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Immigration Law - Convicted as a Kid, Deported as an Adult: Conviction under State Youth Offender Act Predicates Aspiring American's Deportation - Cole v. U.S. Att'y Gen.

Shirin Afsous
Suffolk University Law School

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IMMIGRATION LAW—CONVICTED AS A KID, DEPORTED AS AN ADULT: CONVICTION UNDER STATE YOUTH OFFENDER ACT PREDICATES ASPIRING AMERICAN’S DEPORTATION—*COLE* *V. U.S. ATT’Y GEN.*, 712 F.3D 517 (11TH CIR. 2013).

Federal immigration law negotiates a fine line between imposing civil and criminal penalties on aliens and permanent residents for certain predicate criminal offenses, including crimes involving moral turpitude (“CIMT”) and aggravated felonies.¹ The INA does not allow explanations of innocence by aliens or permanent residents who are convicted of either CIMTs or aggravated felonies.² In *Cole v U.S. Att’y Gen.*,³ the United

¹ See Immigration and Nationality Act (“INA”) § 316, 8 U.S.C. § 1427 (2006) (listing conditions allowing Attorney General to take custody of alien). However, the term moral turpitude has never been legislatively defined. See Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After Silva-Trevino*, 111 COLUM. L. REV. 313, 315 (2011). The Supreme Court held that the term was not unconstitutionally vague in *Jordan v. De George*, 341 U.S. 223 (1951). Pursuant to the *DeGeorge* decision, courts have defined moral turpitude as involving conduct that is base, vile, or depraved, and contrary to the private and social duties man owes to his fellow men or to society in general. See *id.* at 234. Among the consequences of criminal conduct is the inability of a lawful permanent resident to show the “good moral character” required to go through the naturalization process and become a United States citizen. Aliens and Nationality, 8 C.F.R. § 316.2(a)(7) (2011) (describing good moral character as someone who “has been and continues to be a person of good moral character”). “Moral turpitude” is not defined in the INA, and jurisdictions and agencies interpret its meaning differently. See Dadhania, *supra*, at 315. A conviction for an “aggravated felony” according to the expanded definition, presents a lifetime ban to showing “good moral character.” See Adriane Meneses, Comment, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment*, 14 SCHOLAR 767, 796 (2012). Crimes involving moral turpitude (“CIMT”) include theft and robbery, crimes involving bodily harm, sex offenses, and acts involving recklessness or malice. See *id.* at 800. Assault with a deadly weapon is a crime involving moral turpitude because it requires intent to do great bodily harm. See generally *Franklin v. INS*, 72 F.3d 571, 573 (8th Cir. 1995) (stating “moral turpitude is a nebulous concept and there is ample room for differing definitions of the term”).

² See 8 U.S.C. § 1101(a)(48)(A) (2012). The statute defines a conviction as

[A] formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of the punishment, penalty, or restraint on the alien’s liberty to be imposed.

Id. If an alien or permanent resident is convicted of an aggravated felony, he will be removable. 8 U.S.C. § 1227(a)(2)(A)(iii) (2012). A noncitizen convicted of a CIMT that was committed within five years after the date of admission is deportable if the crime is one for which a sentence

States Court of Appeals for the Eleventh Circuit considered whether an alien's conviction for pointing a firearm at another individual was a "conviction" for immigration purposes, and if so, if it constituted an aggravated felony.⁴ The court reasoned that, despite the existence of a circuit split regarding the analysis of the statutory provisions, the language of the statute was unambiguous, and therefore held that an alien's aggravated felony conviction in state court renders him ineligible for the withholding of removal.⁵

Petitioner Chadrick Cole ("Cole") is a native and citizen of Jamaica who was admitted into the United States as a lawful permanent resident in 2006.⁶ On April 6, 2009, Cole violated a South Carolina criminal statute, S.C. §16-23-410, which criminalizes pointing a firearm at another person.⁷ Cole pleaded guilty, and was sentenced under the South Carolina Youthful Offender Act ("SCYOA") to an indeterminate term of imprison-

of one year or longer may be imposed. 8 U.S.C. § 1227(a)(2)(A)(i). Even if a noncitizen is actually sentenced to less than one year, he is still deportable or removal under this provision. See generally Valerie Neal, Note, *Slings and Arrows of Outrageous Fortune: The Deportation of "Aggravated Felons,"* 36 VAND. J. TRANSNAT'L L. 1619, 1630-31 (2003) (discussing issues caused by Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")). Ms. Neal recommends "that Congress address the problems created by . . . IIRIRA in some manner . . . because in its present form it leads to some fundamentally unfair and absurd results." *Id.* at 1653.

³ 712 F.3d 517, 526-27 (11th Cir. 2013) (holding "conviction" under South Carolina law is conviction for removability purposes).

⁴ See *id.* at 524. Under 8 U.S.C. § 1227(a)(2)(A)(iii), aliens are subject to deportation or removal based on the commission of an aggravated felony. See 8 U.S.C. § 1227(a)(2)(A)(iii) (2008). An "aggravated felony" is defined under 8 U.S.C. § 1101(a)(43)(F) to include crimes of violence, which are defined at 18 U.S.C.A. § 16 as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person... [and] "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person may be used in the course of committing the offense." *Id.*; see 18 U.S.C.A. §16 (West 2014); see also *Sareang Ye v. INS.*, 214 F.3d 1128, 1134-35 (9th Cir. 2000) (holding vehicle burglary was not aggravated felony as it lacked substantial risk of physical force).

⁵ See *Cole*, 712 F.3d at 532. (finding Cole "automatically deemed to have committed a particularly serious crime"); see also 8 U.S.C. § 1182(a) (2012) (listing grounds of inadmissibility); 8 U.S.C. § 1227(a)(4) (stating grounds for deportability); Meneses, *supra* note 1, at 773-74 ("Immigration and Customs Enforcement (ICE) reportedly exercises prosecutorial discretion in selecting the aliens against whom it seeks to initiate removal proceedings; but when ICE does pursue prosecution, immigration judges are frequently unable to exercise any form of judicial discretion, having been stripped in large part of this ability through changes to legislation over the past twenty years.").

