No. 15-1028

In the Supreme Court of the United States

COSMO FAZIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner failed to demonstrate that he was prejudiced by his attorney's misadvice about the immigration consequences of pleading guilty.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 795 F.3d 421.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2015. A petition for rehearing was denied on November 12, 2015 (Pet. App. 30-31). The petition for a writ of certiorari was filed on February 10, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of conspiracy to distribute more than 200 but less than 300 grams of cocaine, in violation of 21 U.S.C. 846 and 841(b)(1)(C) (2000 & Supp. II 2002). Pet. App. 23. The district court sen-

tenced petitioner to three years of probation. Pet. 4. The court of appeals affirmed, and this Court denied certiorari. 133 S. Ct. 1480.

Petitioner then filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Pet. App. 9. The district court denied the motion. *Ibid.* The court of appeals affirmed. *Id.* at 10, 19.

1. Petitioner was born in Italy and in 1992 immigrated to the United States. Pet. App. 5. He is a permanent resident alien in the United States. *Ibid.* In 2009, a grand jury sitting in the District Court for the Western District of Pennsylvania returned an indictment charging petitioner with one count of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 846(a)(1) and 841(b)(1)(A)(iii) (2000 & Supp. II 2002). Pet. App. 3.

In April 2011, petitioner entered into a plea agreement that contemplated that he would plead guilty to the lesser-included offense of conspiring to distribute less than 500 grams of cocaine, in violation of 21 U.S.C. 846 and 841(b)(1)(C) (2000 & Supp. II 2002). C.A. Supp. App. 1-2. The plea agreement stipulated that the amount of cocaine attributable to petitioner was between 200 and 300 grams. *Id.* at 6. Petitioner waived his right to appeal and to collaterally attack his conviction or sentence. Pet. App. 3-4.

Under *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), counsel to a defendant considering pleading guilty "must advise her client regarding the risk of deportation" arising from conviction. *Id.* at 367. When the immigration "consequences of a particular plea are unclear or uncertain," the attorney performs reasonably if she "advise[s] a noncitizen client that pending

criminal charges may carry a risk of adverse immigration consequences." *Id.* at 369. When "the deportation consequence is truly clear," by contrast, "the duty to give correct advice is equally clear." *Ibid.*

Before petitioner pleaded guilty, petitioner's counsel informed petitioner that there "could be immigration consequences" arising from his conviction. Pet. App. 7. Counsel stated that he was "confident that with competent immigration counsel" petitioner "stood a good chance of not being deported." *Ibid.* Counsel told petitioner that "there was certainly a chance he could be deported, but it was [counsel's] opinion that he would not be." *Ibid.*

Counsel also reviewed the plea agreement with petitioner "line by line." Pet. App. 7. The agreement stated that petitioner "recognizes that pleading guilty may have consequences with respect to his immigration status if he is not a citizen of the United States." *Id.* at 4. The agreement explained that "[r]emoval and other immigration consequences are the subject of a separate proceeding," and it stated that petitioner "understands that no one, including his own attorney or the district court, can predict to a certainty the effect of his conviction on his immigration status." *Ibid.* Petitioner nevertheless affirmed in the agreement that he "want[ed] to plead guilty regardless of any immigration consequences that his plea may entail, even if the consequence is his automatic removal from the United States." *Ibid.*

2. In June 2011, petitioner pleaded guilty. During the plea colloquy, the district court questioned peti-

tioner about the potential immigration consequences of his plea.[1] Pet. App. 6. The court explained:

> [I]n addition to the possible penalties of which I have advised you, because you are not a United States citizen, you will also face a risk of removal from the United States after you have served any sentence imposed by this Court.
>
> Under federal law, a broad range of crimes are removable offenses, including the offense to which you are pleading guilty. Removal and other immigration consequences are the subject of a separate proceeding, however. Do you understand that no one, including your attorney or me or the government's attorney can predict to a certainty the effect of your conviction on your immigration status?

Ibid. Petitioner responded, "Yes." *Ibid.* The court then asked him, "Now knowing this, do you nevertheless want to plead guilty regardless of any immigration consequences that your plea of guilty may entail, even if the consequence is your automatic removal from the United States?" *Ibid.* Petitioner again responded, "Yes." *Ibid.*

Later in the proceeding, the district court asked defense counsel to summarize the terms of the plea agreement. C.A. App. 29. As part of that summary, defense counsel stated:

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[1] In 2013, Federal Rule of Criminal Procedure 11 was amended to require the district court, before accepting a plea of guilty, to inform the defendant that "if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future." Fed. R. Crim. P. 11(b)(1)(O).

