STATE OF NEW JERSEY, Plaintiff-Petitioner, v. JUAN C. HERNANDEZ-PERALTA, Defendant-Respondent.	SUPREME COURT OF NEW JERSEY Docket No. 089274 Criminal Action Appellate Division Dkt. No: A-3292-22 Sat Below: Hon. Michael J. Haas, J.A.D. Arnold L. Natali, Jr., J.A.D. On Appeal from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: OCEAN COUNTY INDICTMENT NOs: 19-06-946, 19-09-1370

BRIEF OF PROPOSED *AMICUS CURIAE* ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) is a non-profit corporation organized under the laws of this State to, among other things, "protect and ensure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitution; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good[.]" *ACDL-NJ By-Laws*, Article II(a), http://www.acdlnj.org/about/bylaws. The ACDL-NJ is comprised of over 500 members of the criminal defense bar of this State, including attorneys in private practice and public defenders.

Over the years, the ACDL-NJ has participated as *amicus curiae* in numerous cases in this Court and in the Appellate Division. *See, e.g.*, *State v. Hill*, 256 N.J. 266 (2024); *State v. Olenowski*, 253 N.J. 133 (2023); *State v. F.E.D.*, 251 N.J. 505 (2022); *State v. Lodzinski*, 246 N.J. 331 (2021); *State ex rel. A.A.*, 240 N.J. 341 (2020); *State v. L.H.*, 239 N.J. 22 (2019); *State v. Cassidy*, 235 N.J. 482 (2018); *State v. Lunsford*, 226 N.J. 129 (2016); *In re State Grand Jury Investigation*, 200 N.J. 481 (2009); *State v. Osorio*, 199 N.J. 486 (2009); *Gannett Satellite Info. Network, LLC v. Twp. of Neptune*, 467 N.J. Super. 385 (App. Div. 2021); *State v. Martinez*, 461 N.J. Super. 249 (App. Div. 2019); *State v. Jackson*, 460 N.J. Super. 258 (App. Div.

2019), *aff'd o.b.*, 241 N.J. 547 (2020); *State v. Triestman*, 416 N.J. Super. 195 (App. Div. 2010). Indeed, on various occasions, the ACDL-NJ has affirmatively been requested to file *amicus* briefs on matters of importance to the courts. *See, e.g.*, *State v. Hernandez*, 225 N.J. 451 (2016); *State v. Scoles*, 214 N.J. 236 (2013); *State v. Bishop*, 429 N.J. Super. 533 (App. Div. 2013); *State v. Cohen*, 431 N.J. Super. 256 (App. Div. 2009).

Amicus seeks to participate in this matter in order to address the obligation of criminal defense counsel to investigate issues that, while not articulated by their clients, can and should be identified by "red flags" that arise from the record of the case, particularly with respect to critical rights, such as the right to understand the immigration consequences of one's plea and sentence. *Amicus* thus seeks to "assure that all recesses of the problem will be earnestly explored." *See Whelan v. N.J. Power & Light Co.*, 45 N.J. 237, 244 (1965). *Amicus*'s participation is particularly appropriate because this is a case measuring the performance of defense counsel, of which *Amicus*'s membership is comprised and is particularly expert. Indeed, the ACDL-NJ has a long history of participation in cases addressing the standards applicable to ineffective assistance of counsel claims. *See, e.g.*, *State v. Konecny*, 250 N.J. 321 (2022); *State v. Miller*, 216 N.J. 40 (2013); *State v. Nunez-Valdez*, 200 N.J. 129 (2009); *State v. Allah*, 170 N.J. 269 (2002). And because the issue here presented arises in an area of great constitutional significance, *Padilla v. Kentucky*,

559 U.S. 356, 364 (2010) ("[C]hanges to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction); *State v. Gaitan*, 209 N.J. 339, 380, 37 A.3d 1089, 1113 (2012) ("It is thus particularly important now for criminal defense attorneys to be able to, at a minimum, secure accurate advice for their clients on whether a guilty plea to certain crimes will render them mandatorily removable."), the ACDL's participation in this matter would certainly "assist in the resolution of an issue of public importance." *Rule* 1:13-9.

