No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Padilla v. Kentucky*, this Court held that the Sixth Amendment right to effective assistance of counsel requires counsel to provide correct legal advice to noncitizen-defendants about the immigration consequences of a prospective guilty plea. 559 U.S. 356, 368–69 (2010). If federal law is "succinct, clear, and explicit" about the immigration consequences of a guilty plea, then defense counsel's duty to explain those consequences is equally clear. *Id.* at 368. In contrast, defense counsel need only caution that a guilty plea may carry a risk of adverse immigration consequences when federal law is unclear. *Id.* In *Padilla*, the Court determined that federal law clearly required the petitioner's deportation as a result of his guilty plea. *Id.* at 368–69. Defense counsel was therefore required to explain to the petitioner that the guilty plea would trigger his mandatory deportation as a matter of law. *Id.* at 360, 369.

The question presented in this case is: When there is no dispute that a guilty plea will trigger mandatory deportation pursuant to federal law, must defense counsel advise a noncitizen-defendant that the plea will result in deportation as a matter of law, or is it sufficient for defense counsel to caution that the plea could make the noncitizen-defendant "deportable" or that it will "probably" result in deportation?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

Colorado Supreme Court:

Juarez v. Colorado, No. 2017SC815 (Feb. 10, 2020), *reh'g denied* (Mar. 2, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Alfredo Juarez petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court.

OPINIONS BELOW

The decision of the Colorado Supreme Court is reported at 457 P.3d 560 (Colo. 2020) and reproduced in the Appendix at App. 1–23. The Colorado Supreme Court's decision denying rehearing is not reported, but it is reproduced in the Appendix at App. 70. The decision of the Colorado Court of Appeals is reported at 459 P.3d 596 (Colo. App. Ct. 2017) and reproduced in the Appendix at App. 24–45. The decision of the Colorado District Court is not reported, but is available at No. 2011CR01007, 2013 WL 12330519 (Colo. Dist. Ct. May 28, 2013), and it is reproduced in the Appendix at App. 46–69.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The judgment of the Colorado Supreme Court denying a petition for rehearing entered on March 2, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment VI, provides, in relevant part:

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

8 U.S.C. § 1227(a) provides:

> Any alien (including an alien crewman) in and admitted to the United States shall, upon order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens . . .

8 U.S.C. § 1227(a)(2)(B)(i) provides:

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

INTRODUCTION

Since this Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), a significant conflict has emerged among both federal circuit courts and state courts of

last resort about how to interpret *Padilla*'s directive to provide correct legal advice to noncitizen-defendants about the clear immigration consequences of a prospective guilty plea. While courts overwhelmingly agree that the required advice need not include certain talismanic language, there is an entrenched disagreement about whether the advice must at least include a clear explanation of the applicable federal law.

A majority of jurisdictions interpreting *Padilla*—including the Second Circuit, Third Circuit, and Ninth Circuit, as well as the states of Connecticut, Florida, Georgia, Iowa, Washington, and the Commonwealth of Massachusetts—agree that when a guilty plea triggers a clear deportation mandate in the Immigration and Nationality Act ("INA"), defense counsel must unambiguously communicate that legal mandate to noncitizen-defendants. By contrast, other jurisdictions—including the Sixth Circuit and Eighth Circuit, as well as the states of Maryland, Wisconsin, Rhode Island, and now Colorado—hold that the INA's deportation mandate need not be conveyed as long as defense counsel's advice includes an adequate warning about the factual probability that the INA's deportation mandate will be enforced.

Resolving this conflict is immensely important. As the Court recognized in *Padilla*, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 559 U.S. at 364. Furthermore, "[t]he 'drastic measure' of deportation or removal, is now virtually inevitable

for a vast number of noncitizens convicted of crimes." 559 U.S. at 360 (internal citation omitted). But the contradictory interpretations of *Padilla* have created confusion within the defense bar about the type of advice required when the INA is clear. The conflict has also generated significant inequities among noncitizen-defendants whose Sixth Amendment right to constitutionally competent counsel now varies considerably between jurisdictions. These problems will persist without the Court's intervention.