> The plea agreement goes on to note that most importantly in this case, [petitioner] recognizes pleading guilty in this case may have consequences with respect to his immigration status because he is not a citizen of the United States.
>
> Under federal law, a broad range of crimes are removing offenses, including aggravated felonies of which participation in narcotics conspiracy is considered.
>
> Removal or other immigration consequences are the subject of a separate proceeding. The defendant understands neither myself, the U.S. attorney[,] or Your Honor can predict the effect of his conviction on his immigration status.
>
> Despite that, he continues to desire to enter his plea of guilty regardless of those penal consequences.
>
> He acknowledges, Your Honor, that a plea may entail automatic removal from the United States.

Id. at 31. Petitioner affirmed that he had reviewed the plea agreement with his attorney and understood its contents. *Id.* at 35.

After petitioner's guilty plea, his wife became concerned about the possible immigration consequences of his conviction. Pet. App. 7. Petitioner, his wife, and his defense attorney met with attorneys specializing in immigration law, who informed petitioner that he would certainly be removed because he had pleaded guilty to an aggravated felony. *Id.* at 7-8. Petitioner's plea counsel said he had been unaware of the immigration consequences of the conviction and had made a mistake. *Id.* at 8.

In July 2011, petitioner terminated his plea counsel and retained new counsel. Pet. App. 8. On November 1, 2011, petitioner moved to withdraw his guilty plea under Federal Rule of Criminal Procedure 11(d)(2)(B) (2011). *Ibid.* He argued that his plea counsel had provided ineffective assistance by failing to advise him about the immigration consequences of his plea, as required by *Padilla*. *Id.* at 8; see pp. 2-3, *supra*. After an evidentiary hearing at which petitioner's wife, his plea counsel, and an immigration attorney testified, the district court denied petitioner's motion. Pet. App. 8-9; C.A. App. 47-119. The court concluded that defense counsel did not violate the standard in *Padilla* and that, even if he did, the court's "plea colloquy cured any error." Pet. App. 9.

The district court sentenced petitioner to three years of probation, including six months of home confinement. Pet. 4.

3. Petitioner appealed, and the government moved to enforce the appeal waiver in petitioner's plea agreement. Pet. App. 9. The court of appeals granted the government's motion and affirmed. *Ibid.*; see 7/18/12 Order. In February 2013, this Court denied certiorari. 133 S. Ct. at 1480.

4. In April 2013, the United States Department of Homeland Security placed petitioner in removal proceedings. Pet. App. 9. Two days later, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, renewing his assertion that his plea counsel provided ineffective assistance under *Padilla*. Pet. App. 9. The government moved to enforce the collateral-attack waiver in petitioner's plea agreement. *Id.* at 9, 24.

The district court denied petitioner's Section 2255 petition. Pet. App. 22-28. The court explained that it could decline to enforce the collateral-attack waiver if its enforcement would "work a miscarriage of justice." *Id.* at 25. The court concluded that petitioner had not demonstrated that a miscarriage of justice would result because he had not received ineffective assistance of counsel. *Id.* at 25–27.

5. The court of appeals affirmed. Pet. App. 1-19. The court explained that a defendant may waive his right to collaterally attack his conviction and sentence so long as the waiver is entered "knowingly and voluntarily and [its] enforcement does not work a miscarriage of justice." *Id.* at 11.

The court of appeals first concluded that petitioner had entered into the plea agreement knowingly and voluntarily. Pet. App. 11. The court stated that petitioner had signed the plea agreement after reviewing it with counsel and had represented at the plea hearing that he had entered the agreement voluntarily. *Id.* at 11-12.

The court of appeals next concluded that enforcing the collateral-attack waiver would not work a miscarriage of justice because petitioner's counsel had not been "ineffective or coercive in negotiating the very plea agreement that contained the waiver." Pet. App. 13 (quoting *United States* v. *Mabry*, 536 F.3d 231, 243 (3d Cir. 2008), cert. denied, 557 U.S. 903 (2009)); see *id.* at 16-19. With respect to whether counsel's performance was deficient, the court observed that counsel had failed to inform petitioner "that the plea made him subject to automatic deportation, as is required under *Padilla* in cases like [petitioner's] where the immigration consequences of a guilty plea are clear."

