To be argued by
ABIGAIL EVERETT

New York Supreme Court

Appellate Division -- First Department

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

New York County
Ind. No. 5131/07

ANTONIO BADIA,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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

THE PEOPLE OF THE STATE OF NEW YORK,

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PRELIMINARY STATEMENT

This is an appeal from a judgment of the Supreme Court, New York County, rendered on November 13, 2008, convicting appellant, upon his guilty plea, of one count each of criminal possession of a controlled substance in the fifth degree and criminal possession of a controlled substance in the seventh degree (P.L. § 220.06, 220.03), and imposing a one-year determinate term in prison and one year of post-release supervision, concurrent to a one-year definite term of jail (Farber, J., at plea and sentence).

Notice of appeal was filed and, on January 15, 2009, this Court granted appellant leave to appeal as a poor person on the original record and typewritten briefs and assigned Steven Banks, Esq., as counsel on appeal. On December 9, 2010, Robert S. Dean, Center for Appellate Litigation, was substituted as counsel on appeal.

This is also an appeal from an order dated May 10, 2011, denying a motion to vacate the judgment of conviction, pursuant to C.P.L. § 440.10. On January 26, 2012, Justice David B. Saxe granted leave to appeal that order and consolidated the appeal with the pending direct appeal.

No application for a stay of execution of judgment has been made. Appellant has completed his prison term and he has been deported. Appellant had one co-defendant below: Jesus Munoz.

QUESTION PRESENTED

> Whether the court below erred in holding that it was "constrained" to deny the deported appellant's Padilla motion because appellant was "not within the court's jurisdiction," thereby denying appellant his right to challenge the validity of the conviction that led to his deportation. U.S. Const. Amends. VI, XIV; N.Y. Const. Art. I, § 6; Padilla v. Kentucky, 559 U.S. __, 130 S. Ct. 1473 (2010).

STATEMENT OF FACTS

Introduction

Appellant moved, pursuant to C.P.L. § 440.10, to vacate his conviction on the ground that his lawyer was ineffective for not explaining the immigration consequences. See Padilla v. Kentucky, 559 U.S. __, 130 S.Ct. 1473 (2010). However,

before the court could decide the postconviction motion, appellant was deported. Finding itself "constrained" by New York law, as it appeared to be at the time of the motion (People v. Diaz, 7 N.Y.3d 831 (2006)), the court held that appellant's deportation required that the motion be denied. The court recognized that appellant was in a "Catch-22" situation because appellant's absence was "due in part to the conviction he is moving to challenge." Nonetheless, because appellant was "not with the court's jurisdiction," the motion court did not evaluate the merits of appellant's suggestion that alternative technology was available to allow appellant to testify remotely.

Now that the Court of Appeals has made clear, in People v. Ventura, 17 N.Y.3d 675 (2011), that New York law does not constrain judges to deny all defendants' efforts to overturn convictions once they have been deported, appellant asks this Court to reverse and send the matter back to the trial court for further consideration.

Indictment

According to the felony complaint, on October 8, 2007, a police officer observed "an unapprehended black male" approach appellant and hand him money. Appellant motioned towards the co-defendant. The unapprehended man then walked over to the co-defendant and took something from him. The

officer also saw "this same behavior" with a second unapprehended man. When arrested, appellant had $216 but no drugs. The co-defendant possessed 38 bags of crack.

New York County Indictment No. 5131/07 charged appellant, Antonio Badia, with one count of criminal possession of a controlled substance in the third degree and one count of criminal possession of a controlled substance in the fifth degree (Penal Law §§ 220.16, 220.06) (See Indictment). It was alleged that appellant possessed a quantity of cocaine exceeding 500 milligrams in weight (Penal L. § 220.06(5)) and that he possessed the cocaine with intent to sell (Penal L. § 220.16(1)) (See Indictment).

Guilty Plea

On April 10, 2008, appellant appeared before Hon. Thomas Farber, with a Spanish language interpreter and his attorney Victor Castelli, Esq., of The Legal Aid Society (Minutes of April 10, 2008, at 2). At the time, appellant was living in a residential drug treatment program at Samaritan Village (Id.).