This case provides the Court an ideal vehicle to settle the entrenched disagreement. It squarely and cleanly addresses the question presented. First, the question presented has been preserved at all stages of Juarez's post-conviction proceedings. Second, the removal provision that triggered Juarez's deportation is the same provision the Court examined in *Padilla* and determined to set forth a "succinct, clear, and explicit" deportation mandate. 559 U.S. at 368. Third, there is no dispute that Juarez's defense counsel failed to advise him of the law's clear deportation mandate. Finally, prejudice is not an issue in this case. Not only did both the Colorado Supreme Court and the Colorado Court of Appeals explicitly decline to examine the issue of prejudice, but the Colorado district court's prejudice decision was issued well before this Court's opinion in *Lee v. United States*, 137 S. Ct. 1958, 1968–69 (2017), which is dispositive here.

This Court should grant certiorari to resolve the intractable conflict among both federal circuit courts and state courts of last resort. The deep-seated

disagreement about how to interpret *Padilla* cannot be resolved without this Court's intervention. The question presented here, on which the courts are profoundly divided, is incredibly important. It could determine the fate of thousands of noncitizens and their families—families like that of petitioner Alfredo Juarez, who was separated from his U.S. citizen wife and two U.S. citizen children when he was deported to a country where he had not lived since he was a young child.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Juarez's ties to the United States and the 2011 arrest

Petitioner Alfredo Juarez is a native and citizen of Mexico. He was brought to the United States as a young child by his parents. His family settled in Colorado where Juarez attended school and later married. His U.S. citizen wife then petitioned for him to obtain lawful permanent residence status, which was granted in June 2009. Juarez and his wife built a life together in Colorado. They have two U.S. citizen children, and Juarez started his own company to support his family. App. 25, 46–47.

In March 2011, Juarez was arrested for the first time in his life. Responding to a purported domestic dispute, police forcibly entered Juarez's home without a warrant, subdued him, and searched his person. The

police discovered what they perceived to be cocaine on his face and a trace amount of cocaine residue (0.08 grams) on a dollar bill in his pants' pocket. Juarez was then charged under Colorado law with one felony count of possession of a controlled substance.

Juarez subsequently retained defense counsel John Tatum to represent him. App. 25, 47. A few months after being retained, Tatum filed a motion to suppress arguing that the police had improperly obtained the incriminating evidence after unlawfully entering Juarez's home. Tatum also secured several continuances while he pursued negotiations with the prosecution to secure an immigration-friendly plea agreement. App. 25–26.

B. Defense counsel's failure to advise Juarez that the prosecution's plea offer would trigger his deportation as a matter of law

Throughout the criminal process, Tatum knew that deportation was Juarez's paramount concern. App. 29. Tatum also knew that Juarez was a first-time offender and therefore not likely facing a term of imprisonment. Tatum believed that the case was likely to result in probation regardless of whether Juarez pleaded guilty to the felony charge or was convicted at trial.

Despite knowing that his client's primary goal was to avoid deportation, Tatum admitted at the post-conviction evidentiary hearing to conducting no independent legal research to ascertain the immigration

consequences of the felony charge—not even a cursory review of the removal statute. Instead, he relied almost exclusively on the guidance of Juarez's prior immigration attorney, Marshall Whitehead. App. 58. Based on his consultation with Whitehead, Tatum knew that pleading guilty to any controlled substance offense other than a minor marijuana-related offense would trigger Juarez's deportation. App. 26.

Tatum's efforts to secure an adequate plea agreement from the prosecution were ultimately unsuccessful. At the final disposition setting hearing and with a trial date set, Juarez finally accepted the prosecution's plea offer. The plea deal required Juarez to plead guilty to a misdemeanor charge of possessing a controlled substance (pyrovalerone) in exchange for the prosecution dismissing the felony possession charge.[1] App. 48.

