The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2020 CO 8

Supreme Court Case No. 17SC815
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 13CA1296

Petitioner:

Alfredo Juarez,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
February 10, 2020

Attorneys for Petitioner:
Megan A. Ring, Public Defender
John Plimpton, Deputy Public Defender
Denver, Colorado

Attorneys for Respondent:
Philip J. Weiser, Attorney General
Carmen Moraleda, Senior Assistant Attorney General
Denver, Colorado

CHIEF JUSTICE COATS delivered the Opinion of the Court.

JUSTICE GABRIEL concurs in the judgment, and **JUSTICE MÁRQUEZ** joins in the concurrence in the judgment.

Juarez petitioned for review of the court of appeals' judgment affirming the denial of his motion for postconviction relief. With regard to his challenge to the effectiveness of his counsel, the district court found both that defense counsel adequately advised his client concerning the immigration consequences of his plea of guilty to misdemeanor drug possession and that, in any event, there was no reasonable probability Juarez would not have taken the plea. The intermediate appellate court similarly found that counsel's advice fell within the range of competence demanded of attorneys in criminal cases, but as a result of that finding, the appellate court considered it unnecessary to address the question whether counsel's performance prejudiced Juarez.

Because Juarez conceded he was advised and understood that the misdemeanor offense to which he pleaded guilty would make him "deportable," defense counsel's advice concerning the immigration consequences of his plea correctly informed him of the controlling law and therefore did not fall below the objective standard of reasonableness required for effective assistance concerning immigration advice. The judgment of the court of appeals is therefore affirmed.

I.

In April 2012, Alfredo Juarez pleaded guilty to one class 1 misdemeanor count of possessing a schedule V controlled substance, in exchange for the dismissal of a charge of felony possession. As stipulated in the plea agreement, he received a sentence to two years of drug court probation. At the time of his offense and plea, the defendant was a citizen of Mexico and a lawful permanent resident of the United States.

A month after his sentencing, the defendant violated the conditions of his probation, received a suspended two-day jail sentence, and two weeks later, after violating the conditions of that suspension, served those two days in jail. After he received an additional three-day jail sentence for again violating his probation, federal Immigration Customs and Enforcement ("ICE") officers began removal proceedings. The defendant was eventually deported to Mexico.

In October 2012 and January 2013, the defendant filed motions for postconviction relief, challenging the effectiveness of his plea counsel's representation and, as a result, the constitutional validity of his guilty plea. Over a period of three days, the district court heard these motions, including the testimony of the defendant, taken by video over the internet; the testimony of his plea counsel; and the testimony of an immigration attorney retained by him in 2011, prior to his acceptance of the plea agreement. Following that hearing, the court made findings and conclusions and

denied the motions. The hearing revealed the following pertinent facts.

The defendant was charged with a felony following the discovery of cocaine on his person. After nearly a year of continuances, granted for the specific purpose of allowing him to address potential immigration issues prior to accepting any plea agreement, the defendant finally agreed to plead guilty to class 1 misdemeanor possession of a controlled substance in exchange for the dismissal of his felony charge. Prior to the court's acceptance of the plea, defense counsel made a record that he had spoken to two immigration attorneys, advised the defendant to contact an immigration attorney himself after providing him with several names, and clearly informed the defendant that the misdemeanor offered by the prosecution was the equivalent of a felony under federal immigration law.

At the postconviction hearing, defense counsel further testified that on a call with him and the defendant, an immigration attorney explained that the plea offer was not acceptable because it would likely get him deported, and that the immigration attorney followed up the call with a letter, reiterating that the proposed plea would probably result in deportation. Counsel further testified that he consulted another immigration attorney who gave largely the same advice, and that he communicated this response to the defendant, who understood that deportation was the probable outcome of accepting the plea.

The defendant himself also testified that in the process of renewing his lawful permanent resident status, his own immigration counsel had informed him that the plea could make him deportable. The defendant further testified that he spoke to a second immigration attorney, who also informed him that the plea "would" make him deportable. The defendant specifically conceded that although no one told him that accepting the agreement and pleading guilty would "automatically" make him deportable or that he actually "was going to get deported," nevertheless he understood that pleading guilty to the misdemeanor "would" make him "deportable."

The district court reasoned that any distinction between being automatically or mandatorily deportable and simply being deportable was illusory and in fact that being so advised would have created a misleading impression of the probability of deportation. Similarly, it found that the defendant regretted his plea only after he violated his probation and was deported and therefore there was no merit in his assertion that had he been told he would "automatically" be deported he would not have accepted the plea agreement. After agreeing that the defendant was adequately advised, the court of appeals found it unnecessary to opine concerning the likelihood that but for inadequate advice, the defendant would have rejected the plea offer.

II.

For the waiver of fundamental rights inherent in any guilty plea to be effective, a pleading defendant must understand, among other things, the direct consequences of his plea. *Brady v. United States*, 397 U.S. 742, 755 (1970) (for a guilty plea to be voluntary it must, among other things, be entered by one "fully aware of the direct consequences"); *People v. Birdsong*, 958 P.2d 1124, 1128 (Colo. 1998) ("[T]he trial court must advise the defendant of the direct consequences of the conviction to satisfy the due process concerns that a plea be made knowingly and with a full understanding of the consequences thereof."). In addition, before pleading guilty to a crime, a defendant is entitled to advice from his counsel that falls within the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (holding that two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984), applies to challenges to guilty pleas based on ineffective assistance of counsel). Although it appears well settled that a trial court is not required to advise a defendant sua sponte of potential federal deportation consequences, *People v. Pozo*, 746 P.2d 523, 526 (Colo. 1987), defense counsel's obligations and the adequacy of his advice concerning the deportation consequences of his client's acceptance of a guilty plea have long been the subject of debate in both state and federal law, *compare People v. Soriano*, 240 Cal. Rptr. 328, 333–36 (Cal. Ct. App. 1987) (determining that the defendant was denied effective assistance of counsel because he was not adequately advised of the

immigration consequences of his plea), *and People v. Pozo*, 712 P.2d 1044, 1047 (Colo. App. 1985) (determining that the defendant was denied effective assistance where defense attorney did not research and advise the defendant with respect to deportation consequences of guilty plea), *rev'd*, 746 P.2d 523 (Colo. 1987), *and People v. Padilla*, 502 N.E.2d 1182, 1186 (Ill. App. Ct. 1986) (determining that failure to advise of deportation consequences constitutes ineffective assistance of counsel), *with Tafoya v. State*, 500 P.2d 247, 252 (Alaska 1972) (concluding that alien defendant received effective assistance of counsel despite counsel's failure to advise of deportation consequences), *and State v. Ginebra*, 511 So. 2d 960, 962 (Fla. 1987) (determining that counsel's failure to advise client of deportation consequence does not constitute ineffective assistance of counsel), *superseded by rule as stated in State v. De Abreu*, 613 So. 2d 453, 453 (Fla. 1993).

More than thirty years ago, in *Pozo*, this court addressed a challenge to the effectiveness of counsel for failing to advise of possible deportation consequences, but unlike the intermediate appellate court considering the question before us, we expressly declined to determine whether any such duty existed. 746 P.2d at 527. Instead, relying heavily on then-existing federal law that permitted a sentencing court to prevent deportation by recommending against it, we found that the potential deportation consequences of guilty pleas in criminal proceedings brought against alien defendants were material to critical phases of such proceedings. *Id.* at 528–29. Rather than imposing a duty on

counsel to advise specifically of deportation consequences, we relied on the more fundamental principle that attorneys must inform themselves of material legal principles that may significantly impact the particular circumstances of their clients. *Id.* at 529–30. In the absence of an existing adequate record, we therefore remanded for a determination whether defense counsel had reason to know of Pozo's alien status but nevertheless failed to conduct appropriate research into federal immigration law. *Id.*

Nearly a quarter century later, emphasizing that the "judicial recommendation against deportation," or "JRAD," and the Attorney General's authority to grant discretionary relief from deportation had both been eliminated from federal immigration law, the United States Supreme Court characterized that law as now making removal "nearly an automatic result" and deportation as now constituting an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. *Padilla v. Kentucky*, 559 U.S. 356, 363–64, 366 (2010). Expressly finding the collateral versus direct distinction ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation, and noting that in any event the Supreme Court had never applied the distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance of counsel, the Court concluded simply that advice regarding the unique consequence of deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Id.* at 365–66.

After considering various sources of professional responsibility, the Court ultimately articulated counsel's duty with regard to the first, or objective-standard-of-reasonableness, prong of the *Strickland* test in the context of this unique kind of penalty, holding "that counsel must inform her client whether his plea carries a risk of deportation." *Id.* at 374. Acknowledging that immigration law can be complex and that there will undoubtedly be cases in which the deportation consequences of a particular plea will be unclear or uncertain, the Court held that when "the law is not succinct and straightforward," a defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. *Id.* at 369. On the other hand, when the deportation consequence is truly clear, the duty to give correct advice is equally clear. *Id.* In *Padilla* itself, where federal law classified the defendant's particular crime as "deportable," the Court considered "the terms of the relevant immigration statute [to be] succinct, clear, and explicit in defining the removal consequence for Padilla's conviction." *Id.* at 368.

III.

Whether or not our rationale in *Pozo* retains any force after the elimination of judicial discretion as a means of affecting deportation, there can be little question that counsel in the instant case went to substantial lengths to educate himself and ensure that his client was fully informed of the immigration consequences of taking the plea in question. The defendant's

counsel not only secured a number of continuances for the very purpose of ensuring that his client was advised of and understood these consequences, but he also had the defendant advised by an immigration attorney in his presence, and he personally advised the defendant to seek further consultation with an immigration specialist, after providing the defendant with a list of such specialists.

