

No. 08-651

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IN THE  
**Supreme Court of the United States**

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JOSE PADILLA,

*Petitioner,*

*v.*

COMMONWEALTH OF KENTUCKY,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF KENTUCKY

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BRIEF FOR AMICI CURIAE  
ASIAN AMERICAN JUSTICE CENTER,  
MEXICAN AMERICAN LEGAL DEFENSE AND  
EDUCATIONAL FUND, AND OTHER  
IMMIGRANTS' RIGHTS ORGANIZATIONS  
IN SUPPORT OF PETITIONER

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**INTEREST OF AMICI CURIAE<sup>1</sup>**

Amici are non-profit organizations that promote equality, justice, and civil rights for immigrants. The Asian American Justice Center (AAJC) is a non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. AAJC works to promote civic engagement, forge strong and safe communities, and create an inclusive society on a local, regional, and national level. Collectively, AAJC and its affiliates, the Asian American Institute, Asian

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<sup>1</sup> The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Law Caucus, and Asian Pacific American Legal Center of Southern California, have more than 50 years of experience in litigation, public policy, advocacy, and community education.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights and equality of treatment of Latinos living in the United States. MALDEF's mission includes a commitment to pursuing political and civil equality and opportunity through advocacy, community education, and the courts. MALDEF therefore has an interest in the fair and predictable enforcement of the nation's criminal laws.

A list and description of additional amici are included in the appendix to this brief.<sup>2</sup> Those amici are organizations that, like AAJC and MALDEF, work directly with immigrant communities that are affected by the issues in this case.

This case addresses an issue of great importance to amici and many immigrants for whom they advocate: the extent to which non-citizen criminal defendants have a Sixth Amendment right to competent legal ad-

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<sup>2</sup> Additional amici are: Asian American Institute; Asian Law Alliance; Asian Law Caucus; Asian Pacific American Legal Center of Southern California; Boat People, SOS; Center for Pan Asian Community Services; Florida Immigrant Advocacy Center; Fred T. Korematsu Center for Law and Equality; National Asian Pacific American Bar Association; National Asian Pacific American Women's Forum; National Immigrant Justice Center; National Korean American Service and Education Consortium; North Carolina Justice Center; Organization of Chinese Americans; South Asian Americans Leading Together; Southeast Asia Resource Action Center; and Southern Coalition for Social Justice.

vice regarding the immigration consequences of accepting a guilty plea. Under current immigration law, if a non-citizen is convicted of any one of a wide array of offenses, including some relatively minor crimes, that non-citizen must be deported and must be detained pending removal proceedings. In addition, many such convictions can permanently bar those non-citizens from ever returning to the United States. Amici submit this brief to demonstrate the devastating real-life consequences that inadequate or erroneous legal advice in this context can have for immigrants and their families, many of whom are long-time legal permanent residents with family, jobs, and homes in the United States.

### SUMMARY OF ARGUMENT

The United States is home to approximately 12.8 million legal permanent residents. Rytina, *Estimates of the Legal Permanent Resident Population in 2007*, at 1 (DHS Feb. 2009), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr\\_pe\\_2007.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_pe_2007.pdf). Some came to the United States to join their families or were adopted as small children by American parents.<sup>3</sup> Others were sponsored by employers.<sup>4</sup> Still others sought refuge in the United States as they fled persecution and violence in countries such as Somalia, Iran,

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<sup>3</sup> In 2008, 716,244 family-sponsored immigrants became legal permanent residents. Monger and Rytina, *U.S. Legal Permanent Residents: 2008*, at 3 (DHS Mar. 2009), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr\\_fr\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2008.pdf).

<sup>4</sup> In 2008, 166,511 immigrants became legal permanent residents as a result of employment-based preferences. *Id.*

and Cambodia.<sup>5</sup> While their backgrounds and countries of origin vary, many legal permanent residents make America their home and establish roots in their communities, contribute to the economy as members of the workforce or as small business owners,<sup>6</sup> raise families, and join the military.<sup>7</sup>

Like United States citizens, non-citizens sometimes run afoul of the law. When non-citizens interact with the criminal justice system, they may face disadvantages as a result of language and cultural barriers. See National Asian Pacific American Legal Consortium, *Equal Justice, Unequal Access* (2005), available at <http://www.advancingequality.org/files/equaljustice.pdf>. That problem is compounded because under current immigration law, convictions for many types of relatively minor crimes result in mandatory detention and deportation. Indeed, since the effective date of the 1996 amendments to the Immigration and Nationality Act (INA), which expanded the scope of deportable offenses, the number of persons deported from the United States for criminal convictions has greatly increased. From 1998 to 2006, the total number of depor-

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<sup>5</sup> In 2008, 166,392 refugees and asylees became legal permanent residents. *Id.*

<sup>6</sup> See Batalova and Dixon, *Foreign-Born Self-Employed in the United States* (Migration Policy Institute Apr. 2005), available at <http://www.migrationinformation.org/USFocus/display.cfm?ID=301>.

<sup>7</sup> According to the United States Army, roughly 8,000 non-citizens enlist in the United States military each year. See McIlvaine, *U.S. Immigration Reaches out to Military Soldiers and Spouses* (May 2005), available at <http://www.army.mil/-news/2009/05/05/20610-us-immigration-reaches-out-to-military-soldiers-and-spouses/>.

tations for criminal convictions rose from 72,482 to 103,163 annually. Human Rights Watch Report, *Forced Apart* 19 (Apr. 2009), available at <http://www.hrw.org/sites/default/files/reports/us0409web.pdf>. The vast majority of those deportations were for non-violent crimes. *Id.* at 33.

Because detention and deportation tear apart families and disrupt long-settled expectations, for many non-citizens, the immigration consequences of a particular conviction are the most important consideration in deciding whether to accept a guilty plea. As the real-world accounts in Part I of this brief demonstrate, however, without understanding the potential immigration consequences of a given plea, a non-citizen often cannot make a fully informed decision whether to accept a plea agreement. By contrast, as the examples in Part II demonstrate, in many cases where defense attorneys have provided such advice to non-citizen clients, those clients have been better able to make fully informed decisions about whether to accept a plea or go to trial. Defense counsel therefore should ensure that a non-citizen client considering a guilty plea understands the full extent of the immigration consequences that can flow from accepting that plea. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) (recognizing that defense counsel owes a client “certain basic duties,” including “the overarching duty to advocate the defendant’s cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution”); *see also Hill v. Lockhart*, 474 U.S. 52 (1985) (extending *Strickland* to the plea context).

**ARGUMENT****I. BECAUSE THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS CAN BE EXTREMELY SERIOUS, AVOIDING THOSE CONSEQUENCES CAN BE THE MOST IMPORTANT CONSIDERATION FOR NON-CITIZENS IN DETERMINING WHETHER TO ACCEPT A PARTICULAR GUILTY PLEA****A. Immigration Law Imposes Harsh Consequences For Convictions Classified As Aggravated Felonies Or Otherwise Leading To Mandatory Detention And Deportation**

Although courts have often characterized the immigration consequences of a guilty plea as “collateral” effects, the 1996 amendments to the INA rendered the immigration consequences of convictions for many crimes more certain, immediate, and severe. *See* Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. IV, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546. Under the amended law, convictions for many relatively minor state-law crimes that previously were not deportable offenses—or were offenses that carried immigration consequences from which courts had discretion to grant relief on a case-by-case basis—now result in mandatory detention and deportation. Without accurate information about how the INA classifies a particular crime, therefore, a non-citizen considering whether to plead guilty to a minor crime in exchange for a lighter sentence risks accepting a plea deal that has the unintended consequence of detention and, in many cases, permanent banishment from the United States.

