Case No. S225194

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In the Matter of

RON DOUGLAS PATTERSON

On Habeas Corpus.

Related Appeal No. S225193

PROPOSED AMICI CURIAE BRIEF BY THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE ALAMEDA COUNTY PUBLIC DEFENDER'S OFFICE, THE CONTRA COSTA COUNTY PUBLIC DEFENDER'S OFFICE, THE SAN FRANCISCO PUBLIC DEFENDER'S OFFICE, THE SANTA CLARA COUNTY PUBLIC DEFENDER'S OFFICE, AND THE LAW OFFICES OF THE PUBLIC DEFENDER, SONOMA COUNTY, IN SUPPORT OF PETITIONER RON DOUGLAS PATTERSON

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BRIEF OF AMICI CURIAE

I. INTRODUCTION

Amici submit this brief for three reasons. ***First***, *amici* write to assure the Court that defense attorneys understand and accept that their duties to noncitizen clients include providing accurate advice regarding the specific immigration consequences that attach to a conviction. Indeed, California defense attorneys understand their obligations to go further than providing accurate advice: for decades they have accepted the duty to affirmatively defend against adverse immigration consequences by attempting to secure immigration-neutral dispositions whenever possible.

Second, *amici* write to assure the Court that numerous local and national resources are available to aid practitioners in carrying out their Sixth Amendment duties to noncitizen clients. Defense attorneys have access to resources needed to advise their clients when a proposed plea falls within a ground of removal such that deportation is presumptively mandatory, as *Padilla* requires.

Third, *amici* write to emphasize that the standard for showing prejudice under *Strickland v. Washington* was met in this case. The Court of Appeal perfunctorily concluded that Petitioner failed to show prejudice because his trial counsel accurately conveyed the plea offer to him, and because he would have faced deportation had he risked the 10 year sentence

and lost. That misstates the prejudice standard. The correct inquiry is whether the defendant would rationally have rejected the plea deal had he received correct—and constitutionally mandated—advice. By failing to advise her client that he faced certain deportation rather than a possible risk of deportation, Petitioner's counsel misrepresented the risk assumed by Petitioner when he entered the plea.

II. ARGUMENT

A. Defense counsel in California have long understood and accepted their constitutional obligation to advise noncitizen clients that they face mandatory deportation upon conviction.

The Supreme Court's holding in *Padilla* was clear: when a criminal conviction will render a non-citizen defendant mandatorily deportable, defense counsel must provide to their clients an unequivocal warning to that effect. 559 U.S. 356, 360 (2010). The Ninth Circuit recently confirmed this plain reading of *Padilla* in *United States v. Rodriguez-Vega*, holding that "[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." 797 F.3d 781, 786 (9th Cir. 2015) (emphasis in original; internal quotation marks omitted).

For California criminal defense attorneys, *Padilla* was hardly a bolt from the blue; it recognized and adopted the prevailing practice among the

defense bar. Criminal defense attorneys in this state—and indeed across the nation—have long understood and accepted *Padilla*'s command as one of the core obligations they owe their clients.

Since the California Court of Appeal handed down its decision in *People v. Soriano*, 194 Cal. App. 3d 1470, 1480-82 (1987), nearly thirty years ago, defense attorneys practicing in California have understood their duty to investigate and advise defendants of the specific immigration consequences of criminal convictions before entering a plea. The San Francisco Public Defender's Office even penned an amicus brief in *Soriano*, assuring the court that "the public defender's office imposes on its staff attorneys, under its 'Minimum Standards of Representation,' the duty to ascertain "'what the impact of the case may have on [the client's] immigration status in this country.'" 194 Cal. App. 3d at 1481.

