No. _____

In The
Supreme Court of the United States

HUGO REYES-MORALES,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

On Petition for Writ of Certiorari to the
Court of Special Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

If "the deportation consequences of a particular plea are unclear or uncertain…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." *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010). When a defense attorney decides to do more, by incorrectly qualifying the risk as "very low" and mis-advising that the plea is "immigration friendly," does this incorrect advice render nugatory the general advisement about the risk of adverse immigration consequences, thereby rendering the defense attorney's assistance ineffective?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Hugo Reyes-Morales, respectfully petitions for a writ of certiorari to review the judgment of the Maryland Court of Special Appeals.

OPINIONS BELOW

The opinion of the Maryland Court of Special Appeals (Pet. App. A2–A31) is unreported. The opinion of the Maryland Court of Appeals denying certiorari (Pet. App. A1) is unreported.

JURISDICTION

The Circuit Court for Prince George's County, Maryland entered a judgment of conviction against Petitioner on July 10, 2013. Petitioner filed a petition for writ of error coram nobis, and on October 19, 2015, the Circuit Court for Prince George's County granted Petitioner's writ of error coram nobis, and vacated his conviction and sentence. (Pet. App. A32–A42). The State of Maryland appealed to the Maryland Court of Special Appeals, and the Maryland Court of Special Appeals reversed the Circuit Court for Prince's George's County, and entered judgment against Petitioner on February 5, 2021. (Pet. App. A2–A31). Petitioner timely petitioned the Maryland Court of Appeals for certiorari, and the Maryland Court of Appeals denied that petition on May 28, 2021. (Pet. App. A1). Petitioner timely filed this petition for writ of certiorari by October 25, 2021, consistent with this Court's March 19, 2020 order automatically extending the time to file a petition for certiorari to

150 days from the date of the order denying discretionary review. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment VI, provides in pertinent part that:

> In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defence.

The United States Constitution, Amendment XIV, § 1, provides in pertinent part that:

> No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Petitioner, who has lived in this country since 2006, was a legal permanent resident of this country, and was given a Green Card, but was not a U.S. citizen. In 2013, he was indicted for third-degree sex offense in violation of Maryland's Criminal Law statute, section 3-307(b). *See* MD. CODE ANN., CRIM. LAW § 3-307(b) (West 2006).

After retaining a criminal defense law firm to represent him, Petitioner expressed that immigration consequences were his main concern. Petitioner appeared at court on the morning of trial, ready to pick a jury, when at the last minute, two of his defense attorneys structured a plea deal with the prosecutor that they believed made the plea "immigration friendly" with a "very low risk" of deportation.

The plea would be an *Alford*[1] plea to third-degree sex offense of a minor in which Petitioner would receive a suspended sentence of 364-days' incarceration. At that time, it was the widely-held belief in that particular courthouse, that any active sentence of less than 364-days' incarceration – regardless of the offense, and regardless of whether a greater sentence may be imposed under the statute – would be "immigration friendly."

After structing the plea in such a manner, and encouraging Petitioner to take the deal, Petitioner began the plea colloquy with the judge. During that colloquy, Petitioner was given general, equivocal advisements that there could be immigration consequences, but the plea judge, consistent with defense counsel's representations, advised Petitioner that this is "ordinarily" an "immigration friendly" plea and sentence.

In fact, this was not an "immigration friendly" plea and sentence. Six months after his plea, Petitioner received notice from the U.S. Department

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[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

of Homeland Security ("DHS") that removal proceedings had begun because Petitioner was convicted of a crime involving moral turpitude, for which a sentence of one year or longer may be imposed, committed within five years after admission to the United States.

Petitioner filed a petition for writ of error coram nobis and he successfully proved that defense counsel was deficient in failing to advise him that he would be deportable based upon his plea. Although Petitioner had been correctly advised that there could be risks of immigration consequences, he was mis-advised that this would be an "immigration friendly" plea. The coram nobis court also found that Petitioner was prejudiced, in that he would not have entered into this plea if it were not for the mis-advice he received. The coram nobis court vacated his plea and sentence.

