To be argued by
ROBIN NICHINSKY

New York Supreme Court

Appellate Division -- First Department

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

New York County
Ind. No. 3696/07

MATTHEW CHACKO,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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THE PEOPLE OF THE STATE OF NEW YORK, :

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:

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PRELIMINARY STATEMENT

By order of the Honorable Karla Moskowitz, Justice of the Appellate Division, First Department, pursuant to C.P.L. § 460.15, entered on January 3, 2012, appellant appeals from an order of the Supreme Court, New York County (Zweibel, J.), entered September 1, 2011, denying his motion, pursuant to C.P.L. §§ 440.10 & 20, to vacate his plea or set aside his sentence.

Timely notice of appeal was filed and, on March 13, 2012, this Court granted appellant leave to appeal as a poor person on the original record and assigned Robert S. Dean, Center for Appellate Litigation, as counsel.

No application for a stay of execution of judgment has been made. Appellant has fully served his sentence and is currently in ICE custody pending his deportation.

QUESTIONS PRESENTED

1. Whether the failure to inform appellant Matthew Chacko that he would be automatically deported based upon his plea, when he would not have pleaded guilty had he been so informed, rendered his conviction unconstitutionally obtained under federal and state law. U.S. Const. amends. V, VI and XIV; N.Y. Const. art. I, §6.

2. Whether, because of the disproportionately harsh immigration consequences of Mr. Chacko's more-than-one-year sentence, the sentence was unconstitutional as applied to him. U.S. Const. amends. VIII and XIV; N.Y. Const. art. 1, §§5, 6.

STATEMENT OF FACTS

Introduction

Appellant Matthew Chacko was convicted of one count of attempted second-degree possession of a forged instrument, under indictment 3696/07, after he pleaded guilty to possessing a $10 counterfeit bill, in Supreme Court, New York County on November 29, 2007. He was sentenced, as a second felony offender, to a term of 1 ½ to 3 years (Zweibel, J., at plea and sentence). Mr. Chacko's conviction was affirmed on direct appeal by this Court on October 27, 2009. Leave to appeal to the Court of Appeals was denied on February 1, 2010. People v. Chacko, 66 A.D.3d 581 (1st Dept. 2009), leave denied, 14 N.Y.3d 770(2010). After living in this country for over 30 years,

since the age of five, Mr. Chacko now faces deportation based upon the instant offense.

On July 28, 2011, Mr. Chacko filed a motion pursuant to C.P.L. §§440.10(1)(h) & 20(1), to vacate his conviction or, in the alternative, vacate his sentence as illegally imposed. He alleged that his trial attorney had failed to investigate his immigration status, and as a result had failed to advise him that his guilty plea would result in his mandatory deportation. He asserted that this constituted ineffective assistance of counsel under Padilla v. Kentucky, 559 U.S. ___, 130 S. Ct. 1473 (2010), and resulted in a plea that was not knowingly, voluntarily and intelligently made, North Carolina v. Alford, 400 U.S. 25, 31 (1970); People v Ford, 86 N.Y.2d 397, 403 (1995). Mr. Chacko also charged that his sentence under these circumstances constituted cruel and unusual punishment under the Federal and State Constitutions.

The court denied Mr. Chacko's motion. It decided, *inter alia*, that Mr. Chacko's attorney had no obligation under Padilla and prevailing professional norms to investigate his immigration status, and since she did not know he was a noncitizen she was not required to advise him of immigration consequences. The court also held that Mr. Chacko was not prejudiced by his attorney's representation, even if it was deficient. It denied the motion without a hearing.

This Court, in an order dated January 3, 2012, granted leave to appeal that decision (Moskowitz, J.).

Arrest, Plea and Sentence

Matthew Chacko was charged in indictment number 3696/07, on September 5, 2007, with three counts of criminal possession of a forged instrument in the first degree, class C nonviolent felonies, each count representing possession of a counterfeit $10 bill (See Indictment in Motion, Exhibit B).[1] It was alleged that in the early morning hours of July 25, 2007, Mr. Chacko tendered two $10 counterfeit bills at a bar at 174 Orchard Street in Manhattan (D&O at 2). When the bartender realized it and chased Mr. Chacko, he offered the bartender $40 to let him go. Upon arrest, he was found in possession of approximately 74 counterfeit $10 bills and a counterfeit $50 bill (Id.). According to police, at the precinct, Mr. Chacko said, "I know my rights. I should get my real $26 back" (See Voluntary Disclosure Form in Supreme Court file; D&O at 12).

[1]References in parenthesis are to documents in the Record on Appeal, which include: Mr. Chacko's C.P.L. §§440.10 & 20 Notice of Motion, Affirmation and Memorandum of Law [hereinafter "Motion"], with attached Exhibits A-H; the district attorney's Response in Opposition to that Motion ["Response"], dated September 1, 2011; the Memorandum in Reply ["Reply"], dated September 12, 2011; and the trial court's Decision and Order ["D&O"], dated November 3, 2011 (Zweibel, J.).

On November 8, 2007, Mr. Chacko pleaded guilty to one count of attempted possession of a forged instrument in the second degree, a class E nonviolent felony, in satisfaction of the indictment. He received a prison term of 1 ½ to 3 years, the minimum sentence for a second felony offender (D&O at 3).[2] At the time of his plea, Mr. Chacko had been a lawful permanent resident of the United States since 1989, after arriving in the United States from India on a visitor visa with his family in 1981, at the age of five (See Immigration Documents in Motion, Exhibit G). He was 36 years old on August 1, 2011 (Id.).

At Mr. Chacko's plea and sentence proceedings in this case, there was no mention of the fact that he was not a United States citizen and no mention of the immigration consequences of his plea. There was no general immigration warning by the trial court as required pursuant to C.P.L. §220.50(7) (See Plea and Sentencing Minutes, dated November 8 and December 29, 2007, in Motion, Exhibits E and F, respectively; see also D&O at 3).

[2]Mr. Chacko's prior felony was for assault in the second degree under indictment 719S/00 in Westchester County, for which he received a one year sentence in 2000 (See Sentence and Commitment, in Motion, Exhibit C). A C.P.L. §§440.10 & 20 motion was also filed in that case on Padilla-related grounds, and was denied on February 2, 2012 (Zambelli, J.). A motion to appeal pursuant to C.P.L. §460.15, was filed in the Appellate Division, Second Department on March 2, 2012, and is currently pending. On information and belief, Mr. Chacko also has several misdemeanor convictions, an infraction, and a YO adjudication.

Immigration Proceedings

In a Notice to Appear from Immigration and Customs Enforcement ("ICE"), dated September 1, 2010, Mr. Chacko was charged with being subject to removal based upon his conviction under indictment 3696/07, which is an aggravated felony under federal immigration law (See Motion, Exhibit A). His conviction constitutes an aggravated felony because it is an offense related to forgery for which a term of imprisonment of one year or more was imposed. 8 U.S.C. §1101(a)(43)(R); INA §101(a)(43)(R) (See id.). An aggravated felony is a virtually automatic, nonwaivable and permanent ground for deportation. 8 U.S.C. § 1227(a)(2)(A)(iii) (an alien "shall" be deported for conviction of aggravated felony); 8 U.S.C. § 1229b(a)(3) (aliens convicted of aggravated felonies are ineligible for cancellation of removal). It serves as a permanent bar to re-entry, 8 U.S.C. §1182(a)(9)(A)(ii), and the penalty for illegal re-entry is especially severe, 8 U.S.C. §1326 (a),(b)(2).

On October 27, 2011, Mr. Chacko was ordered removed to India based upon this conviction. He is currently in ICE custody at the Hudson County Correctional Facility in Kearny, New Jersey, awaiting deportation.

Personal and Family History

All of the things that comprise Mr. Chacko's identity exist in the United States - where he has lived for over 30

years. He arrived in New York on a visitor visa with his parents and brother Joseph in 1981, at the age of five, and became a lawful permanent resident in 1989 (See Passport and Immigration Documents, in Motion, Exhibit G). He has only been back to India once, for a short visit at the age of eight or nine (See Affidavit of Matthew Chacko, in Motion, Exhibit D). Mr. Chacko's entire family is firmly established in the United States (except for a 100-year-old grandmother who lives in Ranny, a small village 1500 miles from New Delhi. Mr. Chacko has not seen her in decades, does not speak the same language, and she is unable to help him) (See id.; Affidavits of Mr. Chacko's parents, Koshy and Omana Chacko, in Motion, Exhibits H & I).

Mr. Chacko's parents, Omana and Koshy Chacko, his brother Joseph, his uncle Kurien Chacko, with whom Mr. Chacko is very close, as well as other aunts, uncles and cousins, have all immigrated to the United States. His parents and uncle are United States citizens. His parents own The Fair Deal Cafe in White Plains, New York, and raised Mr. Chacko and his brother in a stable home. Mr. Chacko graduated from Byram Hills High School in Westchester County, attended one and one-half years at John Jay College, a year at Westchester Community College, and has worked in the family restaurant (See Affidavits, in Motion, Exhibits D, H and I).

C.P.L. §440.10(1)(h) & 20(1) Motion

On July 28, 2011, Mr. Chacko filed a motion in the Supreme Court, New York County, pursuant to C.P.L. §§440.10 (1)(h) & 20(1), to set aside his conviction and sentence under indictment 3696/07.