PRELIMINARY STATEMENT

Although the issue before the Court arises in the context of elucidating the standards by which counsel's performance should be measured in the context of criminal cases involving immigration consequences, the case really involved the application of the obligation to investigate that is at the heart of a defense counsel's obligations in our system of justice. In particular, this case presents circumstances in which, though the Defendant, had different counsel at the plea and sentencing phases of the case, new information arose in the intervening period — here in the presentence investigation report ("PSR") – that the Defendant had not previously disclosed to his attorney.

ACDL-NJ agrees with the PCR Court and the Appellate Division that no ineffective assistance of counsel exists where a defendant either purposely or inadvertently does not convey to counsel certain or accurate facts, as a result of

which there is nothing to indicate that further investigation is warranted. *State v. Hernandez-Peralta*, No. A-3292-22, 2024 WL 1005085, *4 (App. Div. Mar. 8, 2024) ("'[c]ounsel cannot be faulted for failing to expend time or resources analyzing events about which he or she was never alerted.'") (quoting *State v. DiFrisco*, 174 N.J. 195, 228 (2002)). However, if and when red flags arise during the factual development of the case which bear upon the issues before the Court, further investigation must, in order for defense counsel to fulfill his or her constitutional role, be undertaken. That obligation is even more critical where those red flags arise in the context of other, fundamental constitutional rights – here, the now-established right of the Defendant to be advised about and know the immigration consequences of pleading guilty, or, as in this case, proceeding to sentencing without seeking to withdraw a prior guilty plea.

In this case, although prior counsel has been told by his client that he was a U.S. citizen, such that no immigration consequences would befall him as a result of his guilty plea and sentencing, by the time of the guilty plea, new counsel was confronted by indicia that this was not true, and should, therefore, have conducted further investigation to assure that her client knew the immigration consequences of proceeding to sentencing, as opposed to seeking to withdraw his guilty plea because of the risk of such immigration consequences. Because she failed to do so, her

counsel to Defendant fell below the standard required by the U.S. and State Constitutions. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Amicus adopts the facts and procedural history described in the opinion of the Appellate Division. *Hernandez-Peralta*, 2024 WL 1005085 at *1-4 (App. Div. Mar. 8, 2024).[2] In sum, Defendant represented to counsel and the Court that he was a U.S. citizen, born in New York, and pleaded guilty to an offense that would subject a noncitizen to mandatory removal on November 22, 2019. *Id.* at *1-2. Prior to sentencing, however, new counsel reviewed the Presentence Report, which contained certain indicia that Defendant was, in fact, not a U.S. citizen, including that he had been born in Mexico, that the only parent with whom he had contact lived outside the United States, and that he did not produce a driver's license or even a social security number, both of which were absent from the PSR. *Id.* at *2. Sentencing counsel confirmed with Defendant that he was born in Mexico and asked if he was a U.S. Citizen. *Id.* Defendant responded that he was but that he could not

[1] These sections, which are intertwined, are combined for the Court's convenience.

[2] *See also* Brief of Defendant-Respondent Hernandez-Peralta, Db7-14. In accordance with *Rule* 2:6-8, citations are as follows: "Db" is Defendant-Respondent's brief, dated August 26, 2024; "Sb" is to the State-Petitioner's brief; "Sa" is the State's Appendix, pages Sa107-129 of which are contained in a Confidential Appendix.

recall his social security number. *Id.* Defendant testified at a later PCR hearing that he told the PSR investigator that he was born in Mexico and had his green card, but did not understand his immigration status at the time of his plea and sentencing in 2019. *Id.* at *3. He said that he "was raised in New York [his] whole life," and "kind of forgot and just decided to say that" he was born there. *Id.* He also noted that he was "paranoid around that time" and "wasn't thinking clearly." *Id.*

On December 10, 2019, Defendant was sentenced consistent with the plea agreement to five years of Recovery Court probation, with an alternative five-year custodial term on each of two indictments. *Id.* at * 2. Defendant did not comply with the conditions of his probation and was terminated from Recovery Court in August 2020, at which point the Court imposed the five-year custodial term contemplated by the plea agreement. *Id.* At the hearings on Defendant's probation violations, the court inquired whether Defendant was a U.S. citizen, and Defendant confirmed that he was. *Id.*

