IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D10-2563

LEDUAN DIAZ,
Appellant,
-vs-
STATE OF FLORIDA,
Appellee.

BRIEF AMICUS CURIAE OF AMERICAN IMMIGRATION LAWYERS ASSOCIATION SOUTH FLORIDA CHAPTER IN SUPPORT OF APPELLANT'S MOTION FOR REHEARING

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STATEMENT OF AMICUS CURIAE

The South Florida Chapter of American Immigration Lawyers Association (AILA) is a local chapter of the national organization of AILA, the leading association of immigration lawyers and law school professors in the country. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts and the Board of Immigration Appeals), as well as before the United States District Courts, Courts of Appeals, and the United States Supreme Court. AILA members also appear in post-conviction proceedings in state courts on behalf of noncitizen defendants.

INTRODUCTION

The case of Leduan Diaz presents the question of whether a generic judicial warning about the mere possibility of a criminal conviction being used in a deportation proceeding automatically precludes a showing of prejudice resulting from ineffective assistance of counsel, even when the plea renders defendant's deportation mandatory rather than possible, and even though defense counsel affirmatively misadvised his client that his guilty plea carried no immigration consequence at all.

In 2001, Mr. Diaz, a lawful permanent resident, pled guilty to aggravated assault with a deadly weapon, burglary of an occupied conveyance with the intent

to commit an assault or battery therein, and criminal mischief. He received a withhold of adjudication and a sentence of three years probation. On or about July 22, 2010, the Department of Homeland Security commenced proceedings to remove Mr. Diaz from the United States. The Department charged Mr. Diaz as removable under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act as having been convicted of at least one crime involving moral turpitude. 8 U.S.C. § 1227(a)(2). Aggravated assault with a deadly weapon has long been considered a crime involving moral turpitude. *See Matter of Medina*, 15 I&N Dec. 611, 612 (BIA 1976) (citing *Gonzales v. Barber*, 207 F.2d 398 (9th Cir. 1953, *aff'd*, 347 U.S. 637 (1954)); *U.S. ex rel. Morlacci v. Smith*, 8 F.2d 663 (W.D.N.Y. 1925); *Matter of Ptasi*, 12 I&N Dec. 790 (BIA 1968); *Matter of Goodalle*, 12 I&N Dec. 106 (BIA 1967); *Matter of G-R-*, 2 I&N Dec. 733 (BIA 1943; AG 1947)).

The United States Supreme Court ruled in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), that a defendant's Sixth Amendment right to counsel includes competent advice regarding the immigration consequences of a contemplated plea agreement. The court ruled that defense counsel's failure to advise regarding the immigration consequences of a plea constitutes ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, the Supreme Court held that when removal resulting from a guilty plea is "clear," counsel must advise a client that "deportation [is] presumptively mandatory." On the other

hand, when the risk of deportation is not clear, counsel need only advise the defendant "that pending criminal charges *may* carry a risk of adverse immigration consequences." *Padilla*, 130 S.Ct. at 1483 (emphasis added). Applying these rules to Padilla's claim, the court found that "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." *Id.* at 1478.

On August 24, 2010, Mr. Diaz filed a motion for postconviction relief, alleging that defense counsel affirmatively misadvised him that he would not likely face any risk of deportation because the offenses to which he pled were only withholds of adjudication. In addition, during the plea colloquy, the trial judge did not give Mr. Diaz the standard judicial warning under Fla. R. Crim. Pro. 3.172(c)(8) that a guilty plea by a noncitizen may result in deportation. Instead, the trial court said: "Do you understand that if you are not a US citizen, that this plea can be used in deportation proceedings?"

In an order restating verbatim the state's opposition to Mr. Diaz's motion, the trial court denied Mr. Diaz's motion for post-conviction relief without holding an evidentiary hearing. Mr. Diaz appealed.