Mr. Chacko had been represented by Legal Aid attorney Alyssa Gamliel during the plea and sentence proceedings (See D&O at 3). In his motion and accompanying affidavit, Mr. Chacko asserted that he did not recall if Ms. Gamliel asked him about his immigration status, but is certain she did not inform him of the immigration consequences of his guilty plea (See Motion at ¶6; Affidavit of Matthew Chacko, in Motion, Exhibit D, ¶¶3, 9). He did not know that he was pleading guilty to an aggravated felony under the immigration law, and that it would mandate his virtually automatic, non-waivable and permanent removal from the United States (Id.).

Appellate counsel Robin Nichinsky also affirmed in an affirmation accompanying the §440 motion that she had had two telephone conversations with Ms. Gamliel about Mr. Chacko (See Motion at ¶7). In the first conversation, on June 15, 2011, Ms. Gamliel clearly remembered Mr. Chacko's case. She stated that while she usually asks her clients if they are citizens, she did not recall asking Mr. Chacko if he was a United States citizen, was not aware that he was not a citizen, and did not advise him of the immigration consequences of his plea, as she

admitted she should have (Id.). The issue of immigration was not mentioned or discussed with Mr. Chacko during her representation. She said she would be willing to sign an affidavit to this effect but first needed to consult with her supervisor at Legal Aid, and she promised to order her file in the case (Id.).

In a second telephone conversation on June 29, 2011, Ms. Gamliel reported that it is now Legal Aid policy to not sign affidavits in these cases, and therefore she would not sign one (See Motion at ¶7). If she were subpoenaed at a hearing, she would testify, and she reiterated, consistent with the first conversation with appellate counsel, that she did not recall asking Mr. Chacko about his immigration status and did not inform him of the immigration consequences of his plea in this case (Id.). She had also retrieved Mr. Chacko's file from the Legal Aid archives and, as she expected, there was no indication in the file of any conversation with Mr. Chacko as to immigration consequences and no notations in the file as to his immigration status (Id.).[3]

The motion cited to the United States Supreme Court decision in Padilla v. Kentucky, 559 U.S. ___, 130 S.Ct. 1473 (2010), which eliminated the distinction between failing to

[3]As the trial court's decision noted, the cover page of the presentence report prepared for Mr. Chacko's sentence erroneously indicated he was a citizen (D&O at 11); however, the source of that notation is unknown, and counsel seemed unaware of it in our conversations.

advise a client of the immigration consequences of pleading guilty and providing a client with affirmative misadvise about those consequences. Padilla specifically recognized that the failure to advise a client about the immigration consequences of a guilty plea is objectively unreasonable under the ineffectiveness standard set forth in Strickland v. Washington, 466 U.S. 668, 688 (1984). As in Padilla, the immigration consequences of Mr. Chacko's guilty plea here were clear – his conviction would render him automatically deportable.

Mr. Chacko also stressed that Padilla made clear that an attorney has a duty to investigate the immigration status of his or her client. Padilla cites to practice advisories that reference the duty to investigate a client's immigration status. 130 S. Ct. at 1482. Here, in conversations with the undersigned, Mr. Chacko's Legal Aid attorney Alyssa Gamliel admitted that she did not recall asking Mr. Chacko about his immigration status. As a result, she did not know he was a noncitizen, did not inform him of the immigration consequences of the guilty plea that she urged him to take, and did not investigate the possibility of an immigration-safe plea on his behalf.

Mr. Chacko also alleged that he was prejudiced by his attorney's ineffective assistance, and that he has demonstrated his strong desire to avoid deportation (See Motion at 6-7; Motion, Exhibit D at ¶11). He swore in his affidavit that he

would not have pleaded guilty if had he been told of the deportation consequences of his plea (See Motion, Exhibit D). Instead, he would have directed Ms. Gamliel to explore the possibility of alternative pleas that would not have resulted in an aggravated felony and mandatory deportation. He would have insisted that she negotiate an immigration-safe plea on his behalf instead, or he would have exercised his right to go to trial and would have raised the defense that he did not know the money he possessed was counterfeit (Id.).

When Mr. Chacko was contacted by ICE and learned that he was being deported based upon this plea, he secured the services of an immigration attorney from the Neighborhood Defender Services of Harlem to represent him and fight his deportation. He also asked his immigration attorney to contact the office of appellate counsel (who had represented him on his direct appeal) to pursue remedies to attack this criminal conviction (See Motion at ¶13; Motion, Exhibit D at ¶11).

Appellate counsel discussed with Mr. Chacko the potential consequences of withdrawing his plea: that he would face receiving a harsher sentence than the one he has already served and could end up going back to prison; if that happened, he would still be deported. Mr. Chacko accepted that risk and expressed his desire to nonetheless vacate his plea so that he can have a chance to challenge his deportation (See Motion at ¶13; Motion, Exhibit D at ¶11).

In his motion, Mr. Chacko noted that the instant case is the sole basis for the removal order against him (See ICE Notice to Appear, in Motion, Exhibit A). While he has other convictions (most notably, a prior felony for second-degree assault from 2000 for which he is also seeking vacatur on Padilla grounds), it is Mr. Chacko's conviction in this case that is the basis for his removal (Id.).

Separate and apart from the violation of Mr. Chacko's Federal and State Constitutional right to effective assistance of counsel, he alleged that his plea failed to satisfy Federal and State Due Process requirements. This is because avoiding a conviction that subjected him to mandatory deportation was of "such great importance to him that he would have made a different decision had that consequence been disclosed." People v. Gravino, 14 N.Y.3d 546, 559 (2010). Since it was not disclosed, Mr. Chacko's plea was not knowingly, intelligently and voluntarily made. See People v. Harnett, 16 N.Y.3d 200 (2011); People v Ford, 86 N.Y.2d 397, 403 (1995)(due process mandates that "the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant") (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

Finally, because Mr. Chacko's sentence of one year or more mandates his automatic deportation, he alleged that it was unconstitutionally harsh as applied to him, and his sentence

should therefore be reduced to 364 days. U.S. Const. amends. VIII & XIV; N.Y. Const. art. 1, §§5, 6; People v. Broadie, 37 N.Y.2d 100, 119, cert. denied, 423 U.S. 950 (1975); see, e.g., People v. Easton, 216 A.D.2d 220 (1st Dept. 1995); cf. People v. Bakare, 280 A.D.2d 679 (2d Dept. 2001) (sentence modified, in the interest of justice, from one year to 364 days, citing People v. Cuaran, 261 A.D.2d 169 (1st Dept. 1999)).

Mr. Chacko accordingly requested that his conviction be vacated and the indictment dismissed, a new trial ordered, or at the least a hearing should be ordered. For the reasons stated, he also requested that his sentence be reduced.

Respondent's Response

On September 1, 2011, respondent filed a response to Mr. Chacko's motion, not addressing Mr. Chacko's Federal and State Due Process and Eighth Amendment claims (See Response). Respondent claimed, *inter alia*, that Ms. Gamliel had no duty to investigate Mr. Chacko's immigration status; rather, it was Mr. Chacko's obligation to understand the significance of his status and come forward and tell his attorney that he was not a citizen (Id. at 7-8, 15-17).

In addition, respondent maintained that Mr. Chacko got a good plea, below the maximum possible sentence, and speculated that there was no prejudice even if counsel was ineffective because Mr. Chacko would have taken this plea even if he had known that it would result in his automatic and permanent deportation, despite having lived

in this country for over 30 years and his lack of any ties to India (Response at 18-21). She argued that Mr. Chacko's allegations were insufficient to support the motion absent an affidavit from trial counsel (Id. at 6-11), that Padilla was not retroactive (Id. at 12-15), and urged the trial court to deny the motion without a hearing.

Mr. Chacko's Reply

In a reply filed on September 12, 2011, Mr. Chacko, *inter alia*, countered that it was not his responsibility to tell his attorney he was not a citizen; his counsel had a duty under prevailing professional norms, as recognized in Padilla, to investigate his immigration status so she could advise him of the immigration consequences of his plea, which she erroneously failed to do (See Reply at 4-6, 8-9).[4] Mr. Chacko also reiterated that he would have asserted his right to go to trial had he been informed of the immigration consequences of his plea, and would have alleged that he did not know that the money he possessed was counterfeit, as he had asserted in his affidavit (Id. at 9-12).

[4]There is no indication in this record and no allegation that Mr. Chacko falsely indicated to counsel that he was a citizen. In fact, Ms. Gamliel told appellate counsel that she forgot to ask and did not know that Mr. Chacko was not a citizen (See Motion at 4, ¶7). Compare, e.g., People v. Wong, 29 Misc.3d 1227 (a) (N.Y. Crim. Ct. 2010)(there was a reasonable inference that defendant falsely told his attorney he was a citizen).

The Court's Decision and Order

In his Decision and Order dated November 3, 2011, Justice Zweibel assumed without deciding for purposes of this case that Padilla is retroactive (See D&O at 9 n.2).

While acknowledging that under Padilla a defense lawyer is "obligated to advise a client on the possible immigration consequences of a guilty plea," (D&O at 10), the court was "not certain" counsel's representation was deficient (Id. at 11). It held that counsel "had no obligation under prevailing professional norms to provide advice concerning immigration consequences of a proposed plea," because of the lack of evidence that she knew Mr. Chacko was a non-citizen, that Mr. Chacko had informed her of his status, or "that he inquired as to whether his plea would have any immigration consequences so as to alert Ms. Gamliel as to his immigration status" (Id. at 11). The court therefore found that "defendant's submissions do not satisfy the first prong of Strickland (see People v. Headley, 2011 WL 1821672 [Sup. Ct. N.Y. Co. 2011]; People v. McLarty, 32 Misc.3d 1201(A), 2011 WL 2518628 [Sup. Ct. Bx. Co. 2011])," and counsel's performance was not deficient (Id.).

