No. 16-327

IN THE
Supreme Court of the United States

JAE LEE,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT, THE IMMIGRANT LEGAL RESOURCE CENTER AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are leading experts who have worked for decades at the intersection of criminal and immigration law to ensure that criminal defense counsel have the resources necessary to represent non-citizens effectively. *Amici* founded the nationwide Defending Immigrants Partnership (DIP) in 2002 to coordinate with national criminal defense organizations to help ensure that indigent non-citizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions. The partners and members of DIP have participated as amicus curiae in *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), *Padilla v. Kentucky*, 559 U.S. 356 (2010), *INS v. St. Cyr*, 533 U.S. 289 (2001), and many other cases at the intersection of criminal and immigration law.

Starting well before this Court decided *Padilla*, and before the petitioner in this case was misadvised regarding the immigration consequences of his plea of guilty, *amici* provided immigration advice and training and published materials on the immigration consequences of criminal convictions that described a wide variety of methods that defense counsel can use to avoid deportation and other severe immigration consequences that can follow even relatively minor convictions. *Amici* have a strong interest in ensuring that non-citizen defendants

1. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. Counsel for all parties have consented to the filing of this brief, in letters that are on file with the Clerk or submitted contemporaneously with this brief.

are not prejudiced by counsel's failure to advise, negotiate, and advocate toward the goal of avoiding unintended and unnecessarily severe immigration consequences, as required under defense counsel's clear constitutional duties to advise about immigration consequences and to plea bargain effectively that this Court set out in *Padilla*, *Missouri v. Frye*, 566 U.S. 133 (2012), and *Lafler v. Cooper*, 566 U.S. 156 (2012). *Amici* thus seek to ensure that non-citizens who are prejudiced when counsel's incompetence forecloses reasonable alternative dispositions to avoid mandatory deportation have an avenue for relief through an ineffective assistance of counsel claim.

The Immigrant Defense Project (IDP) is a nonprofit legal resource and training center that defends the legal, constitutional, and human rights of immigrants facing criminal or deportation charges. IDP supports criminal defense attorneys through individual case consultations, trainings and mentorship, development and dissemination of defense strategies to avoid deportation triggers, and publication of written resources. IDP's 20-year-old hotline provides criminal defense attorneys with free guidance to help determine the immigration impact of non-citizens' criminal convictions, charges, and plea offers, suggest alternate dispositions that may protect immigration status, and discuss post-conviction relief options. In addition, since 1998, IDP has published resource materials for criminal defense lawyers, including *Representing Immigrant Defendants in New York*, which in 2005 was adapted by DIP for defense lawyers nationwide. *See* Defending Immigrants Partnership, Representing Immigrant Defendants: A National Guide (2005-2008).

The Immigrant Legal Resource Center (ILRC) is a national organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. For thirty years ILRC has had an "Attorney of the Day" service that offers consultations on immigration law and the immigration consequences of convictions to attorneys, employees of non-profit organizations, public defenders, and others assisting immigrants. Public defender offices throughout California contract with ILRC to strategize about alternative immigration-safe dispositions in individual cases for non-citizen clients. ILRC has a number of publications specifically for defense attorneys. *See*, *e.g.*, Katherine Brady *et al.*, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. 2008, updated 2013); *California Criminal Defense – Procedure and Practice* (CEB 2016) (including chapter on defending non-citizens). ILRC also has a free online "quick reference" chart that analyzes the immigration consequences of more than 200 convictions in California, and helped create similar charts and materials analyzing offenses in Arizona, Nevada, and Washington. *See*, *e.g.*, ILRC, *Quick Reference Chart*, www.ilrc.org/chart (last visited Feb. 6, 2017).

The National Immigration Project of the National Lawyers Guild (NIPNLG) is a national nonprofit organization that provides legal and technical support to attorneys, legal workers, immigrant communities, and advocates seeking to advance the rights of non-citizens. For 30 years, the NIPNLG has provided legal training to the bar and the bench on the immigration consequences of criminal conduct and authored *Immigration Law and Crimes* and four other treatises published by

Thomson-Reuters. Since 2003, NIPNLG has produced a comprehensive chart, *Selected Immigration Consequences of Certain Federal Offenses*.

INTRODUCTION AND SUMMARY OF ARGUMENT

If the government's allegation of strong evidence of guilt precluded a demonstration of prejudice under *Strickland*'s second prong, then Jose Padilla—the petitioner in *Padilla* who was a 40-year lawful permanent resident, served in Vietnam, and had little connection with his country of origin—would have long ago been deported from the United States. Law enforcement found a large quantity of marijuana in his licensed commercial truck after he consented to the search. *See* Brief for Respondent at 2, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651). When asked what the packages in the back of his truck contained, Mr. Padilla reportedly said, "maybe drugs." *Id.* at 3. Mr. Padilla litigated and lost a suppression hearing before pleading guilty in 2002 to state felony marijuana trafficking on his attorney's erroneous advice that he had been in the United States too long to be deported. *Id.*; *see also Padilla*, 559 U.S. at 359. In fact, marijuana trafficking is one of many crimes considered an "aggravated felony" under immigration law and as such it condemned Mr. Padilla to the harshest possible immigration consequences: mandatory detention and mandatory deportation. *See* 8 U.S.C. § 1101(a)(43)(B) (defining "aggravated felony" to include illicit trafficking in a controlled substance).

With the benefit of correct legal advice and proper negotiations, Mr. Padilla's case turned out differently.