⁶ See *Cole*, 712 F.3d at 520 (discussing background of case). Section 101(a)(20) provides: "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20).

⁷ See *Cole*, 712 F.3d at 520. (showing S.C. CODE ANN. § 16-23-410 (1976) classifies pointing or presenting loaded or unloaded firearm as felony).

ment not to exceed five years.⁸ The Department of Homeland Security (“DHS”) sought to remove Cole for having been convicted of an aggravated felony, specifically a crime of violence for which the term of imprisonment is at least one year.⁹

Cole submitted an application for asylum, withholding of removal, and relief under the Convention Against Torture (“CAT”).¹⁰ The Immigration Judge (“IJ”) issued a written decision denying all three of Cole’s claims and ordered him removed to Jamaica.¹¹ Cole appealed the IJ’s deci-

⁸ *Id.* at 521. (detailing relevant facts of Cole’s conviction). In his brief to the United States Court of Appeals for the Eleventh Circuit, Cole argued, “indeterminate sentences imposed under the provisions of the youthful offender process cannot be deemed to be the same as indeterminate sentences imposed for adult criminal offenders.” *Id.* at 531. SCYOA pertains to youthful offenders who are between 17-25 years old at the time of conviction and the conviction is a nonviolent misdemeanor, a Class E or F felony, or a felony with a maximum imprisonment of 15 years or less. See S.C. CODE ANN. § 24-19-10(d)(i)-(ii) (2013). A conviction is defined as a judgment or plea for a charge with a maximum imprisonment of at least one year and does not allow for punishment by death or life imprisonment. See § 24-19-10(f). Cole was twenty-one years old when he was convicted of pointing a firearm at another person. See *Cole*, 712 F.3d at 520-21 (indicating Cole committed offense on April 6, 2009). Under South Carolina law, pointing a firearm at another person is a Class F felony. Compare § 16-1-20 (setting forth punishment for Class F Felony as not more than five years imprisonment), with § 16-23-410. (providing punishment of not more than five years imprisonment). He pled guilty to the offense under the SCYOA because at the time of the commission, he was over seventeen but under twenty-five years old and had committed a Class F felony. See *Cole*, 712 F.3d at 520-21 (stating Cole pled guilty under SCYOA); § 24-19-10(d)(i) (“youthful offender means an offender who is under seventeen years of age and has been bound over for proper criminal proceedings to the court of general sessions ... for allegedly committing an offense ... that is a misdemeanor ... or Class F felony.”) (internal quotation marks omitted). Although it is unclear whether or not the SCYOA functions as a juvenile delinquency status, if it does in fact act as a juvenile delinquency status, the arguments promulgated by *Cole* should have focused on precedent establishing that juvenile delinquency status convictions are not convictions for immigration purposes. See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM.U. L. REV. 367, 403-04 (2006) (arguing criminal penalty favored indeterminate sentences between 1950-1970 for criminal sentence reduction); see also Cassandra S. Shaffer, Comment, *Inequality Within the United States Sentencing Guidelines: The Use of Sentences Given to Juveniles by Adult Criminal Court as Predicate Offenses for the Career Offender Provision*, 8 ROGER WILLIAMS U. L. REV. 163, 163 (2002) (explaining some state courts impose juvenile criminal sentences for adults).

⁹ See *Cole*, 712 F.3d at 521. The Department of Homeland Security (“DHS”) sought to remove Cole pursuant to two sections of the INA. *Id.* Specifically, 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony as defined by 8 U.S.C. § 1101(a)(43)(E) and 8 U.S.C. § 1227(a)(2)(C), for having been convicted of a firearms offense. *Id.* “The DHS later amended the charge of removability pursuant to § 1227(a)(2)(A)(iii) and alleged, in addition to the original charges, that Cole also was convicted of an aggravated felony as defined by § 1101(a)(43)(F), which covers crimes of violence for which the term of imprisonment is at least one year.” *Id.*

¹⁰ See *Cole*, 712 F.3d at 521. Cole offered three distinct theories in support of his claims: (1) his developmental disabilities would make him a target for discrimination and persecution; (2) his status as a deportee would result in government abuse; and (3) his family’s involvement with the People’s National Party would make Cole a target for political violence. *Id.* at 521-22.

¹¹ See *id.* at 521-22 (summarizing IJ’s decision). The IJ reasoned that Cole’s conviction was

sion to the Board of Immigration Appeals (“BIA”), who dismissed Cole’s appeal, upholding most of the IJ’s decisions.¹² Cole appealed the BIA’s decision to the United States Court of Appeals for the Eleventh Circuit, who denied his petition and affirmed the lower court’s findings.¹³

A criminal conviction in the United States creates a far more serious punishment for aliens than for citizens, as aliens face the possibility of removal or deportation.¹⁴ In recent years, judges received narrower discretionary authority to prevent removals.¹⁵ Although the scope of judicial discretion has decreased significantly in recent years, the earliest grounds for restricting immigration on the basis of criminal conduct were based on legislation passed in 1875.¹⁶ Congress created legislation to exclude persons convicted of a felony involving moral turpitude, thereby creating grounds of removal for conduct committed within the United States, between 1891 and 1917.¹⁷

a crime of violence because the offense included an element of “threatened use of physical force against the person ... of another,” and the term of imprisonment exceeded one year, therefore rendering Cole removable under § 1227(a)(2)(A)(iii). *Id.* at 521-22. Since Cole was convicted of a felony, the IJ further determined Cole was ineligible for asylum under 8 U.S.C. § 1158(b)(2)(A)(ii), “which bars aggravated felons from obtaining asylum.” *Id.* at 522. Finally, the IJ found Cole ineligible for withhold because he was convicted of a “particularly serious crime,” i.e. an aggravated felony that carries a term of imprisonment of five years or more. *Id.*

