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THE IMPLICATIONS OF *PADILLA v. KENTUCKY* ON PRACTICE IN UNITED STATES DISTRICT COURTS

JUDGE ROBERT PRATT*

INTRODUCTION

*“That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized.”*¹

Sentencing is unquestionably the most difficult job of any district court judge. For many district court judges, sentencing is one of the most frequently performed judicial tasks, simply by virtue of the fact that every defendant convicted of a crime must be sentenced. While some sentences are imposed following a defendant’s conviction by jury verdict, the vast majority of convicted defendants are sentenced in district court as the result of a guilty plea.² Thus, guilty pleas are on par with sentencings as one of the most frequently performed judicial tasks.

Between October 1, 2009 and September 30, 2010, the ninety-four federal district courts saw indictments or informations filed against 98,311 defendants.³ Of those defendants, 8,147 had their charges dismissed, 394 proceeded to bench trial, and 2,352 proceeded to jury trial.⁴ The remaining 87,418 defendants entered pleas of guilty.⁵ After accounting for the dismissed cases, these figures reflect the fact that just under 97% of all accused defendants chose to enter guilty pleas rather than exercise their Sixth

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1. *Brady v. United States*, 397 U.S. 742, 748 (1970).

2. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 242 tbl.D4 (2010), *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf> (detailing the disposition of criminal cases in United States district courts).

3. *Id.*

4. *Id.*

5. *Id.*

Amendment right to trial.⁶ While the reasons for the high rate of guilty pleas have been discussed by lawyers, judges, and academics in recent years, relatively little attention has been paid to the importance of the plea process itself. The Supreme Court's decision in *Padilla v. Kentucky* in March 2010,⁷ however, serves as a reminder that the plea process and its implications should never be dismissed as routine, regardless of how commonplace it may be in American jurisprudence.

I. PLEAS

A. *Pleas Generally*

There has been significant discussion in legal literature about “vanishing trials,” with much commentary and speculation about why the rate of jury determinations is declining.⁸ Some commentators argue that the declining jury rate naturally leads to a conclusion that more defendants are pleading guilty.⁹ For example, in 2001, one commentator wrote:

Since 1980, the percentage of people going to trial has decreased almost two-thirds, while the percentage of cases resolved by plea has been increased proportionately. From 1980 to 1999, the frequency of federal jury trials fell from nearly 16 percent of all adjudications to just a bit more than 4 percent. In 1980, one defendant went to trial for every four who pled guilty. By 1999, that ratio fell to one in twenty.¹⁰

Yet a look at the Advisory Committee's Notes to the Federal Rules of Criminal Procedure suggests that the high rate of guilty pleas is apparently not new.¹¹ Since as early as the 1966, the comments state, “[t]he great majority of all defendants against whom indictments or informations are filed in federal court plead guilty. Only a comparatively small number go to trial.”¹² Regardless of the reasons why guilty pleas have become so prevalent compared to jury trials, it is clear that, for all of the attention paid to criminal justice proceedings by the media and the public, the guilty plea attracts perhaps the least note. This is

6. *Id.*

7. 130 S. Ct. 1473 (2010).

8. See, e.g., Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 74–75 (2006); Elizabeth Warren, *Vanishing Trials: The New Age of American Law*, 79 AM. BANKR. L.J. 915, 917–18 (2005); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 492–98 (2004).

