APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE
SUPREME COURT OF
THE STATE OF ARIZONA

No. CR-18-0514-PR

[Filed July 16, 2019]

STATE OF ARIZONA, *Petitioner,*	)
v.	)
HECTOR SEBASTION NUNEZ-DIAZ, *Respondent.*	)

Appeal from the Superior Court in Maricopa County
The Honorable Phemonia L. Miller,
Judge *Pro Tempore*
No. CR2013-430489-001
AFFIRMED

Memorandum Decision of the Court of Appeals
Division One
1 CA-CR 16-0793 PRPC
Filed Sept. 18, 2018
AFFIRMED

COUNSEL:

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John Walters, Office of the Pima County Public Defender, Tucson; Jon M. Sands, Federal Public Defender, Keith J. Hilzendeger (argued), Assistant Federal Public Defender, Phoenix; Grant D. Wille, Ralls & Reidy, P.C., Tucson, Attorneys for Amici Curiae Arizona Attorneys for Criminal Justice, Pima County Public Defender, and the Federal Public Defender for the District of Arizona

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CHIEF JUSTICE BALES authored the opinion of the Court, in which JUSTICES TIMMER, BOLICK and PELANDER (RETIRED) joined. JUSTICE BOLICK, joined by JUSTICE PELANDER, filed a concurring opinion. JUSTICE LOPEZ, joined by VICE CHIEF BRUTINEL and JUSTICE GOULD, filed an opinion concurring in the result.

CHIEF JUSTICE BALES, opinion of the Court:

¶1 In this case involving post-conviction relief, the State argues that the lower courts erred in concluding that Hector Sebastion Nunez-Diaz, an undocumented immigrant, received ineffective assistance of counsel when he entered a guilty plea resulting in his mandatory deportation. The State contends that because Nunez-Diaz was deportable without regard to his plea, he cannot establish a claim of ineffective assistance or, alternatively, that any constitutional violation was harmless. Because Nunez-Diaz suffered severe and mandatory consequences (including a permanent bar from reentry) as a result of the plea he entered due to counsel's deficient advice, we agree with the trial court and the court of appeals that he received ineffective assistance of counsel justifying post-conviction relief.

I.

¶2 We defer to a trial court's findings of fact unless clearly erroneous. *State v. Hulsey*, 243 Ariz. 367, 377 ¶ 17 (2018). Nunez-Diaz was stopped for speeding and found in possession of small amounts of methamphetamine and cocaine. He was subsequently charged with possession or use of a dangerous drug and possession or use of a narcotic drug, each a class 4 felony. *See* A.R.S. §§ 13-3407(A)(1), -3408(A)(1). The record does not reflect that Nunez-Diaz had any prior criminal history.

¶3 Upon his arrest, Nunez-Diaz's family began searching for an attorney. Their chief concern was avoiding Nunez-Diaz's deportation. They met with an

attorney from a Phoenix law firm experienced in criminal defense and immigration law, who informed them that although Nunez-Diaz had a difficult case, it was possible to avoid deportation. Reassured by this meeting, Nunez-Diaz's family chose to retain that firm, and the firm assigned a criminal defense attorney to Nunez-Diaz's case.

¶4 The State offered a plea deal that would reduce the charges Nunez-Diaz was facing to a single count of possession of drug paraphernalia, a class 6 undesignated felony. *See* A.R.S. § 13-3415(A). Counsel advised Nunez-Diaz to take the plea. He did. Consistent with the plea agreement, the trial court suspended sentencing and placed Nunez-Diaz on eighteen months' unsupervised probation.

¶5 Nunez-Diaz was transferred to the custody of United States Immigration and Customs Enforcement ("ICE"). He was informed that, because of his plea, he could not bond out of custody and would be deported. This alarmed both Nunez-Diaz and his family, who returned to the law firm. There, an immigration attorney told the family that because of the plea, nothing could be done to keep Nunez-Diaz in this country. The family found new counsel who was able to negotiate for Nunez-Diaz's voluntary removal to Mexico, where Nunez-Diaz has remained.

¶6 Nunez-Diaz then initiated post-conviction relief proceedings pursuant to Arizona Rule of Criminal Procedure 32. He claimed he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. In his pleadings, he avowed that his primary concern in

considering the plea offer was his immigration status and he would not have entered the plea if his counsel had accurately advised him of the immigration consequences.

¶ 7 After holding an evidentiary hearing, the trial court ruled that Nunez-Diaz had established ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The court found overwhelming evidence that "counsel's actions fell below an objective standard [of reasonableness]." Counsel had "misrepresented the immigration consequences to defendant," and failed to inform Nunez-Diaz that his removal would be guaranteed if he accepted the plea. As a "direct result of [counsel's] failure," Nunez-Diaz was prejudiced by forfeiting his chance at trial and thus his only chance at avoiding removal. Accordingly, the trial court ordered that Nunez-Diaz's guilty plea be set aside.

¶ 8 The court of appeals granted the State's petition for review, and a divided panel denied relief. *See State v. Nunez-Diaz*, 1 CA-CR 16-0793 PRPC, 2018 WL 4500758, at *1-*2 ¶¶ 1, 13 (Ariz. App. Sept. 18, 2018) (mem. decision). The court concluded that Nunez-Diaz had "established he suffered from both deficient performance and prejudice when he entered" his plea. *Id.* at *2 ¶ 10. The burden then shifted to the State to demonstrate that the constitutional deficiency was harmless, which it failed to do. *Id.* ¶ 11. The dissenting judge argued that, because Nunez-Diaz was deportable regardless of his plea, there was no prejudice and thus no constitutional claim. *Id.* at *3 ¶ 14 (Morse, J., dissenting).

¶9 We granted review to consider whether deportable immigrants can show prejudice if their lawyers' deficient performances lead them to plead guilty and suffer attendant immigration consequences – a recurring issue of statewide importance.

II.

¶10 The Sixth Amendment guarantees a defendant the right to counsel. U.S. Const. amend. VI; *see also Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that "even aliens" are protected by the Fifth and Sixth Amendments). The right to counsel includes the right to effective assistance of counsel. *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). To demonstrate that counsel's assistance was so deficient as to require reversal of a conviction, a defendant must show both that "counsel's representation fell below an objective standard of reasonableness" and "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 688, 694. Even if a defendant proves a constitutional violation, however, post-conviction relief will be denied if the state proves "beyond a reasonable doubt that the violation was harmless." Ariz. R. Crim. Proc. 32.8(c). This Court reviews a trial court's ruling on a petition for post-conviction relief for an abuse of discretion. *State v. Miles*, 243 Ariz. 511, 513 ¶ 7 (2018).

A.

¶11 To satisfy *Strickland*'s first prong, a defendant must demonstrate that counsel's assistance was constitutionally deficient. *Padilla v. Kentucky*, 559 U.S.

356, 366 (2010). Generally, plea counsel "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* at 369. When the consequences of a plea are clear, however, "the duty to give correct advice is equally clear" and counsel must inform their client of those consequences. *Id.*

¶12 This case is one in which counsel was obliged to give correct advice about the clear consequences of a plea. Nunez-Diaz's plea resulted in a conviction that falls under 8 U.S.C. § 1227(a)(2)(B). Such a conviction renders a noncitizen, other than a lawful permanent resident, ineligible for discretionary relief from removal, *see, e.g.*, 8 U.S.C. § 1229b(b)(1)(C), and would permanently prevent that individual from ever returning to this country, 8 U.S.C. § 1182(a)(2)(A)(i)(II). The trial court found that competent counsel "could have easily" explained the adverse immigration consequences of the plea and that there was "overwhelming evidence" that counsel's assistance was constitutionally deficient. At oral argument in this Court, the State conceded that plea counsel's assistance fell below an objective standard of reasonableness. We agree - the first prong of *Strickland* has been satisfied.

B.

¶13 *Strickland*'s second prong requires that a defendant show counsel's errors had a prejudicial effect. *See Padilla*, 559 U.S. at 369. When a claim of ineffective assistance of counsel stems from plea proceedings, 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." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). To do so, it must "have been rational under the circumstances" for a defendant to refuse a plea and go to trial. *Padilla*, 559 U.S. at 372.

¶14 It is not irrational for a defendant to go to trial when trial represents the only, albeit slim, chance that a defendant can avoid severe and certain immigration consequences. *Lee v. United States*, 137 S. Ct. 1958, 1968 (2017). In *Lee*, defendant Lee received inaccurate advice from plea counsel that resulted in him signing a plea that guaranteed deportation. *Id.* at 1963. The "determinative issue" in Lee's decision-making had been the avoidance of deportation. *Id.* Thus, Lee initiated post-conviction relief proceedings, claiming ineffective assistance of counsel. *Id.*

¶15 The Supreme Court ultimately sided with Lee. *Id.* at 1969. Although a defendant must ordinarily "show that he would have been better off going to trial," this is only true when a defendant's decision turns on his prospects at trial. *Id.* at 1965. Lee's decision, though, turned on what was most likely to keep him in the country – he would not have entered his plea had he been accurately advised of the immigration consequences. *Id.* at 1965, 1967. Although Lee was almost certain to lose at trial, "that 'almost' could make all the difference." *Id.* at 1969. It was not irrational for Lee to try for a "Hail Mary" win in order to avoid the "particularly severe penalty" of deportation. *Id.* at 1967-68.

¶16 *Lee* controls our resolution of this case. The trial court found that had Nunez-Diaz been accurately advised, he would not have accepted his plea, opting

instead to continue plea negotiations or proceed to trial. A plea here resulted automatically in the outcome that Nunez-Diaz most sought to avoid – immediate and permanent removal. If Nunez-Diaz had gone to trial and been convicted, the presumptive sentence on the more serious charge – possession or use of a dangerous drug – would have been 2.5 years' imprisonment, A.R.S. § 13-702(D), and he could have been sentenced to probation on both charges, A.R.S. § 13-901.01(A). *Cf. Lee*, 137 S. Ct. at 1967 (indicating that it would not be irrational for a defendant to opt for trial if there was only a slight difference between the terms of the plea deal and the worst outcome at trial). Although his chances of winning at trial, and thus avoiding automatic immigration consequences, were "highly improbable," it would not have been irrational for Nunez-Diaz to reject the plea. *See id.*

¶17 The State essentially argues that *Lee* only applies to those who are lawfully present in this country. This misreads *Lee* – it turned not on Lee's immigration status but on whether he was "prejudiced by the 'denial of the entire judicial proceeding.'" 137 S. Ct. at 1965 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000)). Moreover, the cases the State relies on to support its argument were decided before *Lee* and their reasoning does not survive. *Compare United States v. Batamula*, 823 F.3d 237, 243 (5th Cir. 2016) (en banc) (stating that, because defendant was already removable, he had not offered a rational reason for wanting to proceed to trial), *with Lee*, 137 S. Ct. at 1966-68 (holding that it was rational to insist on going to trial on the off-chance, albeit remote, a defendant could avoid deportation).

¶18 Because Nunez-Diaz has established a constitutional violation, he is entitled to post-conviction relief unless the State meets its burden of proving beyond a reasonable doubt that the violation was harmless. Ariz. R. Crim. P. 32.8(c). The State contends there was no harm here because Nunez-Diaz was deportable under § 1227(a)(1)(B) and would have been removed regardless of his plea.

¶19 We disagree. "There is a vast difference for an unauthorized alien between being generally subject to removal and being convicted of a crime that subjects an unauthorized alien to automatic, mandatory, and irreversible removal." *Diaz v. State*, 896 N.W.2d 723, 733 (Iowa 2017). As the court of appeals noted, the record does not establish that Nunez-Diaz would necessarily have been removed had he gone to trial and been acquitted. There are many reasons that a deportable immigrant may not be removed. Daniel A. Horwitz, *Actually,* Padilla *Does Apply to Undocumented Defendants*, 19 Harv. Latino L. Rev. 1, 8-10 (2016). Deportable immigrants are potentially eligible for cancellation of removal or adjustment of status under § 1229b(b)(1), but persons with a drug conviction under § 1227(a)(2)(B) are not eligible for such discretionary relief.

¶20 Moreover, due to his plea, Nunez-Diaz was permanently barred from ever returning to this country. Ordinarily, an unlawfully present person who is removed may seek readmission after a period of three or ten years. 8 U.S.C. § 1182(a)(9)(B)(i). A conviction that falls under § 1227(a)(2)(B), however, imposes a permanent bar on such persons from ever

returning. § 1182(a)(2)(A)(i)(II). Such a consequence can hardly be called harmless.

III.

¶21 Although Nunez-Diaz may have had little chance of winning at trial, he was entitled to effective assistance of counsel in deciding whether to take that chance or to accept a plea offer. He gave up his right to trial based on his counsel's deficient advice, which assured the outcome he most feared. The trial court did not abuse its discretion in granting post-conviction relief, and we affirm the ruling of the trial court and the decision of the court of appeals.

BOLICK, J., joined by PELANDER, J. (RETIRED), concurring.

¶22 I concur fully with the Court's opinion. I write separately to question *Lee v. United States*, the United States Supreme Court precedent that dictates the outcome here. 137 S. Ct. 1958 (2017). *Lee* creates a highly unbalanced two-tiered system for criminal defendants seeking relief from convictions for ineffective assistance of counsel: one for aliens subject to deportation and one for most other defendants.

¶23 The baseline decision for ineffective assistance of counsel claims is *Strickland v. Washington*, 466 U.S. 668 (1984). There the Court set forth two requirements for setting aside a conviction: (1) deficient attorney performance of constitutional magnitude and (2) resulting prejudice to the defendant. *Id.* at 687. The second requirement, which is solely at issue here, "requires showing that counsel's errors were so serious

as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Specifically, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694, which requires considering "the totality of the evidence" presented. *Id.* at 695.

¶24 For the ordinary defendant seeking to overturn a conviction for ineffective assistance of counsel, this showing is a "high bar." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). Certainly, if the guilty verdict would have been essentially a fait accompli even absent deficient performance by counsel, the conviction will be sustained. *See Strickland*, 466 U.S. at 694.

¶25 Not so, where, as here, a defendant is facing deportation and counsel erred in explaining the potential immigration consequences of a plea deal. In *Lee,* the Court purported to apply *Strickland*, but the standard actually applied in *Lee* could not be more different. *See* 137 S. Ct. at 1964. *Strickland* requires that the defendant show prejudice by proving that there is a reasonable probability that the ultimate outcome would have been different but for counsel's deficient performance. *See* 466 U.S. at 694; *see also Missouri v. Frye*, 566 U.S. 134, 147 (2012). Thus, under *Strickland*'s articulation of prejudice, the ineffective assistance of counsel claim in *Lee* would have failed. Indeed, in accepting the plea deal, the defendant in *Lee* admitted his guilt and there was no indication on appeal that he had a viable defense, establishing that the result of a trial would be all but a foregone conclusion that would almost certainly lead to

deportation but possibly to greater jail time as well. *See* 137 S. Ct. at 1966; *see also Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam) ("[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case.").

¶ 26 Nonetheless, the *Lee* Court held that a defendant has the right to have a guilty plea set aside even where the defendant has not shown that the ultimate outcome from proceeding to trial would be different. 137 S. Ct. at 1966–69. In other words, *Lee*'s holding extends to situations where no viable defense exists to the charges, and thus, deportation and other immigration consequences, as well as jail time, are almost certain results of going to trial. *Id.* For the vast majority of alien defendants like the one in *Lee*, there is no difference in outcome between proceeding to trial or taking the plea. Even so, under *Lee*, a defendant facing immigration consequences gets to attempt a "Hail Mary" pass in a new trial, *id.* at 1967, while defendants in other contexts who likewise faced almost certain conviction at trial don't even get to the line of scrimmage.

¶ 27 The *Lee* majority cited *Hill v. Lockhart*, 474 U.S. 52 (1985), for the proposition that when a defendant receives ineffective assistance of counsel in connection with a guilty plea, a different standard for evaluating prejudice applies. *See Lee*, 137 S. Ct. at 1965. But *Hill* expressly embraced *Strickland*'s two-part requirement in that context, 474 U.S. at 58–59, and subsequent cases that applied *Hill* required the defendant to show that a different outcome was likely absent the

ineffective assistance of counsel, *see Lee*, 137 S. Ct. at 1973 (Thomas, J., dissenting) (discussing cases). As the dissenting opinion by Justices Thomas and Alito demonstrates, *Lee* grossly diverges from *Strickland*, and thus was wrongly decided. *Id.* at 1969–75. Because *Lee* creates unequal treatment with regard to ineffective assistance of counsel claims and places unnecessary burdens on Arizona courts, I hope the Supreme Court will reconsider that decision.

LOPEZ, J., joined by BRUTINEL, V.C.J., and GOULD, J., concurring in the result.

¶28 I concur in the Court's resolution because *Lee v. United States*, 137 S. Ct. 1958 (2017), controls the outcome in this case. I write separately to clarify my view concerning what constitutes prejudice under *Lee* and *Strickland v. Washington*, 466 U.S. 668 (1984), when a defendant, previously subject to deportation, suffers adverse immigration consequences as a result of a plea he entered due to counsel's deficient advice.

¶29 Here, as the majority notes, Nunez-Diaz's plea resulted in a conviction that, under 8 U.S.C. § 1227(a)(2)(B)(i), renders a noncitizen, other than a lawful permanent resident, ineligible for discretionary relief from removal, 8 U.S.C. § 1229b(b)(1)(C), and permanently prevents future admission into the United States, 8 U.S.C. § 1182(a)(2)(A)(i)(II). *Supra* ¶ 12. The State conceded that Nunez-Diaz's plea counsel failed to meet an objective standard of reasonableness under *Strickland* when advising him about the immigration consequences of the plea. Thus, the only question is

whether Nunez-Diaz's counsel's error resulted in prejudice under *Strickland*. *Supra* ¶ 12.

¶30 The majority concludes that Nunez-Diaz has established prejudice because his plea resulted in his automatic deportation and loss of potential discretionary relief from removal *and* permanently prevents his future lawful admission into the United States. *Supra* ¶¶ 16, 19–20. Although permanent exclusion of admission into the country under 8 U.S.C. § 1182(a)(2)(A)(i)(II) constitutes prejudice under *Strickland* if the sanction is exclusively the result of the plea conviction, I note that deportation and ineligibility for discretionary relief from removal under 8 U.S.C. § 1229b(b)(1)(C) do not constitute prejudice under *Strickland* if a defendant is previously subject to removal as a deportable alien pursuant to 8 U.S.C. § 1227(a)(1)(B). *See, e.g.*, *United States v. Batamula*, 823 F.3d 237, 242–43 (5th Cir. 2016) (holding that defendant "has failed to put forward a rational explanation of his desire to proceed to trial" where his deportability was "a fait accompli before he pleaded guilty"); *cf. United States v. Donjuan*, 720 F. App'x 486, 490 (10th Cir.) (2018) (reasoning that an illegal alien cannot establish prejudice on an ineffective assistance claim due to deportation because their deportation was a result of their illegal presence, not their attorney's erroneous advice), *cert. denied*, 139 S. Ct. 590 (2018).

¶31 The majority rejects the State's suggestion "that *Lee* only applies to those who are lawfully present in this country" because *Lee* "turned not on . . . immigration status but on whether [Lee] was 'prejudiced by the denial of the entire judicial

proceeding.'" *Supra* ¶ 17 (quoting *Lee*, 137 S. Ct. at 1965). The majority may be correct, but it misses an important point. Lee, like the defendant in *Padilla*, was lawfully in the United States, entered a guilty plea pursuant to counsel's deficient advice concerning adverse immigration consequences, and became subject to deportation solely as a result of his plea conviction. *Lee*, 137 S. Ct. at 1962; *Padilla v. Kentucky*, 559 U.S. 356, 359–60 (2010). In other words, Lee and Padilla established *Strickland* prejudice because their decision to proceed to trial was rational because they never would have been subject to deportation but for their convictions.

¶ 32 In contrast, Nunez-Diaz cannot prove *Strickland* prejudice here based on his subsequent deportation because he was already subject to removal (and an ICE detainer) as a deportable alien under 8 U.S.C. § 1227(a)(1)(B) at the time of his plea conviction. Under *Lee*, a defendant must prove that there exists a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 137 S. Ct. at 1965 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). As the majority notes, *supra* ¶ 13, a defendant makes such a showing by proving that going to trial would have been rational under the circumstances. Here, it would not have been rational for Nunez-Diaz to go to trial to avoid deportation when he was deportable no matter the outcome of the case. *See, e.g.*, *Batamula*, 823 F.3d at 242–43; *Donjuan*, 720 F. App'x at 490.

¶ 33 Likewise, Nunez-Diaz fails to meet his burden to show prejudice based on the loss of discretionary relief

under 8 U.S.C. § 1229b(b) because such relief is too speculative. *See, e.g.*, *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1148 (11th Cir. 1999) ("[A]n attorney's deficient representation does not deprive an alien of due process if the deficient representation merely prevents the alien from being eligible for suspension of deportation . . . . [S]uch discretionary relief [is] too speculative, and too far beyond the capability of judicial review, to conclude that the alien has actually suffered prejudice from being ineligible for suspension of deportation."); *Rosario v. State*, 165 So. 3d 672, 673 (Fla. Dist. Ct. App. 2015) ("The possibility for an adjustment in status, a matter within the exclusive discretion of federal officials, is too speculative and not a proper basis to support prejudice for a *Padilla* claim."). Although Lee's election to try for a "Hail Mary" win at trial despite virtually no prospect for success may have been rational to attempt to avoid a deportation that would occur only as a result of a conviction, *supra* ¶ 15, *Lee*'s reasoning does not apply here. Nunez-Diaz's victory (avoiding deportation) required not just a "Hail Mary" win at trial, but also a "Hail Mary" win in subsequent immigration proceedings. In other words, even if Nunez-Diaz prevailed at trial, he would remain deportable and would avoid deportation only if a federal official exercised discretion to allow him to remain in the United States despite his illegal status. A chance at such discretionary relief is too speculative to constitute cognizable prejudice.[1]

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[1] Even if loss of eligibility for discretionary relief from removal under 8 U.S.C. § 1229b(b) constituted *Strickland* prejudice, such eligibility is predicated on, among other things, the deportable alien's continuous physical presence in the United States for at

¶34 However, this approach does not categorically preclude *Lee*'s application to those unlawfully present in the United States (as the State urges) but rather recognizes that *Strickland* prejudice requires a showing that counsel's deficient advice caused a non-speculative, material harm. Although Nunez-Diaz's deportation following his plea conviction and his loss of possible discretionary relief fail to establish prejudice under *Strickland*, I concur in the majority's conclusion that his permanent bar to admission into the United States constitutes prejudice. *Supra* ¶ 20. This adverse immigration consequence, like the deportations in *Padilla* and *Lee*, is a direct material harm that is exclusively the result of his plea conviction. I cannot conclude that, under *Lee,* it was irrational for Nunez-Diaz to try for a "Hail Mary" win at trial in order to avoid the permanent bar to admission to the United States.

¶35 Finally, although *Lee* controls the result in this case, I agree with Justice Bolick's statements in his concurring opinion expressing concern about *Lee*'s "unequal treatment with regard to ineffective assistance of counsel" and its "unnecessary burdens on Arizona courts." *Supra* ¶ 27.

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least ten years prior to application for relief. 8 U.S.C. § 1229b(1)(A). Based on the record, Nunez-Diaz failed to establish his eligibility for such relief.

APPENDIX B

NOTICE: NOT FOR OFFICIAL PUBLICATION. UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

No. 1 CA-CR 16-0793 PRPC

[Filed September 18, 2018]

STATE OF ARIZONA, *Petitioner*,	)
HECTOR SEBASTION NUNEZ-DIAZ, *Respondent*.	)

Petition for Review from the Superior Court
in Maricopa County
No. CR2013-430489-001
The Honorable Phemonia L. Miller,
Judge *Pro Tempore*

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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By Ray A. Ybarra Maldonado
Counsel for Respondent

MEMORANDUM DECISION

Judge Lawrence F. Winthrop delivered the decision of the Court, in which Judge Kent E. Cattani joined. Presiding Judge James B. Morse Jr. dissented.

W I N T H R O P, Judge:

¶1 The State of Arizona petitions this court for review of the superior court's order granting the petition for post-conviction relief filed by Hector Sebastion Nunez-Diaz. We have considered the petition for review and, for the reasons stated, grant review but deny relief.

¶2 Nunez-Diaz was charged with possession or use of a dangerous drug (methamphetamine) and possession or use of a narcotic drug (cocaine), each a class 4 felony. The record does not reflect that Nunez-Diaz had a prior criminal history. He pled guilty to possession of drug paraphernalia, a class 6 undesignated felony, and pursuant to the plea agreement, the court suspended sentencing and placed him on eighteen months' unsupervised probation. Shortly afterward, Immigration and Customs

Enforcement officials took him into custody, subject to being deported, and he agreed to a "voluntary departure" in lieu thereof, while represented by a different attorney for his immigration proceedings.

¶3 Nunez-Diaz filed a petition for post-conviction relief, claiming his plea counsel was ineffective for failing to secure a plea or disposition of his charges that would have protected his ability to remain in the United States, and not advising him that his plea would result in his being subject to mandatory deportation. The superior court ordered an evidentiary hearing.

¶4 Nunez-Diaz appeared via Skype and telephone at the evidentiary hearing, and the superior court took testimony from him, his sister, and his plea counsel. Nunez-Diaz testified that his plea counsel told him there would be no problems with the plea and with his immigration status if he entered the plea. He testified that he would not have signed the plea agreement had he been advised of the specific immigration consequences of the plea and that he was subject to mandatory deportation. His sister testified to meeting with an immigration lawyer from the same firm to which plea counsel belonged, and she was told the firm would help Nunez-Diaz with his immigration issues after his plea. Based on this meeting, they hired the firm to represent Nunez-Diaz. Representation was then assigned to a different attorney in the firm.

¶5 Plea counsel testified she had explained to Nunez-Diaz that there would be "immigration consequences" to the plea, based on the type of plea. She admitted she had advised Nunez-Diaz the plea

"could have consequences for immigration," but conceded she did not tell him the plea would "certainly" have immigration consequences. In other words, counsel did not tell Nunez-Diaz that he was subject to being held without bond and subject to mandatory deportation.

¶6 The superior court granted relief, and ordered the plea set aside after concluding plea counsel's performance fell below an objective standard and that Nunez-Diaz was prejudiced by the ineffective assistance of his counsel. The State's motion for a rehearing was denied.

¶7 The State filed a petition for review, arguing the superior court erred in finding a colorable claim and that Nunez-Diaz did not meet his burden to show entitlement to relief under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). We review the grant or denial of post-conviction relief for an abuse of discretion. *State v. Jenkins*, 193 Ariz. 115, 118, ¶ 5 (App. 1998). Based on the evidence presented at the hearing, we find no such abuse.

¶8 To show ineffective assistance of counsel, a party seeking relief must show both deficient performance by counsel and prejudice. *Strickland*, 466 U.S. at 687. We must "consider whether the defendant was prejudiced by the 'denial of the entire judicial proceeding . . . to which he had a right.'" *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000)). "[T]he 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." *Id.* (citation and internal quotations omitted). The requirements for counsel include advising a client subject to immigration consequences of "the risk of deportation." *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010), *abrogated in part on other grounds by Chaidez v. United States*, 568 U.S. 342, 347 (2013).

¶9 Arizona Rule of Criminal Procedure 32.8(c) states in relevant part: "The defendant has the burden of proving factual allegations by a preponderance of the evidence." The superior court credited Nunez-Diaz' testimony, as well as that of his sister. The court thus found that "defense counsel misrepresented the immigration consequences to defendant."

¶10 "It is for the trial court to resolve conflicting testimony and to weigh the credibility of witnesses." *State v. Alvarado*, 158 Ariz. 89, 92 (App. 1988) (citation omitted). By making this credibility finding, the superior court found that Nunez-Diaz had established he suffered from both deficient performance and prejudice when he entered a plea not understanding the immigration consequences of pleading guilty.

¶11 The burden of proof then shifted to the State to prove "beyond a reasonable doubt that the [constitutional] violation was harmless." Ariz. R. Crim. P. 32.8(c). This it failed to do. Although there was testimony that Nunez-Diaz was generally advised there would be "immigration consequences," as noted above, he testified that he would not have signed the plea

agreement had he been advised of the *specific* immigration consequences of the plea.

¶12 The superior court did not abuse its discretion in finding that counsel was deficient and that, given the goals of Nunez-Diaz and the possible penalties and consequences had he gone to trial, Nunez-Diaz was prejudiced by the faulty advice.[1] The State failed to show beyond a reasonable doubt that relief should have been denied.

¶13 Accordingly, we grant review but deny relief.

MORSE, J., dissenting:

¶14 I respectfully dissent. The record below indicates that (i) Nunez-Diaz did not have legal immigration status in the United States, (ii) Immigration and Customs Enforcement officials had placed a detention hold for removal proceedings against him prior to his guilty plea, and (iii) Nunez-Diaz agreed to voluntary departure and did not contest removal after his conviction. Based on this record, Nunez-Diaz was a deportable alien prior to his conviction, *see* 8 U.S.C. § 1227(a)(1)(B), and his only potential claim of prejudice arises from the possibility of discretionary relief from removal under 8 U.S.C.

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[1] Although we agree with our dissenting colleague that Nunez-Diaz was a deportable alien prior to his conviction, *see* U.S.C. § 1227(a)(1)(B), the record below does not establish that he necessarily would have been deported had he gone to trial and been acquitted of the charges.

