Warning: This Article May Better Inform You About *Strickland*'s Prejudice Prong in Post-Conviction Relief Cases After *Padilla v. Kentucky*

by Eric H. Singer

Introduction

In 1981, your doctor might have reported to you, based on a Harvard School of Public Health study, that drinking coffee *could* or *may* cause pancreatic cancer. *See* Harold Schmeck, Jr., *Study Links Coffee Use to Pancreatic Cancer*, N.Y. Times, March 12, 1981. Suppose, hypothetically (and completely contrary to historical fact), he or she would report to you a year later that based on revised data from the same institution and around which a unanimous consensus had formed, coffee consumption *will* lead to pancreatic cancer. And you understood both of those statements.

In the first instance, your doctor was expressing possibility, using the word "could" or "may" — what philosophers and linguists call "epistemic possibility" (because he or she does not know whether the proposition is or may become true). *See* Michael Swan, Practical English Usage 316, 320 (3d ed. 2005). And whether you ceased or kept drinking coffee reflected a rational choice in light of the uncertain chances of developing pancreatic cancer based on your coffee consumption. In the second instance, your doctors was expressing certainty through the use of the word "will" — and if you continued drinking coffee because the benefits, to you, outweighed the risks of developing pancreatic cancer, then most persons would accuse you of being truculent, if not obtuse, if you later complained that you had developed pancreatic cancer.

Forensic linguists make a strong case that spoken words alone do not express meaning, but rather that "meaning is far more vaporous, teased into existence through vocalized puffs of air, hand gestures, body tilts, dancing eyebrows, and nuanced nostril flares." Jack Hitt, *Words on Trial*, The New Yorker, July 23, 2012, at 25. Yet as lawyers we must rely on the assumption that meaning is, in fact, embedded in the words that we read in statutes and rules and that are, in turn, often read to or heard by our clients from us or judges, including words like "could" and "will."

What, you may wonder, does any of the above have to do with the ability of noncitizen defendants to bring post-conviction ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Padilla v. Kentucky*, 559 U.S. __, 130 S. Ct. 1474, 176 L. Ed. 2d 284 (2010), based on the fact that their counsel failed to inform them of removal orders resulting from their guilty pleas to clearly removable offenses and that they would have opted to go to trial had they otherwise known of this straightforward fact? Everything, actually, with regard to *Strickland's* second prong of prejudice.

The *Strickland* Framework

By way of background: A *habeas corpus* or *coram nobis* petitioner must, at a minimum, satisfy two prongs under *Strickland* to make out a claim of ineffective assistance of counsel so as to set aside the conviction or receive relief. First, he or she must show that his or her counsel's performance was objectively unreasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687. *Padilla* has established that "when the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for [a defendant's] conviction," "the duty to give correct advice is equally clear," and incorrect advice or the failure to render advice falls below an objective standard of reasonableness. *Padilla*, 176 L. Ed. 2d at 296. Thus, for example, counsel's failure to advise a client that his plea to second-degree assault in Maryland, carrying a ten-year sentence, made him subject to automatic removal is constitutionally deficient under *Strickland* and *Padilla* and satisfies the first prong. *See Denisyuk v. State*, 30 A.3d 914, 927 (Md. 2011). Whether *Padilla* will prove, authoritatively, to be retroactive remains to be determined by the Supreme Court shortly in *Chaidez v. United States*, 655 F.3d 684, *cert. granted*, 182 L. Ed. 2d 867 (Apr. 30, 2012 (No. 11-820); oral argument transcript available at 2011 U.S. Trans. 41048, 2012 U.S. Trans. LEXIS 56).

Second, the petitioner must show that counsel's deficient performance caused him prejudice. In the guilty-plea context, that means that "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would have not pleaded guilty and would have insisted on going to trial."

Hill v. Lockhart, 474 U.S. 52, 59 (1985). If, for example, a defendant can rationally show that he would not have pleaded guilty and risked going to trial if he had been properly advised by counsel of the certainty of a removal order, he may able to show prejudice. *See, e.g., Akinsade v. United States*, 686 F.3d 248, 256 (4th Cir. 2011); *Denisyuk*, 30 A.3d at 929-30. But it is also true that "[a] defendant may be unable to show prejudice if," through some other source of information or "at the [plea hearing] the district court provides an admonishment that corrects the misadvice and the defendant expresses that he understands the admonishment." *Akinsade*, 686 F.3d at 253.