After this Court ruled in Mr. Padilla's favor on the attorney competence prong of his ineffective assistance of counsel claim, *see Padilla*, 559 U.S. at 360, the Kentucky Court of Appeals on remand found prejudice in part because, "had the immigration consequences of Padilla's plea been factored into the plea bargaining process, trial counsel may have obtained a plea agreement that would not have the consequence of mandatory deportation." *Padilla v. Kentucky*, 381 S.W.3d 322, 330 (Ky. Ct. App. 2012). After his conviction was vacated, Mr. Padilla's counsel secured a "deferred prosecution" deal which avoided a guilty plea. The charges against Mr. Padilla were ultimately dismissed with prejudice after he completed supervision without further police contact. As a result, he has no conviction or other record resulting from this situation. Letter from Timothy G. Arnold, Director, Post-Trials Division, Kentucky Department of Public Advocacy (Feb. 6, 2017).[2]

When a non-citizen charged with a crime prioritizes the ability to remain in the United States, then counsel's primary aim must be to avoid a conviction that leads to deportation. Sometimes this means the non-citizen will make the rational decision to take his or her chances and go to trial. But since "plea bargaining is . . . not some adjunct to the criminal justice system . . . [but rather] *is* the criminal system," *Frye*, 566 U.S. at 144 (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)), more often it means that counsel must

2. These accounts are drawn from court decisions as well as correspondence between *Amici* and counsel or former counsel for the immigrants involved. All documentation is on file with counsel for *Amici* and is available at the Court's request.

negotiate creatively to secure a plea that avoids or at least mitigates adverse immigration consequences.

Defense counsel's ability to secure a plea or alternative disposition that preserves the non-citizen's ability to avoid deportation depends on a number of factors. First, counsel must fulfill the constitutionally mandated obligation to assess the immigration consequences of a conviction and advise non-citizen clients accordingly to determine the client's goals. *Padilla*, 559 U.S. at 369. Second, if the client's goals include avoiding deportation, counsel must identify alternative dispositions that satisfy their client's instruction. *See* Part II, *infra* (describing numerous resources available to guide defenders on bargaining to avoid unnecessarily harsh immigration consequences). Third, counsel must marshal their client's personal circumstances, including the consequences of deportation, to advocate for a favorable disposition. A non-citizen's strong ties and long residency in the United States or danger of physical harm or death if returned to his or her country of origin are precisely the sort of family, community, and justice-oriented factors that prosecutors regularly consider. *See*, *e.g.*, ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 3-4.4(a) (4th ed. Apr. 2015) ("Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge . . . are . . . whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender."); *see also id.* at Standard 3-5.6(c) ("The prosecutor should consider collateral consequences of a conviction before entering into a disposition agreement."). *Cf.* Nat'l Dist. Attorneys Assoc., *National Prosecution Standards* § 4-1.3.k (3d. ed.

2009) ("Undue hardship . . . to the accused" can be a basis for declination of prosecution).

These specific yet objective factors, and not the personal predilections of a particular prosecutor, drive the prejudice prong of any ineffective assistance of counsel claim. If it is reasonably probable that—with effective assistance of counsel—the defendant would have rejected a plea offer that carried severe immigration consequences and taken his or her chances at a trial, that defendant was prejudiced by counsel's failure to inform the defendant of the plea's immigration consequences. The defendant is *also* prejudiced when it is reasonably probable under the objective circumstances of the case that he or she would have rejected the offer to allow competent defense counsel to attempt to secure a plea or other disposition that avoids deportation.

This brief illustrates the many ways that defense counsel and prosecutors can, and do, negotiate in all types of cases to meet the goals of both parties, *see St. Cyr*, 533 U.S. at 323 (noting the "great number of defendants [who] agreed to plead guilty" to keep avenues of relief from deportation open and the "prosecutors [who] have received the benefit of these plea agreements"), and how counsel's failure to pursue these reasonably probable avenues prejudices the client. *See Zemene v. Clark*, 768 S.E.2d 684, 690 (Va. 2015) (citing *Frye*, 566 U.S. at 146) ("[A] proven desire to go to trial is not the only context in which prejudice may occur where a defendant has accepted a plea agreement upon improper and inadequate advice of counsel.").

ARGUMENT

Padilla tells us that it violates the competency prong of *Strickland*'s ineffective assistance test when counsel fails to advise a client correctly about deportation consequences of a conviction. *Frye* and *Lafler* instruct that effective plea bargaining is a core part of counsel's Sixth Amendment duties. *Lafler*, 566 U.S. at 162 ("Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process."). Mr. Lee's case demonstrates how counsel's failure properly to recognize and advise a client of a plea's adverse immigration consequences can prejudice non-citizens by depriving them of the crucial opportunity to bargain for an alternative disposition that avoids harsh immigration consequences.

I. A Primary Way Non-Citizens Facing Allegedly Strong Evidence Against Them Can Suffer Prejudice is From Defense Counsel's Failure to Negotiate an Alternative Disposition That Avoids The Most Serious Immigration Consequences.

This Court has recognized that counsel with only a "rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence." *Padilla*, 559 U.S. at 373; *see also Vartelas v. Holder*, 566 U.S. 257, 275 n.10 (2012) ("Armed with knowledge that a guilty plea would preclude travel abroad, aliens like Vartelas might endeavor to negotiate a plea to a nonexcludable offense—in Vartelas' case, *e.g.*, possession of counterfeit

securities"); *Mellouli,* 135 S. Ct. at 1987 (non-citizen defendants "anticipate the immigration consequences of guilty pleas in criminal court," and enter "safe harbor guilty pleas that do not expose the alien defendant to the risk of immigration sanctions") (internal quotation omitted). Indeed, the prejudice a non-citizen can suffer from counsel's failure to negotiate to avoid deportation is so clear that one state with a large immigrant population requires prosecutors to "consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution." *See* Cal. Penal Code § 1016.3(b); *see also id.* § 1016.2(d) ("With an accurate understanding of immigration consequences, many non-citizen defendants are able to plead to a conviction and sentence that satisfy the prosecution and court, but that have no, or fewer, adverse immigration consequences than the original charge.").

