Will *Padilla* Reach Across the Border?

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**ABSTRACT**

In *Padilla v. Kentucky*, the Supreme Court recognized a noncitizen criminal defendant’s Sixth Amendment right to receive accurate advice regarding the immigration consequences of a guilty plea. This Article argues that although *Padilla* represents a major step forward, its reach will be uneven. Looking at what *Padilla* will mean for those who have been deported on the basis of constitutionally defective guilty pleas, the author identifies two factors that may limit the decision’s impact. First, restrictions on state and federal postconviction relief, combined with the logistical and evidentiary complexities inherent in litigating a claim from abroad, will present significant obstacles to pursuing *Padilla* claims. Secondly, a deportee who prevails on a *Padilla* claim may find that the vacatur of the conviction fails to provide her with any basis for regaining her former immigration status. In response to these potential limitations, this Article proposes a set of reforms to bring *Padilla*’s promise to fruition. The proposals focus on making mechanisms for postconviction review accessible to deportees and providing ways for deportees to return to the United States temporarily to pursue *Padilla* claims and permanently if they are successful in such claims.

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INTRODUCTION

"Momentous" to its fans and a "sledge hammer" to its critics, Padilla v. Kentucky has attracted no shortage of attention. In holding that criminal defense attorneys have a duty to provide accurate advice to noncitizen clients regarding the immigration consequences of a guilty plea, the Supreme Court signaled important shifts on at least two fronts. First, Padilla lends the Court’s imprimatur to an assertion that has been made for many years by scholars and immigrants’ rights advocates: that deportation has become “an integral part . . . of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes” and thus “most difficult to divorce . . . from the conviction.” Second, Padilla suggests the potential for a more general blurring of the line between “direct” and “collateral” consequences of convictions.

Padilla undoubtedly represents a major turning point in the Court’s understanding of the relationship between criminal law and immigration law. In the rush of excitement over the decision’s implications, however, it is important not to lose sight of its potential limitations. Commentators are beginning to identify factors that may lessen Padilla’s impact, including

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3 Id. at 1473 (majority opinion).
4 See id. at 1486.
5 Id. at 1480.
limits on the availability of postconviction relief under state and federal law. While some jurisdictions have relatively flexible postconviction remedies, others impose custody requirements, statutes of limitations, and other restrictions that may cut off a significant number of Padilla claims.8 Viewing Padilla through this lens yields an important insight: even post-Padilla, the ability of noncitizens to seek postconviction relief based on an attorney’s failure to provide accurate advice regarding the immigration consequences of a guilty plea will vary considerably from state to state.9

Here I consider a related question that has not yet attracted notice: what will Padilla mean for those who have already been deported? In other words, will someone who falls squarely within Padilla’s holding be able to vindicate her Sixth Amendment rights from outside the United States? This question will be particularly pressing if courts conclude that Padilla applies retroactively to old convictions, as some have already done.10

Cross-border Padilla claims add at least two new dimensions to our understanding of the decision’s uneven reach. First, the logistical and evidentiary complexities inherent in litigating a claim from abroad will present challenges to all deportees, even those who are bringing their claims in jurisdictions with relatively flexible postconviction remedies.11 Second, a deportee who prevails in a Padilla claim may find that the vacatur of the conviction fails to provide her with any basis for regaining her former immigration status.12

Any consideration of Padilla necessarily takes place against the backdrop of three complex and interrelated issues, each of which has been the subject of extensive scholarly analysis: the increasing convergence of criminal and immigration law;13 entrenched inequalities in the criminal-justice system, including grossly inadequate systems for indigent defense;14

8 See infra Part I.
9 Federal habeas challenges to state court convictions are subject to a custody requirement as well as many other limitations and are therefore not likely to be of great relevance to those seeking to bring Padilla claims from outside the United States. See 28 U.S.C. § 2254 (2006).
10 See infra note 23 and accompanying text.
11 See infra Part II.A.
12 See infra Part II.B.
13 See sources cited supra note 6.
and the decreasing availability of postconviction review. The issues facing noncitizen defendants call for far more comprehensive reforms than are contemplated here. Nevertheless, Padilla represents a crucial step forward, and the problems unique to post-removal Padilla claims deserve serious attention as courts and policy makers sort out the implications of the decision over the coming years.

To that end, this Article identifies the issues raised by cross-border Padilla claims and sketches out, in a very preliminary way, a set of reforms to bring Padilla’s promise to fruition. Part I briefly reviews the Court’s holding in Padilla and outlines some of the potential limitations on Padilla’s reach that commentators have begun to identify. Part II expands this discussion in a new direction by examining the obstacles that a deportee might encounter in pursuing postconviction relief from abroad. Using a hypothetical example of a former longtime legal resident who has been removed, this part considers how a cross-border Padilla claim might fare, touching briefly on jurisdictional barriers and then focusing in more detail on logistical and evidentiary issues. Next, it considers whether success in such a claim would provide any meaningful benefit to someone who has been deported, examining the obstacles that a deportee might encounter in seeking to return to her former legal status in the United States. Part III proposes four potential reforms that warrant further consideration by scholars, advocates, and policy makers. These proposals focus on making the mechanisms for postconviction review accessible to deportees and providing ways for deportees to return to the United States temporarily to pursue Padilla claims and permanently if they are successful in such claims.

I. Padilla’s Promise and Its Limits

At the heart of Padilla lies the promise that “no criminal defendant—whether a citizen or not—[will be] left to the ‘mercy of incompetent counsel.’” This latest gloss on the right to counsel builds on the long line of cases leading up to and elaborating on Gideon v. Wainwright. Bringing


15 372 U.S. 335 (1963) (guaranteeing right to appointed counsel in federal and state felony cases). Prior to Gideon, in Powell v. Alabama, the Court recognized a right to court-appointed counsel under the Fourteenth Amendment in a state capital proceeding where a defendant did not have the capacity to employ counsel or present his own defense. 287 U.S. 45, 71 (1932). For cases building on Gideon, see White v. Maryland, 373 U.S. 59, 60 (1963) (establishing the right to counsel at arraignment); Arsenault v. Massachusetts, 393 U.S. 5, 6 (1968) (holding that a defendant has a right to counsel at preliminary hearing even where a conviction occurred
citizenship status into the equation for the first time, the Court in *Padilla* interprets the Sixth Amendment to require that defense counsel inform a noncitizen client whether a proposed plea carries a risk of immigration consequences. When a plea carries a “clear” risk of removal, counsel must advise a client that “deportation [is] presumptively mandatory.” When “the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” Failure to adhere to these requirements can now be the basis for a claim for ineffective assistance of counsel under *Strickland v. Washington*, which requires that a petitioner show that the attorney’s representation fell below professional norms and that the defendant suffered prejudice as a result.

There is no question that *Padilla’s* greatest significance will lie in how it transforms the work of criminal defense counsel and prosecutors going forward. However, the majority opinion in *Padilla* includes language suggesting that the decision is to be applied retroactively as well. Courts have split so far on the question of retroactivity. The way that this

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18 Padilla, 130 S. Ct. at 1483.
19 Id.
20 See id. at 1482 (citing Strickland, 466 U.S. at 687).
21 See id. at 1486 (discussing benefits to both defendants and the state in bringing deportation consequences into the plea-bargaining process).
22 Id. at 1485 (“It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. . . . [because] professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.”).

question is ultimately answered will have a significant effect on Padilla’s immediate reach.

