No. CR 18-0514 PR

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, Petitioner,

vs.

HECTOR SEBASTION NUNEZ-DIAZ, Respondent.

On Review of a Memorandum Decision
of the Court of Appeals, Division One
No. 1 CA-CR 16-0793 PRPC

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE, THE PIMA COUNTY PUBLIC DEFENDER, AND THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

This brief is filed on behalf of three groups of criminal defense lawyers who regularly represent noncitizens facing criminal charges. Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those lawyers who defend them. AACJ is a statewide nonprofit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the criminally accused, including noncitizens, in the courts and to promoting excellence in the practice of criminal law through education, training, and mutual assistance.

The Pima County Public Defender (PCPD) is the second largest indigent defense agency in Arizona tasked with defending those accused of felony offenses. With a staff that includes 80 attorneys, PCPD represents many thousands of clients every year on felony charges, including numerous noncitizens whose interests in the outcome of their criminal proceedings extend to obtaining favorable impacts on their immigration status, minimizing adverse consequences for any related removal proceedings, and preserving their interest in remaining in the United States. PCPD also routinely represents clients in postconviction proceedings before the Superior Court, the Arizona Court of Appeals, and this Court. Each year Arizona's appellate courts publish opinions in several of PCPD's cases.

The Federal Public Defender for the District of Arizona (FPD-AZ) is the entity organized under 18 U.S.C. § 3006A(g), the Criminal Justice Act of 1964, to provide representation to indigent persons facing federal criminal charges before the United States District Court for the District of Arizona, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States. FPD-AZ is one of five such entities that serve a district along the U.S. border with Mexico, and so FPD-AZ's annual caseload includes representing numerous noncitizens in criminal immigration prosecutions for illegal reentry under 8 U.S.C. § 1326. In those cases, the fairness of FPD-AZ's clients' prior removal proceedings, including the effective assistance of counsel in any criminal proceeding that led to that client's removal from the United States, is a regular subject of FPD-AZ's litigation practice. *See* 8 U.S.C. § 1326(d); *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987).

Together, AACJ, PCPD, and FPD-AZ work to establish professional standards that protect the rights of noncitizen clients to due process in criminal proceedings and to competent advice regarding the outcome of those proceedings. *Amici* have thus accepted this Court's invitation to file a brief expressing their view about the proper outcome of this case, and offer their perspective in order to promote the sound development of the law.

STATEMENT OF THE CASE

On June 29, 2013, Mr. Nunez was arrested during a traffic stop in Phoenix when he was discovered in possession of small amounts of methamphetamine and

cocaine. He was charged in Maricopa County Superior Court with two class 4 felonies—possession of a dangerous drug, in violation of A.R.S. § 13-3407(A)(1), and possession of a narcotic drug, in violation of A.R.S. § 13-3408(A)(1). Less than a month later, on July 22, 2013, he pleaded guilty to possession of drug paraphernalia, in violation of A.R.S. § 13-3415(A), a class 6 undesignated felony, pursuant to a plea agreement. As part of the plea colloquy, Mr. Nunez was advised (as state law requires) that his guilty plea "may affect" his immigration status. *See* Ariz. R. Crim. P. 17.2(f) (2013).[*] Consistent with the plea agreement, the court suspended imposition of sentence, placed Mr. Nunez on 18 months of unsupervised probation, and ordered him to pay a fine.

At the time of his arrest, Mr. Nunez was an undocumented alien with no criminal history. His guilty plea led to him being placed in removal proceedings. In lieu of a removal order, Mr. Nunez agreed to voluntary departure, and left the United States for his native Mexico. During both the criminal proceedings and the