9. See, e.g., Irwin H. Schwartz, *Consequences of the Disappearing Criminal Jury Trial*, CHAMPION, Nov. 2011, at 7.

10. *Id.*

11. See FED. R. CRIM. P. 11 advisory committee's note (1966).

12. FED. R. CRIM. P. 11 advisory committee's note (1966) (citing U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS STATISTICAL REPORT 1 (1964)).

true even though guilty pleas are, far and away, the most likely method of adjudicating guilt in our legal system, representing something that district judges do on a day to day basis.¹³

Plea bargaining and resultant guilty pleas have long been considered to be important, if not essential, to the proper functioning of the United States' criminal justice system.¹⁴ Without the plea bargaining process, "the States and the Federal Government would need to multiply by many times the number of judges and court facilities," since virtually every criminal charge would require a full-scale trial for resolution.¹⁵ Moreover, when properly administered, the plea bargaining process is often desirable for the prosecutor, the defendant, the courts, and the public:

The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial, he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.¹⁶

Despite the necessity and desirability of plea bargaining, however, courts and litigants must always be mindful of the serious consequences that result from a defendant's plea of guilty. Defendants give up important constitutional rights when they opt to plead guilty. The entire plea bargaining process, from the negotiations leading up to the plea to the colloquy a court engages in to determine whether to accept the guilty plea, has profound implications not only for the defendant but also for the defendant's family and friends, for the general public, and for the victims of a defendant's crimes.

To highlight the significance of a guilty plea, I find it useful to refer to both the jury selection process I use when conducting criminal trials and the colloquy I engage in with criminal defendants entering guilty pleas. In every criminal trial over which I preside, I commence jury selection by presenting a power point presentation to the entire venire.¹⁷ The presentation explains to the venire members how they were selected for jury service and discusses the history of the jury in American jurisprudence. I tell the venire that there are

13. See statistics cited *supra* notes 3–6.

14. See *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) (characterizing the guilty plea and plea bargain process as "important components of this country's criminal justice system"); *Santobello v. New York*, 404 U.S. 257, 260–61 (1971) ("The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice.").

15. *Santobello*, 404 U.S. at 260.

16. *Blackledge*, 431 U.S. at 71 (footnote omitted).

17. PowerPoint presentation created by Hon. Robert W. Pratt for potential jurors (on file with author).

only two methods whereby an accused can be convicted of a crime in the United States. The first is that the accused can knowingly and voluntarily plead guilty, but only after first understanding the maximum potential sentence and giving up or waiving important constitutional rights, such as the right to trial by jury, to confront accusers, to not testify against oneself, to offer testimony on one's own behalf, to demand that witnesses come to open court to give testimony, and to be aided by an attorney. Moreover, I emphasize to the venire that a guilty plea may only be accepted once a judge is assured that the only reason the defendant is pleading guilty to the charged offense is because he or she is, in fact, guilty.

I then explain to the venire that the second method by which an accused can be convicted of a crime is to have the jury return a verdict of guilty after hearing all of the evidence in the case, instructions on the law from the judge, and arguments by the lawyers. I inform the prospective jurors that the power to convict a person is too much power for one person to possess. Thus, the founders of our country denied this power to Presidents, Governors, Senators, and even judges, and placed it instead in the hands of a jury, to be comprised of an accused's peers. I explain to the venire why their service is so important, and highlight for them how the job of a juror is difficult, but also rewarding and vital to the administration of justice. In this way, I attempt to not only educate the prospective jurors about something they often know very little about, but also inform both the veniresmen and the criminal defendant how the Constitution's promises will really "come alive" during the trial process. Once I have concluded my presentation, I find that jurors are often imbued with a significant sense of civic duty and patriotism, and that they almost invariably take great care and pride in the performance of their duties should they ultimately be selected as a juror.

What I tell jurors about our legal system serves, I believe, as a good reminder that the guilty plea process must be afforded the same respect and reverence as the jury trial process. This is so because, while the two methods differ in their execution, they both are equally "legitimate" means to the same end—the conviction and potential deprivation of liberty of a fellow human being. While guilty pleas are the most common means to a conviction in our legal system, we must never forget that the effect of a guilty plea is precisely the same as if a jury was impaneled, heard the evidence, was instructed on the law, and then, after careful deliberations, returned a verdict against the accused. For this reason, every guilty plea hearing must be conducted with no less respect or dignity than that accorded a jury trial, regardless of how many dozens or even hundreds of pleas the presiding judge has taken.

