No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JUAN TINOCO-GARCIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORA K. HIROZAWA
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

QUESTION PRESENTED

Does an immigration judge's failure to advise an immigrant in removal proceedings of their apparent eligibility to seek post-conviction relief under *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010), and its progeny violate a non-citizen's right to due process?

TABLE OF CONTENTS

Table of Authorities

Federal Cases **Page(s)**

Federal Statutes

State Statutes

Federal Regulations

United States Constitution

Miscellaneous

IN THE SUPREME COURT OF THE UNITED STATES

JUAN TINOCO-GARCIA,
Petitioner,

- v. -

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Juan Tinoco-Garcia respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on September 30, 2020.

INTRODUCTION

A single conviction can change the course of a person's life. This is particularly true for non-citizens, who may be deported, denied reentry to the United States, permanently separated from their families, and—in cases like Mr. Tinoco-Garcia's—subsequently prosecuted for illegal reentry, based on a single conviction. Because "[t]he drastic measure of deportation or removal is now virtually inevitable for a vast number of non-citizens convicted of crimes," *see Padilla v. Kentucky*, 559 U.S. 356, 360 (2010), the Court has held that criminal defense counsel is constitutionally required to appropriately advise non-citizen

defendants regarding the immigration consequences of a plea. *Id.* at 374; *see also Lee v. United States*, 137 S. Ct. 1958, 1964 (2017).

But what happens to non-citizens who realize too late that they received bad advice from their defense lawyer? How can a pro se individual in immigration court, with little to no understanding of the complexities of immigration law, avoid the compounding consequences of a constitutionally infirm plea?

Both *Padilla* and *Lee* make clear that a defense attorney who affirmatively misadvises a non-citizen client about the immigration consequences of a plea is ineffective. Yet there remains a practical need for a basic safeguard to ensure that people who receive constitutionally defective advice regarding the immigration consequences of a plea are not erroneously deported, and instead have an opportunity to remedy their lawyer's bad advice.

That safeguard is easily accomplished by a due process mechanism already in place in removal proceedings: an advisal by the immigration judge ("IJ"). Both the regulations governing removal proceedings, *see* 8 C.F.R. § 1240.11(a)(2), and due process require immigration judges to advise individuals in immigration court of their "apparent eligibility" for relief from removal. The Court must clarify that this duty includes advisal regarding post-conviction relief under *Padilla* that could prevent a non-citizen's removal.

This Court's holdings in *Padilla* and *Lee* would have little practical value if a non-citizen has no opportunity to learn of their eligibility for relief due to defense counsel's error *before* being deported. Every right must have a remedy. If *Padilla*'s

guarantee of effective representation for non-citizen defendants is to carry any meaning, IJs must be required to properly advise pro se individuals in removal proceedings of their apparent eligibility to avoid removal by seeking post-conviction relief under *Padilla*.

OPINION BELOW

Over a dissent from Judge Berzon, the Court of Appeals affirmed Mr. Tinoco-Garcia's conviction in an unpublished decision. *See United States v. Tinoco-Garcia*, No. 19-50145, 2020 WL 5815996, at *2 (9th Cir. Sept. 30, 2020) (attached here as Appendix A).

JURISDICTION

On September 30, 2020, the Court of Appeals denied Mr. Tinoco-Garcia's appeal and affirmed his conviction. *See* Appendix A. This Court thus has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution states that "[n]o person … shall be deprived of life, liberty, or property, without due process of law."

STATEMENT OF FACTS

Mr. Tinoco-Garcia was born in Michoacan, Mexico. He moved to Sacramento, California when he was 23 years old. Two years later, in 2011, he met his U.S. citizen wife, Carolina. They fell in love, moved in together, and got married in January 2014. Mr. Tinoco-Garcia quickly became a positive father figure for Carolina's three-year-old son, and they had two daughters together. Mr. Tinoco-

Garcia maintained steady employment working for a construction company in Sacramento that specializes in stucco. His wife, Carolina, worked at an Econo Lodge motel. Before 2016, Mr. Tinoco-Garcia never had any problems with the law.

