No. 2017-0915

IN THE SUPREME COURT OF OHIO

DISCRETIONARY APPEAL FROM THE STARK COUNTY COURT OF APPEALS, FIFTH APPELLATE DISTRICT, CASE NO. 2016CA00201

STATE OF OHIO,
Plaintiff-Appellant,

v.

CARLOS HUMBERTO ROMERO,
Defendant-Appellee.

BRIEF OF *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLEE

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Immigrant Defense Project

The Immigrant Defense Project ("IDP") is one of the nation's leading non-profit organizations with expertise in the interrelationship of immigration and criminal law since 1997. IDP advises and trains criminal defense and immigration lawyers nationwide, as well as immigrants themselves, on issues involving the immigration consequences of criminal convictions. By contract with the New York State Office of Indigent Legal Services, IDP serves as the designated Regional Immigration Assistance Center for New York City, charged, pursuant to the Supreme Court's mandate in *Padilla v. Kentucky*, 559 U.S. 356 (2010), with providing expert immigration advice to certain public defenders and appointed counsel.

Ensuring that noncitizen defendants receive effective assistance of counsel pursuant to the Sixth Amendment is one of IDP's core interests. Court immigration notifications that there "may" be immigration consequences cannot, and should not, replace the duty of counsel articulated in *Padilla v. Kentucky* to competently advise noncitizen defendants of immigration consequences. Claiming a noncitizen is not prejudiced by ineffective assistance because a judge gave a judicial notification contradicts the holding of *Padilla v. Kentucky*, which found the right to immigration advice within the ambit of the Sixth Amendment and duties of counsel, not the court system.

Numerous courts, including the United States Supreme Court and the New York Court of Appeals, have accepted and relied on *amicus curiae* briefs prepared and submitted by IDP (on its own or by its former parent, NYSDA) in key cases involving the intersection of immigration and criminal laws. *See, e.g.*, Brief of *Amici Curiae* IDP et al. in Support of Petitioner in *Lee v U.S.*, 137 S. Ct. 1958 (2017); Brief of *Amici Curiae* IDP et al. in Support of Petitioner in *Chaidez v.*

U.S., 133 S. Ct. 1103 (2013); Brief of *Amici Curiae* IDP et al. in support of Petitioner, in *Padilla v. Kentucky*, 559 U.S. 356 (2010); Brief of *Amici Curiae* IDP et al. in Support of Petitioner in *Pereira v. Sessions*, __ U.S. __ (2018); Brief of *Amici Curiae* IDP et al. in Support of Respondent in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018);Brief of *Amici Curiae* IDP et al. in Support of Petitioner in *Mathis v. United States*, 136 S. Ct. 2243 (2016); Brief of *Amici Curiae* IDP et al. in Support of Petitioner in *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015);Brief of *Amici Curiae* IDP et al. in Support of Petitioner in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010); Brief of *Amici Curiae* IDP et al. in support of Petitioner in *Nijhawan v. Holder*, 557 U.S. 29 (2009); Brief of *Amici Curiae* NYSDA Immigrant Defense Project, et al. in support of Respondent, cited in *INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001); Brief of *Amici Curiae* IDP et al. in *U.S. v. Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015);Brief of *Amicus Curiae* IDP in *People v. Harrison*, 27 N.Y.3d 281 (2016); Brief of *Amici Curiae* in *People v. Baret*, 23 N.Y.3d 777 (2014);Brief of *Amicus Curiae* IDP cited in *People v Peque*, 22 N.Y.3d 168, 188 (2013); and Brief of *Amici Curiae* in *People v Ventura*, 17 N.Y.3d 675 (2011).

As experts in immigration law affecting noncitizens convicted of crimes, *amicus curiae* IDP respectfully offers this brief in support of Defendant-Appellee Hector Romero.

National Association of Criminal Defense Lawyers

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders,

military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. *See, e.g.*, *Lee v. United States*, 137 S.Ct. 1958 (2017); *Padilla v. Kentucky*, 559 U.S. 356 (2010). The organization has a significant interest in ensuring that criminal defendants receive effective assistance of counsel, and has frequently appeared as amicus curiae in cases implicating ineffective assistance of counsel. *See Padilla*, 559 U.S. 356; *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

ARGUMENT

Proposition of Law:

A non-citizen defendant suffers prejudice when defense counsel fails to advise of potential immigration consequences, even if the court notifies defendant that he or she "may" face immigration consequences.