Although Juarez knew that the guilty plea would make him "deportable," he did not know—and was not advised—that federal law would mandate his deportation if he accepted the plea. Tatum instead told Juarez that Whitehead thought the misdemeanor offense would "*probably* result in deportation." App. 29 (emphasis added). Whitehead later testified at the post-conviction hearing that he remembered telling Tatum and Juarez that if Juarez accepted the plea offer he would "probably be placed in remov[al] proceedings." App. 30. Tatum also told Juarez that the misdemeanor

[1] As noted by the Colorado district court, pyrovalerone is a controlled substance for purposes of the INA. App. 48 (citing 21 C.F.R. § 1308.15(d)(1)).

might be looked upon more favorably by immigration officials given the purportedly immigrant-friendly presidential administration at the time and speculated that a hypothetical future change in immigration law might benefit him. App. 16–17, 64–65, 68.

Unaware that his deportation was presumptively mandatory, and based on the mistaken belief that there was some immigration-related benefit to a misdemeanor conviction rather than a felony conviction, Juarez pleaded guilty to the misdemeanor possession offense. App. 16–17, 29. At the plea hearing, Tatum announced to the court that he had told Juarez that the guilty plea would "very likely" result in deportation and potentially other adverse immigration consequences. Tatum claimed that he informed Juarez that the misdemeanor was "the equivalent of a felony under the immigration and naturalization act." App. 27. Juarez was asked by the court if he understood that the plea would likely or could affect his immigration status. Juarez simply answered: "There's nothing I can do. . . . [W]e got to go with what, what we can do now." App. 26–27.

The plea of guilty was entered onto the record and Juarez was given two years of drug court probation. After violating probation, he was placed in state custody where he was moved to immigration detention and removal proceedings were initiated. App. 28. On September 5, 2012, Juarez was ordered deported pursuant to 8 U.S.C. § 1227(a)(2)(B)(i). He was then deported to Mexico where he has now lived separated from his family for approximately eight years. App. 28.

II. THE PROCEEDINGS BELOW

A. Colorado District Court

On October 9, 2012, Juarez filed a petition for post-conviction relief based on Tatum's constitutionally deficient advice. Relying on *Padilla*, Juarez argued that Tatum failed to advise him that his guilty plea would trigger mandatory deportation as a matter of law.[2] App. 49.

After a three-day evidentiary hearing, the court denied Juarez's petition. App. 49, 68. Applying the two-prong ineffective assistance of counsel test articulated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the court held that Tatum's advice to Juarez that he would "probably" be deported due to the guilty plea was not deficient because it "accurately related the effect of the plea under 8 U.S.C. § 1227(a) and also provided additional, correct information as to the probability of deportation." App. 60.

According to the court, Tatum could not have advised Juarez that the guilty plea would make his deportation presumptively mandatory because such advice turns on an "illusory distinction." App. 59. Without accounting for the compulsory term "shall" in the

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[2] Juarez also argued that Tatum failed to advise him about other immigration consequences of the guilty plea, including the triggering of an eligibility bar to cancellation of removal. Those claims were dismissed by the district court and are not being raised here. Furthermore, Juarez was not eligible for cancellation of removal to begin with because he had not accrued the requisite five years as a lawful permanent resident. *See* 8 U.S.C. § 1229b(a)(1).

opening provision of 8 U.S.C. § 1227(a), the court instead noted that "[t]he word 'mandatory' does not appear in the statute."[3] App. 57. With that understanding of the removal provision, the court claimed that terms such as "mandatorily" or "automatically" create "a misleading impression of the probability of actual deportation" which "is not absolute, certain, or guaranteed." App. 59.

The district court also held that even if Tatum's advice was deficient, Juarez was not prejudiced because his decision to forgo a decision on the motion to suppress and a trial was objectively rational. App. 63–64. According to the court, the decision was rational because of a felony's inherent social stigma and the barriers it may present when keeping or obtaining employment. App. 65. It further reasoned that if a future Congress decides to mitigate the consequences of criminal convictions by amending immigration laws "it is logical that they are more likely to be eased for misdemeanors than felony convictions." App. 68. Put simply, Juarez accepted the plea deal because he was "motivated by the hope that he might not actually be deported." *Id.* The court further noted that Juarez might not have been deported had he not violated his probation, which prompted his detention. App. 59.

