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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

Sigifredo Garcia-Bueno,

Petitioner.

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STATE OF WASHINGTON
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BRIEF OF *AMICUS CURIAE*
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN
SUPPORT OF PETITIONER

Robert S. Chang, WSBA #44083
FRED T. KOREMATSU CENTER FOR
LAW AND EQUALITY
901 12th Avenue
Seattle, WA 98122
(206) 398-4025

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Fred T. Korematsu Center for Law and Equality (Korematsu Center) is a non-profit organization based at Seattle University School of Law that works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied military orders during World War II that led ultimately to the incarceration of 110,000 Japanese Americans. He took his challenge to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by “military necessity.” Fred Korematsu went on to successfully vacate his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center has a special interest in promoting fairness in the courts of our country. The Korematsu Center does not, in this memorandum or otherwise, represent the official views of Seattle University.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Sigifredo Garcia-Bueno is representative of a vulnerable class of individuals, non-citizen criminal defendants, whose decisions about whether to accept a particular plea agreement or go to trial can result in severe immigration consequences. Under current immigration law, a non-

citizen convicted of any of a wide array of crimes, including some relatively minor ones, must be deported. In addition, the non-citizen must be detained pending removal proceedings. Further, many such convictions can result in permanent banishment from the United States. Amicus submits this brief to demonstrate the devastating consequences that inadequate or erroneous legal advice can have for noncitizen defendants, many of whom are long-time legal permanent residents with family, jobs, and homes in the United States. Amicus also urges this Court to provide firm guidance to lower courts that plea colloquies and plea forms are no substitute for effective assistance of counsel and cannot cure deficient representation.

III. ARGUMENT

A. DEFICIENT AND ERRONEOUS LEGAL ADVICE REGARDING THE IMMIGRATION CONSEQUENCES OF PLEA AGREEMENTS PREVENTS NONCITIZEN DEFENDANTS FROM MAKING INFORMED CHOICES

1. IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS CAN BE EXTREMELY SERIOUS TO NONCITIZEN DEFENDANTS AND THEIR FAMILIES

The United States Supreme Court in *Padilla v. Kentucky*, -- U.S. --, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), acknowledged that “[t]he severity of deportation—‘the equivalent of banishment or exile,’—only underscores how critical it is for counsel to inform her noncitizen client

that he faces a risk of deportation.” *Padilla*, 130 S. Ct. at 1486 (internal quotes omitted). The Court also made clear that an important consideration included “the concomitant impact of deportation on families living lawfully in this country.” *Id.* This Court has recognized the severe consequences that deportation would have on noncitizen defendants and their families. *State v. Sandoval*, 171 Wn.2d 163, 175-76, 249 P.3d 1015 (2011).

The following table demonstrates the magnitude of the effect of deportation on legal permanent residents [“LPRs”] and their families.

Table 1: Number of LPRs Deported and Estimated Children/Family Members Impacted from 1997–2007¹

Total Number of LPRs Deported	87,884
Estimated percent of LPRs that had at least one child living with them	53%
Estimated Total Number of Children Under 18 Impacted by Deportation of an LPR Father or Mother	103,055
Estimated Total Number of Children Under 5 Impacted by Deportation of an LPR Father or Mother	44,422
Estimated Total Number of U.S. Born Children Under 18 Impacted by Deportation of an LPR Father or Mother	88,627
Estimated Total Number of Immediate Family Members Impacted by Deportation of an LPR in Household	217,068

Source: U.S. Department of Homeland Security. Estimates of the number of children and family members are based on a 95 percent confidence interval and were derived from the 2008 American Communities Survey.

As indicated on this table, over half of the 87,884 legal permanent

¹ International Human Rights Law Clinic, University of California, Berkeley, School of Law, *et al.*, *In the Child’s Best Interest? The Consequences of Losing a Lawful Immigrant Parent to Deportation*, 4-5 (March 2010), available at http://www.law.berkeley.edu/files/Human_Rights_report.pdf (last visited Sept. 22, 2012).

residents deported in the 10 year period from 1997-2007 as a consequence of a criminal conviction had at least one child living with them. Of the 103,055 children impacted by the deportation of a legal permanent resident father or mother, 88,627 were U.S. born children, and 44,422 were under the age of 5. An estimated 216,068 immediate family members were impacted by deportation of a legal permanent resident in their household.

