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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-898

Salim El Eid, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed February 21, 2012
Reversed and remanded
Schellhas, Judge
Concurring in part, dissenting in part, Johnson, Chief Judge

Ramsey County District Court
File No. 62-K5-95-2228

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Considered and decided by Schellhas, Presiding Judge; Johnson, Chief Judge; and Toussaint, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the district court's denial of his postconviction petition, arguing that he should be allowed to withdraw his guilty plea due to ineffective assistance of counsel. We reverse and remand.

FACTS

Appellant Salim El Eid was born in Lebanon in 1957. El Eid legally entered the United States with a student visa in 1979, and in approximately 1981, he became a lawful permanent resident.

In 1995, in Minnesota state court, El Eid pleaded guilty to second-degree criminal sexual conduct, admitting that he engaged in unlawful sexual contact with his then-15-year-old daughter. El Eid's plea petition did not state that a guilty plea may result in immigration consequences. The district court accepted El Eid's guilty plea, stayed imposition of sentence, and placed El Eid on probation.

In August 2010, with permission from his probation officer, El Eid left the United States to visit his mother in Lebanon. On September 1, the district court discharged him from probation, reducing his felony conviction to a misdemeanor by law. But, when El Eid returned to Minnesota from Lebanon, U.S. Customs officials advised him that he was ineligible to re-enter the United States because of his felony conviction. El Eid then filed a petition for postconviction relief, requesting that the district court set aside his conviction on the ground that he received ineffective assistance of counsel under *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). He submitted an affidavit with his petition, stating

that none of his attorneys had advised him that pleading guilty may have immigration consequences, and that he would not have pleaded guilty if his attorneys had so advised him.

Concluding that *Padilla* announced a new rule of criminal procedure, the district court denied El Eid's postconviction petition without a hearing. The court did not address whether the new rule in *Padilla* is a watershed rule of criminal procedure that should be retroactive because "Petitioner bases this argument on an article and the author's opinion that this was a watershed rule; Petitioner did not base the argument on any case law." The district court concluded that "[b]ecause the Petitioner was unable to establish that the rule in *Padilla* applied retroactively to [his] case, the Petition for Post-Conviction Relief is untimely."

This appeal follows.

D E C I S I O N

El Eid challenges the district court's dismissal of his postconviction petition without a hearing. Postconviction courts must set an evidentiary hearing on a petition unless "the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2010). A hearing "is not required unless facts are alleged which, if proved, would entitle a petitioner to the requested relief." *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990). This court reviews the district court's denial of a postconviction petition without a hearing for an abuse of discretion. *Chambers v. State*, 769 N.W.2d 762, 764 (Minn. 2009).

Time Limit for Filing Postconviction Petitions

Untimeliness of Postconviction Petition

Because the district court sentenced El Eid on November 8, 1995, and El Eid did not appeal, his conviction became final before August 1, 2005. *See* Minn. R. Crim. P. 28.02, subds. 2(1), 4(3)(a) (stating that an appeal of a final judgment in felony cases "must be filed within 90 days after final judgment," which occurs "when the district court enters a judgment of conviction and imposes . . . a sentence"); Minn. R. Crim. P. 28.05, subd. 1(1) (stating that party appealing sentence must file an appeal "within 90 days after judgment and sentencing"); *State v. Hughes*, 758 N.W.2d 577, 580 (Minn. 2008) ("[I]f a defendant does not file a direct appeal, his conviction is 'final' for retroactivity purposes when the time to file a direct appeal has expired.").

Because El Eid's conviction was final before August 1, 2005, his deadline for filing a postconviction petition was July 31, 2007. *Moua v. State*, 778 N.W.2d 286, 288 (Minn. 2010). El Eid did not file his postconviction petition until November 15, 2010. The district court determined that El Eid's petition was untimely. We agree. El Eid's petition therefore must be dismissed as untimely unless an exception applies under Minn. Stat. § 590.01, subd. 4(b) (2010). *See Roby v. State*, 787 N.W.2d 186, 191 (Minn. 2010) (holding that "[t]he Legislature specifically provided the postconviction court with the discretion to hear a petition filed more than two years after the disposition of the direct appeal" if any of the exceptions in Minn. Stat. § 590.01, subd. 4(b), are met).

