

I WANT MY (IMMIGRATION) LAWYER! THE NECESSITY OF COURT-APPOINTED IMMIGRATION COUNSEL IN CRIMINAL PROSECUTIONS AFTER *PADILLA* V. *KENTUCKY*

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ABSTRACT

In Padilla v. Kentucky, the Supreme Court held that, under the Sixth Amendment, counsel is required to advise a noncitizen of the possibility of deportation in the event of a criminal conviction in order for the representation to be constitutionally valid. In cases where the immigration consequences of a plea or conviction are clear and succinct, an attorney is required to discuss those consequences with the client. However, in cases where those consequences are less certain, an attorney is only required to advise the client regarding the possibility of such consequences. This Article discusses what happens when the immigration consequences are too complicated for a criminal attorney to ascertain but the client is indigent and cannot afford to hire an immigration attorney.

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I. INTRODUCTION

At the time of his arrest for drug trafficking, Jose Padilla, a Honduras native, had been a lawful permanent resident of the United States for more than forty years and had served in the United States military during the Vietnam War.¹ Unbeknownst to Padilla, the crime with which he was charged required automatic deportation upon conviction.² Not only did Padilla's attorney fail to alert Padilla to this fact, the attorney also told him that he "did not have to worry about immigration status since he had been in the country so long."³ Based upon his attorney's erroneous advice, Padilla pleaded guilty to the charges against him.⁴ Padilla later claimed that he would not have pleaded guilty had his attorney given him the correct advice.⁵

On appeal to the Supreme Court of Kentucky, Padilla argued that his guilty plea was the result of ineffective assistance of counsel under *Strickland v. Washington*,⁶ and that he was therefore deprived of his Sixth Amendment right to counsel.⁷ That court denied Padilla any relief, finding "that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a 'collateral' consequence of his conviction."⁸ The Supreme Court of the United States granted certiorari to decide whether Padilla's counsel was obligated to notify him that, if he pleaded guilty, he would be removed from the country.⁹ The Court ultimately held that the Sixth Amendment does require this notification.¹⁰

Although the Court did not address it, one interesting question that has emerged post-*Padilla* is whether the law requires that indigent noncitizen criminal defendants also be appointed an immigration attorney in cases where the immigration consequences of a plea or conviction are too complicated for a criminal attorney to determine. This Article argues that federal statutory law, the Sixth Amendment, and the Due Process Clause all require that such a defendant be appointed an immigration attorney in certain circumstances.¹¹

¹ Padilla v. Kentucky, 130 S. Ct. 1473, 1477 (2010).

² *Id.* (citing 8 U.S.C. § 1227(a)(2)(B)(i)).

³ *Id.* at 1478.

⁴ *Id.*

⁵ *Id.*

⁶ Strickland v. Washington, 466 U.S. 668 (1984).

⁷ Padilla, 130 S. Ct. at 1478.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ This Article does not address the related but separate issue of whether the Due Process Clause requires the appointment of counsel for an alien in an immigration proceeding, an issue that has spawned several worth-while law review articles. See generally Beth J. Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393 (2000); Note, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544 (2006-07). Although this is an interesting constitutional question, it is beyond the scope of this Article which focuses specifically on whether an indigent non-citizen criminal defendant has the right, under the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment, to be appointed immigration counsel for the purpose of advising the defendant of the immigration consequences of a plea or conviction.

Section II of this Article will review the history of the Supreme Court's Sixth Amendment and Due Process jurisprudence, focusing particularly on the area of indigent representation. Section II.B will examine *Strickland* and its progeny and what is required for representation to be constitutionally effective. Section II.C will discuss the Due Process Clause of the Fourteenth Amendment as it applies to indigent defendants. Section III will provide a detailed discussion of the Supreme Court's opinion in *Padilla*. Finally, Section IV will discuss how all of these precedents might apply in the context of a noncitizen indigent defendant facing the possibility of deportation upon conviction, and will examine federal statutory law in this context.

II. BACKGROUND

A. *The Sixth Amendment and Indigent Representation*

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."¹²

The Supreme Court first recognized a constitutional right to the assistance of appointed counsel for indigent defendants in *Powell v. Alabama*.¹³ *Powell* dealt with the trial of "The Scottsboro Boys," a group of nine African American teenagers who were charged with the rape of two Caucasian women on a freight train traveling from Chattanooga to Memphis, Tennessee, in March 1931.¹⁴ The defendants in *Powell* were all indigent, and, therefore, could not afford attorneys.¹⁵ Immediately prior to trial, but after the trial judge had called the case, an out-of-town lawyer informed the judge that, although he had not been retained by the defendants, he had spoken to some interested parties about the case, and that he wanted "to appear along with counsel that the court might appoint."¹⁶ The judge informed the inquiring attorney that the court would not appoint counsel if he would appear on behalf of the defendants, but would allow him to have co-counsel if any other attorney wanted to help represent the defendants.¹⁷ After the attorney asked the judge if counsel had already been appointed, the judge stated that he had "appointed all the members of the bar for the purpose of arraigning the defendants and then of course [he] anticipated them to continue to help [the defendants] if no counsel appear[ed]."¹⁸

After the out-of-town attorney informed the judge that he did not wish to appear as sole counsel for the defendants, the judge asked all the lawyers present whether any were willing to assist.¹⁹ When one of the attorneys present

¹² U.S. CONST. amend. VI.

¹³ *Powell v. Alabama*, 287 U.S. 45 (1932).

¹⁴ Douglas O. Linder, "The Scottsboro Boys" *Trials*, FAMOUS AM. TRIALS, <http://www.law.umkc.edu/faculty/projects/ftrials/scottsboro/scottsb.htm> (last visited Jan. 6, 2012); see also DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (rev. ed. 1979).

¹⁵ *Argersinger v. Hamlin*, 407 U.S. 25, 44 (1972) (Burger, C.J., concurring) (noting that defendants in *Powell* were indigent).

¹⁶ *Powell*, 287 U.S. at 53.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 54.

answered that he would assist the out-of-town attorney in any way he could, the judge proceeded with the trials.²⁰ After three separate trials, each of which the court completed within a single day, the defendants were all found guilty and sentenced to death.²¹ The Alabama Supreme Court affirmed the convictions and sentences.²²

The United States Supreme Court reversed, concluding that the “action of the trial judge in respect of appointment of counsel was little more than an expensive gesture, imposing no substantial or definite obligation upon any one.”²³ The Court illustrated the defendants’ plight:

[F]rom the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

...
The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.²⁴

Based on these findings, the Court concluded that the defendants had not been granted effective assistance of counsel.²⁵ However, the Court did not focus on the Sixth Amendment right to counsel—at that time, the Sixth Amendment applied only to federal prosecutions—but instead focused exclusively on the Due Process Clause of the Fourteenth Amendment.²⁶ The Court did, however, allude to the Sixth Amendment right to counsel:

It is possible that some of the personal rights . . . may also be safeguarded against state action . . . not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.²⁷

The Court concluded that the right to counsel is fundamental and is therefore guaranteed by the Due Process Clause.²⁸ Despite being a landmark case, *Powell*’s holding was limited—the court restrained the right to counsel to the narrow facts of the case instead of creating a rule that would apply broadly.²⁹

²⁰ *Id.* at 56.

²¹ *Id.* at 50.

²² *Id.*

²³ *Id.* at 56.

²⁴ *Id.* at 57–58.

²⁵ *Id.* at 58.

²⁶ *Id.* at 60.

²⁷ *Id.* at 67 (citations omitted) (internal quotation marks omitted).

²⁸ *Id.* at 68. The court explained that:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Id. at 68–69.

²⁹ [U]nder the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in

Therefore, after *Powell*, indigent defendants were entitled to appointed counsel only where they were being charged with a capital crime and where they were incapable of representing themselves because of ignorance, feeble mindedness, or illiteracy.³⁰

Approximately six years later, in *Johnson v. Zerbst*,³¹ the Supreme Court held that, in all federal felony cases, the Sixth Amendment requires that indigent defendants be appointed counsel.³² The defendant in *Johnson* was arrested and charged in federal court with uttering³³ and passing several counterfeit Federal Reserve notes.³⁴ Johnson was from out of town; he did not have relatives, friends, or acquaintances nearby; he had little education; and he was penniless.³⁵ Because he could not post bail, Johnson was held in jail until he was indicted.³⁶ Two days after he was indicted, he was brought to court, given his first notice of the indictment, and was immediately arraigned, tried, convicted, and sentenced to four-and-a-half years in prison.³⁷ Although Johnson was represented by counsel at his preliminary hearing where he was bound over for indictment, he was not provided counsel at any subsequent stage of the proceedings.³⁸ Johnson filed a habeas petition with the district court, which it denied.³⁹

The Supreme Court held that the Sixth Amendment right to counsel was a fundamental safeguard necessary to insure life and liberty.⁴⁰ The Court observed that this protection recognizes the reality that the average defendant cannot competently protect himself in court.⁴¹ It also recognized that, although attorneys may easily understand legal procedure and arguments, to the

other criminal prosecutions, or under other circumstances, we need not determine. All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law

Id. at 71.

³⁰ *Id.* Justice Pierce Butler, joined by Justice James Clark McReynolds, dissented from the majority's opinion in *Powell*. Although Justice Butler agreed with the majority that *if* petitioners had been denied the right of counsel, they would have been denied due process and entitled to relief, he disagreed with the majority's finding that the petitioners were, in fact, denied the right to counsel. *Id.* at 73–74 (Butler, J., dissenting). In Justice Butler's opinion, the representation afforded the petitioners was more than sufficient. *Id.* at 74–75.

³¹ *Johnson v. Zerbst*, 304 U.S. 458 (1938).

³² JEROLD H. ISRAEL & WAYNE R. LAFAYE, *CRIMINAL PROCEDURE: CONSTITUTIONAL LIMITATIONS IN A NUTSHELL* 345 (Thompson/West, 7th ed. 2006); *see also* Victor L. Streib, *Would You Lie to Save Your Client's Life? Ethics and Effectiveness in Defending Against Death*, 42 *BRANDEIS L.J.* 405, 411–12 (2003–04) (discussing *Powell* and *Johnson*).

