No. 11-820

In The Supreme Court of the United States

ROSELVA CHAIDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR ACTIVE AND FORMER STATE AND FEDERAL PROSECUTORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

HEIDI ALTMAN
Counsel of Record
CENTER FOR APPLIED LEGAL STUDIES
GEORGETOWN LAW SCHOOL
600 New Jersey Avenue NW, Suite 332
Washington, DC 20001
(202) 662-9571
hra8@law.georgetown.edu

MICHAEL K. GOTTLIEB
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are active and former prosecutors. They include District Attorney Craig Watkins of Dallas County, Texas and District Attorney Jeffrey Rosen of Santa Clara County, California, as well as former District Attorneys, County Attorneys, State Attorneys, Attorneys General, United States Attorneys, and a former President of the National District Attorneys Association. *Amici* have served in state and federal jurisdictions throughout Arizona, California, Connecticut, Florida, Illinois, Maryland, Minnesota, Nevada, New Jersey, New York, Tennessee, Texas, and Wisconsin. Many have devoted decades of service to their local and federal governments. The names, titles, and years of service of these *amici* are listed in Appendix A.

Amici's interests are driven by the fundamental responsibilities of the government prosecutor to pursue justice and serve as a steward of the state and community. *See, e.g.*, *ABA Standards for Criminal Justice Prosecution Function* § 3-1.2(c) (1993). These responsibilities are often implicated when a criminal conviction results in unintended immigration penalties, as such penalties weigh heavily in the determination of the proportionality and fairness of a case

[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored any part of the brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

disposition. Further, a defendant's deportation may negatively impact innocent members of the communities prosecutors are duty bound to serve and protect. In *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010), this Court recognized that the consideration of immigration penalties in the plea bargaining phase of a case is often in the State's best interests. That is equally true in the post-conviction phase of a case. Because of the unique State interests raised by some *Padilla*-based claims, *amici* believe that the exercise of prosecutorial discretion in such cases is vital to the State's ability to pursue justice. *Amici* are concerned that the Court's decision in this case could curtail that discretion simply on the basis of the date the underlying conviction was secured.

SUMMARY OF ARGUMENT

Amici, active and former state and federal prosecutors, argue that the retroactive application of this Court's decision in *Padilla v. Kentucky* is necessary to safeguard vital State interests.

Deportation following a criminal conviction has ripple effects that prosecutors must consider in order to best serve the interests of the State. Often, a prosecutor first learns that a conviction will trigger deportation when a post-conviction claim of ineffective assistance of counsel is brought pursuant to *Padilla v. Kentucky*. In some such cases, the prosecutor will contest the motion, believing the original case

disposition to be fair. In other cases, the prosecutor will determine in her discretion that justice demands engaging with the defense to pursue an adjusted disposition that mitigates the attendant immigration penalties. The prosecutor may choose to exercise her discretion in this way because she believes the original disposition and consequent immigration penalties are not proportionate to the underlying offense. Or she may find that the defendant's deportation will leave innocent members of the community, such as the defendant's children or a crime victim, at risk.

A finding of non-retroactivity in this case would significantly restrict prosecutors' discretion to make meaningful choices in post-conviction litigation challenging convictions obtained before the date of the decision in *Padilla v. Kentucky*. *Amici* argue that this restriction would preclude a just outcome in many cases. In fact, a post-conviction claim challenging an older conviction is often the most deserving of an exercise of prosecutorial discretion, as the defendant may have deepened her community ties in the years subsequent to the conviction. The presence of children born in the United States in the years following a conviction, for example, may render deportation a disproportionate penalty for a relatively minor crime.

Although all post-conviction motions raise concerns regarding the finality of convictions, these concerns are outweighed by the State interests at play when deportation is an unintended consequence of a criminal conviction. Furthermore, the finality

concerns raised by this case are mitigated by the barriers to relief in claims brought pursuant to *Padilla v. Kentucky*, barriers that will remain in place regardless of the outcome in this matter.[2]

ARGUMENT

I. A FINDING OF NON-RETROACTIVITY WILL COMPROMISE PROSECUTORS' DISCRETION TO PROTECT STATE INTERESTS IMPLICATED BY IMMIGRATION PENALTIES OF CONVICTIONS

When a defendant asserts a post-conviction claim of ineffective assistance of counsel, the prosecutor must use her discretion to determine how to respond, guided by the long-standing prosecutorial responsibility to pursue justice. This responsibility demands heightened attention in the case of post-conviction motions brought pursuant to *Padilla v. Kentucky*. Unintended immigration penalties resulting from a conviction may implicate the State's interests in justice and proportionality, in addition to the well-being of community members and victims of crime. This Court acknowledged these interests in *Padilla v. Kentucky* with regard to the plea bargaining phase of a case, encouraging the "informed consideration" of

[2] *See infra* Section II.A for an explication of these procedural, jurisdictional, and substantive obstacles to relief.

immigration penalties so that "the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." *Padilla*, 130 S. Ct. at 1486. *Amici* contend that the interests of both parties continue to demand the consideration of immigration penalties during the post-conviction phase of a case. Should the Court rule against the retroactive application of *Padilla v. Kentucky*, however, prosecutors' ability to exercise their own careful judgment in this post-conviction phase will be severely compromised.

