No. 08-651

In The
Supreme Court of the United States

JOSE PADILLA,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF OF *AMICI CURIAE* CRIMINAL AND IMMIGRATION LAW PROFESSORS, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, AND WESTERN KENTUCKY REFUGEE MUTUAL ASSISTANCE SOCIETY, INC. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the Sixth Amendment's guarantee of effective assistance of counsel require a criminal defense attorney to advise a client who is not a citizen that pleading guilty to an aggravated felony will trigger mandatory, automatic deportation?

2. If a criminal defense attorney misadvises his noncitizen client that a guilty plea will not lead to deportation, and that misadvice induces a guilty plea, can that misadvice amount to ineffective assistance of counsel and warrant setting aside the guilty plea?

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INTERESTS OF *AMICI CURIAE*[1]

Amicus curiae Capital Area Immigrants' Rights (CAIR) Coalition is a nonprofit, legal-services organization founded in 1999. CAIR Coalition provides individuals and organizations representing immigrants with education and training services, leadership on public policy development, forums for sharing information, legal-support services, and other empowerment programs. In addition, CAIR Coalition is the only organization working with individuals detained by the Department of Homeland Security (DHS) in Virginia and the Washington metropolitan area. CAIR Coalition provides legal-rights presentations, conducts pro se workshops, and provides legal advice and assistance to individuals detained by DHS at jails in Virginia and Maryland. CAIR Coalition also secures pro bono legal counsel for immigration detainees. Many of the detained immigrants CAIR Coalition serves have been placed in removal proceedings on account of their criminal convictions. Of those immigrants with criminal convictions, CAIR Coalition regularly encounters a high number who have unwittingly entered into criminal plea

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[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days before the due date of *amici curiae*'s intention to file this brief. No person other than *amici curiae*, their employer (the University of Pennsylvania Law School), their members, or their counsel made a monetary contribution to its preparation or submission.

agreements which strip them of eligibility for relief in immigration court.

Amicus curiae the Washington Lawyers' Committee for Civil Rights and Urban Affairs, a nonprofit, public-interest organization, seeks to eradicate discrimination and both fully enforce the nation's civil rights laws and protect individuals' constitutional rights by providing legal assistance without regard to immigration status. The Committee was formed in 1968 in response to both a national report issued by the National Advisory Commission on Civil Disorders identifying discrimination and poverty as the root causes of the recent social unrest, and a related call by Senator Robert Kennedy for members of the private bar to mobilize to meet the legal needs of underserved populations. In the Committee's forty-year history, its attorneys have represented thousands of persons who have alleged discrimination on the basis of race, gender, religion, national origin, color, disability, and age, in cases brought under both federal and local civil-rights laws.

The Committee's Immigrant and Refugee Rights Project has, for thirty years, provided legal representation for immigrants, both documented and undocumented, before courts, agencies, and legislative bodies in matters involving constitutional and civil-rights violations. The cases include political asylum claims, claims of diplomatic employees subject to abusive treatment, adjustment of immigrant or nonimmigrant status, and exclusion and deportation cases. The Project also represents many immigrants

in collective and class-action cases involving employment and housing discrimination. More recently, the Immigrant and Refugee Rights Project represents and advocates on behalf of hundreds of immigrants who are victims of racial profiling by local police in the District of Columbia, Virginia, and Maryland. Hundreds of these immigrants, many of whom are legal permanent residents, are vulnerable to deportation if they are charged and found guilty of particular crimes. For this reason, the Immigrant and Refugee Rights Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs is signing on to this brief and thus hopes to assist the Court in resolving the questions presented in this case.

Amicus curiae Western Kentucky Refugee Mutual Assistance Society, Inc. (WKRMA) is a nonprofit corporation in good standing with the Secretary of State of Kentucky, chartered in 1981. It employs about twelve full-time and four part-time employees. It has resettled about 3,500 refugees and provided services to a similar number of other immigrants. It receives funding from the federal Office of Refugee Resettlement, and, more recently, Interest on Lawyers' Trust Accounts funding from the Kentucky Bar Foundation for its work providing legal education and legal assistance to Kentucky's growing Hispanic population. Such assistance usually involves filing applications for naturalization, visas, employment authorization, and lawful residence under the humanitarian or family unification provisions of the immigration laws. WKRMA has been accredited by the Board of Immigration

Appeals, U.S. Department of Justice, under 8 C.F.R. § 292.1, to prepare and file immigration applications with relevant agencies such as the U.S. Citizenship and Immigration Services (formerly INS).

