

IN THE SUPREME COURT OF IOWA

No. 18-0235

STATE OF IOWA,

Plaintiff-Appellee,

vs.

PRINCE MELLISH,

Defendant-Appellant.

**APPEAL FROM THE IOWA DISTRICT COURT
FOR MUSCATINE COUNTY
HONORABLE GARY P. STRAUSSER
Muscatine County No. AGCR057939**

APPLICATION FOR FURTHER REVIEW

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QUESTIONS PRESENTED FOR REVIEW

- I. **WHETHER THE IOWA SUPREME COURT SHOULD ADOPT A *PER SE* PREJUDICE RULE FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS UNDER THE IOWA CONSTITUTION WHERE A NON-CITIZEN HAS ESTABLISHED DEFICIENT PERFORMANCE.**
- II. **WHETHER NON-CITIZEN DEFENDANTS HAVE A RIGHT TO IMMIGRATION COUNSEL UNDER THE IOWA CONSTITUTION.**

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STATEMENT SUPPORTING FURTHER REVIEW

This case involves an issue of first impression, namely, whether Article I, Section 10 of the Iowa Constitution is more protective of individual liberties than the Sixth Amendment, considering the unfair impact on non-citizens of the “reasonability probability” requirement for ineffective assistance of counsel claims under the Sixth Amendment. *See Matter of Ozkok*, 19 I. & N. Dec. 546, 553 n.7 (BIA 1988) (noting that under the “rule of finality” in immigration courts, a conviction becomes “final,” triggering immigration consequences, through exhaustion or waiver of direct appellate remedies).

Defendant is unaware of any cases adopting the *Strickland* framework for claims under Section 10. *See Strickland v. Washington*, 466 U.S. 668 (1984) (requiring that a defendant must show both deficient performance and prejudice to establish ineffective assistance of counsel). Because Defendant’s arguments are based only on Section 10, this Court is not bound by prior precedent interpreting the Sixth Amendment, including *Strickland* and its progeny. *See, e.g., State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006) (rejecting a *per se* prejudice rule based on an interpretation of *Strickland*).

Thus, further review is warranted here on several grounds. First, “[t]he court of appeals has decided a substantial question of constitutional law or an important question of law that has not been, but should be, settled by the supreme court[.]”

Iowa R. App. P. 6.1103(1)(b)(2). Defendant-Appellant urged the Court of Appeals to adopt a *per se* prejudice rule under the Iowa Constitution for ineffective assistance of counsel claims where a non-citizen has established deficient performance. The Court of Appeals declined to adopt Defendant's *per se* prejudice rule absent a precedential ruling from the Supreme Court. (Ruling, at 7-8). Because the defendant in *Diaz v. State* did not assert a claim under the Iowa Constitution, the Iowa Supreme Court specifically "reserve[d] the right to interpret the Iowa Constitution more stringently than its federal counterpart in future cases." *Diaz v. State*, 896 N.W.2d 723, 727 n.1 (Iowa 2017). Defendant in the instant case has argued that the text and history of Article I, section 10 of the Iowa Constitution supports affording non-citizens protections not provided by the Federal Constitution. Thus, the Supreme Court should decide the issue reserved in *Diaz*, namely, whether the Iowa Constitution's Assistance of Counsel Clause should be more stringently interpreted than its federal counterpart.

Second, this "case present an issue of broad public importance that the supreme court should ultimately determine." Iowa R. App. P. 6.1103(1)(b)(4). As Defendant has argued in the case at bar, the second prong of *Strickland*, i.e. the prejudice prong, unfairly impacts non-citizens. As the Iowa Supreme Court has noted, "Under the 'reasonable probability' standard, it is abundantly clear that most claims of ineffective assistance of counsel in the context of a guilty plea will require

a record more substantial than the one [available on direct appeal].” *Straw*, 709 N.W.2d at 138 (citing *Strickland*, and thus interpreting the Sixth Amendment). However, the unstated assumption of *Straw* is that a criminal defendant will be in a position to adequately challenge his guilty plea in PCR proceedings. This assumption does not account for non-citizens who are removed from this Country once their direct appeal is denied and becomes final for immigration purposes. *See Matter of Ozkok*, 19 I. & N. Dec. 546, 553 n.7 (BIA 1988). Non-citizens who are removed from the United States are simply not in a position to adequately challenge their convictions through PCR proceedings, even where the record establishes a blatant breach of an essential duty.