Deportation inflicts grave emotional and financial harm on families, especially their dependent children. *See* International Human Rights Law Clinic, University of California, Berkeley, School of Law, *et al.*, *In the Child's Best Interest? The Consequences of Losing a Lawful Immigrant Parent to Deportation*, 4-5 (March 2010), available at http://www.law.berkeley.edu/files/Human_Rights_report.pdf (last visited Sept. 22, 2012) [*"In the Child's Best Interest?"*]. The negative effects include negative impacts on children's physical and mental health as well as an increased likelihood of poor education outcomes. *Id.* at 5, 7. When families are separated because of a failure of the system to protect their rights, our society as a whole bears the costs for these family separations. Dependent spouses and children of deportees may be forced to rely on public assistance and other forms of governmental support to survive if the primary breadwinner of the family is deported. *Id.* at 5-6.

The following examples highlight the devastating consequences that can flow when a non-citizen immigrant defendant pleads guilty to a crime that is classified as an “aggravated felony” under the Immigration and Nationality Act [“INA”] and which results in mandatory deportation:

(a) Sann Chey, a refugee who fled Cambodia who has resided in the United States for over twenty years as a legal permanent resident, awaits deportation following a plea to a misdemeanor domestic violence charge for which he received a 365 day sentence.² A sentence of just one day less would have avoided the INA classification as an aggravated felony and would have permitted the immigration judge to consider his strong ties to the United States – service in the U.S. Army, lengthy residence, his five minor U.S. citizen children (custody was awarded to him after he had served his incarceration sentence) – in deciding whether Sann could be granted relief from deportation. Instead, Sann, the primary breadwinner and caretaker of his family, spent six months in immigration detention awaiting a final order of removal and is temporarily back with his family until the U.S. government arranges for travel documents back to Cambodia, a country that he and his family fled over two decades ago. It is uncertain what will happen to his children.

(b) Maria Taganeca came to the United States with her family

² This account is drawn from a longer narrative reported in *In the Child's Best Interest?*, at 2.

as legal permanent residents in 1987 from Fiji when she was seven.³ She was arrested in 2006 and charged with possession of a controlled substance with intent to deliver. Though she did not have drugs on her person, she was driving with her friends, one of whom had drugs in his possession. Upon advice from her attorney, she pled guilty and received a term of probation. Her attorney did not inform her that a guilty plea to a “drug trafficking crime” was an “aggravated felony” under the INA which required mandatory deportation. Taganeca, detained by Immigration and Custom Enforcement awaiting removal, successfully filed for post-conviction relief based on ineffective assistance of counsel. She was then permitted to plead guilty to simple possession which allowed her to avoid deportation. During the many months she was held in immigration detention, she was unable to care for her elder family members. This could have been avoided if she had been informed of the immigration consequences of her initial plea.

2. AVOIDING THESE CONSEQUENCES CAN BE THE MOST IMPORTANT CONSIDERATION FOR NONCITIZENS IN DETERMINING WHETHER TO ACCEPT A PARTICULAR GUILTY PLEA

Given the severe consequences that deportation may have on noncitizen defendants and their families, it should come as no surprise that

³ This account is drawn from a longer narrative in Brief for Asian American Justice Center et al. as *Amici Curiae*, *Padilla v. Kentucky*, No 08-651, 2009 WL 1567358, at *14-16 (June 2, 2009).

avoiding these consequences can be the most important consideration for noncitizens when they are deciding whether to accept a particular guilty plea. The United States Supreme Court in *Padilla* recognized that, “as a matter of federal law, 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.” *Padilla*, 130 S. Ct. at 1480 (emphasis added).

When defense counsel is deficient in advising noncitizen defendants of the immigration consequences of a particular plea, the noncitizen defendant loses the opportunity to make an informed decision. *See United States v. Kwan*, 407 F.3d 1005, 1017-18 (9th Cir. 2005) (finding ineffective assistance of counsel where noncitizen defendant pled guilty of bank fraud with sentence of one year and one day and defendant was misadvised by his counsel of the immigration consequences). The court in *Kwan* noted that the defendant, Kwok Chee Kwan, “could have gone to trial or renegotiated his plea agreement to avoid deportation; he could have pled guilty to a lesser charge; or the parties could have stipulated that Kwan would be sentenced less than one year in prison.” *Id.*

3. WHEN DEFENSE ATTORNEYS ACCURATELY INFORM DEFENDANTS ABOUT IMMIGRATION CONSEQUENCES, DEFENDANTS ARE ABLE TO MAKE INFORMED DECISIONS ABOUT HOW TO PLEAD AND WHETHER TO GO TO TRIAL

Sann Chey, Maria Taganeca, and Kwok Chee Kwan were not able to make informed decisions about whether and how to plead because they were not accurately informed about the immigration consequence of their pleas. The following examples demonstrate that when accurate information about the immigration consequences is provided in a timely manner by their attorneys, noncitizen defendants are able make informed decisions and the State is able to satisfy its objectives.