To return to the coffee-drinking analogy above, then: Consider a seventeen-year old boy who came to the United States as an asylee from Haiti when he was five, then adjusted his status as a twelve-year old, and knows nothing else about the import of his status, or immigration law, except that he has lived here effectively all of his life. Being tried as an adult, he is about to plead guilty to second-degree felony burglary in Maryland that will invariably carry a sentence of more than one year. His criminal defense counsel is oblivious to the aggravated-felony and removal repercussions of the plea under 8 U.S.C. § 1101(a)(43)(G), and tells the boy nothing on point. If the plea judge routinely told the boy, as he must to any defendant under Maryland Rule 2-424(e), that his plea *could* result in his deportation, the boy would understand this just as a coffee drinker would with respect to pancreatic cancer in 1981: Maybe he would turn down the plea, but maybe he would go forward and take it, too, thinking (erroneously) that deportation ("pancreatic cancer") is just one possibility out of many and one that would not necessarily apply to his case.

On the other hand, suppose that — notwithstanding the fact that criminal defense counsel says nothing at all regarding the certainty of a removal order resulting from a guilty plea, with the first prong of ineffective assistance of counsel claim under *Strickland* having been met — the judge states to him that his guilty plea *will* result in his deportation, and he goes forward with the plea. In that event, it would seem sketchy for the boy to come back later in a post-conviction challenge and claim that he would not have pleaded guilty and would rationally have gone to trial had his counsel only told him that deportation was the all-but-certain outcome of his guilty plea, thereby hoping to meet the second prong of prejudice under *Strickland* in this context. For, like so many others in that context, he did know, or presumably knew, the consequence of removal from the certain words of the judge and yet still made his choice to plead guilty, and thus cannot show the required prejudice resulting from his attorney's grievously sub-par performance. *See, e.g.*, *Mendoza v. United States*, 774 F. Supp. 2d 791, 794 (E.D. Va. 2011) (judge informing lawful permanent resident from Nicaragua that she "will also be subject to deportation" arising from guilty plea); *Gonzalez v. United States*, 2010 U.S. Dist. LEXIS 92056, at *2 (S.D.N.Y. Sept. 3, 2010) (judge telling Colombian lawful permanent resident that "one aspect" of his guilty pleas "is deportation"); *United States v. Cruz-Veloz*, 2010 U.S. Dist. LEXIS 72603, at *7 (D.N.J., July 20, 2010) (judge telling Mexican lawful permanent resident that he will "subject yourself . . . to being deported" upon guilty plea and conviction); *see also United States v. Hernandez-Monreal*, 2010 U.S. App. LEXIS 24917, at *2 (4th Cir. Dec. 6, 2010) (judge told lawful permanent resident that his guilty plea "could definitely make it difficult, if not impossible, for [him] to successfully stay legally in the United States").

What you and I perhaps take for granted — namely, that the words "could" and "will," or what we refer to formally in linguistics as modal auxiliary verbs of uncertainty and certainty, respectively, have very different meanings and that the nuance can or should make all the difference in the world of decisionmaking — is now sharply at issue as noncitizens try to collaterally attack their guilty pleas more aggressively in light of *Padilla.*

The different meanings, however, may be finally and increasingly appreciated and getting their due, as reflected in Fourth Circuit's recent decision in *United States v. Akinsade*, 686 F.3d 248 (4th Cir. 2012), *pet. for rehearing denied*, No. 09-7554 (Nov. 20, 2012). There, the court majority has now cleared the way to arguing, more and more forcefully, that the judicial warning to a defendant that his guilty plea "could result in deportation" is inherently equivocal and does not serve to cure defense counsel's own patent failures to properly advise his or her client of the certain removability flowing from a guilty plea. At the same time, substantial resistance to honoring the different meanings — and hence to opening the door to more successful post-conviction challenges — persists, as reflected, for instance, in Chief Judge Traxler's dissent in *Akinsade*.

Background: Earlier Unreported District Court Decisions

Prior to and since *Akinsade*, there have been at least four unreported federal district court decisions in which the court has found that a defendant could not establish Sixth Amendment prejudice in collaterally attacking, by way a *habeas corpus* or a *coram nobis* petition, his conviction because the plea court's admonition that a plea *could* result in deportation sufficed to cure his counsel's utter failure to advise him of the certain adverse immigration consequences of the plea. The cases,

touched on in order below, are *Ellington v. United States*, 2010 U.S. Dist. LEXIS 38943 (S.D.N.Y. Apr. 20, 2010); *Khanali v. United States*, 2011 U.S. Dist. LEXIS 45745 (S.D. Ga. Apr. 12, 2011); *Zoa v. United States*, 2011 U.S. Dist. LEXIS 84858 (D. Md. Aug. 1, 2011); and *Nangia v. United States*, 2012 U.S. Dist. LEXIS 142630 (S.D.N.Y. Oct. 2, 2012).