B. Considerations in the Plea Process

What actually happens during a guilty plea proceeding is, for the most part, not well known. Indeed, I believe that there is an essential misunderstanding

among members of the press, the public at large, and even amongst lawyers as to the duty of the judge in a plea proceeding. Ultimately, the primary duty of a judge in a plea proceeding is to exercise his or her “sound discretion,” in determining whether to accept or reject the guilty plea.¹⁸ The word “discretion” is frequently invoked in reference to the work of district court judges—most often when the district court judge’s actions are being reviewed by an appellate court.¹⁹ The actual meaning of the word “discretion,” however, is not always well understood.

Over one hundred years ago, the Supreme Court attempted to define this oft used term. In *The Styria v. Morgan*, the Court wrote:

The term *discretion* implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of *discretion*, and yet discretion should not be a word for arbitrary will or inconsiderate action. Discretion means a decision of what is just and proper in the circumstances. Discretion means the liberty or power of acting without other control than one’s own judgment.²⁰

Later in *Burns v. United States*, the Court stated:

The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. It takes account of the law and the particular circumstances of the case and “is directed by the reason and conscience of the judge to a just result.”²¹

Thus, when considering how to utilize the broad discretion afforded to them in deciding whether to accept or reject a plea agreement, it is clear that judges must ensure that they evaluate *all* relevant considerations to ensure their acceptance or rejection is just and proper under the circumstances.

1. Rule 11 Requirements for a Plea

To properly exercise his discretion in relation to the acceptance or rejection of an accused’s guilty plea, the judge must fully comply with the strictures of Federal Rule of Criminal Procedure 11, keeping in mind that “the ultimate

18. Rule 11 gives the court discretion to accept or reject a plea agreement. FED. R. CRIM. P. 11(c)(3)(A) (“[T]he court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.”); *see also Santobello*, 404 U.S. at 262 (“A court may reject a plea in exercise of sound judicial discretion.”).

19. *See, e.g., United States v. Robertson*, 45 F.3d 1423, 1438 (10th Cir. 1995); *United States v. Greener*, 979 F.2d 517, 519–20 (7th Cir. 1992); *United States v. Smith*, 417 U.S. 483, 486–87 (5th Cir. 2005).

20. 186 U.S. 1, 9 (1902) (citations and internal quotation marks omitted).

21. 287 U.S. 216, 222–23 (1932) (citation omitted) (quoting *Langnes v. Green*, 282 U.S. 531, 541 (1931)).

decision whether to plead guilty must be made by the defendant.²² Notwithstanding a defendant's desire to plead guilty, however, no judge can or should accept a guilty plea without first making independent findings of fact and conclusions of law, based upon the record at the time of the plea proceeding.²³ In most cases, the plea proceeding will largely be premised on a written plea document wherein the parties will have set out their agreement and the claimed basis for the court to accept the defendant's guilty plea. Federal Rule of Criminal Procedure 11(b)(1), however, explicitly instructs both the parties and the court about what steps must be taken in considering and accepting a guilty or *nolo contendere* plea.²⁴ Specifically, a defendant desiring to plead guilty must be addressed in open court, preferably under oath.²⁵ The court must then "inform the defendant of, and determine that the defendant understands" fourteen specific matters, namely:

- (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
- (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
- (C) the right to a jury trial;
- (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
- (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
- (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or *nolo contendere*;
- (G) the nature of each charge to which the defendant is pleading;
- (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
- (I) any mandatory minimum penalty;
- (J) any applicable forfeiture;
- (K) the court's authority to order restitution;
- (L) the court's obligation to impose a special assessment;
- (M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and
- (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.²⁶

Additionally, Rule 11 requires the court to ensure that the defendant's plea of guilty is voluntary and not the result of any "force, threats, or promises (other

22. Purdy v. United States, 208 F.3d 41, 45 (2d Cir. 2000).

23. The Court has held that it is reversible error for the court to accept a guilty plea where the record does not show that the plea was knowing and voluntary. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

24. FED. R. CRIM. P. 11(b)(1).

25. See *id.* ("Before the court accepts a plea of guilty or *nolo contendere*, the defendant may be placed under oath, and the court must address the defendant personally in open court.")

