NO. 20-120

In the
Supreme Court of the United States

ALFREDO JUAREZ,
Petitioner,
v.
STATE OF COLORADO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010), this Court held that when a noncitizen client is charged with a deportable offense, "counsel must inform her client whether his plea carries a risk of deportation," and when the "deportation consequence is truly clear … the duty to give correct advice is equally clear."

The question presented is: Does *Padilla* require counsel to use specific language in giving "correct advice," or does it instead require counsel to accurately convey—in terms the client can understand—that the guilty plea makes the client "deportable" under the immigration laws, so the client can make a knowing and intelligent decision whether to plead guilty?

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INTRODUCTION

After months of plea negotiations focused on minimizing the risk of deportation, petitioner—knowing it made him deportable—chose to accept a guilty plea to misdemeanor possession of a controlled substance with a stipulated probationary sentence, rather than risking a felony conviction and prison after trial. Petitioner then violated probation several times and was sent to jail, where the United States Immigration and Customs Enforcement (ICE) placed an immigration hold on him and initiated deportation proceedings, which led to ICE deporting him.

Petitioner moved for postconviction relief in the trial court, asserting ineffective assistance of plea counsel for failure to advise him that his guilty plea made him "automatically deportable." After hearings, the trial court denied relief, concluding that petitioner had failed to establish both deficient performance of counsel and resulting prejudice under *Strickland*.

On appeal, the Colorado Court of Appeals affirmed, concluding petitioner had failed to establish deficient performance of counsel, because counsel correctly advised him under *Padilla*.

Upon certiorari review, the Colorado Supreme Court affirmed, also concluding that plea counsel's advice satisfied *Padilla*.

STATEMENT OF THE CASE

1. ***Factual background.*** This case arose out of a 2011 domestic disturbance. R. p. 2. The police arrived at petitioner's residence after a family member called 911. Officers had to physically subdue petitioner, who had cocaine in his nostrils, lip, and pockets. R. pp. 2, 5-7; Tr. pp. 10-12 (Apr. 13, 2012); Tr. pp. 62-64 (Apr. 16, 2013).

The prosecution charged petitioner, a lawful resident alien, with possession of a schedule II controlled substance, a felony, in March 2011. R. pp. 5-6; Tr. p. 16 (Apr. 26, 2013); Tr. pp. 10-11 (May 1, 2013).

A year later, petitioner pleaded guilty to an added count of possession of a schedule V controlled substance, a misdemeanor, in exchange for the dismissal of the felony charge. R. pp. 25-32; Tr. p. 9 (Apr. 13, 2012). At the providency hearing, plea counsel made a record about petitioner's immigration status, and he explained that they had delayed the case for a long time because they were trying to figure out if there was a way to obtain a disposition that would be better for petitioner "immigration-wise." Tr. pp. 6-7 (Apr. 13, 2012). Counsel advised petitioner that even though he would plead guilty to a misdemeanor offense, it was the equivalent of a felony under the immigration laws, and counsel was ready to proceed to trial, although he thought trial would result in a felony conviction, which would also make petitioner deportable. Tr. pp. 7-8 (Apr. 13, 2012).

The trial court sentenced petitioner to two years of drug court probation, as stipulated by the parties,

which petitioner began in early May 2012. R. p. 25; Tr. p. 12 (Apr. 13, 2012).

Following several violations of his probation, the trial court ordered petitioner to serve jail time. R. pp. 37-38. There, ICE placed a hold on petitioner and began deportation proceedings. R. pp. 69-73; Tr. pp. 2-4 (Mar. 15, 2013). In September 2012, the immigration court entered an order of removal, and ICE deported him. R. pp. 73, 160.

2. ***Postconviction proceedings.*** Petitioner, through counsel, moved for postconviction relief under Colo. Crim. P. 35(c), asserting ineffective assistance of plea counsel. R. pp. 41-49. Petitioner alleged plea counsel failed to advise him that his guilty plea would subject him to "mandatory deportation" because it "automatically trigger[ed] the controlled substance ground of deportability," and that there was a reasonable probability that, but for his counsel's error, he would not have pleaded guilty and would have insisted on going to trial. R. pp. 45-47.

