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Reply To:
Margaret Stock, Attorney At Law
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VIA EMAIL ONLY

February 24, 2014

Honorable Mike Chenault
Speaker of the House

Re: Alaska Department of Law's proposed amendment to HB218 to deny any person the ability to ask a three-judge panel to review sentencing for a felony on the basis that the sentence will result in the harsh collateral consequence of deportation

Dear Speaker Chenault:

At the request of three different legislators who are members of the House Judiciary Committee, I am providing the attached list of legal errors in the Memorandum provided to you on February 11, 2014 by Richard Svobodny, Alaska Department of Law.

For the record, I also state the following:

1. The proposed amendment to HB 218 interferes with our judges' duty to ensure that justice is served;
2. The United States Supreme Court, in the case of Padilla v. Kentucky, specifically recognized and sanctioned a judge's power, ability, and duty to fashion sentences that avoid the severe consequences of deportation when appropriate and necessary;
3. The amendment would harm Alaska families. Many persons who would be denied justice under this amendment are the spouses and parents of US citizens and lawful permanent residents. Deportation would result in the permanent break-up of these mixed status families, something that the Department of Law fails to mention whatsoever. Many especially vulnerable Alaska Native families will be harmed by this amendment.
4. The Department of Law lost the arguments made in the Department of Law legal memo when it made these arguments before the three-judge panel in the Silvera case. The Department now mischaracterizes what the Court of Appeals did in the Silvera case. The Silvera decision did not mandate that a three-judge panel must

impose lower sentences, but merely acknowledged that deportation is an appropriate factor to consider when a judge is exercising his or her discretionary sentencing authority.

5. The State of Alaska Department of Law's proposed amendment likely violates the Alaska and Federal Constitutions in that it puts the "manifestly unjust" provision of the three-judge sentencing panel statute off-limits to an entire category of defendants based specifically on their national origin. Although deportation is an extraordinarily harsh collateral consequence, the amendment prohibits the courts from considering it entirely. As the second sentence of the State of Alaska's legal memo indicates, this amendment is apparently motivated by an animus to "foreign born" people.

Please let me know if you have questions.

Very truly yours,

Margaret D. Stock

Enclosures:
Aggravated Felonies: An Overview, by the Immigration Policy Center
List of Aggravated Felonies (Immigration & Nationality Act §101(a)(43))
Padilla v. Kentucky, US Supreme Court decision
State of Alaska v. Silvera, 309 P.3d 1277

IMMIGRATION POLICY CENTER
AMERICAN IMMIGRATION COUNCIL

March 2012

AGGRAVATED FELONIES: An Overview

"Aggravated felony" is a term of art used to describe a category of offenses carrying particularly harsh immigration consequences for non-citizens convicted of such crimes. Regardless of their immigration status, non-citizens who have been convicted of an "aggravated felony" are prohibited from receiving most forms of relief that would spare them from deportation, including asylum, and from being readmitted to the United States at any time in the future.

Yet despite what the ominous-sounding name may suggest, an "aggravated felony" need not be "aggravated" or a "felony" to qualify as such a crime. Instead, an "aggravated felony" is simply an offense that Congress sees fit to label as such, and today includes many nonviolent and seemingly minor offenses.

This fact sheet provides an overview of "aggravated felonies" under federal immigration law and the immigration consequences of being convicted of an "aggravated felony."[1]

What Makes a Crime an "Aggravated Felony"?

An offense need not be "aggravated" or a "felony" in the place where the crime was committed to be considered an "aggravated felony" for purposes of federal immigration law. Instead, an "aggravated felony" is any crime that Congress decides to label as such. As two prominent immigration judges recently noted, numerous "non-violent, fairly trivial misdemeanors are considered aggravated felonies under our immigration laws."[2]

As initially enacted in 1988, the term "aggravated felony" referred only to murder, federal drug trafficking, and illicit trafficking of certain firearms and destructive devices.[3] Congress has since expanded the definition of "aggravated felony" on numerous occasions,[4] but has never removed a crime from the list. Today, the definition of "aggravated felony" covers more than thirty types of offenses, including simple battery,[5] theft,[6] filing a false tax return,[7] and failing to appear in court.[8] Even offenses that sound serious, such as "sexual abuse of a minor," can encompass conduct that some states classify as misdemeanors or do not criminalize at all, such as consensual intercourse between a 17-year-old and a 16-year-old.[9]

What if the Conviction Occurred before the Crime was Labeled an "Aggravated Felony"?

In most federal courts, a conviction for any offense listed as an "aggravated felony" is grounds for deportation, even if the crime was not considered an "aggravated felony" at the time of conviction.[10] In other words, whenever Congress adds a new offense to the list of "aggravated felonies" in the Immigration and Nationality Act (INA), lawfully present immigrants who have previously been convicted of such crimes become immediately deportable. As a result, any addition to the list of "aggravated felonies" will apply to prior convictions unless Congress affirmatively states that it will only apply to future convictions.

Are "Aggravated Felonies" the Only Crimes for Which an Immigrant Can be Deported?

No. An "aggravated felony" is one—but not the only—basis to deport immigrants convicted of a criminal offense. Removal proceedings may also be initiated against immigrants convicted of one or more crimes involving "moral turpitude,"[11] a broad category of offenses that includes, but is not limited to, most crimes that qualify as an "aggravated felony."[12] Immigrants convicted of crimes involving moral turpitude are subject to deportation, but do not face the additional consequences associated with a conviction for an "aggravated felony." The immigration laws also permit deportation for convictions of various standalone offenses.[13]

Thus, whether a noncitizen is subject to deportation for a crime is not determined by whether the crime is labeled an "aggravated felony." Instead, the primary impact of the "aggravated felony" classification relates to the increased immigration penalties attached to the label, including the inability to apply for most forms of relief from removal.

What are the Potential Consequences of Being Convicted of an "Aggravated Felony"?

Deportation without a Removal Hearing

Certain non-citizens convicted of an "aggravated felony" are provided fewer legal protections than other immigrants. For example, any immigrant convicted of an "aggravated felony" who is not a lawful permanent resident (LPR) may be administratively deported from the United States without a formal hearing before an Immigration Judge.[14] Immigrants placed in such proceedings are not eligible for asylum or any other form of discretionary relief.[15] Immigrants found deportable in this manner may not appeal to the Board of Immigration Appeals (BIA) and can be physically removed two weeks after entry of the order.[16]

Mandatory Unreviewable Detention Following Release from Criminal Custody

Federal immigration authorities are *required* to detain any immigrant convicted of an "aggravated felony" upon his or her release from criminal custody.[17] To obtain bond from an immigration judge, LPRs who are detained following an "aggravated felony" conviction must demonstrate with substantial likelihood that the crime in question does not qualify as an "aggravated felony."[18]

Ineligibility for Asylum

Any immigrant convicted of an "aggravated felony" is ineligible for asylum.[19] Asylum is a form of immigration relief available to immigrants who suffered or have a well-founded fear of persecution in their country of nationality or last habitual residence.[20] Immigrants convicted of an "aggravated felony" may also be ineligible for "withholding of removal," a similar form of relief for noncitizens whose life or freedom would be threatened in the country of deportation.[21]

Ineligibility for Cancellation of Removal

Any immigrant convicted of an "aggravated felony" is ineligible for cancellation of removal ("cancellation").[22] Cancellation is a form of relief allowing immigration judges to permit otherwise deportable immigrants to remain in the United States. The bar to cancellation for

immigrants convicted of an "aggravated felony" applies regardless of whether their removal would cause "exceptional and extremely unusual hardship" to an immediate family member who is a U.S. citizen or LPR.[23]

Ineligibility for Certain Waivers of Inadmissibility

Certain LPRs may not obtain a waiver of inadmissibility under Section 212(h) of the INA if they were convicted of an "aggravated felony."[24] A waiver of inadmissibility is a means of excusing immigrants for past misconduct that makes them ineligible for admission to the United States. Waivers under Section 212(h) are available to prospective LPRs whose removal from the United States would cause "extreme hardship" to a qualifying U.S. citizen or LPR.

