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ELGO, J., concurring. United States immigration law has been "characterized as a labyrinth and Byzantine" and "second only to the Internal Revenue Code in complexity." (Internal quotation marks omitted.) *Ebu* v. *Commonwealth*, 661 S.W.3d 319, 329–30 (Ky. App. 2022). Questions about both its applicability and its enforcement often prove difficult for immigration law experts, let alone criminal defense attorneys tasked with providing effective assistance to noncitizens accused of crime. The challenge of providing proper legal guidance has only compounded since the landmark decision of *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), in which the United States Supreme Court held that counsel is required to apprise a defendant of the immigration consequences of a criminal conviction. Id., 374. As a result, public defenders and criminal defense attorneys are left in a precarious position, as the state of the law on this evolving issue frequently is confusing and conflicting.

In the present case, I agree with the majority that the petitioner, Joseph Stephenson, satisfied his burden of establishing that his criminal trial counsel, James Lamontagne, rendered ineffective assistance pursuant to the standard set forth in *Budziszewski* v. *Commissioner of Correction*, 322 Conn. 504, 142 A.3d 243 (2016). In deciding this appeal, it is axiomatic that this court, as an intermediate appellate tribunal, is bound by that precedent. See *Jobe* v. *Commissioner of Correction*, 334 Conn. 636, 645, 224 A.3d 147 (2020); *State* v. *Siler*, 204 Conn. App. 171, 177–78, 253 A.3d 995, cert. denied, 343 Conn. 912, 273 A.3d 694 (2021). I write separately to express my disagreement with the habeas court that, pursuant to *Padilla* and its progeny, defense counsel was obligated to advise the petitioner that his guilty pleas "would automatically subject him to mandatory deportation." In addition, I respectfully submit that the standard articulated by our Supreme Court in *Budziszewski* does not fully comport with its fundamental teaching—that, "[b]ecause noncitizen clients will have different understandings of legal concepts and the English language," counsel must explain "the [plea] consequences set out in federal law accurately and in terms the client could understand." *Budziszewski* v. *Commissioner of Correction*, supra, 507. Accordingly, I respectfully concur.

I

Padilla v. *Kentucky*, supra, 559 U.S. 373–74, marked a sea change in effective assistance of counsel jurisprudence, as it expanded that sixth amendment right to encompassimmigration consequences during the negotiation and plea stages of criminal proceedings.[1] In *Padilla*, the United States Supreme Court recognized that, "as

a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[2] (Footnote omitted.) Id., 364; see also *Immigration & Naturalization Service* v. *St. Cyr*, 533 U.S. 289, 322, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001) ("[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence" (internal quotation marks omitted)). The court also noted that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." *Padilla* v. *Kentucky*, supra, 367. Accordingly, the court held that "counsel must inform her client whether his plea carries a risk of deportation." Id., 374.

In imposing that burden on counsel, the court acknowledged that "[i]mmigration law can be complex, and it is a legal specialty of its own." Id., 369. The court thus drew a critical distinction between federal immigration law that is "succinct and straightforward"; id.; as to whether a guilty plea will render a client "eligible for deportation"; id., 368; and federal immigration law that is "unclear or uncertain" as to that consequence. Id., 369. The court imposed a "more limited" duty on the part of counsel with regard to the latter. Id. As it explained: "When the law is *not* succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges *may carry a risk* of adverse immigration consequences. But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." (Emphasis added; footnote omitted.) Id. Applying that standard to the facts on hand, the court concluded that Jose Padilla's counsel rendered ineffective assistance because "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction" and "counsel could have easily determined that his plea would make him *eligible for deportation* simply from reading the text of the statute . . . ." (Emphasis added.) Id., 368.

