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## The Law Court's Unfinished Analysis in *State v. Ali*: Applying *Padilla* in Maine to Remove Procedural Barriers to Non-Citizens' Ineffective Assistance of Counsel Claims

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*STATE V. ALI*: APPLYING *PADILLA* IN MAINE TO  
REMOVE PROCEDURAL BARRIERS TO NON-  
CITIZENS' INEFFECTIVE ASSISTANCE OF  
COUNSEL CLAIMS

*Hannah McMullen*

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Hannah McMullen \*

INTRODUCTION

The outcome in *State v. Ali*<sup>1</sup> exemplifies the procedural barriers that prevent a non-citizen of the United States from raising an ineffective assistance of counsel claim while subject to deportation as a result of a criminal conviction pursuant to the Immigration and Nationality Act.<sup>2</sup> Fahad Ali, a non-citizen of the United States residing in Maine, pleaded guilty to and was convicted of aggravated trafficking of marijuana<sup>3</sup> and was subsequently subject to deportation as a result of that conviction.<sup>4</sup> Ali filed a motion for a new trial claiming that he did not receive effective assistance of counsel under the Sixth Amendment, when his attorney failed to advise him of the immigration consequences of his criminal conviction.<sup>5</sup> Ali relied on the United States Supreme Court's recent decision in *Padilla v. Kentucky*,<sup>6</sup> which held that defense counsel has a duty to inform the client of deportation consequences of a guilty plea.<sup>7</sup> However, the Superior Court denied Ali's motion and concluded that *Padilla*, which was decided after Ali's conviction, did not apply retroactively.<sup>8</sup> Additionally, the court held that Ali was informed of the deportation consequences when he entered his guilty plea.<sup>9</sup>

On appeal, the Maine Supreme Judicial Court, sitting as the Law Court, avoided the *Padilla* question and instead affirmed the denial of the motion on a procedural basis.<sup>10</sup> The Law Court held that Ali improperly filed a motion for a new trial when the appropriate route to challenge the conviction was to bring a claim for post-conviction review, the "exclusive method of review" for claims of ineffective assistance of counsel.<sup>11</sup> As Justice Silver explained in the dissent, however, Ali would most likely be precluded from seeking post-conviction review

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1. 2011 ME 122, 32 A.3d 1019.

2. 8 U.S.C. § 1227 (2006).

3. *State v. Ali*, 2011 ME 122, ¶¶ 3-4, 32 A.3d 1019.

4. *Id.* ¶ 7.

5. *Id.* ¶ 8.

6. 130 S. Ct. 1473 (2010).

7. *Ali*, 2011 ME 122, ¶ 9, 32 A.3d 1019.

8. *Id.*

9. *Id.*

10. *Id.* ¶ 17.

11. *Id.* ¶ 20.

based on the court's prior decision in *Ngo v. State*,<sup>12</sup> which held that a non-citizen awaiting deportation was not "restrained" under the post-conviction review statute.<sup>13</sup> As a result, Ali would be left without an opportunity for judicial review.<sup>14</sup> Furthermore, the dissent concluded that the court should address the application of *Padilla* in Maine, particularly its effect on the *Ngo* decision and also whether it applies retroactively.<sup>15</sup>

This Note analyzes the question that the *Ali* majority avoided answering – how *Padilla* should be applied in Maine, especially considering the Law Court's past reluctance to decide this constitutional issue raised by non-citizens such as Ali. This Note begins in Part II with a brief overview of the federal Immigration and Nationality Act and how a non-citizen may raise a Sixth Amendment claim of ineffective assistance of counsel through the post-conviction review process in Maine. In Part III, this Note next examines the contrasting opinions of the majority and dissent in the *Ali* decision and specifically how the court's decision and precedent will pose a challenge for Ali seeking post-conviction review in the future. Finally, in Part IV, this Note analyzes the imminent question that the Law Court will likely be required to decide in the future of how *Padilla* should be applied in Maine.

## I. LEGAL BACKGROUND

### A. *The Immigration and Nationality Act*

Under the federal Immigration and Nationality Act,<sup>16</sup> non-citizens of the United States who are convicted of certain crimes may be subject to deportation.<sup>17</sup> Deportable offenses include crimes of moral turpitude, aggravated felonies, and controlled substance offenses, among others.<sup>18</sup> The strict terms of the statute are undeniably significant for non-citizens who "may be deported from the country, barred from returning, and denied the opportunity to become United States citizens" as a result of a criminal conviction.<sup>19</sup> However, some non-citizen defendants claim that they were unaware of these deportation consequences prior to entering a guilty plea for a criminal conviction and therefore, they did not receive effective assistance of counsel. This leads to a remaining question of whether non-citizens have a right to be informed of these consequences at the time of a criminal conviction.

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12. 2008 ME 71, 946 A.2d 424.

13. *Ali*, 2011 ME 122, ¶ 25, 32 A.3d 1019.

14. *Id.* ¶ 27.

15. *Id.* ¶¶ 26-28.

16. 8 U.S.C. § 1227 (2006).

17. *Id.*

18. *Id.* § 1227(a)(2).

19. Gray Proctor & Nancy King, *Post Padilla: Padilla's Puzzles for Review in State and Federal Courts*, 23 FED. SENT'G. REP. 239, 239 (2011).

