New York Supreme Court

APPELLATE DIVISION – FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

New York County
Ind. No. 3696/07

- *against* -

MATTHEW CHACKO,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* IMMIGRANT DEFENSE PROJECT

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As experts in immigration law affecting noncitizens convicted of crimes, *amicus curiae* the Immigrant Defense Project ("IDP") respectfully offers this brief in support of Defendant-Appellant Matthew Chacko's appeal of the Supreme Court's denial of his petition for post-conviction relief.

STATEMENT OF INTEREST

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. 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 proper 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 *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*, Ind. No. 2735/95 (appeal pending in Appellate Division, First Department); 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 *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. __, 130 S. Ct. 1473 (2010); Brief of *Amici Curiae* IDP et

al. in support of Petitioner in *Nijhawan v. Holder*, 129 S. Ct. 2294 (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 *Amici Curiae* NYSDA Immigrant Defense Project in support of Petitioner in *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008); Brief of *Amicus Curiae* NYSDA Immigrant Defense Project in support of Petitioner in *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008); Brief of *Amici Curiae* NYSDA in support of Petitioner in *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003).

ARGUMENT

IDP presents the following points that are relevant to a correct and fair disposition of this case under the standards elaborated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Padilla v. Kentucky*, 559 U.S. __, 130 S. Ct. 1473 (2010). First, counsel has a Sixth Amendment duty to ask a defendant about his citizenship status pursuant to *Padilla* and prevailing professional norms in New York. Second, for claims arising under *Padilla*, a defendant satisfies *Strickland*'s requirement of prejudice simply by demonstrating a reasonable probability that, but for the ineffective assistance of counsel, he would not have pleaded guilty. This inquiry requires establishing that the decision to reject the plea agreement would have been rational under the defendant's unique

circumstances. These circumstances necessarily include his desire to avoid deportation, as well as the reasonable availability of an alternative resolution that mitigated or eliminated the deportation consequence.

I. Sixth Amendment standards at the time of Mr. Chacko's plea required defense counsel to ask his client whether he was a U.S. citizen.

A defense attorney has a Sixth Amendment duty to conduct a meaningful interview of his client, which includes asking whether the client is a U.S. citizen. This requirement is inherent in the duty to advise regarding immigration consequences articulated in *Padilla*, and is expressly articulated by many of the sources relied upon by the *Padilla* Court. Additionally, the prevailing professional norms in New York in 2007 required defense counsel to inquire whether a defendant was a U.S. citizen, as evidenced by professional standards, and the policies and practices of various defender organizations and clinical education programs.

A. Counsel's duty to ask a defendant whether he is a U.S. citizen is expressly required by the sources cited in *Padilla v. Kentucky* as proof of the prevailing professional norms.

The duty to determine whether a defendant is a U.S. citizen is described explicitly in several of the sources cited in *Padilla* for the proposition that "[t]he weight of prevailing professional norms supports the view that counsel must advise

her client regarding the risk of deportation." *Padilla v. Kentucky*, 559 U.S. __, __, 130 S.Ct. 1473, 1482 (2010).[1] The following list sets forth the treatises, reports, and publications that *Padilla* cited for that proposition, and provides quotes from those sources emphasizing counsel's duty to inquire into a defendant's citizenship.

- American Bar Association Standards for Criminal Justice, Pleas of Guilty

[1] The passage in *Padilla* providing the full list of sources reads as follows:

> The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. National Legal Aid and Defender Assn., Performance Guidelines for Criminal Representation § 6.2 (1995); G. Herman, Plea Bargaining § 3.03, pp. 20–21 (1997); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L.Rev. 697, 713–718 (2002); A. Campbell, Law of Sentencing § 13:23, pp. 555, 560 (3d ed.2004); Dept. of Justice, Office of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, pp. D10, H8–H9, J8 (2000) (providing survey of guidelines across multiple jurisdictions); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4–5.1(a), p. 197 (3d ed.1993); ABA Standards for Criminal Justice, Pleas of Guilty 14–3.2(f), p. 116 (3d ed.1999). "[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients ... ." Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12–14 (footnotes omitted) (citing, *inter alia,* National Legal Aid and Defender Assn., Guidelines, *supra,* §§ 6.2–6.4 (1997); S. Bratton & E. Kelley, Practice Points: Representing a Noncitizen in a Criminal Case, 31 The Champion 61 (Jan./Feb.2007); N. Tooby, Criminal Defense of Immigrants § 1.3 (3d ed.2003); 2 Criminal Practice Manual §§ 45:3, 45:15 (2009)).