This Court subsequently affirmed the lower court's decision in Mr. Diaz' case, citing *Flores v. State*, 35 Fla. L. Weekly D1562, 2010 WL 2882465 (July 14, 2010), a case holding that the Florida Rule of Criminal Procedure 3.172(c)(8)

advisal that deportation "may" result from a guilty plea cured any affirmative misadvice on the part of a noncitizen defendant's attorney. A motion for rehearing, rehearing en banc, certification, and clarification is currently pending in *Flores*.

Mr. Diaz has moved for rehearing, rehearing en banc, and certification. Amicus Curiae have requested leave to appear and submit this brief in support of the motion filed by Mr. Diaz.

SUMMARY OF THE ARGUMENT

This Court should not have relied on *Flores v. State* in affirming the trial court's decision in Mr. Diaz's case because *Flores* was wrongly decided. In *Flores*, the District Court of Appeals for the Fourth District incorrectly adopted a *per se* rule that a trial court's generic notification to all defendants that a guilty plea by a noncitizen "may" result in deportation automatically cures any ineffective assistance of counsel to a criminal defendant, including a defendant who (1) relied on his attorney's affirmative misadvice that a negotiated plea to a withhold of adjudication would not cause his deportation, and (2) in fact faces mandatory, rather than possible, deportation as a result of his guilty plea.

The actual judicial warning received by Mr. Diaz does not even satisfy Florida Rule of Criminal Procedure 3.172(c)(8) because the trail court merely informed Mr. Diaz in a nonspecific way that the plea "could be used" in

deportation proceedings. The court did not inform him that a guilty plea may result in deportation, as required by the Rule. Nor did the court state that the plea could be a basis for a deportation proceeding. The trial court said only that the plea "could be used" in such a proceeding. Although this Amicus Brief does not focus on the difference between the required judicial warning and the statement actually made by the court to Mr. Diaz, this is a material difference that distinguishes Mr. Diaz's case from *Flores*. Because this Court relied exclusively on *Flores* in affirming the trial court's decision in this case, this Brief focuses instead on the argument that *Flores* was wrongly decided.

The *Flores* decision conflicts with and would eviscerate the U.S. Supreme Court's ruling in *Padilla v. Kentucky*. In *Padilla*, the court held that the Sixth Amendment right to counsel encompasses a duty of defense counsel to provide accurate advice regarding the immigration consequences of a plea. In particular, the court ruled that defense counsel must advise a client when the removal statute "specifically commands removal" in order for the client's plea to be knowing and voluntary. If permitted to stand, and followed by this Court, the panel *Flores* decision would permit a factually incorrect warning from the court (stating only that a guilty plea "may" result in deportation even when in fact the removal statute "commands removal" in the particular case) to cure ineffective assistance of

counsel even though the same advice–if provided by counsel–would not pass constitutional muster under *Padilla*.

Courts have held that standard judicial warnings do not automatically cure ineffective assistance of counsel. Federal courts and other state's courts have granted noncitizens' motions for postconviction relief notwithstanding a trial court's general warning about possible deportation. Outside the immigration context, Florida courts as well as the U.S. Court of Appeals for the Eleventh Circuit have held that boilerplate judicial advisals do not *per se* cure counsel's deficient advice. Rather than summarily dismiss motions raising a *Padilla* claim because the trial court gave a general warning, courts must conduct an individualized, facts-based inquiry to determine prejudice, which *Strickland v. Washington* defines as whether "the result of the proceeding would have been different" but for counsel's deficient performance. 466 U.S. 668, 694 (1984).

