New York Supreme Court

APPELLATE DIVISION – SECOND DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- *against* -

Queens County
Ind. No. 10352/01
A.D. No. 12-05384

BAGUIDY LAMBERT,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* IMMIGRANT DEFENSE PROJECT

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STATEMENT OF INTEREST

The Immigrant Defense Project ("IDP") is a non-profit legal resource center that provides defense attorneys, immigration attorneys and immigrants with expert legal advice and training on issues involving the interplay between criminal and immigration law. IDP has an interest in ensuring that noncitizen defendants receive effective assistance of counsel pursuant to the Sixth Amendment. To that end, IDP asserts that court immigration notifications regarding possible immigration consequences should not replace the duty of counsel, articulated in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010), to competently advise noncitizen defendants regarding the advisability of entering a guilty plea in light of the immigration consequences. Denials of post-conviction relief motions based on judicial notifications contradict the holding of *Padilla v. Kentucky*, which placed the duty to give advice regarding the plea squarely on defense counsel, not the court system.

Since 1997, IDP, with its former parent organization the New York State Defenders Association, has produced and maintained the only legal treatise for New York defense counsel representing immigrant defendants. *See* Manuel D. Vargas, Representing Immigrant Defendants in New York (5th ed. 2011). IDP regularly addresses the unique circumstances faced by noncitizen criminal

defendants and is well aware of the harsh impact that criminal convictions can have on their immigration status. It has worked through the years to develop standards of conduct for defense counsel in this area and knows well the real-world implications of these standards. As an organization dedicated to improving the quality of justice for immigrants accused or convicted of crimes, IDP has a keen interest in a correct and fair resolution of the legal issues in this case that relate to the right of immigrant defendants to effective assistance of counsel.

Numerous courts, including the United States Supreme Court and the New York Court of Appeals, have accepted and relied on *amicus curiae* briefs prepared and submitted by IDP (on its own or by its former parent, NYSDA) in many of the key cases involving the intersection of immigration and criminal laws. *See, e.g.*, Brief of *Amici Curiae* IDP et al. in Support of Defendants-Appellants Ventura and Gardner in *People v. Ventura*, 958 N.E.2d 884, 17 N.Y.3d 675 (N.Y. 2011); Brief of *Amici Curiae* IDP et al. in Support of Petitioner in *Chaidez v. U.S.*, 133 S. Ct. 1103 (2013); Brief of *Amici Curiae* IDP et al. in Support of Petitioner in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010); Brief of *Amici Curiae* IDP et al. in support of Petitioner, in *Padilla v. Kentucky*, 559 U.S. 356 (2010); Brief of *Amici Curiae* IDP et al. in support of Petitioner in *Nijhawan v. Holder*, 557 U.S. 29 (2009); Brief of *Amici Curiae* NYSDA Immigrant Defense Project, et al. in support of Respondent, cited in *INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001);

Brief of *Amicus Curiae* IDP in Support of Defendant-Appellant in *People v. Andrews*, Dckt. No. 2011-05310 (appeal pending in Appellate Division, Second Department); Brief of *Amicus Curiae* IDP in Support of Defendant-Appellant in *People v. Baret*, 99 A.D.3d 408 (1st Dept. 2012); Brief of *Amicus Curiae* IDP in Support of Defendant-Appellant in *People v. Chacko*, 99 A.D.3d 527 (1st Dept. 2012); Brief of *Amici Curiae* IDP et al. in Support of Defendant-Appellant in *People v. Badia*, 2013 N.Y. Slip Op. 03546 (1st Dept. May 16, 2013); Brief of *Amicus Curiae* IDP in Support of Defendant-Appellant in *People v. Harrison*, Dckt. No. 2011-03751 (appeal pending in Appellate Division, Second Department); Brief of *Amicus Curiae* IDP in Support of Defendant-Appellee in *People v. Mercado* S.C.I. No. 1106/2004 (appeal pending in Appellate Division, First Department). As experts in immigration law affecting noncitizens convicted of crimes, *amicus curiae* IDP respectfully offers this brief in support of Defendant-Appellant Baguidy Lambert's appeal of the Supreme Court's denial of his petition for post-conviction relief.