§ 1229b.[2] Under these circumstances, the superior court erred in finding that Nunez-Diaz established prejudice. *See United States v. Batamula*, 823 F.3d 237, 243 (5th Cir. 2016) (en banc) ("Because Batamula was already deportable under § 1227(a)(1)(C)(i) *before* he pleaded guilty under the two-count information, it would not have been rational for him to proceed to trial in the hopes of avoiding deportability under another subsection of § 1227."); *see also United States v. Donjuan*, 720 F.App'x 486, 490 (10th Cir. 2018) (unpublished) ("The consequence of Defendant's guilty plea was not removal, as was the situation in *Padilla*. Instead, the guilty plea made Defendant ineligible to receive the discretionary relief of cancellation of removal, which is fundamentally different than a lawful resident alien being subject to removal due to a guilty plea."); *United States v. Sinclair*, 409 F.App'x 674, 675 (4th Cir. 2011) (unpublished) (noting that despite the lack of proper immigration warnings, the defendant's "substantial rights were unaffected because he was an illegal alien and therefore his guilty plea had no bearing on his deportability"); *Garcia v. Tennessee*, 425 S.W.3d 248, 261 n.8 (Tenn. 2013) (noting that "courts have consistently held that an illegal alien who pleads guilty cannot establish prejudice" under *Padilla*

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[2] Notably, the petitioner in *Padilla* cited 8 U.S.C. § 1227(a)(1) and affirmatively argued that "only lawfully admitted immigrants can plausibly allege prejudice from conviction of a deportable offense. Illegal aliens generally cannot, absent a colorable pending or future claim to legal immigration status, because illegal presence is grounds for removal independent of the conviction." Reply Brief of Petitioner, 2009 WL 2917817 at *17-18, in *Padilla v. Kentucky*, 559 U.S. 356 (2010).

and collecting cases); *Texas v. Guerrero*, 400 S.W.3d 576, 588-89 (Tex. Crim. App. 2013) ("Unlike Jose Padilla, appellee was an undocumented immigrant and was deportable for that reason alone, both in 1998 and today. Had appellee gone to trial with counsel and been acquitted he would not have been transformed into a legal resident. . . . The prospect of removal therefore could not reasonably have affected his decision to waive counsel and plead guilty."); *United States v. Aceves*, 2011 WL 976706, at *5 (D. Haw. Mar. 17, 2011) ("Had he gone to trial instead of pleading guilty, he would not have been transformed into a legal resident. This is so even if he had been acquitted. In other words, it was not his conviction that made him removable."); *but see United States v. Arce-Flores*, 2017 WL 4586326 (W.D. Wash. Oct. 16, 2017) (rejecting argument that, as a matter of law, illegal aliens cannot demonstrate prejudice under *Padilla*).

APPENDIX C

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-430489-001 DT

[Dated December 23, 2015]
[Filed December 30, 2015]

STATE OF ARIZONA	) KAREN B KEMPER
	)
v.	)
	)
HECTOR SEBASTION NUNEZ-DIAZ (001)	)
	) RAY ANTHONY YBARRA
	)

COMMISSIONER PHEMONIA L. MILLER

CLERK OF THE COURT
Y. King
Deputy

COURT ADMIN-CRIMINAL-PCR

UNDER ADVISEMENT - POST CONVICTION RELIEF RULING

After an Evidentiary Hearing on October 27, 2015, the Court took the Defendant's Motion for Post-Conviction Relief under advisement.

Due to the complexity of the issues, the Court finds that extraordinary circumstances existed in this case

which required this court to consider this matter longer than the time required under Arizona Rules of Procedure 32.8(d).

The Court has considered the initial motions and associated pleadings, the testimony and exhibits introduced at the evidentiary hearing, and the arguments of counsel. The Court has observed the demeanor of the witnesses while testifying and the following findings are based on the evidence as well as the Court's assessment of credibility:

The following evidence was presented at the Evidentiary Hearing:

- On June 29, 2013, the Defendant was charged with one count of Possession of Dangerous Drugs and Possession of Narcotic drugs, both class four felonies.
- Defendant's sister, Maria Josefina Nunez-Diaz testified that she and her family met with Frank Carrizoza, an attorney at Alcock & Associates to discuss her brother's case. They informed the attorney that they were really concerned about defendant's case because he was not a citizen of the United States. She further testified that the attorney went as far as to draw a diagram depicting the criminal and immigration process and the plan to minimize any exposure and help him with immigration court. The family met with the attorney on more than one occasion. The family retained the attorney because they were told there would be no immigration consequences.

- Despite meeting with Mr. Carrizoza, defendant's case was assigned to another attorney, Julia Cassels.
- On July 8, 2013, at the preliminary hearing, Defendant met with Ms. Cassels. A motion to continue the preliminary hearing was filed. Defendant indicated that Ms. Cassels met with him three times for about 10-15 minutes each time.
- Ms. Cassels indicated that she met with Defendant on July 12, 2013 and went over the immigration consequences with him. She also indicated that she referred defendant's family to the head of the Immigration Department in her office.
- Ms. Cassels testified that Defendant could either go to TASC (suspended prosecution) or plead to Possession of Drug Paraphernalia, a Class 6 undesignated felony. However, because of defendant's non-bondable status, he was not eligible for TASC.
- Ms. Cassels indicated that she tried to get a solicitation offer for Defendant, but her request was denied. She further stated that she learned that the plea was the "kiss of death" before defendant took the plea.
- Ms. Nunez-Diaz indicated that she met with Ms. Cassels after her brother's first court date. She was told that the preliminary hearing was continued because there was a way to help her brother by meeting with someone else so that he could be free and immigration would not be bad.
- Defendant testified that Ms. Cassels informed him that he was not going to have any

consequences pleading guilty nor would he have any immigration consequences because her office had attorneys for that and it would not be a problem.

- Defendant further testified that he relied on the statements from his attorney and entered into the plea agreement. Defendant also stated that although the court told him there might be immigration consequences, he signed the plea because his attorney said there would be no immigration consequences.
- Defendant trusted his attorney because she assured him there would be no problems.
- Defendant further testified that if his attorney would have told him of the consequences, he would not have signed the plea.
- On July 22, 2013, Defendant plead guilty to Possession of Drug Paraphernalia, a Class 6 undesignated felony and was sentenced.
- Ms. Nunez-Diaz further testified that after defendant entered into the plea and was sentenced, the attorney said there was nothing she could do. That the matter was now in immigration hands. This made Ms. Nunez-Diaz and her family upset.
- Ms. Nunez-Diaz also testified that Ms. Cassels referred them to another attorney in her office, who said there was nothing they could do to help defendant because he pied guilty to Possession of Drug Paraphernalia.
- Defendant was processed through Immigration and Customs Enforcement and was transferred to the Eloy Detention Center. Once in immigration court, defendant had problems. He

tried to contact his attorney at Alcock and Associates, but did not receive a response.

- Ms. Nunez-Diaz and her family contacted another attorney about Defendant's immigration consequences.
- Defendant later hired the attorney to represent him at the removal proceedings. Defendant was ineligible for bond and subjected to mandatory detention because of the Possession of Drug Paraphernalia conviction. In order to minimize the damage, Defendant agreed to be deported back to Mexico.

CONCLUSIONS OF LAW

The issue before the Court is whether Defendant's counsel was ineffective. Deciding this issue is a question of credibility on the facts.

To establish a claim of ineffective assistance of counsel, a petitioner must show that counsel's actions fell below an objective standard of reasonableness and that petitioner was prejudiced by the alleged ineffective assistance of counsel. *Summers v. Schriro,* 2009 WL 1531847 (D. Ariz), *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 252, 2064 (1984). In ineffective assistance of counsel claims, the prejudice requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. ... *Summers,* supra, *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 370.

As the Arizona Standard 18, RAJI (Criminal) 3rd instructs, this Court considers the following when determining who is credible on a given fact: the

witness's ability to see or hear or know the things the witness testified to; the quality of the witness's memory; the witness's manner while testifying; whether the witness has any motive, bias, or prejudice; whether the witness is contradicted by anything the witness said or wrote before trial, or by other evidence; and the reasonableness of the witness's testimony when considered in the light of the other evidence. Consider all of the evidence in light of reason, common sense, and experience. Standard 18, RAJI (Criminal) 3rd; Credibility of Witnesses.

The Court finds Defendant's testimony and Maria Josefina Nunez-Diaz's testimony credible.

As part of determining credibility, the trier of fact must consider whether a witness's testimony is contradicted by anything the witness said or wrote before trial or by other evidence. In this case, the State's evidence was directly contradicted by the Defendant's witness, Maria Josefina Nunez-Diaz. Ms. Nunez-Diaz stated that the reason her family retained Alcock and Associates is so that her brother could avoid any immigration consequences. She further testified that after the first hearing she was told by Ms. Cassels representative that the hearing was continued and they were working to get her brother free and so that immigration wouldn't be bad. She further stated that at the second hearing defendant entered into a plea and was sentenced. She spoke to Ms. Cassels and was told there was nothing else she could do.

The Court can also consider the reasonableness of the witness's testimony when considered in the light of the other evidence, in determining the credibility of the

witness. The Court finds the testimony of Ms. Nunez-Diaz not only credible but also reasonable. After Ms. Cassels told Ms. Nunez-Diaz and her family there was nothing she could do, they became upset. This is a reasonable reaction in light of the fact they were told the attorney could help with the immigration case. Additionally, it was also a reasonable reaction for defendant to call Alcock and Associates when he learned that there would be immigration consequences as a result of his plea. When defendant and did not get a response, it was reasonable for defendant and his family to contact another immigration attorney.

In this case, the Defendant presented overwhelming evidence that his court-appointed counsel's actions fell below an objective standard. Defendant has shown that counsel's ineffective performance affected the outcome of the plea process. The Court finds that defense counsel misrepresented the immigration consequences to defendant. Counsel was well aware that the defendant and his family were concerned about the immigration consequences because of defendant's status in the United States. One of the main reasons Alcock and Associates was retained was because defendant's family was told there would be no immigration consequences. Counsel referred defendant's family to an immigration attorney; however, counsel failed to refer the *defendant* to an immigration attorney prior to him entering into the plea. An immigration attorney from counsel's firm could have easily spoken to the defendant about the immigration consequences. Based on the evidence presented, this court finds that counsel's actions fell below an objective standard of reasonableness.

The second prong of the ineffective assistance of counsel claim is for the defendant to show that he was prejudiced by the ineffective assistance of counsel. In this case, Defendant has shown that he was prejudiced by the ineffective assistance of counsel. Defendant was placed in removal proceedings because of the consequences of the Possession of Drug Paraphernalia conviction and later deported to Mexico. Defendant would not have signed the plea if he was adequately advised of the immigrations consequences. The court finds that as a direct result of Ms. Cassel's failure to properly advise Defendant of his immigration consequences, defendant was placed in removal proceedings and was held without bond. Furthermore, the reason defendant was unable to attend the TASC program no longer exists in light of the ruling in *Lopez-Valenzuela v. Arpaio,* 770 F. 3rd 772(9th Cir. 2014)

For these reasons, IT IS ORDERD granting Defendant's Petition For Post-Conviction Relief.

IT IS ORDERED setting aside Defendant's plea of guilty.

IT IS ORDERED signing this minute entry as a formal written order of the Court.

/s/Phemonia L. Miller
JUDICIAL OFFICER OF THE SUPERIOR COURT

PHEMONIA L. MILLER
COMMISSIONER/JUDGE PRO TEM

APPENDIX D

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-430489-001 DT

[Dated July 22, 2013]
[Filed July 24, 2013]

STATE OF ARIZONA	)	HEATHER LEE KIRKA
	)	
v.	)	
	)	
HECTOR SEBASTION NUNEZ-DIAZ (001)	)	
DOB: [redacted]/1986	)	JULIA CASSELS
	)	

COMMISSIONER PHEMONIA L. MILLER
FOR COMMISSIONER MONICA GARFINKEL

CLERK OF THE COURT
M. Cabral
Deputy

APO-SENTENCINGS-CCC
APPEALS-CCC
CITS - CCC SPANISH
DISPOSITION CLERK-CSC
RFR

SUSPENSION OF SENTENCE - UNSUPERVISED PROBATION

11:04 a.m.

Courtroom 2A - South Court Tower

State's Attorney:	Casey Mundell for Heather Kirka
Defendant's Attorney:	Julia Cassels
Defendant:	Present
Interpreter:	Fernando Venegas

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

Let the record reflect prior to the proceeding, Fernando Venegas is sworn to act as interpreter of the Spanish language.

Count(s) 1: WAIVER OF TRIAL: The Defendant knowingly, intelligently and voluntarily waived all pertinent constitutional and appellate rights and entered a plea of guilty.

IT IS THE JUDGMENT of the Court Defendant is guilty of the following:

OFFENSE: Count 1 (Amended): Possession of Drug Paraphernalia
Class 6 Undesignated Felony
A.R.S. § 13-3401, 13-3407, 13-3415, 13-3418, 13-610, 12-269, 13-701, 13-702, 13-801, 13-707, 13-802, 13-901.01(D) and 13-901.01(H)(4)
Date of Offense: June 29, 2013
Non Dangerous - Non Repetitive

IT IS ORDERED suspending imposition of sentence and placing defendant on Unsupervised Probation to be monitored by the Adult Probation Department (APD) in accordance with APD's Compliance Monitoring Standards:

Count 1 Probation Term: 18 months

To begin 07/22/2013.

Conditions of probation include the following:

Condition 11 - Actively participate and cooperate in the following program(s):

Substance Abuse Counseling

Condition 15: Restitution, Fines and Fees:

FINE: Count 1 - Total amount of $1372.50, which includes surcharges of 83%, monthly payment and beginning date to be determined by the Adult Probation Department.

Fine is to be paid to the Arizona Drug Enforcement Fund.

Count 1: Time payment fee pursuant to A.R.S. § 12-116 in the amount of $20.00 payable on a date to be determined by the Adult Probation Department.

PENALTY ASSESSMENT - A.R.S. §12-116.04: Count 1 - $13.00 payable on a date to be determined by the Adult Probation Department.

Investigative Agency:

Phoenix Police Department

Count 1: $15.00 to the Drug Lab Remediation payable on a date to be determined by the Adult Probation Department.

All amounts payable through the Clerk of the Superior Court.

Condition 17: Complete a total of 24 hours of community restitution. Complete 5 per month. Complete these hours at a site approved by the APD.

Condition 22: Other - Defendant must show proof of completion of terms 11 and 17 no later than April 22, 2014.

IT IS FURTHER ORDERED that Defendant shall submit to fingerprint identification processing by the Maricopa County Sheriff's Office if directed to do so by the Adult Probation Department. The Adult Probation Department shall direct any Defendant placed on probation who has not already had a State Identification Number (SID) established to submit to fingerprint processing.

Defendant is advised pursuant to A.R.S. § 13-805 that failure to maintain contact with the Probation Department may result in the issuance of:

1. A criminal restitution order in favor of the state for the unpaid balance, if any, of any fines, costs, incarceration costs, fees, surcharges or assessments imposed.

2. A criminal restitution order in favor of each person entitled to restitution for the unpaid balance of any restitution ordered.

IT IS ORDERED granting the Motion to Dismiss the following: Count 2.

IT IS FURTHER ORDERED Defendant be released from custody for this case only.

IT IS FURTHER ORDERED that Defendant must submit to DNA testing for law enforcement identification purposes in accordance with A.R.S. §13-610.

Defendant has waived the preparation of a presentence report.

11:09 a.m. Matter concludes.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

COMMISSIONER PHEMONIA MILLER FOR
COMMISSIONER MONICA GARFINKEL

CLERK OF THE COURT
M. Cabral
Deputy

Date: 07/22/13

No. CR 2013-430489-001

STATE v. Nunez-Diaz

Let the record reflect that the Defendant's right index fingerprint is permanently affixed to this sentencing order in open court.

/s/Phemonia L. Miller
JUDICIAL OFFICER OF THE SUPERIOR COURT

(right index fingerprint)

APPENDIX E

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

SUPERIOR COURT CASE # CR 2013-430489-001

[Filed July 22, 2013]

STATE OF ARIZONA	)
	)
vs.	)
	)
HECTOR SEBASTION NUNEZ DIAZ	)
DOB: [redacted], 1986	)
Booking No. P985421	)
	)
Defendant	)
	)

WAIVER OF PRELIMINARY HEARING
WITH PLEA AGREEMENT

DECLARATION by defendant as follows

Defendant is represented by his/her attorney Julia Cassels 021578

/s/HND ☐ I hereby voluntarily waive my right to a preliminary hearing understanding that I will be held to answer and an information will be filed charging me with

having committed:
Count 1: Possession or Use of Dangerous Drugs, a class 4 felony;
Count 2: Possession of Narcotic drugs a class 4 felony;
Committed on June 29, 2013

This is a non dangerous, non repetitive offense under the criminal code.

/s/HND ☐ I understand and acknowledge that:

A. I have a right to a preliminary hearing.
B. I am represented by an attorney now. Further, I know I have a right to an attorney for all further proceedings in this case. If I cannot afford one, then one will be appointed to represent me at this preliminary hearing as well as in the Superior Court for all purposes including trial, free of charge.
C. I am giving up the right to confront and cross-examine witnesses.
D. I am giving up the right to present evidence in my behalf and that I am giving up the right to have the magistrate determine if there is sufficient evidence against me to establish probable cause to hold me to answer in the Superior Court on the above stated charges, as well as the right to a dismissal of charges against me if the evidence is insufficient.

* * *

/s/HND ☐ 1. The State of Arizona and the defendant hereby agree to the following disposition of this case:

Plea: The defendant agrees to waive the preliminary hearing and plead guilty to: **Count 1 (as amended): Possession of Drug Paraphernalia a class 6 undesignated felony, in violation of A.R.S. 13-3401, 13-3407, 13-3415, 13-3418, 13.610, 12-269, 13-701, 13-702, 13-801, 13-707, 13-802, 13-901.01(D), and 13-901.01(H)(4), committed on June 29, 2013.**

This is a non dangerous, non repetitive offense under the criminal code.

Terms: On the following understandings, terms, and conditions:

The crime carries a presumptive sentence of **1.0** years; a minimum sentence of **0.5** years (**0.33** years if trial court makes exceptional circumstances finding); and a maximum sentence of **1.5** years (**2.0** years if trial court makes exceptional circumstances finding). Probation **IS** available. Restitution of economic loss to the victim and waiver of extradition for probation revocation procedures are required. The maximum fine that can be imposed is **$150,000** plus an **83%** surcharge plus **$20** probation surcharge, plus a **$13** assessment pursuant to ARS 12-116.04 (for crimes occurring on/after 07/20/2011), plus **$15** assessment pursuant to ARS 13-3423 (for crimes occurring on or after 08/02/12).. If the defendant is sentenced to prison, the defendant shall also be sentenced to serve a term of community supervision equal to one seventh of the

prison term to be served consecutively to the actual period of imprisonment. If the defendant fails to abide by the conditions of community supervision, the defendant can be required to serve the remaining term of community supervision in prison. Special conditions regarding sentence, parole, or commutation imposed by statute (if any) are: **If the Defendant is eligible for sentencing under ARS §13-901.01, the court shall require participation in an appropriate drug treatment or education program. Defendant shall submit to DNA testing for law enforcement purposes pursuant to A.R.S. 13-610. If offense is designated a misdemeanor, the maximum penalty is six months jail plus a fine of $2,500 plus an ~~84%~~ 83% surcharge.**

/s/HND ☐ 2. The parties stipulate to the following additional terms: **The defendant shall be placed on unsupervised probation with compliance monitoring. The Defendant shall pay a fine of $750 plus an 83% surcharge for a total fine of $1372.50. The offense shall not be designated a misdemeanor unless or until the defendant successfully completes all terms of probation.**

/s/HND ☐ 3. The following charges are dismissed, or if not yet filed, shall not be brought against the defendant: **Count(s)** 2.

/s/HND ☐ 4. This agreement serves to amend the complaint or information, to charge the offense to which the Defendant pleads,

without the filing of any additional pleading. However, if the plea is rejected by the court or withdrawn by either party, or if the conviction is subsequently reversed, the original charges and any charges that are dismissed by reason of this plea agreement are automatically reinstated.

/s/HND □ 5. If the Defendant is charged with a felony, he hereby waives and gives up his rights to a preliminary hearing or other probable cause determination on the charges to which he pleads. The Defendant agrees that this agreement shall not be binding on the State should the Defendant be charged with or commit a crime between the time of this agreement and the time for sentencing in this cause: nor shall this agreement be binding on the State until the State confirms all representations made by the Defendant and his attorney, to-wit: **Defendant avows to having no more than prior felony convictions and that (s)he was NOT on felony probation release, parole, or community supervision at the time of this offense. The Defendant is not eligible for sentencing pursuant to A.R.S. 13-901.01 (Proposition 200). Defendant further avows that (s)he has no other pending felony matters in any jurisdiction.** If the Defendant

fails to appear for sentencing, the court may disregard the stipulated sentence and impose any lawful sentence which is the same as or exceeds the stipulated sentence in the plea agreement. In the event the court rejects the plea, or either the State or the Defendant withdraws the plea, the Defendant hereby waives and gives up his right to a preliminary hearing or other probable cause determination on the original charges.

/s/HND ☐ 6. Unless this plea is rejected by the court or withdrawn by either party, the Defendant hereby waives and gives up any and all motions, defenses, objections, or requests which he has made or raised, or could assert hereafter, to the court's entry of judgment against him and imposition of a sentence upon him consistent with this agreement. By entering this agreement, the Defendant further waives and gives up the right to appeal.

/s/HND ☐ 7. The parties hereto fully and completely understand and agree that by entering into a plea agreement, the defendant consents to judicial factfinding by preponderance of the evidence as to any aspect or enhancement of sentence and that any sentence either stipulated to or recommended herein in paragraph two is not binding on the court. In making the

sentencing determination, the court is not bound by the rules of evidence. The State's participation in this plea agreement is conditional upon the Court's acceptance its terms conditions or provisions. If after accepting this plea the court concludes that any of the plea agreement's terms conditions or provisions regarding the sentence or any other aspect of this plea agreement are inappropriate. it can reject the plea. If the court decides to reject any of the plea agreement's terms conditions or provisions, it must give both the state and the Defendant an opportunity to withdraw from the plea agreement. Should the Court reject this plea agreement, or the State withdraws from the agreement, the Defendant hereby waives all claims of double jeopardy and all original charges will automatically be reinstated. The Defendant in such case waives and gives up his/her right to a probable cause determination on the original charges.

/s/HND ☐ 8. I understand that if I am not a citizen of the United States that my decision to go to trial or enter into a plea agreement may have immigration consequences. Specifically, I understand that pleading guilty or no contest to a crime may affect my immigration status. Admitting guilt may result in deportation even if the

charge is later dismissed. My plea or admission of guilt could result in my deportation or removal, could prevent me from ever being able to get legal status in the United States, or could prevent me from becoming a United States citizen. I understand that I am not required to disclose my legal status in the United States to the court.

/s/HND ☐ 9. If the court decides to reject the plea agreement provisions regarding sentencing and neither the State nor the Defendant elects to withdraw the plea agreement, then any sentence either stipulated to or recommended herein in paragraph 2 is not binding upon the court, and the court is bound only by the sentencing limits set forth in paragraph 1 and the applicable statutes.

/s/HND ☐ 10. This plea agreement in no way restricts or limits the ability of the State to proceed with forfeiture pursuant to A.R.S. §§13-4301 et seq.; 13-2314 or 32-1993, if applicable. Nor does the plea agreement in any way compromise or abrogate any civil action, including an action pursuant to A.R.S. § 13-2301 et seq. or the provisions of A.R.S. §§ 13-2314(G) or 13-4310.

I have read and understand the provisions of pages one and two of this agreement. I have discussed the case and

my constitutional rights with my lawyer. I understand that by pleading **GUILTY** I will be waiving and giving up my right to a determination of probable cause, to a trial by jury to determine guilt and to determine any fact used to impose a sentence within the range stated above in paragraph one, to confront, cross-examine, compel the attendance of witnesses, to present evidence in my behalf, my right to remain silent, my privilege against self-incrimination, presumption of innocence and right to appeal. I agree to enter my plea as indicated above on the terms and conditions set forth herein. I fully understand that if, as part of this plea agreement, I am granted probation by the court, the terms and conditions thereof are subject to modification at any time during the period of probation. I understand that if I violate any of the written conditions of my probation, my probation may be terminated and I can be sentenced to any term or terms stated above in paragraph one, without limitation.

I have personally and voluntarily placed my initials in each of the above boxes and signed the signature line below to indicate I read and approved all of the previous paragraphs in this agreement, both individually and as a total binding agreement.

Date 7/22/13 **Defendant** /s/Héctor Núñez Díaz

I have discussed this case with my client in detail and advised him of his constitutional rights and all possible defenses. I believe that the plea and disposition set forth herein are appropriate under the facts of this case. I concur in the entry of the plea as indicated above and on the terms and conditions set forth herein.

Date 7/22/13 **Defense Counsel**/s/Julia Cassels 021578

I have reviewed this matter and concur that the plea and disposition set forth herein are appropriate and are in the interest of justice.

Date 7/22/13 **Prosecutor** /s/E. Pedicone 029094

APPENDIX F

IN THE MARYVALE JUSTICE COURT COURT STATE OF ARIZONA, COUNTY OF MARICOPA

[Filed July 2, 2013]

******FINAL**** RELEASE QUESTIONNAIRE**

DEFENDANT'S NAME HECTOR SEBASTION NUNEZ-DIAZ

DOB 1986-[redacted] BOOKING NO. P985421

ALIAS(ES) _____

CASE NO. PF2013430489001

A. GENERAL INFORMATION

Charges
1 Cts. 13-3407A1 DANGEROUS DRUG-POSS/USE F4
1 Cts. 13-3408A1 NARCOTIC DRUG-POSSESS/USE F4

Pursuant to A.R.S. §41-1750 ten-print fingerprints were taken of the arrested person?
☐ Yes ☒ No
If yes, PCN = _____

Pursuant to A.R.S. §13-610 one or more of the above charges requires the arresting agency to secure a DNA sample from the arrested person?
☐ Yes ☒ No

If yes, does the defendant have a valid DNA sample on file with AZDPS? □ Yes □ No

If no, Arresting Agency has taken required sample? □ Yes □ No

Offense Location: 5850 W INDIAN SCHOOL ROAD
Offense Date: 2013-06-29
Arrest Location: 5850 W INDIAN SCHOOL PHOENIX AZ 85033
Date: 2013-06-29 Time: 02:15

B. PROBABLE CAUSE STATEMENT

1. Please summarize and include the facts which establish probable cause for the arrest:
   ON 062913 AT APPROXIMATLEY 0157 HOURS DEF. WAS CONTACTED AT 5850 WEST INDIAN SCHOOL ROAD IN REFERENCE TO A TRAFFIC STOP FOR A TRAFFIC VIOLATION. DEF. WAS OBSERVED TRAVELING EASTBOUND ON INDIAN SCHOOL ROAD FROM 67TH AVE TRAVELING 50MPH IN A 40MPH ZONE. A TRAFFIC STOP WAS CONDUCTED. AFTER DEF. WAS CONTACTED HE WAS NOT ABLE TO PROVIDE I.D. DEF. WAS THEN ASKED TO EXIT THE VEHICLE FOR THE CRIMINAL VIOLATION OF OPERATOR FAIL TO PROVIDE I.D.

   AFTER DEF. PROVIDED HIS INFO A RECORDS CHECK WAS CONDUCTED AND HE WAS FOUND TO HAVE NO VALID DRIVERS LICENSE. DEF. WAS THEN

SEARCHED AND FOUND TO HAVE A SMALL AMOUNT OF METH IN HIS RIGHT FRONT COIN POCKET TUCKED INSIDE A DOLLAR BILL. AFTER CONTINUING THE SEARCH A SMALL CLEAR PLASTIC BAGGY CONTAINING COCAINE WAS FOUND IN DEF. FRONT LEFT PANTS POCKET. DEF. WAS THEN PLACED IN CUSTODY AND TRANSPORTED TO THE MARYVALE PRECINCT. DEF. CHARGED WITH POSSESSION OF NARCOTIC DRUGS AND POSSESSION OF DANGEROUS DRUGS AND POSSESSION OF DRUG PARAPHERNALIA.

C. OTHER INFORMATION (Check if applicable)

1. □ Defendant is presently on probation, parole or any other form of release involving other charges or convictions:
   Explain:

2. List any prior:
   Arrests?

   Convictions?

   F.T.A.'s?

3. Is there any indication the defendant is:

   □ An Alcoholic? □ An Addict?

   □ Mentally disturbed? □ Physically Ill?

4. □ Defendant is currently employed
With whom

How long:

5. Where does the defendant currently reside? 8422 WEST ROMA AVENUE PHOENIX, AZ 85037

With whom

How long: _____ years _____ months _____ days

6. What facts indicate the defendant will flee if released?
Explain:

7. What facts does the state have to oppose an unsecured release? Explain:

D. CIRCUMSTANCES OF THE OFFENSE(Check if applicable)

1. □ Firearm or other weapon was used
Type:

□ Someone was injured by the defendant

□ Medical attention was necessary
Nature of injuries: N/A

2. □ Someone was threatened by the defendant
Nature and extent of threats:

3. If property offense, value of property taken or damaged:

□ Property was recovered

4. Name(s) of co-defendant(s):

E. CRIMES OF VIOLENCE

1. Relationship of defendant to victim:

   □ Victim(s) and defendant reside together

2. How was the situation brought to the attention of the police?

   □ Victim □ Third Party □ Officer observed

3. □ There are previous incidents involving these same parties
   Explain:

4. Is defendant currently the subject of:

   □ An order of protection

   □ Any other court order

   □ Injunction against harassment

   Explain:

F. DOMESTIC VIOLENCE ISSUES (Check if applicable) Defendant's actions

□ Threats of homicide/suicide/bodily harm

□ Control/ownership/jealousy issues

□ Prior history of DV

□ Frequency/intensity of DV increasing

□ Access to or use of weapons

□ Violence against children/animals

□ Multiple violations of court orders

□ Crime occurs in public

□ Kidnapping

□ Depression

□ Stalking behavior

G. CIRCUMSTANCES OF THE ARREST (Check if applicable)

1. Did the defendant attempt to:

□ Avoid arrest □ Resist arrest □ Self Surrender

Explain:

N/A

2. □ Defendant was armed when arrested
Type:

3. ⊠ Evidence of the offense was found in the defendant's possession
Explain: DEF. HAD METH IN HIS RIGHT FRONT COIN POCKET

4. Was the defendant under the influence of alcohol or drugs at the time of the offense?
⊠ Yes □ No □ Unk

H. DRUG OFFENSES

1. If the defendant is considered to be a drug dealer, please state the supporting facts:

2. What quantities and types of illegal drugs are directly involved in the offense? COCAINE AND METH

⊠ Drug field test completed

⊠ Defendant admission of drug type

Approximate monetary value: $50.00

3. Was any money seized?

□ Yes ⊠ No

Amount: $

I. ADDITIONAL INFORMATION

1. Military Service:

Has the defendant served in the military services of the United States? □ Yes ⊠ No □ Unknown

If yes, currently on active duty? □ Yes □ No

Branches Served In: _____ _____ _____
(**AF** - Air Force **AR** - Army **CG** - Coast Guard **MC** - Marine Corp **MM** - Merchant Marines **NG** - National Guard **NV** - Navy **RS** - Reserves)

2. Is the defendant homeless?
□ Yes ⊠ No □ Unknown

If a fugitive arrest, a Form IVA must also be completed

I certify that the information presented is true to the best of my knowledge.

MESCHNARK, RAYMOND/8389
ARRESTING OFFICER/SERIAL NUMBER

AZ0072300/602-495-5008
ARREST AGENCY/DUTY PHONE NUMBER

2013-06-29
DATE

201301147982/AZ0072300
DEPARTMENTAL REPORT NO.

/
DEPARTMENTAL REPORT NO.

/
DEPARTMENTAL REPORT NO.