From the record of the providency hearing, as well as the testimony of defense counsel, the testimony of a separate immigration attorney who advised him, and his own admissions, it was undisputed that the defendant was advised and understood that the misdemeanor drug offense offered by the prosecution would be treated as a felony conviction for purposes of federal immigration law; that he could not afford to take the plea if he wanted to avoid deportation; and that by taking the plea agreement he would in fact be made deportable. The defendant has never asserted that he was affirmatively misinformed that he need not worry about his immigration status, as was the defendant in *Padilla*, 559 U.S. at 359, or that he was not advised that taking the plea in question would make him deportable, just as would a plea to a felony. He testified only that he was never advised that his plea would make him "automatically" deportable or that he actually "was going to get deported."

The defendant now asserts that merely being advised that taking the plea in question would make him deportable according to federal immigration law was insufficient to satisfy the duty imposed upon defense

counsel in *Padilla* to provide advice regarding the risk of deportation. Relying on specific terms used by the Court in criticizing defense counsel's erroneous advice in *Padilla*, the defendant argues instead that adequate advice required counsel's use of the terms "automatic deportation" and "presumptively mandatory deportation," and that advising him he would probably be deported was in fact misleading.

In articulating its holding ("we now hold"), the *Padilla* Court commanded that "counsel must inform her client whether his plea carries a risk of deportation." *Id.* at 374. Drawing a distinction between immigration law that *is not* succinct and straightforward in defining the removal consequence and immigration law that *is* succinct and straightforward in defining the removal consequence, the Court imposed a more limited duty of advice on defense counsel with regard to the former than the latter. *See id.* at 369. When "the law" is not succinct and straightforward, counsel's duty in this regard is limited to advising a noncitizen client that pending charges may carry a risk of adverse immigration consequences, but when the deportation consequence is truly clear, counsel has a duty to give correct advice. *Id.*

The "correct advice" that counsel has a duty to give therefore necessarily refers to a correct explanation of "the law." The immigration law at issue here is the very law that the Supreme Court in *Padilla* found to be "truly clear," for the reason that it specified the deportation consequence for conviction of the crime to which Padilla was pleading guilty, by one of Padilla's

immigration status. That consequence was that such an individual would be "deportable." *See* 8 U.S.C. § 1227(a)(2)(B)(i) (2018) ("Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is *deportable*." (emphasis added)). The "correct advice" concerning the legal consequence of the defendant's plea required in the instant case, just as it was in *Padilla*, was that the alien defendant would, in the language of the statute, be "deportable." *Id*.; s*ee also State v. Sanmartin Prado*, 141 A.3d 99, 126, 128 (Md. 2016) (holding defense counsel provided correct advice under *Padilla* by informing the defendant that his child abuse offense is "deportable" because 8 U.S.C. § 1227(a)(2)(E)(i) defines it as such). That is precisely the advice the defendant in the instant case was given.

The term "presumptively mandatory" nowhere appears in the Court's opinion as a required advisement or as a description of the "correct advice" required of clear statutes, but rather in an explanation why the advice given by Padilla's counsel was incorrect. *See Padilla*, 559 U.S. at 368–69. As the Court indicated in its opinion, it was not hard to find counsel's advice deficient for three reasons: the consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect. *Id.* Similarly, the Court never used the phrases "automatic

deportation" or "automatically deportable" in describing a required advisement or "correct advice." "Subject to automatic deportation" appears only in an introductory passage of the opinion generally summarizing the Court's conclusion that defense counsel's advice to the effect that the defendant need not worry about his immigration status was deficient and that the question whether the defendant would be entitled to relief for ineffective assistance of counsel would therefore depend upon the second or prejudice prong of the *Strickland* standard, a matter the Court for procedural reasons did not propose to address. *Id.* at 360. The Court used the phrase "automatically deportable" only in the portion of its opinion describing historical developments in federal immigration law. *Id.* at 362.

In fact, the *Padilla* opinion does not again use the term "automatic deportation" or suggest in the body of the analysis any requirement for counsel to predict the likelihood that the law will actually be enforced and the defendant will actually be deported. Besides undoubtedly being an accurate prediction, the assessment by the defendant's counsel, as well as that of the other immigration specialists advising him, that if he took the offered plea agreement he would probably be deported did not in any way detract from or minimize the "correct advice," which the defendant also received, that the legal consequence of his accepting the agreement would be to make him deportable. Quite the contrary, being advised that one would probably be deported arguably implies that, as a matter of law, he would at the very least be deportable.

Whether such an advisement of probable consequences standing alone, however, could demonstrate reasonable professional competence; whether, even if so, prejudice could be established in the face of ignoring such an advisement; or whether even correct advice concerning the legal consequence of such a plea might nevertheless be deficient in light of other, contradictory advisements, are all questions we need not answer. In the case before us, it is enough that the defendant was correctly advised concerning both the legal consequence and the practical implications of his plea.

IV.

Because Juarez conceded he was advised and understood that the misdemeanor offense to which he pleaded guilty would make him "deportable," defense counsel's advice concerning the immigration consequences of his plea correctly informed him of the controlling law and therefore did not fall below the objective standard of reasonableness required for effective assistance concerning immigration advice. The judgment of the court of appeals is therefore affirmed.

JUSTICE GABRIEL concurs in the judgment, and **JUSTICE MÁRQUEZ** joins in the concurrence in the judgment.

JUSTICE GABRIEL, concurring in the judgment.

The majority concludes that plea counsel's advice to defendant Alfredo Juarez regarding the immigration consequences of Juarez's guilty plea to a class 1 misdemeanor drug possession count was correct and did not fall below the objective standard of reasonableness required for effective assistance concerning immigration advice. Maj. op. ¶ 22. In my view, however, counsel's advice was deficient under the standards set forth in *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010), and *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987), because it did not correctly convey the clear statutory deportation consequences of Juarez's guilty plea. Nonetheless, like the majority, I would affirm the judgment here because the record does not support Juarez's contention that but for counsel's deficient advice, he would not have pleaded guilty and instead would have proceeded to trial.

Accordingly, I respectfully concur in the judgment only.

I. Factual Background

No one disputes that under the applicable immigration statutes, Juarez's guilty plea in this case rendered him automatically deportable. *See Padilla*, 559 U.S. at 363–64, 366 (noting that under contemporary

law, if a noncitizen commits a removable offense, then his or her removal is "practically inevitable" and that "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders"); *United States v. Yansane*, 370 F. Supp. 3d 580, 586 (D. Md. 2019) (construing the immigration provision at issue here as "automatically" rendering deportable defendants who are convicted of any federal law or regulation relating to controlled substances).[1] Indeed, the majority itself acknowledges the Supreme Court's view that, under prevailing immigration law, removal is now "nearly an automatic result" for noncitizen offenders like Juarez, although the majority goes to some length to try to minimize the import of the Court's statement in that regard. Maj. op. ¶¶ 12, 19 (citing *Padilla*, 559 U.S. at 366).

Plea counsel, however, did not advise Juarez of this applicable law. To the contrary, counsel appears to have advised Juarez only that (1) his plea "*could* make [him] deportable"; (2) if he took the plea offer, he would *probably* be deported; or (3) if he took the plea offer, it "*very likely* [would] result in either deportation or some type of exclusion from the United States." (Emphases added.) In addition, when, prior to accepting the plea offer, Juarez expressed his belief that a felony might be viewed by immigration authorities as worse than a misdemeanor, counsel did not correct Juarez's

[1] Although current law has changed the terminology from "deportation" to "removal," because counsel in this case advised Juarez in terms of "deportation," to avoid confusion, I, too, will generally use that term.

misimpression, even though counsel knew that, from an immigration standpoint, Juarez's plea to the misdemeanor would put him in the same position as if he had been convicted of a felony. Instead, counsel told Juarez, "[T]here's a possibility over the next several years that maybe the law might change, and if you're looking at a misdemeanor versus a felony, might that somehow benefit you [sic]."

The matter proceeded to the providency hearing, and when the court asked Juarez if he understood that his plea *could* affect his immigration status, Juarez replied, "Yeah," but indicated that he was willing to proceed because there was nothing else that he could do. Specifically, Juarez made clear that he understood that his counsel had tried to get a plea deal that would have avoided the possibility of deportation but that the prosecutor would not make such an offer. Juarez thus told the court, "[W]e got to go with what . . . we can do now," and although an immigration lawyer had told Juarez that the plea offer was unacceptable, Juarez pleaded guilty.

II. Analysis

I begin by discussing the standards set forth in *Padilla* and *Pozo*. I then address why I believe that plea counsel's advice in this case was deficient. Last, I turn to the question of prejudice, and I explain why I do not believe that counsel's deficient advice prejudiced Juarez on the facts presented here.

A. *Padilla* and *Pozo*

Addressing counsel's obligations in a case like this, in *Padilla*, 559 U.S. at 368–69, the Supreme Court concluded that when "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for [the defendant's] conviction," counsel must give "correct advice." In contrast, when the law is not succinct and straightforward, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* at 369.

In so concluding, the Supreme Court reached the same conclusion that we had reached some twenty-three years earlier in *Pozo*, 746 P.2d at 529–30. *See People v. Hinojos*, 2019 CO 60, ¶ 28, 444 P.3d 755, 761-62 (citing *Pozo* immediately after describing defense counsel's obligations under *Padilla*); *People v. Chavez-Torres*, 2019 CO 59, ¶ 26, 442 P.3d 843, 850 (same); *Kazadi v. People*, 2012 CO 73, ¶ 31, 291 P.3d 16, 25 (Bender, C.J., dissenting) (equating the obligations of defense counsel set forth in *Pozo*, 746 P.2d at 529, with those set forth in *Padilla*, 559 U.S. at 374).