ARGUMENT

Some courts routinely provide information to defendants regarding possible immigration consequences of a guilty plea, either during a plea colloquy or on a written waiver form signed when a defendant enters a guilty plea; this information is required by statute in many jurisdictions. *See Padilla v. Kentucky*, 559 U.S. 356, __, 130 S.Ct. 1473, 1486 n. 15 (2010) (compiling state statutes, including one from Kentucky, requiring courts to "provide notice of possible immigration consequences"). In New York, the court must provide the following information during every plea colloquy involving a guilty plea to a felony offense: "if the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States." NYCPL § 220.50(7). These general, often "boilerplate" court statements may play a useful role in stimulating a conversation regarding immigration consequences between the attorney and the defendant, but they cannot substitute for competent advice from the attorney, as required by the Sixth Amendment pursuant to *Padilla v. Kentucky*.[1]

[1] *But see* Lang, Note, *Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful Padilla Claims*, 121 Yale L.J. 944, 976-77 (2012) (collecting cases where court immigration notifications were held to adversely impact defendants' ability to establish prejudice under *Padilla*).

I. Court notifications of possible immigration consequences do not cure the prejudice that flows from a defense attorney's failure to competently counsel the defendant regarding the advisability of entering the guilty plea in light of the immigration consequences.

These statements by the court cannot cure the prejudice flowing from a Sixth Amendment violation pursuant to *Padilla v. Kentucky* for several reasons. First, the roles and responsibilities of court and counsel are legally and practically distinct; these distinctions render information provided by the court during the plea colloquy an insufficient substitute for competent advice from the defense attorney about whether it is in the defendant's best interest to enter a particular guilty plea. Second, because the statutorily mandated language in New York states that the guilty plea "may result" in deportation, it does not put a defendant whose deportation is virtually certain on notice regarding the inevitability of deportation. Third, allowing court notifications to replace competent advice from defense counsel contradicts the holding of *Padilla v. Kentucky*, which placed the burden of giving the advice regarding immigration consequences squarely on defense counsel. Fourth, if the defense attorney's failure to recognize the immigration consequences prevents him from negotiating a reasonable alternative plea that eliminates or mitigates these consequences, court notifications are unavailing to cure the prejudice flowing from that error. Finally, the question whether a plea was knowing and voluntary under the Fifth Amendment is separate from the

question whether the advice pertaining to the plea was competent under the Sixth Amendment.

A. The roles and responsibilities of court and counsel are legally and practically distinct.

> [H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.

Powell v. Alabama, 287 U.S. 45, 61 (1932). This cogent description of the distinct responsibilities of the judge and the defense attorney continues to reflect the functional division embodied in our constitutional jurisprudence. *See* Lang, Note, *Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful Padilla Claims*, 121 Yale L.J. 944, 948 (2012) (courts and defense fulfill complementary but separate roles in the criminal justice system – "neither can replace the other, and the failure of either constitutes a breakdown in our system"); *see also* Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 727 (2002) ("The judge is charged with ensuring that the plea is knowing, voluntary, and intelligent; counsel's job is to assist with the determination that a plea is a good idea, which encompasses a broader range of considerations.").

These distinct roles and responsibilities make it impossible for the court to provide meaningful advice to a defendant during the plea colloquy, for myriad reasons. First, courts are unfamiliar with the defendant's particular circumstances; accordingly, a notification of possible immigration consequences is given "blind." Second, plea colloquys are limited as a forum for the provision of meaningful advice to the defendant about the guilty plea he is in the process of entering. Third, the defendant does, and should, rely on the attorney's advice that a particular plea is in his best interest; this reliance makes sense because the attorney has investigated the relevant facts and researched the applicable law prior to advising the defendant about the plea.

i. Court notifications of possible immigration consequences are given "blind" because courts are generally unfamiliar with defendants' specific circumstances that are relevant to the advice regarding immigration consequences.

Courts are generally unfamiliar with defendants' specific circumstances that are relevant to the advice regarding immigration consequences – thus, the court notifications are given "blind." *See, e.g., State v. Smith*, 287 Ga. 391, 397 (2010) ("[D]efense counsel may be ineffective in relation to a guilty plea due to professional duties for the representation of their individual clients that set a standard different—and higher—than those traditionally imposed on trial courts conducting plea hearings for defendants about whom the judges often know very little.").