³³ “[U]ttering” is “[t]he crime of presenting a false or worthless instrument with the intent to harm or defraud.” *BLACK'S LAW DICTIONARY* 1582 (8th ed. 2004) (emphasis omitted).

³⁴ *Johnson*, 304 U.S. at 459–60.

³⁵ *Id.* at 460.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 458–59.

⁴⁰ *Id.* at 462. “The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.” *Id.* at 463 (footnote omitted).

⁴¹ *Id.* at 462–63.

untrained layman the entire situation could be bewildering.⁴² Moreover, the Court rejected the suggestion that an indigent defendant must assert his right to counsel before he is afforded such right; it noted that the Sixth Amendment's guarantee would be nullified if a court could deny a defendant's constitutional rights simply because of his ignorance.⁴³ Turning to the facts of the case before it, the Court concluded that Johnson "was convicted without enjoying the assistance of counsel" and reversed the district court's denial of Johnson's habeas petition.⁴⁴

However, four years later in *Betts v. Brady*,⁴⁵ the Supreme Court declined to extend the *Johnson* holding to state prosecutions via the Fourteenth Amendment.⁴⁶ There, the defendant, Betts, was indicted for robbery in a Maryland state court.⁴⁷ Betts, who was indigent, requested court-appointed counsel.⁴⁸ The judge denied this request and informed the defendant that counsel was only appointed in rape and murder cases.⁴⁹ Betts pleaded not guilty and the case proceeded to a bench trial.⁵⁰ Betts subpoenaed and called his own witnesses and cross-examined prosecution witnesses.⁵¹ He had the opportunity to testify himself, but declined.⁵² The judge found Betts guilty and sentenced him to eight years in prison.⁵³ Betts filed a habeas motion with the Maryland Court of Appeals and claimed that he had been denied the right to counsel in violation of the Fourteenth Amendment.⁵⁴ The court of appeals granted the writ, but denied Betts any relief.⁵⁵

The United States Supreme Court granted certiorari and addressed whether Betts had been denied his due process rights when the court refused to appoint counsel.⁵⁶ First, however, the Supreme Court rejected Betts's argument that the entire Sixth Amendment should be incorporated against the states, finding that it applied only to trials in federal court—but that in some situations a state's denial of a right outlined in the first eight amendments might be an unconstitutional denial of due process.⁵⁷ However, the court was unable to

⁴² *Id.* at 463.

⁴³ *Id.* at 464–65.

⁴⁴ *Id.* at 469. As in *Powell*, Justices Butler and McReynolds dissented. Justice Butler believed that Johnson had waived his right to counsel. *Id.*

⁴⁵ *Betts v. Brady*, 316 U.S. 455 (1942).

⁴⁶ ISRAEL & LAFAYE, *supra* note 32, at 345; *see also* Gabriel J. Chin & Scott C. Wells, *Can a Reasonable Doubt Have an Unreasonable Price? Limitations on Attorneys' Fees in Criminal Cases*, 41 B.C. L. REV. 1, 58 n.275 (1999) (discussing *Powell*, *Johnson*, and *Betts*).

⁴⁷ *Betts*, 316 U.S. at 456.

⁴⁸ *Id.* at 456–57.

⁴⁹ *Id.* at 457.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 457, 461.

⁵⁷ *Id.* at 461–462.

The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circum-

accept the argument that the Fourteenth Amendment's due process "obligates the states . . . to furnish counsel in every such case."⁵⁸

The Court in *Betts* distinguished the case before it from *Powell* by noting that the petitioners in *Powell* were young, unknown in the community, and had neither connections nor the means to obtain an attorney; furthermore, although state law required that the defendants be represented, the trial court in *Powell* casually appointed counsel at the last minute, when it was too late to adequately consult or prepare.⁵⁹ In contrast, *Betts* was forty-three and capable of taking care of his own interests.⁶⁰ The Court also noted that because *Betts*'s defense to the charges against him was that he was not present at the crime and that he had an alibi, the issue was simply the truth of the testimony.⁶¹ The Court found that, under Maryland law, if *Betts* had been at a serious disadvantage because he lacked counsel, the court's refusal to appoint an attorney would have mandated a reversal of judgment.⁶² The Court ultimately rejected *Betts*'s contention that he was denied due process and affirmed the state court.⁶³

Justice Black's dissent, joined by Justices Douglas and Murphy, stated that the Fourteenth Amendment made the Sixth Amendment—including its guarantee of appointed counsel in all felony cases—applicable to the states.⁶⁴ The dissent argued that this right in criminal proceedings is a fundamental one and that denying indigents counsel in cases involving serious crimes has long been seen as a shocking injustice.⁶⁵

This sentiment eventually became law. Twenty-one years later, in *Gideon v. Wainwright*,⁶⁶ the Supreme Court adopted this reasoning, overruled *Betts*, and incorporated the Sixth Amendment against the states.⁶⁷ Clarence Earl Gideon was charged with felony theft after he broke into a poolroom.⁶⁸

stances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth.

Id. (footnote omitted).

⁵⁸ *Id.* at 471. Moreover,

the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.

Id. at 473.

⁵⁹ *Id.* at 463.

⁶⁰ *Id.* at 472.

⁶¹ *Id.*

⁶² *Id.* at 472–73.

⁶³ *Id.* at 473.

⁶⁴ *Id.* at 474 (Black, J., dissenting); see also Akhil Reed Amar, 2000 *Daniel J. Meador Lecture: Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1240–41 (2002) (discussing Justice Black's argument for incorporation in *Betts*).

⁶⁵ *Betts*, 316 U.S. at 475–76.

⁶⁶ *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

⁶⁷ See Amar, *supra* note 64, at 1241. For another in-depth discussion of *Gideon*, see Conference on the 30th Anniversary of the United States Supreme Court's Decision in *Gideon v. Wainwright: Gideon and the Public Service Role of Lawyers in Advancing Equal Justice*, 43 AM. U. L. REV. 1 (1993).

⁶⁸ *Gideon*, 372 U.S. at 336.

Because Gideon was indigent, he asked the court for an appointed lawyer.⁶⁹ The trial judge refused Gideon's request based on a Florida law that provided for appointment of counsel only in capital cases.⁷⁰ After representing himself at trial, Gideon was found guilty and sentenced to five years in prison.⁷¹ On appeal to the Florida Supreme Court, Gideon argued that the trial court's refusal to appoint counsel denied him his constitutional rights.⁷² The Florida Supreme Court denied Gideon all relief.⁷³

After granting certiorari,⁷⁴ the United States Supreme Court, in an opinion authored by Justice Black, applied the doctrine of selective incorporation and held "that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment."⁷⁵ The Court then expressly overruled *Betts* and concluded that the Sixth Amendment right to counsel was of such a fundamental nature that it was incorporated against the states via the Fourteenth Amendment.⁷⁶ The *Gideon* Court cited *Powell* and found that, even though the Court in *Powell* limited its holding to the facts before it, it still undeniably concluded that the right to counsel is a fundamental one.⁷⁷ Based on this reasoning, the Court determined that *Betts* was contrary to the Court's precedent and was incorrectly and unwisely decided.⁷⁸

Several concurring opinions were filed in *Gideon*. Justice Douglas concurred in the judgment, but advocated total incorporation, under which all of the rights granted by the Bill of Rights would be incorporated against the states via the Fourteenth Amendment.⁷⁹ Justice Clark, joined by Justice Harlan, also concurred in the judgment, but wrote separately to express his belief that the majority's holding simply erased the distinction between capital offenses and non-capital offenses, a distinction which, in Justice Clark's view, was illogical from the beginning.⁸⁰ Justice Harlan filed a separate concurrence in which he agreed with the majority that *Betts* should be overruled but felt the Court

⁶⁹ *Id.* at 337.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Although Gideon was denied counsel at trial, Abe Fortas, who two years later would become a Justice on the Supreme Court, was appointed to represent him before the Court. See Abe Fortas, THE OYEZ PROJECT, http://oyez.org/justices/abe_fortas (last visited Jan. 6, 2012).

⁷⁵ *Gideon*, 372 U.S. at 342.

⁷⁶ *Id.* at 345.

⁷⁷ *Id.* at 343.

⁷⁸ *Id.* at 343–45. The Court reasoned that:

In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.

Id. at 344.

⁷⁹ *Id.* at 345–46 (Douglas, J., concurring). For a discussion on incorporation and the Fourteenth Amendment, see Virginia V. Moore & Morris B. Hoffman, *The Court Says No to "Incorporation Rebound"*, 61 BAYLOR L. REV. 818, 831–33 (2009).

⁸⁰ *Gideon*, 372 U.S. at 348 (Clark, J., concurring).

should have taken a more respectful approach.⁸¹ Justice Harlan disagreed that *Betts* had been clearly contrary to the Court's precedent."⁸²

Since *Gideon*, courts have extended the right to appointed counsel⁸³ to all stages of criminal proceedings where the lack of counsel may affect a substantial right.⁸⁴ These critical stages include identification lineups,⁸⁵ interrogations,⁸⁶ arraignments and initial appearances where the state requires the defendant to make an election that could be prejudicial,⁸⁷ preliminary hearings,⁸⁸ trials,⁸⁹ and sentencings.⁹⁰ The Sixth Amendment right to counsel is not automatically satisfied, however, when an indigent defendant is provided an attorney. Instead, the Supreme Court has made it clear that the Sixth Amendment does more than simply establish the right to legal representation—it requires that the representation a criminal defendant receives is competent and effective.