Ineligibility for Voluntary Departure

An immigrant convicted of an "aggravated felony" is ineligible for voluntary departure.[25] Voluntary departure is a discretionary form of relief allowing otherwise deportable immigrants to leave the country at their own expense in place of formal deportation under an order of removal.

Permanent Inadmissibility Following Departure from the United States

An immigrant removed from the United States after being convicted of an "aggravated felony" (or who leaves while an order of removal is outstanding) is permanently inadmissible.[26] To lawfully reenter the United States, such an immigrant must receive a special waiver from the Department of Homeland Security (which is very rare), in addition to meeting all other grounds of admissibility.

Enhanced Penalties for Illegally Reentering the United States

An immigrant who is removed from the United States following a conviction for an "aggravated felony," and who subsequently reenters the country illegally, may be imprisoned for up to 20 years rather than two years.[27]

Conclusion

In the words of the Supreme Court, immigrants convicted of an "aggravated felony" face the "harshest deportation consequences."[28] As Congress ponders proposals to include even more crimes under the definition of "aggravated felony," it must consider the extremely severe consequences that will result. The immigration laws include numerous provisions to ensure that criminals are not allowed to remain in the United States, yet also recognize that exceptions should be made in particularly compelling cases, especially when an immigrant's removal will create hardship for U.S. citizens. Once a crime is labeled an "aggravated felony," however, deportation is all but assured and individualized determinations are rarely possible to make.

Endnotes

[1] The Immigration Policy Center wishes to thank Dan Kesselbrenner of the National Immigration Project of the National Lawyers Guild for his assistance in preparing this fact sheet.

[2] Hon. Dana Leigh Marks and Hon. Denise Noonan Slavin, *A View Through the Looking Glass: How Crimes Appear from the Immigration Court Perspective*, Fordham Urb. L.J. 91, 92 (2012).
[3] Anti-Drug Abuse Act of 1988, Pub. L. 100-690, §§ 7342, 7344, 102 Stat. 4469, 4470.
[4] Immigration Act of 1990, Pub. L. 101-649, §501, 104 Stat. 4978, 5048; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, § 222, 109 Stat. 4305, 4320; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 440(e), 110 Stat. 1276, 1277; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 321, 110 Stat. 3009-627.
[5] INA § 101(a)(43)(F).
[6] INA § 101(a)(43)(G).
[7] INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i); *Kawashima v. Holder*, No. 10-577 (Feb. 21, 2012).
[8] INA § 101(a)(43)(Q), (T), 8 U.S.C. § 1101(a)(43)(Q), (T).
[9] *United States v. Castro-Guevarra*, 575 F.3d 550 (5th Cir. 2009).
[10] INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). In removal proceedings arising in the U.S. Court of Appeals for the Ninth Circuit, however, an "aggravated felony" conviction is grounds for removal only if the conviction occurred after November 19, 1988. *Ledezma-Galicia v. Holder*, 636 F.3d 1059 (9th Cir. 2010).
[11] INA § 237(a)(2)(A)(i)-(ii), 8 U.S.C. § 1227(a)(2)(A)(i)-(ii).
[12] *Judulang v. Holder*, 132 S. Ct. 476, 482 (2011).
[13] *See, e.g.*, INA § 237(a)(2)(A)(iv), 8 U.S.C. § 1227(a)(2)(A)(iv) (high speed flight from an immigration checkpoint); INA § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v) (failure to register as a sex offender); INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (controlled substances violations); INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C) (certain firearms offenses); INA § 237(a)(2)(D), 8 U.S.C. § 1227(a)(2)(D) (miscellaneous crimes); INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E) (crimes of domestic violence).
[14] INA § 238, 8 U.S.C. § 1228.
[15] INA § 238(b)(5), 8 U.S.C. § 1228(b)(5).
[16] INA § 238(b)(3), 8 U.S.C. § 1228(b)(3).
[17] INA § 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B).
[18] *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).
[19] INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i).
[20] INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).
[21] INA § 241(b)(3)(B), 8 U.S.C. § 1231(3)(B).
[22] INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3); INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C).
[23] INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D).
[24] INA § 212(h), 8 U.S.C. § 1182(h).
[25] INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1); INA § 240B(b)(1)(C), 8 U.S.C. § 1229c(b)(1)(C).
[26] INA § 212(a)(9)(ii), 8 U.S.C. § 1182(a)(9)(ii).
[27] INA § 276(b)(2), 8 U.S.C. § 1326(b)(2).
[28] *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2580 (2010).

Quotations from State of Alaska Legal Memo	Discussion of Error in State's Memorandum
"State v. Silvera and *State v. Perez,* 309 P.3d 1277 (Alaska App. 2013), are two cases that allow for a reduction in a sentence by a three-judge sentencing panel for noncitizens of the United States "	These decisions do not just affect noncitizens, but also allow citizens of the United States to seek a reduction in sentence if they might face denaturalization and deportation as a result of the original sentence
" . . . with the resulting consequence that citizens of the United States are sentenced to harsher sentences than noncitizens."	Citizens may also seek reductions in their sentence in appropriate circumstances. They are not categorically "sentenced to harsher sentences" just because they are citizens
"Put another way, a person born in Jamaica (Mr. Silvera) or the Dominican Republic (Mr. Perez) who comes to Alaska and commits a felony can receive a lesser sentence for the same crime than a person born in Bethel or Anchorage, Alaska."	This statement shows a fundamental misunderstanding of citizenship law. Many people born in Jamaica and/or the Dominican Republic are American citizens at birth. Likewise, a person born in Alaska to invading Japanese troops during the Japanese World War II occupation of Attu and Kiska would not be a US citizen, although born in Alaska. Many Americans are born in foreign countries. Examples include US Senator Ted Cruz (born in Canada) , US Senator John McCain (born in Panama), and George Romney (born in Mexico). Place of birth is irrelevant to sentencing decisions under the cases cited.
"If the defendants were to receive at least one year's confinement (the presumptive minimum) for their offenses, each might be classified by U.S. Immigration and Customs Enforcement (ICE) as an 'aggravated felon,' as that term is defined by the federal immigration statutes, and so they might be considered 'deportable.'"	There is no "might" about any of this. Federal immigration law classifies as an "aggravated felony" any crime—whether felony or misdemeanor, and whether "aggravated" or not—if the offense is a "crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense), for which the term of imprisonment [is] at least one year." INA §101(a)(43)(F). If the US Government—not just ICE, but other federal agencies as well—considers a crime to be an "aggravated felony," then a person is deportable under INA 237(a)(2)(A)(iii), which states that "Any alien who is convicted of an aggravated felony at any time after admission is deportable." If the alien has not yet been

	admitted to the United States, there is a waiver—but if the alien has been granted a green card, as Silvera and Perez had, then there is no waiver for the aggravated felony ground of deportation. An "aggravated felon" is permanently barred from naturalizing as a US citizen and is subject to mandatory detention and deportation, without hope of relief unless the person would be tortured if returned to his or her country of citizenship. There is no "might" about any of this. The statute does not provide discretion not to deport an "aggravated felon," and does not give ICE the discretion to refuse to classify the person as an "aggravated felon." The State Department of Law's use of the word "might" is misleading.
"If they are 'deportable' ICE then has prosecutorial discretion to initiate removal proceedings against them."	Immigration detention is mandatory for aggravated felons. ICE does not have discretion, nor do immigration judges have discretion to provide relief to "aggravated felons." Moreover, ICE is not the only federal agency that is implicated. Other federal agencies can initiate removal proceedings based on a person's conviction for an "aggravated felony." Customs and Border Protection is mandated to deny entry to a person who has an aggravated felony conviction, and USCIS is required to deny a naturalization application filed by such a person.
"The defendants asked the sentencing courts to sentence them below the minimum statutory presumptive ranges for their crimes so that they could avoid possible deportation -that is, so that they could avoid being classified as 'aggravated felons.'"	They were not necessarily avoiding deportation, they were merely attempting to avoid being classified as "aggravated felons." They remain highly likely to face deportation proceedings. Being an "aggravated felon" is not the only reason why a person might face deportation proceedings. There are numerous offenses that can lead to deportation and being an "aggravated felony" is only one of