Defendant then petitioned for post-conviction relief, arguing that he was "not properly informed of the immigration consequences of [his] plea agreement. *Id.* at *3. The trial court held a hearing on this subject at which Defendant, plea counsel, and sentencing counsel testified, after which the court granted the PCR petition. *Id.* at *3-6. The Appellate Division agreed with the PCR court that sentencing counsel's performance was deficient but remanded for further consideration of whether

Defendant would have been able to withdraw his guilty plea under *State v. Slater*, 198 N.J. 145 (2009). *Id.* at *9-10. The State moved for leave to appeal, which motion was granted on June 14, 2024. *State v. Hernandez-Peralta*, 257 N.J. 599 (2024).

ARGUMENT

I. A DEFENDANT'S RIGHT TO ADEQUATE INVESTIGATION DEPENDS NOT ONLY ON WHAT THE DEFENDANT SAYS BUT ALSO ON WHAT RED FLAGS ARE REVEALED DURING THE COURSE OF THE PROCEEDINGS.

A. *Strickland* and its progeny require adequate investigation.

The United States Supreme Court has long recognized that the Sixth Amendment right to counsel is needed to "protect the fundamental right to a fair trial" and is "critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). This Court has similarly held that New Jersey's State Constitution entitles criminal defendants to the effective assistance of reasonably competent counsel. *State v. Fritz*, 105 N.J. 42, 58 (1987) (citing Article I, Paragraph 10 of New Jersey Constitution). It is undisputed that this fundamental constitutional right applies to "all critical stages of the criminal proceedings," including "arraignments, postindictment interrogations, postindictment lineups, [and] the entry of a guilty plea." *See Missouri v. Frye*, 566 U.S. 134, 140 (2012) (internal citations omitted); *State v. Hayes*, 205 N.J. 522, 536 (2011) ("The governing principle is simple and deeply ingrained in the fabric of our

jurisprudence: [b]ecause the assistance of counsel is essential to insuring fairness and due process in criminal prosecutions, a convicted defendant may not be imprisoned unless counsel was available to him at every critical point following the initiation of adversary judicial criminal proceedings"). It also applies, as relevant to this case, at sentencing. *Lafler v. Cooper*, 566 U.S. 156, 165 (2012) ("The precedents also establish that there exists a right to counsel during sentencing in both noncapital, and capital cases."); *State v. Hess*, 207 N.J. 123, 129 (2011) (holding that sentencing counsel owes a duty to proffer "mitigating evidence in support of a lesser sentence" and failure to honor that obligation denies a defendant the "constitutional right to the effective assistance of counsel at sentencing.").

Strickland set forth a two-pronged standard, 466 U.S. at 687, which has since been adopted by this Court, *Fritz*, 105 N.J. at 58. *See*, *e.g.*, *State v. Hannah*, 248 N.J. 148, 179-181 (2021) (holding that trial counsel's performance had denied defendant the right to present his third-party guilt defense, amounting to ineffective assistance under *Strickland*); *State v. O'Neil*, 219 N.J. 598, 615-16 (2014) (finding that appellate counsel's failure to raise the issue of self-defense amounted to ineffective assistance under *Strickland*); *Hess*, 207 N.J. 123, 145-47 (2011) (applying *Strickland*'s two-prong standard to petitioner's claim of ineffective assistance at sentencing); *see also Garza v. Idaho*, 586 U.S. 232 (2019); *Lee v. United States*, 582 U.S. 357 (2017); *Roe v. Flores-Ortega*, 528 U.S. 470, 476 (2000).

Under the first prong, a petitioner must demonstrate that counsel's performance was deficient; that is, that "counsel's representation fell below an objective standard of reasonableness[.]" *Strickland*, 466 U.S. at 688; *Hannah*, 248 N.J. at 180 (same); *State v. Pierre*, 223 N.J. at 578 (same). Under the second prong, a petitioner must show that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Fritz*, 105 N.J. at 52 (quoting *Strickland*, 466 U.S. at 694); *see also United States v. Baptiste*, Nos. 20-1400, 20-1401, 2021 U.S. App. LEXIS 23578, at *10 (1st Cir. Aug. 9, 2021) (stating that, under the second prong, "the chief 'focus' remains 'on the fundamental fairness of the proceeding.'" (quoting *Dugas v. Coplan*, 506 F.3d 1, 9 (1st Cir. 2007) (internal quotation omitted))); *Williams v. Taylor*, 529 U.S. 362, 391 (2000) ("It is true that while the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis.").