The trial court held a three-day hearing, where petitioner, his plea counsel, and petitioner's immigration attorney, whom he had retained in 2011, testified. Tr. pp. 12-13 (Apr. 26, 2013); Tr. pp. 5-6, 73-74 (May 1, 2013).

Petitioner's plea counsel testified that petitioner was a non-citizen legal resident, that petitioner had an immigration attorney, and that immigration was always petitioner's "paramount consideration." Tr. p. 16:13-16 (Apr. 26, 2013).

Counsel knew he had a duty to discuss immigration issues with petitioner, and in June 2011, counsel spoke with petitioner's immigration attorney

to discuss the criminal case. Tr. pp. 17-20 (Apr. 26, 2013).

The immigration attorney advised that, because this was a drug case, petitioner "could only sustain a conviction or enter a plea to possession of less than an ounce of marijuana" or a class 3 misdemeanor which the immigration code treats as a petty-offense exception. Tr. pp. 20-21 (Apr. 26, 2013). Around that time, the prosecution had offered a plea to a class 1 misdemeanor with drug court probation, but that plea "was not acceptable because it would likely get [petitioner] deported." Tr. pp. 21-22 (Apr. 26, 2013). Plea counsel could not remember whether the immigration attorney said, "likely to be deported" or "would be deported," but he was certain the immigration attorney did not say that deportation would be "automatic" or would be triggered "as a matter of law." Tr. pp. 25-26 (Apr. 26, 2013). Plea counsel still understood that "deportation was probably going to happen" under the prosecution's plea offer. Tr. p. 22 (Apr. 26, 2013). The immigration attorney specifically advised they needed a "nondrug case," or if it was a drug case, "a less than an ounce of marijuana" or a "class 3 misdemeanor." Tr. p. 24:9-16 (Apr. 26, 2013). Plea counsel conveyed to petitioner all the information he received from the immigration attorney. Tr. pp. 26-29 (Apr. 26, 2013). Plea counsel also consulted another experienced immigration attorney, who gave the same advice. Tr. pp. 26-28 (Apr. 26, 2013).

Plea counsel talked with petitioner's immigration attorney a second time, who again provided the same advice. Tr. pp. 28-29 (Apr. 26, 2013). Later, petitioner,

plea counsel, and the immigration attorney spoke on the phone, and the immigration attorney advised that the guilty plea to a class 1 misdemeanor was a "bad deal," and he had to have less than an ounce of marijuana, or a nondrug class 3 misdemeanor. Tr. p. 30:15-25 (Apr. 26, 2013). Plea counsel tried to get an offer from the prosecution that would allow petitioner to stay in the country, but the prosecutor insisted on the class 1 misdemeanor and drug court probation. Tr. p. 52:5-12 (Apr. 26, 2013). Counsel told the prosecutor the problem was that "*you're offering me a deal that gets him drug court probation, but he's going to get deported*." Tr. p. 52:5-12 (Apr. 26, 2013) (emphasis added).

Plea counsel told petitioner if he went to trial, his prospects of winning were not good, but he thought he would still get probation. Tr. pp. 42-43 (Apr. 26, 2013). He also discussed with petitioner the difference between a felony and a misdemeanor, and explained that it made no difference for immigration purposes. Petitioner, however, believed the felony "might somehow be viewed worse by immigration authorities than the misdemeanor," and was concerned trial would result in a felony conviction. Tr. pp. 50-64 (Apr. 26, 2013). Petitioner decided to accept the plea to avoid a felony conviction; he was sentenced to drug court probation, and, because he violated its terms, he was sent to jail, where ICE placed an immigration hold on him. Tr. pp. 52-54, 64-65 (Apr. 26, 2013).

Petitioner's immigration attorney testified he had been practicing immigration law for 40 years and had experience advising noncitizens about the immigration consequences of convictions. Tr. pp. 75-

76 (May 1, 2013). He first got involved in petitioner's case in May 2011; he helped petitioner apply for the removal of his conditional resident status, and around that time, petitioner told the attorney he had been charged with a drug offense. Tr. pp. 74-75 (May 1, 2013).