Importantly, the court "did not discuss, let alone hold, that defense counsel must use specific magic words in advising of the risk of deportation, such as 'absolute deportation,' 'certain deportation,' or 'inevitable deportation' or the like." *State* v. *Sanmartin Prado*, 448 Md. 664, 711–12, 141 A.3d 99 (2016), cert. denied sub nom. *Prado* v. *Maryland*, 581 U.S. 918, 137 S. Ct. 1590, 197 L. Ed. 2d 707 (2017). As the Supreme Court of Colorado noted, the court in *Padilla* "used the phrase 'automatically deportable' only in the portion of its opinion describing historical developments in federal immigration law"; *Juarez* v. *People*, 457 P.3d 560, 564 (Colo. 2020), cert. denied sub nom. *Juarez* v. *Colorado*, U.S. , 141 S. Ct. 1370, 209 L. Ed. 2d 118 (2021); and

did not "again use the term 'automatic deportation' or suggest in the body of the analysis any requirement for counsel to predict the likelihood that the law will actually be enforced and the defendant will actually be deported." Id., 565. The court in *Padilla* likewise observed, in the historical context section of its opinion, that deportation was "virtually inevitable for a vast number of noncitizens convicted of crimes"; *Padilla* v. *Kentucky*, supra, 559 U.S. 360; but did not again use that terminology at any point in its analysis of the petitioner's ineffective assistance of counsel claim.

In the wake of *Padilla*, courts throughout this country have split on the question of whether counsel must advise a client who pleads guilty to a deportable offense that deportation is mandatory, certain, inevitable or the like. Several have construed *Padilla* to include such a requirement.[3] Others have held that no such obligation exists.[4] In this regard, I am concerned that many courts are conflating the issue of whether a guilty plea renders a defendant *deportable* under federal immigration law with the issue of whether that defendant will, in fact, be deported or removed from this country.[5] The former is the subject of *Padilla* and pertains to the legal ramification of a plea, while the latter pertains to the practical result of the plea. In my view, defense counsel has no obligation to advise clients as to the probability or likelihood that they actually will be removed from this country, as our Supreme Court has held. See *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 507 (*Padilla* "does not require counsel to predict whether or when federal authorities will pursue the client in order to carry out the deportation proceedings required by law"). Rather, to comply with *Padilla*, I believe counsel must advise clients when a guilty plea renders them deportable under federal law and subject to removal by the federal government.

To go any further and delve into the probability or likelihood that a noncitizen client will, in fact, be removed from this country poses a serious risk of misleading the client. Significantly, the relevant statutory language from federal immigration law does not state that removal is automatic, mandatory, or certain for particular offenses. For example, 8 U.S.C. § 1227 (a) (2) (A) (ii) provides that "[a]ny alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, *is deportable*." (Emphasis added.) Similarly, 8 U.S.C. § 1227 (a) (2) (A) (iii) provides: "Any alien who is convicted of an aggravated felony at any time after admission *is deportable*." (Emphasis added.) See also 8 U.S.C. § 1228 (c) (2018) ("[a]n alien convicted of an aggravated felony shall be conclusively presumed *to be deportable* from the United States" (emphasis added)).

As several courts across this country have recognized, "a conviction for a deportable offense will not necessarily result in deportation . . . ." *State* v. *Sanmartin Prado*, supra, 448 Md. 716. In *State* v. *Shata*, 364 Wis. 2d 63, 70, 868 N.W.2d 93 (2015), the Supreme Court of Wisconsin explained that, after pleading guilty to a deportable offense under federal law, the defendant's "deportation was not an absolute certainty. Executive action, including the United States Department of Homeland Security's exercise of prosecutorial discretion, can block the deportation of deportable aliens." It continued: "[W]hether immigration personnel would necessarily take all the steps needed to institute and carry out [an alien's] actual deportation [i]s not an absolute certainty. . . . [P]rosecutorial discretion and the current administration's immigration policies provide possible avenues for deportable aliens to avoid deportation. In fact, the executive branch has essentially unreviewable prosecutorial discretion with respect to commencing deportation proceedings, adjudicating cases, and executing removal orders." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id., 95–96; see also *Padilla* v. *Kentucky*, supra, 559 U.S. 364 (noting "equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses"); *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999) (noting "the Attorney General's discrete acts of 'commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders' " pursuant to federal law and explaining that, "[a]t each stage the [e]xecutive has discretion to abandon the endeavor"); *Ortiz* v. *Lynch*, 640 Fed. Appx. 42, 44–45 (2d Cir. 2016) (referencing memorandum from Department of Homeland Security that "directs the agency to exercise prosecutorial discretion [in pursuing removal] even in the case of noncitizens convicted of aggravated felonies").[6]