26. FED. R. CRIM. P. 11(b)(1)(A)–(N).

than promises in a plea agreement)”²⁷ and that there is an adequate factual basis for the defendant’s plea of guilty to the charged crime.²⁸

2. Human Element of Pleas

Though the requirements of Rule 11 are explicit, an often over-looked factor a judge must consider in accepting or rejecting a plea is the human aspect of the plea proceeding. When a judge schedules a plea proceeding, he or she often knows much about the Assistant United States Attorney and defense counsel, having likely had numerous proceedings involving these attorneys. Moreover, given the frequency with which judges are required to entertain plea agreements, the judge will likely enter the hearing with a presumption that the plea should be accepted. The judge, however, typically knows nothing, or very little, about the defendant, about the circumstances that led the defendant to court, or about the impact that a defendant’s guilty plea will have on the defendant, and on the defendant’s family and community. This is why it is utterly critical to always remain sensitive to the very human aspects of the plea proceeding in exercising judicial discretion. In attempting to remain true to this tenet, I often remind myself of a compelling description of an encounter between a judicial officer and criminal defendants given by the late Chief Judge of the Eighth Circuit Court of Appeals, Richard S. Arnold. While speaking at an Eighth Circuit Judicial Conference, Judge Arnold contrasted the work of appellate judges with that of trial judges:

But the judges who are on the front lines, the judges who see real people most of the time, are the trial judges. And probably the situation in which the most tension tends to develop between judges and the public are situations where criminal defendants are being sentenced. I remember when I first went on the district court, I was told that my job the next day would be to go into the courtroom and sentence four people whom I had never seen before and who, of course, had never seen me. I took some comfort in the fact that they were probably more afraid of me than I was of them, but it may have been close.²⁹

While Judge Arnold was speaking about the sentencing dynamic in particular, I believe that the same combination of humility, seriousness, and clarity in the plea proceeding is important in carrying out a judge’s responsibilities and plays an integral part in ensuring that the guilty plea is truly that of the defendant.³⁰

27. FED. R. CRIM. P. 11(b)(2).

28. FED. R. CRIM. P. 11(b)(3).

29. Hon. Richard S. Arnold, Address at the Eighth Circuit Judicial Conference in Duluth, Minnesota: The Art of Judging (Aug. 8, 2002). I remember well the first day I took a guilty plea from a defendant, and like Judge Arnold, I am certain that I was at least as apprehensive as was the defendant.

30. I say “that of” the defendant because it is a phrase from George Bernard Shaw to which I have grown accustomed. See, e.g., GEORGE BERNARD SHAW, *Getting Married*, in THE DOCTOR’S DILEMMA, GETTING MARRIED, AND THE SHEWING-UP OF BLANCO POSNET, 117, 191

3. The Role of Defense Counsel in Pleas

Yet another important factor judges must consider in determining whether to accept or reject a defendant's guilty plea is whether defense counsel has adequately fulfilled his duties in advising the defendant. In the law, we often say that the ultimate decision to plead guilty or go to trial lies with the defendant, and that is the way it should be. While this may technically be a true statement, we cannot ignore the fact that the vast majority of defendants will look at their lawyers and say, "what should I do?"

To this end, a court entertaining a defendant's guilty plea must make appropriate inquiries of *both* the defendant and the defendant's counsel to determine whether the proposed plea is both "knowing" and "voluntary," or if it is the product of coercion or lack of advice from the lawyer.³¹ In inquiring of defense counsel, however, a judge must be wary of the potential conflict between a defendant's authority to decide and a lawyer's obligation to fully and adequately represent a client without coercing him.

