Rights Without Remedies: How the Illinois Post-Conviction Hearing Act’s Standing Requirement Has Failed Defendants

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Rights Without Remedies: How the Illinois Post-Conviction Hearing Act’s Standing Requirement Has Failed Defendants

NATE NIEMAN*

The Illinois Post-Conviction Act is a procedural mechanism that allows a criminal defendant to assert that his federal or state constitutional rights were substantially violated during trial or at sentencing. The passage of the Act expanded a defendant’s ability to challenge his conviction and sentences collaterally, where before the Act, he had only been able to raise these challenges on direct appeal. However, the Act’s strict standing requirement precludes defendants from relief once they have completed their sentence, ignoring the fact that many important, life-altering civil consequences resulting from criminal convictions occur after a sentence has concluded.

This Article argues that the Act’s standing requirement inadequately contemplates later collateral consequences flowing from a defendant’s conviction that are just as—if not more—important to a defendant than the conviction that triggered the collateral consequences in the first place. These collateral consequences place a defendant’s liberty in jeopardy, yet many defendants currently are unable to use the Act to challenge the convictions that triggered these collateral consequences. I argue that the Act’s standing requirement could be modified to conform with twenty-first-century law in two ways: Illinois courts could dispense with the current “imprisoned”/not “imprisoned” dichotomy and instead focus on whether a petitioner is suffering an “important” consequence of his conviction; or the Act could be amended. This would give defendants a meaningful avenue to seek relief and provide a needed update to the current state of the law in Illinois—which, as of now, is effectively giving criminal defendants a right without a remedy.

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I. INTRODUCTION

Criminal defense lawyers are no longer in the business of trying cases. Recent statistics show that they are in the business of negotiating plea agreements instead of winning over juries. It is therefore no surprise that recent major developments in criminal law jurisprudence reflect the practice’s shift from trying cases to settling them through plea negotiations. As more criminal defendants enter into plea agreements with the State, watershed decisions like Padilla v. Kentucky, Lafler v. Cooper, and Missouri v. Frye have become increasingly important to criminal practice.

What has largely been ignored in the wake of these important constitutional decisions is a defendant’s ability to actually raise these types of new claims in Illinois trial courts through collateral attack mechanisms like Illinois’ Post-Conviction Hearing Act (the Act). While case law impacting the plea negotiation process has been changing quickly, the legal mechanisms available to defendants to collaterally attack their convictions on constitutional grounds have largely remained the same since the inception of the Act in 1949. The result is that the anachronistic procedural hurdles of the Act—namely, its “standing” requirement—have prevented Illinois defendants from raising newly created claims affecting their guilty pleas, even as case law concerning the Act has itself proliferated. Thus, while much has developed in the area of post-conviction law over the past sixty-five years, antiquated procedural hurdles contained within the Act are now leaving Illinois

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1. Missouri v. Frye, 566 U.S. 134, 143 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”); see also Lafler v. Cooper, 566 U.S. 156, 170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”).
2. Padilla v. Kentucky, 559 U.S. 356 (2010), marks the beginning of this shift, as the ineffective assistance of counsel standard announced in Strickland v. Washington, 466 U.S. 668 (1984), had not been applied to plea negotiations in a major Supreme Court case since Hill v. Lockhart, 474 U.S. 52 (1985), which was decided twenty-five years before Padilla. However, the Supreme Court has now examined Strickland in the plea context several times since Padilla was decided. See generally Chaidez v. United States, 568 U.S. 342 (2013); Lee v. United States, 137 S. Ct. 1958 (2017); Frye, 566 U.S. 134; Lafler v. Cooper, 566 U.S. 156 (2012); Premo v. Moore, 562 U.S. 115 (2011).
6. 725 ILL COMP. STAT. ANN. 5/122-1 to 122-7 (West 2023).
7. See infra Section III.B.
8. See People v. Jones, 2012 IL App (1st) 093180, ¶ 6, 969 N.E.2d 482, 487 (“While the entire Act consists of only 1 1/2 pages of text in the statute books, litigation stemming from the Act has resulted in an incredible number of court decisions since being enacted in 1951.”); see also infra Section III.A.5.
This Article first explains the Act’s procedural requirements and their exceptions. It then turns to recent Supreme Court decisions that have developed the law pertaining to plea agreements and discusses how these decisions have been applied in Illinois. Next, specific Illinois cases are examined to demonstrate how criminal defendants have been unable to exercise new substantive rights due to the standing requirement of the Act. This Article concludes with suggested changes that the courts and the legislature could make to the Act’s standing requirement to allow defendants to collaterally attack their convictions based on new rights arising out of recent Supreme Court and Illinois case law.

II. BACKGROUND

This Section discusses the Illinois Post-Conviction Hearing Act, focusing specifically on its procedural, standing, and timeliness requirements. It then turns to the ground-breaking 2010 United States Supreme Court Padilla v. Kentucky decision, as well as two significant Illinois cases—People v. Hughes and People v. Dodds—all of which add new substantive rules regarding the advice of counsel.

A. THE POST-CONVICTION HEARING ACT

The Illinois Post-Conviction Hearing Act10 was passed into law in 1949.11 It created “a procedural mechanism through which a criminal defendant can assert that his or her federal or state constitutional rights were substantially violated in his or her original trial or sentencing hearing.”12 The Act’s passage expanded a defendant’s ability to challenge his conviction and sentences collaterally,13 where he had only been able to challenge these on...
direct appeal before the passage of the Act. The Act is not designed to replace direct appellate review, but is instead intended to complement direct appellate review by allowing defendants to raise constitutional issues that could not be considered by the appellate court on direct appeal.

I. The Act’s Procedural Requirements

A defendant initiates a collateral attack on his conviction or sentence under the Act by filing a petition in the trial court in which he was convicted and sentenced. A defendant can file a petition pro se or with the assistance of counsel. Once filed, the petition is considered by the trial court and either dismissed sua sponte or advanced to a second stage, where the State may answer the petition or file a motion to dismiss. If the State files a motion to dismiss, the defendant is required to “make a substantial showing that his constitutional rights have been violated, taking all well-pled facts as true.” If the petition survives second-stage proceedings, then it advances to a third and final stage, which involves a full consideration of the merits of the petitioner’s claims following an evidentiary hearing. If the petitioner is able to prove that a constitutional violation occurred, then he is eligible to receive a new trial, a new sentence, or both.

However, before the trial court can consider the substantive constitutional claims alleged by the petitioner, the trial court must first determine whether the petitioner has standing to file the petition under the Act and

Although the overturning of the judgment or decree may be important, or even necessary, to the success of the action or proceeding, an attack on a judgment or decree is collateral where that action or proceeding has an independent purpose and contemplates some other relief or result.


14. Davis, 2014 IL 115595, ¶ 13, 6 N.E.3d at 716 (quoting People v. Towns, 696 N.E.2d 1128, 1133–34 (Ill. 1998)) (“The purpose of the post-conviction proceeding is to allow inquiry into constitutional issues involved in the original conviction and sentence that have not been, and could not have been, adjudicated previously on direct appeal.”).

15. People v. Harris, 862 N.E.2d 960, 969 (Ill. 2007) (“[A] postconviction proceeding is not a substitute for a direct appeal, nor is it a second direct appeal. Rather, it is a vehicle for asserting constitutional claims that could not be raised on direct appeal.” (citing People v. Rissley, 795 N.E.2d 174, 178 (Ill. 2003); People v. Derengowski, 256 N.E.2d 455, 457–58 (Ill. 1970))).


whether the petition is timely filed according to the Act’s strict timeliness requirements.  

A petitioner who lacks standing under the Act, or who files his petition beyond the statutory deadline, will not be entitled to relief, regardless of the merit of the substantive claims contained in his or her petition. This Article argues that—in light of the recent developments in Supreme Court and Illinois case law concerning the advice of counsel during the plea phase—the Act’s standing requirement, and to a lesser extent the timeliness requirement, have prevented the Act from fulfilling its original purpose of enabling defendants to collaterally attack constitutionally infirm convictions or sentences.

2. The Act’s Standing Requirement

The Post-Conviction Hearing Act requires that a petitioner have standing in order to file a petition under the Act. Its plain language requires that a petitioner be “imprisoned in the penitentiary” to have standing to file a petition under the Act. The requirement that a petitioner be “imprisoned in the penitentiary” echoes the habeas corpus principles that preceded the creation of the Act. However, it was not long after the Act’s passage that our courts of review recognized that the Act must be “liberally construed . . . to afford a convicted person an opportunity to present questions of deprivation of constitutional rights.” Accordingly, the “imprisoned in the penitentiary” requirement was expanded over time to include defendants on parole in 1976, defendants on probation in 1980, and defendants released on an appeal bond awaiting resentencing in 1986. However, the “imprisoned in the penitentiary” requirement has not been expanded for nearly forty years, despite the emergence of new case law concerning collateral consequences attendant to criminal convictions that have been decided in recent decades.