Most significantly for purposes of this case, "'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *State v. Chew*, 179 N.J. 186, 217 (2004) (quoting *Strickland*, 466 U.S. at 691); *see also State v. Porter*, 216 N.J. 343, 353 (2013) ("'[I]t

is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty.'" (quoting *State v. Russo*, 333 N.J. Super. 119, 139 (App. Div. 2000)). "A counsel's failure to do so will 'render the lawyer's performance deficient.'" *Porter*, 216 N.J. at 353 (quoting *Chew*, 179 N.J. at 217). Courts have repeatedly restated *Strickland*'s principle that "[a]lthough '*strategic* choices made after *thorough* investigation of law and facts relevant to plausible options are virtually unchallengable,' an *unreasonably limited* investigation informing those strategic choices can amount to deficient performance." *Abdul-Salaam v. Sec'y of Pennsylvania Dep't of Corr.*, 895 F.3d 254, 268 (3d Cir. 2018) (quoting *Strickland*, 466 U.S. at 690-91) (emphasis added). That is, although counsel's tactical decisions are entitled to deference under the first prong of *Strickland*, 466 U.S. at 689, such decisions are not entitled to deference if they are not reasonable—that is, if they are not informed by a reasonable investigation. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (stating that deference owed to strategic judgments is defined by the "adequacy of the investigations supporting those judgments"); *see also Strickland*, 466 U.S. at 690-91 (stating that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"); *United States v. McCoy*, 410 F.3d 124, 135 (3d Cir. 2005) ("[M]erely labeling a decision as 'strategic' will not

remove it from an inquiry of reasonableness."); *Weidner v. Wainwright*, 708 F.2d 614, 616 (11th Cir. 1983) ("At the heart of effective representation is the independent duty to investigate and prepare." (internal citations omitted)).

B. Investigation adequacy is tied to the importance of the legal right — and relevant fact(s) — at issue.

Courts have also repeatedly indicated that the adequacy of a counsel's investigation is measured in light of the significance of the particular inquiry at issue to either guilt or innocence or sentencing. That is, it is more critical for counsel to undertake investigation of issues that will have a material impact on the outcome of a defendant's case. For example, the "[f]ailure to investigate an alibi defense is a serious deficiency that can result in the reversal of a conviction . . . [as] 'few defenses have greater potential for creating reasonable doubt as to a defendant's guilt in the minds of the jury [than an alibi].'" *Porter*, 216 N.J. at 353 (quoting *State v. Mitchell*, 149 N.J. Super. 259, 262 (App. Div. 1977)); *State v. Pierre*, 223 N.J. 560, 583 (2015) ("counsel chose to forego evidence that could have reinforced [his] alibi" defense, which "performance fell below the objective standard of reasonableness guaranteed by the United States and New Jersey constitutions."). This is no less true at sentencing than it is during trial preparations. *See State v. Hess*, 207 N.J. 123, 154 (2011) (finding petitioner received ineffective assistance of counsel at sentencing as, even "[p]utting aside defense counsel's failure to object to the restrictions in the plea

agreement at the time of sentencing, . . . the failure to present and argue the mitigating evidence can only be explained as attorney dereliction").

This is particularly present where, as in this case, counsel's investigation goes to the immigration consequences of a plea and sentence. The importance of this issue to noncitizen defendants cannot be overstated. In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Court held that counsel had been ineffective, under *Strickland*, for misadvising a defendant about the potential for deportation as a consequence of the defendant's guilty plea. *See Padilla*, 559 U.S. at 366-68. Before reaching that conclusion, the Court stressed that even if deportation is not, strictly speaking, a "criminal sanction," its consequential weight is enormous; indeed, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Id.* at 368 (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 322 (2001)); see also *id.* at 373-74 ("The severity of deportation — 'the equivalent of banishment or exile,' *Delgadillo v. Carmichael*, 332 U.S. 388, 390–391 (1947) — only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation."). This Court echoed *Padilla*'s analysis in *State v. Gaitan*, reiterating the U.S. Supreme Court's recognition that "deportation is a 'particularly severe penalty . . . intimately related to the criminal process,'" and thus that "'[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." *Gaitan*, 209 N.J. at 355

(quoting *Padilla*, 559 U.S. at 367). In State Court, too, "preserving the right to remain in the United States may be more important . . . than any potential jail sentence." *State v. Blake*, 444 N.J. Super. 285, 295 (App. Div. 2016) (quoting *Padilla*, 559 U.S. at 368; *I.N.S. v. St. Cyr*, 533 U.S. 289, 322 (2001)).