Id. at 15-16. The court did not reach a definitive conclusion as to "whether [petitioner's] plea counsel's advice constituted deficient performance," however, because it concluded that petitioner had failed to demonstrate that he was prejudiced as a result of counsel's errors. *Id.* at 16.

Turning to prejudice, the court of appeals explained that the district court repeatedly advised petitioner during the plea colloquy that his conviction placed him at risk of "automatic removal" and that petitioner had affirmed that he wished to plead guilty "even if the consequence [was] his automatic removal." Pet. App. 18. That exchange, the court of appeals reasoned, indicated that petitioner "was willing to plead guilty even if that plea would lead to automatic deportation." *Ibid.* The court also emphasized that, even putting aside the exchange during the plea colloquy, petitioner's "claim of prejudice is further undermined" by his failure to present "affirmative evidence * * * that he would have rejected the plea had his attorney fully informed him of its immigration consequences." *Id.* at 16 n.3.

ARGUMENT

Petitioner contends (Pet. 6-38) that the court of appeals erred in relying on the warnings about removal consequences that he received in his plea colloquy to conclude that petitioner was not prejudiced by his counsel's incorrect advice on the immigration consequences of his plea. The court of appeals' case-specific holding was correct, and no conflict exists among the courts of appeals. Further review is unwarranted.

1. In his plea agreement, petitioner waived his right to collaterally attack his conviction. Pet. App. 2. Under Third Circuit precedent, a knowing and volun-

tary collateral-attack waiver can be overcome if the defendant demonstrates that "an error amounting to a miscarriage of justice" affects his sentence. *Id.* at 12 (citing *United States* v. *Erwin*, 765 F.3d 219, 226 (3d Cir. 2014), cert. denied, 136 S. Ct. 400 (2015)). The Third Circuit has further held that "a miscarriage of justice may exist" if the defendant establishes that counsel was ineffective in negotiating the plea agreement. *Id.* at 12-13 (citing *United States* v. *Mabry*, 536 F.3d 231, 243 (3d Cir. 2008), cert. denied, 557 U.S. 903 (2009)). Petitioner therefore contends that his counsel was ineffective in negotiating his plea agreement because counsel wrongly advised him that he had a "good chance" of not being deported as a result of his conviction, *id.* at 7, when in fact deportation was nearly certain, *id.* at 14.

To make out a claim for ineffective assistance of counsel, a defendant must show, first, that his counsel's representation "fell below an objective standard of reasonableness," and second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* v. *Washington*, 466 U.S. 668, 688, 694 (1984). In *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), this Court held that counsel performs deficiently when she fails to provide a non-citizen client with reasonable advice concerning "the risk of deportation." *Id.* at 367; see *id.* at 366-367. In that situation, the defendant can demonstrate prejudice by showing "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985); see *Padilla*, 559 U.S. at 371-372. The defendant must support his

subjective assertion that he would not have pleaded guilty by showing that the "decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 371-372.

2. a. The court of appeals correctly held that in evaluating a defendant's claim of prejudice, the court may consider the information the defendant received in the plea colloquy before he pleaded guilty.

To establish prejudice, the defendant must show, among other things, that "but for counsel's errors, he would not have pleaded guilty." *Hill*, 474 U.S. at 59. To succeed on a *Padilla* claim, therefore, a defendant must generally demonstrate that avoiding removal was sufficiently important to him that had he known he could be removed as a result of a conviction, he would have foregone the benefits of pleading guilty and gone to trial, and that such a course of action would have been rational. In considering that question, courts may appropriately examine the warnings the defendant received before he pleaded guilty. The defendant's decision to plead guilty despite warnings about removal may indicate that at the time, he accepted the risk of removal as a consequence of conviction, yet still believed that the benefits of the plea outweighed that consequence. That sequence of events undermines the credibility of his after-the-fact assertion that he would not have pleaded guilty had counsel properly advised him.