In a similar vein, our Supreme Court has observed that "immigration enforcement policies and practices often differ between executive administrations. . . . A period of either relaxed or strict enforcement may not last long, meaning that counsel's advice on current enforcement practices will have little meaning as policies change after the client accepts a plea deal." (Citation omitted.) *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 515; accord *United States* v. *Texas*, 599 U.S. 670, 673, 143 S. Ct. 1964, 216 L. Ed. 2d 624 (2023) ("[i]n 2021, after President Biden took office, the Department of Homeland Security issued new [g]uidelines for immigration enforcement"); *United States* v. *Hercules*, 947 F.3d 3, 8 (1st Cir. 2020) ("[D]espite the high likelihood of the appellant's eventual deportation under the current statutory scheme, we cannot say that the district court clearly erred by deeming the appellant's future deportation uncertain. In practice, enforce-

ment of the immigration laws has not always been a model of consistency, and the district court plausibly noted that the immigration enforcement priorities of the Executive Branch 'seem to be in flux,' changing with the ebb and flow of political tides." (Footnote omitted.)); *State* v. *Shata*, supra, 364 Wis. 2d 95 n.16 ("[s]ince at least the 1960s, the federal executive branch has gone back and forth in adopting and rescinding policies regarding deferred action on deportation").[7]

It is well established that "all guilty pleas must be knowing and voluntary to comport with due process." *Dyous* v. *Commissioner of Mental Health & Addiction Services*, 324 Conn. 163, 176, 151 A.3d 1247 (2016); see also *Boykin* v. *Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (to be valid, guilty plea must be intelligently and understandingly made); *Sherbo* v. *Manson*, 21 Conn. App. 172, 178–79, 572 A.2d 378 ("A guilty plea, which is itself tantamount to conviction, may be accepted by the court only when it is made knowingly, intelligently, and voluntarily. . . . A guilty plea otherwise obtained is in violation of due process and voidable." (Citation omitted.)), cert. denied, 215 Conn. 808, 809, 576 A.2d 539, 540 (1990). A knowing and intelligent decision to plead guilty by a defendant, in turn, requires accurate advice from counsel.[8] Because a noncitizen's actual removal from this country following a guilty plea to a deportable offense is neither mandatory nor inevitable, it is near impossible for a criminal defense attorney lacking immigration law expertise to provide accurate advice on the probability that a client will in fact be removed by the federal government.

In *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 507, our Supreme Court recognized that "noncitizen clients will have different understandings of legal concepts and the English language . . . ." The burden on defense counsel, the court explained, is to accurately convey the immigration consequences of a guilty plea "to the client in terms the client [can] understand." Id., 513. In light of the foregoing, the court emphasized that "there are no fixed words or phrases that counsel must use to convey this information" to noncitizen clients. Id., 512. The court nevertheless held that, when counsel "chooses to give advice" as to the "actual likelihood" that the federal government will remove the client from the United States, counsel must "convey to the client that once federal authorities apprehend the client, *deportation will be practically inevitable* under federal law." (Emphasis added.) Id., 507.

Inevitable is synonymous with certain or definite; see *Sorban* v. *Sterling Engineering Corp.*, 79 Conn. App. 444, 453, 830 A.2d 372, cert. denied, 266 Conn. 925, 835 A.2d 473 (2003); and is defined as "incapable of being avoided or prevented." American Heritage Dictionary of the English Language (5th Ed. 2013) p. 658; see also Webster's Third New International Dictionary (2002) p.

1157 (defining inevitable as "incapable of being avoided or evaded" and "certain to occur"). Given that commonly understood meaning, I respectfully disagree that defense counsel should *ever* advise a client that a guilty plea to a deportable offense will render their removal "practically inevitable." Such advice is inaccurate; see, e.g., *United States* v. *Hercules*, supra, 947 F.3d 8 ("despite the high likelihood of the appellant's eventual deportation . . . we cannot say that the district court clearly erred by deeming the appellant's future deportation uncertain" (footnote omitted)); *United States* v. *Santelises*, 476 F.2d 787, 790 (2d Cir. 1973) ("[d]eportation . . . serious sanction though it may be, is not . . . an absolute consequence of conviction"); *State* v. *Shata*, supra, 364 Wis. 2d 105 ("a conviction for a deportable offense will not necessarily result in deportation"); and poses a serious risk of misleading noncitizen clients, particularly ones with limited "ability to understand the English language . . . ." *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 513. Put simply, counsel "does not control and cannot know with certainty whether the federal government will deport an alien upon conviction." *State* v. *Shata*, supra, 103; see also *United States* v. *Ramirez-Jimenez*, 907 F.3d 1091, 1094 (8th Cir. 2018) (per curiam) ("immigration law complexities should caution any criminal defense attorney not to advise a defendant considering whether to plead guilty that the result of a post-conviction, contested removal proceeding is clear and certain"); *Budziszewski* v. *Commissioner of Correction*, supra, 515 (noting "the difficulty in predicting [immigration] enforcement practices"); *State* v. *Sanmartin Prado*, supra, 448 Md. 719 ("the process that must occur between a defendant's conviction for a deportable offense and actual deportation makes it less than certain or absolute that deportation will actually result even if the defendant is convicted of a deportable offense").