¹² See *id.* BIA held that Cole’s SCYOA conviction was a conviction for immigration purposes, therefore he was subject to removal having been convicted of an aggravated felony and crime of violence. *Id.*

¹³ See *Cole*, 712 F.3d at 523. This court reviews “‘only the BIA’s decision,’ except to the extent that it ‘expressly adopt[s] the IJ’s opinion or reasoning.’” *Id.* This court further explains that it “defer[s] to the BIA’s permissible construction of ambiguous terms in the Immigration and Nationality Act” and determines the standard of review under the substantial evidence test. *Id.* The court will affirm if the BIA’s decision “is supported by reasonable, substantial, and probative evidence on the record considered as a whole.” *Id.*

¹⁴ See generally Nelson A. Vargas-Padilla, *The Immigration Consequences of Criminal Conduct*, 3 AM. CRIM. L. BRIEF 23, 24 (2007) (discussing immigration law consequences of criminal law violations). Aliens convicted of certain crimes, including aggravated felonies, may be either deported or deemed inadmissible from the United States. See 8 U.S.C. § 1182(a) (providing grounds of inadmissibility); 8 U.S.C. § 1227(a) (listing grounds for deportability). Removal proceedings are initiated by the DHS, who determine upon which grounds of removal, deportability or inadmissibility, to charge the alien. See Vargas-Padilla, *supra*, at 24 (summarizing removal process).

¹⁵ See *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (“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 of judges’ authority to alleviate the harsh consequences” of deportation....).

¹⁶ See Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (1875) (restricting entrance of destitute persons, criminals, and prostitutes).

¹⁷ See Immigration Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084 (revising 1882 Immigration Act); Immigration and Nationality Act, ch. 29, 39 Stat. 874 (1917) (revising 1891 Immigration Act); see also *In re Franklin*, 20 I. & N. Dec. 867, 868 (BIA 1994) (“Moral turpitude refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of

The immigration reforms of 1990 further reduced immigration judges' discretionary relief for persons categorized as "aggravated felons."¹⁸ As grounds for removal have expanded throughout the various modifications of the INA, the definition of "aggravated felony" has followed suit.¹⁹ The 1996 provisions of IIRIRA allow an alien incarcerated within the United States to be removed pursuant to an order issued by DHS without a hearing before a judge or any additional review.²⁰ Despite extensive modification and drafting of the INA, the question of indeterminate sentencing for purposes of removal and how the BIA should measure such

morality. . . . [It is] an act which is per se morally reprehensible or intrinsically wrong. . . ."; Stacy Caplow, *Governors! Seize the Law: A Call to Expand the Use of Pardons to Provide Relief From Deportation*, 22 B.U. PUB. INT. L.J. 293, 306 (2013) (arguing the need for increased use of executive pardons). The Immigration Act of 1917 included the first mention of a pardon proviso, which systematically codified defenses to deportation and "empowered both the executive and the judiciary to thwart deportation." Caplow, *supra*, at 306-07.

¹⁸ See Meneses, *supra* note 1, at 782-83. In order to mitigate the steep consequences of the grounds of deportability, Judicial Recommendation Against Deportation ("JRAD") allowed sentencing judges in both state and federal prosecutions to make a binding recommendation 'that such alien shall not be deported.' Created as part of the Immigration and Nationality Act of 1917, JRAD discretionary relief from deportation was severely curtailed when the 1952 INA eliminated the availability of JRAD relief for narcotics offenses. Nearly forty years later in 1990, JRAD was eliminated completely, leaving trial judges presiding over criminal cases unable to prevent non-citizen defendants from being placed in removal proceedings.

Id. at 782-83. See Caplow, *supra* note 17, at 308 (discussing concerned legislators regarding grounds for deportation based on poorly defined criminal activity).

¹⁹ See Immigration Act of 1990 (IMMACT 90), Pub. L. No. 101-649, 649, § 4978, 104 Stat. 5048 (modifying definition of "aggravated felony" to include analysis of sentence imposed); HUMAN RIGHTS WATCH, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, 34 (July 17, 2007), available at http://www.hrw.org/sites/default/files/reports/us0707_web.pdf

[In] the Immigration Law of 1996 ... people were defined as felons in a new way. They were picked up off the streets in the middle of the night, deported without any due process - and these were legal people, here legally, but may have committed some crime, even shoplifting 20 or 30 years ago.

Id. at 34. See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2006) (denoting twenty-one subsections describing offenses considered aggravated felonies). The 1996 codification of aggravated felonies allowed the definition to expand in scope, as it categorized many state misdemeanors as aggravated felonies that were grounds for removal. INA §101(a)(43), 8 U.S.C. § 1101(a)(43) (defining "aggravated felony"). See generally *In re Marroquin-Garcia*, 23 I. & N. Dec. 705, 705 (BIA 2005) (discussing alien convicted remains convicted notwithstanding state expungement action); *In re Salazar-Regino*, 23 I. & N. Dec. 223, 223 (BIA 2002) (discussing crimes defined as aggravated felonies); *In re Roldan-Santoyo*, 22 I. & N. Dec. 512, 512 (BIA 1999) (analyzing INA definition of aggravated felony). The IIRIRA also broadened the definition of "conviction" and "sentence" to apply to any reference of imprisonment or sentence, regardless of any deferred adjudication, probation, suspension, or expungement. See *Siddiqui v. Holder*, 670 F.3d 736, 739 (7th Cir. 2012) (discussing effect and application of IIRIRA).