This Court should decide whether the Iowa Constitution affords non-citizens more protections than the Federal Constitution, as a continuation of the practice of failing to decide ineffective assistance of counsel claims on direct review will lead to the removal of non-citizens from this county who have colorable legal defenses, or who may be actually innocent. *See, e.g. Schmidt v. State*, 909 N.W.2d 778, 787 (Iowa 2018) (noting that uncertainty and imbalances in plea negotiations may lead actually innocent defendants to plead guilty). In order to remedy this problem, Defendant urges this Court to either adopt a *per se* prejudice rule, or to recognize a right to immigration counsel under the Iowa Constitution.

STATEMENT OF THE CASE

On October 18, 2017, the State filed a complaint against Prince Mellish in Muscatine Case No. AGCR057939. (Criminal Complaint, entered October 18, 2017). The complaint alleged that Mr. Mellish committed the offense of theft in the third degree on September 29, 2017, in violation of Iowa Code §§ 714.1 and 714.2(3). *Id.* On November 7, 2017, the State filed a Trial Information, reiterating the charges made in the Complaint. (Trial Information, entered November 7, 2017). On November 8, 2017, a separate criminal complaint was filed against Mr. Mellish for possession of a controlled substance, marijuana, first offense (hereinafter “PCS charge”). *See* Muscatine County Criminal Case No. SRCR058046.

Mr. Mellish entered into a plea agreement resolving the charges against him for both the theft and PCS charges. (Plea Agreement, entered January 9, 2018). Pursuant to the agreement, Mr. Mellish agreed to plead guilty to theft in the third degree. *Id.*

On January 9, 2018, the District Court accepted Mr. Mellish’s guilty plea. (Order of Disposition, entered January 9, 2018). Mr. Mellish was sentenced to 92 days in the Muscatine County Jail with 92 suspended, a \$625 fine, and court costs, including a 35 percent surcharge. *Id.*

On February 7, 2018, Mr. Mellish filed his notice appealing the judgment and sentence finding him guilty of theft in the third degree. (Notice of Appeal, entered February 7, 2018). On February 23, 2018, Mr. Mellish applied for Postconviction Relief, contesting his sentence and conviction for the PCS charge. Mr. Mellish is currently in removal proceedings and subject to deportation.

On March 21, 2018, Mr. Mellish filed a Motion for Limited Remand, requested that the case be moved to district court for the limited purpose of establishing a record of the immigration advice received by trial counsel. (Motion for Limited Remand, entered March 21, 2018). Mr. Mellish's Motion was granted by Court Order. (Order: Remand Granted, entered April 4, 16, 2018). Mr. Mellish's appellate counsel then conducted an evidentiary deposition of trial counsel on June 6, 2018. Pursuant to Supreme Court instruction, this evidentiary was filed in the underlying criminal case. (Evidentiary Deposition, entered July 24, 2018).

The Court of Appeals affirmed Mellish's conviction. (Order, filed March 20, 2019). The Court assumed deficient performance as to Mellish's argument that defense counsel breached an essential duty when he failed to understand that the statute of conviction was divisible; however, the Court of Appeals found that there was no prejudice. (Order, at 6).

STATEMENT OF FACTS

The State alleges that on September 29th, 2017, Mr. Mellish was in possession of a duffel bag with various items stolen from a home burglary, with a collective value of the stolen property estimated between \$501 and \$1000. (Criminal Complaint, entered October 18, 2017). Allegedly, Mr. Mellish told officers that he received the duffel bag from another person who Mr. Mellish knew was often in possession of stolen property. *Id.* On October 18, 2017, Mr. Mellish was charged with theft in the third degree in violation of §§ 714.1 and 714.2(3) for “exercise[ing] control over stolen property knowing such property to have been stolen” where “[s]aid property ha[s] a value exceeding \$500.” (Trial Information, entered November 7, 2018).

On November 8, 2017, unrelated to the theft charge, Mr. Mellish was charged with possession of a controlled substance (marijuana) in Muscatine County Case No. SRCR058046. Mr. Mellish was offered and accepted a plea agreement resolving both the theft and PCS charges against him. (Plea Agreement, entered January 9, 2018).