Moreover, imagine the scenario where counsel advises a noncitizen client that a guilty plea to a deportable offense will render their removal "practically inevitable" and the client, relying on that advice, proceeds to trial and is convicted but thereafter is *not* removed from this country. Can the client maintain an ineffective assistance of counsel claim predicated on counsel's advice that removal was practically inevitable and that, but for that advice, the client would have taken the plea offered by the state? Or, as another judge asked, "[W]ill a claim for ineffective assistance of counsel lie if a defendant proceeds to trial (and is convicted and sentenced) based on advice that fails to include a complete and accurate explanation of all possible exemptions [to removal] that might be available?" *Commonwealth* v. *DeJesus*, 468 Mass. 174, 187 n.2, 9 N.E.3d 789 (Cordy, J., dissenting). There is no clearly marked path for the counsel who ventures into the thicket of federal immigration law, and landmines abound.[9]

As one court cautioned, "While we do not discourage trial counsel from conducting research on immigration law, we caution practitioners that any advice they give beyond the standard must still be accurate . . . ." *Ebu* v. *Commonwealth*, supra, 661 S.W.3d 335; see also *Padilla* v. *Kentucky*, supra, 559 U.S. 369–70 ("counsel is required to provide accurate advice if she chooses to discuss" matters such as removal). Pursuant to rule 1.1 of the Rules of Professional Conduct, lawyers in this state are obligated to furnish competent representation to a client. "[A]n attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." (Internal quotation marks omitted.) *Celentano* v. *Grudberg*, 76 Conn. App. 119, 125, 818 A.2d 841, cert. denied, 264 Conn. 904, 823 A.2d 1220 (2003). I concur with Justice Alito's observation that "thorough understanding of the intricacies of immigration law is not within the range of competence demanded of attorneys in criminal cases." (Emphasis omitted; internal quotation marks omitted.) *Padilla* v. *Kentucky*, supra, 559 U.S. 385 (Alito, J., concurring); see also *Ebu* v. *Commonwealth*, supra, 335 n.7 (noting "the very real difficulty of non-immigration attorneys attempting to understand the United States's convoluted immigration law without typically practicing in this area"); *State* v. *Sanmartin Prado*, supra, 448 Md. 719 ("from a practical standpoint, it would be unreasonable to require defense counsel . . . to essentially become an immigration law specialist").

Attorneys who represent noncitizen clients in this state should be mindful of our Supreme Court's explication that counsel is *not* required "to predict whether or when federal authorities will pursue the client in order to carry out the deportation proceedings required by law." *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 507. Their burden under *Padilla* is to advise clients when a guilty plea renders them deportable under federal law and subject to removal by the federal government. To the extent that a client seeks advice on "the likelihood that [federal immigration] law will actually be enforced and the [client] will actually be deported"; *Juarez* v. *People*, supra, 457 P.3d 565; I believe that counsel should, consistent with their obligations under the Rules of Professional Conduct, advise the client to "consult an immigration specialist [for] advice on that subject." *Padilla* v. *Kentucky*, supra, 559 U.S. 387 (Alito, J., concurring); see also *Chhabra* v. *United States*, 720 F.3d 395, 407–408 (2d Cir. 2013) (concluding that defense counsel did not render ineffective assistance when he "referred [the noncitizen client] to expert immigration counsel, with the result that [the client] received, prior to the acceptance of his plea, correct legal advice as to the deportation effects that

a [guilty plea] would have"); *Ebu* v. *Commonwealth*, supra, 661 S.W.3d 322 (concluding that defense counsel "was not acting ineffectively by advising [the noncitizen client] that there could be immigration consequences to his plea and that he should consult with an immigration attorney"); *Fuentes* v. *Clarke*, 290 Va. 432, 439, 777 S.E.2d 550 (2015) (concluding that defense counsel did not render ineffective assistance when he "informed [the noncitizen client] that deportation was the likely consequence of the plea, and advised her to consult with an immigration attorney because he did not specialize in immigration").