The parties discussed a proposed plea arrangement (Id.).[1] The District Attorney's office were consenting to a plea to fifth-degree drug possession, a felony, with the requirement

[1]Numbers preceded by "P" refer to the pages of the transcript of appellant's May 8, 2008 guilty plea; those preceded by "S" to pages of the transcript of his November 13, 2008 sentencing transcript; those preceded by "PSR" refer to the pages of the New York City Department of Probation's presentence report.

that appellant continue residential drug treatment, through the DTAP ["Drug Treatment Alternative to Prison"] program (Id. at 3). If appellant successfully completed the treatment program, the conviction would be reduced to a misdemeanor (Id.). The plea bargain further provided that appellant would get a two-year prison term if he failed to successfully complete the DTAP program and the sentence would be three years if he absconded from the drug program (Id.). However, appellant still had to be interviewed. If DTAP rejected him from the program, the felony conviction would stand but the sentence would be probation (Id. at 2).

Appellant was worried about pleading guilty to a felony before he knew for certain that he would be accepted into the DTAP program. He asserted, "I don't want a felony because the thing is that I never did that" (Id. at 12). Similarly, appellant later stated:

> THE DEFENDANT: I don't want a felony on my record if I did not do anything.
>
> THE COURT: You don't want a felony on your record even if you did something.
>
> THE DEFENDANT: That is different though.
>
> THE COURT: So the defendant is saying he is innocent I think, so there is no plea.
>
> THE DEFENDANT: I want the program. . . . I want to plead guilty.
>
> THE COURT: No, it does not work like that.

(Id. at 14-15).

The court decided not to accept the plea and the case was adjourned (Id. at 15). The minutes of April 10, 2008 make no reference to appellant's immigration status or possible immigration consequences related to the plea.

On May 8, 2008, appellant again appeared before Justice Thomas Farber, with his attorney, Mr. Castelli, and a Spanish interpreter (P. 2, 8). Appellant agreed to the previously-offered plea bargain with the clarification that his sentence would be a conditional discharge if he successfully completed drug treatment (P. 3).

The court advised appellant that, by his plea, he was waiving his right to remain silent, his right to trial by jury, and his right to confront the People's witnesses (P. 6-7). Appellant answered, "yes," when asked if he and Jesus Nunez had possessed a quantity of cocaine with a net weight that exceeded 500 milligrams (P. 7).

In satisfaction of the two-count indictment, appellant pleaded guilty to one count of criminal possession of a controlled substance in the fifth degree, a class D felony (Penal L § 220.06(5)), and one count of criminal possession of a controlled substance in the seventh degree, a misdemeanor (Penal L. § 220.03) (P. 8).

The trial assistant further informed the court that DTAP "always carr[ies] a requirement that the defendant waive his right to appeal" (P. 7). The court advised appellant:

> THE COURT: What the People are saying, and I guess that was discussed with your attorney as well, ordinarily when you pled [sic] guilty, you have a right to appeal your conviction to a higher court.
>
> As a condition of entering into this plea separate from your decision to plead guilty, the People are requiring that you give up any right to appeal your conviction. Are you willing to do that and have you discussed that with your attorney?
>
> THE DEFENDANT: Yes.
>
> THE COURT: We will do a written waiver of appeal and take a plea and adjourn the case for sentence . . . (P. 8).[2]

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[2]The record contains the following signed written waiver, dated May 8, 2008. The waiver form is a fill-in-the-blanks pre-printed statement which appears to have been signed by appellant and his attorney, Victor Castelli, Esq. It reads as follows:

> I hereby waive my right to appeal from the judgment of conviction. I understand that this waiver does not apply to any of the four following issues: a constitutional speedy trial claim; a challenge to the legality of the sentence promised by the judge; an issue as to my competency to stand trial; or the voluntariness of this waiver. However, I understand and agree that I hereby give up all other appellate claims.
>
> I execute and sign this waiver knowingly and voluntarily after being advised by the Court and after consulting with my attorney [left blank], standing beside me. I have had a full opportunity to discuss these matters with my attorney and any questions I

(continued...)

The case was adjourned for updates from the drug treatment program (See Minutes of June 26, 2008). At no point during the plea proceedings did the court inquire about appellant's immigration status or provide any warnings regarding the possible immigration consequences related to the guilty plea.

Probation Department Pre-sentence Report

According to the pre-sentence report, dated June 20, 2008, appellant was almost 41 years old at the time of the offense (PSR 1, 2). The Probation report indicates that appellant was born in the Dominican Republic and that he was a permanent resident alien of the United States, whose permanent resident alien card "expired" in January 2008, after he was incarcerated (PSR 3, 5).

Before going into residential drug treatment, appellant was living with his 81-year-old mother whom he assisted in the evenings after her home attendant left for the day (PSR 3). Appellant had two children from a prior relationship who lived with their mother, in New York (PSR 3). At the time of his

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[2](...continued)
may have had have been answered to my satisfaction.

