DISSENTING OPINION BY REIFURTH, J.

The majority extends the holding in *Padilla v. Kentucky*, 559 U.S. 356 (2010) to "impose[] the burden on defense counsel who lacks knowledge of the citizenship status of a client to ask." Respectfully, the majority retroactively expands counsel's obligation beyond anything that the Supreme Court required in *Padilla*, or that Hawaiʻi case law has required before or since. Because *Padilla* does not require that defense counsel must inquire about a client's immigration status, because I believe that Hawaiʻi law already provides reasonable assurances that defendants are made aware that a plea may have immigration consequences, because I recoil from intervening in the attorney-client relationship to the extent of directing the questions that counsel must ask his or her clients in order to effectively represent them, and because I am disinclined to label counsel's representation as "ineffective" due to his failure to meet a standard never before in place, I dissent.

A. Neither *Padilla* nor Hawaiʻi case law require defense counsel to inquire about a client's immigration status.

Prior to *Padilla*, Hawaiʻi case law did not require defense counsel to raise the immigration issue with his client before the attorney would be required to advise him of any immigration consequences of his plea. *See D'Ambrosio v. State*, 112 Hawaiʻi 446, 460–63, 146 P.3d 606, 620–23 (App. 2006) (noting and applying the rule adopted by the overwhelming majority of courts in other jurisdictions that the failure of defense counsel to advise a client of the collateral consequences of a guilty plea does not constitute ineffective assistance of counsel); *cf. State v. Nguyen*, 81 Hawaiʻi 279, 916 P.2d 689 (1996) (holding that the trial court was not required to determine that a defendant understood the immigration consequences of his plea).

The majority reads *Padilla* as requiring defense counsel to offer an advisement of the risk of deportation any time that a plea clearly carries that risk, and further requires that counsel affirmatively ask if the facts of the case create such a risk. Respectfully, neither *Padilla* nor our applicable case law justify this burden-shifting; rather it reflects the majority's determination of good policy based on its "best able to bear the

burden" analysis. Whether this is good policy or not, I do not believe that it is our prerogative to impose it.

Padilla states that "[W]hen the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." *Padilla*, 559 U.S. at 369. The deportation consequences in this case, however, were not "truly clear" to defense counsel because Najera never informed his attorney that he was not a citizen.

In *Padilla*, defense counsel knew that his client was a non-citizen immigrant, and, nevertheless, assured Padilla that he did not need to worry about immigration consequences associated with his plea because he had been in the country for a significant period of time. *Id.* at 359. Accordingly, to *that attorney* it should have been clear that deportation was going to apply, as the law as it applied to that client in that particular plea was quite clear. *Id.* at 368 (stating "[i]n the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit . . . . Padilla's counsel could have easily determined that his plea would make [Padilla] eligible for deportation simply from reading the text of the statute. . . .")

In other words, *Padilla* addresses only the legal advice required of competent counsel *once counsel knows that his client is not a U.S. citizen*, and does not impose an obligation on counsel to inquire. "The only issue the United States Supreme Court decided [in *Padilla*] was whether defense counsel had a duty to inform his client, known to be a resident alien, of the effect of a guilty plea on the client's immigration status." *State v. Stephens*, 265 P.3d 574, 577 (Kan. Ct. App. 2011) (holding that defense counsel was not ineffective in failing to investigate defendant's out-of-state criminal record). Therefore, the majority's proposed extension is unwarranted and, as discussed below, unnecessary.

B. Hawaiʻi law already provides reasonable assurance that defendants are made aware that a plea may have immigration consequences.

When considering if a defendant is competent to stand trial, Hawaiʻi courts consider whether or not the defendant is

capable of understanding the proceeding against him and assisting in his own defense. *See State v. Janto*, 92 Hawaiʻi 19, 986 P.3d 306 (1999). In keeping with Hawaii Revised Statutes ("HRS") section 802E-2 (1993), Najera was specifically advised by the court prior to the court accepting his no contest plea that he may be subject to immigration consequences as a result of his plea:

> THE COURT: Have you discussed your no contest plea with your attorney?
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> THE DEFENDANT: Yes, your Honor.
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> THE COURT: Are you satisfied with his advice?
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> THE DEFENDANT: Yes, your Honor.
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> THE COURT: And if you're not a citizen you're possibly looking at consequences of deportation, exclusion from admission to the United States, or denial [of] naturalization under the laws of the United States. Do you understand?
>
> THE DEFENDANT: Yes, your Honor.