APPENDIX G

JAZMIN J. ALAGHA
State Bar No. 026302
LAW OFFICE OF RAY A. YBARRA MALDONADO, PLC
2637 N. 16th Street, Unit 1
Phoenix, Arizona 85006
Phone: 602-910-4040
Fax: 602-910-4000
jazmin@abogadoray.com

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

CR 2013-430489-001

[Filed September 10, 2014]

State of Arizona,	)
	)
Plaintiff,	)
	)
vs.	)
	)
Hector Nunez Diaz,	)
	)
Defendant	)
	)

***AMENDED* PETITION FOR POST-CONVICTION RELIEF**

Petitioner, Hector Nunez Diaz, by and through counsel undersigned, hereby requests that this Court hold an evidentiary hearing and, thereafter, order his guilty plea withdrawn.

This petition is based upon Rules 32.1(a) and 32.8 of the Arizona Rules of Criminal Procedure ("ARCP"), the right to effective assistance of counsel as required by the Sixth and Fourteenth Amendments to the United States Constitution, Article 2, Sections 3, 4 and 24 of the Arizona Constitution, his right to due process, and the following memorandum of points and authorities.

Pursuant to Rule 32.5 Counsel hereby states that every ground knowing to him for vacating judgment or sentence is contained herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Facts

On June 29, 2013, Mr. Hector Nunez Diaz was arrested and charged by direct complaint on July 2, 2013 with one count of Possession of Dangerous Drugs and one count of Possession of Narcotic Drugs.

Mr. Hector Nunez Diaz notified his family who promptly retained Alcock & Associates to represent him in his pending criminal matter. During their initial consultation, Mr. Nunez-Diaz's family advised an Alcock & Associates representative that they were concerned because Mr. Nunez-Diaz was undocumented as well. They were advised that they would resolve the case in a way that would minimize any exposure and

help him out in immigration court. The attorney aht they met with, Frank Carrizoza, went as far as to draw a diagram depicting the criminal and immigration process and explaining the plan that would be taken to protect Hector Nunez Diaz. Despite the fact that Mr. Carrizoza met with the family on two differnet occasions and was their point of contact, Alcock & Associates assigned Ms. Julia Cassels to represent Mr. Nunez Diaz.

Mr. Nunez-Diaz was set for a preliminary hearing in Early Disposition Court (EDC) on July 8, 2013. Ms. Cassels filed a motion to continue the preliminary hearing for two weeks due to being newly retained on the case. Commissioner Garfinkel reset the matter for a preliminary hearing on July 22, 2013.

On July 22, 2013, Mr. Nunez-Diaz was presented with a plea for the charges to be reduced to a class 6 undesignated felony in exchange for him to plead guilty to possession of drug paraphernalia. At the hearing, the standard advisement was conducted. However, prior to the formal hearing, Hector was told it was the best plea available to him and the higher charges would be dropped.

He was also under the impression that he would be referred to an immigration attorney with Alcock & Associates and they would continue to take care of his matter. The plea was to possession of drug paraphernalia, a class 6 undesignated felony. This plea was the original plea offered by the State. A review of the file does not indicate, Ms. Cassels, or any other attorney from her office, submitted any deviation

request or alternative plea given Mr. Nunez-Diaz immigration considerations.

Additionally, the file does not indicate that Hector Nunez Diaz properly advised of the immigration consequences. There are simply, no notes in this matter. As such, there is no indication that Ms. Cassels advised him of the immigration consequences and despite the original consideration and goals, i.e. to preserve his ability to fight his immigration case in immigration court, were ignored.

To the contrary, Alcock and Associates were repeatedly told about the priorities and immigration considerations in the representation of the case. Such considerations were flat out ignored. *See* Exhibit A. *Affidavit of Maria Josefina Nunez Diaz; also* Exhibit B. *Affidavit of Hector Nunez Martinez.*

Maria Josefina Nunez Diaz, sister of Hector Nunez Diaz, acted as his spokesperson in Mr. Nunez Diaz case. She signed the formal contract and met with the attorneys on at least three occasions, each time reiterating the immigration concerns of her brother. She met with attorneys from Alcock and Associates on July 1, 2013 and July 5, 2013, each time told that they would take care of any immigration concerns. Exhibit A. *Affidavit of Maria Josefina Nunez Diaz,* at 1 para. 1& 7. Additionally, these concerns were addressed prior to the entry of any plea with lead counsel, Ms. Cassels. Exhibit A. *Affidavit of Maria Josefina Nunez Diaz,* at 2 para. 11-13. Again, the family was assured that they need not worry since the charges would be minimal it would not affect Mr. Nunez Diaz immigration situation. Exhibit A. *Affidavit of Maria Josefina Nunez Diaz,* at

2 para. 13. Hector Nunez Martinez, father of Hector Nunez Diaz, was present when these assurances were made. *See* Exhibit B. *Affidavit of Hector Nunez Martinez* at 1 para. 5; 2 at para. 11

Most notably, Ms. Cassels acknowledges that she had direct knowledge of Mr. Hector Nunez Diaz immigration consequences. In her own words, she addresses the court at the time of sentencing regarding Mr. Nunez Diaz and the families desire to keep fighting the case despite the fact that Mr. Nunez Diaz' immigration fate was destined for failure upon signing the plea.

At sentencing the following exchange takes place:

THE COURT: Ms. Cassels?

MS. CASSELS: Yes, Your Honor. We'd ask that you place Mr. Nunez-Diaz on a short term of unsupervised probation.

I'd also ask that you allow the probation department to make a determination as to when payment on the fines should begin, given that Mr. Nunez-Diaz is in a little bit of limbo as to what his custody status will be in the next little bit here.

His family is present in the courtroom, they're in about the middle row there. And they're very concerned about him, and they'll do everything they can to assist him once he's released.

Change of Plea Transcript, State of Arizona v. Hector Sebastian Nunez Diaz, CR2013-430489-001, p. 11 (previously submitted.)

Moreover, Ms. Cassels makes these remarks and alludes to the fact that Mr. Nunez Diaz may have a fighting chance at immigration, knowing that no such research or defensive actions were taken to protect Mr. Nunez Diaz's exposure. Similar insight into the communications between Ms. Cassels and Mr. Nunez Diaz is evidenced in the transcript when Mr. Nunez Diaz informs the court that he would like to be released. Change of Plea Transcript, State of Arizona v. Hector Sebastian Nunez Diaz, CR2013-430489-001, p. 12 ("Well, I ask for forgiveness for everyone. I am remorseful and I learn my lesson. And I would like to be released. That's all.") (Previously submitted.)

Upon returning to Maricopa County Jail, Hector Nunez Diaz was processed through the Immigration and Customs; Enforcement 287(g) officer and was transferred to the Eloy Detention Center. Hector Nunez Diaz' family hired Jillian Kong-Sivert, Esq. to represent him in removal proceedings. Counsel advised Hector Nunez Diaz that he was unfortunately ineligible for immigration bond as he was subject to mandatory detention under the Immigration and Nationality Act ("INA") §236(c) due to his plea he took. The reason that he was ineligible for bond and subject to mandatory detention was because a conviction for possession of drug paraphernalia is classified as a "controlled substance offense" under the immigration laws of the United States. Under INA §236(c), an individual with a controlled substance offense conviction is subject to mandatory detention and an immigration judge is jurisdictionally barred from granting bond. *See §INA 236(c).*

Had immigration considerations been considered in plea negotiations, however, Mr. Nunez Diaz could have pled to Solicitation to Possess Marijuana as opposed to actual possession, he would have been eligible for bond as a "solicitation" offense is not considered to be a controlled substance offense for purposes of mandatory detention. *See Coronado Durzao v. INS,* 123 F.3d 1322, 1326 (9th Cir. 1997).Moreover, a conviction for drug paraphernalia renders Mr. Nunez Diaz ineligible for various potential remedies.

A. Ms. Cassels should have been aware of the fact that a conviction for possession of paraphernalia would have a severe impact on Hector's Nunez Diaz immigration status in this country.

Ms. Cassels should have been aware of the severe impact, including deportation and subjection to mandatory detention, that a plea to drug paraphernalia would have on Mr. Nunez Diaz for two reasons. First, Ms. Cassels firm, Alcock and Associates employs three full-time immigration attorneys, Katie Sarreshteh, Claudia Lopez, and Jordan Clegg (who ultimately reviewed Mr. Nunez Diaz file post-conviction and who was immediately able to spot that such a conviction would secure his deportation). See Exhibit C. Alcock and Associates website (attorney printout), *www.alcocklaw.com*

Second, the availability of such information is readily available. A free legal chart regarding immigration consequences prepared in part by the Maricopa County Office of the Public Defender is widely available among criminal lawyers in Maricopa

County. This chart clearly indicates that A.R.S. 13-3405 (Possession of Drug Paraphernalia) is "NOT A SAFE PLEA; will have severe consequences and cause both deportability and inadmissibility.... " See *Excerpt from Quick Reference Chart and Annotation for Determining Immigration Consequences of Selected Arizona Offences,* p. 15, Exhibit D (emphasis in original).

In addition, Mr. Nunez Diaz is not eligible for state rehabilitative relief under the Federal First Offender's Act as this relief was discontinued for immigration cases in the 9th Circuit by the Court's holding in *Nunez-Reyes v. Holder* on July 14, 2011. See, *Nunez-Reyes v. Holder,* 602 F.3d 1102, 1104 (9th Cir. 2011)(overruling *Lujan-Armendariz v. INS,* 222 F.3d 728 (9th Cir. 2000) for purposes of convictions received on or after July 14, 2011.)

B. The plea to drug paraphernalia recommended by Ms. Cassels had severals5yjtyui9] negative immigration consequences not known to Mr. Nunez Diaz at the time he';signed the plea

Upon being transferred to immigration custody, the U.S. Department of Homeland Security determined that Mr. Nunez Diaz was to be held detained, without bond, pending the outcome of his immigration proceedings. Subsequently, Ms. Jillian Kong Sivert was able to avoid his deportation and secured a voluntary departure/return in his case. Mr. Nunez Diaz outside the United States awaiting disposition of this matter so that he may reopen his immigration proceedings and re-enter the United States some day in the future.

As a direct result of Mr. Nunez Diaz plea, which was accepted on the advice of his attorney, he is out of the country and away from his family for the last year. This could have been remedied by a plea to Solicitation to Possess a Controlled Substance rather than possession of drug paraphernalia. A review of the formal file as received per the orders of this Court gives no indication that any of this information was reviewed or that Ms. Cassels requested this alternative plea from the State. Likewise, the file provides no indication that Mr. . Nunez Diaz was affirmatively advised of the severe consequences the plea would have on his immigration status, which was priority, and that he knowingly and voluntarily chose to take that plea and ignore such consequences.

II. Issue

Whether, under the prevailing processional norms of this community, Ms. Julia Cassels, rendered ineffective assistance of counsel to Mr. Nunez Diaz during the plea process by failing to provide specific advice about the immigration consequences of the resulting conviction and whether the court erred in not individually advising him of the possible immigration consequences of the criminal conviction.

III. Law and Arguments

A. General Principles Governing PCRs

A petition for post-conviction relief ("PCR") provides a remedy for constitutional error during the plea process. *See McMann v. Richardson,* 397 U.S 759, 90 S.Ct. 1441 (1970). An allegation of ineffective assistance of counsel is encompassed in ARCP Rule

32.1; a claim that the defendant's conviction was the result of ineffective assistance is a violation of both the United States and Arizona Constitutions. *See State v. Herrera,* 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (Ariz. App. 1995); *State v. Febles,* 210, Ariz. 589,595, 115 P.3d 629, 636 (Ariz. App. 2005).

In order to be entitled to an evidentiary hearing on a Rule 32 petition, the petitioner must present a "colorable claim for relief." *State v. Puls,* 176 Ariz. 273, 275, 860 P.2d 1326, 1328 (Ariz. App. 1993). A colorable claim is one which, if the allegations are true, might have changed the outcome of the trial verdict. *Id.* In short, it is a claim that, factually, has the appearance of validity. *State v. Verdugo,* 183 Ariz. 135, 139, 901 P.2d 1165, 1169 (Ariz. App. 1995).

If an evidentiary hearing is granted, the burden is on the petitioner to prove the actual allegations by a preponderance of the evidence. *Id.* A PCR is addressed to the sound discretion of the trial court, and there is a strong presumption that counsel acted reasonably competently. *Herrera, supra,* at 647 and 1382, *Febles, supra,* at 596 and 636; *see also, Strickland v. Washington,* 466 U.S. 668, 689 (1984). There is no question that the constitutional right to counsel is the right to **effective** counsel, whether that counsel is appointed or retained. *United States v. Cronic,* 466 U.S 648, 654 (1984); *Strickland, supra,* at 685-686, 690.

The proper measure of an attorney's performance is "reasonableness under prevailing professional norms." *Id.* In *State v. Ysea,* the Arizona Supreme Court held that:

> Under Arizona law, a finding of ineffective assistance of counsel requires that a defendant show: (1) trial counsel performed deficiently under prevailing professional norms; and (2) counsel's deficiency prejudiced the defendant. [Citations omitted.] A defendant who makes both of these showing is entitled to have his or her conviction reversed. [Citation omitted.]

State v. Ysea, 191 Ariz. 372, 377, 956 P. 2nd 499, 504 (1998). In addition, the United States Supreme Court has held that a fair trial is imperative:

> in giving meaning to the requirement...we must take its purpose-to ensure a fair trial- as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Strickland, supra, at 692-693.

B. Legal Arguments

Mr. Nunez diaz has established a colorable claim that he was denied effective assistance of counsel during the plea proceedings in this case. In *Padilla v. Kentucky,* the United States Supreme Court held that, "counsel must inform her client whether his plea carries a risk of deportation." *Padilla v. Kentucky,* 130 S.Ct. 1473, 1486 (2010).

In the present case, Ms. Cassels file provides no indication that Mr. Nunez Diaz was properly advised of the immigration consequences of the plea and that he

chose to voluntarily and knowingly ignore and/or accept such consequences and take the plea to drug paraphernalia anyway. Indeed, the file is void of any documentation that such consequences were ever addressed via independent legal research, consultations with one of the three fulltime immigration attorneys in Ms. Cassels firm, or via the Immigration Consequences Handbook.

No action appears to be have been taken to fully advise Mr. Nunez Diaz of the ***clear*** immigration consequences that would result as the file is void of any documentation whatsoever.

The relevant portion of the Immigration and Nationality Act relating to convictions for controlled substance offenses ***clearly*** states that such a conviction will have serious consequences. 8 U.S.C §1182(a)(2)(A)(i) states that, "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of – (II) a violation (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or any foreign country relation to a controlled substance (as defined in section 802 of title 21) is inadmissible."

The plain language of the statute is ***clear*** – an alien is inadmissible for a controlled substance conviction. Further, binding 9th Circuit precedent clearly indicates that a plea to Solicitation to Possess Marijuana will shield an alien from the adverse consequences of deportation and mandatory detention that ordinarily stem from a controlled substance violation. *See Coronado Durazo, supra.*

Had Ms. Cassels made a diligent inquiry into Mr. Nunez Diaz's immigration situation and advised him of the preclusive effect on relief of this conviction, the outcome would have been different and Mr. Nunez Diaz would be not have been eligible for a bond and potentially other remedies before the immigration court. Here, Ms. Cassels did not even request any other plea than the first plea offered. She did not request a plea to Solicitation to Possess a Narcotic Substance from the County Attorney's Office. Had she done so, there is a good chance that the plea would have been modified as the county attorney regularly offers pleas to Solicitation to Possess a Narcotic Substance in first time possession cases.

Had Ms. Cassels complied with the prevailing norms of the legal community, she would have consulted with one of the three on staff immigration attorneys at her firm and would have immediately known that a plea to drug paraphernalia would have serious negative immigration consequences. She could then have requested an alternative plea based on the advice of such attorneys and/or she could have researched 9th Circuit law regarding controlled substance offenses.

Had Ms. Cassels acted effectively she would have complied with Padilla and "informed her client whether the plea carries a risk of deportation." *Padilla v. Kentucky, supra.* Instead, she made an affirmative representation to Mr. Nunez Diaz that the plea would not have significant immigration consequences. This affirmative representation rises to the level of ineffective assistance of counsel. But for this ineffective

assistance of counsel, Mr. Nunez Diaz would have been eligible for a bond and could have fought his case outside of immigration custody and been alongside his family. Instead, he was subject to mandatory detention, any remedies available were significantly thwarted, and he finds himself outside the United States waiting for his case to reopen and fight his case.

The fact of the matter is, the conviction Ms. Cassels recommended had such severe immigration consequences (placing Mr. Nunez Diaz in deportation proceedings and being held without bond) that failing to advise him of such consequences constitutes ineffective assistance of counsel. Not giving specific advice of each of those consequences of the conviction in this case constitutes ineffective assistance of counsel pursuant to *Padilla.* Under these circumstances, it is evident that (1) trial counsel performed deficiently under prevailing professional norms; and (2) counsel's deficiency prejudiced the defendant. Accordingly, Mr. Nunez Diaz has established a claim for ineffective assistance of counsel under the standard set forth by the Arizona Supreme Court in *State v. Ysea,* supra at 377.

Additionally, the court denied due process to Mr. Nunez Diaz in failing to individually advise Mr. Nunez Diaz of the immigration consequences of his guilty plea. The transcript does not mention that Mr. Nunez Diaz was advised individually of his rights, nor does it contain the standard immigration warning commonly given before please of guilty are accepted by the court. The transcript states the following:

THE COURT: Mr. Nunez-Diaz, you were present this morning when I went over your constitutional rights and the immigration advisement; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand your constitutional rights?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Any questions about your constitutional rights?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you understand the immigration advisement?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Any questions about the immigration advisement?

THE DEFENDANT: No, Your Honor.

Change of Plea Transcript, State of Arizona v. Hector Sebastian Nunez Diaz, CR2013-430489-001, p. 8-9 (previously submitted.) The Court should have individually addressed Hector Nunez Diaz the potential immigration consequences, as opposed to simply asking him if he had any questions about a series of rights that were read to a larger group due to the fact that Mr. Nunez Diaz was under the impression that Ms. Cassels and the firm of Alcock & Associates would be formulating a plea agreement that would minimize his exposure in immigration court. Moreover, an individualized advisal would have protected the

spirit and the language of the Arizona Rules of Criminal Procedure. Rule 17.2 of the Arizona Rules of Criminal Procedure states the following:

> [b]efore accepting a plea of guilty or no contest, the court shall address the defendant **personally in open court,** informing him or her of and determining that he or she understands the following:...(f.) That if he or she is not a citizen of the United States, the plea may have immigration consequences, Specifically the court shall state, "If you are not a citizen of the United States., pleading guilty or no contest to a crime may affect your immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. Your plea or admission of guilt could result in your deportation or removal, could prevent you from ever being able to get legal status in the United States, or could prevent you from becoming a United States citizen." The court shall also give the advisement in this section prior to any admission of facts sufficient to warrant finding of guilt, or prior to any submission on the record. The defendant shall not be required to disclose his or her legal status in the United States to the court.

Arizona Rules of Criminal Procedure, Rule 17.2. (emphasis added). Mr. Nunez Diaz was not addressed personally, but rather in a group, which contained an undefined number of people with under undeterminable circumstances. The transcript states the following: "THE COURT: Mr. Nunez-Diaz, you

were present this morning when I went over your constitutional rights and the immigration advisement; is that correct?--...." Change of Plea Transcript, State of Arizona v. Nunez Diaz, CR2013-430489-001, p. 8 (previously submitted.) It is unclear how many people were in the group and whether the group advisement took place over a video screen or in open court. It is also unclear at what time the advisement took place, all is stated is that it was in the morning. The change of plea transcript lists the time that the proceeding began as 10:57 a.m.. An advisement given to Mr. Nunez Diaz in the morning, in a group, is not addressing him personally in open court and advising him of the possible immigration consequences of his plea as required by Rule 17.2.

IV. Conclusion and Requests

The allegations in this petition are sufficient to raise a colorable claim of ineffective assistance of counsel during the plea proceedings and a violation of due process during the change of plea hearing. They have the factual appearance of validity, which entitles Mr. Nunez diaz to an evidentiary hearing. At the hearing, he will prove, by a preponderance of the evidence, that Ms. Cassels failed to comply with prevailing professional norms in the community by providing Mr. Nunez Diaz with specific, accurate advice about the immigration consequences of the plea agreement. He will further prove that the deficiency in counsel's performance gives rise to the reasonable Indeed as a direct result of Ms. Cassel's deficiency, Mr. Nunez Diaz was placed in removal proceedings and was held without bond. As a result of Ms. Cassel's

deficient performance as counsel, Mr. Nunez Diaz requests that this Court allow him to withdraw from his plea to allow him to plead to a different offense that will not place him in removal proceedings and subject him to mandatory detention.

Mr. Nunez Diaz is currently outside of the United States awaiting resolution of this pending post-conviction relief proceedings. As such, counsel respectfully requests that this Court set an evidentiary hearing as quickly as the Court's calendar will allow.

RESPECTFULLY SUBMITTED this 9th day of September, 2014,

s/ Jazmin J. Alagha

JAZMIN J. ALAGHA, ESQ.

DECLARATION OF HECTOR SEBASTIAN NUNEZ DIAZ

I, Hector Sebastian Nunez Diaz, certify under penalty of perjury that I have reviewed the petition for post-conviction relief and its attachments; I hereby certify, under penalty of perjury, that the statements as well as the affidavits and/or attachments provided in support are true and correct to the best of my knowledge.

Signed this 9th day of September, 2014.

/s/ 10-Sep-2014
HECTOR SEBASTIAN NUNEZ DIAZ

* * *

[*Certificate of Service Omitted In the Printing of this Appendix*]

Exhibit A

AFFIDAVIT OF MARIA JOSEFINA NUNEZ DIAZ

STATE OF ARIZONA)
) ss
County of Maricopa)

I, Maria Josefina Nunez Diaz, being first duly sworn, upon my oath, depose and say:

1. My Name is Maria Josefina Nunez Diaz and I am the sister of Hector Nunez Diaz.

2. On June 28, 2013, our family got news that my brother had been arrested and was held in custody. My father called Alcock and Associates on a Saturday and secured a consultation on Monday.

3. On July 1, 2013, I accompanied my father to have a consultation with Alcock and Associates. At this meeting we met with Attorney, Frank Carrizoza.

4. During our meeting, my father and I told Mr. Carrizoza that we were concerned because my brother did not have legal status and we wanted to protect him as much as possible.

5. Mr. Carrizozza looked up the case online and told us that while it may be a difficult case it was not impossible. He then proceeded to draw us a diagram of the charges to be dropped and the goals in the case. He drew out the process of representation for criminal and immigration court. He stated the goal

was reduce his charges and that way he would be protected when transferred to immigration custody.

6. Despite the cost of representation, which was difficult for us to manage economically, we scheduled a meeting to sign a contract a few days later since we felt assured that they would take care of my brother and minimize any exposure in his criminal and immigration matter.

7. On or about July 5, 2014, I met with attorney Frank Carizozza, to sign a contract for the criminal representation of my brother, Hector Nunez Diaz. We discussed our concerns over my brother's immigration status and he assured me that they could resolve the case in a way that would not affect his immigration status.

8. I requested that he go visit my brother at the jail because he was very anxious and worried about his case. Mr. Carizozza told me that he had not been assigned to the case yet and was unsure if who would be assigned but if he was going to the jail the following week he would go and visit him.

9. On July 8, 2013, my brother had his first court hearing. However, we found that Frank would not be representing my brother. Instead, Ms. Julia Cassels would represent him. She continued our brother's case which worried my family and I quite a bit.

10. Our family decided to meet with her to address some of our concerns.

11. On July 10, 2013 more or less, my dad and I met with Ms. Cassels. She told us she continued the case because she knew of an individual who could provide treatment or a type of counseling to my brother and that would help in resolving the case.

12. We told Ms. Cassels some of our concerns, including his immigration status. Ms. Cassels assured us that this was the best plan of action because the judge would see he was getting treatment and his exposure would be minimal so it would not affect his immigration situation.

13. We felt reassured after our meeting with Ms. Cassels that she had the best interest in mind in representing my brother and understood our priorities, which was his immigration status, although the meeting was brief.

14. On July 22, 2013, we went for my brother's court hearing and were surprised to hear he had taken a plea and was sentenced. To our knowledge, he had never met with any counselor as previously indicated.

15. On July 26, 2013, my my sister and I went to meet with Ms. Cassels. She informed us that her portion of legal representation was over and there was nothing that could be done at this point regarding his criminal case. She

then took us down the hall to one of the immigration attorney from Alcock and Associates by the name of Jordan Clegg.

16. Mr. Clegg reviewed our file and laughed stating there was nothing that could be done. My sister and I were shocked by his reaction. We stated we were sure something could be done. He smirked and said not with that conviction, he would most assuredly be deported based on the plea he took and there was nothing that could be done in his case.

17. We consulted with several other immigration attorneys, all who confirmed a drug offense like the one he pled to would assure deportation and there was nothing that could be done.

18. We subsequently hired the Law Office of Ray Ybarra Maldonado to help us with Post Conviction Relief and the Law Office of Jillian Kong-Sivert to try and help him in immigration court.

19. Ms. Kong Sivert tried to get his case continued in immigration court to allow for Post Conviction Relief in this case, however, the continuance was denied. She was able to avoid his deportation and secured a voluntary departure/return to Mexico.

/s/Maria Josefina Núñez Díaz
Maria Josefina Nunez Diaz

SUBSCRIBED AND SWORN to before me this 17th day of January, 2013.

/s/Marabel R. Castro
Notary Public

[SEAL] OFFICIAL SEAL
MARABEL R. CASTRO
Notary Public - State of Arizona
MARICOPA COUNTY
My Comm. Expires May 30, 2015

My Commission Expires:

May 30, 2015

Exhibit B

AFFIDAVIT OF HECTOR NUNEZ MARTINEZ

STATE OF ARIZONA)
) ss
County of Maricopa)

I, Hector Nunez Martinez., being first duly sworn, upon my oath, depose and say:

1. My name is Hector Nunez Martinez and I am the father of Hector Nunez Diaz.

2. On June 28, 2013, I found out that my son Hector Nunez Diaz had been arrested and was being held in custody. On June 29, 2013, which was a Saturday, I called Alcock and Associates to get a consultation and we were scheduled for July 1, 2013.

3. On July 1, 2013, my daughter and I, Maria Josefina Nunez Diaz, met with an attorney from Alcock and Associates by the name of Frank Carrizoza. I explained to him the limited information that I knew.

4. Mr. Carrizoza was able to look up my son's case on the internet. During our meeting, we stressed the immigration concerns we had regarding our son's status. Mr. Carrizoza, after looking up the case and the charges, told us that the case would be "difficult but not impossible."

5. Mr. Carrizoza set up a plan of action. He told us that they would work to reduce the charges to ensure that my son would not have any

immigration consequences. To illustrate, Mr. Carrizoza drew a diagram to depict the steps that needed to be taken in both the criminal courts and the immigration courts to ensure my son would be protected when he is transferred from criminal custody to immigration detainment.

6. At the end of the meeting, we felt assured that Mr. Carrizoza and the firm of Alcock and Associates would be able to help my son in his criminal case given his concerns over the immigration consequences. Mr. Carizoza quoted us a fee of $5,000.00, with 500 dollars down and monthly payments to follow. We agreed to the terms and he scheduled a meeting for a couple days later to sign the contract and make the payment.

7. A few days later, on or about July 5, 2014, my daughter Maria Josefina Nunez Diaz signed the contract on our behalf. My daughter met with attorney Frank Carizozza again where he made the same assurances regarding representation he had told my daughter and I a few days prior on our first meeting of July 2, 2013.

8. My daughter also requested that they go and visit her brother, and he told her that if he was going to the jail the following week he would go and visit him.

9. On July 8, 2013, we appeared for my son's court hearing. We called Frank from Alcock and Associates since he was the attorney we had

been dealing with. However, he informed us that the attorney Ms. Julia Cassels would be representing my son. This was the first time we became concerned since Ms. Cassels we had not met with Ms. Cassels. Additionally, she was requesting a continuance, which we were not expecting; she stated that she did not have any documentation and was not prepared.

10. We met with Ms. Cassels on approximately July 10, 2013. She told us she had continued the case because she knew of an individual who could potentially provide treatment, counseling or classes to my son and that this would help in his case.

11. In this meeting, we discussed some of our concerns with Ms. Cassels. Specifically, we told her that we had immigrations concerns for our son and we asked whether these classes would help our son. She said that it would and that this plan would be the best plan for helping him out with his immigration situation because his sentence would be minimal since the judge could see that he is getting treatment and that it would not affect his immigration situation. We felt very assured with our meeting because she spoke with confidence and we felt she could take care of our son's situation and left the meeting, which was brief.

12. On July 22, 2013, my son had court again and my wife and daughters were present at this hearing. They informed me that my son took a plea and was sentenced.

13. On or about July 26, 2013 I learned from my daughters that they had met with Ms. Cassels and an immigration attorney on staff at Alcock and Associates and where told the immigration attorney told them there was no hope for my son due to his criminal conviction and that he would be deported.

14. I began to contact different immigration attorneys to see if there was anything that could be done for my son, time and again we were told that deportation was inevitable due to plea he took and the criminal conviction against him.

15. Eventually I met with Ms. Jillian Kong Sivert to represent him in his immigration case. Ultimately, she was able to secure voluntary departure/return to Mexico.

16. I met with the Law Office of Ray A. Ybarra Maldonado, PLC which practices both immigration and criminal law. After a full recantation of events, we knew his only option was to file for post-conviction relief due to the misinformation received regarding the plea.

17. I have read the foregoing Affidavit and know the contents thereof and the same is true to the best of my own personal knowledge.

/s/Héctor Núñez Martínez
Hector Nunez Martinez

SUBSCRIBED AND SWORN to before me this 17th day of January, 2013.

/s/Marabel R. Castro
Notary Public

[SEAL] OFFICIAL SEAL
MARABEL R. CASTRO
Notary Public - State of Arizona
MARICOPA COUNTY
My Comm. Expires May 30, 2015

My Commission Expires:

May 30, 2015

APPENDIX H

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

Karen Kemper
Deputy County Attorney
Bar ID No. 013368
Firm ID # 00032000
301 West Jefferson, Suite 210
Phoenix, AZ 85003
Telephone: (602) 506-7422
FAX: (602) 506-7530
MCAOEXEC@mcao.maricopa.gov
Attorney for Plaintiff

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

NO. CR 2013-430489-001

[Filed October 24, 2014]

(The Honorable Bruce R. Cohen,
Rule 32 Management Unit)

STATE OF ARIZONA,	)
	)
Plaintiff,	)
	)
v.	)
	)
HECTOR SEBASTION NUNEZ-DIAZ,	)
	)
Defendant.	)
	)

RESPONSE TO PETITION FOR POST-CONVICTION RELIEF

The State of Arizona, through undersigned counsel, opposes Nunez-Diaz's Petition for Post-Conviction Relief and seeks summary dismissal of the petition pursuant to Rule 32.6(c), Ariz. R. Crim. P.