559 U.S. at __, 130 S.Ct at 1482-83.

- "[C]ounsel should interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces." Standard 14-3.2, Commentary, at 127 (3d ed.1999).

- "To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." *Id.* at 116.

- Gabriel Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*

  - " '[I]t is imperative that criminal defense attorneys become aware of the immigration status of their clients, and the immigration issues involved in each criminal case." 87 Cornell L.Rev. 697, 716 n. 193 (2002) (quoting Melinda Smith, Comment, *Criminal Defense Attorneys and Non-Citizen Clients: Understanding Immigrants, Basic Immigration Law & How Recent Changes in Those Laws May Affect Your Criminal Cases*, 33 Akron L. Rev. 163, 207 (1999)).

  - " '[I]t is critical that defense counsel inquire about the defendant's personal situation so counsel can advise the client about the collateral consequences of a guilty plea or conviction.'" *Id.* (quoting Rodney J. Uphoff, The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach, 2 Clinical L. Rev. 73, 100 (1995)).

- S. Bratton & E. Kelley, *Practice Points: Representing a Noncitizen in a Criminal Case*

  - "[A] defense attorney needs to speak with his client at length to be able to assess the client's situation. Defense counsel must have a clear understanding of the client's immigration status in the United States…including the length of residence and whether the client has any family members in the United States." 31 The Champion 61 (Jan./Feb.2007).

- National Legal Aid and Defender Association, Performance Guidelines for Criminal Representation

    - At the initial interview stage, an "[i]nformation that should be acquired includes . . . immigration status." Guideline 2.2(b)(2)(A). (This requirement is also included verbatim in another source cited in *Padilla* that provided a survey of guidelines across multiple jurisdictions: Department of Justice, Office of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance (2000)).

The *Padilla* Court deemed these sources "valuable measures of the prevailing professional norms of effective representation," and used them to determine that counsel's failure to advise a defendant of the immigration consequences fell below an objective standard of reasonableness. *Padilla*, 559 U.S. at __, 130 S.Ct at 1482. Thus, a failure to advise a defendant about the immigration consequences of a guilty plea satisfied the first prong of *Strickland v. Washington*. *See id.* Because the sources on which the *Padilla* Court relied describe a concomitant duty to inquire about a defendant's immigration status, it follows that the duty to inquire is inseparable from the duty to advise. Consequently, under *Padilla*, counsel's failure to ask a defendant whether he is a U.S. citizen falls below an objective standard of reasonableness.

B. Under prevailing professional norms in New York State at the time of Mr. Chacko's plea, defense attorneys had a duty to inquire about a defendant's citizenship.

In 2007, the prevailing professional norms in New York required that defense counsel ask a defendant if he was a U.S. citizen. The norms are evidenced by New York standards and guides, as well as the practices and policies of various defender organizations and clinical education programs.

i. New York State standards and guides mandate that defense counsel inquire as to a defendant's citizenship.

As discussed *supra*, *Padilla* set forth a number of the national standards describing defense counsel's responsibilities to inquire about citizenship status and to advise clients of the immigration consequences of convictions. *See Padilla*, 559 U.S. at __, 130 S.Ct at 1482-83. Defendant-Appellant Chacko's brief adds to the list of national sources and also includes sources specific to New York State. *See* Brief of Defendant-Appellant, p. 22-25. To supplement Defendant-Appellant's Brief, *amicus* adds the following New York source, which instructs that: "[d]uring the initial interview with the client, the criminal defense attorney should be alerted to areas of potential collateral consequences. *The interview should establish basic information such as defendant's immigration status.*" Gary Muldoon, *Collateral Effects of a Criminal Conviction*, 70 NY State Bar J. 26, 29 (July/August 1998) (emphasis added).

ii. Practices and policies in local public defender offices and clinical education programs indicate that a defense attorney must ask about citizenship.