²⁰ See 8 U.S.C. § 1228 (providing for expedited removal of aliens convicted of aggravated felonies).

sentences is still heavily debated by a circuit split between the sixth and the tenth circuits.²¹

No court has jurisdiction to review any final order of removal, except for “review of constitutional claims or questions of law raised upon a petition for review.”²² In *Cole v U.S. Att’y Gen.*, the Eleventh Circuit considered whether Cole’s conviction under the SCYOA qualified as a conviction for immigration purposes.²³ The court relied on the statutory definition of “conviction,” explaining that the text enumerates two conditions, both of which an SCYOA conviction satisfies.²⁴ The court states that any formal judgment of guilt entered by a court is a conviction.²⁵ Despite this issue

²¹ See *In re S-S.*, 21 I. & N. Dec. 900, 902-03 (BIA 1997) (asserting BIA measures all indeterminate sentences by their maximum possible term). In *Nguyen v. INS*, the Tenth Circuit deferred to the BIA’s rule, explaining that it “accords with the Sentencing Guidelines’ rationale that the term “‘sentence of imprisonment’... refers to the maximum sentence imposed.” *Nguyen v. INA*, 53 F.3d 310, 311 (10th Cir. 1995). Conversely, the Sixth Circuit’s reasoning questions whether deference to the BIA rule is wise, since *Chevron v. NRDC, Inc.*, deference applies only to “an agency’s construction of the statute which it administers...” *Chevron v. NRDC*, 467 U.S. 837, 842 (1984).

²² 8 U.S.C.A. § 1252(a)(2)(D) (2005). The 11th Circuit determined the extent of their subject matter jurisdiction *de novo*, because it always has jurisdiction over legal and constitutional questions. See *Cole v. U.S. Gen.*, 712 F.3d 517, 523 (11th Cir. 2013) (describing court’s subject matter jurisdiction).

²³ See *Cole*, 712 F.3d at 524. The court considered the legislative history of IIRIRA, and concluded that “Congress intended for an alien’s conviction to count as a conviction as soon as the original judgment or finding of guilt occurred.” *Id.* at 526; see H.R. CONF. REP. 104-828, at 224 (1996) (revising definition of “conviction” and broadening its scope). The definition of “conviction” was deliberately broadened to ensure that the federal meaning of the term would be unaffected by the states’ “myriad of provisions for ameliorating the effects of a [state] conviction,” for immigration purposes. See H.R. CONF. REP. 104-828, at 224.

²⁴ See *supra* note 2 and accompanying text (discussing INA definition of conviction). The court reasons that since the statute “makes no distinction based on the age of the offender or what type of proceeding results in the conviction,” and since “the statute does not carve out any exception for conviction that come with the possibility of expungement in the future,” a conviction under SCYOA is a sound conviction. *Cole*, 712 F.3d 517 at 524. This analysis creates problems with the SCYOA because § 22-5-920(B) provides the youth offender, who “after five years from the date of completion of his sentence, including probation and parole, may apply . . . to the circuit court for an order expunging the records of the arrest and conviction.” S.C. CODE ANN., § 22-5-920(B) (2011). The state law statute is in direct conflict with the interpretation of removability pursuant to the INA by both the Supreme Court of the United States and the South Carolina Supreme Court. See generally James A. R. Nafziger & Michael Yimesgen, Article, *The Effect of Expungement on Removability of Non-Citizens*, 36 U. MICH. J.L. REFORM 915, 915-17 (2003) (discussing effect of state expungement statutes on alien removability).

²⁵ See *Cole*, 712 F.3d at 524. The Court of General Sessions in South Carolina accepted Cole’s conviction, which is a court of justice with authority over criminal matters. *Id.* Therefore, the two prongs of 8 U.S.C. § 1101(a)(48)(A) are satisfied because Cole “entered a plea of guilty” and “the judge... ordered some form of punishment,” and what could happen in the future, such as the possibility of expungement is irrelevant for immigration purposes. *Id.* at 524-25; see also *In re Roldan*, 22 I. & N. Dec. 512 (BIA 1999) (holding state rehabilitative action such as expungement will receive no effect). In *Wellington v. Holder*, the Second Circuit debated upholding or

presenting itself as a matter of first impression, the court relied upon the reasoning of *Resendiz-Alcaraz v. U.S. Att’y Gen.* and *Singh v. U.S. Att’y Gen.* to argue that 8 U.S.C. §1101(a)(48)(A) was unambiguous.²⁶

An aggravated felony carries the most severe immigration consequences for an alien.²⁷ Crimes of violence are considered aggravated felonies for immigration purposes, and are defined as any crime for which the term of imprisonment is at least one year, and that involve at least a substantial likelihood of physical force being used during their commission.²⁸

overruling the rule in *Matter of Roldan*. 623 F.3d 115, 118 (2d Cir. 2010) Specifically, the court reasoned, “Five circuits have agreed with the BIA and held that there is no exception to the definition of ‘conviction’ under the INA for aliens who receive state rehabilitative relief... All five of these courts upheld *Roldan* by applying normal principles of statutory construction, without granting *Chevron* deference to the BIA’s interpretation of the statute.” See *Id.* at 119-120; see also *Chevron v. NRDC, Inc.*, 467 U.S. 837 (1984) (holding court defers to agency interpretation when Congressional intent is unclear).