The bottom line of *Flores* is that so long as trial courts give the required warning during a plea colloquy, noncitizen defendants who receive ineffective assistance regarding the immigration consequences of their pleas will never have a remedy for the constitutional violation–even when the court's "warning" is not itself factually accurate. The consequences of such a *per se* rule for noncitizen defendants, many of whom are longtime lawful permanent residents with U.S. citizen spouses and children, cannot be overstated. As the Supreme Court

observed in *Padilla*, changes in immigration law over the past several decades have "dramatically raised the stakes of a noncitizen's criminal conviction" by exponentially expanding the number of deportable offenses and radically reducing the avenues for discretionary relief. 130 S.Ct. at 1480. As a matter of federal law, deportation–that is, total banishment from the United States–has now become "sometimes the most important part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 130 S.Ct. at 1480.

This Court should therefore not follow *Flores*.

ARGUMENT

I. THE *FLORES PER SE* RULE THAT A GENERIC JUDICIAL WARNING CURES DEFECTIVE IMMIGRATION ADVICE CONFLICTS WITH THE UNITED STATES SUPREME COURT'S DECISIONS IN *PADILLA* AND *STRICKLAND*.

A. *Padilla v. Kentucky* Abrogated *Bermudez v. State* and Other Florida Decisions On Which the Court Erroneously Relied to Conclude that the Rule 3.172(c)(8) Warning *Per Se* Cured Counsel's Ineffective Assistance.

The *Flores* decision erroneously relied on this Court's decision *Bermudez v. State*, 603 So. 2d 657 (Fla. 3d DCA 1992) and the Florida Supreme Court's decision in *State v. Ginebra*, 511 So. 2d 960, 960 (Fla. 1987)—both of which are no longer good law after *Padilla*. For more than twenty years, Florida courts had held that a lawyer's Sixth Amendment duty to provide effective assistance of counsel to a criminal defendant did *not* encompass advising the client of the

immigration consequences of a contemplated guilty plea, finding that deportation as a result of the conviction would be a "collateral" rather than "direct" consequence of the plea. *State v. Ginebra*, 511 So. 2d 960, 960 (Fla. 1987). In *Bermudez v. State*, this Court relied on the *Ginebra* premise that "there is no right to be informed of the collateral consequences of a guilty plea" to hold that any prejudice flowing from counsel's misadvice regarding the immigration consequences of a guilty plea was "cured" by the trial court's warning under Rule 3.172(c)(8) that a guilty plea by a noncitizen may result in deportation.[1] 603 So. 2d at 658.

In *Padilla v. Kentucky*, however, the U.S. Supreme Court held that regardless of the lower courts' distinctions between "collateral" and "direct" consequences, counsel has an affirmative Sixth Amendment duty to advise criminal defendants about the immigration consequences of a contemplated guilty plea. *Padilla*, 130 S.Ct. 1473, 1484 (2010). Specifically, the Court ruled that

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[1] In 1988, the Florida Supreme Court adopted Rule 3.172(c)(8), which requires trial courts to "inform" every defendant entering into a plea of guilty or nolo contendere that "if he or she is not a United States citizen, the plea may subject him or her to deportation . . ." Fla. R. Crim. P. Rule 3.172(c)(8). Justice Overton dissented from the adoption of this rule, stating that there was no constitutional right to such notification by the court. He wrote: "All the effects of a plea can never be fully covered by the court, and that is one of the primary reasons we require a defendant to have counsel." *In re Amendments to Fla. R. Crim. P.*, 536 So. 2d 992, 1007 (Fla. 1988).

Padilla's counsel was ineffective for failing to advise him that his conviction for drug distribution subjected him to automatic deportation. *Id.* at 1478.