On January 9, 2018, the Court accepted Mr. Mellish’s guilty plea, entering a separate Order of Disposition for both the theft and PCS charges. (Order of Disposition, entered January 9, 2018). The Sentencing Order notes that Mr. Mellish waived reporting and record of the Plea and Sentencing Hearing. *Id.* Mr. Mellish

also consented to waiver of presence. (Consent to Waive Presence/Immigration and Attorney Fee Notice, entered January 9, 2018). At the time Mr. Mellish signed all these forms, he was in ICE custody. (Evidentiary Deposition, p. 12).

Mr. Mellish is not a United States Citizen, being a native and citizen of Liberia. (Deposition, p. 6, entered July 24, 2018). His status is that of a parolee. *Id.* Mr. Mellish is currently in removal proceedings. Mr. Mellish's mother is a United States Citizen that could petition for Mr. Mellish to adjust his status to a lawful permanent resident. *Id.*

ARGUMENT

I. THE IOWA SUPREME COURT SHOULD ADOPT A PER SE PREJUDICE RULE FOR NON-CITIZENS IN INEFFECTIVE ASSISTANCE OF COUNSEL CASES WHERE PREJUDICE HAS BEEN SHOWN.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999) (citing U.S. Const. amend. VI). Claims of ineffective assistance of counsel are generally preserved for postconviction relief proceedings. *Id.* “The standards required to prevail on a claim of ineffective assistance of counsel are well established. The defendant must prove by a preponderance of the evidence that his ‘counsel failed to perform an essential duty,’ and that he ‘was prejudiced by counsel's error.’” *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

An attorney fails to fulfill an essential duty when he or she “fails to advise a client of the immigration consequences of a plea.” *Diaz v. State*, 896 N.W.2d 723, 728 (Iowa 2017) (citing *Padilla v. Kentucky*, 559 U.S. 356, 367-68 (2010)). Furthermore, “in order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” *State v. Straw*, 709 N.W.2d 128, 136 (Iowa 2006).

Under *Padilla*, defense counsel “has a responsibility to advise non-citizen defendants whether a conviction for the crime that is the subject of the guilty plea agreement is also a crime that renders a non-citizen deportable.” *Diaz*, 896 N.W.2d at 729. The Iowa Supreme Court recently expanded the *Padilla* duty, holding that “counsel has an obligation to inform his or her client of *all the adverse immigration consequences* that competent counsel would uncover.” *Id.* at 732 (emphasis added).

The *Diaz* Court further provided specific guidance regarding the appropriate level of advice defense counsel should provide to non-citizen criminal Defendants. Specifically, citing the ABA Standards for Criminal Justice, the *Diaz* Court noted that

Whether or not deportation consequences are certain or possible under a criminal charge, the specific statutory consequences need to be explained with reasonable clarity so a full and measured decision to

plead guilty can be made. This approach is integrated into the ABA guidelines, which instruct counsel to determine and advise of the “potential adverse consequences from the criminal proceedings, including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family.” Certainly, any person contemplating a plea of guilty to a crime that could lead to deportation would want to know the full meaning and consequences of deportation.

Diaz, 896 N.W.2d at 732.

Because the defendant in *Diaz* did not assert a claim under Article I, Section 10 of the Iowa Constitution, the Iowa Supreme Court specifically “reserve[d] the right to interpret the Iowa Constitution more stringently than its federal counterpart in future cases.” *Diaz*, 896 N.W.2d at 727 n.1.

Defendant now urges the Court to adopt a more stringent standard for ineffective assistance of counsel claims under the Iowa State Constitution. Specifically, Defendant urges this Court to adopt a *per se* prejudice rule where a non-citizen defendant establishes deficient performance.

Defendant notes that the Supreme Court has previously endorsed a *per se* prejudice rule for claims of ineffective assistance of counsel in other contexts. For example, courts presume prejudice where there is no factual basis for a plea of guilty. *See State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996). This approach is consistent with federal jurisprudence, where prejudice may be presumed where: “(1) counsel is completely denied at a crucial stage of the proceeding; (2) where counsel fails to

subject the prosecution's case to meaningful adversary testing; or (3) where surrounding circumstances justify a presumption of ineffectiveness, for example, where counsel has an actual conflict of interest in jointly representing multiple defendants.” *State v. Feregrino*, 756 N.W.2d 700, 707 (Iowa 2008).