²⁶ See *Singh v. U.S. Att’y Gen.*, 561 F.3d 1275, 1279 (11th Cir. 2009); *Resendiz-Alcaraz v. U.S. Att’y Gen.*, 383 F.3d 1262, 1270 (11th Cir. 2004). In *Resendiz-Alcaraz*, the court held that an expunged conviction qualified as a conviction for immigration purposes. *Id.* at 1271. The petitioner had been convicted of possession of marijuana in a Missouri state court. See *id.* at 1265 (detailing relevant facts of *Resendiz-Alcaraz*’s conviction). Although *Resendiz-Alcaraz*’s conviction was expunged a year later, the Eleventh Circuit found that his state conviction satisfied the conditions of §1101(a)(48)(A). See *id.* at 1271 (finding petitioner removable). In *Singh v. U.S. Att’y Gen.*, the fifteen-year old petitioner pled guilty to several felonies, prompting the INS to seek his removal. See *Singh*, 561 F.3d at 1277-78 (summarizing *Singh*’s convictions for burglary and grand theft). *Id.* at 1277. The court rejected petitioner’s argument that his juvenile convictions did not meet constitute a “conviction” for immigration purposes. See *id.* at 1279 (“[A] conviction in adult court is a conviction for immigration purposes, no matter how old the alien was at the time of the offense.”). Instead the court followed the plain reading of §1101(a)(48)(A), and held *Singh*’s convictions as grounds for removability. See *id.* (adopting reasoning of the First, Second, and Ninth Circuits). The *Cole* court reasoned that “*Resendiz-Alcaraz* and *Singh* establish that, standing alone, neither the possibility of expungement nor the age of the offender are relevant in determining whether a conviction in a criminal court of general jurisdiction qualifies as a conviction for immigration purposes.” *Cole*, 712 F.3d at 525-26 (asserting definition of “conviction” does not make exceptions but rather applies uniformly to all convictions); see also *Dung Phan v. Holder*, 667 F.3d 448, 453-54 (4th Cir. 2012) (reasoning set aside of petitioner’s conviction had no implication on its use for immigration purposes).

²⁷ See *supra* note 2 and accompanying text (defining a “conviction” as a formal judgment of guilt entered by a court). Under current immigration law, an alien convicted of an aggravated felony at any time after admission is deportable or removable. 8 U.S.C. § 1227(a)(2)(A)(iii) (2013). Conviction of an aggravated felony results in harsh immigration consequences, among them ineligibility for release on bond, ineligibility for asylum, and ineligibility for discretionary cancellation of removal. See also Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1758 (2013) (discussing expansion of aggravated felony immigration consequences to minor convictions from state court convictions); See also David Cheng, *Emigres of the Killing Fields: The Deportation of Cambodian Refugees as a Violation of International Human Rights*, 25 B.C. THIRD WORLD L.J. 221, 223-24 (2005) (arguing despite the unfairness of the INA aggravated felony provisions, courts continue to sanction noncitizens).

²⁸ See *Crime of Violence Defined*, 18 U.S.C. § 16. (West 2014). Crime of violence means:

The Court discussed how the common law has developed such that crimes of violence encompass a necessary *mens rea* element.²⁹ The Supreme Court of South Carolina has interpreted S.C. Code § 16-23-410 as having three distinct elements: (1) pointing or presenting; (2) a loaded or unloaded firearm; (3) at another.³⁰ Prior to the Supreme Court's decision in *Leocal*,

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. The court employs a categorical approach to determine whether Cole's state law offense qualifies as a crime of violence for immigration purposes. See *Cole*, 712 F.3d at 527. A categorical approach means, "look[ing] to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). This approach was first introduced in *Taylor v. United States*. See 495 U.S. 575, 601-02 (1990). The Supreme Court instructed lower courts to look "only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 602. This analysis was to avoid the "practical difficulties and potential unfairness" of a lengthy and detailed factual review of the offense. *Id.* at 601. But see *Descamps v. United States*, 133 S.Ct. 2276, 2280-81 (2013) ("Because generic unlawful entry is not an element, or an alternative element...a conviction under that statute is never for generic burglary. *Descamps'* ACCA enhancement was therefore improper"). As a federal court analyzes a state law offense, the federal court is bound by the state supreme court's interpretation of state law, "including its determination of the elements of [a crime]." See *Johnson v. United States*, 559 U.S. 133, 138 (2010). In instances when the state Supreme Court has not definitely ruled, the court is bound by "decisions of a state's intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise." *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1133 (11th Cir. 2010); see also *United States v. King*, 673 F.3d 274, 279-80 (4th Cir. 2012) (analyzing S.C. Code § 16-23-410 for sentencing purposes).

²⁹ See *Leocal*, 543 U.S. at 3-4 (finding DUI conviction contained no *mens rea* element and therefore was not crime of violence). The lower court in *Leocal* determined that a Florida statute criminalizing driving under the influence of alcohol and causing serious bodily injury was a crime of violence under 8 U.S.C. § 16. See *id.* at 3-4 (summarizing procedural history). The Supreme Court began by analyzing the language of the Florida statute, and emphasized, "the critical aspect of §16(a) is that a crime of violence is one involving the use of physical force against the person or property of another." See *id.* at 9. The Supreme Court took the analysis one step further, suggesting "use...against...another...requires active employment . . . [and] . . . naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* at 9. Thus, the Court reasoned that since the Florida statute failed to incorporate an element of *mens rea*, it could not be a crime of violence under §16(a). See *id.* at 10.

³⁰ See *State v. Burton*, 589 S.E. 2d 6, 8 (S.C. 2003) (discussing interpretation of state statute). When considering the three distinct elements of S.C. Code § 16-23-410, it seems to fail the *Leocal mens rea* requirement. *Id.* However, South Carolina's Court of Appeals subsequently held that the term "presenting" means "showing or displaying a firearm in a threatening or menacing manner" and thus requires an intentional *mens rea*. See *In Re Spencer*, 692 S.E. 2d 569, 573 n.2 (S.C. Ct. App. 2010) ("the state must offer direct or circumstantial evidence that a person specifically intended to present a firearm at someone before a conviction may be sustained . . ."). The court in *Cole* is "bound by the Court of Appeals' interpretation of the offense." 712 F.3d at 528. "There is a substantial risk that the act of pointing a firearm at another will provoke the sort of confrontation that leads to the intentional use of physical force." *Id.* See generally *James v. United States*, 550 U.S. 192, 203 (2007) ("The main risk of burglary arises not from the simple

the Fourth Circuit previously held that S.C. Code § 16-23-410 constituted a crime of violence under 18 U.S.C. § 16(b) and the *Cole* court found the Fourth Circuit persuasive on the matter.³¹ It held that Cole's offense of pointing a firearm at another was a crime of violence, making Cole an aggravated felon for immigration purposes.³²