Time-Bar Exceptions

A postconviction petition "must invoke an exception." *Rickert v. State*, 795 N.W.2d 236, 241 (Minn. 2011). But "a petition for postconviction relief does not need to include specific citation to a subdivision 4(b) exception to invoke it." *Roby*, 787 N.W.2d at 191. "Rather, the postconviction statutes require a court to look at the 'statement of the facts and the grounds upon which the petition is based,' Minn. Stat. § 590.02, subd. 1(1), 'waiv[ing] any irregularities or defects in form' and 'liberally constru[ing]' the petition to ascertain whether the petition raises an exception, Minn. Stat. § 590.03." *Id.* (alteration in original).

One exception allows a court to hear an untimely petition if "the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice." Minn. Stat. § 590.01, subd. 4(b)(5). A petition is frivolous if it is perfectly apparent, without argument, that the petition is without merit. *Gassler v. State*, 787 N.W.2d 575, 586 (Minn. 2010). A court will hear a petition in the interests of justice only in exceptional situations. *Id.* The court should consider a nonexclusive list of factors for determining whether the petition is "in the interests of justice," including (1) "the degree to which the party alleging error is at fault for that error"; (2) "the degree of fault assigned to the party defending the alleged error"; (3) "whether some fundamental unfairness to the defendant needs to be addressed"; and (4) the need for protecting the "integrity of judicial proceedings." *Id.* at 586–87.

El Eid's postconviction petition is based on the United States Supreme Court's decision in *Padilla*. The petitioner in *Padilla* was a Honduras native and "a lawful

permanent resident of the United States for more than 40 years." *Padilla*, 130 S. Ct. at 1477. The petitioner pleaded guilty to a controlled-substance crime that is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i) (2006). *Id.* He subsequently filed a postconviction petition, claiming that "his counsel not only failed to advise him of [the deportation] consequence prior to his entering the plea," but also told him not to worry about his immigration status because "'he had been in the country so long.'" *Id.* at 1478. The petitioner alleged that "he would have insisted on going to trial if he had not received incorrect advice from his attorney." *Id.*

Citing the two-prong ineffective-assistance-of-counsel test enumerated in *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068 (1984), the Supreme Court held that to be constitutionally effective, defense counsel "must inform her client whether his plea carries a risk of deportation." *Id.* at 1482, 1486. Because the immigration statute in *Padilla* was "succinct, clear, and explicit in defining the removal consequence," the Supreme Court stated that "counsel could have easily determined that [the petitioner's] plea would make him eligible for deportation." *Id.* at 1483. "Instead, [the petitioner's] counsel provided him false assurance that his conviction would not result in his removal from this country." *Id.* The Supreme Court therefore held that the petitioner "sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*," i.e. that the representation fell below an objective standard of reasonableness, and reversed and remanded for a determination of whether the petitioner could show prejudice. *Id.* at 1483, 1487.

Here, El Eid stated in his postconviction petition that he is a lawful permanent resident, he pleaded guilty to second-degree criminal sexual conduct in 1995, defense counsel failed to advise him of the immigration consequences of pleading guilty, he was denied re-entry into the United States in September 2010 based on his felony conviction, and he would not have pleaded guilty if he had been advised of the immigration consequences of his plea. El Eid asserted that he received ineffective assistance of counsel under *Padilla* and requested that his conviction "be set aside." In his memorandum in support of his postconviction petition, El Eid stated that "[t]he relief requested in the petition is . . . *mandated* by the plain language of the Postconviction Relief statute, bedrock axiomatic and fundamental rights guaranteed by the United States and Minnesota State constitutions, and the interests of justice and fairness to which all criminal defendants are entitled."

