IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D10-2462

GABRIEL A. HERNANDEZ,
Appellant,
-vs-
STATE OF FLORIDA,
Appellee.

BRIEF AMICUS CURIAE OF AMERICAN IMMIGRATION LAWYERS ASSOCIATION SOUTH FLORIDA CHAPTER IN SUPPORT OF APPELLANT

TANIA GALLONI
Florida Bar No. 619221
Florida Immigrant Advocacy Center
3000 Biscayne Boulevard, Suite 400
Miami, FL 33137
(305) 573-1106 ext. 1080
(305) 576-6273, facsimile

REBECCA SHARPLESS
Florida Bar No. 131024
Immigration Clinic
University of Miami School of Law
1311 Miller Dr, E257
Coral Gables, FL 33146
(305) 284-6092, clinic
(305) 284-6093, facsimile
(305) 284-3576, direct

Counsel for Amicus Curiae

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER AUTHORITIES

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 Gabriel A. Hernandez presents the question of whether a general judicial warning that a conviction resulting from a guilty plea "could be used" in a deportation proceeding automatically precludes a showing of prejudice resulting from ineffective assistance of counsel, even though defense counsel wholly failed to advise his client of the specific immigration consequences that would result from his plea, and even though the plea rendered the defendant's deportation mandatory rather than merely possible.

Mr. Hernandez came to the United States as a two-year-old child in 1983 and became a lawful permanent resident on January 29, 1999. On May 3, 2001, at

the age of 19, he pled guilty to one count of unlawful sale of a controlled substance, a second degree felony under Florida Statute § 893.13(a)(A)(1). He received a withhold of adjudication and a sentence of 12 months probation. During the plea colloquy, the trial judge did not give Mr. Hernandez 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: "if you are not an American citizen, the US government could use these charges against you in deportation hearings." T. 6, lines 14-18.

In fact, Mr. Hernandez's guilty plea to a controlled substance charge is not merely a factor that could be used against him in a deportation hearing. Rather, unlike other classes of convictions, under federal immigration law the controlled substance conviction makes Mr. Hernandez mandatorily deportable from the United States pursuant to 8 U.S.C. § 1227(a)(2)(B)(i) as "any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less or marijuana." As he was convicted "for sale" of a controlled substance, Mr. Hernandez is also mandatorily deportable under the aggravated felony ground of deportation, 8 U.S.C. § 1227(a)(2)(A)(iii), as having been convicted of an illicit trafficking crime under 8 U.S.C. § 1101(a)(43)(B).

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the United States Supreme Court held that a defendant's Sixth Amendment right to counsel includes competent advice regarding the immigration consequences of a contemplated plea. The Court ruled that counsel's failure to advise a defendant of the immigration consequences of a plea constitutes ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Moreover, the Supreme Court held that when it is "clear" that deportation will result from a guilty plea, counsel must advise the 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 July 8, 2010, Mr. Hernandez filed a motion for postconviction relief, alleging that defense counsel had failed to advise him that he would face any risk of deportation if he pled guilty. Citing to this Court's decision in *Bermudez v. State*, 603 So.2d 657 (Fla 3rd DCA 1992), and the decision *State v. Flores*, 35 Fla. L. Weekly D1562, 2010 WL 2882465 (July 14, 2010), *pet. for reh'g and reh'g en*

banc pending, the trial court denied Mr. Hernandez's motion for post-conviction relief without holding an evidentiary hearing. Mr. Hernandez timely appealed.

SUMMARY OF THE ARGUMENT

A trial judge's generic statement that a guilty plea *may* have possible immigration consequences does not cure the prejudice resulting from the failure of defense counsel to competently advise a noncitizen client, in accordance with *Padilla v. Kentucky*, that the plea *will* result in presumptively mandatory deportation. In holding otherwise, the trial court erred by relying on *Bermudez v. State*, 603 So.2d 657 (Fla 3rd DCA 1992), and *State v. Flores*, 35 Fla. L. Weekly D1562, 2010 WL 2882465 (July 14, 2010), *pet. for reh'g and reh'g en banc pending*.

Bermudez, which predates *Padilla*, was premised on the assumption that criminal defendants have *no* right to be informed of the immigration consequences of their pleas, because the court considered immigration consequences to be merely collateral rather than direct consequences of the plea. That assumption has now been squarely rejected in *Padilla*. 603 So. 2d at 658. Moreover, *Padilla* defined the nature and scope of defense counsel's constitutional duty to include the obligation specifically to notify a defendant when his guilty plea will make him automatically, as opposed to possibly, subject to deportation. *Padilla*, 130 S.Ct. at 1483.

The trial court also erred by relying on the Fourth DCA's decision in *Flores*. The *Flores* decision relied on *Bermudez* to adopt 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 in fact faces mandatory, rather than possible, deportation as a result of his guilty plea. *Flores* should not be followed because it conflicts with and would eviscerate the United States Supreme Court's ruling in *Padilla*.