(a) Ney Medina has lived in the United States since 1990 when he emigrated from the Dominican Republic at the age of 5.⁴ When he was 23, he was charged in one case with assault, menacing, and harassment against his cousin and with petit larceny and criminal possession of a stolen cell phone against the cousin's friend. He was offered a plea to a Class B misdemeanor in each case with a sentence of anger management and restitution for the phone. Though these sentences were light, the two crimes could be considered crimes of moral turpitude under the INA which would have subjected Ney to deportation. Upon advice of counsel, Ney was able to negotiate pleas for more serious charges which were not

⁴ This account is drawn from a longer narrative in Brief for Asian American Justice Center et al. as *Amici Curiae*, *Padilla v. Kentucky*, No 08-651, 2009 WL 1567358, at *32-33 (June 2, 2009).

considered crimes of moral turpitude and therefore avoid deportation.

(b) Mary and Tom Nguyen, refugees from Vietnam, were charged with looting a casino gift shop in the casino where they found shelter for a week following Hurricane Katrina.⁵ Though they wanted to go to trial because they maintained that they had been invited to take what they needed – toothbrushes, food, and water – they were advised by their attorneys that if found guilty and sentenced to more than one year, they would be automatically deported. Instead, with the help of counsel, they negotiated and accepted a plea agreement that included a fine and probation, which allowed them to avoid deportation to Vietnam, a country which they had fled and where they feared persecution upon return.

The *Padilla* court noted that proper legal advice provided by the noncitizen defendant's counsel which allows for informed consideration benefits

both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, 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. The Court also noted that “[c]ounsel . . . may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by

⁵ This account is drawn from a longer narrative in Brief for Asian American Justice Center et al. as *Amici Curiae*, *Padilla v. Kentucky*, No 08-651, 2009 WL 1567358, at *33-34 (June 2, 2009).

avoiding a conviction for an offense that automatically triggers the removal consequence.” *Id.* The State also benefits because “the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.” *Id.*

B. THIS COURT SHOULD GIVE CLEAR GUIDANCE TO LOWER COURTS THAT PLEA COLLOQUIES AND FORMS CANNOT SUBSTITUTE FOR EFFECTIVE ASSISTANCE OF COUNSEL AND CANNOT CURE DEFICIENT REPRESENTATION

The trial court in this case emphasized the plea colloquy in deciding that Sigifredo Bueno-Garcia knew the immigration consequences of his plea. CP 78-79. However, even when accurate information is provided by the trial judge that a guilty plea may result in deportation, the plea colloquy does not negate the prejudice a defendant suffers from ineffective assistance from counsel. *See. United States v. Choi*, 581 F. Supp. 2d 1162, 1163-64 (N.D. Fla. 2008) (plea set aside based on ineffective assistance of counsel even though judge advised defendant of possible immigration consequences). Similarly, accurate information about possible immigration consequences provided by a statutorily mandated plea form does not substitute for or cure ineffective assistance of counsel. *See State v. Sandoval*, 171 Wn.2d 163, 173, 249 P.3d 1015 (2011) (citing *Padilla*, 130 S. Ct. at 1486).

1. PLEA COLLOQUIES ADDRESS FIFTH AMENDMENT REQUIREMENTS, WHEREAS THE EFFECTIVE ASSISTANCE FROM COUNSEL REQUIREMENT STEMS FROM THE SIXTH AMENDMENT

Judges and defense counsel play very different roles in the criminal justice system. Judges, through plea colloquies, ensure that the defendant is properly waiving her rights under the Fifth Amendment against self-incrimination as well as the other constitutional protections of a trial. Judges are not counselors, negotiators, or advocates for defendants, roles reserved for defendants' counsel. As the United States Supreme Court observed in *Powell v. Alabama*,

[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.

287 U.S. 45, 61, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

Defendants have a Sixth Amendment right to adequate counsel. A violation of a defendant's rights under the Sixth Amendment cannot be cured by adequately safeguarding a defendant's Fifth Amendment rights.

2. PLEA COLLOQUIES, WHICH REQUIRE THAT PLEAS BE MADE KNOWINGLY AND VOLUNTARILY, COME TOO LATE IN THE PROCESS FOR TRULY MEANINGFUL OPPORTUNITIES TO CONSIDER AND NEGOTIATE PLEA DEALS

A plea colloquy takes place after the defendant has already made

her choice to accept a particular plea. Practitioners and scholars have argued “that defendants perceive . . . colloquies as largely ceremonial . . . [and] defendants may not realize that they have the right to change their minds and may feel undue pressure or coercion to finalize the plea at that point in the process.” Danielle M. Lang, Note, *Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendants’ Ability to Bring Successful Padilla Claims*, 121 YALE L.J. 944, 964 (2012) (footnotes omitted). A “plea colloquy is unlikely to affect a defendant’s decision to plead guilty at that late point in the process and thus cannot replace the guidance of counsel in deciding whether or not to plead guilty.” *Id.* at 965.

