WHEN STATE COURTS MEET *PADILLA*: A CONCERTED EFFORT IS NEEDED TO BRING STATE COURTS UP TO SPEED ON CRIME-BASED IMMIGRATION LAW PROVISIONS

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I. INTRODUCTION

A few more hours, Roberto thinks, and he will have his truck full of carne seca to its destination in Austin. He knows the road between the Río Grande Valley of South Texas and the state's big cities well enough to know that the only thing that will slow him down at this time of day is the Border Patrol inspection station up ahead.

Every week Roberto moves something along Highway 281. In the long South Texas summer he gets plenty of business from farmers. The rest of the year the maquiladoras that line the southern bank of the Río Grande keep him busy.[1] *Today it's carne seca—a dried beef delicacy loved by generations of South Texans and northern Mexicans.*

As it usually is, the line at the Border Patrol station in Falfurrias is moving slowly.[2] *When Roberto finally makes it to the*

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1. Maquiladoras are manufacturing and assembly facilities located on the Mexican side of the México-United States border and owned by non-Mexican corporations. *See* BILL ONG HING, ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION 17 (2010); *see also* M. Isabel Medina, *At the Border: What Tres Mujeres Tell Us About Walls and Fences*, 10 J. GENDER RACE & JUST. 245, 256 (2007) (describing maquiladoras as "foreign-owned manufacturing plant[s] in the Mexican border region").

2. *See* DAVID SPENER, CLANDESTINE CROSSINGS: MIGRANTS AND COYOTES ON THE TEXAS-MEXICO BORDER 68 (2009); *see also Falfurrias Station*, U.S. DEP'T OF HOMELAND SEC., CUSTOMS & BORDER PROT., http://www.cbp.gov/xp/cgov/border_security/border_patrol/

front, the agent starts the routine.

"U.S. citizen?"

"Residente,"[3] *Roberto replies, handing over his green card.*

The agent looks over Roberto's card. "¿Qué lleva?"[4]

"Carne seca," Roberto responds.

"A donde?"[5]

"Austin."

The agent nods his head. Before he can return Roberto's card, though, another agent appears from around the front of Roberto's truck, his drug-sniffing dog excitedly trotting alongside. Roberto can't hear what they're saying, but he knows that something is wrong.

The first agent turns to Roberto and instructs him to move his truck to a secondary inspection area off to the side. They need to get a closer look at what he's carrying, he explains. "¿Qué es el problema?,"[6] *Roberto asks.*

"Nada. No se preocupe," the agent responds. "No se tardará."[7]

An hour later an agent inspecting the boxes of carne seca finds what alerted the dog—a dry, leafy substance tucked inside a box. Needless to say, Roberto is arrested. He's turned over to the local sheriff and eventually charged with transporting marijuana.[8]

When he speaks to his attorney, Roberto is adamant that he had no idea there was marijuana in his truck. He never opens his

border_patrol_sectors/rio_grande_valley_sector/mcallen_stations/falfurrias.xml (last visited Dec. 4, 2010) (explaining that the Falfurrias station is approximately seventy miles north of the Río Grande River along Highway 281).

3. Author's translation: Resident.

4. Author's translation: What are you carrying?

5. Author's translation: Where to?

6. Author's translation: What's the problem?

7. Author's translation: Nothing. Don't worry. It won't take long.

8. Secondary inspection is a common feature of immigration inspection areas along the Mexican border. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 545-46 (1976) (describing a secondary inspection area in California); United States v. Torres, 537 F.2d 1299, 1300 (5th Cir. 1976) (providing an example of an individual who was detained at the Falfurrias Border Patrol station and charged with an unspecified offense involving marijuana).

cargo to see what's inside. If he did, he'd never get work.

Fighting the charges will take time, the attorney says. Because this is Roberto's first run-in with the law, his attorney says he's pretty sure he can get the district attorney to agree to one year of deferred adjudication.[9] *Roberto could go home immediately and start working. And if he stays out of trouble for the year he won't even have a conviction on his record.*[10] *All he has to do is plead guilty.*

All of this sounds lousy to Roberto because he thinks he hasn't done anything wrong. But what sounds worse is that his wife and kids can't make it without his income.[11] *He's inclined to take the deferred adjudication deal, but he wants to be sure that it won't affect his immigration status. He's heard of people being deported after getting arrested.*

"I don't know what will happen," his attorney says. "I do criminal law. Immigration law is very different. You should talk to an immigration lawyer."

Roberto's family has never had much money and without him working, hiring an immigration lawyer does not seem possible.[12] *As a result, Roberto decides to take the deferred adjudication deal. He'll be home soon. Or so he thinks.*

Instead, the day he enters his plea he's told that Immigration and Customs Enforcement (ICE) has placed a detainer on him. He can't go anywhere until ICE shows up.[13] *A day later the ICE bus*

9. *See* TEX. PENAL CODE ANN. § 42.12(5)(a) (West 2010).

10. *See Ex parte* Welch, 981 S.W.2d 183, 185 (Tex. Crim. App. 1998) ("Deferred adjudication is not a conviction."). *But see In re* Punu, 22 I. & N. Dec. 224, 230 (B.I.A. 1998) (holding that deferred adjudication in Texas constitutes a conviction for purposes of immigration law).

11. Examples of individuals who proclaim their innocence while nonetheless entering a plea due to overriding concerns about the impact of continued incarceration on their families are not unusual. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 95 (2010) (describing the plight of a single mother of two young children who claims innocence, but nonetheless accepts a plea after a month of imprisonment so as to return to her children).

12. The right to counsel in removal proceedings is generally thought to exclude counsel appointed at the government's expense. Indeed, the Immigration and Nationality Act (INA) explicitly states as much. *See* INA § 292, 8 U.S.C. § 1362 (2010).

13. *See* H. Raymond Fasano & Donald F. Madeo, *Immigration Detainers: How to Secure a Non-citizen's Release from Custody Once Bail Conditions Have Been Met*, 87 No. 44 INTERPRETER RELEASES (2010). An individual may be held for up to forty-eight hours awaiting a determination by ICE whether to take the individual into its own custody. *See* 8 C.F.R. § 287.3(d) (2010). Despite the automatic expiration of a detainer after forty-eight hours, "some law

> *arrives and off Roberto goes to the nearby South Texas Detention Facility in Pearsall, Texas, one of the country's largest immigration prisons.*[14] *He has been charged with having been convicted of a controlled substance offense—one of many crime-based grounds of removal.*[15]

Though Roberto's story is fictional, it is not unusual. The Obama Administration has removed record high numbers of individuals who have committed a crime.[16] Touting the Administration's removal achievements in early October 2010, Department of Homeland Security Secretary Janet Napolitano announced that the federal government removed approximately 392,000 people in the 2010 fiscal year, fifty percent of whom had been convicted of some crime.[17]

Though violation of certain criminal offenses has long subjected a non-citizen[18] to removal[19] from the United States, federal and state courts

enforcement officers who do not understand the law or choose to disregard it, keep the individual in custody for longer than the permitted 48 hours, even when ICE does not assume custody." *See Immigration Detainers: A Comprehensive Look*, AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., 3 (Feb. 17, 2010), http://www.immigrationpolicy.org/sites/default/files/docs/Immigration_Detainers_021710_0.pdf.

14. *See* Dep't of Homeland Security, Immigration and Customs Enforcement Agency, *ICE Detainee Population for the Month of May 2010*, FOIA 10-4727, *available at* http://www.ice.gov/doclib/foia/dfs/detentionfacilitystatsmay2010.pdf (reporting that the South Texas Detention Complex in Frio County, Texas—in which Pearsall is located—housed an average daily population of 1,662 people in May 2010, the largest number of detainees of all facilities in the country).

15. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2010).

16. *See Current ICE Removals of Non-citizens Exceed Numbers Under Bush Administration*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Aug. 2, 2010), http://trac.syr.edu/immigration/reports/234/ [hereinafter TRAC, *Current ICE Removals*]. The Transactional Records Access Clearinghouse (TRAC) reports that 83,381 individuals who committed a crime in the United States were removed in FY 2005; 93,156 in FY 2006; 102,024 in FY 2007; 114,415 in FY 2008; and between 116,863 and 136,343 in FY 2009. *Id.* at tbl.2.

17. *See* News Release, ICE, Secretary Napolitano Announces Record-Breaking Immigration Enforcement Statistics Achieved Under the Obama Administration (Oct. 6, 2010), *available at* http://www.ice.gov/news/releases/1010/101006washingtondc2.htm.

18. The technical term used in the INA to refer to "any person not a citizen or national of the United States" is "alien." INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2010). This term is highly offensive insofar as it inspires fears of invasion by creatures of a different ilk. *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 272 (1997); *see also* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 61 (2004) ("The illegal alien that is abstractly defined is something of a specter, a body stripped of individual personage. The mere idea that persons without formal legal status resided in the nation engendered images of great danger."). Rather than reproduce this offensiveness, I use the term "non-citizen" to refer to individuals who are not citizens or nationals of the United States. *See* ANNA MARIE GALLAGHER AND MARIA BALDINI-POTERMIN, IMMIGRATION TRIAL HANDBOOK § 1:2 (preferring the term "non-citizen" to "alien"). Though this term is not ideal, it captures the

long considered the Sixth Amendment right to counsel as having only limited application to situations in which a non-citizen is deported as a result of entering a guilty plea to a criminal charge.[20] Prior to the end of March 2010, someone in Roberto's position had little recourse under Sixth Amendment ineffective assistance of counsel jurisprudence. Roberto's attorney's lack of advice about the deportation consequences of a plea could not serve as the basis for a claim of ineffective assistance of counsel because the Sixth Amendment did not guarantee defendants the right to be advised about the immigration consequences of a plea. A defendant was entitled to advice about the direct consequences of a plea, but not collateral consequences.[21] However, Texas, like most states, had determined that deportation was a collateral consequence of pleading guilty.[22]

The Supreme Court flipped that outcome on its head last March when it adopted a far more robust interpretation of the Sixth Amendment right to

essential characteristic of the individuals with whom I am concerned in this article—their susceptibility to removal from the United States—better than any other term with which I am familiar.