*B. Non-Citizens and Their Right to Effective Assistance of Counsel*

The Sixth Amendment of the United States Constitution states, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”<sup>20</sup> The United States Supreme Court has described the right to assistance of counsel as “fundamental” and one that is uniformly applicable in state courts under the Fourteenth Amendment.<sup>21</sup> The Court has also explained that the right to assistance of counsel means the right to “effective” assistance of counsel,<sup>22</sup> a standard that is analyzed under a two-part test as adopted in *Strickland v. Washington*.<sup>23</sup> The Court emphasized that “the purpose of the effective assistance guarantee of the Sixth Amendment . . . is simply to ensure that criminal defendants receive a fair trial,”<sup>24</sup> and therefore, “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”<sup>25</sup> In *Strickland*, the Court held that a defendant must show “two components” in support of a claim for ineffective assistance of counsel: “First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.”<sup>26</sup> For the first component of deficiency, the Court applied a reasonableness standard that looks at “whether counsel’s assistance was reasonable considering all the circumstances.”<sup>27</sup> For the second component of prejudice, the Court adopted a reasonable probability standard that requires the defendant to establish that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>28</sup> The Court subsequently held that the *Strickland* test applies to claims of ineffective assistance of counsel for guilty pleas as well as for trials.<sup>29</sup>

While courts in Maine apply a “virtually identical”<sup>30</sup> two-part test when analyzing an ineffective assistance of counsel claim,<sup>31</sup> the claim may only be brought through the post-conviction review process pursuant to 15 M.R.S. §

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20. U.S. CONST. amend.VI.

21. *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

22. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

23. 466 U.S. 668 (1984).

24. *Id.* at 689.

25. *Id.* at 686.

26. *Id.* at 687.

27. *Id.* at 688.

28. *Id.* at 694.

29. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

30. *Laferriere v. State*, 1997 ME 169, ¶ 6, 697 A.2d 1301 (quoting *Kimball v. State*, 490 A.2d 653, 656 (Me. 1985)).

31. *Id.* (quoting *Lagasse v. State*, 655 A.2d 328, 329 (Me. 1995)) (“On post conviction review, we have consistently applied a two-part test to the conduct of trial counsel to determine if a new trial is warranted. The inquiry is: ‘(1) whether counsel’s performance falls measurably below the performance that might be expected of an ordinary, fallible attorney; and, if so, (2) whether counsel’s substandard performance likely deprived the defendant of an otherwise available substantial ground of defense.’”).

2122.<sup>32</sup> As the Law Court has explained, “[w]hen the legality of a criminal conviction cannot be resolved by direct appeal or any ‘remedies that are incidental to proceedings in the trial court,’ the post-conviction review process is the exclusive means for judicial review.”<sup>33</sup> A defendant seeking post-conviction review must first file a petition in Superior Court demonstrating “that the challenged criminal judgment or post-sentencing proceeding is causing a present restraint or other specified impediment . . . .”<sup>34</sup> The statute further defines “present restraint or impediment” to include both direct and indirect results of the challenged criminal judgment such as current or pending incarceration, probation, parole, conditional release, unconditional discharge, and an imposed fine.<sup>35</sup>

There are some cases, however, that do not clearly fit within these explicit definitions of a “present restraint or impediment.” The Law Court has recently addressed a series of such cases involving claims of ineffective assistance of counsel by non-citizens facing deportation as a result of their criminal convictions. The court decided these cases primarily on procedural issues, emphasizing that post-conviction review in Superior Court is the exclusive remedy available for these criminal defendants. Additionally, the court narrowly interpreted what circumstances satisfy the requirement of “present restraint or impediment” under the statute, which creates a significant challenge to non-citizens who are subject to deportation and seek judicial review.

For example, in *Aldus v. State*,<sup>36</sup> the Law Court affirmed the Superior Court’s decision to grant post-conviction relief and vacate the defendant’s conviction on the grounds that the defendant did not receive effective assistance of counsel.<sup>37</sup> In 1998, Aldus, who was a native of Somalia, pleaded guilty to aggravated assault.<sup>38</sup> Before she entered her plea, however, she received a message that the Immigration and Naturalization Service was looking for her, and when she asked her counsel what this meant, he replied, “I have no idea.”<sup>39</sup> Aldus did not ask any other questions and her counsel did not request a continuance to follow up on the immigration issue, even though he knew she was a non-citizen.<sup>40</sup> The Superior Court later granted Aldus’ petition for post-conviction review and vacated her

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32. 15 M.R.S.A. § 2122 (2003) (The post conviction review statute provides that “except for direct appeals from a criminal judgment, [post-conviction review is] the exclusive method of review of those criminal judgments and of post-sentencing proceedings occurring during the course of sentences. It is a remedy for illegal restraint and other impediments specified in section 2124 that have occurred directly or indirectly as a result of an illegal criminal judgment or post-sentencing proceeding. It replaces the remedies available pursuant to post-conviction habeas corpus . . .”).

33. *State v. Ngo*, 2007 ME 2, ¶ 4, 912 A.2d 1224.

34. 15 M.R.S.A. § 2124 (2003).

35. *Id.*

36. 2000 ME 47, 748 A.2d 463.

37. *Id.* ¶ 1. This was one of the Law Court’s earlier decisions involving a non-citizen’s ineffective assistance of counsel claim. Unlike the subsequent series of cases that were decided on procedural issues, however, in this case, the court affirmed the lower court’s decision on the merits of the defendant’s ineffective assistance of counsel claim.

38. *Id.* ¶ 2.

39. *Id.* ¶ 6.

40. *Id.*

conviction on the grounds that she did not receive effective assistance of counsel when her counsel failed to investigate her question about immigration services.<sup>41</sup> The court concluded that her counsel should have been “alerted” to a possible immigration problem as a result of the question, especially considering his knowledge about her citizenship status.<sup>42</sup> Furthermore, his “inability to answer her question”<sup>43</sup> and failure to investigate the issue amounted to a “performance measurably below what ‘might be expected from an ordinary fallible attorney’”<sup>44</sup> and thus satisfied the first part of the test for an ineffective assistance of counsel claim.<sup>45</sup> The court explained “the ordinary fallible attorney is expected to advise a defendant, when that client has a question about a serious consequence of a plea agreement, that the plea need not be entered that day.”<sup>46</sup>