The State appealed that decision to the Maryland Court of Special Appeals. That court found that "had counsel's *only* advice been that the plea was 'immigration friendly,'" the constitutional requirements under the Sixth Amendment would not have been met. (Pet. App. A30). However, relying on *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010), the court further found that Petitioner "faced charges that fell under the amorphous categories of 'aggravated felonies' or 'crimes of moral turpitude;' rather than an offense with clearly delineated immigration consequences[.]" (Pet. App. A29). As such, the court determined that "the fact that [Petitioner's] attorney told him 'he could be deported' as a result of the plea, *by itself*, is enough to satisfy"

the constitutional requirements, notwithstanding the mis-advice. (Pet. App. A30) (emphasis added).

The court's ruling was based upon the instruction in *Padilla*, that when "the deportation consequences of a particular plea are unclear or uncertain…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." *Padilla*, 559 U.S. at 369 (emphasis added).

Review by this Court is necessary for three important reasons.

First, Petitioner's case presents a situation in which both correct advice and incorrect advice was given, and therefore is distinct from *Padilla*. In *Padilla*, there was no correct advice given about the immigration consequences, rather Padilla was simply told he did not have to worry about any consequences. Therefore, the *Padilla* Court did not address what the outcome might have been if a defendant had been correctly advised that he would be deportable, but was also misadvised that he did not have to worry about the immigration consequences.

Second, Petitioner's case presents a situation in which this Court can address what type of advice is sufficient when the immigration consequences are unclear or uncertain. In *Padilla*, the deportation consequences were truly clear because Padilla was charged with a drug distribution offense, and therefore, had to be advised that he was subject to

mandatory deportation. By contrast, in Petitioner's case, he was charged with sex offense of a minor, for which, the immigration consequences in the Fourth Circuit were uncertain at the time of his plea. Although *Padilla* instructed that in such a circumstance, defense counsel "need do no more than advise" that there may be "a risk of adverse immigration consequences," *Padilla* did not address what would happen if defense counsel does do more, and goes on to give contemporaneous incorrect advice. *Padilla*, 559 U.S. at 369.

Third, the holding in Petitioner's case is at odds with numerous state courts of last resort and several federal courts of appeals. It is also at odds with numerous state intermediate appellate courts and a federal district court.

STATEMENT OF THE CASE

In 2013, Petitioner was a legal permanent resident of this country, but not a U.S. citizen, when he was indicted for third-degree sex offense of a minor.

After being indicted, Petitioner retained defense attorneys Thomas C. Mooney, Esquire ("Mooney") and Kenneth Joy, Esquire ("Joy").

Immigration "was an issue from the very beginning of this case." T. 10/13/15 at 34.[2] Although Petitioner did not want to go to jail, "he really didn't

[2] T. 10/13/15 refers to the transcripts from the October 13, 2015 hearing, which was the second day of hearings on the petition for writ of error coram nobis.

[want to] get deported." *Id.* at 100, 108. That is why, right up until the trial date, Petitioner was not entertaining any plea and was ready to stand trial. *Id.* at 43-44, 103.

However, the morning of trial, the landscape abruptly changed. The State presented defense counsel with an *Alford* plea offer to third-degree sex offense with a 364-day suspended sentence and 364 days of probation.

Mooney testified at the coram nobis hearing that with a third-degree sex offense, the "prospect existed" that there could be deportation, so this plea agreement "was structured [in a] way to take into consideration immigration" consequences. *Id.* at 104.

Joy testified at the coram nobis hearing that it was his belief at the time of the plea hearing that this was an "immigration friendly plea." *Id.* at 28, 34. He believed that "a sentence of 364 days can avoid immigration consequences," *id.* at 65, and "should not affect [Petitioner's] immigration status." *Id.* at 32. Joy further testified, "*[a]s far as whether or not I told [Petitioner], the belief was that this was an immigration friendly plea, yes.*" *Id.* at 34 (emphasis added).

When asked where Joy acquired this immigration information, Joy testified, "[p]retty much just practicing. I've heard different immigration attorneys tell me different things about cases, and that's one of the things that immigration attorneys have told us." *Id.* at 32. Joy testified that at "that time, the 364 days -- 364 days suspended, 364 days

probation was the only thing I was aware of for immigration issues. This is 2013. So subsequent to that, I've heard other things from immigration attorneys." *Id.* at 32-33.

Joy testified that he did not do immigration work himself, he had not read *Padilla v. Kentucky*, nor had he looked up the collateral consequences for a conviction of a third-degree sex offense. *Id.* at 37, 39-41.