**1. A conviction for a crime classified as an aggravated felony results in mandatory deportation for non-citizens**

The INA requires deportation of non-citizens who have been convicted of a crime qualifying as an “aggravated felony.” 8 U.S.C. § 1227(a)(2)(A)(iii). A conviction for such an offense virtually mandates that the non-citizen will be deported because immigration judges no longer have discretion to grant relief in such cases. *Id.* § 1229b(a)(3) (excluding aggravated felons from the category of non-citizens eligible for cancellation of removal).<sup>8</sup> Persons convicted of aggravated felonies and sentenced to a term of at least five years of imprisonment also become ineligible for withholding of removal. *Id.* § 1231(b)(3)(B).<sup>9</sup> In general, non-citizens

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<sup>8</sup> Deportation is also mandatory for a non-citizen convicted of other crimes that qualify as deportable offenses under 8 U.S.C. § 1227(a)(2), if that non-citizen has not resided in the United States for a specified number of years. *See id.* § 1229b(a)(1)-(2).

<sup>9</sup> Only in extraordinary circumstances can a conviction for an aggravated felony not lead to mandatory deportation. For example, non-citizens convicted of aggravated felonies who can show that they will be subject to torture if deported and non-citizens who were previously admitted as refugees or asylees because of a well-founded fear of persecution might qualify for relief under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987). *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, tit. XXII, § 2242, 112 Stat. 2681, 2681-822 (codified at 8 U.S.C. § 1231 note). Non-citizens allowed to remain under those exceptions, however, remain subject to deportation at any time and are no longer eligible for adjustment of status to that of legal permanent resident. *See* 8 C.F.R. §§ 208.16-.17; 8 U.S.C. § 1159(b)-(c). Although such relief is available, it is rarely granted, and non-citizens have been denied such relief even

convicted of aggravated felonies are also permanently barred from reentering the country once deported. *Id.* § 1182(a)(9)(i). Additionally, a conviction for an aggravated felony serves as a bar to naturalization. *See id.* § 1427(a) (to qualify for naturalization, a non-citizen must be a person of “good moral character”); *id.* § 1101(f)(8) (a person convicted of an aggravated felony shall not be found to be a person of “good moral character”).

By broadening the definition of “aggravated felony,” the 1996 amendments to the INA greatly expanded the scope of convictions that subject a non-citizen to such mandatory deportation. The INA’s current definition of “aggravated felony” includes 21 categories of qualifying offenses, many of which have their own subcategories. 8 U.S.C. § 1101(a)(43). Under that expanded definition, convictions for many relatively minor crimes have been treated as “aggravated felonies.” *See, e.g.,* Dugger, *After Crime, She Made a New Life, but Now Faces Deportation*, N.Y. Times, Aug. 11, 1997, at A8 (telling the story of Xuan Wilson, a legal permanent resident since age four, who faced deportation to Vietnam as an aggravated felon after being convicted of forging a check for \$19.83). Indeed, in some cases, even convictions for crimes classified as misdemeanors under state law have been treated as aggravated felonies for immigration purposes. *See, e.g., United States v. Graham*, 169 F.3d 787 (3rd Cir. 1999);

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in the face of deportation to countries where human rights violations are rampant. *See infra* n.10 (describing cases in which courts have rejected requests for CAT relief from Haitian immigrants, notwithstanding the certainty of detention in Haitian prisons with horrendous conditions akin to those of a “slave ship”).

*United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000); cf. Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 Harv. L. Rev. 1936, 1939 (2000) (some courts have interpreted the definition such that “a crime need not be either aggravated or a felony” to qualify as an aggravated felony).

For instance, the scope of the aggravated felony provision has been held to

include[] such offenses as misdemeanor theft of a video game, valued at approximately \$10; the sale of \$10 worth of marijuana; breaking into an Alcoholics Anonymous meeting in 1968 and drinking a bottle of wine with friends; one woman pulling the hair of another during a fight over a boyfriend; or shoplifting \$15 worth of baby clothes.

*Shortfalls of the 1996 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 33 (2007) (prepared statement of Paul Virtue, former INS Commissioner); see also *Yong Wong Park v. U.S. Att’y Gen.*, 472 F.3d 66, 71-72 (3d Cir. 2006) (holding that Yong Wong Park, a legal permanent resident convicted of selling counterfeit clothing, was deportable for having been convicted of an aggravated felony).

## **2. Convictions for many classes of crimes subject non-citizens to mandatory detention**

The 1996 amendments to the INA also greatly expanded the categories of convictions that subject non-citizens to mandatory immigration detention, even af-

ter completion of their criminal sentences. The law requires non-citizens convicted of specified crimes to be detained during their deportation or relief proceedings. 8 U.S.C. § 1226(c)(1); *see also Demore v. Kim*, 538 U.S. 510 (2003). Some non-citizens subject to that provision are detained in immigration facilities operated by private contractors or the federal government; others are detained in state or county prisons alongside inmates. *See* Amnesty International, *Jailed Without Justice* 3 (Mar. 25, 2009), available at <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>. The conditions of confinement for non-citizens can be similar to—and often worse than—the conditions for criminal inmates. *Id.*; *see infra* Part I.B.4.

Mandatory detention is the consequence of convictions for a wide variety of crimes. For example, the INA mandates detention for non-citizens in the United States charged with being removable after having been convicted of, among other things, an aggravated felony, two crimes involving moral turpitude, a firearms offense, or a controlled substance violation. 8 U.S.C. § 1226(c). Like the definition of aggravated felony, the definitions of many of the other crimes for which detention is mandatory can encompass a number of surprisingly petty offenses. For instance, under the INA’s moral turpitude provision, non-citizens have been detained for such offenses as evading subway fares, *see* Bernstein, *Post-9/11, Even Evading Subway Fares Can Raise the Prospect of Deportation*, N.Y. Times, Oct. 11, 2004, at B1; stealing a \$7 bottle of medicine for a sick child, *see* INS Record of Sworn Statement in Admin. Proceeding 4-5, *In re Calvillo* (June 18, 2007); and various other petty misdemeanors involving theft or intent to defraud, *see In re Pinlac-Abraham*, 2009 WL 331223 (BIA Jan. 22, 2009) (“Theft offenses have

long been held to involve moral turpitude.”). In addition, convictions for possession of small amounts of drugs for personal consumption can subject a person to mandatory detention. *See* 8 U.S.C. § 1226(c)(1)(B).

**3. Whether a non-citizen’s acceptance of a guilty plea will lead to detention or deportation often turns largely on the specifics of the plea agreement**

Because the INA’s reach is exceedingly broad, non-citizens may plead guilty to minor crimes in exchange for a lighter sentence without realizing that they are pleading guilty to crimes that will subject them to mandatory deportation or, at a minimum, detention akin to imprisonment. Whether immigration law classifies a particular criminal conviction as one that results in detention or deportation, however, can turn largely on the specifics of a non-citizen’s plea agreement. For instance, a plea to shoplifting with a one-year suspended sentence, for which the defendant serves no time in prison, results in mandatory detention and deportation. In contrast, a plea to the same crime with a sentence of six months of actual prison time does not have immigration consequences. *See* 8 U.S.C. § 1101(a)(43)(G) (a “theft offense ... for which the term of imprisonment [is] at least one year” qualifies as an aggravated felony) (footnote omitted); *id.* § 1101(a)(48)(B) (“[a]ny reference to a term of imprisonment” in the INA includes suspended sentences). Therefore, because the immigration consequences of pleading guilty can be so severe—and because the specifics of the plea agreement are so important—it is crucial that non-citizens be fully aware of those relevant considerations before accepting a plea.