In *Padilla*, the court held that the Sixth Amendment right to counsel encompasses an affirmative duty of defense counsel to provide accurate advice regarding the immigration consequences of a contemplated plea. In particular, the Court ruled that defense counsel must advise a client when the immigration statute "specifically commands removal." If permitted to stand, the trial court's decision in Mr. Hernandez's case would allow a factually incorrect warning from the court (stating only that a guilty plea could be used in deportation proceedings when in fact the immigration statute "commands removal" based on that plea) to "cure" ineffective assistance of counsel even though the same advice–if given by counsel–would not pass constitutional muster under *Padilla*.[1] Such an interpretation of *Padilla* is untenable.

[1] The actual judicial warning received by Mr. Hernandez in this case does not even

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 the trial court's decision is that so long as trial courts give any general warning during a plea colloquy, noncitizen defendants who receive ineffective assistance of counsel regarding the immigration consequences of their pleas will never have a remedy for the constitutional violation–even when the

---

satisfy Florida Rule of Criminal Procedure 3.172(c)(8) because the trial court merely stated in a nonspecific way that the plea "could be used" in deportation proceedings, as though it might be one of several factors an immigration court might consider, rather than sufficient basis in and of itself to mandate his deportation. 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. Hernandez, this is a material difference that distinguishes Mr. Hernandez's case from *Flores*.

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.

ARGUMENT

I. THE *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 trial court erroneously relied on this Court's decision *Bermudez v. State*, 603 So. 2d 657 (Fla. 3d DCA 1992), to deny Mr. Hernandez's motion for postconviction relief. Both *Bermudez* and the decision upon which *Bermudez*

relies—*State v. Ginebra*, 511 So. 2d 960 (Fla. 1987)—are no longer good law after *Padilla*.

For over twenty years, Florida courts had been following *State v. Ginebra*, 511 So. 2d 960 (Fla. 1987), to hold 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. 511 So. 2d 960 at 960. In *Bermudez*, 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.[2] 603 So. 2d at 658.

[2] 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).

In *Padilla*, however, the U.S. Supreme Court held that regardless of the lower courts' distinctions between "collateral" and "direct" consequences, counsel have 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 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*, the trial court's reliance on *Flores* (and by extension *Bermudez*) for the proposition that judicial warnings always cure prejudice stemming from counsel's ineffective assistance is misplaced for two reasons. First, this Court's rationale in *Bermudez* was based on the *Ginebra* rule that criminal defendants have no right to be informed of the immigration consequences of their pleas. 603 So. 2d at 658. *Padilla* has overruled *Ginebra* on this point. Second, *Padilla* defines counsel's duty as including the specific obligation to notify a defendant when his guilty plea will make him presumptively 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). A court's general admonition in a plea colloquy about the possibility of immigration consequences does not mechanically cure defense counsel's failure to render competent immigration advice.

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 regarding the immigration consequences of a guilty plea 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 these erroneous representations to the client 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 Kwan's 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. The appellate court found that, contrary to counsel's advice, 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 ineffective assistance 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 standard 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 *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 will always cure prejudice, regardless of the particular facts of any case. As evidenced by Mr. Hernandez's case, application of this *per se* rule would allow summary denial of every post-conviction motion based on erroneous immigration advice in Florida, because no matter how deficient counsel's performance is, the trial court's general admonition will always "cure" the constitutional violation and no defendant will ever be found to have been prejudiced.

This *per se* rule conflicts with *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that the prejudice prong be based on 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 in that case permitted the court to disregard the overwhelming evidence of prejudice 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.

Similarly, in the case of Mr. Hernandez, the trial court summarily concluded that the mere mention that his plea "could be used" in a deportation proceeding automatically precluded Mr. Hernandez from establishing prejudice. In so doing, the trial judge dismissed as irrelevant Mr. Hernandez's affidavit stating that his defense attorney wholly failed to advise him of the immigration consequences of such a plea as well as a communication from Mr. Hernandez's attorney stating that he had no recollection of discussing immigration with Mr. Hernandez.

The *Flores per se* rule (or its functional equivalent, as illustrated in this case) would nullify *Padilla*'s holding that a defendant has a Sixth Amendment right to accurate immigration advice. Even the most egregious of constitutional violations would have no remedy. Because the ineffectiveness of defense counsel carries no consequence under *Flores*, attorneys would have no incentive to discharge their *Padilla* duty by rendering competent immigration advice. Moreover, if defense

attorneys were to render specific, accurate advice, *Flores* perversely encourages defendants to disregard that advice and rely instead on the general judicial warning given to everyone—even when the judicial warning is inaccurate.

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."[3] *In re Amendments to Fla. R. Crim. P.*, 536 So. 2d at 992.

In this case, it would not have been reasonable to expect Mr. Hernandez to believe that he needed to "speak up," as the trial court merely stated that Mr. Hernandez's conviction "could be used" in a deportation proceeding. The court's statement did not advise Mr. Hernandez that the conviction could be *the basis for a deportation proceeding*, much less the fact that it would *mandate* his deportation at the conclusion of such a proceeding. Rather, it merely articulated the unremarkable proposition that a conviction—presumably like any other adverse information about an individual—could be "used" in a deportation proceeding.

