative disposition, or if they did not understand the immigration consequences when they decided whether to enter a plea.<sup>324</sup> This law addresses both of *Padilla*'s central holdings: (1) the need for effective advice; and (2) the need for effective plea advocacy.<sup>325</sup> Passing a similar law in Pennsylvania would protect noncitizen residents and ensure that defense errors due to insufficient funding and resources do not disproportionately harm them or result in their removal from the United States.

## 2. *Improve access to its existing post-conviction relief laws*

At a minimum, Pennsylvania should improve access to its existing post-conviction relief structure by developing *pro se* templates for individuals seeking to rectify immigration-related ineffective assistance of defense counsel, creating guides for *pro se* litigants seeking post-conviction relief, translating information about the post-conviction relief process into multiple languages, and providing resources and education about the post-conviction relief process to those in criminal custody. By making the process more accessible to noncitizens who are within the current eligibility guidelines for

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<sup>322</sup> See Wiessner, *supra* note 263, at 482–83, 479 (describing how those who are no longer incarcerated and have finished court-ordered supervision can no longer access post-conviction relief in Pennsylvania).

<sup>323</sup> *Id.* at 482–83.

<sup>324</sup> UCLA Crim. Def. Clinic, *Motions to Vacate a Conviction or Sentence in California*, IMMIGRANT LEGAL RES. CTR. (Sept. 2020), [https://www.ilrc.org/sites/default/files/resources/2020.09\\_ilrc\\_section\\_1473.7.pdf](https://www.ilrc.org/sites/default/files/resources/2020.09_ilrc_section_1473.7.pdf) [<https://perma.cc/8ZVG-QZ8E>].

<sup>325</sup> 559 U.S. at 371–73.

post-conviction relief, Pennsylvania can ensure individuals do not suffer irreparable harm due to restrictive state laws.

### C. REQUIRE INCREASED TRAINING AND TRANSPARENCY FROM PROSECUTORS

Because of the significant power prosecutors hold in plea negotiations and in crafting sentencing structures, district attorneys are highly influential in determining whether a noncitizen can receive an immigration-safe plea bargain.<sup>326</sup> Currently, there is no law in Pennsylvania requiring that prosecutors consider immigration consequences in reaching case resolutions.<sup>327</sup> Individual district attorney offices described significant variation in whether and how they consider immigration status, ranging from officewide policies to informal and highly-discretionary decisions made by line prosecutors themselves. We recommend additional training and transparency regarding immigration considerations to promote both more thoughtful dialogue and fairness in prosecution practices.

#### 1. *Provide training for prosecutors regarding immigration consequences in cases involving noncitizens*

A prosecutor's ultimate duty is to seek justice. *Padilla* described deportation as "an integral part—indeed sometimes the most important part—of the penalty that may be imposed on noncitizens who plead guilty to specified crimes."<sup>328</sup> Our research indicates that prosecutors in Pennsylvania would benefit from increased training on immigration statuses and immigration consequences to better understand the full breadth of the penalties they seek. Many prosecutors expressed concern about treating noncitizens and citizens equally. Training district attorneys to consider immigration consequences will ensure that noncitizens do not inadvertently face disproportionate penalties compared to their United States citizen counterparts. In many cases, a modified, immigration-neutral plea may be very similar in nature and severity to the typical plea offer for a citizen.<sup>329</sup> In other cases, noncitizens may be willing to serve more time in jail or face other

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<sup>326</sup> See Jain, *supra* note 120, at 1200 ("Even in low-level criminal cases, prosecutors can control important civil outcomes such as deportation, public benefits, and professional licensing.").

<sup>327</sup> See Eagly, *supra* note 9, at 10 (describing how California became the first state to pass such a law in 2016).

<sup>328</sup> 559 U.S. at 364.

<sup>329</sup> Altman, *supra* note 107, at 34.

criminal penalties to avoid the risk of deportation.<sup>330</sup> Increased understanding of these issues among prosecutors will promote a fairer justice system and, in streamlining plea negotiations, aid defense counsel in fulfilling their *Padilla* obligations to noncitizen clients.

2. *Require District Attorneys to publish internal policies regarding noncitizens to ensure transparency*

In addition, we recommend that each district attorney office be required to create and publish policies on how they handle prosecutions where immigration issues are concerned and any restrictions on ARD eligibility that impact noncitizens. Requiring transparency about the already-present differences in prosecutorial practices in considering (or not considering) immigration consequences would allow lawmakers to assess the need for policy changes to promote uniformity and fairness. In a state with a growing immigrant population, this change would also allow the public to engage actively with these issues and encourage District Attorneys to address the concerns of their noncitizen constituents. Ultimately, it is the authors' hope that drawing attention to the concerns of noncitizens in criminal court proceedings will encourage Pennsylvania prosecutors to engage thoughtfully with the issue of immigration consequences, how *Padilla*'s holdings can and should impact their work, and what an appropriate "penalty" for misconduct means when one's life and safety are at stake.