The recognition that immigration consequences can play a vital role in plea negotiations contrasts sharply with Mr. Lee's experience with a trial lawyer who confirmed that "[t]here was never any discussion of deportation during the negotiation . . . of the plea agreement or during the sentencing. It was my understanding that the government was not seeking deportation of Mr. Jae Lee." Evid. Hr'g, at 34-35. Mr. Lee, like other similarly situated non-citizens whose counsel fails to take advantage of the myriad resources and avenues to mitigate immigration consequences, suffered prejudice when he was deprived of the opportunity to have counsel seek alternative dispositions that avoided mandatory deportation, despite the reasonable probability that he would have declined to plead guilty to pursue such alternatives, or go to trial.

Across a broad spectrum of offenses, it is possible to negotiate dispositions that either avoid deportation altogether, or avoid mandatory deportation. As the following case examples illustrate, competent counsel in state and federal criminal cases can and do avoid or mitigate adverse immigration consequences even where alternative dispositions seem difficult at first glance.

A. In a Wide Variety of Offenses, Counsel Can—And Do—Secure Pleas That Both Satisfy the Prosecutor's Goals and Avoid Deportation.

In many cases, counsel attuned to immigration consequences can secure an alternative outcome that avoids the most severe among them. They routinely do so even where there is strong evidence of guilt, particularly when their non-citizen client has strong ties to the United States. In some instances, that means avoiding an aggravated felony conviction, which results in mandatory detention and deportation. 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *id.* § 1229b(a)(3) (barring cancellation of removal for lawful permanent residents convicted of an aggravated felony); *id.* § 1226(c)(1)(B) (mandating detention for individuals charged with deportability on aggravated felony conviction grounds). This outcome may allow the non-citizen to seek avenues of relief from deportation, such as cancellation of removal, not available to those convicted of aggravated felonies. *See St. Cyr*, 533 U.S. at 323 (describing cancellation of removal's statutory predecessor as "one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial"). In other instances, defense counsel will be able to negotiate a

plea that avoids most if not all immigration consequences altogether, sometimes to a charge that is the functional equivalent of the original charge or that carries an even higher penalty. In yet other instances, rational insistence on the constitutional right to a trial results in a better plea offer, deferred prosecution or diversion, or even dismissal of the charges as the trial date approaches.

One common example is avoiding a theft aggravated felony, one of several crimes for which "aggravated felony" status turns on the length of the sentence imposed. *See* 8 U.S.C. § 1101(a)(43)(G) (defining "aggravated felony" to include "a theft offense . . . for which the term of imprisonment [is] at least one year."). This is the case even if the sentence is suspended. *Id.* § 1101(a)(48)(B) ("any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part"). In many state misdemeanor shoplifting cases, the maximum sentence under state law is one year. *See*, *e.g.*, N.Y. Penal Law § 155.25. Bargaining with the prosecution or advocating with the court for a sentence of 364 days—just one day less than the maximum—will avoid an aggravated felony conviction. The following examples illustrate how the prosecution's goals can often be met, and the court satisfied, by a guilty plea and a sentence of 364 suspended days or even some amount of imposed jail time.

- Michael Zemene, who lawfully entered the United States at age nine from Ethiopia as the child of an asylee, was charged with petit larceny in Virginia for stealing $33 worth of beer. *Zemene*,

768 S.E.2d at 686. His 2013 guilty plea with a 365-day suspended sentence got him out of jail earlier than the one-year maximum sentence, but his attorney failed to advise him that it also made him deportable. *Id.* at 687. In remanding the case for an evidentiary hearing on prejudice, the Virginia Supreme Court properly noted that "in advancing a claim of prejudice due to defense counsel's failure to advise him of the immigration consequences when entering a plea agreement, Zemene need not demonstrate a likelihood of acquittal at trial. Rather, the question is 'whether counsel's constitutionally ineffective performance *affected the outcome of the plea process*.'" *Id.* at 691 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)) (emphasis added); *see also Zemene*, 768 S.E.2d at 692 ("[T]he court's consideration of the rationality of a decision whether to accept or reject a plea agreement must include a properly advised defendant's desire to avoid a negative impact on his immigration status."). Before the evidentiary hearing, Mr. Zemene's counsel secured a new plea agreement whereby Mr. Zemene re-pleaded to the petit larceny charge in exchange for a negotiated 360-day suspended jail sentence. Letter from Scott C. Seguin, Attorney for Mr. Zemene (Feb. 3, 2017).

- After Waid Mohamed was convicted of grand larceny for shoplifting nearly $2,000 worth of merchandise, a Virginia court sentenced him to two years of incarceration, all suspended, and two years of probation. *Commonwealth v. Mohamed*, 71 Va. Cir. 383, 383-84 (2006). In granting his writ of *coram nobis* and resentencing Mr. Mohamed to

360 days of suspended jail time, the court found prejudice in the fact that, had the court "been made aware of the fact that Mohamed's single criminal conviction could result in deportation without the possibility of discretionary relief, an alternative sentence may have been reached." *Id.* at 385. Similarly, another Virginia trial court judge stated that, had the court known at the time of sentencing that a 12-month suspended sentence would result in an aggravated felony conviction for a 42-year old lawful permanent resident who was "gainfully employed, and married to a U.S. citizen with two U.S. citizen children," the court "undoubtedly" would have imposed an alternative sentence. *Commonwealth v. Sharma*, 58 Va. Cir. 460, 462 (2002).