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[3] "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Kingdomware Tech. v. United States*, 136 S. Ct. 1969, 1977 (2016); *see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (recognizing that "shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion").

B. Colorado Court of Appeals

The Colorado Court of Appeals affirmed the district court's deficient performance holding, but explicitly declined to address its prejudice holding. App. 44. Interpreting *Padilla*, the court held that defense counsel need only provide correct advice about the factual probability of deportation because deportation is not inevitable even when the law requires it. App. 36. Consequently, advice to noncitizen-defendants about the deportation consequences of a guilty plea "need not be unequivocal." App. 36. Tatum's advice that the guilty plea would "probably result in deportation" was thus not constitutionally deficient because it accurately conveyed the factual probability of Juarez's deportation. App. 25, 37–38.

Importantly, the appeals court acknowledged that its holding contributed to a deep conflict among federal and state courts across the country about the type of legal advice *Padilla* requires. App. 38–42. It also recognized that a majority of jurisdictions require defense counsel to explain to noncitizen-defendants when the INA mandates deportation as a consequence to pleading guilty. App. 38–40. Nevertheless, the court believed that Tatum's advice to Juarez met "the general spirit" of the standard. App. 41. But even if it did not, the court reasoned that there was still "no fault in it." *Id.*

C. Colorado Supreme Court

On certiorari, the Colorado Supreme Court affirmed the appeals court's ruling by a divided vote. App. 2. The majority held that Tatum's counsel was not constitutionally deficient because Juarez admitted that he was advised and understood that the guilty plea would make him "deportable." App. 14. Like the appeals court, the Colorado Supreme Court explicitly declined to address the issue of prejudice. *Id.*

Recognizing *Padilla*'s separate standards of required advice depending on federal law's clarity, the court held that an explanation of "the law" is required when the law clearly compels deportation as a consequence to pleading guilty. App. 11. Citing *Padilla*, the court reasoned that federal law in this case clearly made Juarez "deportable" due to the guilty plea. App. 12. Tatum's advice was therefore correct and complete because an advisement that one is "probably" or "very likely" to be deported necessarily implies that one is "deportable." App. 13. The court then noted that the Court in *Padilla* used phrases like "presumptively mandatory" or "automatic deportation" only to illustrate developments in federal immigration law or to emphasize the inaccurate advice provided by Padilla's counsel—not to suggest the type of advice that should be provided. App. 12–13.

Justice Gabriel authored a concurring opinion in the case, which was joined by Justice Márquez. In his opinion, Justice Gabriel determined that Tatum's advice was constitutionally deficient because it failed to

"correctly convey the clear statutory deportation consequences of Juarez's guilty plea."[4] App. 15. Tatum's advice that Juarez's plea "could make him deportable" or that he would "probably" be deported, or that it was "very likely" to result in deportation failed to communicate the statute's clear deportation mandate. App. 19–20. According to Justice Gabriel, "[t]elling a defendant that deportation is probable or likely does not tell him or her what the law is. It provides, instead, a factual prediction as to the plea's likely outcome." App. 20.

Furthermore, Justice Gabriel reasoned, Tatum's failure to correct Juarez's misimpression that the misdemeanor conviction may be looked upon more favorably by immigration authorities or that it might benefit him if immigration laws were amended in the future was misleading. App. 20. That advice gave Juarez further false hope that the guilty plea might not trigger his deportation. App. 20.

After the Colorado Supreme Court's decision issued, Juarez filed a petition for rehearing that was denied on March 2, 2020. App. 70.

[4] Concurring only in the judgment, Justice Gabriel found that the deficient advice was not prejudicial and therefore Juarez's claim failed the second prong of *Strickland*'s ineffective assistance of counsel test. Notably, the concurring opinion—the only opinion in these proceedings to address prejudice other than the district court's opinion—fails to mention this Court's decision in *Lee v. United States*, 137 S. Ct. 1958, 1969 (2017).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONTRIBUTES TO A DEEP CONFLICT AMONG FEDERAL CIRCUIT COURTS AND STATE COURTS OF LAST RESORT.