[*] Before this Court, the state has abandoned any argument that this advisement defeats Mr. Nunez's ineffective-assistance claim. Even so, several courts have held that such a general advisement does not cure any inadequate advice from counsel about the specific immigration consequences of any particular defendant's conviction. *See People v. Patterson*, 391 P.3d 1169, 1178 (Cal. 2017); *Hernandez v. State*, 124 So. 3d 757, 763 (Fla. 2012) (holding that a general advisement about immigration consequences does not categorically bar a *Padilla*-based ineffective-assistance claim); *Taylor v. State*, 810 S.E.2d 862, 865 (S.C. 2018); *State v. Sandoval*, 249 P.3d 1015, 1020 (Wash. 2011) (stating that the "guilty plea statement warnings… cannot save the advice that counsel gave"); *Ortega-Ariaza v. State*, 331 P.3d 1189, 1197 (Wyo. 2014); *United States v. Akinsade*, 686 F.3d 248, 254 (4th Cir. 2012) ("This general and equivocal admonishment [in a plea colloquy] is insufficient to correct counsel's affirmative misadvice….").

subsequent immigration proceedings, Mr. Nunez was represented by retained counsel.

On September 5, 2013, with the assistance of new retained counsel, Mr. Nunez filed a timely notice of postconviction relief. In his petition, he asserted that trial counsel was aware that the paraphernalia plea meant that his "immigration fate was destined for failure" because it made him "ineligible for various potential remedies." (Amended Petition 9/10/2014 at 4, 5) He asserted that trial counsel did not request any alternative plea that would provide a more favorable immigration outcome for him. (Amended Petition 9/10/2014 at 9) He asserted that if trial counsel had considered the immigration consequences of the paraphernalia plea, he could have negotiated a plea to some kind of solicitation offense, such as solicitation to possess a narcotic drug, in violation of A.R.S. §§ 13-1002 and -3408(A)(1), which would have had more favorable to his immigration situation. (Amended Petition 9/10/2014 at 6) *See Coronado-Durazo v. INS*, 123 F.3d 1322, 1325–26 (9th Cir. 1997) (holding that solicitation to possess cocaine under Arizona law was not a removable offense). He asserted that if trial counsel had taken his immigration situation into account in plea negotiations, he would not have been subject to mandatory detention while his removal proceedings were ongoing. (Amended Petition 9/10/2014 at 10) However, he did not specifically allege that he would have proceeded to trial on the possession charges if he had been properly advised about the immigration consequences of the paraphernalia plea. He asked the court to allow him to withdraw his guilty plea so that he could

plead guilty to a different offense and thereby avoid removal proceedings and mandatory detention. (Amended Petition 9/10/2014 at 13)

The superior court held an evidentiary hearing. Mr. Nunez testified that trial counsel told him that "there were not going to be any immigration consequences" from his guilty plea. (RT 10/27/2015 at 7:23–24; *see also* RT 10/27/2015 at 10:17–20) He also testified that if trial counsel had affirmatively told him that the plea would have immigration consequences, he would not have signed it. (RT 10/27/2015 at 9:15–18) Trial counsel testified that she had asked the prosecutor to allow Mr. Nunez to plead guilty to a solicitation offense, but that the request was declined. (RT 10/27/2015 at 28:20 to 29:6; *see also* RT 10/27/2015 at 44:4 to 45:11; 48:20 to 49:10) She testified that she had learned before she began representing Mr. Nunez that a paraphernalia plea was "essentially the kiss of death in immigration" proceedings. (RT 10/27/2015 at 35:22 to 36:10) She also testified that she "absolutely" told Mr. Nunez that the paraphernalia plea would have immigration consequences. (RT 10/27/2015 at 29:15–20) There was no evidence presented either about the immigration benefits that Mr. Nunez might have sought in spite of his undocumented status or how the paraphernalia plea affected his eligibility for those benefits.

Following the hearing, the court granted Mr. Nunez's petition and vacated his guilty plea. The court credited the testimony of Mr. Nunez over that of trial counsel. The court concluded that trial counsel "misrepresented the immigration consequences to defendant. Counsel was well aware that the defendant and his

family were concerned about the immigration consequences because of defendant's status in the United States." (12/30/2015 Ruling at 4) The court found that trial counsel failed to refer Mr. Nunez to an immigration attorney before he accepted the state's plea offer. "Based on the evidence presented, this court finds that counsel's actions fell below an objective standard of reasonableness." (12/30/2015 Ruling at 4) The court further found that as a result of trial counsel's affirmative misrepresentation about the immigration consequences of the plea to a paraphernalia charge, Mr. Nunez was "placed in removal proceedings and was held without bond." (12/30/2015 Ruling at 4) "Defendant would not have signed the plea if he was adequately advised of the immigration[] consequences." (12/30/2015 Ruling at 4) The court made no findings about what Mr. Nunez knew regarding the immigration consequences of his plea or what immigration benefits he would have sought if he had not pleaded guilty to the paraphernalia charge. The court set aside Mr. Nunez's guilty plea. (12/30/2015 Ruling at 5)