II

In the present case, Attorney Lamontagne served as defense counsel for the petitioner, a citizen of Jamaica, in two separate criminal proceedings involving larceny charges. See *Stephenson* v. *Commissioner of Correction*, 197 Conn. App. 172, 174–75, 231 A.3d 210 (2020). The petitioner ultimately entered guilty pleas in both cases. Id., 174. He thereafter commenced this habeas corpus action, alleging in relevant part that Lamontagne rendered ineffective assistance of counsel by failing "to accurately advise [him] . . . that pleading guilty to the larceny charges against him would make him deportable, removable, and inadmissible for reentry under federal immigration law" and by failing "to accurately advise [him] about the enforcement practices of federal immigration authorities and the probability that [they] would take action to have him deported or removed from the United States after [he] entered a guilty plea . . . ." A habeas trial followed, at which both the petitioner and Lamontagne testified.

As noted in part I of this concurring opinion, to comply with *Padilla*, defense counsel must advise clients when a guilty plea renders them deportable under federal law and subject to removal by the federal government. The uncontroverted factual findings made by the habeas court demonstrate that Lamontagne complied with that obligation.[10] The court found that the petitioner "was familiar with deportation proceedings from prior convictions [and] knew of potential immigration and deportation consequences in the present cases." The court also found that Lamontagne "was aware that convictions for crimes of moral turpitude would subject the petitioner to deportation";[11] that he "discussed with the petitioner the difference between one and two convictions for crimes involving moral turpitude"; and that he "told [the petitioner] that he was exposed to deportation" as a result of the two larceny convictions. Most significantly, the court found that, in light of Lamontagne's advice, "[t]he petitioner, therefore, knew that these convictions *made him removable*." (Emphasis added.) In light of those uncontested findings, I would conclude that Lamontagne complied with the mandate of *Padilla*. See *Padilla* v. *Kentucky*, supra, 559 U.S. 374 ("we now hold that coun-

sel must inform her client whether [a guilty] plea carries a risk of deportation"); see also id., 368 (concluding that "counsel could have easily determined that [Padilla's] plea *would make him eligible for deportation* simply from reading the text of the statute" (emphasis added)).

It is also noteworthy that the court found that Lamontagne "had discussions with the petitioner about the immigration consequences [of his guilty pleas and] also with his family. Lamontagne advised the petitioner and his family that they should speak to an immigration attorney." The court also found that Lamontagne "referred the petitioner to an immigration attorney to obtain advice about the different ramifications resulting from one or two convictions from crimes of moral turpitude." Had Lamontagne done no more than advise the petitioner that his guilty pleas would render him removable and that he should consult with an immigration attorney for further guidance, I do not believe the petitioner could meet his burden of proof; see *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 516 n.2; on an ineffective assistance of counsel claim. See, e.g., *Ebu* v. *Commonwealth*, supra, 661 S.W.3d 322 (concluding that defense counsel "was not acting ineffectively by advising [the noncitizen client] that there could be immigration consequences to his plea and that he should consult with an immigration attorney"); *Fuentes* v. *Clarke*, supra, 290 Va. 439 (concluding that defense counsel did not render ineffective assistance when he "informed [the noncitizen client] that deportation was the likely consequence of the plea, and advised her to consult with an immigration attorney because he did not specialize in immigration").