In other cases, deferred prosecution or diversion can fulfill the prosecution's goal of rehabilitation and perhaps restitution, yet also allow a non-citizen to avoid deportation.

- In Nashville, Tennessee state court, C.M. was charged with felony theft of property of $10,000 or more but less than $60,000. The state alleged that C.M. stole money from a man for whom she was a caretaker. C.M.'s public defender was aware of C.M.'s pending application for non-lawful-permanent-resident cancellation of removal. *See* 8 U.S.C. § 1229b(b); Letter from Mary-Kathryn Harcombe, Assistant Public Defender, Nashville Metro Public Defender's Office (Feb. 6, 2017). Despite the serious nature of the allegations, counsel negotiated an agreement where C.M. stipulated that her name would be placed on

the Tennessee Department of Health's "Abuse Registry." In exchange, the charges against her were dismissed with prejudice. *Id.* This outcome allowed C.M. to retain eligibility for deportation relief.

- In the Eastern District of Tennessee in 2013, B.N. faced charges of theft of government funds under 18 U.S.C. § 641 and making false statements under 18 U.S.C. § 1001 for omitting information regarding her income and employment on her Section 8 housing renewal form. The government alleged that B.N. received approximately $23,000 more in rent subsidies than she was entitled to based on her actual income. B.N. had fled to the United States from Liberia about six years before she was investigated for the federal crimes. Because the fraud charges involved an amount more than $10,000, a conviction would be categorized by federal immigration authorities as an aggravated felony, even if the charge were reduced to a misdemeanor. *See* 8 U.S.C. § 1101(a)(43)(M)(i) (defining aggravated felony to include an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000."). B.N.'s federal defender successfully advocated for B.N.'s admission into the federal Pretrial Diversion program based on the immigration consequences of a conviction. Under the agreement, prosecution was deferred for 18 months on various conditions, including supervision by the United States Probation Office and monthly payments towards full restitution. B.N successfully completed diversion and no immigration case against her

was ever opened. She continues to work and both of her daughters have completed graduate-level studies and are employed. Letter from Paula Voss, Assistant Federal Public Defender, Eastern District of Tennessee (Feb. 3, 2017).

B. In Drug Offense Cases, There are Numerous Avenues to Avoid Mandatory Deportation or to Avoid Deportation Altogether Yet Still Meet Prosecutorial Goals.

Drug crime convictions can be particularly problematic for non-citizens when incompetent counsel advises a guilty plea without regard for immigration consequences or after erroneously assuring the client that such consequences will not follow. On the other hand, effective defense counsel can rescue their client from deportation by pursuing one or more of the multiple alternative options available in drug cases to avoid unintended and overly harsh immigration consequences.

Offenses that qualify as "drug trafficking crime[s]" are aggravated felonies under immigration law. 8 U.S.C. § 1101(a)(43)(B). A drug conviction that necessarily involves a controlled substance as defined in 21 U.S.C. § 802—except a single possession offense for personal use of 30 grams or less of marijuana—also makes a non-citizen deportable. 8 U.S.C. § 1227(a)(2)(B)(i). However, while "controlled substance" convictions that are not aggravated felonies still trigger deportability, they do not necessarily disqualify a lawful permanent resident from seeking discretionary cancellation of removal. *See* 8 U.S.C. § 1229b(a). In certain instances, non-citizens facing a drug trafficking aggravated felony

charge will "trade any concern in order to avoid removal so that they can remain in the United States with their families." American Bar Association, Report to the House of Delegates 6 (Aug. 2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/100C_1.authcheckdam.pdf (last accessed Feb. 8, 2017). Still, not all state felony drug convictions are aggravated felonies. *See*, *e.g.*, *Lopez v. Gonzalez*, 549 U.S. 47, 53-60 (2006) (holding that South Dakota felony drug possession conviction was not a felony under the federal Controlled Substances Act and thus was not an aggravated felony). Moreover, a guilty plea to a state drug offense which includes substances not on the federal schedule may not qualify as a deportable offense if the record of conviction does not name a federally controlled substance. *See Mellouli*, 135 S. Ct. at 1984 (finding that a "conviction for concealing unnamed pills in [a] sock did not trigger removal").

Congress also provided a powerful ameliorative mechanism that enables an eligible drug offender who successfully completes probation to avoid "a disability imposed by law upon conviction of a crime, or for any other purpose." 18 U.S.C. § 3607(b). *See* Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law and Crimes* § 4.2 (2016) (opining that this expansive language would insulate a non-citizen from having a conviction for immigration purposes). Finally, pre-plea diversion such as in Mr. Padilla's case *supra*, or dismissal such as in M.I.'s case *infra*, does not qualify as a conviction and thus does not lead to deportation.

This wide variety of deportation-avoiding dispositions means that effective counsel representing non-citizens

facing drug charges can often reach outcomes that allow their clients to preserve their lawful status in the United States. The following cases illustrate how counsel can, and do, achieve this goal.

State Drug Cases

- M.I., who was from the Darfur region of Sudan and had been granted asylum, was inside his apartment when agents executed a search warrant and recovered a box containing approximately five pounds of marijuana in his bedroom. After *Miranda* warnings, M.I. admitted that he knew what was inside the box. M.I. was charged in Nashville, Tennessee state court and detained on bail on felony marijuana trafficking charges. The prosecution offered him a plea bargain to misdemeanor facilitation of sale of marijuana with a straight probationary sentence, which would have resulted in his immediate release from jail. M.I. rejected that offer after effective counsel advised him it would result in mandatory deportation. He chose to remain in jail for eight months before counsel secured his release on bond. Ultimately, the prosecution agreed to dismiss the charges against M.I. Letter from Mary-Kathryn Harcombe, Assistant Public Defender, Nashville Metro Public Defender's Office (Feb. 6, 2017). As with Mr. Padilla's eventual dismissal, described *supra*, M.I.'s outcome avoided all immigration consequences.