The court found that, in the context of a guilty plea, Strickland requires that ineffective representation must have created a "reasonable possibility that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial" (D&O at 6). It added that when a defendant, on the advice of counsel, "reaped the benefits of a favorable plea bargain which substantially limits

his exposure to imprisonment, he has received adequate representation" (Id. at 6-7 (citing People v. McClure, 236 A.D.2d 633 (2d Dept. 1997); People v. Hendriksen, 31 Misc.3d 1222(A) (Kings Sup. Ct. 2011)). To satisfy the prejudice requirement of Strickland and establish that he would have insisted on going to trial, Justice Zweibel found "[s]ome of the factors that must be set out" in a defendant's affidavit must include: the strength of the prosecution's case, the availability of a defense, likelihood of success at trial, a comparison of the sentence promised with the potential exposure if convicted after trial, counsel's advice as to why the plea should be accepted, and a reason why the defendant admitted committing the act (Id. at 7)(emphasis added).

Even assuming arguendo that Ms. Gamliel's representation was deficient, the court found no prejudice, as it determined the evidence against Mr. Chacko to be "overwhelming" (D&O at 12). It found that to prove that he did not know the money he possessed was counterfeit, Mr. Chacko would have had to testify. The jury would then have learned he had previously been convicted of assault and, the court opined, it would not have believed him (Id.). According to Justice Zweibel, Mr. Chacko would thus have "inevitably" been convicted after trial (Id. at 13). The court found it "unlikely" Mr. Chacko would have rejected the plea offer under these circumstances, rather than risk exposure to a maximum of 7 ½ to 15 years if convicted after trial on the "slim chance" of avoiding deportation through acquittal (Id. at 13).

Ignoring appellate counsel's C.P.L. §440.10 & 20 affirmation representations as to her conversations with trial counsel Gamliel, Justice Zweibel found that "apart from his own self-serving declarations, defendant has failed to submit sworn allegations of fact which substantiate that his attorney misadvised him about the adverse consequences of his guilty plea (CPL § 440.30[4][b]; see also CPL § 440.30[4][d])." (D&O at 13). The court did not acknowledge the fact that Ms. Gamliel had told appellate counsel it was Legal Aid policy to not provide affidavits, and that was why none was provided here. Nor did the court address Ms. Gamliel's willingness to testify at a hearing. It noted its own failure to warn Mr. Chacko of the immigration consequences of his plea pursuant to C.P.L. §220.50 (7).

Finally, even though Mr. Chacko had alleged off-the-record information in his motion that the court had not been privy to, the court determined that a hearing was unnecessary because it had presided over the plea and sentence and was "presumed to be fully familiar with all aspects of the case," citing People v. Demetsenare, 14 A.D.3d 792, 793 (3d Dept. 2005)(D&O at 13-14).

ARGUMENT

POINT I

THE FAILURE TO INFORM APPELLANT MATTHEW CHACKO THAT HE WOULD BE AUTOMATICALLY DEPORTED BASED UPON HIS PLEA, WHEN HE WOULD NOT HAVE PLEADED GUILTY HAD HE BEEN SO INFORMED, RENDERED HIS CONVICTION UNCONSTITUTIONALLY OBTAINED UNDER FEDERAL AND STATE LAW. U.S. CONST. AMENDS. V, VI AND XIV; N.Y. CONST. ART. I, §6.

Mr. Chacko has lived in the United States over 30 years, since he came to this country with his family in 1981 when he was five. Based upon his plea in this case, he will now be removed from the United States, banished to a strange country that has never been his home, and permanently separated from his entire family. But when considering whether to take the plea recommended by his attorney in this case, Mr. Chacko was unaware of these severe consequences because his attorney did not tell him. Had Mr. Chacko known his plea would trigger his certain deportation, he would not have taken this plea and would have insisted on either taking a different, immigration-safe plea, or on exercising his right to go to trial.

For these reasons and those discussed below, Mr. Chacko's plea should be vacated and the indictment dismissed or a new trial ordered. In the alternative, a hearing should be ordered.

A. Counsel's Obligation to Advise a Defendant of the Immigration Consequences of His Conviction

In Padilla v. Kentucky, 559 U.S. __, 1330 S. Ct. 1473 (2010), the United States Supreme Court held that a defendant who faces even a risk of deportation as a result of his guilty plea is entitled under the Sixth Amendment to be informed of those consequences. Padilla, 130 S. Ct. at 1486 ("We now hold that counsel must inform her client whether his plea carries a risk of deportation."). The Court's reasoning focused upon the vast changes in federal immigration law, and how, as in Mr. Chacko's case, those changes have demanded more from criminal defense practitioners:

> The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view 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 non-citizen defendants who plead guilty to specified crimes.

130 S. Ct. at 1480 (footnote omitted).

The Supreme Court held that prevailing professional norms have imposed an obligation to provide advice on the deportation consequences of a client's plea for "at least the past 15 years [prior to March of 2010]"; see also id. at 1483-84 (citing standards and guidelines). Where counsel fails to give such advice, the representation is deficient under the analysis in Strickland v. Washington, 466 U.S. 688 (1984). Id.; see also Lafler v. Cooper, 566 U.S. ____, 132 S. Ct. 1376, 1387 (2012)("If a plea bargain has been offered, a defendant has

the right to effective assistance of counsel in considering whether to accept it."); Missouri v. Frye, __ U.S. __, 132 S. Ct. 1399 (2012).

The Supreme Court explicitly considered and rejected the argument that a Sixth Amendment violation occurs only when defense counsel gives the defendant "affirmative misadvice" about the immigration consequences of pleading guilty. 130 S. Ct. at 1484. Rather, "[i]t is quintessentially the duty of counsel to provide her client with advice about an issue like deportation . . . ." Id. The Court set forth the duty as follows:

> 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, as it was in this case, the duty to give correct advice is equally clear.

130 S. Ct. at 1483 (emphasis added).

The offense at issue in Padilla was an aggravated felony conviction, the worst type of offense for immigration purposes and what is at issue here. The Court held that the immigration statute, which commanded removal for non-trivial controlled substances offenses, foretold a "truly clear" consequence that required "equally clear" advice.

Here, where Mr. Chacko also pleaded guilty to a crime that had "truly clear" immigration consequences, defense counsel was required to provide "equally clear" advice. Because his attorney

failed to do so, and Mr. Chacko would not have pleaded guilty but for that lack of advice, this Court must vacate his conviction.[5]

1. The Duty To Investigate Immigration Status

The Padilla holding that an attorney must advise a client of the immigration consequences of his plea presupposes that competent counsel must, at a bare minimum, determine whether her client is a U.S. citizen. Here, counsel Gamliel admitted in two telephone conversations with appellate counsel that she failed to investigate whether Mr. Chacko was a citizen. Consequently, she failed to investigate the possibility of negotiating an immigration-safe plea on his behalf, failed to advise him of the immigration consequences of the plea she did urge him to take, and ensured his deportation. Nonetheless, the court below found that Mr. Chacko was obligated to know he should bring his status to his attorney's attention, and that counsel's ignorance of her client's status excused her from the duty to advise him about immigration consequences. That ruling, anathema to the

[5]The court below assumed, without deciding, that Padilla is retroactive. See D&O at 9 n.2. Under C.P.L. §470.15(1), this Court may only consider those issues that were decided "adversely" to Mr. Chacko by the trial court below. C.P.L. §470.15(1); see People v. Concepcion, 17 N.Y.3d 192, 195 (2011); People v. LaFontaine, 92 N.Y.2d 470 (1998); People v. Santiago, 91 A.D.3d 438 (1st Dept. 2012). C.P.L. §470.15(1) imposes a "legislative restriction" on the power of appellate courts "to review issues either decided in an appellant's favor, or not ruled upon, by the trial court." Id. (quoting LaFontaine, 92 N.Y.2d at 474). Therefore, the trial court's retroactivity assumption may not be revisited here.

Supreme Court's ruling in Padilla and contrary to prevailing professional norms, was error.

1a. The Duty To Investigate A Client's Immigration Status Is Required By Prevailing Professional Practice Standards

In Padilla, the U.S. Supreme Court cited to many professional sources that confirmed an attorney's duty to investigate the background of his or her client. 130 S. Ct. at 1482-83; see, e.g., Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 713-18 (2002). Professional standards, including those set forth by the American Bar Association ("ABA"), have long required defense counsel to inquire into and determine all facts that may impact the consequences flowing from a guilty plea, especially with regard to deportation. See Attila Bogdan, Guilty Pleas by Non-Citizens in Illinois: Immigration Consequences Reconsidered, 53 DePaul L. Rev. 19, 60 (2003) (noting that "fully understanding a client's background and concerns about his or her immigration status is not only mandated by the ABA Standards of Criminal Justice, but also increases the defense counsel's ability to fashion a better plea agreement").

The duty to inquire into a client's immigration status is rooted in the attorney's most fundamental role: to conduct a thorough investigation into a case as well as a thorough interview of the client in order to provide informed, competent representation that takes into account a client's objectives. These duties have long been enshrined in

the ABA's Criminal Justice Standards. See American Bar Association Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed. 1993) § 4-4.1(a) ("Defense counsel should ... explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction"); id., § 4-3.2(a) ("As soon as practicable, defense counsel should ... probe for all legally relevant information without seeking to influence the direction of the client's responses.").