Based upon the advice of defense counsel that there was a very low risk of immigration consequences because this was an immigration friendly plea, Petitioner decided to enter into an *Alford* plea.

Mooney was not present with Petitioner during the plea colloquy. Joy informed the court that Petitioner had been advised about the potential immigration consequences of a conviction:

> [S]ince day one when he's come in our office, through the use of our secretary who spoke Spanish, we have steadfast said every day that we have no guarantee, whatsoever, over any immigration issues. It doesn't matter. We even told him if he got a DUI, he could be deported, so we have no control and he understands that.

T. 7/10/13 at 4.[3]

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[3] T. 7/10/13 refers to the transcripts from the July 10, 2013 plea hearing.

The trial court then asked Petitioner if he wanted to proceed with the plea and he responded, "Yes." *Id.*

The trial court advised Petitioner "with these immigration issues, everyone gives the best advice they can give." *Id.* The trial court further advised that:

> *Ordinarily, the 364 days is considered an immigration friendly sentence*, but I am not aware of what their policy is concerning registry on the sex offender registry. So, you are entering an Alford plea, with the understanding that if you went to trial and got convicted, you could serve a more significant sentence, and still have the same immigration consequence; do you understand?

Id. at 10 (emphasis added).

Petitioner answered, "Yes." *Id.*

Petitioner testified at the coram nobis hearing that he recalled being advised that "ordinarily the 364 days is considered an immigration friendly sentence." T.10/2/15 at 43.[4] He testified that counsel advised him that "[his] case was *very low*, it was low and that immigration might take it or might not." *Id.*

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[4] T. 10/2/15 refers to the transcripts from the October 2, 2015 hearing, which was the first day of hearings on the petition for writ of error coram nobis.

at 23 (emphasis added). Petitioner recounted that Mooney advised,

> [P]ut this on a scale, and show it on the scale, *364 days is nothing*. Versus if you go to trial I don't know what could happen. So, *weigh this on a scale and see that this is nothing*. And I am going to repeat again, *he told me your case is this low. This low*. And he told me that immigration will come pick it up or they will not.

Id. at 71 (emphasis added).

Petitioner testified that he was never advised that he was subject to mandatory deportation. *Id.* at 23. He testified that had he been informed that he would be deportable, he would have pleaded not guilty. *Id.* at 76. Petitioner explained, "what I actually did is I did what my lawyer told me to do…If they had actually told me what the real consequences with Immigration I would have made a different decision." *Id.* at 71.

Subsequent to entering the *Alford* plea to sex offense in the third degree, and being sentenced to a suspended sentence of 364 days' incarceration, on January 31, 2014, Petitioner received notice from DHS that removal proceedings had begun because Petitioner was convicted of a crime involving moral turpitude, for which a sentence of one year or longer may be imposed, committed within five years after admission to this country.

On July 7, 2015, Petitioner filed a petition for writ of error coram nobis. Hearings were held on October 2 and 13, 2015 before the Honorable Beverly J. Woodard. On October 19, 2015, Judge Woodard granted the petition and vacated Petitioner's plea and conviction. The coram nobis court found that "[i]mmediately before proceeding with the plea, the trial court inquired as to the [Petitioner's] advisement regarding the immigration issues" and Petitioner's "counsel told the Court that his office had advised the client on numerous occasions that they 'have no guarantee, whatsoever, over any immigration issues[.]'" (Pet. App. A38-A39). The coram nobis court found that counsel's advice in this regard "was accurate to the best of their knowledge of immigration law." (Pet. App. A39).

However, the linchpin was that the trial court "went on to tell the Petitioner;" incorrectly, that "[o]rdinarily, the 364 days is considered an *immigration friendly sentence*." (Pet. App. A33) (emphasis in original). The coram nobis court determined that,

> It does appear that the Petitioner, under the guise of being eligible for an "immigration friendly" sentence, opted to take the plea to avoid jail time unbeknown that the conviction would make him automatically deportable. With the changes taking place in immigration law, the phrase that was once popularly used in this Court no longer holds true. An 'immigration friendly' plea no longer exists.

(Pet. App. A39).

Relying on, *Sanmartin Prado v. State*, 225 Md. App. 201 (2015), *rev'd*, 448 Md. 664 (2016), the coram nobis court determined that Petitioner was denied effective assistance of counsel where he was misadvised and lead to believe that this was an "immigration friendly" plea rather than being "affirmatively inform[ed] [that] he is deportable[.]" (Pet. App. A38).