On the contrary, in *State v. Trott*,<sup>47</sup> the Law Court upheld the District Court’s denial of a motion to vacate a conviction on the grounds that the defendant could pursue post-conviction review in Superior Court.<sup>48</sup> In 2001, Trott, who was a citizen of Bermuda, pleaded no contest and was convicted of terrorizing his wife and obstructing the report of a crime.<sup>49</sup> He was sentenced to sixty days with credit for time served, allowing him to be immediately released because he had already been incarcerated for more than the sixty days from the time he was initially charged.<sup>50</sup> Later in 2003, he was subject to deportation based on his criminal convictions, which were considered crimes of domestic violence, a deportable offense under 8 U.S.C. § 1227 (a)(2)(E)(i).<sup>51</sup> Trott then filed a motion to vacate his convictions, arguing he had no other available remedy and alleging ineffective assistance of counsel because his attorney failed to advise him of immigration consequences of his criminal conviction.<sup>52</sup> The District Court denied his motion, however, finding that he did have an available remedy through post-conviction review in Superior Court.<sup>53</sup> The Law Court affirmed, concluding that his sentence to time previously served was the “functional equivalent of an unconditional discharge as that term is addressed by the post-conviction review statute” and therefore, “[s]uch a time served is a present restraint by criminal judgment pursuant

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41. *Id.* ¶ 11. Additionally, “[t]he Superior Court noted that the conviction for aggravated assault meant that Aldus was ‘conclusively presumed’ to be deportable.” *Id.*

42. *Id.* ¶ 17.

43. *Id.* ¶ 11.

44. *Id.* ¶ 12.

45. *Id.* ¶ 16.

46. *Id.* ¶ 18. The court further concluded that the second component of prejudice was satisfied as well because Aldus’ testimony at the post-conviction hearing “raise[d] a fair inference that if [counsel] had told Aldus that they could defer entering a plea on the aggravated assault charge to find out why INS was looking for her, Aldus would not have entered a plea of guilty.” *Id.* ¶ 21.

47. 2004 ME 15, 841 A.2d 789.

48. *Id.* ¶ 1.

49. *Id.* ¶¶ 2-3. He was also initially charged with assaulting his wife but that charge was later dismissed. *Id.* ¶ 3.

50. *Id.* ¶ 3.

51. *Id.* ¶ 4.

52. *Id.* ¶¶ 5-6.

53. *Id.* ¶ 7.

to section 2124 (1)(C).”<sup>54</sup>

Similarly in *State v. Ngo* (hereinafter “*Ngo I*”),<sup>55</sup> the Law Court again affirmed the District Court’s denial of a motion to vacate a conviction on the grounds that post-conviction review was the exclusive remedy available for the defendant.<sup>56</sup> Ngo was a citizen of Vietnam who had been residing in the United States for about six years when, in 1998, he pleaded guilty to and was convicted of sexual abuse of a minor and criminal threatening.<sup>57</sup> In 2006, years after he finished serving his sentence, he was detained by federal immigration officials and subject to deportation as a result of his prior criminal convictions.<sup>58</sup> While detained, Ngo filed a motion to vacate his criminal convictions, alleging that he did not receive effective assistance of counsel because his attorney failed to advise him of the immigration consequences of his guilty plea.<sup>59</sup> Ngo brought his motion under Maine Rule of Criminal Procedure 1(c) which states, “[w]hen no procedure is specifically prescribed the court shall proceed in any lawful manner not inconsistent with the Constitution of the United States or of the State of Maine, these rules or any applicable statutes.”<sup>60</sup> The District Court, however, dismissed his Rule 1(c) motion on the grounds that the “Superior Court holds exclusive jurisdiction over post-conviction review . . . .”<sup>61</sup> The Law Court affirmed, finding that Ngo improperly filed a Rule 1(c) motion without first pursuing post-conviction review in the Superior Court.<sup>62</sup> The court reasoned that “Ngo’s motion under Rule 1(c), which seeks the relief that the post-conviction review process is intended to provide, cannot circumvent that process or defeat the procedural requirement that post-conviction review take place in the Superior Court.”<sup>63</sup>

Ngo subsequently petitioned for post-conviction review in Superior Court but the court dismissed his petition on the grounds that he “failed to demonstrate that the criminal judgment he sought to challenge was causing him a present restraint or impediment within the meaning of 15 M.R.S. § 2124(1).”<sup>64</sup> On appeal, the Law Court affirmed the Superior Court’s dismissal in *Ngo v. State* (hereinafter “*Ngo II*”) concluding that “a non-citizen who is being restrained in the course of deportation proceedings that were instituted because of the non-citizen’s prior convictions is not undergoing a present restraint within the meaning of [the post-conviction review statute].”<sup>65</sup>

Although the holding in *Ngo II* practically precludes non-citizens subject to deportation from seeking post-conviction review, it may be subject to further

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54. *Id.* ¶ 13.

55. 2007 ME 2, 912 A.2d 1224.

56. *Id.* ¶ 4.

57. *Id.* ¶ 2.

58. *Id.*

59. *Id.* ¶ 3.

60. ME. R. CRIM. P. 1(c).

61. *State v. Ngo*, 2007 ME 2, ¶ 3, 912 A. 2d 1224.

62. *Id.* ¶¶ 1, 5.

63. *Id.* ¶ 6.

64. *Ngo v. State*, 2008 ME 71, ¶ 5, 946 A.2d 424.