The United States Court of Appeals for the Eleventh Circuit reached its decision by following strict case precedent and traditional statutory interpretation.³³ The court followed the precedent established by the First, Second, and Ninth Circuits in deciding that a "conviction" pursuant to a youth offender state statute fulfills the requirements enumerated by 8 U.S.C. § 1101(a)(48)(A).³⁴ It reasoned that the text of the INA compelled it to treat any formal judgment of guilt entered by a court as a conviction.³⁵ The specific language of 8 U.S.C. § 1101(a)(48)(A) fails to distinguish the definition of conviction based on the age of the offender or the type of proceeding resulting in a conviction.³⁶ The major problem with the Court's

physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party....").

³¹ See *United States v. Thompson*, 891 F.2d 507, 509 (4th Cir. 1989) ("In each of the reported South Carolina cases, the pointing of a firearm at another person was accompanied by the use of physical force."). The *Cole* court concluded that "the substantial risk that accompanies a violation of S.C. Code § 16-23-410 springs not from general recklessness but from the fact that 'by its nature,' it 'involves a substantial risk' that the perpetrator 'will use force against a victim.'" *Cole*, 712 F.3d at 528-529.

³² See *Cole*, 712 F.3d at 529. The court was not persuaded by Cole's attempt to distinguish "pointing" from "presenting" and disagreed with his argument that only "presenting" had the intentional *mens rea* of threatening another. See *id.* (citing *States v. King*, 673 F.3d 274, 280, n. 4 (4th Cir. 2012)) ("[T]he two disjunctively worded terms stand on equal footing by both requiring threatening behavior"). The court acknowledged the serious consequences of its determinations for Cole, namely that "pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) and the definition of aggravated felony in § 1101(a)(43)(F)," Cole was removable as an alien. *Id.*

³³ See *Cole*, 712 F.3d at 517 (discussing the issue of first impression before the court). The major issues before the court were: (1) whether an alien's state conviction for pointing a firearm at another person was a conviction within the meaning of the INA; and (2) if the alien's state conviction constituted an aggravated felony. *Id.*

³⁴ See *supra* note 2 and accompanying text (discussing conviction under youthful offender statute is conviction for immigration purposes). Courts have grappled with the dramatic consequences of deportation for decades, yet they have yet to achieve a fair balance for removing aliens convicted pursuant to youth offender statutes. See generally *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J. dissenting) (arguing deportation is a most severe and cruel punishment).

³⁵ See *Cole*, 712 F.3d at 524. (reasoning statute does not make distinctions based on offender's age or type of proceeding). But see *In re Devison-Charles*, 22 I. & N. Dec. 1362, 1373 (BIA 2000) (holding resentencing following violation of probation does not convert youthful offender judgment into conviction).

³⁶ See *Cole*, 712 F.3d at 524. Although problematic, the court's reasoning in deciding that Cole's SCYO conviction satisfies the INA definition of conviction is a matter of strict interpretation. 8 U.S.C. § 1101(a)(48)(A) enumerates two conditions, both which are met by SCYO. 8

reasoning is an unwillingness to withhold Cole's removal because a SCYOA conviction has a possibility of expungement in the future.³⁷

Since the court found Cole's SCYOA conviction to fit the statutory definition of "conviction" for immigration purposes, it also concluded that §16-23-410 was a crime of violence.³⁸ The court relied on the categorical approach, looking to the "elements and the nature of the offense of conviction," rather than to the particular facts relating to Cole's crime.³⁹ Despite

U.S.C. § 1101(a)(48)(A)(i)(ii) (2013). First, a judge in the court of general sessions found Cole guilty and second, the judge ordered some form of punishment or penalty. *Cole*, 712 F.3d at 524. The Court of General Sessions accepted Cole's guilty plea and sentenced him to serve an indeterminate sentence of up to five years. *Id.* This act satisfied both conditions of the INA. *Id.* at 525. *But see* *Phan v. Holder*, 667 F.3d 448, 452 (D.C. Cir. 2012) (rejecting argument that offender of D.C.'s Youth Rehabilitation Act was adjudicated as juvenile delinquent). Immigration law has long considered juvenile delinquency adjudications not to be convictions. *See In re Devison-Charles*, 22 I. & N. Dec. at 1365 ("We have consistently held that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes.").

³⁷ *See supra* note 2 (considering possibility of expungement does not matter for conviction purposes). *See* Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 355-56 (2012) ("[L]imitations on the preclusive effect of pardons, expungements, appeals, and similar post-conviction processes undermine sovereign interests in maintaining the integrity of the criminal justice system"). § 22-5-920(B) of SCYOA expressly provides the youth offender, who "after five years from the date of completion of his sentence, including probation and parole, may apply...to the circuit court for an order expunging the records of the arrest and conviction." *See* S.C. CODE ANN. § 22-5-920(B) (2011); *see also* *Miller v. Alabama*, 132 S.Ct. 2455, 2464-66 (2012) (discussing differences between adult and youth offenders). In *Miller*, the Court discussed case precedent establishing the constitutional differences between children and adults for sentencing purposes. *Miller*, 132 S.Ct. at 2464. The Court discussed the three significant differences between juveniles and adults, including recklessness, impulsivity, vulnerability, and "a child's character is not as 'well formed' as an adult's." *Id.* The *Miller* Court relied on previous decisions, including *Roper v. Simmons*, 543 U.S. 551, 571 (2005), in arguing that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders. . . [b]ecause. . . the case for retribution is not as strong with a minor as with an adult." *Id.* at 2464 (*quoting Roper*, 543 U.S. at 571). Additionally, the Supreme Court's decision in *Padilla* mandates that defense counsel inform non-citizen alien clients whether a possible criminal plea carries a risk of deportation. *Padilla v. Kentucky*, 559 U.S. 365 (2010). Although the court debated whether deportation was a direct or collateral consequence to a guilty plea, the court nonetheless restated that it is a "particularly severe 'penalty'." *Id.* at 365 (*quoting Fong Yue Ting*, 149 U.S. at 740).