In light of *Padilla*, this Court's reliance on *Flores* (and by extension *Bermudez*) for the proposition that judicial warnings always cure prejudice stemming from counsel's misadvice is misplaced for two reasons. First, this Court based its decision in *Bermudez* on the erroneous premise that criminal defendants have no right to be informed of the immigration consequences of their pleas. 603 So. 2d at 658. Second, *Padilla* has defined the nature and scope of defense counsel's duty to include the specific obligation to notify a defendant when his guilty plea will make him automatically, as opposed to possibly, subject to deportation, as was the case in *Flores* and is the case here. *Padilla*, 130 S.Ct. at 1483 (finding counsel deficient for not informing Padilla that his conviction made deportation "presumptively mandatory," and stating that "when the deportation consequence is truly clear, the duty to give correct advice is equally clear.") To the extent that *Bermudez* and now *Flores* hold that counsel's failure to notify a defendant that his plea would make him automatically subject to deportation is "cured" by a warning that deportation "may" be possible, these holdings are inconsistent with *Padilla*. It defies logic to hold that a warning from a court, which would be unconstitutional if offered by counsel, could cure constitutionally deficient advice by counsel.

While the purpose of procedural rules requiring plea colloquies "of course is to flush out and resolve" issues regarding the knowing and voluntariness of a plea, "like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge" to prove that in fact the plea was neither. *Fontaine v. U.S.*, 411 U.S. 213, 215 (1973) (reversing summary denial of postconviction motion where defendant alleged he was wrongfully induced into pleading guilty, notwithstanding the trial court's plea colloquy and defendant's representation that he entered the plea knowingly and voluntarily); *see also Downs-Morgan v. U.S.*, 765 F.2d 1534, 1539 n. 9 (11th Cir. 1985) (observing that compliance with plea colloquy rules "does not guarantee that the guilty plea is constitutionally valid."); *U.S. v. Couto*, 311 F.3d 179, 187 n.8 (2d Cir. 2002).

B. Courts Have Rejected the Notion That Generic Judicial Warnings Automatically Cure Ineffective Assistance of Counsel.

Both before and after *Padilla,* courts have found ineffective assistance of counsel by attorneys who incorrectly advise their clients or fail to give advice, notwithstanding a trial court's general admonition that a guilty plea may lead to deportation. In *U.S. v. Kwan*, 407 F.3d 1005 (9th Cir. 2005), for example, defense counsel had assured Kwan, a longtime lawful permanent resident with a U.S. citizen wife and three U.S. citizen children, that "although there was technically a possibility of deportation" if he entered a guilty plea, "'it was not a serious possibility,'" and that although the judge at the plea colloquy "would tell him that

he might suffer immigration consequences . . . there was no serious possibility that his conviction would cause him to be deported." *Id.* at 1008. Even after it became clear that Kwan's conviction and sentence rendered him mandatorily deportable, counsel failed to correct his representations when he still had the ability and duty to do so. *Id.* at 1017. The court found that these facts had established both ineffective assistance of counsel and prejudice and ordered that his postconviction motion be granted.

In *People v. Garcia*, N.Y. Slip Op. 20349, 2010 WL 3359548 (N.Y.S. 2010), the court granted a defendant's postconviction motion based on *Padilla* notwithstanding that the trial court had given its standard immigration warning during the plea colloquy. Expressly rejecting the Fourth DCA's approach in *Flores*, the *Garcia* court reasoned that under *Padilla*, when a defendant has in fact been misled by bad or nonexistent advice, "the Court's general warning will not automatically cure counsel's failure nor erase the consequent prejudice." 2010 WL 3359548 at *6.

In *State v. Limarco*, 235 P.3d 1267 (Kan. App. 2010), the defendant, a lawful permanent resident of the United States for more than thirty years, signed a form acknowledging that he understood that a guilty plea by a noncitizen may result in deportation, and reviewed his understanding of the plea during a colloquy with the court. He later sought to withdraw the plea, however, stating that his

attorney never discussed immigration consequences with him, that the form he signed contained only general language about possible deportation and did not put him on notice that he might be subject to deportation in his particular case, and that he would not have entered the plea had he known it would subject him to deportation. Citing *Padilla*, and that it was "'practically inevitable' that a defendant like Limarco would be deported once he pled guilty to the methamphetamine charge," the court found he had adequately stated a claim for ineffective assistance of counsel and resulting prejudice warranting an evidentiary hearing, notwithstanding the trial court warning. 235 P.3d 1267.

