20-1666

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ABDERRAHMANE FARHANE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER-APPELLANT ABDERRAHMANE FARHANE

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Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), counsel for *amici curiae* certify that none of the *amici curiae* are owned by a parent corporation, and no publicly held corporation owns more than ten percent of stock in any *amicus*.

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STATEMENT OF INTEREST

Amici curiae the National Association of Criminal Defense Lawyers (NACDL) and the New York State Association of Criminal Defense Lawyers (NYSADCL) comprise thousands of advocates across the United States who are committed to advancing the interests and protecting the rights of persons accused of crimes.[1] *Amici* urge this Court to hold that the Sixth Amendment right to counsel extends to advice about the denaturalization consequences of a guilty plea for naturalized citizens.

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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[1] No party or its counsel authored this brief in whole or part. Neither a party or its counsel nor any other person contributed money to fund its preparation or submission. This brief is submitted on the consent of all parties and its filing is therefore authorized by Federal Rule of Appellate Procedure 29(a)(2).

The New York State Association of Criminal Defense Lawyers is a not-for-profit corporation with a membership of more than 1,000 attorneys, including private practitioners, public defenders, and law professors, and is the largest private criminal bar association in New York. It is a recognized state affiliate of NACDL and, like that organization, works on behalf of the criminal defense bar to ensure justice and due process for those accused and convicted of crimes.

Amici's interest in this case stems from their dedication to defending the interests and rights of their clients. *Amici*'s members have both an ethical and a constitutional duty to advise their clients, non-citizens and naturalized citizens alike, of the denaturalization and deportation risks of a guilty plea—and to help them avoid such consequences if possible. For people accused of committing crimes, there are few potential penalties more severe than denaturalization and deportation. "In its consequences [denaturalization] is more serious than a taking of one's property, or the imposition of a fine or other penalty." *Schneiderman v. United States*, 320 U.S. 118, 122 (1943). Indeed, the Supreme Court has referred to denationalization as "a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. . . . Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation." *Trop v. Dulles*, 356 U.S. 86, 101–02 (1958) (plurality op.).

INTRODUCTION

The modern criminal defense bar recognizes that its role is not just to counter a criminal charge, but to counsel and defend the whole person. For many people, a jail or prison sentence is only one of the consequences of a criminal conviction, and not necessarily the most long-lasting or damaging. Convictions can lead inexorably to eviction, the loss of public benefits or occupational licenses, or even—as in this case—the loss of citizenship and deportation. While called "collateral," these penalties often perform "[t]he real work of the conviction," operating "as a secret sentence." Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 700 (2002). Accordingly, prevailing professional standards have long required criminal defense attorneys to advise their clients about such consequences—and protect clients from them if possible.

Chief among these consequences in its severity is deportation. And deportation is precisely what Abderrahmane Farhane faces as a result of his guilty plea in November 2006.[2] The Government is moving to denaturalize him as a precursor to removal proceedings. Indeed, the Government has admitted that it would not typically commence denaturalization proceedings unless it intends to deport someone. *See* Anthony D. Bianco et al., *Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship*, 65 U.S. Attys' Bull. 5, 17 (July 2017) ("Typically, the government does not

[2] *Amici* are relying on petitioner-appellant's statement of facts for this brief.

expend resources on civil denaturalization actions unless the ultimate goal is the removal of the defendant from the United States."), *available at* https://www.justice.gov/usao/page/file/984701/download.

Defense counsel has not just an ethical duty but also a Sixth Amendment obligation to advise their clients whether a plea "carries a risk of deportation." *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010). That is because deportation is "intimately related to the criminal process," *id.* at 365, and "an integral part—indeed, sometimes the most important part—of the penalty," *id.* at 364. As this case shows, denaturalization is just as closely tied to criminal proceedings and at least as severe a punishment. Moreover, defense counsel's duty to advise clients of the deportation risks of a guilty plea does not dissipate because the client would have to be stripped of citizenship first.