The attorney first talked with petitioner's plea counsel in August 2011, and then in November 2011. Tr. p. 81:4-8 (May 1, 2013). Another immigration attorney in the same firm also talked with petitioner and his plea counsel about the consequences of taking the plea. Tr. p. 81:16-20 (May 1, 2013). In the November discussion, the immigration attorney told plea counsel they should try to find a nondrug charge or take it to trial, because for immigration purposes it made no difference the plea was to a misdemeanor rather than a felony. Tr. p. 82:1-9 (May 1, 2013). The immigration attorney advised petitioner that, if he took the plea, he could face removal proceedings that would probably result in a permanent bar to reentry. Tr. pp. 83-87, 92-93 (May 1, 2013).

The immigration attorney did not specifically state a controlled-substance offense "would automatically trigger deportability." Tr. pp. 92-93 (May 1, 2013). His understanding was:

> [I]f a person is convicted of [a] drug offense with that one exception involving the 30 grams or less of marijuana, if a person is convicted of a drug offense as a lawful permanent resident, they will be placed in removal proceedings. It would be rare that the government would not do that. So it is pretty standard operating

> procedure that the government would place a person in removal proceeding.

Tr. p. 94:11-18 (May 1, 2013).

The trial court asked the attorney why he said petitioner would "probably" be placed in removal proceedings and "probably" would face a permanent bar. Tr. p. 104:7-12 (May 1, 2013). The attorney explained:

> Because [in] my 40 years of immigration [practice] 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 [removal] 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.

Tr. p. 104:13-24 (May 1, 2013).

Petitioner testified that the first time counsel advised him about the immigration consequences of the guilty plea was outside the courtroom in one of their court appearances; petitioner told him he had been told that he "could possibly be deported," if he

pleaded guilty to that charge. Tr. p. 13:12-20 (May 1, 2013). Petitioner told counsel he was talking to an immigration attorney who was in the process of adjusting his residency status. Tr. p. 13:22-24 (May 1, 2013). The immigration attorney advised him that if he "didn't get the charge dropped to a 30 grams of marijuana or anything less that [he] could possibly face deportation." Tr. p. 14:4-8 (May 1, 2013). So plea counsel called the immigration attorney, who again said that petitioner "could be deported"; but he did not specifically advise about "automatic immigration consequences." Tr. pp. 14-15, 24 (May 1, 2013).

During his cross-examination by the prosecution, petitioner admitted the following:

- Plea counsel told him he had to plead guilty to a marijuana charge or a class 3 misdemeanor in order to avoid deportation. Tr. p. 38:2-8 (May 1, 2013).

- His immigration attorney told him the plea was a "bad deal." Tr. pp. 51-52 (May 1, 2013).

- Plea counsel told him if he went to trial, he could lose and end up with a felony conviction, which petitioner said was a "big deal for me," because "I wanted to continue to have a good job and make a good outcome for my family." Tr. p. 54:13-18 (May 1, 2013).

- A felony conviction was a "bigger deal" to petitioner than a misdemeanor, because he could lose his job and green card, and go to jail. Tr. pp. 54-55 (May 1, 2013).

- Petitioner's counsel advised that his guilty plea "*would make me deportable*.... They never said you are

going to get deported as soon as you are free.[1] You are going to get deported, they never said that." Tr. p. 63:9-13 (May 1, 2013) (emphasis added).

- Petitioner knew that if he went to jail he could be deported because "ICE does a routine check every certain days of the week and they look your name up and if you [are] a resident and you have a drug conviction you automatically get an ICE hold." Tr. pp. 46-47 (May 1, 2013).

- Plea counsel had his case continued many times because they "were trying to get the lower charge with 30 grams of marijuana or less." Tr. p. 67:1-7 (May 1, 2013).

- The marijuana charge was an important distinction because it "wouldn't get [petitioner] deported," and the class 1 misdemeanor "could" get him deported. Tr. p. 68:10-16 (May 1, 2013).