Currently, the Act’s standing requirement provides no relief for a defendant who has completed his sentence, because courts have held that a
defendant who is not serving a sentence has no liberty interest at stake that could be affected by an unconstitutionally obtained conviction or sentence.\textsuperscript{32} The “imprisoned in the penitentiary” requirement in the above cases from 1976, 1980, and 1986 were expanded only because the petitioners in those cases were still serving some portion of their sentence and their liberty interests were therefore at stake.\textsuperscript{33} For a defendant’s liberty to be at stake, the defendant must be deemed to be “on a string that the State may pull when it pleases.”\textsuperscript{34} In other words, if a defendant is serving some form of sentence that can be revoked by the State, only then his liberty is at stake.\textsuperscript{35}

While there is a certain logic behind the reasoning that a defendant must be presently serving some portion of a sentence in order for his liberty to be at stake, the notion that a defendant’s liberty is at stake only when he or she is serving a portion of his or her sentence is obsolete given the recent developments in case law concerning collateral consequences.\textsuperscript{36} This Article argues that the Act’s standing requirement, which has evolved only slightly since the Act’s passage in 1951, inadequately contemplates later collateral consequences flowing from a defendant’s conviction that are just as—if not more—important to a defendant as the conviction that triggered the collateral consequences in the first place.\textsuperscript{37} These collateral consequences place a defendant’s liberty in jeopardy—yet, defendants currently are unable to use the Act to challenge the convictions that caused these collateral consequences.

deprived of their liberty, not persons who have completely served their sentences and merely wish to purge their criminal records of past convictions.”).\textsuperscript{32}

See, e.g., People v. Pack, 862 N.E.2d 938, 942 (Ill. 2007) (“Through the years, this court has emphasized the importance of a person’s liberty interest in defining the class of convicted persons who qualify as ‘imprisoned’ under section 122-1(a).”). The Pack court looked to a prior Illinois Supreme Court case which determined that the legislature’s use of the phrase “imprisoned in the penitentiary” “no doubt intended . . . to make the remedy available only to persons actually being deprived of their liberty and not to persons who had served their sentences and who might wish to purge their records of past convictions.” People v. Dale, 92 N.E.2d 761, 766 (Ill. 1950), overruled on other grounds by People v. Warr, 298 N.E.2d 164, 167 (1973).\textsuperscript{33}

Henderson, 2011 Ill. App (1st) 090923, ¶ 8, 961 N.E.2d at 413 (“[A] defendant retains standing under the . . . Act so long as he is challenging a conviction for which he continues to serve some form of sentence so that his liberty would be directly affected by invalidating his conviction.”). This is because, “[a]s with incarceration, restraints on a person’s liberty accompanying parole, probation and release on appeal bond are unacceptable when imposed in violation of his constitutional rights.” Id. (citing Martin-Trigona, 489 N.E.2d 1356, 1358 (Ill. 1986)).\textsuperscript{34}

Id. (citing People v. Rajagopal, 885 N.E.2d 1152, 1156 (Ill. App. Ct. 2008)).\textsuperscript{35}

People v. Pack, 862 N.E.2d 938, 943 (Ill. 2007).\textsuperscript{36}


See infra Section III.A.5.
3. **The Act’s Timeliness Requirement**

The Act’s “timeliness” requirement is somewhat more convoluted than its standing counterpart, but it is still relatively straightforward. The basic rule is that a petition is timely filed under the Act if it is filed within three years of conviction where no direct appeal is taken (which is most common, given that the vast majority of criminal cases result in guilty pleas), or six months after the defendant’s direct appeal is terminated. The Act’s statute of limitations is not a jurisdictional bar, but rather an affirmative defense the State can raise, waive, or forfeit.

There are two exceptions to the Act’s timeliness requirement. A petition alleging “actual innocence” is not subject to the Act’s timeliness requirement. Therefore, a petition alleging an actual innocence claim can be filed at any time. A defendant who obtains exonerating DNA evidence years after his conviction becomes final, for instance, would be able to use this exception to the Act’s timeliness requirement to challenge his conviction through post-conviction proceedings. Where a petition asserts claims of both actual innocence and other claims of error, the actual innocence claim will not be subject to the Act’s timeliness requirement, but the other claims will be. Therefore, the actual innocence claim may independently survive a timeliness challenge by the State, while the other claims contained in the petition would be dismissed.

The Act also contains a “safety valve” to its timeliness requirement that allows defendants to raise claims unrelated to actual innocence beyond the time frame generally prescribed by the Act. A defendant can file a petition under the Act if he “alleges facts showing that the delay was not due to his or her culpable negligence.” The Illinois Supreme Court has recognized that the “culpable negligence standard in the Act ‘contemplates something greater than ordinary negligence and is akin to recklessness.’” Courts have not

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39. Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 10 (2012) (“An astonishing 97.4% of federal criminal convictions in 2010 were by guilty plea . . . .” (citations omitted); see also supra note 1 and accompanying text).
40. 725 ILL COMP. STAT. ANN. 5/122-1(c) (West 2023).
43. See, e.g. People v. Ortiz, 896 N.E.2d 791, 797 (Ill. App. Ct. 2008) (“[A] showing of actual innocence will excuse a failure to show cause and prejudice . . . . [F]undamental miscarriages of justice will not be tolerated in favor of finality.”).
45. Ortiz, 896 N.E.2d at 797.
46. People v. Ortiz, 919 N.E.2d 941, 949, 952 (Ill. 2009).
47. 725 ILL COMP. STAT. ANN. 5/122-1(c) (West 2023).
created a bright line rule delineating when a defendant is culpably negligent for his or her late filing, but the Second District has explained that “it stands to reason that a defendant who waits nearly five years beyond the statutory deadline to file a petition has more explaining to do than one who is late by less than a week.”

While the Illinois Supreme Court “has held that the Act must be liberally construed to afford a convicted person an opportunity to present questions of deprivation of constitutional rights,” successfully pleading “lack of culpable negligence” is seldom accomplished by petitioners who have filed untimely petitions. To be sure, petitioners have successfully done so in the past, but just like the “lack of culpable negligence” safety valve itself, it is the exception rather than the rule. Of those petitioners who have successfully pled lack of culpable negligence to circumvent the Act’s timeliness bar, it becomes significantly more difficult to do so once several years have passed since the conviction became final, which is when Padilla-like claims can often arise.

While the timeliness bar must be mentioned in the context of the Act’s procedural requirements, it does not present the same barrier as the Act’s standing requirement because it can be waived or forfeited by the State. Furthermore, the “lack of culpable negligence” safety valve allows petitioners to bring Padilla-like claims well after the time period for filing has expired, so long as those claims are based on law that has been determined to

52. See Harris v. DeRobertis, 932 F.2d 619, 621–22 (7th Cir. 1991) (“[Petitioner] argues that the culpable negligence exception to the limitations period has been interpreted so strictly as to render it meaningless. . . . [H]e points out that no Illinois court of review has ever found a lack of culpable negligence that would avoid the limitations period. . . . Since 1949, the Illinois Post-Conviction Act has included a time limitation for filing petitions which could be avoided upon a showing of a lack of culpable negligence. . . . [D]uring the more than forty years since the provision was included, the Illinois courts have failed to produce even a single published opinion in which the court found a lack of culpable negligence. Instead, the opinions which have been issued indicate that the exception is narrowly construed to exclude a wide range of circumstances.”).
53. See People v. Upshaw, 2017 IL App (1st) 151405, ¶ 19, 89 N.E.3d 1049, 1056 (“We first address the timeliness of [defendant]’s petition. Because we find that [he] has made a substantial showing that the untimely filing of his petition was not due to his culpable negligence, we then address the merits of each of the substantive claims that he raises on appeal.”).
be retroactively applicable. That assumes, of course, that the petitioner still has standing. And there is no similar safety valve for the Act’s standing requirement.

B. NEW SUBSTANTIVE RULES REGARDING THE ADVICE OF COUNSEL

1. Padilla v. Kentucky (Immigration Consequences of a Guilty Plea)

Much has already been written about the groundbreaking United States Supreme Court’s decision in Padilla v. Kentucky. This is in part because Padilla recognized, for the first time, the increasing importance of advising defendants of the collateral consequences to guilty pleas, much as Hill v. Lockhart before it recognized, for the first time, the importance of rendering effective assistance to defendants during the plea negotiation phase itself. As Hill v. Lockhart was emblematic of the national shift in our criminal justice system from trying cases to negotiating them, Padilla reflects the modern trend of recognizing that criminal convictions can lead to serious, quasi-criminal civil penalties following the imposition of a sentence.

