

In The
Supreme Court of the United States

—◆—
ROSELVA CHAIDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

—◆—
**BRIEF OF *AMICI CURIAE* NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS, NATIONAL IMMIGRATION PROJECT
OF THE NATIONAL LAWYERS GUILD,
IMMIGRANT LEGAL RESOURCE CENTER AND
IMMIGRANT DEFENSE PROJECT IN SUPPORT
OF PETITION FOR A WRIT OF CERTIORARI**

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The National Association of Criminal Defense Lawyers (“NACDL”), the National Immigration Project of the National Lawyers Guild (“NIP”), the Immigrant Legal Resource Center (“ILRC”), and the Immigrant Defense Project (“IDP”), respectfully submit this *amici curiae* brief in support of Petitioner.¹



INTERESTS OF *AMICI CURIAE*

Amici curiae are nonprofit organizations with myriad members, constituents, clients, and client families who are facing the real-world consequences of detention and deportation resulting from plea-based convictions wrongfully procured in violation of a noncitizen’s Sixth Amendment right to effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). *Amici* are keenly interested in a nationally uniform resolution of the frequently recurring question whether there is a remedy for *Padilla*

¹ Pursuant to Rules 37.2 and 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of this brief of *amici curiae*’s intention to file the brief. All parties have consented to the filing of the brief and the parties’ consent letters are being filed herewith. No counsel for a party authored the brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No persons or entities other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

violations pertaining to convictions that were final prior to March 31, 2010, the date *Padilla* was announced.

NACDL is a nonprofit association of lawyers who practice criminal law before virtually every state and federal bar in the country. NACDL has more than 10,000 affiliate members who include private criminal defense attorneys, public defenders, and law professors. NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel.

NIP is a nonprofit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure a fair administration of the immigration and nationality laws. NIP has provided legal training to the bar and bench on the immigration consequences of criminal conduct since 1970, and has authored the treatise *Immigration Law and Crimes*, which was first published in 1984.

ILRC is a nonprofit national resource center that provides technical assistance in advocacy to low-income immigrants and their advocates. ILRC is known nationally as a leading authority on issues at the intersection of immigration and criminal law. Its publications include *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (formerly *California Criminal Law*

and Immigration), which was first published in 1990. Since its founding in 1979, ILRC has provided daily assistance to criminal defense and immigration counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal convictions.

IDP is a nonprofit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused or convicted of crimes. A leading national expert on issues that arise from the interplay of immigration and criminal law, IDP has provided defense and immigration lawyers, criminal and immigration court judges, and noncitizens with expert legal advice, training, and publications on such issues since 1997. IDP's publications include *Representing Immigrant Defendants in New York*, which was first published in 1998.

NIP, ILRC, and IDP collaborate in the Defending Immigrants Partnership, a national initiative to improve the quality of justice for immigrants accused or convicted of crimes. Defending Immigrants Partnership, <http://defendingimmigrants.org/> (all Internet materials as visited Jan. 27, 2012). The partnership provides materials, training, and technical assistance to criminal defense lawyers and other participants in the criminal justice system.



SUMMARY OF ARGUMENT

There exists an entrenched and deepening conflict among federal and state courts over whether there is a remedy for *Padilla* violations pertaining to convictions that were final prior to March 31, 2010, the date *Padilla* was announced. The lack of a remedy imposes intolerably harsh consequences on countless noncitizens facing detention and deportation as a result of wrongfully procured plea-based convictions. For these noncitizens and their families – which often include both citizen and noncitizen children – the grave misfortune of a pre-*Padilla* final conviction in a federal judicial circuit that does not recognize a remedy for such *Padilla* violations, is deeply unjust and damaging: It can separate long-time residents from their loved ones and communities; tear apart families; impair children’s health and education; and cause severe economic hardship. Moreover, the conflict creates a regrettable disuniformity in the enforcement of federal immigration law. Because the question presented seeks to resolve this intractable conflict, it is a question of exceptional national importance that should be decided by the Court now.

Additionally, the Court should decide the question presented because the decision below is inconsistent with *Padilla* and wrong. *Padilla* reiterates the rule of *Strickland* that the proper measure of attorney performance is reasonableness under prevailing professional norms. However, in deciding whether *Padilla* constitutes an “old rule” that would provide Petitioner with a remedy under *Teague v. Lane*, 489

U.S. 288 (1989), the decision below overlooks the significance of longstanding norms that required defense counsel, like Petitioner’s defense counsel, to advise noncitizen clients of the immigration consequences of a guilty plea. Instead, in incorrectly holding that *Padilla* is a “new rule” under *Teague*, the decision below relies on pre-*Padilla* judicial decisions that mistakenly fail to properly consider these norms in rejecting ineffective assistance of counsel claims by noncitizens. This conflicts with the core premise of *Padilla* and warrants this Court’s review of the decision.



