

Case No. S225194

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

In the Matter of

RON DOUGLAS PATTERSON

On Habeas Corpus.

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Related Appeal No. S225193

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

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CODY S. HARRIS - # 255302  
Keker & Van Nest LLP  
Email: [charris@kvn.com](mailto:charris@kvn.com)  
633 Battery Street  
San Francisco, CA 94111-1809  
Telephone: (415) 391-5400  
Facsimile: (415) 397-7188

ROSE CAHN - # 255289  
Lawyers' Committee for Civil Rights  
Email: [rcahn@lccr.com](mailto:rcahn@lccr.com)  
131 Steuart Street, Suite 400  
San Francisco, CA 94105  
Telephone: (415) 543-9444  
Facsimile: (415) 543-0296

David M. Porter, CA Bar #127024  
Co-Chair, NACDL Amicus Committee  
801 I Street, 3rd Floor  
Sacramento, CA 95814  
Telephone: (916) 498-5700

John T. Philipsborn, SBN 83944  
Chair, CACJ Amicus Curiae Committee  
507 Polk Street, Suite 350  
San Francisco, CA 94102  
Telephone: (415) 771-3801

*Attorneys for Amici Curiae*

**RECEIVED**

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Telephone: (415) 771-3801

*Attorneys for Amici Curiae*

## I. APPLICATION

Pursuant to California Rule of Court 8.520(f), the Lawyers' Committee for Civil Rights ("LCCR"), the California Attorneys for Criminal Justice ("CACJ"), the National Association of Criminal Defense Lawyers ("NACDL"), the Alameda County Public Defender's Office, the Contra Costa County Public Defender's Office, the San Francisco Public Defender's Office, the Santa Clara County Public Defender's Office, and the Sonoma County Public Defender's Office respectfully request permission to file the attached amicus curiae brief in support of Petitioner Ron Douglas Patterson.

This case concerns the duties and obligations that criminal defense attorneys in California owe their noncitizen clients in terms of providing complete and accurate advice regarding the immigration consequences of criminal dispositions, in compliance with *Padilla v. Kentucky*, 559 U.S. 356 (2010), and California law. *Amici* and their members have extensive experience in this regard, are deeply aware of the real-world implications of these standards, and—as criminal defense attorneys—have an interest in ensuring the vitality of the constitutionally protected right to effective assistance of counsel, which is so fundamental to a fair trial. The attached proposed brief offers a perspective that *amici* believe will assist the Court as follows:

*First*, amici explain that the prevailing professional practice and norm among criminal defense attorneys representing noncitizen defendants is to research the actual immigration consequences of a conviction when negotiating a plea deal, to communicate that information directly to the client so that he or she can make an informed decision, and to attempt to secure immigration neutral dispositions whenever possible.

*Second*, the proposed brief explains that although navigating the intersection between criminal and immigration law can prove challenging (especially for public defenders who have watched their budgets shrink over the years), extensive resources exist to aid counsel in fulfilling their obligations.

*Third*, amici explain that the Court of Appeal's perfunctory prejudice analysis failed to take into account the real-world plea negotiations in which counsel and clients engage.

## II. INTEREST OF AMICI CURIAE

*Amici* are associations of public and private criminal defense lawyers with vast experience representing and counseling immigrants who have been accused of crimes, including several public defender offices serving California counties with large noncitizen populations. The issues presented in this case directly impact each organization's members and clients.

*Amici* have a significant interest in the proper interpretation and application of *Padilla* in California. *Amici* and their members understand

their obligation to comply with *Padilla*'s requirements, which include researching potential immigration consequences, affirmatively and accurately advising a noncitizen defendant of those consequences, and attempting to negotiate immigration-neutral dispositions whenever possible. *Amici* believe that a defense attorney who fails to investigate the immigration consequences of a plea or conviction, and who then negotiates a plea agreement that results in clear removal consequences, has breached his or her duty to the bar, to the Sixth Amendment, and—most immediately—to his or her client. Accordingly, *amici* believe that if the Court of Appeal's erroneous interpretation of *Padilla* is allowed to stand, it will contravene the criminal defense bar's own longstanding interpretation of its Sixth Amendment obligations. More fundamentally, the Court of Appeal's ruling, if left intact, will harm the clients whose interests *amici* strive to protect.