Another factor that may limit Padilla’s reach is the prejudice prong of Strickland. To satisfy this inquiry, a petitioner must establish that the outcome of the case would have been different absent counsel’s deficient performance and that a decision to reject the plea bargain would have been rational under the circumstances.24 Thus far, courts have been reluctant to find prejudice in Padilla claims where defendants received generic warnings of possible immigration consequences in a plea colloquy.25

Finally, those seeking to raise Padilla claims will have to navigate the procedural and jurisdictional intricacies of the particular postconviction remedies available to them.26 Depending on the jurisdiction in which relief is being sought and the type of postconviction review at issue, potential barriers may include time limits;27 custody requirements;28 limits on

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24 Padilla, 130 S. Ct. at 1485 (citing Roe v. Flores-Ortega, 528 U.S. 470, 480, 486 (2000)).


26 Postconviction remedies exist in all fifty states, as well as within federal law and the law of the District of Columbia. See generally 1 DONALD E. WILKES, JR., STATE POSTCONVICTON REMEDIES & RELIEF HANDBOOK WITH FORMS (2009-2010 ed.); LARRY W. YACKLE, POSTCONVICTON REMEDIES (1981). In some states, the principal postconviction remedy is a writ of habeas corpus; in others it is a common law writ of error coram nobis or a modern remedy in the nature of coram nobis authorized by statute or by a judicially promulgated rule of court. 1 WILKES, supra, § 1:3. In all states, as well as under federal law, the principal postconviction remedy may be used to raise claims of ineffective assistance of counsel. Id. § 1:4. State postconviction proceedings have been referred to as “some of the most obscure and Byzantine processes known to American law.” Yackle, supra note 15, at 544-45. For a discussion of the barriers that Padilla claims may encounter within postconviction relief procedures, see generally Proctor & King, supra note 23.

27 Federal habeas corpus petitions must be filed within one year from the date that the judgment becomes final. See 28 U.S.C. §§ 2244(d)(1), 2255 (2006). Thirty-seven states impose a statute of limitations on the principle postconviction remedy with regard to some or all types
successive petitions; and lack of appointed counsel. Although it may be possible in some jurisdictions to circumvent restrictions on postconviction relief through the use of common law writs or other vehicles, such attempts have thus far met with little success in state courts.

An instructive example can be found in a recent Padilla claim in California. Juan Carlos Garcia sought to vacate a 1994 conviction that resulted from his plea of no contest to one count of second-degree burglary of convictions, of which twenty states permit exceptions to the statutes of limitations in some circumstances. See 1 Wilkes, supra note 26, § 1:6.

23 In the District of Columbia and twenty-six states, the principle postconviction remedy has a custody requirement. 1 Wilkes, supra note 26, § 1:3; see also 28 U.S.C. §§ 2254(b)(1), 2255 (custody requirement for federal habeas corpus petition). In some of those jurisdictions, however, secondary postconviction remedies without custody requirements may exist. See United States v. Morgan, 346 U.S. 502, 512-13 (1954) (holding that a writ of coram nobis may be used for post-incarceration challenges to federal convictions); 1 Wilkes, supra note 26, § 1:7 (discussing secondary postconviction remedies under state law).

25 Federal law restricts second or successive claims, subject to narrow exceptions not relevant to Padilla claims. See 28 U.S.C. §§ 2244(b), 2255. Most states also restrict second or successive petitions. See Proctor & King, supra note 23, at 246 n.55.

30 See 1 Wilkes, supra note 26, § 1:5 (noting that twenty-eight states have a statutory right to counsel when the principle postconviction remedy is invoked).

31 See United States v. Denedo, 129 S. Ct. 2213, 2224 (2009) (recognizing the availability of coram nobis to challenge the validity of conviction on the grounds of defense counsel’s misadvice regarding the immigration consequences of conviction); Morgan, 346 U.S. at 512-13 (recognizing the continuing vitality of coram nobis to challenge federal convictions where other remedies are unavailable); Hirabayashi v. United States, 828 F.2d 591, 604-06 (9th Cir. 1987) (recognizing availability of coram nobis decades after conviction became final).

32 See, e.g., People v. Garcia, Nos. B219284, B219548, B220182, 2010 WL 3751673, at *4 (Cal. Ct. App., Sept. 28, 2010) (denying relief under Padilla where custody requirement was not met); People v. Carrera, 940 N.E.2d 1111, 1120-21 (Ill. 2010) (denying relief under Padilla where custody requirement was not met); State v. Truong, Nos. 96-1681, 96-907, 2010 Me. Super. LEXIS 104, at *10 (Me. Super. Ct. July 30, 2010) (declining to reach the question whether a Padilla claim barred by state postconviction relief statute may be brought pursuant to Rule 1(c) of the Maine Rules of Criminal Procedure, which provides that “[w]hen no procedure is specifically prescribed the court shall proceed in any lawful manner not inconsistent with the Constitution of the United States or of the State of Maine, these rules or any applicable statutes”); State v. Waugh, 2010 UT App 310, No. 20100737-CA, 2010 WL 4379465 (Utah Ct. App. Nov. 4, 2010), petition for cert. filed, No. 20100967-SC (Utah Dec. 7, 2010) (holding that Padilla claim may not be raised through common law writ or other means); Commonwealth v. Morris, 705 S.E.2d 503, 505-09 (Va. 2011) (holding that Padilla claims must comply with the two-year deadline for filing motions for habeas corpus and cannot be pursued through common law writs).

33 See Garcia, 2010 WL 3751673. Garcia sought postconviction relief through a motion to vacate the no contest plea, a petition for writ of error coram nobis, and a petition for writ of habeas corpus. Id. at *1. Although he initiated the action in 2009, the court reached its decision on September 28, 2010 and addressed the impact of Padilla in its decision. Id. at *4.
of an automobile.\textsuperscript{34} In support of his motion Garcia asserted that at the age of twenty, he “took the blame for the actions of his younger brother, Samuel, who attempted to open the door of a parked car in order to jump their vehicle’s battery.”\textsuperscript{35} He contended that he would not have entered the plea if he had been properly advised of the potential immigration consequences.\textsuperscript{36} At the time that he sought postconviction relief, Garcia had been living in the United States for twenty-two years, was married to a U.S. citizen, and had two U.S. citizen children, one of whom was autistic and required medical care in the United States.\textsuperscript{37}

In its decision, the court cited a declaration submitted by the attorney who negotiated Garcia’s plea, in which the attorney “conceded he did no legal research regarding the immigration consequences” of the plea.\textsuperscript{38} In addition, the court acknowledged that “defense counsel failed to defend the burglary charge even though a factual basis for a defense appear[ed] on the face of the police report which indicates that Garcia did not touch, enter, or remove anything from the car.”\textsuperscript{39} The court also cited an expert witness who testified that the attorney who represented Garcia could have explored alternative pleas, such as auto tampering or attempted taking of a vehicle without the owner’s consent, that would not have carried immigration consequences.\textsuperscript{40} Acknowledging that “[i]t is now beyond dispute that a defendant’s right to the effective assistance of counsel includes an obligation on the part of counsel to inform the defendant

