Immigration Issues in Criminal Cases

Gloucester County Legal Education Association
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Presented by: Scott Elwell

About the Speaker

Scott C. Elwell is an associate at Helmer, Paul, Conley & Kasselman. Scott graduated *magna cum laude* from the University of Pennsylvania, and earned his law degree at Temple University. Scott also obtained a Master of Arts (MA) degree in South Asian Studies from the University of Pennsylvania. He has practiced immigration law for over ten (10) years and has an excellent reputation in the local immigrant communities in New Jersey, Pennsylvania, and Delaware. In addition to English, he is fluent in Hindi, Urdu, Marathi, and German. Scott can be reached at the firm's Haddon Heights office at (856) 547-7888, or by email to scottelwell@helmerlegal.com

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Immigration Issues in Criminal Cases

1. AOC Directive #09-11 requires municipal judges to warn defendants of the immigration consequences of their pleas. (See A-12)

2. Immigration-related PCRs are on hold pending the outcome of State v. Gaitan, 206 N.J. 330 (2011). This stemmed from the US Supreme Court decision in Padilla. (See A-16; A-23)

3. New Jersey Attorney General Directive, dated August 22, 2007: (Law enforcement shall only ask about immigration status while investigating suspects in serious crimes), (Clearly limited to "any indictable crime, or for driving while intoxicated"), (Seton Hall study dated April 15, 2009, states that New Jersey police have exceeded directive).

4. Sources of Law: Immigration and Nationality Act ("INA"), CFR Title 8, Board of Immigration Appeals Case Law, Federal Circuit Cases, and US Supreme Court.

5. Commonly employed sections of law relating to immigration consequences of criminal activity: INA Sec. 101(a)(43); INA Sec. 212(a)(2)(A); INA Sec. 236(c); INA Sec. 237(a)(2). (See A-1 to A10)

6. Aggravated Felony: What is it? Can an "aggravated felon" stay in the US and avoid deportation? See DIOP case: mandatory detention now limited to a "reasonable period" in the Third Circuit. (See A-63)

7. Immigration Detainers and Requesting Bond from an Immigration Judge.

8. Mandatory Detention: Approaches to such detention, and the criminal attorney's responsibility to avoid such a consequence.

9. Inadmissibility vs. deportability: understanding both concepts as they relate to criminal activity by an alien.

10. Applications before the U.S. Department of Homeland Security for permanent residency and naturalization (no need for actual conviction for ability of government to deny an individual naturalization) and how criminal activity can complicate the process.

11. Relief available for criminal aliens before the Immigration Court; i.e. those aliens charged with immigration violations and placed into removal (deportation) proceedings, cancellation of removal for permanent residents, cancellation of removal for certain nonpermanent residents.

12. What is a conviction for immigration purposes?

13. Pretrial Intervention or Diversion NOT a conviction for immigration purposes (no formal admission of guilt). (Any signed statement of guilt to the prosecutor as a quid pro quo for acceptance into such program NOT an "admission of guilt" for immigration purposes.)

14. Expungements and Record Sealings vs. Post-Conviction Relief on the Merits: crucial distinctions for immigration purposes.

15. Discussion of Matter of Pickering, 23 I&N Dec. 621 (BIA 2003). (Post-Conviction Relief cannot be solely for immigration purposes - instead, conviction must be vacated on the merits.) (See A-86)

16. "S" snitch visas.

17. Crime of domestic violence.

18. Victim of domestic violence (immigration possibilities for such a victim - self petition, and waiver for victims of domestic violence outline at INA Sec. 237(a)(7)(A). (See A-11)

APPENDIX

INA Sec. 101 (a)(43): AGGRAVATED FELONY DEFINITION

43) The term "aggravated felony" means-

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in controlled substance (as described in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18, United States Code (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in-

(i) section 842 (h) or (i) of title 18, United States Code, or section 844 (d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18, United States Code (relating to firearms offenses); or

(iii) section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment at least 1 year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least 1 year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18, United States Code (relating to child pornography);

(J) an offense described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations, or an offense described in section 1084 (if it is the second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of 1 year imprisonment or more may be imposed;

(K) an offense that-

(i) relates to the owning, controlling, managing, or supervising of a prostitution business; or

(ii) is described in section 2421, 2422, 2423, of Title 18, United States Code (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of title 18, United States Code (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in-

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18, United States Code;

(ii) section 601 of the National Security Act of 1947 (50 U.S.C. 421) (relating to protecting the identity of undercover intelligence agents); or

(iii) section 601 of the National Security Act of 1947 (relating to protecting the identity of undercover agents);

(M) an offense that-

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 274(a) (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act ;

(O) an offense described in section 275(a) or 276 committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18, United States Code, or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding o nly the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act ;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more; and

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in

vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year ;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

INA SEC. 212(a)(2): INADMISSIBLE ALIENS DUE TO CRIMINAL ACTIVITY

Sec. 212. [8 U.S.C. 1182]

(a) Classes of Aliens Ineligible for Visas or Admission.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(2) Criminal and related grounds.-

(A) Conviction of certain crimes.-

(i) In general.-Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) 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 (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement 2/ were 5 years or more is inadmissible.

(C) 2a/ CONTROLLED SUBSTANCE TRAFFICKERS- Any alien who the consular officer or the Attorney General knows or has reason to believe--

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or

has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissaible.

(D) Prostitution and commercialized vice.-Any alien who-

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10- year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution, is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution.-Any alien-

(i) who has committed in the United States at any time a serious criminal offense (as defined in section **101(h)**),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense, is inadmissible.

(F) Waiver authorized.-For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

INA SEC. 236(c): MANDATORY DETENTION PROVISION

Sec. 236. (a) Arrest, Detention, and Release.-On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General-

(1) may continue to detain the arrested alien; and

(2) may release the alien on-

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of Bond or Parole.-The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

***(c) Detention of Criminal Aliens.-

(1) Custody.-The Attorney General shall take into custody any alien who-

(A) is inadmissible by reason of having committed any offense covered in section,

(B) is deportable by reason of having committed any offense covered in section **237(a)(2)(A)(ii)**, (A)(iii), (B), (C), or (D),

(C) is deportable under section **237(a)(2)(A)(i)** on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section **212(a)(3)(B)** or deportable under section **237(a)(4)(B)**, when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release.-The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18, United States Code, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens.- (1) The Attorney General shall devise and implement a system-

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available-

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial Review.-The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

INA SEC. 237(a)(2): DEPORTABLE ALIENS DUE TO CRIMINAL ACTIVITY

(a) Classes of Deportable Aliens.-Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(2) Criminal offenses.-

(A) General crimes.-

(i) Crimes of moral turpitude.-Any alien who-

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j)) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed.

is deportable

(ii) Multiple criminal convictions.-Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony.-Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High Speed Flight.-Any alien who is convicted of a violation of section 758 of title 18, United States Code, (relating to high speed flight from an immigration checkpoint) is deportable.

(v) 5b/ FAILURE TO REGISTER AS A SEX OFFENDER- Any alien who is convicted under section 2250 of title 18, United States Code, is deportable.

(vi) 5b/ Waiver authorized.-Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances.-

(i) Conviction.-Any 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 (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts.-Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses.-Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable.

(D) Miscellaneous crimes.-Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate-

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18, United States Code, for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18, United States Code;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section **215** or **278** of this Act, is deportable.

(E) **6/** Crimes of Domestic violence, stalking, or violation of protection order, crimes against children and.-

(i) Domestic violence, stalking, and child abuse.-Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or

former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders.-Any alien who at any time after entry is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued fo r the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) TRAFFICKING- Any alien described in section **212(a)(2)(H)** is deportable.

INA SEC. 237(a)(7)(A): DOMESTIC VIOLENCE WAIVER

(7) WAIVER FOR VICTIMS OF DOMESTIC VIOLENCE-

(A) IN GENERAL- The Attorney General is not limited by the criminal court record and may waive the application of paragraph (2)(E)(i) (with respect to crimes of domestic violence and crimes of stalking) and (ii) in the case of an alien who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship--

(i) upon a determination that--

(I) the alien was acting in self-defense;

(II) the alien was found to have violated a protection order intended to protect the alien; or

(III) the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime--

(aa) that did not result in serious bodily injury; and

(bb) where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty.

(B) CREDIBLE EVIDENCE CONSIDERED- In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

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MEMORANDUM

DIRECTIVE # 09-11

To: **Assignment Judges**
Presiding Judges-Municipal Courts
Municipal Court Judges

From: **Glenn A. Grant**

Subj: **Informing Municipal Court Defendants of the Immigration Consequences of Guilty Pleas**

Date: **December 28, 2011**

This Directive promulgates procedures to be followed in the municipal courts to inform defendants that a guilty plea to or conviction of certain municipal court offenses may negatively affect their immigration status, including possibly resulting in deportation. The Supreme Court approved these procedures on the recommendation of the Conference of Presiding Judges-Municipal Courts.

In State v. Nunez-Valdez, 200 N.J. 129, 131 (2009), the New Jersey Supreme Court held that defense counsel, in failing to inform the defendant that under federal law his conviction would mandate deportation, did not provide effective assistance to the defendant. Similarly, in Padilla v. Kentucky, ____ U.S. ____, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284, 299 (2010), the United States Supreme Court held that the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea.

In 2011, the New Jersey Supreme Court addressed this constitutional requirement in Superior Court criminal cases; see Directive #05-11 ("Criminal Plea Form – Question Regarding the Immigration Consequences of a Guilty Plea"). Consistent with Nunez-Valdez, Padilla, and Directive #05-11, this Directive addresses the same concerns in municipal court cases by requiring municipal court judges (1) to inform defendants that a guilty plea or a finding of guilt as to certain offenses may result in negative immigration consequences and (2) to inform defendants that they have a right to seek advice from an attorney regarding those potential consequences.

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A municipal court judge shall inform defendants of possible immigration consequences and of their right to seek counsel on these matters at three stages of the court process: (A) as part of the court's opening statement for each court session; (B) at defendant's first appearance; and (C) as part of the guilty plea colloquy.

A. Opening Statement

The municipal court judge shall include the following language in the opening statement for each municipal court session:

> If you are not a United States citizen and if you plead guilty to or are convicted of certain offenses heard in the municipal court, including some motor vehicle offenses, it may result in your being deported from the United States, or it may prevent you from being re-admitted to the United States if you leave voluntarily, or it may prevent you from ever becoming a naturalized American citizen. You have a right to seek advice from an attorney about the effect a guilty plea will have on your immigration status.

This language will be incorporated into each of the three model opening statements that the Supreme Court adopted in 2008 – one model opening statement for sessions handling criminal matters only, one for sessions handling motor vehicle offenses only, and one for combined sessions.

B. First Appearance

At the first appearance proceeding, any defendant charged with the following offenses shall be advised of the immigration consequences of a guilty plea:

(1) all disorderly or petty disorderly persons offenses;
(2) driving while intoxicated (N.J.S.A. 39:4-50; N.J.S.A. 39:4-50.14; N.J.S.A. 39:3-10.13; N.J.S.A. 12:7-46);
(3) operating motor vehicle while in possession of a CDS (N.J.S.A. 39:4-49.1).

The municipal court judge shall engage in the following colloquy with defendants charged with the above-listed offenses at first appearance proceeding:

> If you are not a United States citizen and if you plead guilty to or are convicted of certain offenses heard in the municipal court, including some motor vehicle offenses, it may result in your being deported from the United States, or it may

prevent you from being re-admitted to the United States if you leave voluntarily, or it may prevent you from ever becoming a naturalized American citizen. Do you understand?

You have a right to seek advice from a private attorney about the effect a guilty plea or conviction will have on your immigration status. If you qualify for a court-appointed attorney, you can speak to the public defender about the immigration consequences of your plea. Do you understand?

The municipal court judge shall engage in this colloquy during the first appearance for all defendants charged with any of the above-listed offenses, regardless of the defendant's name, appearance, or English proficiency. This requirement is not intended to in any way limit the judge's discretion to engage in this same colloquy with other defendants who have been charged with offenses other than those listed above.

C. Guilty Plea

Before accepting a guilty plea to any of the above-listed offenses, the municipal court judge shall engage in the following colloquy with the defendant:

(1) Are you a citizen of the United States?

(If defendant answers "No" to question 1, defendant must answer questions 2 through 6.)

(2) Do you understand that if you are not a citizen of the United States, this guilty plea may result in your removal from the United States and/or may stop you from being able to legally enter or re-enter the United States?

(3) Do you understand that you have the right to seek individualized advice from an attorney about the effect your guilty plea may have on your immigration status?

(4) Have you discussed with an attorney the potential immigration consequences of your plea?

(If defendant answers "No" to question 4, defendant should next answer question 5. If defendant answers "Yes" to question 4, defendant should next answer question 6.)

(5) Would you like the opportunity to do so?

(6) Having been advised of the possible immigration consequences and of your right to seek individualized advice on your immigration consequences, do you still wish to plead guilty?

If during the plea colloquy an indigent defendant seeks the opportunity to discuss with an attorney the potential immigration consequences of the plea and the offense charged would result in a consequence of magnitude, the court should adjourn the proceedings and appoint the municipal public defender to represent defendant. The municipal court judge is under no obligation to appoint additional separate counsel for an indigent defendant to advise defendant on the immigration consequences of a plea.

Additionally, if during the plea colloquy an indigent defendant who is not charged with an offense that would result in a consequence of magnitude seeks the opportunity to discuss with an attorney the possible immigration consequences of the plea, the court should adjourn the matter to give the defendant the opportunity to do so.

Similarly, if during the plea colloquy a non-indigent defendant seeks the opportunity to discuss with an attorney the possible immigration consequences of the plea, whether or not there are possible consequences of magnitude, the court should adjourn the matter to give the defendant the opportunity to do so.

Finally, at no point in the proceedings should the municipal court judge attempt to advise defendants on an individualized basis as to what the actual immigration consequences of a particular plea might be. Both Padilla, 130 S. Ct. at 1486, and Nunez-Valdez, 200 N.J. at 131, made it clear that such individualized advice is the responsibility of counsel, not the judge. As stated previously, the judge's responsibility is limited to informing defendants that a plea or a guilty finding may result in negative immigration consequences and that defendants in that situation have the right to seek advice from an attorney regarding the potential consequences.

Any questions or comments regarding this Directive may be directed to Debra Jenkins, Assistant Director for Municipal Court Services, at 609-984-8241.

G.A.G.

cc: Chief Justice Stuart Rabner
Attorney General Paula T. Dow
Attorney General Designate Jeffrey Chiesa
Joseph E. Krakora, Public Defender
Assignment Judges
Criminal Division Judges
Family Division Judges
Steven D. Bonville, Chief of Staff
AOC Directors and Assistant Directors
Trial Court Administrators
Criminal Division Managers
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State v. Frensel Gaitan, __ N.J. Super. __ (App. Div. 2011).

The following summary is not part of the opinion of the court. Please note that, in the interest of brevity, portions of the opinion may not have been summarized.