Amici curiae Criminal and Immigration Law Professors are forty-six law professors who teach, research, and write about criminal or immigration law, including the intersection of the two. The names, titles, and institutional affiliations (for identification purposes only) of these *amici* are listed in Appendix A. Some *amici* work as clinical professors, counseling, advising, and educating noncitizens on the immigration consequences of criminal convictions, and also train attorneys on how to advise clients of these consequences. *Amici* have a professional interest in illuminating this Court's consideration of the doctrinal, historical, and policy issues involved in this Court's interpretation of the Sixth Amendment's guarantee of effective assistance of counsel.

BACKGROUND

This petition presents significant constitutional questions that have deeply divided state and federal courts for decades. Over the last two decades, major federal legislation has radically altered the immigration consequences of criminal convictions, making a broad array of state and federal felonies the basis for mandatory deportation. There are mature conflicts in the lower courts on whether the Sixth Amendment

duty to render effective assistance of counsel requires defense lawyers to advise clients that a conviction will lead to mandatory deportation. There are also mature conflicts on whether a defense lawyer's misadvice about deportation can support an ineffective assistance claim. The Kentucky Supreme Court has answered both questions in the negative, exacerbating the conflicts. Mandatory deportation is a severe consequence for immigrants, many of whom, like petitioner, are lawful long-term residents with deep roots and families in this country. Given these grave consequences, this Court's review is imperative to resolve the conflicts and bring clarity and uniformity to these pressing questions.

Courts have traditionally treated immigration consequences as entirely separate from criminal convictions. Courts treated deportation as a civil remedy rather than criminal punishment, in part because deportation was contingent on further administrative action, the number of crimes that violated immigration law was limited, and judicial discretion and other relief was readily available. Thus, criminal judges need not advise defendants who plead guilty that they may later be deported as a result. *E.g.*, *People v. Ford*, 657 N.E.2d 265 (N.Y. 1995). In other words, deportation is a collateral rather than a direct consequence of a criminal conviction, and judges need mention only direct consequences in plea colloquies. Over the last two decades, however, immigration reforms have increasingly

made deportation an automatic rather than contingent consequence of various criminal convictions.

Before 1990, immigration-enforcement officials had broad discretion whether to deport or admit noncitizens convicted of crimes. *INS v. St. Cyr*, 533 U.S. 293, 294-96 (2001). Courts and others could also use various mechanisms to prevent or halt deportation of a convicted noncitizen. For example, a sentencing judge had discretion to make a judicial recommendation against deportation (JRAD), which prevented deportation for that crime. Immigration and Nationality Act, 8 U.S.C. § 1251(b) (1988), *repealed by* Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050. Beginning in 1990, however, the entire landscape changed.

The Immigration Act of 1990 adopted many provisions to expedite and ensure removal of noncitizens convicted of crimes. For instance, it abolished JRADs and executive pardons. *Id.* The Act also broadened the definition of aggravated felonies and limited the forms of legal relief available to them. It also barred aggravated felons from proving good moral character. They thus became ineligible for asylum, withholding or suspension of deportation, voluntary departure, registry, and naturalization. *Id.* §§ 509, 515(a) (codified as amended at 8 U.S.C. §§ 1101(a)(43), (f)(8), 1158, 1229b-c, 1259(c), 1427(d)).

The Immigration and Naturalization Technical Corrections Act of 1994 (INTCA) further broadened the category of aggravated felons and gave federal

criminal courts the power to order deportation at sentencing, thus bypassing immigration courts. Pub. L. No. 103-416, §§ 222, 224, 108 Stat. 4305, 4322 (codified as amended at 8 U.S.C. §§ 1101(a)(43), 1252(a)).