A. A finding of non-retroactivity will effectively strip many prosecutors of the ability to reach negotiated settlements with the defense in claims brought pursuant to *Padilla v. Kentucky*

Ordinarily, the defense begins the process of seeking to adjust a conviction by filing a motion with the court that adjudicated the original conviction.[3] A

[3] The procedural vehicle by which a post-conviction motion will ordinarily be brought pursuant to *Padilla v. Kentucky* varies by jurisdiction. *See, e.g.*, *Ex parte Olvera*, No. 05-11-01349-CR, 2012 WL 2336240, at *1 (Tex. App. June 20, 2012) (finding jurisdiction over a *Padilla*-based claim of ineffective assistance of counsel raised by application for writ of habeas corpus); *Campos v. State*, No. A10-1395, 2012 WL 2327962, at *2-3 (Minn. June 20, 2012) (reviewing a *Padilla*-based claim of ineffective assistance of counsel brought under Minn. Stat. Ann. § 15.05(1) (2010), which allows for the withdrawal of a guilty plea upon a timely motion to correct a manifest injustice).

post-conviction motion brought pursuant to *Padilla v. Kentucky* will often inform the prosecutor for the first time that a conviction triggers immigration penalties for a particular defendant. This is in large part because it is the responsibility of the defense attorney to inquire as to her client's immigration status and such inquiries would be inappropriate on the part of the prosecutor. *See National Legal Aid and Defender Ass'n Performance Guidelines for Criminal Defense Representation* § 2.2(b)(2)(A) (1995).

The prosecutor may respond to this motion in a variety of ways. Preliminarily, she may choose to contest the motion, join in the motion, or take no position. Then, should the motion succeed, she may seek to have the original charges dismissed, engage in renewed plea negotiations with the defense, or mount a new prosecution at trial. In motions brought pursuant to *Padilla v. Kentucky*, the defense will often seek an adjusted plea settlement that is similar in nature and severity to the original conviction but does not trigger immigration penalties. As this Court noted in *Padilla v. Kentucky,* "a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction." 130 S. Ct. at 1486.[4]

---

[4] *Cf. Kawashima v. Holder*, 132 S. Ct. 1166, 1180 (2012) (Ginsburg, J., dissenting) (discussing common plea agreements on tax-related charges between federal prosecutors and non-citizen defendants seeking to avoid deportation).

As in the pretrial and trial phase of a case, the prosecutor's actions in response to a post-conviction motion are guided by her ethical obligation to pursue justice. *See* Fred Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 Vand. L. Rev. 171, 181 (2005). For more than a century, the American legal system has tasked the prosecutor with pursuing justice for the defendant and the community.[5] This understanding of the prosecutor's role as unique from other advocates is common among ethical standards guiding prosecutors. *See Model Rules of Prof'l Conduct* R. 3.8 cmt. (2010) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); *ABA Standards for*

[5] The consensus among scholars is that the understanding of the American prosecutor's unique obligation to pursue justice dates back to an essay published by the judge and scholar George Sharswood in 1854. See George Sharswood, *An Essay on Professional Ethics* 94 (Fred B. Rothman & Co. 1993) (1854), as discussed in, for example, Bruce A. Green, *Why Should Prosecutors 'Seek Justice'?*, 26 Fordham Urb. L.J. 607, 612 (1999); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 Wash. L. Rev. 35, 39 n.10 (2009); Jane Campbell Moriarty, *'Misconvictions,' Science, and the Minister of Justice*, 86 Neb. L. Rev. 1, 21-22 (2008). In 1935, this Court embraced Mr. Sharswood's description of the prosecutor as a minister of justice, stating: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

Criminal Justice Prosecution Function § 3-1.2(c) (1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); *National District Attorneys Association National Prosecution Standards* § 1-1.2 cmt. (2009) ("A prosecutor is not a mere advocate and unlike other lawyers, a prosecutor does not represent individuals or entities, but society as a whole.").

In the context of a *Padilla v. Kentucky* claim, the prosecutor's obligation to pursue justice demands a heightened weighing of concerns relating to proportionality and community and victim safety. These interests are explored in detail in Section I.B, *infra*. In the experience and belief of *amici*, some *Padilla*-based claims implicate State interests so significantly that it is in the State's best interest to consent to the requested relief and reach a negotiated post-conviction settlement with the defense. *See infra* Section I.B (discussing two recent post-conviction claims brought pursuant to *Padilla v. Kentucky* in which *amici* Dallas County, Texas District Attorney Craig Watkins and Santa Clara County, California District Attorney Jeffrey Rosen exercised their discretion to consent to relief because of serious concerns regarding proportionality and the well-being of community members).

A finding by this Court that *Padilla v. Kentucky* does not have retroactive application, however, will significantly curtail the ability of prosecutors across the country to exercise such discretion in claims brought concerning convictions secured before March 31, 2010. This Court has held that the non-retroactivity

rule established in *Teague v. Lane*, 489 U.S. 288, 310 (1989) is a "threshold question" that courts may raise sua sponte, even if the State waives or forfeits application of the rule. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1984).[6] Therefore, even if some prosecuting attorneys attempt to waive *Teague* in the event of a finding of non-retroactivity in this matter,[7] such waiver will be rendered meaningless where lower courts nonetheless elect to apply *Teague* and bar relief. Should this Court make a finding of non-retroactivity in this case, many lower courts may consider the non-retroactivity principle sua sponte as a matter of deference, particularly in jurisdictions where *Teague*'s non-retroactivity rule is applied.[8]

---

[6] Many lower courts have taken the Court up on its offer in *Caspari v. Bohlen*. *See, e.g.*, *Frazer v. South Carolina*, 430 F.3d 696, 704 n.3 (4th Cir. 2005) (raising *Teague* as a threshold issue despite the fact that it was not raised by the State in briefing); *Housel v. Head*, 238 F.3d 1289, 1297 (11th Cir. 2001) (citations omitted) ("This nonretroactivity rule, born in *Teague v. Lane*, is a threshold issue, and one that we have discretion to raise sua sponte."); *Curtis v. Duval*, 124 F.3d 1, 5 (1st Cir. 1997) (invoking *Teague*'s non-retroactivity principle although it was not relied upon by the Commonwealth); *Jones v. Page*, 76 F.3d 831, 850 (7th Cir. 1996) (finding no error in lower court's sua sponte raising of *Teague* despite possible state waiver).