Specifically, in *Pozo*, 746 P.2d at 529, we made clear that attorneys practicing in Colorado who knew or had sufficient information to form a reasonable belief that their client was a noncitizen had a duty to "investigate relevant immigration law." This duty, we said, stems "from the . . . fundamental principle that attorneys must inform themselves of material legal principles

that may significantly impact the particular circumstances of their clients." *Id.* Moreover, we noted that in cases involving noncitizen criminal defendants, "thorough knowledge of fundamental principles of deportation law may have significant impact on a client's decisions concerning plea negotiations and defense strategies." *Id.* Accordingly, we remanded the case to determine, in light of the foregoing principles, whether counsel's failure to advise Pozo of the immigration consequences of his plea constituted constitutionally ineffective assistance of counsel. *Id.* at 529–30.

B. Deficient Conduct

Applying the foregoing principles here, I believe that plea counsel's conduct fell below the constitutionally mandated standards set forth in *Padilla* and *Pozo*.

As noted above, in *Padilla*, 559 U.S. at 368–69, the Supreme Court concluded that when "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for [the defendant's] conviction," counsel must give "correct advice." Here, as in *Padilla*, the consequences of Juarez's plea could "easily be determined from reading the removal statute." *Id.* at 369. Specifically, pursuant to applicable law, his plea made him automatically deportable, such that his deportation was, in the words of the *Padilla* Court, "practically inevitable." *See id.* at 363–64, 366; *Yansane*, 370 F. Supp. 3d at 586.

Counsel, however, did not advise Juarez of this applicable law. Instead, he told Juarez only that (1) his

plea "*could* make [him] deportable"; (2) if he took the plea offer, he would *probably* be deported; or (3) if he took the plea offer, it "*very likely* [would] result in either deportation or some type of exclusion from the United States." (Emphases added.) Moreover, when Juarez expressed his belief that a felony might be viewed by immigration authorities as worse than a misdemeanor, counsel did not correct Juarez's misimpression, even though counsel knew that, from an immigration standpoint, Juarez's plea to the misdemeanor would put him in the same position as if he had been convicted of a felony. Instead, counsel gave Juarez false hope that the law might change and that a misdemeanor might be more beneficial than a felony.

In my view, this was not the "correct advice" that *Padilla* and *Pozo* required plea counsel to provide. As the majority correctly observes, those cases require plea counsel to advise their clients correctly as to what the *law* is. Maj. op. ¶ 18. Juarez's counsel, however, did not so advise Juarez. Rather, he told Juarez, as a *factual* matter, what he thought the likely outcome of Juarez's plea would be. I do not believe that this was sufficient under *Padilla* and *Pozo*.

Nor do I agree with the majority's apparent view that advising a defendant that deportation is "probable" or "likely" is the same thing as advising the defendant what the law is (here, that Juarez's plea rendered him automatically deportable). Telling a defendant that deportation is probable or likely does not tell him or her what the law is. It provides, instead, a factual prediction as to the plea's likely outcome.

Moreover, advising a defendant that deportation is "probable" or "likely" tends to convey at least some possibility that deportation might not occur. In my view, giving a defendant in a case like this such a false sense of hope is contrary to what *Padilla* and *Pozo* require because misadvising a defendant in this way interferes with his or her ability to make the voluntary, intelligent, and knowing waiver of rights that must accompany a guilty plea.

In contrast to advising a defendant that deportation is "probable" or "likely," advising defendants in cases like this that their pleas render them automatically deportable provides the defendants with the correct statement of the law that *Padilla* and *Pozo* mandate. And so advising a client does not tend to convey false hope. Indeed, if anything, it tends to suggest a general lack of discretion under the law.

For these reasons, I would conclude that plea counsel's advice in this case was deficient. In my view, counsel's advice understated the consequences of Juarez's guilty plea, and in endorsing such deficient advice, I believe that the majority's opinion substantially weakens the important safeguards that both *Padilla* and *Pozo* have provided to noncitizen defendants who are considering entering guilty pleas.

C. Prejudice

The question for me thus becomes whether plea counsel's deficient advice prejudiced Juarez. On the facts of this case, I cannot say that it did.

In the plea context, to establish the requisite prejudice, a defendant must show a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty but instead would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Here, the record establishes that in deciding whether to accept the plea offer, Juarez was principally focused on the offer's deportation consequences. The record further shows that Juarez knew that his counsel had tried to get a plea offer that would have avoided the possibility of deportation but that the prosecutor would not make such an offer. And the record reveals that Juarez knew that if he accepted the misdemeanor offer that was on the table, then he would probably be deported. Notwithstanding all of the foregoing, and although an immigration attorney had told him that the plea offer was unacceptable, Juarez chose to accept that offer, telling the providency court, "[W]e got to go with what . . . we can do now."

On these facts, I cannot say that but for plea counsel's deficient conduct, Juarez would probably have rejected the plea offer and would instead have proceeded to trial. Although plea counsel did not properly advise Juarez as to the applicable law, as a factual matter, Juarez knew that his deportation was probable or likely if he pleaded guilty to a misdemeanor, and against immigration counsel's advice, he pleaded guilty anyway. In such circumstances, I do not believe that the record supports a finding that Juarez would have acted differently had he been told that his plea

rendered him automatically deportable, such that his removal was practically inevitable.

Accordingly, I would conclude that Juarez has not established the requisite prejudice in this case.

III. Conclusion

For these reasons, although I believe that plea counsel provided deficient advice regarding the immigration consequences of Juarez's guilty plea, I do not believe that Juarez has shown that he suffered any prejudice from that deficient advice.

Accordingly, like the majority, I would affirm the judgment below, but I would do so on different grounds. I therefore respectfully concur in the judgment only.

I am authorized to state that JUSTICE MÁRQUEZ joins in this concurrence in the judgment.

COLORADO COURT OF APPEALS **2017COA127**

Court of Appeals No. 13CA1296
City and County of Denver District Court
No. 11CR1007
Honorable John W. Madden IV, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Alfredo Juarez,

Defendant-Appellant.

ORDER AFFIRMED

Division IV
Opinion by JUDGE GRAHAM
Booras and Dunn, JJ., concur

Announced October 19, 2017

Cynthia H. Coffman, Attorney General, Carmen Moraleda, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, John Plimpton, Deputy State Public Defender, Denver, Colorado; Rachel C. Funez, New Castle, Colorado, for Defendant-Appellant

Defendant, Alfredo Juarez, appeals the postconviction court's order denying his Crim. P. 35(c) motion seeking to withdraw his guilty plea. We conclude that Juarez's plea counsel was not ineffective when he advised Juarez that his plea to a class 1 misdemeanor would "probably result in deportation," and, therefore, we conclude Juarez is not entitled to withdraw his guilty plea. Accordingly, we affirm.

I. Background

Juarez is a Mexican foreign national who has lived in Denver since he was approximately six years old. After graduating from high school, he married a United States citizen, and in 2009 he was granted lawful permanent residence status. His parents live in Denver, he has two children who are United States citizens, and he has not returned to Mexico at any time prior to his deportation at issue in this case.

In early 2011, the police were called to Juarez's residence after he got into a fight with family members. Officers were forced to tase Juarez to subdue him and, in a search incident to arrest, cocaine was found in his possession. Juarez was charged with one felony count of possession of a controlled substance and hired Mr. Tatum to represent him. At the same time, Mr. Whitehead, an immigration attorney, was also representing Juarez in an unrelated matter concerning his lawful permanent residence status.

Tatum received multiple continuances in the criminal case in an attempt to negotiate a plea with the

district attorney that would not result in Juarez's deportation from the United States. Tatum understood that there was no option short of a misdemeanor for less than one ounce of marijuana that would guarantee avoidance of deportation. Ultimately, Juarez pleaded guilty to possession of a schedule V controlled substance, a class 1 misdemeanor, with a stipulated sentence of two years of drug court probation.

During Juarez's April 2012 providency hearing, Tatum informed the court as follows:

> The reason this case has . . . dragged on for a long time is because [co-counsel] and I have spent a lot of time trying to figure out if there was . . . a disposition that would be . . . better for him, immigration-wise.
>
> . . . .
>
> Unfortunately . . . that never occurred. We have . . . at all times advised him that it is our understanding – although we're not – I'm not an expert in immigration law, but based on my consultation with immigration attorneys – that *this plea very likely will result in either deportation or some type of exclusion from the United States.*
>
> He is a legal resident. He does have a green card. But it's fairly well known now that any drug offense other than simple possession of

> under an ounce of marijuana *will have* negative immigration consequences.[1]
>
> . . . .
>
> I – *I cannot tell him any stronger. You know, this is a misdemeanor under Colorado state law, but it is the equivalent of a felony under the immigration and naturalization act*, and, you know, I have made him aware of that. . . .

(Emphasis added.)

The court then asked Juarez if he understood "that this plea could . . . affect your immigration status. Do you understand that?"

> [Juarez]: Yeah.
>
> The Court: Okay. And even knowing that, do you want to proceed with this disposition today?
>
> [Juarez]: (Indistinguishable.) *There's nothing I can do*, you know. It was – I don't know. This whole case just was something that should have . . . never really happened, you know. It was all due to my dumb behavior, but, you know, we tried to make it work, *but we can't get it to what we have to*, so we got to go with what . . . we can do now.
>
> . . . .
>
> The Court: Mr. Juarez, understanding all the consequences, both the immigration

---

[1] In response to this comment by Tatum, the court stated, "*Or it could.*" (Emphasis added.)

> consequences, the potential that if you violate probation I could sentence you pursuant to what I told you . . . do you still want to . . . take this plea today?
>
> [Juarez]: Yeah.

(Emphasis added.)

The court sentenced Juarez to two years of drug court probation as recommended in his plea agreement.