Shortly after they got married, Carolina submitted an I-130 application—the first step in becoming a lawful permanent resident ("LPR")—on Mr. Tinoco-Garcia's behalf. In 2015, Mr. Tinoco-Garcia received notice that his I-130 application had been approved, and he was subsequently scheduled for an interview in March 2017 at the U.S. Consulate. He asked to reschedule the interview so that he could seek a provisional waiver of unlawful presence.

In 2016, Mr. Tinoco-Garcia was charged under California Penal Code § 288(a) for committing lewd and lascivious acts with a minor— his first ever contact with the criminal legal system in the United States. Despite maintaining his innocence throughout the proceedings, Mr. Tinoco-Garcia ultimately pled *nolo contendere* to the original § 288(a) charge based on his lawyer's advice.

But his lawyer never told him that his conviction was an aggravated felony, or that it would result in his virtually certain deportation. In fact, as his lawyer himself later admitted, he had no idea what an aggravated felony was. Instead, Mr. Tinoco-Garcia's lawyer reassured him that he didn't have to worry about the conviction affecting his application for consular processing because "California is a sanctuary state" and "they don't work with ICE."

But after Mr. Tinoco-Garcia served six months in California county jail, he was not released to return home to his family in Sacramento. Instead, he was

picked up by immigration authorities and transferred to an ICE detention center in Sacramento.

On April 6, 2018, Mr. Tinoco-Garcia appeared by video from the Sacramento ICE office before an IJ in San Francisco. He had never appeared in immigration court before. The IJ asked Mr. Tinoco-Garcia about his prior § 288(a) conviction:

> IJ: So Mr. Tinoco, um, is it correct that you were convicted of, um, violating California Penal Code Section 288(a), which is committing a lewd act with a minor under the age of 14?
>
> Mr. Tinoco-Garcia: Uh, well yes. That's the, that's the deal that my attorney, uh, took and even though I did not do anything, and I pled that I wasn't going to oppose anything. Uh, but still the judge said that I was guilty.

Mr. Tinoco-Garcia further explained that his defense lawyer never advised him of the clear and certain consequences of his plea.

> Mr. Tinoco-Garcia: When my wife talked to the attorney… I did not know that taking this deal was going to affect me so much. He did not tell me that it was going to affect me in the future, when I tried to, when my wife tried to get my residency and my work permit. He told me that California is a sanctuary state, that he didn't work with ICE. I thought I was going to do my six months and probation, that's why I took the deal… If I had known that it was going to affect me so much, and that it was going to keep me away from my family, then I would have gone to trial instead.
>
> IJ: Alright. So Mr. Tinoco I understand what you're telling me and you may very well have a motion that you can bring in the California criminal court system regarding your plea. However, there's nothing I can do about that.

	I can only deal with the information in front of me, which is that you have the conviction and it makes you deportable. And in fact, you're already deportable for being here without papers. I can set your hearing over another couple weeks, if you want to talk to an attorney about representing you, um, in immigration court. But it's very unlikely that you're going to have enough time, while you're in custody, to challenge your criminal court conviction. If you want any chance of any, any, doing that while you're still here in the United States, you better get started yesterday.
Mr. Tinoco-Garcia:	Ok. Thank you. Well I do understand and my wife spoke with an immigration attorney and the crime that I accepted has affected me really bad, but what I understood from the judge is that if I am removed to Mexico, my wife can still request me. Cause that's what I understood.

The IJ did not provide any further explanation of the post-conviction relief available to Mr. Tinoco-Garcia, nor did she again offer to continue the proceedings for Mr. Tinoco-Garcia to discuss post-conviction relief with counsel. Finding Mr. Tinoco-Garcia did not qualify for other relief from removal as a result of his misadvised plea, the IJ subsequently ordered Mr. Tinoco-Garcia deported.