Sann Chey, Maria Taganeca, and Kwok Chee Kwan, though they presumably had constitutionally sufficient plea colloquies, were not properly advised of the immigration consequences by their attorneys and were therefore not afforded a meaningful opportunity to negotiate plea deals that ameliorated the immigration consequences of the plea agreement or to make the informed choice to go to trial. Il Hwan Choi, though advised by the trial judge that his guilty plea could result in his deportation, had received misadvice from his attorney, which led him to accept the plea instead of making the informed decision to go to trial. *Choi*, 581 F. Supp. 2d at 1163-64.

Their experiences can be contrasted with the experiences described

above of Ney Marina and Mary and Tom Nguyen. Ney, Mary, and Tom were informed about the immigration consequences by their attorneys at a point in time early enough to successfully negotiate plea agreements that did not have harsh immigration consequences.

This Court should provide clear guidance to lower courts that measures designed to ensure a criminal defendant's rights under the Fifth Amendment cannot serve as a substitute or cure for inadequate assistance of counsel that violates a criminal defendant's rights under the Sixth Amendment.

IV. CONCLUSION

In 2010, Washington was home to approximately 270,000 legal permanent residents.⁶ Some came to the United States to join their families or were adopted as small children by Washington state parents. Some came as workers sponsored by employers. Others fled persecution and war in other countries and found refuge in the United States. Most form deep ties to the United States. They make families. They work. They create small businesses and employ others. They serve in the U.S. military.

Noncitizens, like United States citizens, sometimes run afoul of the law. For noncitizens, the consequences of a criminal conviction can be far

⁶ Nancy Rytina, *Estimates of the Legal Permanent Resident Population in 2010*, at 4, available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_lpr_pe_2011.pdf (last visited September 23, 2012).

greater than any fine, probation, incarceration, or other sentence ordered by the judge in the criminal proceedings. The consequences can include deportation that tears families apart, inflicting grave emotional and financial harm.

We urge this Court to provide clear guidance to lower courts to ensure that noncitizens' rights to adequate counsel are safeguarded. This includes clear direction that plea colloquies and plea forms are no substitute for adequate counsel and cannot cure deficient representation that occurs at a stage when, with proper advice and counsel, the noncitizen defendant can successfully ameliorate the immigration consequences of her plea or make an informed decision to go to trial, as demonstrated through the examples we provided in this brief.

RESPECTFULLY SUBMITTED this 24th day of September, 2012.

By s/Robert S. Chang

Robert S. Chang, WSBA#44083
Executive Director, for *Amicus Curiae*
Fred T. Korematsu Center for Law and
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 v.) No. 87297-0
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I, Robert S. Chang, attorney for Amicus Curiae Fred T. Korematsu Center for Law and Equality, certify that on September 24, 2012, I caused the original Motion to File Amicus Curiae Brief and the Amicus Curiae Brief of the Fred T. Korematsu Center for Law and Equality to be filed in the Washington State Supreme Court and copies of the same to each of the following persons:

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Nancy Collins (via e-mail)	Counsel for Petitioner
Pam Loginsky (via e-mail)	Counsel for Amicus Curiae, Washington Association of Prosecuting Attorneys
Anne Benson and Travis Stearns (via e-mail)	Counsel for Amicus Curiae, Washington Defender Association
David Zuckerman (via e-mail)	Counsel for Amicus Curiae, Washington Association of Criminal Defense Lawyers
Matt Adams (via e-mail)	Counsel for Amicus Curiae, Northwest Immigrant Rights Project
Sejal Zota (via e-mail)	Counsel for Amicus Curiae, National Immigration Project of the National Lawyers Guild

Signed at Seattle, Washington, this 24th day of September, 2012.

s/Robert S. Chang
Robert S. Chang

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Dear Clerk,

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1. Motion for Leave to File Amicus Curiae Brief
2. Amicus Curiae Brief of the Fred T. Korematsu Center for Law and Equality
3. Certificate of Service

Thank you.

Robert S. Chang
Professor of Law
Executive Director, Fred T. Korematsu Center for Law and Equality
Faculty Fellow, Center for Indian Law and Policy

t 206.398.4025 | f 206.398.4036

901 12th Avenue, Sullivan Hall
Seattle, WA 98122-1090
www.law.seattleu.edu

Seattle University School of Law
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