COMMENT

INEFFECTIVE ASSISTANCE OF *PADILLA*: EFFECTUATING THE CONSTITUTIONAL RIGHT TO CRIMMIGRATION COUNSEL

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Abstract

The Supreme Court decided in Padilla v. Kentucky *that noncitizens in criminal proceedings have a Sixth Amendment right to advice on the immigration consequences of a guilty plea. Despite the promise of* Padilla*, many noncitizens with unconstitutional criminal convictions find themselves without a remedy. Discovering the adverse immigration consequences of their convictions only once they face removal in federal immigration proceedings, noncitizens are faced with strict temporal and custodial requirements that foreclose state avenues for* Padilla *relief. While the states can partially alleviate the ineffective assistance of* Padilla *by creating new criminal procedural rules to raise* Padilla *claims in state forums, a uniform federal solution is needed. Federal courts should interpret the definition of "conviction" under the INA to exclude convictions entered without effective crimmigration counsel. Congress did not intend for convictions entered without procedural safeguards guaranteed by the Constitution to make noncitizens removable. Furthermore, immigration judges can use their expertise in immigration law to the advantage of all parties by hearing* Padilla *claims in a federal forum. Sharing the burden of redressing* Padilla *violations between the federal and state forums will ultimately improve the implementation of crimmigration counsel and remedy the current ineffective assistance of* Padilla*.*

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INTRODUCTION

In a 2010 landmark decision, the Supreme Court held that the Sixth Amendment requirement of providing effective assistance of counsel to criminal defendants includes the right to advice on the immigration consequences of a guilty plea.[1] According to *Padilla v. Kentucky*, a guilty plea

1 Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

is constitutionally defective if a noncitizen is not informed that the underlying conviction will make him or her removable from the United States under federal immigration law.[2]

Despite the promise of *Padilla*, for many noncitizens with legitimate claims for ineffective assistance of counsel, relief has remained elusive. Especially for noncitizens who accept pleas with short or noncustodial sentences, the impact of *Padilla* is often a right without a remedy.[3]

The mismatch between the right announced in *Padilla* and the remedy has several causes. First, noncitizens who are not adequately informed of the immigration consequences of their guilty pleas often only become aware of this constitutional defect when they are subject to removal proceedings in federal immigration court. By this point, not only is there no right to court-appointed counsel in immigration proceedings, but also many of the state remedies for ineffective assistance of counsel claims are closed due to timeliness and custodial limitations. Second, there is no mechanism to challenge the criminal conviction in immigration courts. A noncitizen is forced to navigate both federal immigration proceedings and state criminal procedures simultaneously, often without counsel. Finally, some noncitizens never have access to a form of relief under *Padilla* to begin with. For example, a noncitizen whose plea includes participation in a diversion program that is not a conviction for state law purposes cannot vacate the conviction in state courts, but he or she can still be removed if the conviction meets the definition of conviction under the Immigration and Nationality Act (INA).[4]

One potential solution to the ineffective assistance of *Padilla* is for states to implement a remedy. States have the ability to create tailored state criminal procedural rules to provide noncitizens with a remedy for *Padilla* violations.[5]

However, given the lack of momentum to pass such laws and disagreement about the proper forum to provide *Padilla* relief, a federal remedy is the preferable option. The right of a noncitizen with an unconstitutional criminal conviction to remain in the United States should not depend on which state entered the conviction. A uniform federal remedy is needed to address the ineffective assistance of *Padilla*.

Federal courts should interpret the definition of "conviction" under the INA to include only convictions supported by adequate procedural safeguards. If a conviction is the result of procedures so deficient that Congress would not have intended to make the noncitizen removable, the conviction cannot serve as the basis for removal. Convictions entered in

2 *Id.*

3 *See infra* Section IV.C.

4 *See infra* Section IV.C.

5 *See infra* Section V.C.

violation of *Padilla*—where noncitizens were not provided effective assistance of counsel as required by the Sixth Amendment—fall squarely within this category of convictions. Such a reading would require the government either to prove that the minimal constitutional protections were afforded to the noncitizen in the convicting jurisdiction before relying on the conviction in the immigration courts, or to allow the noncitizen to litigate a *Padilla* claim in the federal forum.[6] The federal immigration courts should share the burden of implementing *Padilla* by ensuring that only constitutionally valid convictions lead to immigration consequences. In turn, states that are concerned with having state criminal convictions questioned in a federal forum will be incentivized to effectuate the guarantees of *Padilla* and provide a remedy for when the right is not met.

Of course, Congress could intervene at any point to amend the definition of "conviction" under the INA and clarify how convictions in violation of *Padilla* should be treated. Christopher Lasch proposes a rule to address "the disparity between *Padilla*'s decision rule and its constitutional operative proposition."[7] Whereas Lasch provides a conceptual discussion of the constitutional right to crimmigration counsel announced in *Padilla* and proposes a rule to uphold these values, this Comment discusses *Padilla* in practice, outlining the meager current landscape of *Padilla* remedies and suggesting a federal solution based on statutory interpretation. Building on Lasch's insights about the advantages of providing *Padilla* relief in a federal forum, I will suggest how and why the federal courts should adopt the suggested interpretation of "conviction" under the INA in the absence of congressional intervention to implement *Padilla*.

Finally, a note about language and terminology: the INA refers to noncitizens as "aliens," which for many elicits the notion of "illegal aliens." Many immigrant communities understandably find references to the undocumented population as "illegal aliens" offensive. Additionally, use of the term "alien" under the INA can cause confusion because the statutory term includes all noncitizens and not just those who entered illegally: legal immigrants, nonimmigrant visitors on tourist visas, refugees, legal permanent residents (LPR), etc. To avoid offense or confusion, I will use the term

6 *See infra* Section VII.B.

7 Christopher N. Lasch, *"Crimmigration" and the Right to Counsel at the Border Between Civil and Criminal Proceedings*, 99 IOWA L. REV. 2131, 2156 (2014). Lasch proposes a rule, presumably to be adopted by Congress as an amendment to the INA, that would place the burden of proving the validity of criminal convictions resulting from guilty pleas on the government. *Id.* at 1256-57. The rule would require the government to prove that the subject of removal proceedings was represented by counsel during the criminal proceedings, and either that the noncitizen was able to have a *Padilla* claim heard on the merits in state courts, or, if unable to present a *Padilla* claim in state courts, to provide counsel for the noncitizen to litigate a *Padilla* claim in immigration court. *Id.*

"noncitizen" in place of alien. References to noncitizens are broadly construed to include legal permanent residents, visa holders, entrants without inspection, those who have overstayed nonimmigrant visas, asylum seekers, and refugees. When relevant, I will refer to a subset of noncitizens by a more specific term, such as "nonimmigrant visa holder" or "legal permanent resident."

I. Relationship Between Criminal Convictions and Immigration Proceedings

Federal immigration enforcement has a complex, interwoven relationship with criminal law, much of which is legislated and enforced on the state level. "Crimmigration" refers to the convergence of criminal law and procedure with immigration law, which since its inception has been considered a branch of civil law.[8] Removal of noncitizens for criminal offenses has long been a part of the federal immigration scheme.[9] In recent years, removals of noncitizens with criminal records have come to dominate immigration court dockets.[10]

Removal proceedings are fully adversarial civil hearings.[11] An immigration judge presides over the hearing and a government official acts as the adversary to the noncitizen, who has the right to be represented by counsel at his own expense but no right to court-appointed counsel.[12] The noncitizen has the right to present evidence, give testimony, call witnesses, and cross examine government witnesses, although the noncitizen may not have the right to access secret government evidence for national security reasons.[13] The rules of evidence do not apply, meaning hearsay and unauthenticated documents are generally admissible.[14]

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8 *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 376 (2006) (introducing the phrase "crimmigration" to describe the intersection of criminal and immigration law); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding that deportation and removal are not criminal punishments).

9 *See* Kevin R. Johnson et al., Understanding Immigration Law 310 (2009) (describing the first comprehensive immigration law in 1882 that excluded "undesirable categories of noncitizens, including convicts").

10 *See, e.g.*, Cesar Cuauhtemoc Garcia Hernandez, Crimmigration Law 8 (2015) (reporting that in 2013, ICE removed 216,810 people with criminal convictions on their records); Lasch, *supra* note 7, at 2132 (noting "the explosion, particularly since 1996, in the use of criminal convictions as a ground for deportation").

11 *See* Johnson et al., *supra* note 9, at 334-44 (providing a detailed overview of the removal process, including the substantive and procedural aspects of a removal hearing); *see also* MLive Media Group, *What an Immigration Court Generally Looks Like*, YouTube (Dec. 11, 2017), https://www.youtube.com/watch?v=GIVfJpdbXPo [https://perma.cc/9EM6-ZPPG] (providing a visual of the typical immigration court).

12 Johnson et al, *supra* note 9, at 338.

13 *Id.* at 341-43.

14 *Id.* at 342.

Proceedings begin when the noncitizen is served with the charging document, known as the Notice to Appear (NTA).[15] The NTA may be served by mail or in person.[16] In the case of removals for criminal violations—the general topic of this Comment—the NTA may also be accompanied by an arrest warrant and the noncitizen may be detained—or in the case of certain criminal convictions *must* be detained—for the duration of the removal proceedings.[17]

While the INA has been compared to the federal tax code in its complexity,[18] I will attempt to provide a brief explanation of removals for criminal convictions under federal immigration law. For the purposes of this Comment, the discussion will be limited to offenses committed by noncitizens in the United States that render the noncitizen removable.

A. *Comparing Inadmissibility and Deportability*

While removal is colloquially referred to as "deportation," noncitizens may actually be removed from the United States for criminal convictions under two distinct categories of the INA: 1) offenses that render the person inadmissible; and 2) offenses that render the person deportable.[19] Inadmissibility grounds apply to those who are attempting to enter or are present in the United States but have not made a lawful entry.[20] For example, both noncitizens arriving at the border and noncitizens who entered without inspection and are residing in the United States without legal status may be ruled inadmissible and removed. Noncitizens might enter the United States without inspection and live in the country for decades, but they will be subjected to the same grounds for removal as if they were just arriving at a border inspection point.[21] Deportation, on the other hand, refers to the removal from the United States of noncitizens who were lawfully admitted, including those who overstay a lawful admission pursuant to a nonimmigrant

15 *Id.* at 334.

16 *Id.*

17 *See id.* at 335-37 (describing the expansion of immigration detention as an enforcement tool, and the serious consequences of detention such as separation from friends and family, inability to work, exposure to harsh detention conditions, and the difficulty of retaining and contacting an attorney).

18 *See* ELIZABETH HULL, WITHOUT JUSTICE FOR ALL 107 (1985) ("The immigration laws are second only to the Internal Revenue Code in complexity.").