Practicing attorneys in public defender offices in New York receive training on client interview techniques, which includes instruction to ask every defendant whether he is a U.S. citizen. For example, newly hired criminal defense lawyers at The Legal Aid Society of New York receive this instruction as part of their initial training. Further training is provided periodically to all staff attorneys. *See* The Legal Aid Society, http://www.legal-aid.org/en/criminal/criminalpractice/training.aspx (last accessed July 8, 2012). As part of their training, attorneys are advised to inquire about the defendant's citizenship during the initial interview. Moreover, by 2007, The Legal Aid Society's client folders, which are used at all initial interviews, included a section for immigration status-related queries.[2]

Other local public defender offices similarly have for years required staff attorneys to inquire about the defendant's immigration status at the initial interview.[3] By 2007, Bronx

[2] Information concerning The Legal Aid Society's initial interview practices was confirmed by telephone call between Dorea Silverman, Esq., on behalf of the Immigrant Defense Project, and Christopher Healy, Esq., Staff Attorney, The Legal Aid Society.

[3] All information in this paragraph regarding the practices of the public defender offices was confirmed by emails between Dawn Seibert, Esq., Staff Attorney, Immigrant Defense Project, and attorneys at the respective defender offices: Jennifer Friedman, Esq., Supervising Immigration Attorney, Bronx

Defenders was utilizing an intake form that asked detailed questions about the defendant's immigration status. Brooklyn Defender Services, at least as far back as 2002, likewise required its attorneys to use an intake form that included questions concerning immigration status. In addition, by 2007, attorneys with the Queens Law Associates defender office were instructed to question defendants about their citizenship pursuant to queries included on their intake form.

Clinical criminal defense programs at local law schools routinely instruct students to ask clients whether they are U.S. citizens during the initial interview.[4] For example, the Criminal Defense Clinic at the Benjamin N. Cardozo School of Law and the Criminal Defense Clinic at New York Law School, both of which are affiliated with The Legal Aid Society, have for several years prior to 2007 instructed students on client interview techniques. As part of their instruction, students at both clinics were advised to question clients about their citizenship status at the initial interview. Similarly, by

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Defenders; Marianne C. Yang, Esq. Immigration Unit Director, Brooklyn Defender Services; Sin Yen Ling, Esq., Immigration Staff Attorney, Queens Law Associates.

[4] All information in this paragraph concerning the practices of clinical programs were confirmed by telephone calls or emails between Dorea Silverman, Esq., on behalf of the Immigrant Defense Project, and the directors of the clinical programs: Jonathan H. Oberman, Esq., Director, Criminal Defense Clinic, Benjamin N. Cardozo School of Law; Frank Bress, Esq., Director of Clinical Programs, New York Law School; Adele Bernhard, Esq. Director, Criminal Justice Clinic, Pace Law School.

2007, the Criminal Justice Clinic at Pace Law School required students to ask defendants about their citizenship status.

Moreover, since at least 2006, the Cardozo Criminal Defense Clinic has used a widely known publication that dedicates an entire chapter to "Determining Your Criminal Defendant Client's Citizenship and Immigration Status" and observes that "[a]s a standard preliminary inquiry when representing *any* new criminal defendant client, you should determine whether the client is a U.S. citizen or not." Manuel D. Vargas, New York State Defender Association Immigrant Defense Project, *Representing Immigrant Defendants in New York* (4th Ed. 2006) (emphasis in original).

Accordingly, it is evident that by 2007, prevailing professional norms in New York State—as evidenced by not only standards and practice guides, but also policies and practices in public defender offices and clinical education programs—had established that counsel was required both to ask defendants about their citizenship status and to advise defendants of the immigration consequences of a plea.

II. A defendant satisfies *Strickland*'s requirement of prejudice by demonstrating a reasonable probability that, but for the ineffective assistance of counsel, he would not have pleaded guilty.

A defendant demonstrates prejudice by showing that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty." *Hill v. Lockhart*, 474 U.S. 52,

59 (1985); *accord People v. Reynoso*, 931 N.Y.S.2d 430 (3d Dep't 2011); *People v. Williams*, 899 N.Y.S.2d 438, 439 (3d Dep't 2010); *People v. Rauf*, 934 N.Y.S.2d 28, 29 (1st Dep't 2011). The defendant does not have to show that he would have prevailed at trial; where a guilty plea was based on inaccurate deportation advice, as opposed to attorney errors relating to trial preparation, "the prejudice inquiry . . . does not necessitate a prediction analysis as to the likely outcome of the proceeding." *People v. McDonald*, 1 N.Y.3d 109, 115 (2003); *accord People v. Picca*, __ N.Y.S.2d __, 2012 WL 2016397, *3 (A.D.2 2012) (inquiry is whether the "ineffective performance affected the outcome of the plea process"). A defendant can demonstrate the rational nature of the decision to reject the plea agreement by showing that: 1) he would have proceeded toward trial, even at the risk of a more serious conviction or sentence, because of his desire to avoid deportation, or 2) he would have sought a reasonably available alternative resolution that eliminated or mitigated the deportation consequence. *See id.*, *7-9 ("The determination of whether to plead guilty is a calculus, which takes into account all of the relevant circumstances").

