No. 13-56415

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Respondent-Appellee,

v.

ELIZABETH RODRIGUEZ-VEGA
Petitioner-Appellant.

Appeal from the U.S. District Court
for the Southern District of California
Honorable William V. Gallo Presiding

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c)(1), *amici curiae* National Association of Criminal Defense Lawyers, National Association for Public Defense, Immigrant Defense Project, Immigrant Legal Resource Center, and National Immigration Project of the National Lawyers Guild state that no publicly held corporation owns 10% or more of the stock of any of the parties listed above, which are nonprofit organizations.

Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* state that no counsel for the party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than *amici curiae* and their counsel contributed money that was intended to fund preparing or submitting the brief.

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INTRODUCTION AND STATEMENT OF INTEREST OF *AMICI*

Amici include the National Association of Criminal Defense Lawyers, National Association for Public Defense, National Immigration Project of the National Lawyers Guild, Immigrant Legal Resource Center, and Immigrant Defense Project.[1] *Amici* are associations of public and private criminal defense lawyers with vast experience representing and counseling immigrants accused of crimes. *Amici* also include immigration advocacy and service organizations who have special expertise concerning the immigration consequences of criminal convictions and who provide resources to the criminal defense bar. On a daily basis, *amici* and their member practitioners seek to carry out their Sixth Amendment obligations to their noncitizen clients as articulated by the United States Supreme Court in *Padilla v. Kentucky*. *Amici* have developed standards governing how defense counsel should advise about immigration consequences and are deeply aware of the real-world implications of these standards.

Amici write for three reasons. First, *amici* are concerned that the magistrate in this case misinterpreted the Supreme Court's holding in *Padilla*. The Court held that defense counsel must properly calibrate their advice to their noncitizen clients to accurately communicate the severity of the immigration consequences attendant to a plea. If a plea triggers a ground of removal, as was the case in *Padilla* and as is

[1] Detailed statements of interest are provided in Appendix A.

the case here, defense counsel must convey that deportation is virtually inevitable. In holding that a defense counsel need only advise that deportation in this scenario is a mere possibility, the lower court disregarded *Padilla*'s holding. As support for its conclusion that a warning of only *possible* deportation is sufficient, the magistrate found that deportation is never virtually inevitable because the immigration statute sometimes provides for limited forms of relief in immigration court. This reasoning fails because the Supreme Court expressly considered and rejected it in *Padilla*.

Second, *amici* write to assure the Court that defense attorneys are sufficiently versed in immigration law to deliver accurate and specific advice about immigration consequences. Numerous local and national resources exist to aid practitioners in carrying out their Sixth Amendment duty. Defense attorneys are well-equipped to advise their clients when a proposed plea falls within a ground of removal such that deportation is presumptively mandatory.

Third, *amici* write to challenge the lower court's holding regarding the prejudice prong of *Strickland v. Washington*. The magistrate held that warnings about the possibility of deportation, whether communicated by a judge or counsel, purge prejudice from counsel's failure to advise a noncitizen defendant about virtually certain immigration consequences. This holding is incorrect. Judicial notifications are no substitute for advice by counsel, given the difference between

the roles of judges and attorneys and the fact that judicial notifications are typically generic and delivered without regard to a defendant's circumstances. Moreover, a judicial notification can never cure prejudice stemming from the failure of counsel to negotiate for an immigration-safe plea. Judicial warnings should thus play little, if any, role in the *Strickland* calculus of prejudice.

In any event, a warning that deportation is merely possible cannot purge prejudice where defense counsel failed to advise that deportation is virtually inevitable. A "may" warning is categorically different than a "shall" warning and misrepresents the risk assumed by the defendant in entering the plea.

ARGUMENT

I. The Lower Court Erred In Holding That Defense Counsel Need Only Advise Noncitizen Clients Of Possible Deportation When Deportation Is In Fact Virtually Certain.

Padilla v. Kentucky holds that defense counsel must accurately advise noncitizen defendants like Ms. Rodriguez that deportation is "presumptively mandatory" when a proposed plea clearly falls within a removal ground. 559 U.S. 356, 368-69 (2010). The magistrate acknowledged that Ms. Rodriguez's conviction qualified as an aggravated felony, and, as a result, her "chances of immigration relief [were] severely limited." Habeas Decision at 9-10. He nonetheless erroneously ruled that counsel is never obligated to warn that deportation is a "virtual certainty." *Id* at 8.

A. The Lower Court Disregarded the Holding of *Padilla v. Kentucky*.

The magistrate held that *Padilla* imposes only a limited Sixth Amendment duty to advise all noncitizen defendants that the "guilty plea may carry a risk of adverse immigration consequences." Habeas Decision at 7. In so holding, he fundamentally misinterpreted the Supreme Court's holding in *Padilla*. *Padilla* held that the scope of counsel's duty hinges on the clarity of the immigration consequence. 559 U.S. at 369. If a plea "clear[ly]" falls within a ground of removal, counsel must advise the client that "deportation [is] presumptively mandatory." *Id.*; *see also id*. at 368 (defense counsel must advise a client when the immigration statute "specifically commands removal"). In contrast, when the risk of deportation is not clear, counsel need only advise the defendant "that pending criminal charges *may* carry a risk of adverse immigration consequences." *Id*. at 369 (emphasis added). Applying these rules to Padilla's claim, the Court found that "the terms of the [controlled substance removal ground] are succinct, clear, and explicit in defining the removal consequence of Padilla's conviction." *Id*. at 368. Because the immigration consequences "could easily be determined from reading the removal statute," "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." *Id*. at 369.