19 *See* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON & JULIET P. STUMPF, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 555-56 (8th ed. 2016) (distinguishing between deportability grounds and inadmissibility grounds as justifications for removal).

20 *Id.* at 556.

21 This is a vital distinction, because the grounds for inadmissibility are generally broader and thus easier to trigger. *Id.* at 556-57. Additionally, even long-term legal residents of the United States may be deemed inadmissible if they leave the United States and attempt to reenter under certain conditions, such as returning after more than six months abroad, attempting to reenter without inspection, or reentering after committing certain crimes either in the United States or abroad. *Id.* at 556.

visa.[22] The INA provides for the deportation of noncitizens for a variety of conduct, including the focus of this Comment: criminal convictions.

While inadmissibility and deportability are distinct concepts covered by different sections of the INA, the two are also closely linked. Any noncitizen who was inadmissible at the time of entry—for example a person who is erroneously admitted on a tourist or other nonimmigrant visa despite having disqualifying criminal convictions—is deportable under INA § 1227(a)(1)(A).[23] Additionally, both the inadmissibility and deportability sections of the INA have portions dedicated to removal for criminal convictions.[24] Because removals under both inadmissibility and deportability grounds for criminal convictions turn on shared definitions of criminal behavior, Sections I.B–D will focus on how three key categories of criminal behavior are defined: aggravated felonies, crimes involving moral turpitude, and controlled substance violations.[25] Where relevant, each subsection will identify how the inadmissibility and deportability grounds differ in their treatment of the relevant category of offense.

B. *Aggravated Felonies*

Noncitizens convicted of aggravated felonies are deportable under INA § 1227(a)(2)(A)(iii).[26] Aggravated felony has a specific statutory definition in the INA and does not depend on state law classification as a felony.[27] The INA includes twenty-two crimes in the statutory definition of aggravated felony, including, but not limited to: murder, rape, sexual abuse of minor, firearms trafficking, "crime of violence. . .for which the term of imprisonment [is] at least one year," theft offense punishable over one year, alien smuggling,

22 *See id.* ("Deportability grounds apply only after a noncitizen has been admitted.").

23 Immigration and Nationality Act, 8 U.S.C. § 1227 (2012).

24 *Id.* §§ 1182(a)(2), 1227(a)(2).

25 Discussing only three categories of criminal offenses that render a noncitizen removable is inevitably an oversimplification. Congress has also criminalized other behaviors for the purposes of immigration control, such as immigration document fraud (8 U.S.C. § 1227(a)(3)(C)) and entering the United States without inspection (8 U.S.C. § 1182(a)(6)(A)), both of which can render a noncitizen removable. However, the focus of this Comment is removal for the specific criminal behaviors described in 8 U.S.C. § 1182(a)(2) and § 1227(a)(2).

26 The inadmissibility portion of the INA does not mention aggravated felonies by name, but it does preclude anyone with a conviction for an aggravated felony from accessing a discretionary waiver of criminal inadmissibility grounds that might otherwise allow a noncitizen to enter or remain despite criminal convictions. 8 U.S.C. § 1182(h). Additionally, while the offenses are not required to meet the definition of an aggravated felony, a noncitizen who commits two or more offenses, in a single or multiple trials, with an aggregate penalty of five years or more, is inadmissible. *Id.* § 1182(a)(2)(B).

27 *See* Guerrero-Perez v. INS, 242 F.3d 727, 737 (7th Cir. 2001) (holding that the term "aggravated felony" can include crimes classified as misdemeanors under state law).

and fraud or deceit over $10,000.[28] On the one hand, it is not surprising to hear that serious crimes such as murder and sexual assault are removable offenses. However, crimes of violence and theft offenses punishable over one year encompass a wide range of offenses, some of which may be categorized as misdemeanors under state law.[29] The definition of aggravated felony applies retroactively and has no temporal limit, meaning a years-old crime that was not defined as an aggravated felony under the INA at the time of commission or sentencing can still render a noncitizen deportable today or in the future if the definition of aggravated felony continues to expand.[30]

C. *Crimes Involving Moral Turpitude*

A second broad category of removable offenses is for crimes involving moral turpitude (CIMT). A noncitizen is inadmissible for committing a CIMT, with two exceptions if the person committed only one CIMT: 1) persons under eighteen at the time of commission if five years have passed since release; and 2) if the maximum penalty was under one year and the person was not sentenced to more than six months, regardless of time actually served.[31] Noncitizens are deportable if convicted of a CIMT within five years of admission, but only if a sentence over one year *could* be imposed.[32] Additionally, convictions for multiple CIMTs, not arising out of the same incident, render a noncitizen deportable at any time after admission.[33]

Crime involving moral turpitude is a term of art, defined by case law.[34] Black's Law Dictionary offers a vague, unenlightening definition: "[A]n act of baseness, vileness, or depravity in the private and social duties which man owes to his fellow man, or to society."[35] One way to determine if a crime

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28 *See* 8 U.S.C. § 1101(a)(43) (2012) (defining "aggravated felony").

29 *See* GARCIA HERNANDEZ, *supra* note 10, at 42 (noting that the definition of aggravated felony is "sufficiently broad to include many misdemeanors," including "crimes that would not strike many people as especially aggravated—small-dollar theft offenses, for example.").

30 *See* Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) (explaining that, because immigration law is civil and not criminal, the ex post facto clause banning retroactive penalization of conduct does not apply); Morris v. Holder, 676 F.3d 309, 312 (2d Cir. 2012) (striking down ex post facto challenge to expanding the definition of "aggravated felony"). The lack of ex post facto protection in some cases may render effective crimmigration counsel illusory. Criminal defense counsel can clearly explain the current immigration consequences of a plea deal but cannot predict future changes to the definition of aggravated felonies or the addition of more crimes as removable offenses to the INA. While not addressed in this Comment, the injustice of this scheme is a topic deserving of further treatment.

31 8 U.S.C. §§ 1182(a)(2)(A)(i)–(ii) (2012).

32 *Id.* §§ 1227 (a)(2)(A)(i)(I)–(II).

33 *Id.* § 1227 (a)(2)(A)(ii).

34 *See* JOHNSON ET AL., *supra* note 9, at 317 (explaining that moral turpitude has never been defined by the legislature for immigration purposes).

35 *Moral Turpitude*, BLACK'S LAW DICTIONARY (6th ed. 1990).

"involved moral turpitude" is to compare the crime to others the court "[has] previously deemed morally turpitudinous."[36] Generally, serious crimes against the person (e.g., murder, rape, aggravated assault); serious property crimes (e.g., arson, burglary, embezzlement); and crimes with an element of fraud have been deemed CIMTs.[37]

D. *Controlled Substance Offenses*

The INA is particularly unforgiving when it comes to controlled substance offenses.[38] A noncitizen is inadmissible after being convicted of or admitting to the commission of any controlled substance violation.[39] A noncitizen is likewise deportable after a conviction for a controlled substance violation, with the lone exception of a single offense for possession of thirty grams or less of marijuana for personal use.[40] Neither section carries a sentence limit or temporal restriction on removal. This means that a noncitizen convicted of a single possession offense is removable for the rest of his or her life, or until the INA is amended, regardless of the sentence imposed.

E. *Denials of Relief from Removal*

Beyond rendering a noncitizen removable, a criminal conviction can also result in the denial of certain forms of relief from removal that might otherwise allow noncitizens to remain in the United States and apply for legal permanent residency or to depart voluntarily with reduced penalties.[41] Under § 1229c of the INA, the government or an immigration judge can allow a noncitizen in removal proceedings to depart voluntarily before proceedings begin or at the conclusion of proceedings without a removal order.[42] Voluntary departure is beneficial to noncitizens because it allows them to avoid long periods of detention, to select the country of return, and most importantly to avoid bars on reentering the United States applied to noncitizens who depart

36 Nunez v. Holder, 594 F.3d 1124, 1131 (9th Cir. 2010).

37 *See* ALEINIKOFF ET AL., *supra* note 19, at 680 (exploring crimes that fall within the "maddeningly vague" category of moral turpitude).

38 Controlled substances are defined by federal law. The Controlled Substance Act (CSA) classifies substances in "schedules" and includes most drugs that are also regulated under state law: marijuana, heroin, methamphetamines, cocaine, anabolic steroids, and some types of opioids. *See* GARCIA HERNANDEZ, *supra* note 10, at 53 (outlining which drugs correspond to each schedule). States are free, however, to regulate and criminalize drugs not listed in the CSA, which can create some discrepancy between controlled substance offenses under state law and those that constitute deportable offenses under the INA. *Id.* at 53-54.

39 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2012).

40 *Id.* § 1227(a)(2)(B).

41 GARCIA HERNANDEZ, *supra* note 10, at 42.

42 *See* 8 U.S.C. § 1229c (2012) (outlining scenarios in which voluntary departure is permitted).

under removal orders.[43] However, voluntary departure is not available to any immigrant convicted of an aggravated felony.[44]

The most generous form of relief from removal is cancellation of removal.[45] Cancellation of removal is a discretionary option whereby a noncitizen subject to removal who meets certain criteria—including lengthy residence requirements, good moral character, and extreme hardship to a citizen or Legal Permanent Resident (LPR) immediate relative in the United States—is allowed to remain in the United States and is conferred Legal Permanent Residency rather than removed.[46] Cancellation of removal is not available to LPRs with aggravated felony convictions.[47] A non-LPR does not qualify for cancellation of removal if he or she is inadmissible or deportable for any of the criminal grounds discussed above: aggravated felonies, CIMTs, or controlled substance violations, as well as falsification of travel documents.[48]

The availability of relief from removal can shift incentives at the plea-bargaining stage. For example, effective crimmigration counsel could seek a plea to a lesser offense that does not qualify as an aggravated felony if the noncitizen might qualify for cancellation of removal. Even if the guilty plea might still make the noncitizen deportable—for example, a controlled substance violation—effective crimmigration counsel might negotiate a plea to an offense that is not also an aggravated felony so that the client remains eligible for relief from removal.

F. *Defining Convictions for Immigration Purposes*

Like many concepts borrowed from criminal law and procedure, conviction also has its own definition and meaning for purposes of the INA and immigration law. For immigration purposes, a conviction is defined as follows:

> [A] formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
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> 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
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> ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.[49]

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43 *See* JOHNSON ET AL., *supra* note 9, at 330-31 (discussing the potential benefits of voluntary departure).

44 8 U.S.C. § 1229c(a)–(b) (2012).

45 GARCIA HERNANDEZ, *supra* note 10, at 67.

46 8 U.S.C. § 1229b (2012).

47 *Id.* § 1229b(a)(3).