Jose Padilla was a native of Honduras who had been a lawful permanent resident in the United States for more than forty years when he was charged with trafficking a large amount of marijuana in a tractor-trailer traveling through Kentucky. Padilla pled guilty to drug distribution charges that

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60. Padilla, 559 U.S. at 373 (“Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.”).

61. See, e.g., 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, 28–29 (“[C]onsequences of deportation are severe. . . . [D]eportation is punitive. In assessing the importance of informing a client when a plea carries the risk of deportation, the Padilla majority emphasized the severity of deportation . . . [saying] that deportation is ‘the equivalent of banishment or exile.”).”

virtually guaranteed his removal from the country. Prior to Padilla pleading guilty to the drug trafficking offense, however, counsel not only failed to advise him of immigration consequences, but also told him that he “did not have to worry about immigration status since he had been in the country so long.” Padilla relied on his lawyer’s erroneous advice in deciding to plead guilty. Padilla claimed that he would not have pled guilty and would have instead proceeded to trial had he not received this advice from his attorney.

Padilla later filed a post-conviction petition pursuant to Kentucky Rule of Criminal Procedure 11.42—Kentucky’s equivalent to Illinois’ Post-Conviction Hearing Act—alleging that defense counsel provided ineffective assistance to him by failing to properly advise him on the consequence of deportation that would inevitably flow from the offense to which he pled guilty. The trial court denied Padilla’s petition, finding that a “valid guilty plea does not require that the defendant be informed of every possible consequence of a guilty plea.” The Kentucky Court of Appeals reversed the trial court’s decision and remanded for an evidentiary hearing, holding that although the Sixth Amendment does not require criminal attorneys to advise clients of collateral consequences of criminal convictions—such as deportation—the “affirmative act of ‘gross misadvice’ relating to collateral matters can justify post-conviction relief.” The Kentucky Supreme Court reversed the Court of Appeals, holding that neither counsel’s failure to advise a client of collateral consequences nor counsel’s misadvice regarding collateral consequences of his conviction give the defendant a basis for post-conviction relief.

The question presented before the Supreme Court was “whether, as a matter of federal law, Padilla’s counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country.” The Padilla Court held that “counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.”

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63. *Id.*
64. *Id.* (quoting Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008)).
65. *Id.*
66. *Id.*
67. KY. R. CRIM. P. 11.42.
70. *Id.* at 483–84.
71. *Id.* at 485.
73. *Id.*
74. *Id.* at 374.
Prior to *Padilla*, Illinois defense lawyers had no explicit duty to advise criminal defendants of the potential immigration consequences that could stem from criminal convictions. As in *Padilla*, immigration consequences resulting from criminal convictions were considered collateral consequences to guilty pleas in Illinois, and therefore defense counsel had no duty to advise his or her clients of these potential consequences. This changed after the *Padilla* court characterized the collateral consequence of removal as being so “important” that defense counsel was now obligated to advise her client of this if she was to render effective assistance of counsel under *Strickland* and *Hill*.

2. *People v. Hughes* (Civil Commitment Consequences of Plea)

*Padilla* has not been extended to any other collateral consequences outside of the immigration context at the Supreme Court level, but it has been extended to other collateral consequences in the state of Illinois. In *People v. Hughes*, for example, the Illinois Supreme Court extended the holding of *Padilla* to the context of civil commitment proceedings under Illinois’ Sexual Violent Persons Act (“SVP Act”)—a statutory device that can be used by the State to detain defendants indefinitely after the completion of their criminal sentences.

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76. *People v. Pequeno*, 786 N.E.2d 1071, 1077 (Ill. App. Ct. 2003) (“A direct consequence of a plea, of which a defendant must be informed, represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment. . . . Conversely, a collateral consequence is one that is not related to the length or nature of the sentence imposed on the basis of the plea, and generally results from an action taken by an agency that the trial court does not control. . . . Therefore, regardless of whether defendant’s deportation was a mandatory result of his guilty pleas, because it had no bearing on his sentences or the nature of his punishment for the commission of his crimes, it was a collateral matter, which the trial court was not required to explain before it accepted defendant’s guilty pleas.”) (citations omitted).


78. See United States v. Parrino, No. CR 3:11-MJ-218-DW, 2015 WL 4272022, at *10 (W.D. Ky. July 13, 2015), aff’d 655 F. App’x 399 (6th Cir. 2016) (“Little case law seems to support . . . the judicial expansion of *Padilla* from its unique factual circumstances involving deportation. . . . Indeed, we are unaware of any published federal decision that has extended *Padilla* outside the context of misadvice concerning deportation.”).


80. See, e.g., *People v. Samuelson* (*In re Samuelson*), 727 N.E.2d 228, 231–32 (Ill. 2000) (“The Sexually Violent Persons Commitment Act . . . allows the State to extend the incarceration of criminal defendants beyond the time they would otherwise be entitled to release if those defendants are found to be ‘sexually violent.’”); *In re Lieberman*, 776 N.E.2d 218, 224 (Ill. 2002).
Jackie Hughes pled guilty to a single count of aggravated criminal sexual abuse. He then filed a motion to withdraw his guilty plea, claiming that the trial court lacked subject matter jurisdiction and that his trial counsel failed to advise him that the State could file a petition for involuntary commitment under the SVP Act. The trial court denied the motion, the appellate court affirmed, and the Illinois Supreme Court granted leave to appeal.

The Hughes court began its analysis by observing that civil commitment under the SVP Act is not a direct consequence of a conviction, but rather a collateral consequence. As such, prior to Padilla, defense counsel was generally not obligated to advise clients on the collateral consequences of a conviction. The Hughes court, drawing on the principles of Padilla, determined that even though the “possibility of involuntary commitment here is not immediate, automatic, or mandatory in the same way that deportation would be[,]” the consequence was still “‘enmeshed’ or integrated with the criminal sentence.” The court also found that “[m]ore importantly, much like the serious consequence of deportation, the potential consequence of involuntary commitment is no doubt uniquely severe.”

The court concluded that:

[T]he consequence of involuntary commitment, if imposed, may be more severe than the criminal penalty imposed by the court, overshadowing the penalty. Because of its severity, we cannot deny that the possibility of commitment under the Sexually Violent Persons Commitment Act may be materially important to a defendant’s calculus in determining whether to plead guilty. Accordingly, where a serious liberty interest is potentially at stake, where it is certain that those convicted of sexually violent offenses will definitely be considered for commitment

81. Hughes, 2012 IL 112817, ¶ 1, 983 N.E.2d at 443.
82. Id.
83. Id. ¶¶ 7–16, 983 N.E.2d at 445–47.
84. Id. ¶ 35, 983 N.E.2d at 451 (“The possibility of involuntary commitment under the Sexually Violent Persons Commitment Act does not flow directly and automatically from the conviction, and is not a consequence of a defendant’s sentence that the trial court could impose.”) (citations omitted).
85. Id. ¶ 38, 983 N.E.2d at 452 (“Accordingly, any potential civil commitment would not flow directly from his guilty plea but, rather, from a separate civil proceeding instituted by the State as a collateral consequence.”).
88. Id. ¶ 51, 983 N.E.2d 439, 455.
prior to release from imprisonment, and where the proceedings, if instituted, will impact a defendant’s term of mandatory supervised release, we find this particular consequence, like deportation, should not be categorically excluded from a cognizable claim of ineffective assistance of counsel and a defendant’s sixth amendment rights.89

3. People v. Dodds (Sex Offender Registration Consequences of a Guilty Plea)

Padilla established that there are collateral consequences to convictions that are just as important—if not more important—than the sentences that result from these convictions.90 Hughes, relying heavily on Padilla, recognized this in the context of SVP civil commitment proceedings.91 More cases are sure to follow on the heels of Padilla and Hughes, such as the First District’s decision in People v. Dodds.92

Paul Dodds pled guilty to a single count of child pornography and was sentenced to eighteen months of probation and ordered to register as a sex offender.93 Defense counsel, the State, and the court all mistakenly believed at the time of sentencing that Dodds would only be required to register as a sex offender for ten years, rather than natural life.94 Dodds learned that he would have to register as a sex offender for his natural life, ten years after he was ordered to register.95 Dodds then filed a petition seeking to vacate his conviction and sentence, raising several grounds for relief—including a claim that trial counsel failed to provide effective assistance of counsel by not informing him that a child pornography conviction would trigger lifetime registration under the Illinois Sex Offender Registration Act (SORA).96 The trial court dismissed Dodds’ petition, and he appealed.97

The First District held that “counsel’s performance is deficient whenever he or she fails to advise a defendant of the appropriate SORA