\textsuperscript{34} Id. at *1.
\textsuperscript{35} Id.
\textsuperscript{36} Id. at *2. Garcia faced removal from the United States based on lack of authorized immigration status. Id. Although it is not entirely clear from the decision what immigration consequences were of concern to Garcia, it is possible that he sought vacatur of his conviction in order to be eligible for cancellation of removal, a form of relief available to noncitizens who have been physically present in the United States for at least ten years and are facing removal. See 8 U.S.C. § 1229b(b)(1) (2006). In order to receive such relief, a noncitizen must show that his removal would result in exceptional and extremely unusual hardship to qualifying family members who are U.S. citizens or permanent residents. Id. Any offense that falls under grounds of deportability or inadmissibility renders an applicant ineligible. Id.
\textsuperscript{37} Garcia, 2010 WL 3751673, at *1.
\textsuperscript{38} Id. at *2.
\textsuperscript{39} Id. at *4. According to the decision:

The police report in the 1994 burglary case . . . indicated a witness heard a noise, looked outside and saw one individual enter a parked vehicle while Garcia stood on the sidewalk “looking around.” When Garcia saw the witness, they “both walked off.” Garcia and his brother were stopped a short while later pushing a vehicle. Garcia told the police, “It was my brother’s idea. I just wanted to get a battery to put in my car so we could go home. I was planning to return the battery.”

\textsuperscript{40} Id. at *2.
whether a plea carries a risk of deportation,” the court nevertheless concluded that Garcia was unable to raise the claim of ineffective assistance of counsel due to the fact that he was not in custody. The Supreme Court of Illinois recently denied a Padilla claim on similar grounds. Jesus Carrera, a lawful permanent resident, sought to vacate a first-time drug possession offense for which he had served probation. The court noted that Carrera “had lived in the United States for 40 of his 46 years, had no prior convictions, had never been incarcerated, and supported a wife and four children ranging in age from 8 to 15.” The court further noted that at Carrera’s 2004 plea hearing, “the trial court asked ‘No immigration problems, nothing like that?’ [and] Defendant’s trial counsel answered, ‘No Judge. It’s not an issue.’” In 2007, Carrera was placed in removal proceedings on the basis of the conviction, and in 2008 he filed a motion for postconviction relief. Issuing its decision in the wake of Padilla, the court noted that it was “sympathetic to defendant’s plight” but nevertheless held that Carrera was ineligible for relief due to his failure to meet the custody requirement imposed by statute.

II. The View From the Other Side of the Border

Cross-border Padilla claims add an extra layer of complexity to this picture. What if a noncitizen defendant who was prejudiced by ineffective assistance of counsel is removed on the basis of the resulting guilty plea? If Padilla is held to apply retroactively, the question of how to handle postconviction motions from deportees will be central: many of those who would fall under a retroactive application of Padilla’s holding have already been removed. Yet even if Padilla applies only prospectively, courts will likely confront the question at some point soon. The widespread use of immigration detention and the speed of the removal process combine to

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41 Id. at *4.
42 Id. at *5. See also People v. Villa, 202 P.3d 427, 436 (Cal. 2009) (holding that habeas corpus is the exclusive mechanism for raising claims of ineffective assistance of counsel under California law. The California Supreme Court has held that even those who are in immigration detention are not “in custody” for the purposes of habeas jurisdiction. See id. at 433-34.
43 People v. Carrera, 940 N.E.2d 1111, 1112 (Ill. 2010).
44 Id. at 1113.
45 Id. at 1112-13.
46 Id. at 1113.
47 Id. at 1121.
48 Id. at 1121-22.
49 Between April 1997 and August 2007, 897,099 individuals were removed on criminal grounds. HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS) 19 (2009), available at http://www.hrw.org/sites/default/files/reports/us0409web_0.pdf.
50 The Immigration and Nationality Act (“INA”) requires mandatory detention of most
ensure that many of those who stand to benefit from Padilla will be outside the United States before they have a chance to seek postconviction relief.

For the purposes of the analysis that follows, consider the hypothetical case of a lawful permanent resident, Jane Smith, who is charged with possession with intent to sell a small quantity of marijuana. She is twenty-five years old and has been a lawful permanent resident since early childhood. She maintains her innocence, and the prosecution’s case against her has some clear weaknesses. However, her attorney advises her to admit to the charge in return for a deferred adjudication and six months of probation, at the end of which the charge will be dismissed. The attorney warns her that going to trial always entails a risk, and assures her that since the deferred adjudication will not result in a conviction, there will be no immigration consequences.

As it turns out, this is faulty advice: although the deferred adjudication may leave Smith without a criminal record under state law, it nevertheless counts as a conviction for the purpose of determining deportability or inadmissibility under the Immigration and Nationality Act (“INA”).

...noncitizens with criminal convictions. See INA § 236(c), 8 U.S.C. § 1226(c) (2006). Many commentators and advocates have noted the barriers that detained immigrants face when seeking counsel in removal proceedings. See HEARTLAND ALLIANCE, ISOLATED IN DETENTION 4-5 (2010), available at http://www.immigrantjustice.org/download-document/793-isolated-in-detention-full-report.html; HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 4 (2009), available at http://www.hrw.org/sites/default/files/reports/us1209web.pdf; Peter L. Markowitz, Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study, 78 FORDHAM L. REV. 541 (2009). The barriers to obtaining post conviction counsel are even greater. While immigration law is national and detainees may obtain representation in removal proceedings from attorneys located close to detention centers, a postconviction attorney will likely be located in the jurisdiction where the conviction took place.


52 Deferred adjudications vary in name from state to state. See, e.g., MASS. GEN. LAWS ch. 278, § 18 (2008) (describing the procedure for requesting a continuance without a finding under Massachusetts law); N.Y. CRIM. PROC. LAW § 170.55 (McKinney 2010) (describing adjournment in contemplation of dismissal). In some states, a deferred adjudication is conditioned on a confession or finding of guilt but the final judgment of guilt is not imposed unless the defendant violates the terms imposed by the court. See, e.g., MASS. GEN. LAWS ch. 278, § 18. In most states, a deferred adjudication in which the charges are ultimately dismissed is not a conviction under state law. See, e.g., Id.; N.Y. CRIM. PROC. LAW § 170.55(8).

53 See INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (defining “conviction” to include, inter alia, a withheld adjudication where a defendant has admitted to sufficient facts and where the judge has ordered some form of punishment, penalty, or restraint on liberty).
Moreover, as a drug trafficking offense, it falls under the INA’s definition of an “aggravated felony,”54 which means that Smith is subject to mandatory deportation without any consideration of factors such as her length of residence in the United States or family ties.55 She is also, due to the conviction, subject to mandatory detention while she is in removal proceedings.56

Once she is taken into custody by Immigration and Customs Enforcement (“ICE”), Smith is transferred from her home state to a detention facility thousands of miles away. Facing mandatory deportation as an “aggravated felon,” she realizes that her attorney’s advice regarding the immigration consequences of the deferred adjudication was erroneous. However, by that point she is severely limited in her ability to seek counsel. With little access to a telephone,57 she is unable to locate an attorney in her home jurisdiction to advise her regarding the potential for postconviction relief. It is only after being deported that she is able to explore her options.