A. A defendant establishes a reasonable probability that he would not have pled guilty by demonstrating that the decision to reject the plea agreement would have been rational under the defendant's unique circumstances.

To establish a reasonable probability that he would not have pled guilty, the defendant merely has to show that the decision to reject the plea would have been "rational under the circumstances." *Padilla*, 559 U.S. at __, 130 S. Ct. at 1485; *Picca*, 2012 WL 2016397, *5. It is "rational" for a defendant to reject a plea agreement in favor of pursuing an alternative plea agreement, or a trial, even at the risk of a more serious conviction or sentence, because of the importance of avoiding deportation. *See id*. *7; *People v. DeJesus*, 935 N.Y.S.2d 464 (Sup Ct, NY County 2011); *People v. Mercado*, 32 Misc3d 1220(A), 2011 NY Slip Op 51373(U) (Sup Ct, Bronx County 2011); *People v. Paredes*, Sup Ct, NY County, Nov. 22, 2010, Ward, J., Ind. No. 1104/04 (attached); *State v. Sandoval*, 171 Wash. 2d 163, 174-76 (2011); *United States v. Orocio*, 645 F.3d 630, 645 (3d Cir. 2011).

i. New York courts have deemed the decision to reject a plea agreement "rational" even when such a decision risks a more severe conviction or prison sentence.

People v. Picca, __ N.Y.S.2d __, 2012 WL 2016397 (A.D.2 2012) held that the trial court must factor the defendant's desire to avoid deportation into the analysis of whether it would have been rational to reject the plea agreement. *See id*. *7. The *Picca* defendant was charged with two counts of criminal

possession of a controlled substance in the seventh degree, two counts of criminal possession of a controlled substance in the third degree, and one count of criminal sale of a controlled substance in the third degree. *See id*. *1. He pled guilty to attempted criminal sale of a controlled substance in the third degree in exchange for placement in the Drug Treatment Alternative-to-Prison program. *See id*. *2. Although he subsequently relapsed and was sentenced to three to six years to serve, the original plea agreement gave the defendant the chance to avoid prison entirely. *See id.* However, his defense attorney failed to advise him that the plea rendered him deportable. The *Picca* defendant subsequently filed a 440 motion which was summarily denied by the trial court. *See id.* The Second Department, in analyzing the *Strickland*/*Padilla* prejudice prong, emphasized that the *Picca* defendant had resided in the United States for many years, had strong family ties and an employment history in the United States, and virtually no connection to his country of origin. *See id*. *8. Given those circumstances, the Court found that the decision to reject the plea agreement could have been rational despite the following: 1) strong evidence supporting the criminal offenses, 2) significant disparity between the plea agreement and sentencing exposure if convicted at trial (no prison time compared to a potential sentence of 12 ½ to 25 years), and 3) a prior offense

that rendered the defendant subject to mandatory deportation. *See id.*

The *Picca* Court explicitly distinguished between the prejudice analysis when a citizen attempts to vacate a guilty plea, where the criminal penalties are the primary considerations, and the prejudice analysis for a non-citizen defendant, for whom the avoidance of deportation may rationally outweigh all other considerations. *See id.* *7. The Court also stated that "[t]he rationality standard set by the United States Supreme Court in *Padilla* does not allow the courts to substitute their judgment for that of the defendant" and that "[i]n applying that standard, we do not determine whether a decision to reject a plea of guilty was the best choice, but only whether it is a rational one." *Id.* *8. The trial court had failed to factor the defendant's desire to avoid the penalty of deportation into its prejudice analysis; thus, the Second Department reversed and remanded for a hearing on the 440 motion. *See id.* *10.