19. "Removal" or "removable" refers to individuals found to be "excludable" or "deportable." *See* U.S. DEP'T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW, STATISTICAL YEAR BOOK 2009 app. A at 16 (2010). "Prior to April 1, 1997, an exclusion case involved a person who tried to enter the United States but was stopped at the port of entry because the former Immigration and Naturalization Service (INS) (now Department of Homeland Security) found the person to be inadmissible." *Id.* app. A at 9. In contrast, deportation proceedings were initiated when the former INS "alleged that a respondent entered the country illegally by crossing the border without being inspected by an immigration officer." *Id.* app. A at 8. Deportation proceedings were also initiated when the former INS alleged that a non-citizen violated an immigration law provision. Exclusion and deportation were folded into "removal" proceedings as of April 1, 1997. *See id.* app. A at 8-9.

20. *See, e.g.*, United States v. Banda, 1 F.3d 354, 355 (5th Cir. 1993) ("We hold that an attorney's failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel."); State v. Rojas-Martinez, 2005 UT 86, 125 P.3d 930, 935 (Utah 2005) ("[D]eportation is a collateral consequence of the criminal process and that defense counsel's failure to advise a defendant about all possible deportation consequences does not amount to ineffective assistance of counsel."); People v. Huante, 571 N.E.2d 736, 741 (Ill. 1991) ("[W]e conclude that the conduct of defendant's attorney in failing to volunteer to his client advice concerning the deportation consequences of a criminal conviction did not '[fall] below an objective standard of reasonableness.'") (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)). Daniel Kanstroom locates the origins of deportation for having committed a crime in the early 1900s. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 133-34 (2007).

21. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002).

22. *See* State v. Jimenez, 987 S.W.2d 886, 888-89 (Tex. Ct. Crim. App. 1999); *see also* United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir. 2000); United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993); Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976); Tavarez v. State, 826 A.2d 941, 944 (R.I. 2003). Interestingly, courts never developed a precise method for demarcating direct and collateral consequences. *See* United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982).

counsel. In *Padilla v. Kentucky*, the Court discarded the direct versus collateral consequences distinction when considering the risk of deportation.[23] It then announced that in some circumstances a criminal defense attorney is obligated to affirmatively and accurately advise a non-citizen client about the deportation consequences of a plea: "[W]hen the deportation consequence is truly clear," the Court held, "the duty to give correct advice is equally clear."[24] Failure to provide such advice may constitute ineffective assistance of counsel, resulting in vacatur of a criminal conviction, thus precluding removal based on that criminal activity.

The duty that arises only "when the deportation consequence is truly clear" effectively requires state courts to determine for themselves the accuracy of a defense attorney's analysis of immigration law.[25] State courts must independently determine whether "the deportation consequence is truly clear"[26] to determine whether the clear advice duty applies, and if the duty does apply, the court must then decide whether the defense attorney satisfied that duty by correctly advising her non-citizen client about that consequence. Only by comparing the defense attorney's advice to their own determination of immigration law can state courts properly measure the competency of a defense attorney's representation. State courts, therefore, must quickly become sufficiently well versed in immigration law, an area of law that has not traditionally been within the province of state courts, so that they can properly reach such determinations.[27]

Never before have state courts been asked to delve so deeply into modern immigration law. At least since the development of a federalized immigration law regime, state courts have been uninvolved in the intricacies of immigration law.[28] Moreover, modern immigration law

23. Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010).

24. *Id.* at 1483.

25. *See id.*

26. *Id.*

27. While federal courts and administrative agencies are differently experienced with immigration law—and some may also currently lack sufficient knowledge to address complex immigration issues—this article focuses on state courts to coincide with the symposium's focus on the intersection of state criminal law and immigration.

28. *See* Keith Aoki et al., *(In)visible Cities: Three Local Government Models and Immigration Regulation*, 10 OR. REV. INT'L L. 453, 488 (2008). According to Aoki and his coauthors,

> The traditional view of immigration law is that it falls squarely and solely within the scope of federal powers, yet in fact the struggle for power between levels of government in this area stretches far back into U.S. history. Professor Peter Spiro notes: "[U]ntil the end of the nineteenth century, immigration (both interstate and international) was the subject of state-level regulation in the face of a federal legislative vacuum." By the late nineteenth century, the balance of power shifted into federal hands.

Id. (quoting Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV.

concerning removal based on a criminal offense involves parsing myriad independent statutory provisions through the interpretive lens of a robust body of decisions of the Board of Immigration Appeals (BIA), the federal administrative agency charged with determining whether a person is to be ordered removed, and the federal courts charged with reviewing those removal decisions.[29] Asking state courts to venture so far into immigration law as to require them to accurately determine whether deportation will clearly result from pleading to a particular offense is asking state courts to do what they do not currently have the capacity to do. This predicament is particularly troubling given the recent surge of interest by state legislatures in involving the various branches of state government in regulating immigration because it will inevitably thrust state courts further into immigration law—though state regulation of immigration that requires state courts to examine immigration law may, admittedly, improve their current deficiencies.

This article explores the repercussions of *Padilla*'s enlistment of state courts into the realm of crime-based removal. To fully explore the role of state courts in adjudicating *Padilla* claims this article begins, in Part II, by identifying the requirements imposed by that decision. Part III then addresses the obstacles facing individuals raising *Padilla* claims in state courts. The first section of Part III addresses the institutional competence of state courts to properly determine *Padilla* claims, focusing on the historical lack of involvement of state courts in determining removal. The second section of Part III provides an analysis of the first six months of efforts by state courts to adjudicate *Padilla* claims. The early results are not comforting. State courts, this review evidences, are having great difficulty navigating *Padilla*'s mandate largely because they are unfamiliar with immigration law. The article concludes by offering suggestions to state courts and the immigration bar that might reduce the prevalence of incorrectly decided *Padilla* claims and help to fulfill the promise of *Padilla*.

1627, 1628 (1997)). Karla Mari McKanders explains: "There has been constant tension between federal and state governments over immigration regulation. . . . The Supreme Court addressed whether states should be permitted to regulate immigration as early as 1875, when the Court struck down a proposed state law prohibiting state regulation of immigration." Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 14 (2007) (discussing Henderson v. Mayor of New York, 92 U.S. 259 (1875)).

29. *See* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 901, 928 (2010) ("The question of whether a crime has been properly characterized for immigration purposes involves an arcane and intensely legalistic analysis of interlocking immigration and criminal statutes, the interpretation of which continues to evolve.").

II. REQUIREMENTS IMPOSED BY *PADILLA*

Though *Padilla* stands to become a landmark of "crimmigration" law jurisprudence,[30] it is not a radical departure from criminal procedure norms. Rather, *Padilla* explicitly builds upon the Supreme Court's twenty-six-year-old decision in *Strickland v. Washington* in which the Court held that the Sixth Amendment right to counsel requires effective representation.[31] Only through effective representation, the *Strickland* Court explained, can the right to counsel ensure a fair adversarial criminal process.[32] To properly measure defense counsel's effectiveness, the *Strickland* Court announced a two-part process for determining whether a criminal defense attorney's performance violated a defendant's right to effective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[33]

As part of the *Strickland* analysis, defense counsel must consult with the defendant on important decisions and utilize the skill and knowledge necessary to foster a reliable adversarial criminal process.[34]

In more than a quarter century since *Strickland* was decided, countless federal and state courts, including the U.S. Supreme Court, have repeatedly interpreted the reach of the right to effective assistance of counsel.[35]

30. *See* Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 667 (2008) (defining "crimmigration" as "the confluence of immigration and criminal law").

31. Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

32. *See id.*

33. *Id.* at 687.

34. *See id*. at 688; *see also* Burch v. Millas, 663 F. Supp. 2d 151, 184-85 (W.D.N.Y. 2009) ("Because the adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate[,] [t]he right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.") (internal quotations and citations omitted); State v. Smith, 249 S.W. 3d 119, 121 (Ark. 2007) (explaining that a successful *Strickland* claim shows "that the conviction resulted from a breakdown in the adversary process that renders the result unreliable").

35. *See, e.g.*, Hill v. Lockhart, 474 U.S. 52, 57 (1985) (extending *Strickland* to convictions that result from entry of a plea); Pineo v. State, 908 A.2d 632, 636-37 (Me. 2006) (explaining that Maine's ineffective assistance of counsel standard follows *Strickland*); State v. Johnson, 494 N.E.2d 1061, 1063-64 (Ohio 1986) (applying *Strickland* to a state criminal proceeding).

Largely because most criminal prosecutions occur in state courts,[36] state courts have become quite accustomed to reviewing defense counsel's performance in light of *Strickland*.[37] Though numerous state and lower federal courts had addressed *Strickland*'s application to claims that a defense attorney failed to advise or incorrectly advised a client about the immigration consequences of a plea,[38] *Padilla* marks the Supreme Court's most significant foray into this critical issue in the lives of non-citizen criminal defendants.

Determining whether deportation is a "clear" consequence of pleading guilty to a particular criminal offense is no small task. Immigration law, as the *Padilla* Court and lower courts have acknowledged, is highly "complex."[39] Indeed, numerous practice guides recognize the difficulty of

36. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 1 (2010), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinespdfversion.pdf (stating that there were 76,655 criminal cases filed in federal district courts in 2009); SHAUNA M. STRICKLAND ET AL., STATE COURT CASELOAD STATISTICS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 45 tbl.1 (2010), *available at* http://www.ncsconline.org/D_Research/csp/2008_files/EWSC_2008_Online_Version.pdf (stating that there were more than 21 million criminal cases filed in state trial courts in 2008).

37. *See, e.g.*, State v. Mundt, 115 Ohio St. 3d 22, 2007-Ohio-4836, 873 N.E.2d 828, 838-39 (reviewing a criminal defense attorney's actions in a state criminal prosecution under the *Strickland* analysis); Larngar v. Wall, 918 A.2d 850, 855-56 (R.I. 2007) (same).

38. *Compare* United States v. Del Rosario, 902 F.2d 55, 56-58 (D.C. Cir. 1990) (rejecting a claim of ineffective assistance of counsel based on allegations that the defense attorney failed to advise the defendant that a guilty plea would likely lead to deportation), *and* Rubio v. State, 194 P.3d 1224, 1229-30 (Nev. 2008) (concluding that failure to advise a client about the immigration consequences of a plea does not meet the first prong of *Strickland*'s ineffective assistance of counsel test), *with* State v. Paredez, 101 P.3d 799, 804 (N.M. 2004) (holding that a defense attorney's affirmative misrepresentation regarding the deportation consequences of a conviction or failure to advise about the immigration consequences of a conviction constitutes deficient performance).

39. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010); Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005); *see also* Laura Sullivan, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CAL. L. REV. 567, 571 (2009) (describing the increased complexity of immigration law since the 1970s). Justice Powell's concurring opinion in the landmark decision concerning the right of undocumented children to attend public schools, *Plyler v. Doe*, implicitly acknowledged the difficulty that the states and federal government face in predicting whether a particular individual will be deported precisely because deportation decisions can result only from federal administrative proceedings:

> [I]t is impossible for a State to determine which aliens the Federal Government will eventually deport, which the Federal Government will permit to stay, and which the Federal Government will ultimately naturalize. Until an undocumented alien is ordered deported by the Federal Government, no State can be assured that the alien will not be found to have a federal permission to reside in the country, perhaps even as a citizen. Indeed, even the Immigration and Naturalization Service cannot predict with certainty whether any individual alien has a right to reside in the country until deportation proceedings have run their course.

457 U.S. 202, 241 n.6 (Powell, J., concurring).

determining the precise consequences of a particular conviction.[40] This stems in large part from the convoluted nature of the Immigration and Nationality Act (INA), the federal statutory scheme that governs immigration law, regulatory provisions enacted to implement the INA, and decisions of the BIA and federal courts regarding the proper analysis of the INA's many requirements and prohibitions.[41] The U.S. Court of Appeals for the Ninth Circuit, for example, described immigration laws as a "labyrinth" and "second only to the Internal Revenue Code in complexity."[42]

Seven of the Justices in *Padilla* acknowledge this complexity—the majority opinion written by Justice Stevens and Justice Alito's concurrence regarding the judgment—yet the five-member majority and two-member concurrence reach different conclusions. "There will, therefore, undoubtedly be," writes Stevens joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor, "numerous situations in which the deportation consequences of a particular plea are unclear or uncertain."[43] Expressing a similar sentiment, Alito, joined by Chief Justice Roberts, explains, "'nothing is ever simple with immigration law'—including the

40. *See* DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW & CRIMES § 2:1 (2010).

41. Examples of confusion are legion. For example, courts have struggled mightily for over a century trying to determine what constitutes a crime involving moral turpitude. *See, e.g.*, *id.* § 6:2 (describing the 1891 introduction of the concept of crimes involving moral turpitude into immigration law and the vast confusion regarding the term's meaning that ensued). In recent decades courts have spilled much ink parsing the aggravated felony ground of removal, which currently consists of twenty-one categories of offenses, many of which include subcategories. *See* INA § 101(a)(43)(A)-(U) (2010) (listing the twenty-one categories of the aggravated felony ground of removal); *see also* KESSELBRENNER & ROSENBERG, *supra* note 39, § 7:23 (discussing the difficulty attorneys and courts face in interpreting the aggravated felony definitions).

Even the appropriate method for interpreting the INA is less than clear. In *Taylor v. United States*, the Supreme Court announced the "categorical approach" to statutory analysis in which courts may "look only to the fact of conviction and the statutory definition of the prior offense." 495 U.S. 575, 602 (1990); *see also* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185-87 (2007) (applying *Taylor*'s categorical analysis to aggravated felonies). Courts later expanded this analysis to include such documents as the indictment, jury instructions, and transcript of the plea colloquy, among others. *See Duenas-Alvarez*, 549 U.S. at 187. This analysis is referred to as the "modified categorical approach." *Id.* (quoting Conteh v. Gonzales, 461 F.3d 45, 54 (1st Cir. 2006)). Departing from *Taylor* and its progeny, Attorney General Michael Mukasey instructed immigration courts to "consider any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question." *See In re* Silva-Treviño, 24 I & N Dec. 687, 704 (A.G. 2008).

42. Castro-O'Ryan v. Dep't of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1988) (quoting ELIZABETH HULL, WITHOUT JUSTICE FOR ALL 107 (1985)); *see also* Escobar-Grijalva v. INS, 206 F.3d 1331, 1335 (9th Cir. 2000) (describing asylum regulations as "a labyrinth almost as impenetrable as the Internal Revenue Code").

43. *Padilla*, 130 S. Ct. at 1483 (2010).

determination whether immigration law clearly makes a particular offense removable."[44] The majority's recognition of immigration law's ambiguity leads it to conclude that the right to effective assistance of counsel requires less precise advice from an attorney representing a client facing an ambiguous possibility of deportation than an attorney representing a client with a clear possibility of deportation. "When the law is not succinct and straightforward," the majority opinion announces, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."[45] For his part, Justice Alito describes the bifurcated duty that is imposed on a defense attorney depending on the certainty of deportation as a result of a guilty plea as "problematic."[46] Because immigration law is impressively complex, Alito adds, "it will not always be easy to tell whether a particular statutory provision is 'succinct, clear, and explicit.'"[47]

Justice Alito is certainly correct that *Padilla* requires a defense attorney to provide different advice if deportation is clearly going to result from pleading guilty to a particular offense than when deportation is not clear. If deportation is clear, the right to effective assistance of counsel requires a defense attorney to affirmatively and accurately advise a non-citizen client about the likelihood of deportation.[48] If it is not clear that deportation is going to result from a guilty plea, then the defense attorney's obligation is measurably different: affirmatively advise the client about the possibility of "adverse immigration consequences."[49] Under this clear versus unclear consequences binary, the critical determination necessarily becomes the categorization of a plea as one that does or does not clearly result in deportation.

Given that seven justices explicitly acknowledge that determining the consequences of a guilty plea are not always clear, it is worth considering the one example that *Padilla* identifies of a criminal offense that, in the

44. *Id.* at 1490 (Alito, J., concurring) (citing R. MCWHIRTER, A.B.A., THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS 128 (2d ed. 2006); KESSELBRENNER & ROSENBERG, *supra* note 40, § 2:1). Judge Susan Bolton of the U.S. District Court for the District of Arizona likewise recognized this complexity in that court's decision to grant a preliminary injunction against certain provisions of Arizona's Senate Bill 1070: "Under any interpretation of the revision to A.R.S. § 13-3883, it requires an officer to determine whether an alien's public offense makes the alien removable from the United States, a task of considerable complexity that falls under the exclusive authority of the federal government." United States v. Arizona, 703 F. Supp. 2d 980, 1005 (D. Ariz. 2010).

45. *Padilla*, 130 S. Ct. at 1483.

46. *Id.* at 1490 (Alito, J., concurring).

47. *Id*.

48. *See id.* at 1483, 1484.

49. *See id.* at 1483.

majority opinion's estimation, does clearly result in deportation. José Padilla, the petitioner in *Padilla*, pled guilty to "transportation of a large amount of marijuana in his tractor-trailer."[50] This offense, the majority explains, "is a deportable offense under [INA § 237(a)(2)(B)(i)],"[51] the INA provision that renders deportable any non-citizen convicted of a violation of a state, federal, or foreign country's controlled substance law or regulation.[52] According to the majority, "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction."[53] As such, the majority goes on, "Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses."[54] Characterization of § 237(a)(2)(B)(i)—frequently described as the controlled substances offense ground of removal[55]—as a statutory provision that clearly results in deportation should set a guidepost for lower courts to follow in reaching their own determination.

Using the controlled substance offense as a benchmark, state courts adjudicating *Padilla* claims must determine whether a defense attorney properly advised a non-citizen client. To determine whether a defense attorney had a duty to affirmatively advise a client, a state court must first determine if the INA clearly indicates that deportation would result from pleading guilty to the offense charged. If deportation was a clear consequence, then the state court must determine if the defense attorney accurately advised the client as such. The state court's analysis therefore hinges on its ability to determine when the INA clearly mandates deportation. A state court's ability to reach this determination, as Part III discusses, is severely limited by its lack of institutional competence in immigration law.

50. *See id.* at 1477.

51. *See id.* at 1477 n.1.

52. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

53. *Padilla*, 130 S. Ct. at 1483.

54. *Id.*

55. *See* STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE: DESK EDITION § 17.03[3][d][iii] (Nov. 2009).

III. STATE COURTS ARE CURRENTLY ILL-EQUIPPED TO HANDLE *PADILLA* CLAIMS

A major obstacle facing *Padilla* claims in state courts is their current lack of institutional competence to perform the core analysis required by the Supreme Court. While state courts are thoroughly equipped to adjudicate right to counsel claims under *Strickland* where those claims allege a violation of a requirement of criminal law or criminal procedure,[56] they are not sufficiently familiar with immigration law to determine when deportation will clearly result from pleading guilty to a particular offense. The end result is that state courts routinely misinterpret removal law resulting in incorrect adjudication of *Padilla* claims or altogether avoiding the analysis of immigration law that *Padilla* obligates them to perform.

A. LACK OF INSTITUTIONAL COMPETENCE

Institutional competence, explains the legal scholar Jeff A. King, "is merely a way of describing what courts are good and (more often) bad at doing."[57] State courts do not have sufficient familiarity with law governing removal proceedings, and in particular with the crime-based grounds of removal directly implicated by *Padilla* claims, to be "good" at determining whether a particular state criminal offense will clearly result from deportation. Prior to *Padilla*, state courts that encountered immigration law typically did not endeavor to determine whether a conviction would lead to deportation; rather, they reached a determination on constitutional or other grounds already within their purview.[58]

Historically, administrative tribunals have performed the bulk of the parsing of statutory grounds of removal.[59] Today, immigration judges who

56. *See, e.g.*, State v. Denisyuk, 991 A.2d 1275, 1279-80 (Md. Ct. Spec. App. 2010) (applying *Strickland* to an ineffective assistance of counsel claim motivated by an attempt to avoid deportation); D' Ambrosio v. State, 146 P.3d 606, 621-22 (Haw. Ct. App. 2006) (holding that a criminal defendant's right to effective assistance of counsel was not violated by an attorney's failure to advice about collateral consequences of a guilty plea).