Nevertheless, the court found, and the record confirms, that Lamontagne did more than just advise the petitioner that his guilty pleas would render him removable by the federal government and encourage him to consult an immigration expert. Lamontagne also provided advice to the petitioner on the likelihood of enforcement action by immigration authorities.[12] As the court found in its memorandum of decision: "It was Attorney Lamontagne's understanding that, if a defendant receives a sentence of more than one year, then immigration authorities would automatically initiate deportation proceedings, although those proceedings would not necessarily result in actual deportation. Conversely, it was Lamontagne's understanding that immigration authorities would not automatically initiate deportation proceedings if the sentence were less than one year. Lamontagne advised the petitioner accordingly . . . . Attorney Lamontagne understood that the petitioner could be subjected to deportation if convicted of crimes of moral turpitude, but that he would have a 'fighting chance' because his negotiated sentence was less than one year." In so doing, Lamontagne's advice ran afoul of the stricture of *Budziszewski* v.

Commissioner of Correction, supra, 322 Conn. 507, that, if counsel "chooses to give advice . . . about federal enforcement practices, counsel must . . . convey to the client that once federal authorities apprehend the client, *deportation will be practically inevitable* under federal law." (Emphasis added.) In informing the petitioner that his guilty pleas gave him a "fighting chance" of avoiding removal from this country by entering into his guilty pleas, Lamontagne provided improper advice to the petitioner.[13] Moreover, because the court credited the petitioner's testimony that he "sought to avoid deportation and . . . understood his guilty pleas would not trigger automatic consequences" and that he "would have proceeded to trial had he been correctly advised about the consequences" of his guilty pleas, I would conclude that the petitioner satisfied his burden of establishing the requisite prejudice resulting from that advice.

It is "axiomatic that [an appellate court] may affirm a proper result of the trial court for a different reason." (Internal quotation marks omitted.) *Silano* v. *Cooney*, 189 Conn. App. 235, 241 n.6, 207 A.3d 84 (2019); see also *Helvering* v. *Gowran*, 302 U.S. 238, 245, 58 S. Ct. 154, 82 L. Ed. 224 (1937) ("the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground"). In light of the foregoing, and bound by the precedent of our Supreme Court in *Budziszewski*, I would affirm the habeas court's determination that Lamontagne rendered ineffective assistance of counsel under the particular facts of this case. I, therefore, respectfully concur in the judgment of this court.

[1] As one commentator notes, "*Padilla* is the [United States Supreme Court's] first case to treat plea bargaining as a subject worthy of constitutional regulation in its own right and on its own terms." S. Bibas, "Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection," 99 Cal. L. Rev. 1117, 1120 (2011).

[2] As the Supreme Court of Iowa observed in applying *Padilla*, "deportation is a broad concept, and the adverse immigration consequences of a criminal conviction to a noncitizen under the immigration statute are not limited to removal from this country. In addition to removal from the country, the immigration statute also carries consequences associated with removal, such as exclusion, denial of citizenship, immigration detention, and bar to relief from removal." *Diaz* v. *State*, 896 N.W.2d 723, 729 (Iowa 2017).

[3] See, e.g., *United States* v. *Rodriguez-Vega*, 797 F.3d 781, 786 (9th Cir. 2015) ("where the law is 'succinct, clear, and explicit' that the conviction renders removal virtually certain, counsel must advise his client that removal is a virtual certainty"); *United States* v. *Urias-Marrufo*, 744 F.3d 361, 366 (5th Cir. 2014) ("defense counsel has an obligation under the [s]ixth [a]mendment to inform his noncitizen client that the offense to which he was pleading guilty would result in his removal from this country" (internal quotation marks omitted)); *United States* v. *Akinsade*, 686 F.3d 248, 254 (4th Cir. 2012) ("the admonishment did not 'properly inform' [the defendant] of the consequence he faced by pleading guilty: mandatory deportation"); *Encarnacion* v. *State*, 295 Ga. 660, 663, 763 S.E.2d 463 (2014) ("An attorney's advice as to the likelihood of deportation must be based on realistic probabilities, not fanciful possibilities. . . . [W]here . . . the law is clear that deportation is mandatory and statutory discretionary relief is unavailable, an attorney has a duty to accurately advise his client of that fact. . . . It is not enough to say 'maybe' when the correct advice is 'almost certainly will.' " (Citation omitted.)); *Araiza* v. *State*, 149 Haw. 7, 20, 481 P.3d 14 (2021) (concluding that defense counsel rendered ineffective assistance by advising