B. Strickland and the Standard for Effectiveness

In *Strickland v. Washington*,⁹¹ decided twenty-one years after *Gideon*, the Supreme Court established the test for determining whether an attorney's performance was so ineffective as to deprive the defendant of his Sixth Amendment right to counsel.⁹² After a violent ten-day crime spree, the defendant in *Strickland* was arrested and indicted in state court for kidnapping and murder.⁹³ He was appointed an experienced criminal lawyer, who at first actively defended the case, but abruptly stopped when the defendant confessed to the first two murders, against the attorney's advice.⁹⁴ The attorney became further discouraged when—again against his advice—the defendant pleaded guilty to all charges and waived his right under Florida law to an advisory jury at his sentencing hearing.⁹⁵

The attorney prepared for sentencing only by speaking with the defendant and the defendant's wife and mother about the defendant's background.⁹⁶ Besides this, however, the attorney did not gather character witnesses for the

⁸¹ *Id.* at 349 (Harlan, J., concurring).

⁸² *Id.*

⁸³ For a discussion of post-*Gideon* decisions, see Emily Garcia Uhrig, *A Case for a Constitutional Right in Habeas Corpus*, 60 HASTINGS L.J. 541, 557–59 (2009).

⁸⁴ *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

⁸⁵ *United States v. Wade*, 388 U.S. 218, 236–37 (1967).

⁸⁶ *Escobedo v. Illinois*, 378 U.S. 478, 490–91 (1964).

⁸⁷ *Hamilton v. Alabama*, 368 U.S. 52, 54–55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963).

⁸⁸ *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970).

⁸⁹ *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

⁹⁰ *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

⁹¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

⁹² ISRAEL & LAFAYE, *supra* note 32, at 394. For a comprehensive analysis of *Strickland*, see David J. Gross, *Sixth Amendment—Defendant's Dual Burden in Claims of Ineffective Assistance of Counsel*, 75 J. CRIM. L. & CRIMINOLOGY 755 (1984).

⁹³ *Strickland*, 466 U.S. at 671–72.

⁹⁴ *Id.* at 672.

⁹⁵ *Id.*

⁹⁶ *Id.* at 672–73.

defendant.⁹⁷ Additionally, because the attorney did not have reason to believe the defendant had psychological problems, he failed to request a psychiatric examination.⁹⁸ The attorney also did not present other evidence he thought was potentially damaging, such as the defendant's rap sheet.⁹⁹ Instead, the attorney focused on the defendant's remorse and acceptance of responsibility because the judge had remarked that he found those factors to be important.¹⁰⁰ The attorney also pointed out that the defendant did not have a criminal history, that he was under severe mental and emotional stress when he committed these crimes, and that he had not only surrendered and confessed, but he had also volunteered to testify against a codefendant.¹⁰¹ The defense attorney argued that these factors justified a lesser sentence than the death penalty.¹⁰² However, the attorney did not cross-examine the medical experts that were called by the prosecution to testify regarding the victims' manner of death.¹⁰³

After articulating several aggravating circumstances, including a finding that the defendant was fully aware of the criminal nature of his acts and "was not suffering from extreme mental or emotional disturbance,"¹⁰⁴ the trial judge sentenced the defendant to death.¹⁰⁵ On direct appeal, the Florida Supreme Court upheld the defendant's convictions and sentences.¹⁰⁶ In a subsequent collateral proceeding, the defendant claimed that his attorney had given ineffective assistance because of his failure to move for a continuance in order to gain time to adequately prepare for the sentencing, his failure to order a psychiatric report, his failure to get a presentence investigation report, his failure to obtain favorable character witnesses, his failure to investigate or challenge the medical evidence, and his failure to present relevant and compelling arguments.¹⁰⁷ The defendant presented fourteen affidavits from friends, neighbors, and relatives who would have testified had counsel requested it.¹⁰⁸ He also submitted both a psychiatric report and a psychological report that stated that at the time of the

⁹⁷ *Id.* at 673.

⁹⁸ *Id.* According to the Court:

Counsel decided not to present and hence not to look further for evidence concerning [the defendant's] character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of [the defendant's] confessions to the gruesome crimes. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about [the defendant's] background and about his claim of emotional distress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining [the defendant] on his claim and from putting on psychiatric evidence of its own.

Id. (citations omitted).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 673–74.

¹⁰² *Id.* at 673.

¹⁰³ *Id.* at 674.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 675.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

crimes, he was “chronically frustrated and depressed because of his economic dilemma.”¹⁰⁹

Notwithstanding this evidence, the state trial court denied the defendant’s request for collateral relief, relying on the standard that had been established by the Florida Supreme Court several years prior.¹¹⁰ The trial court concluded that the defendant had failed to show that his attorney had been incompetent, or that the attorney’s decisions had likely affected the outcome.¹¹¹ The Florida Supreme Court affirmed the trial court’s denial of relief, noting that the defendant’s failure to make his case was so substantial that it was certain he was not entitled to relief.¹¹²

The defendant then turned to federal court and filed a habeas petition.¹¹³ After an evidentiary hearing, the district court denied any relief, concluding that “although trial counsel made errors . . . no prejudice to respondent’s sentence resulted from any such error in judgment.”¹¹⁴ En banc, the Eleventh Circuit Court of Appeals reversed the district court under a new test it developed for analyzing ineffective assistance claims.¹¹⁵ The Eleventh Circuit held that the Sixth Amendment gave criminal defendants a right to an attorney who could render effective assistance and who did reasonably do so in light of all of the circumstances.¹¹⁶ The United States Supreme Court, in order to clarify the standard used to determine ineffective assistance of counsel, granted certiorari.¹¹⁷

The Court began its discussion by noting that previous cases, including *Powell*, *Johnson*, and *Gideon*, supported the proposition that the Sixth Amendment, through the right to effective counsel, directly protects the fundamental right to a fair trial.¹¹⁸ However, the Court further held that the mere presence of an attorney does not satisfy the test; the attorney must be competent to fairly represent the defendant so that the court may render a just decision.¹¹⁹

The Court established a two-part test to be utilized in determining whether representation was constitutionally deficient:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.¹²⁰

¹⁰⁹ *Id.* at 675–76 (internal quotation marks omitted).

¹¹⁰ *Id.* at 676–77.

¹¹¹ *Id.* at 677.

¹¹² *Id.* at 678.

¹¹³ *Id.*

¹¹⁴ *Id.* at 678–79.

¹¹⁵ *Id.* at 679.

¹¹⁶ *Id.* at 680.

¹¹⁷ *Id.* at 684.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 685.

¹²⁰ *Id.* at 687. “Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.” *Id.*

After discussing its newly-developed standard in more detail, the Court turned to the facts of the case before it and concluded that the defendant had not established ineffective assistance of counsel because the attorney's choices were reasonably strategic under the circumstances, and the evidence against the defendant was so overwhelming that it was unlikely that any alternative the attorney might have pursued would have made any difference.¹²¹ Accordingly, the Court reversed the Eleventh Circuit and affirmed the district court's denial of habeas relief.¹²²

Since establishing the test for ineffectiveness in *Strickland*, the Supreme Court has decided numerous cases in which it has applied that test to specific circumstances. In *Nix v. Whiteside*, for example, the Court held that the Sixth Amendment right of a criminal defendant to assistance of counsel was not violated by an attorney refusing to cooperate with the defendant in presenting perjured testimony at trial.¹²³ All nine Justices in *Nix* agreed that the defendant failed to meet the prejudice prong of the *Strickland* test, and five Justices held that the defendant failed to meet the incompetency prong.¹²⁴ Likewise, in *Yarborough v. Gentry*, the Court rejected the defendant's assertion that his attorney's closing argument rendered his representation ineffective under *Strickland*.¹²⁵ In a unanimous decision, the Court noted that attorneys must be allowed flexibility in their decisions of how to best represent a client, especially during closing arguments, given the many strategies that may appear reasonable at the time.¹²⁶

¹²¹ *Id.* at 698–700. Under the first prong of the test, the Court found:

[T]he record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. . . . Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.

Id. at 699. Under the second prong, the Court determined:

[T]he lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. . . . Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.

Id. at 699–700.

¹²² *Id.* at 701. Justice Brennan concurred in the majority's reasoning but dissented from the majority's judgment based on his belief that the death penalty was cruel and unusual punishment under the Eighth Amendment. *Id.* (Brennan, J., concurring in part and dissenting in part). Justice Marshall filed a separate dissent, in which he criticized the majority's efforts to clarify effectiveness standards as being "unhelpful." *Id.* at 706–07 (Marshall, J., dissenting).

¹²³ *Nix v. Whiteside*, 475 U.S. 157, 176 (1986).

¹²⁴ ISRAEL & LAFAYE, *supra* note 32, at 400.

¹²⁵ *Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2003).

¹²⁶ *Id.*

Closing arguments should sharpen and clarify the issues for resolution by the trier of fact, but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing argument altogether. Judicial review of a defense attorney's summation is therefore highly deferential—and doubly deferential when it is conducted through the lens of federal habeas.

Id. at 6 (citations omitted) (internal quotation marks omitted).

The Court also applied the *Strickland* test in *Kimmelman v. Morrison*.¹²⁷ There, the defendant claimed that counsel failed to timely file a motion to suppress evidence that was found during an unconstitutional search.¹²⁸ The attorney attempted to justify his failure by arguing that he was unaware of the seizure in question until after trial had already begun.¹²⁹ As to *Strickland*'s performance prong, the Court held that although "the failure to file a suppression motion does not constitute *per se* ineffective assistance of counsel,"¹³⁰ counsel in *Kimmelman* was ineffective because the attorney's failure to file a timely suppression motion was not a strategic decision, but was instead due to his lack of knowledge of the search, which was a direct result of his failure to conduct pretrial discovery.¹³¹ The Court concluded that the record before it was incomplete and remanded the case to the district court for an evidentiary hearing regarding prejudice.¹³²

The Sixth Amendment is not the only constitutional provision that potentially impacts indigent criminal defendants. Because the Sixth Amendment deals only with the right to legal counsel, when faced with questions regarding an indigent defendant's entitlement to services other than those from a lawyer, courts will focus on the Due Process Clause of the Fourteenth Amendment instead. The next section will discuss in detail the Court's due process jurisprudence in relation to indigent criminal defendants.