I have agreed to give up my appellate rights because I am receiving a favorable plea and sentence agreement.

arrest, he was unemployed but he told the Probation Department that he had worked at various times over the prior ten years (PSR 4).

Appellant denied to the Probation Department that he had been selling drugs (PRS 5). He claimed that he was only buying drugs for his own use and admitted that he had a history of using crack, heroin and marijuana (PSR 4-5). Appellant had been hospitalized for psychiatric reasons and for drug detoxification (PSR 4).

Termination from Samaritan Village

On June 30, 2008, appellant was terminated from the program at Samaritan Village and, the following day, he was remanded into custody (See Minutes of July 1, 2008). Samaritan sent the court a letter stating that appellant had been absent overnight with a female patient and had tested positive for an "illegal substance" (Minutes of July 1, 2008, at 4). The case was adjourned to determine whether appellant would be placed in a new program (See Minutes of July 3, 2008).

Sentence

On November 13, 2008, appellant appeared before Justice Farber with his attorney, Mr. Castelli, and a Spanish interpreter. The People offered a sentence of one year (S. 2). Appellant declined an opportunity to withdraw the original

guilty plea (S. 2, 4). On the conviction of criminal possession in a controlled substance in the fifth degree, the court sentenced appellant to a determinate term of one-year imprisonment and one-year post-release supervision (S. 5). On the misdemeanor conviction for criminal possession of a controlled substance in the seventh degree, the court imposed a one-year definite sentence (See Sentence & Commitment Sheet, Court File).

The court did not advise appellant regarding any potential immigration consequences related to his conviction.

C.P.L. § 440.10 Motion to Vacate Conviction

By motion dated February 16, 2011, appellant moved to vacate his conviction under Indictment Number 5131/07. He alleged that he was denied effective assistance of counsel when his attorney, Victor Castelli, failed to advise him of the deportation consequences of his guilty plea, as required by Padilla v. Kentucky, 559 U.S. __, 130 S.Ct. 1473 (2010). (Motion to Vacate, Court File). In his affidavit in support of the motion, appellant alleged:

> My attorney, Victor Castelli, never mentioned that there could be any immigration consequences of either of my guilty pleas. He did not explain that if I failed in drug treatment and the felony conviction remained on my record, that I could be deported. He did not explain that my plea to the misdemeanor alone might cause me to be deported.

(Exhibit I).

In support of the C.P.L. § 440.10 motion, appellant attached an affirmation from Mr. Castelli, stating: "I have reviewed my trial file relating to my representation of Mr. Antonio Badia on Indictment 5131/07. After reviewing the file, I cannot state, with any certainty, that I advised Mr. Badia regarding the immigration consequences of his guilty plea on this indictment" (Exhibit H). Mr. Castelli's trial file contained a one-page NYC Department of Correction website printout, from August 29, 2008, which documents the existence of an immigration warrant (Exhibit D). There are some hand-written notes on the printout which relate to immigration.[3] These notes, however, do not state what, if anything, Mr. Castelli communicated to appellant regarding the immigration consequences of his pleas.

In his affidavit, appellant alleged that he entered the United States legally and was a lawful permanent resident (Exhibit I, ¶ 5). His mother and sister are both naturalized American citizens and his two daughters are American citizens (Exhibit I, ¶ 6). Appellant alleged that his elderly mother is

[3]Specifically, one note appears to state: "Allocution – immigration status ? – reserve right to send you to jail if you get immigrant hold." Other notes state: "motion to withdraw plea – never told about the policy [illegible] would get prison," "220.03 - removable," "aggravated felony - 220.06(5) - not Aggr. Fel. - 2 drug" and, listed as "1, 2, 3," are the words: "judge," "Bd of Imm Appeals" and "Federal court." (Exhibit D).

too sick to travel and that he will never see her again if he is deported (Exhibit I, ¶ 7). He also indicated that his sister has four children at home in New Jersey so she relied on appellant to help care for their mother (Exhibit I, ¶ 8).

Appellant denied that he sold or possessed drugs and stated that he would not have pleaded guilty had he known that he faced deportation (Exhibit I, ¶ 9).

Appellant requested that the court vacate the judgment of conviction under Indictment 5131/07, or, in the alternative, grant a hearing.

Appellant's Motion to Vacate his Two Misdemeanor Drug Convictions

On February 29, 2008, appellant pleaded guilty, in New York County, Criminal Court, to two counts of criminal possession of a controlled substance in the seventh degree (PSR 2).[4] Appellant admitted possessing crack cocaine on October 10, 2007, and a pipe stem with crack residue on November 16, 2007 (See Minutes of February 29, 2008, at page 5, related to Docket Numbers 2007NY077088 and 2007NY087095). The same day, he was sentenced to concurrent sentences of conditional discharge (Id. at page 6; See Ind. No. 5131/07, Motion to Vacate, Affirmation of Abigail Everett, dated

[4]Appellant also has a 2004 misdemeanor conviction for resisting arrest (PSR 2).