A good example of the conflict between the defendant's authority to decide and the lawyer's duty to zealously represent took place in *Purdy v. United States*.³² In that case, the defendant's attorney talked extensively with the government's attorney regarding a plea deal.³³ Though defense counsel discussed these conversations with Purdy, he never specifically advised Purdy to accept the government's plea deal.³⁴ Defense counsel did, however, repeatedly emphasize the strengths of the government's case to Purdy, advising "him to 'give very careful consideration' to the case," and noting that "it will be difficult to convince the jury that [certain payments] were not made for purposes of kickbacks."³⁵ Purdy maintained his innocence and proceeded to trial, where he was convicted by a jury of conspiracy to violate the Anti-Kickback Act.³⁶ Purdy was sentenced to thirty-seven months incarceration, which was later reduced to eighteen months after he agreed to cooperate.³⁷ Purdy filed a habeas corpus petition in district court, seeking to set aside his

(1911). Shaw also wrote: "All professions are conspiracies against the laity." GEORGE BERNARD SHAW, *The Doctor's Dilemma*, in THE DOCTOR'S DILEMMA, GETTING MARRIED, AND THE SHEWING-UP OF BLANCO POSNET 1, 32 (1911).

31. See *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Brady v. United States*, 397 U.S. 742, 747 (1970).

32. 208 F.3d 41 (2d Cir. 2000).

33. *Id.* at 43.

34. *Id.*

35. *Id.* at 44.

36. *Id.* Specifically, Purdy was convicted for paying kickbacks to federal contractors in an effort to obtain military supply contracts. *Id.* at 43.

37. *Id.* His conviction was affirmed on appeal. *United States v. Purdy*, 144 F.3d 241, 248 (2d Cir. 1998).

conviction on the basis of ineffective assistance of counsel.³⁸ In particular, Purdy alleged that his attorney failed to tell him about certain representations made by the federal prosecutor and also failed to explicitly advise him to accept a plea agreement.³⁹ The district court, citing to *Strickland v. Washington*'s two-part test for ineffective assistance of counsel, denied the defendant habeas relief, stating that regardless of whether the defense attorney's performance fell below an objective standard of professional reasonableness, there was no evidence that the attorney's performance had prejudiced the defense.⁴⁰

In affirming the district court's denial of Purdy's request for a certificate of appealability, the Second Circuit addressed the difficult and conflicting duties of defense counsel, stating:

On the one hand, defense counsel "must give the client the benefit of counsel's professional advice on this crucial decision" of whether to plead guilty. As part of this advice, counsel must communicate to the defendant the terms of the plea offer and should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed.

On the other hand, the ultimate decision whether to plead guilty must be made by the defendant. And a lawyer must take care not to coerce a client into either accepting or rejecting a plea offer.⁴¹

The court concluded that Purdy had failed to prove both elements of *Strickland*, noting that "[c]ounsel's conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness because '[r]epresentation is an art.'"⁴²

Ultimately, I believe that *Purdy* serves, in the plea context, to emphasize the fact that, in exercising his discretion, the judge has to be a fact finder first. Put another way, before deciding if Rule 11 has been complied with sufficiently to permit acceptance of the plea, the judge must do more than just repeat a questionnaire from rote memory and listen for the "right" answers. The atmosphere of the proceeding and the demeanor evidence that a judge observes must be taken into account before determining if a defendant truly

38. *Purdy*, 208 F.3d at 42.

39. *Id.*

40. *Id.* at 44. *Strickland v. Washington* sets out the controlling test for ineffective assistance of counsel claims. 466 U.S. 668, 687 (1984). To sustain a convicted defendant's claim for ineffective assistance of counsel, a defendant must demonstrate: 1) that counsel's alleged acts or omissions were "outside the wide range of professionally competent assistance," *id.* at 690, and 2) that counsel's performance was prejudicial to the defendant's defense, *id.* at 692.