For these reasons, and as the courts below identified, a defendant's right to know the deportation consequences of a guilty plea is well established. *Hernandez-Peralta*, 2024 WL 1005085, *4-5. Specifically, Federal and New Jersey authority requires that, where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence," defense counsel's advice must "be equally clear." *Gaitan*, 209 N.J. at 380 (citing *Padilla*, 559 U.S. at 369). Where the deportation consequences of a plea are plain, as they were in this case, the failure "to point out to a noncitizen client that he or she is pleading to a mandatorily removable offense" constitutes "deficient performance of counsel." *Gaitan*, 209 N.J. at 380.

C. Sentencing counsel's investigation was inadequate in this case.

Because the issue of Defendant's deportation as a result of his plea and sentence was so important and his right to be advised of that deportation is settled, the red flags in his PSR, described above and below, made further inquiry absolutely essential. It is not sufficient for counsel to rely on a defendant's statement that he is a U.S. citizen in the face of information to the contrary, as the State contends. *See,*

e.g., Sb26. Of course, counsel would not be obligated to undertake further inquiry if that was the only information she had, as nothing would suggest that it was incomplete or inaccurate. *See DiFrisco*, 174 N.J. at 228 ("'[c]ounsel cannot be faulted for failing to expend time or resources analyzing events about which he or she was never alerted.'"). But that was not the case here, where the PSR identified that Defendant was born in Mexico and that his mother lived out of the United States, and did not confirm his citizenship or alien status. The PSR's failure to include any driver's license information or social security number should, as the Courts below made clear, have caused sentencing counsel further concern and, at the very least, prompted further investigation, and then, if his client wished, a motion to withdraw his guilty plea.[3]

[3] Such a motion would likely have been granted under *State v. Slater*, 198 N.J. 145 (2009) and its progeny. *State v. Chau*, 473 N.J. Super. 430 (App. Div. 2022), is instructive in this respect; there, the Appellate Division reversed a trial court order dismissing a foreign national defendant's post-conviction relief petition without an evidentiary hearing, and remanded the matter for the trial court to assess the defendant's petition under *Strickland* and *Slater*. *Chau*, 473 N.J. Super. at 447. Specifically, the Appellate Division held that the defendant "established a prima facie claim of both ineffective assistance of counsel and prejudice" as a result of his counsel's alleged failure to render advice and correct misadvice regarding the deportation consequences of his guilty pleas, *id.* at 446. The Appellate Division also stated that "although a claim of ineffective assistance of counsel and a motion to withdraw a guilty plea are different applications that must be analyzed separately, 'the two tests may overlap.'" *Id*. at 447 (quoting *State v. O'Donnell*, 435 N.J. Super. 351, 370 (App. Div. 2014)); *see also O'Donnell*, 435 N.J. Super. at 370-71 (App. Div. 2014) ("A defendant may rely on discovery of his or her attorney's misinformation about the consequences of a plea" to establish the reasons for

The State's position that defendant was untruthful about his citizenship and that sentencing counsel was therefore not obligated to provide immigration advice ignores the other evidence in the record that gave rise to the fundamental obligation to investigate. It also seriously minimizes the role of defense counsel, which in many, if not most, cases requires defense counsel to evaluate and understand the limitations in the accuracy of information that their client shares, whether as a result of mental health issues (such as paranoia), substance use disorders, lack of education, communication barriers, an unsophisticated understanding of legal systems, or something else altogether. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 364 (2000) (finding ineffective assistance where "counsel did not fulfill their ethical obligation to conduct a thorough investigation of Williams' background"); *Hamilton v. Ayers*, 583 F.3d 1100, 1118 (9th Cir. 2009) ("A defendant's lack of cooperation does not eliminate counsel's duty to investigate."); *Karis v. Calderon*, 283 F.3d 1117, 1136 (9th Cir. 2002) (determining that the defendant's lack of cooperation did not excuse counsel from further investigating mitigating evidence, especially given that "counsel was aware [that the defendant suffered] childhood abuse. . ."); *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990) ("Where a condition may not be visible to a layman, counsel cannot depend on his or her own evaluation of someone's sanity