57. Jeff A. King, *Institutional Approaches to Judicial Restraint*, 28 OXFORD J. LEGAL STUD. 409, 423 (2008).

58. *See, e.g.*, People v. Ford, 633 N.Y.S.2d 270, 272-74 (1995) (denying an immigration-motivated effort to vacate a conviction on constitutional principles related to ineffective assistance of counsel and the requirements for entering a voluntary and intelligent plea), *abrogated by Padilla*, 130 S. Ct. 1473; Kentucky v. Fuartado, 170 S.W.3d 384, 385-86 (Ky. 2005) (denying an immigration law-based *Strickland* claim by concluding that a defense attorney was under no obligation to inform the defendant about the possibility of deportation), *abrogated by Padilla*, 130 S. Ct. 1473.

59. The Department of Justice (DOJ) was responsible for administering the bulk of immigration law prior to 2003. *See* DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL § 3-3 (2005). A DOJ agency, the Immigration and

are appointed to positions within the Executive Office for Immigration Review (EOIR), a unit of the Department of Justice, make removal determinations.[60] Their decisions are in turn reviewable by the members of the BIA, the immigration law administrative appellate body with exclusive jurisdiction over immigration judges' removal decisions, and also a subunit of the EOIR.[61] Only after the BIA enters a final determination is judicial review possible. Rather than proceeding to the federal district courts, BIA decisions are directly reviewed by the federal courts of appeal and, ultimately, the U.S. Supreme Court.[62]

The benefit of assigning most removal determinations to a single set of institutional actors is straightforward: doing this facilitates expertise and efficiency. The immigration courts and BIA devote the whole of their resources to immigration law. The crime-based grounds of removal present in *Padilla* claims occupy a substantial portion of these resources.[63] By repeatedly parsing the crime-based statutory provisions of removal the immigration judges, BIA members, and attorneys who routinely practice before these decision makers have developed a sophisticated understanding of the nuances of procedural and substantive crime-based removal laws. Through repetitive exposure to the crime-based provisions of the INA these public and private actors are able to more accurately, efficiently, and consistently decide whether commission of a particular criminal offense may or must lead to deportation.[64]

Naturalization Service (INS), considered immigration petitions and naturalization applications and enforced immigration laws. *See id.* The Department of Homeland Security now administers these functions except that the immigration courts and Board of Immigration Appeals remain within the DOJ's Executive Office for Immigration Review. *See id.*

60. *See* INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1) (2010); *see also EOIR Background Information*, U.S. DEP'T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW, http://www.usdoj.gov/eoir/background.htm (last visited Jan. 28, 2011) ("The Executive Office for Immigration Review (EOIR) was created on January 9, 1983, through an internal Department of Justice (DOJ) reorganization which combined the Board of Immigration Appeals (BIA or Board) with the Immigration Judge function previously performed by the former Immigration and Naturalization Service (INS) (now part of the Department of Homeland Security).").

61. *See* 8 C.F.R. § 1003.1(b)(1)-(3) (2010).

62. *See* INA § 242(a)(5), 8 U.S.C. § 1252(a)(5) (2010).

63. In May 2007, TRAC reported that 13.1% (106,878) of individuals placed into removal proceedings were charged as removable under a crime-based ground. *Immigration Enforcement: The Rhetoric, The Reality*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, tbl.2 (May 29, 2007), http://trac.syr.edu/immigration/reports/178/. In August 2010, TRAC reported that ICE had substantially increased the number of individuals who had been convicted of a crime who were removed. TRAC, *Current ICE Removals*, *supra* note 16. According to TRAC, approximately 49% (136,714) of individuals removed in the first nine months of fiscal year 2010 had been convicted of some criminal offense. *Id.* at tbl.4.

64. This is not to say that these administrative tribunals are inherently better equipped to perform this task. I take no position in that regard. Nor is this to say that the immigration courts and BIA are as responsive as federal courts to constitutional norms even when interpreting

To a certain extent, the federal courts of appeal have also developed a specialization in immigration law.[65] Though the courts of appeal are overall generalist tribunals, heavy caseloads in a particular area may convert them into de facto specialists.[66] According to political scientist Lawrence Baum, two federal courts of appeal—the Second and Ninth Circuits—receive a sufficiently high number of appeals of BIA decisions that the judges on these courts have effectively become specialists in immigration law.[67]

In contrast, state courts do not typically address immigration law. Immigration law generally and removal determinations specifically are well outside the scope of state courts' jurisdictional powers.[68] For more than a century the prevailing judicial norm has excluded the states from regulating who may enter or remain in the country and who is forced to leave.[69] To the extent that state courts have been required to grapple with removal provisions, they have done so only tangentially.[70] After *Padilla*, however, state courts must now fully engage removal provisions so as to apply the removal law that federal administrative agencies and federal courts develop.

statutes. It may be the case, as Hiroshi Motomura explains, that "contemporary constitutional law is a significant element of the legal culture that judges inevitably, if often subconsciously, absorb and rely upon when acting in their judicial capacity, including those instances in which they engage in statutory interpretation." Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 561 (1990). Again, I leave analysis of the relative merits of federal courts, immigration judges, and BIA members to another day.

65. *See* Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1504 (2010).

66. *See id.* at 1546.

67. *See id.* at 1551.

68. *See, e.g.*, State v. Martinez, 165 P.3d 1050, 1058 (Kan. Ct. App. 2007) ("[I]t is not the function of the state courts to enforce our national immigration laws."); *Ex parte* Fook, 74 F. Supp. 68, 70-71 (N.D. Cal. 1948) (holding that a state court's determination about a person's place of birth is not conclusive evidence of United States citizenship because citizenship can only be determined by the federal government).

69. *See* McKanders, *supra* note 28, at 14 (discussing Henderson v. New York, 92 U.S. 259 (1875)); *see also* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 23 (2006) (tracking the shift that began in the mid-nineteenth century from state-centered regulation of immigration to federal primacy in this area). Though regulation of immigrants is a power reserved to the federal government, the states may nonetheless regulate the lives of immigrants. The former category is properly referred to as "immigration law," while the latter category is frequently described as "alienage law"—that is, "the law governing the lives of non-citizens inside the United States. . . ." MOTOMURA, *supra*, at 46.

70. *See, e.g.*, People v. Zamudio, 999 P.2d 686, 699 (Cal. 2000) (requiring California courts to determine whether there exists "more than just a *remote possibility* of deportation, exclusion, or denial of naturalization" in considering a motion to vacate a conviction) (internal quotations omitted) (emphasis added).

B. A REVIEW OF SIX MONTHS OF STATE COURTS' TREATMENT OF *PADILLA* CLAIMS

Early attempts at following *Padilla*'s mandate suggest that state courts currently do not have sufficient familiarity with the statutory provisions governing removal to determine whether someone will clearly be deported.[71] For a state court to determine whether a defense attorney accurately advised a non-citizen client about the "clear" possibility of deportation as a result of pleading guilty, the state court must have the capacity to itself analyze the crime-related grounds of removal. Within six months of the Supreme Court's decision, many courts that decided a *Padilla* claim based on the merits evidenced a troubling unfamiliarity with immigration law or reluctance to engage immigration law as required by *Padilla*. These decisions can be grouped into four categories: instances in which courts incorrectly analyzed immigration law, instances in which courts evidenced a misunderstanding of important features of removal proceedings, cases in which courts simply avoided conducting their own analysis of immigration law, and the occasional decision in which courts correctly performed the *Padilla* analysis.

1. INCORRECT ANALYSIS OF IMMIGRATION LAW

Some courts erred in their straightforward analysis of immigration law. In July, a Rhode Island Superior Court justice, a member of that state's trial court, issued a decision denying a petition for post-conviction relief under the state's post-conviction relief statute.[72] The petitioner, Fernando Lora, plead nolo contendere in 1991 to unlawful delivery of cocaine.[73] He was sentenced to five months imprisonment followed by

71. I identified state court decisions to examine by using Westlaw's KeyCite search excluding cases that received a "cited" or "mentioned" depth of treatment indicating that the decision merely contained "usually less than a paragraph" of discussion about *Padilla* or "[t]he citing case contains a brief reference to the cited case, usually in a string citation." *See* KeyCite Limits, Westlaw database. I performed an analogous search on LexisNexis using its Shepardize function.

Importantly, this analysis does not portend to be an exhaustive examination of all state court decisions applying *Padilla*. Rather, the cases discussed here are offered as illustrative of the obstacles state courts face in applying *Padilla*. The central limitation I encountered is the unavailability of state trial court decisions. Neither Westlaw's All State Cases (Westlaw Database Identifier ALLSTATES) database nor LexisNexis's State Court Cases, Combined (Lexis Nexis file-name STCTS) database contains decisions of trial courts from all states. Both databases, for example, fail to include decisions of the Texas District Courts or the Florida Circuit Courts, those states' general jurisdiction trial courts. Because Texas and Florida have large immigrant populations it stands to reason that *Padilla* claims would already be percolating through their court systems. To the extent that I have located relevant decisions not included in Westlaw or LexisNexis I have done so by chance rather than systematic search.

72. Lora v. State, No. PM-2009-3518, 2010 WL 2802107 (R.I. Super. Ct. July 12, 2010).

73. *Id.* Sometimes referred to as a "no contest" plea, a nolo contendere plea requires the

sixty-seven months of probation.[74] After release from prison, Lora assumed a different name and failed to satisfy the terms of his probation.[75] Using his new name he applied for and received permanent residency.[76] In 2009, eighteen years after his conviction, immigration agents finally caught up with Lora as he attempted to return to the United States from a trip to the Dominican Republic.[77] Lora subsequently filed a post-conviction relief petition to vacate his 1991 conviction on the basis that his criminal defense attorney at the time inaccurately advised him about the immigration consequences of entering his plea.[78]

After laying out the *Padilla* framework, the court first devotes significant space to quoting Justice Stevens's lengthy discussion in *Padilla* of the 1996 repeal of a longstanding form of relief from removal—relief pursuant to former § 212(c) of the INA.[79] Immediately following this discussion, the Rhode Island court concludes: "had Mr. Lora served his sentence it is unlikely that he would have been deported."[80] That is, the court concludes that the petitioner would not have been deported had he completed his sixty-seven months of probation following five months in prison instead of having assumed a different name and avoided immigration agents for eighteen years.