- Petitioner told the court he "was trying to get a better deal that wouldn't affect me and my immigration status," and he knew he "*was pleading guilty to a misdemeanor that would make me deportable according to the information that my*

[1] ICE did not place a hold on petitioner when "he was free," but when he was in jail for repeated violations of his probation. As the trial court found, "but for [petitioner's] immediate and repeated problems with complying with his probation, he would not have been placed into custody and would not likely have been deported." Pet. App. 59. The court also found that "[t]he fact that [petitioner] necessarily became *deportable* [did] not mean that he would automatically be *deported*[,]" thus the advisement petitioner claims he should have been given—that he was going to get deported—"would have been inaccurate." Pet. App. 66 (emphasis in original).

lawyer gave me and according to what he knew." Tr. p. 69:10-16 (May 1, 2013) (emphasis added).

The trial court denied petitioner's motion in a detailed order, concluding that he failed to establish both deficient performance of plea counsel and resulting prejudice. Pet. App. 46-69. The trial court found that the case had been continued many times to permit petitioner to obtain an immigration-safe plea; petitioner was advised that pleading guilty to a misdemeanor was the equivalent to pleading guilty to a felony for immigration purposes; he was advised and knew that his plea carried a risk of deportation and the only plea that would avoid that risk was a plea to possession of a small amount of marijuana or to a class 3 misdemeanor; plea counsel consulted with two immigration attorneys, who advised that the plea made petitioner deportable; petitioner pleaded guilty because—although avoiding deportation was his paramount consideration—his next best option was to avoid a felony conviction. Pet. App. 47-48, 58, 63, 67.

Under *Padilla*, plea counsel's "obligation was to advise [petitioner] 'whether his plea carrie[d] a risk of deportation,' and [counsel] met his obligation." Pet. App. 58. The trial court rejected petitioner's contention that *Padilla* required counsel to advise him that his guilty plea would trigger "the automatic, mandatory and permanent removal provision of deportability," observing that petitioner's argument contradicted the specific language in *Padilla*. The trial court also observed that petitioner's argument turned on an illusory distinction: to say someone was "automatically" or "mandatorily" deportable "is the same as saying that he is deportable." Characterizing

deportability as automatic or mandatory only created a "misleading impression of the probability of actual deportation." Pet. App. 59. As the facts demonstrated, "it was not certain [petitioner] would be deported"; indeed, "but for [petitioner's] immediate and repeated problems complying with his probation, he would not have been placed into custody and would not likely have been deported." Pet. App. 59.

The trial court also concluded that even if counsel's advice was deficient, petitioner failed to establish prejudice, because the record showed that "had [petitioner] understood the consequences of his plea," he would have proceeded to trial. Pet. App. 63-64. The court noted that while petitioner's primary desire was to avoid deportation, "[w]hen it became clear that the prosecution would not offer a plea which would avoid that risk and that [petitioner] would lose at trial, he chose what he perceived to be his next best option – avoiding a felony conviction." Pet. App. 67.

3. *Colorado Court of Appeals' Opinion.* Petitioner appealed, and the Colorado Court of Appeals affirmed, concluding that plea counsel correctly advised petitioner under *Padilla*. Pet. App. 24-45. The court of appeals interpreted *Padilla*'s requirement that a defense counsel give "correct advice," *Padilla*, 559 U.S. at 369, as a requirement to advise a client "about the risk of deportation arising from a guilty plea." Pet. App. 36. But this advice:

> [N]eed 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.

Pet. App. 36.

The court of appeals concluded that the well-developed record supported the trial court's conclusion that petitioner was correctly advised and "fully understood the risk of his plea prior to pleading guilty." Pet. App. 43.

In its analysis the court of appeals reasoned that counsel's advice met the "spirit" of a standard followed by a "majority of jurisdictions" that had 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.'" Pet. App. 38-39 (citing cases), 41.

But the court of appeals disagreed with that standard if it required the advice to use "terms of absolute certainty" or incorporate "talismanic language." Pet. App. 41. In that respect, it found more persuasive cases from other jurisdictions that had concluded that "because deportation is not automatic after conviction for a deportable offense, *Padilla* does not require an attorney to advise that he will, with 100% certainty, be deported." Pet. App. 41.

Because petitioner failed to show deficient performance, the court of appeals did not consider prejudice. Pet. App. 44.

4. *Colorado Supreme Court's Opinion.* The Colorado Supreme Court affirmed the court of appeals, concluding petitioner failed to establish deficient performance of counsel. Pet. App. 1-14. Two justices concurred in the judgment; they concluded the advice was deficient, but no prejudice resulted. Pet. App. 15-23.

The Colorado Supreme Court reasoned that under *Padilla*'s holding "counsel must inform her client whether his plea carries a risk of deportation." Pet. App. 11. *Padilla* distinguished between immigration law that was *not* "succinct and straightforward" in defining the deportation consequence, and immigration law that *was*, requiring that when the deportation consequence is "truly clear, counsel has a duty to give correct advice." Pet. App. 11. The "correct advice" referred to a "correct explanation of 'the law.'" Pet. App. 11. The immigration law *Padilla* found to be clear—because it succinctly defined the deportation consequence—was the same immigration law here. 8 U.S.C. § 1227(a)(2)(B)(i) (2018). That consequence was that "such an individual would be 'deportable.'" Pet. App 11-12. Thus, the "correct advice" about the legal consequence of petitioner's plea was, "just as it was in *Padilla*," that he would "in the language of the statute, be 'deportable,'" precisely the advice petitioner received. Pet. App. 12.

The Colorado Supreme Court rejected a reading of *Padilla* that would require counsel "to predict the likelihood that the law will actually be enforced and [petitioner] will actually be deported." Pet. App. 13. Plea counsel's assessment that, if petitioner took the plea, he "would probably be deported" did not detract

or minimize the correct advice he also received; i.e., accepting the plea made him "deportable." Pet. App. 13.

This petition was then filed.

REASONS FOR DENYING THE PETITION

In *Padilla,* this Court held that counsel must "inform her client whether his plea carries a risk of deportation" and when the "deportation consequence is truly clear," counsel has a duty to give "correct advice." 559 U.S. at 369.

Petitioner argues that—despite the multiple layers of advice he received by his plea counsel and an expert in immigration law, despite the many continuances requested to seek an "immigration-safe" plea, and despite petitioner's concession below that he understood his guilty plea to a drug offense made him "deportable"—his plea counsel's advice still was deficient because he failed to couch it in specific language; i.e., that "the guilty plea would trigger his mandatory deportation as a matter of federal law." Pet. 21.

Petitioner asserts there is a deep conflict among circuit courts and state high courts in their application of *Padilla* that requires this Court's intervention. He also asserts the Colorado Supreme Court decision was incorrect, and that prejudice should not be an issue of concern in this case, or, if it is, *Lee v. United States*, 137 S. Ct. 1958 (2017), disposes of it in his favor.

Because none of petitioner's assertions are correct, this Court should deny the petition.

I. There is no genuine split about *Padilla*: the differing authorities reflect their different procedural postures and facts that do not demonstrate a split.

Petitioner cites[2] cases from the Second, Third, and Ninth Circuits, and high courts in Connecticut, Florida, Georgia, Iowa, Massachusetts, and Washington as constituting a majority of jurisdictions that have interpreted *Padilla* to require counsel to "explain the unequivocal terms when the [immigration statute] clearly mandates deportation as a consequence of the guilty plea." Pet. 14.

On the other hand, petitioner cites[3] cases from the Sixth and Eighth Circuits and high courts in Maryland, Rhode Island, and Wisconsin as constituting a minority of jurisdictions that, according to petitioner, have interpreted *Padilla* to only require

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[2] *United States v. Al Halabi*, 633 F. App'x 801, 803 (2d Cir. 2015); *United States v. Fazio*, 795 F.3d 421, 427 (3d Cir. 2015); *United States v. Rodriguez-Vega*, 797 F.3d 781, 788 (9th Cir. 2015); *United States v. Bonilla*, 637 F.3d 980, 984 (9th Cir. 2011); *Diaz v. Iowa*, 896 N.W.2d 723, 730 (Iowa 2017); *Budziszewski v. Commissioner of Correction*, 142 A.3d 243, 249 (Conn. 2016); *Encarnacion v. Georgia*, 295 Ga. 660, 663, 763 S.E.2d 463, 466 (2014); *Massachusetts v. DeJesus*, 9 N.E.3d 789, 795 (Mass. 2014); *Hernandez v. Florida*, 124 So.3d 757, 762 (Fla. 2012); *Washington v. Sandoval*, 249 P.3d 1015, 1017, 1020-21 (Wash. 2011).

[3] *United States v. Ramirez-Jimenez*, 907 F.3d 1091, 1094 (8th Cir. 2018); *Maiyo v. United States*, 576 F. App'x 567, 570-71 (6th Cir. 2014); *State v. Sanmartin Prado*, 141 A.3d 99, 127 (Md. 2016); *Shata v. Wisconsin*, 868 N.W.2d 93, 108 (Wisc. 2015); *Neufville v. Rhode Island*, 13 A.3d 607, 614 (R.I. 2011).

counsel "to caution noncitizen defendants that a guilty plea may carry a risk of deportation because the factual possibility of deportation is unpredictable." Pet. 15, 17.

But the different applications of *Padilla* in the "majority" of jurisdictions reflect different facts in those cases. And contrary to petitioner's assertion, the "minority" of jurisdictions did not interpret *Padilla* "to require legal advice only about the factual probability that the statute's mandate will be enforced." Pet. 14.

A. Because the difference in outcomes turned on the different facts in the cases, any conflict does not require this Court's intervention.

A close review of those cases shows that any differing applications of *Padilla* reflected the different facts and the inadequate advice given in the cases:

In *Al Halabi*, the Second Circuit held that "where the law clearly dictates that removal is presumptively mandatory," defense attorney's advice that defendant "may" be deported was deficient under *Padilla*. 633 F. App'x at 803.

In *Fazio,* the Third Circuit noted that plea counsel told Fazio that "it would be *more likely than not* that Fazio could remain in the United States," even though he pleaded guilty to a deportable offense, which made him "subject to automatic deportation," but the Third Circuit did not ultimately address whether counsel's advice constituted deficient performance because Fazio failed to show prejudice. 795 F.3d at 427 (emphasis added).

In *Rodriguez-Vega*, the Ninth Circuit concluded that counsel's advice that Rodriguez-Vega only faced "the *mere 'potential'* of removal," was deficient; counsel needed to advise Rodriguez-Vega that "her conviction rendered her removal virtually certain, *or words to that effect*." 797 F.3d at 788 (emphasis added),

In *Bonilla,* the Ninth Circuit determined that counsel's failure to advise Bonilla before he pleaded guilty that his guilty plea would subject him to deportation—even after Bonilla's wife asked whether he could be deported—his performance was deficient. 637 F.3d at 981-82.

In *Diaz*, the Iowa Supreme Court found that counsel's advice that Diaz would "probably" be deported was deficient because when "the crime faced by a defendant is clearly covered under the immigration statute, counsel must advise the defendant that the immigration consequences will almost certainly follow." 896 N.W.2d at 726, 730.

In *Budziszewski*, the Connecticut Supreme Court held that "counsel was required to unequivocally convey to the petitioner that federal law mandated deportation as the consequence for pleading guilty," yet "there are no fixed words or phrases that counsel must use to convey this information, and courts reviewing *Padilla* claims must look to the totality of counsel's advice, and the language counsel actually used, to ensure that counsel accurately conveyed the severity of the consequences under federal law to the client in terms the client could understand." 142 A.3d at 249.

In *Encarnacion,* the Georgia Supreme Court found that where "the law is clear that deportation is

mandatory … 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.'" 295 Ga. at 663, 763 S.E.2d at 466.

In *DeJesus,* the Massachusetts Supreme Judicial Court determined that counsel was deficient because counsel failed to advise the defendant that "deportation would be the legal consequence" of pleading guilty to a drug offense. 9 N.E.3d at 795-96.

In *Hernandez,* the Florida Supreme Court concluded that counsel's advice that the plea to a deportable offense "could/may affect [Hernandez's] immigration status" was insufficient to convey "his plea subjected him to presumptively mandatory deportation." 124 So.3d at 762.