Other New York appellate decisions examining prejudice post-*Padilla* have adopted similar analyses. In *People v. Reynoso*, 931 N.Y.S.2d 430 (3d Dep't 2011), the defendant pled guilty to separate counts of sale and possession of controlled substances; his attorney failed to accurately inform him that the convictions rendered him deportable. *See id.* at 431-32. In

remanding for a hearing to determine whether the defendant could satisfy the prejudice prong, the Court indicated that the conviction for sale of a controlled substance constituted an aggravated felony that "virtually mandated" the defendant's deportation. *Id.* at 432. The Court further noted that the defendant alleged in his 440 affidavit that had he known of the deportation consequence, he would have refused to plead guilty. *See id.* *People v. Williams*, 899 N.Y.S.2d 438, 439 (3d Dep't 2010) reiterated the prejudice standard described above, and remanded the case for a hearing where the defendant had filed an affidavit averring that he would not have entered the plea if he had known that the plea would render him deportable. *Accord People v. Rauf*, 934 N.Y.S.2d 28, 29 (1st Dep't 2011)(to satisfy prejudice prong defendant must allege that "he would not have pleaded guilty if he had been properly advised" of deportation consequence, but refusing to remand where defendant failed to make the allegation).

New York trial courts have similarly factored the desire to avoid deportation into the analysis of whether it would have been rational for the defendant to reject the plea agreement had he known that the plea carried the additional penalty of deportation. The court in *People v. DeJesus* found that the defendant suffered prejudice from her attorney's failure to inform her that her guilty plea rendered her deportable, because

a rational person in the defendant's circumstances would have rejected the plea. *See People v. DeJesus*, 935 N.Y.S.2d 464, *15 (Sup Ct, NY County 2011). In finding prejudice despite a slim chance of success at trial, the *DeJesus* Court detailed the defendant's ties to the United States in the form of a husband, children, extended family, and employment, and her lack of ties to the Dominican Republic. *See id.*, *12-15. *People v. Mercado*, 32 Misc3d 1220(A), 2011 NY Slip Op 51373(U) (Sup Ct, Bronx County 2011) found prejudice as a result of the attorney's failure to inform the defendant that the guilty plea rendered him deportable; in its prejudice analysis, the *Mercado* Court considered all of the defendant's ties to the United States, including his eighteen-year residency in the United States as a lawful permanent resident, the fact that his entire immediate family lived here as lawful permanent residents, and his two United States citizen children. *See id.*, *1-2. The *Mercado* Court concluded that "this is one of those cases where '[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *Id.*, *7 (citing *Padilla*, 559 U.S. at __, 130 S.Ct. at 1483 (*quoting INS v. St. Cyr*, 533 U.S. 289, 323 (2001)). In *People v. Paredes*, Sup Ct, NY County, Nov. 22, 2010, Ward, J., Ind. No. 1104/04 (attached), the court examined the defendant's ties to the United States, which consisted of his entire family, and found

prejudice from the lack of advice regarding deportation despite the apparent unavailability of an alternative plea, or a legitimate trial defense.

These New York cases demonstrate that a meaningful prejudice analysis of a *Strickland*/*Padilla* claim must consider whether the decision to reject the plea agreement would have been rational given the defendant's unique circumstances, including the defendant's desire to avoid deportation. The trial court's prejudice analysis in the instant case is fatally flawed in that it failed to consider the defendant's desire to avoid deportation. For that reason, this Court must reverse the trial court's summary denial of the defendant's 440 motion.

ii. Appellate courts from state and federal jurisdictions have held that trial courts must factor the defendant's desire to avoid deportation into the analysis of whether the decision to reject a plea agreement would have been "rational."

State courts of last resort as well as the Third Circuit Court of Appeals have held that the defendant's desire to avoid deportation must be considered, along with the defendant's other unique circumstances, in the analysis of whether it would have been rational to reject the plea agreement in an effort to avoid deportation. *See Denisyuk v. State*, 422 Md. 462 (2011); *United States v. Orocio*, 645 F.3d 630 (3d Cir. 2011); *State v. Sandoval*, 171 Wash. 2d 163 (2011); *accord Hill v. Lockhart*, 474 U.S. 52, 60 (1985)(referencing the importance of "special circumstances that

might support the conclusion that [the defendant] placed particular emphasis on [a specific consequence] in deciding whether or not to plead guilty"). These cases demonstrate that a failure to consider the desire to avoid deportation renders the *Strickland*/*Padilla* prejudice analysis fatally flawed.