Furthermore, for at least 25 years, criminal defense attorneys in California have understood that it does not suffice to inform a client that a plea and conviction *may* lead to removal, when counsel should have known that it almost certainly *will* lead to removal. In *People v. Barocio*, the court affirmed a lower court's decision that defense counsel had provided ineffective assistance by advising her client "that deportation *could* result when research of the applicable law would have indicated that deportation *would* result unless the sentencing court recommended otherwise." 216 Cal. App. 3d 99, 106 (1989) (emphasis in original); *see also id.* at 109

("Effective assistance at sentencing requires the defense attorney to investigate relevant dispositions and their consequences.").[1]

This commonsense principle—that noncitizen defendants rely upon counsel to tell them plainly if a certain disposition will almost certainly lead to deportation—has also been codified in California law. California Penal Code section 1016.2(e) cautions that incorrect or incomplete advice regarding immigration consequences can result in "penalties such as mandatory detention, deportation, and permanent separation from close family." Cal. Penal Code. § 1016.2(e). Consistent with *Padilla*, the statute recognizes that, "[i]n some cases, these consequences could have been avoided had counsel provided informed advice and attempted to defend against such consequences." *Id.* Section 1016.2 therefore codifies the defense bar's longstanding understanding of its obligations in this area.

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[1] Contrary to the government's argument in this case, *In re Resendiz*, 25 Cal. 4th 230 (2001), neither changed defense counsel's understanding regarding the duties they owe to their noncitizen clients nor altered the prevailing practice among the California defense bar. *Resendiz* merely left open a constitutional question that has since been answered both by *Padilla* and the State Legislature. *See* Cal. Penal Code §§ 1016.2, 1016.3. Defense counsel in no way took *Resendiz* as a signal that their obligations to research, understand, advise about, and defend against adverse immigration consequences had somehow lessened. On the contrary, defense counsel in California have expanded and increased their activities in this regard since *Resendiz*. *See infra* Part II.C.

B. Defense counsel in California have long understood and accepted their duty to defend against adverse immigration consequences.

Not only do defense attorneys in California understand their obligation to provide accurate advice regarding the immigration consequences of convictions, but they also have long understood their duty to their clients to go further than that. Defense counsel must do more than understand and advise about removal; they must seek out dispositions that eliminate or mitigate the immigration consequences for noncitizen clients.

Again, this prevailing understanding is nothing new. California courts have recognized that defense attorneys might provide ineffective assistance of counsel by failing to plead up to a non-deportable offense. For example, in *People v. Bautista*, the court concluded that counsel's "failure to investigate, advise, and utilize defense alternatives to a plea of guilty" that leads to mandatory deportation can constitute ineffective assistance. 115 Cal. App. 4th 229, 241 (2004). In *Bautista*, the defendant was correctly told that he "would be deported" for a possession of sales conviction, but counsel made no attempt to plead his client to a non-aggravated felony such as an "offer to sell" or "transportation"—more serious offenses but without the consequence of mandatory deportation—because this possibility did not cross the trial attorney's mind. *Id.* at 238. This representation failed to pass constitutional muster.

The state legislature has also recognized defense counsel's obligation to seek immigration-safe dispositions for non-citizen defendants. California Penal Code section 1016.2(d) provides that, "[w]ith an accurate understanding of immigration consequences, many noncitizen defendants are able to plead to a conviction and sentence that satisfy the prosecution and court, but that have no, or fewer, adverse immigration consequences than the original charge." Cal. Penal Code § 1016.2(d). Likewise, Section 1016.3 requires defense counsel to "provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and . . . defend against those consequences." *Id.* § 1016.3(a). These legislative pronouncements codify and embody what defense attorneys in California have long understood when defending noncitizen clients. For many such clients, removal from the United States is by far the most serious consequence they will face from a conviction. The prospect of removal must be foremost in counsel's mind as he or she advises the client, negotiates with the prosecution, recommends a disposition, and discusses sentencing with the court.

C. Counsel's obligations are well documented in relevant guidelines and publications, and counsel have access to an array of resources to assist them in fulfilling this duty.