Accordingly, the courts of appeals to address the issue have uniformly held that a district court's plea-colloquy warnings are relevant to the prejudice inquiry. See, *e.g.*, *United States* v. *Akinsade*, 686 F.3d 248, 253 (4th Cir. 2012) (in the context of immigration consequences, "[a] defendant may be unable to show

prejudice if at the Rule 11 proceeding the district court provides an admonishment that corrects the misadvice and the defendant expresses that he understands the admonishment"); see also *United States* v. *Newman*, 805 F.3d 1143, 1147 (D.C. Cir. 2015) (colloquy may cure prejudice from counsel's misadvice on immigration consequences); *United States* v. *Kayode*, 777 F.3d 719, 728-729 (5th Cir. 2014) (same); cf. *Cadavid-Yepes* v. *United States*, No. 14-2210, 2016 WL 75607, at *8 (6th Cir. Jan. 6, 2016) (warnings about sentencing exposure); *Thompson* v. *United States*, 732 F.3d 826, 830 (7th Cir. 2013) (same), cert. denied, 134 S. Ct. 1507 (2014); *United States* v. *Hamilton*, 510 F.3d 1209, 1216 (10th Cir. 2007) (same), cert. denied, 552 U.S. 1331 (2008).

Petitioner contends (Pet. 9) that considering plea-colloquy warnings in the prejudice inquiry "circumvent[s] the Court's Sixth Amendment requirement in *Padilla*." That is incorrect. As the Court recognized in *Padilla*, a defendant may establish that his Sixth Amendment right to effective assistance of counsel has been violated only if he is able to establish both deficient performance and prejudice. 550 U.S. at 369, 372; see *Strickland*, 466 U.S. at 694. The prejudice inquiry is founded on the principle that only attorney errors that create a reasonably probable effect on the outcome of the adversarial process should be grounds for relief, *Strickland*, 466 U.S. at 691—and on the recognition that the government's substantial interest in the finality of guilty pleas would be undermined if it were too easy for defendants seeking a better outcome to challenge a plea after the fact, *Hill*, 474 U.S. at 58. If a defendant's attorney performs deficiently by failing to inform the defendant of removal conse-

quences, but the record as a whole—including the plea colloquy—demonstrates that the defendant would have pleaded guilty even if he had been properly advised, counsel's deficient performance did not affect the outcome. In that case, the defendant is not entitled to relief under the Sixth Amendment.

Petitioner also argues (Pet. 21) that a district court's explanation of immigration consequences can never "cure" counsel's misadvice, because counsel is better positioned to provide advice tailored to the defendant's situation. But whether or not the court's warning provides precisely the same information competent counsel would have, a defendant's decision to plead guilty after receiving extended warnings about removal may provide evidence of the defendant's decisionmaking process. If, for instance, the court repeatedly warns the defendant of a substantial risk he will be automatically removed, and the defendant nonetheless pleads guilty, that may establish that he accepted the removal consequences of an otherwise beneficial plea.[2] Petitioner has provided no sufficient

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[2] Petitioner incorrectly asserts (Pet. 22-23) that a plea colloquy affords no "time for meaningful reflection." The colloquy is designed to ensure that the defendant still wishes to plead guilty after being informed of the consequences of doing so. See *United States* v. *Vonn*, 535 U.S. 55, 69 (2002) (Rule 11 provides "a detailed formula for testing a defendant's readiness to proceed to enter a plea of guilty"). A defendant may ask for a recess or continuance if he learns something during the colloquy that affects his willingness to plead. See, *e.g.*, *United States* v. *Nario-Marquez*, 406 Fed. Appx. 145, 147 (9th Cir. 2010) (when district court realized counsel had misadvised defendant about sentencing exposure, court explained exposure to defendant and then granted a recess to permit him to discuss the explanation with counsel); see also *United States* v. *Fard*, 775 F.3d 939, 946 (7th Cir. 2015) (court may call

reason to conclude that, regardless of the content of the warning, a district court's explanation should never be considered along with other circumstances bearing on prejudice.

b. The court of appeals correctly held that, in the circumstances of this case, petitioner failed to establish that he was prejudiced by counsel's deficient performance. Petitioner's challenge to the court's conclusion does not warrant review.