89. Id. ¶ 52-53, 983 N.E.2d 439, 455.
90. Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (“These changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. . . . [A] matter of federal law, 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.”) (footnote omitted).
92. People v. Dodds, 2014 IL App (1st) 122268, 7 N.E.3d 83.
93. Id. ¶ 1, 7 N.E.3d 83 at 85.
94. Id. ¶ 1, 7 N.E.3d 83 at 85.
95. Id. ¶ 1, 7 N.E.3d 83 at 86.
96. Id. ¶ 1, 7 N.E.3d 83 at 85.
97. People v. Dodds, 2014 IL App (1st) 122268, ¶ 1, 7 N.E.3d 83, 86.
registration requirements in the context of a plea agreement.”98 Accordingly, Dodd’s defense counsel’s performance was determined to be deficient under Strickland’s first prong.99 The Dodds court relied on Padilla and Hughes in reaching its decision.100 Namely, Dodds relied on the pronouncement in Hughes that “‘where the [allegedly collateral] consequence [of a sentence] is severe, certain, and sufficiently enmeshed in the criminal process the sixth amendment right to counsel may give rise to a basis for withdrawing [a guilty] plea.”101 The Dodds court considered sex offender registration requirements to be “so enmeshed in the criminal process that failure to advise about it constitutes deficient performance by counsel. Mandatory registration under the SORA is arguably as severe as involuntary commitment or deportation, since it has stigmatizing and far-reaching consequences into every aspect of the registrant’s life.”102

III. ANALYSIS

This section begins by discussing four Illinois cases that, taken together, demonstrate how the Act’s outdated procedural requirements give many criminal defendants a right without a remedy. It argues that the current statutory framework and existing case law—that only looks at whether a defendant is presently suffering some form of direct consequence from his conviction—ignores the many important collateral consequences that affect a defendant’s liberty long after a defendant completes his sentence. It then asserts that the Act’s current standing requirement is at odds with the courts’ expanding recognition of the serious collateral consequences that can affect a defendant’s liberty, and concludes by proffering how the standing requirement can be updated to comport with twenty-first century law and give defendants a meaningful avenue to seek relief.

A. PETITIONERS WITH CLAIMS ORIGINATING UNDER PADILLA, HUGHES, AND DODDS OFTEN LACK STANDING

Decisions like Hughes and Dodds demonstrate that the direct/collateral dichotomy in place for decades prior to Padilla is eroding at pace with our courts’ recognition of the severity of collateral consequences.103 Important, life-altering civil consequences resulting from criminal convictions are now legion, and are “severe, certain, and sufficiently enmeshed in the criminal

98. Id. ¶ 25, 7 N.E.3d 83 at 93.
99. Id. ¶ 39, 7 N.E.3d 83 at 98.
100. Id. ¶ 36, 7 N.E.3d 83 at 97.
102. See People v. Dodds, 2014 IL App (1st) 122268, ¶ 36, 7 N.E.3d 83, 97.
process.”

Courts and legislatures are trending towards ensuring that defendants are fully aware of these consequences before pleading guilty to criminal offenses. Illinois courts, for example, are required by statute to admonish defendants of the effect that a criminal conviction could have on a defendant’s immigration status, and the ability to retain or obtain housing, employment, a firearm, occupational license, or a driver’s license. Defense counsel is likewise obligated to advise clients of certain collateral consequences. But, as defendants accrue new substantive rights requiring them to receive advisement from the court and counsel of the impact of collateral consequences attendant to their convictions, there is still a question of whether proper mechanisms are in place to provide access to a remedy when these defendants are not properly advised.

_Padilla_ breached the wall between direct and collateral consequences of criminal convictions. The _Padilla_ Court acknowledged a quickly expanding gray area concerning the increasing number of civil consequences that can flow from criminal convictions. _Padilla_ also acknowledged the impact that these consequences can have on defendants. _Padilla, Hughes, Dodds_, and the decisions that will inevitably follow will require defense counsel to advise defendants on areas of law outside of their expertise. These decisions will inevitably require counsel to advise defendants on the global—meaning “all”—consequences of their plea, whether direct or collateral.

The distinction between direct and collateral consequences of guilty pleas are continually eroding, without end in sight. _Padilla_ shifted the focus from the direct/collateral dichotomy to “prevailing professional norms,” which paved the way for decisions like _Hughes_ and _Dodds_. Discussions between defense counsel and his client concerning the consequences of pleading guilty to a criminal offense—whether direct or collateral—are going to occur, for the most part, outside of the trial court record, and therefore will

104. Id. ¶ 59, 983 N.E.2d 439 at 456.
105. See discussion _supra_ Section II.B.
106. 725 ILL. COMP. STAT. ANN. 5/113-8(a) (West 2020) (“Before the acceptance of a plea of guilty, guilty but mentally ill, or _nolo contendere_ to a misdemeanor or felony offense, the court shall give the following advisement to the defendant in open court: ‘If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States.’”).
109. See People v. La Pointe, 2015 IL App (2d) 130451, ¶ 74, 40 N.E.3d 72, 88 (“Before _Padilla_, Illinois courts adhered to a strict distinction between ‘direct’ and ‘collateral’ consequences of a guilty plea and held that the effective assistance of counsel requires a defendant’s attorney to inform him of the former but not of the latter.”).
110. See People v. Pequeno, 786 N.E.2d 1071, 1074 (Ill. App. Ct. 2003) (discussing how defense counsel never talked to his client about potential immigration consequences—counsel stated that “he practices criminal law, not immigration law”).
not be cognizable issues on direct appeal.\textsuperscript{112} Rather, these claims will be more appropriately suited to a petition filed under the Act, whose purpose is to accommodate such claims.\textsuperscript{113} But how are defendants to raise these issues in petitions filed under the Act, if the Act’s standing requirement is hostile to defendants who have completed their sentence? When these claims accrue after a defendant has completed this sentence, will that defendant be left with a right without a remedy because of the Act’s outdated procedural requirements? As the following four cases show, as of today, the answer is “yes.”

1. \textit{People v. Carrera (Petitioners in INS Custody Lack Standing)}

Shortly after \textit{Padilla} was decided, the Illinois Supreme Court grappled with the issue of whether a post-conviction petitioner had standing to file a petition when he was in immigration custody in \textit{People v. Carrera}.\textsuperscript{114} Jesus Carrera is a prime example of a defendant who, but for the Act’s standing requirement, would have likely been able to obtain relief after \textit{Padilla}. Carrera pled guilty to a drug offense and was placed on twenty-four months of probation on June 28, 2004.\textsuperscript{115} Carrera was later detained by immigration officials on December 26, 2007, when the Immigration and Naturalization Services instituted removal proceedings against him based on his June 28, 2004, drug conviction.\textsuperscript{116}

Carrera filed a post-conviction petition pursuant to the Act, arguing that, under \textit{Padilla}, his defense counsel had provided ineffective assistance because he failed to advise Carrera that he may face removal from the United States as a result of pleading guilty to the drug offense.\textsuperscript{117} The trial court concluded that Carrera lacked standing under the Act, and dismissed his petition even though he was in government custody (which ultimately resulted from his drug conviction) when he filed his post-conviction petition.\textsuperscript{118} The Illinois Supreme Court affirmed the trial court, holding that:

[d]efendant’s detention by the INS is not imprisonment within the meaning of the Act, however, because defendant has already served his Illinois sentence. Given the fact that defendant had fully served his underlying sentence prior to filing his postconviction petition, defendant’s liberty was not

\textsuperscript{112}. \textit{See} \textit{People v. Massey}, 2019 IL App (1st) 162407, ¶ 55, 142 N.E.3d 803.
\textsuperscript{113}. \textit{Id.} ¶¶ 55–56, 142 N.E.3d 803 (stating that a claim of error that relies on matters outside of the trial record “is more appropriately addressed in a postconviction proceeding”).
\textsuperscript{114}. \textit{People v. Carrera}, 940 N.E.2d 1111, 1112 (Ill. 2010).
\textsuperscript{115}. \textit{Id.} at 1113.
\textsuperscript{116}. \textit{Id}.
\textsuperscript{117}. \textit{Id}.
\textsuperscript{118}. \textit{Id}.
curtailed by the state in any way, and he was not a person “imprisoned in the penitentiary,” as required in order to file a claim for postconviction relief. Consequently, defendant had no standing under the Act to file his petition for postconviction relief.119

The court reached this holding after analyzing decisions in Resendiz v. Kovensky120 and People v. Mrugalla.121 In Resendiz, the Ninth Circuit Court of Appeals held that the immigration consequences that flowed from the defendant’s state conviction did not render him “in custody pursuant to the judgment of a State court” under the federal habeas corpus statute because “[t]he state’s action [was] entirely independent of the INS’s action initiating deportation proceedings, and the state has nothing to do with deportation.”122 Even though Resendiz was threatened with deportation, the threat was not “imposed by the state court . . . .”123 Similarly, Illinois’ Fourth District in Mrugalla determined that the “defendant’s detention and deportation were the result of [an adverse ruling in] a federal deportation proceeding,” and that the “defendant’s liberty was being curtailed by the federal government, not by the State of Illinois.”124