On July 25, 2018, Mr. Tinoco-Garcia was arrested and charged with illegal reentry under 8 U.S.C. § 1326. To satisfy the element of a prior deportation, the government relied upon Mr. Tinoco-Garcia's one IJ removal order.

Before the district court, Mr. Tinoco-Garcia argued for dismissal under 8 U.S.C. § 1326(d). Specifically, Mr. Tinoco-Garcia argued that the removal proceedings violated due process because the IJ failed to properly advise him of his

eligibility to seek post-conviction relief, which would have rendered him eligible for voluntary departure and permitted him a meaningful opportunity to apply for such relief. The district court denied the motion to dismiss, finding that "[t]he immigration judge properly advised the Defendant of the potential avenues for post-conviction relief" and that the proceedings did not violate due process. Mr. Tinoco-Garcia subsequently pled guilty on the condition that he could appeal the denial of his motion to dismiss.

On appeal, Mr. Tinoco-Garcia raised the same arguments. In an unpublished decision, a divided panel of the Ninth Circuit affirmed his conviction. The majority found that the IJ "sufficiently advised Tinoco-Garcia about his apparent relief" and provided him an opportunity to consult with counsel. *See United States v. Tinoco-Garcia*, No. 19-50145, 2020 WL 5815996, at *1 (9th Cir. Sept. 30, 2020) ("Assuming without deciding that the IJ had a duty to advise Tinoco-Garcia about his potential *Padilla* route to vacating his conviction in state court, we agree with the district court that the IJ "properly advised [Tinoco-Garcia] of the potential avenue for post-conviction relief and offered to set the hearing over to allow the Defendant to seek counsel.").

Judge Berzon dissented. Refuting the majority's claim that the IJ "properly advised" Mr. Tinoco-Garcia, Judge Berzon found the IJ's advice regarding the possibility of post-conviction relief under *Padilla* was "critically incomplete." *See United States v. Tinoco-Garcia*, No. 19-50145, 2020 WL 5815996, at *2 (9th Cir. Sept. 30, 2020) (J. Berzon, dissenting). Judge Berzon identified three key flaws:

(1) the IJ did not explain the connection between vacating the prior conviction through post-conviction relief and its impact on Mr. Tinoco-Garcia's removal proceedings; (2) at the time she mentioned post-conviction relief, the IJ was under the erroneous belief that Mr. Tinoco-Garcia's sole conviction was *not* an aggravated felony; and (3) the IJ immediately negated any advice she offered by telling Mr. Tinoco-Garcia that it was "very unlikely" he would "have enough time, while [he was] in custody, to challenge your criminal court conviction." *Id.* At core, Judge Berzon found the IJ's advisal failed because "the IJ did not explain that absent a successful *Padilla* claim in state court, Tinoco-Garcia would not be eligible for voluntary departure and would be barred for life from returning to the United States absent a very-difficult-to-obtain additional waiver." *Id.*

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I.

The Ninth Circuit's Decision Conflicts with This Court's Clear Directive that Defense Counsel's Failure to Provide Accurate Advice Regarding the Immigration Consequences of a Plea Should Not Result in Deportation.

Over a decade ago, the Court acknowledged its "responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the mercies of incompetent counsel." *Padilla*, 559 U.S. at 374. Since then, the Court has consistently reaffirmed that criminal defense counsel must advise non-citizen clients regarding the immigration consequences of a plea. *See Lee*, 137 S. Ct. at 1964. When a non-citizen enters a guilty plea based on counsel's incorrect advice

regarding the immigration consequences of a plea, in violation of the Sixth Amendment, the remedy is to vacate the misadvised plea. *Id.* at 1963–64.

But what happens when a non-citizen does not realize his counsel's error before he appears in removal proceedings? The majority's decision in Mr. Tinoco-Garcia's case would allow an IJ to deport a long-term, non-citizen resident of the United States and separate him from his U.S. citizen wife and children based on an *indisputably* unconstitutional plea, without proper notice that he could potentially avoid removal by vacating the plea. Such a holding would undermine the very foundation that *Padilla* and *Lee* are built upon.