Most states require courts to notify defendants of possible immigration consequences stemming from a plea of guilt, either during a plea colloquy or on a written waiver form signed when a defendant enters a guilty plea. *See Padilla v. Kentucky*, 559 U.S. 356 n.15 (2010) (compiling state statutes that require courts to "provide notice of possible immigration consequences").

The state of Ohio, in the majority, has required judicial notifications since 1989. Pursuant to ORC § 2943.031(A), the court must notify every defendant "[i]f you are not a citizen of the United States you are hereby advised that conviction of the offense to which you are pleading guilty… may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

Statements by the court cannot cure the prejudice flowing from a Sixth Amendment violation pursuant to *Padilla v. Kentucky* for several reasons. First, a defense attorney's failure to recognize the immigration consequences prevents him from negotiating a reasonable alternative plea that eliminates or mitigates these consequences, and court notifications do not cure the prejudice flowing from that error. Second, because the statutorily mandated language in Ohio states that the guilty plea "may" result in deportation, it does not put a defendant whose deportation is virtually certain on notice regarding the inevitability of deportation. Third, generic advisals not tailored to the actual circumstances and consequences do little to undermine counsel's failure. Fourth, the roles and responsibilities of court and counsel are legally and practically distinct; these distinctions render information provided by the court during the plea

colloquy an insufficient substitute for competent advice from the defense attorney about whether it is in the defendant's best interest to enter a particular guilty plea. The question whether a plea was knowing and voluntary under the Fifth Amendment is separate from the question whether the advice pertaining to the plea was competent under the Sixth Amendment. Fifth, allowing court notifications to replace competent advice from defense counsel contradicts the holding of *Padilla v. Kentucky*, which placed the burden of giving the advice regarding immigration consequences squarely on defense counsel.

As a preliminary matter, the prejudice standard for defendants who plead guilty after an attorney provides ineffective assistance prior to a guilty plea is: "the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Lee v. United States*, 137 S.Ct. 1958, 1965 (2017) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). This directly contradicts the prejudice standard proposed by appellant, with the Supreme Court stating"[w]hen a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial 'would have been different' than the result of the plea bargain." *Id*. Applying the correct standard, this court should affirm the Appellate District.

A. Judicial notifications cannot cure defense counsel's foregone negotiations for an immigration-safe plea.

A judicial notification cannot cure the prejudice caused by defense counsel's failure to pursue an alternate, immigration-safe plea. In *Padilla*, the Supreme Court included plea negotiations within the ambit of effective assistance, with a duty to avoid, or reduce the likelihood of, deportation. *Padilla*, 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.") Both the prosecution and defense have an interest in taking immigration consequences into consideration in off-record negotiations, because "[i]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." *Id*. The Supreme Court reaffirmed that ineffective assistance during plea negotiations can result in prejudice shortly after *Padilla*. *Missouri v Frye*, 566 US 134, 144 (2012) ("Criminal defendants require effective counsel during plea negotiations. Anything less… might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him.") (citations omitted).

For non-citizen defendants, establishing a reasonable probability that the defendant could have negotiated an immigration-safe plea demonstrates prejudice. *See United States v. Swaby*, 855 F.3d 233, 241 (4th Cir. 2017) (A "defendant is prejudiced if there is a reasonable probability that the defendant could have negotiated a plea agreement that did not affect his immigration status"); *United States v. Rodriguez-Vega*, 797 F.3d 781, 788 (9th Cir. 2015) (Defendant can "demonstrate that there existed a reasonable probability of negotiating a better plea by identifying cases indicating a willingness by the government to permit defendants charged with the same or a substantially similar crime to plead guilty to a non-removable offense"); *Kovacs v. United States*, 744 F.3d 44, 53 (2d Cir. 2014) (When a "charge was settled on in the plea negotiation for the sole reason that [Defense counsel] believed it would not impair [the defendant's] immigration status"). In the context of relief from deportation, the Supreme Court recognized that "preserving the possibility of [immigration] relief would have been one of the

principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *INS v. St. Cyr*, 533 U.S. 289, 323 (2001). The defendant loses the opportunity to negotiate a plea that mitigates or eliminates immigration consequences when defense counsel fails to appreciate those consequences. A court notification during a plea colloquy does not undo that prejudice.

The actual result of the plea negotiations is also relevant to determining the defendant's decision-making. When "assessing the respective consequences of a conviction after trial and by plea… [and] those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive." *Lee*, 137 S.Ct. At 1966.