In *Ellington*, a reading-disabled Jamaican national and U.S. lawful permanent resident pleaded guilty in 2008 to unlawful possession of a firearm, after a prior felony conviction, pursuant to 18 U.S.C. § 922(g)(1) and was sentenced to eighteen months' incarceration. In April 2009, an immigration judge ordered Ellington removed as having been convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii), and Ellington was removed. From abroad, Ellington raised an ineffective assistance of counsel claim in *habeas* proceedings, stating that he had been unaware that his guilty plea would lead to removal and his counsel had failed to advise him of that fact. The court denied the petition as moot on another ground; namely that Ellington had committed other, unrelated drug offenses, which barred his reentry to the United States again at any rate. But alternatively, the court declared that it need not determine whether his counsel's alleged performance was objectively unreasonable under prevailing professional norms, because Ellington could not establish prejudice — *Strickland*'s second prong: namely, that but his for his counsel's alleged failure to advise properly, he would have not accepted the guilty plea and rationally proceeded to trial.

The rationale was that at Ellington's plea allocution, "Magistrate Judge Fox specifically asked Petitioner, 'Do you recognize that your plea of guilty to the offense outlined in the indictment *may* affect your ability to remain in the United States?' to which Ellington responded, 'Yes, sir.' " *Ellington*, 2010 U.S. Dist. LEXIS 38943, at *9 (emphasis added). "As such," the court continued, "whether counsel failed to inform him of the potential immigration consequences of the guilty plea, or simply failed to orally explain the consequences given Ellington's literacy issues, is of no consequence since Judge Fox explained the issue in open court." *Id.* The decision in *Ellington* is rather remarkable because the record does not show that Judge Fox "explained" anything at all and because the district court implicitly accepted that *Padilla* applied retroactively. *Id.*

Khanali was a lawful permanent resident chiropractor who pleaded guilty to one count of conspiracy to commit health care fraud under 18 U.S.C. §§ 371 and 1347. Apparently, he was ordered removed as a result of his conviction and later petitioned for *habeas* relief on the basis of ineffective assistance of counsel, claiming that his defense counsel had failed to inform him that his plea would lead to removal. The district court denied the petition in part on the ground that the "guilty-plea judge expressly warned him that the maximum penalty *could* include deportation." *Khanali*, 2011 U.S. Dist. LEXIS 45745, at *13 (emphasis added), and, therefore, that he could not show prejudice under *Strickland*. In fact, what the guilty-plea judge said, and to which Khanali assented, was even vaguer: "Well, you are offering to plead guilty to a felony. That is going to cost you many rights. I doubt that you will ever become a citizen of the United States. I doubt that you will be able to keep your green card status. Do you understand that?" *Id.* at *13-14.

Adolphe Zoa, a Cameroonian national and lawful permanent resident of the United States, pleaded guilty to bank fraud and aggravated identity theft in December 2007 and was sentenced to twenty-two months in prison and five years of supervised release. He claimed that his counsel told him that removal was not a risk he faced as a result of his guilty plea because his sentence would be less than one year, and that had he been informed properly by his counsel, he would have not pleaded guilty and proceeded to trial. Based on that misadvice, and while still in removal proceedings, Zoa filed a *habeas* petition attacking his conviction based on ineffective assistance of counsel. What was said at the plea hearing is unclear, except that apparently the judge asked him "if he understood the *possible* consequences of a plea on his immigration status." *Zoa*, 2011 U.S. Dist. LEXIS 84858, at *4 (emphasis added). "He confirmed that he understood." *Id.* The court then ruled that, because Zoa had "expressly represented to the Court during his plea colloquy that he understood that pleading to the indictment *could* affect his immigration status," *id.* at *7 (emphasis added), he had failed to show prejudice under *Strickland*.