As an initial matter, petitioner contends (Pet. 30) that the court of appeals treated the plea colloquy as "dispositive" of the prejudice inquiry, rather than as one factor to be considered. The court did not suggest, however, that whenever a defendant receives any sort of warning about the risk of removal, he will not be able to establish prejudice, regardless of the content of the warning or the surrounding circumstances. Nor did the court set forth any general approach designed to govern future cases involving plea-colloquy warnings. Pet. App. 16-19. Instead, the court focused on petitioner's claim and the facts of this case. The court relied heavily on the plea colloquy, but it also explained that petitioner had failed to present affirmative evidence that he would not have pleaded guilty had his counsel performed reasonably. *Id.* at 16 n.3. The court's decision is thus a fact-specific application of the well-established prejudice standard set forth in *Strickland*, *Hill*, and *Padilla*.

As the court of appeals explained, the district court emphasized during the plea colloquy that petitioner could face "automatic removal" as a result of his conviction. Pet. App. 6. The district court explained that

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recess during plea colloquy to permit defendant to confer with counsel).

"[u]nder federal law, a broad range of crimes are removable offenses, *including the offense to which you are pleading guilty*." *Ibid.* (emphasis added). The court then asked petitioner whether "[n]ow knowing this, do you nevertheless want to plead guilty regardless of any immigration consequences that your plea of guilty may entail, *even if the consequence is your automatic removal from the United States*?" *Ibid.* (emphasis added). Petitioner responded, "[y]es." *Ibid.* Petitioner's own attorney, in summarizing the plea agreement, stated that "participation in [a] narcotics conspiracy is considered" a "remov[able] offense[]" and that petitioner "acknowledges * * * that a plea may entail automatic removal from the United States." C.A. App. 31. The plea agreement itself reaffirmed petitioner's understanding, as it stated that "a broad range of crimes are removable offenses" and that petitioner "nevertheless affirms that he wants to plead guilty regardless of any immigration consequences that his plea may entail, even if the consequence is his automatic removal from the United States." Pet. App. 4.

As the court of appeals correctly concluded, petitioner's responses to the warnings at the plea colloquy and in the plea agreement indicated that petitioner "was willing to plead guilty even if that plea would lead to automatic deportation." Pet. App. 18. Petitioner points out (Pet. 15) that the district court did not inform petitioner that he in fact faced automatic removal. But regardless of whether the district court gave petitioner precise advice with respect to his specific removal prospects, the exchanges between petitioner and the district court indicate that petitioner was aware that automatic removal could result, and

he was not dissuaded from pleading guilty. The lower courts appropriately took that into account in considering petitioner's claim of prejudice.

The court of appeals also emphasized that petitioner failed to present any "affirmative evidence * * * that he would have rejected the plea had his attorney fully informed him of its immigration consequences." Pet. App. 16 n.3. Because petitioner bore the burden of demonstrating prejudice, see pp. 9-10, *supra*, that failure alone was sufficient ground on which to deny relief. The sole evidence that petitioner offered was his wife's testimony that *she* was concerned about removal consequences, C.A. Supp. App. 33, and the conclusory assertion that "[n]o rational human being" would have pleaded guilty in his position, *id.* at 21. Even if the plea colloquy had included no discussion of immigration consequences, petitioner's evidence would have been insufficient to establish that he would not have pleaded guilty but for counsel's unreasonable performance.

In addition, petitioner failed to establish, as is necessary "to obtain relief on this type of claim," that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372. As competent counsel would have advised, petitioner faced removal if he was convicted, whether that conviction was the result of a trial or a plea. See *United States* v. *Batamula,* No. 12-20630, 2016 WL 2342943, at *2 (5th Cir. May 3, 2016). Petitioner's only chance to avoid removal was therefore an acquittal, but as the district court concluded, the evidence of guilt was overwhelming. C.A. Supp. App. 38 (noting "the plethora of witnesses and evidence available to support the government's position of which the Court

is aware from the trial of Defendant's co-conspirators"). Going to trial therefore conveyed no measurable advantage. On the contrary, it would have entailed significant risk of a longer sentence. Under the plea agreement, petitioner was able to plead to a lesser offense than that charged in the indictment—one for which he was ultimately sentenced to probation. He also received the government's commitment to seek a sentence reduction for acceptance of responsibility. *Id.* at 4-7.