The rule that defense counsel must properly calibrate their advice to

accurately communicate the severity of the immigration consequences attendant to a plea is part of *Padilla*'s holding and not mere dicta that can be discarded. The Supreme Court sought to ensure that noncitizen defendants like Mr. Padilla and Ms. Rodriguez are unequivocally informed when deportation is a virtual certainty. The Court recognized that a warning of possible deportation is categorically different from a warning of virtually certain deportation. The stark difference between the two is aptly illustrated by Honorable Robert L. Hinkle, addressing the government's argument that a defendant pleading to an aggravated felony need only know that deportation was a possibility: "Well, I know every time that I get on an airplane that it could crash, but if you tell me it's going to crash, I'm not getting on." *United States v. Choi*, 581 F. Supp. 2d 1162 (N.D. Fla. 2008), Transcript of Motion Hearing (Sept. 24, 2008).

A "may" warning about deportation carries far less influence on a defendant's calculus about whether to accept a plea than a "virtually certain" warning. The former communicates that a defendant has the opportunity to defend against deportation. A defendant receiving this advice might well take her chances in immigration court in exchange for a reduced criminal charge or sentence. Where an offense falls into a ground of removal, however, this warning fails to convey the almost certain likelihood of removal.

A defendant receiving the "virtually certain" warning, however, will correctly understand that the only meaningful way to prevent deportation is to negotiate an immigration-safe plea in criminal proceedings. Such advice accurately reflects the severe and virtually certain consequences of her guilty plea. For example, there is a significant difference "in a lawyer's advice to a client that the client "faces" five years of incarceration on a charge, as compared to advice that the conviction will result in a five-year mandatory minimum prison sentence." *Commonwealth v. DeJesus*, 468 Mass. 174, 182 n.7 (2014). Put another way, an attorney advising a client that she "might" be deported is like saying she "might" get life in prison, or she might get no sentence at all.

This Court has reiterated and applied *Padilla's* holding that counsel must unequivocally inform a defendant when deportation is a "virtually certainty." *See United States v. Bonilla*, 637 F.3d 980, 984 (9th Cir. 2011) (holding that a "defendant who faces almost certain deportation is entitled to know more than that it is *possible* that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty") (emphasis in original). A multitude of courts agree.[2]

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[2] *See, e.g., State v. Campos-Corona*, --- P.3d ----, 2013 WL 781612, at *3 (Colo. App. Feb. 28, 2013) (holding that where removal is mandatory, "plea counsel did not perform reasonably by merely advising Campos–Corona that a plea may carry an adverse immigration risk and thus did not provide adequate assistance"); *Hernandez v. State*, 124 So.3d 757, 762 (Fla. 2012) (where "defense counsel merely advised Hernandez that a plea [to a controlled substance offense] could/may affect [Hernandez's] immigration status," he "was deficient under

In holding that a defense counsel need only advise that deportation is a mere possibility when deportation is in fact a virtual certainty, the lower court failed to heed both *Padilla* and *Bonilla*.

B. Counsel Must Give a Strong Warning of Virtually Certain Deportation Even if Relief in Immigration Court is Potentially Available.

Padilla requires defense counsel to provide an unequivocal warning that deportation is presumptively mandatory even if relief from removal is potentially

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Padilla for failing to advise Hernandez that his plea subjected him to presumptively mandatory deportation"); *State v. Guzman-Ruiz*, 6 N.E.3d 806, 810 (Ill. App. 3d 2014) (holding defense counsel's "representation fell below an objective standard of reasonableness" when he failed to inform defendant that, if she accepted the plea agreement, her deportation for a controlled substance conviction would be "presumptively mandatory"); *DeJesus*, 468 Mass. at 178-79 (holding that defense counsel did not satisfy obligation under *Padilla* to accurately inform defendant that the legal consequence of pleading guilty to an aggravated felony would be "presumptively mandatory deportation" where counsel only advised the defendant that he would be "eligible for deportation"); *Bahtiraj v. State*, 840 N.W.2d 605, 610 (N.D. 2013) (where client's conviction for an aggravated felony resulted in "presumptively mandatory deportation," counsel's advice that deportation was possible constituted deficient performance); *State v. Kostyuchchenko*, 8 N.E.3d 353, 357 (Ohio App. 2014) ("trial counsel, in negotiating Kostyuchenko's guilty plea, had a duty under *Padilla* to ascertain from the immigration statutes, and to accurately advise him, that his conviction mandated his deportation"; general advice regarding possible deportation was insufficient); *Ex parte Leal*, 427 S.W.3d 455, 461-62 (Tex. App.-San Antonio 2014) (holding that attorney could have readily determined that appellant's second plea to a controlled substance would result in deportation and therefore should have provided accurate, specific advice, not a general warning of some adverse immigration consequence); *State v. Martinez*, 253 P.3d 445, 448 (Wash. App. 2011) (finding counsel's performance deficient where he "solely discussed the possibility of deportation" and "did not warn defendant that his deportability for an aggravated felony drug trafficking conviction was "certain").