Requiring criminal defense attorneys to provide advice about immigration consequences to naturalized citizens as well as non-citizens would impose little if any additional burden. Immigration law can be complex, but defense counsel is not required to master it alone. *Amici*'s members have a number of tools at their disposal to help them meet their constitutional duty to advise their clients of immigration consequences—and try to help clients avoid them. Public defender organizations have immigration specialists on staff. Organizations like the Immigrant Defense Project offer training, practice guides, and advice to assigned counsel. Retained counsel can consult with experts. But however they do it, defense attorneys must learn the law sufficiently to advise their clients of the immigration consequences of a guilty plea.

ARGUMENT

THE SIXTH AMENDMENT RIGHT TO COUNSEL EXTENDS TO ADVICE—OR THE FAILURE TO ADVISE—ABOUT THE DENATURALIZATION AND DEPORTATION CONSEQUENCES OF GUILTY PLEAS FOR NATURALIZED CITIZENS.

A. Criminal defense attorneys have a professional responsibility to give case-specific advice about immigration consequences.

The criminal defense bar has long recognized just how important immigration consequences are for their clients. *Amici*'s members have an ethical duty to advise their clients of the risks and benefits of pleading guilty in terms of the client's specific situation and goals. For many people, the most important objective is remaining in this country. Deportation or denaturalization may mean living somewhere where they don't speak the language, no longer have family or friends, and have no means of supporting themselves or their family. They may be willing to endure more jail time—or risk almost certain conviction at trial—to avoid deportation or denaturalization. "Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *I.N.S. v. St. Cyr*, 533 U.S. 289, 322 (2001) (quoting 3 Bender, *Criminal Defense Techniques* §§ 60A.01, 60A.02[2] (1999)).

While there are many collateral consequences of a conviction, from eviction to the loss of occupational licenses, immigration consequences are likely unique in their severity and ties to the criminal process. It is therefore little surprise that professional standards governing the conduct of defense attorneys have long emphasized the importance of counseling clients about immigration consequences. *See generally* Chin &

Holmes, Jr., *supra*, at 713–18 (collecting sources as of 2002). Indeed, national and state bar associations required counsel to do so at the time of this plea in 2006.

Although such professional standards do not have the force of law, the Supreme Court has repeatedly looked to them in determining defense counsel's Sixth Amendment obligations. The Court referred to such "[p]revailing norms of practice" as "guides to determining what is reasonable" in *Strickland v. Washington*. 466 U.S. 668, 688 (1984). Then, in later cases, the Court relied almost exclusively on ABA standards to define the contours of objectively unreasonable performance. *See Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *see also Padilla*, 559 U.S at 367 ("The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." (collecting standards)). In fact, the Court has relied in part on ABA standards promulgated after the time of the trial to determine counsel's duty to investigate mitigating evidence. *Rompilla*, 545 U.S. at 387 nn. 6–7.

1. National organizations

ABA. The American Bar Association's Standards for Criminal Justice emphasize the duty of defense counsel to investigate and advise a client, "sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." *ABA Standards for Criminal Justice: Pleas of Guilty*, Standard 14-3.2(f), at 9 (3d ed. 1999), *available at*

https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pleas_guilty.pdf. As the commentary to this standard explains:

> [C]ounsel should interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces. . . . *[I]t may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client.*

Id. at 127 (emphasis added).

While the duty of defense counsel to investigate and give case-specific advice on immigration consequences is longstanding, the ABA's latest edition of its Criminal Justice Standards for the Defense Function makes this duty even more explicit. *See ABA Criminal Justice Standards for the Defense Function* (4th ed. 2017), *available at* https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/. For example, Standard 4-8.3, which discusses sentencing, specifies that "[t]he consequences (including reasonably foreseeable collateral consequences) of potential dispositions should be explained fully by defense counsel to the client." *Id.*

The latest edition also includes a standard focusing specifically on immigration consequences. Standard 4-5.5 requires defense counsel to "determine a client's citizenship and immigration status," to "investigate and identify particular immigration consequences that might follow possible criminal dispositions," and to advise their client about "*all* such potential consequences," "including removal,

exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family." *Id.* (emphasis added).

NLADA. Since 1995, the National Legal Aid & Defender Association (NLADA) has disseminated a set of standards for criminal defense representation, which reflect its many decades of "knowledge and experience" and "are intended to provide guidance to criminal defense attorneys (by identifying potential options, actions and relevant considerations) for the purpose of ensuring that all defendants receive the zealous and quality representation that should be their right." NLADA, *Performance Guidelines for Criminal Defense Representation* (1995), *available at* http://www.nlada.org/defender-standards/performance-guidelines.