- Dave Bautista, a 28-year old lawful permanent resident who had lived in the United States for

17 years and had a mother, five siblings, wife, and two children who were all American citizens, was charged with and pleaded guilty to possession for sale of marijuana in California state court. *People v. Bautista*, 8 Cal. Rptr. 3d 862, 870 (Cal. Ct. App. 2004). He was sentenced to 16 months in prison. *Id.* at 866. This conviction was an aggravated felony, so it made Mr. Bautista mandatorily deportable. Remanding the case to the trial court for an evidentiary hearing, the appeals court noted how Mr. Bautista's defense attorney could have bargained to have Mr. Bautista plead to "a different but related offense" or "to 'plead up' to a non-aggravated felony even if the penalty was stiffer." *Id.* at 870. Either of those alternatives would have allowed Mr. Bautista to seek cancellation of removal. *Id.*

Federal Drug Cases

- Beatriz Ramirez-Carrillo, a lawful permanent resident for 23 years, had raised her children in Southern California and had no prior criminal history. *See* Transcript of Bond Hearing at 5, *United States v. Ramirez-Carillo*, No. 3:15-cr-01464-H (S.D. Cal. May 29, 2015), ECF No. 25. After Ms. Ramirez-Carrillo consented to a canine sniff of her car and the canine gave a positive alert for narcotics, federal agents discovered 3.2 kilograms of crystal methamphetamine hidden in the car's trunk. Complaint at ¶¶2-3, *United States v. Ramirez-Carillo*, No. 3:15-cr-01464-H (S.D. Cal. May 26, 2015), ECF No. 1. Like Mr. Lee, Ms. Ramirez-Carrillo was charged under 21 U.S.C.

§ 841(a)(1), Possession with the Intent to Distribute a Controlled Substance. *Id.* at 3. After litigating several motions and magistrate appeals, defense counsel secured a plea that will avoid deportability. The government filed a superseding Information charging Ms. Ramirez-Carrillo with making a false statement to a federal officer under 18 U.S.C. § 1001. *See* Superseding Information, *United States v. Ramirez-Carrillo*, No. 3:15-cr-01464-H (S.D. Cal. Jul. 14, 2015), ECF No. 38. She pleaded guilty to that charge and was sentenced to three years of probation and a $250 fine. *See* Judgment, *United States v. Ramirez-Carrillo*, No. 3:15-cr-01464-H (S.D. Cal. Nov. 10, 2015), ECF No. 59.

- Rafael Omar Rueda-Carrazco was stopped at the border after a canine on roving inspection alerted to his car. Border Patrol Officers found 89 pounds of marijuana in the four car tires. He was charged under 21 U.S.C. §§ 952 & 960, federal drug offenses that carry the same sentencing guidelines and mandatory minimums as 21 U.S.C. § 841. *See* Complaint, *United States v. Rueda-Carrazco*, No. 3:12-cr-00469-IEG (S.D. Cal. Jan. 17, 2012), ECF No. 1. Mr. Rueda-Carrazco's federal public defender negotiated a guilty plea to 18 U.S.C. § 4, Misprision of Felony, with four months in jail followed by two years of supervised release. *See* Judgment, *United States v. Rueda-Carrazco*, No. 3:12-cr-00469-IEG (S.D. Cal. May 15, 2012), ECF No. 26. Unlike the original charges, the negotiated plea was not an aggravated felony under immigration law. *See*, *e.g.*, *Matter of Batista-Hernandez*, 21 I. & N. Dec. 955, 958 (BIA 1997) (discussing that

nature of a misprision conviction does not incur deportability for the underlying crime concealed); *Matter of Velasco*, 16 I. & N. Dec. 281, 283 (BIA 1987) (holding that a misprision conviction was not a conviction "relating to" a controlled substance even when the felony concealed was distribution of a controlled substance).

- Renato DeBartolo was charged in 2011 with two counts of possession with intent to distribute and manufacturing marijuana under 21 U.S.C. § 841(a)(1), the same statute as Mr. Lee. *DeBartolo v. United States*, 790 F.3d 775, 777 (7th Cir. 2015). Mr. DeBartolo had a previous state cocaine trafficking conviction, making him eligible for a mandatory minimum of 10 years had the government filed an information under 21 U.S.C. § 851. Instead, Mr. DeBartolo pleaded guilty to the manufacturing charge and received a significant discount on sentencing, from a five-year minimum down to 25 months. *Id.* at 777. Mr. DeBartolo was brought to the United States when he was one year old, had married an American citizen, owned a construction company for some time, and had at least seven children born in the United States. *Id.* at 776-77. Based on his guilty plea to the 2011 charges, he was deported to Italy, where he had no family and did not speak the language. *Id.* at 777. Despite his previous conviction, the sentencing discount, and evidence that the government characterized as "stacked" against Mr. DeBartolo, the Seventh Circuit found prejudice in trial counsel's failure to understand and bargain to avoid the mandatory deportation consequences

> of Mr. DeBartolo's guilty plea. *Id.* at 779. The court noted how Mr. DeBartolo "could have tried to negotiate a different plea deal for an offense that does not make deportation mandatory. For example, he could have offered to plead guilty to simple possession of 30 grams of marijuana and perhaps received the same 25-month sentence." *Id.* at 779.