**B. Deportation And Detention, Which Are Often Consequences Of Criminal Convictions For Non-Citizens, Can Severely Disrupt Settled Expectations, Wreak Havoc On An Individual's Life, And Tear Families Apart**

For many non-citizens facing criminal prosecution, the most important consideration in deciding whether to accept a guilty plea is the effect that the decision will have on their ability to remain in the United States with their families. Indeed, this Court has long recognized that

[t]he impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death.

*Bridges v. Wixon*, 326 U.S. 135, 164 (1945); *see also Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation “obviously deprives [a person] of liberty. ... It may result also in loss of both property and life, or of all that makes life worth living”).

As the following accounts make clear, that risk is not merely hypothetical. Deportation and detention can tear apart families, some of whom have lived legally in the United States for decades, and can “shatter[] the life [they have] built in America.” *Atkinson v. United States*, 2009 WL 900067, at \*5 (N.D. W. Va. Mar. 31, 2009). Deportation and detention also can separate non-citizens from their livelihoods and businesses. Moreover, deportation can send non-citizens back to the countries from which they fled violent persecution. And even non-citizens who are subject to mandatory

detention but who are not ultimately deported suffer serious familial and personal consequences. Because the potential consequences of accepting a guilty plea can result in devastating outcomes,<sup>10</sup> a non-citizen should understand those consequences in order to make a truly knowing and voluntary guilty plea.

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<sup>10</sup> Indeed, in some cases, non-citizens—after completing their criminal sentences and serving time in immigration detention in the United States—may be deported to countries that incarcerate deportees in horrendous conditions upon their arrival.

For example, the Haitian government detains all Haitian citizens who have been deported from the United States because of past criminal convictions. *Auguste v. Ridge*, 395 F.3d 123, 129 (3d Cir. 2005). The conditions of confinement in Haitian detention facilities have been described as “reminiscent of a slave ship.” Delt, *Mother of Two, Deported to Haiti, Dies in Haitian Jail*, *Haiti Progrès*, Sept. 27, 2000, available at <http://www.haiti-progres.com/2000/sm000927/XENG0927.htm> (last visited Apr. 3, 2009). Haitian deportees are often detained “in cells that are so tiny and overcrowded that prisoners must sleep sitting or standing up, and in which temperatures can reach as high as 105 degrees Fahrenheit during the day.” *Auguste*, 395 F.3d at 129. Many of those cells “are full of vermin” and “lack basic sanitation facilities, ... leaving the floors covered with urine and feces.” *Id.* Detained deportees also lack access to basic medical care, which, combined with the unsanitary conditions of the facilities, can lead to illness or death. *Mother of Two, Deported to Haiti, Dies in Haitian Jail*, *supra* (telling the story of Claudette Etienne, who was deported from the United States and died in a Haitian detention facility after drinking the tap water).

Despite the Haitian government’s practice, many courts have rejected Haitian nationals’ requests for relief under the CAT, 8 U.S.C. § 1231 note. *See, e.g., Auguste*, 395 F.3d at 154 (holding that non-citizen awaiting deportation to Haiti did not qualify for CAT relief even though “[t]he conditions that [he] will likely face in Haiti’s prisons, like those awaiting many other criminal deportees, are harsh and deplorable”).

### 1. Deportation and detention separate families

Deportation often has devastating consequences for families, particularly families of legal permanent residents who have resided in the United States for many years. In addition, many non-citizens subject to mandatory detention are detained hundreds of miles away from their homes, separating families for months or even years.

The case of Maria Taganeca illustrates how much is at stake when a lawyer fails to pay attention to the immigration consequences of a plea agreement. Taganeca, a native of Fiji, came to the United States with her family at age seven. She was admitted as a legal permanent resident, and she and her entire family have resided lawfully in the United States since 1987. *In re Taganeca*, No. A40 106 555, Application for Cancellation of Removal, Ex. A, 1 (Exec. Office for Immigr. Review Jan. 26, 2006).

Taganeca grew up in Missouri and maintained strong ties with her family. *In re Taganeca*, Application for Cancellation of Removal, Ex. A, at 1-2. She graduated from high school, enrolled in community college, and held a series of steady jobs, including employment as a restaurant cook. *Id.* She was the primary caregiver for her elderly mother, who suffered from diabetes and renal failure in addition to being wheelchair bound. *Id.* Taganeca also cared for her father, who had a history of chronic illness, and her uncle, who had throat cancer. She was involved in her community, running errands for neighbors and coaching a children's swim team. *Id.*

In 2006, Taganeca was arrested when she was driving with some friends, one of whom had drugs in his possession. Although she did not have drugs on her

person, she was charged under Missouri law with possession of a controlled substance with intent to deliver. *In re Taganeca*, Application for Cancellation of Removal, Exs. G-I. Her attorney advised her to plead guilty, without accurately informing her that accepting such a plea could render her deportable. *In re Taganeca*, No. A40 106 555, Removal Proceedings, Resp. Br. 3 (BIA Dec. 21, 2006).

Taganeca was sentenced to a term of probation, but the offense to which she pleaded guilty qualified as a “drug trafficking crime,” and therefore an aggravated felony, pursuant to 8 U.S.C. § 1101(a)(43)(B). Immigration and Customs Enforcement (ICE) subsequently detained her and initiated removal proceedings. Because the crime was an aggravated felony, Taganeca was not eligible for cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3). She therefore faced almost certain deportation to Fiji, which would have uprooted her life in the United States, left her elderly parents and uncle without a caregiver, and sent her to a country where she had weak roots and very little family. *In re Taganeca*, Application for Cancellation of Removal, Ex. A, at 2. Taganeca feared the effect that deportation would have on her family, explaining, “I’m not much of a daughter, sister or Aunty ... being deported from my family.” *Id.*

Taganeca subsequently filed for post-conviction relief on the grounds that her attorney’s assistance was ineffective and that her plea was not knowing or voluntary because her attorney did not accurately advise her that pleading guilty to the drug-trafficking offense would result in her deportation. The court granted relief, vacated her conviction, and allowed her to plead guilty to simple possession. Although Taganeca was spared deportation, she was subject to many months of

detention, during which she could not care for her chronically ill family members. Moreover, if this Court rules that counsel has no duty to provide accurate advice in a circumstance such as Taganeca's, then relief of the sort Taganeca was fortunate enough to receive will no longer be available.

## **2. Deportation and detention separate non-citizens from their livelihoods**

Many non-citizens come to the United States with the hope of achieving a better economic future for themselves and their families. To that end, some build and run their own businesses. Indeed, the most recent census revealed that roughly 1.4 million foreign-born individuals in the United States were self-employed. *Foreign-Born Self-Employed in the United States, supra*.<sup>11</sup> Deportation and detention, however, can separate non-citizens from their businesses and careers. See, e.g., Ojito, *Immigrant Fights Off His Deportation*, N.Y. Times, Sept. 4, 1998, at B3 (describing the case of Jesus Collado—a long-time legal permanent resident, restaurant owner, and father of three children—who was detained for seven months pending relief proceedings, “almost lost his restaurant” while in detention, and owed \$13,000 in back bills and \$36,000 in back rent upon his release).