These Guidelines likewise make clear the importance of ascertaining a client's immigration status and advising them on immigration consequences. During the initial interview stage, NLADA Guideline 2.2(b)(2)(A) requires an attorney to determine a client's "immigration status." Then, during the plea negotiation stage, Guideline 6.2(a) specifies that, in developing an "overall negotiation plan," counsel should ensure that the client "is fully aware of . . . other consequences of conviction such as deportation." Guideline 6.4(a) also requires counsel to ensure, prior to the entry of a guilty plea, that the client "fully and completely understands . . . the maximum punishment, sanctions, and other consequences" of the plea. Finally, at the sentencing stage, NLADA Guideline 8.2(b) requires counsel to be "familiar with direct and collateral consequences of the sentence and judgment" including immigration

consequences such as "deportation," and Guideline 8.3(a) requires counsel to inform the client of "the likely and possible consequences of the sentencing alternatives."

2. State organizations

At the time of this case, state-level bar associations and indigent defense providers similarly expected defense counsel to identify and advise clients about immigration consequences. For example, the New York State Bar Association tasked defense counsel with "[o]btaining all available information concerning the client's background and circumstances for purposes of . . . avoiding, if at all possible, collateral consequences including but not limited to deportation." New York State Bar Ass'n, *Standards for Providing Mandated Representation*, Standard I-7(a) (2005), *available at* https://nysba.org/app/uploads/2020/02/Standards.pdf. It also charged counsel with "[p]roviding the client with full information concerning such matters as . . . immigration . . . and other collateral consequences under all possible eventualities." *Id.* at I-7(e). The New York State Defenders Association (NYSDA) similarly required that counsel "should be fully aware of, and make sure the client is fully aware of, all direct and potential collateral consequences of a conviction by plea," and "should develop a negotiation strategy based on knowledge of the facts and law of the particular case, the practices and policies of the particular jurisdiction, and the wishes of the client." NYSDA, *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State*, Standard VIII(A)(7) (2004), *available at*

https://cdn.ymaws.com/www.nysda.org/resource/resmgr/pdfs--other/NYSDA_Standards_for_Providin.pdf.

Many states' standards for assigned counsel contain similar requirements to identify and advise clients of the immigration consequences of a criminal conviction.[3]

[3] *See, e.g.*, The State Bar of California, *Guidelines on Indigent Defense Services Delivery Systems*, at 9 (2006) (acting as a "reasonably competent attorney" requires "being aware of and investigating direct and collateral consequences of various dispositional alternatives (including but not limited to immigration consequences) and accurately advising the client of such alternatives"), *available at* https://www.calbar.ca.gov/Portals/0/documents/ethics/Indigent_Defense_Guidelines_2006.pdf; Connecticut Public Defender Services Commission, *Guidelines on Indigent Defense: Guidelines Relating to the Representation of Indigent Defendants Accused of a Criminal Offense*, Guideline 7.3(b)(2) (requiring counsel to advise client of "collateral consequences of conviction, e.g. deportation"), *available at* https://portal.ct.gov/-/media/OCPD/Important-Information/PDGuidelinespdf.pdf; Massachusetts Committee for Public Counsel Services, *Assigned Counsel Manual: Policies and Procedures*, Section 4.21 (2019) (requiring counsel to "advise the client, prior to any change of plea, of the consequences of a conviction, including . . . possible immigration consequences including but not limited to deportation, denial of naturalization or refusal of reentry into the United States"), *available at* https://www.publiccounsel.net/wp-content/uploads/Assigned-Counsel-Manual.pdf; The New Mexico Public Defender Commission & The Law Offices of the Public Defender, *Performance Standards for Defense Representation*, Standard 8.2(b)(8) (2014) (requiring counsel to "be familiar with and advise the client of the direct and collateral consequences of the judgment and sentence, including . . . deportation/exclusion and other consequences under federal immigration law"), *available at* http://www.lopdnm.us/pdf/2016PerfStand.pdf; North Dakota Commission on Legal Counsel for Indigents, *Minimum Attorney Performance Standards: Criminal Matters*, Standard 12.2(B)(6) ("Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including . . . the possibility of negative immigration consequences"), *available at* https://www.indigents.nd.gov/sites/www/files/documents/standards-and-policies/performanceStandardsCriminal.pdf.