In May 2012, Juarez tested positive for THC, and the drug court imposed a suspended two-day jail sentence on the condition his THC levels drop. Because his THC levels did not drop, the drug court imposed the two-day jail sentence in early June. When Juarez again failed to lower his THC levels in late June, the court imposed a three-day sentence. During this second period of incarceration, United States Immigration and Customs Enforcement (ICE) placed a hold on Juarez and began deportation proceedings. An order of removal was entered by the immigration court on September 5, 2012, and Juarez was ultimately deported to Mexico.

In October 2012 and January 2013, Juarez filed motions for postconviction relief alleging ineffective assistance of counsel. Juarez argued Tatum failed to advise him that his guilty plea would subject him to (1) mandatory deportation; (2) lifetime inadmissibility to the United States; (3) mandatory detention; and (4) destruction of the defense of cancellation of removal. But for these errors, Juarez alleged, he would not have

pleaded guilty and instead would have risked going to trial.

The postconviction court held a hearing over three days in which Tatum, Juarez (via internet connection from Mexico), and Whitehead testified. The testimony of each is summarized below:

- Tatum stated that "immigration was always, I think, the paramount consideration" for Juarez; that he "was aware that the plea agreement proposed by the District Attorney was not acceptable because it would likely get Mr. Juarez deported"; and that "I specifically asked Mr. Juarez if he wanted to take the Class 1 misdemeanor deal that had been offered, and I told him, 'Your immigration attorney advised you that a plea to the Class 1 misdemeanor will probably result in deportation.' "
- Juarez testified Tatum and Whitehead told him the plea would make him deportable,[2] but "[t]hey never said you are going to get deported. They never said you are going to get deported as soon as you are free. You are going to get deported, they never said that." Juarez also testified his attorneys never explained that "the misdemeanor plea carried absolutely no benefit over the felony" for immigration purposes; that he "could be subject to mandatory lifetime inadmissibility"; that he

[2] Defendant testified, "I know I was pleading guilty to a misdemeanor that would make me deportable according to the information that my lawyer gave me and according to what he knew."

could be subject to "mandatory immigration detention"; or that his plea would "destroy[] a defense to deportation."

- Whitehead stated that his general practice at the time was to inform his clients "you are going to probably be placed in removal proceedings or you are going to be facing a permanent bar []to admissibility into the country." He also stated, "What I remember telling Mr. Juarez . . . was that if he pled guilty to the drug offense that was being offered to him at the time . . . that he would, 1, probably be placed in remov[al] proceedings and, 2, . . . probably be facing a permanent bar."

After listening to arguments and reviewing the case law on effective assistance to noncitizen defendants, the postconviction court denied Juarez's motion in a written order. The court held:

> [I]n *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), . . . the United States Supreme Court found that, under the present immigration laws, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to certain crimes. In doing so, it noted that deportation is a particularly severe penalty, even though it is not technically a criminal sanction. . . . Accordingly, the United States Supreme Court held that, under the Sixth Amendment's guarantee of effective representation, "counsel must inform her client whether his plea carries a *risk of deportation*." *Id.*, 130 S. Ct. at 1486 (emphasis added). The

> Supreme Court used this precise language – "risk of deportation" – multiple times in *Padilla*.
>
> . . . .
>
> The Defendant was advised and was aware that his plea carried a risk of deportation. Further, the risk of deportation was correctly quantified as being very likely. As such, the Court finds that the Defendant has not established either prong of the *Strickland* test and that his attorney did not provide ineffective assistance of counsel.
>
> The Defendant's attorney, Mr. Tatum, knew early on that the Defendant was a legal resident of this country but was not a citizen. Accordingly, he had an obligation to investigate whether the plea offer made to the Defendant would make the Defendant eligible for deportation. He did this by consulting with an experienced immigration attorney, Lillian Shea, as well as the Defendant's own immigration attorney, Mr. Whitehead. As a result of those consultations, he had a correct understanding that, if the Defendant accepted the plea bargain in this case, he would likely be deported. More importantly in this case, Mr. Tatum also advised the Defendant of this fact. Pursuant to *Padilla*, Mr. Tatum's obligation was to advise the Defendant "whether his plea carrie[d] a risk of deportation," *Padilla*, 130 S. Ct. at 1486, and Mr. Tatum met this obligation.

The court went on to state that Juarez's argument that the advice he received was ineffective because

Tatum did not tell him his guilty plea would trigger "the automatic, mandatory and permanent removal provision of deportability" was "an illusory distinction" "contrary to the specific language in *Padilla*." As the court noted, "[t]he only thing the additional language does is create a misleading impression of the probability of actual deportation." Indeed, "whether a person who is deportable will actually be deported is not absolute, certain or guaranteed." Thus, by advising Juarez "that if he took the plea offer in this case he would likely be deported, Mr. Tatum accurately related the effect of the plea under 8 U.S.C. § 1227(a) and also provided additional, correct information as to the probability of deportation which was not explicit under the statute."

The court further held that the "other purported deficiencies" raised by Juarez – failure to advise he would be permanently barred from reentry into the United States, failure to advise his guilty plea would destroy a defense to removal called cancellation of removal, and failure to advise his guilty plea would subject him to mandatory immigration detention without the possibility of bond – do not fall under the ambit of consequences that defense attorneys are required to advise their clients of in order to provide effective representation. "Addressing the first of those purported failures, there is no express requirement in *Padilla* that an attorney must advise a defendant whether his plea will make him inadmissible." And regarding the defense of cancellation of removal and mandatory detention,

> [i]f defense attorneys were required to have that degree of familiarity with immigration law, then they would presumably also be required to understand concepts such as withholding of removal, the application of the Convention Against Torture, and exemption from inadmissibility for refugees. . . . [T]he defense position would require an attorney to advise a defendant of a collateral consequence to a collateral consequence.

The court also concluded that Juarez failed to establish prejudice because, "[k]nowing that the best offer he could obtain made him eligible for deportation," Juarez "accepted that risk and took the plea." "He had been advised at least by Mr. Tatum and Mr. Whitehead that if he took the plea bargain he would very likely be deported and that he would be permanently barred from returning to the United States. Knowing these consequences, the Defendant still chose to plead guilty."

> Ultimately, the Defendant's primary desire was to avoid deportation if he could do so. When it became clear that the prosecution would not offer a plea which would avoid that risk and that he would likely lose at trial, he chose what he perceived to be his next best option – avoiding a felony conviction. The decision was a rational one under the circumstances. . . . [I]t strongly appears that the Defendant's decision was motivated by the hope that he might not actually be deported even though he knew this outcome was very likely.

II. Counsel's Representation Did Not Fall Below an Objective Standard of Reasonableness

On appeal, Juarez first argues that under *Padilla*, Tatum performed deficiently by failing to inform him that he would be subject to "mandatory deportation" if convicted. Thus, although counsel did inform him that he was "very likely" to be deported, Juarez argues that this advice was deficient because counsel should have told him that his conviction "would absolutely result in deportation" under 8 U.S.C. § 1227(a)(2)(B)(i) (2012). We disagree and conclude that plea counsel acted within *Padilla*'s objective standard of reasonableness. To the extent our holding conflicts with the division in *People v. Campos-Corona*, 2013 COA 23, we decline to follow that opinion as an untenable expansion of *Padilla*. *See People v. Delgado*, 2016 COA 174, ¶ 27, 410 P.3d 697 (one division of the court of appeals is not bound by the decision of another division in a different case).

A. Standard of Review

An appeal from an order denying a claim of ineffective assistance of plea counsel presents a mixed question of law and fact. We defer to the postconviction court's findings of fact if supported by the record, and we review the conclusions of law de novo. *People v. Stovall*, 2012 COA 7, ¶ 18.

B. Law

"The Sixth Amendment guarantees a defendant the effective assistance of counsel at 'critical stages of a criminal proceeding,' including when he enters a guilty plea." *Lee v. United States*, 582 U.S. ___, ___, 137 S. Ct. 1958, 1964 (2017) (quoting *Lafler v. Cooper*, 566 U.S. 156, 165 (2012)). In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth a two-pronged test to determine whether a criminal defendant is entitled to relief as a result of constitutionally deficient representation. "To demonstrate that counsel was constitutionally ineffective, a defendant must show that counsel's representation 'fell below an objective standard of reasonableness' and that he was prejudiced as a result." *Lee*, 582 U.S. at ___, 137 S. Ct. at 1964 (quoting *Strickland*, 466 U.S. at 688, 692).

A defense attorney must advise a noncitizen defendant about potential immigration consequences to his or her plea:

> When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.

Padilla, 559 U.S. at 369 (footnote omitted). Under 8 U.S.C. § 1227(a)(2)(B)(i), "[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State . . . relating to a

controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."

"The severity of deportation – 'the equivalent of banishment or exile,' *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91, 68 S. Ct. 10, 92 L. Ed. 17 (1947) – only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation." *Padilla*, 559 U.S. at 373-74. Therefore, "the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea." *Chaidez v. United States*, 568 U.S. 342, 344 (2013).

C. Analysis

We read *Padilla*'s requirement that a defense attorney give "correct advice," *Padilla*, 559 U.S. at 369, as a requirement to give advice that informs his or her client "about the *risk* of deportation arising from a guilty plea." This advice need not be unequivocal, and it does not require counsel to tell a defendant that his plea will subject him to "mandatory removal," "presumptively mandatory deportation," or "automatic or mandatory deportation." We reach this conclusion because, although a noncitizen defendant is deportable for a controlled substance conviction under 8 U.S.C. § 1227(a)(2)(B)(i), deportation is not guaranteed. *See State v. Shata*, 868 N.W.2d 93, 108 (Wis. 2015) ("Although a controlled substance conviction makes an

alien 'deportable,' 8 U.S.C. § 1227(a)(2)(B)(i), such a conviction will not necessarily result in deportation.").