[7] *Cf. Schiro v. Farley*, 510 U.S. 222, 229 (1994) ("a State can waive the *Teague* bar by not raising it"); *Collins v. Youngblood*, 497 U.S. 37, 41 (1990).

[8] This Court held in *Danforth v. Minnesota*, 552 U.S. 264, 279-80 (2008) that state courts may adopt *Teague*'s non-retroactivity principle or an equivalent or broader retroactivity rule. Since *Danforth*, many state courts have elected to adhere to the *Teague* standard when considering the retroactive

(Continued on following page)

Prosecutors seeking to engage in the post-conviction "informed consideration" of immigration penalties will therefore be left, in most cases, without the practical ability to do so.[9] *Padilla*, 130 S. Ct. at 1486.

B. Claims brought pursuant to *Padilla v. Kentucky* often implicate the State's interests in proportionality and community and victim safety

Amici urge the Court to consider the particular State interests that are often present in post-conviction claims brought pursuant to *Padilla v. Kentucky*. Central to the prosecutor's responsibility to

---

applicability of constitutional rules of criminal procedure. *See, e.g.*, *In re Gomez*, 199 P.3d 574, 576 (Cal. 2009); *Richardson v. State*, 3 A.3d 233, 238 (Del. 2010); *Alford v. State*, 695 S.E.2d 1, 3 (Ga. 2010); *Rhoades v. State*, 233 P.3d 61, 69 (Idaho 2010); *People v. Sanders*, 939 N.E.2d 352, 358-59 (Ill. 2010); *Perez v. State*, No. 10-1315, 2012 WL 2052399, at *4 (Iowa June 8, 2012); *Leonard v. Commonwealth*, 279 S.W.3d 151, 160 (Ky. 2009); *Danforth v. State*, 761 N.W.2d 493, 498 (Minn. 2009); *State v. Gaitan*, 37 A.3d 1089, 1107 (N.J. 2012); *Kersey v. Hatch*, 237 P.3d 683, 691 (N.M. 2010); *Ex parte Lave*, 257 S.W.3d 235, 237 (Tex. Crim. App. 2008).

[9] A post-conviction motion alleging ineffective assistance of counsel pursuant to *Padilla* is likely to be the only vehicle by which a noncitizen defendant may meaningfully challenge a criminal conviction that triggers deportation. The Board of Immigration Appeals has held that pleas vacated "for reasons unrelated to the merits of the underlying criminal proceedings," such as rehabilitation or humanitarian concerns relating to deportation, remain valid for immigration purposes. *In re Pickering*, 23 I. & N. Dec. 621, 624 (B.I.A. 2003).

promote justice, these interests include the pursuit of proportionate case outcomes as well as the stewardship of community and victim safety.

1. Proportionality

A prosecutor may learn in the post-conviction phase of a case that unintended immigration penalties resulted in a final case disposition that is disproportionate to the underlying criminal offense. In such cases, had the prosecutor known of the consequent immigration penalties during the plea bargaining phase of the case, she might very well have worked collaboratively with the defense to negotiate an appropriate immigration-neutral plea. *See Padilla*, 130 S. Ct. at 1486; *cf. INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (noting the frequency with which immigration penalties are factored into plea negotiations). In Santa Clara County, California, for example, *amicus* District Attorney Jeffrey Rosen has instructed his fellow prosecutors that it is incumbent upon them "to consider and, if appropriate, take reasonable steps to mitigate" immigration consequences during case settlement negotiations when those consequences are significantly greater than the punishment for the alleged crime itself. Memorandum from Jeff Rosen, District Attorney, Office of the District Attorney, Santa Clara, California to Fellow Prosecutors (Sept. 14, 2011).[10]

[10] On file with counsel of record.

Ensuring proportionate outcomes – at any stage of a case – is central to the prosecutor's pursuit of justice.[11] As this Court has recognized repeatedly, deportation is a harsh penalty that may impact a defendant's life more significantly than years in prison. *See Padilla*, 130 S. Ct. at 1480 ("deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes"); *see also INS v. St. Cyr*, 533 U.S. 289, 323 (2001); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). This severe a penalty may not comport with the State interest in a proportionate outcome, particularly given that many offenses that trigger the crime-based grounds of removal are non-violent offenses for which a prosecutor might ordinarily recommend no jail time or limited jail time. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2008) (providing that one conviction for a crime involving moral turpitude, regardless of the sentence imposed, constitutes a ground of deportability if committed within five years of the date of admission). The deportation consequence of a conviction drastically alters the prosecutor's calculus as to whether the case outcome is proportionate to the underlying offense. This is

---

[11] *See, e.g.*, American Prosecutors Research Institute, *Prosecution in the 21st Century: Goals, Objectives, and Performance Measures* v (2004), *available at* http://www.ndaa.org/pdf/prosecution_21st_century.pdf (calling on prosecutors "to achieve justice in society by holding offenders accountable and applying the force of the law proportionately and fairly").

especially true in a case like Ms. Chaidez's, where the conviction precludes the defendant from seeking any form of relief from removal in immigration court. *See* Petition for Writ of Cert. at 4-5, *Chaidez v. United States*, No. 11-820 (U.S. Dec. 23, 2011).