The acknowledged conflict among both federal circuit courts and state courts of last resort squarely addressing the question presented in this case is unlikely to be resolved without this Court's intervention. Given how frequently the question arises, the confusion and unpredictability it currently causes across the country, and its importance when it does arise, this Court should grant the writ of certiorari now to resolve the conflict.

When a guilty plea will clearly trigger deportation as a matter of law, courts are sharply divided about whether defense counsel must at least warn noncitizen-defendants that the law will require their deportation. A majority of jurisdictions interpreting *Padilla* require competent defense counsel to explain in unequivocal terms when the INA clearly mandates deportation as a consequence of the guilty plea. In contrast, other jurisdictions have interpreted *Padilla* only to require defense counsel to warn noncitizen-defendants that a guilty plea carries a risk of deportation. In other words, a minority of jurisdictions have interpreted *Padilla* to require legal advice only about the factual probability that the statute's mandate will be enforced—not an unequivocal explanation of what the law demands.

For example, the Second Circuit, Third Circuit, and Ninth Circuit have interpreted *Padilla* as requiring defense counsel to communicate federal law's deportation mandate when that mandate will clearly be triggered by a guilty plea. *United States v. Al Halabi*, 633 F. App'x 801, 803 (2d Cir. 2015) (holding that defense counsel's advice that noncitizen-defendant "may" be deported is deficient when the law clearly mandates deportation); *United States v. Fazio*, 795 F.3d 421, 424 (3d Cir. 2015) (noting that informing a defendant he "could be deported" is insufficient under *Padilla* when it is clear that a plea will make him subject to automatic deportation); *United States v. Rodriguez-Vega*, 797 F.3d 781, 785–86, 788 (9th Cir. 2015) (holding that defense counsel's advice that noncitizen-defendant "faced a potential of removal" and that a misdemeanor guilty plea may be looked upon more favorably than a felony was deficient because the law clearly mandated deportation); *see also United States v. Bonilla*, 637 F.3d 980, 984 (9th Cir. 2011) ("A criminal defendant who faces almost certain deportation is entitled to know more than that it is *possible* that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty." (emphasis in original)).

On the other hand, the Sixth Circuit and Eighth Circuit simply require defense counsel to caution noncitizen-defendants that a guilty plea may carry a risk of deportation because the factual possibility of deportation is unpredictable. *See United States v. Ramirez-Jimenez*, 907 F.3d 1091, 1094 (8th Cir. 2018) ("[I]mmigration law complexities should caution any

criminal defense attorney not to advise a defendant considering whether to plead guilty that the result of a post-conviction, contested removal proceeding is clear and certain."); *Maiyo v. United States*, 576 F. App'x 567, 570-71 (6th Cir. 2014) (noting that advice that defendant "could be deported" was not ineffective under *Padilla* because counsel "told him of the risk of deportation").

The conflict is even more entrenched among state courts of last resort. The high courts of Connecticut, Florida, Georgia, Iowa, Massachusetts, and Washington have interpreted *Padilla* to require unambiguous advice about federal law's clear and mandatory deportation consequence when that mandate will be triggered by a guilty plea. *See Diaz v. Iowa*, 896 N.W.2d 723, 730 (Iowa 2017) ("If 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. If the crime is not clearly covered under the statute, counsel must advise the defendant that immigration consequences may follow."); *Budziszewski v. Comm'r of Correction*, 142 A.3d 243, 249 (Conn. 2016) ("Because federal law called for deportation for the petitioner's conviction, his counsel was required to unequivocally convey to the petitioner that federal law mandated deportation as the consequence for pleading guilty. Warning of only a 'heightened risk' of deportation, as the respondent suggests is sufficient, would not accurately characterize the law."); *Encarnacion v. Georgia*, 763 S.E.2d 463, 466 (Ga. 2014) ("It is not enough to say

'maybe' when the correct advice is 'almost certainly will.' "); *Massachusetts v. DeJesus*, 9 N.E.3d 789, 795 (Mass. 2014) ("Counsel therefore was obligated to provide to his client, in language that the client could comprehend, the information that presumptively mandatory deportation would have been the legal consequence of pleading guilty."); *Hernandez v. Florida*, 123 So.3d 757, 763 (Fla. 2012) ("Where deportation consequences are 'truly clear,' the United States Supreme Court in *Padilla* requires effective counsel to provide more than equivocal advice concerning those consequences."); *Washington v. Sandoval*, 249 P.3d 1015, 1019 (Wash. 2011) ("If the applicable immigration law 'is truly clear' that an offense is deportable, the defense attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation.").