A brief description of each amicus party's specific interest in this case is set forth here:

The Lawyer's Committee for Civil Rights ("LCCR") – LCCR is a civil rights and legal services organization that has protected and promoted the rights of communities of color, low-income individuals, immigrants, and refugees for nearly 50 years. LCCR has a unique vantage point on the issues presented in this action. Through its Immigrant Post-Conviction Relief Project ("IPCRP"), LCCR operates the country's first program

dedicated to upholding the standard of representation laid out in *Padilla* and related California law. The IPCRP assigns pro bono post-conviction counsel to help immigrants combat the devastating impact of unlawful criminal convictions. All of IPCRP's clients are immigrants with California convictions who suffer from trial counsel's failure to inform of, or defend against, immigration consequences. IPCRP bears daily witness to the importance of defense counsel's informed, accurate, and detailed advice about the immigration impact of a conviction.

California Attorneys for Criminal Justice ("CACJ") – CACJ is a nonprofit California corporation administered by a Board of Governors consisting of criminal defense lawyers practicing within the State of California. The organization has approximately 1,700 members, primarily criminal defense lawyers practicing before Federal and State courts, who are employed throughout the State both in the public and private sectors. According to Article IV of its bylaws, CACJ was formed to achieve certain objectives including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California and other applicable law." This includes the right of noncitizen defendants to receive accurate advice from their counsel regarding immigration consequences of pleas, in accordance with *Padilla v. Kentucky* and California law.

National Association of Criminal Defense Lawyers (“NACDL”) –

The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 9,000 and up to 40,000 with affiliates. NACDL’s members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in ensuring that *Padilla v. Kentucky* is properly interpreted in California; NACDL submitted an *amicus* brief to the United States Supreme Court in *Padilla* and has conducted trainings of attorneys’ duties in light of the Court’s holding in that case.

Alameda County Public Defender’s Office – The Office of the

Alameda County Public Defender represents a large number of noncitizens accused of crimes in Alameda County. The Office is highly committed to

affirmatively providing noncitizens with accurate advice regarding immigration consequences of criminal convictions and to zealously defending against those consequences in order to mitigate or avoid them altogether. As such, the Office has an unequivocal interest in the California Supreme Court's decision as to whether or not to overrule the Court of Appeal's erroneous interpretation of *Padilla v. Kentucky*.

Contra Costa County Public Defender's Office – The Office of Public Defender for Contra Costa County represents a large number of indigent noncitizens accused of crimes in Contra Costa County and is highly committed to affirmatively providing noncitizens with accurate advice regarding the actual immigration consequences of their criminal adjudications while simultaneously striving to mitigate any such adverse immigration consequences. As such, the Office of Public Defender for Contra Costa County has an unequivocal interest in the California Supreme Court's stance relating to the duties of defense attorneys with regard to immigration consequences as mandated by the Sixth Amendment of the Constitution of the United States (*Padilla v. Kentucky*, 559 U.S. 356 (2010)) and as codified in California Penal Code §§ 1016.2, 1016.3.

Santa Clara County Public Defender's Office – The Office of the Santa Clara County Public Defender employs 120 attorneys who represent indigent criminal defendants and civil respondents facing any potential loss of liberty. The office handles approximately 40,000 cases per year. Santa

Clara County has 1.9 million residents and 37.4% of the population is foreign born. Recognizing that noncitizen clients are entitled to know the immigration consequences at stake in their cases and to receive zealous advocacy for mitigated plea offers, Public Defender Molly O'Neal prioritized and implemented the hiring of an in-house immigration specialist. The office policy is that every noncitizen client is advised of the specific immigration consequences of the charges and efforts are made to negotiate pleas that take the immigration consequences into account. Accordingly, the Office has an abiding interest in ensuring that the Court of Appeal's erroneous interpretation of *Padilla v. Kentucky* is overruled.