Because the majority's holding in this case conflicts with the logic at the core of *Padilla* and its progeny, the Court should grant a writ of certiorari to reconcile non-citizens' Sixth Amendment right to accurate advice regarding the immigration consequences of a plea with the practical need for notice of a remedy when that right is violated.

II.

This Important Issue Affects Thousands of Immigrants.

Non-citizens who are placed in removal proceedings as a result of a misadvised plea should not be deported without notice of their eligibility to vacate the plea and avoid removal. Absent a safeguard to ensure that individuals are not, in fact, deported as a result of their attorney's bad advice, non-citizens like Mr. Tinoco-Garcia have little recourse to ensure accountability for their counsel's actions, particularly once they are no longer in the United States. This result would

saddle the very "class of clients least able to represent themselves" with the severe, often irreversible, consequence of deportation. *See Padilla*, 559 U.S. at 370-71.

Fortunately, that safeguard can easily be implemented by IJs. IJs are required to advise non-citizens of their "apparent eligibility" for relief from removal. *See* 8 C.F.R. § 1240.11(a)(2); *see also United States v. Melendez-Castro*, 671 F.3d 950, 954 (9th Cir. 2012) ("The Due Process Clause of the Fifth Amendment requires that an alien in immigration proceedings be 'made aware that he has a right to seek relief.'") (quoting *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000)); *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004). Because there is no right to appointed counsel in immigration court, the IJ's duty to advise pro se immigrants of their apparent eligibility for relief and afford them a meaningful opportunity to apply for such relief is particularly critical to ensuring due process in removal proceedings. As with other forms of relief, from asylum to Special Immigrant Juvenile visas, immigration judges must advise respondents of their eligibility for post-conviction relief under *Padilla* when such relief is apparent and could prevent removal.

This duty is particularly important in light of the significant obstacles that detained immigrants like Mr. Tinoco-Garcia face in accessing counsel in removal proceedings. Nationally, between 2007 to 2012, only 37 percent of all immigrants and only 14 percent of detained immigrants secured legal representation in their

removal proceedings.[1] Immigrants with attorneys obtain better results at every stage of removal proceedings—from bond to substantive immigration relief.[2]

Additionally, absent this safeguard, ineffective counsel would rarely—if ever—suffer any consequence of their error. In fact, counsel may never even learn of the error. Thus, there is a significant risk that counsel will replicate the same error, repeatedly, in representing future clients. This lack of accountability would prevent the criminal defense bar from fulfilling its constitutional obligations consistent with this Court's precedent.

Non-citizens deserve to have IJs advise them about their apparent eligibility for post-conviction relief under *Padilla*. If so, non-citizens would have a greater incentive to seek counsel and build a record for post-conviction relief under *Padilla*. Additionally, respondents in immigration court may be more likely to pursue *Padilla* relief prior to suffering the grave and sometimes irreversible consequences of deportation resulting from an unconstitutional conviction if they have better access to both post-conviction relief and immigration counsel.

---

[1] Between 2007 and 2012, over 1.2 million deportation cases were decided. The statistics regarding representation by counsel are drawn from the data for those 1.2 million cases. Ingrid Eagly and Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration Council, at 5 (Sept. 2016) https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

[2] *See id.* at 16-20; *see also* Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87 Fordham L.R. 485, 486 (2018). Notably, only three percent of detained immigrants without counsel even *applied* for immigration relief. *Id.* at 20.

IJs also deserve clarity on the scope of their obligations. Many IJs, like the IJ in Mr. Tinoco-Garcia's case, are aware that post-conviction relief exists but lack clarity on whether or not they are required to advise individuals about their eligibility for post-conviction relief. Clarifying this obligation, in the affirmative, would help IJs ensure that they are meeting their statutory and constitutional duties.

III.

Mr. Tinoco-Garcia's Case Provides a Strong Vehicle to Resolve This Issue.