For example, in the instant case, the court notification consisted of the following: "[i]f you are not a citizen of the United States I have to advise you that a plea to a felony charge could [a]ffect your status." Brief of Appellant, p. 5. This notification was obviously given "blind." It is not clear that the court knew that the defendant was a non-citizen, or knew that the defendant was a lawful permanent resident (green card holder). Furthermore, it is not clear that the court possessed any knowledge of immigration consequences other than a general understanding that a felony conviction can affect the "status" of a non-citizen. In fact, the court's statement seems to evince a misunderstanding because all controlled substance offenses, even violations, with the one-time exception of possession of 30 g or less of marijuana for personal use, render a defendant deportable. *See* 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable"). The court certainly was unaware that the defendant's deportation was virtually mandatory because the conviction rendered him ineligible for relief from deportation (called "cancellation of removal") because he had been in the U.S. less than seven years. *See* Brief of Appellant, p. 2; s*ee also* 8 U.S.C. § 1229b

(cancellation of removal available to an individual who has resided in the United States continuously for 7 years and who has not committed certain offenses, such as a controlled substance offense, during that period). Thus, the court gave the notification "blind," without the information necessary to deduce the immigration consequences; therefore, its statement cannot substitute for informed advice from the defense attorney.

Similarly, in the context of a marijuana violation under NYPL § 221.05, the court may not know whether 1) the defendant has a prior marijuana possession misdemeanor from another jurisdiction such that this second offense renders him deportable, or whether 2) this is the defendant's first marijuana conviction and thus will not impact deportability. *See* 8 U.S.C. § 1227(a)(2)(B)(i). In this example, assuming that the defense attorney has advised each defendant correctly, the boilerplate language of New York's statutory notification ("may result" in deportation) would confirm the advice given to the first defendant if he is eligible for cancellation of removal, a discretionary form of relief. However, if the defendant's deportation is virtually mandatory because he is not eligible for cancellation of removal, the "may result" language would suggest that the attorney has overstated the risk of deportation. For the second defendant, the boilerplate statement would directly contradict the attorney's accurate advice that the plea did not render the defendant deportable. Crucially, the defendant has no way of

knowing whether the court's statement, delivered "blind," is correct as applied to his unique circumstances. Thus, the court's statement cannot replace a discussion with the defense attorney, prior to deciding whether to enter the plea, in which the defense attorney explains how this plea impacts this defendant's immigration status. *See* American Bar Association Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.2 & cmt. (3d ed. 1999) ("Because such discussions may involve the disclosure of privileged or incriminatory information [such as the defendant's immigration status], 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).

ii. A defendant can and should rely on his attorney's informed advice about whether a particular plea is in the defendant's best interest.

Other state supreme courts have rejected the idea that a court notification replaces competent, informed advice from the defense attorney regarding the advisability of pleading guilty in light of the immigration consequences. *See, e.g., State v. Paredez*, 136 N.M. 533, 537-38 (2004); *In re Resendiz*, 25 Cal.4th 230, 240-42 (2001). The *Resendiz* Court made these pertinent observations, cited approvingly in *Paredez*: 1) defendants have a right to effective counsel when they undertake plea evaluation and negotiation; 2) the attorney, not the client, "is particularly qualified to make an informed evaluation of a proffered plea bargain;"

and 3) whether or not the court delivers the statutorily mandated immigration notification, "[t]he defendant can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial." *Id*. at 240 (internal quotations omitted). The *Resendiz* Court ultimately concluded that allowing the court notification of possible immigration consequences to categorically bar immigration-based ineffective assistance claims "would deny defendants [who prove incompetence and prejudice] a remedy for the specific constitutional deprivation suffered, the Sixth Amendment right to effective counsel." *Id*. at 242 (internal quotations omitted).

The following features of our justice system support the conclusion that a court notification cannot substitute for attorney advice: 1) an attorney, unlike the court, must investigate the relevant facts and research the applicable law prior to advising a defendant regarding a particular plea agreement; 2) the attorney, in addition to informing the defendant of the consequences (penal, immigration, etc.) of a plea, counsels the defendant on the advisability of entering a particular plea given the defendant's unique circumstances; and 3) a defendant is entitled to rely on the presumption that his attorney has provided complete, competent advice.

It is a basic tenet that the practice of law requires the attorney to investigate the relevant facts and research the applicable law before advising the client as to his legal situation and options. *See, e.g.,* New York State Bar Association

Standards for Providing Mandated Representation, Standard I-7(b)&(c) (2005); ABA Criminal Justice Standards, Defense Function, Standard 4-5.1(a) (3d ed. 1993) ("After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome"). This explains why the defendant will, and should, rely on his attorney's advice regarding the appropriateness of a plea agreement in a particular case. It also explains why it would be foolish for a defendant to rely upon a boilerplate court notification of possible immigration consequences, given "blind," when the defendant cannot know whether the notification holds true given his unique circumstances.