Defendant notes, however, that the Supreme Court is free to interpret the Iowa Assistance of Counsel Clause more stringently than its federal counterpart, and that the counter-arguments to the *per se* prejudice rule do not override the animating concerns of Article 10.

A. A More Stringent Interpretation of Article I, Section 10 of the Iowa Constitution that Affords More Protections to Non-Citizens is Supported by the Section’s Text and the State’s Constitutional History.

A *per se* prejudice rule for non-citizens where counsel has breached an essential duty is supported by the Iowa Supreme Court’s willingness to construe the State Constitution as more protective of individual liberties than its federal counterpart. For example, the Court in *State v. Short* interpreted the Iowa constitution’s search and seizure clause more stringently to afford more protection to defendants than allowed by the federal Constitution. The Court provided the following reasons for departing from federal jurisprudence:

At the outset, we note that *state* constitutions and not the Federal Constitution were the original sources of written constitutional rights. . . .At the federal constitutional convention, whenever the issue of individual rights arose, the founders repeatedly expressed the view that they looked to *the states* for the preservation of

individual rights. . . . The provisions of the Bill of Rights . . . were modeled by state constitutional provisions and not vice versa as is commonly assumed. . . . The bill of rights in the Iowa Constitution was not considered by Iowa constitutional writers as some kind of appendage controlled by federal court interpretations. Unlike the Federal Constitution, the bill of rights was part of the first articles of the Iowa Constitutions of 1846 and 1857. According to George Ells, Chair of the Committee on the Preamble and Bill of Rights, “the Bill of Rights is of more importance than all the other clauses in the Constitution put together, because it is the foundation and written security upon which the people rest their rights.” . . . Indeed, there is powerful evidence that the Iowa constitutional generation did not believe that Iowa law should simply mirror federal court interpretations.

State v. Short, 851 N.W.2d 474, 481–83 (Iowa 2014) (internal citations omitted).

Like Section 8, at issue in *Short*, Section 10 is also part of Iowa’s Bill of Rights. Thus, for the reasons articulated in *Short*, this Court should exercise its independent authority to “construe state constitutional provisions free from federal precedent.” *Short*, 851 N.W.2d at 484.

On its face, Article I, Section 10 manifests the Iowa Constitutional generation’s desire to deviate from federal precedent. In fact, Section 10 deviates further from its federal counterpart far more than Section 8 does. Article I, Section 10 provides the following:

In all criminal prosecutions, *and in cases involving the life, or liberty of an individual* the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him, to have a copy of the same when demanded; to be confronted with the

witnesses against him; to have compulsory process for his witnesses; and, to have the assistance of counsel.

Iowa Const. art. I, § 10 (emphasis added).

The federal constitutional counterpart to Section 10 provides the following:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel *for his defense*.

U.S. Const. amend. VI (emphasis added).

The two major differences between Section 10 and its federal counterpart is Section 10's addition of the phrase "and in all cases involving the life, or liberty of an individual," and the absence from Section 10 of any implied limitation of the assistance of counsel to an individual's "defense." These textual deviations show that the drafters of the Iowa Constitution intended that Section 10 would provide individuals more protections than its federal counterpart.

This is further supported by the Iowa Constitutional debates, the same debates which were heavily cited by the *Short Court* in its interpretation of Section 8. The addition of the phrase "and in all case involving the life or liberty of an individual" was added on February 3, 1857, by an amendment offered by Mr. Clarke of Henry.

The Debates of the Constitutional Convention of the State of Iowa, Vol. I, p. 201
[hereinafter *The Debates*], available
at www.statelibraryofiowa.org/services/collections/law-library/iaconst.

On February 24, 1857, Mr. Harris moved to strike the words “and in all cases involving the life or liberty of an individual.” *Id.* at Vol. II, p. 736. Mr. Harris’s main concern was that the clause would conflict with the Fugitive Slave Act of 1850, passed a mere seven years prior to the Iowa Constitutional Convention. *Id.* Mr. Harris also noted that the phrase at issue was not in the United States Constitution, nor any other state constitution. *Id.* at Vol. II, p. 737.