C. *The Due Process Clause and Indigent Defendants*

Since deciding *Gideon* in 1963, the Supreme Court has held that, in some situations, indigent defendants are constitutionally entitled under the Due Process Clause to the appointment of certain professionals in addition to attorneys.¹³³ In *Ake v. Oklahoma*, for instance, the Court was presented with the question of whether a defendant who may have been insane at the time of the crime was entitled by the Constitution to have access to a psychiatrist in order to build an effective defense based on his mental condition.¹³⁴ The defendant, Glen Burton Ake, was charged with murdering a couple and wounding their two children.¹³⁵ Ake's behavior at his arraignment was bizarre to the extent that the trial judge ordered a psychiatric evaluation to help the court decide

¹²⁷ *Kimmelman v. Morrison*, 477 U.S. 365, 371–72 (1986).

¹²⁸ ISRAEL & LAFAYE, *supra* note 32, at 401.

¹²⁹ *Kimmelman*, 477 U.S. at 369.

¹³⁰ *Id.* at 384 (emphasis in original).

¹³¹ *Id.* at 385.

Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. Such a complete lack of pretrial preparation puts at risk both the defendant's right to an ample opportunity to meet the case of the prosecution, and the reliability of the adversarial testing process.

Id. (citations omitted) (internal quotation marks omitted).

¹³² *Id.* at 390–91.

¹³³ See generally Fred Warren Bennett, *Toward Eliminating Bargain Basement Justice: Providing Indigent Defendants with Expert Services and an Adequate Defense*, 58 LAW & CONTEMP. PROBS. 95 (1995).

¹³⁴ *Ake v. Oklahoma*, 470 U.S. 68, 70 (1985). For another in-depth analysis of the *Ake* decision, see Carlton Bailey, *Ake v. Oklahoma and an Indigent Defendant's 'Right' to an Expert Witness: A Promise Denied or Imagined?*, 10 WM. & MARY BILL RTS. J. 401 (2002).

¹³⁵ *Ake*, 470 U.S. at 70.

whether further observation would be necessary to determine Ake's mental stability.¹³⁶ The examining psychiatrist concluded that Ake probably suffered from paranoid schizophrenia and recommended that the court order further psychiatric evaluations before determining Ake's competency to stand trial.¹³⁷

Based on this report, Ake was sent to a state mental hospital for examination and determination of his competency.¹³⁸ After several months of observation, the hospital's chief forensic psychiatrist determined that Ake was incompetent and should not be tried.¹³⁹ Accordingly, the court declared Ake incompetent and committed him to a mental hospital.¹⁴⁰ Six weeks after he was committed, the hospital's chief forensic psychiatrist informed the court that Ake had become competent to stand trial.¹⁴¹ The psychiatrist opined that if Ake continued to receive the antipsychotic drug that he was taking at the hospital, his condition would remain stable.¹⁴²

At a pretrial conference held after the criminal proceedings against Ake resumed, Ake's attorney informed the court that Ake intended to raise an insanity defense, and that Ake would need a psychiatrist to determine his mental condition at the time he committed the offense.¹⁴³ The attorney also informed the court that Ake could not afford to pay for a psychiatrist and requested that the court either appoint a psychiatrist or provide funds so Ake could hire one.¹⁴⁴ The court denied counsel's request, rejecting the argument that the Constitution requires access to a psychiatrist when such access is necessary to build an insanity defense.¹⁴⁵

At trial, neither side presented expert testimony regarding Ake's mental state at the time of the offense.¹⁴⁶ The jury ultimately rejected Ake's insanity defense and returned a guilty verdict.¹⁴⁷ Ake was sentenced to death based, at least in part, on testimony presented by the prosecution regarding his future dangerousness.¹⁴⁸ The Oklahoma Court of Criminal Appeals rejected Ake's argument that he was constitutionally entitled to a court-appointed psychiatrist, and affirmed Ake's conviction and sentence.¹⁴⁹ The United States Supreme Court granted certiorari.¹⁵⁰

The Supreme Court reversed the state court and concluded that Ake was constitutionally entitled, under the Due Process Clause of the Fourteenth Amendment, to the assistance of a psychiatrist both on the issue of his sanity at the time of the crime and on the issue of future dangerousness.¹⁵¹ The Court

¹³⁶ *Id.* at 71.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 71–72.

¹⁴³ *Id.* at 72.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 73.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 73–74.

¹⁵⁰ *Id.* at 74.

¹⁵¹ *Id.* at 86–87.

began its discussion by noting “that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense.”¹⁵² The Court held that the Fourteenth Amendment’s protection of fundamental fairness requires that an indigent defendant not be “denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.”¹⁵³

In support of its decision, the Court in *Ake* cited several prior cases that outlined other rights afforded indigent defendants. It noted, for instance, that pursuant to *Griffin v. Illinois*,¹⁵⁴ a criminal defendant must be provided with a trial transcript “if the transcript is necessary to a decision on the merits of the appeal.”¹⁵⁵ It also cited *Burns v. Ohio*,¹⁵⁶ where the Court held against requiring indigent defendants to pay a fee before filing an appeal;¹⁵⁷ *Gideon v. Wainwright*, where the Court held that an indigent defendant is entitled to the assistance of counsel at trial,¹⁵⁸ and *Douglas v. California*,¹⁵⁹ where the Court held that an indigent defendant is entitled to the assistance of counsel on his first direct appeal as of right.¹⁶⁰

The Court went on to hold that:

[W]hile the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, it has often reaffirmed that fundamental fairness entitles indigent defendants to ‘an adequate opportunity to present their claims fairly within the adversary system.’ . . . To implement this principle, we have focused on identifying the ‘basic tools of an adequate defense or appeal’ . . . and we have required that such tools be provided to those defendants who cannot afford to pay for them.¹⁶¹

The Court in *Ake* then turned to the question of “whether, and under what conditions, the participation of a psychiatrist is important enough to preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense.”¹⁶² The Court focused on three relevant factors: the private interest; the governmental interest; and the likely value of the safeguard sought and the risk of error if that safeguard is not provided.¹⁶³

The Court characterized the private interest as the “interest in the accuracy of a criminal proceeding that places an individual’s life or liberty at risk,” and

¹⁵² *Id.* at 76.

¹⁵³ *Id.*

¹⁵⁴ *Griffin v. Illinois*, 351 U.S. 12 (1956).

¹⁵⁵ *Ake*, 470 U.S. at 76.

¹⁵⁶ *Burns v. Ohio*, 360 U.S. 252 (1959).

¹⁵⁷ *Ake*, 470 U.S. at 76.

¹⁵⁸ *Id.*

¹⁵⁹ *Douglas v. California*, 372 U.S. 353 (1963).

¹⁶⁰ *Ake*, 470 U.S. at 76.

¹⁶¹ *Id.* at 77 (citations omitted). Furthermore:

We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Id.

¹⁶² *Id.*

¹⁶³ *Id.*

called this interest “uniquely compelling.”¹⁶⁴ The Court rejected the state’s argument that providing Ake with psychiatric assistance would result “in a staggering burden.”¹⁶⁵ It noted that many other courts provided psychiatric assistance to indigent defendants without incurring a substantial financial burden.¹⁶⁶ Moreover, the Court could not identify any governmental interest that weighed against recognition of this right.¹⁶⁷ As to the value of the psychiatric assistance and the possible harm of failing to offer the service, the Court concluded that without a psychiatrist’s assistance in building an insanity defense, “the risk of an inaccurate resolution of sanity issues is extremely high,” whereas if the defendant were to have access to a psychiatrist, he would be able to fairly and meaningfully present his case.¹⁶⁸

Based on its evaluation of these three factors, the Court held that where a defendant’s sanity at the time he committed the offense is significant to the criminal proceeding, the court is required to provide the defendant with access to a competent psychiatrist.¹⁶⁹ The Court further held that where the defendant’s future dangerousness is raised as a sentencing issue, “due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.”¹⁷⁰ Dissenting, Justice Rehnquist expressed his opinion that the majority’s rule was “far too broad.”¹⁷¹ Rehnquist opined that the rule should be limited to capital cases, and that it should be made clear that a psychiatrist is only to help with an independent psychiatric evaluation, rather than to function as a defense consultant.¹⁷²

In *Caldwell v. Mississippi*,¹⁷³ the Supreme Court “held open the possibility of extending the *Ake* analysis to other types of experts (e.g., forensic specialists), given a proper showing of need.”¹⁷⁴ The defendant in *Caldwell*, who was convicted of murder and sentenced to death, challenged his conviction based in part upon the trial court’s refusal to provide experts to assist the defendant in preparing his case.¹⁷⁵ The Supreme Court affirmed *Caldwell*’s conviction, holding that *Caldwell* had not shown that these experts were necessary to help him prepare his defense.¹⁷⁶ The Court concluded, however, by leaving

¹⁶⁴ *Id.* at 78.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 79.

¹⁶⁸ *Id.* at 82.

¹⁶⁹ *Id.* at 83.

¹⁷⁰ *Id.* at 84.

¹⁷¹ *Id.* at 87 (Rehnquist, J., dissenting).

¹⁷² *Id.*

¹⁷³ *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

¹⁷⁴ ISRAEL & LAFAYE, *supra* note 32, at 360.