Amit Nangia was an Indian national who pleaded guilty in September 2003 to one count of conspiracy to commit bank, wire, and mail fraud involving some $370 million, in violation of 18 U.S.C. § 371, and one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). He was sentenced to a year and a day of incarceration. Two years later, he was deported to India for having been convicted of an aggravated felony. His *coram nobis* petition, filed in August 2011, alleged that his since-deceased attorney had violated his Sixth Amendment right to effective assistance of counsel by failing to advise him of the immigration consequences of pleading guilty and, further, that, if he had been advised, "there is a reasonable probability that he would not have pleaded guilty

and would have insisted on going to trial." *Nangia*, 2012 U.S. Dist. LEXIS 142630, at *4 (internal quotation marks and citation omitted).

At Nangia's plea hearing, the judge asked, " 'Do you understand that because you are not a citizen of the United States, it is possible that you *could* be subject to deportation following conviction? Do you realize that?' and Nangia responded, 'Yes.' " *Id.* at *5-6 (emphasis added). This was enough for the *coram nobis* court to conclude that such a colloquy was "sufficient to preclude prejudice." *Id.* at *6.

The Decision in *Akinsade*

Nangia was decided more than a full two months after *Akinsade v. United States*, 686 F.3d 248 (4th Cir. 2012), and did not acknowledge it. Nevertheless, *Akinsade* would seem to spell big trouble, if not the end, for the prejudice analysis in *Nangia* and the other unreported cases discussed above. In *Akinsade*, a thirty-year old Nigerian lawful permanent resident, Temitope Akinsade, who made a youthful criminal error and then went on to a stellar academic and professional career, appealed the district court's denial of his petition for a writ of error *coram nobis* pursuant to 28 U.S.C. § 1651, a petition he filed in 2009 prior to the decision the Supreme Court's decision in *Padilla*. He claimed that his defense counsel violated his Sixth Amendment right to effective assistance of counsel in having him plead guilty in March 2000 to one Class B felony count of embezzlement in the amount of $16,400 in violation of 18 U.S.C. § 656 — what proved to be an aggravated felony under 8 U.S.C. § 1101(a)(M)(i) (for fraud or deceit exceeding $10,000), which rendered Akinsade removable under 8 U.S.C. § 1227(a)(2)(A)(iii) and resulted in an order of removal.

His defense counsel in 2000 misadvised him — so it appeared — that his plea to this one count would not result in an order of deportation, and that an order of removal would result only if he suffered two felony convictions. (I say "appeared," because, in fact, in the separate but parallel Second Circuit case of *Akinsade v. Holder*, 678 F.3d 138, 143, 147 (2d Cir. 2012), decided two months before the Fourth Circuit's decision, Akinsade, through extremely competent counsel, showed that a modified categorical analysis of the record of conviction did not actually support the fraud element of his aggravated-felony charge of removability and so the BIA ended up having to vacate his order of removal. Thus, at the end of the day and for the wrong reasons Akinsade's defense counsel's advice proved correct in 2000 — a fact that was central, but notably not necessary, to Chief Judge Traxler's dissenting opinion in the Fourth Circuit case. This quirk in the case is a whole other ball of wax that is not the subject of this article.)

Where his defense counsel came up with this notion, no one knows. Akinsade later claimed that he relied on his counsel's misadvice in entering into the guilty plea and would have gone to trial had he known of the certain and consequent removal charges. *Id.* at 254. Further, the plea agreement into which Akinsade entered made no mention whatsoever of any risk of deportation. *Id.* at 250.

Meanwhile, however, during the March 2000 plea hearing, the district judge and Akinsade engaged in the following colloquy:

> The Court: You understand that this offense of embezzlement is a felony and if you are found guilty of a felony, there are certain civil ramifications that flow from this. Let me give you examples and I don't know all of the laws in all of the States, but people who are found guilty of felonies, often lose their right to vote, certain offices they cannot hold, certain professional licenses may be denied them, may not be able to serve on a jury. And I know felons can't possess firearms. Certain jobs may be denied you.
>
> If you are on parole or probation with another system, that can be affected. *Or if you are not a citizen, you could be deported. All of these things could be triggered by being found guilty of a felony. Do you understand that?*
>
> Akinsade: Yes, Your Honor.
>
> The Court: Knowing that do you still wish to plead guilty?
>
> Akinsade: Yes, Your Honor.

Akinsade, 686 F.3d at 258 n.2 (Traxler, C.J., dissenting) (emphasis added).