The Carrera court was persuaded by the reasoning in Resendiz and Mrugalla, even after the Supreme Court’s decision in Padilla.125 The Carrera court explained:

Because the state has nothing to do with defendant’s deportation, and has no control over the actions of the INS, we cannot say that defendant’s possible deportation renders defendant a person “imprisoned in the penitentiary” as required in order to proceed with his postconviction petition under the Act. Defendant’s custody in the INS is not pursuant to a judgment of a state court. The current constraints on defendant’s liberty are imposed by the INS. The constraints of defendant’s liberty due to his criminal conviction expired with defendant’s successful

119. Carrera, 940 N.E.2d at 1118.
120. Resendiz v. Kovensky, 416 F.3d 952 (9th Cir. 2005).
122. Resendiz, 416 F.3d at 958.
123. Id.
125. People v. Carrera, 940 N.E.2d 1111, 1122 (Ill. 2010) (“Even in light of Padilla, we cannot say that deportation is a consequence that relates to the sentences imposed on the basis of that plea. . . . We find the reasoning of the Resendiz and Mrugalla courts to be valid even following the Supreme Court’s decision in Padilla.”).
completion of his probation, so that defendant is no longer eligible to seek relief under the Act.\textsuperscript{126}

The \textit{Carrera} court’s reasoning is premised on the questionable legal fiction that the defendant’s detention in INS custody is somehow entirely independent of his drug conviction in state court—yet, \textit{Carrera} would not have been in INS custody but for the state court drug conviction. This argument did not persuade the \textit{Mrugalla} or \textit{Carrera} courts,\textsuperscript{127} nor did it persuade courts following \textit{Carrera}. Directly or not, though, \textit{Carrera}’s state court drug conviction resulted in an eventual deprivation of his liberty. Whether that deprivation of \textit{Carrera}’s liberty was at the hands of the federal or state government was no doubt immaterial to Jesus \textit{Carrera}—and it likewise should have been immaterial to the \textit{Carrera} court’s analysis.

2. \textit{People v. Steward (Civilly Committed Petitioners Lack Standing)}

\textit{People v. Steward}, decided only weeks after the Illinois Supreme Court’s \textit{Carrera} decision, similarly found that a defendant who had been civilly committed because of his conviction for a sex offense lacked standing to file a petition under the Act.\textsuperscript{128} Steven Steward was convicted of attempted aggravated criminal sexual assault and aggravated battery and sentenced to twenty-five years in prison.\textsuperscript{129} The State filed a petition seeking to civilly commit Steward as a sexually violent person just prior to him being released to the two-year term of mandatory supervised release that was to follow his prison sentence.\textsuperscript{130} Steward was eventually civilly committed under the SVP Act, and he filed a post-conviction petition eleven months after he was discharged from his mandatory supervised release.\textsuperscript{131} The trial court dismissed the petition in part because Steward lacked standing to file the petition because he was no longer “imprisoned in the penitentiary” under the Act.\textsuperscript{132}

The \textit{Steward} court agreed that since Steward was in civil custody, he therefore “lacked standing to file a postconviction petition because he [was] not ‘imprisoned in a penitentiary’ within the meaning of the Act.”\textsuperscript{133} Steward argued that his mandatory supervised release (MSR) was tolled under the SVP Act, but the court rejected this argument because this tolling provision

\begin{itemize}
\item \textsuperscript{126} \textit{Id.} at 1120.
\item \textsuperscript{127} \textit{Id.} at 1120 (citing \textit{Mrugalla}, 868 N.E.2d at 306) (“The fact that the deportation proceedings may have been instituted solely based upon the defendant’s state conviction could not transform the deprivation of liberty effected by the federal government into a deprivation of liberty by the State of Illinois.”).
\item \textsuperscript{128} \textit{People v. Steward}, 940 N.E.2d 140, 142–43 (Ill. App. Ct. 2010).
\item \textsuperscript{129} \textit{Id.} at 143.
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.} at 143–45.
\item \textsuperscript{132} \textit{Id.} at 151.
\item \textsuperscript{133} \textit{People v. Steward}, 940 N.E.2d 140, 149 (Ill. App. Ct. 2010).
\end{itemize}
of the SVP Act did not become law until after Steward had been placed on MSR. Therefore, it did not apply retroactively to him. The court further stated that even if Steward’s MSR was tolled under the SVP Act, the court still could not “say a tolling of MSR satisfies the ‘imprisoned in the penitentiary’ requirement of the Act. Defendant needs to be currently on MSR, not tolled, to be within the realm of the Act.” The court therefore determined that Steward did not have standing to file a petition under the Act, even though his conviction triggered his civil commitment.

3. People v. Stavenger (Sex Offenders Lack Standing)

Steven Steward is not the only defendant who discovered a serious collateral consequence to his conviction after his sentence expired. Consider the somewhat common situation of a defendant who is sentenced to probation of two years for aggravated criminal sexual abuse: his defense attorney advises him prior to pleading guilty to this charge that he will only have to register as a sex offender for ten years. The defendant pleads guilty based on this assurance from counsel. Ten years after his plea, when the defendant is ready to finish his ten-year term of registration, he learns that he was misadvised by his attorney about the SORA requirement for aggravated criminal sexual abuse. The defendant is shocked to learn that he actually has to register for life, which is contrary to what his attorney had advised him, and contrary to a condition that he would have accepted as part of the plea agreement. Had he known this, the defendant would have proceeded to trial.

The proper vehicle for challenging the voluntariness of his plea based on the misadvice of counsel should be to file a petition under the Act—after all, Dodds held that the collateral consequence of being a registered sex offender was “as severe as involuntary commitment or deportation, since it has stigmatizing and far-reaching consequences into every aspect of the registrant’s life,” and that defense counsel therefore had a duty to accurately advise the defendant regarding his registration requirements. However, the defendant in this scenario would have completed his sentence eight years prior to learning of the lifetime registry requirement, leaving him without standing to file his petition. Furthermore, ten years had lapsed since the final judgment was entered, so the petition would also be untimely. The defendant in this scenario would probably be able to circumvent the timeliness

134. Id. at 150.
135. Id.
136. Id. at 151.
137. Id. at 151.
139. People v. Dodds, 2014 IL App (1st) 122268, ¶ 38, 7 N.E.3d 83, 97–98.
requirement by pleading lack of culpable negligence, but under the current state of Illinois law, he would still be left without standing.

The Second District considered this precise scenario in People v. Stavenger. There, the defendant filed a post-conviction petition approximately seven months after he had completed his probation resulting from his conviction for a sex offense. The petition was dismissed by the trial court on standing grounds, and the defendant appealed, arguing that he had standing under the Act because he was a registered sex offender. The Stavenger court disagreed, citing to People v. Downin, a case from the Illinois Appellate Court, which found that the SORA registration requirement “imposes no restraint on liberty.”

The Downin court stated that:

[o]nly those persons whose liberty is actually restrained by their convictions are “imprisoned” for purposes of the Act, and their sentences define the period of that restraint. The requirement to register as a sex offender, however, is not an element of a defendant’s sentence. “Nothing in the [Registration] Act purports to be part of a defendant’s punishment or sentence.”

Citing Downin, among others, the Stavenger court noted that “[o]nce a defendant completes his sentence, his conviction is no longer an actual encumbrance, and he does not need the Act’s remedial provisions to secure his liberty.” The court determined that sex offender registration imposed no “actual restraint” on a defendant’s liberty and was merely a collateral consequence of his conviction. Citing Carrera, the Stavenger court concluded

140. See People v. Boclair, 789 N.E.2d 734, 740 (Ill. 2002) (“[I]f a petitioner can demonstrate that the late filing was not due to his culpable negligence, there is no time limit within which a petitioner must file his post-conviction petition.”) (quoting People v. Wright, 723 N.E.2d 230, 235 (Ill. 1999)) (alteration in original) (citations omitted in original).
142. Id. ¶ 2-4, 36 N.E.3d at 1012.
143. Id.
144. Id. ¶ 11, 36 N.E.3d at 1013–14 (citing People v. Downin, 914 N.E.2d 1169, 1174 (Ill. App. Ct. 3rd 2009)).
145. Downin, 914 N.E.2d at 1174 (alteration in original) (citations omitted).
that any restraint on Stavenger’s liberty concluded with the termination of his sentence.\textsuperscript{148}

4. \textit{People v. Henderson (Losing Standing When the Petition is Pending)}

The Illinois Supreme Court’s standing decisions have been complicated by another commonly encountered problem presented by the Act’s current standing framework. This occurs when a defendant who originally has standing to file a petition under the Act subsequently “loses” standing when his sentence expires during the pendency of the post-conviction proceedings. The First District was the first reviewing court to consider this issue in \textit{People v. Henderson}.\textsuperscript{149}