48 *Id.* § 1229b(b)(1)(C).

49 *Id.* § 1101(a)(48)(A).

Compared to many state definitions, this is extremely broad.[50] Deferred adjudications, suspended sentences, and some diversion programs that would be considered favorable terms in a plea bargain might still render a noncitizen removable.[51] In the context of providing effective crimmigration counsel, the differences between what constitutes a conviction under state law and immigration law are enormously important.[52] For example, advising a noncitizen that a particular guilty plea is favorable because he will not be convicted under state law, without clarifying that the disposition is still a conviction for immigration purposes, can easily lead a noncitizen to unwittingly become deportable.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

The focus of this Comment is on remedying claims of ineffective assistance of counsel by noncitizens who are inadequately counseled about the immigration consequences of plea bargains. The Sixth Amendment requires that a criminal defendant be afforded competent or effective assistance of counsel.[53] *Strickland v. Washington* provides a two-pronged test to determine whether an attorney's representation meets the Sixth Amendment standard.[54] The first part, known as the "performance prong," provides that counsel's representation must not "f[a]ll below an objective standard of reasonableness."[55] Objective reasonableness can be judged against prevailing professional norms.[56] The second prong, known as the "prejudice prong," requires a reasonable probability that the deficient performance affected the result.[57] The prejudice prong is a causation test of sorts, requiring that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[58]

Applying the *Strickland* test, effective assistance of counsel includes the right to an attorney's adequate representation during plea bargaining.[59] In

50 *See* GARCIA HERNANDEZ, *supra* note 10, at 197 (explaining that "discrepancies in how states define a conviction and what constitutes a conviction for immigration law purposes" can make even a favorable state criminal case outcome a removable offense).

51 *Id.*

52 *See infra* subsection IV.B.1.

53 *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) ("First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.").

54 *Id.* at 687-92.

55 *Id.* at 688.

56 *Id.* at 688-90.

57 *Id.* at 694.

58 *Id.*

59 *See* Hill v. Lockhart, 474 U.S. 52, 58 (1985) (extending the *Strickland* test from capital sentencing proceedings to the plea process).

cases challenging counsel's performance during plea-bargaining, the performance prong is essentially the same: counsel must act in an objectively reasonable manner, judged against prevailing professional norms.[60] To measure whether the defendant was prejudiced, the defendant must prove that but for counsel's errors, he or she would not have pled guilty and would have instead insisted on going to trial.[61] Whether or not the defendant would have prevailed at trial or gotten a more favorable outcome, the result of the proceeding was affected because the defendant would have proceeded to trial but for the constitutionally inadequate performance of the attorney.

III. *PADILLA*: INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ADVISE ON IMMIGRATION CONSEQUENCES

Padilla is a landmark case applying the ineffective assistance of counsel jurisprudence to noncitizens in criminal proceedings and holding that the failure to advise a noncitizen on the immigration consequences of a guilty plea is constitutionally deficient assistance of counsel.[62]

Before *Padilla* was decided in 2010, a few states had already determined that failing to counsel a noncitizen on the immigration consequences of a guilty plea was ineffective assistance of counsel.[63] Additionally, thirty states had mandated some version of warning or inquiry regarding deportation consequences, most often a boilerplate question such as, "Do you understand that your plea of guilty may affect your residency or your status with the immigration authorities?"[64] However, no particular advice tailored to the specific plea or the immigration status of the defendant was required.[65] Immigration consequences—despite the harsh and often permanent sanction of deportation—were considered "collateral" rather than "direct," to which the Sixth Amendment did not apply.[66] Noncitizens often unwittingly became removable based on a lack of counsel regarding immigration consequences or affirmative misadvice about such consequences.[67]

Padilla altered this landscape by recognizing that defense counsel has a constitutional duty to act as crimmigration counsel and advise noncitizen

60 *Id.* at 58-59.

61 *Id.* at 59.

62 Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

63 *See, e.g.*, State v. Paredez, 101 P.3d 799, 805 (N.M. 2004); People v. Pozo, 746 P.2d 523, 527-29 (Colo. 1987).

64 Gray Proctor & Nancy J. King, *Post* Padilla: Padilla*'s Puzzles for Review in State and Federal Courts*, 23 FED. SENT'G REP. 239, 244 (2011); *see also id.* (describing common practices in federal and state courts to warn noncitizens of immigration consequences before *Padilla*).

65 *Id.*

66 GARCIA HERNANDEZ, *supra* note 10, at 115.

67 *Id.* at 115-16.

clients on the immigration consequences of guilty pleas.[68] Jose Padilla was an Army veteran and had been a legal permanent resident for forty years when he was convicted of transporting marijuana in the State of Kentucky.[69] His attorney falsely told him that he should not be concerned about deportation since he had been in the United States for so long.[70] Upon this advice, Mr. Padilla accepted a guilty plea to drug charges that made him immediately deportable.[71] The Supreme Court of Kentucky held that the effective assistance of counsel does not include the right to advice about deportation consequences, because immigration consequences are merely collateral consequences.[72]

The Supreme Court reversed, holding that the Sixth Amendment right to effective assistance of counsel includes advice regarding deportation, to which the *Strickland* standard applies.[73] Deportation, while not a criminal penalty, is "uniquely difficult to classify as either a direct or a collateral consequence," given the harsh nature of the penalty.[74] The Court explained that as immigration law had expanded, more crimes had become deportable offenses and the body of law had become increasingly complex.[75] For some noncitizens, the right to remain in the United States might be of more concern than the criminal penalty or jail time, which critically affects the decision of whether to accept a plea or proceed to trial.[76] Therefore, deportation should not be "categorically removed" from Sixth Amendment coverage.[77]

In *Padilla*, the Supreme Court evaluated the performance prong of the *Strickland* test for effective assistance of counsel, concluding that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."[78] Mr. Padilla's case was clear: counsel could have easily discerned from the INA's plain text that he would be deported, but instead provided affirmative misadvice, namely that Mr. Padilla should not be concerned about deportation.[79] The Court explained that when the consequence is clear, "the duty to give correct advice is equally clear."[80] However, when the consequences of the plea are "unclear

68 Padilla v. Kentucky, 559 U.S. 356, 360 (2010).

69 *Id.* at 359.

70 *Id.*

71 *Id.*

72 *Id.* at 359-60.

73 *Id.* at 366.

74 *Id.*

75 *Id.* at 361-64, 369.

76 *Id.* at 368.

77 *Id.* at 366.

78 *See id.* at 367 (citing various practice guidelines for criminal defense lawyers, including ABA, National Legal Aid and Defender Association, and Department of Justice guidelines).

79 *Id.* at 368.

80 *Id.* at 369.

or uncertain," the duty of counsel is "more limited"—potentially just advising the client that criminal charges *may* carry a risk of deportation[81] and suggesting the client speak to an immigration attorney.

One might criticize *Padilla* for not going far enough, given the caveat limiting the duty of attorneys in unclear or uncertain circumstances, but the requirement of affirmative advice is quite a significant step.[82] While the duty to advise may be weaker in complex cases, the attorney always has an affirmative duty to provide counsel, beyond avoiding false or misleading advice.[83]

The Supreme Court remanded Mr. Padilla's case for the state court to determine whether he was prejudiced by the constitutionally deficient performance of his attorney, and the state court ultimately vacated the conviction for prejudice.[84]

IV. *PADILLA* IN PRACTICE: A RIGHT WITHOUT A REMEDY

Padilla is a momentous decision with the power to greatly improve the representation of noncitizens in criminal proceedings, for example, by promoting immigration-safe plea deals. While there are successes to celebrate in the post-*Padilla* landscape,[85] there is also a mismatch between the constitutional right and the available remedy. Noncitizens accept plea bargains without effective assistance of counsel, in violation of *Padilla*, and still face removal based on unconstitutional criminal convictions.[86] This can occur even when the noncitizen had no opportunity to litigate an effective

81 *Id*.

82 *See* GARCIA HERNANDEZ, *supra* note 10, at 120 (noting the importance of the fact that "[u]nder no circumstance is silence an option" for a defense attorney who is advising a noncitizen client).

83 *See Padilla*, 559 U.S. at 371 (noting that it "is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation . . . .").

84 *See* Padilla v. Commonwealth, 381 S.W.3d 322, 330 (Ky. Ct. App. 2012) (deciding that Jose Padilla was prejudiced by the lack of crimmigration counsel). Courts have repeatedly addressed what constitutes prejudice under *Padilla*, with the Supreme Court taking up the question in 2017. *See generally* Lee v. United States, 137 S. Ct. 1958 (2017). The Court applied the prejudice test from *Hill* in *Lee*, concluding that despite overwhelming evidence of his guilt, Lee might have rationally decided to proceed to trial given his long tenure in the United States, need to care for his elderly parents, and repeated inquiries to his attorney about deportation. *Id.* at 1966-69. The Court explained that determining prejudice is a fact-specific inquiry that turns on the actual decisionmaking by the defendant, of which the likelihood of conviction is only one factor. *Id*. at 1966-67. Thus, a *Padilla* petitioner must prove that there is a reasonable probability he or she would have rejected the plea and proceeded to trial, but this decision need not turn on the likelihood of success at trial.

85 *See* Angie Junck, Nadine K. Wettstein & Wendy S. Wayne, *The Mandate of* Padilla*: How Public Defenders Can and Must Provide Effective Assistance of Counsel to Noncitizen Clients*, CRIM. JUST. 24, 26-27 (2016) (describing best practices in providing crimmigration counsel that meets the mandate of *Padilla*, such as supplying in-house crimmigration or *Padilla* units, hiring immigration specialists, and contracting with private immigration attorneys).

86 *See* Proctor & King, *supra* note 64, at 239 (addressing the procedural restrictions to raising a *Padilla* claim).

assistance of counsel claim before his or her removal.[87] This Part will identify and explain some of the barriers to raising legitimate *Padilla* claims, with a primary focus on convictions entered by state criminal courts.

A. *Lack of Right to Counsel for Noncitizens in Removal Proceedings*

One overarching problem is that noncitizens who are not counseled or are misadvised during plea bargaining often only discover the immigration consequences of their convictions when they are subject to removal proceedings.[88] The Notice to Appear listing the criminal conviction as the basis for removal is the first warning that the guilty plea rendered the person removable. Once an individual is in removal proceedings, the Sixth Amendment right to counsel no longer applies because removal is a civil proceeding.[89] Noncitizens may seek representation at their own expense or proceed unrepresented. A noncitizen who believes the underlying conviction was constitutionally invalid must seek to vacate the plea via a procedural mechanism in the jurisdiction in which it was entered.[90] For the noncitizen, this might mean searching for the correct procedural mechanism to raise a *Padilla* claim in state court, while also representing him or herself *pro se* in a removal proceeding. Even with an attorney, the landscape of remedies for *Padilla* violations in state courts is utterly confused and can ultimately leave noncitizens without a remedy.[91] Without the assistance of counsel,

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87 *See infra* Section IV.C.