The ABA has emphasized that a lawyer's duty in interviewing a client cannot be limited to seeking out only the facts of the case. The "essential facts" include "the events surrounding the act charged, *information concerning the defendant's background*, and the defendant's record of prior convictions." Id., § 4-3.2(a) cmt., at 152 (emphasis added). A lawyer must obtain information concerning "the defendant's background, education, employment record . . . and the like," id., § 4-4.1(a), at 181, "regardless of the accused's . . . stated desire to plead guilty," because such information is necessary to raising mitigating factors in the course of representation. Id. at 183.

These obligations are critical at all stages of a criminal case, but they are particularly important in the context of guilty pleas, where "only defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case." ABA Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999), § 14-3.2(f) cmt., at 126. Here,

the ABA has specifically emphasized counsel's duty to conduct a thorough interview tailored to a defendant's needs to ensure that his plea is truly knowing and voluntary. Id. at 127 (counsel should "interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances"). Furthermore, counsel should not recommend acceptance of a guilty plea "unless appropriate investigation and study of the case has been completed." Id. at § 14-3.2(b).

It is therefore unsurprising that national professional organizations such as the ABA, the National Association of Criminal Defense Lawyers, the National Legal Aid & Defender Association, the American Council of Chief Defenders, and the American Immigration Lawyers Association uniformly take the position that it is counsel's clear obligation to ask a client about his citizenship status at the start of any case:

- Counsel "must always ask *every client* directly about the client's citizenship status." Tova Indritz, Puzzling Consequences of Criminal Immigration Cases, The Champion 12, 12-13 (Jan/Feb 2002) (emphasis added) (noting that "[e]arly on in the case, preferably at the first interview, counsel must find out all the information she will need to determine the client's current immigration status and potential immigration status").

- At initial interview of client, "[i]nformation that should be acquired includes, but is not limited to . . . immigration status (if applicable)." National Legal Aid & Defender Association Performance Guidelines for Criminal Defense Representation, Rule 2.2(b)(2)(a) (1995).

- Defense counsel "should interview the client to determine what collateral consequences are likely to be important to a client," whose "greatest potential difficulty, and greatest priority," may very likely be the immigration

consequences of a conviction. ABA Standards for Criminal Justice, Pleas of Guilty, § 14-3.2(f) cmt., at 127 (3d ed. 1999).

- "Regarding potential immigration consequences, the critical starting point is to determine whether the client is a United States citizen." American Council of Chief Defenders Best Practices Committee, Assisting Clients with Immigration and Other Civil Consequences Report 3 (Mar. 7, 2012).

- "In representing a foreign born criminal defendant, it is important to know, early on, your client's immigration status, as it will affect the immigration consequences of the criminal activity." Mary E. Kramer, American Immigration Lawyers Association, Immigration Consequences of Criminal Activity, A Guide to Representing Foreign Born Defendants (2003).

The obligation is no different in New York State. See New York State Bar Association Performance Standards for Providing Mandated Representation, Standard I-7(a)(v) & I-7(e)(v) (2005) (noting that effective representation includes, at minimum, "[o]btaining all available information considering the client's background and circumstances for purposes of avoiding . . . collateral consequences including, but not limited to, deportation"); Manuel D. Vargas, New York State Defender Association Criminal Defense Immigration Project, Representing Noncitizen Defendants in New York State (1998) ("As a standard preliminary inquiry when representing *any* new criminal defendant client, a defense lawyer should determine whether the client is a U.S. citizen or not") (emphasis in original).

These national and state sources reflect a standard of professional practice that has long placed the burden on counsel to inquire about her client's immigration status, and not on the client to volunteer this information. The trial court's ruling otherwise disregards

that standard, and in doing so turns Padilla on its head and rewards counsel (and punishes Mr. Chacko) for her lapse in professional judgment.

1b. Counsel's Duty to Investigate Immigration Status Is Inherent In *Padilla v. Kentucky*

Contrary to the trial court's holding, the obligation to ask about *every* client's immigration status rather than fall prey to assumption follows clearly from the Supreme Court's decision in Padilla v. Kentucky. There, the Court emphasized that it was "quintessentially the duty of counsel to provide her client with available advice about an issue like deportation." Padilla, 130 S. Ct. 1473, 1484 (2010). Noting that professional norms for the past fifteen years have overwhelmingly imposed such an obligation on counsel without condition, the Court held that any failure to advise "clearly satisfies the first prong of the Strickland analysis." Id. at 1484-85. Padilla's duty is absolute: Nowhere does the Court suggest that the obligation is not triggered until the client volunteers that he is not a citizen. Nor does the Court imply that the client has a reciprocal duty to inform her attorney of her immigration status.

In People v. Claudio Picca, __A.D.3d__, 2012 WL 2016397 (2d Dept. June 6, 2012), the Second Department recently found that the trial court erred in failing to grant a hearing on a §440 motion where the defendant alleged that, in 2001, his attorney failed to inform him of the immigration consequences of his plea. The Court

rejected as "logically flawed" the claim that an attorney has no duty to give advice as to immigration consequences unless a defendant informs the attorney he is a noncitizen. 2012 WL 2016397, at *4. As the Court reasoned, such a claim assumes that a defendant already understands the relevance of his immigration status to his criminal case; without that knowledge a defendant would have no reason to know to offer the information.

Putting the burden on the defendant to understand the relevance of his immigration status, the Second Department found, would "undermine the protection that the Padilla Court sought to provide noncitizen defendants. Indeed, it would lead to the absurd result that only defendants who understand that criminal convictions can affect their immigration status could be advised of that fact." Id. But see People v. John Carty, __A.D.3d __, 2012 WL 2034991 (3d Dept. June 7, 2012)(declining to find a duty to investigate where there was evidence defendant told counsel he was a citizen).[6]

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[6]Lower New York court decisions have been split on this issue. Compare, e.g., People v. Bent, 30 Misc.3d 1240 (A)(N.Y. Co. Ct. 2011)(where failure to inform found, court discounted prosecution claim that there was no duty to advise unless counsel "has reason to perceive" a deportation issue)(citing People v. Stella, 188 A.D.2d 318 (1st Dept. 1992)); People v. Harding, 30 Misc.3d 1237(A)(N.Y. Crim. Ct. 2011)(recognized counsel's duty to inquire under Padilla into the immigration status of his or her client) with People v. Headley, 2011 WL 1821672 (N.Y. Sup. Ct 2011) (no ineffectiveness where no evidence attorney either knew of defendant's status or failed to inform of immigration consequences).

Other state courts have found, consistent with the position of nearly every major professional practice guide, that counsel's performance is deficient when she fails to inform her client of the deportation consequences of a plea because she did not ask about his

(continued…)

It is counsel's obligation to ensure that deportation advice is provided to *every* noncitizen client. See Padilla, 1330 S. Ct. at 1486 (noting that the severity of deportation "only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation."). This requires counsel to do what is necessary to fulfill that obligation, including determining a client's citizenship, and consequently his need for advice on deportation. See, e.g., Comm. v. Clarke, supra, 460 Mass. 30, 46 (2011) (finding counsel deficient and noting that "[i]f counsel was unaware of her client's immigration status . . . it is highly unlikely that she ever informed him that his guilty pleas carried a substantial risk of deportation"); New York State Defenders Association,

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[6](…continued)
immigration status. See, e.g., United States v. Bonilla, 637 F.3d 980, 986 (9th Cir. 2011) (counsel's performance deficient where she failed to advise defendant of immigration consequences, and her mistake in thinking defendant was a U.S. citizen "accounted in part for her less than satisfactory performance"); Comm. v. Clarke, 460 Mass. 30, 46 (2011) (counsel's failure to ascertain that client was not a U.S. citizen may be enough to satisfy the ineffectiveness standard "because effective representation requires counsel to gather at least enough personal information to represent him"); Denisyuk v. State, 422 Md. 462 (Md. Ct. App. 2011) (counsel performed deficiently when he failed to advise client of deportation consequences of guilty plea, where counsel did not seem to have been aware that client was a noncitizen); Ex Parte De Los Reyes, 350 S.W.3d 723, 730 (Tex. Ct. App. 2011), petition for discretionary review granted (Jan. 11, 2012)(finding counsel fell below Strickland standard when he failed to discuss immigration consequences at all; "From the Court's discussion in [Padilla] it is clear that regardless of the complexity of the immigration law involved a *complete failure* by defense counsel to inform or advise a defendant regarding the potential effect on his immigration status constitutes a deficient performance"); Sial v. State, 862 N.E.2d 702 (2007) (Ind. Ct. App. 2007) (counsel ineffective where he never inquired into client's immigration status as lawful permanent resident); State v. Paredez, 136 N.M. 533, 535 (2004) (holding that "[d]efendant's attorney had an affirmative duty to determine his immigration status").