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.

---

[3] 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.

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). Similarly, the vague statement that a conviction "could be used" in a deportation proceeding is no substitute for constitutionally competent advice of counsel.

Mr. Hernandez alleges that defense counsel was ineffective for failing to advise him that pleading guilty to unlawful sale of a controlled substance would subject him to deportation. Indeed, under federal immigration law, a noncitizen is automatically subject to removal if he or she has been convicted of any crime "relating to controlled substances." 8 U.S.C. § 1227(a)(2)(B). Moreover, sale of a controlled substance also triggers the aggravated felony ground of deportation. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (incorporating the aggravated felony definition under 8 U.S.C. § 1101(a)(43)(B)). Mr. Hernandez's conviction was therefore not merely something that "could be used" in a deportation proceeding, but rather a sufficient basis to mandate his deportation.

Notably, Mr. Hernandez's conviction subjects him to removal under *the same* immigration statute that was at issue in *Padilla*, which the U.S. Supreme Court characterized as "specifically command[ing] removal for all controlled substances convictions except for the most trivial of marijuana possession offenses."[4] 130 S. Ct. at 1473, 1478. As with Padilla, the risk of removal is "clear" in Mr. Hernandez's case and his counsel was therefore obligated specifically to advise him that "deportation was presumptively mandatory." *Padilla*, 130 S. Ct. at 1483. As in *Padilla*, Mr. Hernandez's case "is not a hard case in which to find deficiency," because the consequences of the plea "could easily be determined from reading the removal statute," which is "succinct, clear, and explicit in defining the removal consequence." *Id.* at 1483 (citing 8 U.S.C. § 1227(a)(2)(B) which makes deportable any noncitizen convicted of any law "relating to a controlled substance" with the exception of a "single offense of possession of 30 grams or less of marijuana").

Moreover, *Padilla* stands for the proposition that counsel renders constitutionally deficient advice if he or she tells a client that deportation is

[4] As U.S. Supreme Court points out, Padilla was also subject to the aggravated felony ground of deportation. 130 S. Ct. at 1479 n.4. The U.S. Supreme Court's decision, however, was analyzing the controlled substance ground of deportation when it concluded that Padilla's counsel should have advised him that the statute "commands [his] removal." *Id*. at 1478.

possible when deportation is in fact practically inevitable.[5] It follows as a matter of logic that a court's comparably deficient warning cannot cure counsel's deficient advice.

In this case, Mr. Hernandez received a factually inaccurate, generic warning from the trial court that his conviction "could" merely be "used" in deportation proceedings. This warning could not cure the ineffectiveness of his defense counsel, who Mr. Hernandez alleges failed entirely to discuss the clear immigration consequences of his contemplated guilty plea. The decision of the trial court, which declined to hold an evidentiary hearing on the matter, must therefore be reversed.

CONCLUSION

For the above reasons, Amicus Curiae urges the Court to grant Appellant's appeal and reverse the trial court's decision.[6]

---

[5] Common sense dictates that the warning that a defendant "may" be subject to deportation differs fundamentally from a warning that he or she would definitively be 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.

[6] AILA, South Florida Chapter, takes no position on the ultimate issue of whether Mr. Hernandez is entitled to have his motion for postconviction relief granted.

Respectfully submitted,

TANIA GALLONI
Florida Bar No. 619221
Florida Immigrant Advocacy Center
3000 Biscayne Boulevard, Suite 400
Miami, FL 33137
(305) 573-1106 ext. 1080
(305) 576-6273, facsimile
tgalloni@fiacfla.org

BY:_____

REBECCA SHARPLESS
Florida Bar No. 131024
Immigration Clinic
University of Miami School of Law
1311 Miller Drive, E257
Coral Gables, FL 33146
(305) 284-3576, direct
(305) 284-6092, clinic
(305) 284-6093, facsimile
rsharpless@law.miami.edu

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I, Rebecca Sharpless, counsel for Amicus Curiae, HEREBY CERTIFY that, on December 16, 2010, a true and correct copy of the foregoing was delivered by Next Day Federal Express delivery to: Counsel for Appellant, Sui Chung, Immigration Law & Litigation Group, Grove Place, 2964 Aviation Avenue, Third Floor, Miami, FL 33133, Counsel for Appellant, Michael Vastine, Immigration Clinic, St. Thomas Univeristy School of Law, 16401 NW 37th Avenue, Miami Gardens, FL 33054, and Timothy Thomas, Office of the Attorney General, Rivergate Plaza, Suite 650, 444 Brickell Avenue, Miami, FL 33131.

_____
REBECCA SHARPLESS
Counsel for Amicus Curiae

CERTIFICATE OF FONT

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

_____
REBECCA SHARPLESS
Counsel for Amicus Curiae