Additionally, an attorney, after informing the defendant of the consequences (penal, immigration, etc.) of a plea, advises the defendant on whether the plea is in his best interest. *See* ABA Standards for Criminal Justice Pleas of Guilty, Standard 14-3.2(c) (cmt.) (3d ed. 1999) ("If, after full investigation, a lawyer has determined that a proposed plea is in the best interests of the defendant, the lawyer 'should use reasonable persuasion to guide the client to a sound decision'"). Thus, an attorney does more than merely inform his client of the various consequences associated with a plea agreement; an attorney recommends acceptance of a particular plea. *See id*., Standard 14-3.2(b). Although the final decision about entering a guilty plea falls squarely on the defendant, *see id*, Standard 14-3.2 (c), the typical

defendant relies heavily on his attorney's advice as to whether a particular plea is appropriate.

Furthermore, a defendant is entitled to rely on the presumption that his attorney has provided competent, complete advice. Attorney competence is presumed under the Sixth Amendment. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984) (courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"). Therefore, the defendant can also presume that his attorney, who is familiar with the details of his particular situation, has provided complete and competent advice.

This is well-illustrated in the instant case, where the defense attorney told the defendant nothing about deportation, only advising him that the plea would prevent him from traveling out of the country. Brief of Appellant, p. 5. This was incomplete and incorrect, but had the hallmark of validity because it was advice from the defense attorney based on the defendant's unique circumstances, which were unknown to the court at the plea colloquy. Therefore, it was reasonable for a defendant to rely on his attorney's erroneous advice as opposed to a court's general statement, given without knowledge of the defendant's individual circumstances, which mentioned the possibility that the plea could "affect" his "status."[2]

[2] In fact, it would be foolish for a defendant to rely on a boilerplate statement made by a court in ignorance of the specific facts and law applicable to the defendant's unique circumstances.

For all the above reasons, this Court should recognize the distinct roles and responsibilities of the court and defense counsel, and hold that a statement made by the court during the plea colloquy cannot substitute for advice given by the defense attorney regarding the advisability of accepting the plea agreement in light of the immigration consequences.

iii. The effect of court notifications regarding possible immigration consequences is limited by the practical realities of the plea colloquy.

Plea colloquys have been criticized as providing only the appearance of due process. *See* Richard Klein, *Due Process Denied: Judicial Coercion in the Plea-Bargaining Process* 32 Hofstra L. Rev. 1349, 1401 (2004) ("[A]ny participant in the criminal justice system knows that the colloquy between the judge and the defendant is scripted, ritualistic, perfunctory, [and] pro forma.") The typical criminal defendant, when confronted with the formality of the plea colloquy, delivered in a language of legalese not easily understood by laymen, is very unlikely to engage in a meaningful dialogue with the judge about the decision to accept the plea agreement. The average defendant is even less likely to question the advice he has received from his trusted attorney because of boilerplate

statements by the judge during a scripted colloquy given to every defendant regardless of his unique circumstances. [3]

The following anecdote illustrates a typical defendant's response to a court statement regarding possible immigration consequences:

> In 2010, I represented a long-time lawful permanent resident in criminal proceedings in the Brooklyn criminal court. He was entering a plea of guilty to a minor offense as part of a re-negotiated plea bargain after his earlier plea had been vacated. The client and I had spoken many times about the new plea agreement, which – unlike the vacated plea – would *not* trigger any of the crime-based grounds of removability. Nonetheless, during the plea colloquy the judge issued a standard warning that if my client was a non-citizen the plea might subject him to deportation. Confused, my client looked to me during the colloquy, uncertain what to do next. Based on my nod of assurance he continued the colloquy, trusting a nod from me over the judge's standardized warning.

Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Non-Citizen Defendants*, 10 Geo. L.J. 1, 21 n.8 (2012).