Submitted October 24, 2014.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY:/s/Karen Kemper
Karen Kemper
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

Overview

This is a possession of narcotic drug case that was pled down to possession of drug paraphernalia as a class 6, undesignated offense. Hector Nunez-Diaz contends that if he had pled to solicitation to possess marijuana, he would have avoided immigration consequences. (Petition at 5, 9.) He asks this court to find his lawyer ineffective, the immigration advisement deficient, and his plea voidable. (Petition at 5, 8, 10, 11-12.)

Facts

The following facts are summarized from departmental report #2013-01147982. On June 29, 2013, at about 2 a.m., two police officers were patrolling West Indian School in their marked patrol unit. They noticed Defendant driving a vehicle in excess of the posted 40 m.p.h. speed limit. The officers paced the speeding vehicle then pulled the driver over. When they asked Defendant for identification he failed to comply. Defendant was then arrested. The result of a search incident to arrest yielded small quantities of methamphetamine and cocaine. The methamphetamine was wrapped in a dollar bill. The cocaine was in a plastic bag. The report does not mention any marijuana.

Waiver of Preliminary Hearing/Change of Plea

Nunez-Diazwas charged with possession or use of a dangerous drug as a class 4 felony for the methamphetamine and possession of narcotic drugs as a class 6 felony for the cocaine. On July 22, 2013, he elected to waive his preliminary hearing and enter a guilty plea. According to transcripts of the proceedings, the group advisement (including the immigration advisement) was given that morning, beginning at 8:51 a.m. Later that same morning Nunez-Diaz entered his plea to possession of drug paraphernalia, based upon his use of a dollar bill to contain the methamphetamine. (RT 07/22/13 10:57 a.m. at 9.) His guilty plea was deemed knowingly, intelligently, and voluntarily made and was then accepted and entered of record. (*Id.* at 10.) Nunez-Diaz elected to immediately proceed to sentencing. The Court placed Nunez-Diaz on unsupervised probation for 18 months and dismissed the remaining count, possession of narcotic drugs.

Nunez-Diaz eventually filed a Rule 32 compliant petition. Nunez-Diaz asks this Court to set aside his plea. For the reasons that follow, the State seeks summary dismissal of Nunez-Diaz's petition.

II. STANDARD/SCOPE OF POST-CONVICTION REVIEW

Ineffective assistance of counsel

To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance

prejudiced him. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985).

In this context, Nunez-Diaz must demonstrate he would not have pled guilty absent counsel's deficient performance and must provide an "allegation of specific facts which would allow a court to meaningfully assess why that deficiency was material to the plea decision." *State v. Bowers,* 192 Ariz. 419, ¶25, 966 P.2d 1023, 1029 (App. 1998). In order to satisfy his burden of proof, the defendant must present evidence of a "provable reality, not mere speculation." *State v. Rosario*, 195 Ariz. 264, ¶ 23, 987 P.2d 226, 268 (App. 1999).

General claims

A colorable claim for relief is one that if the allegations are true might have changed the outcome. *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990); (citing *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986)). The burden, as stated above, is on the petitioner and the showing must be that of a provable reality, not mere speculation. *State v. Rosario*, 195 Ariz. 264, 268, 987 P.2d 226, 230 (App. 1999); *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694,700 (1985). No hearing is required "based on mere generalizations and unsubstantiated claims." *State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985).

III. ARGUMENTS

Nunez-Diaz has failed to show he would not have pled guilty, nor has he shown that counsel's advice was deficient.

Nunez-Diaz opines that he "could have pled to Solicitation to Possess Marijuana as opposed to actual possession, he would have been eligible for bond as 'solicitation' offense is not considered to be a controlled substance offense for purposes of mandatory detention." (Petition at 5, lines 7-10.) Nunez-Diaz' alternative plea suggestion forms the basis for his complaint of ineffective assistance of counsel. But Nunez-Diaz ignores the facts and the law. He possessed methamphetamine and cocaine, not marijuana. The State offered a plea to possession of drug paraphernalia due to the fact that a dollar bill was used to hold the methamphetamine. Nunez-Diaz accepted that plea after listening to a Rule 17.2(f) compliant advisement about the effect a guilty plea may have on immigration status. The plea that was offered was supported by a factual basis.

The offered plea was not the one Nunez-Diaz wishes he'd been offered, but that is not defense counsel's fault. Had Nunez-Diaz proceeded to trial and been convicted as charged it is almost certain his immigration consequences would have been harsher. As it stands, Nunez-Diaz avoided deportation. (Petition at 6, line 16.)

Defense counsel obtained a plea that provided a benefit to her client. The fact that a collateral consequence could not be avoided on these facts is not

a deficiency in representation. Nunez-Diaz claim that his lawyer could have gotten him a better plea is without merit.

Nunez-Diaz has not shown that the procedures followed here violated his right to due process.

As discussed above, Nunez-Diaz listened to a Rule 17.2(f) compliant advisory. When asked by the Court if he had been present for the immigration advisement and if he understood it he said, "Yes, Your Honor." (RT 07/22/2013 at 8-9.) He confirmed that he was not relying on any promises, other than those in the agreement, to get him to plead guilty. (*Id.* at 6.) He now claims that he was "under the impression" that his plea would "minimize his exposure in immigration court." (Petition at 11, line 17.) But by his own admission, his exposure in immigration court was limited. Rather than deportation he was subject to voluntary departure/return. (Petition at 6, line 16.)

Nunez-Diaz has failed to show that the process followed here was either deficient or prejudicial.

IV. CONCLUSION

Nunez-Diaz has not articulated a colorable claim for post-conviction relief. His petition is, therefore, ripe for summary dismissal under Rule 32.6(c).

Submitted October 24, 2014.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

By /s/ Karen Kemper
Karen Kemper
Deputy County Attorney

APPENDIX I

**IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

CR2013-430489-001

[Dated October 27, 2015]

STATE OF ARIZONA,	)
	)
Plaintiff,	)
	)
Vs	)
	)
HECTOR SEBASTION NUNEZ-DIAZ,	)
	)
Defendant.	)
	)

BEFORE THE HONORABLE
PHEMONIA L. MILLER

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EVIDENTIARY HEARING

Phoenix, Arizona
October 27, 2015

COPY
For:

BY: YVONNE M. DE LA TORRE, RPR
Certified Reporter
No. 50470

[p.2]

I_N_D_E_X

WITNESS	D	C	RD	RC
FOR THE PLAINTIFF				
Nunez-Diaz Hector	7	9		
Nunez-Diaz, Maria	15	21		
Cassels, Julia	25	35	45	

[p.3]

APPEARANCES:

For the Plaintiff	Karen Kemper Deputy County Attorney
For the Defendant	Ray Anthony Ybarra Attorney at Law
Interpreter	Kathleen Penney

BEFORE THE HONORABLE
PHEMONIA L. MILLER

*****

Phoenix, Arizona

October 27, 2015

THE COURT: This is the time set for evidentiary hearing on the defendant's petition for Post-Conviction Relief. It is CR2013-430489-001.

In the matter of the State of Arizona versus Hector Nunez-Diaz.

Will the parties announce for the record.

MS. KEMPER: Karen Kemper appearing for the state.

MR. YBARRA: Good afternoon, Your Honor. Ray Ybarra Maldonado on behalf of Mr. Nunez-Diaz.

THE COURT: And Mr. Nunez-Diaz, will you please state your full name and date of birth for the record?

THE DEFENDANT: Hector Sebastian Nunez-Diaz, August 4 of 1986.

THE COURT: And good afternoon to you, sir.

[p.4]

THE DEFENDANT: Good afternoon.

THE COURT: Mr. Nunez-Diaz, by chance, do you have ID on you so that I can verify that you are, in fact, Mr. Nunez-Diaz?

THE DEFENDANT: Yes, of course.

THE COURT: Will you please put it up to the camera. Okay. Go back a little. Go back. Go back. Okay. Can anyone see? Can you guys see. All right. It

is a little bit blurry, can you put it closer, slowly closer to the camera.

All right. Stop. Go back just a little. Okay. I am going to rely on the people with glasses to help me out. Can you see the name?

THE CLERK: It is a picture of him.

THE COURT: Can you see that is him?

MR. YBARRA: No, Your Honor.

THE COURT: All right.

So will the person next to you, can you give her the ID and have her read the name and date of birth for me.

Okay. She is going to give you the phone, she's giving, she is going to tell you the name and the date of birth.

THE COURT: Your name, ma'am.

THE INTERPRETER: The name on the ID says

[p.5]

Hector Sebastian Nunez-Diaz. Martha Bravo is her name.

THE COURT: And the date of birth on the ID?

THE INTERPRETER: It says August 4 of 1986.

THE COURT: Thank you, Ms. Bravo.

You can give the ID back to Mr. Nunez-Diaz.

Mr. Nunez-Diaz, we will conduct this hearing over the phone so the interpreter will interpret to you over the phone.

The Skype may or may not work, but we will still have you on the phone to listen to the hearing if by chance Skpye gets disconnected. Do you understand?

THE DEFENDANT: Okay. Yes, I understand.

THE COURT: Okay. All right. So I will need for you to raise your right hand so that my clerk can swear you in.

HECTOR SEBASTIAN NUNEZ-DIAZ

Called as a witness herein, having been first duly sworn, was examined and testified as follows:

THE COURT: Thank you. All right.

I have had the chance to review the

[p.6]

defendant's petition for Post-Conviction relief.

I have also had the chance to review state's response.

Mr. Ybarra, is the defense read to proceed with the evidentiary hearing?

MR. YBARRA: Yes, we are, Your Honor.

THE COURT: And Ms. Kemper, is the state read to proceed?

MS. KEMPER: Yes, Your Honor.

THE COURT: All right. Mr. Ybarra, it is your motion so let me hear from you first. Call your first witness.

MR. YBARRA: Thank you, Your Honor. We call Hector Sebastian Nunez-Diaz.

THE COURT: Okay.

And Mr. Nunez-Diaz, you were previously sworn in.

Mr. Ybarra, you can proceed.

MR. YBARRA: May I approach, Your Honor, to try to visual.

THE INTERPRETER: Maybe you can stand here and have him, turn the thing around.

MR. YBARRA: Sure.

[p.7]

DIRECT EXAMINATION

BY MR. YBARRA:

Q Mr. Nunez-Diaz, what did your attorney explain to you as far as the immigration consequences of your plea?

A I was told that I was not going to have any consequences pleading guilty. That I would not have

any problem at immigration. That they had attorneys for that to be able to solve my problem.

Q And was this an attorney appointed by the court or someone that you paid?

A It was someone here, I hired.

Q And when she explained to you the plea agreement, do you remember going over that, I believe it is two pages?

A Yes.

Q And do you remember it saying that your plea of guilty might have immigration consequences?

A Yes.

Q So why did you go forward and sign that plea agreement if it is written in the plea that it could have immigration consequences?

A Because the attorney told me that there were not going to be any consequences.

Q And then, again, didn't the judge tell you that

[p.8]

morning that your plea might have immigration consequences?

A Yes.

Q So who did you trust more, what your attorney was telling you or what the judge and the plea agreement said?

A I trusted more in my attorney because she assured me that I would not have any problems.

Q And then when you went over to immigration, did you in fact have problems there?

A Yes, that is where I have problems. They did not want to back me up and they did not want to respond for me.

Q When you say they, are you referring to your attorneys or who are you referring to?

A My attorney.

Q And what about immigration, did they end up letting you go on bond?

A No.

Q What ended up happening?

A I signed a voluntary departure.

Q And why didn't you decide to fight your case in immigration?

A Because I didn't have -- I didn't have an attorney anymore and they were telling me that there was

[p.9]

no solution.

Q So did you end up getting another attorney?

A No.

Q So who told you there was no option to fight your case?

A The same attorney that I hired at the beginning.

Q What was the name of the attorney who represented you, if you remember her name?

A I don't really remember the attorney's name, but the law firm is Alcock and Associates.

Q How many times did that attorney visit you?

A Three times.

Q And for how long did she meet with you?

A For about ten minutes, 15 minutes.

Q And if she would have told you that it was going to have immigration consequences, would you still have signed the plea offer?

A No.

Mr. YBARRA: Pass the witness, Your Honor.

THE COURT: Ms. Kemper?

CROSS-EXAMINATION

BY MS. KEMPER:

Q Thank you. Sir, you were charged with possessing drugs, correct?

[p.10]

A Yes.

Q And the day you appeared in court, you signed a plea, correct?

A Yes.

Q And that is the day you met your lawyer, correct?

A Well, I had already met her before, we had already talked before.

Q So she met with you in the jail, right?

A Yes.

Q And that was before she saw you again in court, correct?

A Uh-huh, yes.

Q So you had met with her at least twice before you signed a plea?

A Yes.

Q But you say that she promised you there would be no immigration consequences if you signed the plea, correct?

A Yes.

Q So you signed a plea?

A Yes.

Q But a judge had told you that there could be immigration consequences if you signed a plea?

A Yes.

[p.11]

Q And you had a written plea agreement, didn't you?

A Yes, of course.

MS. KEMPER: And, Your Honor, we had previously marked the plea as state's exhibit number 1, however, I don't think that I can meaningfully show the defendant the plea.

But I would like leave to be able to ask him questions about it.

MR. YBARRA: No objection, Your Honor.

Q BY MS. KEMPER: Sir, you read your plea agreement with the help of the interpreter, correct?

A Yes.

Q I am going to read paragraph 8 and I will break it up in individual sentences. Okay.

Paragraph 8 says, I understand that if I am not a citizen of the United States, that my decision to go to trial or enter into a plea agreement may have immigration consequences.

Do you recall reading that?

A Yes.

Q Now, the next line.

Specifically, I understand that by pleading guilty or no contest to a crime may affect my immigration status.

[p.12]

Do you recall that?

A Yes.

Q The next line, admitting guilt may result in deportation, even if the charge is later dismissed.

Do you recall reading that?

A Yes.

Q The next line, my plea or admission of guilt could result in my deportation or removal, could prevent me from ever being able to get legal status in the United States or could prevent me from becoming a United States citizen.

Do you recall reading that?

A Yes.

Q Sir, the judge asked you about this plea agreement, do you remember being asked about your plea agreement?

A Yes. Yes, I remember.

Q And she asked you whether you had read it and if you understood it and you said you did, isn't that right?

A Yes.

Q You were also asked if anyone had made you any promises. Do you remember that?

A Yes.

Q And you told the court no one had made you any promises to get you to sign the plea, isn't that correct?

[p.13]

A Uh-huh, yes.

Q When you appeared in court, that day for your change of plea, there was already an immigration hold on you, wasn't there?

A Yes.

MS. KEMPER: Nothing further.

THE COURT: Mr. Ybarra.

MR. YBARRA: No further questions, Your Honor.

Can we excuse Mr. Nunez-Diaz and hang up or are you, no, we don't. I still want him to hear what is going on.

THE COURT: Okay. All right.

MR. YBARRA: But I will ask for permission to remove the labtop from the stand.

THE COURT: Do you have any objection to Mr. Ybarra?

MS. KEMPER: No.

THE COURT: All right. You have permission to remove the labtop from the witness stand.

Mr. Nunez-Diaz will remain on the phone for the rest of the proceedings.

MR. YBARRA: Your Honor, defense calls Maria Josefina Nunez-Diaz.

MS. KEMPER: Your Honor, just so the court

[p.14]

knows, we had previously invoked the rule.

THE COURT: All right. Thank you.

Mr. Ybarra, she will need to be sworn in, first. Come forward.

THE CLERK: Full name, please.

THE WITNESS: Maria Josefina Nunez-Diaz. J. O. S. E. F. I N. A. and then the last name. N. U. N. E. Z.. and N. U. N. E. Z. all right and.

THE COURT: MR. YBARRA.

MARIA JOSEFINA NUNEZ-DIAZ

Called as a witness herein, having been first duly sworn, was examined and testified as follows:

THE CLERK: I didn't hear you.

A PANEL MEMBER: I said I swear.

THE COURT: Louder.

THE WITNESS: I swear.

THE COURT: Okay.

Thank you. Please be seated.

DIRECT EXAMINATION

BY MR. YBARRA:

Q And can you please explain your relationship to the defendant?

[p.15]

A He is my brother.

Q And were you involved at all with the hiring of an attorney for him?

A Yes, I went with my dad.

Q Louder, please.

A Sorry. I went with my dad, and to get an a lawyer when he called us that he was that he got into jail. That he was returned to jail.

THE COURT: Ms. Nunez-Diaz, will you please state your full name for the record.

THE WITNESS: Maria Josefina Nunez-Diaz.

THE COURT: All right. Thank you. Proceed, Mr. Ybarra.

Q BY MR. YBARRA: And if we can please speak slowly, because trying to interpret for your brother and you have to give a little bit of pause to make sure the interpreter translates.

THE INTERPRETER: I am gonna interpret simultaneous, she doesn't have to go slow, but just loud. I don't hear a microphone over there, is there a microphone?

THE WITNESS: Here, pull it closer.

THE COURT: It isn't. Could you touch it and see that it is on. It is not on. All right. It is -- it is on, it just doesn't amplify.

[p.16]

THE COURT: So you just have to speak loud.

THE WITNESS: Louder.

THE COURT: Okay.

Q BY MR. YBARRA: Okay. Who did you meet with when you went to look for a lawyer?

A We went to Alcock and Associates, that is how yeah, and in there we met with Frank, I believe Frank Carrizoza and we explained to him that case, my brother's case.

Q Did you explain his immigration status?

A Yes. That was our concern all the time, which he got arrested and concern was immigration since my brother doesn't have a legal status in here.

Q And what did they explain to you how they were going to deal with that situation?

A Frank did like a diagram. He explained to us he is the criminal case first and then he explained to us the immigration case, which in there was when I understood, there were two different cases. And they needed two different lawyers for that.

He explained the criminal first, he said that he had to lower his sentence I believe, I don't know how to explain it.

And then after he was done with the criminal, he will be able to go to an immigration, but he

[p.17]

-- we wanted to make sure that he, his criminal was to ended up good for his, for his immigration status.

Q And did they give you any promises that it would be okay?

A Yes, they did. That is why we were okay by hiring them like to let, they will help my brother because he said that there was a way to help my brother with immigration after that.

Q And did he go on to represent your brother?

A Frank.

Q Yes?

A No.

Q Who ended up representing your brother?

A Julia Cassels.

Q And did you ever meet with Ms. Cassels?

A Before my brother's first court, no.

Q Did you meet with her at all?

A Yes, after her first -- my brother's first court, we met with her because his first court, just she wasn't

there and we were worried because my brother was already anxious and when she --

THE INTERPRETER: He was what?

A Anxious. Anxious. Sorry.

So we when we got to the court, she extended it, she extended the court date and we were

[p.18]

worried because we didn't know what was happening before, why she was representing my brother. So after that, we went to Alcock and we met with her and that is when we told her if she could explain to us what was going on.

Q And what did she explain to you was going on?

A Well, she said she extended the case because there was a way that she can help my brother by I think meeting with I think it was the teacher, like some kind of program that he could take so the sentence will get lowered. And he will be free and immigration wouldn't be as bad when he was done with criminal.

Q Was that the only time you met with her?

A Well, after my brother's second hearing, we went to ask her if we she was done with the case because after the second one, there was a second hearing and that is when my brother pled guilty and we didn't know that they made that decision. So we met with her and we told her if it was okay, she said that it was okay,

that there was, no, nothing she could do anymore, that it was all in immigration's hands.

Q And did you meet with anybody else at Alcock and Associates?

A Yeah, after that, we asked her to give us an advice to represent my brother in the immigration side and we met with another lawyer, I don't know his name.

[p.19]

And with that lawyer and that same time that we met with her after my brother pled guilty, we told her if she could tell the lawyer to take over the case, she, we met with them and after that, after we met with them, it was when he told us that there was nothing to do for my brother.

Q In what way did he tell that to you?

A Well, we were really, we were really excited because we in a way, we knew that it was over that according to Cassells we, my brother could get out as faster, easier.

So when we met with him, he reviewed the case and he talked, he asked us questions and told us about his why, what, why he is sentenced because he pled guilty, there was nothing else to do, but he said it in a mocking way. He was even laughing at us like there is nothing else to do and he was smiling. And we were serious. We were trying to help my brother. And we when we left there, because my brother, my sister was with me, we were really angry because he was

laughing at us, not I mean we are young, we look young, but we were trying to help my brother.

So that wasn't, that wasn't the way we wanted a lawyer to look at us because he was kind of making fun of us or just thinking that we were foolish

[p.20]

for thinking that my brother could get out of the immigration.

Q And did other attorneys give you different advice or did they say the same thing?

A We did after that, we met with other lawyers, there was a lawyer that my dad hired, I don't know her name, I don't know her, but she said that she all she could do was help my brother get out of since he pleaded guilty, there was nothing that actually could be done, but she said that there was a different way that she could leave and not be too bad for him so there was if since there was nothing for us to do, then we told her to talk to my brother and see what was best.

Q And has your brother been able to legally come back to the county since this?

A No.

MR. YBARRA: No further questions. Pass the witness, Your Honor.

THE COURT: Mr. Kemper.

CROSS-EXAMINATION

BY MS. KEMPER:

Q MS. Nunez-Diaz, I hear you telling us that you are angry with the immigration lawyer, is that right?

A Yes.

[p.21]

Q Do you know what your brother was charged with, the crimes?

A Yes, I do.

Q What was it?

A Drugs.

Q Do you know what kind?

MR. YBARRA: Objection relevance, Your Honor.

THE COURT: What was the question again, Mr. Kemper.

MS. KEMPER: I asked her if she knew what her brother was charged with and what type of drugs because that goes directly to what type of resolution he could have gotten.

THE COURT: The objection is overruled.

THE WITNESS: No, I don't know what kind. The when we met with the lawyer, the lawyer, the immigration lawyer, he did said if my brother was found with marijuana, that it could have been easier

for him to do it, but since there were other drugs involved, that he couldn't do nothing.

Q BY MS. KEMPER: How old is your brother?

A He is 28.

MS. KEMPER: No further questions.

THE COURT: Mr. Ybarra.

[p.22]

MR. YBARRA: No questions.

THE COURT: Thank you.

Ms. Nunez-Diaz, you can step down.

MR. YBARRA: Defense rests, Your Honor.

THE COURT: Mr. Kemper, do you have any witness?

MS. KEMPER: I did. MS. Cassels which appears telephonically. I thought we were doing Skype and so I told her she can appear telephonically so I.

THE COURT: She is out of state.

MS. KEMPER: Yes, ma'am. She lives in California now and she has been standing by all day today for this.

THE COURT: She is not going to be able to call in. Can she call in on your phone?

MS. KEMPER: Yes.

THE COURT: Mr. Ybarra you are aware she was appearing telephonically?

MR. YBARRA: Yes, Your Honor. I we just assume that my client would be on Skype and then her client will call on the phone.

And if too much of a problem, I can speak with my client about waiving his presence for the last witness or remaining on Skype. I think he can ask still.

THE COURT: Well, I don't know if he is

[p.23]

available on Skype, he is available on the phone, why don't you check with him.

MR. YBARRA: Your Honor, he says he is okay.

Your Honor, I spoke with my client, he said he's okay waiving his presence for the last witness so we can get Ms. Cassels on the phone.

THE COURT: So he understands that he will hang up and then the rest of the proceedings will proceed without him?

MR. YBARRA: That is correct, Your Honor. And I did tell him I'd get him a copy of the transcript at a later point. Yes.

THE COURT: Okay. Mr. Nunez Diaz, you are excused.

THE INTERPRETER: Thank you.

THE COURT: All right. You are welcome.

MS. KEMPER: She should be calling.

THE INTERPRETER: The interpreter is excused, Your Honor?

THE COURT: And interpreter excused, thank you.

MS. KEMPER: She's calling into the 506-1887, is that --

THE bailiff: That is this one.

[p.24]

MS. KEMPER: Well, I thought so. Just a second let me see what is going on.

Your Honor, I'd like to just like to place a call to her and see why she's not.

THE COURT: Go right ahead.

MS. KEMPER: Thank you.

Judge, Ms. Cassels is calling in.

THE COURT: And, Ms. Cassels, this is commissioner Miller, can you hear me?

MS. CASSELS: I can hear you a little bit.

Good afternoon.

THE COURT: Good afternoon.

You are in court and we are in the -- we just finished with the defense's case now. The state is

presenting its case. Ms. Kemper is here representing the state and I will need for you to raise your right hand so that my clerk can swear you in.

JULIA CASSELS

Called as a witness herein, having been first duly sworn, was examined and testified as follows:

THE COURT: Put it on speakerphone. Let her be on speaker.

All right, Ms. Kemper.

[p.25]

MS. KEMPER: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. KEMPER:

Q Ms. Cassels, will you please state your full name?

A I am having a hard time hearing you.

THE COURT: Ms. Kemper, you are welcome to go to the podium.

MS. KEMPER: Certainly.

Q BY MR. KEMPER: Is that better, can you hear me?

A That is better.

Q Okay. Will you please state your full name.

A Julia Bass Cassels.

Q And how are you employed? Did you hear the question?

A I am sorry, it is really echoey.

THE COURT: Hang up the phone and press the speaker.

Q BY MR KEMPER: Are you still there?

A I am here.

Q All right. Are you an attorney?

Ms. Cassels, can you hear me?

A Now I can. Yes.

Q Okay. How are you employed?

[p.26]

A I am recently self-employed, I own my own law firm.

Q How long have you been a lawyer?

A I was admitted to the Arizona bar

[p.27]

May of 2002.

Q Have you ever represented Hector Nunez-Diaz?

A Yes.

Q When was that?

A It was in the summer of 2013.

Q And at that time, what type of practice did you have?

A I was at that time working on a contract basis for Alcock and Associates.

Q Did you handle criminal cases?

A Yes.

Q Was Mr. Nunez-Diaz a criminal case client?

A Yes, he was.

Q Do you recall meeting with him?

A Yes, I remember meeting with him on a number of occasions.

Q And can you recall what he was charged with?

A He had two different counts, there was possession of narcotic drugs, and a possession of dangerous drugs, both of class 4 felonies, it was cocaine and methamphetamine specifically.

Q In your representation of Mr. Nunez-Diaz, what would you say his goal was for these charges?

A He was hopeful for a reduction in charges that could lead to the best possible resolution for his

[p.28]

immigration situation.

Q Did you try to achieve that goal?

A I certainly did.

Q What did you do?

A Initially the plea offer that I received from the state indicated he had an option, either plead guilty to a class 6 open felony for a possession of drug paraphernalia or that he was eligible for Tasc.

Tasc, excuse me, will have been the best option for him. And I pursued trying to get him into the Tasc program, but unfortunately due to their rules or policies, he was being deemed ineligible.

Q And you determined that by speaking with someone who worked for Tasc?

A Yes, I did. I e-mailed the woman who was the administrator, then I met with her personally in her office on the second floor of the court building.

Q Once. You learned that Tasc was not available, what did you do next?

A I approached the assigned prosecutor on the case, and requested a plea deviation to a solicitation charge.

Q Were you successful in getting a plea deviation?

A I was informed by the prosecutor that she had staffed it with her supervisor and the request was denied

[p.29]

because Mr. Nunez-Diaz was in possession of two different drugs and, therefore, they were unwilling to make that modification.

Q And those two different drugs, were those methamphetamine and cocaine?

A Correct.

Q Did you explain this to Mr. Nunez-Diaz?

A I did. I explained it to him on two different occasions as well as two to his family.

Q Did Mr. Nunez-Diaz ever tell you that he wanted to go to trial?

A No. He indicated he did not want to go to trial.

Q Were you able to obtain a plea offer for him?

A Yes. He was then presented with the option of accepting the offer to the drug paraphernalia as a class 6 open and he elected to accept that plea offer.

Q Did you tell him that there would be consequences for his immigration status?

A Yes, absolutely.

Q How familiar were you at that time with the requirement under Padilla P. A. D. I L. L. A. versus Kentucky?

A Padilla was decided I believe in 2010 and it was the subject of a great deal of conversation and C. L. E

[p.30]

training in the following month after it happened.

I attended the C. L. E. classes. I additionally had a copy of the a chart, the lengthy chart that was the

prepared by the Florence immigration project to assist criminal lawyers in and clients with clients who have immigration concerns.

Q Did you use that chart with Mr. Nunez-Diaz?

A I consulted with the chart when I was negotiating the plea deviation. I also spoke with one of the immigration attorneys who were employed by the firm about his case.

Q So when you were not able to get a solicitation offer, and you had a client who did not want a trial, was this then the best alternative you could attain?

A Yes, this is absolutely the best result that I unfortunately it carried the immigration consequences.

Q Do you recall meeting with Mr. Nunez-Diaz' family at your office at Alcock and Associates?

A Yes, I met with them on at least one occasion formally. And there perhaps were a couple of other times when I would see them more informally, they had a lot more contact with my assistant at the time.

Q Were you retained to handle the immigration cases in addition to the criminal case?

A No. I referred the family to speak with

[p.31]

Mr. Jordan Clegg, C. L. E. G. G. He was the head of the firm's immigration department and he met with them for a consultation. They ultimately did not hire the firm for the immigration portion.

Q Returning now to the plea agreement, did you review the plea agreement with your client?

A Sorry, I think you cut out there at the end. All I heard was did you review the plea agreement with.

Q Your client?

A Yes, I did. I reviewed the general nature of it and then once I had the written plea agreement, I went over it paragraph by paragraph with the court interpreter's assistance.

Q Did you have any concern about Mr. Nunez-Diaz' ability to understand the agreement?

A No, not at all.

Q I now want to turn to the actual entry of the plea?

A Yes.

Q You're familiar with early disposition court, is that correct?

A Very much so, yes.

Q Are you familiar with a group advisement that is given to all of the defendants on the calendar?

A Yes. Early in the morning the court pulled all

[p.32]

the defendants into the courtroom and reads them their constitutional rights for people who are contemplating accepting a plea and that recitation of rights also includes an immigration advisement.

Q In your review of Mr. Nunez-Diaz case, was he given that group advisement?

A I am aware that he was because I attempted to go up and speak with him in the holding area and was advised that I needed to come back in a few minutes because they were still in group and that was early in the morning shortly before nine o'clock.

Q And that same morning, did you and Mr. Nunez-Diaz stand before the court and enter his guilty plea?

A Yes, we were able to enter his plea and proceed with sentencing later that morning.

Q And during the sentencing proceeding, was there a time when you referred to his custody status as being in limbo?