Waiving any irregularities or defects in form and liberally construing the postconviction petition, we conclude that the statement of the facts in El Eid's postconviction petition and the grounds upon which the petition is based invoke the interests-of-justice exception. Furthermore, the petition is not frivolous because, under *Padilla*, El Eid presented "a good-faith basis for the claim made in the petition." *See Rickert*, 795 N.W.2d at 241. And consideration of El Eid's petition is in the interests of justice because, through no fault of his own, his counsel failed to inform him that pleading guilty may have immigration consequences; he alleges that he would not have pleaded guilty had he known of the potential immigration consequences; he has been excluded from the United States because of his prior felony conviction; and *Padilla*—

which "effectively overruled" prior Minnesota caselaw stating that deportation is a collateral consequence of a conviction arising from a guilty plea, and defense counsel therefore is under no obligation to advise a criminal defendant of the possibility of deportation—applies retroactively to him. *See Campos v. State*, 798 N.W.2d 565, 568–71 (Minn. App. 2011), *review granted* (Minn. July 19, 2011). Because El Eid established that the petition is not frivolous and hearing it is in the interests of justice, his untimely petition may be heard provided that he filed the petition within two years of the date the claim arose.

Two-Year Time Limit from the Date the Claim Arises

Even if an exception applies, the petition "must be filed within two years of the date the claim arises." Minn. Stat. § 590.01, subd. 4(c) (2010). "'Claim' refers to an event that supports a right to relief under the asserted exception." *Bee Yang v. State*, 805 N.W.2d 921, 925 (Minn. App. 2011), *review granted* (Minn. Jan. 17, 2012). "[A] claim under subdivision 4(b)(5) arises on the date of an event that establishes a right to relief in the interests of justice." *Id.*

El Eid claims that he received ineffective assistance of counsel. To prevail on an ineffective-assistance-of-counsel claim, a defendant "must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, *and* (2) a reasonable probability exists that, but for his counsel's unprofessional error, the outcome would have been different." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (emphasis added) (citing *Strickland*, 466 U.S. at 687–88, 104 S. Ct. at 2064–65).

El Eid alleged in his postconviction petition that counsel's performance fell below an objective standard of reasonableness in 1995 because counsel failed "to advise [him] of the immigration consequences of a guilty plea"; that he was prejudiced by counsel's deficient performance in September 2010, when he was denied re-entry into the United States; and that he would not have pleaded guilty "and would have insisted upon going to trial" if he had been informed of the potential immigration consequences. Within the two years preceding El Eid's petition, the United States Supreme Court released its opinion in *Padilla*; this court released its opinion in *Campos*, stating that *Padilla* effectively overrules prior Minnesota caselaw and *Padilla* retroactively applies; and El Eid was excluded from this country. We conclude that El Eid filed his postconviction petition within two years of the date of an event that establishes a right to relief in the interests of justice. *Cf. State v. Byron*, 683 N.W.2d 317, 322 (Minn. App. 2004) (pre-statute-of-limitations case holding postconviction petition timely because petitioner "moved forward with his motion shortly after serious immigration consequences arose as a result of his guilty plea"), *review denied* (Minn. Sept. 29, 2004).

In sum, El Eid's petition was untimely, he invoked an exception to the statute of limitations, established that his petition is not frivolous and in the interests of justice, and filed his petition within two years of the date of an event establishing a right to relief in the interests of justice. Therefore, El Eid's petition may be heard.

Ineffective Assistance of Counsel

El Eid claims that he received ineffective assistance of counsel under *Padilla* when defense counsel failed to advise him of the immigration consequences of pleading

guilty. To support his claim, El Eid argued that *Padilla* applies retroactively to him because it did not announce a new rule of criminal procedure. *See Teague v. Lane*, 489 U.S. 288, 310–11, 109 S. Ct. 1060, 1075–76 (1989) (concluding that new rule of criminal procedure is not retroactive unless rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or is a "watershed rule[] of criminal procedure" that is "central to an accurate determination of innocence or guilt" (quotations omitted)); *see also Danforth v. State*, 761 N.W.2d 493, 500 (Minn. 2009) (adopting *Teague*). Alternatively, El Eid argued that if *Padilla* announced a new rule, it still applies retroactively because it is a "watershed rule of criminal procedure." *See Danforth*, 761 N.W.2d at 496.