February 16, 2011 [Hereinafter, "Everett Aff"], at ¶ 8). The Criminal Court plea/sentence minutes contain no discussion of any possible immigration consequences (See Minutes of February 29, 2008; Everett Aff. at § 9).

In November 2010, appellant moved pro se to vacate these 2008 convictions on the ground that his attorney, Victor Castelli, Esq., failed to advise him of the immigration consequences. This is the same attorney who represented appellant on the instant case, Indictment Number 5131/07. In his motion, appellant alleged that Mr. Castelli also failed at those guilty pleas in Criminal Court to advise him of the immigration consequences (Everett Aff, at ¶ 8, n. 3).

Appellant's Immigration Status

At the time that appellant filed these motions to vacate his convictions, he was in the custody of the Department of Homeland Security. On November 20, 2009, appellant filed an application for cancellation of removal, pursuant to Section 240A of the Immigration and Nationality Act (8 U.S.C. § 1229b (a)). (See Decision and Order, dated August 31, 2010, page 2, attached as Exhibit F, to appellant's motion to vacate the judgment of conviction). The Immigration Judge found that appellant entered the United States legally, in 1998, as a lawful permanent resident and he was eligible for cancellation of removal because he had been a lawful permanent resident

alien for more than five years, had resided continuously in the United States for more than seven years and had not been convicted of an aggravated felony. See 8 U.S.C. § 1229(a)(1) (Id. at p 3, 8).

After a hearing, the Immigration Judge denied the application for cancellation of removal (See Decision and Order, dated August 31, 2010, attached as Exhibit F, to appellant's motion to vacate the judgment of conviction). The Court held that the "adverse factors present in this case outweigh any favorable equities" (Exhibit F at page 9):

> The adverse factors in the Respondent's case relate to his criminal history and drug use. He has been convicted twice[5] for unlawful possession of controlled substances. He was also convicted of resisting arrest. Drug convictions have long been considered serious convictions by the courts. See Matter of Edwards, 20 I & N Dec. 191 (BIA 1990); Matter of C-V-T-, 22 I & N Dec. 7 [(BIA 1998)].

The Board of Immigration Appeals upheld the Immigration Judge's decision on February 2, 2011 (C.P.L. § 440.10 motion, Exhibit G). On February 25, 2011, appellant was involuntarily removed from the United States and returned to the Dominican Republic (See Decision and Order, denying C.P.L. § 440.10 motion, dated May 10, 2011).

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[5]The immigration judge assessed the two misdemeanor cases for which appellant pled and was sentenced on February 28, 2008, as a single conviction. Exhibit G at pages 1, 10.

Denial of C.P.L. § 440.10 Motion

Defense counsel informed the court that appellant had been deported but opposed denial of the motion on this basis (See Letter of Abigail Everett, dated March 18, 2011). Counsel reported that she had contact information for appellant who had recently spoken by phone with the attorney who represented him in Immigration Court. In addition, defense counsel spoke to a vice-consul at the Dominican Consulate in New York, who stated that the Consulate would help appellant set up a phone conference with the United States court. See Everett Letter, at page 2.

In support of the argument that the motion court should not follow People v. Diaz, 7 N.Y.3d 831 (2006), counsel alerted the motion court that the New York State Court of Appeals was about to consider an appeal where the parties were arguing that deported litigants' appeals should not be dismissed. Everett Letter, page 2, citing People v. Ventura, 14 N.Y.3d 894 (Lippman, CJ., lv granted May 21, 2010). Appellant also argued that C.P.L. § 440.10 provided defendants with the legal mechanism to vindicate the constitutional right to effective assistance of counsel and the Legislature did not include in the procedural bars to relief any requirement that the defendant be present in the jurisdiction.

The People sought dismissal, without prejudice, and relied on People v. Diaz, 7 N.Y.3d 831 (2006) (See Letter of A.D.A. Jeffrey Levinson, dated April 1, 2011). The People argued that appellant's physical presence was necessary to resolve his motion.