Under HRS section 802E-3, if the court failed to make this advisement or failed to keep a record of it the plea would have been *per se* eligible to be vacated, thereby conferring upon this colloquy a significance similar to the colloquy required in *Tachibana v. State*, 79 Hawaiʻi 226, 900 P.2d 1293 (1995). Further, Najera later signed a No Contest Plea form which contained the same warning.

> 10. I know that, if I am not a citizen of the United States, a conviction or a plea of guilty or no contest, whether acceptance of my plea is deferred or not, may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States.
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> 11. I am signing this Guilty/No Contest Plea form after I have gone over all of it with my lawyer. . . . I have no complaints about my lawyer and I am satisfied with what he/she has done for me.

While I agree with the majority that "[t]he court's obligation to provide advice to a defendant to assure a knowing and voluntary plea is not commensurate with defense counsel's obligation to provide effective representation," I believe that it nevertheless tips the balance decidedly against Najera in the ineffective assistance of counsel analysis.

Najera does not contend that he had any language difficulties or was incompetent to stand trial. Therefore, it is fair to conclude that he understood the court's explicit warning that there may be immigration consequences associated with his plea if he was not a U.S. citizen, and it is reasonable to expect that he would raise the issue with his attorney in that case, without imposing upon counsel a burden to inquire of every client that he or she represents.[1/] *See Carrillo v. State*, 982 N.E.2d 468, 474-475 (Ind. Ct. App. 2013) (concluding that a trial court's plea dialogue with a criminal defendant that includes a query as to whether he or she is a United States citizen and, if necessary, follows up with questions regarding whether the possibility of deportation has been discussed with counsel, will prospectively address the situation).

The majority's conclusion that the burden of inquiry is best placed on counsel is based on an objective, perfect-knowledge perspective, concluding that counsel who had no reason to know that his client was not a citizen, and had no reason to discuss potential immigration consequences with his client, was ineffective based on action he had no reasonable indication that he needed to take. Comparing the impact on a client to heed multiple warnings that there may be immigration consequences and respond accordingly by raising the issue of the client's own immigration status with his attorney, it would seem that the

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[1/] The majority adopts the reasoning of an American Bar Association ("ABA") conference presenter and contends that the burden is not a difficult one "and can, for example, be satisfied by simply including on an intake questionnaire, the question: 'Are you a United States citizen?'" The majority further cites to the ABA Standards for Criminal Justice 4-5.5(a) (4th ed. 2015), which calls for defense counsel to inquire as to his client's immigration status. It is noteworthy both that the ABA is not among the limited entities which can bind this court, and that the ABA standards limit themselves to:

> provid[ing] guidance for the professional conduct and performance of defense counsel. They are not intended to modify a defense attorney's obligations under applicable rules, statutes, or the constitution. They are aspirational or describe "best practices," and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for clients, or to create a standard of care for civil liability.

ABA Standards for Criminal Justice 4-1.1(b) (4th ed. 2015).

client, not the attorney, is best suited to raise the issue.

While the attorney is indeed in the best position to understand and advise regarding the actual consequences of a plea once the attorney is aware of the client's circumstances, the conclusion that the attorney is therefore best able to bear the burden of inquiry is faulty. The client clearly has superior knowledge about his own immigration status and therefore is in the best position to raise the issue in response to the court's clearly-stated warnings. To hold otherwise places the court unnecessarily in the position of managing the terms of the attorney-client relationship.

C. This court should avoid unnecessarily interjecting itself into client intake processes.

The majority goes awry in dictating specific questions and subjects which criminal defense counsel and his client must discuss. The attorney-client relationship is a special relationship in which the two are united by a unique consideration of the defendant's interests above all else, as the federal and Hawaiʻi constitutions demand. *Cf. United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120 (3rd Cir. 1997) (stating that the court's infringement upon the choice to testify by conditioning representation upon silence was an impermissible invasion into the attorney-client relationship, and therefore a violation of the right to assistance of counsel); *State v. Silva*, 78 Hawaii 115, 125, 890 P.2d 702, 712 (App. 1995) (holding that where a court persuades a defendant to forgo testifying in his own defense, it has impermissibly "exceed[ed] its judicial power and authority and invade[d] the province of the attorney-client relationship.")