client that guilty plea would result in " 'almost' certain" deportation and holding that "defense attorneys must advise their clients using language that conveys that deportation 'will be required' by applicable immigration law for an aggravated felony conviction"); *Commonwealth* v. *DeJesus*, 468 Mass. 174, 179, 9 N.E.3d 789 (2014) ("advising a defendant faced with circumstances similar to those in this case that he is 'eligible for deportation' does not adequately inform such a defendant that, if he were to plead guilty . . . his removal from the United States would be presumptively mandatory under [f]ederal law"); *Salazar* v. *State*, 361 S.W.3d 99, 103 (Tex. App. 2011) ("[T]he correct advice, which was that the plea of guilty would result in certain deportation, was not given. Both the terms 'likelihood' and 'possibility' leave open the hope that deportation might not occur. Consequently, these admonishments were inaccurate and did not convey to [the client] the certainty that the guilty plea would lead to his deportation.").

[4] See, e.g., *United States* v. *Ramirez-Jimenez*, 907 F.3d 1091, 1094 (8th Cir. 2018) (per curiam) ("[The defendant] argues that trial counsel's performance was defective because [he] was not told that 'he was subject to mandatory deportation and ineligible for relief from removal.' But the argument misinterprets *Padilla* and is based on a false premise. In *Padilla*, the Supreme Court held that plea counsel's performance was deficient for failing to advise Padilla that his conviction would make him 'deportable' . . . if he pleaded guilty, not that deportation or removal was either mandatory or certain."); *State* v. *Sanmartin Prado*, supra, 448 Md. 713 (concluding that counsel's advice that "the offense [to which the defendant pleaded guilty] was a 'deportable offense,' that [the defendant] 'could be deported . . . if the federal government chose to initiate deportation proceedings,' and thus that it was 'possible' that [the defendant] would be deported" was "correct advice" pursuant to *Padilla*); *Chacon* v. *State*, 409 S.W.3d 529, 537 (Mo. App. 2013) (defense counsel's advice that defendant would "very likely be deported and wouldn't be able to come back" was constitutionally effective assistance (internal quotation marks omitted)); *Commonwealth* v. *Escobar*, 70 A.3d 838, 842 (Pa. Super. 2013) ("[w]e do not read [the federal immigration statute] or the [*Padilla*] court's words as announcing a guarantee that actual deportation proceedings are a certainty such that counsel must advise a defendant to that effect"), cert. denied, 624 Pa. 680, 86 A.3d 232 (2014); *Neufville* v. *State*, 13 A.3d 607, 614 (R.I. 2011) ("[c]ounsel is not required to inform their clients that they *will* be deported, but rather that a defendant's plea would make [the defendant] eligible for deportation" (emphasis in original; internal quotation marks omitted)); *Fuentes* v. *Clarke*, 290 Va. 432, 441, 777 S.E.2d 550 (2015) (concluding that trial counsel did not render deficient performance pursuant to *Padilla* when counsel "expressly informed [the defendant] that he was not a specialist in immigration, advised her that she would be deportable unless she found a remedy within the immigration system, and advised her to consult with an immigration attorney"); *State* v. *Shata*, 364 Wis. 2d 63, 97, 868 N.W.2d 93 (2015) ("[b]ecause deportation is not an absolutely certain consequence of a conviction for a deportable offense, *Padilla* does not require an attorney to advise [a noncitizen] client that deportation is an absolute certainty upon conviction of a deportable offense").

In *Juarez* v. *People*, supra, 457 P.3d 561–62, the defendant conceded that he was advised that his guilty plea would make him "deportable" and "that deportation was the probable outcome of accepting the plea." He nonetheless argued on appeal that "adequate advice required counsel's use of the terms 'automatic deportation' and 'presumptively mandatory deportation,' and that advising him he would probably be deported was in fact misleading." Id., 564. The Supreme Court of Colorado disagreed, stating: "The 'correct advice' that counsel has a duty to give [pursuant to *Padilla*] . . . necessarily refers to a correct explanation of 'the law.' . . . The 'correct advice' concerning the legal consequence of the defendant's plea required in the instant case, just as it was in *Padilla*, was that the alien defendant would, in the language of the statute, be 'deportable.' . . . That is precisely the advice the defendant in the instant case was given." (Citations omitted.) Id.

[5] As the court in *Padilla* observed, "changes to [federal] immigration law have also involved a change in nomenclature; the statutory text now uses the term 'removal' rather than 'deportation.' " *Padilla* v. *Kentucky*, supra, 559 U.S. 364 n.6; see also 8 U.S.C. § 1228 et seq. (2018).