A case recently litigated by *amicus* Dallas County, Texas District Attorney Craig Watkins exemplifies the profound justice interests that often arise in post-conviction claims brought pursuant to *Padilla v. Kentucky*. In 2011, District Attorney Watkins's office received an application for a writ of habeas corpus filed by Mr. M[12] seeking to vacate his 2009 guilty plea to Tex. Penal Code Ann. § 32.31 (2009), credit card abuse. Application for Writ of Habeas Corpus at 1-2, *State v. M*, No. WX 11-xxxxx-V (292nd Jud. Dist. Ct. Tex. Apr. 7, 2011). Mr. M's conviction stemmed from an incident years earlier, in which he had approached an ATM at a local bank to withdraw money from his account and realized that the transaction prior to his had been left open. He withdrew approximately $500 from the prior customer's account. He was apprehended shortly thereafter at his home, where he immediately confessed and handed the money over to the arresting police officer.

[12] The defendant's full name and the full case number are omitted from this description and the accompanying citations in order to protect the privacy of the defendant and his family. All cited documents are on file with counsel of record.

The District Attorney's office charged Mr. M with credit card abuse, categorized as the lowest level state felony. True Bill Indictment, *State v. M*, No. F09-xxxxx-V (203rd Jud. Dist. Ct. Tex. Mar. 27, 2009). The prosecuting attorney did not believe jail time was warranted in the case and recommended a plea to the charge with a sentence of three years' probation through a deferred community supervision program and a fine of $1,500. Mr. M agreed to the plea. Plea Agreement, *State v. M*, No. F09-xxxxx-V (292nd Jud. Dist. Ct. Tex. Nov. 12, 2009).

Mr. M, a lawful permanent resident of the United States, had no idea that his guilty plea would trigger deportation. His attorney failed to advise him of this risk. Application for Writ, *State v. M*, at 2. Subsequent to his plea, he complied fully with the requirements of his probation, maintained regular employment, and married a United States citizen with whom he began a family that now includes two United States-born children. Nonetheless, on return to the United States from a vacation with his family to El Salvador, he was stopped at the border and placed in removal proceedings.[13] *Id*. He filed his motion for relief with Dallas County's Judicial District

[13] The Department of Homeland Security charged Mr. M with the ground of inadmissibility at 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2010), as an individual convicted of a crime involving moral turpitude. Application for Writ of Habeas Corpus at 24, *State v. M*, No. WX 11-xxxxx-V (292nd Jud. Dist. Ct. Tex. Apr. 7, 2011).

Court under threat of deportation and permanent separation from his wife and children.[14] *See id.*

The prosecuting attorney assigned to review the post-conviction motion in Mr. M's case felt that the case outcome, in its entirety, did not comport with justice. Although he had committed a crime, Mr. M had been deprived of a fair proceeding when his attorney failed to advise him that, by pleading guilty, he risked deportation and the inability to be a husband to his wife and a father to his children. Further, the prosecuting attorney originally assigned to the case had not sought any jail time, judging a three year community supervision program and a modest fine to be the appropriate and fitting punishment. The District Attorney's office determined that the addition of deportation to that punishment rendered the case outcome disproportionate to the underlying crime. After the court conducted a hearing on Mr. M's application, District Attorney Watkins's office consented to relief. Motion to Dismiss, *State v. M*, No. F09-xxxxx-V (292nd Jud. Dist. Ct. Tex. Jan. 12, 2012). The judge granted Mr. M's application for a writ and the charges against him have since been dismissed. *Id.* (with court order appended).

---

[14] Had Mr. M been removed from the United States, he would have been barred from return for at least ten years pursuant to 8 U.S.C. § 1182(a)(9)(A)(ii)(I) (2010). Subsequent to those ten years, he would have remained inadmissible on the basis of the same 2009 conviction pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(I)(2010).

2. Community and victim safety

Unintended immigration penalties of a conviction may jeopardize the communities and victims prosecutors seek to serve and protect. Like the responsibility to pursue justice, the prosecutor's responsibility as a steward of community safety is codified in the ethical standards guiding the profession, and is often described as primary to the responsibility to secure convictions in individual cases. *See, e.g.*, *National District Attorneys Association National Prosecution Standards* § 1-1.2 cmt. (2009) (outlining the prosecutor's responsibility to "society as a whole," including "victims, witnesses, law enforcement officers, suspects, defendants and those members of society who have no direct interest in a particular case, but who are nonetheless affected by its outcome.").

A convicted defendant's deportation can have devastating impacts on innocent members of prosecutors' communities. One measure of the community impact of deportation is the number of parents of one or more United States citizen children removed from the United States; this number reached 46,486 for only the first half of fiscal year 2011. U.S. Dep't of Homeland Security Immigration and Customs Enforcement, *Deportation of Parents of U.S.-Born Citizens: Fiscal Year 2011 Report to Congress Second Semi-Annual Report* 4 (2012). The most common change in family structure in the aftermath of an immigration enforcement action is the conversion of a dual-parent home to a single-parent home. *See* The Urban Institute, *Facing Our Future: Children in the*

Aftermath of Immigration Enforcement viii (2010). Some children of deported parents are left with no one at all to care for them; at least 5,100 children are currently in the foster care system across the nation subsequent to the immigration detention or deportation of a parent. *See* Applied Research Center, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* 22 (2011).