Immigration law can be complex. But the immigration consequences of Mr. Tinoco-Garcia's plea were quite clear. As in *Padilla* and *Lee*, Mr. Tinoco-Garcia pled guilty to an aggravated felony. As a result of the plea, he was subject to permanent, mandatory deportation. And, as in *Padilla* and *Lee*, Mr. Tinoco-Garcia's attorney not only failed to properly advise him regarding the immigration consequences of his plea, but affirmatively *misadvised* him. His attorney admitted that "[a]t the time [he] represented Mr. Tinoco-Garcia [in 2016-2017], [he] had never heard the term 'aggravated felony' as an immigration term of art." Thus, he did not advise Mr. Tinoco-Garcia of the immigration consequences of an aggravated felony plea. Instead, his attorney told him "that California is a sanctuary state" and that "he didn't work with ICE."

But unlike the appellants in *Padilla* and *Lee*, Mr. Tinoco-Garcia did not learn of his attorney's error until he appeared before an immigration judge following a six-month sentence in county jail. When he appeared in immigration court,

Mr. Tinoco-Garcia had no idea that his plea carried immigration consequences, let alone mandatory deportation.

The audio recordings from Mr. Tinoco-Garcia's removal proceeding unequivocally establish that Mr. Tinoco-Garcia set forth his apparent eligibility for post-conviction relief *Padilla* relief before the IJ. And the record supports the plausibility of post-conviction relief. Before the district court, Mr. Tinoco-Garcia submitted a declaration from his prior defense attorney and a declaration from a post-conviction relief expert in support of his eligibility for such relief. And the government conceded that post-conviction relief would have been successful: Mr. Tinoco-Garcia's attorney was constitutionally ineffective and Mr. Tinoco-Garcia was prejudiced because he could have obtained an alternative disposition that did not result in mandatory deportation.

The key question that the Court must clarify is whether the IJ was required to advise Mr. Tinoco-Garcia of his ability to seek such relief—relief that could have prevented his deportation. The majority opinion fails to address this question, which is essential to the basic function of the remedy *Padilla* and its progeny require. "Assuming without deciding" whether the IJ was required to advise Mr. Tinoco-Garcia of his apparent eligibility for post-conviction relief, the majority concluded that the IJ's brief reference of a motion in state court was a sufficient advisal. However, as Judge Berzon's dissent explains, the majority's decision misses the mark. Critically, the IJ failed to connect the motion in state court to Mr. Tinoco-Garcia's ability to avoid removal. *See United States v. Tinoco-Garcia*, No. 19-50145,

2020 WL 5815996, at *2 (9th Cir. Sept. 30, 2020) (J. Berzon, dissenting). The majority also ignores the fact that "absent a successful *Padilla* claim in state court, Tinoco-Garcia would not be eligible for voluntary departure and would be barred for life from returning to the United States absent a very-difficult-to-obtain additional waiver." *Id.*

Because Mr. Tinoco-Garcia pled guilty to an aggravated felony that carried clear immigration consequences, he clearly set forth a prima facie *Padilla* claim on the record before the IJ. And post-conviction relief under *Padilla* was the only thing that stood between him and relief from removal. Thus, Mr. Tinoco-Garcia's case provides a good vehicle to resolve the conflict between the majority's conclusion and this Court's precedent in *Padilla* and its progeny.

CONCLUSION

Permitting deportation of a non-citizen who unknowingly pled to an aggravated felony based on his defense attorney's affirmative misadvice, without any notice that he could avoid removal though post-conviction relief, directly conflicts with the clear protections established by *Padilla*. Accordingly, the Court should grant Mr. Tinoco-Garcia's petition for a writ of certiorari to clarify IJs'

obligation to advise non-citizens of their eligibility for post-conviction relief where such relief is apparent and could prevent their removal.

Respectfully submitted,

Date: December 23, 2020

s/ Nora K. Hirozawa

NORA K. HIROZAWA
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner