No. 20-120

IN THE

Supreme Court of the United States

ALFREDO JUAREZ,
Petitioner,

v.

PEOPLE OF THE STATE OF COLORADO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

REPLY BRIEF FOR PETITIONER

FELICIA H. ELLSWORTH
SAMUEL C. LEIFER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

PHILIP L. TORREY
Counsel of Record
CRIMMIGRATION CLINIC
HARVARD IMMIGRATION AND
CLINICAL PROGRAM
HARVARD LAW SCHOOL
6 Everett Street, Suite 3105
Cambridge, MA 02138
(617) 495-0638
ptorrey@law.harvard.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS

REPLY BRIEF FOR PETITIONER

Respondent does not dispute that there is a conflict among circuit courts and state courts of last resort about the proper application of *Padilla v. Kentucky*, 559 U.S. 356 (2010). Instead, respondent suggests (at 16) that any conflict should be ignored because it simply reflects the different facts reviewed by those courts rather than a genuine disagreement about how to interpret *Padilla*. At its core, the respondent's argument relies on a strategy of diversion and obfuscation that fails to recognize a deep and genuine conflict concerning the question presented that has already been acknowledged by multiple courts. *See, e.g.*, *Budziszewski v. Comm'r of Correction*, 142 A.3d 243, 249 n.1 (Conn. 2016) (citing circuit courts and state courts of last resort that are diametrically opposed concerning the proper interpretation of *Padilla*); *Maryland v. Sanmartin Prado*, 141 A.3d 99, 114-24 (Md. 2016) (comprehensively reviewing the split as it then existed).

Respondent's secondary argument (at 20)—that this case is not the proper vehicle to resolve any conflict because it implicates the fact-specific issue of prejudice—is also unavailing. The Court need only consult its own precedent, including *Padilla* itself, to quickly dispel the notion that the issue of prejudice must be reached to resolve the question presented. In any event, the question of prejudice is not before this Court because both the Colorado Court of Appeals and the Colorado Supreme Court explicitly declined to review the issue of prejudice in rendering their decisions.

The growing conflict in authority on the issue presented by the petition is of exceptional importance and can only be resolved with this Court's intervention. Certiorari should therefore be granted.

ARGUMENT

I. THE SPLIT ON THE QUESTION PRESENTED IS GENUINE AND DEEPLY ENTRENCHED

There is a genuine and growing split among federal circuit courts and state courts of last resort regarding how to interpret *Padilla's* directive to advise noncitizen-defendants that a conviction will subject them to mandatory deportation under federal immigration law. Indeed, the Colorado Court of Appeals expressly "acknowledge[d]" this split in its denial of petitioner's appeal. Pet. App. 38-42; *see* Pet. 11.

Since the filing of the petition, the conflict has only deepened. For example, the highest court of Guam has now joined the majority of jurisdictions—which includes the Second, Third, Fifth, and Ninth Circuits, as well as state courts in Connecticut, Florida, Georgia, Iowa, Massachusetts, and Washington—holding that *Padilla* requires counsel to unequivocally advise noncitizen-defendants that a conviction will either result in their deportation or subject them to presumptively mandatory deportation. *People v. Titus*, 2020 Guam 16, ¶ 26 (Aug. 24, 2020). In contrast, the Eleventh Circuit has now joined the minority of jurisdictions—which includes the Sixth and Eighth Circuits, as well as state courts in Maryland, Wisconsin, Rhode Island, and Colorado—holding that *Padilla* does not require such unequivocal advice. *Alvarado-Ponce v. United States*, 2020 WL 5230892, at *1 (11th Cir. Aug. 4, 2020).

Respondent suggests (at 16) that, notwithstanding the deep and entrenched nature of the split, the Court need not resolve this issue because the varying applications of *Padilla* merely reflect the "different facts in th[ose] cases." In particular, respondent claims that:

(1) the majority of jurisdictions have held that legal advice was deficient under *Padilla* only because counsel failed to convey the "risk of deportation" to noncitizen-defendants or that a guilty plea made them "deportable;" and (2) the minority of jurisdictions "simply rejected interpretations of *Padilla*" that would require counsel to advise a defendant that a conviction will "absolutely" result in deportation or to use "specific magic words" in advising of the risk of deportation. *Id.* at 18-19. In short, respondent argues (at 16-19) that the disparate interpretations of *Padilla* can be reconciled by the different "inadequate advice" given by counsel and the different terminology used by the courts in their decisions.