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<sup>11</sup> See also Immigrant Learning Center, *Economic Contributions of Immigrants Through Entrepreneurship*, available at [http://www.ilctr.org/news/pdf/imm\\_entrepreneurs.pdf](http://www.ilctr.org/news/pdf/imm_entrepreneurs.pdf) (last visited May 31, 2009) (noting that every census from 1880 through 1990 showed “that immigrants are more likely to be self-employed than natives” and describing “immigrant entrepreneurs as engines for economic growth in urban areas and centers of innovation”).

For instance, Martin Medel, a legal permanent resident, came to the United States from Mexico in 1990. Mem. of Law in Support of Pet. for Writ of Mandamus 3, *Medel v. Head*, No. Civ. 09-1-3334-33 (Ga. Super. Ct., Cobb County Apr. 9, 2009). Medel built a life in Georgia, where he married, bought a home, and had three children who are United States citizens. In addition, Medel started a successful subcontracting business. One of his business associates has described him as “a model husband, father, and businessman who represents the ideal individual that we, as American citizens, should embrace and expect in our country.” Letter from Jason R. Wagner, Feb. 5, 2009.<sup>12</sup> Another business associate, who has had a business relationship with Medel’s subcontracting company for eleven years, explained Medel’s devotion to his business: “Martin Medel is one of the finest men I’ve ever met. I’ve found him to be utterly honest and dependable. Martin runs a very successful business. ... He sets the example by working harder than anyone else. We consider him a major asset.” Letter from Leonard A. D’Orlando, Jr., Feb. 5, 2009.<sup>13</sup>

While driving one night in 1999, Medel was pulled over. Upon searching his pockets, police found a dollar bill coated with trace amounts of cocaine. Aff. of Martin Medel Mejia, Mar. 24, 2009.<sup>14</sup> Medel, who had no prior criminal record, was charged with violating the Georgia Controlled Substances Act for possessing less

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<sup>12</sup> This document is on file with counsel for amici and is available at the Court’s request.

<sup>13</sup> *See supra* n.12.

<sup>14</sup> *See supra* n.12.

than one gram of cocaine. Mem. in Support of Pet. for Writ of Mandamus 4-7. In exchange for pleading guilty pursuant to the Georgia First Offender Act, he was offered no jail time, conditioned on the successful completion of a term of probation. *Id.* The plea agreement also contained a promise that, should he successfully complete probation, Medel would not have a criminal record or an adjudication of guilt under state law. *Id.* Relying on advice from his counsel that such a plea would not affect his immigration status, Medel accepted the plea and was sentenced to a term of probation. *See id.*; Medel Aff. Medel successfully completed probation, fulfilled the terms of the plea agreement, and had no further problems with the law. Mem. in Support of Pet. for Writ of Mandamus 8.

In February 2009, Medel traveled to Mexico to visit friends. Upon his return, ICE detained him in Texas and charged him as being removable under 8 U.S.C. § 1227(a)(2)(B) for having committed a controlled substance offense. *See* Pet. for Writ of Mandamus 8. He was immediately placed in a Texas detention facility pending his removal proceedings. Medel has asserted that, because of the impact on his life, family, and business, he would not have pleaded guilty had his lawyer accurately informed him that doing so could lead to deportation. Medel Aff. He remains in detention in Texas pending his deportation proceedings, far away from his family, home, and business in Georgia.

### **3. Deportation can send non-citizens back to the countries from which they fled persecution**

Thousands of people fleeing persecution in their home countries are admitted to the United States each year. Indeed, in 2008 alone, 90,030 refugees became le-

gal permanent residents, as did 76,362 asylees. *U.S. Legal Permanent Residents: 2008*, at 3, *supra*. Deportation, however, can send such people back to the countries from which they fled, often to avoid oppression, torture, or death.

For example, in the 1970s and 1980s, the United States admitted roughly 145,000 Cambodian refugees fleeing genocide and persecution under the repressive Khmer Rouge regime. Sontag, *In a Homeland Far from Home*, N.Y. Times Magazine, Nov. 16, 2003, *available at* <http://www.nytimes.com/2003/11/16/magazine/16CAMBODIA.html>. Many of those refugees were children. Once in the United States, “[t]he Cambodian refugees ... were singularly ill equipped to adjust to America” because of their peasant backgrounds and the trauma they had experienced. *Id.* As a result, many Cambodian refugees who arrived as children “were left to fend for themselves” and ended up getting into legal trouble. *Id.*

Despite the fall of the Khmer Rouge, Cambodia’s “human rights record remain[s] poor,” U.S. Department of State, *2008 Human Rights Report: Cambodia* (Feb. 25, 2009), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119036.htm>. Many Cambodians who have been convicted of deportable offenses, particularly those who fled to the United States as children, face deportation to a strange land where they have no relatives and whose language they do not speak. Unmacht, *A Bumpy Road Ahead for US Deportees to Cambodia*, *Christian Science Monitor*, Jan. 21, 2003, *available at* <http://www.csmonitor.com/2003/0121/p08s01-wosc.html>. Indeed, “[o]ne in seven returnees have never before set foot in Cambodia, because they were born in refugee camps in Thailand. Many don’t speak Khmer, and almost none read or write the language. Cambodians of-

ten ostracize the newcomers because of their American mannerisms [and] dress.” Stokes, *Between Two Nations*, Nat’l. J., Jan. 13, 2007, at 57.

One such refugee is Sokha Chhan, whose family fled the atrocities of the Khmer Rouge in 1979 out of fear that his father would be executed for having been a member of the opposition party. Decl. of Sokha Chhan, executed Feb. 18, 2009, *People v. Chhan*, No. F02906020-3, at 2 (Cal. Super. Ct., Fresno County). Chhan entered the United States as a refugee when he was thirteen years old and has been a legal permanent resident since 1983. *Id.* at 1.

Chhan and his family established a life in California. Chhan married, had five children, and served honorably in the United States Army Reserve. *See* Sokha Chhan Decl. 2. His job and all of his immediate family and friends are in the United States; he has not been back to Cambodia for nearly three decades. *Id.* Chhan, however, had problems with his ex-wife, who suffered from a serious gambling addiction and had violent tendencies. Decl. of Billie Kuoy “KC” Chhan, executed Mar. 9, 2009, *People v. Chhan*, No. F02906020-3, at 1 (Cal. Super. Ct., Fresno County). In 2002, Chhan got into a physical altercation with her and was arrested. *Id.* After consulting with a public defender, he pleaded no contest to two charges of domestic violence and was sentenced to 365 days of imprisonment and 36 months of probation. Sokha Chhan Decl. 3. The public defender did not inform Chhan that accepting such a plea would almost certainly lead to deportation, even though she “was aware that a sentence of 364 days instead of 365 days could make a difference for Mr. Chhan regarding his immigration status.” Decl. of Julie Bower, Esq., executed Jan. 28, 2009, *People v. Chhan*, No. F02906020-3, at 4 (Cal. Super. Ct., Fresno County); *see*

8 U.S.C. § 1101(a)(43)(F) (“crime of violence ... for which the term of imprisonment [is] at least one year” is an aggravated felony) (footnote omitted). In addition, Chhan’s attorney did not advise him that he could have attempted to pursue an agreement to serve a six-month sentence for each conviction, with the sentences to be served consecutively, which would not have rendered him deportable. *See* Decl. of Angela Junck, Esq., executed Mar. 6, 2009, *People v. Chhan*, No. F02906020-3, at 5 (Cal. Super. Ct., Fresno County).