As noted by Whitehead at the postconviction hearing:

> [In] my 40 years of [practicing] immigration [law] I learned there is nothing absolutely . . . certain or guaranteed with the immigration service. And just because a person may be mandator[ily] subject to it doesn't necessarily mean they will automatically be placed in proceedings.
>
> ICE takes a look at a case – on a case by case basis as do the trial attorneys with the government. And just because the statute calls for something doesn't necessarily mean they'll automatically do it. There is a likelihood they will do it. But if you are telling somebody there is a guarantee something is going to happen within the immigration confines it may not happen.

Indeed, "the executive branch has essentially unreviewable prosecutorial discretion with respect to commencing deportation proceedings, adjudicating cases, and executing removal orders." *Id.* (citing *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482-85 (1999)).

Tatum not only advised Juarez of the risk of deportation, he quantified it by stating that it was

"probable"[3] and that drug offenses "will have" negative consequences. Indeed, Juarez understood these warnings to mean that "[t]here [was] nothing [he] c[ould] do" because he could not get a plea deal "to what [I] have to."

In addition, removal proceedings for Juarez began only after he thrice violated the terms of his drug court probation. Once he was confined in county jail for violating his probation, ICE placed a hold on him and began removal proceedings. This raises the question of whether such a proceeding would have been initiated had Juarez not violated his probation, resulting in his incarceration. When viewed in this context, Tatum's advice to Juarez correctly conveyed that the risk of deportation was "very likely" and "probable," and that his guilty plea would have adverse consequences. *See Commonwealth v. DeJesus*, 9 N.E.3d 789, 799 (Mass. 2014) (Cordy, J., dissenting) ("There was no inaccuracy or soft pedaling of advice here."); *Shata*, 868 N.W.2d at 111 (The defendant's "attorney gave him advice that there was a 'strong chance' of deportation, which was absolutely correct. Correct advice is not deficient.").

We acknowledge that a majority of jurisdictions have interpreted *Padilla* as requiring counsel to inform a noncitizen defendant that conviction for a deportable offense will either result in deportation or subject a defendant to "mandatory deportation."

---

[3] Webster's Third New International Dictionary 1806 (2002) defines "probable" as "that almost certainly is or will prove to be something indicated."

United States v. Al Halabi, 633 F. App'x 801, 803 (2d Cir. 2015) ("[W]here the law clearly dictates that removal is presumptively mandatory, a defense attorney's failure to advise his client of that fact falls below an objective standard of reasonableness."); *United States v. Rodriguez-Vega*, 797 F.3d 781, 786 (9th Cir. 2015) ("[W]here the law is 'succinct, clear, and explicit' that the conviction renders removal virtually certain, counsel must advise his client that removal is a virtual certainty." (quoting *Padilla*, 559 U.S. at 368-69)); *United States v. Urias-Marrufo*, 744 F.3d 361, 365 (5th Cir. 2014) ("[D]efense counsel has an obligation under the Sixth Amendment to inform his noncitizen client 'that the offense to which he was pleading guilty would result in his removal from this country.'" (quoting *Padilla*, 559 U.S. at 360)); *United States v. Akinsade*, 686 F.3d 248, 254 (4th Cir. 2012) ("[T]he admonishment did not 'properly inform' Akinsade of the consequence he faced by pleading guilty: mandatory deportation."); *Budziszewski v. Comm'r of Corr.*, 142 A.3d 243, 246 (Conn. 2016) ("In circumstances when federal law mandates deportation and the client is not eligible for relief under an exception to that command, counsel must unequivocally convey to the client that federal law mandates deportation as the consequence for pleading guilty."); *Hernandez v. State*, 124 So. 3d 757, 760, 762 (Fla. 2012) (Where counsel informed the defendant a plea "could/may" affect his immigration status, "Hernandez's counsel was deficient under *Padilla* for failing to advise Hernandez that his plea subjected him to presumptively mandatory deportation."); *Encarnacion v. State*, 763 S.E.2d 463, 466 (Ga.

2014) ("An attorney's advice as to the likelihood of deportation must be based on realistic probabilities, not fanciful possibilities. . . . [W]e find that where, as here, the law is clear that deportation is mandatory and statutory discretionary relief is unavailable, an attorney has a duty to accurately advise his client of that fact. It is not enough to say 'maybe' when the correct advice is 'almost certainly will.' ") (citation omitted); *DeJesus*, 9 N.E.3d at 794 ("We conclude that advising a defendant faced with circumstances similar to those in this case that he is 'eligible for deportation' does not adequately inform such a defendant that, if he were to plead guilty . . . then, upon apprehension, his removal from the United States would be presumptively mandatory under Federal law."); *Salazar v. State*, 361 S.W.3d 99, 103 (Tex. App. 2011) ("[T]he correct advice, which was that the plea of guilty would result in certain deportation, was not given. Both the terms 'likelihood' and 'possibility' leave open the hope that deportation might not occur. Consequently, these admonishments were inaccurate. . . ."); *State v. Sandoval*, 249 P.3d 1015, 1019 (Wash. 2011) ("If the applicable immigration law 'is truly clear' that an offense is deportable, the defense attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation." (quoting *Padilla*, 559 U.S. at 369)); *see Campos-Corona*, ¶ 13 ("Because Campos-Corona was not advised of mandatory removal, we conclude that the postconviction court erred in finding counsel's performance was reasonable.").

We think that the advice given by Tatum meets the general spirit of that standard. But if it does not, we nevertheless see no fault in it. We cannot say that counsel's advice must be couched in terms of absolute certainty or must incorporate talismanic language. Consequently, we find more persuasive cases in those jurisdictions that have concluded that because deportation is not automatic after conviction for a deportable offense, *Padilla* does not require an attorney to advise a client that he will, with 100% certainty, be deported. *Chacon v. State*, 409 S.W.3d 529, 537 (Mo. Ct. App. 2013) (holding defense counsel's advice that the defendant would "very likely be deported and wouldn't be able to come back" was constitutionally effective assistance); *Commonwealth v. Escobar*, 70 A.3d 838, 842 (Pa. Super. Ct. 2013) ("We do not read the statute [8 U.S.C. § 1227] or the [*Padilla*] court's words as announcing a guarantee that actual deportation proceedings are a certainty such that counsel must advise a defendant to that effect."); *Neufville v. State*, 13 A.3d 607, 614 (R.I. 2011) ("Counsel is not required to inform their clients that they *will* be deported, but rather that a defendant's 'plea would make [the defendant] eligible for deportation.'" (quoting *Padilla*, 559 U.S. at 368)) (alteration in original); *Shata*, 868 N.W.2d at 109 ("Because deportation is not an absolutely certain consequence of a conviction for a deportable offense, *Padilla* does not require an attorney to advise an alien client that deportation is an absolute certainty upon conviction of a deportable offense, including a controlled substance offense."); *see DeJesus*, 9 N.E.3d at 799-800 (Cordy, J., dissenting) ("[D]eportation has not been

demonstrated to be inevitable in the aftermath of every plea of guilty that creates either 'eligibility' or even a 'presumption' of deportation. . . . [T]he deportation proceeding is contingent on there being an 'order' of removal from the Attorney General of the United States, and there still remain discretionary avenues to avoid deportation, albeit limited ones."). Instead, we conclude, taking into account the language counsel actually uses and the circumstances of the noncitizen client (such as the ability to read and understand English), a criminal defense attorney may provide effective assistance even when using equivocal terms such as "likely," "strong chance," or "probably."

> The *Padilla* Court ultimately "[held] that counsel must inform her client whether his plea carries a *risk* of deportation." *Padilla*, 559 U.S. at 374, 130 S. Ct. 1473 (emphasis added). The Court did *not* hold that an attorney must inform an alien client that a conviction for a deportable offense will absolutely result in deportation. The Court did not require an attorney to use any particular words, such as "inevitable deportation," or to even convey the idea of inevitable deportation.

Shata, 868 N.W.2d at 98 (alteration in original).

In *Campos-Corona*, a division of this court held that while both counsel and the trial court advised the defendant "his plea could, or likely would, result in deportation and difficulty re-entering the United States," ¶ 12, "[b]ecause Campos-Corona was not advised of mandatory removal," ¶ 13, the postconviction court

erred in finding counsel's performance reasonable. But the division summarily reached this conclusion in two paragraphs with little discussion or analysis of *Padilla* and the concomitant case law. In any event, had the division considered the above-mentioned case law and reached the same conclusion, we would respectfully disagree. Indeed, we would have concluded that counsel's advice that "a guilty plea would make renewing [Campos-Corona's] permanent residence status difficult, if not impossible, and that he would likely be deported," *id.* at ¶ 3, was not constitutionally deficient.

The record supports the postconviction court's findings that Juarez was correctly advised and fully understood the risk of his plea prior to pleading guilty. Given Juarez's acknowledgment that he knew he could not reach a plea that would prevent his deportation, plus the multiple layers of advice he received (including inquiry by the court regarding immigration consequences prior to accepting his guilty plea), we are satisfied that Tatum provided constitutionally effective representation. As stated by the Wisconsin Supreme Court, "[t]he bottom line is that an attorney's advice must be adequate to allow a defendant to knowingly, intelligently, and voluntarily decide whether to enter a guilty plea." *Shata*, 868 N.W.2d at 107. The advice Juarez received from Tatum allowed him to do so. The fact that Juarez's subsequent behavior resulted in his incarceration and eventual deportation does not make the advice given by his counsel constitutionally ineffective.

III. Additional Contentions

Juarez goes on to argue that Tatum was required to advise him that his guilty plea would result in lifetime inadmissibility to the United States, mandatory detention, and destruction of the defense of cancellation of removal.[4] We find no support for these arguments in the language of *Padilla.* Indeed, the *Padilla* Court said "[i]mmigration law can be complex, and it is a legal specialty of its own" in which "the deportation consequences of a particular plea are [often] unclear or uncertain." 559 U.S. at 369. *Padilla* does not require criminal defense attorneys to function as immigration lawyers. Juarez's arguments to the contrary expand *Padilla* past any commonsense reading. *See People v. Vicente-Sontay*, 2014 COA 175, ¶ 38 ("[The defendant] cites no authority . . . nor have we seen any, requiring counsel to advise a defendant on the particulars of cancellation of removal when the defendant's eligibility for such relief is unclear.").