These ripple effects caused by deportation are of vital concern to *amici* because children left behind by deportation are significantly more likely to engage in behavior that is both self-destructive and destructive to the communities in which currently practicing *amici* prosecute. In a study of children whose parents had been the subject of an immigration enforcement action, for example, nearly half began displaying "angry or aggressive" behavior that was persistent over the long term. The Urban Institute, *supra,* at 43. Children raised in non-intact family homes, such as single parent homes or the foster system, demonstrate significantly increased risks of incarceration and illegal behavior. *See, e.g.*, Institute for Marriage and Public Policy, *Policy Brief: Can Married Parents Prevent Crime? Recent Research on Family Structure and Delinquency* 2000-2005 1-2 (2005); Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Ages 23 and 24* 22-69 (Chicago: Chapin Hall at the University of Chicago 2009). Children who have aged out of the foster care system report much higher

levels of involvement in the criminal justice system than the nationwide average. Courtney et al., *supra*, at 69. Prosecutors must, therefore, consider the real risk that one defendant's deportation will leave that defendant's child more likely to commit crimes, thereby threatening public safety.

When considering a recent post-conviction motion, for example, *amicus* Santa Clara County, California District Attorney Jeffrey Rosen was largely focused on the safety of a young United States citizen child growing up with a debilitating brain development disorder. This young girl relies heavily on her father, Mr. A,[15] who accompanies her to doctor appointments and therapy sessions and supports her financially and emotionally. Petition for a Writ of Habeas Corpus at Ex. K, *People v. A*, No. CC 0xxxxx (Super. Ct. Cal. Nov. 22, 2011). At the age of 21, however, before his daughter was born, Mr. A had been convicted of a drug-related offense. Years later, that conviction triggered removal proceedings and threatened Mr. A's ability to remain in the United States with his family.

In 2000, Mr. A was arrested and charged in a two count complaint with possession of a controlled substance for sale, Cal. Health & Safety Code § 11378

[15] The defendant's full name and the full case number are omitted from this description and the accompanying citations in order to protect the privacy of the defendant and his family. All cited documents are on file with counsel of record.

(2011), and transportation of a controlled substance, Cal. Health & Safety Code § 11379 (2011). Felony Complaint at 1, *People v. A*, No. CC 0xxxxx (Super. Ct. Cal. Dec. 5, 2000). The District Attorney's office offered Mr. A a plea settlement to either count. On advice of counsel, he chose to plead to the possession for sale offense, section 11378, and was sentenced to 364 days in jail and a term of probation. Petition, *People v. A*, at 2.

Mr. A is a lawful permanent resident who has lived in the United States since the age of 10. Petition, *People v. A*, at Ex. J. He stated in his petition that he had received no advice from his attorney regarding immigration consequences. *Id.* Mr. A had no way of knowing that his conviction constituted an aggravated felony under the immigration law, mandating removal with no possibility of relief.[16] He similarly could not have known that the alternative plea offered by the prosecution – to section 11379 –

[16] A conviction for the sale of methamphetamine pursuant to Cal. Health & Safety Code § 11378 (2011) falls within the "illicit trafficking in a controlled substance" aggravated felony grounds of removal. *See* 8 U.S.C. § 1101(a)(43)(B) (2011); 8 U.S.C. § 1227(a)(2)(A)(iii) (2008); *see also, e.g.*, *Garcia-Gomez v. Holder*, No. 10-72740, 2012 WL 1065568, at *1 (9th Cir. Mar. 30, 2012). With minor exceptions not relevant here, an aggravated felony conviction precludes the immigration adjudicator from considering relief from removal regardless of an individual's equities. *See, e.g.,* 8 U.S.C. § 1229b(a)(3) (2008) (providing the aggravated felony bar to relief in the form of "cancellation of removal for certain permanent residents"); *see also Padilla*, 130 S. Ct. at 1480.

would have preserved his eligibility for relief from removal.[17] Nine years later, the Department of Homeland Security initiated removal proceedings against Mr. A after he applied for a replacement for his lawful permanent resident card. Petition, *People v. A*, at Ex. H.

In the years subsequent to his 2001 conviction, Mr. A had no further contact with the criminal justice system. Petition, *People v. A*, at 2, Ex. F. He is now a responsible father of two United States citizen daughters and has worked in construction for the same employer for nine years. *Id.* at 2, 8, Ex. G. In 2011, Mr. A petitioned the court to withdraw his 2001 plea on the basis of ineffective assistance of counsel. Petition, *People v. A*, at 25. The safety and well-being of Mr. A's family and community weighed heavily on the prosecuting attorney assigned to review the case. Mr. A's daughters' mother had provided a letter in support of Mr. A's petition, explaining the "integral part" he plays in his daughters' lives and attesting that it would be "emotionally devastating" should he be deported. Petition, *People v. A*, at Ex. K. She provided the court with information regarding her daughter's ongoing physical disabilities. *Id.* In pursuit of a just outcome, the prosecuting attorney