Henderson pled guilty in October of 2006 to three controlled substance offenses in exchange for a total sentence of four years in the Illinois Department of Corrections.\textsuperscript{150} Henderson filed a pro se petition for post-conviction relief on December 10, 2008, arguing that his fully negotiated plea was unknowingly and involuntarily made because he did not receive the benefit of the bargain from the plea agreement.\textsuperscript{151} The trial court dismissed Henderson’s petition as untimely and frivolous and patently without merit on February 9, 2009.\textsuperscript{152} The First District affirmed the trial court’s dismissal of the petition in a decision filed on July 21, 2011.\textsuperscript{153} The First District then granted a petition for rehearing and reconsidered its original decision.\textsuperscript{154}

Before reaching the merits of the petition, however, the court considered whether the appeal was moot because the defendant had “successfully completed his mandatory supervised release (MSR) terms and, thus, is no longer serving a sentence in any of the three cases at issue.”\textsuperscript{155} The defendant was fully discharged from his term of MSR on October 19, 2011, which was after the original decision had been filed on July 21, 2011, but before the trial court’s decision became final on appeal in the First District’s decision filed on November 17, 2011.\textsuperscript{156} Thus, before the appellate court could reach the merits of defendant’s petition, it first had to determine whether the appeal

\textsuperscript{148} Stavenger, 2015 IL App (2d) 140885, ¶ 8, 36 N.E.3d at 1014 (citing People v. Carrera, 940 N.E.2d 1111 (Ill. 2010)).

\textsuperscript{149} People v. Henderson, 2011 IL App (1st) 090923, ¶ 1, 961 N.E.2d 407, 411.

\textsuperscript{150} Id. ¶ 3, 961 N.E.2d at 411.

\textsuperscript{151} Id. ¶ 5, 961 N.E.2d at 412.

\textsuperscript{152} Id. ¶ 5, 961 N.E.2d at 412.

\textsuperscript{153} Id. ¶ 5, 961 N.E.2d at 412.


\textsuperscript{155} Id. ¶ 8, 961 N.E.2d at 412.

\textsuperscript{156} Id. ¶ 8, 961 N.E.2d at 412.
was moot where “defendant’s liberty is no longer encumbered by his convictions,” which is required under the Act.  

The question posed in Henderson was “whether defendant, who is in no way serving a sentence, may obtain relief under the Act or whether his release from MSR eliminates his standing to obtain relief under the Act, rendering the parties’ arguments under the Act moot.” To answer this threshold question, the Henderson court relied on the traditional analysis of whether Henderson was “on a string that the State may pull when it pleases”—that is, whether he was serving some form of sentence. The Henderson court determined that the defendant was not on such a string, as he had completed his term of MSR. Henderson therefore lacked standing under the Act because “[w]hen a defendant’s conviction is no longer an encumbrance, he no longer needs assistance from the Act to secure his liberty and, thus, the Act is no longer available to him.”

The Henderson court considered the similar, but distinct, procedural posture of People v. Correa, where the Illinois Supreme Court determined that because Correa was serving the MSR portion of his sentence when he filed his petition under the Act, he was entitled to relief. But Correa was unhelpful in deciding the issue before the Henderson court because the Correa court “did not state whether the defendant in Correa had already successfully completed his MSR term by the time the supreme court rendered its opinion or consider whether a defendant loses standing under the Act where he is released from MSR following the filing of his petition.” The Henderson court also considered People v. Vunetich, because it was the only case where a defendant had completed his entire sentence—including parole—after filing his postconviction petition, but before a final judgment

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157.  *Id.* ¶ 10, 961 N.E.2d at 413 ("A remedy under the Act is only available to persons who are actually being deprived of their liberty, not persons who have completely served their sentences and merely wish to purge their criminal records of past convictions.").

158.  *Id.* ¶ 9, 961 N.E.2d at 413.


161.  *Henderson*, 2011 IL App (1st) 090923, ¶ 11, 961 N.E.2d at 413 (citing People v. Downin, 914 N.E.2d 1169, 1172 (Ill. App. Ct. 2009)). Conversely, “a defendant retains standing under the Act so long as he is challenging a conviction for which he continues to serve some form of sentence so that his liberty would be directly affected by invalidating his conviction.” *Id.* ¶ 11, 961 N.E.2d at 413 (citing People v. Dent, 948 N.E.2d 247, 249–50 (Ill. App. Ct. 2011)).

162.  *Id.* ¶ 12, 961 N.E.2d at 414 (citing People v. Correa, 485 N.E.2d 307, 309 (Ill. 1985)).

163.  *Id.* ¶ 12, 961 N.E.2d at 414.

on appeal had been filed from the petition’s dismissal.\(^{165}\) The *Vunetich* court found that the “defendant was still subject to potential parole revocation” when he filed his postconviction petition and therefore retained standing under the Act.\(^{166}\) The *Henderson* court did not find *Vunetich* helpful in deciding the issue because *Vunetich* did not consider whether the defendant lost standing after completing his MSR term.\(^{167}\)

The *Henderson* court ultimately concluded that the defendant lacked standing where “[t]he aforementioned case law clearly demonstrates that the Act is not intended to purge a defendant’s convictions where his liberty is not encumbered. Absent a deprivation of liberty, ‘the wrong which the Act was intended to remedy is nonexistent.’”\(^{168}\) The *Henderson* court found that there was no meaningful distinction to be drawn between instances where the defendant’s liberty is not encumbered when he files the petition and those instances in which a defendant regains his liberty after the petition is filed. The purpose of the Act would not be fulfilled by giving either defendant relief. He is no longer on that string and the State cannot affect his liberty at present.\(^{169}\)

The *Henderson* court therefore determined that because the defendant completed his MSR term, and therefore “no longer needs the Act’s assistance to secure his liberty,” he lost standing under the Act.\(^{170}\)

5. *These Cases Demonstrate that the Act’s Outdated Procedural Requirements Give Similarly Situated Defendants a Right Without a Remedy*

*Henderson* was the first, but not the only, case to decide that a defendant loses standing under the Act once he has completed his MSR term. A different division of the First District reconsidered *Henderson*’s holding six months later in *People v. Jones*, where the court ordered the parties to submit additional briefing as to whether *Henderson*’s holding required Jones’ appeal to be dismissed as moot.\(^{171}\) To the State’s great credit, it “responded to the

\(^{165}\) *Henderson*, 2011 IL App (1st) 090923, ¶ 13, 961 N.E.2d at 414.

\(^{166}\) *Id.* ¶ 13, 961 N.E.2d at 414 (citing *Vunetich*, 541 N.E.2d at 744).

\(^{167}\) *Id.* ¶ 13, 961 N.E.2d at 414.

\(^{168}\) *Id.* ¶ 14, 961 N.E.2d at 414 (quoting *People v. Farias*, 543 N.E.2d 886, 889 (Ill. App. Ct. 1989)).

\(^{169}\) *Id.* ¶ 14, 961 N.E.2d at 414.

\(^{170}\) *Henderson*, 2011 IL App (1st) 090923, ¶ 15, 961 N.E.2d at 414.

\(^{171}\) *People v. Jones*, 2012 IL App (1st) 093180 ¶ 3, 969 N.E.2d 482, 486.
issue forthrightly by stating that it was the position of the State’s Attorney’s office that the Henderson court’s dismissal of defendant’s postconviction petition as moot on appeal was wrong and not grounded in established Supreme Court precedent.”172 Rather, the State took the position “that Henderson’s release from parole subsequent to his timely filed petition did not eliminate his standing to obtain relief pursuant to the Act and render his petition moot.”173 The Jones court agreed.174

Important to Jones’ criticism of Henderson is the length of time that must be taken to litigate petitions under the Act.175 Jones was sentenced in 1999.176 His conviction was affirmed on direct appeal in 2000, and he filed his postconviction petition in 2001.177 Jones’ petition was denied the same year, and his appeal languished in the appellate court for four years until it was remanded back to the trial court in June of 2005.178 The petition was then litigated in the trial court until 2009, when it was denied.179 The appellate court did not reach its decision on the appeal from that denial until May of 2012.180 Thus, over twelve years lapsed before Jones’ petition was finally adjudicated. Such a delay is understandable given that “public offices charged with representing the parties in these postconviction petitions suffer from understaffing and underfunding, which predictably result in severe backlogs.”181 It is therefore foreseeable that a defendant’s sentence may lapse while he is awaiting the adjudication of his petition. Thus, the court’s determination that Jones maintained standing, despite his sentence being discharged during the pendency of his petition, was correctly decided in accordance with “prior Illinois Supreme Court cases where the court has made clear that all that is required is that a petitioner must still be serving any sentence imposed, including any period of mandatory supervised release, at the time of the initial timely filing of his petition.”182

While the Henderson decision appears to be an outlier that has drawn sharp disagreement from other divisions of its own court,183 it has yet to be