65. *Id.* ¶ 9 n. 3 (citing *State v. Trott*, 2004 ME 15, ¶ 9, 841 A.2d 789).



review in light of the United States Supreme Court's recent decision in *Padilla v. Kentucky*.<sup>66</sup> In *Padilla*, Jose Padilla, who was a citizen of Honduras but had been a "lawful permanent resident of the United States for more than forty years," pleaded guilty to transporting a large amount of marijuana and later was subject to deportation as a result of the criminal conviction.<sup>67</sup> Padilla sought post-conviction review alleging that his defense counsel failed to advise him of the immigration consequences of his plea and also gave him incorrect advice about his circumstances by saying Padilla "did not have to worry about immigration status since he had been in the country so long."<sup>68</sup> The Supreme Court of Kentucky denied his post-conviction review on the grounds that counsel's advice about deportation, although incorrect advice, did not constitute ineffective assistance of counsel because deportation was only a "collateral" consequence of the criminal conviction.<sup>69</sup> However, the United States Supreme Court reversed, holding that defense counsel has a duty to advise the client of immigration consequences.<sup>70</sup> The Court explained that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim."<sup>71</sup> The Court did not distinguish between direct and collateral consequences but rather concluded that "[d]eportation 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."<sup>72</sup> Furthermore, the Court described deportation as "enmeshed" and "intimately related to the criminal process."<sup>73</sup> The Court also held:

When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.<sup>74</sup>

The Court explained that Padilla's risk of deportation for a controlled substance offense should have been easily ascertained just by reading the statute and therefore, his counsel was deficient in his failure to advise Padilla of the deportation consequences.<sup>75</sup>

*Padilla* was a landmark decision which set forth new principles for immigration and criminal law because of the explicit duty its holding imposed on defense counsel. However, the decision left many unanswered questions, particularly whether it applies retroactively. Because many defendants will likely

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66. 130 S. Ct. 1473 (2010).

67. *Id.* at 1477.

68. *Id.* at 1478.

69. *Id.*

70. *Id.* at 1482.

71. *Id.*

72. *Id.*

73. *Id.* at 1481.

74. *Id.* at 1483.

75. *Id.*

raise their *Padilla* claims on collateral or post-conviction review, the question is whether the *Padilla* holding applies to convictions that occurred prior to *Padilla*.<sup>76</sup> The answer to that question depends on whether the *Padilla* holding constitutes a new constitutional rule. In *Teague v. Lane*,<sup>77</sup> the Supreme Court held that “new constitutional rules of criminal procedure will not be applicable to those cases [on collateral review]<sup>78</sup> which have become final before the new rules are announced.”<sup>79</sup> The Court explained that a new rule is one that “breaks new ground or imposes a new obligation on the States or the Federal Government.”<sup>80</sup> Furthermore, “a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”<sup>81</sup>

## II. THE ALI DECISION

### A. Factual Background

In April 2008, eighteen-year-old Fahad Ali was arrested in Portland, Maine for possessing seven small bags of marijuana which he was allegedly trying to sell for ten dollars each.<sup>82</sup> “Ali was charged with aggravated trafficking in scheduled drugs” under 17-A M.R.S.A. § 1105-A(1)(E)(6).<sup>83</sup> Ali was appointed counsel and initially pleaded not guilty at his arraignment but later changed his plea to guilty.<sup>84</sup> At the next hearing on October 10, 2008,<sup>85</sup> before accepting Ali’s plea, the court inquired about Ali’s citizenship status,<sup>86</sup> and Ali stated that he was born in Somalia

76. See Proctor & King, *supra* note 19.

77. 489 U.S. 288 (1989).

78. The Court distinguished between cases on direct and collateral review, specifically that new constitutional rules are not applicable to cases on collateral review, such as the traditional writ of *habeas corpus*. The Court explained that, “[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.” *Id.* at 309.

79. *Id.* at 310. The Court identified two general exceptions to the retroactivity rule:

First, a new rule should be applied retroactively if it places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.’ Second, a new rule should be applied retroactively if it requires the observance of “those procedures that . . . are implicit in the concept of ordered liberty.”

*Id.* at 307 (citations omitted).

80. *Id.* at 301.

81. *Id.*

82. State v. Ali, 2011 ME 122 ¶ 3, 32 A.3d 1019.

83. *Id.* Ali was arrested near Portland High School. The statute 17-A M.R.S. §1105-A(1)(E)(6) provides, “A person is guilty of aggravated trafficking in a scheduled drug if . . . [a]t the time of the offense, the person is on a school bus or within 1,000 feet of the real property comprising a private or public elementary or secondary school or a safe zone . . . and the drug is . . . [a] schedule Z drug. Violation of this subparagraph is a Class C crime.” 17-A M.R.S.A. § 1105-A(1)(E)(6) (2011).

84. Ali, 2011 ME 122, ¶ 4, 32 A.3d 1019.

85. Brief for Appellee at 5, State v. Ali, 2011 ME 122, 32 A.3d 1019 (No. CUM-11-141).

86. When a defendant enters a plea under Rule 11 of the Maine Rules of Criminal Procedure, the court must first address the defendant to ensure that the defendant is making the plea knowingly and voluntarily. ME R. CRIM. P. 11.

and was not a citizen of the United States.<sup>87</sup> Ali's attorney stated that Ali and his mother were "working with the immigration project."<sup>88</sup> The attorney stated that he explained to Ali that there were possible immigration consequences as a result of the conviction.<sup>89</sup> The court asked Ali a series of questions to determine if he understood the possible immigration consequences of his conviction and Ali responded in the affirmative.<sup>90</sup> Ali still agreed to plead guilty and he was sentenced to four months imprisonment and ordered to pay a \$400 fine.<sup>91</sup> Ali paid his fine and completed his sentence by September 14, 2010.<sup>92</sup>

### B. Procedural History

On February 10, 2011,<sup>93</sup> several months after completing his sentence, Ali received notice of his immigration status from the United States Department of Homeland Security indicating that he was subject to deportation under the Immigration and Nationality Act as a result of his conviction for aggravated trafficking in scheduled drugs.<sup>94</sup> On March 9, 2011,<sup>95</sup> Ali, while detained and awaiting removal, filed a motion for a new trial in which he claimed that he did not receive effective assistance of counsel under the Sixth Amendment because he was not "adequately" informed about the immigration consequences of his conviction prior to entering his plea.<sup>96</sup> Ali cited Maine Rules of Criminal Procedure 1(c),<sup>97</sup>

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87. *Ali*, 2011 ME 122, ¶ 4, 32 A.3d 1019.

88. *Id.* ¶ 4.

89. *Id.*

90. *Id.* ¶ 5.

Court: You understand that a conviction here of this charge may in fact result in you being deportable from this country?