¹⁷⁵ *Caldwell*, 472 U.S. at 323–24 n.1. Although the trial court was required by state law to, and did, provide a psychiatrist, it rejected *Caldwell*’s requests for a fingerprint expert, a criminal investigator, and a ballistics expert. *Id.*

¹⁷⁶ *Id.* The Court noted, as an example, that in support of his request for a ballistics expert, *Caldwell* “included little more than the general statement that the requested expert would be of great necessarius witness.” *Id.* (internal quotation marks omitted).

open the possibility that denial of such assistance might amount to a due process violation if more of a showing of necessity was made.¹⁷⁷

Several courts of appeals have applied the *Ake* and *Caldwell* analyses to specific cases. In *Moore v. Kemp*, for example, the Eleventh Circuit Court of Appeals interpreted *Ake* and *Caldwell* as standing for the proposition that there is no guarantee that indigent defendants will receive every expert they demand; instead, a defendant must show “a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.”¹⁷⁸ In *Little v. Armontrout*, the Eighth Circuit Court of Appeals held that due process was violated when the court refused to appoint a hypnosis expert for a defendant in a rape trial where the only issue was identification, and the prosecution’s eyewitness was hypnotized to improve his memory.¹⁷⁹ The Eighth Circuit determined that *Ake* should be applied even when the defendant did not face the death penalty and the requested expert was not a psychiatrist.¹⁸⁰ The court felt that need should be determined based on the importance of the scientific issue and the amount of help an expert could provide, regardless of whether or not the expert was a psychiatrist or whether or not the case was a capital one.¹⁸¹

Based on the legal principles set forth in *Ake*, *Caldwell*, *Moore*, and *Little*,¹⁸² the appointment of an immigration attorney for an indigent noncitizen

¹⁷⁷ *Id.* “We therefore have no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type here sought.” *Id.*

¹⁷⁸ *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987) (footnote omitted).

¹⁷⁹ *Little v. Armontrout*, 835 F.2d 1240, 1241–42 (8th Cir. 1987). The court in *Little* concluded that “the denial of a state-provided expert on hypnosis to assist this indigent defendant rendered the trial fundamentally unfair and require[d] that the conviction be set aside.” *Id.* at 1243.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

There is no principled way to distinguish between psychiatric and nonpsychiatric experts. The question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have given. Nor do we draw a decisive line for due-process purposes between capital and noncapital cases. To be sure, the defendant’s interest in staying alive is greater and different in kind from his interest in avoiding a prison term, but the latter interest, in our opinion, still outweighs the state’s interest in avoiding the relatively small expenditure that would be required. *Id.* at 1243–44.

¹⁸² See also *Ex parte Moody*, 684 So. 2d 114, 119 (Ala. 1996) (“[A]n indigent defendant . . . [is] entitled to expert assistance at public expense . . . [if he shows] a reasonable probability that the expert would be of assistance in the defense and that the denial of expert assistance would result in a fundamentally unfair trial.”); *People v. San Nicolas*, 101 P.3d 509, 542 (Cal. 2004) (“A criminal defendant has the due process right to the assistance of expert witnesses . . . if necessary, to prepare his defense.”); *Weis v. State*, 694 S.E.2d 350, 361 (Ga. 2010) (“It is beyond question that the State is required to provide appointed counsel and expert assistance to indigent criminal defendants.”); *State v. Davis*, 318 S.W.3d 618, 632 (Mo. 2010) (“[W]here the required showing of significance and necessity is made, *Ake*’s rationale may extend to non-psychiatric experts in the appropriate case.”); *State v. Wolf*, No. 91-L-096, 1992 Ohio App. LEXIS 6185, at *12–13 (Ohio Ct. App. Dec. 11, 1992) (holding that trial court’s refusal to appoint expert pathologist in murder case required reversal of defendant’s conviction); David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L.J. 281 (1990) (arguing that due process requires

criminal defendant might be required not only by the Sixth Amendment, but by the Due Process Clause of the Fourteenth Amendment as well.

III. PADILLA—THE SIXTH AMENDMENT AND NONCITIZEN DEFENDANTS

In *Padilla*, the Supreme Court, in an opinion authored by Justice Stevens and joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor, concluded that the Sixth Amendment requires counsel to advise a noncitizen of the possibility of deportation in order for the representation to be constitutionally competent.¹⁸³ In support of its holding, the Court cited the Second Circuit's holding "that the Sixth Amendment right to effective assistance of counsel applies to a JRAD request¹⁸⁴ or lack thereof."¹⁸⁵ The Second Circuit held that, far from being a collateral matter, "the impact of a conviction on a noncitizen's ability to remain in the country was a central issue to be resolved during the sentencing process."¹⁸⁶

The *Padilla* Court stated that recent changes in immigration law—mainly the elimination of a judge's discretion to allow an otherwise deportable alien to stay in the country¹⁸⁷—"dramatically raised the stakes of a noncitizen's criminal conviction."¹⁸⁸ The Court noted:

The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of

appointment of experts to indigent civil litigations); Justin B. Shane, *Money Talks: An Indigent Defendant's Right to an Ex Parte Hearing for Expert Funding*, 17 CAP. DEF. J. 347 (2005) (arguing that due process entitles indigent defendants to apply ex parte for expert funding); A. Michelle Willis, Comment, *Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-Ake Criminal Justice System*, 37 EMORY L.J. 995 (1988) (discussing due process concerns generally); Jay A. Zollinger, Comment, *Defense Access to State-Funded DNA Experts: Considerations of Due Process*, 85 CALIF. L. REV. 1803 (1997) (discussing criminal defendant's right to state-funded DNA Experts).

¹⁸³ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010).

¹⁸⁴ "JRAD" stands for a "judicial recommendation against deportation." *Id.* at 1479. The JRAD procedure, which was first created by the Immigration and Nationality Act of 1917, permitted the sentencing judge in both state and federal prosecutions to make a recommendation that an alien convicted of an otherwise deportable offense should not be deported. *Id.* The JRAD procedure "was 'consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation.'" *Id.* (quoting *Janvier v. United States*, 793 F.2d 449 (2d Cir. 1986)). The effect of the JRAD procedure was that there was no such thing as "an automatically deportable offense." *Id.* As the Court noted in *Padilla*, however, the JRAD procedure was eliminated by Congress in 1990. *Id.* at 1480. Under the current state of the law, "if a noncitizen has committed a removable offense . . . his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses." *Id.* As noted by the *Padilla* Court "[s]ubject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance." *Id.* For a more detailed explanation of the state of immigration law as it relates to criminal convictions, see *infra* notes 235–45 and accompanying text.

¹⁸⁵ *Padilla*, 130 S. Ct. at 1480.

¹⁸⁶ *Id.*

¹⁸⁷ See *supra* note 184.

¹⁸⁸ *Padilla*, 130 S. Ct. at 1480.

the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.¹⁸⁹

The Court in *Padilla* held that deportation was so closely connected to the criminal process that it could not properly be characterized as a direct or collateral consequence, and therefore, that the distinction was not applicable in this context.¹⁹⁰

Moving to the question of whether Padilla's counsel was ineffective under the standard set forth in *Strickland*, the Court found:

When the law is not succinct and straightforward . . . 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. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.¹⁹¹

The Court concluded that Padilla met the first prong of *Strickland*,¹⁹² but it did not decide whether Padilla satisfied *Strickland*'s second prong by showing prejudice.¹⁹³ It left that question to the Kentucky courts.¹⁹⁴

Concurring in the judgment, Justice Alito, joined by Chief Justice Roberts, took a more narrow view of what is required by *Strickland* in this context. In Justice Alito's view, *Strickland* requires an attorney to "(1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney."¹⁹⁵ Justice Alito disagreed that an attorney must attempt to explain potential immigration consequences and criticized the majority's holding "that a criminal defense attorney must provide advice in this specialized area in those cases in which the law is 'sufficient and straightforward'—but not, perhaps, in other situations."¹⁹⁶

Justice Scalia, in a dissenting opinion joined by Justice Thomas, stated that the Sixth Amendment does not guarantee "sound advice about the collateral consequences of conviction," nor require "counsel to provide accurate advice concerning the potential removal consequences of a guilty plea."¹⁹⁷ Justice Scalia stated that even "affirmative misadvice about those consequences"

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1482.

¹⁹¹ *Id.* The Court based this finding on the fact that:

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited.

Id. Additionally, the Court noted that Padilla's case was "not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." *Id.* at 1483.

¹⁹² *Id.*

¹⁹³ *Id.* at 1483–84.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1487 (Alito, J., concurring).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1494 (Scalia, J., dissenting).

does not render the assistance of counsel constitutionally infirm.¹⁹⁸ According to Justice Scalia, statutory provisions could better remedy the concerns raised by the majority.¹⁹⁹

After *Padilla*, it is clear that the Sixth Amendment requires counsel in a criminal case to “inform her client whether his plea carries a risk of deportation.”²⁰⁰ *Padilla* requires counsel to advise the client of the deportation consequences of a guilty plea or conviction when those consequences are clear, succinct, and straightforward.²⁰¹ Where the deportation consequences are not so clear or straightforward, however, counsel need only advise the client of the possibility of immigration consequences.²⁰² What is not clear is whether the Constitution requires the appointment of a separate immigration attorney, in addition to a criminal defense attorney, for an indigent noncitizen defendant in cases where the deportation consequences are not clear or straightforward. The remainder of this Article will discuss when and whether such an appointment is constitutionally mandated in light of the Supreme Court’s Sixth Amendment and Due Process precedents. It will also discuss whether such an appointment is required by federal statutory law.

IV. ANALYSIS

A. *The Current State of Immigration Law & Criminal Convictions*

Before discussing whether the Constitution or federal law requires the appointment of an immigration attorney for indigent noncitizen criminal defendants facing possible deportation, it is important to understand the current state of immigration law as it relates to criminal convictions. Under the federal Immigration and Nationality Act (“INA”), aliens convicted²⁰³ of certain crimes are subject to removal from the United States.²⁰⁴ The list includes convictions for crimes of “moral turpitude committed within five years . . . after the date of admission,” convictions for “two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct,” any conviction for “an aggravated felony,” a conviction for high speed flight from an immigration checkpoint, and a conviction for failing to register as a sex offender.²⁰⁵ An alien is also subject to removal if convicted of a “violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one’s own use of 30 grams or less of marijuana,”²⁰⁶ or a firearm offense.²⁰⁷ Other deportable offenses under the INA include espionage.

¹⁹⁸ *Id.* at 1494–95.

¹⁹⁹ *Id.* at 1495.

²⁰⁰ *Id.* at 1486.

²⁰¹ *Id.* at 1483.

²⁰² *Id.*

²⁰³ The word “convicted,” as used in the INA, includes a formal judgment of guilt, a plea of guilty, and a plea of nolo contendere. 8 U.S.C. § 1101(48)(A)(i)–(ii) (2006).