The People also informed the court that the Criminal Court had dismissed appellant's motion to dismiss his two misdemeanor convictions, under Dockets 2007NY077088 and 2007NY087095. As the People argued, Justice Anthony J. Ferrara held that appellant's deportation made it impossible to hold an evidentiary hearing to decide the underlying factual maters asserted in the post-judgment motion (See Levinson Letter).[6]

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[6]Justice Ferrara held:

> Because the Defendant is no longer subject to this Court's jurisdiction, the motion is dismissed without prejudice (see People v. Diaz, 7 N.Y.3d 831 [2006]) Furthermore, based on the submissions of the parties this Court could not rule on the merits of Defendant's motion until after a hearing where the Defendant would be required to establish that defense counsel's representation fell below an objective standard of reasonableness, and there is a reasonable probability that, but for defense counsel's . . . lack of advice regarding immigration consequences, the Defendant would not have pleaded guilty (see Padilla v. Kentucky, 599 U.S. __, 130 S.Ct. 1473 [2010]; Strickland v. Washington, 466 U.S. 668 [1984]; Hill v. Lockhart, 474 U.S. 52, 56 [1985]), or that he did not receive "meaningful representation" (see People v. Henry, 95 N.Y.2d 563, 565 [2000]; People v. Benevento, 91 N.Y.2d 708, 713 [1998]; People

(continued...)

On May 10, 2011, the court denied appellant's motion to vacate his conviction under Indictment Number 5131/07:

> It is currently the law in this state that a court will not decide an appeal of a conviction if the defendant is not within the court's jurisdiction (*see People v. Diaz*, 7 N.Y.2d 831 (2006); *People v. Casada*, 2010 WL 5187726 [30 Misc. 3d 1202A](Sup. Ct. Kings County, McKay, J.) (CPL § 440.00 motion dismissed because defendant was deported).

The Court noted, "While the current state of the law places defendant in a 'Catch 22' situation, since his unavailability is due in part to the conviction he is moving to challenge, the law is clear and I am constrained to follow it." The court also reasoned that the motion to vacate could not be decided without a factual hearing and determined that appellant's actual presence was necessary to such a hearing.

The Court's decision was "without prejudice to renew should he return to the Court's jurisdiction or should there by a change in the controlling authority."

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[6](...continued)

> v. Baldi, 54 N.Y.2d 137, 147 [1981], aff'd, 96 A.D.2d 212 [1983] lv denied, 61 N.Y.2d 761 [1994].) Accordingly, the Court concludes that the Defendant cannot meet his burden of going forward with his motion pursuant to Criminal Procedure Law § 440.10.

On July 15, 2011, the Appellate Term, First Department, denied appellant's motion for permission to appeal the denial of the C.P.L. § 440.10 motion.

On January 26, 2012, Justice David B. Saxe granted appellant permission to appeal the denial of the CPL § 440.10 motion.

ARGUMENT

POINT

THE COURT BELOW ERRED IN HOLDING THAT IT WAS "CONSTRAINED" TO DENY THE DEPORTED APPELLANT'S PADILLA MOTION BECAUSE APPELLANT WAS "NOT WITHIN THE COURT'S JURISDICTION," THEREBY DENYING APPELLANT HIS RIGHT TO CHALLENGE THE VALIDITY OF THE CONVICTION THAT LED TO HIS DEPORTATION. U.S. CONST. AMENDS. VI, XIV; N.Y. CONST. ART 1, § 6; PADILLA V. KENTUCKY, __ U.S. __, 130 S. Ct. 1473 (2010).

As Justice Farber recognized, using appellant's deportation as the basis for denying his C.P.L. § 440.10 motion put appellant in a "Catch-22" situation because defendant's ". . . unavailability [was] due in part to the conviction he is moving to challenge." Order, dated May 10, 2011. Despite this apparent sympathy for appellant's dilemma, Justice Farber believed that People v. Diaz, 7 N.Y.3d 831 (2006) "constrained" judges to deny postconviction motions following a defendant's deportation. The Court of Appeals' subsequent decision in People v. Ventura, 17 N.Y.3d 675 (2011) made clear, however, that Diaz was inapplicable to appellant's predicament. This Court should reverse the order and remand

the case for determination of appellant's claim that his attorney failed to advise him of the immigration consequences of his guilty plea, in violation of the appellant's constitutional right to effective assistance of counsel. See Padilla v. Kentucky, 559 U.S. __, 130 S. Ct. 1473 (2010).

Because New York Law Requires Courts to Grant Meritorious Postconviction Motions Alleging Ineffective Assistance of Counsel and Generally Bars Individuals From Raising this Issue on Direct Appeal, Individuals Must Be Allowed to Continue to Litigate Padilla Claims Even after Deportation

In People v. Ventura, 17 N.Y.3d 675 (2011), the Court of Appeals held that the State's Appellate Divisions may not dismiss a criminal appeal based on the defendant's deportation. New York law gives individuals a statutory "right" to appeal their criminal convictions, which cannot be eroded by the individual's involuntary deportation. The Court stressed:

> As a matter of fundamental fairness, all criminal defendants shall be permitted to avail themselves of intermediate appellate courts as the State has provided an absolute right to seek review in criminal prosecutions.