In sum, the court of appeals correctly concluded, after considering all of the circumstances, that petitioner had failed to demonstrate prejudice resulting from any misadvice on his attorney's part. That fact-bound conclusion does not warrant review. And even if this Court were to grant review and conclude that the court of appeals erred in considering the warnings petitioner received at the plea colloquy, petitioner would receive no benefit from that result, as he failed to present evidence that he would not have pleaded guilty or that such a decision would have been rational under the circumstances.

3. Petitioner contends (Pet. 9) that a conflict among courts of appeals exists concerning whether a plea colloquy can be sufficient to prevent the defendant from being prejudiced by counsel's misadvice. Petitioner is incorrect.

Contrary to petitioner's assertion (Pet. 9-11), none of the appellate decisions on which petitioner relies held that a district court's explanation of immigration consequences during a plea colloquy may never be considered in evaluating whether the defendant would not have pleaded guilty had he known about those consequences. Nor do any of the appellate decisions

that petitioner cites hold that any mention of removal during a plea colloquy necessarily prevents the defendant from later establishing prejudice. But cf. Pet. 7 & n.3. Rather, to the extent the decisions address the question presented here, they hold only that the defendant's decision to plead after receiving warnings is a relevant consideration in the prejudice analysis; and that on the facts of each case, the defendant established prejudice despite any warning given by the district court. Those decisions are thus consistent with the decision below.

In *Akinsade*, the Fourth Circuit held that the district court's "general and equivocal admonishment" that the defendant might be removed did not prevent him from establishing that he would not have pleaded guilty had he been aware that removal was certain. 686 F.3d at 254. Unlike in this case, the district court had mentioned removal only in passing, at the end of a list of other potential collateral consequences of conviction, such as losing the right to vote or possess firearms. *Id.* at 250. The Fourth Circuit took care to emphasize, consistent with the decision below, that a more robust warning could have weighed against finding that the defendant suffered prejudice. *Id.* at 255. Similarly, in *United States* v. *Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015), the court of appeals held that a brief, equivocal statement that the defendant "potentially * * * could be deported or removed, perhaps" did not "purge prejudice." *Id.* at 785, 790 (emphasis omitted).

In *United States* v. *Urias-Marrufo*, 744 F.3d 361 (2014), the Fifth Circuit did not address the question presented here. The court held that a defendant's knowing and voluntary guilty plea did not prevent the

defendant from moving to withdraw the plea on the ground that counsel had misadvised him on the immigration consequences of pleading. *Id.* at 369. In explaining that holding, the court stated that it is "counsel's duty, not the court's, to warn of certain immigration consequences, and counsel's failure cannot be saved by a plea colloquy." *Ibid.* The court remanded to permit the district court to address the *Padilla* claim, and it therefore did not address whether the defendant had suffered prejudice in light of the plea colloquy at issue. *Ibid.*

The state-court decisions on which petitioner relies (Pet. 11) also do not conflict with the decision below. In *Ortega-Araiza* v. *State*, 331 P.3d 1189 (Wyo. 2014), the Supreme Court of Wyoming held that a "generic advisement" that "certain felony convictions may be the basis for" removal proceedings was insufficient to establish that the defendant was not prejudiced. *Id.* at 1192, 1196. That passing statement is very different from the district court's extensive, specific warning in this case. In *State* v. *Favela*, 343 P.3d 178 (N.M. 2015), the Supreme Court of New Mexico held that a court's plea colloquy "cannot, *by itself*, cure the prejudice created by" defense counsel's deficient performance and that courts adjudicating *Padilla* claims should consider the totality of the circumstances before concluding that the defendant did not suffer prejudice. *Id.* at 184. That holding is consistent with the decision below, which examined not only the plea colloquy, but also the plea agreement and the lack of other "affirmative evidence."[3] Pet. App. 16 n.3. Further review is not warranted.

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[3] Two other decisions did not address the question presented here. In *State* v. *Sandoval*, 249 P.3d 1015, 1020-1021 (Wash. 2011),

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2016

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the Supreme Court of Washington discussed the effect of the plea colloquy only in relation to the first *Strickland* prong, which is not at issue here. In *In re Resendiz*, 19 P.3d 1171 (Cal. 2001), a pre-*Padilla* decision, the court held only that an adequate plea colloquy is not a "categorical bar to immigration-based ineffective assistance claims." *Id.* at 1177.