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172. Id. ¶ 4, 969 N.E.2d at 486.
173. Id. ¶ 4, 969 N.E.2d at 486.
174. Id. ¶ 4, 969 N.E.2d at 486.
175. Id. ¶ 8, 969 N.E.2d at 487 (“Many of these petitions frequently experience delays not found in other categories of cases before they receive final review.”).
177. Id. ¶ 8, 969 N.E.2d at 487.
178. Id. ¶ 8, 969 N.E.2d at 487.
179. Id. ¶ 8, 969 N.E.2d at 487—88.
180. See generally id. ¶¶ 1–4, 969 N.E.2d at 486.
182. Id. ¶ 8, 969 N.E.2d at 488 (citing People v. Davis, 235 N.E.2d 634, 636 (Ill. 1968); People v. Carrera, 940 N.E.2d 1111, 1112 (Ill. 2010)).
183. Henderson was decided by the First District, Fourth Division, but drew heavy criticism in Jones, which was decided by the First District, Second Division. Several other courts have agreed with Jones’ holding, including the Third and Sixth divisions. See, e.g., People v. Sanchez, 2015 IL App (1st) 130369-U, ¶ 28 (“[W]e are persuaded that the
overruled by the Illinois Supreme Court and thus remains good law. The “troubling” reasoning in Henderson\textsuperscript{184} underscores why it is problematic to decide whether a defendant’s liberty is affected (and thus whether a petitioner has standing under the Act) by merely ascertaining whether a defendant has been directly, as opposed to collaterally, affected by his conviction. By looking only at whether a defendant is suffering some form of direct consequence from his conviction, the current statutory framework and existing case law that narrowly interprets the Act ignores a myriad of important collateral consequences that affect a defendant’s liberty—many of which survive long after a defendant completes his sentence.

Jones held that the passage of time that had occurred while the petition was pending should not be held against a petitioner. If this is true, why, then, should the passage of time occurring between the original constitutional violation and when it became symptomatic to the petitioner be held against him? It would strain credulity to conclude that an unconstitutionally obtained felony conviction would no longer affect an alien’s liberty just because he had finished his term of his probation. This is a difficult premise to accept when the federal government can institute removal proceedings after the defendant’s term of probation has been completed.\textsuperscript{185} To say, in this scenario, that such a defendant’s liberty is unaffected by his unconstitutionally obtained conviction defies basic notions of fairness, just as it would be to say that a defendant has somehow “lost” standing simply because his petition took too long to wind its way through the courts. Yet, that is the current state of the law in Illinois.

The conclusion reached by our colleagues in Jones is correct. That is, a petitioner who timely files a post-conviction petition does not lose standing under the Act merely because he completes his MSR term by the time that his petition comes before the court for review.\textsuperscript{184} People v. Chapman, 2016 IL App (1st) 140724-U, ¶ 11 (agreeing with Jones and holding that the defendant’s standing is based upon when he originally filed his petition). And the Fourth District—the court that decided Henderson—recently examined the many cases that have since weighed in on this issue, ultimately concluding that a defendant who filed his petition while in custody has standing under the Act, even though he completed his term of mandatory supervised release. People v. Lash, 2020 IL App (1st) 170750-U, ¶ 47. But see People v. Delgado, 2017 IL App (1st) 163166-U, ¶ 6 (agreeing with the State that the defendant’s petition under the Act was properly dismissed for lack of standing because he had already completed his sentence when he filed his petition).

\textsuperscript{184} Sanchez, 2015 IL App (1st) 130369-U, ¶ 26 (citing People v. Jones, 2012 IL App (1st) 093180, ¶ 6, 969 N.E.2d 482, 487).

\textsuperscript{185} See Bado v. United States, 186 A.3d 1243, 1257–58 (D.C. Cir. 2018) (“Congress . . . can prescribe the penalty of removal for a criminal conviction. That penalty is triggered by conviction of an offense that falls within offense classifications identified by Congress . . . regardless of whether the conviction results from violations of federal[] [or] state . . . law.”).
B. THE INCREASED RECOGNITION OF IMPORTANT COLLATERAL CONSEQUENCES ARE AT ODDS WITH THE ACT’S STANDING REQUIREMENT

If, after Carrera, the determination of whether a petitioner has standing under the Act hinges solely on whether he is serving a sentence that the trial court imposed, then decisions like Hughes and Dodds make this determination problematic and unworkable. Hughes and Dodds recognized that there are some consequences that, while they do not flow “directly” from a guilty plea by being a component of the sentence, are nevertheless so impactful to the defendant that the consequence is as important—if not more important—than the sentence itself.\(^\text{186}\) Hughes and Dodds recognized that civil commitment and lifetime registration on the sex offender registry, like deportation, can have lifetime consequences that extend well beyond the completion of the sentence imposed as part of the plea.\(^\text{187}\) Both of these collateral consequences directly flowed from the defendants’ criminal convictions. Yet the Act’s current standing and timeliness scheme would prevent defendants from challenging the voluntariness of the plea that led to those state-imposed sanctions—unless the defendant was still serving the comparatively brief sentence that resulted from the plea—even if the defendant learned of the collateral consequence after that sentence had been discharged.\(^\text{188}\)

The Act’s standing requirement is therefore at odds with Illinois courts’ expanding recognition of “important” collateral consequences. The courts are continuing to expand the substantive rights of defendants while also restricting their ability to redress the violation of those rights on collateral review. The distinction that Carrera makes to determine whether a defendant has standing to file a petition is complicated by the current trend in Illinois of Padilla being extended to situations outside of the immigration context, as seen in Hughes and Dodds.\(^\text{189}\)


\(^{187}\) Hughes, 2012 IL 112817, ¶ 47, 983 N.E.2d at 454 (“[E]ven though deportation is a civil consequence of a guilty plea, it should not be categorically eliminated from defense counsel’s duties because it is a particularly severe penalty, intimately related to the criminal process, and nearly an automatic result due to recent changes in immigration law, which have enmeshed the conviction with the penalty of deportation. . . . [W]here consequences are severe, certain to occur, enmeshed in the criminal process, and are of predictable importance to a defendant’s calculus, they are not categorically excluded from Strickland’s purview despite being traditionally categorized as collateral.”) (citations omitted); Dodds, 2014 IL App (1st) 122268, ¶ 32, 7 N.E.3d at 96–97.

\(^{188}\) People v. Steward, 940 N.E.2d 140, 148 (Ill. App. Ct. 2010) (“A petition filed pursuant to the Act has no merit if filed by an individual who is not imprisoned. . . . [A] petitioner’s status as an imprisoned person is inherent to the right to relief under the Act.”); People v. Stavenger, 2015 IL App (2d) 140855, ¶ 5 36 N.E.3d 1011, 1013.

\(^{189}\) See Hughes, 2012 IL 112817, ¶ 47, 983 N.E.2d at 454; Dodds, 2014 IL App (1st) 122268, ¶ 32, 7 N.E.3d at 97.
Prior to Padilla, defense counsel had no duty to advise defendants on collateral consequences.\textsuperscript{190} Padilla recognized that some collateral consequences, even though not part of the sentence, nonetheless so significantly affected the defendant’s liberty that counsel had a duty to advise the defendant of them.\textsuperscript{191} Hughes recognized that civil commitment was one of these “important” collateral consequences,\textsuperscript{192} and Dodds relied on Hughes to recognize that SORA registration was likewise an important collateral consequence.\textsuperscript{193} Yet, as it relates to standing, several appellate court districts, including the First, Second, and Third District Court opinions cited in Stavenger, have held that “[r]equiring a sex offender to register imposes no actual restraint on his liberty and is merely a collateral consequence of his conviction.”\textsuperscript{194} This, despite the Fourth District having previously determined that “because a violation of the SORA is a strict liability offense punishable by jail time, lifetime registration places a severe constraint on a defendant’s liberty.”\textsuperscript{195}

Further complicating our courts’ contemporary understanding of standing is the line of cases that hold that a petitioner retains standing if his petition is filed while he is serving a sentence that expires before the petition can be ruled upon.\textsuperscript{196} Normally, a defendant is not permitted to collaterally attack his conviction when he is no longer encumbered by a deprivation of liberty resulting from his sentence.\textsuperscript{197} Petitioners like those in Carrea, Steward, and Stavenger, were no longer serving the sentence imposed by the trial court, so their liberty was not considered encumbered by the courts such that they would have standing. Yet petitioners like Jones, who lost standing after his sentence was completed, were still permitted to collaterally attack their convictions, even though they were not suffering the serious collateral consequence that the petitioners suffered in Carrea, Steward, and Stavenger.

\textsuperscript{190} Margaret Colgate Love, Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation, 31 St. Louis Univ. Pub. L. Rev. 87, 100–101 (2011) (“While courts at least have an affirmative obligation under the Due Process Clause and court rules to ensure that a defendant’s plea is knowing and voluntary, the misadvice rule gives defense lawyers a perverse incentive to tell their clients nothing at all. That is where the law stood in almost every U.S. jurisdiction on March 29, 2010, the day before the Court announced its decision in Padilla v. Kentucky.”).