Assuming that this scenario occurs after March 31, 2010, Padilla will apply no matter how the issue of retroactivity is resolved. It seems fairly clear that Smith’s attorney’s performance fell below professional norms as defined in Padilla,58 and Smith has a strong argument that she was prejudiced by counsel’s failure to provide accurate advice. She thus would appear to fall within the class of people that Padilla is intended to reach.59

55 See INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (barring those with aggravated felonies from cancellation of removal); INA § 212(b), 8 U.S.C. § 1182(b) (barring those with aggravated felonies from waivers of criminal grounds of inadmissibility); INA § 208(b)(2)(A)(i), 8 U.S.C. § 1158(b)(2)(A)(i) (barring those who have been convicted of a “particularly serious crime” from asylum); INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (providing that aggravated felony conviction is a per se particularly serious crime).
56 See INA § 236(c), 8 U.S.C. § 1226(c).
57 See HEARTLAND ALLIANCE, supra note 50, at 9 (discussing inadequate telephone access in immigration detention centers and the resulting barriers to communication with legal counsel).
58 See Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) (noting that the terms of the INA relating to controlled substance offenses are “succinct, clear, and explicit” and that “Padilla’s counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute”). Even prior to Padilla, many courts had held that affirmative misadvice could be the basis for a claim of ineffective assistance of counsel. See, e.g., Denedo v. United States, 66 M.J. 114, 129 (C.A.A.F. 2008) (citing cases), aff’d 129 S. Ct. 2213 (2009).
59 See Padilla, 130 S. Ct. at 1483.
Yet she may not reap any benefit from the decision. The problems she may encounter fall into two categories: (1) barriers, both jurisdictional and logistical, that could prevent her from accessing particular postconviction remedies; and (2) barriers within immigration law that may prevent her from returning to the United States even if she succeeds in obtaining postconviction relief.

A. Barriers to Postconviction Relief

To some extent, cross-border Padilla claims present a variation on a theme, highlighting the more general barriers that stand to limit Padilla’s reach.60 For example, a custody requirement for filing ineffective assistance of counsel claims will preclude many Padilla claims, including virtually all claims by deportees.61 Deportees may also be affected by filing deadlines and other restrictions.

What is different about cross-border Padilla claims is that even in states that have relatively accessible postconviction relief procedures,62 deportees seeking to enforce their constitutional rights under Padilla may encounter logistical and evidentiary obstacles.63 Claims of ineffective assistance of

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60 See supra Part I.
61 Those who have been removed from the United States have generally been deemed to no longer be “in custody” for purposes of habeas. See Peter Bibring, Jurisdictional Issues in Post‐Removal Habeas Challenges to Orders of Removal, 17 GEO. IMMIGR. L.J. 135, 165‐73 (2002) (discussing treatment of custody requirement within the context of immigration‐related habeas petitions). However, constructive custody, such as probation or parole, is generally sufficient to establish custody for purposes of habeas. See Jones v. Cunningham, 371 U.S. 236, 243 (1963); see also, e.g., People v. Villa, 202 P.3d 427, 431 (Cal. 2009) (citing California cases). Thus, a deportee who is still on parole may be considered “in custody” for habeas purposes following removal. But see Press Release, Cal. Dep’t of Corr. and Rehab., CDER to Discharge Deported Criminal Aliens to Federal Authorities (Mar. 2, 2009), available at http://www.cder.ca.gov/news/2009_Press_Releases/Mar_02.html0 (announcing new California policy of discharging individuals from parole upon removal).
62 For example, New York’s postconviction remedy includes no statute of limitations and no custody requirement. See N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2010). See generally 1 WILKES, supra note 26, at §§ 1.1‐1.7 (providing overview of state postconviction relief vehicles).
counsel can be highly fact-dependent. A person bringing a *Padilla* claim must establish that defense counsel failed to provide accurate advice about the immigration consequences of a plea and must persuade the court that the defendant’s actions would have been different had she been properly advised. Theoretically, an individual who is pursuing postconviction relief from abroad could return to the United States temporarily to appear at an evidentiary hearing; one route would be to seek humanitarian parole, and another would be to seek admission on a non-immigrant visa with a waiver of inadmissibility. However, neither of these options is likely to be available to deportees except in isolated cases with particularly compelling circumstances. It is likely, then, that the majority of deportees

prohibits a convicted criminal from availing himself of the courts once he has escaped custody. See Labe M. Richman, *Deported Defendants: Challenging Convictions from Abroad?,* N.Y. L.J., June 14, 2006, at 4, 4. He also notes, however, that these are summary decisions in which it does not appear from the briefs that the question of jurisdiction was fully litigated and that it is quite possible that counsel in these cases lost contact with their clients following removal. *Id.* At least one court has held that an involuntary departure from the United States is distinguishable from a voluntary absence and that the fugitive disentitlement doctrine therefore does not apply. See *State v. Ortiz*, 774 P.2d 1229, 1230 (Wash. 1989) (en banc). 64 In this regard, *Padilla* claims are very different from motions for postconviction relief based on the failure of the court to provide a mandated warning regarding the potential immigration consequences of a plea. See *Brief of the Nat’l Ass’n of Criminal Def. Lawyers*, *supra* note 25, 11a app.B (listing states that mandate judicial advisals). In such cases, the transcript of the proceeding is often sufficient to establish the claim. *Padilla* claims, in contrast, may be difficult to establish through the official record.

65 See *supra* note 24 and accompanying text.

66 The INA provides that the Attorney General may “parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States.” INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) (2006). This authority was transferred in 2003 to the Secretary of Homeland Security under the Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered sections of 6 U.S.C.), and has been delegated to a variety of officials within the Department of Homeland Security ("DHS"). See 8 C.F.R. § 212.5(a) (2010). The regulations specify that among the categories of detained immigrants who may be paroled are those who "will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies." *Id.* § 212.5(b)(4). In the case of those who are not detained, parole may be granted to "any alien applicant for admission, under such terms and conditions . . . [as the granting official] may deem appropriate." *Id.* § 212.5(c). See also *id.* § 212.5(t) (providing for advance authorization of parole for those who are outside the United States).


seeking to vacate a conviction under Padilla will be forced to do so from afar.

There are a number of ways that a postconviction motion could proceed without the presence of the petitioner. Under many postconviction remedies, a court may waive the personal appearance of the petitioner69 and may choose to decide issues of fact based on affidavits, declarations, or other evidence in the record.70 Prosecutors’ offices have been known to lend their support to motions to vacate convictions, particularly in cases involving minor offenses and compelling equities.71 In addition, the attorney whose performance is at issue may be willing to testify that she failed to advise the client properly. In such cases, the testimony of the petitioner may not be essential. However, there will inevitably be cases where such testimony will be deemed necessary. Barring the petitioner’s physical return to the United States, evidentiary issues will be at the mercy of courtroom technology and the judge’s discretion.

Here and there, examples can be found of creative strategies for handling such scenarios. For example:

In Maine Superior Court, Phu Truong, a lawful permanent resident, brought a Padilla claim after he had traveled to Vietnam and found himself unable to renew his expired green card while abroad because his

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(last visited Apr. 8, 2011) (“Humanitarian parole is an extraordinary measure sparingly used to bring an otherwise inadmissible alien into the United States for a temporary period of time due to a compelling emergency.”). For a discussion of limited availability of non-immigrant visas for deportees, see ROSENBLOOM, supra note 67, at 2-3 (noting difficulties that former longtime residents of the United States may face in establishing, for purposes of being granted non-immigrant visas, that they lack intent to remain permanently in the United States).