The state petitioned for review of the superior court's decision to grant Mr. Nunez's postconviction petition. Without calling for a response from Mr. Nunez, a divided panel of the court of appeals affirmed the grant of postconviction relief. Because the superior court had credited Mr. Nunez's testimony at the evidentiary hearing, the court concluded, Mr. Nunez had proven both components of the ineffective-assistance claim he raised. "Although there was testimony that Nunez-Diaz was generally advised that there would be immigration consequences…, he testified that he would not have signed the plea agreement had he been advised of the *specific* immigration consequences of the plea." *State v. Nunez-Diaz*, No. 1 CA-

CR 2016-0793 PRPC, 2018 WL 4500758, at *2 (Ariz. Ct. App. Sept. 18, 2018). The court also observed that, although Mr. Nunez was a "deportable alien prior to his conviction" on the ground that he had no legal status in the United States, *see* 8 U.S.C. § 1227(a)(1)(B), "the record below does not establish that he necessarily would have been deported had he gone to trial and been acquitted of the charges." *Id.* n.1.

The dissenting judge would have reversed the grant of Mr. Nunez's ineffective-assistance claim. In his view, the fact that Mr. Nunez was an undocumented alien at the time of his arrest meant that he could not show prejudice from any incorrect advice about the immigration consequences of his guilty plea. *Id.* at *3.

ARGUMENT

The Sixth Amendment right to effective assistance of counsel in criminal proceedings applies both to the advice a criminal defendant receives in regard to any plea offer extended to him as well as to the decision to accept that offer and plead guilty. *Missouri v. Frye*, 566 U.S. 134, 140 (2012) (citing *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Hill v. Lockhart*, 474 U.S. 52 (1985)). This guarantee ensures that "no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.'" *Padilla*, 559 U.S. at 374 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). When counsel advises any noncitizen defendant about how to resolve a criminal charge, "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence"

that he may receive under a plea agreement. *Id.* at 368 (quoting *INS v. St. Cyr*, 533 U.S. 289, 322 (2001)). Thus, to discharge her constitutional obligation to provide competent advice relating to a guilty plea, defense counsel "must inform her client whether his plea carries a risk of deportation." *Id.* at 374. When the "deportation consequence is truly clear," the "duty to give correct advice is equally clear." *Id.* at 369.

A postconviction claim of ineffective assistance of counsel in connection with the immigration consequences of a guilty plea will not succeed unless the claimant can show prejudice from counsel's incorrect advice. In general, prejudice in this context means that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lee v. United States*, 137 S. Ct. 1958, 1964 (2017) (quoting *Roe v. Flores-Ortega*, 529 U.S. 470, 482 (2000)). The showing of prejudice required in this context does not depend on "how a hypothetical trial would have played out absent the error." *Id.* at 1965 (discussing *Hill*, 474 U.S. at 60). Thus where, as here, the claim relates to defense counsel's incorrect advice about the immigration consequences of a guilty plea, the metric of prejudice is whether "but for counsel's errors," the claimant "would not have pleaded guilty and would have insisted on going to trial." *Id.* at 1965 (quoting *Hill*, 474 U.S. at 59).

"The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea." *Id.* at 1966 (citing *St. Cyr*, 533 U.S. at 322–23). In *Padilla* the Supreme Court said that in order to show prejudice,

the decision to reject a plea offer and go to trial must be "rational under the circumstances." 559 U.S. at 372. Where a plea offer carries an absolute certainty that deportation will be the inevitable result, the Supreme Court has held that it is not irrational for a defendant like Mr. Nunez to roll the dice at trial in order to avoid a result that certainly bars him from ever returning to the United States. *See Lee*, 137 S. Ct. at 1968–69.