\textsuperscript{191} Padilla v. Kentucky, 559 U.S. 356, 369–71 (2010) (“When the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear... It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation...”).

\textsuperscript{192} Hughes, 2012 IL 112817, ¶ 53, 983 N.E.2d at 455.

\textsuperscript{193} Dodds, 2014 IL App (1st) 12268, ¶ 36, 7 N.E.3d at 97.

\textsuperscript{194} People v. Stavenger, 2015 IL App (2d) 140885, ¶ 11, 36 N.E.3d 1011, 1014 (emphasis added) (collecting cases).

\textsuperscript{195} People v. Dodds, 2014 IL App (1st) 122268, ¶ 38, 7 N.E.3d 83, 97 (emphasis added).

\textsuperscript{196} See discussion supra Section III. A. 3.

\textsuperscript{197} See discussion supra Section III. A. 3.
Petitioners like Jones—who are not suffering collateral consequences—are still allowed to collaterally attack their convictions, whereas individuals in INS custody, SVP committees, or sex offender registrants remain on the outside looking in.

Those petitioners who filed their petitions while serving a sentence that expired prior to the court reaching the merits are effectively allowed to use the Act as an expungement mechanism, which the court has vehemently condemned,\(^\text{198}\) while those petitioners who are truly encumbered by a serious collateral consequence resulting from their convictions are left with rights without a remedy. This logical inconsistency cannot be reconciled unless the Act’s standing requirement is broadened to include defendants who are suffering serious collateral consequences that flow from their criminal convictions.

C. RECOMMENDATIONS

When the Padilla Court was faced with concerns that its ruling would open up the “floodgates” to new collateral attacks, the Court concluded that a flood was unlikely to follow in the decision’s wake.\(^\text{199}\) The Supreme Court’s confidence that its decision would not lead to an opening of the floodgates has proved to be correct— the floodgates have indeed not opened\(^\text{200}\)— despite Padilla being a groundbreaking new rule of criminal procedure. Nonetheless, Padilla’s influence will no doubt be felt for years to come, in part due to the increasing number of collateral consequences that now flow from criminal convictions.\(^\text{201}\) When Illinois’s legislature passed the Act in 1951, it could not have envisioned our contemporary criminal law landscape, where civil and criminal penalties are becoming ever intertwined. Removal was far less common\(^\text{202}\) and the SVP Act and SORA were not enacted until

\(^{198}\) People v. Carrera, 940 N.E.2d 1111, 1121 (Ill. 2010).

\(^{199}\) See Padilla v. Kentucky, 559 U.S. 356, 371 (2010) ("We confronted a similar 'floodgates' concern in Hill but . . . [a] flood did not follow in that decision's wake.").

\(^{200}\) See Lafler v. Cooper, 566 U.S. 156, 172 (2012) ("Petitioner argues that implementing a remedy here will open the floodgates to litigation by defendants seeking to unsettle their convictions. Petitioner’s concern is misplaced. Courts have recognized claims of this sort for over 30 years, and yet there is no indication that the system is overwhelmed by these types of suits or that defendants are receiving windfalls. . . . In addition, the prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction. This, too, will help ensure against meritless claims.").

\(^{201}\) See Brian M. Murray, Beyond the Right to Counsel: Increasing Notice of Collateral Consequences, 49 UNIV. RICH. L. REV. 1139, 1144 (2015) (noting that “although the number of collateral consequences has increased dramatically over the years, knowledge of their scope and breadth is lost on various players within the system.").

\(^{202}\) Paul T. Crane, Incorporating Collateral Consequences into Criminal Procedure, 54 WAKE FOREST L. REV. 1, 10–11 (2019) ("The laws governing deportation were largely overhauled in the 1990s. Among other things, Congress increased the number of crimes...")
many years later. Collateral consequences were considered afterthoughts that were far removed from the conviction and sentence imposed by the trial court. Accordingly, standing was conferred only to those serving their actual sentences. With increasing removal efforts, the passage of the SVP Act and SORA, and with other civil penalties automatically resulting from criminal convictions, criminal convictions can have lifelong impacts on a defendant. The Act’s standing requirement should be updated to contemplate this.

The Act’s standing requirement could be modified to conform with twenty-first century law in two ways: Illinois courts could simply dispense with the “imprisoned”/not “imprisoned” dichotomy and instead focus on whether a petitioner is suffering an “important” consequence of his conviction, or the legislature could amend the Act.

1. Courts Should Focus on Whether a Petitioner is Suffering an “Important” Consequence Resulting from his Conviction, Rather than Continuing to use the “Imprisoned”/Not “Imprisoned” Dichotomy

First, Illinois courts could simply dispense with the “imprisoned”/not “imprisoned” dichotomy currently used to determine standing and instead focus on whether a petitioner is suffering an “important” consequence of his conviction—similarly to how the courts have abandoned the direct/collateral consequence dichotomy in determining whether defense counsel must advise her client regarding certain collateral consequences of a conviction. Courts could determine whether a consequence is “important” by determining whether the consequence is “severe, certain, and sufficiently enmeshed in the criminal process,” which our courts have already been determining in the context of counsel’s duty to advise her client. If a court determines that a consequence is “important” enough that defense counsel was obligated to advise the defendant of it, then as long as the petitioner was still suffering the effects of that consequence, he would have standing under the Act to redress defense counsel’s failure to advise him of the important collateral consequence resulting from his conviction.

Calling on the courts to decide which collateral consequences are “important” and which ones are not could perhaps be challenging. However, courts have already been determining, on a case-by-case basis, whether

204. See generally Murray, supra note 201.
petitioners are “culpably negligent” for filing untimely petitions.\textsuperscript{206} The courts have been able to accomplish this with relative ease. Determining whether collateral consequences are “important” would be even easier. The courts would be able to first look at which collateral consequences have already been deemed “important” (as the Padilla, Hughes, and Dodds courts did with immigration consequences, SVP commitment, and SORA registration, respectively), and then confer standing on those petitioners who have been affected by those collateral consequences. When new collateral consequences arise, the courts could use existing frameworks already in place for deciding whether defense counsel has a duty to advise of these consequences to determine whether a defendant has standing to challenge the conviction that resulted in the collateral consequence.

2. \textit{The Act’s Current Standing Requirement Should be Modified or Removed}

Second, the legislature could amend the Act to either remove or modify its current standing requirement. Removing the standing requirement could arguably undermine the overarching value that courts have placed on the finality of convictions, which may be politically challenging. The most efficient solution would be for courts to liberally construe the Act’s standing requirement in favor of the petitioner, as the courts are already required to do with the Act as a whole.\textsuperscript{207} Removing the standing requirement could lead to the undesirable result of a wave of petitioners attempting to use the Act to “purge” prior convictions, a practice that the Illinois Supreme Court has expressly prohibited.\textsuperscript{208} But if the courts construed the standing requirement liberally, petitioners who have been affected by truly serious collateral consequences resulting from their convictions could still be accommodated without turning the Act into an expungement mechanism.

\section*{IV. CONCLUSION}

The Act’s strict standing requirement must be updated to give defendants an effective avenue to seek post-conviction relief. The current state of

\textsuperscript{206} People v. Lander, 831 N.E.2d 596, 603 (Ill. 2005) (“We caution that our determination in this regard is fact-specific and is not amenable to an easily defined standard or rule.”).

\textsuperscript{207} People v. Correa, 485 N.E.2d 307, 308 (Ill. 1985) (citing People v. Pier, 281 N.E.2d 289, 290 (Ill. 1972)) (“This court has held that the Act must be liberally construed to afford a convicted person an opportunity to present questions of deprivation of constitutional rights.”).

\textsuperscript{208} People v. Carrera, 940 N.E.2d 1111, 1121 (Ill. 2010) (citing People v. Dale, 92 N.E.2d 761, 766 (Ill. 1950)) (“[A] postconviction remedy is available only to those that are actually being deprived of their liberty, and not to those who have served their sentences and might wish to purge their records of past convictions.”).
the law in Illinois precludes defendants from relief once they have completed their sentence, ignoring the fact that many important, life-altering civil consequences result from criminal convictions. Expanding the Act’s standing requirement would accommodate petitioners who, while they may have finished the sentence resulting from the underlying conviction, are still affected by the violation of their constitutional rights that undermined the validity of their original conviction. This result will give affected defendants an ability to seek meaningful relief without opening the floodgates to petitioners who view the Act only as an alternative to expungement. An expansion of the Act’s standing requirement would preserve the Act’s efficacy as a vehicle for maintaining the constitutional integrity of criminal convictions, while also ensuring that no defendant is left with a right without a remedy in the state of Illinois.