17 N.Y.3d at 681, quoting People v. Montgomery, 24 N.Y.2d 130, 132 (1969).

In this case, the motion court held that a prior case People v. Diaz, 7 N.Y.3d 831 (2006) mandated denial of a deported defendant's postconviction motion. In Ventura, the

Court of Appeals discussed Diaz at length and found it inapplicable to appeals in the Appellate Division. The Ventura Court's analysis makes clear that Diaz also does not apply to postconviction ineffective assistance of counsel motions. As the Ventura Court stressed, in Diaz and other cases, such as People v. Del Rio, 14 N.Y.2d 165 (1964), the Court of Appeals was dismissing criminal appeals that were pending in the Court of Appeals after the defendant's deportation. That situation was very different from the defendant's right to continue a criminal appeal in the Appellate Division and it is very different from the defendant's right to raise an ineffective assistance of counsel claim in a postconviction motion.

In Ventura, the Court of Appeals explicitly distinguished its own "permissible appellate jurisdiction" from the defendant's "right" to challenge the conviction on appeal. The court found this to be a "material[]" distinction between Ventura and its prior cases such as Diaz. The Court of Appeals may dismiss appeals of deported individuals because the New York Court of Appeals is a court of "permissive appellate jurisdiction." The Appellate Division, in contrast, is not a court of permissive appellate jurisdiction.

By this same reasoning, deportation should not lead to dismissal of C.P.L. § 440.10 ineffective assistance of counsel claims. Individuals in New York have an absolute right to

vindicate their right to effective assistance of counsel via C.P.L. § 440.10 motions, in cases where the issue cannot be, or could not have been, litigated on the appeal, as of right.[7] As long as such procedural bars do not exist, New York State courts must grant meritorious postconviction claims of ineffective assistance of counsel. Under C.P.L. § 440.30(3) the motion may not be summarily denied unless essential facts supporting the legal claim are conclusively refuted or there is no reasonable possibility that a defendant's unsupported allegations are true. Thus, all defendants have a right to litigate ineffective assistance of counsel claims via C.P.L. § 440.10 motions.

In Ventura, the Court of Appeals also stressed that deported individuals suffer a "complete lack" of review when the Appellate Division dismiss direct appeals. 17 N.Y.3d at 682. This principle was not in play when the Court of Appeals dismissed appeals in Diaz and Del Rio because those deported individuals had already had one full opportunity to raise their appellate claims in a judicial forum. In fact, the defendants in Diaz and Del Rio had already taken advantage of

[7]C.P.L. Article 440 bars motions where the defendant failed to pursue available direct appeal remedies or failed, through lack of diligence, to make an adequate record for direct appellate review. See C.P.L. § 440.10 (2), (3).

the far broader scope of appellate review available in the Appellate Division. See People v. Ventura, 17 N.Y.3d at 681.

The Ventura Court's concern that individuals not be denied one full opportunity for issue review is further reason that deported individuals should not be barred from litigating Padilla claims in postconviction motions. For a defendant alleging ineffective assistance of counsel, C.P.L. § 440.10 generally provides the sole avenue of relief. See, e.g., People v. Taylor, __ A.D.3d __, 2012 NY Slip Op 05935 (2d Dept. 2012) ("Since the defendant's claim of ineffective assistance cannot be resolved without reference to matter outside the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim in its entirety."); People v. Burroughs, 71 A.D.3d 1447, 1448 (4th Dept. 2010) ("Insofar as the further contention of defendant that he was denied effective assistance of counsel involves matters outside the record on appeal, it must be raised by way of a motion pursuant to CPL article 440."); People v. Santer, 30 A.D.3d 1129, 1129 (1st Dept. 2006) ("Since defendant's ineffective assistance of counsel claim turns on matters outside the record, including counsel's specific advice to defendant concerning the immigration consequences of his plea, it is not reviewable on direct appeal and would require a further record to be developed by way of a CPL 440.10 motion."); People v.