²⁰⁴ 8 U.S.C. § 1227(a)(2) (2006 & Supp. II 2008).

²⁰⁵ *Id.* § 1227(a)(2)(A)(i)–(v).

²⁰⁶ *Id.* § 1227(a)(2)(B)(i).

²⁰⁷ *Id.* § 1227(a)(2)(C).

nage, sabotage, treason, and sedition; threats against the President or Vice-President; engaging in an expedition against a friendly nation; violating the Selective Service Act or the Trading With the Enemy Act;²⁰⁸ crimes of domestic violence, stalking, violation of a protective order or crimes against children;²⁰⁹ and trafficking of aliens.²¹⁰

As the Supreme Court in *Padilla* noted, “Under contemporary law, if a noncitizen has committed a removable offense . . . his removal is practically inevitable.”²¹¹ The only exception to this inevitable removal is that the Attorney General may cancel removal if the alien has (1) been lawfully admitted as a permanent citizen for at least five years, (2) has lived continuously in the United States for at least seven years after being admitted, and (3) has never been convicted of an aggravated felony.²¹²

Because of the current state of immigration law, criminal convictions of noncitizens may have severe repercussions. The increased stakes of a criminal conviction for an alien were discussed in more detail by the Asian American Justice Center and the Mexican American Legal Defense and Educational Fund in their amicus brief to the Supreme Court in the *Padilla* case. In their brief, these organizations noted that “the 1996 amendments to the INA rendered the immigration consequences of convictions for many crimes more certain, immediate, and severe.”²¹³ The amicus brief went on to note that “[u]nder the amended law, convictions for many relatively minor state-law crimes that previously were not deportable offenses—or were offenses that carried immigration consequences from which courts had discretion to grant relief on a case-by-case basis—now result in mandatory detention and deportation.”²¹⁴ According to the amici, uninformed noncitizens are at risk of entering into a plea with unintended immigration consequences.²¹⁵

²⁰⁸ *Id.* § 1227(a)(2)(D)(i)–(iii).

²⁰⁹ *Id.* § 1227(a)(2)(E)(i)–(ii).

²¹⁰ *Id.* § 1227(a)(2)(F).

²¹¹ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010).

²¹² 8 U.S.C. § 1229b(a)(1)–(3) (2006).

²¹³ Brief for Amici Curiae Asian Am. Justice Ctr. et al. in Support of Petitioner at 6, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651).

²¹⁴ *Id.*

²¹⁵ *Id.* The amici brief also discusses the difficulty that a noncitizen criminal defendant would have in attempting to determine the immigration consequences of his plea or conviction without competent counsel to advise him of those consequences:

Because the INA’s reach is exceedingly broad, non-citizens may plead guilty to minor crimes in exchange for a lighter sentence without realizing that they are pleading guilty to crimes that will subject them to mandatory deportation Whether immigration law classifies a particular criminal conviction as one that results in detention or deportation, however, can turn largely on the specifics of a non-citizen’s plea agreement. . . . Therefore, because the immigration consequences of pleading guilty can be so severe—and because the specifics of the plea agreement are so important—it is crucial that non-citizens be fully aware of those relevant considerations before accepting a plea.

Id. at 11. The brief goes on to argue that “[d]eportation and detention, which are often consequences of criminal convictions for non-citizens, can severely disrupt settled expectations, wreak havoc on an individual’s life, and tear families apart.” *Id.* at 12 (emphasis omitted). It discusses certain consequences of deportation, such as the separation of families, the loss of livelihood, and possible deportation back to countries from which the alien fled persecution. *Id.*

The Court in *Padilla* cited these concerns in support of its holding that an attorney, in order to comply with the Sixth Amendment, “must inform her client whether his plea carries a risk of deportation.”²¹⁶ The Court, however, also noted the likelihood that in many cases the immigration consequences would be unclear.²¹⁷ In those difficult cases, the Court held, all a criminal defense attorney must do is inform the defendant that the charges against him “may carry a risk of adverse immigration consequences.”²¹⁸ Even under Justice Alito’s concurrence, a criminal defense attorney is required to “advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney.”²¹⁹

The remainder of this Article will discuss what happens when a noncitizen criminal defendant cannot afford to consult an immigration attorney. This Article will argue that federal statutory law, the Sixth Amendment, and the Due Process Clause of the Fourteenth Amendment all require that such a defendant be appointed an immigration attorney in certain circumstances.

B. *Statutory Entitlement: The Criminal Justice Act*

In addition to the appointment of immigration counsel under the Sixth Amendment and the Due Process Clause, an indigent noncitizen defendant may also be entitled to government funding of an immigration attorney under federal statutory law. The Criminal Justice Act (“CJA”) requires, in federal prosecutions, the funding of services other than counsel²²⁰ where the court finds “that the services are necessary and that the person is financially unable to obtain them.”²²¹ Specifically, the CJA provides that where the defendant is indigent, counsel for that defendant may request the needed experts or services.²²² Once such an application is made, the court must hold an ex parte hearing to confirm both that the requested assistance is necessary²²³ and that the defendant cannot afford such assistance.²²⁴ After making the appropriate finding, the court is required to authorize counsel to obtain those services.²²⁵

Moreover, where such expert services are necessary for adequate representation, counsel for an indigent defendant who herself was appointed to represent the defendant under the CJA, “may obtain, subject to later review,

²¹⁶ *Padilla*, 130 S. Ct. at 1486.

²¹⁷ *Id.* at 1483.

²¹⁸ *Id.*

²¹⁹ *Id.* at 1487 (Alito, J., concurring).

²²⁰ Although an immigration attorney is technically “counsel,” such an attorney would be treated the same as a non-lawyer expert under the CJA.

²²¹ 18 U.S.C. § 3006A(e)(1) (2006).

²²² *Id.*

²²³ The question of whether assistance is “necessary” is determined by courts on a case-by-case basis. *See, e.g.*, *United States v. Theriault*, 440 F.2d 713, 715 (5th Cir. 1971) (“The standards to govern what is ‘necessary to an adequate defense’ are not susceptible to arbitrary articulation but can best be developed on a case by case basis.” (quoting *Schultz v. United States*, 431 F.2d 907, 913 (8th Cir. 1970) (concurring opinion))).

²²⁴ 18 U.S.C. § 3006A(e)(1).

²²⁵ *Id.*

investigative, expert, and other services without prior authorization.”²²⁶ However, where there was no prior authorization by the court, “the total cost of service[] . . . may not exceed \$800 and expenses reasonably incurred.”²²⁷ An exception to this \$800 limit exists where the court finds “that timely procurement of necessary services could not await prior authorization.”²²⁸ Upon such a finding, the court “may, in the interest of justice . . . approve payment for such services after they have been obtained, even if the cost of such services exceeds \$800.”²²⁹ The CJA also places a cap of \$2,400 on the provision of such services “unless payment in excess of that limit is certified by the court . . . as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit.”²³⁰

The above-referenced provisions of the CJA would apply to a request for immigration counsel where the defendant’s criminal attorney could establish that such assistance is necessary and that the defendant is not financially able to obtain such assistance. At least one court has interpreted the CJA as possibly requiring funding for the services of an immigration attorney in certain circumstances. In that case, *United States v. Alves*, the defendant was charged with transferring counterfeit social security cards and alien registration cards in violation of federal law.²³¹ Because he was indigent, the court appointed counsel to represent him under the CJA.²³² Through his appointed criminal attorney, the defendant requested the additional help of an immigration attorney.²³³ The criminal attorney filed a motion arguing that he was not knowledgeable in immigration law and that the immigration consequences were crucial to determining how to proceed with the case.²³⁴

The attorney did not cite the CJA directly, but instead cited Section 2.11 of the Guide to Judicial Policies and Procedures. However, the district court expressly recognized the provision of the CJA allowing for ex parte applications for expert services,²³⁵ and held that the standard under Section 2.11 was essentially the same as that required by the CJA.²³⁶ Therefore, the court’s holding regarding availability of funds under the Guide to Judicial Policies and Procedures would apply with equal force to an application for prior approval of expert funding under the CJA.²³⁷

In deciding whether to grant the defendant’s request for the appointment of an immigration attorney under Paragraph 2.11(B),²³⁸ the district court first

²²⁶ *Id.* § 3006A(e)(2)(A).

²²⁷ *Id.*

²²⁸ *Id.* § 3006A(e)(2)(B).

²²⁹ *Id.*

²³⁰ *Id.* § 3006A(e)(3). This provision goes on to provide that “[t]he chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.” *Id.*

²³¹ *United States v. Alves*, 317 F. Supp. 2d 65, 66 (D. Mass. 2004).

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ 18 U.S.C. § 3006A(e)(1).

²³⁶ *Alves*, 317 F. Supp. 2d at 67 n.2.

²³⁷ *Id.*

²³⁸ In 2004, Paragraph 2.11.B of the Guide provided:

noted that “a prerequisite for obtaining the appointment of an additional attorney is that the case be ‘extremely difficult.’”²³⁹ The court held that this requirement was necessary to prevent routine requests from appearing in every case where the defendant may face immigration consequences, which would inevitably severely strain the courts’ resources.²⁴⁰ The court concluded that, because the defendant in the case before it wanted an immigration attorney to help research the case and provide advice on immigration matters generally instead of seeking to have the immigration attorney actually represent him, Part B did not allow for such an appointment.²⁴¹

The court went on to discuss Part A of Paragraph 2.11, which provided:

Unless appointed in accordance with paragraph[] 2.11 B . . . co-counsel or associate attorneys may not be compensated under the [CJA]. However, an appointed counsel may claim compensation for services furnished by a partner or associate or, with prior authorization by the court, counsel who is not a partner or associate, within the maximum compensation allowed by the [CJA], separately identifying the provider of each service.²⁴²

Because the attorney did not move for prior authorization for funding under Paragraph 2.11(A), but instead moved for appointment of an immigration attorney under Part B, the court did not decide whether the defendant would be entitled to prior authorization under Part A.²⁴³ However, the court did discuss what the defendant must show to obtain such prior approval: namely, that the defendant’s otherwise competent CJA counsel cannot, through research, discover the immigration consequences under the circumstances.²⁴⁴

As illustrated by the district court’s decision in *Alves*, even if the appointment of immigration counsel is not constitutionally required, an indigent nonci-

In an extremely difficult case where the court finds it in the interest of justice to appoint an additional attorney, each attorney is eligible to receive the maximum compensation allowable under the [CJA]. The finding of the court that the appointment of an additional attorney in a difficult case was necessary and in the interest of justice shall appear on the Order of Appointment.