Before a defense attorney can reasonably determine the removal consequences of a potential plea deal, he or she must conduct some preliminary investigation and research. *See Strickland v. Washington*, 466

U.S. 668, 690-91 (1984) ("[C]ounsel has a duty to make reasonable investigations."). *Padilla* makes clear that, in order to determine the removal consequences of a particular plea deal, counsel must investigate and analyze the client's immigration status, criminal history, the specific criminal statute at issue, and the client's plea statement. *Padilla*, 559 U.S. at 367. This command is familiar to California defense counsel—*amici* and their member practitioners have been conducting such research for years, and relevant guidelines and standards reflect that. *See, e.g.*, Nat'l Legal Aid and Defender Ass'n, *Performance Guidelines for Criminal Representation* ¶ 6.2 (1995) ("In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of . . . other consequences of conviction such as deportation. . . . In developing a negotiation strategy, counsel should be completely familiar with . . . the advantages and disadvantages of each available plea according to the circumstances of the case."); Am. Bar Ass'n, *ABA Standards for Criminal Justice, Pleas of Guilty*, 14-3.2(f), (3d ed. 1999) ("counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigation law and fact and advising the client.").

Although not all criminal defense lawyers have scrupulously complied with their obligations in this area (as is clear from Petitioner's case), a considerable array of publications, training materials, and other

resources has long existed to help criminal defense counsel fulfil their obligations to noncitizen clients. These resources include treatises and hornbooks, online practice manuals, reference guides, and state-specific materials that work through the laws of many jurisdictions and explain the immigration implications of each one. The United States Supreme Court considered such materials in *Padilla*. *See* Brief for Nat'l Ass'n of Criminal Defense Lawyers *et al.* as *Amici Curiae* Supporting Petitioner, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651), 2009 WL 1567356, at *1AAA (listing nearly 1000 different publications and hundreds of training materials for defenders throughout the nation regarding the immigration consequences of criminal convictions). Many of these publications are available online and free of charge to defense attorneys. Moreover, criminal and immigration law organizations have engaged in extensive nationwide efforts to train defense attorneys in immigration and deportation related issues, and to establish national, regional, and statewide hotlines through which defense attorneys can obtain case-specific advice. *Id.* at *24.

None of this is to say that fulfilling this obligation is always a simple or straightforward task, especially for public defender offices that have been operating under severe budget constraints for years. Accordingly, many California public defender offices partner with various organizations, or have a "point person" who keeps abreast of immigration consequences,

and who can advise and train other attorneys in recognizing the importance of investigating, advising, and defending noncitizens from adverse immigration consequences. For example, in Marin County, the Public Defender's Office website explains that, "[a]s a result of *Padilla*, public defenders and immigration advocacy groups are providing information on community resources available to address immigration issues." Public Defender of Marin, Community Resources/Recurses de la Communidad, http://www.marincounty.org/depts/pd/community-resources-recursos-de-la-communidad (explaining partnership with Canal Alliance). In Los Angeles County, "the Los Angeles Public Defender offers free consultation through Deputy Public Defender Graciela Martinez," as well as training sessions to defenders in the Southern California region. Immigrant Legal Resource Center ("ILRC"), Immigration Criminal Law Resources for California Criminal Defenders, 3, https://www.ilrc.org/files/immigration_criminal_law_resources.pdf (last visited April 8, 2016).

Indeed, recognizing that the standard of care requires investigation, the provision of accurate and complete advice, and efforts to mitigate, at least seven California public defender offices serving communities with large noncitizen populations have in-house attorneys specializing in immigration consequence consulting, and some have immigration attorneys on staff. These counties include Alameda, Contra Costa, Los Angeles, San

Bernardino, Santa Clara, San Francisco, and Sonoma. *See, e.g.*, ILRC, Protocols for Ensuring Effective Defense of Noncitizen Defendants in California (Oct. 2015), http://www.ilrc.org/files/documents/protocols_for_ensuring_effective_defense_of_noncitizen_defendants_in_ca_oct_2015.pdf (listing part-time, full-time, and contract immigration specialists in Los Angeles County, San Bernardino County, Sacramento County, and Alameda County); San Francisco Public Defender, Public Defender to Provide Immigration Help (Aug. 5, 2014), http://sfpublicdefender.org/news/2014/08/public-defender-to-provide-immigration-help/).

In addition, since 2002, the ILRC has partnered with several public defenders offices in the state through the California Defending Immigrants Partnership (Cal-DIP), a "program designed to facilitate the necessary collaboration between public defense counsel and immigration law experts to ensure that indigent noncitizen defendants in California are provided effective counsel to avoid or minimize the immigration consequences of their criminal dispositions and to defend against immigration enforcement in the criminal justice system." ILRC, Immigration Criminal Law Resources for California Criminal Defenders at 1.