Supported by the dissenting judge below, the state contends that Mr. Nunez categorically cannot show prejudice from any incorrect advice about the immigration consequences of his plea because he had no legal status in the United States at the time of his arrest. In the state's view, this fact should have been dispositive of Mr. Nunez's ineffective-assistance claim. (Pet. Rev. at 1) But this contention is both objectively incorrect and inconsistent with the Sixth Amendment holding of *Padilla.*

When it comes to applying the Sixth Amendment right to effective assistance of counsel, *Padilla* makes plain that that right applies to *all defendants* regardless of citizenship status. *See Padilla*, 559 U.S. at 374. The Sixth Amendment makes no distinction between categories of noncitizens who may claim the right to competent advice from counsel about immigration consequences. There is a "vast difference for an unauthorized alien between being generally subject to removal and being convicted of a crime that subjects an unauthorized alien to automatic, mandatory, and irreversible removal." *Morales Diaz v. State*, 896 N.W.2d 723, 733 (Iowa 2017). A guilty plea to certain removable offenses can foreclose an

undocumented alien's eligibility to adjust status to that of a lawful permanent resident. *See id.* (citing 8 U.S.C. § 1229(b)(1)(C)); *see also Ex parte Aguilar*, 537 S.W.3d 122, 127 (Tex. Crim. App. 2017) (holding that nonimmigrants may raise a viable *Padilla* claim). In advising noncitizen clients in connection with plea negotiations, the Court in *Padilla* imagined that counsel "would follow the advice of numerous practice guides" regarding the discretionary relief available to their clients and how to protect their eligibility for it. *Padilla*, 559 U.S. at 368 (citing *St. Cyr*, 533 U.S. at 323 n.50). The categorical rule that the dissenting judge below proposed is incompatible with these assumptions and inconsistent with the case-by-case assessment that governs all ineffective-assistance claims. *See Lee*, 137 S. Ct. at 1967; *Commonwealth v. Marinho*, 981 N.E.2d 648, 662 n.21 (Mass. 2013) (stating that "undocumented defendants" raising *Padilla* claims must "address the issue of their particular status and how different performance [of counsel] could have led to a better outcome"); *see also generally* Daniel A. Horwitz, *Actually,* Padilla *Does Apply to Undocumented Defendants*, 19 Harv. Latino L. Rev. 1, 15–23 (2016) (explaining how undocumented aliens can show prejudice on a *Padilla* claim).

The record in this case demonstrates that trial counsel did not appropriately investigate or advise Mr. Nunez about how either accepting the state's plea offer or going to trial would affect his immigration status, including any discretionary relief from removal that might have been available to him as an undocumented alien. The record likewise demonstrates that Mr. Nunez would have preferred rolling the dice on an acquittal at trial over taking a plea deal that meant he would be forever barred from returning to the United States. Under these circumstances, this Court should

either dismiss the petition for review as improvidently granted or remand the case to the superior court for further proceedings.

1. This Court should dismiss the petition for review as improvidently granted because the superior court implicitly found that Mr. Nunez would have preferred to go to trial in order to preserve whatever right he may have had to remain in or return to the United States.

This Court reviews a postconviction ruling for abuse of discretion. *See State v. Miles*, 243 Ariz. 511, 513 ¶ 7, 414 P.3d 680, 682 (2018) (citing *State v. Pandeli*, 242 Ariz. 175, 180 ¶ 4, 394 P.3d 2, 7 (2017)). In reviewing for abuse of discretion, this Court views the facts in the light most favorable to upholding the trial court's ruling, including any implicit finding necessary to uphold that ruling. *See State v. Peoples*, 240 Ariz. 244, 249 ¶ 21, 378 P.3d 421, 426 (2016). This Court "presume[s] that a court is aware of the relevant law and applies it correctly in arriving at its ruling." *State v. Moody*, 208 Ariz. 424, 443 ¶ 49, 94 P.3d 1119, 1138 (2004) (citing *State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996)).