Chhan completed his term of imprisonment and focused on caring for his children. In 2008, however, Chhan’s ex-wife had a violent outburst and chased one of their children with a cleaver. Sokha Chhan Decl. 5. A court subsequently awarded Chhan sole custody of their five children, all of whom are under the age of eighteen. Order re Child Custody and Visitation, *Chhan v. Chea*, No. 08CEFL03650 (Cal. Super. Ct., Fresno County Oct. 20, 2008). In March 2009, ICE initiated removal proceedings against Chhan for his 2002 conviction and placed him in detention. KC Chhan Decl. 2. According to Chhan’s sister, after Chhan was detained:

My mother cried for days and his kids are extremely depressed in his absence. It is like they have been mute since he’s been gone. I believe that while this news has been devastating for all of his five children, the youngest daughter is going to be the one who suffers the most. She cries herself to sleep every night. Sokha is loved by all of his kids and is a supportive father, both emotionally and financially. If Sokha is deported, it will tear our family apart.

*Id.* at 2.

Chhan's family is now faced with the prospect of losing their only provider and caregiver, and Chhan is faced with the prospect of being sent to a country from which he fled violent persecution 30 years ago. In light of those consequences, Chhan has stated that he would not have accepted the 2002 plea had he known that doing so would lead to his deportation. Sokha Chhan Decl. 2-3 (noting that he "would have been willing to plead to a different offense, even if it meant serving additional time in custody, if it meant avoiding mandatory deportation"). He remains in detention pending deportation proceedings.

**4. Mandatory detention schemes cause non-citizens convicted of specified offenses to suffer serious consequences from prolonged detention even when they are not subject to mandatory deportation**

Non-citizens convicted of certain crimes—for example, two crimes involving moral turpitude or one controlled substance offense—will be subject to mandatory detention even if they are eligible for relief from deportation. *See* 8 U.S.C. §§ 1226(c)(1)(B), 1229b. Because detention is mandatory following conviction in those cases, an uninformed non-citizen seeking to avoid substantial prison time may accept a guilty plea in exchange for a lighter sentence, only to be immediately arrested by ICE officials and detained. Last year alone, roughly half a million non-citizens were detained in "the rapidly growing patchwork of more than 500 county jails, profit-making prisons and federal detention centers" that ICE uses to house immigrants pending deportation or relief proceedings. Bernstein, *Immigrant Detainee Dies, and a Life Is Buried, Too*, N.Y. Times, Apr. 3, 2009, at A1.

Mandatory detention, even when deportation does not necessarily follow, can have devastating consequences for non-citizens and their families. Non-citizens subject to mandatory detention can remain detained for months or even years pending their deportation or relief proceedings. In addition, many non-citizens are detained in facilities far away from their homes and families, making visits from loved ones difficult if not impossible. ACLU of Massachusetts, *Detention and Deportation in the Age of ICE* 23-26 (Dec. 2008), available at [http://www.aclum.org/ice/documents/aclu\\_ice\\_detention\\_report.pdf](http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf). ICE can transfer non-citizens in its custody to other facilities without notice or cause, and many times does so without informing the non-citizen's lawyer or family. *Id.* at 23.<sup>15</sup>

While in detention—often in state or federal prisons—many non-citizens experience unpleasant conditions, including excessive overcrowding and harsh treatment by prison officers. See *Detention and Deportation in the Age of ICE* 8, *supra*; see also *Jailed Without Justice* 7, *supra*. Moreover, non-citizens in immigration detention often have difficulty obtaining necessary medical care, leading to severe illness or even

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<sup>15</sup> See also DHS, OIG, *Immigration and Customs Enforcement's Tracking and Transfers of Detainees* 1 (Mar. 2009), available at [http://www.dhs.gov/xoig/assets/mgmttrpts/OIG\\_09-41\\_Mar09.pdf](http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_09-41_Mar09.pdf) (“At the time of transfer, Immigration and Customs Enforcement does not always provide detainees the name of the facility to which they are being sent. The Detainee Transfer Notification form was not properly completed for 143 of the 144 transfers we tested. Agency staff interviewed generally considered completing and providing copies of the transfer forms to detainees a low priority. Also the staff interviewed did not know that they were responsible for informing detainees’ legal representatives of transfers.”).

death. See Priest and Goldstein, *System of Neglect*, Wash. Post, May 11, 2008, at A1; Goldstein and Priest, *In Custody, In Pain*, Wash. Post, May 12, 2008, at A1 (describing the struggles of Yong Sun Harvill, a Korean immigrant detained pending deportation on the basis of a conviction for buying stolen jewelry, whose repeated requests for cancer treatment were denied); Miroff, *ICE Facility Detainee's Death Stirs Questions*, Wash. Post, Feb. 1, 2009, at C1 (describing the case of Guido Newbrough—a German citizen who had lived in Virginia since age six—who died in ICE detention from an untreated bacterial infection after his “requests for medical attention were ignored”).<sup>16</sup> As one newspaper described it, non-citizen “detainees have less access to lawyers than convicted murderers in maximum-security prisons and some have fewer comforts than al-Qaeda terrorism suspects held at Guantanamo Bay, Cuba.” *System of Neglect, supra*.

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<sup>16</sup> Indeed, between October 7, 2003, and February 7, 2009, at least 90 people died in immigration custody. *Immigrant Detainee Dies, supra*. Many of those people were relatively young and were denied necessary medical care despite repeated requests. *System of Neglect, supra* (43-year-old Yusif Osman died from cardiac arrest after repeatedly being refused treatment for chest pains); Bernstein, *Ill and in Pain, Detainee Dies in U.S. Hands*, N.Y. Times, Aug. 13, 2008, at A1 (34-year-old Hiu Lui Ng died of a fractured spine and cancer that had gone untreated despite numerous complaints of back pain and requests for medical treatment); Bernstein, *Few Details on Immigrants Who Died in U.S. Custody*, N.Y. Times, May 5, 2008, at A1 (52-year-old Boubacar Bah died of a skull fracture and multiple brain hemorrhages after falling in custody and being placed in solitary confinement instead of being taken to a hospital).

The experiences of Edna Borges and Andre Venant illustrate the heavy toll that mandatory detention can take on the lives of non-citizens and their families.

a. Born in Portugal, Edna Borges came to the United States with her parents at age two. Rhor, *Unwelcome Turn '99 Conviction Spurs Mother's Detention*, Boston Globe, Aug. 7, 2003, at B1. She grew up in Massachusetts. *See id.* In 1999, when she was a teenager, Borges was arrested twice for shoplifting clothing from a department store. Emery, *Conviction Flags Portuguese Mom for Deportation*, Standard-Times, Aug. 7, 2003, at A3, available at <http://archive.southcoasttoday.com/daily/08-03/08-07-03/a03sr016.htm>. Without being advised of the potential immigration consequences, Borges pleaded guilty to larceny and received a term of unsupervised probation. *See Unwelcome Turn '99 Conviction Spurs Mother's Detention, supra*; Crim. Dkt. No. 9959CR005767 (Mass. Dist. Ct., Quincy Sept. 20, 1999); Crim. Dkt. No. 9831CR1303 (Mass. Dist. Ct., Taunton Mar. 16, 1998). Although she was not detained then, she was required to check in periodically with ICE officials. *Conviction Flags Portuguese Mom for Deportation, supra*.