---

[17] *See Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1128-29 (9th Cir. 2007) (finding a conviction pursuant to Cal. Health & Safety Code § 11379 (2011) is not categorically an aggravated felony and therefore "does not foreclose" eligibility for relief in the form of cancellation of removal).

agreed to enter into a stipulation with Mr. A, allowing him to withdraw his plea to section 11378 and enter a new plea to section 11379 *nunc pro tunc* to the date of the original plea. *See* Stipulation and Order at 1, *People v. A*, No. CC 0xxxxx (Super. Ct. Cal. Dec. 8, 2011). This agreement furthered the interests of both parties: for District Attorney Rosen's office, the integrity of the conviction was maintained as the new plea was appropriate to the underlying offense and actually carried a higher maximum sentence exposure than the original plea; and Mr. A was given the opportunity to petition the immigration judge for a second chance to remain in the United States with his family.

In some cases, the family members who feel the financial and emotional impact of deportation most deeply are themselves the victim of the underlying crime, individuals prosecutors are duty bound to protect and serve.[18] This is most often the case in domestic violence prosecutions, where the defendant's deportation may leave the crime victim behind as a single parent without marital and/or child support. The American Bar Association's Criminal Justice Section has noted that in many domestic violence cases it is the "strong wish" of the victim to avoid the

[18] *See, e.g.*, *National District Attorneys Association National Prosecution Standards* § 1-1.1 (2009) ("The [prosecutor's primary] responsibility includes . . . ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected."); American Prosecutors Research Institute, *supra* note 11, at 11.

defendant's deportation because she "wants the protections afforded in a domestic violence [case], but does not want the abuser deported because of a need for continuing child support or a desire to try to salvage a parent-child or couple relationship." ABA Criminal Justice Section, *Recommendation Adopted by the House of Delegates No. 100C* 5 (2010). In such cases, the Criminal Justice Section encourages prosecutors, judges, and criminal defense attorneys to adopt one of many "basic immigration strategies that are designed to give the prosecution what is required, while avoiding making the defendant removable or ineligible for relief from removal." *Id.* at 4.

C. The State's interest in ensuring just outcomes for noncitizen defendants does not end at conviction

It is well-settled that the prosecutor's interests in pursuing justice extend into the post-conviction phase of a case. More than thirty-five years ago, this Court recognized that a prosecutor is "bound by the ethics of his office" even after securing a conviction. *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). This consensus understanding that the obligations of the State continue beyond conviction has been recently codified in the Model Rules of Professional Conduct, which as of 2008 require a prosecutor to take remedial steps in the post-conviction phase of a case when she is aware of evidence establishing or suggesting a

defendant's innocence. *Model Rules of Prof'l Conduct* R. 3.8(h) (2010).[19]

The extent to which a post-conviction motion implicates prosecutorial interests varies widely depending on the substance of the claim. *See* Zacharias, *supra*, at 176-85. For example, a post-conviction claim brought on the basis of new evidence establishing innocence goes directly to the heart of the prosecutor's obligation as a "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935). However, a claim brought on the basis of a procedural defect that does not sully the integrity of the finding of guilt nor the fairness of the case outcome will implicate fewer prosecutorial interests. A claim brought pursuant to the type of ineffective assistance of counsel addressed in *Padilla v. Kentucky*

[19] The amendment of Rule 3.8 (governing "Special Responsibilities of a Prosecutor") to include post-conviction obligations is particularly noteworthy because the amendment process has been described as a "ground-up reform" approach by which the amendment came to represent a consensus among all players in the criminal justice system. *See* Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 Geo. J. Legal Ethics 427, 457 (2009). Although model ethics rules and ethics opinions are usually proposed by the ABA's Ethics Committee, this amendment was initially proposed by the Criminal Justice Section, representing prosecutors, defense attorneys, and judges working in the criminal justice system. *See id*. at 460. Furthermore, the amendment's origins can be traced to local reform initiatives, namely a proposal adopted by the New York State bar in 2000. *See id.* at 461.

may very well impact questions of proportionality and community and victim safety, elevating its centrality to the prosecutor's mission. The stories of Mr. M and Mr. A in Section I.B above illustrate that, where immigration penalties are present, the post-conviction phase of a case often presents the prosecutor with the sole opportunity to adjust a case disposition so that it aligns with State interests.

II. THE STATE'S INTEREST IN MAINTAINING THE DISCRETION TO RESPOND APPROPRIATELY TO *PADILLA* CLAIMS OUTWEIGHS CASE MANAGEMENT CONCERNS

Like all post-conviction litigation, post-conviction motions brought pursuant to *Padilla v. Kentucky* raise concerns for the State regarding safeguarding the finality of convictions.[20] However, in *amici*'s belief, these concerns are vastly outweighed by the State interest in preserving the discretion to choose how to respond to motions raised by defendants facing immigration penalties on the basis of prior convictions. First, assuming an outcome favorable to the Petitioner in this matter, there will remain significant

[20] *See, e.g.*, *U.S. v. Timmreck*, 441 U.S. 780, 784 (1979) ("Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." (quoting *United States v. Smith*, 440 F.2d 521, 528-29 (7th Cir. 1971) (Stevens, J., dissenting))).

barriers to relief under *Padilla v. Kentucky* that will both limit the number of actions brought and allow prosecutors to vigorously oppose those motions lacking in merit or worth. Second, as discussed in Section I.B above, the specter of a defendant's deportation implicates prosecutorial interests in ways that many post-conviction motions do not. These interests often ripen with time, such that post-conviction claims raised on convictions secured prior to the decision date in *Padilla v. Kentucky* are often among the most worthy of a positive exercise of prosecutorial discretion.