Unfortunately, the court is wrong. In 1991 when Lora was convicted, just like today, conviction for a controlled substances offense rendered a non-citizen deportable. The version of the statute that existed at the time plainly provided that any non-citizen convicted of a controlled substances offense "at any time after entry . . . is deportable."[81] This statutory

defendant to admit all the elements of the offense. 21 AM. JUR. 2D *Criminal Law* § 675 (2010). The defendant may then be sentenced identically as someone who pled guilty. *Id.* "A plea of nolo contendere is used by the accused in criminal cases to save face and avoid exacting an admission that could be used as an admission in other potential litigation, to avoid trial with its attendant expense and adverse publicity in the event of a conviction." *Id.*

74. *Lora*, 2010 WL 2802107.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* Section 212(c) granted the Attorney General "broad discretion" to admit an excludable individual or grant a waiver of deportation to a deportable individual. *See* INS v. St. Cyr, 533 U.S. 289, 294-95 (2001). This type of relief existed in some form from 1917 to 1996. *See id.* at 294-96.

80. *Lora*, 2010 WL 2802107.

81. 8 USC § 1251(a)(2)(B)(i) (1992) ("Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

language, in fact, was in all relevant parts the very same language under which Padilla was ordered removed many years later and about which the *Padilla* Court concluded, "The consequences of Padilla's plea could easily be determined from reading the removal statute . . . ."[82] Given that the relevant language of the controlled substances offense did not change between 1991 and 2010, deportation for a controlled substances offense was, to borrow from *Padilla*, "presumptively mandatory" in 1991 just as it was in 2010 when the *Padilla* Court reviewed the same words in the same statutory provision.[83] Lora unquestionably fell into this category. He had entered the country as "entry" was defined at the time[84] and he was convicted, as that term was defined for immigration law purposes,[85] of an offense involving a prototypical controlled substance—cocaine.[86]

The Rhode Island court's incorrect analysis of the consequences of Lora's plea alone dooms Lora's petition. Since the court concludes that Lora would not have been deported had he completed his sentence, it implicitly determines that Lora's defense attorney was not obligated to advise him about deportation consequences. As such, the court does not address the accuracy of the defense attorney's advice.

The court's missteps, however, do not end there. It suggests that Lora

82. Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

83. *See id.* at 1483.

84. Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 301(a), 110 Stat. 3009-575 (Sept. 30, 1996), the INA defined "entry" as:

> any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: Provided, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1991).

85. Under BIA precedent at the time, "a person [is considered] convicted if the court has adjudicated him guilty or has entered a formal judgment of guilt." *In re* Ozkok, 19 I. & N. Dec. 546, 551 (B.I.A. 1988), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, H.R. Rep. No. 104-828, at 223-24 (Conf. Rep.), *as recognized in* Retuta v. Holder, 591 F.3d 1181, 1186 (9th Cir. 2010). Where the non-citizen had pleaded nolo contendere, as had Lora, the BIA required "some form of punishment, penalty, or restraint on the person's liberty to be imposed." *Id.*

86. The controlled substances offense provision in effect at the time, identically to the current version, defined "controlled substance" by reference to the federal Controlled Substances Act codified at 21 U.S.C. § 802. *See supra* note 79 and accompanying text; INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (1988). In turn, Schedule II of the version of the federal Controlled Substances Act that existed in December 1991 when Lora entered his plea included cocaine. *See* 21 U.S.C. §§ 802(6), 812(c), Schedule II (1988).

would have been subject to more favorable immigration laws in 1991 than in 2009 because in 1991 he could have benefited from the now-repealed § 212(c). "Mr. Lora skirted the law . . . and, by his doing, became subject to laws and policies that were not in effect at the time of his sentencing," the court explains.[87] Again, the court is incorrect. The passage of time has not affected Lora's ability to seek § 212(c) relief. If Lora was eligible for § 212(c) in 1991, then he is eligible for it today, essentially as if time had stopped.[88] Based on the information provided by the Rhode Island court, it appears that Lora would not have been eligible for § 212(c) relief at the time of his conviction because § 212(c) relief was available only to lawful permanent residents and Lora "was in the United States illegally" at the time of his conviction.[89]

Importantly, had immigration agents wanted to or been able to catch up to Lora in 1991, he could have been ordered deported. That he managed to continue on for so long says more about Lora's wiliness and the INS's administrative priorities than it does about the state of deportation law or the amount of flexibility in the controlled substances offense ground of deportation that existed in 1991. A defense attorney cannot be asked to predict whether a client who faces deportation as a result of a conviction will manage to outrun immigration law enforcement authorities. Nor can an attorney be asked to predict whether immigration officials will attempt to locate an individual subject to deportation, begin removal proceedings, and actually physically remove the person from the United States.[90] In a case

87. *Lora*, 2010 WL 2802107.

88. *See St. Cyr*, 533 U.S. at 326 ("We therefore hold that § 212(c) relief remains available for aliens, like respondent, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.").

89. *See Lora*, 2010 WL 2802107; KESSELBRENNER & ROSENBERG, *supra* note 40, §§ 10:32, :33.

90. Immigration officials have long enjoyed prosecutorial discretion in determining when and if to initiate removal proceedings. *See, e.g.*, John Morton, Assistant Sec'y, Dep't of Homeland Sec., Immigration & Customs Enforcement, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* (Aug. 20, 2010) (explaining ICE's prosecutorial discretion guidelines regarding individuals in removal proceedings who also have an application or petition pending with the United States Citizenship and Immigration Services); John Torres, ICE Director, *Use of Prosecutorial Discretion in Cases of Extreme or Severe Medical Concern—2006 Guidance* (Dec. 11, 2006), *reprinted at* 14 Bender's Immigr. Bull. 1, appx. B (Dec. 15, 2009) (providing guidelines for use of prosecutorial discretion by ICE officers when determining whether a person with a severe medical condition should be held in custody); Doris Meissner, INS Comm'r, HQOPD 50/4, *Exercising Prosecutorial Discretion* (Nov. 17, 2000), *reprinted at* 5 Bender's Immigr. Bull. 995 (Dec. 1, 2000) (describing the prosecutorial discretion available to officers of the former Immigration and Naturalization Service). The American Immigration Council's Legal Action Center recently published a practice advisory to assist immigration attorneys in understanding the prosecutorial discretion available to DHS officials. *See* Mary Kenney, *Prosecutorial Discretion: How to Get DHS to Act in Favor of*

that preceded *Padilla* by several years, the Ninth Circuit aptly explained the uncertainty that necessarily results from the fact that removal proceedings are exclusively within the control of an agency that is independent of criminal proceedings: "[W]hether an alien will be removed is still up to the INS. There is a process to go through, and it is wholly independent of the court imposing sentence."[91] Reflecting this bifurcated enforcement, *Padilla* does not ask defense attorneys to possess anything resembling the clairvoyance necessary to predict what immigration officials will do after a non-citizen is convicted. All *Padilla* asks defense attorneys to do is determine whether the INA clearly mandates deportation—a difficult enough task unto itself.

The difficulty of this task is exemplified by the Rhode Island court's third important flaw. The court implies that the availability of relief under § 212(c) means that Lora would not have been deported. This is wrong because it appears from the facts that the court provided that Lora was not deported.[92] Rather, he was excluded from the United States.[93] In the court's words, "[h]e was refused re-entry and returned to the Dominican Republic where he remains."[94]

Though on first blush the distinction between deportation and exclusion seems to be overly technical nitpicking, this distinction is actually quite central to the operation of § 212(c) relief. Relief under § 212(c) initially applied only to individuals charged as excludable.[95] Over time courts extended § 212(c) relief to individuals charged as deportable, but only if they were charged as deportable for an offense for which there was a comparable ground of exclusion.[96] The comparable grounds analysis functions as an additional requirement imposed on individuals in deportation proceedings. While the § 212(c) analysis involves two steps for people being excluded—meeting the statutory eligibility requirements and meriting a favorable discretionary decision—it involves an additional step for people in deportation proceedings—showing that a comparable ground of exclusion exists.[97] Satisfying the comparable ground requirement is no

Your Client 1 (Nov. 30, 2010), *available at* www.legalactioncenter.org/sites/default/files/ProsecutorialDiscretion-11-30-10.pdf. This advisory contains an annotated list of fourteen memoranda concerning prosecutorial discretion issued by DHS or the former INS. *See id.* at 14-17.

91. United States v. Leal, 276 F.3d 511, 516 (9th Cir. 2002).

92. *See supra* note 19 and accompanying text (discussing the definition of "deportable").

93. *See supra* note 19 and accompanying text (discussing the definition of "exclusion").

94. Lora v. State, PM-2009-3518, 2010 WL 2802107 (R.I. Super. Ct. July 12, 2010).

95. *See* INS v. St. Cyr, 533 U.S. 289, 295 (2001).

96. *In re* Silva, 16 I. & N. Dec. 26, 30 (B.I.A. 1976); *see also St. Cyr*, 533 U.S. at 295.

97. *See* GALLAGHER & BALDINI-POTERMIN, *supra* note 18, § 6:85.

small feat.[98] The *Lora* court seems blissfully ignorant of this. Though the court's incorrect characterization of Lora's matter as one involving deportation rather than exclusion does not affect the court's outcome, it is nonetheless cause for concern because it may affect the court's outcome in a case in which an individual's ability to lawfully stay in the United States depends on the correct application of grounds of exclusion rather than grounds of deportation.