	them. See, generally, INA 237(a); see also the attached Factsheet from the Immigration Policy Center. The defendants, however, were trying to avoid being convicted of something defined under federal law as an "aggravated felony" because those convicted of such crimes generally have no possible relief from deportation, no matter how long they have lived in the US, no matter what their ties here, and no matter what their equities. If they are considered deportable for a reason besides being an "aggravated felon," they can sometimes obtain relief from deportation before an immigration judge.
"In its decision, the court of appeals ruled that Alaskan sentencing courts may impose less severe sentences on noncitizen defendants than sentences they would impose on otherwise similarly situated citizen defendants, to specifically include imposing sentences below the presumptive minimum sentences generally mandated by the Alaska Legislature."	The Court of Appeals indicated that it could also impose less severe sentences on citizens who might face deportation after being denaturalized.
"Under the court of appeals' ruling, courts may do so for the sole purpose of providing noncitizen defendants with *defacto* immunity from or providing them with otherwise prohibited defenses to immigration law."	The defendants received no immunity whatsoever. They may still face deportation. They only avoided the classification of "aggravated felon." An immigration judge could still order them deported.
"Specifically, the court ruled that a three-judge panel may impose a sentence below the presumptive minimum term for the sole purpose of shielding a noncitizen defendant from possible deportation proceedings (the outcome of which would be uncertain)."	The outcome of a deportation for an "aggravated felon" is certain—the person is ordered removed, with no relief available unless the person would be tortured if returned to his or her country of citizenship. The person is also subject to mandatory detention when transferred from state to immigration custody.
"The court of appeals' ruling violates the equal protection principles of the Alaska Constitution because it authorizes courts to	The Court of Appeals specifically rejected the argument that considering deportation consequences would violate equal protection.

treat defendants differently based on their citizenship and immigration status."	Moreover, there is no equal protection violation because (1) citizens who face possible deportation may also ask for a sentence reduction, and (2) equal protection does not mean that all persons have to be treated exactly the same. For example, it is not an equal protection violation against sane people that insane people may raise an insanity defense, a defense that is not available to sane people. Moreover, citizens are harmed when their noncitizen loved ones are banished permanently from the United States.
"Applying a different sentencing standard for citizens and noncitizens will undermine public confidence in Alaska's criminal justice system."	Having the Alaska State legislature ratify the break-up of mixed status families so that mandatory detention and deportation may occur will no doubt undermine public confidence in Alaska's criminal justice system. Moreover, the United States Supreme Court specifically ratified the concept of taking immigration consequences into account when sentencing a defendant, in the case of Padilla v. Kentucky.
"From the citizens' point of view, they will be denied an opportunity to be sentenced by the three-judge panel simply because they are citizens and so are not subject to federal immigration laws that the state judges have decided are unjust."	Nothing in current prevents a citizen who may face denaturalization and deportation from asking to be sentenced by a three-judge panel. Citizens may also be subject to federal immigration laws. The State's proposed amendment would prevent citizens from arguing to a three-judge panel that the immigration consequences to citizens may be taken into account in sentencing.

Sec. 101 [1101] Definitions
[8 U.S.C. 1101]

101(a) [1101(a)] As used in this Act--

101(a)(43) [1101(a)(43)] The term "aggravated felony" means--

101(a)(43)(A) [1101(a)(43)(A)] murder, rape, or sexual abuse of a minor;

101(a)(43)(B) [1101(a)(43)(B)] illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);

101(a)(43)(C) [1101(a)(43)(C)] illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title);

101(a)(43)(D) [1101(a)(43)(D)] an offense described in section 1956 of title 18, United States Code (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

101(a)(43)(E) [1101(a)(43)(E)] an offense described in--

101(a)(43)(E)(i) [1101(a)(43)(E)(i)] section 842(h) or (i) of title 18, United States Code, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

101(a)(43)(E)(ii) [1101(a)(43)(E)(ii)] section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18, United States Code (relating to firearms offenses); or

101(a)(43)(E)(iii) [1101(a)(43)(E)(iii)] section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses);

101(a)(43)(F) [1101(a)(43)(F)] a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment at [sic]

least 1 year;

101(a)(43)(G) [1101(a)(43)(G)] a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at [sic]

least 1 year;

101(a)(43)(H) [1101(a)(43)(H)] an offense described in section 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom);

101(a)(43)(I) [1101(a)(43)(I)] an offense described in section 2251, 2251A, or 2252 of title 18, United States Code (relating to child pornography);

101(a)(43)(J) [1101(a)(43)(J)] an offense described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of 1 year imprisonment or more may be imposed;

101(a)(43)(K) [1101(a)(43)(K)] an offense that--

101(a)(43)(K)(i) [1101(a)(43)(K)(i)] relates to the owning, controlling, managing, or supervising of a prostitution business;

101(a)(43)(K)(ii) [1101(a)(43)(K)(ii)] is described in section 2421, 2422, 2423, of Title 18, United States Code (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

101(a)(43)(K)(iii) [1101(a)(43)(K)(iii)] is described in any of sections 1581-1585 or 1588-1591 of title 18, United States Code (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

101(a)(43)(L) [1101(a)(43)(L)] an offense described in--

101(a)(43)(L)(i) [1101(a)(43)(L)(i)] section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18, United States Code;

101(a)(43)(L)(ii) [1101(a)(43)(L)(ii)] section 601 of the National Security Act of 1947 (50 U.S.C. 421) (relating to protecting the identity of undercover intelligence agents); or

101(a)(43)(L)(iii) [1101(a)(43)(L)(iii)] section 601 of the National Security Act of 1947 (relating to protecting the identity of undercover agents);

101(a)(43)(M) [1101(a)(43)(M)] an offense that--

101(a)(43)(M)(i) [1101(a)(43)(M)(i)] involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

101(a)(43)(M)(ii) [1101(a)(43)(M)(ii)] is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

101(a)(43)(N) [1101(a)(43)(N)] an offense described in paragraph (1)(A) or (2) of section 274(a) (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;

101(a)(43)(O) [1101(a)(43)(O)] an offense described in section 275(a) or 276 committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph [;]

101(a)(43)(P) [1101(a)(43)(P)] an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18, United States Code, or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;

101(a)(43)(Q)an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

101(a)(43)(R) [1101(a)(43)(R)] an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

101(a)(43)(S) [1101(a)(43)(S)] an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

101(a)(43)(T) [1101(a)(43)(T)] an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

101(a)(43)(U) [1101(a)(43)(U)] an attempt or conspiracy to commit an offense described in this paragraph.

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

Syllabus

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

SUPREME COURT OF THE UNITED STATES

Syllabus

PADILLA *v.* KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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

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

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

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

Syllabus

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

(c) To satisfy *Strickland*'s two-prong inquiry, counsel's representation must fall "below an objective standard of reasonableness," 466 U. S., at 688, and there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694. The first, constitutional deficiency, is necessarily linked to the legal community's practice and expectations. *Id.*, at 688. The weight of prevailing professional norms supports the view that counsel must advise her client regarding the deportation risk. And this Court has recognized the importance to the client of " '[p]reserving the . . . right to remain in the United States' " and "preserving the possibility of" discretionary relief from deportation. *INS* v. *St. Cyr*, 533 U. S. 289, 323. Thus, this is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect. There will, however, undoubtedly be numerous situations in which the deportation consequences of a plea are unclear. In those cases, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear. Accepting Padilla's allegations as true, he has sufficiently alleged constitutional deficiency to satisfy *Strickland*'s first prong. Whether he can satisfy the second prong, prejudice, is left for the Kentucky courts to consider in the first instance. Pp. 9–12.

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

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

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

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

SUPREME COURT OF THE UNITED STATES

No. 08–651

JOSE PADILLA, PETITIONER *v.* KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[March 31, 2010]

JUSTICE STEVENS delivered the opinion of the Court.