Likewise, the manner in which the judge broached the topic of immigration consequences in the instant case provides a cogent example of the practical realities of the plea colloquy that preclude its usefulness as a vehicle to provide advice regarding the immigration consequences of the plea**.** *See* 6/11/01 plea colloquy, *People v. Lambert* (Defendant's 440 motion, Tab B). First, the court asked the defense attorney whether the defendant wanted to plead guilty to

[3] To the extent that the court might phrase the consequences in a reasonably accurate fashion, this is happenstance and the defendant cannot know whether by chance the court has gotten it right.

attempted criminal possession of a controlled substance; the defense attorney replied in the affirmative. *See id*., p. 4. The court then addressed the nature of the charge, the voluntariness of the plea, the waiver of defendant's trial rights, and the sentence, asking a series of formal questions that yielded "yes" or "no" answers. *See id*., p. 4-6. The judge repeatedly used the phrase "the charge [crime] that you are pleading guilty to," thus evincing his understanding that this was a *fait accompli*. *Id*., p. 4-5. The court then stated: "If you are not a citizen of the United States I have to advise you that a plea to a felony charge could affect your status. Do you understand that as well?" *Id*., p. 6. The defendant replied again, "yes." *Id.* The court never asked the defendant, at any point during the plea colloquy, whether he wished to plead guilty. The defendant did not re-affirm his desire to plead guilty after the court's remark about the plea "affecting [his] status;" in fact, the defendant never explicitly affirmed his desire to plead guilty at all. Furthermore, the defendant's attorney had already told the judge that the defendant wanted to plead guilty, and the judge was talking about the plea as if it was already done; the typical defendant in that situation would not realize that he could "put the cat back in the bag" and retract his decision to plead guilty. This colloquy demonstrates why the very nature of plea colloquys precludes them from being a forum to provide meaningful advice to the defendant regarding the decision to plead guilty. *See* Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of*

Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 731 (2002) (describing the problem with a warning given during the plea colloquy, after the decision to plead guilty has been made, and noting that "[i]f the objective is to give fair warning of consequences to the defendant and if implicit in this is a desire to have the consequences carefully considered, a last-minute warning hardly gives time for mature reflection") (internal quotations omitted).

iv. The effect of these general, typically "boilerplate" court statements is properly limited to stimulating a conversation between the attorney and defendant regarding the advisability of entering the guilty plea in light of the immigration consequences, as required by the Sixth Amendment.

A court notification can play a positive role in prompting the attorney to discuss immigration consequences with the defendant, and to discuss whether a particular plea is in the defendant's best interest in light of the immigration consequences. *See People v. Achouatte*, 91 A.D.3d 1028 (3d Dept. 2012) (describing how New York's statutory notification, delivered at a pre-trial conference three months before the defendant entered his guilty plea, put defendant and his attorney on notice and prompted discussions between the defendant, his attorney, and an immigration attorney regarding the immigration consequences of the plea).[4]

[4] It is unclear whether these discussions produced correct advice ultimately, and so equally unclear whether the court's decision on the merits was correct, but the court played an exemplary role pre-trial in providing the notice of immigration consequences, avoiding characterizing those as advice, and allowing the defense attorney to comply with *Padilla v. Kentucky*.

Professional standards clarify that judicial statements regarding immigration consequences may operate to stimulate a conversation between the attorney and the defendant, but do not substitute for the attorney advice required during that conversation. American Bar Association standards state that:

> Before accepting a plea of guilty or nolo contendere, the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to the forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant's immigration status. The court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea.

ABA Standards for Criminal Justice Pleas of Guilty, Standard 14-1.4(c) (3d ed. 1999). The Standards elaborate further:

> Although the court must inquire into the defendant's understanding of the possible consequences at the time the plea is received under Standard 14-1.4, this inquiry is not, of course, any substitute for advice by counsel. The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations which will not be covered by the judge in his or her admonition.

Id., Standard 14-3.2 (cmt.). Therefore, this Court should conclude that a boilerplate statement by the court regarding possible immigration consequences is limited in effect to putting the attorney and defendant on notice that an attorney-

client conversation regarding these consequences is in order, but cannot substitute for the advice required during that conversation.

B. In any event, the statutorily mandated language in New York states that the guilty plea "may result" in deportation; thus, it does not put a defendant whose deportation is virtually certain on notice regarding the inevitability of deportation.