An array of secondary source material also helps counsel understand how to defend against adverse immigration consequences through plea and sentence bargaining. The "Bible" of California criminal practitioners,

CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE (CEB) (2015) [hereinafter, "CCLPP"], has included a chapter entitled "Representing the Noncitizen Criminal Defendant," updated annually, since it was first published in 1975. The current edition confirms that "[a] general warning of the possible consequences" of deportation, "similar to what the court is required to give, . . . is not sufficient advice by *defense counsel*, who must also advise a client of the specific immigration consequences that will be triggered in the defendant's particular case." CCLPP § 52.8 (2015) (emphasis in original). That treatise further explains: "Defense counsel who fails to investigate and advise the defendant of the specific immigration consequences of a guilty plea, and who fails to try to avoid those consequences by obtaining an alternative disposition, may be found to have provided ineffective assistance of counsel." *Id.*

The chapter also offers practical tips on securing alternative dispositions for many offenses that would otherwise trigger deportability or inadmissibility, and provides additional resources for counsel to consult. *Id.* § 52.1. The authors also reference a free online chart maintained by the ILRC, which "detail[s] the immigration consequences of common California offenses, together with notes describing plea strategies in criminal court for immigrants." *Id.*; *see also* ILRC, Quick Reference Chart for Determining Key Immigration Consequences of Selected California Offenses (Jan. 2016),

http://www.ilrc.org/files/documents/california_chart_jan_2016-v2.pdf. The CCLPP also recommends that defense counsel should "consult an in-depth research guide," and lists several additional resources. CCLPP § 52.1

A newer CEB treatise, California Criminal Defense of Immigrants, is devoted entirely to helping criminal defense attorneys research, advise about, and defend against the immigration consequences that attend specific criminal charges. *See* Norton Tooby & Katherine Brady, CALIFORNIA CRIMINAL DEFENSE OF IMMIGRANTS (2015). The foreword to the 600 page treatise explains that it is "designed to give criminal defense counsel the necessary information to represent noncitizen defendants effectively, not only by providing accurate advice, but also by offering alternative dispositions that will help practitioners avoid the worst immigration catastrophes for their clients." *Id.* at xi. To those ends, the book includes a chapter entitled "Investigating Immigration Consequences," and nine separate chapters covering immigration-neutral pleas an attorney might secure for various types of offenses, ranging from DUIs, to assaults, to controlled substances violations. *See id.* at 15-96, 159-328. The treatise also suggests additional resources, experts, and publications for defense attorneys to consult if needed. *See id.* at 60-65.

In sum, there are significant resources available to aid defense attorneys as they research, investigate, and analyze the immigration consequences of convictions, and advise and defend their clients

accordingly. Although fulfilling this constitutional obligation can prove challenging in light of the complexities of criminal and immigration law—as well as the intense budget pressures under which many defenders must operate—defense attorneys have access to a wealth of information as they navigate these issues on their clients' behalf.

D. The Court of Appeal misarticulated the prejudice standard.

The Court of Appeal's three-paragraph discussion of the prejudice standard misstated and misapplied that aspect of the *Strickland* analysis. *See People v. Patterson*, No. E060758, 2015 WL 105767, at *4 (Cal. Ct. App. Mar. 9, 2015). The court failed even to cite the relevant standard, which is well-known to the defense bar: in the plea context, a defendant alleging ineffective assistance of counsel must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty," *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985), and that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372. The defendant need not prove that he would have prevailed at trial but for the deficient advice—or that he is actually innocent of the charges. He need only demonstrate that it would have been rational for him to reject the offered plea and attempt to negotiate another disposition.