02-07-11 STATE v. FRENSEL GAITAN
A-0197-09T4

Defendant filed a petition for post-conviction relief, arguing his attorney failed to discuss with him the deportation consequences of his guilty plea. The trial judge denied the petition, concluding without the benefit of an evidentiary hearing that defendant's responses to the plea form as well as his testimony at the plea hearing demonstrated he understood the deportation consequences. In reversing that determination, the court also considered the impact of Padilla v. Kentucky, 559 U.S. __, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), and State v. Nuñez-Valdéz, 200 N.J. 129 (2009), both of which were decided after defendant pled guilty and after his PCR petition was denied.

The court recognized that certain aspects of Padilla -- namely, its holding that counsel's failure to give any deportation advice is no different than the rendering of bad deportation advice, and its holding that the direct/collateral methodology regarding deportation advice had never applied to Sixth Amendment claims of ineffectiveness -- did not create new rules insofar as the Sixth Amendment is concerned. Because defendant was entitled to the benefit of that federal rule, the argument that Nuñez-Valdéz's rejection of the direct/collateral methodology as a matter of New Jersey constitutional law constituted a new rule was irrelevant in determining whether defendant received the effective assistance of counsel when he pled guilty.

The court also concluded that Nuñez-Valdéz should at least be given pipeline retroactivity, and that defendants with appeals pending from the denial of post-conviction relief at the time Nuñez-Valdéz was decided are entitled to the benefit of its holding. As a result, defendant was entitled to a hearing on the claims set forth in his PCR petition, and the court remanded for that purpose.

1 of 1 DOCUMENT

STATE OF NEW JERSEY, Plaintiff-Respondent, v. FRENSEL GAITAN, Defendant-Appellant.

DOCKET NO. A-0197-09T4

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2011 N.J. Super. LEXIS 22

December 1, 2010, Submitted
February 7, 2011, Decided

SUBSEQUENT HISTORY: [*1]
Approved for Publication February 7, 2011.

PRIOR HISTORY: On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 04-11-4389.

COUNSEL: *Yvonne Smith Segars*, Public Defender, attorney for appellant (*Gregory P. Jordan*, Designated Counsel, on the brief).

Paula T. Dow, Attorney General, attorney for respondent (*Frank J. Ducoat*, Deputy Attorney General, of counsel and on the brief).

JUDGES: Before Judges CUFF, FISHER AND SIMONELLI. The opinion of the court was delivered by FISHER, J.A.D.

OPINION BY: FISHER

OPINION

The opinion of the court was delivered by

FISHER, J.A.D.

In this appeal, we consider whether the recent decisions in *Padilla v. Kentucky, 559 U.S. , 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)*, and *State v. Nuñez-Valdéz, 200 N.J. 129, 975 A.2d 418 (2009)*, should apply to this noncitizen defendant's argument, raised for the first time in his post-conviction relief (PCR) petition, that his attorney failed to discuss with him the deportation consequences of his guilty plea.

I

On June 27, 2005, defendant pled guilty to third-degree distribution of a controlled dangerous substance within 1000 feet of a school, *N.J.S.A. 2C:35-7*, and, on October 7, 2005, was sentenced to a five-year probationary term. Defendant did not file [*2] a direct appeal. Instead, on May 28, 2008, defendant filed a PCR petition claiming the ineffectiveness of his counsel.

The PCR judge denied defendant's petition, and he appealed, raising the following issues for our consideration:

> I. THE COURT ERRED BY NOT ALLOWING ORAL ARGUMENT WHEREIN THE PETITIONER COULD HAVE MORE FULLY EXPLAINED THE PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL.
>
> II. IT WAS ERROR NOT TO ALLOW THE DEFENDANT AN EVIDENTIARY HEARING OR GRANT HIS APPLICATION FOR POST-CONVICTION RELIEF.
>
> A. THE PETITIONER SHOULD BE PERMITTED TO WITHDRAW HIS PLEA.
>
> III. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

A. TRIAL COUNSEL FAILED TO ADVISE THE PETITIONER OF THE COLLATERAL CONSEQUENCES OF HIS PLEA.

IV. THE TRIAL COURT ERRED BY FAILING TO ASCERTAIN WHETHER DEFENDANT UNDERSTOOD THE CONSEQUENCES OF HIS PLEA.

We agree defendant was erroneously denied an evidentiary hearing concerning whether he received the effective assistance of counsel regarding the deportation consequences of his guilty plea and remand for that purpose. [1]

1 Defendant also argued in the trial court that his counsel was ineffective for failing to pursue the alleged fact that defendant was not informed of his [*3] *Miranda* rights when arrested and for allegedly failing to sufficiently investigate defendant's claim of innocence. Those arguments have not been pursued in this court and are, therefore, waived. *State v. Robinson, 200 N.J. 1, 20, 974 A.2d 1057 (2009).*

II

The PCR judge denied relief based on defendant's affirmative response to the plea form's Question 17, which inquired whether he understood "that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty." The judge also relied on the colloquy at the plea hearing, concluding that defendant's statements at that time demonstrated he "entered into [the plea] agreement with full knowledge that there could be collateral immigration consequences."

A few months after the PCR judge rendered his decision, our Supreme Court decided *Nuñez-Valdéz*, which not only rejected application of the traditional direct/collateral methodology [2] in this context, but also determined that a simple "yes" answer to Question 17 was not conclusive in determining whether an attorney was effective, *200 N.J. at 141-42, 975 A.2d 418*, and, in fact, concluded Question 17 required further "refinement," *id. at 144, 975 A.2d 418*. As a result, the PCR judge's considerable [*4] reliance on defendant's affirmative response to Question 17 was erroneous.

2 In *State v. Bellamy, 178 N.J. 127, 137, 835 A.2d 1231 (2003)*, the Court explained the direct/collateral methodology in the following way: "Traditionally, the determination of whether defendant must be informed of certain consequences of his plea turns on whether those consequences are 'direct or penal,' in which case defendant must be informed, or 'collateral,' in which case defendant need not be informed." The Court rejected that approach as having no relevance in determining the effectiveness of an attorney who failed to advise a defendant pleading to a sex offense of the possibility of involuntary civil commitment. *Id. at 138-39, 835 A.2d 1231.*

As mentioned, the PCR judge also relied on the following colloquy during defendant's plea hearing:

Q. You have no difficulty reading or writing?

A. No.

. . . .

Q. Did you then with your attorney read and discuss the four pages that make up the plea agreement?

A. Yes.

Q. Did you read, understand, truthfully answer all questions on each page?

A. Yes.

Q. Were those answers circled as you gave them?

A. Yes.

Q. When each page had been filled in, completed, did you understand what it said?

A. Yes.

Q. Did you put [*5] your initials at the bottom of pages 1 and 2?

A. Yes.

Q. Sign your name to page 3 and 4?

A. Yes.

Q. Did you do that voluntarily?

A. Yes.

At first blush, this testimony may seem inconsistent with defendant's certification in support of post-conviction relief; however, closer examination of the latter suggests otherwise:

> 5. In discussing the plea form with me[,] [my attorney] asked me "Are you a citizen" to which I replied "No, I'm a [l]awful [p]ermanent [r]esident."
>
> 6. [My attorney] did not discuss with me the possible implications of a guilty plea on my immigration status. Specifically, he did not advise me that I might become subject to removal as a result of a guilty plea to the offer made by the Office of the Prosecutor.
>
> 7. I had no personal knowledge that a guilty plea might result in the initiation of removal proceedings against me.

Defendant's testimony during the plea hearing and the PCR certification are not incompatible. The words "deportation," "removal" or "citizen" were never uttered at the plea hearing. The closest the judge came to inquiring about the potential for deportation or about any such discussions between defendant and his attorney was when he asked defendant whether his [*6] attorney discussed the four pages of the plea form. Defendant does not deny in his PCR certification that his attorney asked whether he was a citizen, but when defendant said he was a legal permanent resident, defendant claims there was no discussion about the deportation possibilities. The sworn statements given at both the plea hearing and in the PCR certification are not inconsistent and the PCR judge was mistaken in holding otherwise. [3]

> 3 Moreover, even if the plea testimony and the PCR certification were in conflict, the PCR judge could not find the former more credible than the latter absent an evidentiary hearing because he did not have the opportunity to see and hear defendant testify on any occasion. This is not to suggest, however, that a judge, who presided over the earlier phase, may not consider his or her view of a defendant's credibility in ruling on a PCR petition. But, when a PCR judge, as here, has not had the opportunity to see and hear the defendant testify, the PCR judge may not assign greater credibility to one written sworn statement over another.

Because neither defendant's response to Question 17 nor his testimony at the plea hearing are inconsistent with his [*7] contentions in the PCR certification -- the two bases upon which post-conviction relief was denied -- we conclude that defendant was entitled to an evidentiary hearing as to the content and scope of his attorney's advice, if any, regarding his potential removal from the country.

III

The only potential obstacle to a remand for an evidentiary hearing is the State's argument that *Nuñez-Valdéz* and *Padilla* should not be applied here. This argument is convoluted by the fact that these recent decisions contain or presuppose multiple principles, some of which are undoubtedly new and some of which are not. In any given case, whether or to what extent those principles may be given retroactive effect turns on the nature of the ineffectiveness argument, that is, whether the attorney gave incorrect advice, no advice, or only forecasted the possibility or probability of deportation. For the reasons that follow, we conclude that what is relevant about these recent decisions is not new and what is new about them is not relevant to the matter at hand.

The State concedes that insofar as *Nuñez-Valdéz* determined that the rendering of incorrect advice meets the first prong of the test for ineffectiveness, [4] [*8] it does not constitute a new rule,

citing, among others, *State v. Garcia, 320 N.J. Super. 332, 339, 727 A.2d 97 (App. Div. 1999)*. While the State's contention in this regard is certainly true, it is not relevant since defendant does not contend he received bad advice, only that he received no advice.

> 4 *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*; *State v. Fritz, 105 N.J. 42, 519 A.2d 336 (1987)*. *Nuñez-Valdéz's* holding is actually limited to determining what is required by *Fritz*, since the Court "elect[ed] to decide this case under our state constitution." *200 N.J. at 139, 975 A.2d 418*. As will be seen, *Strickland* imposes more extensive obligations on an attorney representing a noncitizen than does *Fritz*.

We discern from its arguments that the State views the rendering of no advice as requiring a different approach from that taken when a defendant contends an attorney rendered bad advice. We reject this contention for the same reasons enunciated by Justice Stevens for the Court in *Padilla*:

> [a] holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. [*9] Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." *Libretti v. United States, 516 U.S. 29, 50-51, 116 S. Ct. 356, [368,] 133 L. Ed. 2d 271, 516 U.S. 29, 116 S. Ct. 356, 133 L. Ed. 2d 271[, 290] (1995)*. When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all. Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so "clearly satisfies the first prong of the *Strickland* analysis." *Hill v. Lockhart, 474 U.S. 52, 62, 106 S. Ct. 366[, 372], 88 L. Ed. 2d 203[, 212] (1985)* (White, J., concurring in judgment).
>
> [*Padilla, supra, 559 U.S. at , 130 S. Ct. at 1484, 176 L. Ed. 2d at 296-97.*]

The State's argument that the "no advice" scenario, found sufficient to meet the first prong of the *Strickland* test in *Padilla*, is a new rule that should be applied only prospectively [*10] is without merit. In fact, the *Padilla* Court relied upon "the weight of prevailing professional norms" in so holding, citing authorities that preexisted defendant's guilty plea in this case. *Id. at , 130 S. Ct. at 1482-83, 176 L. Ed. 2d at 294-95*. Its holding that no advice is the equivalent of misadvice is not new. Thus, an attorney's rendering of bad advice or the failure to give any advice regarding deportation satisfied the first prong of the *Strickland* test at the time defendant pled guilty. [5]

> 5 Such an allegation would also likely satisfy the first prong of the test at the time defendant pled guilty insofar as New Jersey law is concerned. The plea form used here contained Question 17, which was undoubtedly intended to engender a discussion between counsel and the accused about deportation. That question, in one form or another, has been used by our courts since 1988, as a response to Chief Justice Wilentz's dissent in *State v. Heitzman, 107 N.J. 603, 606-08, 527 A.2d 439 (1987)*, thus establishing a professional norm existing at the time defendant discussed the plea agreement with his attorney. *See AOC Administrative Directive* #1-1988 (Jan. 15, 1988).

In this same vein, it also appears the [*11] State views *Nuñez-Valdéz's* rejection of the direct/collateral methodology as a new rule that ought not be applied retroactively. [6] That argument may be accurate as a matter of state constitutional law,

but the *Padilla* Court recognized that it had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland. . . ." 559 U.S. at , 130 S. Ct. at 1481, 176 L. Ed. 2d at 293.* Rather than create a new rule, the Court held that existing federal law compelled its rejection of Kentucky's direct/collateral approach. As a result, our Supreme Court's rejection of the direct/collateral methodology in this context in *Nuñez-Valdéz* -- whether or not that constitutes a new rule for purposes of state constitutional law -- has no direct impact here; when being advised to plead guilty, defendant was entitled to the benefits of federal constitutional law, which has never recognized the direct/collateral methodology.

> 6 Certainly, in deciding *Nuñez-Valdéz*, the Court for the first time jettisoned the direct/collateral methodology in deportation circumstances. Whether that aspect of *Nuñez-Valdéz* should [*12] be viewed as a new rule or not -- a matter we need not decide -- certainly the direct/collateral methodology's demise was foreshadowed years earlier by the Court. *See Bellamy, supra, 178 N.J. at 138-39, 835 A.2d 1231* (deeming the direct/collateral methodology unhelpful in determining whether an individual pleading guilty to a sex crime should be advised of the possibilities of involuntary civil commitment).

To be sure, *Padilla* announces a new rule, which, in the Court's words, "now" requires that counsel inform the noncitizen client "whether his plea carries a risk of deportation." *559 U.S. at , 130 S. Ct. at 1486, 176 L. Ed. 2d at 299.* Defendant's ineffectiveness claim here, however, is not based on his attorney's failure to advise whether deportation would occur but only on the attorney's alleged failure to give any advice. We, thus, need not presently determine whether or to what extent the new aspect of *Padilla* might apply here. [7]

> 7 Of course, such a determination may have to be made if, at the conclusion of the evidentiary hearing required by today's judgment, the PCR judge determines that the attorney gave advice but only opined on the possibility of deportation rather than provide a firm opinion [*13] of the risk of deportation now required by *Padilla*.

To summarize, what may arguably be viewed as "new" in *Nuñez-Valdéz* -- the rejection of the direct/collateral methodology -- is not a new federal concept. And what may be viewed as "new" in *Padilla* -- that counsel must now "inform [the] client whether his plea carries a risk of deportation," *559 U.S. at , 130 S. Ct. at 1486, 176 L. Ed. 2d at 299* -- is not relevant here, or at least not until the facts are further illuminated at the evidentiary hearing required.