In contrast, Colorado's high court now joins the high courts of Maryland, Rhode Island, and Wisconsin, where defense counsel need only caution noncitizen-defendants that a guilty plea carries a risk of deportation, even when federal law clearly mandates deportation. *See Maryland v. Sanmartin Prado*, 141 A.3d 99 (Md. 2016) ("[W]here defense counsel testified that he also advised the defendant that 'there could and probably would be immigration consequences' and 'that it was a deportable or a possibly deportable offense,' . . . such advice was not constitutionally deficient, but rather was 'correct advice' about the 'risk of deportation,' as required by *Padilla*."); *Shata v. Wisconsin*, 868 N.W.2d 93, 110 (Wisc. 2015) ("[T]he [*Padilla*] Court's

overall emphasis was that the deportation statute in question makes most drug convicts subject to deportation in the sense that they certainly become deportable, not in the sense that plea counsel should know and state with certainty that the federal government will, in fact, initiate deportation proceedings." (internal quotation marks omitted)); *Neufville v. Rhode Island*, 13 A.3d 607, 614 (R.I. 2011) ("Counsel is not required to inform their clients that they *will* be deported, but rather that a defendant's 'plea would make [the defendant] eligible for deportation.'" (quoting *Padilla*, 559 U.S. at 368)).

The correct interpretation of *Padilla* has a significant impact on both the scope of Sixth Amendment rights afforded to noncitizen-defendants in criminal proceedings and the criminal defense bar. As articulated by this Court in *Padilla* and demonstrated by this case, the immigration consequences of a criminal charge are often the predominate concern for noncitizen-defendants deciding whether to accept a guilty plea. When the unambiguous deportation consequences of a plea offer are not clearly communicated, the results can be devastating. In this case, Juarez was deported to a country he did not know and where he had not lived since he was a small child. He was separated from his livelihood, his wife, and his children. Defense counsel, along with thousands of individuals like Juarez, need this Court to resolve the question presented in order to ensure the fair and uniform application of the Sixth Amendment.

This established conflict leads to deeply unfair results. For example, noncitizen-defendants in Massachusetts and Rhode Island are likely to have received different pre-conviction advice about the immigration consequences of a guilty plea, but they appear for removal proceedings in the same Boston immigration court. Individuals with Massachusetts convictions will have been advised that a guilty plea clearly requires their deportation as a matter of law. Those noncitizen-defendants are consequently prepared for removal proceedings to result in their deportation. Noncitizen-defendants with Rhode Island convictions, on the other hand, may mistakenly believe that they can evade deportation because they received equivocal advice about the likelihood of deportation—not that the law requires it. This hypothetical is neither farfetched nor geographically limited.

Noncitizen-defendants in Iowa, for example, may receive different advice concerning the same deportation consequences depending upon whether criminal charges have been lodged in state court or federal court. In state court, where the Iowa Supreme Court's decision in *Diaz* controls, noncitizen-defendants must be advised when a guilty plea will trigger their presumptively mandatory deportation. 896 N.W.2d at 732. On the other hand, noncitizen-defendants in the U.S. District Court for the District of Iowa need only be cautioned that a guilty plea may result in deportation based on the Eighth Circuit's holding in *Ramirez-Jimenez*. 907 F.3d at 1094.

Only this Court can correct the inequities caused by the disparate interpretations of *Padilla* across the federal circuits and state courts of last resort. Given the depth and breadth of the conflict on this issue, it is practically inevitable that this Court, at some point, will have to resolve the question presented in this case.