Outside the immigration context, courts have also recognized that ineffective assistance is not automatically cured by a trial court's general warning. In *Luedtke v. State*, 6 So. 3d 653 (Fla. 2d DCA 2009), for example, the criminal defendant entered a negotiated plea of no contest to one count of sexual battery with a sentence of confinement after his counsel incorrectly advised him that the Jimmy Ryce Act's provisions regarding involuntary civil commitment would probably not apply to him. *Id.* at 655. The attorney took a moment to render this advice during the plea colloquy, when the court issued the required admonition under Rule 3.172(c)(9) regarding the applicability of the Jimmy Ryce Act's provisions. The defendant acknowledged to the court that he understood, and that he and his attorney had discussed the matter. After obtaining new counsel, however, the

defendant moved to withdraw his plea based on counsel's incorrect advice. Observing that "affirmative misadvice regarding collateral consequences of a plea forms a basis for allowing a defendant to withdraw [a] plea," the appellate court found that the application of the Jimmy Ryce Act's provisions to the defendant was "not a matter of probability, but a legal certainty." *Id.* at 656. The court therefore found that counsel's advice constituted misadvice that warranted invalidation of the plea. *Id.*

In *Thompson v. United States*, the U.S. Court of Appeals for the Eleventh Circuit held that the ineffectiveness of counsel in failing to file an appeal was not cured by the trial court's notification that the defendant had a right to appeal. The court found that Thompson, who was not properly counseled about the right to appeal, had established both ineffective assistance of counsel and prejudice as a result. The court stated that the judicial advisal about the general right to appeal "[did] not absolve counsel from the duty to consult with his client about the substance of the right to appeal." 504 F.3d 1203, 1208 n.8 (11th Cir. 2007).

C. The *Flores* Decision's *Per Se* Rule That the Judicial Immigration Warning Cures Prejudice Conflicts With *Strickland*, Which Requires An Individualized, Facts-Based Determination Of Prejudice.

Flores erroneously held that the generic Rule 3.172(c)(8) warning always cures prejudice, regardless of the particular facts of the case. This *per se* rule allows summary denial of every post-conviction motion based on erroneous

immigration advice in Florida, because no matter how deficient counsel's performance was, the trial court's general admonition will always "cure" the constitutional violation and no defendant will ever be found to have been prejudiced. *See, e.g., Clark v. State*, --- So.3d ---, 2010 WL 3418396 (Fla. 4th DCA Sept. 1, 2010) (per curiam affirmed, citing *Flores*).

This *per se* rule conflicts with *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a determination of whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. In making this determination, a trial court must make a record-based decision that takes account of all relevant facts. *Id.* at 695. The relevant standards do not establish "mechanical rules," but rather must be applied on a case-by-case basis. *Id.* at 696.

The *Flores* decision, however, concluded that Mr. Flores could not establish prejudice based on its application of a "mechanical rule," namely that the required stock warning *automatically* cures ineffective assistance of counsel. The application of this *per se* rule permitted the Court to disregard the overwhelming evidence offered by Mr. Flores, which demonstrated that he would not have pled guilty had he known that the plea would lead to his automatic removability. This evidence included: counsel's affirmative misadvice that the plea to a reduced charge would not lead to deportation because it was only a misdemeanor; Mr.

Flores' wife's testimony that she discussed immigration issues with counsel, and specifically the couple's concern that Mr. Flores not be deported; and even the prosecutor's statement that she recalled Mr. Flores' counsel telling her during plea negotiations that his client would not accept a plea to possession of cocaine because it would lead to his deportation.