Because we conclude that counsel's performance was "within the range of competence demanded of attorneys in criminal cases," *Strickland*, 466 U.S. at 687 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)), we need not consider whether counsel's deficient performance prejudiced Juarez in this case.

---

[4] We note, as did the postconviction court, that the defense of cancellation of removal was not available to Juarez because he was not a lawful permanent resident of the United States for five years prior to his arrest and conviction in this case. *See* 8 U.S.C. §§ 1182(a)(2), 1229b(b)(1)(C) (2012); *accord People v. Vicente-Sontay*, 2014 COA 175, ¶¶ 37-38.

IV. Conclusion

The order is affirmed.

JUDGE BOORAS and JUDGE DUNN concur.

DISTRICT COURT CITY & COUNTY OF DENVER, COLORADO 520 West Colfax Avenue Denver, Colorado 80204	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff v. ALFREDO JUAREZ Defendant	**▲ COURT USE ONLY ▲** Case Number: 11CR1007 Courtroom: 5D
DENIAL OF PETITION FOR POST CONVICTION RELIEF (Filed May 28, 2013)	

THIS MATTER comes before the Court on the Defendant's Petition for Postconviction Relief Pursuant to Crim. P. 35(c). The Court, having considered the related submissions of the parties, the testimony and evidence presented at the recent hearing, the related pleadings and its file, finds and rules as follows:

Background

The Defendant is not a United States citizen but he had been brought to this country from Mexico by his parents when he was a small child. He has no ties to Mexico other than being born there. He is married to and has children with a United States citizen and he

obtained his lawful resident status. In the present case, he was charged with a class 6 felony for possession of a Schedule II controlled substance, cocaine. In such regard, the police allege that they responded to a report of a disturbance in which an intoxicated person was fighting with family members inside a residence. They claim that they saw the Defendant assaulting three women inside the residence and that they eventually had to subdue the Defendant with a taser. After the Defendant was arrested, powder cocaine was found in the Defendant's coin pocket and what appeared to be cocaine was observed on the Defendant's face, around his nose.

The proceedings in this case were continued multiple times to permit the Defendant to explore the immigration consequences of the proposed plea bargain. More specifically, on March 21, 2011, while still before the County Court, the Defendant requested and was granted a one month continuance for that purpose. On May 19, 2011, the Defendant reported that he had consulted with an immigration attorney, Lillian Shea, but asked for a continuance to retain a criminal defense attorney. On June 2, 2011, John Tatum entered his appearance and the Defendant sought and was granted another month long continuance. On July 12, 2011, the parties reported that they had not reached a disposition and the matter was set over for an appearance before this Court. On August 4, 2011, the Defendant sought and was granted almost a two month continuance. On September 29, 2011, the Defendant pled not guilty and the matter was set for disposition and a

motions hearing. On November 3, 2011, the Defendant requested another continuance for the express purpose of resolving issues with an immigration attorney before deciding whether to accept a plea offer. On January 27, 2012, the Defendant again sought a continuance of the proceedings. Finally, on February 16, 2012, the matter was scheduled for trial and the disposition setting was put off for an additional two months. On April 13, 2012, at the final disposition setting, the Defendant accepted the proposed plea bargain and pled guilty to a class 1 misdemeanor for possession of a Schedule V controlled substance, pyrovalerone,[1] with an agreement to a sentence of drug court probation.

During the providency hearing, the Defendant's attorney, Mr. Tatum, advised the Court, in the presence of the Defendant, that the Defendant had been told the plea would very likely result in deportation or some type of exclusion from the United States. Mr. Tatum also stated that, even though the Defendant was a legal resident and had his green card, that any drug offense, other than simple possession of under an ounce of marijuana, would have negative immigration consequences. Mr. Tatum then went on to state that he could not tell the Defendant "any stronger" that, although the plea was to a misdemeanor, it was the equivalent of a felony for immigration purposes. These representations notwithstanding, the Defendant confirmed his

---

[1] Pyrovalerone is a controlled substance for purposes of the Immigration and Nationality Act pursuant to 21 C.F.R. § 1308.15(d)(1).

desire to accept the plea bargain. The Defendant was then immediately sentenced to drug court probation.

As discussed in more detail below, the Defendant's plea made him deportable. Nevertheless, deportation proceedings were not initiated against the Defendant, most likely because the Defendant was not placed into custody following his plea in this matter. Instead, the Defendant began drug court probation in May, 2012. On May 14, 2012, the drug court imposed two days in the Denver County Jail due to positive urinalysis tests for THC, but suspended the two days on the condition the level of THC dropped. On June 11, 2012, the Defendant's THC levels apparently did not drop and the drug court imposed the suspended jail time. On June 25, 2012, the drug court again found that the Defendant was not in compliance with his probation and, this time, imposed three days in the Denver County Jail. As a result of the second period of incarceration, United States Immigration and Customs Enforcement (ICE) placed a hold on the Defendant and began deportation proceedings. The Defendant was then deported to Mexico.

On October 9, 2012, the Defendant filed his Petition for Postconviction Relief Pursuant to Crim.P. 35(c). The Court initially denied the Petition without a hearing; however, after review of the Defendant's Motion to Reconsider, the Court vacated its initial denial and set the matter for a hearing. The matter eventually proceeded to a hearing on April 26, May 1 and May 6, 2013. The Defendant appeared, from Mexico, by means of an audio-video internet connection. The

Court heard testimony from the Defendant's attorney in the criminal proceeding, John Tatum, one of the immigration attorneys with whom he consulted, Marshall Whitehead, and the Defendant himself.

Legal Standards

Although there is no constitutional right to post-conviction review, Crim. P. 35 affords defendants this right subject to certain limitations. *People v. Weidemer*, 852 P.2d 424 (Colo. 1993). The validity of the judgment of conviction is presumed unless a defendant establishes his right to relief by a preponderance of the evidence. *People v. Rodriguez*, 914 P.2d 230 (Colo. 1996).

Generally, to establish a claim of ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance fell outside the wide range of professionally competent assistance; and, (2) the defendant was prejudiced by his counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *see also Silva v. People*, 156 P.3d 1164 (Colo. 2007). Where, as here, an ineffective assistance of counsel claim arises from alleged deficient representation during the plea bargaining stage of a criminal action, to establish *Strickland* prejudice, a defendant must prove that there is a reasonable probability that, but for his attorney's deficient representation, he would not have pleaded guilty and would have instead insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985). Because a presumption of validity attaches to a judgment of conviction, it is the defendant's burden

in a Crim. P. 35(c) proceeding to prove both elements of an ineffective assistance of counsel claim by a preponderance of the evidence. *People v. Russell*, 36 P.3d 92, 95 (Colo. App. 2001).

Federal statutory provisions regarding deportation

Pursuant to 8 U.S.C. § 1227(a), an alien admitted to the United States is subject to removal by order of the Attorney General if he is deportable. As applicable to the present circumstance, 8 U.S.C. § 1227(a)(2)(B)(i) provides that an alien who is convicted of a violation of a law relating to a controlled substance, other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

Pursuant to 8 U.S.C. § 1182(1), aliens who are inadmissible are ineligible for admission into the United States. Under 8 U.S.C. § 1182(a)(2)(A)(i)(II) an alien who is convicted of a violation of a law relating to a controlled substance is inadmissible.

Pursuant to 8 U.S.C. § 1229b(a)(1), the Attorney General may cancel removal of an alien who is deportable or who is inadmissible if, among other requirements, the alien has been a lawful permanent resident for at least 5 years.

Pursuant to 8 U.S.C. § 1226, an alien may be arrested and detained, upon a warrant issued by the Attorney General, pending a decision on whether to remove the alien. In certain circumstances, the Attorney

General may, but is not required to, release the alien on bond. Under subsection (c)(1)(a) of this statute, however, an alien is not entitled to such a bond, even on a discretionary basis, if he is inadmissible as a result of having committed a violation of a law relating to a controlled substance.

Advisement of deportation consequences

An attorney's responsibility to advise his client in a criminal proceeding of the deportation consequences of the client's plea was reviewed by the Colorado Supreme Court in *People v. Pozo*, 746 P.2d 523 (Colo. 1987). The Colorado Supreme Court was not prepared, at that time, to state in absolute terms that attorneys have a duty to advise noncitizen clients of the possible deportation consequences of a guilty plea. It did, however, find that the potential deportation consequences of guilty pleas are material to critical phases of criminal proceedings brought against noncitizen defendants and that, when a defense attorney is aware that his client is not a citizen, he may reasonably be required to investigate relevant immigration law.

Thirteen years later, the same issue arose in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010). Therein, the United States Supreme Court found that, under the present immigration laws, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to certain crimes. In so doing, it noted that deportation is a particularly severe penalty, even though it is not

technically a criminal sanction. It further stated that deportation is intimately related to the criminal process, that the law in this country has enmeshed deportation and criminal convictions for nearly a century, and recent changes in immigration law have made deportation a nearly automatic result for many noncitizen defendants. Accordingly, the United States Supreme Court held that, under the Sixth Amendment's guarantee of effective representation, "counsel must inform her client whether his plea carries ***a risk of deportation***." *Id.*, 130 S.Ct. at 1486 (emphasis added). The Supreme Court used this precise language – "risk of deportation" – multiple times in *Padilla.*

In *Padilla*, the defendant's attorney misadvised[2] the defendant that he was not likely to be deported. The Supreme Court found that the provisions of 8 U.S.C. § 1227(a)(2)(B)(i), which is also the primary statutory provision at issue in the present case, are succinct, clear, and explicit in defining the removal consequence for a defendant's conviction for a narcotics offense. In condemning the conduct of the defendant's attorney, the Court specifically noted that the attorney could have easily determined that the plea in that case would make the defendant "eligible for deportation" simply by reading the text of the statute. *Id.*, 130 S.Ct. at 1483.