Mr. Clark of Alamakee responded with an impassioned defense of the wording of Section 10. Noting that Section 10 may conflict with the Fugitive Slave Act, Mr. Clark argued that the state of Iowa, as sovereign, had the right to protect the life and liberty of all the people within its borders:

I claim that no State can be sovereign, no people can be independent, without a right reposed in that people, and in that sovereignty, to protect its own people, and to determine within the jurisdiction of that sovereignty the right of the people found there to life or liberty. I hold that unless we have the right to make a constitution which will secure to me the right of jury trial, if I am claimed as a fugitive slave, without that right we are not a sovereign people. Without that right we cannot protect every individual member of society. Without that right we cease to be a sovereign, and become dependent on some other power. . . . *If it may be so that either myself or any other individual who is a citizen of this State, may be claimed as a fugitive from service, and dragged from his home in this State, dragged from his family, dragged from the*

presence of his friends, dragged from the spot where he can have the best means of proving his freedom, and taken into a foreign land, into another State, under an independent sovereignty, to be tried, irrespective of the place where he is found and lives, if that may be done, there is no essence and there is no meaning in the term 'sovereignty.'

Id. at Vol. II, p. 738 (emphasis added).

This view of the section was not singular. Mr. Wilson also stated the following: “I will repeat here today, that if the provision under consideration should come in conflict with the fugitive slave law, I do not care.” *Id.* Mr. Harris’s motion to strike the words “and in all cases involving the life or liberty of an individual” was subsequently rejected. *Id.* at Vol. II, p. 741.

Thus, the drafters of Section 10 were conscious that the precise wording of the section differed from its federal counterpart and that of other states, and thus intended to provide more protections to individuals living within the State. The addition of the words “and in all cases involving the life or liberty of an individual” was meant to remedy the problem of a fugitive slave not being afforded a jury trial, and the corresponding procedural rights that accompany a trial, e.g. the right to the assistance of counsel.

The logic employed by the drafters of section 10 regarding fugitive slaves applies with equal force to non-citizens. See Karla M. McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring their Similarities*, 61 Cath. U.L.

Rev. 921 (2014). Available at: <http://scholarship.law.edu/lawreview/vol61/iss4/1>.

Non-citizens have the right not to be dragged from their homes and their communities without adequate safeguards. Given the inability of non-citizens to challenge a conviction that triggers adverse immigration consequences because of the rule of finality, one such safeguard would be to adopt a *per se* prejudice rule where a non-citizen has shown that counsel breached an essential duty. *See Matter of Ozkok*, 19 I. & N. Dec. 546, 553 n.7 (BIA 1988).

B. Given Section 10's Text and History, this Court Should Adopt A Per Se Prejudice Rule where Non-Citizens have shown Deficient Performance.

Given the text of Section 10 and its history, Defendant argues that a *per se* prejudice rule would provide courts with a manageable tool to satisfy Defendant's interpretation of Section 10. The *per se* prejudice rule would alleviate the due process concerns at issue where a non-citizen is not properly informed of the immigration consequences of his plea, as envisioned by *Diaz*.

The reasoning of Chief Justice Lavorato, joined by Justice Wiggins, in *State v. Straw* is applicable in the instant case. Chief Justice Lavorato argued that the *Strickland* prejudice "reasonable probability" requirement should not apply "when defendants plead guilty without being informed of the *maximum possible punishment they face*." *State v. Straw*, 709 N.W.2d 128, 141 (Iowa 2006) (C.J. Lavorato, dissenting) (emphasis added). Citing *State v. White*, Chief Justice

Lavorato noted that a *per se* prejudice rule should apply because of the severity of the due process concerns:

It is virtually self-evident that a defendant's decision to plead guilty ... to a criminal charge is a grave and personal judgment, which a defendant should not be allowed to enter *without full comprehension of possible consequences of conviction by such plea*. Whether it be the maximum term of imprisonment authorized by the statute prescribing a penalty for conviction of a crime or whether it be a combination of terms of imprisonment imposed as penalties for convictions of separate crimes, duration of possible imprisonment is an important factor affecting any defendant's intelligent choice between the alternatives confronting a defendant-going to trial or entering a plea of guilty.... Anyone unaware that the term or duration of incarceration acutely affects a defendant's decision regarding a guilty ... plea in a criminal case is oblivious to one of the realities in our system for efficient criminal justice.