San Francisco Public Defender's Office – The San Francisco Office of the Public Defender provides legal representation to people who are charged with a crime and unable to afford an attorney. Led by Jeff Adachi, California's only publicly elected Public Defender, the office provides legal representation to over 25,000 indigent people charged with crimes each year. Approximately 7% of clients of the San Francisco Public Defender are non-citizens, and approximately 35% of the San Francisco population is foreign born. The San Francisco Public Defender hired an in-house immigration specialist in August, 2014, whose duty is to advise attorneys on the immigration implications of criminal charges against non-citizens. Per office policy, all attorneys employed at the SF Public Defender's Office

must obtain an individualized consultation from the in-house immigration attorney when representing a non-citizen client in criminal proceedings.

The Law Office of the Public Defender, Sonoma County—The Law Offices of the Public Defender, County of Sonoma represents a significant number of noncitizen indigent clients in criminal cases. It recognizes the long standing law that requires attorneys to advise noncitizen clients of immigration consequences, avoid these consequences, and even to plead to charges that would be considered a greater offense in the state in order to avoid the draconian immigration consequences that may attach to a conviction. For this reason, the Office is very dedicated to ensuring that noncitizen clients receive accurate advice and affirmatively seek resolutions that mitigate immigration consequences. As such, the Office has an unequivocal interest in the California Supreme Court's decision as to whether or not to overrule the Court of Appeal's erroneous interpretation of *Padilla v. Kentucky*.

### **III. DISCLOSURE OF AUTHORSHIP AND MONETARY CONTRIBUTION**

Pursuant to California Rule of Court 8.520(f)(4), *amici* state that no party or counsel for a party in the pending appeal authored the proposed *amici* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed *amici* brief.

**IV. CONCLUSION**

For the foregoing reasons, *amici* respectfully request that the Court accept and file the accompanying brief in this case.

Respectfully submitted,

Dated: April 13, 2016

KEKER & VAN NEST

By: \_\_\_\_\_

  
Cody S. Harris

*Attorney for amici curiae*

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ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE  
ALAMEDA COUNTY PUBLIC DEFENDER'S OFFICE, THE  
CONTRA COSTA COUNTY PUBLIC DEFENDER'S OFFICE,  
THE SAN FRANCISCO PUBLIC DEFENDER'S OFFICE, THE  
SANTA CLARA COUNTY PUBLIC DEFENDER'S OFFICE,  
AND THE LAW OFFICES OF THE PUBLIC DEFENDER,  
SONOMA COUNTY, IN SUPPORT OF PETITIONER RON  
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CODY S. HARRIS - # 255302  
Keker & Van Nest LLP  
Email: [charris@kvn.com](mailto:charris@kvn.com)  
633 Battery Street  
San Francisco, CA 94111-1809  
Telephone: (415) 391-5400  
Facsimile: (415) 397-7188

Rose Cahn - # 255289  
Lawyers' Committee for Civil Rights  
Email: [rcahn@lccr.com](mailto:rcahn@lccr.com)  
131 Steuart Street, Suite 400  
San Francisco, CA 94105  
Telephone: (415) 543-9444  
Facsimile: (415) 543-0296

David M. Porter, CA Bar #127024  
Co-Chair, NACDL Amicus Committee  
801 I Street, 3rd Floor  
Sacramento, CA 95814  
Telephone: (916) 498-5700

John T. Philipsborn, SBN 83944  
Chair, CACJ Amicus Curiae Committee  
507 Polk Street, Suite 350  
San Francisco, CA 94102  
Telephone: (415) 771-3801