Court notifications of possible immigration consequences have been generally deemed insufficient to inform a defendant that the conviction will render his deportation virtually certain. *See United States v. Akinsade*, 686 F.3d 248, 253-55 (4th Cir. 2012); *People v. Garcia*, 907 N.Y.S.2d 398 (Sup Ct, Kings County 2010); *People v. DeJesus*, 33 Misc 3d 1225(A), 2011 NY Slip Op 52112(U) (Sup Ct, NY County 2011); *Hernandez v. State*, __ So.3d __, 2012 WL 5869660 *4 (Fla. Nov. 21, 2012); *State v. Sandoval*, 249 P.3d 1015 (Wash. 2011); *State v. Nunez-Valdez*, 200 N.J. 129 (2009) (guilty plea to fourth degree criminal sexual conduct invalid despite a written court warning that "you may be deported by virtue of your plea of guilty"); *United States v. Krboyan*, No. 1:10–CV–02016 OWW, 2011 WL 2117023 (E.D.Cal. May 27, 2011) (guilty plea to mail fraud vacated even though "immigration consequences of Petitioner's plea agreement were considered and discussed at length during the plea agreement and sentencing hearing"); *People v. Kazadi*, 284 P.3d 70 (Colo.App.2011), *aff'd*, 291 P.3d 16 (Colo. 2012); *State v. Limarco*, 235 P.3d 1267 (Kan. Ct. App. 2010); *Ex parte De Los Reyes,* 350 S.W.3d 723, 731-32 (Tex.App.-El Paso 2011), *pet. granted and*

judgment vacated on other grounds, 392 S.W.3d 675 (Tex.Crim.App. 2013); *Ex parte Tanklevskaya*, 361 S.W.3d 86 (Tex.App-Hous.(1Dist.) 2011), *pet. granted and judgment vacated on other grounds*, 393 S.W.3d 787 (Tex.Crim.App. 2013); *Ex parte Romero*, 351 S.W.3d 127 (Tex.App.-San Antonio 2011), *pet. granted and judgment vacated on other grounds*, 393 S.W.3d 788 (Tex.Crim.App. 2013); *Brea v. State*, 2010 WL 5042898 (R.I.Super.). This is typically because the boilerplate language used by the courts does not articulate the virtual certainty of deportation that exists when a defendant pleads guilty to a deportable offense.

A cogent illustration of the court's reasoning in this type of case is provided by Hon. Robert L. Hinkle's comment during an evidentiary hearing where the parties were arguing about whether advice that deportation was a possibility was sufficient when the guilty plea had rendered the defendant's deportation virtually certain: "Well, I know every time that I get on an airplane that it could crash, but if you tell me it's going to crash, I'm not getting on." *United States v. Choi*, No. 4:08cr5-RH, Transcript of Motion Hearing, September 24, 2008 (available on Pacer).

The Fourth Circuit has held that a court notification that the plea "could lead" to deportation was insufficient to cure attorney misadvice. *Akinsade*, 686 F.3d at 254. The *Akinsade* Court noted that the notification was "general and equivocal," and "did not 'properly inform' Akinsade of the consequence he faced

by pleading guilty: mandatory deportation." *Id.* The Court recognized that the particular severity of the consequence of deportation requires a court notification to be "specific and unequivocal" if it is to be considered curative of a Sixth Amendment violation. *Id.*

Likewise, the Florida Supreme Court recently considered the effect of its statutory warning of possible immigration consequences on an ineffective assistance of counsel claim. *See Hernandez v. State*, __ So.3d __, 2012 WL 5869660 (Fla. Nov. 21, 2012). Florida's statute, quite similar to New York's, requires the court to notify a defendant that "if he or she pleads guilty or nolo contendere, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service." Fla. R. Crim. P. 3.172(c)(8). The *Hernandez* Court first held that the attorney was ineffective for advising of the possibility of deportation in a case where "the deportation was 'truly clear.'" *Hernandez*, 2012 WL 5869660, at *3. The Court then held that the "equivocal" statutory notification was insufficient to cure the prejudice flowing from the attorney error, because it did not convey clearly that the plea made the defendant's deportation virtually certain. *Id.*, at *4.

New York courts have similarly held that a statement regarding deportation from the judge at the plea colloquy does not cure the prejudice caused by lack of

advice from the defense attorney. *See Garcia*, 907 N.Y.S.2d 398 (Sup Ct, Kings County 2010). The defense attorney failed to advise the *Garcia* defendant that his guilty plea to a controlled substance conviction rendered him deportable. *See id*. at 399-400. The trial court made the following statements:

> Well, I have two things to say about that. One is that I can't make any representations about what immigration would do and I understand he's got independent immigration counsel and that's fine, but a controlled substance conviction can certainly lead to deportation and I don't want him to have any doubt about the fact that I can't promise or guarantee anything about what immigration will do on [account] of this case or this conviction or any of his other issues with immigration and, as far as I'm concerned, he can assume that he's deportable. That's the first thing.

Id. at 400. The *Garcia* court focused on the fact that the statement by the court was general, and held that it did not cure the prejudice caused by the lack of immigration advice from defense counsel. *See id*. at 406-07.