available in immigration court. This rule extends to all individuals whose pleas fall within a ground of removal and not just those convicted of an aggravated felony.[3]

As support for his conclusion that a warning of only *possible* deportation always suffices, the magistrate found that deportation is never "absolutely certain" in light of certain, limited "exceptions to deportation."[4] Habeas Decision at 11-13.

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[3] Although counsel must issue an unequivocal warning regarding presumptively mandatory removal for every plea to a deportable offense, *Padilla* also requires that defense counsel distinguish between pleas that bar eligibility for cancellation of removal and those that permit the defendant to apply for this discretionary relief. *See, e.g.*, *Ex Parte Carpio Cruz*, No. 08-10-00240-CR, 2011 WL 5460848, at *6-7 (Tex. Ct. App. Nov. 9, 2011). Preserving eligibility for discretionary relief is critical in a case where the charged offense is an aggravated felony, a plea to a non-aggravated felony may be available, and the defendant otherwise meets the eligibility requirements for cancellation of removal. Because cancellation is discretionary and may be extremely difficult to obtain, counsel must always advise a defendant that deportation is "practically inevitable" whenever a plea falls within a ground of removal, regardless of whether the "exercise of limited remnants of equitable discretion" is possible. *Padilla*, 559 U.S. at 364.

[4] The magistrate focused specifically on the availability of withholding of removal, 8 U.S.C. § 1231(b)(3)(A) and deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, art. III, p. 20, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85; 8 C.F.R. § 1208.17(a). Withholding of removal is a persecution-based relief that has a more stringent standard of proof than asylum, and is barred by a conviction of a particularly serious crime. 8 U.S.C. §§ 1231(b)(3)(A) & (B)(ii). CAT does not have any criminal bars, but requires an exceptionally difficult showing of significant likelihood of government-led or-government-acquiesced torture of the noncitizen in her native country. 8 C.F.R. § 208.16. Both forms of relief are rarely granted. In fiscal year 2013, immigration judges granted withholding in only 1,518 cases and CAT in only 506 cases out of a total of 173,013 cases. By percentage, then, withholding was granted in .88% of removal cases and CAT in .29% of removal cases. *See* U.S. Dep't. of Justice, Executive Office for Immigration Review, FY 2013 Statistical Year Book, B2, K6, M1 (2014).

In so finding, however, the magistrate ignored the Supreme Court's rejection of this argument in *Padilla*:

> Under contemporary law … if a noncitizen has committed a removable offense, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses …. Subject to limited exceptions, this discretionary relief is not available for an [aggravated felony].

559 U.S. at 364. The Court was thus well aware that relief may be available for all removable noncitizens, including "limited" relief for people convicted of an aggravated felony. But the Court was equally aware that the possibility of relief is so remote that counsel must advise their clients that removal consequences are "presumptively mandatory" when the proposed plea offense falls within a ground of removal. Unless the facts show that a client has a strong case for one of these rare forms of relief, it is grossly misleading to tell her only that she *might* be removed. Such advice would be the equivalent of telling a defendant she might not be convicted at trial because an affirmative defense applies to the charged crime, even though there was no evidence to support such a defense.

C. Ample Attorney Resources Make it Easy to Provide Accurate Advice of Clear Immigration Consequences.

Amici and its members, comprised both of associations of public and private criminal defense lawyers in all fifty states and immigrant advocacy organizations providing resources to the criminal defense bar, advance and promote the standards

of effective attorney performance embodied in *Padilla*. *Amici* train criminal defense counsel to comply with the duties set forth in *Padilla*, which include researching potential immigration consequences and accurately advising a noncitizen where the removal consequences are presumptively mandatory. A defense attorney who fails to investigate and negotiates a plea resulting in clear removal consequences has not fulfilled his attorney's duty to the bar, to the Constitution, or, most importantly, to his client. *See, e.g.*, "Obligation to Advise on Immigration Consequences" catalogued on the website for the Training Division of Defender Services Office, http://www.fd.org/navigation/select-topics-in-criminal-defense/immigration-consequences-of-conviction/subsections/obligation-to-advise-on-immigration-consequences.[5]

Before a defense attorney can reasonably determine the removal consequences of a potential plea, he must engage in some preliminary investigation and research. *See Strickland v. Washington*, 466 U.S. 668, 690-691 (1984) ("counsel has a duty to make reasonable investigations").[6] The professional

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[5] The Training Division of Defender Services Office (DSO) provides substantial training and other resource support to Federal Defender Organization (FDO) staff and CJA panel attorneys, both of whom provide criminal defense services to federal defendants that are unable to afford representation. *See* http://www.fd.org/odstb/about-us.