Another cautionary example of a state court fumbling immigration law requirements comes from a New York trial court contemplating a *Padilla* claim brought by a lawful permanent resident with six convictions, including two for criminal possession of a controlled substance.[99] In that case, *People v. Cristache*, the Court distinguished *Padilla* by explaining,

> Unlike defendant Padilla, however, defendant here did not plead guilty to any offenses which would have clearly subjected him to "automatic" or "mandatory" removal or deportation, inasmuch as none of the offenses constituted an "aggravated felony". . . . On the contrary, defendant's current counsel candidly admitted during oral argument on the motion that defendant, who has been a lawful permanent resident since at least 1996, is eligible for, and currently applying for, "cancellation of removal," during the removal proceedings, which, if granted, would effectively preclude, or "cancel" removal and restore defendant to his status as a legal permanent resident.[100]

The Court is mistaken that the possibility of receiving Cancellation of Removal renders the non-citizen's removal any less "mandatory" than Padilla's controlled substances offense conviction. The INA leaves no doubt that Cristache's convictions render him removable, most likely several times over. To begin, though the court does not precisely identify the controlled substance that formed the basis of these convictions, it does note that Cristache was addicted to heroin and admitted into a drug detoxification program.[101] The INA clearly renders deportable any person who abuses or is addicted to drugs: "Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable."[102] Cristache's

98. *See* KESSELBRENNER & ROSENBERG, *supra* note 40, §10:29 (illustrating the importance and complexity of comparable ground analyses); Gregory G. Sarno, Annotation, *Eligibility for Discretionary Admission Under § 212(c) of Immigration and Nationality Act of 1952 (8 U.S.C.A. § 1182(c)), of Alien Returning to Unrelinquished Domicile After Trip Abroad*, 80 A.L.R. FED. 8, § 3[e] (1986) (same).

99. *See* People v. Cristache, 907 N.Y.S.2d 833 (N.Y. Crim. Ct. 2010).

100. *Id.* at 843 (citations omitted).

101. *See id.* at 835.

102. *See* INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii) (2010); *see also* Pondoc Hernaez v. INS, 244 F.3d 752, 756 (9th Cir. 2001) (holding that § 237(a)(2)(B)(ii) "which makes drug

drug use, therefore, was alone sufficient to render him deportable.

Because the *Cristache* court did not identify the type or quantity of controlled substance involved in these convictions it cannot be determined with certainty whether each conviction alone or combined would render Cristache deportable under the controlled substances offense ground. For one thing, removal cannot be ordered under this provision without identification of the specific controlled substance involved.[103] Secondly, to be removable under the controlled substances offense provision, the particular controlled substance for which the person was convicted must be included in the federal Controlled Substances Act (CSA).[104] Because of the lack of information provided by the *Cristache* Court regarding the drug involved in Cristache's possession convictions, it is impossible to determine from the opinion whether the drug is listed in the federal CSA. However, given Cristache's recognized heroin addiction it is not unreasonable to conclude that he was convicted of possessing heroin, a drug that is included in the federal CSA,[105] rendering him removable based on each conviction.

Moreover, the controlled substances offense ground of removal allows for an exception only for "a single offense involving possession of one's own use of thirty grams or less of marijuana . . . ."[106] Even assuming that both of Cristache's controlled substances convictions were based solely on possession for his own use of thirty grams or less of marijuana, the two convictions combined would preclude him from benefiting from the exception since it explicitly applies only to "a single offense."[107] As such, Cristache's two controlled substances convictions would make him subject to the controlled substances offense ground of deportation. It bears repeating that this is the very provision that rendered Padilla

addiction grounds for deportation, does not require a conviction").

103. *See In re* Paulus, 11 I. & N. Dec. 274, 276 (B.I.A. 1965).

104. *See* INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2010). This provision references the definition of "controlled substance" found at 21 U.S.C. § 802. Section § 802(6) in turn references the substances included in schedules I-V, found at 21 U.S.C. § 812(b) with revisions at 21 C.F.R. § 1308.

105. *See* 21 U.S.C. § 812(c), 21 C.F.R. § 1308.11(c)(11) (2010).

106. *See* INA § 237(a)(2)(B) (2010). It is unlikely that either conviction was based on possession of marijuana because New York maintains a separate statutory scheme for marijuana possession convictions. *See* N.Y. PENAL LAW §§ 221.05-.55 (McKinney 2010). Indeed, New York's criminal possession of marijuana in the fourth degree, N.Y. PENAL LAW § 221.15, results in the same Class A misdemeanor conviction as does the offense for which Cristache was convicted—criminal possession of a controlled substance in the seventh degree, N.Y. PENAL LAW § 220.03. It stands to reason that Cristache would have been convicted of the more specific marijuana possession conviction had that been the basis of his offense rather than the more general offense for which he was actually convicted.

107. *See* INA § 237(a)(2)(B) (2010).

"presumptively mandatory."[108]

At least two of Cristache's four other convictions—the two convictions for criminal possession of stolen property in the fifth degree[109]—likely also render him deportable under the provision that requires deportation for any non-citizen "who at any time after admission is convicted of two or more crimes involving moral turpitude . . . ."[110] Each of these offenses is likely to be considered to involve moral turpitude.[111] Therefore, combined, these two convictions render Cristache deportable independently of the controlled substances offenses.

The *Cristache* court failed to discuss any of these possibilities. Instead, it simply concluded that Cristache was not automatically or mandatorily removable largely because, as is explained below, the court incorrectly concluded that Cristache's eligibility for relief from removal renders him not deportable.[112] Having incorrectly concluded that deportation would not result from Cristache's convictions, the court analyzed Cristache's *Padilla* claim under the more lax prong that applies to convictions that do not clearly result in deportation.[113] Cristache's defense attorney, the court explained, "was constitutionally obliged to 'do no more than advise [defendant] that pending criminal charges may carry a risk of adverse immigration consequences.'"[114] The court concluded that Cristache's defense attorney did as much, therefore Cristache's claim was denied.[115] Had the court correctly construed the relevant crime-based

108. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

109. N.Y. PENAL LAW § 165.40 (McKinney 2010).

110. *See* INA § 237(a)(2)(A)(ii) (2010). The BIA defines "crimes involving moral turpitude" as "encompass[ing] conduct that shocks the public conscience as being 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.'" *In re* Solon, 24 I. & N. Dec. 239, 240 (B.I.A. 2007) (quoting *In re* Ajami, 22 I. & N. Dec. 949, 950 (B.I.A. 1999)). The phrase "generally refers to acts that are per se morally reprehensible and intrinsically wrong." *Id.*

111. *See* Michel v. INS, 206 F.3d 253, 263 (2d Cir. 2000) ("[W]e conclude that all violations of New York Penal Law 165.40 are, by their nature, morally turpitudinous . . . ."); *see also* De Leon-Reynoso v. Ashcroft, 293 F.3d 633, 635-37 (3d Cir. 2002) (finding that possession of stolen goods involves moral turpitude where the defendant believed the items were probably stolen); *In re* Serna, 20 I. & N. Dec. 579, 585 n.10 (B.I.A. 1992) (noting that possession of stolen property with knowledge that it is stolen constitutes a crime involving moral turpitude).

112. *See* People v. Cristache, 907 N.Y.S.2d 833, 843 (N.Y. Crim. Ct. 2010); *see also infra* notes 116-26 and accompanying text.

113. *See Cristache*, 907 N.Y.S.2d at 843.

114. *Id.* (quoting *Padilla*, 130 S. Ct. at 1483).

115. *See id.* Cristache's defense attorney testified that she informed Cristache that "if he failed to complete the drug treatment program '. . . he would have immigration consequences,'" but

> counsel also admitted that she failed to advise defendant regarding the immigration consequences of pleading guilty (as distinguished from providing advice regarding the immigration consequences of failing to complete treatment), even though she was aware that

grounds of removal, it would have determined that Cristache's convictions clearly subjected him to removal. Consequently, Cristache's defense attorney's performance should have been reviewed under the stricter *Padilla* prong: the obligation to affirmatively and accurately inform Cristache that his convictions would render him deportable.

2. MISUNDERSTOOD IMPORTANT FEATURES OF REMOVAL PROCEEDINGS

Courts frequently conflate two aspects of removal proceedings that are more accurately conceptualized as distinct stages—the removal stage and the relief stage. During the removal stage the immigration judge must determine whether the non-citizen has violated an immigration law provision and is thus rendered removable.[116] Needless to say, this can be a contentious affair.[117] If the judge concludes that the non-citizen respondent has violated the relevant statutory provision, the respondent may then request relief from removal.[118] The relief stage of proceedings is usually conducted at a later date so that the parties can properly prepare their arguments.

Several courts discuss these distinct stages jointly. Sometimes it appears that the court presumes that the statutory possibility of relief from removal means that removal will not be ordered, while on other occasions it appears that courts are confused about the terms of art used in removal proceedings. Both of these common occurrences are troubling because they suggest a fundamental lack of understanding of removal proceedings—the very proceedings whose outcome a *Padilla* claim asks courts to predict.

Cristache provides a fitting example of a court that incorrectly concludes that removal is not certain because relief from removal is a possibility. Despite the court's statement that these offenses do not render Cristache mandatorily removable "inasmuch as none of the offenses constituted an 'aggravated felony'," the INA's plain language directs otherwise.[119] The INA succinctly and clearly provides that a non-citizen convicted of a controlled substances offense or of multiple crimes involving

> the subsequent vacatur and dismissal of the charges [resulting from completion of the drug treatment program] would not necessarily eliminate the possibility of deportation . . . .

Id. at 839.

116. *See* 8 C.F.R. § 1240.10(c)-(d) (2010).

117. *See* GALLAGHER & BALDINI-POTERMIN, *supra* note 18, § 5:8 (describing the contested nature of hearings where the non-citizen denies the charge of inadmissibility or deportability).

118. *See generally* AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE § 7:5.3 (4th ed. 2010) (describing the operation of removal proceedings).

119. *See Cristache*, 907 N.Y.S.2d at 843.

moral turpitude "is deportable."[120] The "is deportable" language found in the controlled substances offense and multiple crimes involving moral turpitude provisions is identical to the "is deportable" language used in the aggravated felony ground of removal that the *Cristache* court correctly explains does require mandatory removal.[121] There is nothing more "mandatory" about removal that results from an aggravated felony conviction than removal that results from a controlled substances offense or two crimes involving moral turpitude. All result in the entry of an order of removal. Indeed, the prefatory sentence to the INA section that enumerates all crime-based grounds of deportation, including these three provisions, states that anyone who falls into "one or more of the following classes of deportable aliens . . . shall . . . be removed."[122] There is nothing ambiguous about the term "shall." Even if there were, there is certainly nothing more ambiguous about the term "shall" as it applies to one ground of crime-based removal than another. At the risk of redundancy, the *Padilla* Court explained that Padilla's "deportation was presumptively mandatory" as a result of his controlled substances offense conviction.[123]

The only difference between the aggravated felony provision and the controlled substances offense or multiple crimes involving moral turpitude provisions is in the types of relief available to non-citizens who have been ordered removed under each of these provisions. Lawful permanent residents such as Cristache who have been ordered removed as a result of a controlled substances offense or two crimes involving moral turpitude may, as the *Cristache* court correctly explains, seek Cancellation of Removal, a commonly sought form of relief for lawful permanent residents.[124] In contrast, lawful permanent residents removed under the aggravated felony provision are statutorily barred from receiving Cancellation of Removal.[125] These individuals, however, are not barred from all forms of relief. Rather, individuals convicted of an offense deemed an aggravated felony may seek

120. *See* INA §§ 237(a)(2)(A)(ii), (B)(i) (2010).