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

In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he "'did not have to worry about immigration status since he had been in the country so long.'" 253 S. W. 3d 482, 483 (Ky. 2008). Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme

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

Court of Kentucky denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a "collateral" consequence of his conviction. *Id.*, at 485. In its view, neither counsel's failure to advise petitioner about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief.

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

I

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

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

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

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

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

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

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

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

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[3] As enacted, the statute provided:

"That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, . . . make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act." 1917 Act, 39 Stat. 889–890.

This provision was codified in 8 U. S. C. §1251(b) (1994 ed.) (transferred to §1227 (2006 ed.)). The judge's nondeportation recommendation was binding on the Secretary of Labor and, later, the Attorney General after control of immigration removal matters was transferred from the former to the latter. See *Janvier* v. *United States*, 793 F. 2d 449, 452 (CA2 1986).

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

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

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

However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA),[6] and in

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

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

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

These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part[7]—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

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

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

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

II

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

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

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

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

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

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

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

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

III

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

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

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

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

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

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. See 8 U. S. C. §1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable"). Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios

posited by JUSTICE ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.[10] But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

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

IV

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

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

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

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

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

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

concurring in judgment).

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

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

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

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

separate specious claims from those with substantial merit.

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

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

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

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

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

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

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

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

V

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel." *Richardson*, 397 U. S., at 771. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

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

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

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

It is so ordered.

309 P.3d 1277
Court of Appeals of Alaska.

STATE of Alaska, Appellant/Cross-Appellee,
v.
Michael SILVERA, Appellee/Cross-Appellant.
State of Alaska, Petitioner,
v.
Jose Manuel Perez, Respondent.

Nos. A-11174, A-11193, A-11195. | Sept. 27, 2013.

Synopsis

Background: After defendant's conviction of second-degree assault was affirmed, 244 P.3d 1138, case was referred to three-judge sentencing panel. The Statewide Three Judge Panel, Eric Smith, John Suddock, and Fred Torrisi, JJ., concluded that harsh collateral consequences of deportation was appropriate non-statutory mitigating factor and imposed sentence below presumptive range. State appealed. Following second defendant's conviction of fourth-degree assault and interference with official proceedings, case was referred to three-judge sentencing panel. The Statewide Three Judge Panel, Eric Smith, John Suddock, and Anna Moran, JJ., assumed, without deciding, that deportation would be harsh collateral consequence, and imposed composite sentence on defendant to avoid deportation. State appealed. The Court of Appeals consolidated cases.

Holdings: The Court of Appeals, Allard, J., held that:

[1] panels' sentencing hearings were not de facto immigration hearings;

[2] panels' decision did not provide defendants with expressly-proscribed exemption from deportation;

[3] federal law did not prohibit panels from considering consequences of deportation;

[4] panels had statutory authority to impose sentence below presumptive range; and

[5] panels' considering deportation did not violate equal protection clause.

Affirmed in part and remanded in part with instructions.

West Headnotes (12)

[1] **States**
Conflicting or conforming laws or regulations
States
Occupation of field

Courts generally apply two-step analysis to preemption questions: (1) courts look to see whether Congress has overtly preempted subject matter state wishes to regulate, either explicitly, by declaring its intent to preempt all state authority, or implicitly, by occupying the entire field of regulation on subject in question, and (2) if neither kind of direct preemption is found, courts look to whether federal and state law conflict in this particular instance. U.S.C.A. Const. Art. 6, cl. 2.

[2] **States**
State police power

In preemption analysis, courts must assume that historic police powers of states are not superseded unless that was clear and manifest purpose of Congress. U.S.C.A. Const. Art. 6, cl. 2.

[3] **Aliens, Immigration, and Citizenship**
Sentencing Requirements

Federal law did not prohibit three-judge sentencing panel from considering the harsh collateral consequences of deportation as non-statutory mitigating factor and, if manifest injustice would otherwise result, from imposing a sentence below the presumptive range based on that consideration; Congress expressly reserved a role for state courts in determining when defendant has committed aggravated felony for purposes of federal immigration law, panel did not conduct de facto immigration hearing in

considering deportation as mitigating factor, and panel's decision did not provide defendants with exemption from deportation that Congress expressly proscribed. U.S.C.A. Const. Art. 6, cl. 2; Immigration and Nationality Act, § 239(b), 8 U.S.C.A. § 1229(b); AS 12.55.165(a), 12.55.175(b).

[4] **Sentencing and Punishment**
- Sentencing Proceedings in General

States
- Offenses and punishments

Sentencing hearings conducted by three-judge panels that considered consequences of deportation as non-statutory mitigating factor to sentence imposed on defendants were not de facto immigration hearings such that panels' decisions would be preempted by federal immigration law, even though federal immigration officials would weigh some of the same considerations panels considered at sentencing; potential overlap between state sentencing considerations and federal immigration considerations did not establish Congress's clear and manifest purpose to prohibit state courts from considering the totality of legally relevant circumstances at sentencing, including risk and consequences of deportation. U.S.C.A. Const. Art. 6, cl. 2; Immigration and Nationality Act, § 101 et seq., 8 U.S.C.A. § 1101 et seq.; AS 12.55.165(a), 12.55.175(b).

[5] **Aliens, Immigration, and Citizenship**
- Aggravated felonies in general

Sentencing and Punishment
- Sentencing Proceedings in General

States
- Offenses and punishments

Decision of three-judge sentencing panels, in concluding it would be manifestly unjust to impose sentences on defendants within presumptive range, to consider non-statutory mitigating factor of harsh collateral consequence of deportation to impose sentences below presumptive range did not provide defendants with exemption from deportation that Congress expressly proscribed, such that panels' decision would be preempted by federal immigration law, and thus defendants were not barred from any available remedies under Immigration and Nationality Act; defendants had not been convicted of aggravated felonies. U.S.C.A. Const. Art. 6, cl. 2; Immigration and Nationality Act, §§ 101 et seq., 239(b), 8 U.S.C.A. §§ 1101 et seq., 1229(b); AS 12.55.165(a), 12.55.175(b).

[6] **Sentencing and Punishment**
- Effect of Statute or Regulatory Provision

Sentencing and Punishment
- Mitigating circumstances in general

Goal in enacting presumptive sentencing was to reduce disparity in criminal sentencing, and it gave sentencing courts no authority to impose sentence below presumptive range unless defendant established at least one of statutory mitigating factors. AS 12.55.005, 12.55.155(d).

[7] **Sentencing and Punishment**
- Effect of Statute or Regulatory Provision

Sentencing and Punishment
- Factors or Purposes in General

Sentencing and Punishment
- Mitigating circumstances in general

If three-judge sentencing panel concludes that non-statutory mitigating factor is proved, and that it would be manifestly unjust to fail to adjust presumptive sentencing range based on that factor, panel must assess proper sentence, taking mitigating factor into consideration and applying sentencing criteria to determine whether sentence would further sentencing goals of rehabilitation, general and specific deterrence, affirmation of societal norms, and public safety. Const. Art. 1, § 12; AS 12.55.155(d), 12.55.165(a), 12.55.175(b).

[8] **Sentencing and Punishment**
- Other offender-related considerations

Sentencing and Punishment

Sentencing Proceedings in General

Three-judge sentencing panel had statutory authority to impose sentence below presumptive range based on non-statutory mitigating factor of harsh collateral consequences of deportation, since, if panel was precluded from considering harsh collateral consequences, there would be substantial risk that unduly harsh, manifestly unjust sentences would be imposed on non-citizens, which would defeat goal of uniformity of sentencing. Const. Art. 1, § 12; AS 12.55.005, 12.55.155(d), 12.55.165(a), 12.55.175(b).

[9] **Aliens, Immigration, and Citizenship**

Aggravated felonies in general

Federal immigration officials did not have broad discretion to decide whether to deport aggravated felons; even though deportation would be speculative in some cases, it would be practically certain in others. Immigration and Nationality Act, § 101 et seq., 8 U.S.C.A. § 1101 et seq.