Under these standards, the superior court's factbound ruling granting Mr. Nunez's petition for postconviction relief is not reversible. The record supports the conclusion that Mr. Nunez's right to effective assistance of counsel in connection with plea negotiations was not honored. Both lower courts credited Mr. Nunez's testimony that trial counsel told Mr. Nunez that there would be no immigration consequences *at all* stemming from the paraphernalia plea. The superior court thus correctly found that trial counsel neither adequately consulted with Mr. Nunez about his immigration status, including the benefits for which he was eligible, nor

competently advised him that pleading guilty to the paraphernalia charge would make him permanently eligible to return to the United States.

The record also supports the superior court's finding of prejudice. The state has consistently suggested that it would never have offered Mr. Nunez any plea deal other than the paraphernalia charge to which he pleaded guilty. Mr. Nunez's credible assertion that he would not have signed the plea thus implies that he would have proceeded to trial in the face of correct advice about the immigration consequences of the paraphernalia plea. *Padilla* reiterates that the Sixth Amendment applies to all categories of noncitizens in the same manner that it applies to citizens. Under the circumstances, the superior court correctly concluded under *Lee* that Mr. Nunez would rationally have concluded to take his case to trial and roll the dice on an acquittal if that was truly his only hope of ever lawfully returning to or remaining in the United States. Dismissing the petition for review would simply leave a nonprecedential opinion of the court of appeals in place. *See* Ariz. Sup. Ct. R. 111(c). The superior court's straightforward application of law to facts does not warrant correction by this Court on discretionary review.

2. Otherwise, this Court should remand the case to the superior court to allow Mr. Nunez to clarify the allegations surrounding his ineffective-assistance claim.

If this Court does not dismiss the petition for review, then it should remand this case to the superior court for further proceedings. Under *Padilla*, the fact that Mr. Nunez was undocumented at the time of his arrest has no bearing on the adequacy of trial counsel's advice about whether to accept the paraphernalia plea

offer. Nevertheless, the record is not sufficiently developed about what immigration benefits Mr. Nunez was eligible for and what he understood about how either accepting that offer or proceeding to trial would have affected his eligibility for those benefits. And although the trial court's ruling implicitly addresses this point, the supporting record is less clear. *Lee* does not foreclose a noncitizen from ever making out a viable claim of prejudice from deficient immigration advice, but it does require evidence that he would have gone to trial in the face of proper advice. The state correctly points out that Mr. Nunez did not specifically allege in his postconviction petition or at the evidentiary hearing that he would have gone to trial in order to preserve even a remote chance of remaining in or returning to the United States.

This Court should hold that under *Padilla* and *Lee*, a claim of ineffective assistance of counsel predicated on inadequate advice regarding immigration consequences requires the claimant to explain the specific immigration consequences about which he did not receive adequate advice and the precise course of action he would have taken in the face of such adequate advice. Once this Court clarifies the law in this way, the parties should have another opportunity to clarify their respective positions in this case.

A. The record does not adequately explain what immigration benefits Mr. Nunez might have been eligible for as an undocumented alien.

The *Padilla* Court recognized that if a noncitizen commits a removable offense, "his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal

for noncitizens convicted of particular classes of offenses." 559 U.S. at 364 (citing 8 U.S.C. § 1229b). Even the dissenting judge below recognized that Mr. Nunez had a *potential* claim of prejudice stemming from trial counsel's deficient advice about the immigration consequences of his conviction insofar as the conviction affected his eligibility for discretionary relief from removal. But he effectively disregarded this potential source of prejudice, concluding that *no matter what* Mr. Nunez could have shown about his eligibility for any discretionary relief from removal, it would not have made a difference to Mr. Nunez. That conclusion was not supported by the record, because there was no evidence presented to the superior court about *any* form of discretionary relief for which Mr. Nunez might have been eligible.

The discretionary relief available to undocumented immigrants comes in four main forms. First, the federal government retains "absolute discretion" to decline to enforce federal law. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). In the immigration context, exercising this discretion typically takes into account a person's criminal history. Second, even undocumented immigrants can be eligible for asylum, withholding of removal, or protection under the Convention Against Torture. *See Zheng v. Ashcroft*, 332 F.3d 1186, 1193 (9th Cir. 2003). But these forms of relief are not available to those who have certain criminal convictions. *See* 8 U.S.C. § 1158(b)(2)(A)(ii), (b)(2)(B)(i). Third, cancellation of removal is available to a wide variety of aliens on humanitarian grounds, including to victims of trafficking or domestic violence, and to those who have close relatives in the United States. But cancellation is not available to aliens who have been convicted of a crime involving moral turpitude or of a controlled substances offense. *See* 8 U.S.C.