Two years later, the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) severely restricted judicial review of administrative removal orders and greatly limited discretionary relief from deportation. For example, AEDPA amended and then IIRIRA repealed former § 212(c) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(c), so that noncitizens convicted of aggravated felonies would no longer be eligible for discretionary relief from deportation. AEDPA, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1276-77 (codified as amended at 8 U.S.C. § 1105a(a)(10)); IIRIRA, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, 3009-597 (1996). IIRIRA reiterated the ban on voluntary departure and cancellation of removal for aggravated felons. § 304(a)(3), 110 Stat. 3009-594, 3009-596 (codified as amended at 8 U.S.C. §§ 1229b-c). IIRIRA and AEDPA further changed the definition of aggravated felonies not only by adding new crimes but also by significantly lowering the thresholds for which offenses qualify as aggravated felonies. For example, thefts, burglaries, and gambling offenses punishable by one year's imprisonment became aggravated felonies. These amended definitions of aggravated felonies applied retroactively, making noncitizens deportable for crimes that at the time were not

aggravated felonies. AEDPA § 440(d), (e)(1) (codified as amended at 8 U.S.C. § 1101(a)(43)(J)); IIRIRA, § 321(a)(3)-(4), (b), (c) (codified as amended at 8 U.S.C. § 1101(a)(43)(F) & (G)). Aggravated felons sentenced to an aggregate of five years' imprisonment or more also became ineligible for withholding of removal. IIRIRA § 305(a) (codified as amended at 8 U.S.C. § 1231(b)(3)(B)).

Because these reforms have eliminated virtually all discretion, lawful permanent residents who are convicted of aggravated felonies and sentenced to at least five years' imprisonment now have no possible relief from deportation. The only exceptions are for extraordinary cases in which noncitizens can show that if deported they would suffer torture, or for those previously determined to be refugees or asylees because of a well-founded fear of persecution. Convention Against Torture, 8 C.F.R. § 1208.16-.17 (2009) (granting those facing torture a right to remain and work, but allowing their status to be revoked at any time and forbidding adjustment of status and the right to bring family members); 8 U.S.C. § 1159(b)-(c) (2000).

As can be seen, these statutes have targeted and enlarged a category of crimes known as aggravated felonies. Today, a wide range of crimes are aggravated felonies and thus trigger automatic deportation. Many of these are nonviolent crimes, including theft, receipt of stolen property, perjury, and tax evasion or fraud of more than $10,000. 8 U.S.C. § 1101(43)(G), (M)(i), (ii), (S). Petitioner's conviction for trafficking

in marijuana is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). His plea agreement specified five years' imprisonment followed by five years' probation, so he was ineligible for any discretionary relief as he faced no danger of torture.

SUMMARY OF ARGUMENT

Every day in America, noncitizen criminal defendants rely on their lawyers' advice in deciding whether to plead guilty. Many convictions trigger automatic deportation, with no hope of discretionary relief. For decades, however, state and federal courts have been deeply divided over what the Sixth Amendment's guarantee of effective assistance requires in these cases. Courts are split 27-3 on whether nonadvice about immigration consequences violates the Sixth Amendment; two additional states join the minority position under their state constitutions. Courts are also split 17-2 on whether misadvice violates the Sixth Amendment. The issues continue to recur despite decades of percolation and repeated efforts to train defense lawyers. These issues matter greatly to thousands of defendants, many of them lawful permanent residents who will lose their families and livelihoods by pleading guilty to crimes that need not be violent. Thus, in dicta, this Court has suggested that competent attorneys should advise clients of immigration consequences. *INS v. St. Cyr*, 533 U.S. 289, 322-23 & nn.48, 50 (2001). Much of the case law denying a duty to advise rests

on outdated assumptions, importing the collateral-consequence doctrine that governs judges to regulate defense lawyers as well. Deportation is no longer a collateral consequence of conviction, as statutory changes over the last two decades have made it automatic upon conviction of certain crimes, with no discretionary relief. Even if judges need not advise defendants about immigration consequences, defense attorneys serve a different role as counselors and should provide correct advice. Finally, this vehicle is an excellent one: it is a direct appeal from a final judgment, involves no procedural bars, and squarely presents both legal issues on undisputed facts.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE LARGE CIRCUIT SPLITS ON WHETHER COUNSEL'S NONADVICE OR MISADVICE ABOUT DEPORTATION VIOLATES THE SIXTH AMENDMENT