In finding that the legal standard of review had been met by Petitioner as to both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984), the coram nobis court granted Petitioner's writ of error coram nobis and vacated his conviction. (Pet. App. A40).

The State appealed that decision and while the appeal was pending, the Maryland Court of Appeals decided *State v. Sanmartin Prado*, 448 Md. 664, 666-67 (2016), *cert. denied*, 137 S.Ct. 1590 (2017), holding that equivocal advice that a defendant could possibly be deported is "correct advice" about the "risk of deportation."

Relying on *Padilla* and *Sanmartin Prado*, the Court of Special Appeals reversed the judgment of the coram nobis court and reinstated Petitioner's conviction.

The Court of Special Appeals determined that "had counsel's only advice been that the plea was 'immigration friendly,' *Sanmartin Prado's*

requirements would not be met." (Pet. App. A30). But "the fact that [Petitioner's] attorney told him 'he could be deported' as a result of the plea, *by itself*, is enough to satisfy the mandate of *Sanmartin Prado*." (Pet. App. A30) (emphasis added).

Petitioner timely petitioned the Maryland Court of Appeals for certiorari, and the Maryland Court of Appeals denied that petition on May 28, 2021. (Pet. App. A1).

REASONS FOR GRANTING THE PETITION

I. This Court has never rendered a holding on the performance prong of *Strickland* when defense counsel has given both correct and incorrect advice about the potential immigration consequences of a plea.

In *Padilla*, this Court determined that defense counsel was ineffective for failing to provide *any* correct advice about the risk of deportation, and instead provided inaccurate advice that the defendant did not have to worry about deportation. Thus, it was not a case where there was some correct advice given in the face of mis-advice.

In *Lee v. United States*, -- U.S. --, 137 S. Ct. 1958, 1968 (2017), this Court determined that defense counsel was ineffective where the plea judge advised that a conviction "could result in [Lee] being deported," but defense counsel undermined that advisement by telling Lee that this was just a "standard warning." Although *Lee* was a case in which there was general correct advice coupled with

mis-advice, this Court was only asked to determine whether prejudice was established because "the Government conceded that Lee's counsel had performed deficiently[.]" *Id.* at 1961. Petitioner avers that guidance is need for courts trying to interpret the deficiency prong under circumstances where there is both correct and incorrect advice given, and the government does not concede the deficiency, like in Petitioner's case.

In *Kaushal v. Indiana*, 138 S.Ct. 2567 (2018), the defendant was provided written warnings that, as a non-citizen, he could face deportation and other immigration consequences. However, his attorney never advised him that his plea to child molestation could subject him to presumptive detention and deportation, and his attorney grossly understated the immigration consequences he would be facing. This Court granted Kaushal's petition, but vacated his judgment, and remanded the case to the Court of Appeals of Indiana for further consideration in light of *Lee*. Therefore, this Court never rendered an opinion in *Kaushal*.

Thus, there continues to be a chasm of caselaw by this Court on whether defense counsel provides constitutionally adequate assistance when he gives both correct advice and incorrect advice about the deportation consequences of a plea.

II. This Court has never analyzed the adequacy of advice given to a defendant who pleads to a crime that has unclear or uncertain immigration consequences.

The offense in *Padilla* was drug distribution and the offense in *Lee* was possession with intent to distribute drugs. Thus, in both cases, this Court determined that these were considered "aggravated felony" offenses under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B), where "the deportation consequence is truly clear;" thus, "the duty to give correct advice is equally clear." *Padilla*, 559 U.S. at 374, 369; *see also Lee*, 137 S. Ct. at 1963.

The *Padilla* Court determined that by contrast, when "the deportation consequences of a particular plea are unclear or uncertain…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." *Padilla*, 559 U.S. at 369 (emphasis added).

Petitioner entered an *Alford* plea to sex offense in the third degree in violation of the Annotated Code of Maryland, Criminal Law § 3-307(b). The Court of Special Appeals determined that Petitioner "faced charges that fell under the amorphous categories of 'aggravated felonies' or 'crimes of moral turpitude;' rather than an offense with clearly delineated immigration consequences." (Pet. App. A29).