B. There is no reason to distinguish the Sixth Amendment duties of defense counsel based on the type of immigration consequence.

While professional standards have long required defense counsel to advise clients about immigration consequences, *Padilla* made clear there is also a Sixth Amendment duty to do so. Although Jose Padilla's lawyer misadvised him about the immigration consequences of his guilty plea—telling him there would be none, 559 U.S. at 359—the Court declined the Solicitor General's invitation to limit its holding to cases of "affirmative misadvice." *Id.* at 369. The Court reasoned that so limiting its holding "would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. . . . Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation . . . ." *Id.* at 370–71. Instead, the Court held that counsel must provide specific advice about immigration consequences: "counsel must inform her client whether his plea carries a *risk of deportation*. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less." *Id.* at 374 (emphasis added).

There is no reason to adopt a different rule for deportation following denaturalization than for deportation of someone who already was a non-citizen at the time of conviction. Not only will denaturalization lead to deportation in the mine run of cases—as this case shows—denaturalization is just as tied to the criminal

process and at least as serious in its consequences for those accused of crimes. Indeed, for many of *amici*'s clients immigration consequences such as deportation and denaturalization are the most important penalties for a conviction—and avoiding them the paramount goal of the representation. "[D]enaturalization, like deportation, may result in the loss 'of all that makes life worth living.'" *Knauer v. United States*, 328 U.S. 654, 659 (1946) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

Although *Padilla* itself referred to deportation, courts have frequently described *Padilla*'s holding as being "that an attorney is ineffective for failing to advise a client of the *immigration consequences* of a guilty plea." *Sutherland v. Holder*, 769 F.3d 144, 147 (2d Cir. 2014) (emphasis added); *accord, e.g.*, *United States v. Urias-Marrufo*, 744 F.3d 361, 368–69 (5th Cir. 2014); *United States v. Delgado-Ramos*, 635 F.3d 1237, 1240–41 (9th Cir. 2011). This case shows how denaturalization, like deportation, is "intimately related to the criminal process," *Padilla*, 559 U.S. at 365: the basis for the civil denaturalization proceedings against Abderrahmane Farhane is his conviction of a crime he allegedly committed before he applied for and received citizenship. And here, too, denaturalization is "an integral part—indeed . . . the most important part—of the penalty" imposed for pleading guilty. *Id.* at 364. In fact, denaturalization may result not only in Mr. Farhane's deportation, removing him from his family and community, but also strip citizenship from some of his children. *See* 8 U.S.C. § 1451(d) ("Any person who claims United States citizenship through the naturalization of a parent or spouse [who is later denaturalized because their naturalization was procured by

concealment of a material fact or willful misrepresentation] shall be deemed to have lost and to lose his citizenship and any right or privilege of citizenship. . . .").

Adopting a different rule for denaturalization than for deportation would be a particularly tortured distinction given that denaturalization is a precursor to deportation. The government has admitted that its "ultimate goal" in initiating denaturalization proceedings is typically to deport someone. Bianco et al., *supra*, at 17. Denaturalization is simply the first step in deporting naturalized citizens. It hardly makes sense to say that counsel has a Sixth Amendment duty to "inform her client whether his plea carries a risk of deportation," *Padilla*, 559 U.S. at 374, *except* when the government first has to strip the client of citizenship. That the government has to take an intermediate step does not diminish counsel's duty to warn her client of the risk.

The Government argued below that there is no Sixth Amendment right to counsel to advise criminal defendants of the denaturalization consequences of a guilty plea, because denaturalization is a "collateral" consequence of a conviction rather than a "direct" consequence. But this is a retread of an argument that the Supreme Court already rejected in *Padilla*. Eschewing the direct-collateral distinction as "ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation," the *Padilla* Court "conclude[d] that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." 559 U.S. at 366.