Ali: Yes, Your Honor.

Court: Do you understand that?

Ali: Yes, Your Honor.

Court: And you have talked about this with your attorney here?

Ali: Yes, Your Honor.

Court: And you and your mother are also working with the immigration project in regard to this issue?

Ali: Yes, Your Honor.

Court: You understand there can be no promises or guarantees that you will be permitted to stay in this country if you in fact are convicted of this charge?

Ali: Yes, Your Honor.

Court: Do you still want to go ahead with your plea?

Ali: Yes, Your Honor.

*Id.*

91. *Id.* ¶ 6. (Ali's four month sentence was served at Long Creek Youth Development Center concurrently with another sentence he had for a separate juvenile offense). *Id.*

92. *Id.*

93. Brief for Appellant at 5, *State v. Ali*, 2011 ME 122, 32 A.3d 1019 (No. CUM-11-141); Brief for Appellee, *supra* note 85, at 6.

94. *Ali*, 2011 ME 122, ¶ 7, 32 A.3d 1019.

95. Brief for Appellee, *supra* note 85, at 4.

96. *Ali*, 2011 ME 122, ¶ 8, 32 A.3d 1019.

2,<sup>98</sup> and 33<sup>99</sup> in support of his motion.<sup>100</sup> Ali argued that his “imminent removal and the lack of available relief” was new evidence under Rule 33 and thus grounds for a new trial “in the interest of justice, due process and effective assistance of counsel.”<sup>101</sup> At a non-testimonial hearing, the Superior Court denied Ali’s motion for a new trial on the grounds that the Supreme Court’s holding in *Padilla* did not apply retroactively and also that Ali was “sufficiently aware of the immigration consequences of his plea at the time he entered it.”<sup>102</sup> Ali subsequently appealed to the Law Court.<sup>103</sup>

### C. Arguments

On appeal, Ali primarily relied on the Supreme Court’s holding in *Padilla* and argued that he did not receive effective assistance of counsel because his counsel failed to advise him of the “presumptively deportable nature of the conviction, and the automatic removal that would thereafter take place . . . .”<sup>104</sup> In support of his claim, Ali asserted that his case fell squarely within the *Padilla* holding in that the immigration consequences related to his conviction were explicit in the statute and his counsel failed to advise him of the consequences prior to his decision to enter a guilty plea.<sup>105</sup> Specifically, Ali’s offenses qualified as both an aggravated felony and controlled substance offense under the statute.<sup>106</sup> Ali further argued that the court’s Rule 11 inquiry as to his understanding of possible deportation

97. ME. R. CRIM. P. 1(c) provides, “Procedure When None Specified. When no procedure is specifically prescribed the court shall proceed in any lawful manner not inconsistent with the Constitution of the United States or of the State of Maine, these rules or any applicable statutes.”

98. ME. R. CRIM. P. 2 provides, “[t]hese rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.”

99. ME. R. CRIM. P. 33 provides in relevant part,

The court on motion of the defendant may grant a new trial to the defendant if required in the interest of justice. If the trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct entry of a new judgment. A motion for a new trial based on any ground other than newly discovered evidence shall be made within 10 days after verdict or finding of guilty or within such further time as the court may fix during the 10-day period. Any motion for a new trial based on the ground of newly discovered evidence may be made only before, or within 2 years after, entry of the judgment in the criminal docket.

100. *Ali*, 2011 ME 122, ¶ 8, 32 A.3d 1019.

101. *Id.*

102. *Id.* ¶ 9.

103. *Id.*

104. Brief for Appellant, *supra* note 93, at 8.

105. *Id.*

106. *Id.* The statute 8 U.S.C.S. § 1227(2) provides, “(A)(iii) Any alien who is convicted of an aggravated felony at any time after admission is deportable” and “(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 or marijuana, is deportable.” 8 U.S.C. §§ 1227(a)(2)(A)(iii), (B)(i)(2006).

consequences was “not sufficient to overcome the ineffective assistance.”<sup>107</sup>

Ali also claimed that post-conviction review was not an available remedy for his situation, similar to *Ngo*, and without the option of post-conviction review, he was “without remedy.”<sup>108</sup> In addition, Ali stressed the interrelation between immigration consequences and criminal convictions, emphasizing the Court’s reasoning in *Padilla* that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.”<sup>109</sup> In turn, Ali inferred that *Padilla* suggests other relief beyond post-conviction review must be made available for defendants in his situation.<sup>110</sup> Moreover, Ali asserted that *Padilla* applies retroactively because it is not a new rule.<sup>111</sup> In accord with his argument that post-conviction review is not available, Ali argued:

Applying the newly discovered evidence standard of Rule 33 to the simplicity and fairness dictates of Rule 2, and proceeding in a manner consistent with constitutional due process under Rule 1, the court should find the Defendant’s motion for a new trial is the appropriate means to the appropriate relief.<sup>112</sup>

In contrast, the State argued that Ali’s motion was properly denied because post-conviction review is the “exclusive means” for review of claims of ineffective assistance of counsel as outlined by the Law Court’s prior decision in *Ngo I*.<sup>113</sup> The State acknowledged that *Padilla* may be relevant to the holding in *Ngo II* but emphasized that “the holding in *Padilla* has no relevancy to the holding of *Ngo I* because *Ngo I* merely holds that post-conviction review was the exclusive means for judicial review . . . .”<sup>114</sup> Nevertheless, the State asserted that even if the *Padilla* holding was relevant in this case, it would not be applicable because it does not apply retroactively.<sup>115</sup> In support of this argument, the State asserted that *Padilla* constituted a new rule under *Teague* because it was not “dictated by then-existing precedent.”<sup>116</sup> The State reasoned that there was a clear disparity between *Padilla*, which imposes a duty on criminal defense counsel to advise a client of deportation consequences, and the Law Court’s prior decision in *Ngo II*, which concluded that “deportation is a civil sanction and not imposed as punishment for a crime . . . .”<sup>117</sup>

#### *D. Decision of the Law Court*

The majority affirmed the lower court’s denial of Ali’s motion based on procedural grounds.<sup>118</sup> The majority held that Ali improperly brought his claim of

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107. Brief for Appellant, *supra* note 93, at 9.