All of these methods of securing a plea that might avoid deportation demonstrate how it is objectively rational for someone in Mr. Lee's position to reject a plea that will lead to automatic and mandatory deportation. These numerous avenues for plea bargaining underscore how competent defense counsel, armed with an understanding of the immigration consequences of criminal convictions, could have secured such a plea. Absent successful negotiations, it would be perfectly rational for someone in Mr. Lee's position to exercise his constitutional right to trial. *See* Brief for Petitioner, at 25-29.

II. Defense Attorneys Had Many Resources Available to Them in 2009 and Earlier to Help a Non-Citizen Client Avoid Deportation.

In seeking alternative outcomes that avoid unnecessarily harsh immigration consequences, defense counsel does not operate alone, or in a vacuum. Rather, there are a number of resources in place for counsel to consult with immigration experts about consequences of particular convictions. There are also many well-regarded treatises, practical guides, charts, and other written materials widely available for defense counsel to consult on the topic of immigration consequences of

convictions. Most relevant to the prejudice inquiry, these consultations and written materials are replete with—and sometimes entirely focused on—ways to negotiate to avoid unnecessary immigration consequences, and practical tips on plea bargaining alternatives that might satisfy both parties' interests. Putting the content of those consultations and materials into action in negotiations, as demonstrated by the stories in Part I *supra*, highlights the likelihood of mitigating immigration consequences for non-citizen defendants in many instances.

For decades, criminal defense counsel have enjoyed ready access to a variety of resources to help them negotiate pleas that avoid adverse immigration consequences. *Amici*'s brief in *St. Cyr* detailed the many resources predating 1996 on the immigration consequences of criminal convictions and practical ways to avoid, through proper counseling, negotiation, and other advocacy, unnecessary immigration consequences. *See* Brief of *Amici Curiae* Nat'l Ass'n of Criminal Def. Lawyers *et al.* (NACDL) at 6-10, App. 8a-20a, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767) ("*St. Cyr Amicus*"). *Amici*'s 2009 brief in *Padilla v. Kentucky*—written the year Mr. Lee pleaded guilty—reflects that the availability of resources has multiplied considerably since *St. Cyr*. The brief describes the extensive array of resources available at the national level to assist criminal defense attorneys in advising their non-citizen clients and details how these national efforts have been successfully replicated on a local scale in jurisdictions throughout the nation. Brief of *Amici Curiae* NACDL at 25-39, App. 13a-30a, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651) ("*Padilla Amicus*"); *see id.* at 25-26 (describing National Immigration Project of the National Lawyer Guild's more

than 3,000 instances of free assistance and nearly 10,000 listserv posts between 2003-2009); *id*. at 27-28 (describing Immigrant Defense Project's free, nationally-available hotline and the organization's individualized assistance in about 12,000 cases between 1997-2009); *id*. at 30-31 (describing Defending Immigrants Partnership's 220 training sessions between 2002-2009 for about 10,500 people and "extensive resource library of materials" available to defenders on its website at no cost).

Mr. Lee's case exemplifies the missed opportunities for plea bargaining to avoid unintended and unnecessary immigration consequences when counsel gives a defendant incorrect information about a conviction's immigration consequences. In the five years before Mr. Lee's guilty plea, Tennessee criminal defense attorney and immigration specialist Michael Holley published several practice guides and conducted trainings about immigration consequences of convictions, including a training titled: *The Long Road for the Short and Quick Plea: How the Easy Plea in Criminal Court Can Permanently Ruin Your Immigrant Client's Life. See Padilla Amicus,* App. C. at 27a-28a. The year before Mr. Lee's plea in Memphis, Holley published a short, practice-oriented piece in a newsletter of the Tennessee Association of Criminal Defense Lawyers which warned that for clients "facing an aggravated felony conviction, pleading guilty will almost always be out of the question." Michael Holley, *Immigration Consequences of Select Tennessee Offenses*, The Defense, June-July 2008, at 1, 2. The article described how defense counsel should propose "alternative dispositions" that would "both satisfy the prosecution . . . and also protect your client from immigration consequences." *Id*. at 2. It went on to lay out the six "most fruitful" ways to protect the

client, including a plea "to a similar offense that carries the same criminal penalty but lesser or no immigration consequences." *Id.* at 4; *see also Padilla Amicus* at App. 13a-16a, 27a-28a (listing numerous resources for federal criminal defenders and Tennessee practitioners).

Amici's briefs in both *St. Cyr* and *Padilla* reference the leading comprehensive treatises for defense attorneys with non-citizen clients. Many of those remain available and have been updated. *See, e.g.,* Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law and Crimes* (2016-2ed.); Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook: A Comprehensive Outline and Reference Tool* (15th ed. 2016); Norton Tooby, *Criminal Defense of Immigrants* (2007 ed., updated monthly).

Counseling about and negotiation to avoid severe immigration consequences was routine among informed and effective criminal defense counsel in 2009, when Mr. Lee pleaded guilty. Since *Padilla*, the local, state, and national resources and structures in place for criminal defense counsel representing non-citizen clients have grown even more numerous. For example, the Training Division of the Defender Services Office (DSO) maintains a page, "Immigration Consequences of Conviction" which has tools, manuals, and links to resources on a variety of immigration topics related to federal criminal defense practice. *Obligation to Advise on Immigration Consequences*, Federal Defender, https://www.fd.org/navigation/select-topics-in-criminal-defense/immigration-consequences-of-conviction/subsections/obligation-to-advise-on-immigration-consequences (last visited Feb. 5, 2017). Since 2011, the DSO has partnered with Heartland Alliance's National Immigrant Justice Center

"to provide training and resources to CJA practitioners around the country on immigration-related issues." There is a hotline and email address, with the promise of an attorney's response to inquiries within 24 hours. *National Immigrant Justice Center's Defenders Initiative*, Federal Defender, https://www.fd.org/navigation/select-topics-in-criminal-defense/immigration-consequences-of-conviction/subsections/national-immigrant-justice-center's-defenders-initiative (last visited Feb. 5, 2017); *see also* Fed. Def. of San Diego, Inc., *Defending A Federal Criminal Case* (2016) (including chapter on "Special Considerations in Representing Noncitizen Defendants").