Welchagner, 108 A.D.2d 1020, 1021 (3d Dept. 1985) ("Ineffective assistance of counsel can usually be determined only after an evidentiary exploration under C.P.L. § 440.10 motion and it is the rare occasion when such a claim can be resolved on direct appeal."); see also, e.g., McCollough v. Bennett, No. 02-CV-5230, 2010 WL 114253 at *6 (E.D.N.Y. Jan. 12, 2010) (When ineffective assistance of counsel claims "are based on matters outside the record, and not reviewable on direct appeal, New York law requires that they 'be pursued by way of a CPL § 440.10 motion.'"). Cf. People v. Brown, 45 N.Y.2d 852, 854 (1978) ("Generally, the ineffectiveness of counsel is not demonstrable on the main record but in this case it is. Consequently, in the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or postconviction proceeding brought under CPL 440.10.").

In Martinez v. Ryan, __ U.S. __, 132 S.Ct. 1309 (2012), the Supreme Court recognized that collateral challenges may sometimes "provide the first occasion to raise a claim of ineffective assistance of counsel." In such circumstances, the postconviction motion can be thought of, more precisely, an "initial-review collateral proceeding." This proceeding is so important that the Supreme Court "suggested, though without

holding," that the Constitution may require States to provide counsel in initial-review collateral proceedings because "'in these cases . . . state collateral review is the first place a prisoner can present a challenge to his conviction.'" Martinez, at *1315, quoting Coleman v. Thompson, 501 U.S. 722, at 755 (1991).

Since, under New York law, appellant could only file a postconviction motion to vindicate his right to effective assistance of counsel,[8] due process requires that his involuntary deportation not eviscerate this important legal right.

Appellant's Padilla Claim is Not Moot Despite his Deportation

Nor does appellant's deportation make his claim moot. Appellant's narcotics convictions are keeping him from returning to the United States to be with his elderly mother and American-citizen children. Numerous courts have recognized the deported individual's interest in successfully challenging the basis for deportation and paving the legal route to return. Thus, in State v. Ortiz, 113 Wash.2d 32, 434 (1989),

[8]Should the Court, however, determine that the record, in this case, does plainly indicate that no one had explained the immigration consequences, see post at 35, Ventura requires this Court to decide appellant's claim on his consolidated direct appeal, without regard to his deportation. Appellant's appeal waiver does not preclude a challenge that ineffective assistance of counsel vitiated the voluntariness of his guilty plea. People v. Melendez, 24 A.D.3d 222 (1st Dept. 2005).

the Supreme Court of Washington wrote: "Far from mooting his appeal, Ortiz's deportation make the appeal all the more significant. As a result of his Yakima conviction, Ortiz will be unable to return to this country. See 8 U.S.C. § 1182(a)(23) (alien convicted of narcotics offense 'shall be excluded from admission into the United States')." Accord Cuellar v. State, 13 S.W.3d 449, 452 (Tx. Court of Appeals, 2000).

A number of courts have already determined, specifically, that it is appropriate to hold a Padilla hearing even after the defendant has been deported. In People v. Carty, 96 A.D.3d 1093 (3rd Dept. 2012), the Third Department reversed the court's order denying the Padilla motion and remanded for further proceedings even though the defendant had already been deported. See also State v. Cabanillas, __ P.3d__, 2012 WL 2783182 (Ariz. Court of Appeals, July 10, 2012); People v. Guzman, 962 N.E.2d 1182, 357 Ill. Dec. 281 (Il. App. 2011).

As for the two misdemeanor drug convictions that were also cited as grounds for deportation, appellant will be eligible to renew his C.P.L. § 440.10 Padilla claims on those cases in Criminal Court, upon this Court's determination that deportation did not constrain the courts to deny the postconviction motion. C.P.L.R § 2221 (e) (Defendant may move to renew based on a "change in the law"). Appellant,

therefore, hopes to show that the same lawyer provided ineffective assistance of counsel on all three cases.

Even if appellant is only successful in vacating his felony conviction under Indictment Number 3151/07, vacatur of this "key part" in his removal would entail him to a new hearing on his cancellation of removal petition. See Cardoso-Tlaseca v. Gonzales, 460 F.3d 1102, 1106 (9th Cir. 2006) (quoting Estrada-Rosales v. INS, 645 F.2d 819, 821 (9th Cir. 1981). Similarly, the Second Circuit has held that re-opening a removal proceeding is "more than appropriate" where the vacated conviction gives rise to the basis for removability. See Johnson v. Ashcroft, 378 F.3d 164, 171 (2d Cir. 2004).