REASONS THE WRIT SHOULD BE GRANTED

I. The Question Presented Is Exceptionally Important Because the Deepening Conflict Over the Retroactivity of *Padilla* Imposes Severe Consequences on Countless Non-citizens and Causes Disuniformity in the Enforcement of Federal Immigration Law.

Each year, tens of thousands of noncitizen criminal defendants plead guilty in federal and state courts and risk detention and deportation as a result. For example, the U.S. Department of Justice reports that between October 1, 2008 and September 30, 2009, approximately 97 percent (or 84,326 out of 86,975) of federal convictions resulted from guilty pleas, and approximately 45 percent (or 35,629 out of

79,073) of convicted federal offenders were noncitizens.² The U.S. Department of Homeland Security reports that in 2009, 395,165 individuals were removed from the United States, of which 131,840 had criminal violations.³ While the Court rightfully presumes that most convictions of noncitizens do not result from incompetent legal advice, *Padilla*, 130 S. Ct. at 1485, for those that did the consequences can be devastating.

Detention and deportation impose severe consequences on individual deportees. For example, most noncitizens charged with an aggravated felony are long-time residents of the United States who, on average, have been in the country for 15 years.⁴ Deportation can separate them indefinitely from loved ones, communities in which they have deep roots, and gainful employment. See J. Hagan, B. Castro & N. Rodriguez, *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border*

² M. Motivans, U.S. Dep't of Justice, Bureau of Justice Statistics, Federal Justice Statistics, 2009: Table 10 (2011); *id.*, Federal Justice Statistics, 2009: Statistical Tables, Table 4.4.

³ Office of Immigration Statistics, U.S. Dep't of Homeland Security, 2010 Yearbook of Immigration Statistics: Table 38 (2010).

⁴ Transactional Records Access Clearinghouse, *How Often is the Aggravated Felony Statute Used?* <http://trac.syr.edu/immigration/reports/158/>. Petitioner falls within this group; she has been a lawful permanent resident since 1977, and has U.S. citizen children and grandchildren. Pet. 4, *Chaidez v. United States*, No. 11-820 (U.S. Dec. 23, 2011).

Perspectives, 88 N.C. L. Rev. 1799, 1818-20 (2010) (hereinafter “Hagan, *The Effects of U.S. Deportation Policies*”). Furthermore, research indicates that after deportation, deportees suffer “multiple traumas as they attempt to reintegrate into a country, culture, and society that they may have left years before.” *Id.*, 88 N.C. L. Rev. at 1820.

In addition, the detention and deportation of an immigrant parent or spouse can inflict damaging emotional, psychological, and financial consequences on children and other family members remaining in the United States. See J. Baum, R. Jones & C. Barry, *In the Child’s Best Interest?: The Consequences of Losing a Lawful Immigrant Parent to Deportation*, Int’l Human Rights Law Clinic, University of California, Berkeley, School of Law *et al.*, 4-5 (2010), available at http://www.law.berkeley.edu/files/Human_Rights_report.pdf (hereinafter “Baum, *In the Child’s Best Interest?*”) (“By removing a lawful permanent resident parent of a U.S. citizen child, the government . . . creates immense secondary social and economic effects.”); Hagan, *The Effects of U.S. Deportation Policies*, 88 N.C. L. Rev. at 1820 (“The physical removal of parents can have long-lasting traumatic effects on children and spouses left behind in the United States.”). Many of the children who suffer these consequences are United States citizens.⁵

⁵ According to one report, between 1997 and 2007, the United States deported the legal permanent resident (“LPR”) (Continued on following page)

For example, in one recent study examining “the consequences of parental arrest, detention, and deportation on 190 children in 85 families in six locations across the country,” researchers reported that immigrant parental separation “pose[d] serious risks to children’s immediate safety, economic security, well-being, and longer-term development.” A. Chaudry, R. Capps, J. Manuel Pedroza, R. Maria Castañeda, R. Santos & M. Scott, *Facing Our Future: Children in the Aftermath of Immigration Enforcement*, Urban Institute, viii (2010), http://www.urban.org/UploadedPDF/412020_FacingOurFuture_final.pdf. “[A]bout two-thirds of [the] children [in the study] experienced changes in eating and sleeping habits”; “[m]ore than half of [the] children . . . cried more often and were more afraid, and more than a third were more anxious, withdrawn, clingy, angry, or aggressive.” *Id.* at ix. Moreover, most households in the study “lost a working parent” as a result of immigration enforcement