At the time of Petitioner's plea, the law in the Fourth Circuit, which includes Maryland, was "less

clear" as to whether a sexual offense against a minor would be considered a crime involving moral turpitude, because generally that classification required a culpable mental state, and it was undecided whether mental culpability required knowledge of the age of the victim. *See Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 295 (4th Cir. 2018). The Board of Immigration Appeals was not uniformly applying its precedent at the time of Petitioner's plea.

Defense counsel was not concerned with whether third-degree sex offense was a crime of moral turpitude or an aggravated felony; rather, the 364-day sentence, "was the only thing [he] was aware of for immigration issues[.]" T. 10/13/15 at 32-33. Defense counsel erroneously believed that a 364-day sentence could save a person from being deported. However, unlike some provisions of the immigration statute specifying that a crime becomes an "aggravated felony" if a sentence of "at least one year" attaches, the provision for "sexual abuse of a minor" makes a qualifying conviction an "aggravated felony" regardless of the sentence that is or may be imposed. *Compare* 8 U.S.C.A. § 1101(a)(43)(F), (G), (J), (R), and (S) (West 2014[5]), *with* § 1101(a)(43)(A). "Any alien who is convicted of an aggravated felony at any time after admission…[is] deportable." 8 U.S.C. § 1227(a)(2)(A)(iii).

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[5] The 2014 amendments did not change the applicable aggravated felony section for this case in 2013. *See* amendments at Pub. L. 113-76, Div. K, Title VII, § 7083, Jan. 17, 2014, 128 Stat. 567.

Similarly, if the third-degree sex offense qualified as a "crime of moral turpitude" (as was determined by DHS in this case), the 364-day sentence likewise would not prevent Petitioner from becoming "deportable" because the statute explicitly states that a noncitizen becomes "deportable" for a crime of moral turpitude if the noncitizen is "convicted of a crime for which a sentence of one year or longer ***may*** be imposed[.]" 8 U.S.C.A. § 1227(a)(2)(A)(i)(II) (West 2008) (emphasis added). A simple reading of this statute would have informed defense counsel that it did not matter whether a sentence of one year or longer ***is*** imposed; only whether it ***may*** be imposed.

The crime of third-degree sex offense carries a statutory maximum sentence of ten years' imprisonment. *See* MD. CODE ANN., CRIM. LAW § 3-307(b) (West 2006). Thus, it was a crime for which a sentence of one year or longer may be imposed.

Defense counsel never read any of the immigration statutes, *Padilla v. Kentucky*, or any other immigration case, to determine whether the immigration consequences were clear, and what advice needed to be given. T. 10/13/15 at 37, 39-41.

Because the Court of Special Appeals determined that Petitioner's offense was one in which the consequences of immigration were uncertain, the court determined that only equivocal advice about the risk of deportation was required. *See Sanmartin Prado*, 448 Md. at 666-67. The Court of Special Appeals therefore held that "the fact that [Petitioner's] attorney told him 'he could be deported' as a result of the plea, *by itself*, is enough to satisfy"

the constitutional requirements, notwithstanding the mis-advice. (Pet. App. A30) (emphasis added).

But the equivocal advice sanctioned by *Sanmartin Prado*, does not mean that erroneous advice can be swept under the rug. That *Padilla* said "correct advice" is required "where the deportation consequence is clear," 559 U.S. at 374, does not mean that "incorrect advice" will be tolerated simply because the deportation consequence was unclear. The *Padilla* Court cautioned defense counsel to "do no more" than advise about the risk of immigration consequences when those consequences are unclear. *Id.* at 369. But where an attorney does do more, he does so at his own peril.

The *Padilla* Court could not have intended that a general advisement about the risk of immigration consequences, would "by itself," be sufficient to satisfy constitutional guarantees, regardless of the contemporaneous mis-advice given by defense counsel, as was upheld by the Maryland Court of Special Appeals in Petitioner's case. (Pet. App. A30).

This Court has yet to render an opinion in a case in which both correct advice and mis-advice were given for a plea to a crime with unclear or uncertain deportation consequences. This Court has never decided what happens when, in a case of unclear deportation consequences, a criminal defense attorney does more than simply advise a noncitizen defendant about the risk of immigration consequences. This Court should grant this writ to determine that the "required advice [under *Padilla*] about immigration consequences would be a useless

formality if, in the next breath, counsel could give the noncitizen defendant the impression that he or she should disregard what counsel just said about the risk of immigration consequences." *State v. Sandoval*, 249 P.3d 1015, 1020 (Wash. 2011) (en banc).