IV

Lastly, we would note that even were we to agree with the State that the standard required of defense counsel in this case necessarily relies on the new aspects of the recently-decided cases of *Padilla* or *Nuñez-Valdéz*, or both, we do not agree they should not be applied here. Our Supreme Court has traditionally applied new rules of criminal practice and procedure at least to cases in the pipeline existing at the time. *See, e.g., State v. Natale, 184 N.J. 458, 494, 878 A.2d 724 (2005); Bellamy, supra, 178 N.J. at 142-43.*

Here, defendant's PCR petition was denied on March 20, 2009. *Nuñez-Valdéz* was decided on July 27, 2009, and defendant filed an appeal from the denial of his PCR petition on [*14] August 28, 2009; although defendant's appeal was not literally "in the pipeline" at the moment *Nuñez-Valdéz* was decided, the fact that *Nuñez-Valdéz* was decided shortly after the aggrieving order and before the filing of a notice of appeal -- the timeliness of which has not been challenged -- suggests the fairness of including defendant's appeal as entitled to the benefit of *Nuñez-Valdéz.* Moreover, defendant's appeal was certainly in the pipeline when *Padilla* was decided on March 31, 2010.

It bears further observation that in unpublished decisions since *Nuñez-Valdéz*, we have remanded similar matters to the trial courts for reconsideration of defendant's ineffectiveness arguments in light of *Nuñez-Valdéz.* And, by remanding a matter to this court to reconsider an ineffectiveness argument in light of its decision in *Nuñez-Valdéz, see State v. McIntyre, 200 N.J. 365, 981 A.2d 1277 (2009),* [8] the Court implicitly concluded that *Nuñez-Valdéz*

should at least apply to cases pending in our appellate courts at the time of decision. [9]

8 McIntyre was sentenced in 2002 and had nearly completed his prison term when, in 2005, he filed a PCR petition, which was denied. We affirmed by way of an unpublished opinion. *See* [*15] *State v. McIntyre, No. A-1280-07, 2008 N.J. Super. Unpub. LEXIS 1893 (App. Div. Dec. 5, 2008)*. After the Supreme Court remanded, *200 N.J. 365, 981 A.2d 1277*, we considered the impact of *Nuñez-Valdéz* and again affirmed because McIntyre's attorney had discussed the deportation consequences and had urged McIntyre to seek the advice of an immigration attorney. *See State v. McIntyre, No. A-1280-07, 2009 N.J. Super. Unpub. LEXIS 2689 (App. Div. Oct. 30, 2009)*.

9 We reject the notion that pipeline retroactivity in this setting includes only those cases in which the defendant has a *direct appeal* pending. Questions regarding the effectiveness of counsel are most often considered and determined by way of PCR petitions. *See State v. Preciose, 129 N.J. 451, 460, 609 A.2d 1280 (1992)*. Pipeline retroactivity in this context logically includes those cases pending appeal of an order denying post-conviction relief.

Reversed and remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PADILLA *v.* KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 08–651. Argued October 13, 2009—Decided March 31, 2010

Petitioner Padilla, a lawful permanent resident of the United States for over 40 years, faces deportation after pleading guilty to drug-distribution charges in Kentucky. In postconviction proceedings, he claims that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived in this country so long. He alleges that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla postconviction relief on the ground that the Sixth Amendment's effective-assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a "collateral" consequence of a conviction.

Held: Because counsel must inform a client whether his plea carries a risk of deportation, Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether he is entitled to relief depends on whether he has been prejudiced, a matter not addressed here. Pp. 2–18.

(a) Changes to immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms have expanded the class of deportable offenses and limited judges' authority to alleviate deportation's harsh consequences. Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important. Thus, as a matter of federal law, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. Pp. 2–6.

Syllabus

(b) *Strickland* v. *Washington*, 466 U. S. 668, applies to Padilla's claim. Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *McMann* v. *Richardson*, 397 U. S. 759, 771. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about deportation concerned only collateral matters. However, this Court has never distinguished between direct and collateral consequences in defining the scope of constitutionally "reasonable professional assistance" required under *Strickland*, 466 U. S., at 689. The question whether that distinction is appropriate need not be considered in this case because of the unique nature of deportation. Although removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence. Because that distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation, advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Pp. 7–9.

(c) To satisfy *Strickland*'s two-prong inquiry, counsel's representation must fall "below an objective standard of reasonableness," 466 U. S., at 688, and there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694. The first, constitutional deficiency, is necessarily linked to the legal community's practice and expectations. *Id.*, at 688. The weight of prevailing professional norms supports the view that counsel must advise her client regarding the deportation risk. And this Court has recognized the importance to the client of " '[p]reserving the . . . right to remain in the United States' " and "preserving the possibility of" discretionary relief from deportation. *INS* v. *St. Cyr*, 533 U. S. 289, 323. Thus, this is 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. There will, however, undoubtedly be numerous situations in which the deportation consequences of a plea are unclear. In those cases, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear. Accepting Padilla's allegations as true, he has sufficiently alleged constitutional deficiency to satisfy *Strickland*'s first prong. Whether he can satisfy the second prong, prejudice, is left for the Kentucky courts to consider in the first instance. Pp. 9–12.

(d) The Solicitor General's proposed rule—that *Strickland* should

Syllabus

be applied to Padilla's claim only to the extent that he has alleged affirmative misadvice—is unpersuasive. And though this Court must be careful about recognizing new grounds for attacking the validity of guilty pleas, the 25 years since *Strickland* was first applied to ineffective-assistance claims at the plea stage have shown that pleas are less frequently the subject of collateral challenges than convictions after a trial. Also, informed consideration of possible deportation can benefit both the State and noncitizen defendants, who may be able to reach agreements that better satisfy the interests of both parties. This decision will not open the floodgates to challenges of convictions obtained through plea bargains. Cf. *Hill* v. *Lockhart*, 474 U. S. 52, 58. Pp. 12–16.

253 S. W. 3d 482, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 08–651

JOSE PADILLA, PETITIONER *v.* KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[March 31, 2010]

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U. S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.[1]

In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this 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.'" 253 S. W. 3d 482, 483 (Ky. 2008). Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme

[1]Padilla's crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U. S. C. §1227(a)(2)(B)(i).

Court of Kentucky denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held 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. *Id.*, at 485. In its view, neither counsel's failure to advise petitioner about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief.

We granted certiorari, 555 U. S. ___ (2009), to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

I

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal, *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10 (1948), is now virtually inevitable for a vast number of noncitizens convicted of crimes.

The Nation's first 100 years was "a period of unimpeded immigration." C. Gordon & H. Rosenfield, Immigration Law and Procedure §1.(2)(a), p. 5 (1959). An early effort to empower the President to order the deportation of those

immigrants he "judge[d] dangerous to the peace and safety of the United States," Act of June 25, 1798, ch. 58, 1 Stat. 571, was short lived and unpopular. Gordon §1.2, at 5. It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country, Act of Mar. 3, 1875, ch. 141, 18 Stat. 477. Gordon §1.2b, at 6. In 1891, Congress added to the list of excludable persons those "who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.[2]

The Immigration and Nationality Act of 1917 (1917 Act) brought "radical changes" to our law. S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 54–55 (1950). For the first time in our history, Congress made classes of noncitizens deportable based on conduct committed on American soil. *Id.*, at 55. Section 19 of the 1917 Act authorized the deportation of "any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States . . . ." 39 Stat. 889. And §19 also rendered deportable noncitizen recidivists who commit two or more crimes of moral turpitude at any time after entry. *Ibid.* Congress did not, however, define the term "moral turpitude."

While the 1917 Act was "radical" because it authorized deportation as a consequence of certain convictions, the Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation "that such alien

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[2] In 1907, Congress expanded the class of excluded persons to include individuals who "admit" to having committed a crime of moral turpitude. Act of Feb. 20, 1907, ch. 1134, 34 Stat. 899.

shall not be deported." *Id.*, at 890.[3] This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was "consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation," *Janvier* v. *United States*, 793 F. 2d 449, 452 (CA2 1986). Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.

Although narcotics offenses—such as the offense at issue in this case—provided a distinct basis for deportation as early as 1922,[4] the JRAD procedure was generally

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[3] As enacted, the statute provided:
"That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, . . . make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act." 1917 Act, 39 Stat. 889–890.
This provision was codified in 8 U. S. C. §1251(b) (1994 ed.) (transferred to §1227 (2006 ed.)). The judge's nondeportation recommendation was binding on the Secretary of Labor and, later, the Attorney General after control of immigration removal matters was transferred from the former to the latter. See *Janvier* v. *United States*, 793 F. 2d 449, 452 (CA2 1986).

[4] Congress first identified narcotics offenses as a special category of crimes triggering deportation in the 1922 Narcotic Drug Act. Act of May 26, 1922, ch. 202, 42 Stat. 596. After the 1922 Act took effect, there was some initial confusion over whether a narcotics offense also had to be a crime of moral turpitude for an individual to be deportable. See *Weedin* v. *Moy Fat*, 8 F. 2d 488, 489 (CA9 1925) (holding that an individual who committed narcotics offense was not deportable because offense did not involve moral turpitude). However, lower courts eventually agreed that the narcotics offense provision was "special," *Chung*

available to avoid deportation in narcotics convictions. See *United States* v. *O'Rourke*, 213 F. 2d 759, 762 (CA8 1954). Except for "technical, inadvertent and insignificant violations of the laws relating to narcotics," *ibid.*, it appears that courts treated narcotics offenses as crimes involving moral turpitude for purposes of the 1917 Act's broad JRAD provision. See *ibid.* (recognizing that until 1952 a JRAD in a narcotics case "was effective to prevent deportation" (citing *Dang Nam* v. *Bryan*, 74 F. 2d 379, 380–381 (CA9 1934))).

In light of both the steady expansion of deportable offenses and the significant ameliorative effect of a JRAD, it is unsurprising that, in the wake of *Strickland* v. *Washington*, 466 U. S. 668 (1984), the Second Circuit held that the Sixth Amendment right to effective assistance of counsel applies to a JRAD request or lack thereof, see *Janvier*, 793 F. 2d 449. See also *United States* v. *Castro*, 26 F. 3d 557 (CA5 1994). In its view, seeking a JRAD was "part of the sentencing" process, *Janvier*, 793 F. 2d, at 452, even if deportation itself is a civil action. Under the Second Circuit's reasoning, 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—not merely a collateral matter outside the scope of counsel's duty to provide effective representation.

However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA),[5] and in

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Que Fong v. *Nagle*, 15 F. 2d 789, 790 (CA9 1926); thus, a narcotics offense did not need also to be a crime of moral turpitude (or to satisfy other requirements of the 1917 Act) to trigger deportation. See *United States ex rel. Grimaldi* v. *Ebey*, 12 F. 2d 922, 923 (CA7 1926); *Todaro* v. *Munster*, 62 F. 2d 963, 964 (CA10 1933).

[5]The Act separately codified the moral turpitude offense provision and the narcotics offense provision within 8 U. S. C. §1251(a) (1994 ed.) under subsections (a)(4) and (a)(11), respectively. See 66 Stat. 201, 204,

1990 Congress entirely eliminated it, 104 Stat. 5050. In 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation, 110 Stat. 3009–596, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996, *INS* v. *St. Cyr*, 533 U. S. 289, 296 (2001). Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, 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.[6] See 8 U. S. C. §1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. See §1101(a)(43)(B); §1228.

These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. 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[7]—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

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206. The JRAD procedure, codified in 8 U. S. C. §1251(b) (1994 ed.), applied only to the "provisions of subsection (a)(4)," the crimes-of-moral-turpitude provision. 66 Stat. 208; see *United States* v. *O'Rourke*, 213 F. 2d 759, 762 (CA8 1954) (recognizing that, under the 1952 Act, narcotics offenses were no longer eligible for JRADs).

[6] The changes to our immigration law have also involved a change in nomenclature; the statutory text now uses the term "removal" rather than "deportation." See *Calcano-Martinez* v. *INS*, 533 U. S. 348, 350, n. 1 (2001).

[7] See Brief for Asian American Justice Center et al. as *Amici Curiae* 12–27 (providing real-world examples).

II

Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *McMann* v. *Richardson*, 397 U. S. 759, 771 (1970); *Strickland*, 466 U. S., at 686. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, *i.e.*, those matters not within the sentencing authority of the state trial court.[8] 253 S. W. 3d, at 483–484 (citing *Commonwealth* v. *Fuartado*, 170 S. W. 3d 384 (2005)). In its view, "collateral consequences are outside the scope of representation required by the Sixth Amendment," and, therefore, the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel." 253 S. W. 3d, at 483. The Kentucky high court is far from alone in this view.[9]

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[8] There is some disagreement among the courts over how to distinguish between direct and collateral consequences. See Roberts, Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, 95 Iowa L. Rev. 119, 124, n. 15 (2009). The disagreement over how to apply the direct/collateral distinction has no bearing on the disposition of this case because, as even JUSTICE ALITO agrees, counsel must, at the very least, advise a noncitizen "defendant that a criminal conviction may have adverse immigration consequences," *post*, at 1 (opinion concurring in judgment). See also *post*, at 14 ("I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation"). In his concurring opinion, JUSTICE ALITO has thus departed from the strict rule applied by the Supreme Court of Kentucky and in the two federal cases that he cites, *post*, at 2.

[9] See, *e.g.*, *United States* v. *Gonzalez*, 202 F. 3d 20 (CA1 2000); *United States* v. *Del Rosario*, 902 F. 2d 55 (CADC 1990); *United States* v. *Yearwood*, 863 F. 2d 6 (CA4 1988); *Santos-Sanchez* v. *United States*, 548 F. 3d 327 (CA5 2008); *Broomes* v. *Ashcroft*, 358 F. 3d 1251 (CA10 2004); *United States* v. *Campbell*, 778 F. 2d 764 (CA11 1985); *Oyekoya* v. *State*, 558 So. 2d 990 (Ala. Ct. Crim. App. 1989); *State* v. *Rosas*, 183

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland*, 466 U. S., at 689. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that deportation is a particularly severe "penalty," *Fong Yue Ting* v. *United States*, 149 U. S. 698, 740 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1038 (1984), deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, see Part I, *supra*, at 2–7. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. *United States* v. *Russell*, 686 F. 2d 35, 38 (CADC 1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See *St. Cyr*, 533 U. S., at 322 ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions").

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction

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Ariz. 421, 904 P. 2d 1245 (App. 1995); *State* v. *Montalban*, 2000–2739 (La. 2/26/02), 810 So. 2d 1106; *Commonwealth* v. *Frometa*, 520 Pa. 552, 555 A. 2d 92 (1989).

is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim.

III

Under *Strickland*, we first determine whether counsel's representation "fell below an objective standard of reasonableness." 466 U. S., at 688. Then we ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*, at 688. We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . ." *Ibid.*; *Bobby* v. *Van Hook*, 558 U. S. ___, ___ (2009) *(per curiam)* (slip op., at 3); *Florida* v. *Nixon*, 543 U. S. 175, 191, and n. 6 (2004); *Wiggins* v. *Smith*, 539 U. S. 510, 524 (2003); *Williams* v. *Taylor*, 529 U. S. 362, 396 (2000). Although they are "only guides," *Strickland*, 466 U. S., at 688, and not "inexorable commands," *Bobby*, 558 U. S., at ___ (slip op., at 5), these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. National Legal Aid and Defender Assn., Performance Guidelines for Criminal Representation §6.2 (1995); G. Herman, Plea Bargaining §3.03,

pp. 20–21 (1997); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 713–718 (2002); A. Campbell, Law of Sentencing §13:23, pp. 555, 560 (3d ed. 2004); Dept. of Justice, Office of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, pp. D10, H8–H9, J8 (2000) (providing survey of guidelines across multiple jurisdictions); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4–5.1(a), p. 197 (3d ed. 1993); ABA Standards for Criminal Justice, Pleas of Guilty 14–3.2(f), p. 116 (3d ed. 1999). "[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients . . . ." Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12–14 (footnotes omitted) (citing, *inter alia*, National Legal Aid and Defender Assn., Guidelines, *supra*, §§6.2–6.4 (1997); S. Bratton & E. Kelley, Practice Points: Representing a Noncitizen in a Criminal Case, 31 The Champion 61 (Jan./Feb. 2007); N. Tooby, Criminal Defense of Immigrants §1.3 (3d ed. 2003); 2 Criminal Practice Manual §§45:3, 45:15 (2009)).