69 See, e.g., MASS. R. CRIM. P. 30(c)(6) (2008) (“A judge may entertain and determine a motion . . . [for postconviction relief] without requiring the presence of the moving party at the hearing.”). In Indiana, the state postconviction remedy is a civil proceeding, and “[t]he court may receive affidavits, depositions, oral testimony, or other evidence and may at its discretion order the applicant brought before it for the hearing.” Ind. R. Post-Conv. Rem. 1 § 5 (2011).

70 See, e.g., MASS. R. CRIM. P. 30(c); Ind. R. Post-Conv. Rem. 1 § 5; see also People v. Superior Court (Zamudio), 999 P.2d 686, 697 (Cal. 2000) (“There is simply no authority for the proposition that a trial court necessarily abuses its discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing live testimony.” (quoting Rosenthal v. Great W. Fin. Sec. Corp., 926 P.2d 1061, 1072 (Cal. 1996))).

71 See, e.g., Hakeem Ishola et al., Kentucky v. Padilla: Perils and Pearls, THE DEFENDER (Utah Ass’n of Criminal Def. Lawyers), Fall 2010, at 24 (noting that in years past, “obtaining post-conviction vacatur was simply a matter of reaching a stipulation with a reasonable prosecutor and getting the judge to sign off on the agreement”). It is an open question whether such cooperation will continue at its former levels if Padilla brings on a rush of postconviction motions. See id. (noting that in Utah “with the increase in deportations and the opening of the Salt Lake City Immigration Court, post-conviction petitions have dramatically increased and many prosecutors and judges have become somewhat hostile to them”).
convictions rendered him inadmissible and ineligible for relief.\textsuperscript{72} At a hearing on Truong’s motion for postconviction relief, several witnesses testified, including Truong’s father and an attorney from a local legal services organization.\textsuperscript{73} Truong’s own version of events was presented via the testimony of an interpreter who had interviewed Truong over the phone using questions prepared by Truong’s attorney.\textsuperscript{74} The court expressed doubt about the admissibility of Truong’s testimony\textsuperscript{75} but, denying the motion on unrelated grounds,\textsuperscript{76} left open whether the substance of the testimony might be considered in the absence of an objection.\textsuperscript{77}

In the Eleventh Judicial Circuit of Florida (Miami-Dade County), a former lawful permanent resident who had been removed to Chile submitted a sworn affidavit in his motion for postconviction relief. During the hearing on the motion, he stood by in Chile to testify telephonically if necessary, along with a Chilean notary to swear him in.\textsuperscript{78} The court granted the motion.\textsuperscript{79}

In Rhode Island Superior Court, Fernando Lora, a former permanent resident living in the Dominican Republic, filed a motion to vacate a 1991 conviction.\textsuperscript{80} Lora initially testified via an Internet-based video connection.\textsuperscript{81} However, due to a poor Internet connection, the interpreter, stenographer, and court were unable to understand him.\textsuperscript{82} The trial was recessed and resumed at a later date. Without objection, Lora was permitted to testify at the later hearing via a deposition transcript.\textsuperscript{83}

\textsuperscript{73} Id. at *5.
\textsuperscript{74} Id. at *6.
\textsuperscript{75} Id. at *6, n.5.
\textsuperscript{76} Id. at *20 (holding that Padilla does not apply retroactively).
\textsuperscript{77} Id. at *6, n.5.
\textsuperscript{78} Telephone Interview with Attorney Michael Mirer (Nov. 10, 2010). This motion was filed prior to Padilla and was based on the court’s failure to warn the defendant of the immigration consequences of a plea. Id. However, there was no available transcript of the original proceeding, so the case presented evidentiary issues not unlike those that might arise in Padilla claims. Id. At the time that the postconviction motion was filed, the author of this Article was counsel to the client in his parallel efforts to reopen his removal proceedings.
\textsuperscript{79} Id.
\textsuperscript{81} Id. at *3.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at *3 n.2 (“Although the deposition was apparently videotaped, the Court was only
These examples show that in at least some cases, courts have been willing to countenance unconventional strategies for dealing with evidentiary issues in cross-border petitions for postconviction relief. However, there is no assurance that every court will do so, particularly when objections are raised. Court practices vary widely, and technological resources vary not only among courts but also among the countries in which deportees find themselves. Some courts may have sophisticated videoconferencing systems; however, the costs and technical requirements of connecting to such systems will make them out of reach to indigent deportees and those who have been removed to countries where such technology is not widely available. Some courts have embraced low-cost, Internet-based alternatives such as Skype, but others have barred such technologies due to concerns regarding image and sound quality, reliability, and security. As the Rhode Island example cited above illustrates, Internet-based videoconferencing can easily falter, particularly in a location without dependable broadband Internet access.

Where does all of this leave Jane Smith? If convicted in a state with a relatively accessible procedure for seeking postconviction relief, she may be able to pursue her Padilla claim. Perhaps the attorney who represented her in the plea will be willing to testify to having misadvised her, or the prosecutor’s office will lend its support to the motion. It is possible that the court might see fit to grant her motion without ever requiring live testimony from her. If live testimony is required, she may find a way to testify from abroad.

However, Smith could easily find herself barred from seeking postconviction relief or severely prejudiced in her attempt to do so. She may encounter a jurisdictional limitation such as a custody requirement. She may be unable to meet a requirement that she appear in person for an evidentiary hearing. Even if she is permitted to testify via two-way videoconferencing, she may find it difficult to establish her credibility or to be a persuasive witness through remote testimony. If the facts required to

provided with the stenographic record.

83 See, e.g., Julia Dahl, Facts Can’t Ex-Skype, N.Y. POST, Sept. 25, 2009, http://www.nypost.com/p/news/local/queens/item_hUeD08kB668Wq1jUwlWhVwL (discussing a personal injury suit litigated from abroad and quoting Queens Supreme Court Justice Martin Ritholtz as saying: “No more wasting time. All we need is a Web cam and Skype”).

84 For example, Fairfax County Court in Virginia has high-tech courtrooms equipped with “high-end, secure videoconferencing technology using high-speed ISDN (Integrated Services Digital Network) data transfer lines.” Circuit Court Courtroom Technology Reservation Request, FAIRFAX CNTY. VA, http://www.fairfaxcounty.gov/courts/circuit/ccrcourt tech-reservation-form.htm (last visited Apr. 8, 2011). However, “[t]he use of home based systems utilizing private services such as Skype is not permitted.” Id.

85 See supra note 28.

86 The use of videoconferencing has been the subject of criticism in the context of both
meet the Strickland test are not clearly on her side, or if the equities do not entirely weigh in her favor, she may have a difficult time convincing the judge that she merits postconviction relief. In any of these scenarios, Padilla will be of little use.

B. Barriers Within Immigration Law and Procedure

Cross-border Padilla claims pose challenges not only for postconviction courts but also for the immigration court system and the various agencies that play a role in administering immigration benefits and determining admissibility. The Supreme Court’s stated aim in Padilla is to protect noncitizen defendants from pleading to charges without understanding the removal proceedings and criminal proceedings. For criticism of the use of videoconferencing in removal proceedings, see, for example, Aaron Haas, Videoconferencing in Immigration Proceedings, 5 PIERCE L. REV. 59, 63-64 (2006) (noting problems with translation, eye contact, body language, equipment difficulties, poor sound quality, the use and presentation of evidence, and the use of documents); Developments in the Law – Access to Courts, 122 HARV. L. REV. 1151, 1186 (2009) (citing studies showing that fact-finders evaluate video testimony as less credible than in-court testimony and that testifying through a video monitor is less persuasive than testifying in person). For criticism of the use of videoconferencing in criminal proceedings, see Anne Bowen Poulin, Criminal Justice and Videoconferencing Technology: The Remote Defendant, 78 TUL. L. REV. 1089, 1098 (2004) (“When live hearings are replaced with videoconferencing, the perceived gains inure primarily to the governmental side of the system, benefitting judges, court personnel, and prosecutors. As a result, the decision-making process that leads courts to rely on videoconferencing may be biased, failing adequately to consider the defendants’ interests.”).