The federal courts of appeals and state courts of last resort have issued holdings that are far broader than respondent claims. For example, respondent suggests (at 17) that in *United States v. Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015), one of the cases on the majority side of the split, the Ninth Circuit held that advice was deficient under *Padilla* only because defense counsel inaccurately informed his noncitizen-client that she faced "the *mere 'potential'* of removal." Opp. 17 (emphasis by respondent) (quoting 797 F.3d at 788). Yet, the Ninth Circuit clearly imposed a broader obligation on defense counsel: "[W]e hold that Rodriguez–Vega's counsel was *required* to advise her that her conviction rendered her removal *virtually certain*, or words to that effect." 797 F.3d at 786 (emphases added).

The other courts on the majority side of the split have likewise not limited their holdings to the "specific facts" or "inadequate advice" provided by counsel. Opp. 16, 18. Instead these courts have held that counsel have an affirmative duty to unequivocally advise noncitizen-

defendants that a conviction for a deportable offense will subject them to "mandatory" or "virtually certain" deportation. *See, e.g, United States v. Al Halabi*, 633 F. App'x 801, 803 (2d Cir. 2015) ("defense attorney's failure to advise his client" that "removal is presumptively mandatory" constitutes deficient advice under *Padilla*); *United States v. Fazio*, 795 F.3d 421, 427 (3d Cir. 2015) (advising a noncitizen-client that a plea "made him subject to automatic deportation … is required under *Padilla*"); *United States v. Urias-Marrufo*, 744 F.3d 361, 368 (5th Cir. 2014) ("under *Padilla*, she was required to be advised of the certain deportation consequences"); *Diaz v. Iowa*, 896 N.W.2d 723, 730 (Iowa 2017) ("counsel must advise the defendant that the immigration consequences will almost certainly follow"); *Budziszewski v. Comm'r of Correction*, 142 A.3d 243, 249 (Conn. 2016) ("counsel was required to unequivocally convey to the petitioner that federal law mandated deportation"); *Hernandez v. Florida*, 124 So. 3d 757, 762 (Fla. 2012) ("counsel was deficient under *Padilla* for failing to advise Hernandez that his plea subjected him to presumptively mandatory deportation"); *Massachusetts v. DeJesus*, 9 N.E.3d 789, 795 (Mass. 2014) ("counsel needed to convey that … deportation would be practically inevitable"); *Washington v. Sandoval*, 249 P.3d 1015, 1019 (Wash. 2011) (en banc) ("the defense attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation"); Titus, 2020 Guam 16, ¶ 25 ("duty to advise his client that removal is a virtual certainty").

As to courts on the minority side of the split, respondent argues (at 18-19) that their holdings are not inconsistent with the majority view because they "simply rejected interpretations of *Padilla* that would require counsel" to advise clients that deportation is

"absolutely" certain or to use "'specific magic words in advising of the risk of deportation.'" But the courts on the minority side did not limit their holdings to the specific "language" that defense counsel used in advising their clients. *Id.* at 17. Instead, these courts have held that *Padilla* simply does not require counsel to unequivocally advise noncitizen-defendants that they will be subject to either mandatory or virtually certain deportation, a position that is utterly irreconcilable with the advice required by the majority of courts as outlined above. Pet. 17-18.

For example, the Eighth Circuit has stated that *Padilla* does not require counsel to advise noncitizen-defendants that pleading guilty to a deportable offense will make deportation either "mandatory or certain." *United States v. Ramirez-Jimenez*, 907 F.3d 1091, 1094 (8th Cir. 2018) (per curiam); *Dilang Dat v. United States*, 2020 WL 7702227, at *1, 3 (8th Cir. Dec. 29, 2020) ("Allen was not required to tell Dat that his deportation was virtually certain.").

Similarly, the other courts in the minority have held that—irrespective of the specific "words" or "language" used—defense counsel are simply not required to advise noncitizen-defendants of the mandatory nature of the immigration laws to which they will be subject, or of the extremely high probability of deportation that they will face if convicted of a deportable offense. *See Maiyo v. United States*, 576 F. App'x 567, 570-71 (6th Cir. 2014) (advice that defendant "could be deported" is sufficient under *Padilla*); *Neufville v. Rhode Island*, 13 A.3d 607, 613-14 (R.I. 2011) (counsel need not "inform their clients that they will be deported," even if they plead guilty to an offense that mandates deportation); *Maryland v. Sanmartin Prado*, 141 A.3d 99, 124 (Md. 2016) (advising a client that "there could and

probably would be immigration consequences" is "correct advice" under *Padilla*); *Wisconsin v. Shata*, 868 N.W.2d 93, 111 (Wisc. 2015) (advising a client "that there was a 'strong chance' of deportation" is "not deficient" under *Padilla*).