41. *Purdy*, 208 F.3d at 44–45 (citations omitted) (quoting *Boria v. Keane*, 99 F.3d 492, 497 (2d Cir. 1996)).

42. *Id.* at 45 (quoting *Strickland*, 466 U.S. at 693).

understands the implications of his guilty plea and the resultant conviction. Likewise, though the decision to enter the plea is ultimately the defendant's, the advice the defendant does or does not receive from counsel is of great significance in making sure that the defendant's decision is an informed one of his own choosing.

C. *The Effect of Padilla on Pleas*

The *Padilla* case presents yet another consideration that district court judges must take into account in determining whether to accept or reject a defendant's plea of guilty.⁴³ Jose Padilla was a native of Honduras, who had been a lawful resident of the United States for over forty years.⁴⁴ Padilla pled guilty to transporting a large amount of marijuana in Kentucky, a deportable offense.⁴⁵ Padilla claimed that "his counsel not only failed to advise him of [the deportation] consequence prior to his entering the plea, but also told him that he 'did not have to worry about immigration status since he had been in the country so long.'"⁴⁶ Padilla claimed that, had he been properly advised that he would be subject to "virtually mandatory" deportation as a result of his plea, he would have insisted on going to trial.⁴⁷ The Supreme Court of Kentucky denied Padilla's request for post-conviction 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."⁴⁸

The Supreme Court reversed, stating that it has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."⁴⁹ The Court noted that "deportation is a particularly severe 'penalty'" that is "intimately related to the criminal process," and therefore concluded, "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claims."⁵⁰

In applying *Strickland* to Padilla's claim, the Supreme Court stated that it has "long recognized that the negotiation of a plea bargain is a critical phase of

43. 130 S. Ct. 1473 (2010).

44. *Id.* at 1477.

45. *Id.* at 1477 & n.1. Padilla was deportable under relevant immigration law which provides "[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable." 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

46. *Padilla*, 130 S. Ct. at 1478 (citation omitted).

47. *Id.*

48. *Id.* (citing *Kentucky v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008)).

49. *Id.* at 1481 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

50. *Id.* at 1481–82.

litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”⁵¹ Moreover, it recognized that the “severity of deportation—‘the equivalent of banishment or exile’—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.”⁵² Accordingly, the Court concluded that “counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.”⁵³

Many commentators have already stressed the significance of the *Padilla* ruling, as it is unquestionably a landmark case that will have day-to-day implications for defendants, defenders, prosecutors, probation officers, judges, the Bureau of Prisons, and even the public.⁵⁴ Indeed, as Justice Alito states in his concurring opinion, the majority’s holding is a “dramatic expansion of the scope of criminal defense counsel’s duties under the Sixth Amendment.”⁵⁵ Yet while each of the participants in the criminal justice system will undoubtedly have their own views as to the effect of *Padilla*, I can only speak from my own perspective as a district court judge. To me, the primary implication of *Padilla* in my work as a judge is in the plea process, since *Padilla* is, for all practical purposes, part and parcel of the *Strickland* standard. Trial judges must, as they always have, ensure that a defendant’s plea is knowing, voluntary, and made only after full disclosure has been made concerning the consequences of the plea.⁵⁶ After *Padilla*, this full disclosure of plea consequences necessarily must include a reasonable statement of the likelihood or possibility of deportation. This effect of *Padilla*, if ever in doubt, was reinforced by a letter I

51. *Id.* at 1486.

52. *Padilla*, 130 S. Ct. at 1486 (quoting *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947)).

53. *Id.* Having determined that the first prong of the *Strickland* test was satisfied, the Supreme Court remanded the matter for determination of the second *Strickland* factor. *Id.* at 1487 (“Whether *Padilla* is entitled to relief will depend on whether he can demonstrate prejudice as a result [of the fact that his counsel was constitutionally deficient], a question we do not reach because it was not passed on below.”).