Accordingly, I would decline to impose my personal measure of reasoned information-sharing between attorney and client by requiring that a specific subject be addressed with every defendant in every criminal case. While this is admittedly a tiny breach in the dam of the attorney-client relationship, it is unclear from where we devise the power or how we will limit it. *See Lakeside v. Oregon*, 435 U.S. 333, 344 (1978) (Stevens, J., dissenting) (stating that the shared interest in advancing

the defendant's interests is the reason that the decision to testify is reserved for the defendant and his attorney, and that rationale is rooted in the Constitution). In the absence of any limiting principle, I would abstain from entering down this path.

D. Defense counsel representation should not be declared "ineffective" retroactively.

Finally, while I disagree with the majority's conclusion that counsel's failure to discover Najera's citizenship status renders his assistance ineffective, putting that aside for the moment, if the majority intends to announce this new rule, it should be announced as such without applying it to this case. In declining recently to apply *Padilla* to a federal conviction, the Eighth Circuit Court of Appeals reasoned that

> Unlike in the procedural-default context, ineffective assistance claims are not uniquely situated when it comes to achieving [finality of convictions]. In other words, there is a difference between (1) allowing an exception to the finality of a decision for criminal defendants to raise an attorney's deficient performance, the grounds for which were unknown or unreviewable on direct review, and (2) allowing an exception for criminal defendants to claim an attorney's performance was deficient even though the attorney complied fully with the standards of performance in existence at the time.

Barajas v. United States, No. 16-1680, 2017 WL 6001563, at *5 (8th Cir. Dec. 5, 2017). The court, relying on *Chaidez v. United States*, 568 U.S. 342 (2013), declined to apply *Padilla* to a pre-*Padilla* plea in the federal system.

In *Chaidez*, the Supreme Court held that *Padilla* stated a new rule.

> "[A] case announces a new rule," *Teague [v. Lane]* explained, "when it breaks new ground or imposes a new obligation" on the government. 489 U.S.[288,] 301[(1989)]. "To put it differently," we continued, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Ibid*. And a holding is not so dictated, we later stated, unless it would have been "apparent to all reasonable jurists."

568 U.S. at 347 (citing *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997)). Applying *Teague*'s standard as annunciated in *Chaidez*, the majority's declaration in this case that all criminal defense counsel must inquire as to their client's immigration status would qualify as a new rule, as something

which both breaks new ground[2/] and as a conclusion which is not apparent to all jurists.[3/]

Accordingly, I conclude that the majority's new rule should be applied prospectively only, and the Order Denying Petition should be affirmed. *See State v. Jess*, 117 Hawaiʻi 381, 402-03, 184 P.3d 133, 154-55 (2008) (declining to apply *Apprendi* retroactively on the grounds that it was being sought in a collateral attack on a final conviction using a new rule).

E. Conclusion

The Circuit Court's Order Denying Petition is premised upon two alternate grounds: (1) Najera waived his ineffective assistance of counsel argument because he did not raise it in any prior proceeding; and (2) the claim is patently frivolous and without trace of support either in the record or from other evidence submitted by Najera because counsel satisfied the advisement required by *Padilla* and Hawaiʻi case law governing ineffective assistance of counsel.

I concur with the majority that because Najera was until recently represented by trial counsel he did not have a realistic opportunity to raise his ineffective assistance of counsel claim prior to filing his instant Rule 40 Petition. Therefore I agree that the Circuit Court erred in ruling that Najera had waived the issue of the ineffective assistance of his trial counsel. As discussed above, however, I disagree with the majority as to the second basis for the Circuit Court's ruling, and would, on that basis, affirm the order.

[2/] Specifically, the majority breaks new ground in announcing a bright line rule that attorneys must inquire as to their client's immigration status, thereby forcing *Padilla* to apply in every Hawaiʻi criminal defense case.

[3/] *See Carillo* and other out of state cases cited *supra*.