In *Sandoval,* the Washington Supreme Court held counsel's advice that Sandoval should take the plea because—even though it was to a deportable offense—he "would not be immediately deported and that he would then have sufficient time to … ameliorate any potential immigration consequences of his guilty plea" was deficient under *Padilla.* 249 P.3d at 1017, 1020-21.

Those cases show that the difference in outcome reflected the specific facts, which showed the attorneys rendered assistance that *Padilla* condemned as deficient, because the *totality* of the advice fell short of accurately conveying the risk of deportation and that their guilty pleas made them deportable.

In turn, while petitioner asserts that the minority of jurisdictions have interpreted *Padilla* to require legal advice only about the *factual probability of*

deportation, those cases simply rejected interpretations of *Padilla* that would require counsel to advise a defendant that a conviction for a deportable offense "will absolutely or with certainty" result in deportation as a matter of fact, *see Shata*, 868 N.W.2d at 109-11; *Prado*, 141 A.3d at 127; *Neufville*, 13 A.3d at 613-14, or to use "specific magic words in advising of the risk of deportation," *Prado*, 141 A.3d at 127. In this respect, as the Colorado Court of Appeals noted, "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." Pet. App. 41. As the trial court put it, "that [petitioner] necessarily became *deportable* [did] not mean that he would automatically be *deported*." Pet. App. 66 (emphasis in original). Petitioner's own actions ultimately led to his deportation.

B. Because any conflict would not be outcome-dispositive, this Court's intervention is unnecessary.

Regardless of any conflicting interpretations or applications of *Padilla* by the cases above, none of the courts petitioner cites as the majority approach would rule any differently on petitioner's claim. Not only does the totality of plea counsel's advice show that the advice was legally correct, but it also meaningfully conveyed the risk of deportation.

Indeed, petitioner admitted and acknowledged at the hearing that the guilty plea "would make [him] deportable"; plea counsel advised him that, "in order to avoid deportation," he had to plead guilty to a small amount of marijuana or a class 3 misdemeanor; his

immigration attorney advised that the guilty plea was a "bad deal"; the case was continued many times to try to get a deportation-safe plea; and petitioner wanted to avoid jail because he knew ICE conducted routine checks and if a resident had a drug conviction "you automatically get an ICE hold." Tr. pp. 38, 47, 51-52, 63, 67-68 (May 1, 2013).

Petitioner's own testimony demonstrates plea counsel's advice was correct because it conveyed the legal consequence of pleading guilty—it made petitioner deportable. And while petitioner complains counsel should have advised him that the plea would trigger "deportation as a matter of law" or made him subject to "presumptively mandatory deportation," the distinction is one of semantics, not of substance. A person cannot be "deportable" unless the law so prescribes; thus, the terminology petitioner urges would make the advice "correct" is legally superfluous. In other words, "as a matter of law" adds nothing that "deportable"—the term used in the immigration statute—does not already mean. *See* 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of … any law or regulation … 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).

II. This case is also an unsuitable vehicle to resolve the question presented because petitioner failed to show prejudice.

Petitioner claims prejudice is not properly before this Court because neither the Colorado Court of Appeals nor the Colorado Supreme Court addressed it

and, in any event, *Lee* disposes of it in his favor. But if certiorari is granted, the issue of prejudice *would* properly be before this Court because: petitioner cannot succeed on a claim of ineffective assistance of counsel unless he proves prejudice[4]; the issue of prejudice was well-developed in the postconviction proceedings; the trial court addressed and rejected the claim of prejudice in a thorough and well-reasoned ruling; the Colorado Supreme Court's two dissenting justices also rejected petitioner's claim on prejudice grounds; and *Lee* refutes petitioner's claim of prejudice.

A. Prejudice is properly before the Court and the record proves this case is an unsuitable vehicle to resolve the question presented.

The trial court found petitioner failed to establish any prejudice, because there was no reasonable probability that he would have rejected the guilty plea and instead insisted on going to trial. The trial court reasoned that, based on the hearing testimony, while petitioner's desire was to avoid deportation, "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, [petitioner] chose what he perceived to be his next best option—avoiding a felony conviction." Pet. App. 67. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) ("[T]o satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have

[4] *See Strickland v. Washington*, 466 U.S. 668 (1984).

insisted on going to trial."). Petitioner so acknowledged at the providency and postconviction hearings.