A Yes, I asked the court to allow the adult probation department to determine the start date for his fees and fines that were being imposed because it was unknown when he we would be released from custody.

Q And that was unknown because of what?

A It was unknown because he had an ICE hold.

[p.33]

Typically when a defendant is sentenced and they have no further time that they need to serve for their sentence and they don't have any hold, they will be processed out of the jail in usually about 24 hours. When someone has a hold, they then get transferred to that other facility and they need to go through steps of

that process so at that time I have had no idea of knowing when he would be released from custody.

Q Did you know what Mr. Nunez-Diaz' view on being held in the Maricopa County jail was?

A He and his family, well, expressed to me that he was really unhappy there. He was in the Durango jail, the conditions are tough, the food is not great. And it is hard for his family members to visit and I remember his sister was very concerned about him. I believe her name is Maria.

Q You stated that you are familiar with some of the consequences of a plea agreement as they affect immigration status, is that correct?

A Yes.

Q You mentioned that there are two types of processes, voluntary departure is one, is that correct?

A Yes, voluntary departure is one of the ways for a person to resolve their immigration matter.

Q What is the other one?

[p.34]

A A person can also apply for some forms of relief, have an asylum claim, they may be eligible for cancelation of removal or may chose to go through and the entire proceeding and until the point of at which the judge order them to be removed. I am speaking generally in that matter.

Q Right. And I'm asking you a hypothetical question, and drawing on your experience, if someone

wanted to complain about their state court lawyer during immigration proceedings, what would be the best way to do that?

A Generally, a person who is pending an immigration matter, if it comes to light that there has been a problem with the proceedings in the criminal case, they can ask for a stay of the immigration proceeding in order to address the issue in the criminal case.

You can do that when in court in the state court via the Rule 32 or the federal court via Higgins petition under section 2255.

Q During your representation of Mr. Nunez-Diaz did, were you ever told by him that you had failed him?

A No, absolutely not.

MS. KEMPER: Pass the witness.

THE COURT: Thank you.

Mr. Ybarra?

[p.35]

MR. YBARRA: Thank you.

THE COURT: Is it Ybarra Maldonado?

MR. YBARRA: Ybarra Maldonado, yes.

CROSS-EXAMINATION

BY MR. YBARRA:

Q Mr. Cassels, how long have you been employed or contracted to work at Alcock and Associates when you took Mr. Nunez-Diaz' case?

A I started working for Mr. Alcock August of 20, sorry, August of 2012.

And his case was in July of the following year so a year almost.

Q So for a year, you had been doing E. D. C., R. C. C. court?

A Definitely for a year there and additionally from the time that I started practicing Maricopa County in 2002.

Q Did you previously work for the public defender's office?

A I did for three years.

Q And at what point did you learn that the plea that he accepted is essentially the kiss of death in immigration?

A In regard to Mr. Nunez-Diaz specifically or

[p.36]

generally?

Q Generally. Specifically, that what he pled to, that it is a, you are not going to get any traction in immigration court, when did you learn that?

A I have been aware of that for quite some time through various family proceedings and through my own work in other cases.

Q So it is prior to representing Mr. Nunez-Diaz, correct?

A Oh, yes, for sure.

Q And you said that you also talked to immigration attorneys at your office about his case?

A I did.

Q Why would you do that if you are already certain it was not a good plea for immigration?

A It was the policy of our office that we need to do immigration consultations informally for lawyers to be sure that we are getting the best possible result and to stay up to date with any changes in the law.

Q So on every single case you've handled, you consulted with an immigration attorney within the office on that specific case?

A Yes. And we will also regularly have group meetings and e-mails about immigration consequences for our criminal clients.

[p.37]

Q And in July of 2013, how many clients were you representing?

A I'm not sure. There was were probably active cases in the area of 30.

Q And you felt or did you feel you had enough time to work on all your cases and meet with all your clients?

A Yes, for sure.

Q And you also submitted letters and even motions to the court about this case, didn't you?

A Yes.

Q And in that letter, did you state that you explained to him clearly that he will get nowhere in immigration court with this charge?

A Sorry, I don't understand.

Q In the letter, if you remember, what did you say in regards to the consequences in immigration court?

A I said that he would be facing definitely consequences in immigration court and the situation was very difficult.

Q That is what you put in your letter?

A Not sure what letter exactly you are referring to. Sorry.

Q Okay. Do you remember writing a letter dated January of 29th of 2015?

A Yes, I do.

[p.38]

Q Okay. Do you possibly have that the in front of you?

MR. YBARRA: Your Honor, it has been marked as defense exhibit B. B. as in boy.

A If I can pull it up on my computer.

Q So if you can read to us the second paragraph, that looks like the third sentence starts with that the jail visit, do you see that, Ms. Cassels?

A Sorry, which paragraph are you on?

Q The second paragraph, the second full paragraph and looking for the sentence that starts with at a jail visit on July 12?

A Yes.

Q Can you read the sentence for us, please?

A At the jail visits on July 12 of 2013, I explained to Mr. Nunez-Diaz with the assistance of an interpreter that his charges in the plea that had been offered could have consequences in the immigration proceedings due to his status.

Q Now, you had just testified that you said with certainty, it would have consequences, not that it could have consequence, is that correct?

A Yes.

Q So is there a difference between could have consequences and most certainly will have consequences?

[p.39]

A On July 12th, I was not aware of whether or not he would be eligible for Tasc so I explained the difference between a paraphernalia plea, a solicitation plea and being able to enter into Tasc.

Q Okay. So when did you find out he cannot get into Tasc?

A I sent the e-mail on the 15th, I believe a couple of days before his court appearance and then I spoke with the representative the morning of his hearing.

Q So the morning of his hearing, did you advise him that it would certainly have immigration consequences?

A Yes, I did.

Q Okay. If you can go down to the 4th paragraph in that same letter, and read to us the third sentence with I again advised him?

A I again, sorry, I again advised him that a plea could have consequences for immigration.

Q So again you write here, could have consequences for immigration, not will certainly have consequences in immigration. Is that correct?

A That is what I wrote, correct.

Q Okay. So when you were writing here it says after on July 22nd, that is what you told him so are we to understand that is what you told him or are we to

[p.40]

believe what you are saying now?

A What I am saying is that I advised him that the different plea offer would have immigration consequence. Those consequences would differ based on which of the pleas he ultimately was able to enter.

Q But in this paragraph, you said on July 22nd of 2013, I reviewed the written document with him and I again advised him that it could have consequences so you are specifically referring to the plea, are you not?

A Yes, I am referring to the plea.

Q But you neglected to put in there it will with certainty have immigration consequences?

A That is what I wrote.

Q And when you wrote it, you wanted to be very careful because you knew it was being used in a Rule 32 proceeding, did you not?

A Yes, I did.

Q Now, Ms. Kemper the state's attorney asked about using the word limbo, do you remember using the word limbo in front of the commissioner?

A I don't recall that. However, I saw it in the transcript that you sent to me earlier this afternoon.

Q So it has been marked as defense exhibit C., Your Honor for identification.

So if you can turn to page 11, which is

[p.41]

bate stamped as bates 11, Ms. Cassels, in that document?

A Yes.

Q Could you read to us the part at the bottom starting on line 19 where you say ,I also ask and to line 22?

A One second to pull it up.

On page 13.

Q Yes, page 11, sorry, bate stamped page 11, line 19?

A Reading from the transcript, I also ask that you allow the probation department to make a determination as to when payment on the fines should begin given that Mr. Nunez-Diaz is in a little bit of limbo as to what his custody status will be in the next little bit here.

Q Now, I heard you try to explain that, but it didn't make any sense to me so please help me clarify, what is the little bit of limbo that he was in?

A His release date would be uncertain.

Q You have been working in E. D. C. and R. C. C. for how long?

A For a long time.

Q And you had plenty of undocumented clients with ICE holds, have you not?

A Yes, of course.

Q So you knew that they were picked up very

[p.42]

quickly, did you not?

A Yes.

Q So what is limbo? What is a little bit of limbo? Wasn't it a certainty that ICE was going to come get him?

A It was ceratin that ICE would pick him up, however, it was uncertain as to how long he will be in ICE custody.

Q So a little bit of limbo as to what his custody status will be in the next little bit here, is it more accurate to say that certain he will go with immigration and certain he will be either involuntary departure or deported from the country?

A Yes.

Q And then further down, line 25, you speak about his family, could you read to us starting at line 24, that sentence starts with and they are very concerned?

A And they are very concerned about him and they will do everything they can to assist him once he's released.

Q So once he is released, I mean, lawyer terms, he can say you mean released to Mexico, is that what you meant when you said those words?

A That is what I meant.

Q And then Mr. Nunez-Diaz, your client at the time

[p.43]

you were representing goes on to say I on page 12, I am remorseful and I did learn my lesson and I would like to be released. That is all. Now, at that point, do you remember when you heard that?

A Not specifically, but yes that is something in the transcript.

Q When you are in court with your client, they are being sentenced and they are speaking, do you listen to what they are saying?

A Of course, I do.

Q Because it is your job to give that person advice?

A Of course.

Q It is your job to make sure they know what is going on in their case?

A Absolutely.

Q So when you hear the words and I would like to be released, did anything click in your mind that, hey, maybe I should explain to my client that judge doesn't have the power to release him?

A Well, he was aware he was being released from the custody of the sheriff and to immigration custody. He was very unhappy with the conditions in the

Durango jail so, no, that did not set off a red flag to me. I knew he was anxious to get out of the Durango jail.

[p.44]

Q So you thought he was just saying release to immigration as fast as you can?

A That was what I understood, yes.

Q And what efforts again did you make to get the solicitation offer?

A I spoke to Ms. Pedicone about, the assigned county attorney about the fact that Tasc was finding him ineligible and requested that based on the circumstances of the case, the fact that he had that prior criminal history, he had strong family support, that he consider a plea to solicitation.

Q That was to who again, sorry?

A I believe the County Attorney who was assigned to the case was Erin Pedicone.

Q And you did that in e-mail you said?

A I spoke to her in person.

Q And you have done deviation requests before in the past?

A Yes, at length.

Q Have you ever taken the time to write them down?

A Yes. Yes, of course.

Q You ever attach the letter from the family?

A Yes.

Q Did you do that in this case?

A In this case, we found out he was not eligible

[p.45]

for Tasc on that day. I have the letters already with me and prepared to be submitted to the court. And so I showed Ms. Pedicone his letters when I discussed the family support and but, no, in this situation I did not submit a written deviation request because we were there present in court and Mr. Nunez-Diaz was anxious to resolve his case.

Q And on the E. D. C. plea offer sheet, did you request solicitation?

A I don't recall if I wrote it on the sheet. I do know that I spoke to her about it.

MR. YBARRA: No further question.

THE COURT: Mr. Kemper.

MS. KEMPER: Thank you.

REDIRECT EXAMINATION

BY MS. KEMPER:

Q So back on July 12, you did not know at that time for certain that Mr. Nunez-Diaz would not be eligible for Tasc, is that right?

A Correct. I did not know for sure. I had mentioned to him that I was concerned about it. Due to my experience in other cases, but that I would certainly speak with the representative again and try to get him into the program.

[p.46]

Q When you used the phrase, could have consequences for immigration, and now on speaking about your letter of January 29 of 2015, and that would be the fourth paragraph, could you expound on that a little bit for us?

A Any of the three plea agreements were going to have different consequences.

If you were able to enter into Tasc, and have the deferred prosecution, then he would be in a much different situation with immigration because he will not have a conviction on his record.

If he were to enter a solicitation plea, he would be in a much better situation in terms of immigration court because of the way that the laws deal with solicitation language.

So my point was that each of the three things have different consequences. And which consequence he will suffer wouldn't be known until we were clear which plea we can get the state or the Tasc program to agree to.

Q And wouldn't you say that that is true anytime you are advising a person charged with a crime that there are various options?

A Generally, yes.

Q So really what matters here is perhaps not what

[p.47]

was written in a letter, but what you told Mr. Nunez-Diaz?

A Yes, I will agree with that.

Q And what you told Mr. Nunez-Diaz just, so that we can all refresh our recollection after having sort of taken those detours, was on the day that he was signing the plea agreement, what did you tell him about immigration?

A That after his sentencing, he would be released to ICE custody. At that point, he would make -- have to make a decision about how to proceed with his case, whether he wanted to attempt to do voluntary departure, whether he had some other claims for release that he could pursue. Or exactly how he wanted to handle that part of his matter.

Q So you were using the word release with Mr. Nunez-Diaz in the way that we have used it here in the courtroom today meaning not that you get to walk out on to the street, but that you go from one custody situation to another?

A He absolutely knew that he was going to immigration custody, as did his family because we discussed how long it would take for him to be transported, roughly, and what to expect in those days to follow.

[p.48]

Q And you were standing with him when the plea colloque was being given, right?

A Yes, of course.

Q And if there has been any doubt in your mind whether he was doing this knowingly, voluntarily and intelligently, would you have done something?

A If I had any concerns that he wasn't understanding, I would have stopped the proceedings and asked to a either reset the matter or have a few moments to speak with him.

Q And did you --

A I would have addressed it.

Q Did you have any concern that day that he didn't understand the consequences?

A I was confident he understood the consequences.

MS. KEMPER: No further questions.

THE COURT: Thank you.

MS. Cassels, I have a couple of questions for you, this is Commissioner Miller.

Did you ever talk to MS. Pedicone, about a solicitation offer?

THE WITNESS: Sorry, it's a little bit hard to hear you, can you repeat that.

THE COURT: Did you ever talk to MS. Pedicone about a solicitation offer?

[p.49]

THE WITNESS: Yes, I specifically requested if she can amend the plea offer to a solicitation charge.

THE COURT: And was the state willing to amend it to a solicitation charge at that time?

THE WITNESS: I was told no because he was in possession of two different drugs.

THE COURT: All right.

THE WITNESS: They were not willing to make that amendment in that situation.

THE COURT: All right.

Ms. Kemper, any additional questions?

MS. KEMPER: No, thank you.

THE COURT: Mr. Ybarra Maldonado, any questions?

MR. YBARRA: No, Your Honor, thank you.

THE COURT: All right. Thank.

You Ms. Cassels, you are excused.

MS. CASSELS: Thank you.

THE COURT: Any additional witnesses?

MS. Kemper.

MS. KEMPER: Your Honor, MS. Pedicone was in trial, the state is going to rest, thank you.

THE COURT: All right. Mr. Ybarra Maldonado, any rebuttal witnesses?

MR. YBARRA: No, your honor, defense rests.

[p.50]

THE COURT: All right. Thank you.

Any argument, Mr. Ybarra Maldonado?

MR. YBARRA: Thank you, Your Honor.

I believe we have met our burden of showing that Mr. Nunez-Diaz relied on the advice of his immigration of his defense counsel that it would not have immigration consequences and that is the sole reason why he accepted the plea agreement.

I heard from the family members who the only reason that they hired Alcock and Associates was so that their loved one could stay in the country. They were forced to pay thousands of dollars to get the same results that the public defender would have got, but probably with better advice in the public defender's office than they got from Alcock and Associates.

And I think it is clear that Mr. Nunez-Diaz was not aware. He did of course hear Your Honor say the immigration consequences, he did read that in the plea agreement as he admitted and but the most important evidence is him saying I relied on my attorney telling me that it would not have immigration consequences.

MS. Cassels, as she testified was well aware of the time that this plea would have severe immigration consequences, as she wrote in her letter to the court that she advised her client, it could have

[p.51]

immigration consequences.

That is very key, your honor. I think on that alone, we should win this case. Based on the Padilla case and subsequent case law about the importance of advising clients with certainty what the immigration results would be.

She knew that results would be, she neglected to clearly explain that to the client even months later on when she knew she was being investigated, when she knew there was a microscope on her, she writes a letter to the court and doesn't say with certainty I informed him this was going to be the result. She specifically says, I informed him it could have immigration consequences.

Now she said is that on July 12 and I can understand if her explaining, well, I am still trying to get solicitation, still trying to get Tasc. Then, when you go further down to that letter, when she says on July 22, when I was explaining to him the plea that she signed, I said it could have consequences and that is not what she should have said. She should have said, it will have immigration consequences.

Based on that fact, Your Honor, I ask the court to grant our petition for petition for Post-Conviction relief.

[p.52]

Addressing our additional argument simply that the person should be given the immigration advisement individually when they are in front of the court and not in the morning ask if they simply remember it, but of course, I will leave that to the discretion of the court. I think our stronger argument is the Padilla that she did not say with certainty the result will have, when she knew and had consulted with immigration attorneys in her office what the results would be.

THE COURT: All right. Thank you.

Ms. Kemper.

MS. KEMPER: Your honor, in all Post-conviction proceedings, there is a strong presumption that counsel was ineffective.

So today, we have heard from MS. Cassels about the efforts that she made. She met with the defendant more than once, more than twice. She met with the family. She tried to get a better offer, she met with the person from Tasc. She couldn't get it done based on what he was found in possession of.

And it was because he was possessing two drugs, cocaine and methamphetamine. That she couldn't get a deal that will have given him a little bit of latitude relative to the immigration consequences.

This is a lawyer who testified that she was

[p.53]

well familiar with the Padilla versus Kentucky requirements, she had attended C. L. E. she even referred to the family when they came to see her on the immigration lawyer there in her office.

She did everything she could. So even if the law didn't require a strong presumption of effective assistance, it is the state's belief that MS. Cassels' testimony demonstrates effective assistance.

The defendant heard it from his defense lawyer, he heard it from this court and he saw it in the plea agreement. Three times he was told that there were potential immigration consequences.

He was told specifically by his lawyer that there were immigration consequences. But the defendant chose to go forward with the plea and telling the it is, that he chose then to elect voluntary departure, he didn't want to stay and fight and complain about the lawyer or seek a stay, no. He chose voluntary departure. So, again, this dove-tails very much with what Ms. Cassels was testifying to.

That once arrested, once in custody, the defendant's goal was to just get released into the next custody situation and to be done with this.

He chose voluntary departure.

Your Honor, the grant of a Post-Conviction

[p.54]

relief petition is truly resolved as the Carriger case, C. A. R. R. I. G. E. R.

For the situation where justice is run its course, but it has run awry, this is not that situation.

This defendant had all of the protections, he all the advisement. Heard the plea agreement. He had an attorney who was skilled and knowledgeable standing at his side, who will have stopped the proceedings if she had any doubt about his ability to understand.

It is not this lawyer's fault that this defendant was caught with drugs of such a type that a better offer wasn't available and so for all of these reasons, I will ask that you not grant the petition for Post-Conviction relief.

THE COURT: And Mr. Ybarra-Maldonado.

MR. YBARRA: Your Honor, just we like to emphasize that we didn't bring a claim alleging ineffective negotiations of a better plea. Ineffective investigation of the case. Because we thought so strongly that the immigration advice or misadvice was such that was our winning argument, it is just as clear as can be.

With regards to what can happen in the future, I know Mr. Kemper and I have discussed this before, and it is almost like, well, we win the case,

[p.55]

then how do we get him back and he gets back, they already said won't give solicitation, they won't do this and won't do that.

I will just ask the court to not take that into consideration. To take into consideration what our legal arguments are, what the constitution of the United States says.

What the Supreme court said regarding the Padilla case and its proginy. You find that there was ineffective assistance and in my experience in doing criminal immigration work in Phoenix, this is not the first I have heard of Alcock and Associates law firm giving misadvice to someone who is undocumented.

It is, unfortunately, very common within our community.

MR. KEMPER: Your Honor, I will seek to object to that. It is improper argument. There was no evidence of adduced about Alcock and Associates, what their practices are.

MR. YBARRA: That is, fine Your Honor, I will retract that.

THE COURT: All right. Thank you.

Mr. YBARRA: I do want to state that if we do get him back over here, it is now a different ball game. Because when he was in custody, we still had Prop

[p.56]

100. Prop 100 has since been ruled unconstitutional, but now we can get him a bond, which should in fact make him now eligible for Tasc.

Because the reason they were denying Tasc because he had an ICE hold so get him back and I don't in other cases given the C. R. number. I have got the person released to immigration custody, bonded out or let out on the street by immigration, returned and say, hey, this guy no longer has an ICE hold, he is out here in the community and I know he is here and then there should be and that should be, that has been sufficient enough to get the Tasc offer.

Thank you, Your Honor.

THE COURT: You are welcome.

I will take this matter under advisement, issue my ruling by way of minute entry.

Anything further from the state?

MS. KEMPER: No, Your Honor. Thank you.

THE COURT: Any further from the defense?

MR. YBARRA: Judge, thank you and your staff for being very generous with the unbelievably difficult technological problems.

THE COURT: You are welcome. It was an experience for all of us.

Thank you.

[p.57]

Can we, Ms. Kemper and Mr. Maldonado, move to admit all the exhibits?

MS. KEMPER: Certainly.

MR. MALDONADO: Yes, Your Honor. No objection.

THE COURT: Exhibits 1, 2 and 3 an are admitted. Thank you .

[p.58]

I, Yvonne M. De La Torre, RPR, do hereby certify that the foregoing pages constitute a complete, accurate, typewritten record of my stenographic notes taken at said time and place, all done to the best of my skill and ability.

DATED this 2nd day of February, 2016.

_____/S/_____

Certified Reporter

No. 50470

APPENDIX J

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

No. 1 CA-CR 16-_____ PRPC

Maricopa County Superior Court
No. CR2013-430489-001

[Filed November 22, 2016]

STATE OF ARIZONA,	)
	)
Petitioner,	)
	)
v.	)
	)
HECTOR NUNEZ-DIAZ,	)
	)
Respondent.	)
	)

PETITION FOR REVIEW

The State of Arizona, through counsel undersigned, asks this Court to accept review and to vacate Commissioner Phemonia Miller's grant of post-conviction relief, the effect of which was to set aside Respondent's guilty plea. For all the reasons that follow, relief was not justified.

Submitted this 22nd day of November, 2016.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY
By /s/_____
KAREN KEMPER
DEPUTY COUNTY ATTORNEY

MEMORANDUM OF POINTS AND AUTHORITIES

I. OVERVIEW –FACTUAL AND PROCEDURAL HISTORY

This petition for review arises from an of-right Rule 32 proceeding in which Respondent claimed he would not have suffered immigration consequences if his lawyer, Julia Cassels, had gotten him a better plea offer or had done a better job explaining the consequences of his plea offer. Respondent prevailed in spite of the State's opposition and without offering evidence that the State would have offered a better plea or a plea with fewer immigration consequences than the one Respondent signed. The trial court granted Respondent's Rule 32 petition on December 30, 2015.The State then timely filed a motion for rehearing under Rule 32.9(a).

Rehearing was sought for two reasons. The first reason was a post-ruling clarification to Rule 32.8 that had issued by the Arizona Supreme Court in *State v. Amaral*, 239 Ariz. 217, 368 P.3d 925 (2016). *Amaral* stated that a colorable claim requires more than a showing that the alleged facts "might" have changed the outcome. 239 Ariz. at ¶ 11. Here, the parties and the trial court had relied upon the "might"-have-changed-the-outcome standard which originated in *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). In *Amaral* the Arizona Supreme Court determined that "[a] standard based on what "might" have changed the sentence or verdict is inconsistent with Rule 32 and most of the case law." 239 Ariz. at ¶ 11. Therefore, the State's request for rehearing gave the trial court an opportunity to consider the

recently-clarified proper standard under *Amaral* and using that standard to then determine "whether he [Rule 32 petitioner] has alleged facts which, if true, would probably have changed the verdict or sentence. If the alleged facts would not have probably changed the verdict or sentence, then the claim is subject to summary dismissal." *Id.* The State contends that application of *Amaral* to the relevant facts should have resulted in summary dismissal.

The second reason for requesting rehearing was to give the trial court an opportunity to review a transcript of the Rule 32.8 hearing and other of record facts.[1] Simply put, the facts found by the trial court did not track with of-record facts from plea proceedings nor did the trial court's factual findings square with the relevant facts adduced at the Rule 32.8 hearing. The State's reply brief juxtaposed the trial court's factual findings with quoted passages from sworn testimony. Again, the trial court was given an opportunity to consider the actual testimony and whether the court's factual findings were supported by testimony.

Oral argument on the motion for rehearing was heard on August 23, 2016. The trial court took the matter under advisement. On October 27, 2016, the trial court affirmed its grant of relief without commenting upon *Amaral* and without commenting upon the discrepancies between objective, relevant facts and the trial court's factual findings.

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[1] A copy of the Rule 32.8 hearing transcript was attached to the State's rehearing reply.

II. MATERIAL FACTS AND REASONS WHY REVIEW SHOULD BE GRANTED

Review under Rule 32.9(c) is required because the trial court's legal and factual findings are an abuse of discretion. As argued herein, if the following relevant facts had been subjected to proper legal analysis, relief would not have been granted.

- Respondent was caught with methamphetamine and cocaine after he was stopped for driving in excess of the speed limit.
- The only plea offer, despite defense counsel's request for a better offer, allowed Respondent to plead guilty to Possession of Drug Paraphernalia, a class 6 felony. The factual basis for the plea was that Respondent used a dollar bill as a wrapper for his methamphetamine. Under the plea agreement, the State agreed to dismiss the class 4 methamphetamine charge and the class 4 cocaine charge.
- Respondent chose to accept the State's plea offer rather than proceed to trial.
- Had Respondent gone to trial he risked convictions on both counts. His risk of conviction was likely. Respondent had not asserted any defenses to the charges, and given the strength and simplicity of the State's case, conviction on both charges was a substantial risk.

The record before the trial court did not justify a finding that Respondent was prejudiced by defense counsel's representation. The State's offer was its best and only offer. Defense counsel should not have been found ineffective for being unable to obtain a better offer where no better offer existed.

III. ISSUE INCORRECTLY DECIDED BY TRIAL COURT

The trial court framed the issue as follows:

> "The issue before the Court is whether Defendant's counsel was ineffective. Deciding this issue is a question of credibility on the facts."

(Minute Entry 12/30/2015 at 3.)

IV. STANDARD OF REVIEW

An error of law committed in reaching a discretionary conclusion may, constitute an abuse of discretion. *State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006). A trial court abuses its discretion when the reasons given by the court for its decision are clearly untenable, legally incorrect, or amount to a denial of justice. *State v. Chapple*, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n. 18 (1983).

V. FACTUAL FINDINGS UNSUPPORTED BY THE RECORD AND ERRANT LEGAL ANALYSIS LED TO AN ABUSE OF DISCRETION.

A. The trial court succumbed to a wholly subjective inquiry in which objective, of-record facts were discounted or ignored.

Respondent's petition for post-conviction relief invited the trial court to speculate that there could have been a better plea offer and that if there had been a better offer a better result would have attained. Respondent's Rule 32 petition alleged that his lawyer, Julia Cassels, should have obtained a better plea agreement for him, but offered no proof that a better offer could have been attained. Furthermore, Respondent's Rule 32 petition was based upon an impossibility of fact. Respondent asserted that if he "could have pled to Solicitation to Possess Marijuana" he would have been bond eligible. (Rule 32 Petition at 5.) Respondent ignored the fact that he did not possess marijuana. In his prayer for relief, found on page 13 of his petition, he concludes with this request: "As a result of Ms. Cassel's [*sic*] deficient performance as counsel, Mr. Nunez Diaz requests that this Court allow him to withdraw from his plea to allow him to plead to a different offense that will not place him in removal proceedings and subject him to mandatory detention." Respondent's prayer for relief ignores the separation of powers doctrine that would prevent a judicial branch superior court judge from forcing an executive branch prosecutor to offer a plea. *See Andrews v. Willrich*, 200 Ariz. 533, ¶¶ 7-8, 29 P.3d 880, 882-83 (App. 2001).

The State's response, filed October 24, 2015, cited case law requiring a Rule 32 petitioner to provide an "allegation of specific facts which would allow a court to meaningfully assess why that deficiency was material to the plea decision." *State v. Bowers*, 192 Ariz. 419, ¶ 25, 966 P.2d 1023, 1029 (App. 1998) The State also cited petitioner's burden of presenting evidence of a "provable reality, not mere speculation." *State v. Rosario*, 195 Ariz. 264, ¶ 23, 987 P.2d 226, 268 (App. 1999). In making its findings, the trial court disregarded controlling authority. The following bullet points are all verbatim quotes from the trial court's December 30, 2015, minute order:

- The Court finds that defense counsel misrepresented the immigration consequences to defendant.
- Counsel was well aware that the defendant and his family were concerned about the immigration consequences because of defendant's status in the United States.
- One of the main reasons Alcock and Associates was retained was because defendant's family was told there would be no immigration consequences.
- Counsel referred defendant's family to an immigration attorney; however, counsel failed to refer the defendant to an immigration attorney prior to him entering into the plea.
- An immigration attorney from counsel's firm could have easily spoken to the defendant about the immigration consequences.

- Based on the evidence presented, this court finds that counsel's actions fell below an objective standard of reasonableness.

The trial court's findings intertwined conduct allegedly committed by un-hired immigration attorneys with the conduct of Respondent's attorney, Ms. Cassels. Yet, the trial court's conclusion laid deficient performance at the feet of only one lawyer: "[t]he Defendant presented overwhelming evidence that his court appointed attorney's actions fell below an objective standard." (Minute Entry 12/30/2015 at 4.) This conclusion discounted the State's record of objective evidence from the change-of-plea proceedings, the plea agreement itself, and Respondent's testimony. The trial court instead favored the subjective thoughts and beliefs of Respondent's sister, Maria Josefina Nunez-Diaz. There can be no doubt about the trial court's assessment of the evidence because the trial court said it was so: "In this case, the State's evidence was directly contradicted by the Defendant's witness, Maria Josefina Nunez-Diaz." (*Id.* at 3-4.)

In contrast to the trial court's findings, the State's evidence was adduced from two sources, the change-of-plea proceedings and the Rule 32.8 hearing. This is the State's evidence:

Change of Plea Proceedings, July 22, 2013

- On July 22, 2013, Respondent waived his preliminary hearing and was present for the immigration-consequences group advisement given to those defendants entering a guilty plea.

- That same morning, July 22, 2013, Respondent pled guilty to possession of drug paraphernalia. The factual basis for his plea was that he used a dollar bill as a wrapper for the methamphetamine. (RT 07/22/2013 10:57 a.m. at 9.) As a result of his agreement with the State, the dangerous drug charge was amended and the narcotic drug charge was dismissed.

- Respondent's written plea agreement included standard paragraph number 8, which states: "I understand that if I am not a citizen of the United States that my decision to go to trial or enter into a plea agreement may have immigration consequences. Specifically, I understand that pleading guilty or no contest to a crime may affect my immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. My plea or admission of guilt could result in my deportation or removal, could prevent me from ever being able to get legal status in the United States, or could prevent me from becoming a United States citizen. I understand that I am not required to disclose my legal status in the United States to the court."