§ 1182(a)(2)(A)(i). Fourth, even aliens with no status can adjust their status to that of a lawful permanent resident through a qualifying relative. But aliens who are inadmissible by virtue of a criminal conviction cannot do this. *See* 8 U.S.C. § 1182(a)(2). The dissenting judge would make no room for these forms of relief in assessing the prejudice component of an undocumented alien's *Padilla* claim. By incorrectly proclaiming that no undocumented alien would rationally account for these kinds of discretionary relief when weighing a plea offer, the dissenting judge's conclusion is legally inconsistent with *Lee*. *See also Commonwealth v. Lavrinenko*, 38 N.E.3d 278, 297 (Mass. 2015) (requiring an assessment of available relief from removal in the prejudice inquiry).

Moreover, we do not know whether Mr. Nunez would have or could have qualified for one of these exceptions available to undocumented aliens. Nothing in the record indicates whether trial counsel ever investigated that possibility. And it is not even certain that Mr. Nunez could not have qualified for these exceptions even if he had been convicted of the original charges at trial. The Ninth Circuit has conflicting unpublished decisions on that score. *See Madrid-Fanfan v. Sessions*, 729 F. App'x 621 (9th Cir. 2018) (holding that a conviction under A.R.S. § 13-3408 was categorically not a removable offense); *but see Gonzalez-Dominguez v. Sessions*, 743 F. App'x 808 (9th Cir. 2018) (holding that a conviction under A.R.S. § 13-3407 can be a removable offense).

In sum, this Court should not sanction the dissenting judge's categorical view that no undocumented alien can ever show the necessary prejudice on a

Padilla claim. That view is incorrect both as a matter of federal immigration law and under the Sixth Amendment. Nevertheless, issues regarding the precise relief that may have been available to Mr. Nunez in 2013 were not developed during the postconviction proceedings here. This Court should remand for further proceedings to address that gap in the evidence.

B. The record does not adequately explain whether the only alternative to the paraphernalia plea that was available to Mr. Nunez was a trial on the possession charges.

Both in its petition for review to the court of appeals and in its supplemental brief to this Court, the state focuses on Mr. Nunez's shifting assertions on the prejudice prong of his *Padilla* claim as grounds for reversing the superior court's decision to grant relief. The state correctly points out that, before the superior court, Mr. Nunez did not specifically allege that he would have gone to trial on the two drug-possession charges he faced if he had known that pleading guilty to the paraphernalia charge would have forever foreclosed his ability to return to the United States. But because he has consistently maintained that he would not have signed the plea and the state has strongly suggested that it would not have extended any other offer to him, this is not the fatal flaw in the decisions below that the state believes it to be. Because the record about the relief that may have been available to Mr. Nunez in 2013 must be more fully developed, this Court should return this case to the superior court so that Mr. Nunez may clarify his allegations of prejudice against the backdrop of a fully-developed record about his immigration situation.

The record shows that Mr. Nunez has adequately alleged sufficient prejudice within the meaning of *Padilla* and *Lee* to make out a colorable claim of ineffective assistance of counsel. Whatever other course of action he might have taken, Mr. Nunez has consistently maintained that he would not have taken the deal that was offered to him. Other courts have held that similar allegations that do not specifically focus on the desire to go to trial nevertheless make out a colorable claim of prejudice under *Padilla*. *See People v. Martinez*, 304 P.3d 529, 536 (Cal. 2013) (holding that a defendant makes a colorable assertion of prejudice by "provid[ing] a declaration or testimony stating that he or she would not have entered into the plea bargain if properly advised"); *Commonwealth v. Lys*, 110 N.E.3d 1201, 1207 (Mass. 2018) (holding that a defendant met the "baseline requirement for raising an issue of prejudice" by asserting "that he would have pursued other options, including going to trial, had he known about his plea's immigration consequences"); *Zemene v. Clarke*, 768 S.E.2d 684, 691 (Va. 2015) (holding that an assertion of obtaining a more favorable plea agreement sufficiently alleged prejudice); *United States v. Rodriguez-Vega*, 797 F.3d 781, 789 (9th Cir. 2015) (explaining that a defendant may show prejudice "by showing that she settled on a charge in a purposeful attempt to avoid an adverse effect on her immigration status"). This Court should reach the same conclusion on this record, and hold that the allegations that Mr. Nunez has made so far are sufficient to allow him to clarify them on remand.