Inc., Life After *Padilla v. Kentucky*: What Defense Attorneys Should Know (available at http://www.nysda.org/docs/PDFs/CIDP/App%20F%20NYSDA%20PADILLA%20ADVISORY.pdf) (as of April 17, 2012) (advising defender offices to "design and implement a screening method to identify the immigration status of *all* clients," and advising attorneys to "identify client's immigration status" as a first step towards providing effective assistance of counsel") (emphasis added); Hans Meyer, Padilla v. Kentucky: The Duty of Defense Counsel Representing Noncitizen Clients, Colo. L. Rev. 37, 41 (2011) ("[T]he Padilla decision appears to require defense counsel to determine the immigration status of their clients during the course of representation"). But see State v. Stephens, 46 Kan. App.2d 853 (Ct. App. 2011) (finding that Padilla did not impose upon counsel the duty to investigate the citizenship or immigration status of every client in a criminal case).

Here, as Mr. Chacko asserted in his affidavit, he did not tell Gamliel about his immigration status because, after 30 years in this country, he did not realize that it mattered. See People v. Picca, supra, 2012 WL 2016397, at 2* (defendant in this country for three decades "'really had no idea that there were any immigration consequences'" to his plea); cf. Padilla, 130 S. Ct. at 1478 (counsel erroneously told his client, who had been in this country for four decades, that he "did not have to worry about immigration status since he had been in the country so long."). And counsel did not ask, perhaps assuming he was a U.S. citizen. But as warned in chapter two of *Representing Noncitizen Defendants in New York State,* Manuel

D. Vargas, New York State Defender Association Criminal Defense Immigration Project, 1998:

> Do not make the U.S. citizenship inquiry only with respect to those who appear or sound "foreign," as many noncitizens may not look foreign to you and may have no accent whatsoever. In fact, many noncitizens have lived virtually their whole lives in the United States....

Id. at 2-1 (emphasis in original).

The burden on counsel here was not great. Had she merely asked Mr. Chacko a single question about his citizenship, as prevailing norms required, she would have readily learned that he was a lawful permanent resident who would face mandatory deportation. To place the burden on defendants to know the law and use that as an excuse to discharge attorneys from upholding prevailing professional standards as articulated in Padilla is simply wrong. That burden belongs squarely where Padilla places it – on the attorney, not the defendant.

Finally, the rule fashioned by the trial court would punish those who are arguably most deserving of Padilla's protection. Individuals such as Mr. Chacko who have been in the United States the longest; who will likely not display any telling signs of their immigration status; who will more likely fail to ask about deportation because they do not realize that a conviction can affect their long-standing status as lawful permanent residents; who will, ironically, be most strongly prejudiced by the lack of immigration advice because of their strong ties to the United States, would be precluded from challenging their guilty pleas. (And because an aggravated felony

requires mandatory removal, long-standing ties and other equities cannot even be considered in immigration court). That immigration advice need not be given to individuals for whom deportation would be most devastating merely because they may look and sound American could not have been what the Padilla Court intended.[7]

B. Counsel Failed To Give Mr. Chacko Constitutionally Adequate Advice And But For That Failure, He Would Not Have Pleaded Guilty

1. Counsel Was Not Reasonably Effective Because She Failed to Advise Mr. Chacko That His Plea Would Result In Deportation, And Failed To Negotiate For An Immigration-Safe Plea On His Behalf

As in Padilla, the deportation consequence in this case was clear: When Mr. Chacko entered his plea to attempted second-degree possession of a forged instrument, with a sentence of one year or more, he was condemning himself to certain deportation for an aggravated felony under the immigration law. Were Mr. Chacko's lawyer equipped with even a bare-bones understanding of Mr. Chacko's circumstances and the adverse immigration consequences of his plea, she would have advised Mr. Chacko of those consequences and sought to avoid this conviction, including by means of aggressive plea bargaining.

There is no evidence here to refute Mr. Chacko's credible claim

[7]Nor did the court fulfill its duty to inform Mr. Chacko of possible immigration consequences at the time of his plea, as required under C.P.L. §220.50(7). Such a charge would not, in any event, have absolved counsel of her obligations. See, e.g., People v. DeJesus, 30 Misc.3d 1203 (A), n. 13 (N.Y. Sup. Ct. 2010).

that he was not advised of the immigration consequences of his plea before he pleaded guilty. Indeed, counsel Gamliel admitted to appellate counsel, as stated in appellate counsel's §440 affirmation, that she did not ask and did not know that Mr. Chacko was not a citizen.[8]

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[8]The court's adverse ruling that "apart from his own self-serving declarations, defendant has failed to submit sworn allegations of fact which substantiate that his attorney misadvised him about the adverse consequences of his guilty plea...," (D&O at 13), was error. See People v. Radcliffe, 298 A.D.2d 533 (2d Dept. 2002). Pursuant to C.P.L. §440.30 (4)(d), a court can only deny a §440 motion where an essential fact is "made solely by the defendant and is unsupported by any other affidavit or evidence, and ... there is no reasonable possibility that such allegation is true." See also C.P.L. §440.30 (4)(b)(a court may deny a §440 motion where papers fail to contain "sworn allegations substantiating or tending to substantiate all the essential facts...."). That is not the case here, where Mr. Chacko's affidavit claims as to counsel's failure to inform him of immigration consequences was both supported by appellate counsel's affirmation and shown to be true.

Mr. Chacko's affidavit as to counsel's lack of advice was substantiated by appellate counsel's §440 affirmation description of two telephone calls with trial counsel Gamliel. In those conversations, Ms. Gamliel confessed that she neither investigated Mr. Chacko's immigration status nor advised him of the immigration consequences of his plea. In the second call, she stated that due to Legal Aid's policy she refused to sign an affidavit (Affirmation by Robin Nichinsky, in Motion at ¶7). She also shared that she had located her records and, consistent with her recollection, there were no references in the file to any conversation with Mr. Chacko as to immigration consequences (Id.).

Even where §440.30 (4)(d) has been interpreted to require more than a defendant's affidavit alone, an explanation for the absence of an affidavit from trial counsel has been deemed sufficient to warrant a hearing. See, e.g., People v. Pedraza, 56 A.D.3d 390 (1st Dept. 2008); People v. Gil, 285 A.D.2d 7 (1st Dept. 2001). Justice Zweibel's ruling (which did not even refer to appellate counsel's affirmation or Gamliel's claim as to Legal Aid policy), was contrary to the facts, the law, and common sense, and would allow any attorney to defeat an ineffectiveness claim simply by refusing to submit an affidavit. If the court had any questions as to what Ms. Gamliel knew or did, the proper course here would have been to order a hearing so she could testify.

Mr. Chacko did not realize the significance of his status, as he had been in this country for decades. He relied upon his lawyer to explain the important ramifications of any potential plea to him. As his affidavit describes, he did not receive the advice he needed, and as a consequence he did not understand that by taking this plea he was ensuring his own deportation. This was not the type of clear advice that Padilla mandates when the consequences are in fact clear.

Moreover, counsel's failure to negotiate an immigration-safe plea on Mr. Chacko's behalf serves as an independent basis for finding her representation constitutionally deficient. In Padilla, the Supreme Court acknowledged the importance of plea bargaining in cases where deportation is a risk:

> Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

130 S. Ct. at 1486.

In Missouri v. Frye, __U.S. __, 132 S. Ct. 1399 (2012), the Supreme Court quoted from Padilla that "'the negotiation of a plea bargain is a critical phase of litigation for purposes

of the Sixth Amendment right to effective assistance of counsel.'" Id. at 1406 (quoting Padilla, 130 S. Ct. at 1486). In Frye, counsel had failed to communicate a favorable plea bargain offer to the defendant and the offer expired. The defendant later took a less favorable plea. In its decision, the Supreme Court recognized:

> The reality is that plea bargains have become so central to the criminal justice system that defense counsel have responsibilities in the plea bargain process ... to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. "To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system."

132 S. Ct. at 1407 (citations omitted; emphasis in original); see also Lafler v. Cooper, 566 U.S. __, 132 S. Ct. 1376 (2012)(conviction vacated where counsel's bad advice resulted in the rejection of a plea offer and conviction after trial with a more severe sentence).

Here, counsel's ineffectiveness caused her to fail to seek an immigration-safe plea on Mr. Chacko's behalf. Had she done so, particularly in the time between his July 25, 2007 arrest and September 5, 2007 indictment, she might, for example, have secured a plea offer to the lesser offenses of possession of a forged instrument in the third degree under P.L. §170.20, or theft of services under P.L. §165.15 (2) (the latter which was charged in the felony complaint.

See Supreme Court file). She could then have negotiated consecutive sentences for these offenses that equaled or even exceeded Mr. Chacko's present sentence, in exchange for not pleading to an aggravated felony. See I.N.S. v. St. Cyr, 533 U.S. 289, 322 (2001) (for a deportable defendant, a "better" plea bargain would be one that does not carry immigration consequences, even where it results in a larger fine or longer term of incarceration).

Because counsel did not explore these or other similar possibilities, Mr. Chacko was denied the opportunity to secure them. Instead, he did not even know of these options and did not make an informed decision as to whether to take the plea that was offered, push for another plea, or go to trial - knowing the risks of deportation in each option.

Counsel's ignorance of Mr. Chacko's immigration status also denied him the benefit of counsel's informed advice. An attorney should not only state the potential consequences of a plea, but explain them to her client and recommend the best plea in light of the defendant's goals, be it avoiding deportation, incarceration, etc. Advice is not given for the defendant to process himself, but is part of a larger discussion as to whether a plea offer makes sense. Mr. Chacko was denied this as well.

Contrary to the trial court's holding, Mr. Chacko, like defendant Padilla, easily establishes the first prong of the two-part Strickland analysis: that his attorney failed to provide the performance to which he was entitled under the Sixth Amendment of the Federal Constitution.