The Court of Appeal's decision in this case ignored—and violated—this Court's most recent pronouncement on the prejudice standard in *People v. Martinez*, 57 Cal. 4th 555 (2013) (discussing prejudice in connection with a motion to vacate a plea pursuant to Cal. Penal Code § 1016.5). There, the Court held that "relief should be granted if the court . . . determines the defendant would have chosen not to plead guilty or nolo contendere, even if the court also finds it is not reasonably probable the defendant would thereby have obtained a more favorable outcome." *Id.* at 559. Accordingly, a defendant meets the prejudice standard if he shows that he "would have rejected the existing bargain to accept or attempt to negotiate another" with less onerous immigration consequences. *Id.*

This Court's holding in *Martinez* recognizes the real-life implications and practicalities of plea negotiations, and is fully applicable here. The question is rarely whether a criminal defendant would "take it or leave it," or whether he would win his case if it proceeded to trial. Rather, the pertinent question is whether, in light of the particular circumstances of a case and aided by competent defense counsel, a defendant would either rationally reject a particular plea deal in an attempt to negotiate a better one, or rationally risk taking his case to trial given the draconian immigration consequences that would attach to a particular plea.

As the state legislature has recognized, a noncitizen defendant, with counsel's help, may be "able to plead to a conviction and sentence that

satisfy the prosecution and court, but that have no, or fewer, adverse immigration consequences than the original charge." Cal. Penal Code § 1016.2(d). In some cases, this may mean pleading up to a more serious charge, with the same or even harsher penalties, but which avoids mandatory deportation. *See Bautista*, 115 Cal. App. 4th at 241; CCLPP § 52.2 (2015). In other cases, it may mean taking a minor case to trial, even with relatively slim odds of success, "if the alternative is certain deportation." CCLPP § 52.2. Whatever the calculation, the focus is and must be on "*what the defendant would have done*" had he been properly advised, and not whether he has shown a reasonable probability that he "would have obtained a more favorable result by rejecting the plea bargain." *Martinez*, 57 Cal. 4th at 559 (emphasis in original).

Given the devastating impact that mandatory deportation has on a criminal defendant, his family, his livelihood, and his community—and the disastrous effects that inaccurate or incomplete advice can wreak on the outcome of criminal proceedings—it is imperative that this Court make clear that the prejudice standard reflects the realities of plea negotiations and the rational calculations defendants and their counsel undertake regarding the risks of proceeding to trial.

III. CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to grant the Petition and vacate the trial court's decision.

Respectfully submitted,

Dated: April 13, 2016

KEKER & VAN NEST

By: _____
Cody S. Harris

Attorney for amici curiae

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court 8.504(a), 8.504(d)(1) and 8.204(c)(1), and in reliance upon the word count feature of the software used, I certify that the attached AMICI CURIAE BRIEF contains approximately 3,282 words, excluding parts not required to be counted under Rule 8.204(c)(3).

Dated: April 13, 2016

CODY S. HARRIS

CERTIFICATE OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Keker & Van Nest LLP, 633 Battery Street, San Francisco, California 94111-1809.

On April 13, 2016, I served the following document(s):

APPLICATION OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE ALAMEDA COUNTY PUBLIC DEFENDER'S OFFICE, THE CONTRA COSTA COUNTY PUBLIC DEFENDER'S OFFICE, THE SAN FRANCISCO PUBLIC DEFENDER'S OFFICE, THE SANTA CLARA COUNTY PUBLIC DEFENDER'S OFFICE, AND THE LAW OFFICE OF THE PUBLIC DEFENDER, SONOMA COUNTY, FOR LEAVE TO FILE ATTACHED AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER RON DOUGLAS PATTERSON;

and

PROPOSED AMICI CURIAE BRIEF BY THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE ALAMEDA COUNTY PUBLIC DEFENDER'S OFFICE, THE CONTRA COSTA COUNTY PUBLIC DEFENDER'S OFFICE, THE SAN FRANCISCO PUBLIC DEFENDER'S OFFICE, THE SANTA CLARA COUNTY PUBLIC DEFENDER'S OFFICE, AND THE LAW OFFICE OF THE PUBLIC DEFENDER, SONOMA COUNTY, FOR LEAVE TO FILE ATTACHED AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER RON DOUGLAS PATTERSON

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this Certificate of Service was executed on April 13, 2016, in San Francisco, California.

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