7 GUIDE TO JUDICIAL POLICIES & PROCEDURES ¶ 2.11.B [hereinafter GUIDE TO JUDICIAL POLICIES]. The Administrative Office of the U.S. Courts, which creates the guide, redesigned the guide in 2010. The new format for volume 7 of the guide can be found at http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Viewer.aspx?doc=/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol_07.pdf. There is a link that shows how the old paragraph structure transferred into the new section formatting.

²³⁹ *Alves*, 317 F. Supp. 2d at 67.

²⁴⁰ *Id.* at 67 n.1.

²⁴¹ *Id.* at 67.

²⁴² GUIDE TO JUDICIAL POLICIES, *supra* note 238, at ¶ 2.11.A.

²⁴³ *Alves*, 317 F. Supp. 2d at 69.

²⁴⁴ [A]n attorney appointed pursuant to the CJA should be granted such authorization only when there is a specific need which the CJA attorney himself is unable to meet. That is to say, prior authorization should not be given merely because a defendant is not a citizen and, hence, there will be immigration consequences upon conviction. CJA counsel, although not a specialist in immigration law, should be able to do the research necessary to discover those consequences. If, however, CJA counsel has a defendant where it cannot be discerned, despite CJA counsel’s diligent research efforts, what effect a conviction will have on the defendant’s immigration status, then a case can be made that prior authorization to obtain assistance from an immigration attorney should be granted.

Id. at 67–68.

tizen defendant may still be eligible for government funding of such counsel under the CJA where the defendant's appointed criminal attorney can show that such expert assistance is necessary and that the defendant cannot afford it himself. The CJA, of course, only applies in federal prosecutions. However, many states, as well as the District of Columbia, have similar statutes that give defendants some right to petition the court for expert assistance.²⁴⁵ In those states that do not have such a statute, however, an indigent noncitizen defendant will have to rely on the Sixth Amendment and/or the Due Process Clause of the Fourteenth Amendment to support a claim of entitlement to the assistance of an appointed immigration lawyer.

C. Requiring the Appointment of an Immigration Attorney Under the Sixth Amendment

In light of the *Padilla* Court's acknowledgement that deportation is perhaps the paramount penalty noncitizens face for specific crimes, and its observation that immigration law is often too complex for attorneys who do not specialize in it,²⁴⁶ it would make little sense for the Court to conclude that an indigent defendant should not be afforded such a specialist to advise him regarding the possible deportation consequences of his plea or conviction. To fail to do so, in fact, would likely violate the Sixth Amendment right to counsel and the competency requirement imposed under *Strickland*.

By way of example, suppose defendant Juan Pérez, who moved to the United States from Guatemala four years ago and has gained permanent residency, is charged with indecent exposure. Because this offense occurred within five years of Pérez's admission to the United States, if it is considered a "crime of moral turpitude," he will be removable under the INA.²⁴⁷ Further, because he has not legally resided in the United States for at least five years, he would

²⁴⁵ Shane, *supra* note 182, at 356–57; see also Bailey, *supra* note 134, at 457 n.535 (listing relevant state statutes). These jurisdictions include, but are not limited to, Alabama (ALA. CODE § 15-12-21(d) (1995 & Supp. 2011)), Alaska (ALASKA STAT. ANN. § 18.85.100(a)(1)-(2) (West 2007 & Supp. 2011)), Arizona (ARIZ. REV. STAT. ANN. § 13-4013(B) (2010)), Arkansas (ARK. CODE ANN. § 14-20-102(a)(1) (West 2004)), California (CAL. PENAL CODE § 987.9 (West 2008) (limited to capital and second-degree murder cases)), Colorado (COLO. REV. STAT. ANN. § 18-1-403 (West 2004)), Delaware (DEL. CODE ANN. tit. 29, § 4603(b) (West 2006) (permitting public defender to spend money on any necessary assistance)), District of Columbia (D.C. CODE § 11-2605(a) (2001 & Supp. 2011)), Hawaii (HAW. REV. STAT. § 802-7 (West 2008)), Idaho (IDAHO CODE ANN. § 19-852(a)(2) (West 2006)), Kansas (KAN. STAT. ANN. § 22-4508 (West 1995)), Minnesota (MINN. STAT. ANN. § 611.21(a) (West 2009)), Nevada (NEV. REV. STAT. § 7.135 (2009)), New Hampshire (N.H. REV. STAT. ANN. § 604-A:6 (2001 & Supp. 2011)), New Mexico (N.M. STAT. ANN. § 31-16-3 (West 2003)), New York (N.Y. COUNTY LAW § 722-c (McKinney 2004)), North Carolina (N.C. GEN. STAT. ANN. § 7A-450(b) (West 2004)), Ohio (OHIO REV. CODE ANN. § 2929.024 (West 2006 & Supp. 2011) (limited to aggravated murder cases)), Oklahoma (OKLA. STAT. tit. 20, § 1304(B)(19) (Supp. 2011)), Oregon (OR. REV. STAT. ANN. § 135.055(3) (West 2003 & Supp. 2011)), South Carolina (S.C. CODE ANN. § 17-3-50(B) (1976 & Supp. 2011)), Tennessee (TENN. CODE ANN. § 40-14-207(b) (West 2008 & Supp. 2011) (limited to capital cases)), Texas (TEX. CODE CRIM. PROC. ANN. art. 26.05(d) (West 2009 & Supp. 2011)), and Vermont (VT. STAT. ANN. tit. 13, § 5231(a)(2) (West 2007 & Supp. 2011)).

²⁴⁶ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480, 1484 (2010).

²⁴⁷ 8 U.S.C. § 1227(a)(2)(A)(i)–(ii) (2006).

be ineligible for cancellation of that removal.²⁴⁸ However, the question of whether the crime is one of “moral turpitude,” as that term is used in the INA, is open for interpretation.²⁴⁹ This is because the INA does not define “crime of moral turpitude,” thus leaving it to trial courts to engage in a case-specific analysis to determine whether the elements of the crime charged fit into the generic definition.²⁵⁰

Suppose also that Pérez’s court-appointed criminal defense attorney, a recent law school graduate and local public defender, knows little to nothing about immigration law, and therefore is unable to tell Pérez whether or not he will be deported if he decides to plead guilty or is otherwise convicted. Pursuant to *Padilla*, however, the attorney informs Pérez of the possibility of immigration consequences and suggests that Pérez talk to an immigration lawyer for more detailed advice. Pérez, however, cannot afford to even briefly consult an immigration attorney, and, therefore, unless the court appoints an immigration attorney or provides Pérez funds to hire one himself, he cannot know for certain whether his guilty plea would deem him removable under the INA.

Given the importance of the immigration consequences of a criminal conviction, which were expressly recognized by the Supreme Court in *Padilla*, it is inconsistent with the purpose of the Sixth Amendment’s right to counsel to tell Pérez that he is not entitled to a court-appointed or court-funded immigration specialist. The Supreme Court has held that “[t]he purpose of the Sixth Amendment counsel guarantee . . . is to ‘protec[t] the unaided layman at critical confrontations’ with his ‘expert adversary,’ the government.”²⁵¹ As mentioned above, the Court in *Strickland* held that the Sixth Amendment does not just guarantee the assistance of counsel, but more specifically guarantees *effective* assistance of counsel in all criminal prosecutions.²⁵² If an attorney who focuses her practice on criminal defense cannot effectively provide representation and consultation regarding immigration issues, then the Sixth Amendment would seemingly require the appointment of an immigration specialist in order for the representation to be effective under the *Strickland* standard.

If this were not required, it could not be said that an indigent defendant charged with a crime for which the immigration consequences are difficult to determine was afforded the “reasonable professional assistance” required under *Strickland*.²⁵³ Further, without this rule, the holding in *Padilla* would lose much of its practical significance because a noncitizen indigent defendant who is informed by his criminal defense attorney that he should consult an immigration lawyer for more detailed advice would almost never be able to do so. Accordingly, such a defendant would be in no better position than he was before he was informed of the possibility of immigration consequences. Therefore, if the Court wants to give its holding in *Padilla* real practical significance,

²⁴⁸ *Id.* § 1229b(a)(1).

²⁴⁹ See *Nunez v. Holder*, 594 F.3d 1124, 1138 (9th Cir. 2010) (concluding that indecent exposure under California law is not a crime involving moral turpitude).

²⁵⁰ See *id.* at 1129.

²⁵¹ *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991) (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)).

²⁵² *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

²⁵³ *Id.* at 689.

it should extend the Sixth Amendment's guarantee to include the appointment of immigration counsel to indigent noncitizen defendants.

Promulgating such a rule, moreover, would not mean that every indigent noncitizen criminal defendant would be entitled to the appointment of an immigration attorney. Instead, the Court could limit this right to noncitizen indigent defendants who are able to show that (1) they are facing the possibility of deportation upon conviction and (2) the immigration consequences of their plea or conviction are beyond the ability of their appointed criminal attorney to determine.

The Court could borrow such a rule from the due process realm, where courts have held that some sort of showing of necessity must be made before a criminal defendant is entitled to the assistance of appointed experts.²⁵⁴ One way in which a defendant could make such a showing of necessity would be to present an affidavit from his appointed criminal attorney stating that the defendant is facing potential immigration consequences, but that the exact nature of those consequences is beyond the scope of that attorney's expertise. Such a rule would not require the appointment of immigration counsel in cases where the court determines that the immigration consequences are so clear and straightforward that the appointed criminal defense attorney could effectively advise the defendant regarding that issue. Where such an appointment is necessary to ensure the fair administration of justice, however, it would be required.