We too have previously recognized that " '[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *St. Cyr*, 533 U. S., at 323 (quoting 3 Criminal Defense Techniques §§60A.01, 60A.02[2] (1999)). Likewise, we have recognized that "preserving the possibility of" discretionary relief from deportation under §212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *St. Cyr*, 533 U. S., at 323. We

expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief. *Ibid.*, n. 50.

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. See 8 U. S. C. §1227(a)(2)(B)(i) ("Any 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 . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable"). Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is 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.

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. When the law is not succinct and straightforward (as it is in many of the scenarios

posited by JUSTICE ALITO), 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.[10] But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.

IV

The Solicitor General has urged us to conclude that *Strickland* applies to Padilla's claim only to the extent that he has alleged affirmative misadvice. In the United States' view, "counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case . . . ," though counsel is required to provide accurate advice if she chooses to discusses these matters. Brief for United States as *Amicus Curiae* 10.

Respondent and Padilla both find the Solicitor General's proposed rule unpersuasive, although it has support among the lower courts. See, *e.g.*, *United States* v. *Couto*, 311 F. 3d 179, 188 (CA2 2002); *United States* v. *Kwan*, 407 F. 3d 1005 (CA9 2005); *Sparks* v. *Sowders*, 852 F. 2d 882 (CA6 1988); *United States* v. *Russell*, 686 F. 2d 35 (CADC 1982); *State* v. *Rojas-Martinez*, 2005 UT 86, 125 P. 3d 930, 935; *In re Resendiz*, 25 Cal. 4th 230, 19 P. 3d 1171 (2001). Kentucky describes these decisions isolating an affirmative misadvice claim as "result-driven, incestuous . . .

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[10] As JUSTICE ALITO explains at length, deportation consequences are often unclear. Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice.

[,and] completely lacking in legal or rational bases." Brief for Respondent 31. We do not share that view, but we agree that there is no relevant difference "between an act of commission and an act of omission" in this context. *Id.*, at 30; *Strickland*, 466 U. S., at 690 ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance"); see also *State* v. *Paredez*, 2004–NMSC–036, 136 N. M. 533, 538–539.

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." *Libretti* v. *United States*, 516 U. S. 29, 50–51 (1995). When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.[11] Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so "clearly satisfies the first prong of the *Strickland* analysis." *Hill* v. *Lockhart*, 474 U. S. 52, 62 (1985) (White, J.,

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[11]As the Commonwealth conceded at oral argument, were a defendant's lawyer to know that a particular offense would result in the client's deportation and that, upon deportation, the client and his family might well be killed due to circumstances in the client's home country, any decent attorney would inform the client of the consequences of his plea. Tr. of Oral Arg. 37–38. We think the same result should follow when the stakes are not life and death but merely "banishment or exile," *Delgadillo* v. *Carmichael*, 332 U. S. 388, 390–391 (1947).

concurring in judgment).

We have given serious consideration to the concerns that the Solicitor General, respondent, and *amici* have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar "floodgates" concern in *Hill*, see *id.*, at 58, but nevertheless applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.[12]

A flood did not follow in that decision's wake. Surmounting *Strickland*'s high bar is never an easy task. See, *e.g.*, 466 U. S., at 689 ("Judicial scrutiny of counsel's performance must be highly deferential"); *id.*, at 693 (observing that "[a]ttorney errors . . . are as likely to be utterly harmless in a particular case as they are to be prejudicial"). Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. See *Roe* v. *Flores-Ortega*, 528 U. S. 470, 480, 486 (2000). There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to

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[12] However, we concluded that, even though *Strickland* applied to petitioner's claim, he had not sufficiently alleged prejudice to satisfy *Strickland*'s second prong. *Hill*, 474 U. S., at 59–60. This disposition further underscores the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong.

JUSTICE ALITO believes that the Court misreads *Hill*, *post*, at 10–11. In *Hill*, the Court recognized—for the first time—that *Strickland* applies to advice respecting a guilty plea. 474 U. S., at 58 ("We hold, therefore, that the two-part *Strickland* v. *Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel"). It is true that *Hill* does not control the question before us. But its import is nevertheless clear. Whether *Strickland* applies to Padilla's claim follows from *Hill*, regardless of the fact that the *Hill* Court did not resolve the particular question respecting misadvice that was before it.

separate specious claims from those with substantial merit.

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. See, *supra*, at 11–13. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty. *Strickland*, 466 U. S., at 689.

Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions.[13] But they account for only approximately 30% of the habeas petitions filed.[14] The nature of relief secured by a successful collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs whether it is wise to challenge a

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[13] See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2003, p. 418 (31st ed. 2005) (Table 5.17) (only approximately 5%, or 8,612 out of 68,533, of federal criminal prosecutions go to trial); *id.*, at 450 (Table 5.46) (only approximately 5% of all state felony criminal prosecutions go to trial).

[14] See V. Flango, National Center for State Courts, Habeas Corpus in State and Federal Courts 36–38 (1994) (demonstrating that 5% of defendants whose conviction was the result of a trial account for approximately 70% of the habeas petitions filed).

guilty plea in a habeas proceeding because, ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. *Hill*, 474 U. S., at 57; see also *Richardson*, 397 U. S., at 770–771. The severity of deportation—"the equivalent of banishment or exile," *Delgadillo* v. *Carmichael*, 332 U. S. 388, 390–391 (1947)—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.[15]

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[15]To this end, we find it significant that the plea form currently used in Kentucky courts provides notice of possible immigration conse-

V

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel." *Richardson*, 397 U. S., at 771. To satisfy this responsibility, we now hold 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.

Taking as true the basis for his motion for postconviction relief, we have little difficulty concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below. See *Verizon Communications Inc.* v. *FCC*, 535 U. S. 467, 530 (2002).

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quences. Ky. Admin. Office of Courts, Motion to Enter Guilty Plea, Form AOC–491 (Rev. 2/2003), http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf (as visited Mar. 29, 2010, and available in Clerk of Court's case file). Further, many States require trial courts to advise defendants of possible immigration consequences. See, *e.g.*, Alaska Rule Crim. Proc. 11(c)(3)(C) (2009–2010); Cal. Penal Code Ann. §1016.5 (West 2008); Conn. Gen. Stat. §54–1j (2009); D. C. Code §16–713 (2001); Fla. Rule Crim. Proc. 3.172(c)(8) (Supp. 2010); Ga. Code Ann. §17–7–93(c) (1997); Haw. Rev. Stat. Ann. §802E–2 (2007); Iowa Rule Crim. Proc. 2.8(2)*(b)*(3) (Supp. 2009); Md. Rule 4–242 (Lexis 2009); Mass. Gen. Laws, ch. 278, §29D (2009); Minn. Rule Crim. Proc. 15.01 (2009); Mont. Code Ann. §46–12–210 (2009); N. M. Rule Crim. Form 9–406 (2009); N. Y. Crim. Proc. Law Ann. §220.50(7) (West Supp. 2009); N. C. Gen. Stat. Ann. §15A–1022 (Lexis 2007); Ohio Rev. Code Ann. §2943.031 (West 2006); Ore. Rev. Stat. §135.385 (2007); R. I. Gen. Laws §12–12–22 (Lexis Supp. 2008); Tex. Code. Ann. Crim. Proc., Art. 26.13(a)(4) (Vernon Supp. 2009); Vt. Stat. Ann., Tit. 13, §6565(c)(1) (Supp. 2009); Wash. Rev. Code §10.40.200 (2008); Wis. Stat. §971.08 (2005–2006).

The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 08–651

JOSE PADILLA, PETITIONER *v.* KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[March 31, 2010]

JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland* v. *Washington*, 466 U. S. 668 (1984), if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. In my view, such an attorney must (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. I do not agree with the Court that the attorney must attempt to explain what those consequences may be. As the Court concedes, "[i]mmigration law can be complex"; "it is a legal specialty of its own"; and "[s]ome 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." *Ante*, at 11. The Court nevertheless holds that a criminal defense attorney must provide advice in this specialized area in those cases in which the law is "succinct and straightforward"—but not, perhaps, in other situations. *Ante*, at 11–12. This vague, halfway test will lead to much confusion and needless litigation.

I

Under *Strickland*, an attorney provides ineffective assistance if the attorney's representation does not meet reasonable professional standards. 466 U. S., at 688. Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction. See, *e.g.*, *United States* v. *Gonzalez*, 202 F. 3d 20, 28 (CA1 2000) (ineffective-assistance-of-counsel claim fails if "based on an attorney's failure to advise a client of his plea's immigration consequences"); *United States* v. *Banda*, 1 F. 3d 354, 355 (CA5 1993) (holding that "an attorney's failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel"); see generally Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 699 (2002) (hereinafter Chin & Holmes) (noting that "virtually all jurisdictions"—including "eleven federal circuits, more than thirty states, and the District of Columbia"—"hold that defense counsel need not discuss with their clients the collateral consequences of a conviction," including deportation). While the line between "direct" and "collateral" consequences is not always clear, see *ante*, at 7, n. 8, the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess fire-

arms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. Chin & Holmes 705–706. A criminal conviction may also severely damage a defendant's reputation and thus impair the defendant's ability to obtain future employment or business opportunities. All of those consequences are "seriou[s]," see *ante*, at 17, but this Court has never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice about such matters.

The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations. See *ante*, at 9 ("The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation"). However, ascertaining the level of professional competence required by the Sixth Amendment is ultimately a task for the courts. *E.g.*, *Roe* v. *Flores-Ortega*, 528 U. S. 470, 477 (2000). Although we may appropriately consult standards promulgated by private bar groups, we cannot delegate to these groups our task of determining what the Constitution commands. See *Strickland*, *supra*, at 688 (explaining that "[p]revailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable, but they are only guides"). And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.

Even if the only relevant consideration were "prevailing professional norms," it is hard to see how those norms can support the duty the Court today imposes on defense counsel. Because many criminal defense attorneys have little understanding of immigration law, see *ante*, at 11, it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms. But the Court's opinion would not just require defense counsel to warn the client

of a general *risk* of removal; it would also require counsel in at least some cases, to specify what the removal *consequences* of a conviction would be. See *ante*, at 11–12.

The Court's new approach is particularly problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex. "Most crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as *crimes involving moral turpitude* or *aggravated felonies*." M. Garcia & L. Eig, CRS Report for Congress, Immigration Consequences of Criminal Activity (Sept. 20, 2006) (summary) (emphasis in original). As has been widely acknowledged, determining whether a particular crime is an "aggravated felony" or a "crime involving moral turpitude [(CIMT)]" is not an easy task. See R. McWhirter, ABA, The Criminal Lawyer's Guide to Immigration Law: Questions and Answers 128 (2d ed. 2006) (hereinafter ABA Guidebook) ("Because of the increased complexity of aggravated felony law, this edition devotes a new [30-page] chapter to the subject"); *id.*, §5.2, at 146 (stating that the aggravated felony list at 8 U. S. C. §1101(a)(43) is not clear with respect to several of the listed categories, that "the term 'aggravated felonies' can include misdemeanors," and that the determination of whether a crime is an "aggravated felony" is made "even more difficult" because "several agencies and courts interpret the statute," including Immigration and Customs Enforcement, the Board of Immigration Appeals (BIA), and Federal Circuit and district courts considering immigration-law and criminal-law issues); ABA Guidebook §4.65, at 130 ("Because nothing is ever simple with immigration law, the terms 'conviction,' 'moral turpitude,' and 'single scheme of criminal misconduct' are terms of art"); *id.*, §4.67, at 130 ("[T]he term 'moral turpitude' evades precise definition").

Defense counsel who consults a guidebook on whether a particular crime is an "aggravated felony" will often find that the answer is not "easily ascertained." For example, the ABA Guidebook answers the question "Does simple possession count as an aggravated felony?" as follows: "Yes, *at least in the Ninth Circuit.*" §5.35, at 160 (emphasis added). After a dizzying paragraph that attempts to explain the evolution of the Ninth Circuit's view, the ABA Guidebook continues: "Adding to the confusion, however, is that the Ninth Circuit has conflicting opinions depending on the context on whether simple drug possession constitutes an aggravated felony under 8 U. S. C. §1101(a)(43)." *Id.*, §5.35, at 161 (citing cases distinguishing between whether a simple possession offense is an aggravated felony "for immigration purposes" or for "sentencing purposes"). The ABA Guidebook then proceeds to explain that "*attempted* possession," *id.*, §5.36, at 161 (emphasis added), of a controlled substance *is* an aggravated felony, while "[c]onviction under the federal *accessory* after the fact statute is *probably not* an aggravated felony, but a conviction for accessory after the fact to the manufacture of methamphetamine *is* an aggravated felony," *id.*, §537, at 161 (emphasis added). Conspiracy or attempt to commit drug trafficking are aggravated felonies, but "[s]olicitation is not a drug-trafficking offense because a generic solicitation offense is not an offense related to a controlled substance and therefore not an aggravated felony." *Id.*, §5.41, at 162.

Determining whether a particular crime is one involving moral turpitude is no easier. See *id.*, at 134 ("Writing bad checks *may or may not* be a CIMT" (emphasis added)); *ibid.* ("[R]eckless assault coupled with an element of injury, but not serious injury, is *probably* not a CIMT" (emphasis added)); *id.*, at 135 (misdemeanor driving under the influence is generally not a CIMT, but may be a CIMT if the DUI results in injury or if the driver knew that his

license had been suspended or revoked); *id.*, at 136 ("If there is no element of actual injury, the endangerment offense *may* not be a CIMT" (emphasis added)); *ibid.* ("Whether [a child abuse] conviction involves moral turpitude *may* depend on the subsection under which the individual is convicted. Child abuse done with criminal negligence *probably* is not a CIMT" (emphasis added)).

Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law. To take just a few examples, it may be hard, in some cases, for defense counsel even to determine whether a client is an alien,[1] or whether a particular state disposition will result in a "conviction" for purposes of federal immigration law.[2] The task of offering advice about the immigration consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with

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[1] Citizens are not deportable, but "[q]uestions of citizenship are not always simple." ABA Guidebook §4.20, at 113 (explaining that U.S. citizenship conferred by blood is "'derivative,'" and that "[d]erivative citizenship depends on a number of confusing factors, including whether the citizen parent was the mother or father, the immigration laws in effect at the time of the parents' and/or defendant's birth, and the parents' marital status").