Straw, 709 N.W.2d at 141 (emphasis added); *see also Padilla v. Kentucky*, 559 U.S. 356, 365–66, 130 S. Ct. 1473, 1481–82, 176 L. Ed. 2d 284 (2010) (noting that removal from this County is a “particularly severe penalty”).

In practice, the *per se* prejudice rule would also conserve judicial resources if it operates as Chief Justice Lavorato envisioned:

Under the *per se* prejudice approach, I suggest the following. I would, as we did in *Kress*, presume prejudice, vacate the judgment of sentence and conviction, and remand the case to allow the defendant to plead anew. . . . I would [] on remand allow the State to reinstate the charges, if it so desired, and to file any additional charges supportable by the available evidence. In answer to the majority's second-bite-at-the-apple claim, allowing the State to reinstate charges and file additional charges

should eliminate any incentive on the part of defendants to claim they were not advised of the maximum possible punishment when in fact they were so advised. These remedies are analogous to the remedies we apply in claims of ineffective assistance of counsel based on a lack of factual basis. Moreover, contrary to the majority's conclusion, these remedies preserve the integrity of the process while at the same time they serve the purpose and spirit of rule 2.8(2)(b). Finally, the approach I suggest would conserve judicial resources by eliminating a postconviction hearing and an appeal in the event the defendant lost in the postconviction process. This makes far more sense than the approach the majority takes.

Straw, 709 N.W.2d at 145.

The comment on the conservation of judicial resources also hints at one of the main due process concerns that supports adopting the *per se* prejudice rule. For immigration purposes, a criminal conviction does not trigger removal until a conviction has become “final.” A conviction becomes “final” through exhaustion or waiver of direct appellate remedies. *See Matter of Ozkok*, 19 I. & N. Dec. 546, 553 n.7 (BIA 1988). Thus, the common practice of appellate courts to preserve and not rule on claims of ineffective assistance of counsel so that a record can be adequately developed in postconviction-relief proceedings unfairly impacts non-citizens. Non-citizens who are removed from the United States simply are not in the same situation as other defendants; they are not in a position to challenge their guilty plea, to adequately seek the appointment of PCR counsel, or to meet with their attorney.

The common practice of the appellate courts will inevitably lead, and likely already has led, to innocent non-citizen defendants pleading guilty to crimes they did not commit, with no hope of challenging the plea before removal from the United States. Instructive here are the concerns raised in *Schmidt v. State*:

People have been known to confess to crimes they did not commit during police interrogations and such confessions bleed into their decisions to plead guilty. . . . [I]nnocent defendants plead guilty for reduced charges and shorter sentences. . . . Simply put, in economic terms, defendants engage in a cost-benefit analysis. Entering into a plea agreement is not only rational but also more attractive than dealing with the uncertainty of the trial process and the possibility of harsher sentences. . . . A plea does not weed out the innocent. Rather, a plea is an explicit agreement between the prosecutor and the defendant that establishes a ‘going rate.’ . . . Innocent defendants may also plead guilty in the face of pressure from prosecutors and even their own defense counsels.

Schmidt v. State, 909 N.W.2d 778, 788 (Iowa 2018).

In short, the animating concerns of *Diaz* and *Schmidt* cannot be properly alleviated without a mechanism for non-citizen defendants to challenge their guilty pleas before being removed from this country. It simply is not enough for reviewing courts to require non-citizen defendants to wait until PCR proceedings to develop a record establishing ineffectiveness, at which point their convictions have already become final, and the defendants ripe for removal. This problem could be mitigated by adopting the *per se* prejudice rule Defendant proposes.

II. NON-CITIZENS HAVE A RIGHT TO IMMIGRATION COUNSEL UNDER ARTICLE I, SECTION 10 OF THE IOWA CONSTITUTION.

Alternatively, Defendant argues that the textual and historical analysis of Section 10 would justify the appointment of immigration attorneys for non-citizens charged with a criminal offense.¹

Since *Gideon v. Wainwright*, the Supreme Court has recognized the importance of counsel, noting that a defendant “lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.” *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). The right to counsel recognized in *Gideon* was further expanded so as to apply to all “critical stages” of the criminal process, including, e.g., preliminary hearings, plea negotiations, arraignments, sentencing, direct appeals as of right, and probation