121. *See* INA § 237(a)(2)(A)(iii) (2010) ("Any alien who is convicted of an aggravated felony at any time after admission *is deportable*.") (emphasis added).

122. INA § 237(a) (2010).

123. Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

124. *See* INA § 240A(a) (2010); *see also* U.S. DEP'T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW, *supra* note 19, at R3 tbl.15 (providing data indicating that 2,929 lawful permanent residents were granted Cancellation of Removal in Fiscal Year 2009; 3,035 in FY 2008; 3,205 in FY 2007; 2,972 in FY 2006; 2,531 in FY 2005). Importantly, the number of Cancellation of Removal applications granted in any fiscal year is statutorily capped at 4,000, subject to some exceptions. *See* INA § 240A(e)(1)-(e)(3), 8 U.S.C. § 1229(b)(e)(1)-(e)(3) (2010).

125. *See* INA § 240A(a)(3) (2010). Individuals convicted of an aggravated felony are also ineligible to receive Cancellation of Relief for Non-Permanent Residents. INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) (2010).

relief in the form of Withholding of Removal,[126] protection under the United Nations Convention Against Torture,[127] or readjustment of status.[128] Though these forms of relief are more burdensome than Cancellation of Removal, they are nonetheless available.[129]

On other occasions courts simply seem to misunderstand fundamental features of immigration law regarding removal.[130] Justice Alito, for example, in his concurring opinion in *Padilla*, writes, "a conviction for a particular offense may render an alien excludable but not removable."[131] Exclusion and removal are terms of art in immigration law. "Exclusion,"

126. *See* INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2010). Some individuals convicted of aggravated felonies are barred from eligibility for Withholding of Removal as well. Individuals convicted of an aggravated felony and who have been sentenced "to an aggregate term of imprisonment of at least 5 years" are barred from receiving Withholding of Removal because such offenses are deemed "particularly serious crime[s]." *See* INA § 241(b)(3)(B)(ii) (2010); *see also In re* Y-L-, 23 I. & N. Dec. 270, 274 (A.G. 2002) (holding "that aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute 'particularly serious crimes' within the meaning of section 241(b)(3)(B)(ii). Only under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible.").

127. *See* 8 C.F.R. § 208.16(c) (2010). As with Withholding of Removal, individuals convicted of an aggravated felony and who have been sentenced "to an aggregate term of imprisonment of at least 5 years" are barred from receiving protection under the Convention Against Torture because such offenses are deemed "particularly serious crime[s]." *See* 8 C.F.R. § 208.16(d)(3); *see also* Heeren, *supra* note 29, at 629 (explaining that some individuals "who are found to be properly deportable and ineligible for all discretionary relief from removal [may] still win CAT relief or withholding of removal").

128. *See In re* Mendez-Moralez, 21 I. & N. Dec. 296, 298 (B.I.A. 1996) (holding that a lawful permanent resident in deportation proceedings may apply for adjustment of status pursuant to INA § 245). Readjustment of status is particularly helpful to individuals convicted of an aggravated felony because the aggravated felony category does not apply to individuals seeking admission; it applies only to individuals in deportation proceedings.

129. The number of applicants seeking protection under the Convention Against Torture (CAT) and the percentage of those applications granted provides some suggestion of the difficulty of receiving this type of relief. In FY 2009, the immigration courts received 25,665 CAT claims. U.S. DEP'T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW, *supra* note 19, at M1. Of these only 504 were granted. *Id.* The bulk of the rest were either denied (10,894), withdrawn (5,583), or abandoned (1,340), with a significant minority (7,344) categorized as having an unexplained "other" disposition." *Id.*

130. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1491 (2010) (Alito, J., concurring); *see also* People v. Baker, 2010 WL 2175691, 2010 N.Y. Slip Op. 31289(U) (N.Y. Sup. Ct. 2010) (concluding that an individual who stated during his plea colloquy that he was a United States citizen, but who later filed a claim of ineffective assistance of counsel based on adverse immigration consequences, "deliberate[ly] misrepresent[ed]" his status "in the hopes of possibly avoiding detection of his immigrant status" without considering that many individuals genuinely believe they are citizens only to learn later that they are not).

131. *Padilla*, 130 S. Ct. at 1491 (Alito, J., concurring); *see also* People v. Cristache, 907 N.Y.S.2d 833, 843 (N.Y. Crim. Ct. 2010) (using, in adjacent sentences, "removal" in two ways: physical rejection from the United States and as a term of art).

sometimes referred to as "inadmissibility,"[132] describes the process by which a person who has not been formally "admitted," another term of art, into the country is kept out of the country either physically or through a legal fiction that defines "admission" into the United States "separate from physical entry and presence"; rather, "admission" is contingent on inspection and authorized entry by an immigration officer.[133] A person who is "excludable," therefore, may be prevented from entering the United States. The statutory definition of "removable" explicitly includes individuals charged as "inadmissible" or "deportable."[134] "Removable" accordingly refers to a person who is either excludable or deportable.[135] Alito's contrast of exclusion and removal suggests a binary between these two categories that does not exist in immigration law. Excludable is a subset of removable.[136] Numerous practice guides unambiguously explain this.[137] As such, a person who is determined to be excludable is necessarily also removable.

Alito most likely meant to use "deportable" rather than removable. Indeed, later in the same paragraph he remarks on "the oddity of an alien that is inadmissible but not deportable."[138] Contrasting exclusion with deportation makes sense because Alito's purpose in this section is to highlight the complexity of immigration law by explaining that some people who cannot be deported may nevertheless be kept out of the country if they voluntarily leave—"such as to visit an elderly parent or to attend a

132. *See* MAILMAN, *supra* note 55, § 16.01[1] ("This chapter discusses the grounds of inadmissibility (formerly called grounds of exclusion) . . . ."); § 16.01[2] ("Until the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), the INA used the term 'exclusion.'").

133. INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (2010); *see* Won Kidane, *The Alienage Spectrum Disorder: The Bill of Rights From Chinese Exclusion to Guantanamo*, 20 BERKELEY LA RAZA L.J. 89, 139 (2010). Section 101(a)(13)(A) provides: "The terms 'admission' and 'admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." The statute then adds several exceptions to this general definition. *See* INA § 101(a)(13)(B)-(C), 8 U.S.C. § 1101(a)(13)(B)-(C) (2010).

134. INA § 240(e)(2) (2010).

135. *See id.*

136. *See id.* § 240(e)(2)(A) (2010) (explaining that "removable" includes non-citizens who are inadmissible to the United States).

137. *See, e.g.*, MAILMAN, *supra* note 55, § 16A.01[1] ("For cases starting on or after April 1, 1997, there is a single removal proceeding, rather than separate 'exclusion' and 'deportation' proceedings as provided under prior law."); *id.* § 16A.01[2] ("One uniform procedure for removing aliens was created, rather than the previously separate deportation and exclusion proceedings."); WEISSBRODT & DANIELSON, *supra* note 59, § 1-9.1 ("IIRIRA also eliminated the procedural differences between exclusion and deportation proceedings, and provided that there would be only one 'removal proceeding' for excluding or deporting non-citizens.").

138. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1491 (2010) (Alito, J., concurring).

funeral"[139]—and attempt to return. That he presented a nonexistent binary, though, suggests an inexactitude toward immigration law that derives from a failure to appreciate the terms of art employed in this field and their significance. Alito's imprecision is especially cause for concern because he committed this subtle but important error despite the bountiful resources at his disposal in comparison to the resources available to state trial court judges.[140]

3. COURTS AVOID INDEPENDENTLY ANALYZING IMMIGRATION LAW

Perhaps recognizing their limited understanding of immigration law, many courts reviewing *Padilla* claims have altogether avoided conducting an independent analysis of the likelihood of deportation as a result of pleading guilty or exploring the accuracy of defense counsel's advice. One court left no room to doubt its avoidance of an immigration law analysis: "We make no findings as to whether these immigration consequences would actually be applicable to defendant."[141] Despite its explicit avoidance of an analysis of the consequences of the non-citizen's conviction, the court perplexingly proceeded to dispose of the *Padilla* claim by determining that defense counsel's statement that "if he pled guilty, he risked that he would be deported," was sufficient to meet *Padilla*'s advice requirement.[142] Other courts relied on more familiar criminal procedure grounds to dispose of *Padilla* claims without performing an analysis of the relevant immigration law.[143]

139. *See id.*

140. While Supreme Court Associate Justices, including Alito, are authorized to hire four law clerks, *see* Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 55 (2008), and suffer no shortage of legal resource material, state trial court judges frequently have few if any clerks assigned exclusively to them, *see* Michael F. Connolly & William P. McDermott, *Court Reform: A Retrospective*, BOSTON BAR J. 4 (March-Apr. 1995) (explaining that Massachusetts trial court judges "have access to only one half of one clerk"), and have much more limited legal research access, *see* Peter W. Martin, *Reconfiguring Law Reports and the Concept of Precedent for a Digital Age*, 53 VILL. L. REV. 1, 27 (2008) (explaining that some Kansas trial court judges have no access to online legal research services). Tellingly, a Department of Justice report that includes information on the number of law clerks available to state judges in courts of last resort and intermediate appellate courts did not even include data for state trial courts. *See* LYNN LANGTON & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION, 1987-2004, 3 tbl.2 (2007).

141. State v. Romos, 2010 WL 2598630, *2 n.2 (Iowa Ct. App. June 30, 2010); *see also* People v. George, 2010 WL 3516072, *2 (N.Y. Crim. Ct. Aug. 25, 2010) ("Since the attorney who represented defendant in this matter is unavailable to tell us what advise [sic] she may or may not have provided to Defendant regarding the immigration consequences of his guilty plea, this Court will accept Defendant's uncontested assertion that he specifically asked about the repercussions of his plea.").