54. See McGregor Smyth, *From “Collateral” to “Integral”: The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 798 (2011); César Cuauhtémoc García Hernández, *When State Courts Meet Padilla: A Concerted Effort is Needed to Bring State Courts Up to Speed on Crime-Based Immigration Law Provisions*, 12 LOY. J. PUB. INT. L. 299, 303–05 (2011); Joanna Woolman, *Padilla’s “Truly Clear” Test: A Case for a Broader Application in Minnesota*, 37 WM. MITCHELL L. REV. 840, 842–44 (2011); Daniel Kanstroom, *Padilla v. Kentucky and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?*, 45 NEW ENG. L. REV. 305, 306 (2011).

55. *Padilla*, 130 S. Ct. at 1492 (Alito, J., concurring).

56. FED. R. CRIM. P. 11(b); see also *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Brady v. United States*, 397 U.S. 742, 747 (1970).

received shortly after the Supreme Court's opinion was handed down. Writing to me in my capacity as Chief Judge, the Criminal Division Chief of the United States Attorney's Office for my district stated:

The purpose of this letter is to inform the Court that this office will begin asking the Court to routinely inquire into whether non-citizen defendants have conferred with counsel regarding the immigration consequences of their guilty pleas. Although not strictly required by Rule 11, it appears advisable to address this issue in light of the Supreme Court's recent decision in *Padilla v. Kentucky*. As the Court noted in *Padilla*, such inquiry is routinely included within the plea colloquy in several states, including under Rule 2.8(2)(b)(3) of the Iowa Rules of Criminal Procedure.⁵⁷

I am confident that many such letters were sent by or to judges around the country following the *Padilla* decision.

CONCLUSION

In my tenure as a judge, I have come to believe that "adjudicating" a person guilty of a crime is a huge responsibility, and the judge and the lawyers both have important obligations to ensure that the correct atmosphere is established so that compliance with the law may be achieved. Outside of its clear impact on the plea process and, of course, post-conviction proceedings, I believe that the most significant accomplishment of *Padilla* is to remind us again about the importance and solemnity of the guilty plea itself.

As stated previously, guilty pleas are one of the most common types of tasks engaged in by judges, prosecutors, and defenders. With so many guilty pleas taking place, it is far too easy for everyone involved to start believing that "everyone is guilty" and that establishing guilt on the record is just a "formality." With such an attitude comes complacency and a lack of attention to the details of the plea proceeding. Such conceptions, however, could not be further from the truth. Indeed, like many of the constitutional protections afforded criminal defendants, the right of an accused to have a guilty plea accepted only if it is knowing, voluntary, and fully informed, is not really for the benefit of the guilty; it is for the benefit of the innocent. Many formulations of this concept have been made by scholars, philosophers, and judges throughout history. As Judge Jon Newman wrote in 1992:

We usually say that it is better that some number of guilty persons go free than that one innocent person be imprisoned, though we might not all agree on the number of wrongful acquittals we are willing to accept to guard against one

57. Letter from Andrew H. Kahl, Criminal Div. Chief, U.S. Attorney for the Southern Dist. of Iowa, to Hon. Robert W. Pratt, Chief Judge, U.S. Dist. Court for the Southern Dist. of Iowa (May 6, 2010) (on file with author).

wrongful conviction. One familiar version is that it is better that ten guilty persons go free than that one innocent person is convicted.⁵⁸

Put another way by Justice Brennan, “[I]f there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”⁵⁹ Though this statement is most often thought of in relation to jury trials, due process is equally a requirement of convictions by guilty plea. In this regard, it is my most ardent hope that *Padilla* will serve to reinforce these traditional concepts of justice in the minds of all who participate in the criminal justice process.

58. *Goetz v. Crosson*, 967 F.2d 29, 39 (2d Cir. 1992) (Newman, J., concurring).

59. *In re Winship*, 397 U.S. 358, 364 (1970).