[2] "A disposition that is not a 'conviction,' under state law may still be a 'conviction' for immigration purposes." *Id.*, §4.32, at 117 (citing *Matter of Salazar*, 23 I. & N. Dec. 223, 231 (BIA 2002) (en banc)). For example, state law may define the term "conviction" not to include a deferred adjudication, but such an adjudication would be deemed a conviction for purposes of federal immigration law. See ABA Guidebook §4.37; accord, D. Kesselbrenner & L. Rosenberg, Immigration Law and Crimes §2:1, p. 2–2 (2008) (hereinafter Immigration Law and Crimes) ("A practitioner or respondent will not even know whether the Department of Homeland Security (DHS) or the Executive Office for Immigration Review (EOIR) will treat a particular state disposition as a conviction for immigration purposes. In fact, the [BIA] treats certain state criminal dispositions as convictions even though the state treats the same disposition as a dismissal").

which immigration law changes; different rules governing the immigration consequences of juvenile, first-offender, and foreign convictions; and the relationship between the "length and type of sentence" and the determination "whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen," Immigration Law and Crimes §2:1, at 2–2 to 2–3.

In short, the professional organizations and guidebooks on which the Court so heavily relies are right to say that "nothing is ever simple with immigration law"—including the determination whether immigration law clearly makes a particular offense removable. ABA Guidebook §4.65, at 130; Immigration Law and Crimes §2:1. I therefore cannot agree with the Court's apparent view that the Sixth Amendment requires criminal defense attorneys to provide immigration advice.

The Court tries to downplay the severity of the burden it imposes on defense counsel by suggesting that the scope of counsel's duty to offer advice concerning deportation consequences may turn on how hard it is to determine those consequences. Where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[s]" of a conviction, the Court says, counsel has an affirmative duty to advise the client that he will be subject to deportation as a result of the plea. *Ante*, at 11. But "[w]hen 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." *Ante*, at 11–12. This approach is problematic for at least four reasons.

First, it will not always be easy to tell whether a particular statutory provision is "succinct, clear, and explicit." How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in

isolation? What if the application of the provision to a particular case is not clear but a cursory examination of case law or administrative decisions would provide a definitive answer? See Immigration Law and Crimes §2:1, at 2–2 ("Unfortunately, a practitioner or respondent cannot tell easily whether a conviction is for a removable offense. . . . [T]he cautious practitioner or apprehensive respondent will not know conclusively the future immigration consequences of a guilty plea").

Second, if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable. If an alien charged with such an offense is advised only that pleading guilty to such an offense will not result in removal, the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States if the alien returns to his or her home country for any reason, such as to visit an elderly parent or to attend a funeral. See ABA Guidebook §4.14, at 111 ("Often the alien is both *excludable* and *removable*. At times, however, the lists are different. Thus, the oddity of an alien that is inadmissible but not deportable. This alien should not leave the United States because the government will not let him back in" (emphasis in original)). Incomplete legal advice may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.

Third, the Court's rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem—such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences. As *amici* point out, "28 states and the

District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas." Brief for State of Louisiana et al. 25; accord, Chin & Holmes 708 ("A growing number of states require advice about deportation by statute or court rule"). A nonconstitutional rule requiring trial judges to inform defendants on the record of the risk of adverse immigration consequences can ensure that a defendant receives needed information without putting a large number of criminal convictions at risk; and because such a warning would be given on the record, courts would not later have to determine whether the defendant was misrepresenting the advice of counsel. Likewise, flexible statutory procedures for withdrawing guilty pleas might give courts appropriate discretion to determine whether the interests of justice would be served by allowing a particular defendant to withdraw a plea entered into on the basis of incomplete information. Cf. *United States* v. *Russell*, 686 F. 2d 35, 39–40 (CADC 1982) (explaining that a district court's discretion to set aside a guilty plea under the Federal Rules of Criminal Procedure should be guided by, among other considerations, "the possible existence of prejudice to the government's case as a result of the defendant's untimely request to stand trial" and "the strength of the defendant's reason for withdrawing the plea, including whether the defendant asserts his innocence of the charge").

Fourth, the Court's decision marks a major upheaval in Sixth Amendment law. This Court decided *Strickland* in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's Sixth Amendment right to counsel. As noted above, the Court's view has been rejected by every Federal Court

of Appeals to have considered the issue thus far. See, *e.g.*, *Gonzalez*, 202 F. 3d, at 28; *Banda*, 1 F. 3d, at 355; Chin & Holmes 697, 699. The majority appropriately acknowledges that the lower courts are "now quite experienced with applying *Strickland*," *ante*, at 14, but it casually dismisses the longstanding and unanimous position of the lower federal courts with respect to the scope of criminal defense counsel's duty to advise on collateral consequences.

The majority seeks to downplay its dramatic expansion of the scope of criminal defense counsel's duties under the Sixth Amendment by claiming that this Court in *Hill* v. *Lockhart*, 474 U. S. 52 (1985), similarly "applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty." *Ante*, at 14. That characterization of *Hill* obscures much more than it reveals. The issue in *Hill* was whether a criminal defendant's Sixth Amendment right to counsel was violated where counsel misinformed the client about his eligibility for parole. The Court found it "unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland* v. *Washington* requirement of 'prejudice.'" 474 U. S., at 60. Given that *Hill* expressly and unambiguously refused to decide whether criminal defense counsel must *avoid misinforming* his or her client as to *one* consequence of a criminal conviction (parole eligibility), that case plainly provides no support whatsoever for the proposition that counsel must *affirmatively advise* his or her client as to *another* collateral consequence (removal). By the Court's strange logic, *Hill* would support its decision here even if the Court had held that misadvice concerning parole eligibility does *not* make counsel's performance

objectively unreasonable. After all, the Court still would have "applied *Strickland*" to the facts of the case at hand.

II

While mastery of immigration law is not required by *Strickland*, several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.

First, a rule prohibiting affirmative misadvice regarding a matter as crucial to the defendant's plea decision as deportation appears faithful to the scope and nature of the Sixth Amendment duty this Court has recognized in its past cases. In particular, we have explained that "a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys *in criminal cases*.'" *Strickland*, 466 U. S., at 687 (quoting *McMann* v. *Richardson*, 397 U. S. 759, 770, 771 (1970); emphasis added). As the Court appears to acknowledge, thorough understanding of the intricacies of immigration law is not "within the range of competence demanded of attorneys *in criminal cases*." See *ante*, at 11 ("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"). By contrast, reasonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar. Candor concerning the limits of one's professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases. As the dissenting judge on the Kentucky Supreme Court put it, "I do not believe it is too much of a burden to place

on our defense bar the duty to say, 'I do not know.'" 253 S. W. 3d 482, 485 (2008).

Second, incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question. See *Strickland*, 466 U. S., at 686 ("In giving meaning to the requirement [of effective assistance of counsel], we must take its purpose—to ensure a fair trial—as the guide"). When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea, the defendant can fairly be said to assume the risk that the conviction may carry indirect consequences of which he or she is not aware. That is not the case when a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable. In the latter case, it seems hard to say that the plea was entered with the advice of constitutionally competent counsel—or that it embodies a voluntary and intelligent decision to forsake constitutional rights. See *ibid.* ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result").

Third, a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences.

Finally, the conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court's approach, not require any upheaval in the law. As the Solicitor General points out, "[t]he vast majority of the

lower courts considering claims of ineffective assistance in the plea context have [distinguished] between defense counsel who remain silent and defense counsel who give affirmative misadvice." Brief for United States as *Amicus Curiae* 8 (citing cases). At least three Courts of Appeals have held that affirmative misadvice on immigration matters can give rise to ineffective assistance of counsel, at least in some circumstances.[3] And several other Circuits have held that affirmative misadvice concerning nonimmigration consequences of a conviction can violate the Sixth Amendment even if those consequences might be deemed "collateral."[4] By contrast, it appears that no court of appeals holds that affirmative misadvice concerning collateral consequences in general and removal in particular can *never* give rise to ineffective assistance. In short,

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[3] See *United States* v. *Kwan*, 407 F. 3d 1005, 1015–1017 (CA9 2005); *United States* v. *Couto*, 311 F. 3d 179, 188 (CA2 2002); *Downs-Morgan* v. *United States*, 765 F. 2d 1534, 1540–1541 (CA11 1985) (limiting holding to the facts of the case); see also *Santos-Sanchez* v. *United States*, 548 F. 3d 327, 333–334 (CA5 2008) (concluding that counsel's advice was not objectively unreasonable where counsel did not purport to answer questions about immigration law, did not claim any expertise in immigration law, and simply warned of "possible" deportation consequence; use of the word "possible" was not an affirmative misrepresentation, even though it could indicate that deportation was not a certain consequence).

[4] See *Hill* v. *Lockhart*, 894 F. 2d 1009, 1010 (CA8 1990) (en banc) ("[T]he erroneous parole-eligibility advice given to Mr. Hill was ineffective assistance of counsel under *Strickland* v. *Washington*"); *Sparks* v. *Sowders*, 852 F. 2d 882, 885 (CA6 1988) ("[G]ross misadvice concerning parole eligibility can amount to ineffective assistance of counsel"); *id.*, at 886 (Kennedy, J., concurring) ("When the maximum possible exposure is overstated, the defendant might well be influenced to accept a plea agreement he would otherwise reject"); *Strader* v. *Garrison*, 611 F. 2d 61, 65 (CA4 1979) ("[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel").

the considered and thus far unanimous view of the lower federal courts charged with administering *Strickland* clearly supports the conclusion that that Kentucky Supreme Court's position goes too far.

In concluding that affirmative misadvice regarding the removal consequences of a criminal conviction may constitute ineffective assistance, I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation. When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.

III

In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel's duty to assist the client. Instead, an alien defendant's Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.

SUPREME COURT OF THE UNITED STATES

No. 08–651

JOSE PADILLA, PETITIONER *v.* KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[March 31, 2010]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.

The Sixth Amendment guarantees the accused a lawyer "for his defense" against a "criminal prosecutio[n]"—not for sound advice about the collateral consequences of conviction. For that reason, and for the practical reasons set forth in Part I of JUSTICE ALITO's concurrence, I dissent from the Court's conclusion that the Sixth Amendment requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about those consequences renders an attorney's assistance in defending against the prosecution constitutionally inadequate; or that the Sixth Amendment requires counsel to warn immigrant defendants that a conviction may render them removable. Statutory provisions can remedy these concerns in a more targeted fashion, and without producing

permanent, and legislatively irreparable, overkill.

* * *

The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel. See, *United States* v. *Van Duzee*, 140 U. S. 169, 173 (1891); W. Beaney, Right to Counsel in American Courts 21, 28–29 (1955). We have held, however, that the Sixth Amendment requires the provision of counsel to indigent defendants at government expense, *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963), and that the right to "the assistance of counsel" includes the right to *effective* assistance, *Strickland* v. *Washington*, 466 U. S. 668, 686 (1984). Even assuming the validity of these holdings, I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create. We have until today at least retained the Sixth Amendment's textual limitation to criminal prosecutions. "[W]e have held that 'defence' means defense at trial, not defense in relation to other objectives that may be important to the accused." *Rothgery* v. *Gillespie County*, 554 U. S. ___, ___ (2008) (ALITO, J., concurring) (slip op., at 4) (summarizing cases). We have limited the Sixth Amendment to legal advice directly related to defense against prosecution of the charged offense—advice at trial, of course, but also advice at postindictment interrogations and lineups, *Massiah* v. *United States*, 377 U. S. 201, 205–206 (1964); *United States* v. *Wade*, 388 U. S. 218, 236–238 (1967), and in general advice at all phases of the prosecution where the defendant would be at a disadvantage when pitted alone against the legally trained agents of the state, see *Moran* v. *Burbine*, 475 U. S. 412, 430 (1986). Not only have we not required advice of counsel regarding consequences collateral to prosecution, we have not even required counsel appointed to defend against one prosecution to be

present when the defendant is interrogated in connection with another possible prosecution arising from the same event. *Texas* v. *Cobb*, 532 U. S. 162, 164 (2001).

There is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand—to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction. Such matters fall within "the range of competence demanded of attorneys in criminal cases," *McMann* v. *Richardson*, 397 U. S. 759, 771 (1970). See *id.*, at 769–770 (describing the matters counsel and client must consider in connection with a contemplated guilty plea). We have never held, as the logic of the Court's opinion assumes, that once counsel is appointed all professional responsibilities of counsel—even those extending beyond defense against the prosecution—become constitutional commands. Cf. *Cobb*, *supra*, at 171, n. 2; *Moran*, *supra*, at 430. Because the subject of the misadvice here was not the prosecution for which Jose Padilla was entitled to effective assistance of counsel, the Sixth Amendment has no application.

Adding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping-point. As the concurrence observes,

> "[A] criminal convictio[n] can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. . . . All of those consequences are 'serious,' . . . ." *Ante*, at 2–3 (ALITO, J., concurring in judgment).

But it seems to me that the concurrence suffers from the

same defect. The same indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice. And the concurrence's suggestion that counsel must warn defendants of potential removal consequences, see *ante*, at 14–15—what would come to be known as the "*Padilla* warning"—cannot be limited to those consequences except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act, 18 U. S. C. §924(e). We could expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar's devising of ever-expanding categories of plea-invalidating misadvice and failures to warn—not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given.

The concurrence's treatment of misadvice seems driven by concern about the voluntariness of Padilla's guilty plea. See *ante*, at 12. But that concern properly relates to the Due Process Clauses of the Fifth and Fourteenth Amendments, not to the Sixth Amendment. See *McCarthy* v. *United States*, 394 U. S. 459, 466 (1969); *Brady* v. *United States*, 397 U. S. 742, 748 (1970). Padilla has not argued before us that his guilty plea was not knowing and voluntary. If that is, however, the true substance of his claim (and if he has properly preserved it) the state court can address it on remand.[1] But we should not smuggle the

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[1] I do not mean to suggest that the Due Process Clause would surely provide relief. We have indicated that awareness of "direct consequences" suffices for the validity of a guilty plea. See *Brady*, 397 U. S., at 755 (internal quotation marks omitted). And the required colloquy between a federal district court and a defendant required by Federal Rule of Criminal Procedure 11(b) (formerly Rule 11(c)), which we have said approximates the due process requirements for a valid plea, see *Libretti* v. *United States*, 516 U. S. 29, 49–50 (1995), does not mention

claim into the Sixth Amendment.

The Court's holding prevents legislation that could solve the problems addressed by today's opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given.[2] Moreover, legislation could provide consequences for the misadvice, nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses and evidence needed for retrial have disappeared. Federal immigration law might provide, for example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel's misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today's sledge hammer.

In sum, the Sixth Amendment guarantees adequate assistance of counsel in defending against a pending criminal prosecution. We should limit both the constitutional obligation to provide advice and the consequences of bad advice to that well defined area.

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collateral consequences. Whatever the outcome, however, the effect of misadvice regarding such consequences upon the validity of a guilty plea should be analyzed under the Due Process Clause.

[2] As the Court's opinion notes, *ante*, at 16–17, n. 15, many States—including Kentucky—already require that criminal defendants be warned of potential removal consequences.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-1113

CHEIKH DIOP,
a/k/a Ibou Ndiaya,
a/k/a Ebou Njie

Cheikh Diop,

Appellant

v.