After her brush with the law, Borges turned her life around. *Unwelcome Turn '99 Conviction Spurs Mother's Detention, supra*. She became involved in a youth group, earned a vocational certificate from a local school, and started her own business. *Id.*; *Conviction Flags Portuguese Mom for Deportation, supra*. She did not commit any other crimes. *Id.*

When Borges was 22 years old, she gave birth to her second child. *Conviction Flags Portuguese Mom for Deportation, supra*. Eight days later, she checked in with ICE, which promptly placed her in detention

after determining for the first time that she was subject to mandatory immigration detention and possible deportation because her two shoplifting convictions constituted crimes involving moral turpitude. *Id.*; *Unwelcome Turn '99 Conviction Spurs Mother's Detention, supra*. After she was detained, her baby refused to feed from a bottle and became very ill. *See Conviction Flags Portuguese Mom for Deportation, supra*. In addition to being detained, Borges faced the prospect of deportation to Portugal, a country she had never known, and the threat of permanent separation from her new baby and the rest of her family. *Id.*

ICE initiated deportation proceedings, but Borges was eventually granted cancellation of removal as a result of her strong community ties and the media attention that her case attracted. *See Judge Orders Release of Immigrant Mother*, Boston Globe, Aug. 8, 2003, at B3. Had her attorney properly advised her of the immigration consequences of pleading guilty to the shoplifting charges in the first place, however, her detention and the resulting trauma to her family and children could have been avoided.

b. The story of Andre Venant also demonstrates how detention can adversely affect non-citizens' lives. Venant, a native of Madagascar, immigrated to the United States in 1981, hoping to find employment in the New York City restaurant industry. *See Post-9/11, Even Evading Subway Fares Can Raise the Prospect of Deportation, supra*. He became a legal permanent resident and worked in a series of well-known New York restaurants for nearly twenty years, starting off as a dishwasher and working his way up to cook. *Id.*

In 2003, however, Venant became ill with diabetes and was hospitalized for a broken leg after a fall. Soon

he was destitute and without a full-time job. Short of cash, Venant learned how to fold empty subway fare cards so that they displayed the \$2 fare when swiped at the turnstile. *Post-9/11, Even Evading Subway Fares Can Raise the Prospect of Deportation, supra.* Venant used those cards to avoid paying the fare or sold them to other riders. He was arrested multiple times for misdemeanor MetroCard fraud, each time serving a sentence of less than seven days in jail. *Id.* Those convictions, however, rendered him deportable under 8 U.S.C. § 1227(a)(2)(A)(ii) and subject to mandatory detention pursuant to 8 U.S.C. § 1226(c)(1)(B) for having been convicted of multiple crimes involving moral turpitude.

ICE placed Venant in jail, and within days, he was transferred to a detention center in Louisiana, where he spent six months. *Post-9/11, Even Evading Subway Fares Can Raise the Prospect of Deportation, supra.* With a friend's help, he was able to obtain a lawyer and eventually received cancellation of removal. After his release from detention, Venant "returned to New York to find his identity in tatters: Rikers Island officials had destroyed his green card, driver's license and Social Security card, documents he needed to get work and medical care for diabetes." *Id.* Venant described mandatory detention as "a kind of kidnapping ... . It's like sending people to a desert island." *Id.*

## **II. 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**

Criminal defendants rely on their attorneys for advice about whether to plead guilty to an offense or ex-

ercise their right to go trial. For many non-citizens, the prospect of being deported or detained for a prolonged period may be far more important than the prospect of serving a longer prison sentence. However, such defendants can make a voluntary and intelligent decision about whether to enter into a plea bargain only when they are fully informed about the immigration consequences of the plea and of alternative courses of action.

As discussed above, examples of non-citizens who are deported or detained after accepting guilty pleas without being fully informed of the immigration consequences are legion.<sup>17</sup> As the following examples dem-

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<sup>17</sup> Other examples abound. A Virginia court held that Mohamed Wael's counsel was ineffective for erroneously advising Wael that pleading guilty to a grand larceny charge for shoplifting in exchange for a two-year suspended sentence would not lead to deportation. His conviction, however, qualified as an aggravated felony under the INA. The court noted that counsel's "misstatements removed any opportunity for Mohamed or his counsel to ask for a sentence that was slightly below the one year threshold so as to avoid the harsh immigration consequences that would follow." *Commonwealth v. Mohamed*, 2006 WL 2388632, at \*2 (Va. Cir. Ct. Aug. 18, 2006).

The Ninth Circuit held that Kwok Chee Kwan's counsel was ineffective for inaccurately assuring Kwan that pleading guilty to bank fraud, which resulted in a sentence of one year and one day and thus qualified as an aggravated felony, was unlikely to lead to deportation. The court explained that Kwan could have pursued a number of other options that would not have affected his immigration status had he been fully informed of the potential consequences. Specifically, he "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 to less than one year in prison." *United States v. Kwan*, 407 F.3d 1005, 10017-1018 (9th Cir. 2005).

onstrate, however, non-citizens who receive accurate advice about the consequences of pleading guilty to certain offenses are better able to make informed decisions and exercise their rights accordingly. The non-citizens in these examples chose to plead guilty to one or more charges and were punished for those crimes; their lawyers' advice simply allowed them to plead guilty with a full understanding of their options and the potential immigration consequences of a guilty plea to each alleged offense.

#### A. Baindu Marian Mando

Baindu Marian Mando immigrated to the United States at the age of ten as a refugee from her home country, Liberia, which was experiencing a bloody civil war. Mot. for Downward Departure & for a Variance from the Advisory Guideline Range and Incorporated Sentencing Mem. 4, *United States v. Mando*, No. 06-cr-00018 (M.D. Tenn. Nov. 29, 2006). Because of the threat of political violence, Mando and her family had to flee their home, and she spent several years of her early childhood in refugee camps. *Id.* During that time, her father abandoned the family and her mother died of illness. *Id.* at 4-5. Mando ultimately immigrated to the United States with her uncle.

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And a New York court held that Bruce McDonald's counsel was ineffective for wrongly advising McDonald that pleading guilty to sale of marijuana, an aggravated felony, would not result in deportation. In that instance, the prosecution's case against McDonald was weak, and he pleaded guilty only to avoid a long prison sentence, during which he would have been separated from his family. After McDonald was granted post-conviction relief on grounds of ineffective assistance of counsel, McDonald's case went to trial, and he was acquitted of all felony charges. Caher, *Tag Team of Lawyers Drawn to Alien's Plight*, 231 N.Y.L.J. 1 (2005).

Mando had a difficult childhood in the United States. Mot. for Downward Departure 6-7. She was raised by her uncle who sexually abused her. *Id.* at 8. When he subsequently abandoned her, she was taken into state custody. She spent her teenage years in various foster homes and residential placements. *Id.* She became pregnant at age 15 when an older man took advantage of her. *Id.* at 9. Mando suffers from Post-Traumatic Stress Disorder and depression as a result of the many traumas in her life. *Id.* at 6.

In 2006, Mando, then age 20, was arrested for allegedly attempting to rob a bank by passing a demand note to a teller through the bullet-resistant glass. Mot. for Downward Departure 1. The teller laughed and showed the note to the manager. Mando, who was unarmed, immediately left the bank and walked to the parking lot, where she was apprehended by the police. *Id.*

Mando's attorney was aware that Mando was a non-citizen and could face immigration consequences depending on her conviction. Letter from David Baker, counsel for Mando, May 28, 2009, at 1.<sup>18</sup> He consulted an immigration treatise and confirmed that she would necessarily be deported if she were convicted of robbery and sentenced to one or more years in prison. *Id.*<sup>19</sup> For Mando, avoiding deportation was the most

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<sup>18</sup> *See supra* n.12.