³⁸ *See Cole*, 712 F.3d at 526. The court found that the element of intent satisfied *Leocal's* intent requirement pursuant to 18 U.S.C.S. § 16(b). *Id.* at 527-28 (reasoning "presenting means showing or displaying a firearm in a threatening or menacing manner") (internal quotation marks omitted); *see also* *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (asserting crimes of violence have requisite *mens rea* element). The court reasoned that the language of 18 U.S.C.S. § 16(b) defines a "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* at 527.

³⁹ *Id.* at 527 (*quoting Leocal v. Ashcroft*, 543 U.S. 1 (2004)). A crime's violent character is assessed on the face of the statute under which the defendant was convicted. *See* Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 605 (2011). In deciding a crime's

this court's application of the categorical approach as being the appropriate method of determining applicability of the grounds of removal, recent case law has implemented a different standard.⁴⁰ On issues of state law, such as which elements are necessary to convict a person of some state-level crime, the court was bound by the decisions of South Carolina's intermediate appellate courts unless there was persuasive evidence that the highest state court would rule otherwise in deciding Cole's state law offense.⁴¹

Following the rule established in *Leocal*, the court correctly asked whether Cole's state-law offense contained a *mens rea* greater than negligent conduct.⁴² The analytical logic of the court seems reasonable, howev-

violent characteristics, the courts turn to the statutory definition, considering whether the statute includes the use or attempted or threatened use of force, or "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 604 (quoting *James v. United States*, 550 U.S. 192, 197 (2007)). "When the text of a state criminal statute does not clearly fall within or without the generic federal definition . . . courts may consider the actual indictment, information, or jury instructions from the defendant's trial." *Id.* at 604, n.165. The first prong of the definition, i.e. the use, threatened use, or attempted use of force, is consistent with the conceptions of violence as seen in common law and modern definitions of substantive offenses. *Id.* at 605. However, the second prong, i.e. a serious potential risk of physical injury, is a "substantial expansion of the concept of violence. . . ." *Id.* This expanded definition of violence results in the categorization of offenses that are not crimes against the person. *Id.*

⁴⁰ See *Meneses*, *supra* note 1, at 793 (discussing analysis including "non-elemental facts"). The BIA differentiates between (a) grounds of deportability that focus entirely on the actual elements of the conviction, and (b) grounds of deportability that instead include factors "not tied to the elements of any State or Federal criminal statute." *Id.* at 793 n. 127 (quoting *In re Babaisakov*, 24 I&N Dec. 306, 309 (BIA 2007)). Since 2007, an analysis of evidence outside of the record of conviction is permitted to determine whether "non-elemental" factors have been met for an alien to qualify as an aggravated felon. *Id.* Thus far, the "non-elemental" inquiry into facts outside the record of conviction has not been applied to non-aggravated felony grounds of deportability. *In re Velazquez-Herrera*, 24 I&N Dec. 503, 516-17 (BIA 2008). The *Cole* court decided to use the categorical approach because they did not want to engage in a complicated analysis of the facts specific to Cole's conviction. *Cole*, 712 F.3d at 527-528. If the court had engaged in a non-elemental analysis, perhaps the court would have found that Cole's youth offense was not enough as a ground of removability. *But see* *Silva-Trevino v. Holder*, 742 F.3d 197, 200 (5th Cir. 2014) (holding judges may consider only "the inherent nature of the crime, as defined in the statute"). Following the *Silva-Trevino* decision, courts are required to conduct an element analysis when considering if a crime in a state court constitute a conviction for immigration purposes. *Id.*

⁴¹ See *Cole*, 712 F.3d at 527 (quoting *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1133 (11th Cir. 2010)) (discussing authority of intermediate courts).

⁴² See *id.* The *Leocal* court reviewed a decision holding that FLA. STAT. § 316.193(3)(c)(2), which criminalized driving under the influence of alcohol and causing serious bodily injury, was not a crime of violence under 18 U.S.C § 16, specifically because it lacked a *mens rea* element. *Leocal*, 543 U.S. at 3-4. On its face, S.C. Code § 16-23-410 seems to lack the *mens rea* requirement, because the statute only states, "it is unlawful for a person to present or point at another person a loaded or unloaded firearm." *Cole*, 712 F.3d at 528. However, the South Carolina Court of Appeals clarified the definition of "presenting" to mean "showing or displaying a firearm in a threatening or menacing manner," which requires an intentional *mens rea*. *Id.*; see also *In re Spencer*, 387 S.C. 517, 692 (S.C. Ct. App. 2010) ("[T]he State must offer direct or circumstantial evidence that a person specifically intended to present a firearm at someone before a conviction

er, the problem is that in an immigration context, once the court determines that Cole's state conviction is a violent crime, he inevitably becomes an aggravated felon.⁴³ Legally, the court correctly affirmed the BIA's determinations, however for policy reasons, this court failed to fully appreciate the consequences of its decision.⁴⁴ The *Cole* court failed to take initiative

may be sustained."). The *Cole* court argues that since the South Carolina Supreme Court has upheld this definition of "presenting" in subsequent cases, the court is bound by the interpretation. *Cole*, 712 F.3d at 528.