108. *Id.* at 10.

109. *Id.* at 11-12.

110. *Id.* at 12-13.

111. *Id.* at 14.

112. *Id.* at 15.

113. Brief for Appellee, *supra* note 85, at 2.

114. *Id.* at 9-10.

115. *Id.* at 10-11.

116. *Id.*

117. *Id.* at 10-11.

118. *State v. Ali*, 2011 ME 122, ¶ 1, 32 A.3d 1019.

ineffective assistance of counsel by way of a motion for a new trial when the appropriate and exclusive remedy was to bring his claim through post-conviction review.<sup>119</sup> Comparing the case to *Ngo I*, the court reasoned “[w]e do not consider claims of ineffective assistance of counsel on direct appeal; such claims will only be considered after a certificate of probable cause has been issued following a hearing on a post-conviction petition.”<sup>120</sup> The court concluded that Rule 1(c) was inapplicable, as it was in *Ngo I*, because post-conviction review is the prescribed procedure for a claim of ineffective assistance of counsel.<sup>121</sup> Likewise, the court explained that Rule 2 does not “provide for the application of an inappropriate procedure where an appropriate procedure already exists.”<sup>122</sup> Additionally, the court found that although Ali claimed his risk of deportation was newly discovered evidence as grounds for a new trial under Rule 33, his motion for a new trial exceeded the two-year deadline.<sup>123</sup> Furthermore, even though Ali argued that the *Padilla* holding was applicable to his case, the majority declined to address *Padilla*’s application and whether or not it would cause them to “reconsider” their prior holding in *Ngo II*.<sup>124</sup>

Justice Silver dissented on the grounds that the court should have addressed whether or not the *Padilla* holding would be applicable to Ali.<sup>125</sup> He explained that, although the court previously avoided addressing this constitutional issue in *Ngo II* and *Trott*, “the post-conviction rights of noncitizen defendants is a quickly-evolving and topical area of law that deserves the Court’s attention sooner rather than later.”<sup>126</sup> Justice Silver concluded that, based on *Ngo II*, post-conviction review would likely be unavailable to Ali because Ali was not “restrained” as required in the post-conviction statute.<sup>127</sup> Justice Silver explained that this would leave Ali “without any legal recourse”<sup>128</sup> and therefore, Rule 1(c) should be applicable to Ali if post-conviction review is unavailable.<sup>129</sup> However, Justice Silver further noted the apparent disparity between the court’s reasoning in *Ngo II* that “deportation is a civil, collateral consequence of conviction” and the Supreme Court’s reasoning in *Padilla* that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes . . . .”<sup>130</sup> He concluded that the court may have to re-examine its reasoning in *Ngo II* in light of *Padilla*.<sup>131</sup> “[t]o the extent that *Padilla* treats deportation as a penalty arising from a criminal

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119. *Id.* ¶ 20.

120. *Id.* ¶ 20 (citing *State v. Nichols*, 1997 ME 178, ¶ 4, 698 A.2d 521).

121. *Id.* ¶¶ 19-20.

122. *Id.* ¶ 21.

123. *Id.* ¶ 22.

124. *Id.* ¶ 17.

125. *Id.* ¶ 26 (Silver, J., dissenting).

126. *Id.*

127. *Id.* ¶ 25.

128. *Id.* ¶ 27.

129. *Id.* ¶ 28.

130. *Id.* ¶ 25.

131. *Id.*

judgment, it suggests that noncitizen petitioners subject to this penalty are entitled to review pursuant to section 2124.<sup>132</sup> Moreover, Justice Silver also concluded that *Padilla* should apply retroactively and post-conviction review should be made available to Ali.<sup>133</sup>

### III. ANALYSIS

The Law Court's decision in *Ali* is just one example of the procedural barriers preventing a non-citizen from raising a constitutional claim of ineffective assistance of counsel while awaiting deportation as a result of a criminal conviction. Although the majority held that Ali's exclusive remedy for raising his claim of ineffective assistance of counsel is through post-conviction review, *Ngo II* likely precludes Ali from seeking post-conviction review based on the court's holding that deportation is not a "present restraint"<sup>134</sup> under the post-conviction review statute. As Justice Silver concluded in his dissent, however, the court's holding in *Ngo II* is irreconcilable with the Supreme Court's holding in *Padilla*. In *Padilla*, the Court held that defense counsel has an obligation, under the Sixth Amendment right to effective assistance of counsel, to advise a client of immigration consequences that result from a criminal conviction. Additionally, the Court concluded that immigration consequences, particularly deportation, are "intimately related" and "enmeshed" with criminal convictions.<sup>135</sup> Accordingly, deportation as a consequence of a criminal conviction is part of the criminal penalty and a non-citizen who may be subject to deportation as a result of the criminal conviction has a right under the Sixth Amendment to be advised of such consequences before entering a plea.

Therefore, the Law Court's underlying rationale in *Ngo II* that "deportation is a civil rather than a criminal sanction"<sup>136</sup> and that "deportation is not imposed as punishment,"<sup>137</sup> is no longer valid in light of *Padilla*. The Law Court will inevitably have to reconsider its analysis in *Ngo II* in order to determine what remedy is available for a non-citizen raising an ineffective assistance of counsel claim while awaiting deportation as a result of a criminal conviction. Furthermore, post-conviction review should be available to non-citizens in these cases because, based on the rationale in *Padilla*, the court could reasonably interpret deportation as a "present restraint" under Maine's post-conviction review statute. The remaining question that must be addressed by the court, however, is how *Padilla* should be applied in Maine, and specifically whether *Padilla* should be applied retroactively to criminal convictions that were issued before *Padilla* was decided. The answer to that question will depend on whether the court interprets *Padilla* as a new constitutional rule under *Teague*. Because a number of courts have already addressed this question and are split as to the answer, the Supreme Court may

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132. *Id.* ¶ 28.