[6] The duty to investigate and research the immigration consequences also applies when "the law is not succinct and straightforward." *Padilla*, 559 U.S. at 367, 369. Before a defense attorney can reasonably determine that the immigration

standards relied on by the Supreme Court in *Padilla* make clear that determining the consequences of a particular plea requires investigation and analysis of the client's immigration status and criminal history, the specific criminal statute, and the client's plea statement. 559 U.S. at 367; *see, e.g.*, Nat'l Legal Aid and Defender Ass'n, *Performance Guidelines for Criminal Representation* § 6.2 (1995) ("In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of . . . other consequences of conviction such as deportation. . . . In developing a negotiation strategy, counsel should be completely familiar with . . . the advantages and disadvantages of each available plea according to the circumstances of the case.");[7] Amer. Bar Ass'n., *ABA Standards for Criminal Justice, Pleas of Guilty* Standard 14-3.2(f), (3d ed. 1999) ("counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client").[8]

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consequences are too complex to warrant specific advice, preliminary investigation and research must be done. *See Strickland*, 466 U.S. at 690-91. Whether the relevant immigration law is simple, as in this case, or more complicated, attorneys cannot simply eschew their duty to research and give generic warnings about immigration consequences.

[7] The National Legal Aid and Defender Association Guidelines are available at www.nlada.org/Defender/ Defender_Standards/Performance_Guidelines .

[8] The ABA criminal justice standards are available at www.americanbar.org/content/dam/aba/publications/ criminal_justice_standards/pleas_guilty.authcheckdam.pdf.

Although not all criminal defense attorneys have complied with their obligations in this area – as demonstrated by Ms. Rodriguez's case, a considerable array of resources has long existed to help defense counsel fulfill these professional obligations. These resources include a wide range of written treatises, online practice manuals, convenient reference guides, and state-specific guides that work through the laws of many jurisdictions and explain the immigration implications of each one. *See Amici Curiae* Brief for the Nat'l Ass'n. of Criminal Defense Lawyers, et. al. at 32, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651) (identifying almost 1,000 different publications and hundreds of training sessions for defenders throughout the nation on the immigration consequences of criminal convictions). Many of these publications are available online and free of charge to defense attorneys. Moreover, criminal and immigration law organizations have engaged in extensive nationwide efforts to train defense attorneys in immigration issues and to establish and maintain nationwide, statewide and regional hotlines through which defense attorneys can obtain case-specific advice. *Id*. at *25-32.

In particular, California, where this case arises, has in place a significant infrastructure to provide immigration advice to all defendants in California. For example, *amicus* Immigrant Legal Resource Center (ILRC), founded in California in 1979, provides legal trainings, educational materials, and advocacy to advance

immigrant rights. *See* www.ilrc.org/about_ilrc/index.php. For thirty years, ILRC has provided a nationwide consultation service called "Attorney of the Day" that "offer[s] consultations on many aspects of immigration law to attorneys, employees of non-profit organizations, public defenders, and others assisting immigrants," including consultation on the immigration consequences of conviction. *See* www.ilrc.org/technical_assistance/index.php. Many public defender offices in California contract with the ILRC to answer their questions on the immigration consequences of crimes, and a few, such as the Los Angeles County Public Defender Office and the Alameda County Public Defender Office, maintain immigration-trained counsel on staff. Since 1990, ILRC has also published a widely-used treatise for defense attorneys with noncitizen clients in states covered by that Circuit. *See* Katherine Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (Immigrant Legal Resource Ctr. ed. 10th ed. 2011). Also since 1990, ILRC has co-authored a chapter on the representation of non-citizen defendants in the widely distributed publication *California Criminal Law: Procedure and Practice*, which is published by the University of California and the State Bar of California. ILRC also provides subscribers with "quick reference" charts assessing the immigration consequences of convictions in California, and presents national webinars and full-day seminars to immigration and criminal defense attorneys throughout the states

of the Ninth Circuit. *See* www.ilrc.org/crimes . California attorney Norton Tooby has also published a number of widely-cited national practice manuals, including Norton Tooby, *Tooby's Guide to Criminal Immigration Law* (2008 ed.); Norton Tooby, *Tooby's Crimes of Moral Turpitude* (2007 ed.); Norton Tooby, *Criminal Defense of Immigrants* (4th ed. 2007); Norton Tooby & Joseph Justin Rollins, *Aggravated Felonies* (2006 ed.); and Norton Tooby & Joseph Justin Rollins, *Safe Havens* (2005 ed.).