88 *See* Proctor & King, *supra* note 64, at 241 ("[O]ften . . . counsel's error became apparent only after immigration proceedings commenced.").

89 *See, e.g.*, 8 U.S.C. § 1229(b)(4)(A) (2012) (establishing that there is no right to counsel at the government's expense in removal proceedings); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding that "the order of deportation is not a punishment for crime" and therefore aliens ordered to be deported are not "deprived of life, liberty, or property, without due process of law").

90 *See* Dorothy A. Harbeck, M. Michelle Park & Yoonji Kim, *The Impact of* Padilla v. Kentucky *on the Immigration Courts: Does the Potential for Vacating a Criminal Plea Effect Removal/Deportation Proceedings?*, 1 ST. JOHN'S J. OF INT'L. & COMP. L. 47, 60 (2016) (explaining that "it is not within the Immigration Court's authority to determine whether alien's counsel provided ineffective assistance in a criminal proceeding").

91 Further undermining the available remedies for a *Padilla* violation, the Supreme Court decided in 2013 that *Padilla* was a "new rule" that would not apply retroactively to guilty pleas entered before *Padilla* came down in 2010. Chaidez v. United States, 568 U.S. 342, 344 (2013). The Supreme Court decided that *Padilla* "altered the law of most jurisdictions" and thus, under the *Teague* standard for determining retroactivity, the Sixth Amendment right to advice on the immigration consequences of a guilty plea was a nonretroactive new rule, and not a "garden variety" application of the right to effective assistance of counsel as defined in *Strickland*. *Id.* at 348-52. Despite the holding in *Chaidez*, states can still apply *Padilla* retroactively on an individual basis. *See* Kate Lebeaux, Note, Padilla *Retroactivity on State Law Grounds*, 94 B.U. L. REV. 1651, 1653 (2014) ("Despite the Supreme Court's holding, the question of *Padilla*'s retroactivity is not definitively settled, as states are able to provide broader remedies for constitutional violations than federal law requires."). State courts can determine: 1) that the state constitution provides broader relief than

noncitizens may either never realize that their guilty pleas were constitutionally invalid or struggle to simultaneously navigate the federal immigration court system and state criminal justice system.

B. *Challenges to Using Habeas Corpus and State Post-Conviction Statutes as Vehicles for* Padilla *Relief*

Logically speaking, most people who wish to challenge a criminal conviction based on ineffective assistance of counsel outside of the *immigration* context do so very soon after the judgment is entered and while they are still serving their sentence. Often the purpose of post-conviction relief, including vacating a guilty plea, is to end unjustified custody or supervision. After the sentence has been served and probation has ended, there are fewer incentives to challenge a conviction outside the immigration context. While an older criminal conviction can still have collateral consequences—in a search for employment or housing, for example—many people use expungement procedures or the pardon process for relief.[92]

Noncitizens who plead guilty to a crime are in a unique position compared to citizens. First, the constitutional violation occurs in criminal court, but the penalty complained of occurs in federal immigration court. *Padilla* petitioners are not seeking relief from the criminal penalty itself, but rather are seeking relief from a consequence that may be realized years later, over which the state criminal courts have no jurisdiction. Second, the consequences of removal and potential bar on reentry are so harsh that many noncitizens will wish to challenge a guilty plea long after the sentence has been served, the person has been released, and supervision has ended. Third, significant time may elapse before the noncitizen even discovers the plea made him or her removable, often once a Notice to Appear in immigration court is served. However, at this point the mechanisms available to challenge convictions for ineffective assistance of counsel are extremely limited.

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the reading of *Padilla* in *Chaidez*; 2) the state follows a different retroactivity analysis than *Teague*; or 3) the state applies *Teague* but under a different interpretation than the Supreme Court in *Chaidez*. *See* GARCIA HERNANDEZ, *supra* note 10, at 140. For example, *Padilla* is retroactive in New Mexico until 1990, which is when the state began requiring criminal defense attorneys to advise clients on immigration consequences of guilty pleas. *Id.* at 141. *Padilla* has also been held to have retroactive effect in Massachusetts, although New York, Maryland, and South Dakota have reached the opposite conclusion and refused to apply *Padilla* retroactively. *See* Lebeaux, *supra* note 91, at 1654.

92 *See* ALEINIKOFF ET AL., *supra* note 19, at 684 (explaining that the Board of Immigration Appeals has held that "expungement pursuant to a state rehabilitative statute has no impact on a conviction's immigration consequences," and that "[t]he courts that have addressed the issue have generally agreed").

1. Post-Conviction Relief Statutes

Probably the most common vehicle to raise an ineffective assistance of counsel claim is through state post-conviction relief (PCR) statutes. In many cases, post conviction is the first time that ineffective assistance of counsel can be raised, rather than on direct appeal.[93] This is either because the necessary information is not in the trial record or the client is not made aware of the defect in representation.[94] Noncitizens seeking to raise ineffective assistance of counsel claims via PCR statutes may face several hurdles, depending on the state's particular requirements. For example, the Post-Conviction Relief Act (PCRA) in Pennsylvania has a strict custodial requirement: those who are no longer incarcerated and have finished court ordered supervision can no longer access post-conviction relief.[95] Post-conviction relief statutes also often have strict timeliness and due diligence requirements.[96] Additionally, there is no right to appointed counsel for post-conviction relief under federal law, and many states choose not to provide appointed counsel.[97]

Finally, inconsistencies between the definition of conviction under state law and the INA can cause a noncitizen to become removable without any possibility of raising a *Padilla* claim under state post-conviction relief statutes.[98] Two examples illustrate the relevance of discrepancies in the definition of conviction when it comes to ineffective assistance of counsel claims under *Padilla*. In Colorado, a "deferred judgement" is not a conviction for state law purposes even though the defendant is required to plead guilty and submit to probation.[99] However, such a disposition does meet the INA

93 Unless the client has identified the incompetence of counsel and sought a new attorney, it is unlikely that the client would know to file a direct appeal asserting ineffective assistance of counsel. *See* Proctor & King, *supra* note 64, at 240 (explaining the reasons that *Padilla* claims are usually unreviewable on direct appeal and first heard in post-conviction proceedings).

94 *Id.*

95 *See* 42 PA. STAT. AND CONS. STAT. ANN. §§ 9541–9546 (West 1988) (explaining that the PCRA provides relief only to those who are currently imprisoned, or are on probation or parole for the conviction they wish to challenge).

96 *See, e.g.*, *id.* § 9545 (explaining that the statute of limitation under the PCRA in Pennsylvania is within one year of judgement becoming final on appeal); Proctor & King, *supra* note 64, at 241 (describing how, in order to access collateral review of a final conviction under federal law, "[a] federal petitioner has one year to file his claims, beginning on the date the judgement becomes final"). Under Arkansas state law, a petitioner has only ninety days from state trial court judgment or sixty days from state appellate court decision, and the time requirement cannot be waived. ARK. CODE ANN. § 37.2(c) (2015); *see also* State v. Tejeda-Acosta, 427 S.W. 3d 673, 678-79 (Ark. 2013) (applying Rule 37 time constraints). New Jersey is more generous, but still requires a PCR petition to be filed within five years of the conviction. N.J. STAT. ANN. §§ 3:22-12(a)(1), (b) (West 2011).

97 *See* Commonwealth v. Holmes, 79 A.3d 562, 581 (Pa. 2013) (holding that there is no federal constitutional right to counsel in state post-conviction proceedings and thus petitioner had no right to counsel under the PCRA).

98 *See supra* Section I.F.

99 GARCIA HERNANDEZ, *supra* note 10, at 144.

definition of "conviction" for immigration purposes because the plea is entered and the defendant submits to court-ordered supervision.[100] This is problematic later if the noncitizen seeks *Padilla* relief to vacate the guilty plea based on lack of counsel about immigration consequences.[101] Since there has been no state law conviction, the defendant cannot access Colorado post-conviction relief to vacate the plea, but remains removable based on the conviction.[102]

In Tennessee, a defendant who completes a diversion program has the conviction immediately expunged, but expungement does not affect the conviction for immigration purposes.[103] There is no access to post-conviction proceedings since there is no conviction under the state law definition after the diversion program is completed.[104] However, the guilty or *nolo contendre* plea, supervision, and charging of court fees to the defendant are considered a "conviction" under immigration law.[105] An ostensibly favorable disposition—participation in a diversion program and expungement of the charge—can have dire immigration consequences for a noncitizen defendant. The potential for *Padilla* violations is particularly high in these circumstances. Defense counsel is likely to accept a favorable plea, such as deferred adjudication or diversion, but less likely to be aware of the incongruent definitions of "conviction" for the purposes of state law versus immigration law.

2. Habeas Corpus Relief

Another common vehicle to raise ineffective assistance of counsel claims, habeas corpus, is also subject to strict confines that are problematic for *Padilla* claims. A writ of habeas corpus is a petition for release from unlawful custody to which all persons have a constitutional right.[106] Because habeas relief seeks to attack unlawful restraints on liberty, habeas corpus petitions have strict custodial requirements. The petitioner must either be in physical custody or be subject to restrictions on liberty imposed by the court, such as monitored

100 *Id.*

101 *Id.*

102 *See id.* ("[A] migrant can be removed but cannot challenge removal by arguing that the immigration law conviction resulted from unconstitutionally poor representation.").

103 *See* Rodriguez v. States, 437 S.W. 3d 450, 457 (Tenn. 2014) ("[W]e conclude that a guilty plea expunged following successful completion of judicial diversion is not a conviction within the meaning of the Post-Conviction Act.").

104 *Id.* at 455.