In *Denisyuk*, where counsel gave no advice regarding deportation, the petitioner established sufficient prejudice solely with an uncontroverted affidavit stating that the petitioner would have rejected the plea and gone to trial if he had known of the deportation consequence. *See Denisyuk*, 422 Md. at 487-89. The state argued that the petitioner could not demonstrate the requisite prejudice because he was facing multiple charges, the evidence against him was overwhelming, and the plea argument was favorable. *See id.* at 487. The *Denisyuk* Court recognized these factors but noted that the state was assuming that "conviction of fewer charges and a relatively short period of incarceration" were the petitioner's top priorities when he entered his plea. *Id.* Endorsing the *Padilla* Court's observation (quoting *St. Cyr*, 533 U.S. at 322), that "preserving the client's right to remain in the United States may be more important to the client than any jail sentence," the *Denisyuk* Court found that it was rational for a defendant to "run the risk of significant jail time, rather than the near certainty of deportation." *Denisyuk*, 422 Md. at 488. The

Denisyuk Court further explained that "many noncitizens might reasonably choose the possibility of avoiding deportation combined with the risk of a greater sentence over assured deportation combined with a lesser sentence." *Id.* Explicitly rejecting the state's assertion that the inevitability of conviction eliminated the possibility of prejudice, the Court indicated that the state misunderstood "the focus of the prejudice inquiry in cases involving plea agreements." *Id.* The Court stated that the "appropriate determination is not whether Petitioner ultimately would have been convicted following a trial, but rather whether there 'is a reasonable probability that, but for counsel's errors, [Petitioner] *would not have pleaded guilty*.'" *Id.* at 488-89 (emphasis in original) (citing *Hill*, 474 U.S. at 59).

In *Orocio*, a noncitizen defendant charged with drug trafficking pled guilty to a simple possession offense which rendered him deportable, with no advice from counsel as to the immigration consequences. *See Orocio*, 645 F.3d at 634. The defendant received a sentence of time served (it is unclear whether the defendant actually served one year or eighteen months) followed by two years of supervised release; his exposure after trial would have been an aggravated felony conviction and a minimum ten year sentence. *See id.* at 634, 645. The *Orocio* Court found that "it would have been a reasonable decision" to go to

trial even though the defendant "faced a drug distribution charge constituting an aggravated felony with a ten-year minimum sentence." *Id.* at 645. The Court explained that "the threat of removal provides a . . . powerful incentive to go to trial if a plea would result in removal anyway." *Id.* Furthermore, the Court found that the defendant "rationally could have been more concerned about a near-certainty of multiple decades of banishment from the United States than the possibility of single decade in prison." *Id.*

In *Sandoval*, the defendant's decision to go to trial in an attempt to avoid deportation was deemed rational, even though he risked a very long prison sentence, because of the severity of the deportation consequence. The *Sandoval* defendant was charged with rape in the second degree, which carried a standard sentencing range of 78 to 102 month's imprisonment and a maximum sentence of life. *See Sandoval*, 171 Wash.2d at 175. He pled guilty to rape in the third degree, which carried a standard sentencing range of six to twelve months. *See id.* at 167. The *Sandoval* Court accepted "the State's argument that the disparity in punishment ma[de] it less likely that Sandoval would have been rational in refusing the plea offer." *Id.* at 175. However, the Court noted that "Sandoval had earned permanent residency and made this country his home." *Id.* The Court further noted that for criminal defendants, "deportation no less than prison can mean banishment or exile, and separation

from their families." *Id.* at 175-76 (internal quotations omitted). Therefore, the *Sandoval* Court concluded that "given the severity of the deportation consequence, . . . Sandoval would have been rational to take his chances at trial." *Id.* at 176.

The case law from New York and other jurisdictions demonstrates that a defendant establishes the requisite prejudice to support a finding of ineffective assistance of counsel under the Sixth Amendment if the defendant demonstrates a reasonable probability that, absent counsel's deficient performance, he would have rejected the plea agreement. These case also demonstrate that a decision to reject the plea agreement and proceed to trial, or seek a non-deportable resolution, must be considered in the light of the defendant's unique circumstances, including the desire to avoid deportation. Thus, it can be "rational under the circumstances" for a non-citizen to reject a plea agreement even if he risks a conviction of a serious charge, and significant prison time.

B. A defendant can establish prejudice by demonstrating a reasonable probability that the outcome would have been different if the defense attorney had negotiated effectively in light of the immigration consequences.

Padilla indicates that counsel have an affirmative duty to use the information regarding deportation to the defendant's benefit, and the United States Supreme Court has since confirmed that counsel has an affirmative Sixth Amendment duty to conduct

plea negotiations effectively. *See Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (2012). Therefore, an attorney's failure to affirmatively negotiate to attempt to avoid the deportation penalty constitutes ineffective assistance of counsel.

i. Counsel has a Sixth Amendment duty to negotiate effectively in light of the immigration consequences.

The *Padilla* Court discussed the manner in which counsel should use the information regarding the immigration consequences during the plea-bargaining process:

> Counsel who possess the most rudimentary understanding of the deportable 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.

Id. at 1486. The Supreme Court reiterated the way in which immigration consequences impact the plea bargaining process in *Vartelas v. Holder*, 132 S.Ct. 1479, 1492 n. 10 (2012) ("Armed with knowledge that a guilty plea would preclude travel abroad, aliens like Vartelas might endeavor to negotiate a plea to a nonexcludable offense—in Vartelas' case, *e.g.*, possession of

counterfeit securities—or exercise a right to trial"). *Padilla* and *Vartelas*, read together with *Frye* and *Lafler*, mandate that counsel has a Sixth Amendment duty to negotiate effectively to avoid or minimize immigration consequences. This duty is analogous to counsel's duty to negotiate to avoid or minimize criminal penalties. *See Frye*, 132 S.Ct. at 1407-08 ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargaining process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages"); *Lafler*, 132 S.Ct. at 1384 ("During plea negotiations defendants are entitled to the effective assistance of counsel") (internal quotations omitted).

"[T]he effective assistance of counsel is imperative in the pre-pleading stage because the decision to plead guilty, and thereby forfeit many of the rights guaranteed by the United States and New York Constitutions, is ordinarily the most important single decision in any criminal case." *People v. Picca*, __N.Y.S.2d__, 2012 WL 2016397 *3 (A.D.2 2012) (internal quotations omitted); *accord Frye*, 132 S.Ct. at 1407-08. While it is true that "there is no constitutional right to plea bargain" and that "the prosecutor need not do so **if he prefers to go to trial**," *Weatherford v. Busey*, 429 U.S. 545, 561 (1977)

(emphasis added), once the prosecutor offers a plea agreement, thereby evincing his desire to enter into a plea bargain and thus avoid trial, the defense attorney must continue the plea negotiations in an effective manner. The *Frye* decision asserts that "[t]o a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long." *Frye*, 132 S.Ct. at 1407. Thus, defense counsel's responsibilities as "horse trader" mandate that once the prosecutor has made an offer, defense counsel has a duty to evaluate that offer in light of all the associated penalties and to advise the defendant accordingly. If the offer is unacceptable to the defendant, the defense attorney must counter with an offer acceptable to the defendant that is reasonably likely to be attractive to the prosecutor. The *Frye* Court recognized that plea bargaining benefitted both parties, and stated that "[i]n order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations," and that "[a]nything less . . . might deny a defendant 'effective representation by counsel at the only stage where legal aid and advice would help him." *Id.* at 1407-08.

ii. To establish prejudice where defense counsel has been ineffective in plea negotiations, the defendant must demonstrate a reasonable probability of a more favorable disposition.

> It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. . . . The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel's errors can be conducted within that framework.

Missouri v. Frye, 132 S.Ct. 1399, 1410 (2012).

A defendant can demonstrate the rational nature of the decision to reject a plea agreement by "showing that . . . there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated." *Commonwealth v. Clarke*, 460 Mass. 30, 47, 949 N.E.2d 892, 906 (2011) (internal quotations omitted); *accord Picca*, __ N.Y.S.2d __, 2012 WL 2016397, *9 (A.D.2 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"). The *Frye* Court specified that when defense counsel's error resulted in a missed opportunity for a more favorable plea bargain, the defendant must "demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it." *Frye*, 132 S.Ct. at 1409. The prejudice