parent of approximately 103,000 children, of which at least 85 percent (or 88,000) were United States citizens. Baum, *In the Child’s Best Interest?* 4-5. In addition, an estimated 217,000 “other immediate family members – including U.S. citizen husbands, wives, brothers, and sisters” – were affected by the deportation of an LPR from their household. *Id.* Another study, which focused on individuals deported to El Salvador, shows that 73 percent of the interviewed deportees were parents with a child under the age of 18 living in the United States, and 90 percent of those children were born in the United States. J. Hagan, K. Eschbach & N. Rodriguez, *U.S. Deportation Policy, Family Separation, and Circular Migration*, 42 *Int’l Migration Rev.* 77 (2008).

and, thus, “experienced steep declines in income and hardships such as housing instability and food insufficiency.” *Id.* at viii-ix.

Amici can attest, based on decades of experience representing and counseling immigrants, that because of these and other far-reaching effects of deportation, immigration consequences are a key consideration for most noncitizen defendants in deciding whether to give up their right to a trial and plead guilty in a criminal case. *See Padilla*, 130 S. Ct. at 1483 (“We too have previously recognized that preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.”) (citations and internal quotation marks and brackets omitted). In many cases, the risk of deportation is the *most important consideration* – which is not surprising given that many noncitizen defendants have lived in the United States for many years and have longstanding ties to this country. This is particularly so in cases in which a conviction may be deemed an “aggravated felony” under the immigration laws, like a conviction for petit larceny or receipt of stolen property where the sentence, even if suspended, is for at least one year. 8 U.S.C. § 1101(a)(43)(G). The immigration consequences of such a conviction can be dire for a noncitizen, and can include mandatory detention and deportation notwithstanding favorable factors such as long-time

lawful residence, family ties, evidence of rehabilitation, and service to the community.⁶

Amici have observed that such long-time residents, particularly those with family ties and a history of community service that might enable them to obtain a waiver of deportation if not convicted of an aggravated felony, are likely to place a very high priority on avoiding the consequences of an aggravated felony conviction when properly advised about a plea. As the American Bar Association (“ABA”) appropriately concluded in promulgating professional standards for defense counsel, on which the Court relied in *Padilla*, 130 S. Ct. at 1482, “many clients’ greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction.” ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), cmt. (3d ed. 1999).

For these reasons, the question presented is one of exceptional national importance. In addition, it is compelling and important because the decision of the majority below deepens the disagreement between the Third Circuit, the Massachusetts Supreme Judicial Court, and other federal and state courts that have held there is a remedy for *Padilla* violations pertaining to convictions that were final prior to March 31, 2010, see *United States v. Orocio*, 645 F.3d 630, 641 (3d Cir. 2011); *Commonwealth v. Clarke*, 949

⁶ Transactional Records Access Clearinghouse, *Aggravated Felonies and Deportation* <http://trac.syr.edu/immigration/reports/155/>.

N.E.2d 892, 904 (Mass. 2011),⁷ and the Tenth Circuit and other federal and state courts that have held there is not, *see United States v. Hong*, ___ F.3d ___, 2011 WL 3805763, at *7 (10th Cir. Aug. 30, 2011).⁸ This creates greater disuniformity and unfairness in the enforcement of the Nation’s immigration laws. *Cf. Murrieta v. INS*, 762 F.2d 733, 735 (9th Cir. 1985) (“Immigration law is an area in which uniformity is of great importance.”). Accordingly, the question presented should be decided by the Court now.

II. The Decision Below Is Appropriate for Review Because It Is Inconsistent With *Padilla* and Wrong.

The divided decision below holds that *Padilla* does not provide Petitioner with a remedy for the violation of her right to effective assistance of counsel under the Sixth Amendment, on the ground that *Padilla* is a “new rule” under *Teague* that does not apply to convictions like Petitioner’s that became final before *Padilla* was announced. Pet. App. 18a, *Chaidez v. United States*, No. 11-820 (U.S. Dec. 23, 2011). The decision reasons in part that *Padilla* is a “new rule” because of the existence of pre-*Padilla* judicial decisions that held “the Sixth Amendment did not require counsel to provide advice concerning any

⁷ *See also* Pet. 14-15 nn.6-8 (citing cases).