See Strickland, 466 U.S. at 688; People v. McDonald,1 N.Y.3d 109, 113 (2003). Counsel's failure to competently advise Mr. Chacko of the advisability of entering the plea in light of the immigration consequences, or to seek an immigration-safe plea on his behalf, also significantly deprived him of "meaningful representation," see People v. Henry, 95 N.Y.2d 563 (2000), and constituted ineffective assistance of counsel under the New York State Constitution. Contra People v. Ford, 86 N.Y.2d 397 (1995).

Under the Strickland standard, the only remaining question (or second prong in the analysis) is whether Mr. Chacko was prejudiced by counsel's inadequate representation, an inquiry which turns on whether the attorney's failing "affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59 (1985). Under Padilla, the defendant must convince the Court that the decision to plead guilty "would have been rational under the circumstances." Padilla, 130 S. Ct. at 1485. As set forth below, Mr. Chacko satisfies this requirement as well.

2. Mr. Chacko Was Prejudiced by Trial Counsel's Deficient Representation

A defendant is deemed prejudiced by deficient assistance with a showing that, "but for counsel's unprofessional errors, the result of that proceeding would have been different." Padilla, 130 S. Ct. at 1473 (quoting Strickland, 466 U.S. at 694)); see also Lafler v. Cooper, 566 U.S. __, 132 S. Ct. 1376 (2012)(same). The defendant need only establish prejudice through a showing of reasonable probability

that the outcome would have been different. See, e.g., United States v. Arteca, 411 F.3d 315, 321 (2d Cir. 2005). In the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty. See Hill v. Lockhart, 474 U.S. 52, 59 (1985); accord People v. McDonald, 1 N.Y.3d at 115 (applying Strickland prejudice standard because defendant's argument rested solely on federal constitutional law); cf. People v. Rauf, 90 A.D.3d 422, 423 (1st Dept. 2011)(no ineffectiveness based on misadvise where defendant "never argued that he would not have pleaded guilty if he had been properly advised").

The Court of Appeals in McDonald rejected the argument that the defendant was required to show that, had he gone to trial, the outcome would have been more favorable than his plea. The Court held that under Federal law a defendant is simply required to "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." 1 N.Y.3d at 115 (quoting Hill v. Lockhart, 474 U.S. at 59). A reasonable probability is "a probability sufficient to undermine confidence in the outcome," not that "counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693-94.

In Padilla, the Court held that to establish Strickland prejudice in a case where the defendant pleaded guilty, a defendant must show that his decision "to reject the plea bargain would have been rational

under the circumstances." Padilla, 130 S. Ct. at 1485 (citing Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000)).

Under New York law, an even less specific prejudice showing is required, focusing on "the fairness of the process as a whole rather than [any] particular impact on the outcome of the case." People v. Benevento, 91 N.Y.2d 708, 714 (1998); People v. Baldi, 54 N.Y.2d 137 (1981). This "meaningful representation" standard does not logically require a separate prejudice analysis, and represents a broader, more-lenient-to-defendant standard that subsumes the Strickland but-for probability standard. See People v. Stultz, 2 N.Y.3d 277, 284 (2004) ("[U]nder our *Baldi* jurisprudence, a defendant need not fully satisfy the prejudice test of *Strickland*. We continue to regard a defendant's showing of prejudice as a significant but not indispensable element in assessing meaningful representation. Our focus is on the fairness of the proceedings as a whole.").

Given that the New York standard is more favorable to defendants than the but-for Strickland standard, in a case where the negative immigration consequences of a plea far outweigh the possible penal consequences, as occurred here, an attorney's misadvice or failure to advise may well meet the New York prejudice standard even where a "reasonable probability" the defendant would not have pleaded guilty cannot be proven.

In People v. Picca, 2012 WL 2016397, the Court recognized that the prejudice analysis must take immigration consequences into account, as this may play a significant role in a defendant's decision whether

to take a plea even where the evidence seems strong or the plea otherwise favorable:

> [N]either the fact that the defendant had previously been convicted of a removable offense, nor the seemingly strong evidence against him..., nor the favorable plea bargain he received, necessarily requires a finding that the defendant was not prejudiced by his counsel's failure to advise him of the removal consequences of his plea. The determination of whether to plead guilty is a calculus, which takes into account all of the relevant circumstances....Especially for "the alien who has acquired his residence here," the "stakes are ...high and momentous."

2012 WL 2016397, at *7 (citations omitted).

Given "the primary importance that aliens may place upon avoiding exile from this country," a defendant's immigration status could weigh heavily in the decision whether to accept a plea. 2012 WL 2016397, at *7-8. If a defendant has been in the country only a short while and has no family here, facing trial where the evidence is overwhelming might be irrational. However, for a defendant like Mr. Picca (and Mr. Chacko) who has been in the country since childhood – and over three decades – and has all his family in the United States, an evaluation of whether he "could rationally reject a plea offer" must consider these "particular circumstances informing the defendant's desire to remain in the United States" along with the other relevant factors, such as the strength of the evidence and potential sentence. Id. at 7.

In Picca, the defendant had been observed selling drugs, was found in possession of drugs upon arrest, and admitted the drug

sale. 2012 WL 2016397, at *1, 8. Nonetheless, the Court noted that the burden of proof is a high one and "it cannot be known at this juncture what weaknesses may have existed" in the prosecution's case. Id. at 8. At the same time, the defendant had substantial ties to the United States, where he had lived almost his entire life. Under these circumstances, the Court found that the defendant's averments that he would have rejected the plea offer and taken his chance at trial if he had known about the immigration consequences of this plea would have been rational.

In reaching its decision, the Picca Court cautioned that the rationality standard as expressed in Padilla "does not allow the courts to substitute their judgment for that of the defendant, and the question is not "whether a decision to reject a plea of guilty was the best choice, but only whether it is a rational one." 2012 WL 2016397, at *8; see also People v. DeJesus, 34 Misc.3d 748 (N.Y. Sup. Ct. 2011)(The rational defendant standard requires the court to "examine the relative risks and consequences of going to trial or taking a plea, under the circumstances facing th[e] defendant at the time of her plea," which includes the significance to the defendant of the right to remain in this country).

Here, as in Picca, Mr. Chacko had every reason to want to protect his ability to remain in the United States. He too has lived in the United States for almost his entire life – over three decades – and his entire family lives here. He knows no one in India and

has no support in that alien country.[9] This is a factor that the trial court in this case failed to properly consider. As Mr. Chacko alleged, had he known of this terrible penalty for what otherwise might have seemed like a reasonable plea, he would have rejected it, and that decision would have been a rational one. See I.N.S. v. St. Cyr, 533 U.S. at 322-23 ("Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.")(internal quotation omitted).

Moreover, if Mr. Chacko had received competent advice, he might have been able to negotiate a different plea that would not have carried such devastatingly negative and certain immigration consequences. See Padilla, 130 S. Ct. at 1486; see also Picca, supra, 2012 WL 2016397 at *9 ("had the immigration consequences of the defendant's plea been factored into the plea bargaining process, defense counsel may have succeeded in obtaining a plea agreement that would not have borne the consequence of mandatory removal from the United States.")(citing Padilla,130 S. Ct. at 1486). As discussed above, see ante at pp. 34-35, such other potential plea options did exist.

Even if he had gone to trial, the outcome here was far from certain. The evidence was considerably weaker than in Picca. There was no evidence as to where the bills had come from or whether Mr. Chacko actually knew they were counterfeit when he used a couple of $10 counterfeit bills in a bar. The prosecution would have had

[9]He has only a very elderly grandmother who lives in a remote village, does not speak his language, and cannot help him.

to prove intent beyond a reasonable doubt, and the evidence of intent here was sparse at best.[10]

Nor was it clear, as the court found, that Mr. Chacko would have had to testify to prevail at trial, or that if he did testify he would be automatically disbelieved simply because he had an assault conviction from years before. As an articulate man raised in a stable Westchester home, he might well have made a good impression upon the jury and been a credible witness. As the Court noted in McDonald, Mr. Chacko did not have to prove he would have *prevailed* at trial, only that there was a reasonable possibility that he would not have pleaded guilty had he been aware of the full consequences of his plea.

The court also erred in finding that Mr. Chacko would have taken this plea even if faced with permanent, inevitable exile from the home and family he loves because of the maximum potential sentence of 7 ½ to 15 years – a sentence unlikely in any event for a relatively minor non-violent crime. The "benefit" of this plea was in fact a monstrously cruel punishment that Mr. Chacko agreed to only because he did not know about the consequences, due to the ineffectiveness of his counsel. See, e.g., In re Resendiz, 19 P.3d 1171, 1188 (Cal.

[10]Mr. Chacko's comments after the fact were of little relevance. The alleged act of trying to give the bartender money not to call the police may be evidence that he sought to avoid prosecution, but not that he knew the money was counterfeit before he was accused. Similarly, his comment that he wanted his "real" money back may have occurred after police took away what they charged was "fake" money, but did not prove Mr. Chacko knew the money was counterfeit *before* he tried to use it.

2001)(Mosk, J., concurring and dissenting) ("the immigration consequences of criminal convictions have verged on the monstrously cruel in their harshness compared to many of the crimes on which they are imposed.").