133. *Id.*

134. *Ngo v. State*, 2008 ME 71, ¶ 9 n.3, 946 A.2d 424.

135. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

136. *Ngo v. State*, 2008 ME 71 ¶ 10, 946 A.2d 424.

137. *Id.*

ultimately be called upon for the answer.

Some courts have held that *Padilla* announced a new constitutional rule under *Teague* and therefore does not apply retroactively.<sup>138</sup> For example, the Cumberland County Superior Court of Maine, one of the first courts to address the issue only months after *Padilla* in 2010, concluded in *State v. Truong*<sup>139</sup> that *Padilla* announced a new constitutional rule and did not apply retroactively.<sup>140</sup> The defendant filed a motion to vacate his criminal convictions from 1996 and a motion for a new trial under Maine Rules of Criminal Procedure 1 and 2 on the grounds that he did not receive effective assistance of counsel because his attorney did not advise him of the immigration consequences of his criminal convictions in 1996.<sup>141</sup> The Superior Court denied the defendant's motion after holding that *Padilla* did not apply retroactively.<sup>142</sup> The court explained:

[T]he Court's holding in *Padilla* breaks new ground in terms of the scope of representation required for constitutional representation under the Sixth Amendment; Prior to its 2010 decision in *Padilla*, the Supreme Court has never held that defense counsel in a criminal case had any particular responsibility to advise an alien defendant of the potential consequences of a conviction under the immigration laws . . . .<sup>143</sup>

Similarly, in *United States v. Hong*,<sup>144</sup> the Tenth Circuit Court of Appeals also held that *Padilla* announced a new rule because it "was not dictated or compelled by Court precedent."<sup>145</sup> In 2010, the defendant was subject to deportation as a result of his 2008 criminal conviction.<sup>146</sup> He subsequently petitioned for *habeas corpus* seeking to vacate his criminal conviction on the grounds that he did not receive effective assistance of counsel because he was not advised of the immigration consequences of a criminal conviction before he entered a guilty plea.<sup>147</sup> The lower court denied his motion and the Tenth Circuit dismissed his appeal after concluding that *Padilla* did not apply retroactively to cases on collateral review.<sup>148</sup> The court reasoned that, prior to *Padilla*, many state and federal courts did not previously consider the Sixth Amendment right to effective assistance of counsel as requiring counsel to advise a client of collateral consequences such as immigration consequences.<sup>149</sup> Therefore, the court concluded that, "the application of *Strickland* to immigration consequences of a

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138. See *Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011), *cert. granted*, 132 S. Ct. 2101 (2012); *United States v. Martinez*, 843 F. Supp. 2d 136 (D. Mass. 2012); *United States v. Agoro*, CR 90-102 ML, CR 91-074 ML, 2011 U.S. Dist. LEXIS 140476 (D. R.I. Nov. 16, 2011).

139. Nos. CR-96-1681, CR-96-907, 2010 Me. Super. LEXIS 104 (Me. Super. July 30, 2010).

140. *Id.* at \*13.

141. *Id.* at \*1.

142. *Id.* at \*24.

143. *Id.* at \*21.

144. 671 F.3d 1147 (10th Cir. 2011).

145. *Id.* at 1154

146. *Id.* at 1149

147. *Id.*

148. *Id.* at 1148.

149. *Id.* at 1154.



guilty plea, was an extension of *Strickland* into previously untread grounds.”<sup>150</sup>

In contrast, some courts have held that *Padilla* does apply retroactively because it did not announce a new constitutional rule under *Teague*. For example, in *Commonwealth v. Clarke*,<sup>151</sup> the Supreme Judicial Court of Massachusetts concluded that *Padilla* did not announce a new rule but rather was “an extension of the rule in *Strickland* . . . .”<sup>152</sup> The defendant filed a motion for a new trial claiming he did not receive effective assistance of counsel because he was not advised of the immigration consequences of his criminal conviction prior to entering his guilty plea.<sup>153</sup> The lower court denied his motion.<sup>154</sup> The Supreme Judicial Court of Massachusetts held that *Padilla* applied retroactively but affirmed the denial of the defendant’s motion after finding that the defendant failed to satisfy the second requirement of prejudice under *Strickland*.<sup>155</sup> In deciding that *Padilla* applied retroactively, however, the court reasoned that since the Supreme Court in *Strickland* did not specifically define all of counsel’s duties or obligations to a client,<sup>156</sup> the Court intended the *Strickland* analysis to be a “case-by-case application” that would require “some examination of the facts” in each case.<sup>157</sup> The court concluded that, “[*Padilla*] is the definitive application of an established constitutional standard on a case-by-case basis, incorporating evolving professional norms (on which the standard relies) to new facts. It is not the creation of a new constitutional rule.”<sup>158</sup>

Likewise, in *United States v. Orocio*,<sup>159</sup> the Third Circuit Court of Appeals held that *Padilla* applied retroactively because it did not announce a new rule.<sup>160</sup> The court explained that the Supreme Court precedent “require[s] effective assistance of counsel on all ‘important decisions’ in plea bargaining that could ‘affect[] the outcome of the plea process . . . .’”<sup>161</sup> The court reasoned that, “*Padilla* is best read as merely recognizing that a plea agreement’s immigration consequences constitute the sort of information an alien defendant needs in making ‘important decisions’ affecting ‘the outcome of the plea process . . . .’”<sup>162</sup>

It is clear that the retroactivity of *Padilla* is a contested issue among courts and the Supreme Court will likely have to decide the issue in the future. Until then, the Law Court will need to decide how to apply *Padilla* in Maine. Although the *Padilla* holding created an explicit obligation for defense counsel to advise a client

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150. *Id.* at 1155.

151. 949 N.E.2d 892 (Mass. 2011).