[6] Consider the case of Danelo Cavalcante, a citizen of Brazil who escaped from Chester County Prison in Pennsylvania this August, causing a statewide manhunt. Cavalcante had been convicted of murdering his girlfriend in Pennsylvania in front of her children in 2021 and sentenced to life in prison.

Despite that murder conviction, Cavalcante was not deported but remained in the United States to serve his sentence. As one article on Cavalcante notes, "[f]or a variety of reasons, those [noncitizens convicted of] serious crimes are most often required to serve any sentences in the United States." M. Jordan, "In Major Crimes, Deportation Is Often Delayed," New York Times, September 11, 2023, p. A15.

[7] In light of the foregoing authority, I respectfully submit that the majority in *Commonwealth* v. *DeJesus*, 468 Mass. 174, 182, 9 N.E.3d 789 (2014), mistakenly concluded that "all of the conditions necessary for removal would be met by the defendant's guilty plea, and that, under [f]ederal law, there would be virtually no avenue for discretionary relief once the defendant pleaded guilty and that fact came to the attention of [f]ederal authorities." As the dissenting justice in that opinion noted, "[D]eportation is not 'mandatory' or 'inevitable.' Indeed, the deportation proceeding is contingent on there being an 'order' of removal from the Attorney General of the United States, and there still remain discretionary avenues to avoid deportation . . . ." Id., 187 (Cordy, J., dissenting).

[8] See, e.g., *Gilbert* v. *United States*, 64 F.4th 763, 771 (6th Cir. 2023) (effective assistance at plea stage requires counsel to provide "accurate advice" to defendants); *United States* v. *Castro-Taveras*, 841 F.3d 34, 50 n.13 (1st Cir. 2016) ("[i]f an attorney takes it upon himself to advise a client about a material matter, thereby suggesting that he knows what he is talking about, but then provides incorrect advice, the client should be able to bring an ineffective assistance of counsel claim"); *United States* v. *Youngs*, 687 F.3d 56, 61 (2d Cir. 2012) (explaining that *Padilla* held that "a defense attorney's incorrect advice to his client about the risk of deportation constituted ineffective assistance of counsel in violation of the [s]ixth [a]mendment"); *Waugh* v. *Holder*, 642 F.3d 1279, 1283 (10th Cir. 2011) ("the right to effective assistance of counsel includes the right to accurate advice about the risk of deportation"); *State* v. *Shata*, supra, 364 Wis. 2d 107 ("[t]he bottom line is that an attorney's advice must be adequate to allow a defendant to knowingly, intelligently, and voluntarily decide whether to enter a guilty plea").

[9] As Justice Alito observed in his concurring opinion in *Padilla*, "Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience. . . . [D]etermining whether a particular crime is an 'aggravated felony' or a 'crime involving moral turpitude' . . . is not an easy task. . . . Many other terms of [federal immigration law] are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law. . . . The task of offering advice about the immigration consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with which immigration law changes; different rules governing the immigration consequences of juvenile, first-offender, and foreign convictions; and the relationship between the 'length and type of sentence' and the determination 'whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen . . . .' " (Citations omitted.) *Padilla* v. *Kentucky*, supra, 559 U.S. 376–80.

[10] In his appellate brief, the petitioner correctly notes that the respondent in this appeal "does not challenge" the factual findings made by the habeas court.

[11] At the habeas trial, Lamontagne testified that larceny is a crime of moral turpitude and that the petitioner, by pleading guilty, would "be subject to deportation because of the crimes of moral turpitude . . . ."

[12] In his appellate reply brief, the respondent acknowledges that "Lamontagne provided advice [to the petitioner] on both deportability and the likelihood of enforcement" by immigration authorities.

[13] Lamontagne's advice on the likelihood of enforcement by immigration authorities not only contravened *Budziszewski* but also was factually inaccurate. As the majority notes, the habeas court was presented with testimony from Attorney Renee Redman, an immigration law specialist, who testified that the petitioner's retail theft crimes were presumptively crimes of moral turpitude and that a sentence length of less than one year would have "no effect at all" on whether the petitioner would come to the attention of immigration authorities. In its memorandum of decision, the court expressly credited Redman's testimony.