---

[2] The standard set forth in *Padilla* is specifically not limited to affirmative misadvice. Rather, it encompasses both misadvice and failures to advise regarding the risk of deportation.

As discussed below, although the Defendant in the present case argues his prior counsel did not properly advise him of the deportation consequences of his plea, he also argues that he was not properly advised of the impact of his plea on his future admissibility, the impact on the defense of cancellation of removal or whether he would be subject to detention without bond during removal proceedings. *Padilla* does not directly address any of these issues. Instead, it specifically discusses an attorney's obligation to advise a defendant of the risk of *deportation.* The only obligation to advise a defendant of the more abstract concept of *immigration* consequences arises if the deportation consequences are not clear and, in that case, all that is required is an advisement that there may be a risk of adverse immigration consequences. *See id.*, 130 S.Ct. at 1477. This position is also supported by the express rationale behind the opinion. The reason noncitizen defendants need to be advised of deportation consequences, despite the fact that they are not required to be advised of many other possible consequences of their pleas, is that deportation imposes a severe penalty on such individuals. *Id.*, 130 S.Ct. at 1481. The severity of deportation, the fact that it is the equivalent of banishment or exile, underscores how critical it is that such defendants be advised they face a risk of deportation. *Id.*, 130 S.Ct. at 1486. Often, the right to remain in this country is more important to such defendants than any potential jail sentence. *Id.*, 130 S.Ct. at 1483. In fact, due to circumstances in some defendants' home countries, those defendants and their families risk being killed upon deportation. *Id.*, 130 S.Ct. at 1484, n.11.

Despite the fact that there is no express requirement in *Padilla* that other specific immigration consequences beyond deportation must be addressed by an attorney, the opinion does reference the fact that the Supreme Court had previously recognized, in *I.N.S. v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271 (2001), that preserving the possibility of discretionary relief from deportation would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer and that the Supreme Court had expected attorneys would familiarize themselves with that particular form of relief. *Padilla*, 130 S.Ct. at 1483. That acknowledgement, however, was made in dicta. Further, *St. Cyr* does not deal with the issue of effective assistance of counsel and *Padilla* does not directly address whether the Sixth Amendment requires an attorney to advise his client of the impact of a plea on possible defenses to deportation. When combined with the United States Supreme Court's express acknowledgment in *Padilla* that it must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, *Id.*, 130 S.Ct. at 1485, these facts suggest that the reference to the now repealed provision for discretionary relief from deportation serves simply to note the historical awareness of the severity of deportation, and not as a loose finding that other immigration consequences have the same status as the risk of deportation.

A year after *Padilla*, an attorney's obligation to advise a defendant about the risk of deportation came before the Colorado Court of Appeals in *People v. Kazadi*,

284 P.3d 70 (Colo. App. 2011). Similarly to the situation in the present case, the defendant in *Kazadi* came to the United States as a child, had no associations with anyone in his prior country, had a child with a United States citizen, but was being deported after having pled guilty to a felony drug charge as part of a deferred judgment and having also pled guilty to a misdemeanor drug charge not involving marijuana. The defendant in *Kazadi* alleged that his attorney had been ineffective in not advising him that he would become subject to presumptive mandatory removal and permanent exclusion from the United States. The trial court denied the defendant's Crim.P. 35(c) motion without a hearing, finding that he was not prejudiced by his attorney's purported ineffectiveness because he had read, understood, and signed a Crim. P. 11 advisement form which told him that his plea may cause removal, exclusion from admission to the United States or denial of naturalization and that, for certain felonies, federal statutes could require removal and permanent exclusion. The Court of Appeals found that the Crim. P. 11 advisement, which discussed the effect of pleading guilty to certain felony charges, did not inform the defendant of the removal consequences of his plea to the misdemeanor charge. Accordingly, the Court of Appeals held that the defendant was entitled to a hearing on his Crim. P. 35(c) motion. It is of note that the defendant was also facing deportation due to his plea to the felony charge as part of a deferred judgment, presumably under the definition of a conviction under 8 U.S.C. § 1221(48)(A). The Court of Appeals found that, even though the defendant was facing deportation as a

result of the felony plea, he was not entitled to relief under Crim.P. 35(c) because judgment had not entered on that plea.

Finally in this regard, in the recent case of *People v. Campos-Corona*, ___ P.3d ___, 2013 WL 781612 (Colo. App. 2013), the defendant was advised by his attorney and by the trial court that his plea would likely result in deportation and difficulty re-entering the United States. With only minimal discussion, the Court of Appeals apparently found the advisement to be the equivalent of an advisement that the plea may carry an adverse immigration risk, and found that the defendant had to be told, instead, that pleading guilty would subject him to a mandatory, permanent removal provision. *Campos-Corona*, however, has not yet been released for publication, and it appears a petition for certiorari in the Colorado Supreme Court is pending. As such, the holding is not presently binding on this Court and simply constitutes persuasive authority. Ultimately, the Court finds the holding not to be persuasive. First, the assumption that a defendant who is deportable necessarily will be removed is factually incorrect. For the same reasons discussed below, 8 U.S.C. § 1227(a) would have made the defendant deportable. The word "mandatory" does not appear in that statute. More importantly, the position taken in *Campos-Corona* misreads the distinction in *Padilla* between advising of the risk of deportation and advising of the possibility of adverse immigration consequences. *Padilla* specifically and repeatedly states that an attorney must advise his client if a plea will carry "a risk

of deportation." Advising a defendant that a plea will likely result in him being deported, advises him that there is a risk of deportation, not simply that there may be adverse immigration consequences.

Analysis

The Defendant was advised and was aware that his plea carried a risk of deportation. Further, the risk of deportation was correctly quantified as being very likely. As such, the Court finds that the Defendant has not established either prong of the *Strickland* test and that his attorney did not provide ineffective assistance of counsel.

The Defendant's attorney, Mr. Tatum, knew early on that the Defendant was a legal resident in this country but was not a citizen. Accordingly, he had an obligation to investigate whether the plea offer made to the Defendant would make the Defendant eligible for deportation. He did this by consulting with an experienced immigration attorney, Lillian Shea, as well as the Defendant's own immigration attorney, Mr. Whitehead. As a result of those consultations, he had a correct understanding that, if the Defendant accepted the plea bargain in this case, he would likely be deported. More importantly in this case, Mr. Tatum also advised the Defendant of this fact. Pursuant to *Padilla*, Mr. Tatum's obligation was to advise the Defendant "whether his plea carrie[d] a risk of deportation," *Padilla*, 130 S.Ct. at 1486, and Mr. Tatum met this obligation. Accordingly, the Court finds that the

Defendant has not established the first prong of the *Strickland* test.

The defense argues that advising the Defendant he was likely to be deported is insufficient and that the Defendant should have been told "his guilty plea would trigger the automatic, mandatory and permanent removal provision of deportability." Not only is this argument contrary to the specific language in *Padilla* discussed above, it turns on an illusory distinction. To say that someone "automatically" will be deportable, is the same as saying he will be deportable. To say that he "mandatorily" will be deportable, is the same as saying he will be deportable. The only thing the additional language does is create a misleading impression of the probability of actual deportation. As the facts in this case demonstrate, however, it was not certain that the Defendant would be deported. To the contrary, but for the Defendant's immediate and repeated problems complying with his probation, he would not have been placed into custody and would not likely have been deported. Further, as established by Mr. Whitehead, who specializes in immigration law and who has forty years of experience in that area, whether a person who is deportable will actually be deported is not absolute, certain or guaranteed. Advising someone that he will be deportable, which is all 8 U.S.C. § 1227 states, does not indicate how likely he is to be deported, whereas advising him that he is likely to be deported provides him with additional, accurate information upon which he can make a decision. Further, an advisement that he is likely to be deported effectively encompasses his status

under 8 U.S.C. § 1227. Stated another way, a person must necessarily be eligible for deportation if he is likely to be deported. Therefore, by advising the Defendant that if he took the plea offer in this case he would likely be deported, Mr. Tatum accurately related the effect of the plea under 8 U.S.C. § 1227(a) and also provided additional, correct information as to the probability of deportation which was not explicit under the statute.

It is of note that the other purported deficiencies raised by the defense in this case fall squarely within the concern of the dissent in *Padilla* of post-conviction counsel devising "ever-expanding categories of plea-invalidating . . . failures to warn." *Padilla*, 130 S.Ct. at 1496. Addressing the first of those purported failures, there is no express requirement in *Padilla* that an attorney must advise a defendant whether his plea will make him inadmissible. Although the language of 8 U.S.C. § 1182 appears to be "succinct and clear," *Padilla*, 130 S.Ct. at 1483, it is not succinct and clear as to removal, as required by *Padilla*, it is succinct and clear as to a different immigration consequence: admissibility. As noted in Justice Alito's concurrence, there are circumstances in which a plea can render a defendant inadmissible but not deportable. Based upon the majority's discussion of the concurrence, it appears the majority considered its holding to be sufficiently narrow in scope as to avoid such issues. For this to be true, the ruling could not require an attorney to affirmatively advise his client of immigration consequences other than the risk of deportation. Further,

inadmissibility as a "penalty" resulting from a criminal plea does not carry the same severe consequences of deportation which justify the imposition of a special obligation on defense attorneys which is not imposed by numerous other significant and onerous consequences of guilty pleas.