D. PENNSYLVANIA COURTS SHOULD RETURN TO *PADILLA*'S CENTRAL HOLDINGS

Finally, we suggest that Pennsylvania courts reconsider the Superior Court's decision in *Escobar* and *McDermitt* and ensure that Pennsylvania case law reflects *Padilla*'s holdings and the constitutional mandates on defense counsel performance that the case created. Many attorneys interviewed for this study interpret *Escobar* and *McDermitt* as permitting general or vague immigration warnings, even when the immigration consequences of a given conviction are readily ascertainable. Pennsylvania courts should reexamine these decisions, consider the prevailing professional norms of other jurisdictions and the American Bar Association, and return to *Padilla*'s central holdings that clear legal consequences require clear legal advice.

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330 *Id.* at 35.

Anything less is a violation of noncitizens' Sixth Amendment rights to effective counsel.

Furthermore, in returning to *Padilla's* central holdings, judges should be provided additional training on the immigration consequences of Pennsylvania criminal convictions, so that they may incorporate such factors into their consideration of plea agreements and sentencing.<sup>331</sup> In interviews conducted for this study, some participants noted that even where attorneys negotiated and carefully crafted immigration-safe plea bargains, trial courts sometimes did not accept them.<sup>332</sup> In some cases, judges cited frustration with the “overly-lenient” offers district attorneys extended to noncitizen clients; in others, they used inferences about an individual's immigration status to justify a determination that they were “undeserving” of favorable treatment.<sup>333</sup> In one particularly stark example, a judge used a misreading of a client's FBI report to determine (erroneously) that they had been previously ordered deported, and thus were, in the court's view, ineligible for diversionary programs.<sup>334</sup> Increased training on the central tenets of *Padilla* and immigration consequences generally would assist judges in understanding why pleas and/or sentencing for noncitizens might be structured differently, and, the authors hope, would encourage judges to honor immigration-safe plea bargains that parties have negotiated.

Importantly, however, judges should refrain from inquiring about, or otherwise revealing, a noncitizen's immigration status in court records without the individual's consent. Interviewees for this project stated they observed judges asking clients about their immigration status and history during criminal hearings, or even affirmatively placing assertions about that status into the court record.<sup>335</sup> This is potentially dangerous. Revealing an

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<sup>331</sup> Pennsylvania sentencing guidelines suggest judges consider several factors in making sentencing decisions, including the seriousness of the offense, criminal history and past criminal behavior, and other aggravating and mitigating information. Courts still have, however, broad discretion in tailoring sentences on a case-by-case basis. See 42 Pa. C.S. § 2154(b) (sentencing guidelines); 42 Pa. C.S. § 9721(b) (alternative sentences).

<sup>332</sup> Emails with Public Defenders from Philadelphia (Feb. 29, 2024) (describing how a judge who is no longer sitting would reject pleas that he knew or believed were made for immigration purposes).

<sup>333</sup> Anecdotal information from Whitney Viets, Immigration Counsel at the Defender Association of Philadelphia.

<sup>334</sup> *Id.* Upon review by an immigration attorney, the citations the judge referenced in the FBI report in fact referred to the client's encounter with immigration officials at the U.S.-Mexico border when he surrendered to apply for asylum. He was lawfully seeking asylum at the time the judge attempted to disqualify him from diversion.

<sup>335</sup> Interview with Public Defender from Allegheny County (Mar. 27, 2023) (describing how some judges ask if the person is a U.S. citizen during the plea colloquy before providing warnings about



individual's immigration status in open court without the accused's consent is no minor occurrence and can have far-reaching consequences. It also leaves undocumented or otherwise-deportable noncitizens with an impossible choice: fail to appear at their criminal hearing and resolve the charges against them, or face ICE detention and removal when they do. Ensuring that criminal court is a safe space for noncitizens would facilitate the resolution of criminal cases, protect the rights of victims who deserve to have their voices heard, and promote a more efficient justice system overall.

### CONCLUSION

This Article has sought to provide information about how Pennsylvania's public defenders have responded to the mandate established in *Padilla v. Kentucky*, requiring that defense attorneys provide noncitizen clients advice regarding the potential immigration consequences of a guilty plea. In the fourteen years since *Padilla* was decided, most public defense offices have taken significant steps to implement their *Padilla* obligations. However, Pennsylvania's state courts' narrow reading of *Padilla*, the Commonwealth's unique public defense structure, and the vast funding disparities that exist across counties lead to highly-localized practices that often do little more than provide generalized, unspecific immigration warnings to noncitizens facing criminal charges. *Padilla* requires more.