A. Significant barriers to relief under *Padilla v. Kentucky* mitigate finality concerns, regardless of retroactivity

Should the Court find *Padilla v. Kentucky* to have retroactive application, noncitizen defendants will continue to face numerous procedural, jurisdictional, and substantive barriers to relief. These barriers, first, greatly limit the number of claims brought pursuant to *Padilla v. Kentucky*. Second, they equip prosecutors with the tools to assert a robust opposition in cases where the prosecutor finds the original case outcome, including the consequent deportation, to have been just.

Regardless of *Padilla v. Kentucky*'s retroactive applicability, noncitizen defendants seeking post-conviction relief under the decision must meet each element of the standard for ineffective assistance of

counsel set out by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984) in order to succeed. *See Padilla*, 130 S. Ct. at 1482. To do so, the claimant must prove that 1) counsel's conduct fell below a standard of reasonableness under prevailing professional norms due to misadvice or lack of advice regarding deportation risks, and 2) the outcome of the proceeding was prejudiced by that ineffective assistance. *Id*.

This Court has noted that, "Surmounting *Strickland*'s high bar is never an easy task." *Padilla*, 130 S. Ct. at 1485.[21] Indeed, in establishing the first prong of *Strickland*, it is the defendant's burden to overcome the "strong presumption" that counsel's conduct was reasonable. *Strickland*, 466 U.S. at 689. This burden is "most substantial" in cases settled by plea due to the "added uncertainty" inherent in the evidentiary record in such cases. *Premo v. Moore*, 131 S. Ct. 733, 745 (2011). For defendants able to meet this first step of establishing unreasonable conduct by counsel, it is nonetheless "often quite difficult" to

[21] *See also Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("Judicial scrutiny of counsel's performance must be highly deferential."); *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (" . . . [T]he standard for judging counsel's representation is a most deferential one."); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.").

satisfy *Strickland*'s prejudice requirement. *Padilla*, 130 S. Ct. at 1485 n.12.[22]

Furthermore, some lower courts have imposed time bars on defendants' eligibility for relief pursuant to *Padilla v. Kentucky*[23] and others have restricted the availability of vehicles such as coram nobis and habeas corpus to assert *Padilla*-based claims for

---

[22] Defendants seeking to establish prejudice must demonstrate that the proceedings were rendered "fundamentally unfair" by counsel's deficient performance. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Judicially imposed requirements for establishing prejudice in ineffective assistance claims brought pursuant to *Padilla v. Kentucky* are often quite strict. *See, e.g.*, *United States v. Hough*, No. 2:02-cr-00649-WJM-1, 2010 WL 5250996, at *5 (D.N.J. Dec. 17, 2010) (finding defendant was not prejudiced by counsel's failure to inform him of the risk of deportation where the evidence against him "was strong," rendering "dubious" his claim that he would have proceeded to trial with proper counsel); *Flores v. Florida*, 57 So.3d 218, 220 (Fla. Dist. Ct. App. 2010) (finding defendant's claim of prejudice precluded by a judicial advisal regarding deportation risk given during the plea colloquy).

[23] *See, e.g.*, *Smith v. State*, 85 So.3d 551, 552 (Fla. Dist. Ct. App. 2012) (citing *State v. Green*, 944 So.2d 208, 218 (Fla. 2006)) (finding a motion brought pursuant to *Padilla v. Kentucky* more than two years subsequent to the date of judgment and sentence untimely under the state's post-conviction statute, Fla. R. Crim. P. R. § 3.850 (2011)); *El Eid v. State*, No. A11-898, 2012 WL 539186, at *4 (Minn. Ct. App. Feb. 21, 2012) (finding the state post-conviction statute at Minn. Stat. Ann. § 590.01(4)(c) (2005) to require claims of ineffective assistance pursuant to *Padilla v. Kentucky* to be brought within the two-year period after an event establishing a right to relief such as immigration consequences that arise as a result of a guilty plea).

relief.[24] As California's Fourth District Court of Appeal has stated, "*Padilla* does not require states to provide an avenue for noncitizens to challenge their convictions based on an erroneous immigration advisement when no other remedy is presently available." *People v. Shokur*, 141 Cal.Rptr.3d 283, 288 (Cal. Ct. App. 2012).

B. In those cases where a remedy does exist, the State's interest is often greater with regard to convictions that pre-date the *Padilla v. Kentucky* decision

Where a legal remedy does exist, prosecutors weigh many factors when determining how to respond to a post-conviction motion brought pursuant to *Padilla v. Kentucky*. In weighing these factors, the prosecution often discovers that the State's interest in an adjusted case outcome is strongest in post-conviction litigation on older convictions that pre-date the decision in *Padilla v. Kentucky.*

---

[24] In *People v. Fernandez*, for example, California's Second District Court of Appeal noted that the retroactive application of *Padilla v. Kentucky* is "simply beside the point" where no vehicle exists for the appellant to raise his claim. No. B229073, 2011 WL 4357730, at *4 (Cal. Ct. App. Sept. 20, 2011) (citing *People v. Kim*, 202 P.3d 436, 448 (Cal. 2009)) (finding Fernandez's claim of ineffective assistance not cognizable on coram nobis). *See also People v. Constantino*, No. H037018, 2011 WL 6000881, at *2 (Cal. Ct. App. Dec. 1, 2011) (finding *Padilla v. Kentucky* to have "no application" where defendant was not in actual or constructive custody).