[10] **Sentencing and Punishment**

Other offender-related considerations

Consideration of potential deportation consequences in sentencing as non-statutory mitigating factor would lead to sentence that better advanced sentencing goals of rehabilitation, general and specific deterrence, affirmation of societal norms, and public safety. Const. Art. 1, § 12; AS 12.55.005, 12.55.155(d), 12.55.165(a), 12.55.175(b).

[11] **Sentencing and Punishment**

Other offender-related considerations

Allowing courts to adjust sentence to avoid risk of deportation based on non-statutory mitigating factor of harsh collateral consequences of deportation did not contravene goal of uniformity of sentencing; declining to impose sentence below presumptive sentencing range based on non-statutory mitigating factor had potential to defeat uniformity because non-citizen facing deportation may be subject to much harsher overall consequences than citizen convicted of same offense. AS 12.55.005, 12.55.155(d), 12.55.165(a), 12.55.175(b).

[12] **Constitutional Law**

Sentencing and Punishment

Sentencing and Punishment

Other offender-related considerations

Three-judge sentencing panels' consideration of deportation risk as harsh collateral consequence when concluding it would be manifestly unjust to impose sentence within presumptive range on defendants did not violate federal or state equal protection clauses; defendants did not receive favorable treatment based on their status of non-citizens, but rather it was harsh collateral consequences they faced if deported that led panels to reach conclusion, defendants were not similarly situated to other defendants that did not face harsh consequence of deportation as a result of conviction, and departing from presumptive range based on collateral consequences would not necessarily result in sentence that was more lenient than that imposed on citizen. U.S.C.A. Const.Amends. 5, 7; Const. Art. 1, § 12; AS 12.55.005, 12.55.155(d), 12.55.165(a), 12.55.175(b).

Attorneys and Law Firms

*1280 Renee McFarland, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellants Silvera and Perez.

Ann B. Black, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: MANNHEIMER, Chief Judge, ALLARD, Judge, and COATS, Senior Judge. [1]

Opinion

OPINION

ALLARD, Judge.

This consolidated case raises the question of whether the statewide three-judge sentencing panel has the authority to impose a sentence below the presumptive range to lessen, or eliminate, the risk that a defendant will be deported.

The State argues that federal law prohibits state courts from modifying a sentence for the purpose of influencing the federal immigration consequences of a conviction. It also argues that the Alaska Statutes do not authorize the three-judge panel to impose a sentence below the presumptive range based on the collateral consequences of deportation. Lastly, it argues that adjusting a sentence to lessen the risk of deportation violates the equal protection clause, because the non-citizen offender may receive a more lenient sentence than a citizen would based on the same conduct.

For the reasons explained below, we conclude that the three-judge panel has authority to impose a sentence below the presumptive range based on the harsh collateral consequences of deportation and that this authority is not preempted by federal law.

With respect to Michael Silvera, the three-judge panel has already concluded that Silvera's potential deportation was a "harsh collateral consequence" that qualified as a non-statutory mitigating factor and has already imposed a sentence below the presumptive range. We therefore affirm Silvera's sentence.

With respect to Jose Manuel Perez, the three-judge panel did not directly decide whether deportation would qualify as a harsh collateral consequence. Instead, the panel assumed that Perez had established this non-statutory mitigating factor and concluded that consideration of this factor would justify imposing a sentence below the presumptive range for one of Perez's convictions. We therefore remand Perez's case to the three-judge panel for further proceedings.

Facts and proceedings

Michael Silvera

Michael Silvera has been a lawful resident of the United States since 1978. He served in the Armed Forces for more than six years and received an honorable discharge. In 2007, he was convicted of second-degree assault for assaulting a man with a knife during a drunken incident in a taxicab in Nome.[2] As a first felony offender, Silvera faced a presumptive range of 1 to 3 years for that offense.[3] Because his conviction was for a crime of violence, he also faced deportation as an "aggravated felon" if he was sentenced to 1 year or more.[4]

*1281 Silvera asked his sentencing judge to refer his case to the three-judge sentencing panel for consideration of the non-statutory mitigating factor of "harsh collateral consequences."[5] Silvera asserted that he had a serious medical condition for which he received regular treatment from the Veterans Administration and that he would lose those benefits if he were deported.[6] The sentencing judge ultimately ruled that it would be manifestly unjust not to consider the non-statutory mitigating factor of "harsh collateral consequences," and he referred Silvera's case to the three-judge panel.

The three-judge panel concluded that "harsh collateral consequences" is an appropriate non-statutory mitigating factor. It then found that Silvera had established that factor by showing: (1) that he was at substantial risk of deportation to Jamaica if he received a sentence of 1 year or more; (2) that he would lose his medical benefits if he were deported; and (3) that he would not be able to afford the medical care he needed, even assuming it was available in Jamaica, because his illness had prevented him from working. The panel also found that Silvera was not at high risk of reoffending. Based on these findings, the panel concluded that a sentence within the presumptive range would be manifestly unjust. It therefore imposed a sentence that would not subject Silvera to deportation as an aggravated felon: a sentence of 364 days to serve.

Jose Perez

In 2011, Jose Perez was convicted of fourth-degree assault[7] and interference with official proceedings[8] for assaulting a police informant who was a witness against him in a drug case while he and the informant were incarcerated. Perez entered a plea to the underlying drug charge (fourth-degree misconduct involving a controlled substance for possessing heroin).[9]

At the time of sentencing, Perez had been a lawful permanent resident of the United States for twenty-six years, since he was ten years old. As a first felony offender, he faced a presumptive term of 1 to 3 years for the interference with official proceedings conviction[10] and 0 to 2 years for the controlled substance conviction.[11] He also faced a sentence of up to 1 year for fourth-degree assault and imposition of up

to 437 days of suspended time for revocation of his probation in another misdemeanor case.

Like Silvera, Perez asked the sentencing court to refer his case to the three-judge sentencing panel for consideration of the proposed non-statutory mitigator of "harsh collateral consequences." The consequence Perez faced was deportation as an aggravated felon if he received a sentence of 1 year or more for his interference with official proceedings conviction.[12] (Perez also faced deportation based on his drug offense, but because that offense was not an aggravated felony under federal law, he could apply for discretionary relief from deportation based on that conviction.[13]) Perez claimed this consequence was unduly harsh given that he had left the Dominican Republic at a young age and had no real ties there.

*1282 The sentencing judge concluded that if he was not otherwise bound by the presumptive range of 1-3 years for Perez's interference with official proceedings conviction, he might consider structuring Perez's composite sentence to lessen the risk that Perez would be deported. The judge therefore referred the case to the three-judge panel for consideration of the non-statutory mitigating factor of "harsh collateral consequences." The judge recommended that the panel impose a sentence of 364 days for the interference with official proceedings conviction and a total composite sentence of 3 years and 71 days.

The three-judge panel found, as a factual matter, that Perez would be deported if he received a sentence of 1 year or more for his interference with official proceedings conviction. The panel assumed, without deciding, that deportation would be a harsh collateral consequence in Perez's case.[14] It then adopted the sentencing judge's recommended sentence, concluding that it would be manifestly unjust to subject Perez to inevitable deportation when it was possible to construct a composite sentence that fully satisfied the *Chaney*[15] criteria but still allowed Perez to apply for relief from deportation.[16]

Alaska courts are not prohibited by federal law from imposing a sentence aimed at influencing the defendant's risk of deportation

The State argues that federal law preempts state sentencing law and that, because the federal government has exclusive authority over deportation decisions, the three-judge sentencing panel is prohibited from modifying a sentence for the purpose of influencing the defendant's risk of deportation.