A. There Is a 27-3 Split on Whether the Sixth Amendment Obligates Defense Counsel to Advise Clients Who Are Noncitizens That a Criminal Conviction May Lead to Deportation

Federal and state courts are deeply divided, 27-3, on whether defense counsel has a federal constitutional duty to advise a client who is not a citizen of possible immigration consequences of

criminal convictions. Ten federal circuits and seventeen states hold that defense lawyers are under no obligation. Judges presiding over plea colloquies, they note, need advise defendants only of the direct and not the collateral consequences of convictions. So, the courts reason, defense lawyers should likewise bear no obligation to advise of collateral consequences such as deportation. *United States v. Del Rosario*, 902 F.2d 55, 59 (D.C. Cir. 1990); *United States v. Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000); *Yong Wong Park v. United States*, 222 F. App'x 82 (2d Cir. 2007); *United States v. Yearwood*, 863 F.2d 6 (4th Cir. 1988); *Santos-Sanchez v. United States*, 548 F.3d 327, 334 (5th Cir. 2008); *Santos v. Kolb*, 880 F.2d 941, 944-45 (7th Cir. 1989), *superseded by statute* Pub. L. No. 101-649, tit. V, § 505(b), 104 Stat. 5050, *cert. denied,* 493 U.S. 1059 (1990); *Gumangan v. United States*, 254 F.3d 701, 706 (8th Cir. 2001); *United States v. Fry*, 322 F.3d 1198 (9th Cir. 2003); *Broomes v. Ashcroft*, 358 F.3d 1251, 1257 (10th Cir. 2004), *cert. denied*, 543 U.S. 1034 (2004); *United States v. Campbell*, 778 F.2d 764 (11th Cir. 1985); *Oyekoya v. State*, 558 So.2d 990 (Ala. Crim. App. 1989); *Tafoya v. State*, 500 P.2d 247, 251 (Alaska 1972), *cert. denied*, 410 U.S. 935 (1973); *State v. Rosas*, 904 P.2d 1245 (Ariz. Ct. App. 1995); *Major v. State*, 814 So.2d 424 (Fla. 2002); *Williams v. Duffy*, 513 S.E.2d 212 (Ga. 1999); *People v. Huante*, 571 N.E.2d 736, 741 (Ill. 1991); *Mott v. State*, 407 N.W.2d 581, 583 (Iowa 1987); *State v. Muriithi*, 46 P.3d 1145, 1152 (Kan. 2002); *Commonwealth v. Fuartado*, 170 S.W.3d 384 (Ky. 2005); *State v. Montalban*, 810 So. 2d 1106 (La. 2002); *Alanis v. State*, 583 N.W.2d 573, 579

(Minn. 1998); *State v. Zarate*, 651 N.W.2d 215 (Neb. 2002); *Barajas v. State*, 991 P.2d 474 (Nev. 1999); *State v. Dalman*, 520 N.W.2d 860 (N.D. 1994); *Commonwealth v. Frometa*, 555 A.2d 92 (Pa. 1989); *Nikolaev v. Weber*, 705 N.W.2d 72 (S.D. 2005); *State v. McFadden*, 884 P.2d 1303 (Utah Ct. App. 1994).

Three courts, however, have recognized that, to render effective assistance of counsel, criminal defense lawyers must advise at least some noncitizen clients of the immigration consequences of a conviction. *People v. Pozo*, 746 P.2d 523, 527 (Colo. 1987) (holding that if lawyer had enough information to believe the client was a noncitizen, effective assistance would require advising about collateral immigration consequences), *rev'd on other grounds*, 746 P.2d 523 (1987) (en banc); *State v. Paredez*, 101 P.3d 799, 805 (N.M. 2004) (holding that an attorney must determine the defendant's immigration status and specifically advise the defendant of the immigration consequences of pleading guilty); *see also State v. Creary*, No. 82767, 2004 WL 351878, at *2 (Ohio Ct. App. Feb. 26, 2004) (explaining that while defense lawyers ordinarily need not advise clients of collateral consequences including deportation, "an evolving sense of the lawyer's duty indicates that such information should be given when it appears critical to the defendant's situation"; lawyer's failure to advise client whom he knew to be interested in deportation consequences can be ineffective). Two other courts have reached this same holding under their own