ICE/HOMELAND SECURITY;
WARDEN MARY E. SABOL;
THOMAS R. DECKER;
JOHN P. TORRES;
SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY;
ATTORNEY GENERAL OF THE UNITED STATES.

On Appeal from the United States District Court
For the Middle District of Pennsylvania
(D.C. Civil Action No. 4:09-cv-1489)
District Judge: Honorable Malcolm Muir

Argued January 24, 2011

Before: FUENTES and CHAGARES, Circuit Judges,
POLLAK, District Judge*

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* Honorable Louis H. Pollak, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

(Opinion Filed: September 1, 2011)

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OPINION OF THE COURT

FUENTES, *Circuit Judge*.

A 1996 law requires that the Executive Branch take into custody any person who is removable from this country because he has committed, among other things, a crime involving moral turpitude or a crime involving a controlled substance. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 303, 110 Stat. 3009-585-86 (1996) (codified at 8 U.S.C. § 1226(c)). Detention under this authority is mandatory, does not provide for the possibility of release on bond, and does not require that the Executive Branch at any time justify its conduct. Pursuant to this law, the petitioner in this case, Cheikh Diop, was detained for 1,072 days—two years, eleven months, and five days. The District Court concluded that such prolonged detention was lawful. We disagree. For the following reasons, we conclude that the statute authorizes only detention for a reasonable period of time. After that, the Due Process Clause of the Fifth Amendment to the Constitution requires that the Government establish that continued detention is necessary to further the purposes of the detention statute.

I.

Although the merits of the immigration case against Diop are not before us, we chronicle his journey through our complex immigration system in order to illustrate how individual actions by various actors in the immigration system, each of which takes only a reasonable amount of time to accomplish, can nevertheless result in the detention of a removable alien for an unreasonable, and ultimately unconstitutional, period of time.

Days 1-198. The story begins with Diop's receipt of a Notice to Appear from the Department of Homeland Security ("DHS") on March 19, 2008, charging him as a removable alien who had entered the United States unlawfully and as an alien convicted of a crime involving moral turpitude, a 2005

conviction in Pennsylvania state court for the crime of recklessly endangering another person. *See* 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), (a)(6)(A)(i); *see also* 18 Pa. Con. Stat. Ann. § 2705. That same day, Diop was detained by the Bureau of Immigration and Customs Enforcement ("ICE").[1] Thirteen days later, on April 1, Diop had his first appearance before an immigration judge. His case was reset so that he could seek counsel. A subsequent hearing on April 29 had the same result. And on May 27, Diop's case became even more complicated when the Government[2] charged that he was also removable as an alien convicted of a crime relating to a controlled substance. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II). That conviction occurred in 1995, for the Pennsylvania crime of possessing a controlled substance with the intent to manufacture or deliver it. *See* 35 Pa. Con. Stat. § 780-113(a). The immigration judge once again reset the proceedings so that Diop, who had failed to obtain the assistance of a lawyer, would have time to file an application for asylum and withholding of removal, which he did on August 12.

Days 199-261. On October 3, an immigration judge heard Diop describe his arrest, detention, and severe beating at the hands of Senegalese government officials. Diop told the immigration court that he fears persecution in Senegal because the government of that country believes, based on the alleged affiliation of members of his family, that he is a member of a separatist group called the Movement of Democratic Forces of the Casamance. The immigration judge found Diop to be a credible witness and presumed that his

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[1] Immigration and Customs Enforcement is a bureau within the larger Department of Homeland Security. For convenience, we use the term "Government" as a shorthand term to describe their collective efforts, and refer specifically to DHS or ICE only when necessary.

[2] In the District Court, the Government filed the declaration of John Ellington, Deputy Chief Counsel for the Philadelphia Office of ICE. There, Ellington stated that "respondent [Diop] was denied bond" at this May 27 hearing. The declaration provides no further explanation of that statement, the reasons for the denial of bond, or whether Diop was even eligible for bond in the first place.

testimony was completely accurate, but nevertheless denied his application for withholding of removal because his 1995 conviction was "probably" for a "particularly serious crime," which would make him ineligible for that kind of relief, and because, even if he was persecuted in the past, changed country conditions mean that there is no presumption that he would be persecuted in the future. 8 U.S.C. § 1231(b)(3)(B)(ii); *Denis v. Attorney Gen.*, 633 F.3d 201, 213 (3d Cir. 2011) (explaining that withholding of removal is unavailable to an alien who has committed a "particularly serious crime").

Days 262-390. Diop, still representing himself while detained, filed a notice of appeal. On December 5, 2008, he filed a hand-written appellate brief with the Board of Immigration Appeals ("BIA"). In a March 17, 2009 order, the BIA concluded that the immigration judge should actually determine whether his 1995 conviction was a "particularly serious crime," instead of leaving it open as a mere probability, disagreed with the judge's determination that conditions changed in Senegal, and remanded Diop's case to the immigration judge for further proceedings.

Days 391-589. More master calendar hearings followed: one on April 13, 2009, where the case was reset and another on May 4 in which Diop explained that he was trying to obtain representation from a law school clinic. On May 17, Diop filed another handwritten brief with the court. Thirty-eight days later, on June 24, Diop received a second ruling from the immigration judge concerning his application. This time, the immigration judge concluded that Diop's asylum application was untimely, but granted his application for withholding of removal. The immigration judge reasoned that Diop's crime was not particularly serious because Diop testified that his 1995 conviction for drug possession involved marijuana. Furthermore, he ruled that the Government had not overcome the presumption that Diop would face the threat of future persecution if he was sent to Senegal. On July 21, the Government appealed the immigration judge's ruling concerning withholding of removal, providing, for the first time, evidence that Diop's 1995 conviction involved the distribution of cocaine, not marijuana. Diop initially appealed the ruling concerning asylum, but withdrew that

appeal on August 4. That same day, Diop filed a *pro se* Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Pennsylvania. He argued that it is unconstitutional for the government to detain him, pursuant to 8 U.S.C. § 1226(c), for a prolonged period of time without a hearing to determine whether his detention is justified.

Days 590-754. Approximately three months later, on October 29, 2009 the District Court denied Diop's habeas petition for two reasons. First, it concluded that Diop's petition was premature. Citing 8 U.S.C. § 1231(a), the District Court observed that, after an order of removal has been entered, the Attorney General has 90 days to remove an alien, during which time the alien must be detained. In Diop's case, removal proceedings were ongoing, so the 90-day period had yet to begin and Diop's petition was filed too soon.[3] Second, on the basis of the Supreme Court's holding in *Demore v. Kim*, 538 U.S. 510 (2003), the District Court concluded that it was constitutional to hold Diop while his proceedings are pending, with no regard to how long the proceedings actually take. Diop then filed a timely *pro se* appeal to this Court.

Days 755-776. The appeal in Diop's immigration case—the appeal from the June 24, 2010 decision of the immigration judge—was resolved by the BIA in an order issued on April 12, 2010. However, as in the previous appeal, the BIA once again concluded that the immigration judge's lack of clarity required a remand. Specifically, the BIA explained that a remand was required because the immigration judge's application of the standard for determining what constitutes a particularly serious crime was unclear. Diop, now with help from the appellate litigation clinic at Georgetown University Law Center, filed a motion for reconsideration.

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[3] The Government concedes that this was error. Respondents-Appellees' Answering Br. 10 n.6. The Government's basis for detaining Diop was 8 U.S.C. § 1226(c), not § 1231. The former governs pre-removal detention, while the latter applies to aliens who have been deemed removable pursuant to a final order.

Days 777-959. Clarifying himself on remand, the immigration judge decided, on May 4, 2010 that Diop's drug crime was particularly serious and that Diop was ineligible for withholding of removal. On October 26, the BIA affirmed the immigration judge's decision to deny Diop's application for withholding of removal and denied the motion for reconsideration. But, once again, it remanded for further proceedings, this time so that the immigration judge could consider whether Diop might be eligible for deferral of removal pursuant to the Convention Against Torture.

Days 960-987. Up to this point, a combination of continuances to find a lawyer and prepare Diop's *pro se* filings, along with several incomplete decisions from the immigration judge, had resulted in a 959 day period of incarceration, with still no indication of when or whether Diop might be able to stay in the United States. During that time, the Supreme Court decided, in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), that a resident alien's constitutional right to effective assistance of counsel in criminal proceedings requires that he be advised of the collateral immigration consequences of a criminal conviction. On November 3, 2010 the Pennsylvania Court of Common Pleas applied that decision retroactively and vacated Diop's 1995 conviction. A few weeks later, on November 24, the state of Pennsylvania appealed to the Superior Court.

Days 988-1,037. On December 1, Diop appeared for yet another master calendar hearing, arguing that the vacatur of his conviction meant that he was eligible for withholding of removal. The Government asked for time to consider the matter and the case was reset. At the next master calendar hearing on January 18, 2011 the Government argued that Diop would only be eligible for withholding of removal if the Superior Court affirmed the Court of Common Pleas's vacatur of his 1995 conviction. The parties then agreed to have a hearing on March 1 regarding Diop's claim of a right to relief under the Convention Against Torture. The next day, amici in Diop's habeas appeal—the American Civil Liberties Union and the American Civil Liberties Union of Pennsylvania (collectively, the "ACLU")—contacted counsel for the Government to seek consent to file a supplemental appendix in this Court updating us on the status of Diop's

immigration proceedings. The day after that, on January 20, 2011 the Government reversed its litigating position in the immigration courts and filed a motion stating that Diop was immediately eligible for withholding of removal, even though the vacatur of his 1995 conviction was still on appeal.

Days 1,038-1,072. We heard oral argument on this appeal on January 24, 2011. The next week, at a master calendar hearing in the immigration court on February 2, the Government confirmed to the immigration judge that its position was that Diop was immediately eligible for withholding of removal. In a ruling on February 22, the immigration judge granted Diop withholding of removal. Finally, on February 24, 2011 after 1072 days of detention, four rulings by an immigration judge, three rulings by the BIA, a state court ruling on his 1995 conviction and a subsequent pending appeal to the intermediate state court, a ruling by a federal district court judge on his habeas petition, and an appeal to this court, Diop was freed.

The Government waived its right to appeal the February 24, 2011 holding. The next day, it filed a motion in this court arguing that Diop's federal habeas appeal is moot because Diop has been released from custody. Our first task, then, is to determine whether we still have jurisdiction to decide the merits of Diop's habeas petition.

II.

The District Court had jurisdiction under 28 U.S.C. § 2241. Congress has authorized our jurisdiction pursuant to 28 U.S.C. § 1291, but the Constitution vests us with jurisdiction only to decide "cases or controversies." U.S. Const. art. III, § 2; *Turner v. Rogers*, 564 U.S. ---, slip op. at 5 (June 20, 2011). This means that Diop must have "standing"—the personal stake in a lawsuit that exists when a person has suffered an "injury in fact," caused by "the conduct complained of," that can be "redressed by a favorable decision"—at all stages of review and not just at the time he filed his habeas petition. *Camreta v. Greene*, 564 U.S. ---, slip op. at 5 (May 26, 2011); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) ("Mootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the

commencement of the litigation (standing) must continue throughout its existence (mootness)." (internal quotation marks omitted)).[4]

Diop's prolonged detention was certainly an injury in fact, caused by the Government, which could have been redressed by a decision from this Court granting his petition for writ of habeas corpus. However, the Government asserts that these things are no longer true, so Diop's case is moot. We disagree. Diop's case falls within the special mootness exception for cases that are "capable of repetition" while "evading review." *Turner*, 564 U.S. ---, slip op. at 6 (quoting *S. Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498 (1911)). This exception applies when "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Id.* (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)).

The difficulty with determining whether Diop's detention is too short to be fully litigated prior to its cessation is that, although Diop was detained for over three years, the claim that his detention was unlawful could not have been filed immediately. Instead, it would have had to "ripen" at some unspecified time that is "notoriously hard to pinpoint." *Pittsburgh Mack Sales & Services, Inc. v. Int'l Union of Operating Eng'rs, Local Union No. 66*, 580 F.3d 185, 190 (3d Cir. 2009). Further compounding the difficulty of evaluating claims of unlawful pre-removal detention is that the underlying removal proceedings justifying detention may very well be nearing a resolution by the time a federal court of appeals is prepared to consider them. A court of appeals reviewing these types of claims is therefore presented with a moving target, knowing only that review must happen

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[4] Standing must be distinguished from the separate and distinct inquiry into whether a petitioner is "in custody," as required under the habeas statutes. "[W]hat matters for the 'in custody' requirement is whether the petitioner was in custody *at the time his habeas petition was filed*." *Kumarasamy v. Attorney General*, 453 F.3d 169, 173 n.7 (3d Cir. 2006). Diop was in custody when he filed his petition.

sometime after an alien has been detained and before he is released, but never knowing the precise time period in which the case is ripe.

Given these difficulties, mootness would likely doom almost any attempt to challenge the lawfulness of pre-removal detention. The law is not so rigid. In *United States v. Frumento*, this Court recognized that a case is not moot if a litigant contesting his detention takes "prompt, diligent, and timely" action to perfect his appeal, especially "when fundamental personal liberties are at issue and review of an order of confinement as a practical matter is not available[.]" 552 F.2d 534, 541 (3d Cir. 1977) (en banc); *see also Lee v. Stickman*, 357 F.3d 338, 343 (3d Cir. 2004). Diop had been detained for one year, four months, and sixteen days before he filed a petition for writ of habeas corpus complaining that detention for this length of time was unreasonable and hence, unauthorized. Once filed, his actions in that proceeding were "prompt, diligent and timely," as was his conduct in the subsequent appeal to this court. Assuming, without deciding, that his claim was ripe on the day he filed his petition, Diop's detention for another year, six months, and twenty days was less than the two years the Supreme Court has found to be too short to be fully litigated in other contexts, *see Turner*, 564 U.S. ---, slip op. at 6 (citing *S. Pac. Terminal Co.*, 219 U.S. at 514-516 (1911) for the proposition that a two-year period can be too short), and is the type of claim that, given the practical reality of its highly contingent nature, will always evade review.

Diop's claim is also capable of repetition. The Government, which bears the burden of proving that this appeal is moot, *Princeton Cmty. Phone Book, Inc. v. Bate*, 582 F.2d 706, 710 n.9 (3d Cir. 1978), argues that there is no "reasonable expectation" or "demonstrated probability" that Diop will again be the subject of prolonged detention. *See Murphy v. Hunt*, 455 U.S. 478, 483 (1982). In *Murphy*, the named plaintiff brought suit under 42 U.S.C. § 1983 asserting the unconstitutionality of a Nebraska constitutional provision requiring pretrial detention without bail for those accused of sex crimes. Before the case could be heard on appeal, Murphy's trial for the underlying sex crimes ended with his conviction on three counts. Nevertheless, he argued that the

challenge to his pretrial detention was not moot because his convictions were still on appeal. The Supreme Court disagreed. It reasoned that there was no evidence in the record that his convictions would be overturned, and hence the possibility that they might be was "wholly speculative." *Id.*, 455 U.S. at 483 & n.7.