[1] The law of federal preemption is derived from the Supremacy Clause of Article VI of the United States Constitution, which declares that federal law shall be "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The Alaska Supreme Court generally applies a two-step analysis to preemption questions:

> First, we look to see whether Congress has overtly preempted the subject matter the state wishes to regulate, either explicitly, by declaring its intent to preempt all state authority, or implicitly, by occupying the entire field of regulation on the subject in question. Second, if neither kind of direct preemption is found, we look to whether federal and state law conflict in this particular instance.[17]

[2] In this analysis, courts must assume that the historic police powers of the states are not superseded "unless that was the clear and manifest purpose of Congress."[18]

[3] The State does not assert that Congress has enacted a statute expressly forbidding state courts from considering deportation consequences at sentencing. Instead, it argues that Congress's regulation of immigration is so pervasive that it establishes Congress's intent to displace any state action aimed at influencing who will be deported.

The flaw in the State's argument is that Congress expressly reserved a role for state courts in determining when a crime is an "aggravated felony" under federal law. Under the Immigration and Nationality Act,[19] *1283 some crimes—including murder, rape, and drug trafficking—are aggravated felonies no matter what sentence is imposed.[20] Other crimes are aggravated felonies based on the maximum sentence that *may* be imposed.[21] But the offenses at issue in this case—crimes of violence and obstruction of justice—only become aggravated felonies if a court actually *imposes* a sentence of 1 year or more.[22] We therefore infer that for these offenses, Congress expected that state courts would have a role in determining who qualified as an aggravated felon.[23]

The State argues that Congress did not intend these state sentencing decisions to be motivated by a desire to influence the defendant's risk of deportation. To support this argument, the State observes that Congress in 1990 eliminated judicial authority to make binding recommendations against deportation in criminal cases.

Beginning in 1917, when Congress first authorized deportation based on certain criminal convictions, sentencing judges had the authority to make a "judicial recommendation against deportation," known as a JRAD, for non-citizens convicted of crimes of moral turpitude, and this recommendation had the effect of binding the executive branch to disregard the conviction as a basis for deportation.[24] Congress first circumscribed that procedure in 1952, and then completely eliminated it in 1990.[25]

But as the defendants point out, Congress did away with this judicial authority as part of a broader effort to streamline the deportation of non-citizens convicted of criminal offenses. The same 1990 legislation that eliminated the JRAD procedure also limited the Attorney General's authority to grant discretionary relief from deportation to defendants convicted of aggravated felonies.[26] And in 1996, Congress eliminated the Attorney General's statutory authority to grant this relief to aggravated felons,[27] leaving the Attorney General with only "limited remnants of equitable discretion."[28]

Even accepting that Congress intended to preempt state courts from issuing binding decisions on deportation in criminal cases, that does not mean Congress intended to prohibit state courts from considering the risk of deportation in deciding whether to impose a term of imprisonment that would lead to the defendant's classification as an aggravated felon. As already explained, Congress expressly reserved a role for state courts in determining when a defendant has committed an aggravated felony for purposes of federal immigration law; it reserved no such role for state courts in deciding whether a criminal defendant should be deported. For this reason, courts have consistently ruled that the federal government's exclusive power over the administration and enforcement of immigration laws deprives criminal courts of the authority to order a defendant to leave the United States or to require a defendant to leave or remain outside the United States as a condition of probation.[29] *1284 By contrast, state courts have asserted their authority to adjust a defendant's sentence to lessen the risk that the defendant will be deported.[30] Moreover, the state courts that have directly considered the issue have rejected the claim that federal law prohibits state courts from modifying a defendant's sentence to avoid an aggravated felony conviction.[31]

We acknowledge that two federal circuits have held that Congress intended to prohibit federal courts from granting a downward adjustment in the federal sentencing guidelines to lessen the likelihood of deportation.[32] But we do not find those decisions persuasive here. We note that Congress has given exclusive authority to the United States Sentencing Commission to decide what factors can never be the basis for a downward departure from the federal sentencing guidelines,[33] and that the Sentencing Commission has not acted to make deportation a forbidden, or even a discouraged, sentencing factor.[34]

[4] The State claims that the sentencing hearings conducted by the three-judge panel in Silvera's and Perez's cases were *de facto* immigration hearings. This claim is not supported by the record. In both cases, the three-judge panel addressed state sentencing considerations, and they did not purport, as the State argues, to substitute their judgment for that of federal immigration officials based on "myriad humanitarian, political, and national security factors." It may be that federal immigration officials weigh some of the same factors in deportation proceedings that state courts traditionally consider at sentencing, but this potential overlap does not establish Congress's clear and manifest purpose to prohibit state courts from considering the totality of legally relevant circumstances at sentencing—including the risk and consequences of deportation.

[5] The State also argues that the decisions of the three-judge panel provided Silvera and Perez with an exemption from deportation that Congress expressly proscribed. Specifically, the State points to 8 U.S.C. § 1229(b), which bars the Attorney General from cancelling the deportation of a non-citizen who has been convicted of an aggravated felony.[35] But Silvera and Perez have not been convicted of aggravated felonies; therefore, this provision does not bar them from any remedies available to them under the Immigration and Nationality Act.

For these reasons, we reject the State's claim that federal law prohibits the three-judge sentencing panel from considering the harsh collateral consequences of deportation and, if manifest injustice would otherwise result, from imposing

a sentence below the presumptive range based on that consideration.

The three-judge panel did not act outside its authority by considering the non-statutory mitigating factor of "harsh collateral consequences"

[6] [7] The Alaska Legislature's goal in enacting presumptive sentencing was to reduce *1285 disparity in criminal sentencing, and it gave sentencing courts no authority to impose a sentence below the presumptive range unless the defendant established at least one of the mitigating factors listed in AS 12.55.155(d).[36] To avoid manifest injustice in cases in which these mitigating factors did not apply, the legislature created the "safety valve" of the three-judge sentencing panel.[37] If a sentencing judge finds that manifest injustice will result from the failure to consider a mitigating factor *not* listed in AS 12.55.155(d), that judge by statute must refer the case to the three-judge panel.[38] The three-judge panel then independently reviews whether the defendant has established the non-statutory mitigating factor by clear and convincing evidence.[39] If the panel concludes that the mitigating factor is proved, and that it would be manifestly unjust to fail to adjust the presumptive range based on that factor, it must "assess the proper sentence, applying the *Chaney* sentencing criteria and taking the mitigating factor into consideration."[40]

[8] The State argues that this statutory scheme does not permit the three-judge panel to impose a sentence below the presumptive range based on the harsh collateral consequences of deportation. It argues that mitigating a sentence to lessen the risk that a defendant will be deported defeats the legislative goal of promoting uniformity in sentencing[41] and does not support the sentencing goals elucidated in *State v. Chaney*,[42] AS 12.55.005,[43] or article I, section 12 of the Alaska Constitution.[44] The State also asserts that, as a matter of law, a federal deportation decision can never be "manifestly unjust."

The Alaska Supreme Court and this Court have previously recognized that the harsh collateral consequences of a criminal conviction, including deportation, are appropriate sentencing considerations.[45] The State argues that this precedent is limited to circumstances in which the defendant's deportation is "nearly certain,"[46] and that it does not apply when deportation is a "mere possibility." We have no reason to decide in this case whether the "mere possibility" of deportation is a proper sentencing consideration. The three-judge panel found that Silvera was at "substantial risk" of deportation and that deportation was a certainty in Perez's case. The State has not challenged these findings, and we therefore treat these findings as true.