For many years, the federal defense bar has benefited from numerous trainings, practice materials, and other resources aimed specifically at federal defenders and CJA appointed counsel. The Training Division of Defender Services Office (DSO), which provides substantial training and other resource support to both federal defenders and CJA panel attorneys, has incorporated *Padilla* training panels into its live national seminars for several years and makes available recordings of these training panels on its website. *See* http://www.fd.org/navigation/select-topics-in-criminal-defense/immigration-consequences-of-conviction/subsections/obligation-to-advise-on-immigration-consequences. The Training Division also maintains helpful resources on its website. *Id*. Significantly, in 2011, the Office of Defender Services established a partnership with Heartland Alliance's National Immigrant Justice Center (NIJC) to provide training and resources to CJA practitioners around the country on

immigration-related issues, including a hotline for all CJA counsel and federal defenders with questions regarding immigration consequences of potential pleas. *See* http://www.fd.org/navigation/select-topics-in-criminal-defense/immigration-consequences-of-conviction/subsections/national-immigrant-justice-center%27s-defenders-initiative. Lastly, the Federal Defenders of San Diego, Inc. has for at least thirty years published *Defending A Federal Criminal Case,* an extensive practice guide that addresses the duty to advise clients of immigration consequences. The most recent edition contains a thirty-page primer on the immigration consequences of conviction. *See* Fed. Defenders of San Diego, Inc., *Defending A Federal Criminal Case,* chapter 9 at 9-459 (2010).

As noted in *Padilla*, the determination of whether a crime is a deportable one can often be made with a straightforward review of the immigration statute or caselaw. 559 U.S. at 368-69. This was undeniably the case regarding Ms. Rodriguez's conviction under 8 U.S.C. § 1324(a). *See* Habeas Decision at 9-10 ("it is clear that Section 1324(a)(2)(A) constitutes an aggravated felony for immigration purposes"). Trial counsel not only failed to read the statute, but he neglected to take advantage of the myriad resources available to him. For example, he could have 1) called *amicus* ILRC's "Attorney of the Day" consultation service; 2) consulted with the local Federal Defenders of San Diego; 3) called NIJC's Defender's Initiative hotline (which responds to any inquiry in a federal criminal

case within 24 hours); 4) reviewed one of the many immigration treatises or practice materials available on the Training Division of Defender Services Office website, including Jodi Linker, *Representing Non-citizens After Padilla* (Aug. 2011); or 5) conducted quick legal research which would have yielded clear case law on the matter. [9] In fact, even a simple Google search would have yielded the information necessary to analyze Ms. Rodriguez's case.[10]

II. Noncitizen Defendants Who Fail to Receive Clear and Accurate Advice About the True Likelihood of Deportation Can Establish Prejudice, Notwithstanding Notice of Possible Deportation.

Noncitizen defendants like Ms. Rodriguez who allege that they failed to receive unequivocal and accurate advice about the true likelihood that a plea will result in deportation can establish prejudice, even if their attorney or a judge has notified them about possible deportation. Under *Strickland*, a defendant must show that 1) defense counsel's performance fell below an objective standard of

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[9] *See Matter of Ruiz-Romero*, 22 I & N Dec. 486, 491 (BIA 1999) ("since its introduction to the aggravated felony definition, section 101(a)(43)(N) has included all the actions which will incur criminal penalties under sections 274(a)(1)(A) and (2) of the Act"); *Biskupski v. Attorney General*, 503 F.3d 274, 280−81 (3d Cir. 2007) (holding that the phrase "aggravated felony" is a term of art that Congress had expressly defined to include misdemeanor alien smuggling).

[10] The search "8 U.S.C. 1324 and deportation" produces a resource titled "Categorical Analysis Checklist," authored by experts Norton Tooby and Joseph Justice Rollins. The cover page of this guide lists various aggravated felonies including "alien smuggling," and provides specific information about this ground on page four. *See* http://nortontooby.com/pdf/FreeChecklists/CATChecklist.pdf (visited on July 16, 2014).

reasonableness, and 2) the performance prejudiced the defendant. 466 U.S. at 687. To establish prejudice, "a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372 (citing to *Roe v. Flores–Ortega*, 528 U.S. 470, 480, 486 (2000)). A defendant can establish prejudice by establishing a "reasonable probability" that "but for counsel's errors" she would have either rejected the plea and "insisted on going to trial," *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), or that she would have continued to negotiate. *Missouri v. Frye*, 132 S.Ct. 1399, 1408-9 (2012) (*Hill* test is not the only test for prejudice); *United States v. Kwan*, 407 F.3d 1005, 1017-1018 (9th Cir. 2005) (prejudice where showing that defendant would have continued to negotiate), *abrogated on other grounds by Padilla v. Kentucky*, 559 U.S. 356 (2010); *Kovacs v. United States*, 744 F.3d 44, 52 (2d Cir. 2014) (same). *Strickland* mandates that courts employ a case-by-case "totality of the circumstances" standard for evaluating a defendant's claim of prejudice. 466 U.S. at 695.

In this analysis, this Court must recognize that judicial notifications cannot substitute for advice by counsel and must therefore be given little weight. *See State of New Mexico v. Favela*, 311 P.3d 1213, 1223 (N.M. Ct. App. 2013), *cert. granted*, 313 P.3d 251, No. 34, 311 (N.M. Oct. 18, 2013) (judicial plea colloquy warnings "should be given very little weight when considering prejudice").