In Mr. Romero's case, his counsel did not secure a plea offer from the prosecutor at all (nor did substitute counsel who appeared on the date of the plea). Thus, it cannot be meaningfully said that Mr. Romero avoided any particular consequence by pleading guilty instead of going to trial, unless one accepts that merely exercising one's right to trial should result in a harsher sentence if convicted. But certain facts may be sifted from the record. For example, the prosecutor did not appeal the community control sentence, despite having a right to do so under ORC § 2953.08(B) based on the presumption in favor of a prison term. This demonstrates that the prosecutor was not seeking any specific sentence. The community control sentence also means that the court found Mr. Romero's "conduct was less serious than conduct normally constituting the offense" and he had "a lesser likelihood of recidivism." ORC § 2929.13(D)(2). In order to negotiate an immigration-safer plea, Mr. Romero needed to not plead guilty to the offense charged by Homeland Security in the Notice to Appear, "Trafficking in Marijuana, ORC § 2925.11(A)(C)(3)(c)". The remaining counts would still allow for the same prison term reserved by the judge, 48 months. Presumably there are other cases in Stark County

in which prosecutors dismissed certain counts of an indictment as part of a plea agree. Mr. Romero could point to those cases to show his attorney was ineffective by not trying to do the same. If Stark County has ever dismissed counts as part of a plea bargain, that would conform fully with the Supreme Court's understanding of plea negotiations, when "a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation… the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does." *Padilla*, 559 U.S. at 373.

Critical to the prejudice analysis, the court notification at the plea colloquy did not prod substitute counsel into negotiating or realizing that the plea required mandatory deportation. The court also did not clarify the mutually inconsistent propositions that Mr. Romero could work in the United States but could be deported. *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)(describing the problem with a warning given during the plea colloquy, after the decision to plead guilty has been made, and noting that "[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).

B. The statutorily mandated language in Ohio, which states that the guilty plea "may" result in deportation, does not accurately advise a defendant whose deportation is virtually certain and mandatory.

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 falls clearly within a removal ground. The Supreme Court in *Padilla* contrasted 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.

The state supreme courts of California, Florida, Massachusetts, New Jersey, New Mexico, South Carolina, Washington, Wyoming, and the Fourth, Fifth, and Ninth Circuits agree. *See People v. Patterson*, 2 Cal. 5th 885, 895-896 (2017) ("[A]dvisement that a criminal conviction 'may' have adverse immigration consequences cannot be taken as placing [the defendant] on notice that, owing to his particular circumstances, he faces an actual risk of suffering such") (citations omitted); *Hernandez v. State*, 124 So.3d 757, 763 (Fla. 2012) ("[A]n 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* ("[T]he 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"); *State v. Nunez-Valdez*, 200 N.J. 129 (2009) (Defendant prejudiced by ineffective assistance despite a written court warning that "you may be deported by virtue of your plea of guilty"); *State v. Favela*, 2015-NMSC-005, 343 P.3d 178, ¶ 16 ("[A]n advisement by a judge cannot render sufficient an attorney's otherwise deficient performance in failing to advise his client of the immigration consequences

of his plea, [and] the same advisement cannot, *by itself*, cure the prejudice created by such a failure to advise.") (emphasis in original); *Taylor v. State*, 422 S.C. 222, 229, 810 S.E.2d 862, 865 (2018) ("[T]he colloquy was generic in that Petitioner was merely informed that his plea could affect his immigration status. In light of Padilla and its progeny, we are constrained to conclude that the plea court's general warning failed to cure counsel's deficient representation.") (emphasis in original); *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015, 1020-21 (Wash. 2011) ("[T]he guilty plea statement warnings . . . cannot save the advice that counsel gave"); *Ortega-Araiza v. State*, 2014 WY 99, ¶ 19, 331 P.3d 1189, 1197 (The court "stated only that a plea '*may* be the basis for deportation proceedings by the ICE.' A warning such as this would be insufficient under *Padilla* if provided by [defendant's] own defense counsel, and becomes no more sufficient when provided by the district court") (emphasis in original); *United States v. Swaby*, 855 F.3d 233, 241 (4th Cir. 2017) ("The court's general, nonspecific warning that [the defendant] may face immigration consequences and may be deported could not cure [defense counsel's] deficient performance"); *United States v. Urias-Marrufo*, 744 F.3d 361, 369 (5th Cir. 2014) ("It is counsel's duty, not the court's, to warn of certain immigration consequences, and counsel's failure cannot be saved by a plea colloquy. Thus, it is irrelevant that the magistrate judge asked Urias whether she understood that there *might* be immigration consequences and that she and her attorney had discussed the *possible* adverse immigration consequences of pleading guilty") (emphasis in original); *United States v. Rodriguez-Vega*, 797 F.3d 781, 790 (9th Cir. 2015) ([T]he court's advisement and the statements in the plea agreement that Rodriguez-Vega faced the possibility of removal did not purge prejudice, if for no other reason than that they did not give her adequate notice regarding the actual consequences of her plea").