Before *Padilla*, some state and federal courts had held that defense attorneys had a duty to advise their clients of the direct consequences of a conviction but not

the collateral consequences. *See, e.g., Broomes v. Ashcroft*, 358 F.3d 1251, 1257 (10th Cir. 2004) ("[D]eportation remains a collateral consequence of a criminal conviction, and counsel's failure to advise a criminal defendant of its possibility does not result in a Sixth Amendment deprivation."); Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 Iowa L. Rev. 119, 131–34 & nn.43–54 (2009) (collecting cases). Courts did so largely by relying on the Supreme Court's statement in *Brady v. United States* that a guilty plea is valid if entered "by one fully aware of the *direct consequences*." 397 U.S. 742, 755 (1970) (emphasis added). But *Brady* dealt with what due process requires a *judge* to do to ensure a plea is voluntary; it did not deal with the distinct question of what *counsel* must do, although courts have frequently applied the collateral-direct distinction derived from *Brady* to claims of ineffective assistance of counsel. *See* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 Minn. L. Rev. 670, 694–96 & nn.112–124 (2008).

The Government's proffered distinction between direct and collateral consequences thus erroneously conflates the due-process requirements for courts to warn *defendants* and the Sixth Amendment obligations of counsel to advise their *clients*. As *amici* can attest, "[t]he judge and defense counsel play very different roles with respect to a person pleading guilty . . . . While the judge must ensure, on the record, that a plea is entered voluntarily and with the requisite knowledge, she is not charged with the underlying counseling of the defendant before the plea." *Id.* at 697. Since

"defense counsel and the court have different duties of loyalty, investigation, and legal research as a result of their distinct roles as advocate and decisionmaker, there is no reason to assume that their obligations of advising the accused of the risks and benefits of pleading guilty should be identical." Chin & Holmes, Jr., *supra*, at 727.[4]

This Court has already made clear that the same standards do not apply in the Fifth and Sixth Amendment contexts, reasoning that the "Sixth Amendment responsibilities of counsel to advise of the advantages and disadvantages of a guilty plea are greater than the responsibilities of a court under the Fifth Amendment." *United States v. Youngs*, 687 F.3d 56, 62 (2d Cir. 2012); *see also Michel v. United States*, 507 F.2d 461, 465 (2d Cir. 1974) ("[C]ounsel and not the court has the obligation of advising [a non-citizen client] of his particular position as a consequence of his plea.").

Padilla itself explicitly rejected the Government's preferred distinction between the collateral and direct consequences of a conviction in the immigration context. In an *amicus* brief in *Padilla*, the Government argued that "the Sixth Amendment does not require counsel to provide advice on immigration and other consequences of conviction that are beyond the scope of the criminal proceeding." Brief for the United States as *Amicus Curiae* Supporting Affirmance, 2009 WL 2509223, at *8; *see also id.* at 25 ("[C]ounsel need not affirmatively advise defendants about collateral

[4] Of course, there is some overlap between due-process and Sixth-Amendment claims in the guilty-plea context. If a defendant received ineffective assistance of counsel, his plea is involuntary. *See Hill v. Lockhart*, 474 U.S. 52, 56–57 (1985).

consequences."). The *Padilla* Court, however, declined to adopt the Government's proffered distinction, noting that it "ha[d] never distinguished between direct and collateral consequences in defining the scope of constitutionally 'reasonable professional assistance.'" 559 U.S. at 357. The Court continued: "The question whether that distinction is appropriate need not be considered in this case because of the unique nature of deportation. Although removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence." *Id.* at 367.

As discussed above, denaturalization is just as intimately tied to criminal proceedings and at least as severe a penalty as deportation, since deportation is its ultimate purpose. Regardless of whether the Sixth Amendment right to counsel extends to advice about other consequences of a conviction such as the loss of housing or public benefits, *Padilla*'s logic extends to all immigration consequences. *Padilla* thus forecloses a conclusion that denaturalization is merely "collateral" when deportation is not. The Sixth Amendment requires counsel to advise naturalized citizens of the deportation and denaturalization risks of a guilty plea.

C. Requiring defense counsel to give advice about denaturalization and deportation consequences to naturalized citizens would impose at most a *de minimis* additional burden.

Clarifying that criminal defense attorneys have a duty to advise their clients about denaturalization would impose little, if any, additional burden on counsel.