Similarly, in the case of Mr. Diaz, this Court summarily concluded that the mere mention of the plea being used in a deportation proceeding automatically precluded Mr. Diaz from establishing prejudice. In so doing, the Court upheld the trial judge's denial of an evidentiary hearing to Mr. Diaz and ignored Mr. Diaz's affidavit in which he states: 1) his defense attorney mistakenly advised him that he would not likely face deportation; and 2) if he had known that the plea would lead to automatic deportation, he would not have pled guilty and would have gone to trial. The *Flores* per se rule also prevented this Court from considering the fact that Mr. Diaz is now detained by immigration authorities and is in removal proceedings on account of the plea that he took.

Continued application of the *Flores per se* rule would eviscerate *Padilla*'s holding that a defendant has a Sixth Amendment right to accurate immigration advice, by (1) affording no remedy for the constitutional violation, even when counsel affirmatively misleads a defendant into believing his guilty plea will not lead to deportation; (2) providing no incentive for attorneys to meet their

constitutional obligations under *Padilla* since they will never be found ineffective; and (3) perversely encouraging defendants to disregard attorneys' particularized advice and rely on the court's one-size-fits all warning instead, even when counsel's advice is accurate and the judicial warning is not.

The *Flores per se* rule would also have other unintended, but nevertheless damaging, consequences on the administration of justice and fundamental fairness. The fact that the trial court's stock warning never changes, regardless of the actual facts of the case, produces absurd results. For example, whenever an attorney advises that a plea will *not* have immigration consequences, but the court says that it "may," the client will not know who to believe. Because defendants in this position will get mixed signals, it calls into question whether any plea under these circumstances can be knowing or voluntary. If the client reasonably relies on counsel's advice, but it turns out to be wrong, the defendant will have no remedy, as the court's stock admonition will have "cured" the misadvice. If the defendant believes he should listen to the court rather than to his lawyer, but it is the lawyer who is in fact *right*, the defendant may elect to forgo a beneficial plea agreement and, if found guilty at trial, be deported.

The *Flores* decision suggests that defendants need only "speak up" during plea colloquies if counsel's advice differs from the stock admonition of the court. This, however, would require defendants to disclose confidential attorney-client

communications, even though the Florida Supreme Court specifically requires that the warning be given in all cases and without the trial court's inquiring as to whether the defendant is a United States citizen "in order to protect the defendant's due process rights."[2] *In re Amendments to Fla. R. Crim. P.*, 536 So. 2d at 992.

[2] The *Flores* decision's reliance on *Iacono v. State*, 930 So. 2d 829 (Fla. 4th DCA 2006) on this point was entirely misplaced. 2010 WL 2882465 at *3. *Iacono* involved allegations that a defendant lied under oath during the plea colloquy at the direction of counsel but later sought to undo those statements. The Court refused to entertain the allegation, finding that this would condone perjury and that a defendant is bound by his sworn answers. *Iacono*, 930 So. 2d at 831. Mr. Flores, however, did not contend that he lied during the plea colloquy, or tried to take back false statements made under oath. Rather, Mr. Flores simply acknowledged that while he understood the trial court's stock warning that a noncitizen's guilty plea may subject him or her to deportation, he did not believe that warning applied to him given his attorney's particularized advice to the contrary. *Id.* at *1.

II. BECAUSE *PADILLA* REQUIRES THAT COUNSEL INFORM A CLIENT WHEN A PLEA WILL RESULT IN PRACTICALLY INEVITABLE DEPORTATION, A GENERIC JUDICIAL WARNING CAN NEVER CURE PREJUDICE IN A CASE WHERE THE PLEA RESULTS IN AUTOMATIC DEPORTATION.