- After asking Respondent a series of questions, all part of the plea colloquy, the court deemed Respondent's guilty plea knowingly, intelligently, and voluntarily made and then accepted it and entered it of record. (*Id.* at 10.)
. . .

Rule 32.8 Evidentiary Hearing, October 27, 2015

- Respondent testified at the Rule 32.8 hearing that his lawyer promised him there would be no immigration consequences. However, he recalled the judge asking him whether anyone had promised him anything and he recalled telling the judge there were no promises. (RT 10/27/2015 at 10, 12-13.) (Emphasis added.)

- The State marked the plea agreement as an exhibit at the hearing and used it, without objection, during cross-examination of Respondent. (RT 10/27/2015 at 11.)

- Respondent admitted that the day he appeared in court for his change of plea, there was already an immigration hold on him. (RT 10/27/2015 at 13.)

- Respondent pled guilty and was sentenced the same day, receiving an unsupervised probation grant. Soon thereafter he was sent to an immigration detention center. Once there, he did not fight his case, but instead agreed to voluntary departure. (RT 10/27/2015 at 8.)

- Respondent's defense attorney, Julia Cassels, testified that her client was not eligible for deferred prosecution under the TASC program due to his undocumented/illegal status, so she tried to get a better plea offer from the assigned prosecutor. (RT 10/27/2015 at 28.)

- Ms. Cassels further testified that the assigned prosecutor told her the case had been staffed with a supervisor and that Ms. Cassels' request for a

better offer had been denied because the defendant had possessed both methamphetamine and cocaine. (*Id.* at 28-29.)

- Ms. Cassels testified that her client told her he did not want to go to trial. (*Id.* at 29.)
- In response to whether she told her client there would be immigration consequences, Ms. Cassels testified, "Yes, absolutely." (*Id.*)
- Respondent's sister testified that an immigration lawyer named Frank drew a diagram explaining that a criminal case and an immigration case "were two different cases" and "needed two different lawyers". (*Id.* at 16.)
- Respondent's sister admitted that they did not hire Frank. (*Id.* at 17.)
- After Respondent pled and was sentenced, Respondent's sister was told by Ms. Cassels that it was now in immigration's hands. (*Id.* at 18.)
- Respondent's sister testified that after her brother's guilty plea she "met with another lawyer" whose name she did not know and he told her "there was nothing to do for my brother." (*Id.* at 18-19.) (Emphasis added.)

The State's evidence was replete with objective evidence from the change-of-plea proceedings as well as sworn testimony. The trial court's factual findings omitted the objective evidence in favor of subjective testimony from Respondent and his sister which, at times was even rejected in favor of a narrative not

supported by the State or Respondent. An example of the former is the trial court's acceptance as fact that Respondent was promised there would be no immigration consequences if he pled guilty. Apparently, the trial court rejected the fact that Respondent avowed to the court, on the record, at the change of plea that no promises had been made to him. An example of the latter is the selective nature of the trial court's factual findings and conclusion that consultation with an immigration lawyer occurred after the change of plea and was, therefore, too late. This conclusion ignores testimony by Respondent's sister that a lawyer named "Frank" initially drew a diagram and explained the difference between an immigration case and a criminal case. The trial court's conclusion also ignores the clear meaning of the word "another"-- a word that Respondent's sister used when she testified that the family met with "another lawyer" after sentencing.

The State contends that Respondent failed in his Rule 32 petition to state a colorable claim for relief and that he failed at his Rule 32.8 hearing to sustain his burden. Respondent's failures were overlooked by the trial court and therein lies an abuse of discretion.

As the State urged in its response to the Rule 32 petition, a colorable claim of ineffective assistance of counsel requires a defendant to show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). It was incumbent upon Respondent to demonstrate that he would not have pled guilty but for

counsel's deficient performance and to do so he must provide "specific facts which would allow a court to meaningfully assess why that deficiency was material to the plea decision." *State v. Bowers*, 192 Ariz. 419, ¶ 25, 966 P.2d 1023, 1029 (App. 1998). Those specific facts must rise to the level of evidence that is a "provable reality, not mere speculation." *State v. Rosario*, 195 Ariz. 264, ¶ 23, 987 P.2d 226, 268 (App. 1999).

Respondent's Rule 32 petition was based upon speculation and "what ifs" rather than provable realities. He claimed to have been "under the impression" that his plea would "minimize his exposure in immigration court." (PCR Petitioner filed 09/09/2014 at 11.) Yet, by his own admission, his exposure in immigration court was limited to voluntary departure, rather than deportation. The relief he sought in his petition was for the trial court to order a better plea offer. (*Id.* at 13.) As argued earlier, his request, had it been honored, would have violated the separation of powers doctrine.

Here, there are five provable realities with their attendant specific facts: 1) Respondent was caught with dangerous drugs and narcotic drugs, not marijuana; 2) The State's offer of a Class 6 undesignated felony was the most lenient offer the State was willing to tender; 3) Respondent's attorney was aware of Respondent's immigration status and she tried to get him a better offer, but to no avail; 4) Respondent was aware of immigration consequences and the record demonstrates that his attorney told him, the court told him and the plea agreement warned him

about possible immigration consequences, yet he chose to enter a plea rather than risk going to trial and being convicted of two class 4 felonies; and 5) The risk of being convicted at trial, on these facts, was a significant risk.

The State maintains that what Respondent's sister thought or believed is not relevant. The trial court viewed Ms. Nunez-Diaz' thoughts and beliefs as relevant and used her testimony to establish deficient performance by counsel and prejudice under *Strickland*. Doing so was an abuse of discretion.

B. A nearly inevitable result is not prejudice per se.

The following findings of prejudice are all quotes from the trial court's minute order:

- In this case, Defendant has shown that he was prejudiced by the ineffective assistance of counsel. Defendant was placed in removal proceedings because of the consequences of the Possession of Drug Paraphernalia conviction and later deported to Mexico.

- Defendant would not have signed the plea if he was adequately advised of the immigration consequences. The court finds that as a direct result of Ms. Cassel's failure to properly advise Defendant of his immigration consequences, defendant was placed in removal proceedings and was held without bond.

- Furthermore, the reason defendant was unable to attend the TASC program no longer exists in

> light of the ruling in *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014)."

The trial court believed that the consequences that befell Respondent were caused by deficient representation. While it is true that *Padilla v. Kentucky*, 559 U.S. 356, 369, 130 S. Ct. 1473, 1482 (2010), requires defense attorneys to give correct advice about deportation consequences when those consequences are clear, the inquiry does not stop there. The prejudice prong must also be satisfied.

Deciding the prejudice prong was, according to the Court, a matter for the Commonwealth of Kentucky to decide:

> Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland's* second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.

Padilla, 559 U.S. at 369, 130 S. Ct. at 1483-84.

Here, the State provided the trial court with a post-remand summary of the Kentucky state court review on the prejudice prong. *See* State's Motion for Rehearing filed March 8, 2016 at 7-8. The defendant in *Padilla* was able to demonstrate that if he had been properly informed of the immigration consequences of his guilty plea, he would have insisted upon going to trial. *Padilla v. Commonwealth*, 381 S.W. 3d 322, 328-29 (App. 2012). In assessing whether Jose Padilla's insistence that he would have gone to trial was reasonable under the circumstances, the appellate court looked at the fact that Jose Padilla had been a

lawful permanent resident of the United States for over forty years. *Id.* at 324. The court also considered the fact that Padilla took a plea offer the day of trial under an erroneous belief that he would not be subject to mandatory deportation. *Id.* at 329. Had Padilla known that either way he faced a possibility of mandatory deportation, it would have been reasonable for him to choose a trial, therefore Padilla had suffered prejudice. *Id.* at 330.

Having presented the above analysis to the trial court here, the trial court chose not to consider it. Although the State maintains there was no deficient performance by defense counsel, the trial court found otherwise. Therefore, under the second prong of *Strickland* the trial court should have considered whether there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 326 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984).

Here, even if counsel had repeatedly told Respondent that there absolutely, positively would be immigration consequences, it cannot be said there is a reasonable probability the result of the proceeding would have been different. Unlike the defendant in *Padilla,* Respondent was not a lawful permanent resident who would reasonably choose a trial in order to fight to stay in this country. Padilla had nothing to lose by going to trial and hoping for a miracle. By contrast, Respondent had no legal status in this country. He was under an ICE hold from the beginning. Respondent had a choice, he could take a plea to the lowest level of felony or he could risk

picking up two class 4 felonies if convicted at trial. Respondent was in a lose-lose situation.

These are the inescapable facts. Respondent's after-the-fact claim that he would have gone to trial is belied by the underlying facts--his immigration status, the record, and by his request that the court provide him with a better plea. He did not ask the court to allow him to proceed to trial. Respondent's prejudice claim and the trial court's finding of prejudice run afoul of *Strickland* and *Padilla.*

C. The law in effect at the time is the law that applies.

Finally, the trial court relied upon a change in the law announced in *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014), to support the court's finding of prejudice. The decision in *Lopez-Valenzuela* invalidated categorical denial of bail to undocumented immigrants held on certain felony charges. *Id*. at 788. But the decision in *Lopez-Valenzuela* issued after Respondent's July 22, 2013, plea and sentencing. The law in effect at the time of Respondent's plea and sentencing was the law that applied to him. Defense counsel cannot be faulted for failing to presage a change in the law. Nor can this change in the law be used to support a finding of prejudice. Respondent was not prejudiced, in the legal sense, by having the law in effect at the time applied to him.

IV. CONCLUSION

The trial court's decision in this Rule 32 case does not comport with established law. Whether the court was employing the *Strickland* standard is ambiguous,

at best. As the Ninth Circuit recently observed, "it is not enough to cite *Strickland* –-a court's analysis must reflect it too." *Mann v. Ryan*, 828 F. 3d 1143, 1166 (9th Cir. 2016)(en banc).

For all the reasons argued herein, the State asks this Court to grant review, vacate the trial court's order granting relief, and remand the matter for further proceedings.

SUBMITTED this 22nd day of November, 2016.

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By /s/
Karen Kemper
Deputy County Attorney

APPENDIX K

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IN THE SUPREME COURT
STATE OF ARIZONA

No. CR 2018-0514-PR

[Filed December 10, 2018]

STATE OF ARIZONA,	)
	)
Petitioner,	)
	)
v.	)
	)
HECTOR NUÑEZ DIAZ,	)
	)
Respondent.	)
	)

Court of Appeals
No. 1 CA-CR-16-0793 PRPC

Maricopa County Superior Court
No. CR2013-430489-001

RESPONSE TO PETITION FOR REVIEW

Hector Nuñez-Diaz, by and through undersigned counsel, respectfully asks this Court to deny the Petition for Review. The following memorandum supports this request.

RESPECTFULLY SUBMITTED this December 10, 2018

BY: /s/ RAY A. YBARRA MALDONADO
RAY A. YBARRA MALDONADO
Attorney at Law

Table of Contents

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The Petitioners failure to understand immigration law and the removal process should result in a denial of their petition. Petitioner begins their Petition by boldly stating, "Respondent was a deportable alien before his drug-possession arrest in Maricopa County. That fact should have been dispositive of Respondent's post-conviction relief/Rule 32 petition." Petitioner erroneously believes their arguments are facts. Petitioner failed to develop a record at the trial court level to back their erroneous arguments. Petitioner could have called an immigration law expert to testify about how the removal process works. If they had in fact done so it is unlikely they would be making the arguments presented in their petition. Instead, Petitioner puts forth arguments to this honorable court that lack a foundation, hoping this honorable court will issue a decision that impacts noncitizens facing criminal charges in our state for decades to come.

REASONS THE COURT SHOULD DENY REVIEW

I. THE STATE FAILS TO CITE THE RECORD OR FACTS SUPPORTING THEIR ARUGMENT THAT NO COUNSEL COULD HAVE NAVIGATED AROUND RESPONDENT'S "PRE-EXISTING" DEPORTABLE ALIEN STATUS.

The sole issue contained in the Petition for Review is that "no counsel could have navigated around Respondent's pre-existing deportable alien status" (Petition, p. 3) and therefore his post-conviction relief

for receiving ineffective-assistance-of-counsel should be vacated.

Taken to its logical conclusion, Petitioner's position would allow defense counsel to affirmatively lie to noncitizens about their immigration consequences. A scrupulous attorney who preys upon vulnerable communities could force family members to turn over their hard-earned money with the illusion they will help the noncitizen facing criminal charges. That attorney could then inform their client that pleading guilty will not have immigration consequences and they should ignore the immigration advisal given by the judge presiding over the criminal case. That person could then be ordered removed by an Immigration Judge even though they were promised by their defense attorney they would receive no immigration consequence from their guilty plea. The Petitioner's position would nonetheless result in a denial of a properly filed Rule 32 simply because the noncitizens "pre-existing deportable alien status." Foreclosing Rule 32 as a path for noncitizens would not only be unjust but likely be a violation of the Equal Protection Clause of the United States Constitution.

The State writes, "Respondent's pre-existing deportable alien status dictated the outcome of his immigration case, independent from anything that happened in his state criminal court case." Petitioner does not cite to the record to support their bold statement. Petitioner did not receive testimony from Respondent's prior immigration counsel, nor did Petitioner call an immigration law expert to provide such an analysis of Respondent's "pre-existing"

condition. The Petitioner continues to make false assertations such as the defense counsel should not be blamed and labeled ineffective "for failing to achieve an unachievable result." (Pet'r Petition p. 16). To the contrary, defense counsel should be blamed and labeled an ineffective for failing to properly advise the Respondent, counsel should not be left off the hook simply because the person they misadvised was a noncitizen. The Petitioner also claims "Respondent had an unsolvable, strict-liability-type immigration problem due to his being an undocumented alien…." (Pet'r Petition p. 12). That statement is simply erroneous. Simply having an ICE hold does not mean a noncitizen will eventually be removed from the country. If such was the case, there would be no need for removal defense attorneys. Indeed, there would be no need for immigration judges or Immigration and Customs Enforcement Trial Attorneys. A simple ICE hold placed by a non-attorney employee of Immigration and Customs Enforcement does not equate to unsolvable, strict-liability-type immigration problem.

An immigration detainer is a boilerplate, checkbox form issued by any rank and file immigration officer for a civil immigration purpose. see 8 C.F.R. § 287.7(b) (authorizing all "deportation officers" and "immigration enforcement agents," among others, to issue detainers); 8 C.F.R. § 287.7(a) (describing the purpose of an immigration detainer). A detainer is a request that the law enforcement agency (LEA) arrest and detain the individual for up to an additional 48 hours beyond when the LEA's legal detention authority expires, in order to allow ICE to assume custody if it determines to do so. A detainer is not supported by warrant or any

other probable cause determination, by a detached and neutral judicial officer or otherwise. An ICE detainer is not supported by a determination that there is reason to believe that the subject individual is "likely to escape before a warrant can be obtained," as is required to make a warrantless civil immigration arrest. 8 U.S.C. § 1357(a)(2); *Arizona v. United States*, -- U.S. --, 132 S. Ct. 2492, 2505-07 (2012) (finding Arizona statute permitting unlimited warrantless civil immigration arrest authority preempted because it exceeded the limited authority granted to ICE under 8 U.S.C. §1357(a)(2)); *Jimenez Moreno v. Napolitano*, 2016 WL 5720465 (N.D. Ill. Sept. 30, 2016) (declaring all warrantless immigration detainers in the six state ICE Chicago Area of Responsibility null and void because the detainers violate the limits of 8 U.S.C. § 1357(a)(2)).

An ICE detainer is essentially ICE saying they want to take custody of someone prior to them being released to the street. An ICE detainer can even be placed on a United States Citizen. *See*, Trump Protestor Says She Was Transferred To ICE After Her Arrest, Huffington Post, March 22, 2016[1]. ICE can then themselves release the person and not put the person in removal

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[1] "The Maricopa County Sheriff's Office told ABC15 that all three protesters went through ICE interviews, which is standard protocol, and "a hold was placed on Gonzalez for an unknown reason." They also confirmed that ICE investigated Gonzalez after MCSO tried to release the woman from their custody." Gonzales is a United States Citizen. Available at https://www.huffingtonpost.com/entry/this-us-citizen-was-arrested-at-a-trump-protest-then-transferred-into-immigration-custody_us_56f15d3ae4b03a640a6baab2

proceedings. It is possible that someone found not guilty following a jury trial or whose case is dismissed or amicably resolved could in fact not be placed in removal proceedings at all.

If ICE does decide to place the person in removal proceedings, their problem is not "unsolvable". First, counsel can persuade ICE Trial Attorneys to terminate (dismiss) proceedings. If the ICE Trial Attorneys do not agree to terminate proceedings, they also could move to administratively close proceedings. If ICE Trial Attorneys are reluctant to either terminate of join in administrative closure, a Respondent, or Counsel for a Respondent can seek termination or administrative closure from the Immigration Judge. The Respondent can also challenge the allegations in the Notice to Appear or file a motion to suppress certain evidence that could lead to termination. Even if the person is eventually found to be removable, a Respondent may be able to seek relief from removal from the Immigration Judge. See, FACT SHEET: Forms of Relief From Removal, U.S. Department of Justice, Executive Office for Immigration Review, published August 3, 2004). (Specifically, Cancellation of Removal which a person is disqualified from applying for if they have been convicted of a certain offense, such as the conviction in this case.) It is astonishing to think an ICE hold or someone's "pre-existing deportable alien status" leads to an "unsolvable" problem, or as the Petitioner further puts is "deportation was a foregone conclusion". (Petition, p. 16). If such was the case undersigned counsel would not have a law firm which consists of

three attorneys and an additional staff of five[2]. Indeed, there are entire books dedicated to the defense of removal. See, Immigration Law and Defense, Fall 2018, ed., by Philip Hornok and National Immigration Project of the National Lawyers Guild, Clark Boardman Callaghan. A quick google search will even find blogs such as "15 Ways to Stop Deportation in Immigration Court[3]", "Possible Defenses to Deportation of an Undocumented Alien[4]", and "Avoiding Removal[5]."

The petitioner's argument that deportation was a foregone conclusion prior to his conviction are simply not supported by the record.

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[2] Undersigned Counsel has represented Respondents in Removal Proceedings in Immigration Courts in Eloy, Florence, Tucson, Phoenix, El Paso, New York, Buffalo, and Los Angeles and has attained administrative closure, termination, adjustment of status and cancellation of removal for his clients. Outside of removal proceedings Counsel has assisted his clients in attaining asylum (after termination of proceedings in Immigration Court), U Visas, VAWA, NACARA, 601A waivers, 601 waivers, and adjustment of status.

[3] https://www.shouselaw.com/immigration/fight_deportation, last visited December 10, 2018.

[4] https://www.nolo.com/legal-encyclopedia/possible-defenses-deportation-undocumented-alien.html, last visited December 10, 2018.

[5] https://immigration.findlaw.com/deportation-removal/forms-of-relief-from-removal.html, last visited December 10, 2018.

II. THIS HONORABLE COURT'S DECISION IN *STATE V. AMARAL*, IS IRRELEVANT TO THE TRIAL COURT'S ANALYSIS AND RULING ON HECTOR NUÑEZ-DIAZ'S RELIEF RULING.

The Petitioner writes "[t]he trial court's reliance upon *State v. Schrock's* incorrect definition of a colorable claim under now-rejected might-have-changed-the-outcome standard was error." (Petition, p.3). There is one glaring problem with Petitioner's argument. The Superior Court did not rely on the *State v. Schrock*, 149 Ariz. 433, 441 (1986) language overturned in *State v. Amaral,* No. CR-15-00090 PR, 2016 WL 423761 (Feb. 4, 2016). Essentially, the *Amaral* decision is irrelevant to the trial court's ruling. In *State v. Amaral* the Court clarified a petitioner's standard for entitlement to a Rule 32.8(a) evidentiary hearing on claims arising under Rule 32.1(e) and stated that it is not whether "alleged facts **'might'** have changed the outcome" but is "whether he has alleged facts which, if true would **probably** have changed the verdict or sentence." *Id.* at ¶ 10, 11 (emphasis added). The Petitioner put forth this argument in a request for rehearing, which after having a hearing granted the trial court affirmed their decision and did not again rely on *State v. Schrock*.

It is irrelevant what is cited in briefs. The trial court's decision clearly did no contain a reliance on the since changed standard. Mr. Nuñez-Diaz's amended petition for post-conviction relief did cite *State v. Puls*'s standard that a "colorable claim is one which, if the allegations are true might have the changed the outcome of the trial verdict." Amended Petition dated

September 9, 2014, at 7, citing *State v. Puls*, 175 Ariz 273, 275, 860 P.2d 1326, 1328 (Ariz. App. 1993). However, there is no issue whether the alleged facts might have or probably would have changed the verdict or sentence. It is with 100% certainty that Mr. Nunez-Diaz would not have accepted the plea. As the court correctly noted in the Court's order, "Defendant further testified that if his attorney would have told him of the consequences, he would not have signed the plea." (Under Advisement-Post Conviction Relief Ruling, December 23, 2015, p. 2) In addition, the petition relied upon *State v. Verdugo,* which states that a colorable claim is one that "factually, has the appearance of validity." *Id.* 183 Ariz. 135, 139, 901 P.2d 1165, 1169 (Ariz. App. 1995). But, more importantly, the petition relies heavily on United States Supreme Court cases and relevant case law regarding ineffective assistance of counsel since the issue here was whether Mr. Nuñez-Diaz was rendered effective assistance of counsel during his plea process. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 252, 2064 (1984); *United States v. Cronic,* 466 U.S. 648, 654; *State v. Herrera,* 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (Ariz. App. 1995); *State v. Febles,* 210 Ariz. 589, 595, 115 P.3d 629, 636 (Ariz. App. 2005); *State v. Ysea*, 191 Ariz. 372, 377, 956 P.2nd 499, 504 (1998).

Counsel for the State fails to acknowledge the trial court's Post Conviction Relief Ruling does not rely on the *State v. Puls* standard. Interestingly, the State dos not even one time quote from the order. The State does not point out where in the decision the court relied on the "might have" standard. Again, since this is a claim for ineffective assistance of counsel, Judge Miller relies

on *Summers v. Schriro,* 2009 WL1531847 (D. Ariz), and *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 252 (1984). The standard to establish a claim of ineffective assistance of counsel is that "a petitioner must show that counsel's actions fell below an objective standard of reasonableness and that the petitioner was prejudiced by the alleged ineffective assistance of counsel." *Strickland v. Washington* at 687, 2964.

Under this stringent standard Judge Miller considered an "overwhelming" amount of evidence that Mr. Nuñez-Diaz's counsel's (Ms. Cassels) actions fell below an objective standard and found that "as a direct result of Ms. Cassels's failure to properly advise Defendant of immigration consequences, defendant was placed in removal proceedings and was held without bond." *State of Arizona v. Nuñez-Diaz*, No. CR2013-430489-001 (Dec. 23, 2015), (order granting Defendant's Petition for Post-Conviction Relief) at page 4. Whether facts might or probably would have changed the outcome is not relevant to this case since Judge Miller found that the facts would have changed the outcome. (Defendant trusted his attorney because she assured him there would be no problems….Defendant further testified that if his attorney would have told him of the consequences, he would not have signed the plea. The family retained the attorney because they were told there would be no immigration consequences. Defendant would not have signed the plea if he was adequately advised of the immigration consequences.) Counsel's actions fell below an objective standard and Mr. Nuñez-Diaz was prejudiced by that ineffective assistance of counsel.

III. MR. NUÑEZ-DIAZ WAS PREJUDICED WHEN COUNSEL FAILED TO PROPERLY ADVISE HIM OF THE IMMIGRATION CONSEQUENCES OF HIS PLEA.

State's Counsel mistakenly believes that the standard here needed clarification. The standard remains the same. This was and will continue to be an ineffective assistance of counsel claim. To establish a claim of ineffective assistance of counsel "a petitioner must show that counsel's actions fell below an objective standard of reasonableness and that the petitioner was prejudiced by the alleged ineffective assistance of counsel." *Strickland v. Washington* at 687, 2964. In addition, the United States Supreme Court held that, "counsel must inform her client whether his plea carries a risk of deportation." *Padilla v. Kentucky,* 130 S.Ct. 1473, 1486 (2010).

Here, Judge Miller found that Mr. Nuñez-Diaz met *Strickland's* two prong test. Specifically, Judge Miller found that, "the Defendant presented overwhelming evidence that his court-appointed counsel's actions fell below an objective standard," and that Mr. Nuñez-Diaz showed, "that he was prejudiced by the ineffective assistance of counsel." (order granting Defendant's Petition for Post-Conviction Relief) at page 4. Yet, State's Counsel claims that deportation was a foregone conclusion. But State's Counsel blatantly ignores Ms. Cassels's irresponsible advice that lead to Mr. Nuñez-Diaz being placed in removal proceedings.

Petitioner continues to present an irrelevant issue to this court, a distinction between *might* and *probably* is irrelevant when here we have an absolute certainty

the result would have been different. Mr. Nunez-Diaz himself testified he would not have taken the plea. But State's Counsel failed to distinguish the fact that in order to comply with *Strickland* and *Padilla* counsel *must* inform their client if their plea *most certainly*-as oppose to *could*-has a risk of deportation. Ms. Cassels testified that she was well aware, at that time, that the plea would have severe immigration consequences. Transcript of Evidentiary Hearing at Page 35, lines 22-25, Page 36, lines 1-10. However, Ms. Cassels never relayed the consequences to Mr. Nuñez-Diaz and even the letter Ms. Cassels provided simply stated that she advised her client that the plea *could*-when she knew with the utmost most certainty that it would-have immigration consequences (previously submitted). Another attorney would have advised their client of the clear immigration consequences. In addition, if unable to explain the clear consequences another attorney would have referred Mr. Nuñez-Diaz to an immigration attorney—especially if they were employed at a firm with three immigration attorneys that made themselves readily available to criminal attorneys. This neglect, in addition to the overwhelming evidence heard at the Evidentiary Hearing before Judge Miller, falls below an objective standard of reasonableness.

We again agree with Judge Miller's finding that the second prong of the *Strickland* was met and that Mr. Nuñez-Diaz was prejudiced by the ineffective assistance of counsel. Had Ms. Cassels advised Mr. Nuñez-Diaz of the immigration consequences, the outcome would have been different. Instead of being placed in removal proceedings and held without bond he could have had his plea modified. Or, he could have

challenged the original stop through a motion to suppress or chosen to go to trial. Mr. Nuñez-Diaz had a right to effective counsel that would inform him whether his plea carries a risk of deportation. Prejudice flowed when this right was violated, not from Mr. Nuñez-Diaz's choice. The problem, here, is that he was never given a choice, because he was never informed of the fact that his plea would have immigration consequences.

The state argues that the facts here would result in the same outcome no matter who represented the Defendant. If the State was so confident in their argument they would not waste the State's resources in filing requests for appeals, but simply re-open the case against Mr. Nunez-Diaz. The reluctance on the part of the State to give Mr. Nunez-Diaz his day in Court with competent counsel is quite telling. The State attempts to distinguish Mr. Nunez-Diaz's case from Mr. Padilla's case. The proper forum for that distinction was in the State's Response to Petition for Post-Conviction Relief. Mr. Nunez-Diaz cited to the *Padilla v. Kentucky*, 130 S.Ct. 1473, 1486 (2010) case in his Amended Petition for Post-Conviction Relief at page 8 and 10 of that document. However, the State refused to address the case in the State's Response to Petition for Post-Conviction Relief. The State now seeks to petition this honorable court simply on misinformed understanding of immigration law. The State writes that Defendant Nunez-Diaz was not a lawful permanent resident who reasonably would choose a trial in order to fight to stay in this country. The State's argument shows a fundamental misunderstanding of immigration law. Even someone who is not a legal permanent resident

can fight to stay in the country. Indeed, thousands of people without legal status everyday appear before an immigration judge in an attempt to fight to stay in this country. The state goes as far to say as the "inescapable facts" of the case are that Mr. Nunez-Diaz would have been deported. The government ignores the court's ruling which states, "Furthermore, the reason defendant was unable to attend the TASC program no longer exists in light of the ruling in *Lopez-Valenzuela v. Arpaio*, 770 F.3rd 772 (9th Cir. 2014.)" The state also incorrectly assumes a guilty verdict following a jury trial would have been a certain outcome. Counsel has attained not guilty verdicts following jury trials on behalf of undocumented immigrants. See, *State of Arizona v. Miguel Angel Morales-Sedano*, CR2012-151103-008. Counsel has also attained TASC for individuals with ICE holds. See, *State of Arizona v. Christian Cuevas*, CR2015-121228-001. To state that the "inescapable fact" is that Mr. Nunez-Diaz would have been deported if he refused the plea offer is absurd. The real inescapable facts in this case are (1) Mr. Nunez-Diaz was not properly advised of the immigration consequences despite his attorney knowing with absolute certainty what those harsh consequences were and (2) he would not have accepted the plea offer if he had been properly advised.

CONCLUSION

Defendant asks this honorable Court deny the Petition for Review.

Submitted December 10, 2018

s/Ray A. Ybarra Maldonado
Ray A. Ybarra Maldonado
Attorney for Defendant

APPENDIX L

IN THE ARIZONA SUPREME COURT

Supreme Court No. CR-18-0514-PR

Court of Appeals No.
1 CA-CR 16-0793 PRPC

Maricopa County Superior Court
Cause No. CR-2013-430489-001

[Filed March 25, 2019]

STATE OF ARIZONA,	)
	)
Petitioner,	)
	)
v.	)
	)
HECTOR SEBASTION NUNEZ DIAZ,	)
	)
Respondent.	)
	)

RESPONDENT'S SUPPLEMENTAL BRIEF

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ISSUE PRESENTED ON REVIEW

Whether, the trial court abused its discretion in finding that an experienced criminal defense attorney who knows with absolute certainty the immigration consequences of a plea, knows their client is primarily concerned with the immigration consequences, and has an office with immigration attorneys is ineffective when counsel misrepresents the immigration consequences to the defendant and fails to refer to an immigration attorney in their own firm prior to entering into the plea?

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES PAGES

INTRODUCTION

When a defense attorney fails to inform a noncitizen client that a guilty plea subjects him or her to deportation, or erroneously informs the client that the plea will not subject him or her to deportation, and the noncitizen pleads guilty in reliance upon the attorney's deficient advice, a serious injustice results. *See Padilla v. Kentucky*, 559 U.S. 356, 369 (2010) (constitutionally competent counsel must provide accurate, affirmative advice regarding immigration consequences).