Postconviction relief that is granted solely on rehabilitative factors or to avoid immigration consequences is not effective in eliminating the conviction for immigration purposes. In re Pickering, 23 I. & N. Dec. 621, 624 (B.I.A. 2003). However, it is widely recognized among practitioners that the presentation to the court of evidence of rehabilitation and good character can be an essential element of a successful motion for postconviction relief. See NORTON TOBY, POST-CONVICTIOn RELIEF FOR IMMIGRANTS 18-20 (2004) (noting that equities of a case will often determine the likelihood of success in a postconviction motion); see also Andrew Moore, Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity, 22 GEO. IMMIGR. L.J. 665, 701 (2008) (noting that courts and prosecutors often seek to “shoehorn their ameliorative goals into the substantive or procedural defect mold that the BIA established in Pickering”).

Someone who is unable to vacate a criminal conviction would face an uphill battle in arguing that the conviction should not carry any immigration consequences. However, an argument could conceivably be made that a conviction that violates the Sixth Amendment, even if it has not been vacated, cannot form the basis for a removal order or other such consequence. Cf. United States v. Mendoza-Lopez, 481 U.S. 828, 838-39 (1987) (holding that a deportation order that violates due process cannot serve as the basis for imposition of criminal penalty for illegal reentry).

These include: Citizenship and Immigration Services and Customs and Border Protection, both housed within the Department of Homeland Security, and the Department of State, which issues visas at U.S. consulates abroad.
potential immigration consequences.91 Yet even those who succeed in Padilla claims may still find themselves facing the immigration consequences of a plea. This is so because vacating the conviction may do little to enable them to return home to the United States.

To grasp the disconnect between Padilla and immigration law, it may be useful to consider the path of a lawful permanent resident who is removed on the basis of a criminal conviction. When a permanent resident is placed in removal proceedings, the immigration judge will first determine whether the noncitizen (referred to as the “respondent”) is subject to removal on the alleged grounds (in this case, on the basis of a criminal conviction).92 If the respondent is not removable (for example, because the conviction has been vacated, or because the conviction does not trigger grounds of removability), the proceedings will be terminated, and the respondent will retain her permanent resident status. If the respondent is found to be removable, the next stage of the proceeding will focus on the respondent’s eligibility for various forms of relief from removal.93 The respondent may not be eligible for relief, in which case the immigration judge will order her removed. If the respondent is eligible for relief, the immigration judge will then make a decision whether to grant relief (in which case the respondent will remain a lawful permanent resident) or to deny relief (in which case the respondent will be ordered removed).

The respondent then has thirty days in which to file an administrative appeal to the Board of Immigration Appeals (“BIA”).94 Upon the BIA’s affirmance of the removal order (or alternatively, upon the elapse of the filing period for an appeal, if no appeal is filed), the removal order becomes administratively final and the respondent may be physically removed from the United States.95 Once the respondent departs the United States, the removal order is deemed executed, and the respondent may face

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93 See id. § 1229a(c)(4). Forms of discretionary relief include cancellation of removal under § 1229b, asylum under § 1158, and waivers under § 1182(h) and former 8 U.S.C. § 1182(c). See INS v. St. Cyr, 533 U.S. 289, 326 (2001) (holding that those who pleaded guilty to criminal charges prior to the 1996 repeal of § 1182(c) remain eligible to apply for the waiver if it would have been available at the time of the plea).
94 8 C.F.R. § 1003.38 (a)-(b) (2010).
95 See 8 U.S.C. § 1101(a)(47)(B); 8 C.F.R. §§ 1003.3, 1003.39. If the respondent files a petition for review of the BIA’s decision in the federal court of appeals, such a filing will not bar the physical removal of the respondent unless the court of appeals stays the execution of the order. See 8 U.S.C. § 1252(b)(3)(B). However, a deportee who prevails on a petition for review will have an opportunity to contest deportability or to seek relief from removal on remand to the agency. See Lopez v. Gonzales, 549 U.S. 47, 52 n.2 (2006) (discussing ability of deportee to seek relief in remanded proceeding).
a variety of grounds of inadmissibility if she later seeks to return to the United States.96

How does Padilla fit into this picture? Suppose that the court vacates Jane Smith’s conviction and the district attorney declines to prosecute her again on the charge. Smith now has a clean criminal record, not only under state law but for immigration purposes as well.97 However, vacatur of Smith’s conviction will have no immediate effect on her immigration status. She is still a former permanent resident who has been removed as an “aggravated felon.” She no longer has a green card, or any other status that would permit her to return to the United States.

Procedurally, the only way to turn back the clock and restore Smith’s permanent resident status would be to seek reopening of the removal proceeding from the immigration judge who ordered her removed (or from the BIA if it affirmed the removal order).98 A reopened proceeding would follow the same path outlined above, with the immigration judge having the power to terminate the proceeding upon a finding that Jane Smith is not removable, or to consider her application for relief from removal if appropriate.99

Although motions to reopen removal proceedings must generally be filed within ninety days of a removal order becoming administratively final,100 immigration judges and the BIA retain jurisdiction to reopen proceedings “at any time” if warranted by exceptional circumstances.101 Vacatur of an underlying conviction has been recognized as an exceptional circumstance that warrants reopening of removal proceedings even after the deadline for motions to reopen has passed.102 A noncitizen who

96 See infra note 113.
98 A motion to reopen must be supported by affidavits or other evidence and must establish that the evidence is material, was unavailable at the time of original hearing, and could not have been discovered or presented at the original hearing. See INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7); 8 C.F.R. §§ 1003.2(c)(1), 1003.23(b)(3). An immigration judge may reopen a removal proceeding only if jurisdiction has not vested with the BIA. 8 C.F.R. § 1003.23(b)(1).
99 In this hypothetical, Smith is a lawful permanent resident and has only one conviction, and thus vacatur of the conviction would likely mean that she is no longer removable. However, there will be many cases in which an individual is otherwise removable but may be eligible for relief based on the vacatur of a conviction. This would appear to be the case in People v. García, Nos. B219284, B219548, B220182, 2010 WL 3751673, at *4 (Cal. Ct. App., Sept. 28, 2010). See supra notes 33-42 and accompanying text.
100 See INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7); 8 C.F.R. §§ 1003.2(c)(2), 1003.23(b)(1).
101 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1). The BIA has held that sua sponte reopening is appropriate only in exceptional circumstances. In re J-J, 21 I. & N. Dec. 976, 984 (B.I.A. 1997).
102 See Cruz v. Att’y Gen., 452 F.3d 240, 242 (3d Cir. 2006) (“In cases where the BIA has found an alien’s conviction vacated for purposes of the INA, it has routinely considered this fact to be an ‘exceptional situation’ that provides the basis for granting a motion to reopen sua
prevails in a Padilla claim while still in the United States will no longer face grounds of deportability as a result of the (now vacated) conviction and will almost certainly be able to reopen a removal proceeding if a removal order has issued. However, this route is foreclosed for many deportees. Current Department of Justice regulations bar reopening of a removal proceeding after the person subject to the removal order has departed the United States. The “departure bar” on reopening has been the subject of extensive litigation over the past few years. Four circuits have struck down the relevant regulations as invalid, and deportees who were ordered removed by immigration judges sitting within those circuits may seek reopening from outside the United States after prevailing on a Padilla claim. However, those removed by immigration judges in other circuits will be categorically barred from reopening. Moreover, there is no guarantee even in circuits that have struck down the departure bar that a deportee with a vacated conviction will be able to obtain reopening, due to

sponte, without regard to the timing of the filing”); see also id. at 246 n.3 (citing ten unpublished BIA cases granting reopening based on vacated convictions and noting that “[t]he parties have not identified, and we have not found, a single case in which the Board has rejected a motion to reopen as untimely after concluding that an alien is no longer convicted for immigration purposes”).