<sup>19</sup> Mando was charged with attempted bank robbery in violation of 18 U.S.C. § 2113(a). Although she had no weapon, any attempted bank robbery is considered a "crime of violence." Accordingly, a conviction of bank robbery with a term of imprisonment of at least one year is an aggravated felony under federal immigration law. 8 U.S.C. § 1101(a)(43)(F).

important consideration, not least because she had two young American children who depended on her to care for them and raise them. Returning to Liberia was unthinkable. Having fled Liberia as a child, Mando no longer had any family or connections in her home country and barely remembered her native tribal language. *Id.* at 2.

Mando and her attorney considered her options, which included: (1) negotiating a plea to a misdemeanor such as bank larceny; (2) accepting the attempted robbery plea and seeking a downward departure from the sentencing judge; or (3) going to trial. Given the government's unwillingness to negotiate a plea to a lower offense and the risk of a significantly higher sentence if Mando did not prevail at trial, she concluded that her chances of avoiding deportation were better if she accepted the attempted robbery plea and persuaded the judge to lower her sentence to less than one year. Baker Letter 2.

Mando pleaded guilty to attempted bank robbery in violation of 18 U.S.C. § 2113(a) and moved for a downward departure. Plea Agreement, *United States v. Mando*, No. 06-cr-00018 (M.D. Tenn. Sept. 22, 2006). In addition to advising the judge of the many mitigating circumstances such as Mando's youth, low I.Q., and psychological trauma, defense counsel also accurately advised the court that she would be deported and separated from her two young children if sentenced to prison for 365 days or more. Mot. for Downward Departure 16. Taking all of those factors under consideration, the judge sentenced Mando to eleven months, time served. Mando is currently raising her children in Nashville. Baker Letter 2.

### B. Ney Medina

In 1990, Ney Medina immigrated to the United States from the Dominican Republic at age five. Letter from Ann H. Mathews, counsel for Ney Medina, May 28, 2009, at 1.<sup>20</sup> He attended school in the United States and considers America his home. He is currently raising his three-year-old daughter, an American citizen. *Id.*

In 2008, Medina, then 23, was charged in two cases. In the first case, filed by his adult cousin, he was charged with assault, menacing, and harassment. The second case, filed by his cousin's friend, involved charges of petit larceny and criminal possession of stolen property (a cell phone). Mathews Letter 1-2. The prosecutor initially offered Medina a plea to a Class B misdemeanor in each case, with a sentence of anger management and restitution for the stolen cell phone. *Id.* Despite the relatively low sentences offered, Medina's attorneys were concerned that the convictions could be considered crimes involving moral turpitude under federal immigration law. *Id.* at 2. Medina would have been deportable if he had pleaded guilty to two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. 8 U.S.C. § 1227(a)(2)(A)(ii).

Aware of those immigration consequences, Medina's attorneys negotiated an agreement with the prosecutor whereby Medina pleaded guilty to more serious counts not originally charged—possession of a weapon in the fourth degree by a non-U.S. citizen (a wire hanger)—and disorderly conduct, neither of which

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<sup>20</sup> See *supra* n.12.

is a crime involving moral turpitude. Mathews Letter 2-3; Plea Hr'g Tr. 3, *People v. Medina*, Indictment Nos. 02802C-2008, 05501C-2008 (N.Y. Sup. Ct. Bronx County Oct. 10, 2008). Medina was sentenced to three days of community service and anger management. Tr. 2. Medina has successfully completed his sentence. Mathews Letter 3.

### C. Mary and Tom Nguyen

Mary Nguyen and her son Tom<sup>21</sup> came to the United States as refugees from Vietnam over ten years ago and established a life in Mississippi. Letter from Tuyet G. Duong, Immigration and Immigrant Rights Program, May 27, 2009, at 1.<sup>22</sup> In 2005, Hurricane Katrina completely ravaged their home, leaving them homeless. The Nguyens joined a group of families living in the parking lot of a casino. An individual who identified himself as a casino employee and supervisor opened the casino gift shop for the families temporarily sheltered at the casino. During the week they stayed at the casino, the families took necessary supplies from the gift shop such as toothbrushes, food, and water. *Id.* at 1-2. Shortly thereafter, the Nguyens were charged with looting under a Mississippi state law that expressly punishes individuals involved in theft following a natural disaster. *See* Miss. Code Ann. § 97-17-65(1). The crime is punishable by up to six years of imprisonment.

The Nguyens were assigned a public defender. Duong Letter 2. They also contacted a Vietnamese-

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<sup>21</sup> Mary and Tom Nguyen are pseudonyms.

<sup>22</sup> *See supra* n.12.

speaking attorney at a local Asian American legal clinic to help them navigate the criminal justice system. The attorneys explained the charges and the possible immigration consequences of their plea. The Nguyens adamantly maintained that, because they were invited to take what they needed, they were not guilty. Although the Nguyens wanted to go to trial, both of their attorneys advised them that if they were found guilty at trial and sentenced to more than one year in prison, they would be automatically deported as aggravated felons.<sup>23</sup> With the advice of counsel, the Nguyens accepted a plea agreement that included a fine and a term of probation rather than imprisonment. *Id.* As a result of that informed choice, the Nguyens avoided deportation to Vietnam, a country they had fled and where they feared they would be persecuted upon their return. *Id.*

### CONCLUSION

This Court should conclude that, under the Sixth Amendment standards for ineffective assistance of counsel, defense counsel is required accurately to advise a non-citizen client of the immigration consequences of accepting a guilty plea.

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<sup>23</sup> Theft for which the term of imprisonment is at least one year is an aggravated felony under the INA. 8 U.S.C. § 1101(a)(43)(G).

Respectfully submitted.

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JUNE 2009

# APPENDIX

## LIST OF ADDITIONAL AMICI CURIAE

Asian American Institute (AAI) is a pan-Asian, non-partisan, not-for-profit organization located in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy by using coalition building, education, and research. AAI's programs include community organizing, leadership development, and legal advocacy. Asian Americans are a diverse and often overlooked community, but they are one of the fastest-growing populations in the United States. AAI strives to put a human face on the challenges that immigrants experience and illustrate the real-life experiences of non-citizens. Accordingly, AAI has an important interest in *Padilla v. Kentucky*, which implicates the ability of non-citizens to make fully informed decisions about their criminal cases and avoid unduly harsh consequences to themselves and their families.

The Asian Law Alliance (ALA), founded in 1977, is a non-profit public interest legal organization with the mission of providing equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California. In the area of immigration law, ALA has represented countless immigrants in the criminal justice system, as well as immigrants concerned about the immigration consequences of their criminal convictions.

The Asian Law Caucus (ALC), founded in 1972, is a non-profit organization advancing the legal and civil rights of Asian American and Pacific Islander communities. It is the nation's oldest legal organization serving Asian Americans and is dedicated to the pursuit of equality and justice for all sectors of society, with a specific focus directed toward addressing the needs of low-income, immigrant, and underserved Asians and

Pacific Islanders. Through legal services and community education, ALC advocates for the rights of immigrants whose language abilities or lack of resources make them particularly vulnerable in our justice system.