The district court concluded that *Padilla* announced a new rule of criminal procedure because *Padilla* "expressly overrule[d]" Minnesota Supreme Court precedent, which holds that deportation is a collateral consequence of a conviction arising from a guilty plea, and defense counsel therefore is under no obligation to advise a criminal defendant of the possibility of deportation. *See Alanis v. State*, 583 N.W.2d 573, 579 (Minn. 1998), *overruling recognized by Campos*, 798 N.W.2d at 568. And a new rule generally does not retroactively apply to a defendant's case once the defendant's case has become final. *Danforth*, 761 N.W.2d at 496. A new rule of criminal procedure is retroactive in cases that have become final only in two circumstances: "(1) when the rule places certain specific conduct beyond the power of the criminal law-making authority to proscribe, or (2) when the rule is a 'watershed' rule of criminal procedure, and is a rule without which the likelihood of an accurate conviction would be seriously diminished."

Id. Although El Eid argued that if *Padilla* announced a new rule, it is a watershed rule of criminal procedure, the district court did not address the argument because El Eid "base[d] this argument on an article and the author's opinion that this was a watershed rule; [El Eid] did not base the argument on any case law." The district court held that El Eid failed to establish that *Padilla* applied retroactively to him, and the postconviction petition therefore was untimely.

After the district court's decision in this case, this court determined that *Padilla* did not announce a new rule, and that it therefore applied retroactively to other postconviction petitioners because *Padilla* "merely applied the long-standing principles regarding ineffective assistance of counsel enunciated in *Strickland* to specific facts." *Campos*, 798 N.W.2d at 568–69. We therefore reverse and remand to the district court for reconsideration in light of *Campos*.

The state argues that the allegations in El Eid's petition are insufficient to establish an ineffective-assistance-of-counsel claim because El Eid failed to offer evidence of the standard of reasonable attorney performance when he pleaded guilty in 1995. But this court held in *Campos* that *Padilla* did not announce a new rule, and that it therefore applied retroactively to other postconviction petitioners. 798 N.W.2d at 568–69. Because *Padilla* is not a new rule and merely an application of existing precedent, the standard of reasonable attorney performance at the time El Eid pleaded guilty was the *Padilla* standard. Consequently, El Eid's affidavit, stating that he was not advised by his attorney that his guilty plea may have immigration consequences, is sufficient to support his claim that counsel's performance fell below an objective standard of reasonableness. The state

also argues that El Eid failed to cite the applicable immigration law in effect in 1995. But a petition should not contain argument or citation to authorities. Minn. Stat. § 590.02, subd. 1(1) (2010).

Reversed and remanded.

JOHNSON, Chief Judge (concurring in part and dissenting in part)

I concur in the opinion of the court except insofar as it concludes that El Eid has satisfied the requirements of pleading a postconviction claim such that the district court is required to hold an evidentiary hearing. Therefore, I concur in part and dissent in part.

A postconviction petition must contain "a statement of the facts and the grounds upon which the petition is based." Minn. Stat. § 590.02, subd. 1(1) (2010). The "[a]llegations in a postconviction petition must be more than argumentative assertions without factual support." *Sanchez-Diaz v. State*, 758 N.W.2d 843, 846 (Minn. 2008). A postconviction petitioner alleging ineffective assistance of counsel "*must allege facts that demonstrate* (1) that his trial counsel's performance fell below an objective standard of reasonableness . . . and (2) that there is a reasonable probability that, but for counsel's errors, the result of the . . . trial would have been different." *Patterson v. State*, 670 N.W.2d 439, 442 (Minn. 2003) (emphasis added) (citing *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984))). An evidentiary hearing is unnecessary if the petitioner fails to allege facts that, if proved, would entitle him to relief. *Erickson v. State*, 725 N.W.2d 532, 537 (Minn. 2007). In addition, an evidentiary hearing may be denied if the petitioner does not submit an offer of proof to support the allegations in the petition. *Id*. This court applies an abuse-of-discretion standard of review to a district court's decision to deny a postconviction petition without an evidentiary hearing. *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002).