105 GARCIA HERNANDEZ, *supra* note 10, at 144-45.

106 *See, e.g.*, U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it."); 28 U.S.C. § 2241(c) (2012) ("The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody under or by color of the authority of the United States [or] . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States . . .").

supervision.[107] Habeas relief is unavailable to a host of noncitizens with *Padilla* claims: those who served their sentences and have since been released, received a sentence of time served, received a suspended sentence, or completed a diversion program that is still a conviction for immigration purposes. A *potential* sentence of one year or more can trigger removability under some categories of the INA, meaning that many noncitizens who serve only very short sentences and thus have a limited window to file a writ of habeas corpus are still removable.[108]

3. Writs of *Coram Nobis*

A third potential procedural mechanism to raise a claim of ineffective assistance of counsel under *Padilla* is a writ of *coram nobis*.[109] A writ of *coram nobis* is a procedural mechanism to collaterally attack a criminal conviction for a person who is no longer in custody and therefore cannot access habeas relief or state post-conviction remedies with custodial requirements.[110] On the federal level, *coram nobis* relief must be sought in a timely manner, unless the petitioner can demonstrate "a sound reason for failing to seek relief earlier."[111] While a writ of *coram nobis* may be available in situations where state post-conviction relief or petitions for habeas corpus are not, there are still significant limitations on the availability of this writ. Unfortunately, not all states offer relief from state convictions via *coram*

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107 *See, e.g.*, LEGAL ACTION CTR., AM. IMMIGRATION COUNCIL, INTRODUCTION TO HABEAS CORPUS 4 (2008) ("Although § 2241 says that habeas corpus is available only when a person is 'in custody,' courts have interpreted the statute to not require actual physical restraint; rather other restrictions on liberty can satisfy the custody requirement."); Proctor & King, *supra* note 64, at 243 ("Habeas relief, in state or federal court, is available only to a petitioner who is still serving the sentence for the judgment he is attacking.").

108 The REAL ID Act of 2005 further limits access to habeas relief for noncitizens in immigration detention who might wish to challenge their removal order based on ineffective assistance of counsel during the criminal proceedings. *See* LEGAL ACTION CTR., *supra* note 107, at 2 ("The REAL ID Act of 2005 purports to eliminate habeas corpus jurisdiction over final orders of removal, deportation, and exclusion and consolidate such review in the court of appeals." (footnote omitted)). Removal is likely a restriction on liberty, but jurisdiction over removal orders is found solely and exclusively in the courts of appeals. *See* Real ID Act § 106, 8 U.S.C. § 1252(a)(5) (2012) ("Notwithstanding any other provision of law (statutory or nonstatutory), including [habeas, mandamus, and all Writs Act], . . . a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for juridical review of an order of removal entered or issued under any provision of this chapter . . . .").

109 *See* Chaidez v. United States, 568 U.S. 342, 345 n.1 (2013) (assuming without deciding that Ms. Chaidez could proceed on a *coram nobis* petition but rejecting her claim for relief based on the fact that her conviction became final before the *Padilla* decision).

110 *Id.*

111 *See* Proctor & King, *supra* note 64, at 243; *see also id.* ("[A]n unexplained delay will bar relief for a *Padilla* claim that could easily have been raised earlier.").

nobis petitions, and even states that do offer such a mechanism may not consider ineffective assistance of counsel to be a basis for relief.[112]

Pennsylvania, for example, does not allow a writ of *coram nobis* to raise a *Padilla* claim for relief.[113] The lack of availability of a *coram nobis* petition, coupled with the strict temporal and custodial limitations in the PCRA, severely limits noncitizens' options to raise an ineffective assistance of counsel claim in Pennsylvania. A hypothetical noncitizen who does not receive immigration advice about his plea in Pennsylvania state court, and who also receives a short, noncustodial sentence for a controlled substance offense or a crime that *could* carry a penalty up to one year, may have *no* avenue for relief under Pennsylvania state law. Hypothetically, a legal permanent resident sentenced to time served on a marijuana possession offense is left without remedy and could be removed for this conviction. Noncitizens with the least serious convictions—convictions that defense counsel without expertise in immigration law are most likely to misinterpret as nonthreatening for immigration purposes—are in the most danger of removal based on unconstitutional convictions.

V. A STATE-BASED SOLUTION TO THE INEFFECTIVE ASSISTANCE OF *PADILLA*

A. *States Can Create New Rules of Criminal Procedure to Raise* Padilla *Claims*

The challenges to bringing successful *Padilla* claims in state courts are numerous, but states are not without options for overcoming the ineffective assistance of *Padilla*.[114] In states that have foreclosed or imposed strict requirements on *Padilla* relief via PCR statutes, habeas corpus, and writs of *coram nobis*, the option remains for the state to create a new rule of state

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112 *Id.*

113 *See* Commonwealth v. Descardes, 136 A.3d 493, 503 (Pa. 2016) ("[T]he PCRA is the only method of obtaining collateral review."); *see also* People v. Kim, 202 P.3d 436, 453-54 (Cal. 2009) (holding that claims for ineffective assistance of counsel cannot be raised via a writ of *coram nobis*, which is reserved for claims based on newly discovered facts).

114 In addition to the possibility of creating procedural mechanisms to raise *Padilla* claims, states also wield considerable power over removals through substantive criminal law and sentencing. For example, state legislatures decide which crimes carry a punishment over one year. *See* GARCIA HERNANDEZ, *supra* note 10, at 201 (explaining how "California, Illinois, Nevada, and Washington altered their penal codes to cap maximum possible penalty for some misdemeanors at 364 days" in order to address the common situation in which noncitizens were convicted of minor crimes and received little or no jail time, but remained deportable because of the maximum possible penalty under state law). While the primary focus of this Comment is procedural fairness for noncitizens with invalid guilty pleas under *Padilla*, substantive changes in state criminal law may ultimately have an even greater impact for noncitizens convicted of minor offenses by making fewer offenses removable convictions in the first place.

criminal procedure to raise *Padilla* claims.[115] In fact, in states where there is political support for such a rule, it is the best option for implementing *Padilla* on the state level. State legislatures can set the parameters for the rule, even tailoring the procedure specifically for *Padilla* claims: loosen or eliminate temporal and custodial requirements, mirror the language of the *Padilla* decision, and apply the rule retroactively to pleas entered before *Padilla* became final.

California is a model for such a rule.[116] Section 1473.7 of the California Penal Code went into effect on January 1, 2017.[117] The California law permits people who are no longer in custody to vacate a conviction or sentence—not limited to guilty plea—due to "a prejudicial error damaging the [defendant's] ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or *nolo contendere*."[118] Previously, there was no procedural mechanism in California to challenge a conviction after custody ended, leaving noncitizens with *Padilla* claims without a remedy.[119] The language of section 1473.7 of the California Penal Code clearly applies to the failure to research and advise a noncitizen client on the specific immigration consequences of a plea.[120] Additionally, the

115 *See Kim*, 202 P.3d at 456 ("Because the Legislature remains free to enact further statutory remedies for those in defendant's position, we are disinclined to reinterpret the historic writ of error *coram nobis* to provide the remedy he seeks.").

116 New York also has a criminal procedural motion to raise an ineffective assistance of counsel claim that does not have a statute of limitations or custodial limitation, known as a 440 motion. N.Y. CRIM. PROC. LAW § 440.10(1)(h) (McKinney 2016). A 440 motion would function much the same as the California rule discussed in this section; the noncitizen or crimmigration counsel would be required to prove both prongs of the *Strickland* test to succeed. *See Post*-Padilla *Post-Conviction Relief in New York State Courts*, IMMIGRANT DEFENSE PROJECT, https://immigrantdefenseproject.org/wp-content/uploads/2012/04/Model-Motion-Doc.-0.5-Guide-to-Accompany-Motion.final_.pdf [https://perma.cc/Z8XJ-MJZN] (last visited Oct. 11, 2018) ("To win a 440 motion under *Padilla*, you must establish that 1) the advice, or lack thereof, regarding immigration consequences was deficient in comparison to the prevailing professional norms, and 2) the client suffered prejudice as a result of #1."). While the language of the rule does not track the *Padilla* case as closely as the California rule, the New York rule clearly applies to convictions entered in violation of the defendants Sixth Amendment rights. *Id.*; *see also* N.Y. CRIM. PROC. LAW § 440.10(1)(h) (McKinney 2016) (providing that a judgment may be vacated if it was obtained in violation of the Constitution). A successful 440 motion places the noncitizen "in the position he found himself immediately prior to the plea," at which point he may seek a more favorable plea, seek to dismiss the charges, or go on to try his chances at trial. *Post*-Padilla *Post-Conviction Relief in New York State Courts*, IMMIGRANT DEFENSE PROJECT, https://immigrantdefenseproject.org/wp-content/uploads/2012/04/Model-Motion-Doc.-0.5-Guide-to-Accompany-Motion.final_.pdf [https://perma.cc/Z8XJ-MJZN] (last visited Oct. 11, 2018).

117 Rose Cahn, *How to Use New California Law Penal Code § 1473.7 to Vacate Legally Invalid Convictions*, IMMIGRANT LEGAL RESOURCE CTR., Oct. 2016, at 1.

118 CAL. PENAL CODE § 1473.7(a)(1) (West 2017).

119 *See* Cahn, *supra* note 117, at 2 (explaining how the California Supreme Court ruled *coram nobis* petitions could not be vehicles for raising ineffective assistance of counsel claims, "shut[ting] the courtroom doors" for defendants no longer in custody).

120 *See, e.g.*, *id.* at 3 (noting that § 1473.7(a)(1) will provide a cause of action where "defense counsel violated the duty to investigate and accurately advise the defendant about the specific

requirement of "prejudicial error" can be measured by the same prejudice standard as ineffective assistance of counsel claims under *Strickland* and *Hill*.[121]

The California law does have a timeliness requirement, but it is significantly more generous than many of the requirements under PCR statutes.[122] Meeting the "reasonable diligence" standard requires that the moving party file at the later date of either receiving the charging document for a removal proceeding—the Notice to Appear—or the date the removal order based on the conviction or sentence becomes final.[123]

Section 1473.7 of the California Penal Code is an advantageous option for several reasons. First, if the motion is granted, the conviction ceases to exist for all purposes, including not only immigration consequences but also sentence enhancements and registration requirements.[124] Second, because of the less restrictive timing and lack of custodial requirements, the motion will be available to noncitizens who had minor convictions with short sentences, even those who are not aware of the consequences until they are served a notice to appear.[125] Finally, the law is specifically tailored to *Padilla* claims, with clear and express language mirroring the decision. Rather than being left to scour state criminal procedural law for an option to raise an ineffective assistance of counsel claim, even a noncitizen filing a motion *pro se* has a clearly applicable procedural rule to remedy ineffective crimmigration counsel.

B. *Limitations of State-Based Remedies to* Padilla *Claims*

In an ideal world, every state would pass a criminal procedural law like section 1473.7 of the California Penal Code. However, in reality there are several limitations on state-based solutions to the ineffective assistance of *Padilla*. The first and most obvious barrier is the lack of political will to address a problem

immigration consequences of a plea"); *see also* CAL. PENAL CODE §§ 1016.2-3 (West 2016) (justifying the § 1473.7(a)(1) remedy when defense counsel failed to "investigate and advise regarding the immigration consequences of [a plea]"). For example, this remedy would have provided relief to the defendant in *In re* Resendiz, 25 Cal.4th 230 (2001), whose claim was based on his counsel's failure to "investigate immigration consequences or research immigration law." *Id.* at 250.