states' constitutions, reflecting evolving understandings of justice. *Williams v. State*, 641 N.E.2d 44, 49 (Ind. App. 1994) (contending that the collateral label is irrelevant given the seriousness of deportation, and holding that defense attorneys must advise noncitizen defendants of deportation consequences of their guilty pleas); *Lyons v. Pearce*, 694 P.2d 969, 977 (Or. 1985) (appearing to rely on the Sixth Amendment to the United States Constitution); *Gonzalez v. State*, 134 P.3d 955, 958-59 (Or. 2006) (reinterpreting *Lyons* as resting on Oregon's state constitution). And Judge Calabresi, writing for the Second Circuit, has suggested in dicta that nonadvice should amount to ineffective assistance of counsel. *United States v. Couto*, 311 F.3d 179, 187-88 (2d Cir. 2002), *cert. denied*, 544 U.S. 1034 (2005).

B. There Is a 17-2 Split on Whether Defense Attorneys' Misadvice to Noncitizen Clients About Immigration Consequences Violates the Sixth Amendment

There is likewise a large split of authority on whether an attorney's misadvice about immigration consequences is or may be ineffective assistance. Seventeen jurisdictions hold that misadvice is (or may be) ineffective assistance of counsel. *Couto*, 311 F.3d at 187-88; *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979); *United States v. Kwan*, 407 F.3d 1005, 1016-18 (9th Cir. 2005); *Downs-Morgan v. United States*, 765 F.2d 1534, 1541 (11th Cir. 1985); *Djioev v. State*, No. A-9158, 2006 WL 361540 (Alaska Ct. App.

Feb. 15, 2006) (unpub); *Alguno v. State*, 892 So. 2d 1200 (Fla. Dist. Ct. App. 2005); *Rollins v. State*, 591 S.E.2d 796, 799 (Ga. 2004); *People v. Correa*, 485 N.E.2d 307 (Ill. 1985); *Rubio v. State*, 194 P.3d 1224, 1230-31 (Nev. 2008); *State v. Garcia*, 727 A.2d 97 (N.J. Super. Ct. App. Div. 1999); *Creary*, 2004 WL 351878, at *3; *King v. State*, No. M2006-02745-CCA-R3-CD, 2007 WL 3052854 (Tenn. Crim. App. Sept. 4, 2007); *State v. Rojas-Martinez*, 125 P.3d 930 (Utah 2005); *Commonwealth v. Tahmas*, Nos. 105254 & 105255, 2005 WL 2249587 (Va. Cir. Ct. July 26, 2005); *Valle v. State*, 132 P.3d 181, 184 (Wyo. 2006); *see also In re Resendiz*, 19 P.3d 1171, 1177 (Cal. 2001) (failure to advise or misadvice may be ineffective); *People v. McDonald*, 745 N.Y.S.2d 276 (N.Y. Ct. App. 2002) (same), *aff'd*, 802 N.E.2d 13 (N.Y. 2003).

On the other side, two jurisdictions reject ineffectiveness claims based on lawyers' misadvice about immigration consequences. The District of Columbia Circuit upheld the refusal to allow withdrawal of a defendant's guilty plea notwithstanding blatant misadvice about the possibility of deportation. *United States v. Sambro*, 454 F.2d 918 (D.C. Cir. 1971). The decision below in this case joined *Sambro* in that minority position: The Kentucky Court of Appeals found that on the facts, petitioner Padilla had received clear misadvice, but for which he would not have pleaded guilty. Pet. App. 36. Nevertheless, the Kentucky Supreme Court squarely held that because counsel had no obligation to advise his client of collateral consequences such as deportation, even

misadvice cannot as a matter of law invalidate a guilty plea. *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008); Pet. App. 23.