In *Padilla*, the petitioner pleaded guilty to a drug offense in 2002. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1477 (2010); *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008). Less than two years later, he petitioned for postconviction relief, alleging that his former counsel did not advise him of the immigration consequences of his guilty plea and, in fact, misadvised him that he "did not have to worry about immigration status since he had been in the country so long." 130 S. Ct. at 1478 (quotations omitted); *see also* 253 S.W.3d at 483. The Court reasoned that, because a federal immigration statute that makes "virtually every drug offense" a "deportable offense," 130 S. Ct. at 1477 n.1 (citing 8 U.S.C. § 1227(a)(2)(B)(i)), "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequences for Padilla's conviction," *id.* at 1483. The Court concluded, "This is not a hard case in which to find deficiency" because the consequences of Padilla's plea "could easily be determined" and "counsel's advice was incorrect." *Id.* The Court also commented that, if "the deportation consequences of a particular plea are unclear or uncertain . . . 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." *Id.*

In this case, El Eid pleaded guilty to second-degree criminal sexual conduct in 1995. The *Padilla* opinion does not discuss the immigration consequences of a conviction of criminal sexual conduct. El Eid's postconviction petition does not allege that federal immigration law in 1995 was "succinct, clear, and explicit in defining the removal consequences" of a conviction of criminal sexual conduct so as to impose a duty on counsel to inform El Eid of those consequences. *See id.* El Eid's postconviction

petition also does not allege that federal immigration law in 1995 was "unclear or uncertain" so as to impose on counsel a more general duty to "advise [El Eid] that pending criminal charges may carry a risk of adverse immigration consequences." *See id.* By its silence, El Eid's petition leaves open the possibility that pleading guilty to second-degree criminal sexual conduct in 1995 did not give rise to any immigration consequences, or that any potential immigration consequences known to exist were so unlikely that his plea counsel had no duty to give him advice on that subject. In addition, El Eid did not offer any evidence of the objective standard of reasonableness that applied to his plea counsel in 1995. *See Bruestle v. State*, 719 N.W.2d 698, 705 (Minn. 2006) (affirming denial of postconviction petition without evidentiary hearing because petitioner "presented no evidence," such as "affidavits from unaffiliated defense attorney experts to the effect that counsel's representation . . . fell below an objective standard of reasonableness"); *cf. Jerry's Enterprises, Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 820 (Minn. 2006) (stating that plaintiff in legal malpractice case must prove standard of care and breach of standard of care). Thus, El Eid has failed to demonstrate that he is entitled to postconviction relief or even an evidentiary hearing.[1]

[1]The court's conclusion in this case is inconsistent with our conclusion in *Edwards v. State*, No. A11-71, 2011 WL 3557853 (Minn. App. Aug. 15, 2011), *review granted and stayed* (Minn. Nov. 22, 2011), in which we affirmed the denial of postconviction relief on a *Padilla*-style claim, without an evidentiary hearing, because the petitioner "did not explain to the postconviction court what the immigration law provided in 1997, . . . did not show that the advice of his counsel was incorrect in 1997, [and] did not offer affidavit testimony of another attorney who could testify that his counsel's performance was deficient in 1997." *Id.* at *3. Because *Edwards* is an unpublished opinion, however, it is not binding precedent. *See* Minn. Stat. § 480A.08, subd. 3(c) (2010); *Vlahos v. R & I Constr., Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004).

The ultimate resolution of El Eid's postconviction claim presumably will require the district court to determine whether the performance of El Eid's plea counsel satisfied an objective standard of reasonableness.[2] That determination will be based, in significant part, on federal immigration law as it existed in 1995. Certain questions inevitably arise, such as whether El Eid's exclusion from the United States in 2010 was foretold by federal immigration law as it existed in 1995 or was brought about by provisions of federal immigration law that were enacted after 1995. Yet counsel did not offer any guidance to the district court on federal immigration law as it existed in 1995 or on the standard of care applicable to an attorney representing non-citizens charged with criminal sexual conduct in 1995. Counsel should not expect the district court, or this court, to undertake an independent inquiry into these matters. In the post-*Padilla* era, counsel must gain an understanding of the applicable federal immigration law and must communicate that understanding to the courts to allow for fully informed judicial decisions.[3]

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[2]A district court, however, may resolve an ineffectiveness claim by analyzing only one part of the two-part *Strickland* test, if the petitioner's claim fails on that part. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006). The *Padilla* Court noted that, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." 130 S. Ct. at 1485 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486, 120 S. Ct. 1029, 1036, 1039-40 (2000)); *see also Hill v. Lockhart*, 474 U.S. 52, 58-60, 106 S. Ct. 366, 370-71 (1985).