Years later, before United States District Judge for the District of Maryland Williams in 2009, Akinsade was denied his *coram nobis* relief. Judge Williams agreed that Akinsade's counsel's advice was unreasonably deficient. (During the appeal of the denial before the Fourth Circuit, the Supreme Court rendered its decision in *Padilla*, but the *Akinsade* court expressly chose not to decide whether *Padilla* was retroactive, since neither the government nor Akinsade ever took issue with Judge Williams's earlier finding that Akinsade's counsel's performance was constitutionally deficient, regardless of *Padilla*. *Id.* at 251 n.3.)

With regard to *Strickland's* second prong of prejudice, however Judge Williams believed that the original judge's admonition to Akinsade that his guilty plea "could" result in deportation cured any prejudice Akinsade had suffered as a result of his defense counsel's ineffectiveness. According to him, Akinsade was, in

fact, warned by the judge of the possibility of deportation, assented to that possibility during the colloquy, and still went forward and pleaded guilty. On July 25, 2012, however, a divided panel for the Fourth Circuit overruled the denial — an overruling that now sticks in light of the Fourth Circuit's decision on November 20, 2012, to deny reconsideration.

In a vigorous dissent — that thankfully remains one for the history books for now, at least in the Fourth Circuit, given the recent denial of the government's motion for reconsideration — and in the spirit of the various unreported district court decisions discussed above, Judge Traxler argued that the district court's admonition that Akinsade "could" be subject to deportation as a result of his guilty plea, and Akinsade's following through with that guilty plea, cured his counsel's misadvice and defeated his ineffectiveness claim as a matter of law. What mattered to Judge Traxler was that Akinsade "assumed the risk," so to speak. "Clearly, the district court's statement that removal was a consequence that 'could be triggered' by pleading guilty, coupled with Akinsade's admission that he understood the consequences and still intended to plead guilty, was enough to show removal was a risk that Akinsade was willing to accept." *Akinsade*, 686 F.3d at 265. True enough, yet Akinsade's claim did not sound in tort — where "assumption of the risk" might be a defense — nor was the facial voluntariness of his plea ever at issue. Rather, it is vital to recognize, his challenge was constitutional, falling under the Sixth Amendment's guarantee of the right to effective assistance of *counsel*.

The panel majority, consisting of Judges Gregory and Wynn, determined that the plea judge's admonishment in 2000 — "could be deported" — was too equivocal, in view of all the circumstances, to correct for Akinsade's counsel's ineffective assistance and thereby to preclude a showing of prejudice. (And it also ruled, in fact, that Akinsade could show and had shown prejudice, for reasons not discussed here.) How the *Akinsade* majority reached its decision was less than compelling or elegant at times, however.

For example, the majority tried to distinguish three unreported cases mentioned in the Introduction, above, including one of the Fourth Circuit's own — *Hernandez-Monreal*, *Gonzales*, and *Cruz-Veloz* — by noting that in those cases, the defendants had manifested their assent to the judges' specific, individuated warnings regarding deportation, whereas Akinsade's assent to the judge's admonition came in response to "a list of generalized warnings of which deportation was a part." *Id.* at 254 n.6. While that is true, it is also true, as noted above, that the warnings or statements given by the judges in those cases ("will" versus "could") were themselves unequivocal or nearly so. And it is also difficult to believe that the majority would have ruled that Akinsade could not have shown prejudice as a matter of law if only his plea judge had actually stated, in a separate free-standing sentence to him, that he could be deported if he was not a citizen, and then Akinsade had stated that he understood that.

Further, perhaps because it was breaking new ground and had no precedents on which to rely directly, the panel majority also tried to draw upon and distinguish, rather awkwardly, one of its own published cases, *Foster v. United States*, 68 F.3d 86 (4th Cir. 1995). There, after pleading guilty to aiding and abetting the distribution of cocaine base, and in light of his two prior felony convictions, Foster was sentenced as a "career offender" under the Sentencing Guidelines. Foster later filed a *habeas corpus* petition claiming ineffective assistance of counsel because, so he asserted, his counsel had assured him that by entering the plea he would not be subjected to a sentence as a career offender, and he would not have pleaded guilty and would have proceeded to trial had he known. *Id.* at 88.

The Fourth Circuit ruled that Foster had failed to show prejudice even assuming that his attorney's performance was objectively unreasonable. That was because the plea judge gave Foster a "careful explanation of the potential severity of the sentence," *id.*: the possible maximum penalty was twenty years' incarceration and supervised release for as much as five years. His prior record could be taken into account in sentencing. Foster stated that he understood. "Since the district court had 'properly informed [the defendant] of the potential sentence he faced,' this Circuit concluded that 'he could not be prejudiced by any misinformation his counsel allegedly provided him.' " *Akinsade*, 686 F.3d at 254 (quoting *Foster*).