Moreover, when the court goes "off script," as in the instant case, and delivers an inaccurate or incomplete variation of the statutory notification of possible immigration consequences, this may serve only to confuse the defendant. *See People v. DeJesus*, 33 Misc 3d 1225(A), 2011 NY Slip Op 52112(U) (Sup Ct, NY County 2011) (hereinafter *DeJesus II*) (*modified by People v. DeJesus*, 935 N.Y.S.2d 464 (Sup Ct, NY County 2011). The *DeJesus II* defendant, a lawful permanent resident, contended that the judge's statement," if you are not a citizen or a resident alien, as a result of the plea of guilty, you may be deported" confused

her. *See id*., *13. The *DeJesus II* Court noted that the defendant did not ask any questions in response to the court's statements regarding immigration consequences, but ultimately concluded that "the advisory provided by the court was inaccurate, and reflected neither the text of CPL §220.50(7) nor the removal law of the United States, which provides for deportation of all non-citizens, including legal permanent residents, who commit aggravated felonies." *Id.* The *DeJesus II* Court held that due to its misleading, inaccurate nature, the immigration notification by the judge did not "in any way" mitigate "counsel's own failure to provide accurate advice on the subject." *Id.*

The foregoing cases establish that New York's statutorily required court notification does not accurately convey the inevitability of deportation when a defendant pleads guilty to a deportable offense and has no possibility of relief from removal. Thus, this Court should hold that a court immigration notification that puts the defendant on notice of the possibility of immigration consequences cannot substitute for advice from the defense attorney that deportation is virtually certain as a result of the guilty plea.

C. Allowing court notifications to replace competent advice from defense counsel contradicts the holding of *Padilla v. Kentucky*, which placed the burden of giving the advice regarding immigration consequences squarely on defense counsel.

The *Padilla* Court highlighted that Kentucky, along with many other states, required courts to notify defendants of potential immigration consequences. *Padilla v. Kentucky*, 559 U.S. at __, 130 S.Ct. at 1486 n.15. Yet instead of these notifications excusing the failure of counsel to provide immigration advice, the *Padilla* Court found that these court notifications reflected the severity of deportation, which "underscore[d] how critical it is for *counsel* to inform her noncitizen client that he faces a risk of deportation." *Id*. at 1486 (emphasis added). Allowing these notifications to substitute for competent advice regarding the advisability of entering the plea in light of the immigration consequences contradicts the holding of *Padilla.*

The *Padilla* Court specifically placed the duty to provide competent immigration advice within the purview of the Sixth Amendment right to effective assistance of defense counsel. Allowing a court notification of possible immigration consequences to eradicate counsel's duty under the Sixth Amendment will have the following effect:

> Whether or not a lawyer advises a noncitizen on the immigration consequences of her plea will be irrelevant to her ability to prevail on a Sixth Amendment claim. The robust protection of the Sixth

> Amendment, meant to ensure the integrity of the criminal process, will be replaced by Fifth Amendment plea colloquy warnings that cannot possibly play the same role in our criminal justice system. Moreover, the structure for recognizing Sixth Amendment violations will no longer align whatsoever with the substantive expectations of defense lawyers established by the first prong of the Sixth Amendment. To the extent that the Sixth Amendment is meant to set the bar for minimally proficient counsel, it will no longer serve that function with respect to immigration consequences.

Lang, Note, *Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful Padilla Claims*, 121 Yale L.J. at 985. Therefore, as the holding of the *Padilla* decision would be undercut by allowing court notifications to replace competent attorney advice, this Court should hold that a court notification is not an acceptable substitute for the competent advice required under the Sixth Amendment regarding the advisability of entering the guilty plea in light of the immigration consequences.

Furthermore, allowing a court statement regarding the possibility of immigration consequences to cure the prejudice from a *Padilla* violation would have the same effect as the "affirmative misadvice" rule that the *Padilla* Court rejected. *See Padilla*, 559 U.S. at __, 130 S.Ct. at 1484. The *Padilla* Court chose not to limit its holding to "affirmative misadvice" because that would cause the "absurd result" of giving defense counsel "an incentive to remain silent on matters of great importance, even when answers are readily available." *Id.* Additionally, "[s]ilence under these circumstances would be fundamentally at odds with the

critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." *Id.* (internal citations omitted). In New York, where court notifications are mandated in all felony cases, and often given in misdemeanor cases also, allowing the statutory notification to substitute for defense counsel advice will encourage defense attorneys to remain silent rather than risk affirmative misrepresentations that could later be used against them. In this manner, such a holding would create the "absurd result" of encouraging silence just as the affirmative misadvice rule would. Thus, this Court should hold that a court notification cannot replace competent advice from the defense attorney regarding the advisability of entering the plea in light of the immigration consequences.