The prejudice suffered by non-citizens deprived of the opportunity to bargain for a plea that avoids deportation stands in stark relief against the backdrop of numerous immigration resources available to counsel to help develop alternative pleas that allow the government to fulfill its deterrent and retributive goals. Defense counsel who fail to avail themselves of such advice, training, and resources, much of it free and publicly available, prejudice their non-citizen clients by depriving them of the opportunity to make truly informed decisions about whether to plead guilty, go to trial, or renegotiate to obtain a plea offer or alternative disposition that allows them to remain in the country that they consider their home.

III. The Prejudice Inquiry is Context-Specific and Requires Demonstration of a Reasonable Probability of Rejection of the Guilty Plea, Not of an Acquittal at Trial.

Under the Sixth Circuit's erroneous approach to the prejudice prong, the most egregious misadvice by counsel

can never prejudice a defendant so long as the evidence against that defendant appears to be very strong. This is because, according to the opinion below, "no rational defendant charged with a deportable offense and facing 'overwhelming evidence' of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence." *Lee v. United States*, 825 F.3d 311, 314 (6th Cir. 2016) (quoting *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012)). This statement reveals a fundamental misunderstanding of the way the criminal justice system actually works, and a retreat from this Court's significant inroads into correcting that misunderstanding in *Padilla, Lafler*, and *Frye*. *See*, *e.g.*, *Frye*, 566 U.S. at 144 ("In today's criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant"). In the actual criminal justice system, defendants are often overcharged, counsel who function effectively seek favorable plea offers that fulfill the client's goals, plea offers often get more favorable as the case moves towards trial, and the relatively rare trial frequently reveals unexpected evidence and sometimes a result not obvious from the government's charging documents. *See, e.g.,* Part I.B *supra,* Cases of M.I. and Ramirez-Carrillo. *See also* Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 85-105 (1968) ("The Problem of Overcharging"). The narratives in Part I of this brief, Mr. Lee's Merits brief, and the brief of *Amici* Asian Americans Advancing Justice are replete with such examples. *See* Part I. *supra*; Brief for Petitioner, at 25; Brief of *Amici Curiae* Asian Americans Advancing Justice *et al.*, at 11-18. The Sixth Circuit effectively applied, and the government here seeks, a *per se* test for proving prejudice. Yet this Court "has never required an affirmative demonstration of likely

acquittal at such a trial as the *sine qua non* of prejudice." *United States v. Orocio*, 645 F.3d 630, 643 (3d Cir. 2011), *abrogated on other grounds by Chaidez v. United States*, 133 S. Ct. 1103 (2013).

As this Court has made clear, the prejudice prong of an ineffective assistance of counsel claim involves a context-specific inquiry. Starting with *Strickland*, the prejudice inquiry has asked whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," 466 U.S. at 694, a standard that may include but does not end at the prospect of an acquittal after trial. *Id.* ("A reasonable probability is a probability sufficient to undermine confidence in the outcome"). The Sixth Circuit referred to *Hill v. Lockhart*'s statement that to prevail, a defendant must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee*, 825 F.3d at 313 (quoting *Hill*, 474 U.S. at 59). Yet *Hill* also recognized that courts must "focus[ ] on whether counsel's constitutionally ineffective performance affected the outcome *of the plea process*." 474 U.S. at 59 (emphasis added). If there were any question that a trial-outcome analysis is relevant in some contexts but not others, and that the appropriate standard for proving prejudice more broadly addresses the outcome of the plea process, this Court put that to rest in *Lafler v. Cooper*: "The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining." 566 U.S. at 169; *id.* at 174 ("[R]espondent has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea.").

Recognizing that reasonable probability of a different outcome in the plea bargaining process is the proper prejudice inquiry, however, does not answer the question of *how* a defendant can meet his burden in this regard. *Strickland* instructs that the standard requires demonstrating something more than "some conceivable effect" yet less than a "more likely than not" effect on outcome. *Strickland*, 466 U.S. at 693; *see also id.* at 694 ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."). And in *Padilla*, the Court held that "to obtain relief . . . a petitioner must convince the court that a decision to reject the plea bargain would have been *rational under the circumstances*" – not that he or she would have won at trial. 559 U.S. at 372 (emphasis added).

Determining whether a rational person in the petitioner's circumstances would have rejected the plea given correct immigration information and available outcomes through effective plea bargaining is an objective inquiry. However, the government's prediction of how a trial would have unfolded is not the only "objective" factor at issue,[3] and is not particularly relevant when the