Under current immigration statutes, families face a unique and devastating threat if any noncitizen family member that gets caught up in the criminal justice system. As such, when defense counsel represents an immigrant in a criminal prosecution, "'[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (citation omitted). When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, the inquiry is not whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because while courts ordinarily "apply a strong presumption of reliability to judicial proceedings," courts cannot accord" any such presumption "to judicial proceedings that never took place." *Jae Lee v. United States*, __ U.S__, 137 S. Ct. 1958, 1965 (2017) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 482-83). Instead, the court should consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding…to which he had a

right." *Id.* (quoting *Roe*, 528 U.S. at 483). As the U.S. Supreme Court held in *Hill v. Lockhart*, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, 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*, 137 S. Ct. at 1965 (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

ARGUMENTS

This Court has held that it will not disturb a trial court's ruling absent a clear abuse of discretion. *State v. Swoops*, 216 Ariz. 390, ¶ 4 (App. 2007)(*citing State v. Schrock*, 149 Ariz. 443, 441 (1986)); *accord State v. Pandelli*, 242 Ariz. 175, ¶ 4 (2017); *State v. Krum*, 183 Ariz. 288, 293 (1995) ("Because the trial court is most familiar with the defendant and the proceedings below, we review its decision whether this type of post-conviction relief petition presents a colorable claim only on a discretionary standard."); *State v. Watton*, 164 Ariz. 323, 325 (1990)("We note at the outset that a grant or denial of post-conviction relief is within the trial court's discretion. We will not reverse the trial court's decision unless an abuse of discretion affirmatively appears.")(*citing State v. Schrock*, 149 Ariz. 433, 441 (1986); *State v. Adamson*, 136 Ariz. 250, 265 (1983), *cert. denied*, 464 U.S. 865 (1983))."An abuse of discretion occurs if the PCR court makes an error of law or fails to adequately investigate the facts necessary to support its decision." *Pandelli*, 216 Ariz. at ¶ 4 (citations omitted).

Mr. Nunez-Diaz testified: "I was told that I was not going to have any consequences pleading guilty. That I would not have any problem at immigration. That they had attorneys for that to be able to solve my problem." PCR Hr'g Tr. at 7:6-9. When asked if his attorney had informed him the plea was going to have immigration consequences if he still would have signed the plea he stated, "No". PCR Hr'g Tr. at 9:15-18. When the family was finally able to speak to an immigration attorney at the firm they hired, after Mr. Nunez-Diaz was informed to plead guilty, they were laughed at and told that there was nothing that could be done because of the plea he signed. PCR Hr'g Tr. at 19:12-22.

When the trial attorney was asked by the State what was Mr. Nunez-Diaz's goal for his charges, the following response was given: "[h[e was hopeful for a reduction in charges that could lead to the best possible resolution for his immigration situation." PCR Hr'g Tr. at 27:24-25, 28:1. As part of the Rule 32 proceeding the trial counsel wrote a letter to the court giving an overview of her representation, some of which Counsel read into the record during her cross-examination. This letter clearly stated that the plea *could* have immigration consequences.

> At the jail visit on July 12 of 2013, I explained to Mr. Nunez-Diaz with the assistance of an interpreter that his charges in the plea that had been offered could have consequences in the immigration proceedings due to his status. PCR Hr'g Tr. at 38:15-19.

Trial Counsel had previously testified that she was aware that the plea Mr. Nunez-Diaz took was the "kiss

of death in immigration." *See* PCR Hr'g Tr. at 35:22-25, 36:1-10. Despite this, trial counsel wrote in her letter to the court that she informed Mr. Nunez-Diaz the plea "could have" immigration consequences. Trial Counsel attempted to explain this by stating she was referring to the different options still available, such as TASC or solicitation. However, the statement is clear, "his charges in the plea that had been offered" was what trial counsel wrote. This is despite trial counsel knowing with certainty that his charges in the plea that had been offered certainly had immigration consequences.

Trial counsel's attempt to gloss over the specific statement referring to the actual plea signed was again highlighted in later cross examination about a different paragraph within trial counsel's letter.

> **Q** But in this paragraph, you said on July 22nd of 2013, I reviewed the written document with him and I again advised him that it could have consequences so you are specifically referring to the plea, are you not?
>
> **A** Yes, I am referring to the plea.
>
> **Q** But you neglected to put in there it will with certainty have immigration consequences?
>
> **A** That is what I wrote.
>
> **Q** And when you wrote it, you wanted to be very careful because you knew it was being used in a Rule 32 proceeding, did you not?
>
> **A** Yes, I did.
>
> PCR Hr'g Tr. at 40:6-17.

The record is clear that trial counsel was well aware of the immigration consequences. Trial counsel knew

with certainty it was the "kiss of death" in immigration proceedings. Mr. Nunez-Diaz testified that he was affirmatively misinformed. His trial counsel wrote a letter to the court where she on two occasions mentions she advised Mr. Nunez-Diaz the plea "could" have immigration consequences, as opposed to writing and testifying that she informed him his plea would certainly have immigration consequences. The trial court could believe either person and still find that trial counsel was ineffective.

In analyzing whether a PCR court has abused its discretion, this Court has reasoned that it would uphold a lower court's ruling by examining implicit findings in the record. *See e.g. State v. Peoples*, 240 Ariz. 244, ¶ ¶ 21, 27, 30 (2016) ("Based on this evidence, the trial court did not abuse its discretion by implicitly finding that the good-faith exception to the exclusionary rule did not apply."

I. THE PCR COURT DID NOT ABUSE ITS DISCRETION IN GRANTING MR. NUNEZ DIAZ'S PCR AS THE RECORD SUPPORTS THAT TRIAL COUNSEL WAS INEFFECTIVE.

The PCR court correctly found that trial counsel provided ineffective assistance of counsel. In making its determination, the PCR relied on the two-prong *Strickland* test for ineffective assistance of counsel and Arizona Standard 18 RAJI (Criminal) 3rd, which considers the credibility of witnesses on a given fact. PCR Ct. Op. at 3.

The PCR found the testimony of Mr. Nunez Diaz and his sister Maria Josefina Nunez Diaz as credible.

PCR Ct. Op. at 3. Part of the determination, as the PCR court reasoned was that the testimony given by Maria Josefina Nunez Diaz directly contradicted the State's evidence. She testified that the reason her family retained trial counsel was because they wanted to avoid immigration consequences for her brother. PCR Ct. Op. at 4. The PCR court additionally found that the Mr. Nunez Diaz presented evidence that trial counsel's "actions fell below the objective standard" and that "defense counsel mispresented the immigration consequences to the defendant." PCR Ct. Op. at 4.

The PCR court reasoned that trial counsel's "actions fell below the objective standard" because:

> "[c]ounsel was well aware that defendant and his family were concerned about the immigration consequences because of the defendant's status in the United States. One of the main reasons Alcock and Associates was retained was because defendant's family was told there were would be no immigration consequences. Counsel referred defendant's family to an immigration attorney; however, counsel failed to refer the *defendant* to an immigration attorney prior to him entering into a plea. An immigration attorney from counsel's firm could have easily spoken to the defendant about the immigration consequences."

PCR Ct. Op. at 4. By this reasoning, the PCR court implicitly found that trial counsel was ineffective under *Padilla v. Kentucky*. In *Padilla v. Kentucky*, the U.S. Supreme Court held that "constitutionally competent counsel would have advised" that conviction would

make the defense subject to removal, if that consequence were clear. 559 U.S. 356, 369 (2010).

Just as the PCR court did for Mr. Nunez Diaz, the Supreme Court placed this requirement under the *Strickland* two-prong test for ineffective assistance of counsel and ruled that a defense attorney's failure to advise that a conviction would make a defendant automatically deportable violated the Sixth Amendment right to effective assistance of counsel. *See id.* at 373-74[1]; *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the Court asked whether the defense attorney's conduct "fell below an objective standard of reasonableness." *Padilla*, 559 U.S. at 367 (quoting *Strickland,* 466 U.S. at 688). The Court measures this by the "practice and expectations of the legal community," examined "under prevailing professional norms." *Id.* Those norms, the *Padilla* Court concluded, recognized that providing advice on deportation consequences was a duty of the criminal defense attorney. *Id.* at 366-68.

The PCR court did not abuse its discretion in finding trial counsel ineffective as it "adequately investigate[d] the facts necessary to support its decision" and as such did not "make an error of law" that would require reversal. *Pandeli*, 216 Ariz. at ¶ 4. The PCR court made the following findings of the facts to reach its conclusion. First, trial counsel testified that she knew Mr. Nunez Diaz's goals was the best possible

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[1] *Strickland*'s standard for ineffective assistance of counsel was first applied to guilty pleas in *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985).

resolution for his immigration status. TR 27:22-25; 28:1. Second, trial counsel indicated that she was familiar with *Padilla*. TR. 29:21-25; 30:1-2. Third, Mr. Nunez Diaz testified that trial counsel "informed him that he was not going to have any consequences to pleading guilty nor would he have any immigration consequences because her office had attorneys for that and that would not be a problem." PCR Ct. Op. at 2. Fourth, trial counsel testified that "she learned that the plea was the 'kiss of death' before the defendant took the plea." PCR Ct. Op. at 2. Fifth, Mr. Nunez Diaz testified that he relied on statements from his attorney and entered the plea agreement and "although the court stated there might be consequences, he signed the plea because his attorney said there would be no immigration consequences." PCR Ct. Op. at 2; *See also* PCR Hr'g Tr. 7:20-24; 8:4-8.

Looking at the facts cumulatively, the PCR court did not fail to adequately investigate the facts that led to its decision. These findings of fact, support that that counsel was ineffective under *Padilla*. The PCR court implicitly followed the same analysis as in *Padilla*. The PCR court's implicit finding was just like the conclusion in *Padilla* -- more than merely a general warning, defense counsel is required to advise a defendant about the specific immigration consequences of a plea. *Padilla*, 559 U.S. at 369. Advice that a conviction "may carry a risk of adverse immigration consequences" or "may make you eligible for deportation" is insufficient where the immigration consequences are clear. *Id*. The failure to give "correct" advice constitutes deficient performance under *Strickland*. *Id.*

II. BECAUSE OF THE SINGULAR HARM PRODUCED BY DEPORTATION, A NONCITIZEN CRIMINAL DEFENDANT SATISFIES *STRICKLAND*'S REQUIREMENT OF PREJUDICE BY DEMONSTRATING A REASONABLE PROBABILITY THAT, BUT FOR THE INEFFECTIVE ASSISTANCE OF COUNSEL, HE WOULD NOT HAVE PLEADED GUILTY.

In light of the frequently drastic consequences of deportation for noncitizen criminal defendants, it is reasonable for certain defendants to reject a deportation-enabling plea deal. A defendant demonstrates prejudice by showing that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). *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.

A. A defendant establishes a reasonable probability that he would not have pled guilty by demonstrating that the decision to reject the plea agreement would have been rational under the defendant's unique circumstances.

To establish reasonable probability that he would not have pled guilty, the noncitizen criminal defendant merely has to show that the decision to reject the plea would have been "rational under the circumstances." *Padilla*, 559 U.S. at 372. Unsurprisingly, then, it is "rational" for noncitizen criminal defendants with close ties to the United States have an overriding interest in

avoiding deportation, even if that means rejecting plea deals that minimize sentences, and even when the evidence of guilt may be strong. Many who have accepted deportation-enabling plea deals on deficient advice of counsel regarding the convictions immigration consequences would have rejected those plea deals if properly counseled -- and understandably so. That satisfies *Strickland*'s prejudice inquiry as it applies in this context: that, but for defective assistance of counsel, the defendant would have rationally rejected the plea deal that was accepted. When everything most important in one's life rides on remaining in this country, it is rational --and likely --- that one would reject a plea that triggers mandatory deportation.

B. The decision to reject a plea agreement is rational even such a decision risks a more severe conviction or prison sentence at trial

In *Jae Lee v. United States*, the Supreme Court considered the standard for proving prejudice under Padilla. The Court reiterated the *Strickland* standard of a "reasonable probability" that, but-for counsel's errors, 'the result of the proceedings would be different." 137 S. Ct. 1958, 1974 (2017). The Court however, rejected the Sixth Circuit's *per se* rule that a defendant who pleads guilty when there is strong evidence of guilt could never show that she was prejudiced by her attorney's incompetent immigration advice. *Id.* at 1966-67. In other words, a court does not look at whether the result of a trial would have been different from the result of the plea agreement. The question is whether the defendant was prejudiced by the "denial of the entire judicial proceeding . . .to which

he had a right." *Id*. at 1965 (quoting *Roe*, 528 U.S. at 483).

The Court explained that the inquiry in *Hill v. Lockhart* – would a defendant have rejected the plea and insisted on going to trial—focuses on a particular defendant's decision-making, which may not turn solely on the likelihood of conviction after trial. *Jae Lee*, 137 S.Ct. at 1966. A prediction of the likely outcome at trial is not appropriate where the error is one that is not claimed to be pertinent to a trial outcome, but is instead claimed to have "affected a defendant's understanding of the consequences of his guilty plea." *Id*. at 1967 n.3. For someone like Lee, for whom avoiding deportation was "the determinative factor," a court must consider when "asking what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decision making." *Id*. at 1967. The likelihood of conviction, thus, is one of several factors that a defendant like Lee will weigh when deciding how to proceed in a case. In applying the *Hill* standard to Lee's case, the Court looked to contemporaneous evidence to substantiate his expressed priorities. *Id*. at 1966. In finding that Lee had demonstrated that he was prejudiced by the attorney error, the Court noted that "deportation was the determinative issue in Lee's decision whether to accept the plea deal." *Id.* Specifically, the court pointed to Lee's repeated inquiries to his attorney about the risk of deportation, and his and his attorney's testimony in the post-conviction proceedings that he would have gone to trial had he known the immigration consequences. *Id.*

Here, Mr. Nunez Diaz testified that "if his attorney would have told him of consequences, he would not have signed the plea." **PCR Op. at 2.** His sister testified that they hired the firm of Alcock and Associates to help her brother stay in the country. ("That was our concern all the time, which (sic) he got arrested and concern was immigration since my brother doesn't have a legal status in here"). PCR Hr'g Tr. At 16:11-13. Trial counsel testified that Mr. Nunez-Diaz's "was hopeful for a reduction in charges that could lead to the best possible resolution for his immigration situation." PCR Hr'g Tr. at 27:24-25, 28:1. Focusing instead on only the strength of the evidence of guilt ignores a fundamental feature of any rational risk reward calculus: the magnitude of reward should the risk pay off.

The State's argument is more akin to the dissent in Jae Lee. "The dissent contends that a defendant must also show that he would have been better off going to trial." *Lee,* 137 S. Ct. at 1965. Here Lee knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error had nothing to do with that. The error was instead one that affected Lee's understanding of the consequences of pleading guilty. Just as in Lee, Mr. Nunez-Diaz claims he would not have accepted the plea. There the U.S. Supreme Court found there was a reasonable probability he would not have pleaded guilty. So too did the trial court for Mr. Nunez-Diaz. Mr. Nunez-Diaz testified under oath he would not have taken the plea if he had known the consequences. This is supported by his sister testifying the family hired an attorney because they were concerned about the immigration consequences. Trial

counsel re-affirmed that Mr. Nunez-Diaz's concern was his immigration status. If the State wants to find out if Mr. Nunez-Diaz will file a motion to suppress and then go to trial if evidence remains, all it needs to do is stop appealing.

Where a noncitizen defendant faces certain deportation under a plea deal, and the harms of deportation are sufficiently dire, he or she can rationally – and will likely – choose to reject that deal even if the risk of doing so is so high, given that the potential reward (acquittal is of immense value.) *State v. Nkiam*, 778 S.E.2d 863, 873-87 (N.C. Ct. App. 2015).

C. Appellate courts from state and federal jurisdictions have held that trial courts must factor the defendant's desire to avoid deportation into the analysis of whether the decision to reject a plea agreement would have been "rational."

State courts of last resort as well as the Third and Seventh Circuit Court of appeals have held that the defendant's desire to avoid deportation must be considered, along with other unique circumstances, in the analysis of whether it would have been rational to reject the plea agreement in an effort to avoid deportation. *See Denisyuk v. State*, 422 Md. 462 (2011); *State v. Sandoval*, 171 Wash.2d 163, 249 P.3d 1015, 1022 (2011); *accord Hill v. Lockhart*, 474 U.S. 52, 60 (1985)(referencing the importance of "special circumstances that might support the conclusion that [the defendant] placed particular emphasis on [a specific consequence] in deciding whether or not to plead guilty"); *see also DeBartolo v. United States*, 760 F.3d 775, 778 (7th Cir. 2015)("DeBartolo

unquestionably wants to roll the dice, which is strong evidence that he also would have chosen to roll the dice four years ago he had known about the deportation threat. He faces the same risk of conviction and a long sentence now that he did then."); *People v. Sifuentes*, 410 P.3d 730 (Colo. App., 2017)("…we conclude that rejecting the guilty plea offer and going to trial would have been a rational decision for defendant here…'recognizing that the relevant question is whether taking "a chance, however slim, of being acquitted after trial would have been rational"')(*citing People v. Picca ,* 97 A.D.3d 170, 947 N.Y.S.2d 120, 130 (2012)); *Keserovic v. State*, 345 P.3d 1024, 158 Idaho 234 (Idaho App., 2015). These cases demonstrate that a failure to consider the desire to avoid deportation renders the *Strickland/Padilla* prejudice analysis fatally flawed.

In *Denisyuk*, where counsel gave no advice regarding deportation, the petitioner established sufficient prejudice solely with an uncontroverted affidavit stating that the petitioner would have rejected the plea and gone to trial if he had known of the deportation consequence. *See Denisyuk*, 422 Md. at 487-89. The state argued that the petitioner could not demonstrate the requisite prejudice because he was facing multiple charges, the evidence against him was overwhelming, and the plea argument was favorable. *See id*. at 487. The *Denisyuk* Court recognized these factors but noted that the state was assuming that "conviction of fewer charges and a relatively short period of incarceration" were the petitioner's top priorities when he entered his plea. *Id*. Endorsing the *Padilla* Court's observation (quoting *St. Cyr*, 533 U.S.

at 322), that "preserving the client's right to remain in the United States may be more important to the client than any jail sentence," the *Denisyuk* Court found that it was rational for a defendant to "run the risk of significant jail time, rather than the near certainty of deportation." *Denisyuk*, 422 Md. at 488.

The *Denisyuk* Court further explained that "many noncitizens might reasonably choose the possibility of avoiding deportation combined with the risk of a greater sentence over assured deportation combined with a lesser sentence." *Id*. Explicitly rejecting the state's assertion that the inevitability of conviction eliminated the possibility of prejudice, the Court indicated that the state misunderstood "the focus of the prejudice inquiry in cases involving plea agreements." *Id*. The Court stated that the "appropriate determination is not whether Petitioner ultimately would have been convicted following a trial, but rather whether there 'is a reasonable probability that, but for counsel's errors, [Petitioner] would not have pleaded guilty.'" *Id*. at 488-89 (emphasis in original) (citing *Hill*, 474 U.S. at 59).

In *Sandoval*, the defendant's decision to go to trial in an attempt to avoid deportation was deemed rational, even though he risked a very long prison sentence, because of the severity of the deportation consequence. The *Sandoval* defendant was charged with rape in the second degree, which carried a standard sentencing range of 78 to 102 month's imprisonment and a maximum sentence of life. *See Sandoval*, 171 Wash.2d at 175. He pled guilty to rape in the third degree, which carried a standard

sentencing range of six to twelve months. *See id.* at 167. The *Sandoval* Court accepted "the State's argument that the disparity in punishment ma[de] it less likely that Sandoval would have been rational in refusing the plea offer." *Id.* at 175. However, the Court noted that "Sandoval had earned permanent residency and made this country his home." *Id.* The Court further noted that for criminal defendants, "deportation no less than prison can mean banishment or exile, and separation 22 from their families." *Id.* at 175-76 (internal quotations omitted). Therefore, the *Sandoval* Court concluded that "given the severity of the deportation consequence, . . . Sandoval would have been rational to take his chances at trial." *Id.* at 176.

The case law from other jurisdictions demonstrates that a defendant establishes the requisite prejudice to support a finding of ineffective assistance of counsel under the Sixth Amendment if the defendant demonstrates a reasonable probability that, absent counsel's deficient performance, he would have rejected the plea agreement. These cases also demonstrate that a decision to reject the plea agreement and proceed to trial, or seek a non-deportable resolution, must be considered in the light of the defendant's unique circumstances, including the desire to avoid deportation. Thus, it can be "rational under the circumstances" for a noncitizen to reject a plea agreement even if he risks a conviction of a serious charge, and significant prison time.

CONCLUSION

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*,

466 U.S. at 694. All of the possibilities outlined undermine confidence in the outcome for Mr. Nunez Diaz, namely, he would not have plead guilty had he known the immigration consequences. The prejudice inquiry is not about whether a defendant can show he would have been victorious at trial. 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. Siding with the State is allowing unscrupulous attorneys to charge a family thousands of dollars, affirmatively lie to their clients to accept guilty pleas, and never have to face the repercussions of a Rule 32 proceeding.

DATED: (electronically filed) March 25, 2019.

/s/	/s/
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APPENDIX M

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. CR 18-0514 PR

[Filed April 8, 2019]

STATE OF ARIZONA, Petitioner,	)
vs.	)
HECTOR SEBASTION NUNEZ-DIAZ, Respondent.	)

On Review of a Memorandum Decision
of the Court of Appeals, Division One
No. 1 CA-CR 16-0793 PRPC

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE, THE PIMA COUNTY PUBLIC DEFENDER, AND THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Other Authorities

INTEREST OF AMICI CURIAE

This brief is filed on behalf of three groups of criminal defense lawyers who regularly represent noncitizens facing criminal charges. Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those lawyers who defend them. AACJ is a statewide nonprofit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the criminally accused, including noncitizens, in the courts and to promoting excellence in the practice of criminal law through education, training, and mutual assistance.

The Pima County Public Defender (PCPD) is the second largest indigent defense agency in Arizona tasked with defending those accused of felony offenses. With a staff that includes 80 attorneys, PCPD represents many thousands of clients every year on felony charges, including numerous noncitizens whose interests in the outcome of their criminal proceedings extend to obtaining favorable impacts on their immigration status, minimizing adverse consequences for any related removal proceedings, and preserving their interest in remaining in the United States. PCPD also routinely represents clients in postconviction proceedings before the Superior Court, the Arizona Court of Appeals, and this Court. Each year Arizona's appellate courts publish opinions in several of PCPD's cases.

The Federal Public Defender for the District of Arizona (FPD-AZ) is the entity organized under 18 U.S.C. § 3006A(g), the Criminal Justice Act of 1964, to provide representation to indigent persons facing federal criminal charges before the United States District Court for the District of Arizona, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States. FPD-AZ is one of five such entities that serve a district along the U.S. border with Mexico, and so FPD-AZ's annual caseload includes representing numerous noncitizens in criminal immigration prosecutions for illegal reentry under 8 U.S.C. § 1326. In those cases, the fairness of FPD-AZ's clients' prior removal proceedings, including the effective assistance of counsel in any criminal proceeding that led to that client's removal from the United States, is a regular subject of FPD-AZ's litigation practice. *See* 8 U.S.C. § 1326(d); *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987).

Together, AACJ, PCPD, and FPD-AZ work to establish professional standards that protect the rights of noncitizen clients to due process in criminal proceedings and to competent advice regarding the outcome of those proceedings. *Amici* have thus accepted this Court's invitation to file a brief expressing their view about the proper outcome of this case, and offer their perspective in order to promote the sound development of the law.

STATEMENT OF THE CASE

On June 29, 2013, Mr. Nunez was arrested during a traffic stop in Phoenix when he was discovered in possession of small amounts of methamphetamine and

cocaine. He was charged in Maricopa County Superior Court with two class 4 felonies—possession of a dangerous drug, in violation of A.R.S. § 13-3407(A)(1), and possession of a narcotic drug, in violation of A.R.S. § 13-3408(A)(1). Less than a month later, on July 22, 2013, he pleaded guilty to possession of drug paraphernalia, in violation of A.R.S. § 13-3415(A), a class 6 undesignated felony, pursuant to a plea agreement. As part of the plea colloquy, Mr. Nunez was advised (as state law requires) that his guilty plea "may affect" his immigration status. *See* Ariz. R. Crim. P. 17.2(f) (2013).[*] Consistent with the plea agreement, the court suspended imposition of sentence, placed Mr. Nunez on 18 months of unsupervised probation, and ordered him to pay a fine.

At the time of his arrest, Mr. Nunez was an undocumented alien with no criminal history. His guilty plea led to him being placed in removal

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[*] Before this Court, the state has abandoned any argument that this advisement defeats Mr. Nunez's ineffective-assistance claim. Even so, several courts have held that such a general advisement does not cure any inadequate advice from counsel about the specific immigration consequences of any particular defendant's conviction. *See People v. Patterson*, 391 P.3d 1169, 1178 (Cal. 2017); *Hernandez v. State*, 124 So. 3d 757, 763 (Fla. 2012) (holding that a general advisement about immigration consequences does not categorically bar a *Padilla*-based ineffective-assistance claim); *Taylor v. State*, 810 S.E.2d 862, 865 (S.C. 2018); *State v. Sandoval*, 249 P.3d 1015, 1020 (Wash. 2011) (stating that the "guilty plea statement warnings… cannot save the advice that counsel gave"); *Ortega-Ariaza v. State*, 331 P.3d 1189, 1197 (Wyo. 2014); *United States v. Akinsade*, 686 F.3d 248, 254 (4th Cir. 2012) ("This general and equivocal admonishment [in a plea colloquy] is insufficient to correct counsel's affirmative misadvice….").

proceedings. In lieu of a removal order, Mr. Nunez agreed to voluntary departure, and left the United States for his native Mexico. During both the criminal proceedings and the subsequent immigration proceedings, Mr. Nunez was represented by retained counsel.

On September 5, 2013, with the assistance of new retained counsel, Mr. Nunez filed a timely notice of postconviction relief. In his petition, he asserted that trial counsel was aware that the paraphernalia plea meant that his "immigration fate was destined for failure" because it made him "ineligible for various potential remedies." (Amended Petition 9/10/2014 at 4, 5) He asserted that trial counsel did not request any alternative plea that would provide a more favorable immigration outcome for him. (Amended Petition 9/10/2014 at 9) He asserted that if trial counsel had considered the immigration consequences of the paraphernalia plea, he could have negotiated a plea to some kind of solicitation offense, such as solicitation to possess a narcotic drug, in violation of A.R.S. §§ 13-1002 and -3408(A)(1), which would have had more favorable to his immigration situation. (Amended Petition 9/10/2014 at 6) *See Coronado-Durazo v. INS*, 123 F.3d 1322, 1325–26 (9th Cir. 1997) (holding that solicitation to possess cocaine under Arizona law was not a removable offense). He asserted that if trial counsel had taken his immigration situation into account in plea negotiations, he would not have been subject to mandatory detention while his removal proceedings were ongoing. (Amended Petition 9/10/2014 at 10) However, he did not specifically allege that he would have proceeded to trial on the possession charges

if he had been properly advised about the immigration consequences of the paraphernalia plea. He asked the court to allow him to withdraw his guilty plea so that he could plead guilty to a different offense and thereby avoid removal proceedings and mandatory detention. (Amended Petition 9/10/2014 at 13)

The superior court held an evidentiary hearing. Mr. Nunez testified that trial counsel told him that "there were not going to be any immigration consequences" from his guilty plea. (RT 10/27/2015 at 7:23–24; *see also* RT 10/27/2015 at 10:17–20) He also testified that if trial counsel had affirmatively told him that the plea would have immigration consequences, he would not have signed it. (RT 10/27/2015 at 9:15–18) Trial counsel testified that she had asked the prosecutor to allow Mr. Nunez to plead guilty to a solicitation offense, but that the request was declined. (RT 10/27/2015 at 28:20 to 29:6; *see also* RT 10/27/2015 at 44:4 to 45:11; 48:20 to 49:10) She testified that she had learned before she began representing Mr. Nunez that a paraphernalia plea was "essentially the kiss of death in immigration" proceedings. (RT 10/27/2015 at 35:22 to 36:10) She also testified that she "absolutely" told Mr. Nunez that the paraphernalia plea would have immigration consequences. (RT 10/27/2015 at 29:15–20) There was no evidence presented either about the immigration benefits that Mr. Nunez might have sought in spite of his undocumented status or how the paraphernalia plea affected his eligibility for those benefits.

Following the hearing, the court granted Mr. Nunez's petition and vacated his guilty plea. The court credited the testimony of Mr. Nunez over that of trial

counsel. The court concluded that trial counsel "misrepresented the immigration consequences to defendant. Counsel was well aware that the defendant and his family were concerned about the immigration consequences because of defendant's status in the United States." (12/30/2015 Ruling at 4) The court found that trial counsel failed to refer Mr. Nunez to an immigration attorney before he accepted the state's plea offer. "Based on the evidence presented, this court finds that counsel's actions fell below an objective standard of reasonableness." (12/30/2015 Ruling at 4) The court further found that as a result of trial counsel's affirmative misrepresentation about the immigration consequences of the plea to a paraphernalia charge, Mr. Nunez was "placed in removal proceedings and was held without bond." (12/30/2015 Ruling at 4) "Defendant would not have signed the plea if he was adequately advised of the immigration[] consequences." (12/30/2015 Ruling at 4) The court made no findings about what Mr. Nunez knew regarding the immigration consequences of his plea or what immigration benefits he would have sought if he had not pleaded guilty to the paraphernalia charge. The court set aside Mr. Nunez's guilty plea. (12/30/2015 Ruling at 5)

The state petitioned for review of the superior court's decision to grant Mr. Nunez's postconviction petition. Without calling for a response from Mr. Nunez, a divided panel of the court of appeals affirmed the grant of postconviction relief. Because the superior court had credited Mr. Nunez's testimony at the evidentiary hearing, the court concluded, Mr. Nunez had proven both components of the ineffective-

assistance claim he raised. "Although there was testimony that Nunez-Diaz was generally advised that there would be immigration consequences…, he testified that he would not have signed the plea agreement had he been advised of the *specific* immigration consequences of the plea." *State v. Nunez-Diaz*, No. 1 CA-7 CR 2016-0793 PRPC, 2018 WL 4500758, at *2 (Ariz. Ct. App. Sept. 18, 2018). The court also observed that, although Mr. Nunez was a "deportable alien prior to his conviction" on the ground that he had no legal status in the United States, *see* 8 U.S.C. § 1227(a)(1)(B), "the record below does not establish that he necessarily would have been deported had he gone to trial and been acquitted of the charges." *Id.* n.1.

The dissenting judge would have reversed the grant of Mr. Nunez's ineffective-assistance claim. In his view, the fact that Mr. Nunez was an undocumented alien at the time of his arrest meant that he could not show prejudice from any incorrect advice about the immigration consequences of his guilty plea. *Id.* at *3.