Consistent with the Supreme Court's exhortation to focus on the defendant's decision-making, courts must consider that "[a] defendant entering a guilty plea may be aware that some criminal convictions may have immigration consequences as a general matter, and yet be unaware that a conviction for a specific charged offense will render the defendant subject to mandatory removal... [a judicial] advisement that a criminal conviction 'may' have adverse immigration consequences 'cannot be taken as placing [the defendant] on notice that, owing to his particular circumstances, he faces an actual risk of suffering such.'" (citations omitted) *People v. Patterson*, 2 Cal. 5th 885, 895-896 (2017). And "[w]arning of the possibility of a dire consequence is no substitute for warning of its virtual certainty. As Judge Robert L. Hinkle explained, '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. Rodriguez-Vega*, 797 F.3d at 790 (citing *United States v. Choi*, Case No. 4:08-CR-00386-RH, Transcript, Docket No. 96, at 52 (D. Fla. Sept. 30, 2008).

This Court should hold that a court immigration notification that puts the defendant on notice of the possibility of immigration consequences cannot substitute for advice from the defense attorney that deportation is virtually certain as a result of the guilty plea.

C. Judicial notifications given without regard to a defendant's particular circumstances must be given little weight in the prejudice analysis.

Courts are generally unfamiliar with defendants' specific circumstances that are relevant to the advice regarding immigration consequences – thus, the court notifications are given "blind." *See, e.g., State v. Smith*, 287 Ga. 391, 397 (2010) ("[D]efense counsel may be ineffective in relation to a guilty plea due to professional duties for the representation of their individual clients that set a standard different—and higher—than those traditionally imposed on trial courts conducting plea hearings for defendants about whom the judges often know very

little."). As a result, the defendant has no way of knowing whether the court's statement, delivered "blind," is correct as applied to his unique circumstances. The court's statement cannot replace a discussion with the defense attorney, prior to deciding whether to enter the plea, in which the defense attorney explains how this plea impacts this defendant's immigration status. *See* American Bar Association Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.2 & cmt. (3d ed. 1999)

The court notification to Mr. Romero appears "blind." Nothing indicates whether the court knew that the defendant was a lawful permanent resident (green card holder), the colloquy only establishing that he was not a U.S. citizen. Furthermore, it is not clear that the court possessed any knowledge of immigration consequences, and that Mr. Romero faced mandatory deportation based on the plea. Indeed, the community control sentence is inconsistent with such knowledge, since Mr. Romero would not be (and is not now) in the United States to serve his sentence as a result of his plea to a mandatory deportation offense. The court gave the notification "blind," without the information necessary to deduce the immigration consequences; therefore, its statement cannot substitute for informed advice from the defense attorney.

D. The roles and responsibilities of court and counsel are legally and practically distinct.

Because defense counsel and judges play fundamentally distinct roles in our criminal justice system, defendants do not –and should not– regard court 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 accused which sometimes partake of the inviolable character of

the confessional." *Id.*; *see also Marroquin v. U.S.*, 480 Fed. Appx. 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)).

A judge's obligation to ensure that a defendant's plea is voluntary stems from the Fifth Amendment's Due Process Clause. *See Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969). A judge's role is to serve as a neutral arbiter, while counsel's role is to serve as the defendant's advocate—providing competent advice pursuant to the Sixth Amendment, which includes advising the defendant regarding the immigration consequences of a guilty plea. *See Padilla*, 559 U.S. at 366.

The United States Supreme Court rejected the proposition that a knowing and voluntary plea supersedes error by defense counsel. *See Missouri v. Frye*, 132 S.Ct. 1399, 1406 (2012) (discussing this losing argument in context of *Padilla v. Kentucky*, 559 U.S. 336); *United States v. Akinsade*, 686 F.3d 248, 255 (4th Cir. 2012) (citing *Frye* for the proposition that a valid colloquy under the Fifth Amendment does not automatically cure deficient attorney performance under the Sixth Amendment). The Court has also confirmed that an analysis of whether a decision to reject a plea is "knowing and voluntary" fails to address the claim that the advice that led to the decision constituted ineffective assistance of counsel; in fact, importing the Fifth Amendment "knowing and voluntary" analysis into a Sixth Amendment ineffectiveness claim violated "clearly established federal law." *Lafler v. Cooper*, 132 S.Ct. 1376, 1390 (2012). In rejecting the Sixth Amendment ineffectiveness claim, the state court had concluded that the defendant's decision to reject the plea was knowing and voluntary. *See id.* The *Lafler* Court

found that the state court incorrectly applied the Fifth Amendment "knowing and voluntary" analysis to the defendant's Sixth Amendment ineffectiveness claim: "An inquiry into whether the rejection of a plea is knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel." *Id.* In the context of counsel's failure to provide affirmative accurate advice regarding immigration consequences, as required by *Padilla*, the *Lafler* holding demonstrates that it is incorrect to use a court immigration notification, given as part of the required plea colloquy that ensures the "knowing and voluntary" nature of the plea, to address the ineffective assistance of counsel claim.