Factors that weigh in the prosecutor's exercise of discretion on a post-conviction motion brought pursuant to *Padilla v. Kentucky* might include: the severity and nature of the crime; the impact of the defendant's deportation on the victim and the wider community; and the defendant's positive and negative equities. In many cases, the years that have passed between a conviction and the filing of a post-conviction motion will significantly alter the balance of these factors. During the ensuing years, a noncitizen defendant may have accrued such positive equities as marriage to a United States citizen spouse, the birth of one or more United States citizen children, the provision of financial support to immediate family or other community members, and/or a consistent employment history. In these cases, the deportation penalty attached to the conviction ripens into a harsher and less proportionate component of the case outcome than it was at the time of the conviction. Furthermore, the hardship caused by deportation to the defendant and the defendant's family and community will have increased dramatically.

The post-conviction claims in the cases of Mr. M and Mr. A, discussed in Section I.B, *supra*, were brought in the recent past challenging convictions secured in 2009 and 2000, both prior to the decision in *Padilla v. Kentucky*. In both cases, the defendants had maintained clean records in the years since their convictions and deepened their ties to the United States through continued employment and growing families. In both cases, the prosecuting attorneys

were compelled to consent to an adjusted disposition because of the significant State interests present – the pursuit of proportionate case outcomes and the well-being of innocent spouses and children who would be devastated by the defendants' deportations. These interests were altered dramatically by the events that transpired in the years subsequent to Mr. M and Mr. A's convictions.

CONCLUSION

Amici are concerned that a ruling adverse to the Petitioner in this case will restrict prosecutors nationwide from exercising meaningful discretion on *Padilla*-based claims merely because of the date of the original conviction. As the case examples in Section I.B demonstrate, a post-conviction motion brought pursuant to *Padilla v. Kentucky* may provide the State with the sole opportunity to adjust a case outcome that flies in the face of varied and compelling State interests. This opportunity should not be lost or gained simply because the conviction falls on the wrong side of March 31, 2010.

For the reasons set forth above, *amici* respectfully submit that the decision of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

HEIDI ALTMAN
Counsel of Record
CENTER FOR APPLIED
LEGAL STUDIES
GEORGETOWN LAW SCHOOL
600 New Jersey Avenue NW,
Suite 332
Washington, DC 20001
(202) 662-9571
hra8@law.georgetown.edu

MICHAEL K. GOTTLIEB
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400

Counsel for Amici Curiae

July 23, 2012

APPENDIX A:

Amici Curiae Active and Former State and Federal Prosecutors

A. Bates Butler III
United States Attorney, District of Arizona (1980-1981)
First Assistant United States Attorney, District of Arizona (1977-1980)
Deputy Pima County (Arizona) Attorney (1970-1977)

Paul Butler
Trial Attorney, United States Department of Justice, Criminal Division (1990-1993)

Zachary W. Carter
United States Attorney, Eastern District of New York (1993-1999)

W.J. Michael Cody
Attorney General, State of Tennessee (1984-1988)
United States Attorney, Western District of Tennessee (1977-1981)

Robert Del Tufo
Attorney General, State of New Jersey (1990-1993)
United States Attorney, District of New Jersey (1977-1980)

W. Thomas Dillard
United States Attorney, Northern District of Florida (1983-1987)
United States Attorney, Eastern District of Tennessee (1981)
Assistant United States Attorney, Eastern District of Tennessee (1967-1976, 1978-1982)

Bennett L. Gershman
Prosecutor, New York County District Attorney's Office (1967-1972)
Prosecutor, New York Special State Prosecutor (1973-1976)

Daniel Goldstein
Assistant United States Attorney, District of Maryland (1976-1982)

Bruce R. Jacob
Assistant Attorney General, State of Florida (1960-1962)

Robert M.A. Johnson
President, National District Attorneys Association (2000-2001)
County Attorney, Anoka County, Minnesota (1983-2011)

Thomas L. Johnson
Hennepin County Attorney, Minnesota (1979-1991)

Jeremy Lasnetski
Division Chief, Repeat Offender Unit, State Attorney, 4th Judicial Circuit of Florida (2007-2008)
Prosecutor, State Attorney, 4th Judicial Circuit of Florida (2001-2007)

E. Michael McCann
District Attorney, Milwaukee County, Wisconsin (1969-2006)

Kenneth J. Mighell
United States Attorney, Northern District of Texas (1977-1981)
Assistant United States Attorney, Northern District of Texas (1961-1977)

H. James Pickerstein
United States Attorney, District of Connecticut (1974)
Chief Assistant United States Attorney, District of Connecticut (1974-1986)

Richard J. Pocker
United States Attorney, District of Nevada (1989-1990)

Jeffrey Rosen
District Attorney, Santa Clara County, California (2011-Present)

Harry L. Shorstein
State Attorney, 4th Judicial Circuit of Florida (1991-2009)

Thomas P. Sullivan
United States Attorney, Northern District of Illinois (1977-1981)

John Van de Kamp
Attorney General, State of California (1983-1991)
District Attorney, Los Angeles County, California (1975-1983)
United States Attorney, Central District of California (1966-1967)

Craig Watkins
District Attorney, Dallas County, Texas (2006-Present)

David M. Zlotnick
Assistant United States Attorney, Washington D.C. (1989-1993)