When viewed in the proper context – compared to the loss of Mr. Chacko's family, a lifetime of friends, and the only home he has ever known - the benefits of this plea pale in comparison. See United States v. Orocio, 645 F.3d 630, 645 (3rd Cir. 2011)("For the alien defendant most concerned with remaining in the United states, especially a legal permanent resident, it is not at all unreasonable to go to trial and risk a ten-year sentence and guaranteed removal, but with the chance of acquittal and the right to remain in the United States, instead of pleading guilty to an offense that ... carries 'presumptively mandatory' removal consequences."); Denisyuk v. State, 422 Md. at 488 (because "preserving the client's right to remain in the United States may be more important to the client than any jail sentence," court found that it was rational for a defendant to "run the risk of significant jail time, rather than the near certainty of deportation.").

Mr. Chacko submitted an affidavit credibly alleging that had he known of the severely harsh immigration consequences of the guilty plea his attorney negotiated, he would not have taken it and would instead have insisted on going to trial. Under the circumstances as discussed here, as the Court found in Picca, that decision would have been entirely rational.

Contrary to the court's finding, Mr. Chacko's claim that he was not advised of the consequences of his plea *was* also substantiated. Appellate counsel's §440 affirmation related two conversations with trial counsel, who admitted she did not know Mr. Chacko was not a citizen and did not inform him of immigration consequences; but Ms. Gamliel's employer, the Legal Aid Society, would not allow her to attest to that in an affidavit.

The specifics of Mr. Chacko's personal circumstances were also substantiated by affidavits from his father, Koshy Chacko, and his mother, Omana Chacko, United States citizens who each swore that Mr. Chacko's family is here in the United States and he has no one and nothing in India (See Motion, Exhibits H & I). These latter circumstances were improperly given no weight by the trial court in its decision.

The trial court's prejudice analysis failed to properly consider the significance that mandatory deportation would have had on Mr. Chacko's decision-making about any plea offer. Moreover, it relied upon a standard more akin to proof beyond a reasonable doubt than the "reasonable probability' required by Strickland and Padilla. See Orocio, 645 F.3d at 643 (in determining prejudice of ineffectiveness, the Court cited to Strickland, 466 U.S. at 694, in stating that, "'a reasonable probability' is a standard of proof 'somewhat lower' than a preponderance of the evidence"). Its minimizing of Mr. Chacko's certain deportation as a factor, while at the same time

finding that he "must"[11] address myriad factors including proof of likelihood of success at trial, goes far beyond the requirements of Strickland, Padilla, and the New York State "meaningful representation" standard of Baldi.

Moreover, the fact that Justice Zweibel presided over Mr. Chacko's plea and sentence is not determinative of whether a hearing is merited on Mr. Chacko's §440 claims, which involve new factual issues raised for the first time in this motion. See,e.g., People v. Reynoso, 88 A.D.3d 1162 (3d Dept. 2011)(reversing a §440.10 denied without a hearing, where defendant alleged that had he not been misadvised about immigration consequences he would have refused the plea and gone to trial; defendant was "entitled to a hearing on that aspect of his motion alleging ... ineffective assistance of counsel")(citations omitted).

Under these circumstances, Mr. Chacko's plea should be vacated; at the least, a hearing should be ordered.

C. Mr. Chacko's Plea Was Not Knowing and Voluntary

Separate and apart from Mr. Chacko's claims of ineffectiveness, this Court must vacate his plea because the failure to inform him of the immigration consequences of his aggravated felony conviction renders his plea unknowing and involuntary.[12]

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[11]In contrast, in People v. Powell, 35 Misc.3d 1214(A)(N.Y. Sup. Ct. 2012), these same factors were described as facts "that *may* be described in an affidavit...." (emphasis added).

[12]The trial court acknowledged the voluntariness as well as

(continued…)

The Federal and State Constitutions demand that a guilty plea be knowing, intelligent, and voluntary. See Boykin v. Alabama, 395 U.S. 238, 242 (1969); People v. Fiumefreddo, 82 N.Y.2d 536, 543 (1993). The court and counsel have independent obligations to insure that a defendant pleading guilty has a full understanding of what the plea connotes and its consequences. See Lockhart, 474 U.S. at 56-57. The record must show that the defendant's decision to plea guilty is a "voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31 (1970); see also Chaipis v. State Liquor Authority, 44 N.Y.2d 57, 63 (1978) (stating that a guilty plea may be taken "only when the defendant has the knowledge and understanding of the consequences of the plea"). It is a violation of due process for a court to accept a defendant's guilty plea "without an affirmative showing that it was intelligent and voluntary." Boykin v. Alabama, 395 U.S. at 245; People v. Moissett, 76 N.Y.2d 909, 910-11 (1990).

In People v. Harnett, 16 N.Y.3d 200 (2011), the Court of Appeals addressed the issue of when a plea will be rendered involuntary on the ground that the defendant was not informed of the potential consequences

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[12](…continued)
Eighth Amendment issue in its opinion; while it did not specifically analyze those issues, it later ruled that "defendant's motion is denied in its entirety." B5 at 1,14. These issues were thus decided adversely to Mr. Chacko, and should now be decided by this Court. See People v. Concepcion, 17 N.Y.3d at 195 ; People v. LaFontaine, supra, 92 N.Y.2d 470. Should this Court find itself precluded from addressing these issues, the correct course of action would be to hold this matter in abeyance and remit to Supreme Court for a ruling on both these issues. See, e.g., People v. Chattley, 89 A.D.3d 1557 (4th Dept. 2011).

of his plea. When Harnett pleaded guilty to a sex offense, he was informed that he would be sentenced to 7 years in prison and 3 to 10 years of post-release supervision, that he would be subject to an order of protection for 15 years, and that he would be required to register as a sex offender. Id. at 203. Harnett's conviction also rendered him a "detained sex offender." Id. at 204. As such, he was subject to the Sex Offender Management and Treatment Act (SOMTA), which triggers a series of proceedings, and potentially, a trial at which a jury determines whether the offender "suffers from a mental abnormality." Id. Where a jury finds a "mental abnormality," the offender must then be classified as either a "dangerous sex offender" requiring civil confinement, or a "sex offender requiring strict and intensive supervision." Id. However, no mention was made of SOMTA at Harnett's plea proceeding.

Harnett argued that the failure to advise him of the SOMTA consequences of his conviction invalidated his plea on two grounds: that they were "direct consequences" of his plea, and therefore consequences about which he should have been advised; and whether direct or collateral, they were so important that their non-disclosure rendered the plea proceedings fundamentally unfair. Id. at 205. Although the Court ultimately rejected both prongs of Harnett's claim, the implicit reasoning of the decision requires vacating Mr. Chacko's plea here.

1. Pleading Guilty To This Aggravated Felony Triggered Consequences That Are "Direct," and the Failure to Disclose Them Renders Mr. Chacko's Plea Involuntary

Although the Court found that SOMTA was not a direct consequence of Harnett's plea, it did so for reasons that are plainly distinguishable from the facts presented here. Quoting Ford, the Court explained that direct consequences are those that have a "definite, immediate and largely automatic effect on defendant's punishment." Harnett, 16 N.Y.3d at 205 (quoting Ford, 86 N.Y.2d at 403). Then comparing the SOMTA to SORA,[13] the Court held that SOMTA's non-penal purpose, its administration by agencies outside of the court's control, and its non-automatic nature rendered it a collateral consequence. Harnett, 16 N.Y.3d at 206.

Padilla has rendered invalid Ford's characterization of deportation consequences as "collateral." As recognized in Padilla , the "drastic measure of removal...is now virtually inevitable for a vast number of noncitizens convicted of crimes." Padilla, 130 S. Ct. at 1478. Aggravated felonies such as the nonviolent felony to which Mr. Chacko pleaded guilty, serve as virtually non-waivable grounds for deportation, with few exceptions. In contrast, the large majority of people who are "detained sex offenders" under SOMTA will suffer no consequences from the designation, and about 6% of eligible offenders were or were likely to be subject to civil commitment within the first three years of SOMTA's passage. Harnett, 16 N.Y.3d at 205.

[13]The Court of Appeals held that SORA's registration requirements were a collateral consequence in People v. Gravino, 14 N.Y.3d 546 (2010).

As with SOMTA, a body "not under the court's control" — an immigration judge — oversees the consequences that befall the offender. But again, unlike the administrative bodies that oversee SOMTA's execution in a particular case, an immigration court's discretion is strictly limited. The immigration court cannot consider any equities in the case of aggravated felony deportability and must order a defendant removed for aggravated felony convictions (subject to very few exceptions inapplicable here). And, unlike the "remedial" purpose of SOMTA, deportation is, without a doubt, punishment. See Scheidemann v. I.N.S., 83 F.3d 1517, 1527 (3d Cir. 1996)(Sarokin, J.,concurring)("The legal fiction that deportation following a criminal conviction is not punishment is difficult to reconcile with reality....If deportation under such circumstances is not punishment, it is difficult to envision what is.").

It would make little sense that a plea must be rendered unknowing and involuntary when a defendant was not informed of the post-release supervision portion of his sentence, but not when he was not informed that his plea would result in banishment from all the people he knows and loves and the only life he has ever known. See People v. Catu, 4 N.Y.3d 242, 245 (2005) ("a defendant pleading guilty to a determinate sentence must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action.").

2. Mr. Chacko's Plea Was Fundamentally Unfair

Although it recognized it as a "stronger argument," the Court also rejected Harnett's separate claim that SOMTA consequences, whether collateral or not, were simply too important to be left out of a plea allocution. Id. at 206. The rejection, however, was on grounds plainly not present here, and the Court's reasoning actually compels a finding that Mr. Chacko's plea was fundamentally unfair and violated due process.