This study reveals that there is significant work to be done to improve the quality of criminal defense representation of noncitizens in Pennsylvania. The desire to expand resources and access to immigration counsel is an essential change necessary to ensure that noncitizens are not disproportionately punished by the criminal legal system. As *Padilla* noted, noncitizens charged with crimes face a "particularly severe penalty" in the form of deportation that is "intimately related" to the criminal process.<sup>336</sup> To ensure that such individuals receive both proper advice and effective advocacy from public defenders and private defense counsel during plea negotiations, attorneys need to have information and training on the

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immigration consequences); Interview with Public Defender from Erie County (Apr. 11, 2023) (describing how judges handle colloquies differently in different counties and courtrooms. The participant reported that some judges have asked about immigration if they hear a heavy accent or suspect there is an immigration issue); Interview with Public Defender from Philadelphia (Mar. 28, 2023) (describing how judges are not supposed to ask about immigration status on the record, but that some judges get suspicious of offers once they find out a person is a noncitizen because they do not want the noncitizen to get a better deal than a U.S. citizen).

<sup>336</sup> 559 U.S. at 364–65.

potential immigration consequences their noncitizen clients might face. In addition, and critically, they must also understand how to effectively negotiate plea bargains with prosecutors (both at the trial and sentencing stage) that mitigate the risk that those consequences will occur. Only then—and only with the participation of courts, prosecutors, and policymakers across the Commonwealth—will Pennsylvania noncitizens be guaranteed constitutionally-adequate defense.

## APPENDIX

## I. INTERVIEW SCRIPTS

The following interview scripts were utilized for all interviews. Upon feedback from several interviewees, we limited questions about PCRA if counties generally did not provide those services. In late March 2023, we added questions that are marked with an asterisk\* to better ensure that the same types of follow up questions that arose during interviews were asked to all participants. Finally, the interviewer generally asked any follow-up questions necessary to seek clarification or obtain additional detail on a case-by-case basis. Those follow up questions are not listed in the script, as they were contingent on the participants' responses.

## A. PUBLIC DEFENDERS

1. What is your position?
2. How is your office structured? Are public defenders mostly full time or contracted?
3. What is your experience, if any, with advising noncitizen clients about immigration consequences of criminal convictions/pleas?
  - \*Does your office have a policy as it relates to providing immigration warnings?\*
4. How do you identify people who need immigration warnings? What questions, if any, do you ask?
5. What training, if any, did you receive on how to provide immigration warnings to noncitizens?
6. How does your office or county conduct advising for noncitizens who face potential immigration consequences?
7. What is the ratio of immigration experts to noncitizens appearing before the criminal court in your county/city/office?
8. Do you feel like your office has sufficient resources to provide immigration warnings/analysis to noncitizen clients? Is there anything you wish your office had access to that would help with this?
9. Do people generally receive immigration warnings on paper or orally? If on paper, is it generally translated to the person's language?
10. Do court appointed lawyers have access to any immigration related resources that your office has (if any)?

11. Do you provide assistance with post-conviction relief assistance (PCRA) petitions for individuals who did not receive prior immigration warnings (or have other immigration related due process issues)?

12. What are the biggest barriers to PCRA work in your office?

13. What is the process for obtaining appointed or *pro bono* counsel for PCRA matters related to immigration?

14. What trainings, if any, has your office provided about immigration advising?

15. \*How does your office negotiate with the DA regarding noncitizen clients?\*

16. \*Everyone has different views on this, so I am asking both prosecutors and defense attorneys. How do you define the obligation of Padilla on defense attorneys? How expansive do you consider it to be?\*

17. \*Do you have any way of advising those charged with summary offenses (especially retail theft) who don't get counsel?\*

18. \*Is there anything else I didn't ask about that I should have asked about related to immigration?\*

## B. PROSECUTORS

1. What is your role and how is the office structured?

2. Does your office have an immigration specialist? If so, is that person an immigration lawyer?

- If not, how did that person receive their immigration training?
- How does the immigration specialist in your office coordinate with the District Attorneys to provide them with immigration advice? E.g., how do they find out about cases that might need immigration safe dispositions?

3. Does your office have a policy regarding plea negotiations to aim to reach immigration safe plea deals? If so, what does that policy include? What factors do you consider in deciding if and when to offer immigration-safe plea bargains?

4. How does your office generally respond to immigration related concerns raised by defense counsel?

5. How much does your office consider immigration status in determining plea negotiations/offers/priorities?

6. Do line DAs have the authority to make decisions about immigration safe plea negotiations on their own or do they consult with supervisors or someone in particular? If so, who?

7. Does your office feel a duty to notify immigration officials about noncitizens?

8. \*Does your office have any guidelines about eligibility for ARD as it relates to noncitizens? Do you need a driver's license to participate in ARD?\*

9. \*Everyone has different views on this, so I am asking both prosecutors and defense attorneys. How do you define the obligation of Padilla on defense attorneys? How expansive do you consider it to be?\*

10. How often do you see immigration come up?

11. \*Is there anything else I didn't ask about that I should have asked about related to immigration?\*