The state also suggests that there was and only ever would be one and only one plea offer extended to Mr. Nunez. But the record is insufficiently developed to support that suggestion. Although trial counsel testified that she explored some

alternative plea options, she offered no testimony about how plea negotiations might have proceeded if Mr. Nunez had not resolved his case within the context of Maricopa County's early disposition program. Nor did the state present any other testimony about how plea negotiations might have proceeded. In the experience of AACJ members who routinely handle drug-possession cases in Maricopa County courts, alternate offers are routinely extended to defendants who refuse an initial offer made as part of the early disposition program. More evidence along these lines would help flesh out whether an alternative resolution would have been rational under the circumstances. *See Martinez*, 304 P.3d at 537 ("To establish prejudice, defendant must show that he would not have entered into the plea bargain if properly advised—a decision that might be based either on the desire to go to trial or on the hope or expectation of negotiating a different bargain without immigration consequences."); *but see Cosio-Nava v. State*, 383 P.3d 1214, 1219 (Idaho 2016) (affirming denial of *Padilla*-based ineffective-assistance claim because there was no evidence presented about the viability of alternative resolutions to the charges).

It is also worth noting that the sentence Mr. Nunez would have faced if convicted on the two possession charges could have been probation—the same sentence he received under the paraphernalia plea. Because he had no criminal history, he was statutorily eligible for probation even if convicted at trial (indeed, probation would be required on the narcotic-drugs charge). *See* A.R.S. §§ 13-901.01; 13-3407(C); 13-3408(C). Waiting to resolve his case outside of the early-disposition program might also have allowed him to assess the viability of a motion

to suppress based on any flaw in the traffic stop that led to his arrest. *See Commonwealth v. DeJesus*, 9 N.E.3d 789, 797 (Mass. 2014) (finding prejudice where a guilty plea waived a viable motion to suppress). But all of these factors underscore *both* Mr. Nunez's assertion that avoiding whatever adverse immigration consequences that would ensue from resolving the charges in this case was his most important priority *and* the superior court's finding that trial counsel's advice to Mr. Nunez on that score was constitutionally deficient.

In sum, the record as a whole is incomplete about whether a decision by Mr. Nunez to reject the paraphernalia plea offer would have been rational under the circumstances. No evidence was presented about either what Mr. Nunez understood about his immigration situation or whether he was eligible for any discretionary relief from removal. Mr. Nunez did not specifically allege before the superior court that he wanted to proceed to trial, although his credible testimony implies as much and he has now made that specific allegation before this Court. And the record does not indicate how plea negotiations might have played out if Mr. Nunez had waited to resolve his case outside of the early-disposition program. The Court should remand this case to the superior court for further proceedings.

CONCLUSION

The reasoning of *Padilla* makes plain that the Sixth Amendment right to effective assistance of counsel extends to all persons, including undocumented immigrants, who face criminal charges in American courts. *Amici* respectfully ask the Court either to dismiss the petition for review as improvidently granted or to remand this case to the superior court for further proceedings.

Respectfully submitted: April 8, 2019.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the length limit set forth in the March 5, 2019, order granting review because it is 20 pages in length, excluding the parts of the brief exempted by Ariz. R. Crim. P. 31.6(d). I further certify that this brief complies with the typeface and type style requirements of Ariz. R. Crim. P. 1.6(b)(1)(B) and 31.6(b) because it was prepared in a proportionally-spaced serif typeface (Equity, designed by Matthew Butterick and published by MB Type) using Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I certify that on April 8, 2019, I caused the foregoing brief to be filed with the Clerk of Court using the TurboCourt system. I further certify that all case participants are registered TurboCourt users and that service will be accomplished by the TurboCourt system.

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