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seeking to withdraw the plea under *Slater* as well as to establish that counsel's representation was not objectively reasonable under *Strickland*).

once he has reason to believe an investigation is warranted because, where such a condition exists, the defendant's attorney is the sole hope that it will be brought to the attention of the court."); *Com. v. Alvarez*, 433 Mass. 93, 102-03 (2000) (on topics of which one would not expect a defendant to "have detailed information or a sophisticated understanding," the defendant's "own recollection" should not be seen "as a reliable source of information." (quoting *Strickland*, 466 U.S. at 691)).

Particularly at the sentencing phase, defense counsel has the critical role of providing a window into who stands before the court beyond the offense conduct. *See* N.J.S.A. 2C:44-1(b) (directing courts to consider mitigating factors, including "character and attitude of the defendant"). In doing so, counsel must sometimes draw out information that the defendant might not understand to be important or even relevant. That may arise through observations of the client, discussions with a family member, or review of discovery or reports that raise red flags. *See, e.g.*, 1 ABA Standards for Criminal Justice 4–4.1 (4th ed. 2017) ("Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. . . ."). But it is certainly not the case that competent defense counsel relies entirely upon what a defendant tells her, regardless of the other aspects of the record, to determine what investigation is necessary to provide adequate representation.

See, e.g., *Jacobs v. Horn*, 395 F.3d 92, 102-03 (3rd Cir. 2005) (finding that counsel failed to exercise "reasonable professional judgment in failing to investigate further and discover [petitioner's]" mental impairments, where counsel "should have known from [petitioner's] behavior and from his interactions with [petitioner] that he should initiate some investigation of a psychological or psychiatric nature."); *see also* César Cuauhtémoc García Hernández, *Criminal Defense After Padilla v. Kentucky*, 26 Geo. Immigr. L.J. 475, 515 (2012) (drawing guidance from pre- and post-*Padilla* case law, ABA Model Rules, and other sources to state that "[a]s a preliminary matter, defense attorneys must consider a client's citizenship status. Asking a client "Are you a citizen of the United States?," however, is insufficient . . .."); id. at 517 ("In all likelihood most defendants will answer a question about place of birth with sufficient clarity as to allow 'reasonably diligent counsel' to decide that 'further investigation would be a waste.' As with all client counseling, however, . . . defense attorneys need to gauge how far they pursue this line of questions in light of the peculiarities of each client's responses. For example, an exception may arise if the attorney has some reason to doubt the client's statement, perhaps because the client's mental competence appears hindered or recollection seems faulty."). Here, counsel need only have communicated with Defendant to identify the discrepancies in the PSR as relevant to the immigration issue and inquired further as to how he became a citizen. *See, e.g.*, *United States v. Russell*, 221 F.3d 615, 621 (4th Cir. 2000)

(holding that counsel had rendered ineffective assistance where he "simply relied on [certain] representations of the government" and the "necessary investigation was minimal: a simple check of the District of Columbia Superior Court records would have verified" important background information the government had miscommunicated). As the Appellate Division concluded, this inquiry likely would have revealed that Defendant was a green card holder, at which time counsel could have taken additional steps, including further consultation with her client, discussions with immigration counsel and, if required, the filing of a motion to withdraw the previously entered guilty plea.

Because counsel failed to conduct the additional inquiry that was warranted by the information in the PSR, and in light of the import of the well-settled right to know the immigration consequences of a plea to a deportable offense, the Appellate Division correctly affirmed the PCR court's determination that counsel's performance was deficient under the first prong of *Strickland*.

CONCLUSION

For the reasons set forth above, *Amicus Curiae* the ACDL-NJ respectfully urges the Court to affirm the decision of the Appellate Division.

Respectfully submitted,

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