The same analysis applies with even greater force to the question of whether a defense attorney has an obligation to advise a defendant whether cancellation of removal is possible and whether bail will be available if deportation proceedings are initiated. With regard to the first issue, based upon the reference in *Padilla* to *St. Cyr* and the fact that cancellation of deportation serves a similar function, albeit drastically more restricted, as the repealed provision for discretionary relief from deportation, it could be argued that the United States Supreme Court would extend a defense attorney's obligations to also advise his client regarding the possibility of cancellation of removal. Even if that were true, however, the nature of the plea in this case had no direct impact on whether the Attorney General could cancel removal for the Defendant. Instead, cancellation was not available to the Defendant under 8 U.S.C. § 1229b(a)(1) because he had not been a permanent resident for at least 5 years. In other words, contrary to the Defendant's argument, his plea did not destroy the defense of cancellation of removal – the Defendant was never eligible for that defense. As such, there was no such defense to preserve. Moreover, the *Padilla* opinion acknowledges that immigration law is complex and is a legal specialty of its own. The concept

of cancellation of removal is different than the risk of deportation in that it would require a criminal defense attorney, who does not practice in the area of immigration law, to so familiarize himself with the procedures of deportation proceedings as to be aware of the defense in the first instance, before he could know to research whether it may be applicable. If defense attorneys are required to have that degree of familiarity with immigration law, then they would presumably also be required to understand concepts such as withholding of removal, the application of the Convention Against Torture, and exemption from inadmissibility for refugees. As to the issue of detention under 8 U.S.C. § 1226, the defense position would require an attorney to advise a defendant of a collateral consequence to a collateral consequence. Although pleas to certain offenses create a risk of detention throughout any subsequent removal proceedings, guilty pleas often subject defendants to incarceration in collateral matters, including probation revocation proceedings and habitual offender proceedings. More importantly, as noted by the concurrence in *Padilla*, they can carry a wide variety of consequences such as civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses, yet the Sixth Amendment does not require defense attorneys to advise their clients of such consequences and there is no reason to treat immigration issues aside from deportation any differently.

Even if the Court were to find that advising the Defendant he was likely to be deported was deficient, or that Mr. Tatum had an obligation to advise the Defendant about the effect of his plea on admissibility, cancellation of removal or detention during deportation proceedings, the Defendant has still not proven the second prong under the *Strickland* test.

The Defendant's own testimony establishes that he was aware the only plea that would avoid the risk of deportation was a plea either to possession of marijuana or to a class 3 misdemeanor. In fact, the Defendant indicated that it was he who initially advised Mr. Tatum of the risk of deportation rather than the other way around. Understandably, the Defendant did not want to be deported but, after numerous continuances to try to obtain a better offer, it became apparent that the prosecution was not willing to offer a plea to an offense that would not carry a risk of deportation. Knowing that the best offer he could obtain made him eligible for deportation, the Defendant accepted that risk and took the plea. The Defendant now claims that if he had understood the consequences of his plea he would have proceeded to trial,[3] yet this is belied by his

[3] This assertion, however, was made in response to a narrow leading question by his attorney. When answering a related question by the prosecution, the Defendant stated that, if he had known the other consequences of his plea, he would have said he was not ready to make a plea, that he would have asked to delay the proceedings further, and that he would have hired a different attorney. As discussed in the Background section of this ruling, by the time of the plea, the case had been set over nine times and

actions in the case. More specifically, the Defendant believed that he would likely receive a sentence to probation whether he took the plea deal or was convicted at trial of the original felony charge.[4] He had been advised at least by Mr. Tatum and Mr. Whitehead that if he took the plea bargain he would very likely be deported and that he would be permanently barred from returning to the United States. Knowing these consequences, the Defendant still chose to plead guilty. From the statements he made to his wife prior to the plea, it appears the determinative issue was the fact that he would avoid a felony conviction, even though the Defendant was advised before the Court that the charge to which he was pleading would be treated the same as a felony for immigration purposes. Although the risks of going to trial were largely the same for immigration purposes, the decision to accept the plea bargain was still objectively rational. In such regard, the evidence

---

the Defendant had consulted with multiple attorneys. The Defendant pled guilty on the last disposition date before trial.

[4] As a practical matter, this belief was potentially incorrect in this instance. The sheer volume of cases before the Court necessarily requires it to accommodate some sentencing concessions made as part of the prosecution's efforts to resolve the vast majority of its cases short of trial. Absent such a circumstance, there is usually no benefit in imposing a sentence to probation on a defendant who cannot participate in any of its programs and who will not be subject to any supervision. This fact notwithstanding, the Defendant's belief was consistent with the advice given to him by Mr. Tatum's and that advice was reasonable based upon his attorney's experiences with other district courts in Colorado. The fact that defense counsel's assessment of the likelihood of probation in this case was possibly incorrect is irrelevant to the issues presently before the Court.

that the Defendant was in possession of cocaine appears to be overwhelming. Although the defense devotes significant discussion to the amount of cocaine recovered, a measurable quantity of cocaine was recovered from the Defendant's person and a white powder was observed around his nose. Although the strength of the evidence against the Defendant is not determinative of whether he would still have accepted a plea disposition, it is strongly supportive of that fact in this case. Further, the underlying factual allegations support Mr. Tatum's assessment that the Defendant would likely lose at trial. Since a felony conviction carries greater social stigma, makes it more difficult to obtain employment if the Defendant was not deported and could be a possible factor impacting future actions by ICE if the law were ever to change,[5] and since the Defendant faced essentially the same risk of deportation either way, the decision to accept a misdemeanor conviction rather than to proceed to trial is an understandable choice.

Although the Defendant was aware that his plea would subject him to the risk of deportation at the time of his plea, his desire to vacate that plea involves a present misapprehension of that risk. More specifically, during his testimony, the Defendant was critical of the fact that he was advised that he "could" be deported due to his plea, not that he "would" be deported.

---

[5] Both the Defendant and Mr. Tatum indicated that this issue was discussed. Further, it appears from the Defendant's testimony that the possibility that immigration law could always change in the future had some impact on his decision.

Although the defense has argued strenuously that the Defendant was not advised of an automatic consequence of his plea, that consequence was the change in his status not actual deportation. The fact that the Defendant necessarily became *deportable* does not mean that he would automatically be *deported.* As such, the advice given to him, that he would likely be deported was correct, whereas the advisement he now believes he should have been given would have been inaccurate. Further, since the Defendant knew that the only way to avoid becoming deportable was to plead to a minor marijuana charge or to a class three misdemeanor, but chose to go ahead with a plea that would subject him to likely deportation, the Court finds no merit in the assertion that he would have taken a different course of action if he had been properly advised of the risk of deportation.

The Defendant also indicated that he would not have taken the plea had he known that it would subject him to lifetime inadmissibility. Contrary to this assertion, based upon the testimony of Mr. Whitehead, and to a lesser degree the testimony of Mr. Tatum, the Court finds that the Defendant was told that, if he was deported, he would be permanently barred from returning. The Defendant asserts, however, that this concept was not explained to him. The consequence, however, does not require further definition. Instead, the fact that the Defendant would be permanently barred from returning to the United States if he was; in fact, deported is an explanation of what it means to be inadmissible. Since there is no reason to suspect the

Defendant could not understand this concept, there was no need to provide an explanation of the explanation of the concept of inadmissibility.

The Defendant also asserts that he would not have taken the plea if he had known that he could not post bail if removal proceedings were, in fact, initiated. The reason for this position, however, is somewhat unclear. The Defendant seems to suggest that the related reason is that he would not have wanted to be in custody and that he would not have wanted to miss spending holidays and other events with his children. The Defendant, however, continued to smoke marijuana and failed to comply with his probation despite knowing he would be incarcerated for doing so. Much more importantly, the only way the Defendant would be subject to immigration detention would be if the Defendant was in the process of being deported. Deportation was of far greater concern to the Defendant, yet he was willing to take the plea in this case despite the chance that it might result in his deportation. Considering this and all of the other related circumstances, the Court does not find it credible that knowledge of the fact the Defendant could not post a bond during removal proceedings would have changed his decision.

Ultimately, the Defendant's primary desire was to avoid deportation if he could do so. When it became clear that the prosecution would not offer a plea which would avoid that risk and that he would likely lose at trial, he chose what he perceived to be his next best option – avoiding a felony conviction. The decision was a rational one under the circumstances. The Defendant

was aware that a felony conviction would make it more difficult for him to keep or obtain employment in the event he was not deported. In fact, he would have received that benefit had he complied with his probation. Moreover, it was pointed out to him that the present administration appears to be immigration friendly and it is possible that the immigration laws could change in the future. If those laws do change and deportation standards are to be relaxed, it is logical that they are more likely to be eased for misdemeanor convictions than felony convictions. Finally in this regard, it strongly appears that the Defendant's decision was motivated by the hope that he might not actually be deported even though he knew this outcome was very likely. These circumstances also establish that risk of detention during removal proceedings and the availability of the cancellation of removal would not have likely had any impact on the Defendant's decision to accept the plea offer.

Ruling

For the reasons discussed above, the Court finds that the Defendant has not established that his attorney counsel's performance fell below the range of professionally competent assistance or that he was prejudiced by any of his attorney's purported errors. Accordingly, the Defendant's Petition for Postconviction Relief Pursuant to Crim. P. 35(c) is denied.

SO ORDERED this 28th day of May, 2013

BY THE COURT:

/s/ John W. Madden
John W. Madden, IV
District Court Judge

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: March 2, 2020 CASE NUMBER: 2017SC815
Certiorari to the Court of Appeals, 2013CA1296 District Court, City and County of Denver, 2011CR1007	
Petitioner: Alfredo Juarez, **v.** **Respondent:** The People of the State of Colorado	Supreme Court Case No: 2017SC815
ORDER OF COURT	

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MARCH 2, 2020.

JUSTICE ARQUEZ and JUSTICE GABRIEL would grant the petition.