E. Allowing court notifications to replace advice from defense counsel contradicts *Padilla v. Kentucky*, which placed the burden of giving the advice regarding immigration consequences squarely on defense counsel.

In *Padilla*, the Supreme Court highlighted that Kentucky, along with many other states, required courts to notify defendants of potential immigration consequences. *Padilla v. Kentucky*, 559 U.S. at 374, n.15. Yet instead of these notifications excusing the failure of counsel to provide immigration advice, the *Padilla* Court found that these court notifications reflected the severity of deportation, which "underscore[d] how critical it is for *counsel* to inform her noncitizen client that he faces a risk of deportation." *Id*. at 373-74 (emphasis added). Allowing judicial notifications to substitute for competent advice regarding the advisability of entering the plea in light of the immigration consequences contradicts the holding of *Padilla.*

Allowing a court statement regarding the possibility of immigration consequences to cure the prejudice from a *Padilla* violation would have the same effect as the "affirmative misadvice" rule that the *Padilla* Court rejected. *See Padilla*, 559 U.S. at 370. The *Padilla* Court chose not to limit its holding to "affirmative misadvice" because that would cause the "absurd result" of giving defense counsel "an incentive to remain silent on matters of great importance, even when

answers are readily available." *Id.* Additionally, "[s]ilence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." *Id.* (internal citations omitted). In Ohio, where court notifications are mandated in virtually all cases, allowing the statutory notification to substitute for defense counsel advice will encourage defense attorneys to remain silent rather than risk affirmative misrepresentations that could later be used against them.

In this manner, such a holding would create the "absurd result" of encouraging silence just as the affirmative misadvice rule would. Even the most egregious of constitutional violations would have no remedy. Thus, this Court should hold that a court notification cannot replace competent advice from the defense attorney regarding the advisability of entering the plea in light of the immigration consequences. As recognized by the South Carolina Supreme Court, "[t]he meaning of Padilla would be negated if we allowed general comments from the plea court to satisfy the specific requirements imposed on counsel under the Sixth Amendment." *Taylor v. State*, 422 S.C. at 229.

A court notification *can* play a positive role in prompting the attorney to discuss immigration consequences with the defendant, and to discuss whether a particular plea is in the defendant's best interest in light of the immigration consequences. Indeed, ORC § 2943.031 specifically contemplates such a role, stating "the court shall allow him additional time to consider the appropriateness of the plea in light of the advisement described in this division." Professional standards clarify that judicial statements regarding immigration consequences may operate to stimulate a conversation between the attorney and the defendant, but do not substitute

for the attorney advice required during that conversation.[1] This Court should conclude that a boilerplate statement by the court regarding possible immigration consequences is limited in effect to putting the attorney and defendant on notice that an attorney-client conversation regarding these consequences is in order, but cannot substitute for the advice required during that conversation.

CONCLUSION

For all the foregoing reasons, this Court should hold that a court notification of possible immigration consequences does not cure the prejudice stemming from the defense attorney's failure to competently counsel the defendant regarding the advisability of entering the guilty plea in light of the immigration consequences.

Dated: July 2, 2018

By:

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/s Ryan Muennich

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[1] "Although the court must inquire into the defendant's understanding of the possible consequences at the time the plea is received under Standard 14-1.4, this inquiry is not, of course, any substitute for advice by counsel. The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations which will not be covered by the judge in his or her admonition." ABA Standards for Criminal Justice Pleas of Guilty, Standard 14-3.2 (cmt.) (3d ed. 1999)

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CERTIFICATE OF SERVICE

I hereby certify that *Amici* served a copy of this brief by e-mail, to Assistant Prosecuting Attorney Jessica L. Logothetides at jllogothetides@starkcountyohio.gov, Counsel of Record for Plaintiff-Appellant, and to Assistant Public Defender Stephen P. Hardwick at stephen.hardwick@opd.ohio.gov, Counsel of Record for Defendant-Appellee.

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