121 *See* Cahn, *supra* note 117, at 4 (explaining that "prejudice" is met by establishing a reasonable probability that the noncitizen would have rejected the guilty plea, attempted to negotiate an alternative disposition, or continued to trial but for counsel's failure to advise on potential immigration consequences).

122 *See* CAL. PENAL CODE § 1473.7(b)(1-2) (West 2016) (requiring a motion to be filed at the later of either "(1) The date the moving party receives a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal;" or "(2) The date a removal order against the moving party, based on the existence of the conviction or sentence, becomes final.").

123 *Id.*

124 Cahn, *supra* note 117, at 6.

125 *Id.* at 2 (noting the "holes in California's criminal procedural landscape" and the particularly devastating consequences these holes had on noncitizens with unconstitutional criminal convictions).

affecting only noncitizens, especially those with criminal convictions.[126] It is not a surprise that the most encompassing and immigrant-friendly criminal procedural remedy came out of California. With the nation at a political impasse about helping even a popular and sympathetic group of noncitizens such as DACA recipients, it is hard, if not impossible, to imagine a wave of state legislatures passing criminal procedural rules to protect noncitizens from the immigration consequences of guilty pleas.[127]

Second, state-based solutions lead to a lack of uniformity among states about which noncitizens are removable, even though immigration law is federal law. In the current landscape, a noncitizen in California and a noncitizen in Pennsylvania might be accused of the exact same state criminal violation, accept the same plea offer with the same inadequate crimmigration counsel, and both end up in removal proceedings; the noncitizen in California could move to vacate the plea whereas the noncitizen in Pennsylvania would be left remediless and be removed.

Finally, there is a federalism issue at play between state courts and federal immigration courts. States lack the incentive to expend time and resources addressing what is ultimately viewed as a federal immigration issue.[128] Lasch describes the idea of requiring states alone to implement the *Padilla* decision as "an unfunded mandate."[129] Criminal procedural rules like section 1473.7 of the California Penal Code undermine the finality of state criminal convictions, in the interest of upholding federal immigration laws. Once a mechanism to raise *Padilla* claims is in place, states will also continue to spend resources litigating the claims. An ineffective assistance of counsel petition, via a writ of *coram nobis* or a law like section 1473.7, will likely require a hearing with evidence and testimony on both prongs of the *Strickland* test. In states applying *Padilla* retroactively, remedying *Padilla* violations will also require making decisions about years- or even decades-old criminal convictions.

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126 Addressing the nation in 2014 about immigration reform, President Obama applauded the eighty percent increase in "deportations of criminals," proclaiming his goal of removing "felons, not families; criminals, not children; gang members, not a mom who's working hard to provide for her kids." Barack Obama, U.S. President, Address to the Nation on Immigration Reform (Nov. 20, 2014).

127 *See* Scott Clement & David Nakamura, *Survey Finds Strong Support for 'Dreamers'*, WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/politics/survey-finds-strong-support-for-dreamers/2017/09/24/df3c885c-a16f-11e7-b14f-f41773cd5a14_story.html?noredirect=on&utm_term=.7b67ccbe4991 [https://perma.cc/T7WM-UDJK] (finding that eighty-six percent of those polled supported allowing DACA recipients to stay in the United States). Furthermore, popular support for protecting noncitizens from the immigration consequences of minor criminal convictions may be better aimed at changing substantive criminal law and state sentencing laws so that fewer offenses make noncitizens removable to begin with. *See supra* note 126 and accompanying text.

128 *See* Lasch, *supra* note 7, at 2159 ("[S]tate courts have little incentive to upset state criminal convictions based on federal immigration consequences.").

129 *Id.* at 2145.

On the other hand, immigration courts are federal civil courts, with no expertise in state criminal law and no power to overturn criminal convictions in the state courts.[130] From the federal immigration judge's perspective, ensuring that guilty pleas for state criminal law violations are entered into knowingly and voluntarily is the business of state courts alone. States have an interest in upholding the integrity of the state criminal justice system, including for noncitizens, and should not shift this burden onto the federal immigration courts. From this point of view, federal immigration courts should be able to presume that a conviction under state law is constitutionally valid, and states should be responsible for remedying Sixth Amendment violations.

VI. FEDERAL SOLUTION

Regardless of whether the state or federal immigration courts have the more convincing argument regarding the responsibility for remedying *Padilla* violations, in the meantime noncitizens are being removed based on unconstitutional criminal convictions. The ideal solution is to share the burden between states and federal immigration courts, while encouraging states to implement mechanisms to raise *Padilla* claims in state courts.

Federal immigration courts should decline to order noncitizens removed based on unconstitutional criminal convictions, including convictions based on guilty pleas where the noncitizens had no procedural mechanism to challenge the underlying conviction after discovering the constitutional defect. In response, states that are concerned about having the validity of state criminal convictions questioned in federal civil courts have the option of implementing a procedure to raise *Padilla* claims in state court. This is not to suggest that the federal immigration courts can or should determine the factual guilt or innocence of noncitizens, but rather the federal immigration courts should interpret the definition of "conviction" under the INA so as not to include convictions that are invalid under *Padilla*.[131]

A. *Defining "Conviction" for Immigration Purposes*

Congress need not amend the INA in order for immigration courts to implement a federal remedy to the ineffective assistance of *Padilla*.[132]

130 *See generally* Harbeck et al., *supra* note 90 and accompanying text.

131 *See* Matter of Roberts, 20 I & N Dec. 294, 301 (B.I.A. 1991) ("While inquiry may be had into the circumstances surrounding the commission of the crime in order to determine whether a favorable exercise of discretion is warranted, it is impermissible to go behind a record of conviction to reassess an alien's ultimate guilt or innocence.").

132 However, a congressional remedy remains open. *Cf.* Lasch, *supra* note 7, at 2156 (suggesting a decision rule to be used in immigration courts that would require either the opportunity to litigate a *Padilla* claim in state courts or provision of counsel to litigate the claim in immigration court). In

Immigration courts, the Board of Immigration Appeals (BIA), circuit courts, and, if the issue reaches it, the Supreme Court, should read the definition of "conviction" in the INA to apply only to convictions where noncitizens were afforded the Sixth Amendment right to crimmigration counsel announced in *Padilla*. Based on principles of statutory interpretation, legislative history, and case law interpreting the definition of "conviction," the correct interpretation of "conviction" excludes convictions entered in the absence of the constitutional right to effective assistance of crimmigration counsel.

When interpreting the definition of "conviction," the aim of the reviewing court is to discern the intent of Congress.[133] First, Congress has not "directly spoken to the precise question at issue."[134] Congress added a statutory definition of the word "conviction" to the INA as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[135] Because *Padilla* was not decided until fourteen years later, the issue of convictions based on guilty pleas with ineffective crimmigration counsel is not addressed by the plain language of the statute.[136]

Because the plain language of the statute does not address convictions entered in violation of *Padilla*, the court should next consider principles of interpretation in the specific context of removal proceedings.[137] In the context of interpreting a statutory provision related to deportation, the Supreme Court has dictated that the language of the provision should be construed

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contrast, this Comment suggests a judicial solution, relying on evidence of the intent of Congress in defining a conviction for immigration purposes.

133 *See* Orabi v. United States, 738 F.3d 535, 545 (3d Cir. 2013) ("Our task in interpreting a statute 'is to discern legislative intent.'").

134 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

135 8 U.S.C. § 1101(a)(48)(A) (2012) ("The term conviction means . . . a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt 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.").

136 *Chevron*, 467 U.S. at 843-44. Because we are not faced with an explicit DHS interpretation of whether a conviction entered in violation of *Padilla* meets the definition of conviction under the INA, to which *Chevron* deference may or may not be owed, this Comment does not undertake a full analysis under *Chevron*. *See id.* at 844 (holding that, once the court determines that Congress has not directly addressed the issue, deference is owed to a reasonable interpretation of an ambiguous provision by an executive agency). Rather, the purpose of this Comment is to provide support for an interpretation of conviction that upholds the constitutional rights of noncitizens in removal proceedings.

137 *See* Robinson v. Shell Oil Co., 519 U.S. 337, 340-41 (1997) (noting the "our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent…." and otherwise the meaning of statutory language "is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole."); *see also* Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 552-53 (1987) ("[W]hen statutory language is plain . . . that is ordinarily the 'end of the matter.'").

narrowly and that doubt should be resolved in favor of the noncitizen.[138] Given the harsh and drastic nature of removal, the court should "not assume that Congress meant to entrench on [the noncitizen's] freedom beyond that which is required by the narrowest of several possible meanings of the words used."[139] These principles support a narrow interpretation of conviction that errs on the side of protecting noncitizens when selecting among possible meanings.

The legislative history, while sparse, also sheds some light on the intention of Congress in drafting the definition of conviction. The definition is purposefully broad.[140] The express intent was to include deferred adjudications in the definition of conviction, thus overruling a previous BIA decision finding that such convictions do not always carry immigration consequences.[141] Deferred adjudication, while it varies state to state, is a disposition where the court finds that the defendant committed, or has admitted sufficient facts to be found guilty of, the charged offense, but suspends the sentence so long as the defendant complies with court-ordered conditions or probation. In defining conviction to include deferred adjudications, Congress sought to alleviate discrepancies between state procedures for entering deferred adjudications that would lead some deferred adjudications to be considered convictions for immigration purposes, and other convictions not to count for immigration purposes.[142] For example, some states do not impose a finding of guilt when a sentence of deferred adjudication is entered, but rather do so only if the conditions of probation are violated and another hearing is held.[143] In these states, a second hearing would be required before the defendant was "convicted," and those who completed the probation period would never have a conviction for immigration purposes.[144] Other states impose a finding of guilt at the time the sentence of deferred adjudication is entered, but merely suspend the sentence for the period of probation.[145] These defendants would be considered convicted for immigration purposes.[146] To avoid this discrepancy,

138 *See, e.g.*, Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (construing ambiguity narrowly because "deportation is a drastic measure").

139 *Id.*; *see also In re* Salazar-Regino, 23 I & N Dec. 223, 241-42 (B.I.A. 2002) (Rosenburg, J., dissenting) (applying the doctrine of constitutional doubt announced in *Fong Haw Tan* to the current definition of "conviction").

140 *See supra* Section I.F.

141 *See* H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.) (noting that the Board of Immigration Appeals in Matter of Ozkok, 19 I & N Dec. 546 (B.I.A. 1988), "while making it more difficult for alien criminals to escape [immigration consequences, did] not go far enough").