A close comparison of the cases on either side of this issue illustrates the irreconcilable conflict in these varying interpretations of *Padilla*. In *Neufville*, for example, the Rhode Island Supreme Court held that *Padilla* requires only that counsel inform noncitizen-defendants that a conviction for a deportable offense will make them "eligible for deportation." 13 A.3d at 614. But in *DeJesus*, the Massachusetts Supreme Judicial Court held that the exact same phrase, "eligible for deportation," is deficient under *Padilla* because it "does not adequately inform [] a defendant" that "his removal from the United States would be presumptively mandatory." 9 N.E.3d at 794; *see id.* at 796 (reasoning that the word "eligible" inaccurately conveys that "the law requires additional conditions to be met before an individual could be removed and allows for the exercise of discretion in determining whether those conditions are met").

Similarly, in *Budziszewski*, the Connecticut Supreme Court held that *Padilla* requires defense counsel to "unequivocally" advise noncitizen-defendants when "federal law mandates deportation." 142 A.3d at 246. But in *Prado*, the Maryland Court of Appeals concluded that advice couched in "qualifying words" is still sufficient under *Padilla*. 141 A.3d at 130; *see also* Pet. App. 42 (counsel "may provide effective assistance [under *Padilla*] even when using *equivocal* terms" (emphasis added)). In short, legal advice that has been expressly endorsed in certain jurisdictions has been expressly rejected by others. *See also*, *Rodriguez-Vega*, 797 F.3d at

786 ("counsel was required to advise her that her conviction rendered her removal *virtually certain*" (emphasis added)); *Dilang Dat*, 2020 WL 7702227, at *3 ("Allen was not required to tell Dat that his deportation was *virtually certain*." (emphasis added)).

The result of this jurisdictional split is that noncitizen-defendants are currently entitled to receive (and their counsel instructed to provide) different standards of advice under the Sixth Amendment depending upon the court in which they happen to be prosecuted. *See also* Pet. 19. Further, the breadth of this conflict has already grown in the few short months since the filing of this petition. *See Titus*, 2020 Guam 16; *Alvarado-Ponce*, 2020 WL 5230892. Because deportation is a "virtually inevitable" outcome for a "vast number of noncitizens convicted of crimes," this conflict will continue to grow as more courts are confronted with this issue. *Padilla*, 559 U.S. at 356. The Court should resolve the conflict now.

II. THE QUESTION PRESENTED IS UNDENIABLY IMPORTANT

Respondent does not dispute that the question presented is important. This Court has repeatedly recognized the "seriousness of deportation," *Padilla*, 559 U.S. at 374, and noted that a noncitizen-client's "right to remain in the United States may be more important to the client than any potential jail sentence," *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (quotations omitted). Deportation "can destroy lives and disrupt families." *Gastelum-Quinones v. Kennedy* 374 U.S. 469, 479 (1963); *see Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile.").

The present case reflects these same concerns. Pet. App. 29 ("immigration was always … the paramount consideration"); *id.* at 67 ("Defendant's primary desire was to avoid deportation"). Petitioner was deported to a country where he has "no ties" and has not lived since he was six years old. *Id.* at 25, 46. He was separated from his U.S. citizen wife and his two children, all of whom depended on him for support. *Id.* at 25, 46-47. And he has remained separated for nearly a decade from his family and the business and life that he built in this country. It is crucial for petitioner and the "vast number" of noncitizens like him that the Court confirm the standard of legal advice to which these individuals are constitutionally entitled. *Padilla*, 559 U.S. at 356.

Further, the Court has long recognized the importance, and constitutional imperative, of the uniform application of federal immigration law. *See Arizona v. United States*, 567 U.S. 387, 394 (2012) (recognizing "the National Government's constitutional power to 'establish an uniform Rule of Naturalization,'" (quoting U.S. Const. art. 1, § 8, cl. 4)); *see also Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) ("Our principal responsibility … is to ensure the integrity and uniformity of federal law."). But under the patchwork of interpretations of *Padilla*, defendants are entitled to different legal advice, and thus suffer disparate immigration consequences, based upon the jurisdiction in which they are prosecuted. The Court should resolve this issue to promote the fair and uniform application of federal law.