Moreover, defendants are entitled to clear and correct information about the likelihood that they will be deported. When deportation is practically inevitable, a notification that amounts to a warning about *possible* deportation could never purge the prejudice flowing from counsel's error. *See, e.g.*, *United States v. Urias-Marrufo*, 744 F.3d 361, 368-69 (5th Cir. 2014) (judicial notification that deportation might occur does not cure failure "to warn of *certain* immigration consequences") (emphasis in original); *United States v. Akinsade*, 686 F.3d 248, 253-55 (4th Cir. 2012) ("clear error made by counsel" can only be cured by a judicial "admonishment that is specific and unequivocal").

The magistrate thus abused his discretion by finding a lack of prejudice due to the court's pro forma notification that immigration consequences could possibly flow from the conviction. Moreover, counsel's ineffective and misleading advice about the mere possibility of deportation neither informed Ms. Rodriguez of the automatic adverse consequences she would face nor substituted for correct advice.

A. Because Judicial Warnings About Immigration Consequences of a Plea Differ Categorically From Advisals By Defense Counsel, They Do Not Purge Prejudice.

A judge's notification about the immigration consequences of a plea agreement cannot cure a defense attorney's failure to accurately advise a defendant about the immigration consequences of a plea for at least three reasons. First, judges and defense attorneys play distinct roles in the criminal justice system and

defendants properly rely on the advice of counsel irrespective of a judge's warnings. Second, judges generally give notifications about immigration consequences without regard to the individual circumstances, or the best interests, of a defendant. Judicial notifications often, as here, take the form of generic warnings about consequences and do not constitute advice about whether to take a plea in light of the facts of the case, the governing law, and the client's goals. Third, when a defense attorney's failure to accurately advise about immigration consequences prevents the attorney from negotiating an alternative plea that eliminates or mitigates immigration consequences, a judicial notification cannot cure the resulting prejudice. Judicial notifications should thus play little, if any, role in the *Strickland* prejudice calculus.

1. Judges and Defense Attorneys Assume Different Responsibilities and Roles In the Criminal Justice System.

Because defense counsel and judges play fundamentally distinct roles in our criminal justice system, defendants do not—and should not—regard judicial notifications in the same way that they regard advice from counsel about whether to take a plea. The Supreme Court has recognized that a judge cannot "effectively discharge the obligations of counsel for the accused." *Powell v. Alabama*, 287 U.S. 45, 61 (1932). Although judges ensure the fairness of proceedings, they "cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and the accused which sometimes partake of the

inviolable character of the confessional." *Id*.; *see also Marroquin v. United States*, 480 F. App'x 294, 299 (5th Cir. 2012) (J. Dennis, concurring) ("the judicial plea colloquy is no remedy for counsel's deficient performance in fulfilling [their] obligations [,]" but rather merely "assist[s] the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary.") (quoting *McCarthy v. United States*, 394 U.S. 459, 465 (1969)).

Judges are neutral arbiters. The Fifth Amendment requires them to ensure that a defendant's plea is voluntary. *See Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969). Attorneys, by contrast, are zealous advocates who have a duty under the Sixth Amendment to provide competent counsel.[11] As the U.S. Supreme Court has recognized, the constitutional duties of judges and attorneys are distinct. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1390 (2012) (importing the Fifth Amendment's "knowing and voluntary" analysis into a Sixth Amendment ineffectiveness claim violated "clearly established federal law").

A judge's Fifth Amendment duty to ensure that a plea is voluntary consists of making sure that that the plea must "not be the product of 'actual or threatened physical harm, or ... mental coercion overbearing the will of the defendant' or of state-induced emotions so intense that the defendant was rendered unable to weigh

[11] *See* Model Rules of Professional Conduct Preamble (2013) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.")

rationally his options with the help of counsel." *Matthew v. Johnson*, 201 F.3d 353, 365 (5th Cir. 2000) (quoting *Brady v. United States*, 397 U.S. 742, 750 (1970)). This important duty is circumscribed. It does not encompass fact investigation or counseling defendants to accept or reject a plea in accordance with their interests and in light of the full and sometimes confidential information relevant to their cases.[12] Indeed, judges are barred from considering information outside of the record and from giving advice. *See* Fed. R. Crim. P. 11(c)(1) ("the court must not participate in [plea] discussions."); *see also Libretti v. U.S.*, 516 U.S. 29, 50–51 (1995) ("Apart from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo.").

Attorneys do much more than recite the theoretical consequences of a plea. They marshal the law and the facts (including confidential ones) to advise clients whether proposed pleas are in their interests, as defined by their clients' goals. Under ABA standards, "[i]f, after full investigation, a lawyer has determined that a proposed plea is in the best interests of the defendant, the lawyer 'should use

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[12] The American Bar Association (ABA) has recognized that "discussions [about the consequences of a plea] may involve the disclosure of privileged or incriminatory information [such as the defendant's immigration status], only defense counsel is in a position to ensure that defendant is aware of the full range of consequences that may apply in his or her case." *ABA Standards for Criminal Justice, Pleas of Guilty* Standard 14-3.2 cmt (3d ed. 1999).

reasonable persuasion to guide the client to a sound decision.'" *See ABA Standards for Criminal Justice Pleas of Guilty* Standard 14-3.2(c) cmt. (3d ed. 1999); *see also ABA Criminal Justice Standards, Defense Function* Standard 4-5.1(a) (3d ed. 1993) ("After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome"). Advice about whether to ultimately take a plea after balancing relevant pros and cons differs fundamentally from a judge's rote notification of immigration consequences. Given the fundamental differences in duties and role between attorneys and judges, defendants rightly rely more on statements by their counsel than those by a judge. *See State v. Yahya*, 10AP-1190, 2011 WL 5868794 at *5 (Ohio Ct. App. Nov. 22, 2011) (finding it "reasonable" for the defendant to have relied on "her attorney's specific assurance that she would not be deported" rather than "trial court's delivery of the warning [she may be deported]").