Diop is in a different situation because the prospect of his once again being detained by the Government is not wholly speculative. His case is closer to the one presented in *Frumento*, where a criminal defendant was held in contempt and imprisoned until he either complied with a court order to testify in a trial or that trial was finished. Before his appeal could be heard, the trial ended and he was released. Nevertheless, we held that his appeal was not moot for two reasons. First, he might once again be subpoenaed to give testimony at trial and, upon his refusal, would once again be held in contempt and detained; second, holding his appeal to be moot would make it impossible to evaluate the significant issues of personal liberty at stake. 552 F.2d at 540.

The Government doggedly pursued Diop's detention and removal for three years. Should the vacatur of his 1995 conviction be overturned on the ground that *Padilla* is not retroactive—a possibility that is far from remote[5]—Diop would once again be ineligible for withholding of removal and the Government's position in this appeal—that 8 U.S.C. § 1226(c) requires Diop's detention without a bond hearing—would lead it to once again place Diop in confinement. In addition, the Government's current litigating position that the vacatur is immediately effective is contrary to its position in other similar cases, *see, e.g.*, *McLeod v. Mukasey*, 287 F.

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[5] We recently held that the Supreme Court's decision in *Padilla v. Kentucky* is retroactive. *United States v. Orocio*, --- F.3d ---, 2011 WL 2557232, at *7 (3d Cir. June 29, 2011). However, there is no judicial consensus on the issue and many lower courts have come to a contrary conclusion. *See United States v. Shafeek*, 2010 WL 3789747 (E.D. Mich. Sept. 22, 2010); *Martin v. United States*, 2010 WL 3463949 (C.D. Ill. Aug. 25, 2010); *Gacko v. United States*, 2010 WL 2076020 (E.D.N.Y. May 20, 2010).

App'x 562, 563 (9th Cir. 2008), lending further support to the conclusion that Diop's freedom is based on little more than governmental grace, subject to change at its discretion. [6] And finally, in its briefs here the Government argued that Diop could be detained on the basis of his 2005 conviction. In short, it is reasonable for Diop to fear that he might once again be the subject of lengthy removal proceedings and pre-removal detention at any time. His appeal falls into an exception to the mootness rule.

Even if Diop's case did not fall into the exception for cases capable of repetition yet evading review, we would still conclude that he maintains his standing in this appeal. In *Camreta v. Greene*, the Supreme Court held that government officials retained standing to challenge an appellate court ruling that they had violated the Fourth Amendment, even though that same court found that the government officials had immunity and, therefore, could not be ordered to pay money damages. 564 U.S ---, slip op. at 5-7. The Supreme Court reasoned that in situations where an official regularly engages in the conduct deemed unconstitutional, the judgment results in a continuing injury because the official then operates in the shadow of potential liability. "So long as [the judgment] continues in effect, [the official] must either change the way he performs his duties or risk a meritorious damages action." *Id.* at 7. "Only by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future. . . . [C]onversely, if the person who initially brought the suit may again be subject to the challenged conduct, she has a stake in preserving the court's holding." *Id.*

Camreta differs from this case in important respects. Here, there are no money damages at issue. Also, the District Court found that the Government's conduct did not violate the Constitution. Nevertheless, *Camreta* provides a helpful lesson in standing that is applicable to this case. Here, even without the potential for monetary damages that existed in

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[6] This court has a longstanding policy of not citing to not-precedential decisions. We cite to *McLeod* not to make any substantive legal point, but only to show that the Government has assumed a different litigating position in similar cases.

Camreta, the Government and its officials retain an interest in ensuring that they operate within the bounds of the Constitution, *see id.* at 7 n.4 (explaining that government officials have a stake in the outcome of a case "independent of any future suit brought by a third party" because a ruling that its conduct is not constitutional will change their behavior).

Additionally, in this case, "the person who initially brought the suit" (Diop) "may again be subject to the challenged conduct" (prolonged pre-removal detention by ICE). Diop's newfound freedom is the fragile result of several precarious conditions. First, if the vacatur of his 1995 conviction is overturned on appeal, Diop would once again be subject to mandatory detention by ICE. Second, the Government's consistent position throughout this appeal has been that Diop's detention is required not only because of his 1995 drug conviction, but also because of his 2005 conviction for recklessly endangering another person. (Respondent-Appellee's Answ. Br. 16 n.8; Respondent-Appellee's Resp. to Brief for *Amici Curiae* 27). That 2005 conviction has not been vacated, which means that Diop "may again be subject to the challenged conduct" and hence continues to have "a stake in preserving the court's holding." *Camreta*, 564 U.S. ---, slip op. at 7. The Government has, for over three years, zealously guarded its power to detain Diop while pursuing its removal case against him; as explained above, the record provides a strong basis for the conclusion that Diop may again be subject to detention.

The issues raised in Diop's appeal are capable of repetition and are the kinds of issues that would almost always evade review by this court. Moreover, under *Camreta*, he retains an interest in this appeal despite his release. For these reasons, we conclude that there is a case or controversy over which we must exercise jurisdiction.

III.

We liberally construe Diop's *pro se* petition for writ of habeas corpus and his appellate briefs to argue that his detention cannot be authorized by 8 U.S.C. § 1226(c) because (1) neither his 1995 nor his 2005 convictions provide a basis for detaining him under the statute; and (2) even if they do

provide such a basis, any purported authority to detain him for a prolonged period of time without a bond hearing would be unconstitutional. The Government resists each of these conclusions.

A.

We begin with the argument that neither of Diop's prior criminal convictions authorizes his detention because, if they do not, then his detention is unlawful independent of any constitutional concerns. *See Doe v. Pennsylvania Bd. Of Probation and Parole*, 513 F.3d 95, 102 (3d Cir. 2008) ("As a first inquiry, we must avoid deciding a constitutional question if the case may be disposed of on some other basis.").

Section 236(a) of the IIRIRA, now codified at 8 U.S.C. § 1226(a), provides that "on a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."[7] The statute then authorizes the Attorney General to release an alien on bond "except as provided in subsection (c)." Subsection (c), in turn, states that "[t]he Attorney General *shall* take into custody," "when released" following his sentence, "any alien who . . . is deportable by reason of having committed," among other crimes, one "involving moral turpitude" or one "relating to a controlled substance." 8 U.S.C. § 1226(c) (emphasis added) (cross-referencing 8 U.S.C. § 1227(a)(2)(A)(i), for crimes involving moral turpitude and § 1227(a)(2)(B) for crimes relating to a controlled substance).

Subsection (a) of this statute expressly provides that the Attorney General "may release the alien on bond" pending a decision as to whether that alien is to be removed. 8 U.S.C. § 1226(a). Subsection (c) contains no such language. Instead, it says that aliens detained under that subsection may be released only if the Attorney General

[7] The Homeland Security Act of 2002 transferred most of the Attorney General's immigration-related responsibilities to the newly formed Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002); *Alli v. Decker*, --- F.3d ---, 2011 WL 2450967, at *1 n.2 (June 21, 2011).

decides that they should be part of the federal witness protection program. 8 U.S.C. § 1226(c)(2).

Diop asserts that his 1995 conviction for possessing a controlled substance cannot be the basis of his detention under the authority of § 1226(c) because he was not taken into custody "when released" for that offense; and his 2005 conviction is no reason to detain him without bond because that conviction is not one involving moral turpitude. The Government ignores Diop's argument regarding his 1995 conviction and instead relies on the assertion that the 2005 conviction is one involving moral turpitude. (Respondents'-Appellees' Answering Br. 16 n.8).

The dispute over whether Diop's conviction is, as a definitive legal matter, one involving moral turpitude, is irrelevant. If the statute required certitude that an alien was deportable before that alien could be detained, then no alien could ever be detained because the question of removability cannot be answered until after proceedings in the immigration courts are resolved. The appropriate question is whether applicable regulations, and interpretations of the governing statutes by the BIA, allow ICE to detain Diop with some level of suspicion, but no definitive legal conclusion, that he is covered by § 1226(c). They do. According to the regulations and the commentary accompanying them, an authorized ICE agent may detain an alien if there is "reason to believe that this person was convicted of a crime covered by the statute." 63 Fed. Reg. 27444; 8 C.F.R. § 236.1; *In re Joseph I*, 22 I. & N. Dec. 660, 668 (B.I.A. 1999). Immigration judges then have the authority to review the ICE agent's initial determination that a person is subject to detention at a *Joseph* hearing. *See In re Joseph II*, 22 I. & N. Dec. 799, 800 (B.I.A. 1999); *see also Demore*, 538 U.S. at 514 n.3 (explaining that a *Joseph* hearing gives an alien the opportunity to avoid mandatory detention by establishing that he is not an alien, was not convicted of a crime requiring mandatory detention, or is otherwise not subject to mandatory detention). Because neither party attacks the constitutionality of these regulations, or the BIA's interpretation of the applicable statutes, we will assume, without deciding, that they are valid and that they authorize Diop's pre-removal detention because "there is reason to believe"—even if we do not know for sure—that

the 2005 conviction was for a crime involving moral turpitude.[8]

B.

The Government asserts that § 1226(c) says that aliens can be detained for as long as removal proceedings are "pending," even if they are "pending" for prolonged periods of time. (Respondents'-Appellees' Answ. Br. at 17). Diop counters that his detention is unlawful because § 1226(c) does not authorize prolonged detention without a bond hearing. In support, amicus ACLU notes that courts interpret statutes with the presumption that Congress does not intend to pass unconstitutional laws. For this reason, "it is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, . . . [courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). Applying this principle to § 1226(c), we conclude that the statute implicitly authorizes detention for a reasonable amount of time, after which the authorities must make an individualized inquiry into whether detention is still necessary to fulfill the statute's purposes of ensuring that an alien attends removal proceedings and that his release will not pose a danger to the community.

1.

Our Constitution forbids the Government from depriving "any person" of "life, liberty, or property without due process of law." U.S. Const. amend. V. This Due

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[8] Because the Government relies solely on the 2005 conviction for its authority to detain Diop, we do not reach the issue of whether he can be detained because of his 1995 conviction. In addition, because the parties do not question the constitutional adequacy of a *Joseph* hearing, we decline to address it here. We note, however, that the issue is an open one, *see Demore v. Kim*, 538 U.S. 510, 514 n.2 (2003), and that at least one circuit judge has expressed grave doubts as to whether *Joseph* is consistent with due process of law, *see Tijani v. Willis*, 430 F.3d 1241, 1244 (9th Cir. 2005) (Tashima, J., concurring).

Process Clause refers to "any person," which means that aliens, no less than native-born citizens, are entitled to its protection. *Zadvydas v. Davis*, 533 U.S. at 693. Thus, § 1226(c) raises a serious risk of running afoul of this command unless it is premised on a "sufficiently strong special justification." *Id.* at 690.

The Supreme Court has concluded that it is, at least on its face. Reading through the legislative history in *Demore v. Kim*, the Supreme Court noted that Congress was concerned with the immigration authorities' "wholesale failure" to "deal with the increasing rates of criminal activity by aliens." 538 U.S. at 518. Section 1226(c) was intended to remedy this perceived problem by ensuring that aliens convicted of certain crimes would be present at their removal proceedings and not on the loose in their communities, where they might pose a danger. *Demore*, 538 U.S. at 519; *id.* at 531 (Kennedy, J., concurring).

The Supreme Court's opinion emphasized Congress's broad power to pass laws relating to immigration. *Id.* at 521 ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976))). It reasoned that, although Congress's powers are limited by the Due Process Clause, aliens' due process rights are not necessarily violated when they are initially detained without a specific, individualized, finding that a particular alien poses a flight risk or a risk of danger to the community. *Id.* at 523-34 (citing *Carlson v. Landon*, 342 U.S. 524 (1952)).

Justice Kennedy concurred in the Supreme Court's opinion, but highlighted an important limitation on the scope of its holding. In his view, Congress's broad immigration powers allow it to pass a law authorizing an alien's initial detention, so long as those implementing the statute provide individualized procedures through which an alien might contest the basis of his detention—a requirement satisfied in *Demore* when the petitioner, Hyung Joon Kim, received a *Joseph* hearing. *Id.* at 532. Critically, Justice Kennedy added that even if an alien is given an initial hearing, his detention might still violate the Due Process Clause if "the continued

detention became unreasonable or unjustified." *Id.* "Were there to be an unreasonable delay by the [Immigration and Naturalization Services ("INS")][9] in pursuing and completing deportation proceedings, it would become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons." *Id.* at 532-33.

Justice Kennedy's opinion provides helpful guidance on how to interpret the *Demore* opinion. Under the Supreme Court's holding, Congress did not violate the Constitution when it authorized mandatory detention without a bond hearing for certain criminal aliens under § 1226(c). This means that the Executive Branch *must* detain an alien at the beginning of removal proceedings, without a bond hearing—and may do so consistent with the Due Process Clause—so long as the alien is given some sort of hearing when initially detained at which he may challenge the basis of his detention. However, the constitutionality of this practice is a function of the length of the detention. At a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community.[10]

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[9] The responsibilities of the INS were assumed by three different agencies—ICE, Customs and Border Protection, and Citizenship and Immigration Services—within DHS when Congress passed the Homeland Security Act of 2002. *See Lin-Zheng v. Attorney General*, 557 F.3d 147, 152 n.4 (3d Cir. 2009) (citing Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002)).

[10] Although it did not frame the issue this way, we read Justice Kennedy's decision to uphold the statute on its face, while leaving open the possibility that it might be unconstitutional as applied. In other words, Congress did not violate the Constitution when it passed the law, but the Executive Branch might violate the Constitution in individual circumstances depending on how the law is applied. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*,

This will necessarily be a fact-dependent inquiry that will vary depending on individual circumstances. We decline to establish a universal point at which detention will always be considered unreasonable. [11]

The Supreme Court's opinion in *Carlson v. Landon*, 342 U.S. 524 (1952), does not conflict with the result we reach in this case.[12] According to *Demore*, *Carlson* held that it was constitutional to detain the aliens in that case—deemed deportable because of their participation in Communist activities—without an individualized determination of their dangerousness or their likelihood of flight. 538 U.S. at 524. However, this reading of *Carlson*—permitting an alien to be initially detained without an individualized hearing—is consistent with Justice Kennedy's view that, at some point past this initial period, detention can become unreasonable, and hence unconstitutional, unless there is an individualized inquiry into whether detention advances the purposes of the statute.

For the same reason, we conclude that the Supreme Court's holding in *Reno v. Flores*, 507 U.S. 292 (1993), does not control the outcome of this case. There, a class of alien

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62 Stan. L. Rev. 1209, 1230-35 (2010) (describing "as applied" and facial challenges in this manner).

[11] In this regard, we note that our decision today differs from our prior decision in *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001), which was overruled by the Supreme Court in *Demore*. *See Demore*, 538 U.S. at 516. *Patel*'s holding was much broader. In *Patel*, this Court held that §1226(c) was unconstitutional in *all* circumstances unless *all* aliens detained pursuant to that statute received an individualized bond hearing. Our much narrower holding today, by contrast, is that the statute is only unconstitutional when it is applied to detain someone for an unreasonable length of time without further individualized inquiry into whether detention is necessary to carry out the purposes of the statute.