[9] The State argues that a judicial finding that a defendant faces deportation will *always* be impermissibly speculative, because immigration officials have broad discretion in deciding whether to initiate deportation proceedings. To support this argument, the State relies on *State v. Mendoza*,[47] a Minnesota Court of Appeals case holding that the prospect of deportation is always too uncertain to be a proper consideration at sentencing.[48]

As a preliminary matter, we do not agree that the State has established that immigration officials have broad discretion to decide whether to deport aggravated felons. A policy *1286 memorandum issued by U.S. Immigration and Customs Enforcement, which is part of the record in this case, indicates that the agency treats aggravated felons as "priority 1" for deportation. And the United States Supreme Court has declared that, under current law, deportation is "practically inevitable" for non-citizens who commit deportable offenses.[49]

We have no doubt that deportation will be speculative in some cases—but it will be practically certain in others. For this reason, even if we were not bound by the decisions of our supreme court holding that deportation is a proper consideration at sentencing, we would not be persuaded by the reasoning of the Minnesota Court of Appeals.[50] We note that courts regularly consider the prospect that a defendant will be deported in deciding whether to impose probation or certain conditions of probation.[51]

[10] The State next argues that considering the harsh collateral consequences of deportation is inconsistent with the *Chaney* goals of rehabilitation, general and specific deterrence, affirmation of societal norms, and public safety, and also does not advance the interests of crime victims, because these goals are "not impaired by enforcing properly promulgated federal law." This argument frames the analysis too narrowly; the question is whether consideration of potential deportation consequences will, in appropriate cases, lead to a sentence that better advances the *Chaney* sentencing

goals. Alaska courts have already answered that question in the affirmative.[52]

[11] The State contends that allowing courts to adjust a sentence to avoid the risk of deportation contravenes the legislative goal of uniformity in sentencing. This argument finds some support in our observation in our earlier decision in *Silvera* that a non-citizen who is sentenced to a term below the presumptive range because of the prospect of deportation may, in some instances, receive a more lenient sentence than an identical citizen who is not subject to deportation.[53] But the alternative—declining to impose a sentence below the presumptive range based on this non-statutory mitigating factor—also has the potential to defeat uniformity in sentencing, because a non-citizen facing deportation may be subject to much harsher overall consequences than a citizen convicted of the same offense.

The State argues that, because of the procedural fairness and prosecutorial discretion built into the federal immigration system, it can never be manifestly unjust to refrain from mitigating a sentence to lessen the risk of deportation. But this argument ignores the statutory context in which an Alaska court's finding of manifest injustice is made. The question before Alaska courts is not whether it would be manifestly unjust for the federal government to deport a defendant; the mandate of Alaska sentencing courts is to determine whether a sentence within the ***1287** presumptive range would be manifestly unjust in light of the *Chaney* criteria and the totality of legally relevant circumstances, including the non-statutory mitigating factor of "harsh collateral consequences."[54] Federal immigration officials are not motivated or constrained by these same considerations in deciding whether to deport a non-citizen. Therefore, even if the federal government's decision to deport a defendant is just in light of its statutory mandate and priorities, a sentence that does not take account of the risk of deportation might still be manifestly unjust under Alaska law.

We conclude that the three-judge panel has the statutory authority to impose a sentence below the presumptive range based on the harsh collateral consequences of deportation. If the three-judge panel were precluded from considering this factor as a matter of law, there is a substantial risk that unduly harsh sentences would be imposed on non-citizens in particular cases, defeating the legislature's goal of uniformity in sentencing.[55]

Considering deportation consequences does not violate the equal protection clause

[12] The State next argues that adjusting a sentence purely to avoid the immigration consequences of a conviction violates the federal and state equal protection clauses, because a non-citizen defendant in these circumstances might receive a more lenient sentence than would be imposed on a citizen defendant. This claim was not raised below, and the three-judge panel did not rule on it, so we review it for plain error.[56]

The State's argument rests on the premise that Silvera and Perez received favorable treatment based on their status as non-citizens.[57] But as already explained, it was the harsh collateral consequences they faced if they were deported, not their status as non-citizens, that led the three-judge panel to conclude that sentencing the defendants within the presumptive range would be manifestly unjust in these cases.

Moreover, to establish an equal protection violation, a party must show that the persons being compared are similarly situated.[58] Defendants who face harsh collateral consequences as a result of deportation are not similarly situated to defendants who do not face these harsh consequences. In imposing a sentence that satisfies the *Chaney* criteria, a sentencing court must take the totality of legally relevant circumstances into account, including the risk of deportation. As noted earlier, the failure to account for these types of differences could result in a sentence that is unduly harsh and therefore not proportionate to sentences imposed on other defendants.

Permitting sentencing courts to consider immigration consequences will not invariably result in more lenient sentences for non-citizens. In some cases, sentencing courts may determine that the defendant's risk of deportation does not establish a non-statutory mitigating factor and that referral to the three-judge panel is not warranted. In other cases, the three-judge panel may reject the sentencing court's finding of a non-statutory mitigating factor, or it may conclude that, even though the factor was established, it would not be manifestly unjust to sentence the defendant within the presumptive range.

Even in cases where the three-judge panel departs from the presumptive sentencing range based on the harsh collateral consequences of deportation, the result will not necessarily be a sentence that is more lenient than the sentence that would be

imposed on a citizen. In Perez's case, for example, the three-judge panel ultimately proposed a composite sentence that was no different than *1288 what Perez would have received if he did not face deportation.

We acknowledge that there may be some cases, such as Silvera's, where the sentence imposed by the three-judge panel is more lenient than the sentencing judge would have imposed if the defendant did not face deportation. But even then, the critical question for purposes of equal protection analysis is whether the sentence complies with the *Chaney* criteria. Notably, the State has not challenged Silvera's sentence as clearly mistaken.[59]

We conclude that the State's generalized equal protection concerns are without merit and that its concerns about overly lenient sentences in particular cases are most appropriately addressed in those individual cases through the existing legal framework of the *Chaney* criteria and Alaska sentencing law.

Conclusion

Silvera's sentence is AFFIRMED. Perez's case is REMANDED to the three-judge panel for a determination of (1) whether deportation is a harsh collateral consequence qualifying as a non-statutory mitigating factor in his case and, if so, (2) whether a sentence within the presumptive range would be manifestly unjust given that harsh collateral consequence and the *Chaney* criteria. We do not retain jurisdiction.

Footnotes

1 Sitting by assignment made pursuant to article IV, section 11 of the Alaska Constitution and Administrative Rule 23(a).

2 *Silvera v. State*, 244 P.3d 1138, 1141–42 (Alaska App. 2010).

3 AS 11.41.210(a), (b) (providing that second-degree assault is a class B felony); AS 12.55.125(d)(1) (setting the presumptive range for a first felony offender convicted of a class B felony at 1–3 years).

4 8 U.S.C. § 1101(a)(43)(F) (defining "aggravated felony" to include a crime of violence if a sentence of 1 year or more is imposed); 8 U.S.C. § 1227(a)(2)(A)(iii) (providing that a non-citizen convicted of an aggravated felony after admission is deportable).

5 *Silvera*, 244 P.3d at 1149.

6 *Id.* at 1150.

7 AS 11.41.230(a).

8 AS 11.56.510(a)(1)(A).

9 AS 11.71.040(a)(3)(A).

10 AS 11.56.510(b) (providing that interference with official proceedings is a class B felony); AS 12.55.125(d)(1) (setting the presumptive range for a first felony offender convicted of a class B felony at 1–3 years).

11 AS 11.71.040(d) (providing that fourth-degree controlled substance misconduct is a class C felony); AS 12.55.125(e)(1) (setting the presumptive range for a first felony offender convicted of a class C felony at 0–2 years).

12 8 U.S.C. § 1101(a)(43)(S) (defining "aggravated felony" to include an offense relating to obstruction of justice for which the term of imprisonment is at least 1 year); 8 U.S.C. § 1227(a)(2)(A)(iii) (providing that a non-citizen convicted of an aggravated felony after admission is deportable).

13 8 U.S.C. § 1227(a)(2)(B)(i) (providing that non-citizens convicted of drug offenses are deportable); 8 U.S.C. § 1229b(a)(3) (providing that certain long-time residents may apply for cancellation of removal, unless they have been convicted of an aggravated felony).

14 The panel concluded that it was not required to reach this issue, based on its reading of an order issued by this Court.

15 *State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970).

16 The three-judge panel did not impose this sentence. In response to a petition for review filed by the State, this Court had ordered the three-judge panel to decide on an appropriate sentence but to not impose the sentence to avoid any potential double jeopardy issues if the State prevailed on the claims raised in its petition for review. Court of Appeals Order, File No. A-11195 (March 9, 2012).

17 *Tlingit–Haida Reg'l Elec. Auth. v. State*, 15 P.3d 754, 766 (Alaska 2001) (footnote omitted).