⁴³ See *supra* note 2 and accompanying text (discussing immigration ramifications of conviction as aggravated felon). The court dismisses Cole's argument that on its face, S.C. Code § 16-23-410 criminalizes pointing even with an unloaded firearm, because the court concludes "being unloaded does not render a firearm non-threatening." *Cole*, 712 F.3d at 529; see generally Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 245, 248 (2004) (arguing need for aliens to receive due process protection following expanded definition of aggravated felony).

⁴⁴ See *Cole*, 712 F.3d at 529. ("There are three significant consequences to this determination. First, pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) and the definition of aggravated felony in § 1101(a)(43)(F), the BIA correctly determined that Cole was a removable alien..."). As such, Cole was unable to apply for withholding of removal or asylum because asylum is not available to aliens convicted of particularly serious crimes. See 8 U.S.C. § 1158(b)(2)(A)(ii) (2009) (reasoning aliens convicted of particularly serious crimes pose danger to United States community); *Cole*, 712 F.3d at 529 (recognizing Cole's conviction bars him from seeking asylum). A "particularly serious crime" is synonymous with conviction of an aggravated felony. See *Cole*, 712 F.3d at 530. This court failed to consider the policy reasons discussed in *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) or subsequent cases where courts discuss the realities of deportation. Cf. Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 115-119 (1999) (arguing deportation is punishment rather than mere civil remedy); See also Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1890-91 (2000) (discussing practical effects of deportation). There have been many arguments regarding the Eighth Amendment violations caused by punishing juveniles like adults. See *Diatchenko v. Dist. Att'y*, 1 N.E.3d 270, 276-278 (Mass. 2013) (discussing inherent differences between juvenile and adult offenders). The *Diatchenko* court considered the precedent and reasoning established by the *Miller* court, concluding, "[s]imply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved." *Diatchenko*, 1 N.E. 3d at 284.; see *Miller v. Alabama*, 132 S.Ct. 2455, 2465 (2012) (recognizing children are constitutionally different from adults for sentencing purposes). The Supreme Court has consistently held that deportation is a civil, non-punitive punishment, rather than a criminal sanction. See Anita Ortiz Maddali, *Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1, 5-6 (2011) (arguing deportation of convicted aliens constitutes punishment, notwithstanding Supreme Court's assertions to the contrary). But see *Padilla v. Kentucky*, 559 U.S. 356, 365-66 (2010) (recognizing removal proceedings, while civil in nature, are intimately related to criminal process). In *Padilla*, the Court reasoned that the Sixth Amendment's right to effective assistance of counsel is especially critical for aliens in criminal proceedings, when a guilty verdict could ultimately impact their immigration status. See *id.* at 373-74 (emphasizing risk of deportation places heightened importance on Sixth Amendment protections). Despite the progress made for non-citizens due to the *Padilla* decision, juvenile offenders continue to face the grave consequence of deportation by violating state laws. See Beth Caldwell, *Banished for Life: Deportation of Juve-*

from *Padilla* and instead followed a traditional strict statutory interpretation analysis.⁴⁵ One of the major components of Cole's case that the court does not discuss is whether he was adequately informed of the legal ramifications of pleading guilty pursuant to the SCYOA.⁴⁶

The issue before the Court of Appeals for the 11th Circuit was whether an alien's conviction for pointing a firearm at another individual was a "conviction" for immigration purposes, and if so, if it constituted an aggravated felony. The court held that the defendant's conviction satisfied the requirements of "conviction" for immigration purposes, as a judge of the Court of General Sessions accepted his guilty plea and sentenced him to serve an indeterminate sentence of up to five years. Following an established categorical approach, the court held that the defendant's conviction for pointing a firearm at another individual constituted an aggravated felony because of the incorporated *mens rea* element. Since the defendant was a permanent resident who was convicted of an aggravated felony within five years of receiving his permanent resident status, he was determined removable or deportable by this court. The Court of Appeals should have conducted a balancing test to weigh the public policy options of deporting an individual who was convicted on account of a state youth offender statute with the possibility of expungement.

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nile Offenders as Cruel and Unusual Punishment, 34 CARDOZO L. REV. 2261, 2264 (2013) ("[D]eportation is a punishment under the law, and the mandatory deportation of those deported due to a juvenile conviction violates the Eight Amendment's prohibition against cruel and unusual punishment.").

⁴⁵ See also Stephen H. Legomsky, *The New Path of Immigration law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007) (discussing nature of criminal law within context of immigration law).

⁴⁶ See *id.* at 487. This decision follows a line of cases illustrating the lack of arguments available to defendants facing deportation after being deemed aggravated felons. *Id.* at 471. It is unclear from the decision whether Cole raised an argument as to ineffective counsel. See Maryellen Meymarian, *Providing Immigration Advice During Criminal Proceedings: Preempting Ineffective Assistance of Counsel Claims When Non-Citizen Aliens Seek to Withdraw Guilty Pleas to Avoid Adverse Immigration Consequences*, 39 AM. J. CRIM. 53, 55 (2011) (discussing difficulties of providing adequate legal counsel during criminal proceedings). However, failure to provide competent and accurate advice concerning potential deportation consequences constitutes a Sixth Amendment violation. See *id.* Although the court in *Padilla* pointed out that the decision primarily affected defense counsel, specifically when immigration consequences are "succinct, clear, and explicit," the court further discussed the burden on prosecutors and judges in such proceedings. *Id.* at 55 (quoting *Padilla*, 559 U.S. at 368). "Prosecutors and judges must preserve limited judicial resources and affirmatively seek to prevent future ineffective assistance of counsel claims." *Id.* There have been so many ineffective counsel claims from defendants that ICE has prepared a "tool kit for prosecutors" to assist prosecutors in understanding the potential consequences of a criminal conviction in the immigration process. *Id.* at 56; ICE, *Protecting the Homeland: Tool Kit for Prosecutors*, (April 2011), <http://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf>.