⁸ *See also id.* at 12-13 nn.3-4 (citing cases).

collateral (as opposed to direct) consequences of a guilty plea.” *Id.*

This reasoning directly conflicts with the core premise of *Padilla*, which reiterates what *Strickland* held more than 25 years ago: “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Padilla*, 130 S. Ct. at 1482 (quoting *Strickland*, 466 U.S. at 688 (internal quotation marks omitted)). Although the majority below does not dispute this well-established principle, Pet. App. 5a, it mistakenly downplays the significance of longstanding professional norms that required defense counsel, including Petitioner’s defense counsel, to advise noncitizen clients of the immigration consequences of a guilty plea. Instead, it relies too heavily on pre-*Padilla* judicial decisions that mistakenly fail to properly consider these norms in rejecting ineffective assistance of counsel claims by noncitizens. This reliance conflicts with *Padilla*’s core premise that it is prevailing professional norms, not prior judicial decisions, that determine whether a *Padilla* violation exists.⁹

In considering prevailing professional norms, the Court in *Padilla* found that “[f]or at least the past 15

⁹ Moreover, as the decision below tacitly admits, Pet. App. 12a, its holding is inconsistent with this Court’s statement in *Padilla* that “[w]e . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*”. 130 S. Ct. at 1481 (internal citation omitted).

years, [these] norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.” *Padilla*, 130 S. Ct. at 1485; *see also id.*, 130 S. Ct. at 1483-84 (citing standards and guidelines). “[A]uthorities of every stripe – including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications – universally require defense attorneys to advise as to the risk of deportation consequences for non-citizens.” *Id.*, 130 S. Ct. at 1482 (internal quotation marks and citation omitted). For example, ABA standards at least as early as 1999 required defense counsel to “determine and advise” a client about the immigration consequences of pleading guilty. ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), cmt. (3d ed. 1999).¹⁰ Similarly, in 1995, the National Legal Aid & Defender Association (“NLADA”) published guidelines directing defense counsel to “make sure the client is fully aware of . . . other consequences of conviction such as deportation” during guilty plea negotiations. NLADA, Performance Guidelines for Criminal Defense Representation, § 6.2(a)(3) (1995).

¹⁰ ABA standards at least as early as 1982 required defense counsel to investigate, and advise clients about, collateral “considerations” of a guilty plea, and listed deportation as a consideration in the commentary. ABA Standards for Criminal Justice, Pleas of Guilty Standard 14-3.2, cmt. (2d ed. 1982).

Numerous practice aids have educated defense counsel during the past few decades about the importance of advising noncitizen clients of the immigration consequences of a guilty plea, and ways to effectively do so. A widely cited defense treatise in use in the 1980s notes that “[n]o intelligent plea decision can be made by either lawyer or client without full understanding of the possible consequences of a conviction . . . [including] liability to deportation if the defendant is an alien.” 1 A. Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases* § 204 (1988); see also M. Fullerton & N. Kinigstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 *Am. Crim. L. Rev.* 425 (1986). Another leading treatise instructs that an “attorney who suspects that his client is an alien has a duty to inquire and to protect his client’s immigration status.” 3 *Criminal Defense Techniques* § 60A.01 (S. Daniels & E. Smolinsky Pall eds., 2002). In addition, defense counsel have long had access to detailed resource materials that explain the specific immigration consequences of certain criminal convictions, and that describe strategies for ameliorating such consequences during criminal proceedings. See, e.g., D. Kesselbrenner, M. Baldini-Potermis & L. Rosenberg, *Immigration Law and Crimes*, NIP (2010) (first published in 1984); K. Brady, N. Tooby, M. Mehr & A. Junck, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws*, ILRC (10th ed. 2008) (first published in 1990); M. Vargas,

Representing Immigrant Defendants in New York, IDP (5th ed. 2011) (first published in 1998).

The applicability and availability of these standards, guidelines, and practice aids have been long recognized by the Court. *See INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001) (stating “competent defense counsel, following the advice of numerous practice guides,” would have affirmatively advised client whether conviction would impact removability). They demonstrate that there should be a remedy for *Padilla* violations suffered in connection with plea-based convictions that became final prior to March 31, 2010, because *Padilla* straightforwardly applied *Strickland* to hold that courts must look to these professional norms to determine whether defense counsel’s advice falls below the constitutional minimum. *See Orocio*, 645 F.3d at 639; *Clarke*, 949 N.E.2d at 903-04. The decision below failed to do that. Accordingly, it is inconsistent with *Padilla*, it is wrong, and it should be reviewed by the Court.



CONCLUSION

For the reasons stated herein, and in the petition for a writ of certiorari, the petition should be granted.

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