The Asian Pacific American Legal Center of Southern California (APALC) was founded in 1983 and is the largest non-profit public interest law firm devoted to the Asian Pacific American community, serving 15,000 individuals and organizations a year. APALC provides direct legal services and uses impact litigation, public advocacy, and community education to obtain, safeguard, and improve the civil rights of the Asian Pacific American community. APALC represents Asian Pacific Americans in a number of areas, including immigration and citizenship, anti-discrimination, workers' rights, voting rights, domestic violence, and hate crimes. Through case work and policy advocacy, APALC has sought to ensure equal access to justice for immigrants, particularly those subject to the consequences of the country's immigration laws.

Boat People, SOS (BPSOS) is a national immigrant services organization serving primarily Vietnamese refugees and immigrants with 13 branch offices nationwide. BPSOS's domestic operation includes an array of human and immigration services for Vietnamese refugees, asylees, and immigrants to assist in their integration into American life. BPSOS provides limited immigration assistance including visa applications, adjustment of status, naturalization, and citizenship services.

The Center for Pan Asian Community Services (CPACS) is a private non-profit organization in At-

lanta, Georgia, whose mission is to create and deliver culturally competent and comprehensive social and health services to counteract problems faced by immigrants, refugees, and racial-ethnic minorities. Established as the first and largest Asian and Pacific Islander health and human service agency in the Southeast region, CPACS has been providing its core group of services to immigrant and refugee families in Georgia for over 25 years. CPACS's legal department represents clients from all over the United States and from countries all over the world on a range of immigration issues. Through its programs, many of which are based on the principle of targeting women, children, and families, CPACS strives to ensure that immigrants have the knowledge and resources to navigate American society and its legal system.

Florida Immigrant Advocacy Center (FIAC), a not-for-profit law firm, was founded in 1996 when federal funding restrictions limited Legal Services' ability to handle immigration cases on behalf of indigent clients. FIAC's mission is to protect and promote the basic human rights of immigrants of all nationalities. FIAC serves the most vulnerable immigrant populations through direct services, federal court litigation, impact advocacy, and education. For more than twelve years, FIAC attorneys have represented individual clients in removal proceedings before immigration judges, the Board of Immigration Appeals, and the U.S. Court of Appeals for the Eleventh Circuit. Through this work, FIAC routinely encounters longtime lawful permanent residents facing deportation as a result of guilty pleas to charges they did not know carried drastic immigration consequences.

The Fred T. Korematsu Center for Law and Equality (Korematsu Center) is a non-profit organization

based at Seattle University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the internment of 110,000 Japanese Americans. He took his challenge of the military orders 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 challenge his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice for all. It has a special interest in promoting fairness in the courts of our country. That interest includes ensuring effective assistance of counsel, especially when legal advice is given that has consequences relating to the detention or removal of individuals, many of whom have extensive ties to the United States. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

The National Asian Pacific American Bar Association (NAPABA) is the national association of Asian Pacific American attorneys, judges, law professors, and law students. NAPABA represents the interests of over 40,000 attorneys and 58 local Asian Pacific American bar associations. Its members include solo practitioners, large firm lawyers, corporate counsel, legal service and non-profit attorneys, and lawyers serving at all levels of government. Since NAPABA’s inception in 1988, it has promoted justice, equity, and opportunity for Asian Pacific Americans, as the national voice for Asian Pacific Americans in the legal profession. These

efforts have included civil rights advocacy on various fronts. In furtherance of its mission to promote justice, equity, and opportunity for Asian Pacific Americans, NAPABA joins amici to protect the rights of non-citizens who are particularly vulnerable due to their limited language capabilities and lack of resources.

The National Asian Pacific American Women's Forum (NAPAWF) is the only national, multi-issue Asian and Pacific Islander women's organization in the country. NAPAWF's mission is to build a movement to advance social justice and human rights for Asian and Pacific Islander women and girls. We advocate for the rights of immigrant women, girls, and their families given their particular vulnerabilities within the immigration and justice systems due to their lower economic status, limited access to education and resources, and limited English speaking abilities.

Heartland Alliance's National Immigrant Justice Center (NIJC) is a not-for-profit organization, accredited by the Board of Immigration Appeals to provide immigration assistance since the late 1970s. NIJC promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education. With the support of the Chicago Bar Foundation and others, NIJC created the Defenders Initiative, which currently provides legal consultations, trainings, and materials to criminal defense attorneys to understand the consequences of criminal convictions on immigration status. In fiscal year 2008, NIJC provided critical legal representation and education to more than 8,000 asylum seekers, refugees, survivors of domestic violence, detained immigrants, victims of human trafficking, and other immigrants facing removal and family separation.

The National Korean American Service and Education Consortium (NAKASEC) was founded as a consortium in 1994 by local community centers who realized that only by coming together can we build and contribute to a national movement for civil rights. Our mission is to project a national progressive voice on major civil rights and immigrant rights issues and promote the full participation of Korean Americans in American society.

The North Carolina Justice Center, through its Immigrants' Legal Assistance Project, has been the primary provider of legal representation to low-income immigrants in North Carolina for over 13 years. The North Carolina Justice Center represents individuals and families in establishing their status as citizens or legal residents of this country. It provides this representation before Citizenship and Immigration Services, Immigration Court, and the Board of Immigration Appeals. Justice Center staff also work with and provide training to public defenders, private criminal defense attorneys, and district attorneys about the specific immigration consequences of plea bargains and/or convictions of immigrants facing criminal charges.

Organization of Chinese Americans (OCA) is a national organization dedicated to advancing the social, political and economic well-being of Asian Pacific Americans. Headquartered in Washington, D.C., OCA represents members and associates in over 80 chapters and college affiliates across the country. For 36 years, OCA has worked to defend the rights of the Asian Pacific American and immigrant communities and ensure that they are accorded the rights guaranteed to them under the Constitution and federal, state, and local law.

South Asian Americans Leading Together (SAALT) is a national non-profit organization whose

mission is to promote the full and equal civic and political participation of South Asians in the United States. As a predominantly foreign-born community, many South Asians confront a range of challenges during removal proceedings, particularly in light of post-9/11 criminal and immigration enforcement measures. SAALT joins this amicus brief to help ensure that individuals in immigration proceedings have meaningful access to effective assistance of counsel, particularly as it relates to immigration consequences resulting from guilty pleas.

The Southeast Asia Resource Action Center (SEARAC) is a national non-profit organization advancing the interests of Southeast Asian Americans through leadership development, capacity building, and community empowerment. SEARAC has been a strong advocate of immigrant rights, particularly around the issue of deportation and its impact on Southeast Asian American families. For those who come in contact with the legal system, immigration consequences resulting from criminal convictions, even minor ones, have been especially harmful because of inadequate information and representation provided by their counsel. SEARAC has particular concern regarding the deportation of individuals who arrived as refugees back to the very same countries they fled in fear of persecution. SEARAC supports this brief to highlight the life-long immigration impact that ineffective assistance of defense counsel has on thousands of legal permanent residents, including those who arrived as refugees, and their families across this country.

The Southern Coalition for Social Justice (SCSJ) promotes justice by empowering minority and low-income communities to defend and advance their political, social, and economic rights. SCSJ uses the com-

bined skills of lawyers, social scientists, community organizers, and media experts to help underrepresented people develop strategies to achieve their visions for themselves and their communities, incorporating an international human rights perspective, and linking their efforts to broader processes of political, legal, social, and economic change in the South. As part of this effort, SCSJ has been active in working for the rights of immigrant communities, including advocacy, education, and direct representation in the immigration courts.