II. THE ISSUE IS AN IMPORTANT AND RECURRING ONE WORTHY OF THIS COURT'S ATTENTION

The issue of defense-lawyer misadvice or nonadvice about immigration consequences is important and recurring. The dozens of cases cited in the previous section attest to the issue's importance, recurrence, and divergence of approaches. Since AEDPA and IIRIRA were enacted in 1996, an estimated 1.6 million families have been separated and more than 670,000 noncitizens have been deported because of their criminal convictions. *Deportees in Latin America and the Caribbean: Hearing Before the Subcomm. on the Western Hemisphere of the H. Comm. on Foreign Affairs*, 110th Cong. 1 (2007) (statement of Rep. Eliot L. Engel, Chairman, Subcomm. on the Western Hemisphere); MICHAEL E. FIX & WENDY ZIMMERMAN, URBAN INST., ALL UNDER ONE ROOF: MIXED STATUS FAMILIES IN AN ERA OF REFORM (1999). In 2007 alone, the Department of Homeland Security removed 99,900 criminal noncitizens from the United States. A majority of these noncitizens were removed because they had been convicted of drug or immigration crimes. Office of Immigration Statistics Policy Directorate, U.S. Dep't of Homeland Security, *Immigration Enforcement Actions: 2007 Annual Report* 4 tbl.4 (2008). Before AEDPA in 1996, more than half the

applications under § 212(c) received relief from deportation. *St. Cyr*, 533 U.S. at 296 n.5. AEDPA and IIRIRA have choked off that source of discretion by repealing § 212(c) and forbidding discretionary relief for noncitizens convicted of aggravated felonies.

Bar associations recognize the importance of the issue. The ABA has added provisions to the ABA Standards for Criminal Justice stressing the need for attorneys to advise clients of the immigration consequences of a guilty plea. American Bar Ass'n, *ABA Standards for Criminal Justice, Pleas of Guilty*, 1999 ABA Crim. Just. Section 14-3.2(f), cmt. 75 (3d ed. 1999); American Bar Ass'n, *ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons* standard 19.2-3(a). Bar magazines and periodicals repeatedly instruct defense attorneys to warn noncitizen clients that criminal convictions may lead to deportation. *E.g.*, Tova Indritz, *Puzzling Consequences of Criminal Immigration Cases* (pts. 1-3), CHAMPION, Jan./Feb. 2002, at 12, 20, 26; William R. Maynard, *Deportation: An Immigration Law Primer for the Criminal Defense Lawyer*, CHAMPION, June 1999, at 12; Ronald Kaplovitz, *Criminal Immigration: The Consequences of Criminal Convictions on Non-U.S. Citizens*, MICH. BAR J., Feb. 2003, at 30; David C. Koelsch, *Proceed with Caution: Immigration Consequences of Criminal Convictions*, MICH. BAR J., Nov. 2008, at 44; Fernando A. Nuñez, *Collateral Consequences of Criminal Convictions to Noncitizens*, MD. BAR J., July/Aug. 2008, at 40; Rex B. Wingerter, *Consequences of Criminal*

Convictions, MD. BAR J., Mar./Apr. 2004, at 21. A solid minority of states (23 plus the District of Columbia) by statute or rule require judges to warn noncitizens of the immigration consequences of guilty pleas. ARIZ. R. CRIM. P. 17.2(f); CAL. PEN. CODE § 1016.5 (West 2008); CONN. GEN. STAT. § 54-1j (2001); D.C. CODE § 16-713 (2001); FLA. R. CRIM. P. 3.172 (2008); GA. CODE. ANN. § 17-7-93 (1997); HAW. REV. STAT. § 802E-2 (1993); IDAHO R. CRIM. P. 11(d)(1) (2007); 725 ILL. COMP. STAT. 5/113-8 (2004); MD. R. CRIM. P. 4-24(e); ME. R. CRIM. P. 11(b)(5), (h); MASS. ANN. LAWS ch. 278, § 29D (2004); MINN. R. 15.01 (2008); MONT. CODE ANN. § 46-12-210 (1997); NEB. REV. STAT. ANN. § 29-1819.02 (2002); N.M. R. CRIM. P. 5-303(F)(5); N.Y. CRIM. P. § 220.50(7) (2004, to be repealed 2009); N.C. GEN. STAT. § 15A-1022 (1999); OHIO REV. CODE ANN. § 2943.031 (2003); OR. REV. STAT. § 135.385 (1997); R.I. GEN. LAWS § 12-12-22 (2000); TEX. CODE CRIM. PROC. ANN. art. 26.13 (2003); WASH. REV. CODE § 10.40.200 (1990); WIS. STAT. § 971.08 (1993-94); *see also* U.S. DIST. CT. FOR THE DIST. OF COLO. LOCAL RULES § 3, App. K (form guilty plea notification requiring acknowledgement of possible deportation). The repetition of this guidance confirms not only that the issue is important, but also that it continues to recur despite statutes, rules, and persistent efforts to educate attorneys.