[3]A brief review of federal law indicates that, in 1995, a non-citizen convicted of criminal sexual conduct could have been deemed deportable or excludable, unless an administrative waiver was granted. At that time, a federal statute provided that, in certain circumstances, an alien was deemed "deportable" following a conviction of a crime involving moral turpitude. 8 U.S.C. § 1251(a)(2)(A)(i) (1994); *see also* 8 U.S.C.

A postconviction petitioner is not required to withhold allegations supporting a *Padilla*-style claim because of the statutory prohibition on "argument or citation of authorities" in a postconviction petition. *See* Minn. Stat. § 590.02, subd. 1(1) (2010). A petitioner may satisfy the minimum pleading requirements without making argument or citing legal authorities. In *Roby v. State*, 787 N.W.2d 186 (Minn. 2010), the supreme court held that a postconviction petitioner must affirmatively plead facts that invoke a statutory exception to the two-year statute of limitations governing postconviction claims, despite the statutory prohibition on argument or citation of legal authorities. *Id.* at 190-91. Likewise, a postconviction petitioner may plead factual statements describing the

§ 1182(a) (1994) (addressing excludability). But another federal statute gave the Attorney General discretion to grant a waiver of deportability or excludability. *See* 8 U.S.C. § 1182(c) (1994) (commonly referred to as Immigration and Nationality Act § 212(c)); *I.N.S. v. St. Cyr*, 533 U.S. 289, 295, 121 S. Ct. 2271, 2276 (2001). We know from *Padilla* that "Congress . . . eliminated the Attorney General's authority to grant discretionary relief from deportation" in 1996. 130 S. Ct. at 1480 (citing 110 Stat. 3009-596). But caselaw suggests that El Eid still may benefit from the pre-1996 statutory scheme. *See St. Cyr*, 533 U.S. at 326, 121 S. Ct. at 2293 (holding "that § 212(c) relief remains available for aliens . . . whose convictions were obtained through plea agreements and who . . . would have been eligible for § 212(c) relief at the time of their plea under the law then in effect"); *Lovan v. Holder*, 574 F.3d 990, 993-98 (8th Cir. 2009) (granting petition for review and remanding to agency for consideration of waiver request filed by Laotian citizen convicted of sexual abuse of minor in Arkansas state court in 1991 and ordered removed from United States in 2002). Legal authorities such as these provide a framework for determining the standard of care applicable to El Eid's plea counsel in 1995. The standard of care also depends on how the federal immigration agency interpreted and applied the immigration laws in effect in 1995, which would have determined the probability that a person convicted of criminal sexual conduct actually would be deported or excluded. *See, e.g.*, *Maashio v. I.N.S.*, 45 F.3d 1235, 1237 (8th Cir. 1995) (upholding immigration judge's denial of waiver of deportability filed by Ethiopian citizen convicted of third-degree criminal sexual conduct in Minnesota state court and placed on probation); *Hajiani-Niroumand v. I.N.S.*, 26 F.3d 832 (8th Cir. 1994) (describing agency's multi-factor balancing tests); *see also St. Cyr*, 533 U.S. at 295-96, 121 S. Ct. at 2277 (noting that "substantial percentage" of § 212(c) waivers have been granted).

standard of care applicable to former counsel or the actions that former counsel should have taken or should not have taken.

In any event, postconviction counsel should understand that the prospects for success on a *Padilla*-style claim likely are enhanced by submitting a memorandum of law with the postconviction petition, even if a memorandum is not required. Commentators have noted that legal citations in support of a postconviction claim are "helpful, if not essential," and that "a memorandum external to the petition . . . is advisable in appropriate cases." 9 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice—Criminal Law & Procedure* § 39.6A, at 319 (3d ed. 2001). Furthermore, it may be necessary for postconviction counsel to file affidavits to support the allegations in a postconviction petition. The postconviction statute expressly permits a district court to receive evidence in the form of an affidavit. *See* Minn. Stat. § 590.04, subd. 3 (2010). A postconviction petition may be dismissed without an evidentiary hearing if an offer of proof does not accompany the petition. *Erickson*, 725 N.W.2d at 537; *Bruestle*, 719 N.W.2d at 705.

For these reasons, I would remand the case in a manner that allows the district court, in the first instance, to determine whether El Eid is entitled to an evidentiary hearing on his claim of ineffective assistance of counsel.