ARGUMENT

The Sixth Amendment right to effective assistance of counsel in criminal proceedings applies both to the advice a criminal defendant receives in regard to any plea offer extended to him as well as to the decision to accept that offer and plead guilty. *Missouri v. Frye*, 566 U.S. 134, 140 (2012) (citing *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Hill v. Lockhart*, 474 U.S. 52 (1985)). This guarantee ensures that "no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.'" *Padilla*, 559 U.S. at

374 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). When counsel advises any noncitizen defendant about how to resolve a criminal charge, "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence" that he may receive under a plea agreement. *Id.* at 368 (quoting *INS v. St. Cyr*, 533 U.S. 289, 322 (2001)). Thus, to discharge her constitutional obligation to provide competent advice relating to a guilty plea, defense counsel "must inform her client whether his plea carries a risk of deportation." *Id.* at 374. When the "deportation consequence is truly clear," the "duty to give correct advice is equally clear." *Id.* at 369.

A postconviction claim of ineffective assistance of counsel in connection with the immigration consequences of a guilty plea will not succeed unless the claimant can show prejudice from counsel's incorrect advice. In general, prejudice in this context means that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lee v. United States*, 137 S. Ct. 1958, 1964 (2017) (quoting *Roe v. Flores-Ortega*, 529 U.S. 470, 482 (2000)). The showing of prejudice required in this context does not depend on "how a hypothetical trial would have played out absent the error." *Id.* at 1965 (discussing *Hill*, 474 U.S. at 60). Thus where, as here, the claim relates to defense counsel's incorrect advice about the immigration consequences of a guilty plea, the metric of prejudice is whether "but for counsel's errors," the claimant "would not have pleaded guilty and would have insisted on

going to trial." *Id.* at 1965 (quoting *Hill*, 474 U.S. at 59).

"The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea." *Id.* at 1966 (citing *St. Cyr*, 533 U.S. at 322–23). In *Padilla* the Supreme Court said that in order to show prejudice, the decision to reject a plea offer and go to trial must be "rational under the circumstances." 559 U.S. at 372. Where a plea offer carries an absolute certainty that deportation will be the inevitable result, the Supreme Court has held that it is not irrational for a defendant like Mr. Nunez to roll the dice at trial in order to avoid a result that certainly bars him from ever returning to the United States. *See Lee*, 137 S. Ct. at 1968–69.

Supported by the dissenting judge below, the state contends that Mr. Nunez categorically cannot show prejudice from any incorrect advice about the immigration consequences of his plea because he had no legal status in the United States at the time of his arrest. In the state's view, this fact should have been dispositive of Mr. Nunez's ineffective-assistance claim. (Pet. Rev. at 1) But this contention is both objectively incorrect and inconsistent with the Sixth Amendment holding of *Padilla.*

When it comes to applying the Sixth Amendment right to effective assistance of counsel, *Padilla* makes plain that that right applies to *all defendants* regardless of citizenship status. *See Padilla*, 559 U.S. at 374. The Sixth Amendment makes no distinction between categories of noncitizens who may claim the right to competent advice from counsel about

immigration consequences. There is a "vast difference for an unauthorized alien between being generally subject to removal and being convicted of a crime that subjects an unauthorized alien to automatic, mandatory, and irreversible removal." *Morales Diaz v. State*, 896 N.W.2d 723, 733 (Iowa 2017). A guilty plea to certain removable offenses can foreclose an undocumented alien's eligibility to adjust status to that of a lawful permanent resident. *See id.* (citing 8 U.S.C. § 1229(b)(1)(C)); *see also Ex parte Aguilar*, 537 S.W.3d 122, 127 (Tex. Crim. App. 2017) (holding that nonimmigrants may raise a viable *Padilla* claim). In advising noncitizen clients in connection with plea negotiations, the Court in *Padilla* imagined that counsel "would follow the advice of numerous practice guides" regarding the discretionary relief available to their clients and how to protect their eligibility for it. *Padilla*, 559 U.S. at 368 (citing *St. Cyr*, 533 U.S. at 323 n.50). The categorical rule that the dissenting judge below proposed is incompatible with these assumptions and inconsistent with the case-by-case assessment that governs all ineffective-assistance claims. *See Lee*, 137 S. Ct. at 1967; *Commonwealth v. Marinho*, 981 N.E.2d 648, 662 n.21 (Mass. 2013) (stating that "undocumented defendants" raising *Padilla* claims must "address the issue of their particular status and how different performance [of counsel] could have led to a better outcome"); *see also generally* Daniel A. Horwitz, *Actually,* Padilla *Does Apply to Undocumented Defendants*, 19 Harv. Latino L. Rev. 1, 15–23 (2016) (explaining how undocumented aliens can show prejudice on a *Padilla* claim).

The record in this case demonstrates that trial counsel did not appropriately investigate or advise Mr. Nunez about how either accepting the state's plea offer or going to trial would affect his immigration status, including any discretionary relief from removal that might have been available to him as an undocumented alien. The record likewise demonstrates that Mr. Nunez would have preferred rolling the dice on an acquittal at trial over taking a plea deal that meant he would be forever barred from returning to the United States. Under these circumstances, this Court should either dismiss the petition for review as improvidently granted or remand the case to the superior court for further proceedings.

1. This Court should dismiss the petition for review as improvidently granted because the superior court implicitly found that Mr. Nunez would have preferred to go to trial in order to preserve whatever right he may have had to remain in or return to the United States.

This Court reviews a postconviction ruling for abuse of discretion. *See State v. Miles*, 243 Ariz. 511, 513 ¶ 7, 414 P.3d 680, 682 (2018) (citing *State v. Pandeli*, 242 Ariz. 175, 180 ¶ 4, 394 P.3d 2, 7 (2017)). In reviewing for abuse of discretion, this Court views the facts in the light most favorable to upholding the trial court's ruling, including any implicit finding necessary to uphold that ruling. *See State v. Peoples*, 240 Ariz. 244, 249 ¶ 21, 378 P.3d 421, 426 (2016). This Court "presume[s] that a court is aware of the relevant law and applies it correctly in arriving at its ruling." *State*

v. Moody, 208 Ariz. 424, 443 ¶ 49, 94 P.3d 1119, 1138 (2004) (citing *State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996)).

Under these standards, the superior court's factbound ruling granting Mr. Nunez's petition for postconviction relief is not reversible. The record supports the conclusion that Mr. Nunez's right to effective assistance of counsel in connection with plea negotiations was not honored. Both lower courts credited Mr. Nunez's testimony that trial counsel told Mr. Nunez that there would be no immigration consequences *at all* stemming from the paraphernalia plea. The superior court thus correctly found that trial counsel neither adequately consulted with Mr. Nunez about his immigration status, including the benefits for which he was eligible, nor competently advised him that pleading guilty to the paraphernalia charge would make him permanently eligible to return to the United States.

The record also supports the superior court's finding of prejudice. The state has consistently suggested that it would never have offered Mr. Nunez any plea deal other than the paraphernalia charge to which he pleaded guilty. Mr. Nunez's credible assertion that he would not have signed the plea thus implies that he would have proceeded to trial in the face of correct advice about the immigration consequences of the paraphernalia plea. *Padilla* reiterates that the Sixth Amendment applies to all categories of noncitizens in the same manner that it applies to citizens. Under the circumstances, the superior court correctly concluded under *Lee* that Mr. Nunez would rationally have

concluded to take his case to trial and roll the dice on an acquittal if that was truly his only hope of ever lawfully returning to or remaining in the United States. Dismissing the petition for review would simply leave a nonprecedential opinion of the court of appeals in place. *See* Ariz. Sup. Ct. R. 111(c). The superior court's straightforward application of law to facts does not warrant correction by this Court on discretionary review.

2. Otherwise, this Court should remand the case to the superior court to allow Mr. Nunez to clarify the allegations surrounding his ineffective-assistance claim.

If this Court does not dismiss the petition for review, then it should remand this case to the superior court for further proceedings. Under *Padilla*, the fact that Mr. Nunez was undocumented at the time of his arrest has no bearing on the adequacy of trial counsel's advice about whether to accept the paraphernalia plea offer. Nevertheless, the record is not sufficiently developed about what immigration benefits Mr. Nunez was eligible for and what he understood about how either accepting that offer or proceeding to trial would have affected his eligibility for those benefits. And although the trial court's ruling implicitly addresses this point, the supporting record is less clear. *Lee* does not foreclose a noncitizen from ever making out a viable claim of prejudice from deficient immigration advice, but it does require evidence that he would have gone to trial in the face of proper advice. The state correctly points out that Mr. Nunez did not specifically allege in his postconviction petition or at the

evidentiary hearing that he would have gone to trial in order to preserve even a remote chance of remaining in or returning to the United States.

This Court should hold that under *Padilla* and *Lee*, a claim of ineffective assistance of counsel predicated on inadequate advice regarding immigration consequences requires the claimant to explain the specific immigration consequences about which he did not receive adequate advice and the precise course of action he would have taken in the face of such adequate advice. Once this Court clarifies the law in this way, the parties should have another opportunity to clarify their respective positions in this case.

A. The record does not adequately explain what immigration benefits Mr. Nunez might have been eligible for as an undocumented alien.

The *Padilla* Court recognized that if a noncitizen commits a removable offense, "his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses." 559 U.S. at 364 (citing 8 U.S.C. § 1229b). Even the dissenting judge below recognized that Mr. Nunez had a *potential* claim of prejudice stemming from trial counsel's deficient advice about the immigration consequences of his conviction insofar as the conviction affected his eligibility for discretionary relief from removal. But he effectively disregarded this potential source of prejudice, concluding that *no matter what* Mr. Nunez could have shown about his eligibility for any

discretionary relief from removal, it would not have made a difference to Mr. Nunez. That conclusion was not supported by the record, because there was no evidence presented to the superior court about *any* form of discretionary relief for which Mr. Nunez might have been eligible.

The discretionary relief available to undocumented immigrants comes in four main forms. First, the federal government retains "absolute discretion" to decline to enforce federal law. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). In the immigration context, exercising this discretion typically takes into account a person's criminal history. Second, even undocumented immigrants can be eligible for asylum, withholding of removal, or protection under the Convention Against Torture. *See Zheng v. Ashcroft*, 332 F.3d 1186, 1193 (9th Cir. 2003). But these forms of relief are not available to those who have certain criminal convictions. *See* 8 U.S.C. § 1158(b)(2)(A)(ii), (b)(2)(B)(i). Third, cancellation of removal is available to a wide variety of aliens on humanitarian grounds, including to victims of trafficking or domestic violence, and to those who have close relatives in the United States. But cancellation is not available to aliens who have been convicted of a crime involving moral turpitude or of a controlled substances offense. *See* 8 U.S.C. § 1182(a)(2)(A)(i). Fourth, even aliens with no status can adjust their status to that of a lawful permanent resident through a qualifying relative. But aliens who are inadmissible by virtue of a criminal conviction cannot do this. *See* 8 U.S.C. § 1182(a)(2). The dissenting judge would make no room for these forms of relief in assessing the prejudice component of an

undocumented alien's *Padilla* claim. By incorrectly proclaiming that no undocumented alien would rationally account for these kinds of discretionary relief when weighing a plea offer, the dissenting judge's conclusion is legally inconsistent with *Lee*. *See also Commonwealth v. Lavrinenko*, 38 N.E.3d 278, 297 (Mass. 2015) (requiring an assessment of available relief from removal in the prejudice inquiry).

Moreover, we do not know whether Mr. Nunez would have or could have qualified for one of these exceptions available to undocumented aliens. Nothing in the record indicates whether trial counsel ever investigated that possibility. And it is not even certain that Mr. Nunez could not have qualified for these exceptions even if he had been convicted of the original charges at trial. The Ninth Circuit has conflicting unpublished decisions on that score. *See Madrid-Fanfan v. Sessions*, 729 F. App'x 621 (9th Cir. 2018) (holding that a conviction under A.R.S. § 13-3408 was categorically not a removable offense); *but see Gonzalez-Dominguez v. Sessions*, 743 F. App'x 808 (9th Cir. 2018) (holding that a conviction under A.R.S. § 13-3407 can be a removable offense).

In sum, this Court should not sanction the dissenting judge's categorical view that no undocumented alien can ever show the necessary prejudice on a *Padilla* claim. That view is incorrect both as a matter of federal immigration law and under the Sixth Amendment. Nevertheless, issues regarding the precise relief that may have been available to Mr. Nunez in 2013 were not developed during the postconviction proceedings here. This Court should

remand for further proceedings to address that gap in the evidence.

B. The record does not adequately explain whether the only alternative to the paraphernalia plea that was available to Mr. Nunez was a trial on the possession charges.

Both in its petition for review to the court of appeals and in its supplemental brief to this Court, the state focuses on Mr. Nunez's shifting assertions on the prejudice prong of his *Padilla* claim as grounds for reversing the superior court's decision to grant relief. The state correctly points out that, before the superior court, Mr. Nunez did not specifically allege that he would have gone to trial on the two drug-possession charges he faced if he had known that pleading guilty to the paraphernalia charge would have forever foreclosed his ability to return to the United States. But because he has consistently maintained that he would not have signed the plea and the state has strongly suggested that it would not have extended any other offer to him, this is not the fatal flaw in the decisions below that the state believes it to be. Because the record about the relief that may have been available to Mr. Nunez in 2013 must be more fully developed, this Court should return this case to the superior court so that Mr. Nunez may clarify his allegations of prejudice against the backdrop of a fully-developed record about his immigration situation.

The record shows that Mr. Nunez has adequately alleged sufficient prejudice within the meaning of *Padilla* and *Lee* to make out a colorable claim of

ineffective assistance of counsel. Whatever other course of action he might have taken, Mr. Nunez has consistently maintained that he would not have taken the deal that was offered to him. Other courts have held that similar allegations that do not specifically focus on the desire to go to trial nevertheless make out a colorable claim of prejudice under *Padilla*. *See People v. Martinez*, 304 P.3d 529, 536 (Cal. 2013) (holding that a defendant makes a colorable assertion of prejudice by "provid[ing] a declaration or testimony stating that he or she would not have entered into the plea bargain if properly advised"); *Commonwealth v. Lys*, 110 N.E.3d 1201, 1207 (Mass. 2018) (holding that a defendant met the "baseline requirement for raising an issue of prejudice" by asserting "that he would have pursued other options, including going to trial, had he known about his plea's immigration consequences"); *Zemene v. Clarke*, 768 S.E.2d 684, 691 (Va. 2015) (holding that an assertion of obtaining a more favorable plea agreement sufficiently alleged prejudice); *United States v. Rodriguez-Vega*, 797 F.3d 781, 789 (9th Cir. 2015) (explaining that a defendant may show prejudice "by showing that she settled on a charge in a purposeful attempt to avoid an adverse effect on her immigration status"). This Court should reach the same conclusion on this record, and hold that the allegations that Mr. Nunez has made so far are sufficient to allow him to clarify them on remand.

The state also suggests that there was and only ever would be one and only one plea offer extended to Mr. Nunez. But the record is insufficiently developed to support that suggestion. Although trial counsel testified that she explored some alternative plea

options, she offered no testimony about how plea negotiations might have proceeded if Mr. Nunez had not resolved his case within the context of Maricopa County's early disposition program. Nor did the state present any other testimony about how plea negotiations might have proceeded. In the experience of AACJ members who routinely handle drug-possession cases in Maricopa County courts, alternate offers are routinely extended to defendants who refuse an initial offer made as part of the early disposition program. More evidence along these lines would help flesh out whether an alternative resolution would have been rational under the circumstances. *See Martinez*, 304 P.3d at 537 ("To establish prejudice, defendant must show that he would not have entered into the plea bargain if properly advised—a decision that might be based either on the desire to go to trial or on the hope or expectation of negotiating a different bargain without immigration consequences."); *but see Cosio-Nava v. State*, 383 P.3d 1214, 1219 (Idaho 2016) (affirming denial of *Padilla*-based ineffective-assistance claim because there was no evidence presented about the viability of alternative resolutions to the charges).

It is also worth noting that the sentence Mr. Nunez would have faced if convicted on the two possession charges could have been probation—the same sentence he received under the paraphernalia plea. Because he had no criminal history, he was statutorily eligible for probation even if convicted at trial (indeed, probation would be required on the narcotic-drugs charge). *See* A.R.S. §§ 13-901.01; 13-3407(C); 13-3408(C). Waiting to resolve his case outside of the early-disposition program might also have allowed him to assess the

viability of a motion to suppress based on any flaw in the traffic stop that led to his arrest. *See Commonwealth v. DeJesus*, 9 N.E.3d 789, 797 (Mass. 2014) (finding prejudice where a guilty plea waived a viable motion to suppress). But all of these factors underscore *both* Mr. Nunez's assertion that avoiding whatever adverse immigration consequences that would ensue from resolving the charges in this case was his most important priority *and* the superior court's finding that trial counsel's advice to Mr. Nunez on that score was constitutionally deficient.

In sum, the record as a whole is incomplete about whether a decision by Mr. Nunez to reject the paraphernalia plea offer would have been rational under the circumstances. No evidence was presented about either what Mr. Nunez understood about his immigration situation or whether he was eligible for any discretionary relief from removal. Mr. Nunez did not specifically allege before the superior court that he wanted to proceed to trial, although his credible testimony implies as much and he has now made that specific allegation before this Court. And the record does not indicate how plea negotiations might have played out if Mr. Nunez had waited to resolve his case outside of the early-disposition program. The Court should remand this case to the superior court for further proceedings.

CONCLUSION

The reasoning of *Padilla* makes plain that the Sixth Amendment right to effective assistance of counsel extends to all persons, including undocumented immigrants, who face criminal charges in American

courts. *Amici* respectfully ask the Court either to dismiss the petition for review as improvidently granted or to remand this case to the superior court for further proceedings.

Respectfully submitted: April 8, 2019.

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s/Keith J. Hilzendeger
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* * *

[*Certificate of Compliance and Certificate of Service Are Omitted in the Printing of this Appendix*]

APPENDIX N

ARIZONA SUPREME COURT

Arizona Supreme Court
No. CR-18-0514-PR

Arizona Court of Appeals
No. 1 CA-CR 16-0793 PRPC

Maricopa County Superior Court
No. CR-2013-430489-001

[Filed April 8, 2019]

STATE OF ARIZONA,	)
	)
Petitioner,	)
	)
v.	)
	)
HECTOR SEBASTION NUNEZ-DIAZ,	)
	)
Respondent.	)
	)

BRIEF OF THE ARIZONA ATTORNEY GENERAL AS *AMICUS CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTERESTS OF *AMICUS CURIAE*

The Attorney General has clear and direct interests in this action. The Attorney General is the chief legal officer of the State. A.R.S. §41-192(A). The Attorney General's Office not only prosecutes criminals, but also handles appellate matters for the fifteen county attorneys. In addition, the Attorney General is responsible for defending a wide variety of post-conviction petitions by inmates.

INTRODUCTION

As an initial matter, courts throughout the United States have almost uniformly held that a criminal defendant cannot establish prejudice under *Strickland* for allegedly deficient attorney advice regarding deportation where the criminal defendant is deportable even before any criminal conviction is entered. These courts have broadly recognized that such cases are fundamentally different from *Padilla v. Kentucky*, 559 U.S. 356 (2010) and *Lee v. United States*, 137 S. Ct. 1958 (2017), where the criminal defendants were only deportable *if* they were convicted. Because Respondent was deportable regardless of the outcome of his criminal case and the legal advice he received, all of those courts would have held that Respondent was barred from establishing prejudice under *Strickland*.

This robust consensus was ignored by the panel majority—even though the dissent specifically raised the conflicts. In contrast to the robust reasoning supplied by the dozens of courts concluding that *Strickland* prejudice is categorically barred, the panel majority offered almost no reasoning in support of its

holding. And what little it offered is far less persuasive than the reasoning of contrary precedents, which are legion.

Reversal of the prejudice holding is further warranted because Respondent's deportable status results from an uncontested fact that is neither suppressible nor the product of any allegedly deficient legal advice: his *identity* as an alien not lawfully present in the United States. Because the Superior Court could not afford any relief that would change Respondent's identity, and the legal advice at issue was not a link in the causal chain leading to discovery of Respondent's identity (and resulting exposure to deportation), the prejudice holding must be reversed.

ARGUMENT

I. The Prejudice Holding Below Is A Radical Outlier

This case presents a threshold, dispositive issue: can a criminal defendant who is not lawfully present in the United States—and is thus deportable even if acquitted on all charges—satisfy the prejudice requirement of *Strickland* in attempting to rescind a guilty plea based on attorney advice regarding deportability? Although an issue of first impression in this Court, it has been widely considered by courts throughout the country. And these courts' answer to that question is virtually unanimous: a *categorical and resounding "no."*

The decision below is thus a stark departure from the prevailing judicial consensus: virtually *every* court throughout the United States that has ever considered

the issue has held that such non-citizens cannot establish prejudice under *Strickland* because they were deportable regardless of whether they pled guilty. As the *en banc* Fifth Circuit has explained, "controlling law unequivocally" establishes that a criminal defendant cannot "show prejudice because he was already deportable." *United States v. Batamula*, 823 F.3d 237, 242 (5th Cir.) (en banc) *cert. denied* 137 S. Ct. 236 (2016). Thus, "[b]ecause Batamula was already deportable … before he pleaded guilty …, it would not have been rational for him to proceed to trial in the hopes of avoiding deportability[.]" *Id.* at 243.

The Fourth Circuit has similarly held that a defendant advancing a similar claim as Respondent could not establish prejudice because his "substantial rights were unaffected because he was an illegal alien and therefore his guilty plea had no bearing on his deportability." *United States v. Sinclair*, 409 F. App'x 674, 675 (4th Cir. 2011). The Tenth and Eleventh Circuits are broadly in accord.[1] No federal circuit has ever reached a contrary result, and the Supreme Court has refused to disturb this consensus by repeatedly denying *certiorari*.

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[1] The Eleventh Circuit held *Strickland*'s prejudice requirement was not satisfied because the defendant "never obtained legal status, and thus continued to be subject to removal[.]" *Gutierrez v. United States*, 560 F. App'x 924, 927 (11th Cir.) *cert. denied* 135 S. Ct. 302 (2014). The Tenth Circuit held that *Strickland*'s deficient-performance requirement could not be satisfied because "unlike the petitioner in *Padilla*, Defendant's guilty plea did not render him removable." *United States v. Donjuan*, 720 F. App'x 486, 490 (10th Cir.) *cert. denied* 139 S. Ct. 590 (2018).

These federal appellate courts are hardly outliers. As one law review article has explained, "a nearly unanimous line of authority" has "concluded that because 'a guilty plea does not increase the risk of deportation' for undocumented defendants, such defendants are categorically incapable of establishing the legal 'prejudice' that *Padilla* requires in order to obtain relief." Daniel A. Horwitz, *Actually,* Padilla *Does Apply to Undocumented Defendants*, 19 Harv. Latino L. Rev. 1, 3–4 (2016) (citation omitted). Indeed, courts adopting the same reasoning as the federal circuit courts include:

- The Tennessee Supreme Court;[2]
- The Texas Court of Criminal Appeals;[3]
- State appellate courts in Michigan and Florida;[4]

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[2] *Garcia v. State*, 425 S.W.3d 248, 261 n.8 (Tenn. 2013) ("[C]ourts have consistently held that an illegal alien who pleads guilty cannot establish prejudice" under *Padilla*.) (collecting cases).

[3] *State v. Guerrero*, 400 S.W.3d 576, 588-89 (Tex. Crim. App. 2013) ("Unlike Jose Padilla, appellee was an undocumented immigrant and was deportable for that reason alone, both in 1998 and today. Had appellee gone to trial with counsel and been acquitted he would not have been transformed into a legal resident.… The prospect of removal therefore could not reasonably have affected his decision to waive counsel and plead guilty.")

[4] *See People v. Gomez-Perez*, No. 319745, 2015 WL 1227721, at *2 (Mich. Ct. App. Mar. 17, 2015) ("[D]efendant was subject to deportation whether he pleaded no contest or proceeded to trial and was either acquitted or convicted. Thus, even if defense counsel had failed to warn defendant about any risk of being deported, defendant cannot establish any prejudice"); *Rosario v.*

- At least *nine* federal district courts.[5]

State, 165 So.3d 672, 672 (Fla. Dist. Ct. App. 2015) ("[P]rejudice cannot be established if the defendant was present in the country unlawfully or was otherwise subject to removal").

[5] *United States v. Aceves*, No. 10-00738, 2011 WL 976706, at *5 (D. Haw. Mar. 17, 2011) ("Removal therefore should not reasonably have affected his decision to plead guilty, and he cannot show prejudice flowing from that plea[.]"); *Cadet v. United States*, No. 11-113, 2012 WL 7061444, at *2 (N.D. Ga. May 29, 2012) *report and recommendation adopted as modified*, 2013 WL 504821 (N.D. Ga. Feb. 8, 2013) ("Movant cannot show that he was prejudiced … because Movant was subject to deportation as an illegal alien regardless of whether he was convicted in this case."); *United States v. Gutierrez-Martinez*, No. 10-2553, 2010 WL 5266490, at *4 (D. Minn. Dec. 17, 2010) ("As his guilty plea had no bearing on his deportability, the information about the immigration consequences of his guilty plea would not have affected his decision whether to plead or go to trial."); *Mudahinyuka v. United States*, No. 10-5812, 2011 WL 528804, at *4 (N.D. Ill. Feb. 7, 2011) (agreeing with District of Minnesota); *United States v. Perea,* No. 11-2218, 2012 WL 851185, at *5 n.4 (D. Kan. Mar. 8, 2012) ("In light of the fact that defendant was already subject to deportation, he has not shown how he could have rationally rejected the plea agreement[.]"); *United States v. Perez*, No. 8-296, 2010 WL 4643033, at *3 (D. Neb. Nov. 9, 2010) ("Perez could very well be subject to deportation even without his conviction at the federal level[.]"); *United States v. Serrato*, No. 12-2018, 2012 WL 2958249, at *1 (S.D. Tex. July 18, 2012) ("Defendant's substantial rights were unaffected by counsel's alleged failure to advise because Defendant is an illegal alien and therefore his guilty plea had no bearing on his deportability[.]"); *Medina-Marquez v. United States*, No. 12-080, 2013 WL 12230792, at *6 (W.D. Tex. May 31, 2013), *report and recommendation adopted*, 2013 WL 12230717 (W.D. Tex. Aug. 15, 2013) ("[G]iven Petitioner's present status as an illegal alien unauthorized to be in the United States, the Court finds no prejudice as Petitioner would be have been deported with or without pleading guilty"); *Artica-Romero v. United States*, No.

The panel dissent notably cited no less than six of these contrary decisions. *State v. Nunez-Diaz*, 1 CA-CR 16-0793, 2018 WL 4500758, at *3 ¶14 (App. Sept. 18, 2018) (Morse, J., dissenting). But the majority did not distinguish them or explain why they were incorrectly decided. Nor did the majority cite their agreement with the sole contrary precedent cited by the dissent, the unpublished, non-precedential decision in *United States v. Arce-Flores*, No. 15-0386, 2017 WL 4586326 (W.D. Wash. Oct. 16, 2017).[6]

This Court should join the vast majority of other courts in holding that prejudice under *Strickland* is categorically barred in these circumstances.

II. Because Respondent's Identity Is Not Suppressible, He Cannot Establish Prejudice Under *Strickland*

The holding below suffers from another foundational defect. Respondent's deportability ultimately arises from a fundamental fact that is not the product of any legal advice he received and is beyond the power of the Superior Court to remedy: his *identity* as an alien not lawfully present in the United

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3:17-CR-44-J-34, 2019 WL 447881, at *7 (M.D. Fla. Feb. 5, 2019) ("Because Artica-Romero was illegally present in the country and already subject to removal, unlike the petitioner in *Padilla* who was a lawful permanent resident, she cannot establish prejudice under *Padilla*")

[6] The Supreme Court of Iowa has also adopted the same reasoning as the panel majority. *See Diaz v. State*, 896 N.W.2d 723 (Iowa 2017). That decision does not appear to have been cited by the parties or the court of appeals.

States before he committed any of the drug crimes at issue. Because of that identity, the absence of prejudice under *Strickland* is even more apparent.

The Supreme Court has made clear that identity evidence is unique: "The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984). For that reason, "the simple fact of who a defendant is cannot be excluded, regardless of the nature of the violation leading to his identity." *United States v. Del Toro Gudino*, 376 F.3d 997, 1001 (9th Cir. 2004). Indeed, "'Identity evidence is inherently different from other kinds of evidence,'" and courts have thus "refused to suppress the defendant's identity … even if it was '"obtained as a result of an egregious constitutional violation."' *United States v. Ortiz-Hernandez*, 427 F.3d 567, 577 (9th Cir. 2005) (citation omitted).

Thus, even if Respondent had been illegally arrested, and the arrest was even an "egregious constitutional violation," Respondent would *still be deportable* based on his identity; no court could provide him any relief. Here, however, the legality of Respondent's arrest is apparently unchallenged. There is no reason that Respondent (who was lawfully arrested) should fare better those immigrants whose arrest is concededly and egregiously *un*lawful.

Respondent was thus subject to deportation following his lawful arrest and before he received even a single word of legal advice. Respondent's subsequent

receipt of allegedly deficient immigration-law advice does not change *at all* Respondent's deportability based on his identity alone. As a result, Respondent cannot establish prejudice under *Strickland* because the counsel he received in no way affects his identity—*i.e.*, the lawfulness of his presence in the United States.

Ultimately, "the simple fact of who a defendant is cannot be excluded, regardless of the nature of the violation leading to his identity." *Del Toro Gudino*, 376 F.3d at 1001. And here the alleged constitutional violation (deficient counsel) is not even arguably a link in the causal chain leading to discovery of Respondent's identity (and all of its resulting consequences for deportation). And because Respondent's identity is not suppressible—and is a fully sufficient basis for his deportation—Respondent's Sixth Amendment claim necessarily fails.

CONCLUSION

The Court should reverse the decision below, and Respondent's guilty plea and conviction should be reinstated.

RESPECTFULLY SUBMITTED this 8th day of April, 2019.

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APPENDIX O

ORAL ARGUMENT

Tuesday, May 7, 2019

En Banc	**COURTROOM**

Scott Bales, Chief Justice
Robert M. Brutinel, Vice Chief Justice
Ann A. Scott Timmer, Justice
Clint Bolick, Justice
Andrew W. Gould, Justice
John R Lopez, IV, Justice

9:30 AM

CR-18-0514-PR	**STATE OF ARIZONA v NUNEZ-DIAZ**

10:15 am

CV-19-0033-CQ	**SKY HARBOR HOTEL PROPERTIES v PATEL PROPERTIES**

10:50 AM

CV-19-0034-CQ	**MORRISANDERSON & ASSOC v REDEYE II LLC et al**