Defendant Harnett's fundamental fairness argument before the Court relied upon a New Jersey case, State v. Bellamy, 178 N.J. 127 (2003). The defendant in that case had pleaded guilty to a sex crime in exchange for the State's promise to recommend an 18-month jail sentence. Harnett, 16 N.Y.3d at 206. By the time he was sentenced, he was scheduled to be released in little more than two months, but a week before his release date the New Jersey Attorney General instituted proceedings under the state's Sexually Violent Predator Act and the defendant was committed. Id. The Bellamy court held that "fundamental fairness requires that prior to accepting a plea to a predicate offense, the trial court must inform a defendant of the possible consequences under the Act." Id. The court thus remanded Bellamy's case to permit him to make a motion to withdraw his plea, which it said should be granted "[i]f the trial court is satisfied that defendant did not understand the consequences of his plea." Id. at 206-07.

The Harnett Court rejected the defendant's attempts to analogize his case to Bellamy's. Unlike Bellamy, Harnett did not even assert

that he had been made the subject of a SOMTA proceeding, and the Court could not discern from the record "whether there is or ever was any significant likelihood that that would occur." Id. at 207.

Importantly, however, the Court recognized the validity of Bellamy's claim: "Certainly, if facts like those of Bellamy were before us, the argument that the plea was involuntary would have to be taken seriously." Id. The Court stressed "there may be cases in which a defendant can show that he pleaded guilty in ignorance of a consequence that, although collateral for purposes of due process, was of such great importance to him that he would have made a different decision had that consequence been disclosed." Id. (quoting Gravino, 14 N.Y.3d at 559). Recognizing that SOMTA consequences can include extended confinement, the Court contemplated that a plea made in ignorance of such a significant consequence could be proved involuntary where a "defendant can show that the prospect of SOMTA confinement was realistic enough that it reasonably could have caused him, and in fact would have caused him, to reject an otherwise acceptable plea bargain." Id. at 207. It noted further that a defendant would have to show that he "did not know about SOMTA—i.e., that his lawyer did not tell him about it—before he pleaded guilty." Id. Then, citing Padilla, the court recognized that "the issue of whether the plea was voluntary may be closely linked to the question of whether a defendant received the effective assistance of counsel." Id.

The Court's exploration of Harnett's fundamental fairness claim provides a straightforward guide for evaluating Mr. Chacko's claims

on the same grounds. Mr. Chacko has demonstrated that he pleaded guilty in ignorance of a consequence that was of "such great importance to him that he would have made a different decision had that consequence been disclosed." Further, the consequence here — removal from the United States — is at least as serious a consequence as extended confinement under SOMTA. And unlike Harnett, Mr. Chacko easily demonstrates that the consequence here was a realistic one — his deportation has already been ordered. Finally, as set forth above, Mr. Chacko has demonstrated that he did not know he was pleading guilty to an offense that constituted an aggravated felony under the immigration law.

Moreover, at Mr. Chacko's plea, neither counsel *nor* the Court informed him of the direct and foreseeable immigration consequences of his plea, even though Criminal Procedure Law §220.50(7) states that a trial court must advise a defendant of immigration consequences when it takes a plea. While the statute states that the failure to do so "shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction...," id., according to the 2011 Supplementary Practice Commentary to §220.50(7), that proviso "now seems at least obliquely inconsistent with federal constitutional law" in light of the decision in Padilla. Peter Preiser, 2011 Pocket Part Update, C.P.L. § 220.50(7) (McKinney's). But see People v. Carty, supra, 2012 WL 2034991 (court's failure to advise upheld post-Padilla); People v. Diaz, 92 A.D.3d 413 (1st Dept. 2012)(Padilla does not expand trial court duties; court had advised that defendant "could" be adversely

affected by plea). Here, the court's failure to mention anything about immigration consequences at either the plea or sentence also violated Mr. Chacko's rights to fundamental fairness and due process under the Federal and State Constitutions.

For all of the above-stated reasons, this Court should vacate Mr. Chacko's plea. Given that he long ago completed his sentence, and since the offense was nonviolent and relatively minor, in the interest of justice the indictment should be dismissed. See, e.g., People v. Allen, 39 N.Y.2d 916 (1976); People v. Kvalheim, 17 N.Y.2d 510 (1966) (affirming dismissal of complaint where defendant had already served his sentence of imprisonment); People v. Smart, 184 A.D.2d 341 (1st Dept. 1992) (dismissal of fourth-degree arson felony conviction warranted under "the peculiar circumstances of this case, including the nature of the crime" and where defendant fully served sentence); People v. Valle, 95 A.D.2d 865 (2d Dept. 1980) (felony third-degree criminal possession of stolen property conviction dismissed where sentence served). In the alternative, this Court should restore Mr. Chacko to pre-pleading status. At the very least, his credible allegations, coupled with the available evidence, mandate that this Court cannot deny the motion here without granting a hearing. See People v. Ortega, 29 Misc.3d 1203 (A) (N.Y. Crim. Ct. 2010) (Ferrara, J.); see also People v. Reynoso, supra, 88 A.D.3d 1162 (3d Dept. 2011).

POINT II

BECAUSE OF THE DISPROPORTIONATELY HARSH IMMIGRATION CONSEQUENCES OF MR. CHACKO'S MORE-THAN-ONE-YEAR SENTENCE, THE SENTENCE WAS UNCONSTITUTIONAL AS APPLIED TO HIM. U.S. CONST. AMENDS. VIII AND XIV; N.Y. CONST. ART. 1, §§5, 6.

Matthew Chacko's conviction for attempted possession of a forged instrument is an aggravated felony and mandates deportation under federal immigration law only because it includes a punishment of over one year. 8 U.S.C. 1101(a)(43). These circumstances constitute the relatively rare situation where Mr. Chacko's punishment is unconstitutionally harsh as applied to him, and his sentence should therefore be reduced to 364 days. U.S. Const. amends. VIII and XIV; N.Y. Const. art. 1, §§5, 6; People v. Broadie, 37 N.Y.2d 100, 119, cert. denied, 423 U.S. 950 (1975); see, e.g., People v. Easton, 216 A.D.2d 220 (1st Dept. 1995); People v. Martinez, 191 A.D.2d 306 (1st Dept. 1993); People v. Skeffrey, 188 A.D.2d 438 (1st Dept. 1992); People v. Robinson, 68 A.D.2d 413 (1st Dept. 1979); People v. Diaz, 179 Misc.2d 946 (N.Y. Sup. Ct. 1999); People v. Dowd, 140 Misc.2d 436 (Qns Sup Ct 1988)(statutorily mandated term of imprisonment in robbery case held cruel and unusual as relating to this defendant).

Courts have reduced the sentences of defendants expressly because of the cruel consequences that would follow the imposition of a sentence in excess of one year, as occurred here. See People v. Bakare, 280 A.D.2d 679 (2d Dept. 2001) (sentence modified, in the interest of justice, from one year to 364 days, citing People v. Cuaran, 261 A.D.2d 169 (1st Dept. 1999)(interest of justice served by a reduction

in defendant's sentence to 364 days, in order to relieve him of the unanticipated effect on his immigration status of his one year sentence); see also Matter of Song, 23 I & N Dec. 173 (BIA 2001) (revised sentence of 364 days not an aggravated felony); In Re Maria Socorro Agasino, 2010 WL 2224557 (BIA May 7, 2010); cf. United States v. Hamdi, 432 F.3d 115, 118-19 (2d Cir. 2005) (defendant's case satisfied the case or controversy requirement of Article III of the Constitution because an after-the-fact reduction in his sentence would have a substantial impact on his ability to obtain a discretionary waiver of inadmissibility under the federal immigration laws).

Accordingly, in the alternative, this Court should reduce Mr. Chacko's sentence, which has already been served in its entirety, to a sentence of 364 days.

CONCLUSION

FOR THE REASONS IN POINT I STATED ABOVE, THE DEFENDANT'S CONVICTION SHOULD BE VACATED, THE INDICTMENT DISMISSED OR A NEW TRIAL ORDERED; IN THE ALTERNATIVE, A HEARING SHOULD BE ORDERED. FOR THE REASONS IN POINT II, HIS SENTENCE SHOULD BE REDUCED TO 364 DAYS.

Respectfully submitted,

ROBIN NICHINSKY
Attorney for Defendant

June, 2012

ADDENDUM

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

MATTHEW CHACKO,

Defendant-Appellant.

STATEMENT PURSUANT TO RULE 5531

1. The indictment number in the court below was 3696/07.

2. The full names of the original parties at trial were People of the State of New York against Matthew Chacko. There has not been a change of parties on this appeal.

3. This action was commenced in Supreme Court, New York County.

4. This action was commenced by the filing of an indictment.

5. This appeal is from a judgment denying appellant's C.P.L. §§440.10 & 20 motion to vacate his conviction, after a plea, of attempted possession of a forged instrument in the second degree, and reduce his sentence.

6. This is an appeal from a judgment of denial rendered November 3, 2011 (Zweibel, J.).

7. Appellant has been granted permission to appeal as a poor person on the original record. The appendix method is not being used.

PRINTING SPECIFICATIONS STATEMENT

The brief was prepared in Wordperfect®, using a 12-point Courier (New) font, and totals 14,216 words.

This count is less the Statement and everything thereafter.