III. The holding in Petitioner's case is at odds with numerous courts across the country.

The holding in Petitioner's case conflicts with numerous state courts of last resort, and with several federal courts of appeals. *See*, *e.g.*, *Sandoval*, 249 P.3d at 1020 (giving required advice would be a "useless formality" if counsel gives the impression that the defendant could disregard that general advice); *Araiza v. State*, 481 P.3d 14, 18 (Haw. 2021) ("Even technically-accurate immigration advice can be deficient if the advice as a whole 'understates the likelihood that [a defendant] would be removed.'"); *Budziszewski v. Comm'r of Correction*,142 A.3d 243, 251 (Conn. 2016) ("If counsel gave the advice required under *Padilla*, but also expressed doubt about the likelihood of enforcement, the court must also look to the totality of the immigration advice given by counsel to determine whether counsel's enforcement advice effectively negated the import of counsel's advice required under *Padilla* about the meaning of federal law."); *Kovacs v. United States*, 744 F.3d 44 (2d. Cir. 2014) (defense counsel's erroneous advice that "misprison of felony is not deportable" was both deficient and prejudicial, despite the district court's warning that "immigration consequences were not in its control and that it would give no such assurance"); *United*

States v. Swaby, 855 F.3d 233 (4th Cir. 2017) (mis-advice regarding specific immigration consequences of a plea warranted relief even though defendant was warned of "risk" of deportation); *United States v. Akinsade*, 686 F.3d 248 (4th Cir. 2012) (district court's general and equivocal admonishment that defendant's plea *could* lead to deportation is insufficient to correct defense counsel's affirmative mis-advice that Akinsade's crime was not categorically a deportable offense); *Dat v. United States*, 920 F.3d 1192, 1195-96 (8th Cir. 2019) (finding a presentence report that noted the defendant would be subject to "Administrative Removal" was insufficient to remedy his attorney's mis-advice that he would not be deported).

The holding in Petitioner's case is also at odds with decisions by intermediate appellate courts and a federal district court. *See*, *e.g.*, *People v. Ogunmowo*, 232 Cal. Rptr. 3d 529, 538-39 (Cal. Ct. App. 2018) (defense counsel who never researched immigration statutes misadvised non-citizen defendant that there would be no immigration consequences for his conviction of drug trafficking and plea court's warning about the immigration consequences could not cure defense counsel's deficient performance); *People v. Marones-Quinonez*, 363 P.3d 807 (Colo. Ct. App. 2015) (counsel's affirmative misrepresentation cannot be cured by a correct court advisement); *People v. Martinez*, 117 N.Y.S.3d 199 (N.Y. App. Div. 2020) (plea counsel's erroneous advice as to deportation consequences of guilty plea amounted to ineffective assistance notwithstanding that plea court advised defendant that there could be immigration consequences to

guilty plea); *Klaiber v. United States*, 471 F. Supp. 3d 696 (D. Md. 2020) (general and equivocal warnings in a plea agreement or during a plea colloquy, about potential immigration consequences, do not cure an attorney's deficient performance in giving erroneous advice regarding the near-certain immigration consequences of an aggravated felony conviction).

Where the immigration consequences are unclear, the magic words, "plea carries a risk of deportation," *Padilla*, 559 U.S. at 374, will only retain their adequacy, when defense counsel "do[es] no more." *Id.* at 369. The *Padilla* Opinion cannot be misconstrued as a license to understate the likelihood that a defendant would be removed where the immigration consequences are uncertain. Afterall, *Padilla* was decided "against the backdrop, and in the context, of affirmative mis-advice having been given." *Sanmartin Prado*, 448 Md. at 713 (citing *Padilla*, 559 U.S. at 368-69).

The holding of the Court of Special Appeals of Maryland turns *Padilla* on its head by suggesting that, "the fact that [Petitioner's] attorney told him 'he could be deported' as a result of the plea, *by itself*, is enough to satisfy the mandate of" the Sixth Amendment, (Pet. App. A30), notwithstanding the fact that Petitioner was advised that this plea was "immigration friendly", with a "very low" risk of deportation, and that a 364-day sentence "should not affect immigration status."

CONCLUSION

For the foregoing reasons, this Court should grant this writ of certiorari.

Respectfully submitted,

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