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.*

Congress specifically included "deferred adjudication" in the definition of conviction for immigration purposes.[147]

While Congress "deliberately broaden[ed] the scope of the definition of 'conviction'" beyond that adopted by the BIA, there is nothing to suggest Congress intended to include convictions that lacked procedural and constitutional safeguards.[148] The discussion of deferred adjudications is limited to the lack of uniformity between state criminal processes for entering deferred adjudications.[149] There is no suggestion that deferred adjudications violate the constitutional rights of defendants, like a conviction entered without crimmigration counsel. In fact, Congress decided to overrule *Ozkok* and clearly defined "conviction" to include deferred adjudications in order to achieve "a uniform federal approach" to defining conviction, avoiding "different treatment, based solely on where the offense occurred, of aliens guilty of the same misconduct . . . ."[150] Adopting the interpretation of conviction suggested by this Comment would also provide a uniform federal approach to overcome inconsistencies in the availability of *Padilla* relief among states.[151]

Case law interpreting the meaning of conviction also sheds light on whether convictions in violation of *Padilla* or with no mechanism to raise a *Padilla* claim should be considered "convictions" for the purpose of removal. The language of the INA is quite broad in defining "conviction;" however, the definition also has constitutional limitations.[152] Relevant case law addressing whether specified offenses fall within the meaning of conviction for immigration purposes supports the suggested limitation. According to the case law, only a conviction where the noncitizen defendant was provided the protections "normally attendant upon criminal adjudication" are valid for immigration purposes.[153] For example, a conviction where the noncitizen

147 *Id.*

148 *Id; see also In re* Eslamizar, 23 I & N Dec. 684, 688 n.5 (B.I.A. 2004) ("Rather, the history demonstrates that Congress was concerned mainly, if not exclusively, with clarifying the effect of post-proceeding rehabilitative actions on whether an alien was deemed convicted.").

149 *See* H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.) ("[T]here exist in the various States a myriad of provisions for ameliorating the effects of a conviction.").

150 *In re* Mauro Roldan-Santoyo, 22 I & N Dec. 512, 517 (B.I.A. 1999).

151 Admittedly, Congress could also decide that in order to eliminate "the need to refer to the vagaries of the states[]" in determining whether a noncitizen was convicted for immigration purposes (*i.e.*, look at which states provide *Padilla* relief and which do not in order to determine if a conviction is supported by adequate procedural safeguards), "conviction" should be amended to include all guilty pleas, regardless of the availability of *Padilla* relief. *Id.* at 518. However, such a provision could raise Due Process objections for ordering removal of noncitizens despite the protections guaranteed by *Padilla*. Unless or until Congress intervenes to clarify the definition, the congressional record supports an interpretation of conviction that counteracts the "vagaries of the states" in providing *Padilla* relief. *Id.*

152 *See* GARCIA HERNANDEZ, *supra* note 10, at 29 ("Despite the breadth of the conviction definition, it is not limitless.").

153 *Id.*

was not provided appointed counsel, afforded the right to a trial by jury, or the prosecution was not required to prove its case beyond a reasonable doubt would all be invalid convictions for immigration purposes.[154]

In *In re Eslamizar*, the BIA found that a conviction of a noncitizen under the standard of preponderance of the evidence rather than beyond a reasonable doubt "does not fall within the meaning of the term 'conviction' under section 101(a)(48)(A)" of the INA.[155] Hadi Eslamizar was an Iranian native and Legal Permanent Resident of the United States.[156] He was convicted of a misdemeanor theft offense in Oregon and served two years' probation.[157] Three years later, he was convicted of a second theft offense that was treated as a "Class A violation," punishable by a maximum fine of $600, rather than as a misdemeanor.[158] To be found guilty, the state was only required to prove guilt by a preponderance of the evidence rather than beyond a reasonable doubt.[159] Removal proceedings were initiated against Mr. Eslamizar based on the commission of two or more crimes involving moral turpitude.[160]

The BIA held that, although Mr. Eslamizar had been found guilty in an Oregon court, the conviction did not meet the definition provided in the INA.[161] The BIA conceded that "a literal reading of the conviction definition persuaded us earlier that the respondent's offense was a 'conviction' for immigration purposes" because the state treated the conviction as a criminal violation and entered a judgement of guilt.[162] However, the BIA changed course and concluded that "we do not find the definition to be clear or to dictate such an outcome."[163] Proof beyond a reasonable doubt of each element of an offense is a bedrock constitutional principle.[164] A conviction where the noncitizen defendant is denied this safeguard cannot be considered a conviction for immigration purposes.[165]

Situations in which there has been an alleged *Padilla* violation, and the noncitizen has no procedural mechanism to raise an ineffective assistance of counsel claim upon discovery of the violation, should be treated similarly. Like the BIA in *Eslamizar*, courts should look beyond the literal text of the

154 *Id.*
155 *In re* Eslamizar, 23 I & N Dec. 684, 688 (B.I.A. 2004).
156 *Id.* at 685.
157 *Id.*
158 *Id.* at 685 n.3.
159 *Id.* at 685.
160 *Id.*
161 *Id.* at 686.
162 *Id.* at 686-87.
163 *Id.* at 687.
164 *Id.* at 688.
165 *Id.* at 689.

INA definition of conviction to the "more sensible reading of the statute."[166] A guilty plea entered without crimmigration counsel may be a conviction under the literal meaning of the statutes, but the real question is "whether Congress would have intended" the conviction to support a removal.[167] Cases such as *Eslamizar*, *Castillo*, and decisions discussed in *Castillo*[168] suggest that Congress did not have "so expansive a reach in mind" to cover convictions without crimmigration counsel guaranteed by the Sixth Amendment.[169] Applying *Eslamizar*, as outlined by the Third Circuit in *Castillo*, courts should consider whether a conviction where the defendant was denied effective assistance of counsel—as required by the Sixth Amendment—was entered in a "true criminal proceeding" where the defendant was provided "the

166 Castillo v. United States, 729 F.3d 296, 306 (3d Cir. 2013); *see also id.* (quoting *Eslamizar* to describe how "the BIA expressly rejected a literal reading of the term 'conviction'" in favor of "a far more sensible reading of the statute"). In *Castillo v. United States*, the Third Circuit rejected the BIA finding that *Eslamizar* only applied to convictions where no proof beyond a reasonable doubt was required and ordered the BIA to reevaluate whether a municipal court adjudication for shoplifting, considered a "disorderly persons offense" under New Jersey law, was a conviction for purposes of the INA. *Id.* at 298-99. Mr. Castillo argued that, because a disorderly persons offense was not a crime under New Jersey law and defendants were not entitled to a trial by jury, the adjudication did not qualify as conviction of a crime for immigration purposes. *Id.* at 299. The Third Circuit, interpreting *Eslamizar*, found that the BIA had rejected a literal reading of "conviction" in favor of "a far more sensible reading," which requires the court to consider whether the conviction is supported by the constitutional safeguards required in a "true criminal proceeding." *Id.* at 306 (citing *Eslamizar*, 23 I & N Dec. at 686-87). The rationale of *Eslamizar* requires consideration of other constitutional safeguards besides the right to proof beyond a reasonable doubt, for example the right to trial by jury that Mr. Castillo was denied. *Id.* at 307. The Third Circuit remanded for the BIA to conduct an open-ended inquiry into whether Mr. Castillo's adjudication was entered in a true criminal proceeding where he was afforded "the constitutional safeguards normally attendant upon a criminal adjudication." *Id.* at 311 (citing *Eslamizar*, 23 I & N Dec. at 687).

167 *Id.* at 301.

168 *See, e.g.*, *In re* Cuellar-Gomez, 25 I & N Dec. 850, 852-55 (B.I.A. 2012) (finding that a judgment entered by a Kansas municipal court for violation of a city ordinance prohibiting the possession of marijuana meets the statutory definition of conviction because municipal court judges possess the power to enter judgments of guilt and impose fines or incarceration in marijuana possession cases, the prosecution was required to prove the charge beyond a reasonable doubt, and the judgment of guilt represented a conviction for purposes of calculating a defendant's criminal history, and the defendant had the constitutional and statutory right to appeal the decision to a state district court and demand a trial by jury); *In re* Bajric, A077 686-506, 2010 WL 5173974, at *2 (B.I.A. Nov. 30, 2010) (determining that a conviction for stealing under a Missouri municipal ordinance does not meet the INA definition of conviction because the proceeding, although quasi-criminal, "clearly remained civil in nature in that it did not bar a prosecution for the same offense by the state, and his conviction for a violation of a municipal ordinance, unlike those for misdemeanors and felonies, is not admissible for impeachment purposes."); *In re* Rivera-Valencia, 24 I & N Dec. 484, 486-88 (B.I.A. 2008) (finding that a court-martial entered by the United States Armed Forces is a conviction entered in a genuine criminal proceeding because service members in court-martial proceedings are afforded the procedural protections afforded in civilian courts such as the privilege against compulsory self-incrimination, the right to representation by counsel at public expense, and the right to call witnesses and present evidence).

169 *Eslamizar*, 23 I & N Dec. at 687.

constitutional safeguards normally attendant upon a criminal adjudication."[170] The Sixth Amendment right to effective assistance of counsel is a vital constitutional safeguard, the denial of which is sufficient to find that a guilty plea does not meet the definition of "conviction" under the INA.

Finally, federal regulations suggest that the agency charged with implementing the removal provisions of the INA is also concerned with the procedural fairness of convictions that serve as the basis for removal. Federal regulations exclude certain convictions from immigration consequences because of a lack of procedural safeguards, such as convictions entered in absentia or based on fabricated charges for purely political offenses.[171] Resolving "any lingering ambiguities in deportation statutes in favor of" the noncitizen, the best interpretation of "conviction" excludes convictions entered without effective crimmigration counsel.[172]

B. *Burden of Proof that a Conviction Is Constitutionally Invalid*

Unless noncitizens were afforded a mechanism to raise a *Padilla* claim, these guilty pleas should be invalid for immigration purposes. Procedurally, the question remains of how and when the issue of ineffective crimmigration counsel should be raised when a noncitizen is subject to removal based on an allegedly invalid guilty plea. In a deportation proceeding, the government has the burden of proving by clear and convincing evidence that the noncitizen is deportable.[173] If the noncitizen has already accessed post-conviction relief and had the conviction vacated in state court, the immigration courts must give full faith and credit to the decision of the state court and dismiss the proceeding.[174] Likewise, if the noncitizen raised a *Padilla* claim in state court and lost on the merits, the conviction must be considered legitimate for the purposes of immigration law and the noncitizen is removable.[175] It would be unreasonable to give a second bite at the apple in federal immigration courts.

If the government can prove that there is a facially legitimate conviction in the state court that appears to meet the definition of "conviction," but the

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170 *Castillo*, 729 F.3d at 300.

171 *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2012) (excluding convictions for a purely political offense from the meaning of conviction for a crime involving moral turpitude, including where the offense stems from fabricated charges); 22 C.F.R. § 40.21(a)(4) (1999) (excluding convictions in absentia from the meaning of conviction for a crime involving moral turpitude); *see also* 22 C.F.R. § 40.22(b),(d) (1997) (applying the above exclusions for the definition of conviction for multiple criminal convictions).

172 INS v. St. Cyr, 533 U.S. 289, 320 (2001).

173 8 U.S.C. § 1229a(c)(3)(A) (2012).

174 *See* Harbeck et al., *supra* note 90, at 59-60 ("[T]he [BIA] gives full faith and credit to state court actions that purport to vacate a non-citizen's criminal conviction.").

175 *Id.* at 60.

noncitizen has not had the opportunity to raise a *Padilla* claim,[176] then the noncitizen should be allowed to raise ineffective crimmigration counsel as an affirmative defense to removal. The affirmative defense would be limited to cases where *Padilla* relief was foreclosed due to inconsistencies in the definition of conviction,[177] or where there is no available state court relief for the various aforementioned reasons.[178] If successful in raising the affirmative defense of ineffective crimmigration counsel, the noncitizen should be afforded the opportunity to litigate a *Padilla* claim before the immigration judge.

Since the affirmative defense might not be available in cases where an avenue for *Padilla* relief remains open in state courts[179]—such as section 1473.7 of the California Penal Code or a similar state procedural rule, *coram nobis*, or a more generous post-conviction relief statute—the government has an incentive to encourage state courts to provide *Padilla* relief. Federal immigration courts will save time and resources if *Padilla* claims are litigated on the merits in state courts. Additionally, state courts and legislatures that are concerned with having state criminal convictions questioned in federal immigration courts will be further incentivized to provide state relief.[180] Finally, both state and federal actors will be incentivized to ensure there are clear policies and procedures to implement *Padilla* in order to avoid ineffective crimmigration challenges altogether.[181] When states provide effective crimmigration counsel at the outset, and keep a clear record of *Padilla*'s implementation, there will be fewer challenges in both state and federal immigration courts. When *Padilla* is effectively implemented and clear, efficient remedies are available in state criminal courts, all parties

176 Opportunity to litigate here implies that a noncitizen had an available avenue for *Padilla* relief at some point *after* he or she discovered the constitutional defect. It would not be enough for the government to allege that state habeas or post-conviction relief was presumptively available for some window of time during which the noncitizen was unaware of the *Padilla* violation. *See supra* Section IV.B (discussing the strict custodial and temporal restrictions on state avenues for *Padilla* relief).

177 *See supra* Section IV.B.

178 *See supra* Section IV.B.

179 *See* Cabral v. Holder, 632 F.3d 886, 890 (5th Cir. 2011) (holding that the BIA may decline to hold immigration proceedings in abeyance while a noncitizen pursues post-conviction relief in state courts).

180 The state criminal conviction would not be undermined for state criminal purposes. The purpose of litigating the *Padilla* claim would be to decide if the conviction meets the federal statutory definition of conviction, and would not otherwise affect state reliance on the conviction, for example for the purposes of future sentence enhancement or collateral consequence. *See, e.g.*, Griffiths v. INS, 243 F.3d 45, 49 (1st Cir. 2001) ("While the INA compels consideration of various state criminal laws and procedures because it allows state convictions to form the basis for deportation, the question of what constitutes a 'conviction' sufficient to afford such a basis is a question of federal, not state, law."); *In re* Matter of Roberts, 20 I & N Dec. 294, 301 (B.I.A. 1991) (explaining that federal immigration courts may look to state criminal proceedings to determine questions of federal immigration law, but may not undermine the conviction for state law purposes).

181 *See* Junck et al., *supra* note 85, at 26-27 (discussing best practices for providing crimmigration counsel in state courts).

benefit: noncitizens have their rights protected, state criminal courts uphold the integrity of the criminal justice system, and federal immigration courts can rely on state convictions.

C. *Application to Inadmissibility Grounds*

The previous discussion focused primarily on deportation proceedings for noncitizens. Noncitizens in inadmissibility proceedings—which includes most undocumented immigrants—are removable not only for a conviction, but also for admitting to the commission of a crime: "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of" a crime involving moral turpitude or controlled substance offense is inadmissible.[182] A guilty plea that is unconstitutional for lack of crimmigration counsel should also be considered invalid as an admission under the criminal grounds for inadmissibility.

Over the years, the BIA has identified four requirements for a factual admission to trigger inadmissibility: 1) the noncitizen must admit to engagement in conduct that is unquestionably a specific crime in the jurisdiction in which it was committed; 2) the conduct must necessarily involve moral turpitude or a criminalized controlled substance; 3) admissions to government officials must be preceded by an explanation of the relevant crime; and 4) the admission must be made freely and voluntarily.[183]

This fourth requirement, that the admission be made freely and voluntarily, should preclude the use of a guilty plea accepted without effective crimmigration counsel to establish an admission. Considering any guilty plea to be factual admission is, at some level, a legal fiction. There is a reason it is referred to as "plea bargaining" or "plea negotiation;" rather than finding the facts, the prosecution and defense weigh resources and likely outcomes before settling on a mutually agreeable compromise.[184]

The questionable reliability of a guilty plea as an admission of fact is increased when one considers a guilty plea accepted without knowledge of the consequences of that plea. Along with effective assistance of counsel during plea bargaining, a valid plea must also be knowing, intelligent, and voluntary.[185] A guilty plea accepted without knowledge of the immigration consequences is

182 8 U.S.C. § 1182(a)(2)(A)(i) (2012).

183 GARCIA HERNANDEZ, *supra* note 10, at 26-27.

184 *Cf.* Missouri v. Frye, 566 U.S. 134, 144 (2012) (describing the plea-bargaining process as a mutually beneficial exchange because of "[t]he potential to conserve valuable prosecutorial resources and for defendants to . . . receive more favorable terms at sentencing").

185 *See* Boykin v. Alabama, 395 U.S. 238, 244 (1969) (noting the importance of ensuring that an accused has "a full understanding of what the plea connotes and its consequence").

not a free and voluntary admission.[186] The entire idea behind the prejudice prong of *Padilla* is that a noncitizen would not have admitted to commission of a particular crime if he or she had known the consequences, and instead would have either pursued a different plea bargain or proceeded to trial.[187] A plea bargain that is unconstitutional due to inadequate counsel on immigration consequences is not a valid conviction, nor a voluntary and intelligent admission of fact.[188]

D. *Advantages of Litigating* Padilla *Claims in Federal Court*

Although the guilty plea was entered in state criminal courts, there are unique advantages to litigating a *Padilla* claim in federal immigration courts. Whereas state courts have expertise in litigating ineffective assistance of counsel claims more generally, immigration judges bring to bear expertise in immigration law, which is vital to applying the *Strickland* test in the *Padilla* context.[189] Immigration judges are in a better position to decide if the performance of the crimmigration counsel was unreasonable, which according to *Padilla* depends partially on whether the immigration consequences were straight forward or complex.[190] Additionally, immigration judges' intimate knowledge of the harsh consequences of deportation give them insight into noncitizens' decisionmaking during plea-bargaining, which is an essential component in determining the prejudice prong of an ineffective crimmigration

186 Padilla v. Kentucky, 559 U.S. 356, 385 (2010) (Alito, J., concurring) (arguing that it is "hard to say" that a guilty plea entered without constitutionally competent counsel "embodies a voluntary and intelligent decision" to forsake the right to a trial); *cf. Frye*, 566 U.S. at 141-42 (discussing how the *Padilla* court rejected the government's contention that a guilty plea entered into knowingly and voluntarily can overcome errors by defense counsel).

187 *See Padilla*, 559 U.S. at 373 (explaining that by considering immigration consequences during plea negotiation, "the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties," including by creating pleas that avoid triggering removal while incentivizing noncitizens to take favorable guilty pleas).

188 A second difference between removals for inadmissibility and deportability is the burden of proof. If the removal is for inadmissibility, the noncitizen has the responsibility of proving "clearly and beyond a doubt" that he or she is not inadmissible. 8 U.S.C. § 1229a(c)(2)(A) (2012). Because the noncitizen would be responsible for raising ineffective crimmigration counsel as an affirmative defense, however, the shifting burden of proof should not affect the procedure outlined above. The noncitizen would have the burden of proving that he or she was admissible because the conviction was constitutionally invalid due to ineffective crimmigration counsel.

189 *See* Lasch, *supra* note 7, at 2159 (discussing the advantages of litigating *Padilla* claims in immigration courts, including that immigration courts are "the forum with the greatest incentive to vindicate the right," given state courts' concern with the finality of convictions and lack of concern over federal immigration consequences of state convictions).

190 *See Padilla*, 559 U.S. at 368-69 (describing the variable duties of counsel based on the complexity and clarity of the deportation consequences); *see also* Lasch *supra* note 7, at 2159 (suggesting that state courts are not equipped to determine whether the immigration consequences of a guilty plea are straightforward or complex).

counsel claim.[191] An immigration judge is in a better position to determine both whether the performance of crimmigration counsel was unreasonable and how such advice affected the noncitizen's decision to accept the plea.

It is also improbable to suggest that the federal immigration courts will be faced with a flood of nonmeritorious *Padilla* claims. Because the burden falls on the noncitizen to prove ineffective crimmigration counsel, and noncitizens may be subjected to mandatory detention during removal proceedings, those with no viable claim that defense counsel inadequately advised them on immigration consequences and thus adversely affected their decision to plea are unlikely to raise the affirmative defense.

CONCLUSION

The holding of *Padilla* is clear: a guilty plea entered without advice on the immigration consequences of the conviction is a violation of the Sixth Amendment. It would be incongruous to suggest that a guilty plea that is constitutionally invalid because of the failure to advise the defendant on the immigration consequences of that plea could still be used to effectuate those very same adverse immigration consequences. Given the insufficient and jumbled state of *Padilla* remedies in the state courts, the federal courts should step in to ensure that noncitizens are not removed without effective assistance of crimmigration counsel, as guaranteed by *Padilla*. In doing so, the federal courts will encourage states to effectively implement policies upholding *Padilla* and to provide remedies in cases where crimmigration counsel was inadequate. Like it did in 1996 with the passage of IIRIRA, Congress may step in and clarify the definition of "conviction" to conform to the *Padilla* decision. However, until this occurs, there is substantial support for an interpretation of conviction that is consistent with *Padilla*'s requirement that noncitizens be afforded effective crimmigration counsel.

191 *See supra* note 84 (discussing the prejudice prong post-*Padilla)*.