104 See supra note 102.

105 See 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1). A motion to reopen or reconsider “shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States.” 8 C.F.R. § 1003.23(b). For a more detailed analysis of the departure bar, see Rachel E. Rosenbloom, Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure, 33 U. HAW. L. REV. (forthcoming 2011) (manuscript at 17-26) (on file with author).

106 See Fruidze v. Holder, 632 F.3d 234, 240-41 (6th Cir. 2011) (invalidating the departure bar on the ground that the agency lacks authority to limit its own jurisdiction); Marin-Rodriguez v. Holder, 612 F.3d 591, 592-95 (7th Cir. 2010) (same); Coyt v. Holder, 593 F.3d 902, 906-07 (9th Cir. 2010) (holding that a related regulation deeming motions to reopen to be withdrawn upon departure is ultra vires); William v. Gonzales, 499 F.3d 329, 332 (4th Cir. 2007) (holding that the departure bar is ultra vires); see also Lin v. Gonzales, 473 F.3d 979, 982 (9th Cir. 2007) (holding that the departure bar in 8 C.F.R. § 1003.23(b)(1) does not apply to someone who has departed the United States subsequent to being ordered removed because such a person is no longer “the subject of” removal proceedings); Reynoso-Cisneros v. Gonzales, 491 F.3d 1001, 1002 (9th Cir. 2007) (extending the holding in Lin to cover the departure bar in 8 C.F.R. § 1003.2(d)). But see Zhang v. Holder, 617 F.3d 650, 660 (2d Cir. 2010) (upholding the validity of the departure bar with regard to untimely motions to reopen); Rosillo-Puga v. Holder, 580 F.3d 1147, 1156 (10th Cir. 2009) (upholding the validity of the departure bar); Ovalles v. Holder, 577 F.3d 288, 296-97 (5th Cir. 2009) (holding the departure bar to be valid with regard to untimely motions to reopen or reconsider); Pena-Muriel v. Gonzales, 489 F.3d 438, 442-43 (1st Cir. 2007) (upholding the validity of the departure bar without considering the argument that regulation is ultra vires).

107 See supra note 105 and accompanying text.
the broad discretion that immigration judges and the BIA have to deny untimely motions.108 Recent unpublished BIA decisions suggest that the BIA may be using this broad grant of discretion to deny post-departure motions to reopen even in circuits that have struck down the departure bar.109

Thus, there is a good chance that Jane Smith will be unable to vacate her removal order even though the conviction on which it is predicated no longer exists. Her only other option for returning to the United States on a permanent basis would be to start all over again with a new immigrant visa petition. This route will be available to her only if she qualifies for such a visa through a family relationship, employer sponsorship, or other means.110 Depending on the nature of the visa eligibility, she could face years of waiting for the visa to become available.111

Moreover, even if she is the beneficiary of an approved and current visa petition, Smith will still have to contend with grounds of inadmissibility. Upon her removal, she faced lifetime inadmissibility on two independent grounds: having been ordered removed on the basis of an aggravated felony conviction and having a drug trafficking conviction. What about after the conviction is vacated? Although the conviction itself no longer makes her inadmissible,112 she remains inadmissible based on the

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108 See 8 C.F.R. § 1003.2(a) (“The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.”); 8 C.F.R. § 1003.23(b)(3) (“The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief.”). The lower federal courts have widely held that the Board’s decision not to exercise its sua sponte authority is unreviewable. See, e.g., Tamenut v. Mukasey, 521 F.3d 1000, 1004 (8th Cir. 2008); Harchenko v. INS, 379 F.3d 405, 410-11 (6th Cir. 2004); Enrriquez-Alvarado v. Ashcroft, 371 F.3d 246, 249-50 (5th Cir. 2004); Belay-Gebru v. INS, 327 F.3d 998, 1001 (10th Cir. 2003); Calle-Vujiles v. Ashcroft, 320 F.3d 472, 475 (3d Cir. 2003); Ekmian v. INS, 303 F.3d 1153, 1159 (9th Cir. 2002); Luis v. INS, 196 F.3d 36, 40-41 (1st Cir. 1999); Anin v. Reno, 188 F.3d 1273, 1279 (11th Cir. 1999); see also Alex I. Craciunescu, Is It Time to Review the Unreviewable BIA’s Sua Sponte Power?, A.B.A. LITIG. SEC., http://www.abanet.org/litigation/committees/immigration/articles/071610-craciunescu-unreviewable-bia-sua-sponent.html (last visited Apr. 8, 2011).

109 See, e.g., William v. Holder, 359 F. App’x 370, 372-73 (2009) (per curiam) (upholding the BIA’s denial of motion to reopen, where conviction was vacated after respondent had been removed); Rosenbloom, supra note 105 (manuscript at 21-26) (discussing unpublished BIA denials of post-departure motions to reopen in circuits that have struck down the departure bar).

110 See INA § 201(e), 8 U.S.C. § 1151(f) (2006) (immediate relatives of United States citizens); § 1153(a) (family-sponsored immigrant visas); § 1153(b) (employment-based immigrant visas); § 1153(c) (diversity visa lottery).


112 See In re Pickering, 23 I. & N. Dec. 621, 624 (B.I.A. 2003). It should be noted that even a
prior removal order and is subject to at least a ten-year bar.\textsuperscript{113}

In sum, it is quite possible that Jane Smith, even if she immigrated to the United States in early childhood and was removed solely on the basis of the now-vacated conviction, will have no way of returning lawfully to the United States. Thus, the key animating principle of Padilla—to prevent noncitizen defendants from being “at the mercy of incompetent counsel”\textsuperscript{114}—will not have been fulfilled.

III. Fulfilling the Promise of Padilla

What will it take to ensure that noncitizen criminal defendants are not left to the mercies of incompetent counsel? To address this question in a holistic fashion will require wide-ranging reforms of the criminal justice system, as well as a rethinking of the policies under which even minor convictions can trigger mandatory deportation. Yet even in the absence of broader reforms, there are a number of more immediate steps that can be taken to make Padilla’s promise a meaningful one.

The proper training of criminal defense attorneys will be key; such efforts have been underway for years\textsuperscript{115} and will no doubt accelerate in the wake of Padilla. When attorneys fail to advise clients regarding the immigration consequences of convictions, and clients are prejudiced by the failure, Padilla provides a crucial first step to providing redress. However, Padilla on its own is far from sufficient. Truly protecting noncitizen defendants from the mercies of incompetent counsel will require the involvement not only of courts but also of administrative agencies and legislatures.