This common, recurring issue merits this Court's attention. Immigration law has changed drastically enough in the last two decades that deportation is no longer a contingent, unpredictable, collateral consequence of a conviction for an aggravated felony.

Judges should not have to speculate about future contingencies at guilty-plea allocutions, but deportation is no longer speculative. Statutory changes have broken down the walls between criminal and immigration proceedings, even empowering judges to order deportation at criminal sentencing and eliminating judicial and executive relief after sentencing. The Immigration Act, AEDPA, and IIRIRA have eliminated all discretion not to deport, unless the defendant can prove that if deported he will suffer torture or persecution. If those rare exceptions do not apply, a defendant convicted of an aggravated felony punished by five years' imprisonment (such as petitioner) must be deported automatically. There is no longer an immigration court or other noncriminal body on which the legal effect of an aggravated-felony conviction depends. Deportation is thus a direct rather than a collateral consequence of an aggravated-felony conviction.

Even if judges need not advise defendants of deportation at guilty-plea colloquies, defense lawyers should have to do so. Lower courts have unthinkingly imported the collateral-consequence doctrine from judges' obligations to the very different context of defense lawyers' responsibilities. But defense lawyers, unlike judges, serve as advocates and counselors. At the time of a guilty plea, a judge may know almost nothing about a case, but a defense lawyer should be intimately familiar with it. To guide their clients' decisions to plead guilty or go to trial, lawyers must apprise them of the relevant pros and cons of a

plea, including the legal principles that significantly bear on the client's decision. *Pozo*, 746 P.2d at 529. As counselors, their clients need accurate advice about whether they will be forced to leave the country. *Cf. Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (recognizing defendant's Sixth Amendment right to effective assistance and advice that has a reasonable probability of influencing his decision to plead guilty). It should not matter whether one labels these consequences direct or collateral, civil or criminal. Clients who have lived in this country for many years may care far more about possible deportation than months or years in prison. *Paredez*, 101 P.3d at 805; *Williams v. State*, 641 N.E.2d at 49; *cf. Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (describing deportation as "a life sentence of exile. . . . a savage penalty"). Thus, as this Court suggested in dicta, competent defense counsel should follow bar standards and practice guides and warn clients of immigration consequences. *INS v. St. Cyr*, 533 U.S. 289, 322-23 & nn.48, 50 (2001).

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE CIRCUIT SPLITS

This case is an excellent vehicle for resolving the circuit splits over defense attorneys' nonadvice and misadvice. It is on direct review from the final judgment of the highest court of a state, with no procedural defaults to obstruct the issue. The issue is presented squarely on undisputed facts: Petitioner has no refugee or asylee status nor prospect of

torture, and his plea to an aggravated felony and acceptance of a five-year prison sentence barred any possible discretionary relief from deportation. The Kentucky Court of Appeals explicitly found that petitioner had been misadvised about deportation and that, had he received proper advice, he would not have pleaded guilty. Pet. App. 36. The Kentucky Supreme Court took no issue with these factual findings. It denied as a matter of law any legal obligation to give advice or give correct advice about immigration consequences, and rested its judgment on this holding. 253 S.W.3d 482; Pet. App. 23. Because the decision below rested on holdings about both misadvice and nonadvice, this case is an exceptionally good vehicle. Unlike many other vehicles, it gives this Court a choice of how broadly to resolve the issue. This Court can choose either to resolve the case on the misadvice issue alone or also to rule on nonadvice and the duty to advise more generally.

The decision below rested expressly on the Sixth Amendment to the U.S. Constitution and not on any adequate and independent state ground that could bar this Court's review. The circuit splits and issues have been percolating for decades, providing a wealth of guidance from lower courts and confirming that the issues will not go away on their own. And the quality of the lawyering should further assist this Court's consideration. Petitioner has assembled a strong legal team of both Kentucky counsel and newly substituted counsel of record, experienced Supreme Court counsel

at Paul, Hastings, Janofsky & Walker (formerly of Sidley & Austin) and a former law clerk to this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2009