D. *Due Process Considerations*

In addition to the CJA and the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment might also require the appointment of an immigration attorney under certain circumstances. Because the Sixth Amendment has historically been limited to a defendant's right to a criminal defense attorney,²⁵⁵ courts might feel more comfortable utilizing the due process framework, which has already been extended to cover a wide variety of appointed experts.²⁵⁶ Moreover, it would be relatively simple to utilize the rules and standards already employed by courts in other due process cases.

If the Supreme Court is ever asked to decide whether the Due Process Clause requires the appointment of immigration counsel, it would likely employ the three-factor test that it established in *Ake* to answer that question.²⁵⁷ Under the *Ake* analysis, the Court would look at (1) the defendant's interest, (2) the government's interest, and (3) the probable value of the safeguard that is sought, "and the risk of an erroneous deprivation of the affected interest if th[at] safeguard[] [is] not provided."²⁵⁸ The first factor that the Court would consider—the defendant's interest—clearly supports recognizing a due process

²⁵⁴ See, e.g., *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987) (An indigent defendant "must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.").

²⁵⁵ Although, as discussed in the previous section, this is not a necessary, or even wise, limitation.

²⁵⁶ See *supra* notes 134–183 and accompanying text.

²⁵⁷ *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

²⁵⁸ *Id.*

right to appointed immigration counsel. As already discussed, the Supreme Court in *Padilla* expressly found that the immigration consequences of a criminal conviction are extremely important.²⁵⁹ A noncitizen defendant's interest in staying in the United States is just as important, if not more important, than that defendant's interest in whether or not he is convicted. As the amici in *Padilla* noted in their brief, removal from the United States has numerous severe consequences, such as the separation of families, the loss of livelihood, and a possible forced return to a persecuting country.²⁶⁰ Accordingly, as was the case in *Ake*, a noncitizen defendant has a compelling interest in obtaining accurate and specific immigration advice.

Application of the second factor—the government's interest—is less clear. States would likely argue that imposition of such a requirement would create a severe financial burden. This argument was rejected in *Ake*, where the Court noted that states would not face a “staggering burden” because many states, as well as the federal government, already made psychiatric assistance available to indigent defendants and had not suffered such adverse effects.²⁶¹ The same cannot be said for the appointment of immigration attorneys for noncitizen indigent criminal defendants because no state has ever imposed such a requirement. However, as was the case in *Ake*, it is hard to discern any state interest, beyond the purely economic, that is against recognizing the right to appointed immigration counsel.²⁶² In light of the government's strong interest in the fair administration of justice,²⁶³ the Court would likely conclude that the state's interest in denying the assistance of immigration counsel “is not substantial.”²⁶⁴ This is especially true because the right to appointed immigration counsel would not extend to every indigent noncitizen criminal defendant, but would instead only extend to those defendants who could make a proper showing of necessity, thereby lessening the financial burden imposed on the government.²⁶⁵

The third and final *Ake* factor that the Court would consider is the probable value of the safeguard and “the risk of error” if the safeguard is not offered.²⁶⁶ This factor likely also works in favor of recognizing the due process right to immigration counsel. Just as the Court in *Ake* looked at “the pivotal role that psychiatry has come to play in criminal proceedings,”²⁶⁷ the Court could borrow from its language in *Padilla* regarding the pivotal role that immigration consequences play when the defendant is a noncitizen.²⁶⁸ Likewise, the Court could also cite *Padilla* when discussing the risk of error if the safeguard

²⁵⁹ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010) (finding that immigration consequences are “sometimes the most important part” of the penalty imposed on noncitizen criminal defendants).

²⁶⁰ See *supra* notes 213–15 and accompanying text.

²⁶¹ *Ake*, 470 U.S. at 78.

²⁶² *Id.* at 78–79

²⁶³ See, e.g., *Martinez v. Court of Appeal*, 528 U.S. 152, 163 (2000) (discussing government's interest in “fair and efficient administration of justice”).

²⁶⁴ *Ake*, 470 U.S. at 79.

²⁶⁵ See *supra* note 254 and accompanying text.

²⁶⁶ *Ake*, 470 U.S. at 79.

²⁶⁷ *Id.*

²⁶⁸ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010).

is not offered. As the Court recognized in *Padilla*, “Immigration law can be complex,” and “[t]here will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain.”²⁶⁹ The risk of error if the defendant is not provided access to immigration counsel in those difficult cases is, therefore, substantial and likely worthy of protection.²⁷⁰

As with the Sixth Amendment, the right to appointed immigration counsel under the Due Process Clause would not be unlimited or automatic. Properly limiting the scope of such a right would lessen the financial burden on the state and ensure that an immigration attorney is provided free of charge only in cases where such an appointment is necessary to ensure fairness. It is clear that, pursuant to *Caldwell v. Mississippi*, where a defendant offers “little more than undeveloped assertions that the requested assistance would be beneficial,” such assistance is not required in order to comport with due process.²⁷¹ The Court in *Caldwell*, however, did leave open the possibility that a stronger showing of need would trigger the Due Process Clause.²⁷²

One way the Court could limit a noncitizen defendant’s due process right to appointed immigration counsel would be to follow the standard established by the Eleventh Circuit in *Moore v. Kemp*.²⁷³ Under that standard, a noncitizen indigent defendant would be entitled to an appointed immigration lawyer only if that defendant could show “that there exists a reasonable probability both that an [immigration lawyer] would be of assistance to the defense and that denial of [such] assistance would result in a fundamentally unfair trial.”²⁷⁴ As was discussed in the previous section,²⁷⁵ a defendant could make such a showing by presenting an affidavit by his criminal attorney stating that the defendant faces possible immigration consequences, but that the criminal attorney is unable to advise the defendant regarding the exact nature of those consequences. This test would ensure that the appointment of an immigration attorney occurs only in those cases in which such an appointment is necessary to ensure the fair administration of justice.

Another test that courts could employ in deciding whether a particular defendant is entitled to appointed immigration counsel is the test utilized by the Eighth Circuit in *Little v. Armontrout*.²⁷⁶ In *Little*, the Eighth Circuit held that “[t]he question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and

²⁶⁹ *Id.* at 1483.

²⁷⁰ See Brief for Amici Curiae Asian Am. Justice Ctr. et al. in Support of Petitioner, *supra* note 213, at 13 (“Without accurate information about how the INA classifies a particular crime . . . a non-citizen considering whether to plead guilty to a minor crime in exchange for a lighter sentence risks accepting a plea deal that has the unintended consequence of detention and, in many cases, permanent banishment from the United States.”).

²⁷¹ *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985).

²⁷² See *id.*

²⁷³ *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987).

²⁷⁴ *Id.* (footnote omitted).

²⁷⁵ See *supra* Part IV.C.

²⁷⁶ *Little v. Armontrout*, 835 F.2d 1240, 1243 (8th Cir. 1987). The Court need not, of course, choose one of these tests over the other. Instead, the Court could craft its own test combining certain elements of both.

how much help a defense expert could have given.”²⁷⁷ In holding that the immigration consequences of a plea or conviction are extremely important in *Padilla*,²⁷⁸ the Supreme Court has already resolved the first part of the *Little* test—the importance of the issue involved. Therefore, all a court would need to do on a case-by-case basis in deciding whether to appoint an immigration specialist, is to determine how much help such a specialist could give in that specific case.²⁷⁹ In those cases where the immigration consequences of a plea or conviction are obvious and readily apparent to even a non-immigration attorney, a court could refuse to appoint an immigration attorney because, in such a case, an immigration attorney would not contribute anything significant to the defense. On the other hand, where the deportation consequences are unclear, a court could find that an immigration specialist would contribute significantly to the defense, and, therefore, make such an appointment.²⁸⁰

V. CONCLUSION

In *Padilla*, the Supreme Court recognized the pivotal role that the immigration consequences of a plea or conviction play when an individual facing criminal charges is a noncitizen. Those immigration consequences are perhaps the most important part of the penalty that can be imposed on a noncitizen criminal defendant. In light of these concerns, the Court in *Padilla* concluded that, pursuant to the Sixth Amendment, counsel in a criminal case must advise her client of the deportation consequences of a plea or conviction where those consequences are clear, succinct, and straightforward. Where those consequences are not so clear or straightforward, however, the attorney must simply advise the client of the possibility of immigration consequences. The *Padilla* Court predicted that the latter situation would occur often, due to the complexity of immigration law, even for lawyers who do not specialize in immigration.

The *Padilla* Court’s acknowledgement of the importance of the immigration consequences of a plea or conviction, combined with its recognition that immigration law is complex and often not accessible to lawyers who do not specialize in it, would mean very little if an indigent noncitizen defendant whose criminal lawyer was not qualified to give immigration advice was not provided with an appointed immigration attorney, or, at the very least, with funding to hire one himself.

Not only is such an appointment required under federal statutory law when a proper showing of necessity is made, but it is also likely required by the Sixth Amendment itself, as well as the Due Process Clause of the Fourteenth Amendment. This is because an indigent noncitizen defendant who is denied such expert assistance cannot be said to have enjoyed the effective assistance of counsel or a fundamentally fair criminal proceeding.

²⁷⁷ *Id.*

²⁷⁸ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010).

²⁷⁹ *Little*, 835 F.2d at 1243.

²⁸⁰ A court could also follow the standard that has been employed by courts in the context of the CJA. For a detailed discussion of this standard, see *supra* notes 235–44 and accompanying text.

Moreover, the Court could limit such a right to situations where the noncitizen defendant establishes his financial need, and where the defendant's appointed criminal attorney affirms to the court that she cannot accurately advise the defendant regarding the immigration consequences of his plea or conviction. This would balance the defendant's important constitutional rights with the state's interest in judicial economy, and prevent entitlement to an immigration specialist from becoming routine or automatic.