2. Judicial Notifications Are Given Without Regard to a Defendant's Particular Circumstances

Judicial notifications must be given little weight in the *Strickland* prejudice analysis because they are typically delivered "blind"—i.e., without regard to the particular circumstances of the defendant. Defendants reasonably refrain from relying on such one-size-fits-all judicial notifications because it is apparent that the warnings do not take their individual circumstances into account. Notifications

given during a plea colloquy are particularly "scripted, perfunctory, pro forma, and delivered too late in the process to meaningfully impact the defendant's decision whether to accept the plea agreement." Richard Klein, *Due Process Denied: Judicial Coercion in the Plea-Bargaining Process*, 32 Hofstra L. Rev. 1349, 1401 (2004); *see also* Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 731 (2002) ("[i]f the objective is to give fair warning of consequences to the defendant and if implicit in this is a desire to have the consequences carefully considered, a last-minute warning hardly gives time for mature reflection") (internal quotations omitted).

The following anecdote from a defense attorney illustrates a typical defendant's response to a court statement regarding immigration consequences:

> In 2010, I represented a long-time lawful permanent resident in criminal proceedings in the Brooklyn criminal court. He was entering a plea of guilty to a minor offense as part of a re-negotiated plea bargain after his earlier plea had been vacated. The client and I had spoken many times about the new plea agreement, which—unlike the vacated plea—would not trigger any of the crime-based grounds of removability. Nonetheless, during the plea colloquy the judge issued a standard warning that if my client was a non-citizen the plea might subject him to deportation. Confused, my client looked to me during the colloquy, uncertain what to do next. Based on my nod of assurance he continued the colloquy, trusting a nod from me over the judge's standardized warning.

Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Non-Citizen Defendants*, 10 Geo. L.J. 1, 21 n. 108 (2012). In this example, it

would have been foolish for the lawyer's client to have relied upon the court's stock notification of immigration consequences. Similarly, it is reasonable for a patient to rely on advice from a doctor about whether to take prescription medication rather than on boilerplate information about possible side effects. Standard warnings about side effects are meant to spark a conversation between a patient and her doctor in the same way that judicial warnings are an attempt to induce a conversation between a defendant and her attorney. *See ABA Standards for Criminal Justice Pleas of Guilty* Standard 14-1.4(c) (3d ed. 1999) (stating that, after a warning about deportation, "[t]he court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea").

3. Judicial Notifications Cannot Cure the Deficiency of Having Foregone Negotiations For an Immigration-Safe Plea

A judicial notification about immigration consequences cannot cure the prejudice caused by defense counsel's failure to pursue an alternate, immigration-safe plea. The Supreme Court in *Padilla* defined the scope of defense counsel's Sixth Amendment duty to include negotiating a plea to avoid, or reduce the likelihood of, deportation. 559 U.S. at 373 ("Counsel who possess the most rudimentary understanding of the deportation consequences . . . may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation."). The Supreme Court has made

clear that the actions of counsel during the plea bargaining process can result in prejudice. *Frye*, 132 S.Ct. at 1408-9 ("criminal defendants require effective counsel during plea negotiations"). Prejudice can flow from the failure of counsel to negotiate an immigration-safe plea. *See Kwan*, 407 F.3d at 1017-1018 (finding prejudice because defendant could have negotiated for a downward departure to avoid being convicted of an aggravated felony or "explored the option of renegotiating his plea agreement"), *abrogated on other grounds by Padilla v. Kentucky*, 559 U.S. 356 (2010); *Kovacs*, 744 F.3d at 52 (prejudice shown if "but for counsel's unprofessional errors, there was a reasonable probability that the petitioner could have negotiated a plea that did not impact immigration status or that he would have litigated an available defense") (citing *Kwan*, 407 F.3d at 1017–18). No notification of immigration consequences can undo the prejudice of defense counsel neglecting to pursue an alternate plea. *See Marroquin*, 480 F. App'x at 298 (J. Dennis, concurring) ("whether a petitioner is entitled to relief on the claim that defense counsel failed to advise her that the offered plea would result in automatic deportation turns on whether prejudice resulted from counsel's performance during the plea negotiation process [] and cannot be measured by a judge's performance in accepting the defendant's guilty plea as voluntary").

B. Equivocal Information About the Risk of Deportation Does Not Cure Prejudice When Deportation is Practically Inevitable.