¹ Defendant does *not* argue that immigration attorneys need to be appointed for immigration court. Again, because of the rule of finality, a particular criminal proceeding will not trigger adverse immigration consequences until exhaustion of direct appeals, so immigration counsel upon criminal prosecution should suffice to satisfy the concerns of *Diaz*. In practice, this likely would involve appointment of immigration counsel for the purpose of consultation, e.g., an analysis of potential immigration consequences and the effects, if any, on possible avenues of affirmative relief. This is especially important since immigration attorneys are not considered experts, and thus the Iowa State Public Defender does not authorize contract attorneys to retain immigration attorneys to complete the proper *Diaz* analysis.

revocation proceedings. *See, e.g., State v. Majeres*, 722 N.W.2d 179, 182 (Iowa 2006).

Of particular importance here is the extension of the right to counsel to sentencing proceedings. Although sentencing does not concern a defendant's guilty or innocence, the Supreme Court's jurisprudence recognizes "that any amount of actual jail time has Sixth Amendment significance." *Glover v. United States*, 531 U.S. 198, 198–99 (2001); *see also Scott v. Illinois*, 440 U.S. 367, 374 (1979) (noting that there is no right to appointed counsel where there is no risk of actual imprisonment.).

Although immigration consequences are not criminal in nature, the Supreme Court in *Padilla v. Kentucky* noted that

We have long recognized that deportation is a particularly severe "penalty,"; but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.

Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010).

Because removal proceedings are civil in nature, the Sixth Amendment does not require the appointment of immigration counsel, as the text of the Amendment limits the right to counsel to criminal prosecutions. *See Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 198 (2008) (“The Sixth Amendment right of the ‘accused’ to assistance of counsel in ‘all criminal prosecutions’ is limited by its terms: ‘it does not attach until a prosecution is commenced.’”). However, this limitation is not present in the text of Section 10. Section 10 expands the scope of the assistance of counsel beyond criminal prosecutions by providing that “[i]n all criminal prosecutions, *and in cases involving the life, or liberty of an individual* the accused shall have a right to . . . have the assistance of counsel.” Iowa Const. art. I, § 10 (emphasis added).²

Given the severe penalty of removal, and the text and history of Section 10, this Court should recognize that the right to the assistance of counsel under the Iowa Constitution requires that all people³ accused in a criminal case have access to

² For purposes of this appeal, Defendant does not urge an interpretation of this Section that would require appointed counsel for any proceeding where any liberty-interest is arguably at stake outside of the criminal process, e.g. civil cases. The term “accused” in Section 10 is still consistent with the right to counsel attaching after the commencement of a *criminal prosecution*. The right to immigration counsel would apply only where immigration consequences would result from State criminal prosecution.

³ There is no rationale or textual support to limit this right only to non-citizens. However, as a matter of practice, there simply would be no reason for a citizen to consult with an immigration attorney.

immigration counsel. Not only is such access necessitated by Section 10, but would also preserve judicial resources in the long term. Under *Diaz*, consultation with immigration counsel would preclude most ineffective assistance of counsel claims, and ensure that all pleas of guilty are knowing and voluntary. Furthermore, access to immigration counsel would also cure the unfair burden on non-citizens who may be removed from the country before they are able to challenge their guilty plea during PCR proceedings.

As this Court has previously noted, “the Iowa constitutional generation did not believe that Iowa law should simply mirror federal court interpretations.” *Short*, 851 N.W.2d at 4883. This Court should recognize that Section 10’s text and history demand a remedy to the systematic unequal and unfair burden imposed on non-citizens by the “reasonable probability” requirement in ineffective assistance of counsel claims.

CONCLUSION

For all these reasons, the Defendant-Appellant respectfully requests that this Court grant further review in this matter.

DECISION OF THE COURT OF APPEALS

The Court of Appeals' Opinion, dated March 20, 2019, is attached to this application.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER-APPELLANT

PROOF OF SERVICE AND CERTIFICATE OF FILING

The undersigned certifies that a copy of the foregoing Appellant's Request for Further Review was file with the Clerk of the Supreme Court on the 8th day of April, 2019.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE
REQUIREMENTS**

1. This Proof Brief complies with the type-volume limitation of Iowa R.App.P.6.903(1)(g)(1) or (2) because this brief contains 5,516 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
 2. This Proof Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, Font size 14.
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