What is more, while both a guilty plea and a conviction after trial would make petitioner deportable, by pleading guilty he avoided jail, decreasing the risk that ICE would or could place an immigration hold on him. As the trial court found, it was petitioner's repeated probation violations that led to his incarceration and ultimate deportation.

The record therefore shows that, even if plea counsel had used talismanic words or couched the advice as "the plea would trigger deportation as a matter of law," rejecting the plea was not rational under the circumstances, because petitioner avoided a felony conviction, jail, and a higher risk of apprehension and deportation. *Padilla*, 559 U.S. at 372 ("[T]o obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.").

B. This case is unlike *Lee v. United States*, where the petitioner was assured he would *not* be deported.

Petitioner argues that *Lee* dispels any concern that he was not prejudiced by plea counsel's deficient advice.

To the contrary, *Lee* is unlike this case because there, unlike here, counsel repeatedly *assured* Lee that he did *not* have to worry about the guilty plea to a narcotics offense because "the Government would not deport him if he pleaded guilty." 137 S. Ct. at 1962 (emphasis added). And based on the "assurance" that

he "would not be deported as a result of pleading guilty," Lee accepted the plea. *Id.* at 1963. This Court concluded, "We cannot agree that it would be irrational for a defendant in Lee's position to reject the plea offer in favor of trial," because "[b]ut for his attorney's incompetence, Lee would have *known* that accepting the plea agreement would certainly lead to deportation." *Id.* at 1968 (emphasis added). And while going to trial would "almost certainly" lead to deportation, that "'almost' could make all the difference." *Id*. at 1968-69.

In contrast, petitioner was repeatedly advised and understood the guilty plea made him deportable, and the reason the case was continued multiple times was to obtain a deportation-safe plea. But the prosecution did not offer such a plea despite counsel's efforts. So petitioner cannot argue that *but for* his counsel's erroneous advice, he would have known that accepting the plea agreement would lead to deportation: that was precisely the advice he received and he full-well understood.

Thus, this case is the opposite of *Lee*, and petitioner has not demonstrated that he could have been prejudiced by his counsel's advice.

III. The decision below is correct.

Petitioner argues the decision below is incorrect because *Padilla* requires that plea counsel must advise that "the guilty plea would trigger his mandatory deportation as a matter of law." Pet. 21. Not only is that language nowhere in the holding of *Padilla*, but it also elevates semantics over substance, which could harm noncitizen defendants making a

potentially life-changing decision whether to plead guilty.

In *Padilla*, unlike here, counsel told the defendant he "did not have to worry about immigration status since he had been in the country for so long"—even though the guilty plea was to the transportation of a large amount of marijuana—and on that erroneous advice, the defendant pleaded guilty. 559 U.S. at 359.

In this context, this Court stated, "we now *hold* that counsel must inform her client whether his plea carries a risk of deportation" and "when the deportation consequence is truly clear," as it was there, so is "the duty to give correct advice" 559 U.S. at 357, 369, 374 (emphasis added). The Colorado Supreme Court held the same in a narrow opinion constrained to the facts. Pet. App. 11-13. And while *Padilla* concluded that counsel has a "duty to give correct advice," it did not formulate the precise language that would satisfy that obligation, because the content of the advice would depend on the facts and circumstances of each case. *See Padilla*, 559 U.S. at 369.

In rejecting petitioner's contentions, the Colorado Supreme Court reasoned that "[t]he term 'presumptively mandatory' nowhere appear[ed] 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." Pet. App. 12 (emphasis added). *See Padilla*, 559 U.S. at 368-69.

The Colorado Supreme Court thus faithfully applied *Padilla* to the facts, which were well-developed below. This Court should decline

petitioner's request to disregard the many layers of advice he received (including from immigration experts) and his own concessions below, which showed that the totality of plea counsel's advice accurately informed petitioner that the guilty plea made him deportable under the immigration laws at the same time as meaningfully conveying the risk of deportation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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