In any event, a notification that deportation is merely *possible* cannot cure prejudice when deportation is *practically inevitable*, as was the case in *Padilla* and is the case whenever a plea clearly falls within a removal ground. As discussed above in § I, the Supreme Court in *Padilla* drew a sharp contrast between counsel's duty in cases where it is "clear" that deportation is "practically inevitable" and cases where deportation is only possible. 559 U.S. at 364, 369; *compare id*. at 368 (defense counsel must advise a client when the immigration statute "specifically commands removal") *with id*. at 357 ("that pending criminal charges *may* carry a risk of adverse immigration consequences"). It follows as a matter of logic that a defense attorney or trial judge's statement that a guilty plea *may* or *could* have immigration consequences does not cure the prejudice resulting from the failure of defense counsel to competently advise a noncitizen client that the plea *will* result in presumptively mandatory deportation.

Numerous courts agree. *See, e.g.*, *Urias-Marrufo*, 744 F.3d at 368-69 (defense attorney's duty "to warn of *certain* immigration consequences . . . cannot be saved by a plea colloquy" in which magistrate judge asked whether the defendant "understood that there *might* be immigration consequences") (emphasis in original); *Akinsade*, 686 F.3d at 253-55 ("the severity of the consequence at issue and the clear error made by counsel in rendering the advice warrants a

curative admonishment that is specific and unequivocal as to the deportation consequences of … conviction"); *Hernandez*, 124 So. 3d at 763 ("a colloquy containing an equivocal warning from the trial court . . . cannot, by itself, remove prejudice resulting from counsel's deficiency"); *Commonwealth v. Clarke*, 949 N.E.2d 892, 907 n.20 (Mass. 2011), *abrogated on other grounds by Chaidez v. United States*, 133 S.Ct. 1103 (2013) ("the receipt of [a judicial] warning[] is not an adequate substitute for defense counsel's professional obligation to advise her client of the likelihood of *specific and dire immigration consequences* that might arise from such a plea") (emphasis added).

Holding that a notification of possible deportation cures prejudice would greatly undermine *Padilla*'s holding that a defendant has a Sixth Amendment right to accurate immigration advice. Even the most egregious of constitutional violations would have no remedy. Because the ineffectiveness of defense counsel would carry no consequence, attorneys would not be properly incentivized to discharge their *Padilla* duty by rendering competent immigration advice. *Amici* urge the Court to remain steadfast in its commitment to upholding *Padilla*'s mandate to defense attorneys to deliver properly calibrated and clear advice about immigration consequences.

CONCLUSION

For the above reasons, *amici curiae* urge the Court to grant Appellant's appeal, reverse the trial court's decision, and remand this case for an evidentiary hearing.

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Respectfully submitted,

s/ Sejal Zota

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APPENDIX A

STATEMENTS OF INTEREST OF *AMICI CURIAE*

National Association of Criminal Defense Lawyers

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 12,000 members nationwide, and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. Founded in 1958, NACDL promotes criminal law research, advances and disseminates knowledge in the area of criminal practice, and encourages integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the constitutional standards for effective criminal defense counsel.

National Association for Public Defense

The National Association for Public Defense (NAPD) is an association of nearly 7,000 professionals critical to delivering the right to counsel. NAPD members include attorneys responsible for executing the constitutional right to effective assistance of counsel, including regularly researching and providing advice to clients on the immigration consequences of specific convictions. We are the advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best

practices, but also in the practical, day-to-day delivery of services. Our collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and through a diversity of traditional and holistic practice models.

National Immigration Project of the National Lawyers Guild

The National Immigration Project of the National Lawyers Guild (National Immigration Project) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The National Immigration Project provides legal training to the bar and the bench on the immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* and three other treatises published by Thomson West.

Immigrant Defense Project

The Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to defending the legal, constitutional and human rights of immigrants. A national expert on the intersection of criminal and immigration law, IDP supports, trains and advises both criminal defense and immigration lawyers, as well as immigrants themselves, on the immigration consequences of criminal convictions and related issues. IDP seeks to improve the quality of justice for

immigrants accused of crimes and therefore has a keen interest in ensuring that immigrants in the nation's criminal justice system receive competent legal counsel regarding the immigration consequences of criminal convictions.

Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC), founded in 1979, is a national back-up center that provides technical assistance, training, publications, and assistance in advocacy to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. Its publications include *Defending Immigrants in the Ninth Circuit* (formerly *California Criminal Law and Immigration*), which has been cited by the Ninth Circuit Court of Appeals and the California Supreme Court, and a chapter entitled *Representing a Non-citizen Criminal Defendant* in *California Criminal Law Procedure and Practice.* The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status and the immigration consequences of criminal convictions.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d), I hereby certify that the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and, according to computerized count, contains 6,667 words.

DATED: August 14, 2014

s/ Sejal Zota
_____
Sejal Zota

CERTIFICATE OF SERVICE

When All Case Participants are Registered
for the Appellate CM/ECF System

U.S. Court of Appeals Docket No. 13-56415

I, Sejal Zota, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 14, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Sejal Zota

Sejal Zota
National Immigration Project of the
National Lawyers Guild

Date: August 14, 2014