D. If the defense attorney's failure to recognize the immigration consequences prevents him from negotiating a reasonable alternative plea that eliminates or mitigates these consequences, court notifications are unavailing to cure the prejudice flowing from that error.

The *Padilla* Court specifically contemplated the use of this information not only to inform a defendant's choice regarding a guilty plea, but also to inform defense negotiation strategy: "Counsel who possess the most rudimentary understanding of the deportation consequences . . . may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation." *Id*. at 1486; s*ee also People v. Picca*, 97 A.D.3d 170, 186 (2d Dept. 2012) ("[H]ad 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"); *People v. Chacko*, 99 A.D.3d 527, 527-28 (1st Dept. 2012) (same). If the consequence to the defendant of the attorney's failure to appreciate the immigration consequences is that the defendant loses the opportunity to negotiate a plea that mitigates or eliminates the immigration consequences, this type of prejudice is not addressed by a court notification. Thus, this Court should hold that a court notification of possible immigration consequences does not cure the prejudice that flows from a defense attorney's failure to negotiate a reasonable resolution that mitigates or eliminates the immigration consequences.

E. The question whether a plea was knowing and voluntary under the Fifth Amendment is separate from the question whether the advice pertaining to the plea was effective under the Sixth Amendment.

A judge's obligation to ensure that a defendant's plea is voluntary stems from the Fifth Amendment's Due Process Clause. *See Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969). A judge's role is to serve as a neutral arbiter, while counsel's role is to serve as the defendant's advocate—providing competent advice pursuant to the Sixth Amendment, which includes advising the defendant regarding the immigration consequences of a guilty plea. *See Padilla*, 559 U.S. at __, 130 S.Ct. at 1483; *see also* Lang, Note, *Padilla v. Kentucky: The Effect of Plea*

Colloquy Warnings on Defendants' Ability to Bring Successful Padilla Claims, 121 Yale L.J. 944, 954 (2012) (explaining that the Sixth Amendment right to counsel and the Fifth Amendment plea colloquy serve analytically distinct purposes, and that the Fifth Amendment plea colloquy is by its nature a far more limited enterprise).

The United States Supreme Court has recently rejected the proposition that a knowing and voluntary plea supersedes error by defense counsel, cognizable under the Sixth Amendment. *See Missouri v. Frye*, 132 S.Ct. 1399, 1406 (2012) (discussing this losing argument in context of *Padilla v. Kentucky*, 559 U.S. at ___, 130 S. Ct. at 1480); *United States v. Akinsade*, 686 F.3d 248, 255 (4th Cir. 2012) (citing *Frye* for the proposition that a valid colloquy under the Fifth Amendment does not automatically cure deficient attorney performance under the Sixth Amendment). The Court has also confirmed that an analysis of whether a decision to reject a plea is "knowing and voluntary" fails to address the claim that the advice that led to the decision constituted ineffective assistance of counsel; in fact, importing the Fifth Amendment "knowing and voluntary" analysis into a Sixth Amendment ineffectiveness claim violated "clearly established federal law." *Lafler v. Cooper*, 132 S.Ct. 1376, 1390 (2012). In rejecting the Sixth Amendment ineffectiveness claim, the state court had concluded that the defendant's decision to reject the plea was knowing and voluntary. *See id.* The *Lafler* Court found that

the state court incorrectly applied the Fifth Amendment "knowing and voluntary" analysis to the defendant's Sixth Amendment ineffectiveness claim: "An inquiry into whether the rejection of a plea is knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel." *Id.* In the context of counsel's failure to provide affirmative accurate advice regarding immigration consequences, as required by P*adilla*, the *Lafler* holding demonstrates that it is incorrect to use a court immigration notification, given as part of the required plea colloquy that ensures the "knowing and voluntary" nature of the plea, to address the ineffective assistance of counsel claim.

CONCLUSION

For all the foregoing reasons, this Court should hold that a court notification of possible immigration consequences does not cure the prejudice stemming from the defense attorney's failure to competently counsel the defendant regarding the advisability of entering the guilty plea in light of the immigration consequences.

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