18 *Arizona v. United States*, — U.S. —, 132 S.Ct. 2492, 2501, 183 L.Ed.2d 351 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)).

19 *See* Pub.L. No. 104-208 (Illegal Immigration Reform and Immigrant Responsibility Act of 1996); 8 U.S.C. § 1101 et seq. (Immigration and Nationality Act).

20 8 U.S.C. § 1101(a)(43)(A)-(C), (E), (H), (I), (K), (L), (N), (O).

21 8 U.S.C. § 1101(a)(43)(J), (Q), (T). With respect to the offense of failure to appear, characterization as an aggravated felony hinges on the length of the sentence that may be imposed for the underlying offense. 8 U.S.C. § 1101(a)(43)(Q), (T).

22 8 U.S.C. § 1101(a)(43)(F), (S); 8 U.S.C. § 1101(a)(48)(B).

23 Courts are constrained, of course, by the penalty ranges established by the legislature. But in any event, with respect to these crimes, it is state action—action by the state legislature or the state court—that determines whether a defendant is convicted of an aggravated felony under federal law.

24 *Padilla v. Kentucky*, 559 U.S. 356, 361–62, 130 S.Ct. 1473, 1479 & n. 3, 176 L.Ed.2d 284 (2010) (citing former 8 U.S.C. § 1251(b)).

25 *Id.*, 559 U.S. at 363, 130 S.Ct. at 1480.

26 *State v. Gaitan*, 209 N.J. 339, 37 A.3d 1089, 1101 (2012).

27 *Padilla*, 559 U.S. at 363, 130 S.Ct. at 1480; *Gaitan*, 209 N.J. 339, 37 A.3d at 1101.

28 *Padilla*, 559 U.S. at 364, 130 S.Ct. at 1480.

29 *See, e.g., People v. Antonio Antimo*, 29 P.3d 298, 302–03 (Colo.2000); *Torres v. State*, 415 So.2d 908, 908 (Fla.Dist.Ct.App.1982) (per curiam); *Sanchez v. State*, 234 Ga.App. 809, 508 S.E.2d 185, 187 (1998); *Rojas v. State*, 52 Md.App. 440, 450 A.2d 490, 492 (1982); *State v. Pando*, 122 N.M. 167, 921 P.2d 1285, 1286–88 (N.M.App.1996); *Gutierrez v. State*, 380 S.W.3d 167, 173 (Tex.Crim.App.2012); *see generally* David E. Rigney, Annotation, *Propriety, in criminal case, of federal district court order restricting defendant's right to reenter or stay in United States*, 94 A.L.R. Fed. 619 (1989 & Supp.).

30 *See State v. Lewis*, 797 A.2d 1198, 1199, 1202–03 (Del.2002); *State v. Tinoco–Perez*, 145 Idaho 400, 179 P.3d 363 (App.2008); *State v. Quintero Morelos*, 133 Wash.App. 591, 137 P.3d 114, 116–18 (2006); *State v. Sway*, 828 A.2d 790, 794–95 (Me.2003); *Commonwealth v. Gevorgiyan*, No.2003–CA–002743–MR, 2005 WL 1125194, at *1–2 (Ky.App. May 13, 2005); *Commonwealth v. Gomes*, unpublished, No. CA 971653, 1999 WL 1705908 at *1–2 (Mass.Super. Oct. 14, 1999). *But see State v. Mendoza*, 638 N.W.2d 480, 483–84 (Minn.App.2002) (ruling that deportation is never a proper sentencing consideration because it is too uncertain).

31 *Lewis*, 797 A.2d at 1202; *Quintero Morelos*, 137 P.3d at 119.

32 *United States v. Maung*, 320 F.3d 1305, 1309 (11th Cir.2003); *United States v. Aleskerova*, 300 F.3d 286, 301 (2nd Cir.2002).

33 *Koon v. United States*, 518 U.S. 81, 106–07, 116 S.Ct. 2035, 2050–51, 135 L.Ed.2d 392 (1996).

34 *See United States v. Martinez–Carillo*, 250 F.3d 1101, 1107 (7th Cir.2001).

35 8 U.S.C. § 1229b(a)(3).

36 *See Nell v. State*, 642 P.2d 1361, 1369–70 (Alaska App.1982); AS 12.55.005.

37 *See State v. Wagner*, 835 P.2d 454, 455–56 (Alaska App.1992); *Griffith v. State*, 653 P.2d 1057, 1058 (Alaska App.1982); AS 12.55.165–175.

38 AS 12.55.165(a).

39 *Garner v. State*, 266 P.3d 1045, 1047–48 (Alaska App.2011) (citing AS 12.55.175(b)).

40 *Garner*, 266 P.3d at 1048.

41 Ch. 2, § 1, SLA 2005.

42 477 P.2d 441 (Alaska 1970).

43 AS 12.55.005 codifies the *Chaney* criteria.

44 Alaska Const. art. I, § 12 requires that criminal administration be based on "the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation."

45 *Dale v. State*, 626 P.2d 1062, 1064 & n. 4 (Alaska 1980); *State v. Tucker*, 581 P.2d 223, 226 & n. 5 (Alaska 1978); *Chaney*, 477 P.2d at 446 n. 22; *Silvera*, 244 P.3d at 1150.

46 *Dale*, 626 P.2d at 1063.

47 638 N.W.2d 480.

48 *Id.* at 483–84.

49 *Padilla*, 559 U.S. at 364, 130 S.Ct. at 1480; *see also United States v. Couto*, 311 F.3d 179, 189–90 (2d Cir.2002), *abrogated on other grounds by Padilla*, 559 U.S. 356, 130 S.Ct. 1473 (noting that under the 1996 amendments "an alien convicted of an aggravated felony is automatically subject to removal and no one—not the judge, the INS, nor even the United States Attorney General—has any discretion to stop the deportation").

50 Even the Minnesota Supreme Court has not signed on to the Minnesota Court of Appeals' "broad assertion that 'possible deportation because of immigration status is not a proper consideration in criminal sentencing,' " leaving resolution of that question "for another day." *State v. Kebaso*, 713 N.W.2d 317, 324 n. 7 (Minn.2006).

51 *See, e.g., People v. Espinoza*, 107 Cal.App.4th 1069, 132 Cal.Rptr.2d 670, 673 (2003); *People v. Hernandez–Clavel*, 186 P.3d 96, 99 (Colo.App.2008) (citing *People v. Sanchez*, 190 Cal.App.3d 224, 235 Cal.Rptr. 264, 267 (1987)); *Yemson v. United States*, 764 A.2d 816, 819 (D.C.2001); *State v. Martinez*, 38 Kan.App.2d 324, 165 P.3d 1050, 1055–57 (2007). *But see Mendoza*, 638 N.W.2d at 484.

52 *Dale*, 626 P.2d at 1064 & n. 4.; *Tucker*, 581 P.2d at 226 & n. 5; *Silvera*, 244 P.3d at 1150.

53 *Silvera*, 244 P.3d at 1150; *see also Burleson v. State*, 543 P.2d 1195, 1202 (Alaska 1975) ("Sentencing is an individualized process, and all persons committing the same crime should not necessarily receive like sentences. Yet, theoretically, if two persons of identical background commit the same offense, they should receive like punishment.").

54 *See Campbell v. State*, 594 P.2d 65, 67 n. 5 (Alaska 1979); *Juneby v. State*, 665 P.2d 30, 37 (Alaska App.1983).

55 *See Smith v. State*, 711 P.2d 561, 570–71 (Alaska App.1985).

56 *See Bobby v. State*, 950 P.2d 135, 139 (Alaska App.1997).

57 *See Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (applying strict scrutiny to classifications based on alienage).

58 *Brandon v. Corrections Corp. of America*, 28 P.3d 269, 275 (Alaska 2001) (noting that the federal and state equal protection clauses "require equal treatment only for those who are similarly situated") (citation omitted).

59 *See* Appellate Rule 215(a)(3) (providing the procedural mechanism by which the State can challenge a sentence as too lenient).

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