The reforms proposed here warrant detailed consideration that is outside the scope of the present Article. However, with the aim of starting

\textsuperscript{113} All those ordered removed are subject to either a five-year or ten-year bar of inadmissibility, depending on the circumstances of the removal. See § 1182(a)(9)(A)(i)- (ii). Those who have been removed and have also been convicted of an aggravated felony are subject to a lifetime bar. Id. Inadmissibility based on a prior removal order can, in some circumstances, be waived as a matter of agency discretion. See § 1182(a)(9)(A)(iii).


\textsuperscript{115} See generally Brief of the Nat’l Ass’n of Criminal Def. Lawyers, supra note 25, at 25-39 (describing local and national trainings and resources on the immigration consequences of criminal convictions).
such a discussion, I offer the following preliminary list:

First, procedures for seeking state and federal postconviction relief must catch up with the changing nature of the “crimmigration” system.\(^{116}\) In Padilla, the Court cites changes to the immigration laws that have “dramatically raised the stakes of a noncitizen’s criminal conviction”\(^ {117}\) and made deportation “practically inevitable” for individuals convicted of certain offenses.\(^ {118}\) Some of the offenses that can now lead to removal result in little or no jail time.\(^ {119}\) In some cases, the immigration consequences of such convictions do not become apparent until years later.\(^ {120}\) Postconviction remedies that include custody requirements or strict statutes of limitation are simply not suited to deal with these types of convictions.\(^ {121}\) Both legislatures and courts can play a role in ensuring that Padilla claims remain available in such circumstances.\(^ {122}\)

Second, the Department of Homeland Security and the Department of State must take steps to facilitate the temporary return to the United States of those who are seeking to testify on their own behalf at a hearing on postconviction relief. There is precedent for using humanitarian parole to bring noncitizen witnesses into the United States.\(^ {123}\) Parole, or an

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\(^{116}\) See Stumpf, supra note 6, at 377-78 (coining the term “crimmigration” to describe the increasing intersection of criminal and immigration law).

\(^{117}\) Padilla, 130 S. Ct. at 1480.

\(^{118}\) Id.

\(^{119}\) See Morawetz, supra note 54, at 1939-43.

\(^{120}\) For example, Jose Velasquez, who became a lawful permanent resident in 1960, was placed in removal proceedings in 1998 on the basis of a 1980 conviction for a controlled substances offense. See Velasquez v. Reno, 37 F. Supp. 2d 663, 664-65 (D.N.J. 1999). As explained by the court reviewing a habeas challenge to his detention, the circumstances of his conviction were as follows:

[He] was at a party; was approached by a friend and asked if he could sell cocaine; [and] replied that he did not sell cocaine, but that another man at the party might do so. He claims, and respondents do not dispute, that he never anticipated receiving, and never received, any compensation for any transaction that might thereafter have taken place. Petitioner successfully completed probation and no removal proceedings were initiated against him over the many years prior to the present action. From all accounts, he led an exemplary life prior to the incident in 1980, and he surely has led an exemplary life since then.

Id. at 665 (alteration in the original) (citation omitted).

\(^{121}\) See supra Part II.A.

\(^{122}\) For cases in which courts have been asked to recognize exceptions to the limitations on state postconviction relief, see cases cited supra note 32.

alternative mechanism such as non-immigrant visas, should be made available to those seeking to pursue Padilla claims. This is the only solution that would permit those whose Sixth Amendment rights have been violated to prepare an effective case and to participate fully in the postconviction proceeding. Testifying via telephone or videoconference, although it is better than nothing, cannot compare to in-person testimony in the courtroom.

Third, when personal appearance is not possible, courts must explore ways to make courtrooms accessible to those who are outside the United States through videoconferencing and other means. Although remote testimony has significant drawbacks, it is a necessity for those who have no realistic possibility of making an in-person appearance. The testimony of remote witnesses is far clearer (and therefore, perhaps, more persuasive) when it is transmitted through a high-quality videoconferencing system. It is thus crucial that applicants for postconviction relief have access to advanced technology rather than having to rely on consumer-grade alternatives. One significant way that the federal government could facilitate this process would be to make existing videoconferencing facilities in U.S. consulates available to those who are participating from abroad in legal proceedings in the United States. The use of such facilities may raise security concerns if they are located in areas of the consulates that are not accessible to the public. However, a pilot program is currently being considered to allow consulates to conduct visa interviews via videoconference, which would entail the development of remote

some advocates in obtaining humanitarian parole for migrant worker clients to return to the United States to testify against former employers or recruiters in labor and employment claims.

124 See ROSEN BLOOM, supra note 67 (describing waivers for non-immigrant visas).

125 See supra note 87 and accompanying text; see also TOOBY, supra note 88, at 470 (discussing importance of having client present “in court in order to personalize the client, introduce [the client] to the prosecutor, . . . [and] show how much the client cares about remaining in the United States”).

126 This is an issue of relevance not only for post-removal Padilla claims but also for a wide variety of proceedings. In particular, advocates for the rights of migrant workers have been engaged in devising ways for workers who are no longer in the United States to pursue labor and employment claims against their former employers. See Cathleen Caron, Portable Justice, Global Workers, and the United States, 40 CLEARINGHOUSE REV. 549, 555-57 (2007); Victoria Gavito, The Pursuit of Justice is Without Borders: Binational Strategies for Defending Migrants’ Rights, HUM. RTS. BRIEF, Spring 2007, at 5, 6.

127 See Frederic L. Lederer, Wired: What We’ve Learned About Courtroom Technology, CRIM. JUST., Winter 2010, at 18, 22-23 (discussing the experiences of the Center for Legal and Court Technology with both high-definition video and low-quality, Internet-based technology for remote testimony).

128 In January 2006, the Secretaries of State and Homeland Security launched the “Rice-Chertoff Joint Vision: Secure Borders and Open Doors in the Information Age.” State,
videoconferencing locations for use by visa applicants.129 Such locations, which would be accessible to the public, might be well-suited for use by remote witnesses in legal proceedings.

Fourth, the Department of Justice must alter its policies to permit immigration judges and the BIA to reopen removal proceedings when the underlying conviction that formed the basis for the removal order has been vacated. A petition for administrative rulemaking to eliminate the “departure bar” on motions to reopen is currently pending before the Department of Justice.130 Without this crucial change, success in a Padilla claim will remain a hollow victory to those who have already suffered the consequences of their pleas.

CONCLUSION

Even in the wake of Padilla, noncitizen criminal defendants who are prejudiced by a defense attorney’s failure to provide accurate advice on the immigration consequences of a plea face many potential barriers to obtaining postconviction relief. For those who are seeking such relief from outside the United States, these barriers are compounded by the logistical and evidentiary complexities of litigating a claim from abroad. Moreover, for those who have already been removed, even success in a Padilla claim will provide little assurance of the outcome that really matters: returning to their lives in the United States.

With its decision in Padilla, the Supreme Court has promised to protect noncitizen defendants from the mercies of incompetent counsel. To fulfill this promise will require action not only by courts but by administrative agencies and legislatures as well. Padilla will remain a hollow promise until postconviction remedies are made accessible to deportees and until those who have been removed on the basis of constitutionally defective convictions are permitted to return home to the United States.