*Attorneys for Amici Curiae*

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## BRIEF OF AMICI CURIAE

### I. INTRODUCTION

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

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

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

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

## II. ARGUMENT

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

The Supreme Court’s holding in *Padilla* was clear: when a criminal conviction will render a non-citizen defendant mandatorily deportable, defense counsel must provide to their clients an unequivocal warning to that effect. 559 U.S. 356, 360 (2010). The Ninth Circuit recently confirmed this plain reading of *Padilla* in *United States v. Rodriguez-Vega*, holding that “[a] criminal defendant who faces almost certain deportation is entitled to know more than that it is *possible* that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty.” 797 F.3d 781, 786 (9th Cir. 2015) (emphasis in original; internal quotation marks omitted).

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

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

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

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

(“Effective assistance at sentencing requires the defense attorney to investigate relevant dispositions and their consequences.”).<sup>1</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Bernardino, Santa Clara, San Francisco, and Sonoma. *See, e.g.*, ILRC, Protocols for Ensuring Effective Defense of Noncitizen Defendants in California (Oct. 2015), [http://www.ilrc.org/files/documents/protocols\\_for\\_ensuring\\_effective\\_defense\\_of\\_noncitizen\\_defendants\\_in\\_ca\\_oct\\_2015.pdf](http://www.ilrc.org/files/documents/protocols_for_ensuring_effective_defense_of_noncitizen_defendants_in_ca_oct_2015.pdf) (listing part-time, full-time, and contract immigration specialists in Los Angeles County, San Bernardino County, Sacramento County, and Alameda County); San Francisco Public Defender, Public Defender to Provide Immigration Help (Aug. 5, 2014), <http://sfpublicdefender.org/news/2014/08/public-defender-to-provide-immigration-help/>).

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

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

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

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

[http://www.ilrc.org/files/documents/california\\_chart\\_jan\\_2016-v2.pdf](http://www.ilrc.org/files/documents/california_chart_jan_2016-v2.pdf). The CCLPP also recommends that defense counsel should “consult an in-depth research guide,” and lists several additional resources. CCLPP § 52.1

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

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

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

**D. The Court of Appeal misarticulated the prejudice standard.**

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

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

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

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

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

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

**III. CONCLUSION**

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

Respectfully submitted,

Dated: April 13, 2016

KEKER & VAN NEST

By:   
Cody S. Harris

*Attorney for amici curiae*

## CERTIFICATE OF WORD COUNT

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

Dated: April 13, 2016

  
\_\_\_\_\_  
CODY S. HARRIS

**CERTIFICATE OF SERVICE**

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

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

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

**and**

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

by **FEDERAL EXPRESS**, by placing a true and correct copy in a sealed envelope addressed as shown below. I am readily familiar with the practice of Keker & Van Nest LLP for correspondence for delivery by FedEx Corporation. According to that practice, items are retrieved daily by a FedEx Corporation employee for overnight delivery.

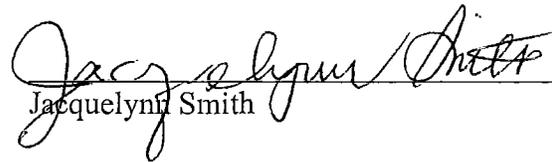
AJ Kutchins  
2705 Webster St., #5138  
Berkeley, CA 94705  
(510) 841-5635  
[ajkutchins@earthlink.net](mailto:ajkutchins@earthlink.net)

Attorneys for RON DOUGLAS PATTERSON

Meagan J. Beale  
OFFICE OF THE ATTORNEY GENERAL  
600 W Broadway, Ste. 1800  
San Diego, CA 92101  
[meagan.beale@doj.ca.gov](mailto:meagan.beale@doj.ca.gov)

Attorneys for THE STATE OF CALIFORNIA

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

  
Jacquelyn Smith