analysis in the *Clarke* and *Picca* cases is nearly identical to the analysis described in *Frye;* the only difference is that in the *Clarke* and *Picca* scenarios the court must evaluate whether there is a reasonable probability that the prosecutor would have accepted the defendant's counter-offer. If the court finds a reasonable probability that the prosecutor would have done so, the prejudice analysis continues with an inquiry into whether the prosecutor would have withdrawn the acceptance, and whether the trial court would have accepted the plea bargain. *See id.* at 1409. This analysis is done within the predictable confines of the jurisdiction's plea bargaining practices. *See id.* at 1410. If the court finds that a reasonable probability exists that the prosecutor and subsequently the court would have accepted the plea bargain, then the court must vacate the guilty plea and allow the plea bargaining process to start anew. *See id.* at 1409; *accord People v. Bautista*, 115 Cal.App.4th 229, 238-42 (2004) (defendant prejudiced by attorney's failure to "attempt to 'plead upward,' that is, pursue a negotiated plea for violation of a greater . . . offense" that carried less severe immigration consequences).

There is a wealth of New York and Second Circuit case law holding that a defendant can establish prejudice from defense counsel's failure to obtain a reasonably available alternative plea agreement even when the plea agreement was not offered by

the prosecutor. *See People v. Mercado*, 934 N.Y.S.2d 36, *7 (Sup Ct, Bronx Coty 2011) (finding prejudice where non-deportable resolution, although not offered by prosecutor, "was entirely feasible"); *Mask v. McGinnis*, 233 F.3d 132 (2d Cir. 2000) (affirming reversal of state court denial of 440 motion based in part upon finding that there was a reasonable probability that the prosecutor would have offered a more favorable plea agreement absent defense counsel's ineffectiveness); *Cross v. Perez*, 823 F.Supp.2d 142, 160 (E.D.N.Y. 2011) (overturning state court denial of 440 motion despite "no evidence in the record from the prosecutor" because "the circumstantial evidence strongly suggests the conclusion that" absent defense counsel's ineffectiveness, the prosecutor would have offered a more favorable plea agreement"); *Aeid v. Bennett* 296 F.3d 58, 63 (2d Cir. 2002) (to show prejudice under *Strickland* where defense counsel was ineffective in failing to obtain a more favorable sentence, the defendant must demonstrate reasonable probability "(1) that the prosecutor would have offered him such a sentence and (2) that [he] would have accepted that offer"); *People v. De Aga*, 903 N.Y.S.2d 39, 40 (A.D.1 2010) (vacating a plea where "[m]isinformation as to defendant's status impacted plea negotiations," and "[t]hese misapprehensions may have affected the People's offer, as well as defendant's decision to accept it"); *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998)

("whether the government had made a formal plea offer was irrelevant because [defendant] was nonetheless prejudiced because he did not have accurate information upon which to make his decision to pursue further plea negotiations or go to trial").

The foregoing discussion establishes that a defendant can demonstrate prejudice by showing a reasonable probability that the outcome would have been different if the defense attorney had negotiated effectively in light of the immigration consequences. The trial court failed to consider this type of prejudice, and therefore this Court should reverse the trial court's summary denial of the defendant's 440 motion.

CONCLUSION

In the instant case, the lower court erred in failing to find a Sixth Amendment duty to ask a defendant whether he is a U.S. citizen. This duty is clear under *Padilla* and professional norms in New York. Furthermore, the lower court applied an incorrect prejudice standard, stating that the defendant must demonstrate "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty **and would have insisted on a trial**." *People v. Chacko*, New York County Ind. No. 3696/07, Decision and Order dated Nov. 3, 2011, p. 7 (emphasis added). As noted above, demonstrating that he would

have insisted on going to trial is only one way for a defendant to prove prejudice under *Strickland*. If a noncitizen demonstrates a reasonable probability that, if correctly advised, he would have rejected a plea to pursue one of the options outlined above, this satisfies the "prejudice" prong of *Strickland*.

For the foregoing reasons, amicus respectfully requests that this Court reverse the Supreme Court's order denying Defendant-Appellant's petition for post-conviction relief.

Dated: New York, New York
July 12, 2012

Respectfully Submitted,

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Printing Specifications Statement

This brief complies with the type-volume limitation of the Rules of Procedure of the Appellate Division because it contains 6,767 words, excluding the parts of the brief exempted by the rules. It complies with the typeface and type style requirements because it has been prepared in using Microsoft Word in Courier New 12-point font.

Dated: New York, New York
July 12, 2012

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