3. Indeed, it is worth noting that strength of the evidence is often less objective than other factors. Particularly when a guilty plea happens early, a case's apparent strength will come from the government's charging document and perhaps supporting affidavits by law enforcement. At this juncture, defense counsel may not yet have conducted discovery nor investigated the case or even fully explored defenses or other trial strategies. *See* William J. Brennan, Jr., *Criminal Prosecution: Sporting Event or Quest For Truth? A Progress Report*, 68 Wash. U. L.Q. 1, 2 (1990) ("The essential purpose

claim of prejudice flows from counsel's failure to secure a plea or other disposition that avoids at least the most serious immigration consequences. A petitioner's personal circumstances are always highly relevant, including his ties to this country and his relationship, if any, with his country of origin. *See*, *e.g.*, *DeBartolo*, 790 F.3d at 778 (finding it "unquestionabl[e]" that a 48-year-old who immigrated to the United States at age one with his family, married an American citizen, had at least seven American citizen children, had owned a small business in Indiana, and had no family in Italy or knowledge of the language, would have taken his chances at trial had he known the deportation consequences of his guilty plea); *Alam v. United States*, 630 F. Supp. 2d 647, 653–54 (W.D.N.C. 2009) (finding no "reason to doubt" petitioner's claim that he would have rejected a guilty plea but for counsel's erroneous assurances it would not make him deportable, in light of objective evidence of petitioner's 25 years in the U.S., his U.S. citizen children, and his successful business here). A defendant's testimony about his willingness to reject one plea with the goal of securing a disposition more favorable to his immigration status, or to risk a trial despite the possibility or even likelihood of a longer period of incarceration, are also factors that

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of permitting a criminal defendant to engage in pretrial discovery of the prosecution's case is to enhance the truth-finding process so as to minimize the danger that an innocent defendant will be convicted"). *Cf.* Evid. Hr'g, at 36-37, 47 (Mr. Lee testified, and the court deemed his testimony credible, that trial counsel never reviewed the elements of the crime charged with him nor explained what the government would have had to prove at trial to secure a conviction, that he was unaware there was a confidential informant involved in his case until he saw the Pre-Sentence Report, and that counsel failed to show him photographs of the drugs recovered from his apartment).

can be viewed through the objective lens of a reasonable, similarly-situated defendant. Courts are well equipped to assess individual facts and circumstances objectively, and do so in a number of different situations. *See generally* Kit Kinports, *Criminal Procedure In Perspective*, 98 J. Crim. L. & Criminology 71 (2007) (describing various such contexts).

Just as courts reviewing ineffective assistance claims are well-equipped to view the defendant's personal circumstances through an objective lens, they must heed this Court's caution that the prejudice inquiry proceed without regard for the "idiosyncracies of the particular decisionmaker." *Strickland*, 466 U.S. at 695. The prejudice inquiry's objective nature narrows the scope of evidence a defendant must offer at a post-conviction hearing to demonstrate the likelihood of a different result but for counsel's ineffectiveness. It would be unfair and improper to require defendants to show that the particular prosecutor in the particular case would have offered a particular alternative plea.

Such a standard would mean a prosecutor's office could effectively immunize itself from all ineffective assistance claims based on prejudice relating to alternative plea outcomes by attesting to its refusal to offer alternative pleas. Petitioners in post-conviction proceedings cannot reasonably be expected to secure testimony from the very prosecutor's office that opposes his petition, about how it may have offered an alternative plea. Such a standard would also mean that defendants in one jurisdiction would carry a different burden from defendants in another jurisdiction. Finally, it is worth noting that many ineffective assistance of counsel claims will be

pursued by *pro se* petitioners, *see* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 681 (2007), and it would be unfair to expect a *pro se* petitioner, often incarcerated, to develop such testimony at a hearing or in a filing. *See Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000) ("[I]t is unfair to require an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal.") (emphasis deleted). While in a rare case a well-resourced post-conviction petitioner might find a criminal defense lawyer who has secured a more favorable outcome in a similar case and who is willing to testify, or even a former prosecutor from the jurisdiction willing to testify about their former office's plea policies, that type of evidentiary bar is both unrealistic and unfair, particularly to those without counsel. It is for these reasons that, with respect to the competency prong of the ineffective assistance test, this Court has used prevailing national norms to determine the reasonableness of counsel's performance. *See*, *e.g.*, *Padilla*, 559 U.S. at 366-68; *Wiggins v. Smith*, 539 U.S. 510, 522 (2003). This avoids the troubling race-to-the-bottom that might occur if the constitutional floor were set at the lowest local level of performance.

Part I *supra* illustrates the spectrum of reasonable alternative outcomes in a variety of circumstances, including Mr. Lee's. The fact that the record below does not refer to alternative offers that were made and rejected should not be surprising. After all, trial counsel believed Mr. Lee would not be deported and so did not even attempt to negotiate to avoid that result. It is at the pre-trial stage

of a criminal case, when defendants have a right to counsel, where effective bargaining to meet a defendant's goals, including immigration goals, must happen. Even though the Sixth Circuit in the opinion below erroneously stated that the record was devoid of evidence that Mr. Lee's counsel could have secured a plea that would have avoided mandatory deportation,[4] the relevant inquiry is whether it is reasonably probable that Mr. Lee would have rejected the plea that led to mandatory deportation and instructed his counsel to seek an alternative.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. All of the possibilities outlined in Part I *supra* undermine confidence in the outcome for Mr. Lee, namely, conviction on the only count with which he was charged, an aggravated felony rendering him presumptively and mandatorily deportable. The prejudice inquiry is not about whether a defendant made a rational decision to plead guilty with erroneous immigration advice from counsel. Rather, it is about whether a decision to *reject* the plea would have been rational had that defendant been fully and correctly informed that it would render him deportable, and had counsel used immigration consequences as a touchstone in counseling the client about any plea and in negotiations.

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4. At the evidentiary hearing, trial counsel was asked whether, had Mr. Lee "been offered three years and reliable assurances that he would not be deported, would he have taken that?" Trial counsel responded: "He would have." Evid. Hr'g, at 124. In addition, Mr. Lee's trial counsel testified that, although the case "probably was a losing proposition in someway [o]f course, you know, as defense counsel, you have a lot of losing propositions that you end up coming out better than you think. Probably the best -- the best thing that could have come out of this was maybe a possession, that's it." *See id.* at 115-16.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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