The *Akinsade* majority maintained that Akinsade's case was "decidedly different" from *Foster*, in that the plea judge in Akinsade's case warned only that the plea "*could* lead to deportation," *id.* (emphasis in original), and did not advise him of the consequence of mandatory deportation. As this article submits, that the plea judge communicated in that fashion is all-important, but it does not appear to be the case that *Foster* required more than such communication, because, in *Foster*, receiving notice of the *potential* maximum sentence (which subsumed what a "career offender" sentence could have been) sufficed. In that sense, the plea judge in *Akinsade* did exactly what *Foster* would prescribe as sufficient to preclude a showing of prejudice – gave him a warning about the *potential* of deportation. In dissent, Chief Judge Traxler was probably correct, therefore, in noting that, contrary to the majority's view, "there was no material difference between this case and *Foster*." *Id.* at 265.

In truth, the majority rationale in *Akinsade* turns on both the plain linguistic differentiation between "may" or "could" and "will," noted at the outset, and the spirit and letter of *Padilla*, even though, as noted above, the court professed that it was not ruling on the issue of *Padilla's* retroactivity. The court ruled that the words "could lead to deportation" constituted "a general and equivocal admonishment" that was "insufficient to correct counsel's affirmative misadvice that Akinsade's crime was not categorically a deportable offense." *Id.* at 254. It was insufficient because patently erroneous affirmative advice (as opposed, perhaps, to a failure to advise at all), the court seemed to suggest, needed to be corrected by nothing less than clear and correct advice or judicial communication if a lack of prejudice were to be found. *See id.* at 254, 255 (relying on *Lafler v. Cooper*, 556 U.S. ___, 132 S. Ct. 1376, 1386, 182 L. Ed. 2d 398 (2012) for the proposition that the cure for particular pre-trial errors required an equally particular correction).

But the court's rationale was also broader (and opens the door for a still broader argument) and does not turn just on "misadvice." The majority acknowledged that words "could lead to deportation" cannot preclude a showing of prejudice "when the consequences at stake are 'particularly severe'" and "will likely result in the 'loss of both property and life or of all that makes life worth living,'" 686 F.3d. at 254 (quoting *Padilla*, 130 S Ct. at 1481, 176 L. Ed. 2d 284, 293, and *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)) — an indirect way of saying, in other words, "when the consequences of the guilty plea are removal from the United States," particularly an order of removal founded most harshly on an aggravated-felony charge, as was Akinsade's case. But that will *always* be so in the vast majority of post-conviction-relief cases: Removal is the outcome that is sought to be avoided (as opposed to, say, jeopardized naturalization prospects that arise from a guilty plea).

And, as a result of *Padilla's* own command and hence as a matter of proportionality, a level of specificity from a plea judge that is more elevated than "could" should be warranted in order to preclude prejudice when that removal clearly flows a guilty plea. As Justice Stevens stated:

> 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 is truly clear, as it was in this case, *the duty to give correct advice is equally clear*.

Padilla, 130 S. Ct. at 1483, 176 L. Ed. 2d 284, 296 (emphasis added; internal footnote omitted). A recent Texas Court of Appeals decision said it most simply and best, perhaps, in a case involving defense counsel's failure to research the immigration consequence of his client's two theft convictions and advise his client of them prior to his plea:

> The trial court determined in effect that Appellant was not prejudiced by [counsel's failure to advise] because the 2004 plea papers informed that the plea "*may* result in deportation, exclusion from admission to the U.S.A. or denial of naturalization under federal law." *However, given the near certainty that Appellant would be deported, the admonishment that the plea "may" result in deportation was not sufficient to alleviate the prejudice arising from counsel's failure to advise Appellant of the plea's immigration consequences.*

Ex Parte de los Reyes, 350 S.W. 3d 723, 732 (Tex. Ct. App. 2012) (emphasis added).

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Eric H. Singer, Esq. practices appellate litigation and immigration law and litigation in Rockville, Maryland. He can be reached at eric@eslegal.net, and his website address is www.eslegal.net. His last article, *The Muddle of Moral Turpitude After* Silva-Trevino, appeared in the March 1, 2012, issue of the *Bulletin*.

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