II. THE DECISION BELOW IS INCORRECT AND OFFERS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

A. The decision below is incorrect.

Tatum's advice to Juarez that his guilty plea would "probably" result in deportation or could make him "deportable" was constitutionally deficient because it failed to unequivocally communicate that the guilty plea would mandate Juarez's deportation based on the INA's "succinct, clear, and explicit" text. App. 26–27, 29. When federal law is clear, as it was in this case, defense counsel must provide advice that is equally clear. *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010).

In this case, Juarez's guilty plea triggered the same clear removal provision at issue in *Padilla*, but Tatum's advice failed to convey what the law compelled: automatic deportation. Tatum's advice that Juarez was "probably" going to be deported was deficient because it simply reflected his best guess about the theoretical probability of the law's enforcement, not an explanation of what the law required. *See Hill v. Lockhart*, 474 U.S. 52, 62 (1985) (White, J.,

concurring) ("The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis."). Advising Juarez that the guilty plea could make him "deportable" is also problematic because it merely states the obvious: any admitted noncitizen is "capable of" being deported. *See* Merriam-Webster, Online Dictionary, https://www.merriam-webster.com/dictionary/able (defining the suffix –able as "capable of, fit for, or worthy of"); *see also DeJesus*, 9 N.E.3d at 796 ("Telling the defendant that he was 'eligible for deportation' and that he would 'face deportation' was not adequate advice because it did not convey what is clearly stated in Federal law."). Furthermore, Tatum's comments about how the misdemeanor may look more favorable to immigration officials or that it might benefit Juarez if immigration laws change in the future similarly sidesteps the law's clear mandate and infects Juarez's plea decision with false hope that he might avoid deportation if he pleads guilty. *See Rodriguez-Vega*, 797 F.3d at 785–86, 788.

Padilla required Tatum to advise Juarez that the guilty plea would trigger his mandatory deportation as a matter of law. *See Padilla*, 559 U.S. at 360 ("We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation."). When Tatum failed to do that, his counsel became constitutionally deficient.

B. This case offers an ideal vehicle to resolve the question presented.

The Court should issue the writ of certiorari because this case offers an ideal vehicle to settle the entrenched conflict between jurisdictions. The Colorado Supreme Court's narrow holding in this case squarely addresses the constitutional sufficiency of Tatum's legal advice. There is no dispute that the deportation mandate in the removal provision at issue here is "clear, succinct, and explicit." *Padilla*, 559 U.S. at 368–69. There is also no dispute that defense counsel failed to warn Juarez that his guilty plea would trigger his mandatory deportation as a matter of federal law.

Furthermore, prejudice is not an issue that should complicate the Court's decision about whether to grant this petition for two reasons. First, the issue of prejudice is not properly before this Court because both the Colorado Appeals Court and the Colorado Supreme Court explicitly declined to examine prejudice in this case. App. 14, 44; *see also Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to review an issue not addressed by the Court of Appeals and noting that the Court is one of "review, not first view"). Second, even if this Court decides to review the question of prejudice, its decision in *Lee v. United States*, 137 S. Ct. 1958, 1968–69 (2017) quickly dispels any concern that Juarez was not prejudiced by Tatum's deficient advice.

In *Lee*, the Court held that the petitioner demonstrated a reasonable probability that he would have rejected a plea agreement—despite only a slim chance of

succeeding at trial—if the petitioner had known that it would trigger "mandatory deportation." 137 S. Ct. at 1967–69. According to the Court:

> But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference.

Id. at 1968–69 (emphasis in original).

Like the petitioner in *Lee*, Juarez's primary concern throughout the criminal process was the possibility of deportation. App. 29. He also has strong ties to the United States. He was brought to the United States as a young child, attended school in Colorado, married, had two children, and started his own business. App. 25, 46–47. Furthermore, as a first-time offender, the likely punishment of the felony possession charge compared with the likely punishment of the misdemeanor charge were not markedly different. But for Tatum's deficient advice, there is a reasonable possibility that Juarez would have rejected the plea agreement and proceeded to trial.

This case is therefore an ideal vehicle to resolve the question presented, which has been preserved

throughout Juarez's post-conviction proceedings and is squarely and cleanly presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 30, 2020