III. This Case Is An Ideal Vehicle To Address The Question Presented

Respondent claims (at 20) that this case is a poor vehicle to address the question presented because the

Colorado trial court determined that petitioner was not prejudiced by his counsel's deficient advice. Respondent thus argues (at 20-23) that the issue of prejudice is properly before this Court and that the Court should—indeed must—reach the issue if certiorari is granted. Respondent's argument is without merit for two reasons.

First, this Court's own precedent establishes that it is in no way obligated to reach the issue of prejudice in a case concerning ineffective assistance of counsel. Indeed, the Court need look no further than *Padilla* itself. In that case, the Court held that although the advice Mr. Padilla received was constitutionally deficient, "relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below." *Padilla*, 559 U.S. at 374; *see also Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020) (holding that counsel's performance was deficient pursuant to *Strickland* and remanding so that the state court could address the issue of prejudice in the first instance). The Court can address the question presented without reaching the issue of prejudice in this case as well.

Second, the Court need not reach the issue of prejudice if certiorari is granted because neither the Colorado Court of Appeals nor the Colorado Supreme Court reached the issue. This Court consistently declines to address issues where they have not first been addressed by the lower courts. *See, e.g.*, *Meyer v. Holley*, 537 U.S. 280, 291-92 (2003) (declining to consider additional factors of a broker relationship to determine vicarious liability because the court of appeals declined to consider those factors); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither

raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

This maxim holds true, including in cases involving constitutionally ineffective assistance of counsel, where the issue was addressed by a trial court but not initially reviewed by an intermediate appellate court. *See, e.g.*, *Andrus*, 140 S. Ct. at 1881 ("The evidence makes clear that Andrus' counsel provided constitutionally deficient performance under *Strickland*. But we remand so that the Court of Criminal Appeals may address the prejudice prong of *Strickland* in the first instance."); *see also Herrera v. Wyoming*, 139 S. Ct. 1686, 1703 (2019) ("[T]he state trial court decided that Wyoming could regulate the exercise of the 1868 Treaty right 'in the interest of conservation' … . The appellate court did not reach this issue. We do not pass on the viability of those arguments today."); *Chrysler Corp. v. Brown*, 441 U.S. 281, 318-19 (1979) (remanding so that the Court of Appeals could review an issue initially decided by the trial court but not reviewed by the Court of Appeals); *Cory Corp. v. Sauber*, 363 U.S. 709, 712 (1960) (same).

There is no dispute that the majority opinions of both the Colorado Court of Appeals and the Colorado Supreme Court explicitly declined to review the issue of prejudice. *See* Pet. 22; Opp. 21; Pet. App. 14, 44. If certiorari is granted, this Court should likewise decline to reach the prejudice issue and, if necessary, remand to allow the courts below to review that issue in the first instance.

Even if this Court is persuaded that the issue of prejudice should be reached, *Lee v. United States*, 137 S. Ct. 1958, 1968-69 (2017) is dispositive. Respondent argues (at 22) that *Lee* is distinguishable because the advice petitioner received in that case was different

than the advice provided here. But this argument fails to recognize that the issue in *Lee* was not about the content of counsel's advice but whether an individual could show prejudice by demonstrating that but for counsel's deficient advice there was a reasonable possibility he would have rejected a plea offer and proceeded trial despite a slim likelihood of succeeding at trial. 137 S. Ct. at 1962, 1968-69. As demonstrated in the petition (at 23), *Lee* remains squarely on point.

Finally, respondent spills a great deal of ink on the subject of petitioner's post-conviction probation violations, which are wholly irrelevant to the question presented. Respondent parrots (at 22) the Colorado trial court in suggesting that "it was petitioner's repeated probation violations that led to his incarceration and ultimate deportation." But petitioner's deportation was triggered by a violation of federal immigration law—not the violation of a post-conviction probationary term. The moment petitioner pleaded guilty to the controlled substance offense, his deportation was required by 8 U.S.C. § 1227(a)(2)(B)(i). As determined by this Court in *Padilla*, constitutionally competent counsel would have unequivocally communicated to petitioner that this mandated his deportation. *See* 559 U.S. at 360.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

FELICIA H. ELLSWORTH
SAMUEL C. LEIFER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

PHILIP L. TORREY
Counsel of Record
CRIMMIGRATION CLINIC
HARVARD IMMIGRATION AND
CLINICAL PROGRAM
HARVARD LAW SCHOOL
6 Everett Street, Suite 3105
Cambridge, MA 02138
(617) 495-0638
ptorrey@law.harvard.edu

JANUARY 2021