Padilla established a clear duty on counsel to inform a client when a plea will result in practically inevitable deportation. As a result, the judicial warning under Rule 3.172(c)(8) that a guilty plea "may" subject a noncitizen to deportation can never in and of itself cure ineffective assistance in cases in which immigration law mandates removal. *Boakye v. U.S.*, No. 09 Civ. 8217, 2010 WL 1645055 (S.D.N.Y. 2010) (recognizing that a judicial warning that deportation is "possible" does not cure ineffective assistance when removal is mandatory). Mr. Diaz alleges that his defense counsel was ineffective because he advised him that pleading guilty to withhold of adjudication for aggravated assault, burglary of a conveyance, and criminal mischief would not subject him to removal. Counsel's alleged advice was incorrect because federal immigration law makes a noncitizen automatically subject to removal if he or she has been convicted of any crime involving moral turpitude. 8 U.S.C. § 1227(a)(2)(A). Aggravated assault with a deadly weapon has long been considered a crime involving moral turpitude. *See Matter of Medina*, 15 I&N Dec. 611, 612 (BIA 1976) (citing *Gonzales v. Barber*, 207 F.2d 398 (9th Cir. 1953, *aff'd*, 347 U.S. 637 (1954); *U.S. ex rel. Morlacci v. Smith*, 8 F.2d 663 (W.D.N.Y. 1925); *Matter of Ptasi*, 12 I&N Dec. 790 (BIA 1968); *Matter*

of Goodalle, 12 I&N Dec. 106 (BIA 1967); *Matter of G-R-*, 2 I&N Dec. 733 (BIA 1943; AG 1947)). As with Padilla, the risk of removal was "clear" in Mr. Diaz' case and his counsel was therefore obligated to advise him that "deportation was presumptively mandatory." *Padilla*, 130 S. Ct. at 1483.

Padilla stands for the proposition that counsel renders constitutionally deficient advice if he or she tells a client that deportation is *possible* when deportation is practically inevitable.[3] It follows as a matter of logic that a *court's* equivalent warning cannot cure counsel's deficient advice. Mr. Diaz received a factually inaccurate generic warning from the trial court that his conviction "could" merely be "used" in deportation proceedings. He is entitled to have an evidentiary hearing on the allegations of ineffective assistance of counsel and resulting prejudice reviewed and decided by this Court.

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[3] Common sense dictates that the warning that a defendant "may" be subject to deportation differs fundamentally from a warning that he or she is definitively subject to removal. If a surgeon were to advise a patient that death is a possible consequence of surgery, the patient would not understand the surgeon to mean that death is practically inevitable. On the other hand, a surgeon's statement that death in fact was a practically certain result of the particular surgery would undoubtedly affect the patient's decision whether to proceed. A patient who decides to undergo surgery based on advice only that it may be risky, cannot be said to have knowingly and voluntarily agreed to undergo certain death.

CONCLUSION

For the above reasons, Amicus Curiae urges the Court to grant Appellant's motions for rehearing, rehearing en banc, clarification, and certification.[4]

[4] AILA, South Florida Chapter, takes no position on the ultimate issue of whether Mr. Diaz is entitled to have his motion for post-conviction relief granted.

Respectfully submitted,

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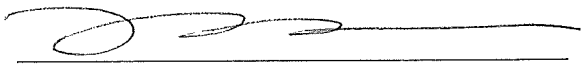
CERTIFICATE OF SERVICE

I, Rebecca Sharpless, counsel for Amicus Curiae, HEREBY CERTIFY that, on November 3, 2010, a true and correct copy of the foregoing was delivered by Next Day Federal Express delivery to: Counsel for Appellant, Maggie Arias, Pozo Goldsten & Gomez, LLP, 2121 SW 3rd Avenue, Fifth Floor, Miami, FL 33129 and Benjamin S. Waxman, Tunkey, Ross, Amsel, Raben & Waxman, P.A., 2250 S.W. 3d Avenue, 4th Floor, Miami, FL 33129, Office of the Attorney General, Magaly Rodriguez, Rivergate Plaza, Suite 650, 444 Brickell Avenue, Miami, FL 33131, and Counsel for Amicus Curiae Florida Association of Criminal Defense Lawyers, Sonya Rudenstine and Michael Ufferman, 2022-1 Raymond Diehl Road, Tallahassee, FL 32308.



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Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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