142. *See Romos*, 2010 WL 2598630, at *2.

143. *See, e.g.*, People v. Cuatete, 2010 WL 1744891, *3 n.4 (Cal. Ct. App. May 3, 2010) ("[A]

Since *Padilla* requires that a defense attorney provide advice regarding the possible immigration consequences of a plea even where deportation is not certain, courts can easily conclude that *Padilla*'s advice requirement was not met where the defense attorney failed to give any advice about immigration consequences—or any advice the client could possibly follow. In *People v. Garcia*, for example, a New York trial court reviewed a claim arising from a defense attorney's failure to give any immigration advice despite the defendant's request for such advice.[144] Instead, the defense attorney merely suggested that the defendant speak with an immigration attorney.[145] The court appropriately had no difficulty concluding that the defense attorney's failure to advise the defendant about immigration consequences satisfies *Strickland*'s constitutional deficiency prong.[146] In another case, a defense attorney whose performance was questioned made the reviewing court's task quite easy by apparently giving three conflicting bits of advice: "that there were no immigration

petition for writ of error *coram nobis*[] precludes the issue of ineffective assistance of counsel."). Other courts denied *Padilla* claims because they determined the factual allegations to be incredible or incorrect characterizations of what actually occurred at trial. *See, e.g.*, People v. Shao, 2010 WL 3235418, 2010 N.Y. Slip Op. 32113(U) (N.Y. Sup. Ct. 2010) ("The defendant's assertion that he was never informed of the immigration consequences of pleading guilty is refuted by the record."); People v. Mills, 28 Misc. 3d 1236(A), 2010 WL 3619858, *4 n.6 (N.Y. Crim. Ct. 2010) (explaining that "defendant mischaracterizes the trial court record" by alleging that his trial counsel advised him that a conviction would have adverse immigration consequences only if he left the country and attempted to re-enter which the reviewing court concluded was contradicted by the trial counsel's statements memorialized in the transcript); People v. Valestil, 27 Misc. 3d 1234(A), 2010 WL 2367351, *2 (N.Y. Crim. Ct. 2010) ("Defendant again fails to pass the first prong of the *Strickland* test, in that, there is no credible evidence that Defendant's counsel was ineffective."); People v. Robles-Mejia, 27 Misc. 3d 1219(A), 2010 WL 1855762, **7 (N.Y. Sup. Ct. 2010) ("[D]efendant's averment is completely undermined—if not rendered perjurious—by his attorney's on-the-record statement during the course of the plea proceeding . . . ."); People v. Baker, 2010 WL 2175691, 2010 N.Y. Slip Op. 31289(U) (N.Y. Sup. Ct. 2010) ("The court finds that the defendant's conclusory assertions . . . are both unsupported by any other evidence as well as being contradicted by a court record, namely the plea and sentence minutes, and that there is no reasonable possibility that such allegation is true."). Denying a claim of ineffective assistance of counsel because the court finds the factual allegations untrustworthy is, of course, well within the court's time-tested discretionary authority regardless the substantive basis of the complaint. *See, e.g.*, Strozier v. United States, 991 A.2d 778, 788 (D.C. 2010) (explaining that a hearing is not required on an ineffective assistance of counsel claim where the motion is based on "palpably incredible claims" or a number of other reasons) (quoting Joyner v. United States, 818 A.2d 166, 174 (D.C. 2003)); Gibson v. Comm'r, 986 A.2d 303, 307 n.2 (Conn. App. Ct. 2010) (noting that the trial court denied certain allegations of ineffective assistance of counsel "because [the petitioner] had not presented any credible evidence in support of those allegations."); Hightower v. State, 698 S.E.2d 312, 317 (Ga. 2010) (quoting Robinson v. State, 586 S.E.2d 313 (2003)) (noting that trial courts make credibility determinations regarding claims of ineffective assistance of counsel).

144. *See* People v. Garcia, 907 N.Y.S.2d 398, 400 n.3 (N.Y. Sup. Ct. 2010).

145. *See id.*

146. *See id.* at 405.

consequences, that he didn't think there were any, or . . . that he informed the defendant of 'a possible immigration consequence.'"[147] This performance, the court had no trouble concluding, "falls below reasonable professional norms."[148]

4. CORRECT ANALYSIS OF *PADILLA* CLAIM

In fairness, some courts surely have performed an independent analysis of a defense attorney's advice and correctly construed the relevant removal provisions. In *Ex parte Gonzalez*, a Texas trial court determined that a defense attorney advised her client that pleading guilty to a theft offense "may result in deportation."[149] A theft conviction, the Court independently concluded, "can readily be determined to be an 'aggravated felony' by simply reading the plain and clear language of [INA § 101(a)(43)(G),] 8 U.S.C. § 1101(a)(43)(G)."[150] Defense counsel's failure to inform her client that the INA "specifically commands removal" for individuals convicted of an aggravated felony constituted constitutionally deficient representation.[151] This case stands apart from other cases because it is the only example I located of a state court that correctly performed the full *Padilla* analysis: independently examining the relevant removal provisions and correctly determining whether deportation would clearly result from the plea, then comparing that conclusion to the advice provided by defense counsel.[152]

IV. CONCLUSION

Padilla requires state courts to venture into territory that has previously been out of bounds to them. For the first time, state courts are required to delve into the heart of crime-based removal provisions. The

147. People v. Bennett, 903 N.Y.S.2d 696, 702 (N.Y. Crim. Ct. 2010).

148. *Id.*; *see also* Rampal v. Rhode Island, 2010 WL 1836782 (R.I. Super. Ct. Apr. 2010) (concluding that a *Padilla* claim arising from a situation in which "[t]here was no immigration advice here" constitutes constitutionally deficient representation).

149. *See Ex Parte* Gonzalez, No. CR-395-08-J(1), slip op. at 2 (Tex. Dist. Ct. Aug. 9, 2010). The author participated in developing the litigation strategy for this case and is of counsel in the lead attorney's firm, the Law Offices of Raúl García & Associates.

150. *See id.* at 3.

151. *See id.* at 6.

152. Even other courts that granted a *Padilla* claim did not do as much. *See, e.g.*, *Bennett*, 903 N.Y.S.2d at 702 (granting *Padilla* claim without independently analyzing likelihood of deportation because defense attorney advise was internally contradictory); State v. Limarco, 235 P.3d 1267, 2010 WL 3211674, *5 (Kan. App. 2010) (granting an evidentiary hearing to determine whether defense counsel provided any immigration advice); *Rampal*, 2010 WL 1836782 (granting *Padilla* claim without independently analyzing removal provisions because defense attorney did not provide any immigration advice); People v. Garcia, 907 N.Y.S.2d 398, 403 (N.Y. Sup. Ct. 2010) (same).

search for an accurate prediction of the deportation consequences of a plea is perilous even for experienced tribunals such as the immigration courts, the BIA, and federal courts of appeal. For state courts so unfamiliar with removal law that they are at times unaware of the nuances that must be considered, *Padilla* presents an especially difficult challenge. To date, state courts have not met this challenge. With few exceptions, the early decisions on *Padilla* claims suggest that state courts are having difficulty meeting their own role in the *Padilla*-mandated process. By and large they are misconstruing fundamental features of the removal process, misinterpreting crime-related grounds of removability, or avoiding an independent analysis of immigration law entirely.

All hope is not lost, however. State courts are fully capable of adapting to *Padilla*'s mandate. There are no inherent obstacles that prevent state courts from parsing the INA. Though they are not specialists in this area—and many may never develop this specialization because they do not see many *Padilla* claims—state courts must nevertheless develop a working familiarity with crime-based removal provisions. Most importantly for the individuals whose claims are already appearing on trial court dockets, state courts must get up to speed immediately. The minefields are vast and the consequences of error difficult to overstate. As the Supreme Court explained as early as 1922, deportation "may result . . . in loss of both property and life; or of all that makes life worth living."[153]

A potential remedy begins with state courts recognizing their existing institutional incompetence regarding removal. Because they have never been asked or allowed to make determinations regarding removal, they are not sufficiently familiar with this area of law to know even which questions to ask and which nuances to consider. To avoid repeating the errors of the first six months after *Padilla*, state courts must be cognizant of this significant limitation. Accordingly, they must proceed into immigration law with the special care and humility of a novice: tread carefully, seeking guidance along the way.

State courts can implement a number of concrete measures to ensure that they give *Padilla* claims the attention these claims deserve. First, courts should consider hiring law clerks with demonstrated immigration law experience or interest. Doing this increases the likelihood of identifying the nuances of removal law because it is clerks' job function to conduct background research and bring unexpected complications to the judges' attention. Secondly, courts should expand their legal research capabilities to include immigration law. Previously there was no need for limited

153. *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

research budgets to include immigration law resources in courts' libraries or chambers' collections. Since *Padilla* requires state courts to address the clarity with which deportation results, courts should now have on hand the treatises, journals, and practice guides that deftly address crime-based removal. Third, state court judges should make a deliberate effort to participate in on-going training and educational events geared toward understanding the scope of *Padilla* generally and the details of crime-based removal specifically. The ever-changing state of crime-based removal means that these events should occur with some regularity so that judges and clerks remain alert to the latest developments in an area of law that they are now required to apply.

The task of improving state courts' familiarity with removal law does not fall on the courts alone. The segment of the immigration bar that focuses on crime-based removal must continue its efforts to reach out to state courts, in particular state trial courts where most ineffective assistance of counsel claims begin. Several efforts have already begun, though the focus seems to have been on raising the defense bar's awareness of immigration consequences so as to ensure that defense attorneys comply with *Padilla*. This goal is obviously notable. Defense attorneys, as this article suggests, are not the only critical newcomers to crime-based removal. The immigration bar therefore needs to continue its outreach to courts as it has already started to do to defense attorneys.

Failure to address state courts' lack of familiarity with removal law threatens to subvert *Padilla*'s mandate and imposes too heavy a burden on individuals with viable ineffective assistance of counsel claims. However, working together, state courts, immigration attorneys, and criminal defense attorneys can ensure that non-citizens receive the full protection of the Sixth Amendment right to counsel.