[12] The parties do not address the substance of this decision in their briefs. However, as binding Supreme Court precedent, we are required to address it.

juveniles argued that it was unconstitutional for the immigration authorities to detain juveniles and release them only into the care of a parent, legal guardian or other specified adult relative. The Supreme Court upheld the constitutionality of the detention. However, the detention in that case was not mandatory. Moreover, just like *Carlson*, a reading of *Flores* that purported to uphold detention for an unreasonable length of time without further individualized inquiry would be contrary to Justice Kennedy's concurrence in *Demore*.

In short, when detention becomes unreasonable, the Due Process Clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute.

2.

This leaves us with the question of whether Diop's prolonged detention in this case was unconstitutionally unreasonable and, therefore, a violation of the Due Process Clause. We conclude that it was. *Demore* emphasized that mandatory detention pursuant to § 1226(c) lasts only for a "very limited time" in the vast majority of cases. 538 U.S. at 529 & n.12. In fact, *Demore* relied on statistics showing that detention under § 1226(c) "lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which an alien chooses to appeal." *Id.* at 530. This leads us to believe that the result may well have been different had the petitioner in *Demore* been detained for significantly longer than the average. Indeed, the petitioner in *Demore* had been detained for only slightly longer than the average (6 months) when his habeas petition was decided. Assuming, without deciding, that this was a presumably reasonable period of detention, and comparing it to Diop's 35 months of detention, which was nearly six times longer, leads us to conclude that Diop's detention, without any post-*Joseph* hearing inquiry into whether it was necessary to accomplish the purposes of § 1226(c), was unreasonable.

The Government argues that there was no "unreasonable delay" in Diop's proceedings because he was

given continuances to find an attorney, to draft an application for asylum and withholding of removal, and because he took several appeals. Diop responds that the delay is attributable to the immigration judge's continued errors, which necessitated the appeals and remands. We agree with the Government that the reasonableness determination must take into account a given individual detainee's need for more or less time, as well as the exigencies of a particular case. But we also conclude that reasonableness must take into account errors in the proceedings that cause unnecessary delay. No system of justice can be error-free, and those errors require time to fix. Nevertheless, in this case the immigration judge's numerous errors, combined with the Government's failure to secure, at the earliest possible time, evidence that bore directly on the issue of whether Diop was properly detained, resulted in an unreasonable delay.

We cannot simply rely on the Government's determination of what is reasonable. Although judicial deference to the Executive Branch in the immigration context is "of special importance" because officials "exercise especially sensitive political functions that implicate questions of foreign relations," *Negusie v. Holder*, 129 S. Ct. 1163-64 (2009), courts reviewing petitions for writ of habeas corpus must exercise their independent judgment as to what is reasonable, *see Zadvydas*, 533 U.S. at 699 ("Whether a set of particular circumstances amounts to detention within, or beyond, a period reasonably necessary to secure removal is determinative of whether the detention is, or is not, pursuant to statutory authority. The basic federal habeas corpus statute grants the federal courts authority to answer that question."). In *Zadvydas*, the Supreme Court adopted a presumption that six months of detention pursuant to the post-removal statute was reasonable. It reasoned that Congress had previously doubted the constitutionality of detention for longer than this period and observed that such a six-month window would free the Executive Branch from excessive interference by the judiciary. Amicus ACLU urges us to adopt a similar position in this case. We decline to adopt such a one-size-fits-all approach. Reasonableness, by its very nature, is a fact-dependent inquiry requiring an assessment of all of the circumstances of any given case. That being said, we note that the reasonableness of any given detention pursuant to §

1226(c) is a function of whether it is necessary to fulfill the purpose of the statute, and, given that Congress and the Supreme Court believed those purposes would be fulfilled in the vast majority of cases within a month and a half, and five months at the maximum, *see Demore*, 538 U.S. at 530, the constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past those thresholds. In this case, there can be no question that Diop's detention for nearly three years without further inquiry into whether it was necessary to ensure his appearance at the removal proceedings or to prevent a risk of danger to the community, was unreasonable and, therefore, a violation of the Due Process Clause.

3.

It was unconstitutional to detain Diop for nearly three years under the authority granted by Congress in § 1226(c). Nevertheless, "if Congress has made its intent in the statute clear, we must give effect to that intent." *Zadvydas*, 533 U.S. at 696 (internal quotation marks omitted). We do not believe that Congress intended to authorize prolonged, unreasonable, detention without a bond hearing. For one, the parties have not provided any legislative history in support of such a conclusion. Furthermore, in *Demore*, the Supreme Court observed that Congress directed the INS to "complete removal proceedings against [criminal aliens] as promptly as possible." 538 U.S. at 530 n.13. This, combined with statistics showing that detention is often for only a brief period of time, leads us to believe that Congress did not intend to authorize prolonged detention pursuant to § 1226(c) without, at some point, requiring further inquiry into whether detention is necessary to carry out that statute's purpose. Accordingly we conclude that § 1226(c) contains an implicit limitation of reasonableness: the statute authorizes only mandatory detention that is reasonable in length. After that, § 1226(c) yields to the constitutional requirement that there be a further, individualized, inquiry into whether continued detention is necessary to carry out the statute's purpose. *Cf. Zadvydas*, 533 U.S. at 682, 699 (reading § 1231 to contain an implicit "reasonable time" limitation on the length of post-removal detention).

IV.

Diop maintains a reasonable expectation that he may, once again, find himself imprisoned while the authorities sort through the complicated laws and procedures governing the removal of criminal aliens. Should he be detained once again, our holding provides that he may only be detained for a reasonable length of time. Should the length of his detention become unreasonable, the Government must justify its continued authority to detain him at a hearing at which it bears the burden of proof. For all of the foregoing reasons, we will vacate the District Court's decision and order dismissing Diop's petition for Writ of Habeas Corpus.

In re Christopher PICKERING, Respondent

File A70 539 319 - Detroit

Decided June 11, 2003

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) If a court vacates an alien's conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.

(2) Where the record indicated that the respondent's conviction for possession of a controlled substance was quashed by a Canadian court for the sole purpose of avoiding the bar to his acquisition of permanent residence, the court's action was not effective to eliminate the conviction for immigration purposes.

FOR RESPONDENT: Marshal E. Hyman, Esquire, Troy, Michigan

FOR THE DEPARTMENT OF HOMELAND SECURITY:[1] Marsha K. Nettles, Assistant District Counsel

BEFORE: Board Panel: FILPPU, GUENDELSBERGER, and PAULEY, Board Members.

PAULEY, Board Member:

In a decision dated September 21, 1999, an Immigration Judge found the respondent removable as an alien convicted of a controlled substance violation and ordered him removed from the United States. The respondent has appealed, arguing that he has not been convicted for immigration purposes because a Canadian court with jurisdiction over the matter issued an order quashing his conviction. The appeal will be dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of Canada. On November 6, 1980, he was convicted in Chatham, Ontario, Canada, of unlawful possession of a restricted drug, namely, Lysergic Acid Diethylamide ("LSD"), contrary to Section 41(1) of the Food & Drugs Act. The respondent was sentenced to

[1] We note that the functions of the Immigration and Naturalization Service have been transferred to the Department of Homeland Security pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

pay a fine of $300.00 (Canadian) or, in default of payment, to 30 days in custody.

In March 1993, the respondent filed an application for adjustment of status. Aware that his controlled substance conviction rendered him ineligible for adjustment, the respondent subsequently requested that the Ontario Court of Justice (General Division) quash the conviction. In a judgment dated June 20, 1997, the court quashed the respondent's 1980 conviction for unlawful possession of LSD. On August 21, 1998, the respondent's application for adjustment of status was denied and removal proceedings were initiated.

The Immigration Judge found the respondent removable on the basis of his conviction and ordered him removed. In his decision, the Immigration Judge declined to give effect to the Canadian court's order quashing the conviction, finding that the court's action was for rehabilitative purposes to allow the respondent to live permanently in the United States.

II. ISSUE

The question presented in this appeal is whether the Canadian court's order quashing the respondent's conviction vitiates the conviction for immigration purposes. On the facts of this case, we find that it does not.

III. ANALYSIS

Section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) (2000), defines the term "conviction" as follows:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication has been withheld, where—
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Although the definition of a conviction in section 101(a)(48)(A) does not directly address "quashing" of convictions, we have considered the issue of vacated convictions in two recent decisions. We held in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), that under the definition in section 101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. In *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000), we determined that a conviction that had been

vacated on the merits pursuant to Article 440 of the New York Criminal Procedure Law did not constitute a conviction for immigration purposes within the meaning of the statute.

The issue presented in this case is not directly controlled by either *Matter of Roldan* or *Matter of Rodriguez-Ruiz*. We limited our holding in *Roldan* to "those circumstances where an alien has been the beneficiary of a state rehabilitative statute which purports to erase the record of guilt." *Matter of Roldan*, *supra*, at 523. *Rodriguez-Ruiz* involved a statute authorizing vacation of a conviction based on the legal merits of the underlying proceedings. The Government argued that because the New York conviction had been vacated "for purposes of avoiding removal, and not for reasons relating to a constitutional or legal defect in the criminal proceedings," the respondent's conviction should remain a "conviction" under the Act. *Matter of Rodriguez-Ruiz*, *supra*, at 1379. We rejected that contention, finding that the court's order was not within the parameters of *Roldan* because the law under which the conviction was vacated was not an expungement or rehabilitative statute. We further held that we would not look behind the state court judgment to ascertain whether the court acted in accordance with its own law in vacating the conviction.

The federal courts have also considered whether section 101(a)(42)(A) of the Act provides an exception for a vacated conviction from the definition of a "conviction." In *Herrera-Inirio v. INS*, 208 F.3d 299, 306 (1st Cir. 2000), the United States Court of Appeals for the First Circuit noted that the "emphasis that Congress placed on the *original* admission of guilt plainly indicates that a subsequent dismissal of the charges, based solely on rehabilitative goals and not on the merits of the charge or on a defect in the underlying criminal proceedings, does not vitiate that original admission." Thus, the court concluded that

> state rehabilitative programs that have the effect of vacating a conviction other than on the merits or on a basis tied to the violation of a statutory or constitutional right in the underlying criminal case have no bearing in determining whether an alien is to be considered "convicted" under section 1101(a)(48)(A).

Id. at 306. In reaching this conclusion, the court relied on *United States v. Campbell*, 167 F.3d 94, 98 (2d Cir. 1999), where the Second Circuit observed that "no provision [in the immigration laws] excepts from this definition a conviction that has been vacated" and found that a state order setting aside a conviction was invalid for immigration purposes where it "was not based on any showing of innocence or on any suggestion that the conviction had been improperly obtained."

In *Zaitona v. INS*, 9 F.3d 432, 436-37 (6th Cir. 1993), the Sixth Circuit, in whose jurisdiction this case arises, held that a district court order vacating a federal conviction would not be recognized for immigration purposes where

the sole reason for the order was to enter an otherwise untimely judicial recommendation against deportation in order to prevent the alien's deportation. In this regard, the Sixth Circuit stated that the sentencing court should not subsequently be permitted "to vacate a judgment for reasons that have nothing to do with the underlying validity of the guilty plea and original conviction themselves." *Id.* at 436.

The Sixth Circuit's approach is also consistent with other relevant federal court decisions. *See, e.g., Renteria-Gonzalez v. INS*, 322 F.3d 804, 812 (5th Cir. 2002) (stating that "the text, structure, and history of the INA suggest that a vacated federal conviction does remain valid for purposes of the immigration laws");[2] *Beltran-Leon v. INS*, 134 F.3d 1379, 1380-81 (9th Cir. 1998) (finding that a vacated conviction remained a conviction for deportation purposes where the state court's action, pursuant to a writ of audita querela, was undertaken "solely in order to prevent deportation and the subsequent hardship to [the alien] and his family"); *cf. United States v. Bravo-Diaz*, 312 F.3d 995 (9th Cir. 2002) (finding that audita querela and the All Writs Act are unavailable to undo a conviction in order to avoid deportation on equitable grounds where there is no legal defect in the conviction); *United States v. Tablie*, 166 F.3d 505 (2d Cir. 1999) (same); *Doe v. INS*, 120 F.3d 200 (9th Cir. 1997) (same).

In accord with the federal court opinions applying the definition of a conviction at section 101(a)(48)(A) of the Act, we find that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A). If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes.[3] The fact that the case at bar involves a foreign conviction does not alter our analysis with respect to the purpose of the subsequent vacation of that conviction.

[2] The majority opinion in *Renteria-Gonzalez v. INS*, *supra*, indicates that a vacated federal conviction remains valid for purposes of the immigration laws irrespective of the reasons why the conviction was vacated. *See id.* at 822-23 (Benavides, J., specially concurring). This approach appears contrary to *Matter of Rodriguez-Ruiz*, *supra*, and we decline at this time to adopt it outside the jurisdiction of the Fifth Circuit.

[3] *But cf. Matter of Sirhan*, 13 I&N Dec. 592 (BIA 1970); *Matter of O'Sullivan*, 10 I&N Dec. 320 (BIA 1963) (declining to find that a conviction was vacated for the sole purpose of avoiding deportation).

The resolution of this case therefore turns on whether the conviction was quashed on the basis of a defect in the underlying criminal proceedings.[4] In making this determination, we look to the law under which the Canadian court issued its order and the terms of the order itself, as well as the reasons presented by the respondent in requesting that the court vacate the conviction.

The order quashing the conviction in this case does not reference the law pursuant to which the conviction was vacated. Although the respondent noted in his affidavit that he sought the relief pursuant to Section 24(1) of the Canadian Charter of Rights and Freedoms and has argued that the purpose of this section is to provide appropriate and just remedies for violation of Charter rights, we are unable to discern such a purpose from the official documentation submitted in support of the claim.

Turning to the wording of the order and the respondent's request for post-conviction relief, we note that the judgment only refers, as the grounds for ordering the conviction quashed, to the respondent's request and his supporting affidavit. Significantly, neither document identifies a basis to question the integrity of the underlying criminal proceeding or conviction. The affidavit alleges that the respondent's controlled substance conviction is a bar to his permanent residence in the United States and indicates that the sole purpose for the order is to eliminate that bar.[5] Under these circumstances, we find that the quashing of the conviction was not based on a defect in the conviction or in the proceedings underlying the conviction, but instead appears to have been entered solely for immigration purposes. For these reasons, we agree with the Immigration Judge that the respondent has a "conviction" for possession of a controlled substance within the meaning of section 101(a)(48)(A) of the Act. Accordingly, the respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

[4] There is no contention that the Canadian court has inaccurately stated the basis for its ruling.

[5] The affidavit recites that the respondent had been granted a pardon in 1996 for his 1980 LSD offense (as well as for convictions in 1977 for taking a vehicle without consent and in 1979 for assault causing bodily harm), but that he had been advised that only the 1980 crime stood as a "bar to gaining permanent residency in the United States." We note that the foreign pardon the respondent received would not serve to eliminate his convictions for immigration purposes. *See Matter of B-*, 7 I&N Dec. 166 (BIA 1956); *cf.* section 237(a)(2)(A)(v) of the Act, 8 U.S.C. § 1227(a)(2)(A)(v) (2000).