While immigration law can be complex, there are ample resources available to help defense counsel fulfill their constitutional duty to advise clients of immigration consequences. In New York City, where Abderrahmane Farhane was prosecuted, public defender organizations like the Neighborhood Defender Service of Harlem, the Bronx Defenders, and the Legal Aid Society all have immigration specialists on staff. So do the Federal Defenders of New York. Further, the Immigrant Defense Project (IDP) provides "training, written resources, and expert legal advice to court-appointed attorneys" as well as "free individualized case consults." IDP, *Padilla Support Center*, https://www.immigrantdefenseproject.org/what-we-do/padilla-support-center/ (last visited Jan. 29, 2021). Privately retained attorneys are, of course, also able to consult an immigration expert—and required to do so in appropriate cases. *See, e.g.*, *Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001) (holding that counsel's failure to consult or retain an expert was objectively unreasonable performance); *ABA Criminal Justice Standards for the Defense Function*, Standard 4-5.5 ("Consultation or association with an immigration law expert or knowledgeable advocate is advisable . . . .").

Providing naturalized citizens with case-specific advice about the risk of denaturalization requires little more than what defense attorneys already do to meet their Sixth Amendment obligations. Criminal defense attorneys are not required to be experts in immigration law, but they are required to know the key facts about their clients. Because many people are confused about their immigration status, criminal practitioners know that the best way to investigate immigration consequences is to

start by asking, "Were you born outside the United States? Obviously, the answer to this question is not dispositive of citizenship, but experts recommend it as the simplest way to flag potential immigration issues for deeper exploration." McGregor Smyth, *Holistic Is Not A Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy,* 36 U. Tol. L. Rev. 479, 498 & n.104 (2005). In fact, IDP provides a two-page flowchart for criminal defense counsel, which recommends first asking all clients, "Where were you born?" IDP, *Immigration Consult Worksheet*, https://www.immigrantdefenseproject.org/wp-content/uploads/Immigration-Consult-Worksheet.pdf (last visited Jan. 29, 2021). The next step is to ask clients about their legal status. *Id.* Unless the client "naturalize[d] prior to the alleged offense date," IDP recommends consulting with an immigration specialist. *Id.*

Thus, for naturalized citizens, the only additional question criminal defense attorneys must ask is "When did you become a citizen?" If the answer is "after the charged crime," as it was here, defense counsel should treat the case like any case involving a non-citizen client and investigate the possible immigration consequences. *See id.* To the extent this is burdensome, it is not a new burden but instead part and parcel of counsel's existing Sixth Amendment duties.

In order to properly advise his client, trial counsel had to know only two things besides the date that his client naturalized and the date of the alleged offense: (1) naturalized citizens can have their citizenship taken away based on fraud or willful misrepresentations in their citizenship application; and (2) individuals applying for

citizenship are required to certify that they have not committed any uncharged crimes. The relevant portion of the civil denaturalization statute was clear in its scope and had been on the books since 1952. *See* 8 U.S.C. § 1451(a); *see also, e.g.*, *Kungys v. United States*, 485 U.S. 759, 773 (1988); *United States v. Rossi*, 319 F.2d 701, 701 (2d Cir. 1963). This is far simpler to learn than which crimes are "aggravated felonies" or "crimes involving moral turpitude," or when someone is eligible for cancellation of removal. And it is axiomatic that counsel's failure to take action due to "ignorance of the law" or "misunderstanding" the law is objectively unreasonable. *See Kimmelman v. Morrison*, 477 U.S. 365, 385–86 (1986); *Flores v. Demaskie*, 215 F.3d 293, 304 (2d Cir. 2000).

Padilla already requires defense counsel to investigate their clients' immigration status and provide case-specific advice about the risk of deportation if they plead guilty. It is little additional work to do so in cases involving naturalized citizens as well as non-citizens. Indeed, it would be a bizarre rule that counsel must provide such advice about immigration consequences to everyone but naturalized citizens.

CONCLUSION

This Court should hold that the Sixth Amendment right to counsel extends to advice for naturalized citizens about the denaturalization and deportation risks of a guilty plea, and reverse the district court's contrary decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), as well as the type-volume limitations of Local Rule 29.1(c). It was prepared in a proportionally spaced typeface using Microsoft Word and 14-point Garamond font. According to that software, this brief contains 4,820 words, not including the cover page, corporate disclosure statement, table of contents, table of authorities, signature block, or this certificate.

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