152. *Id.* at 899.

153. *Id.* at 896.

154. *Id.*

155. *Id.* at 907.

156. *Id.* at 899.

157. *Id.* at 900.

158. *Id.* at 903.

159. 645 F.3d 630 (3d Cir. 2011).

160. *Id.* at 639-40. See also *United States v. Dass*, Criminal No. 05-140 (3) (JRT/FLN), 2011 U.S. Dist. LEXIS 76506, at \*13 (D. Minn. July 14, 2011); *Song v. United States*, Nos. CV 09-5184 DOC, CR 98-0806 CM, 2011 U.S. Dist. LEXIS 78624, at \*7 (C.D. Cal. July 15, 2011).

161. *United States v. Orocio*, 645 F.3d 630, 638 (3d Cir. 2011) (citations omitted).

162. *Id.* (citations omitted).

of immigration consequences, it was not a “new obligation”<sup>163</sup> representing a new constitutional rule under *Teague*. The *Padilla* holding was instead an extension of what was already required for effective assistance of counsel under *Strickland*. In *Padilla*, the Court implied that its holding was not a new rule but rather consistent with professional norms which “generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s [guilty] plea.”<sup>164</sup>

Furthermore, in *Teague*, the Court explained that “a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”<sup>165</sup> Even though the Law Court in Maine has primarily decided non-citizen claims of ineffective assistance of counsel on procedural rather than substantive issues, the significance of immigration status in the context of a criminal conviction is clearly not a new concept in Maine. For example, the Law Court recognized in *Aldus v. State*, which was decided a decade prior to *Padilla*, that defense counsel’s failure to investigate the defendant’s question about immigration consequences amounted to ineffective assistance of counsel. Consequently, Rule 11 of the Maine Rules of Criminal Procedure was amended shortly after the *Aldus* decision, in 2001, to include subsection (h) entitled “Immigration Consequences of the Plea.” Rule 11(h) requires that before the court accepts a defendant’s guilty plea, “the court shall inquire whether the defendant is a United States citizen” and if the defendant has not already been advised by counsel, “the court shall notify the defendant that there may be immigration consequences of the plea . . . .”<sup>166</sup> Accordingly, the holding in *Padilla* which imposes a duty on defense counsel to advise a client of immigration consequences is not a new rule in Maine when viewed in light of *Aldus* and Rule 11(h) as it was written before *Padilla* was decided.<sup>167</sup> Therefore, the Law Court should apply *Padilla*

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163. *Teague v. Lane*, 489 U.S. 288, 301 (1989).

164. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010).

165. *Teague v. Lane*, 489 U.S. 288, 301 (1989).

166. ME. R. CRIM. P. 11(h), as amended in 2001, provides:

(h) Immigration Consequences of the Plea. Before accepting a plea of guilty or nolo contendere, the court shall inquire whether the defendant is a United States citizen. If the defendant is not a United States citizen, the court shall ascertain from defense counsel whether the defendant has been notified that there may be immigration consequences of the plea. If no such notification has been made, or if the defendant is unrepresented, the court shall notify the defendant that there may be immigration consequences of the plea and may continue the proceeding for investigation and consideration of the consequences by the defendant.

The Advisory Committee Note in 2002 explained that:

The purpose of the amendment is preventative; it seeks both to prevent an improvident plea and to prevent the burdens of post-conviction review . . . [t]he amendment directs the court to alert defense counsel and unrepresented defendants that they may need to pause to explore hidden, serious immigration consequences of the plea.

167. ME. R. CRIM. P. 11(h), as amended in 2011, after the *Padilla* decision, provides:

(h) Potential Adverse Immigration Consequences to Noncitizens of a Plea to Any Crime. Before accepting a plea of guilty or nolo contendere for any crime, the court shall inquire whether the defendant was born in the United States. If, based on the defendant’s answer, it appears that the defendant is not a United States citizen, the court shall ascertain from defense counsel whether the defendant has been advised of the risk under federal law of

retroactively.

Although the Law Court did not address the application of *Padilla* in *Ali*, it is a significant issue that will need to be decided. Without the retroactive application of *Padilla*, Ali has no procedural means to raise an ineffective assistance of counsel claim because he is precluded from post-conviction review under *Ngo II*. Based on the Supreme Court's conclusion in *Padilla*, that immigration consequences are "intimately related" and "enmeshed" with criminal convictions, the Law Court should reconsider its decision in *Ngo II* and find that deportation as a consequence of a criminal conviction constitutes a "present restraint" under the post-conviction review statute. Furthermore, by applying *Padilla* retroactively in Maine, Ali and other non-citizens will be able to raise an ineffective assistance of counsel claim on post-conviction review.

#### IV. CONCLUSION

The Law Court's recent decisions such as *Ali* exemplify the procedural barriers preventing non-citizens from raising an ineffective assistance of counsel claim while awaiting deportation as a result of a criminal conviction. The court will inevitably be required to reconsider the issue, especially in light of the Supreme Court's conclusion in *Padilla* that deportation is "intimately related" and "enmeshed" with criminal convictions. Moreover, the Law Court will also need to decide whether to apply the *Padilla* holding, which imposes an obligation on defense counsel to advise a client of immigration consequences resulting from a criminal conviction, retroactively to criminal convictions that occurred before *Padilla* was decided. Because the connection between deportation and criminal conviction is not a new concept in Maine practice, the Law Court should apply *Padilla* retroactively and non-citizens such as Ali should be allowed to raise an ineffective assistance of counsel claim through post-conviction review.

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adverse immigration consequences, including deportation, as a result of the plea. If no such advice has been provided, or if the defendant is unrepresented, the court shall notify the defendant that the plea can create a risk of adverse immigration consequences, including deportation, and may continue the proceeding in order for counsel to provide the required advice, or, in the case of an unrepresented defendant, for investigation and consideration of the consequences by the defendant. The court is not required or expected to inform the defendant of the nature of any adverse immigration consequences.