Permitting Deported Individuals to Continue Their Postconviction Challenge Is Consistent with Principles of Fairness

As a matter of fairness, this Court should consider that it may be difficult for indigent defendants to begin litigating postconviction ineffectiveness claims before they find themselves in immigration proceedings. Ninety percent of criminal dispositions in New York result from guilty pleas. See New York State Unified Court System, Annual Report, 17 (2010) (In 2009, 45,612 of the 50,915 criminal filings in New York State were disposed of by guilty plea). Many defendants

do not appeal after pleading guilty[9] and, if they are indigent, that means they are without counsel. For these individuals, the immigration consequences generally do not become clear until they are fighting deportation and there is, therefore, a real risk that they will be deported before they can complete their postconviction challenges. For that reason, it is particularly harsh to deprive them of the postconviction remedy after deportation.

Appellant Has Not Had a Full Opportunity to Show that He Can Still Establish a Meritorious Padilla Claim

Finally, the lower court erred in concluding, in a summary manner, that appellant's deportation made it impossible to decide the motion, on the merits. There is no legal requirement that the defendant be present. C.P.L. § 440.10 itself does not on its face require the defendant to be present before relief may be granted. As a matter of law, the New York State Court of Appeals has held that New York State trial judges have broad authority to use "innovative procedures" for the reception of evidence, so long the steps are taken to ensure reliability. People v. Wrotten, 14 N.Y.3d 33, 37 (2009) (The complaining witness testified from an out-

[9]The 2010, Unified Court System report also documents that, in 2009, the combined Appellate Divisions in New York disposed of 3,948 criminal cases, including appeals concluded before submission of arguments.

of-state courtroom via two-way video). Similarly, in State v. Santos, 210 N.J. 129 (2012), the New Jersey Supreme Court reasoned that a deported Mexican national could testify at a Padilla hearing, via telephone, if "special circumstances" compelled the taking of telephone testimony and the court was satisfied that the witness' identity was established and there was "some circumstantial voucher of the integrity of the testimony." 210 N.J. at 141, quoting Aqua Marine Products, Inc. v. Pathe Computer Control Systems Corp., 229 N.J. Super. 264 (App. Div. 1988).

In this era of advanced technology, courts are already starting to turn to the possibilities of remote testimony. Thus, in People v. Michael, 16 Misc. 3d 84 (App. Term 9th & 10th 2007), where the defendant was being held in an out-of-state immigration facility and could not be produced for the Padilla hearing, the Appellate Term held that a defendant could 'put forth . . . his contentions by proof and argument' via for example, the advocacy of counsel, defendant's affidavit and/or recorded deposition." 16 Misc. 3d at 87, quoting People v. Richetti, 302 N.Y. 290 (1951) (ellipsis in original). Michael was remanded for a hearing where the defendant was expected to give testimony "via a telephonic linkage."

In this case, defense counsel informed the hearing court that she had already determined that telephonic testimony could be set up for appellant, with the assistance of the Dominican Republic consulate. Another obvious possibility would be the establishment of a video connection via Skype. See In re S.W., 2012 WL 3115749 (Tx. Court of Appeals, 2012) (trial court permitted Skype testimony of out-of-state witnesses in matter related to parental rights).

Beyond these simple technologies, many courts today use two-way video connections. Appellant currently resides in Santo Domingo, the capital of the Dominican Republic, where commercial companies are able to set up two-way video connections, if the court determines that it is necessary.[10]

Alternately, in some cases, deported defendants may qualify for a temporary parole into the United States in order to testify. See Karimijanaki v. Holder, 579 F.3d 710, 713 (6th Cir. 2009) (inadmissible Iranian nationals granted temporary parole so they could testify before Immigration Court regarding their immigration claims).

Should it, ultimately, be determined that a particular defendant cannot provide in-court testimony or make reliable arrangements for remote testimony, Padilla hearing courts

[10]One company, for example, is EyeNetwork Global Videoconference Services. http://www.eyenetwork.com.

still should not presume, across the board, that the defense is unable to meet its burden. Though the defendant may be out of the country, there may still be cases where a defendant can establish, through other evidence, that counsel failed to explain immigration consequences and that the inadequate advice was prejudicial. For example, counsel's own testimony may establish that no advice was given and counsel or family members may remember or have notes that clearly reveal the defendant's state of mind regarding the pros and cons of pleading guilty.

In any event, in this particular case, the trial-level court did not have an opportunity to consider these various options because the court felt "constrained" by the "current law in this state" to deny the motion. Citing Diaz, 7 N.Y.3d 831, the court determined that it was bound to deny the motion if appellant was "not within the court's jurisdiction." In light of the Court of Appeals' subsequent decision in People v. Ventura, the case should be reversed and remanded for a hearing where the Padilla court may determine, as an exercise of discretion, the admissibility of proffered evidence.

Summary Denial is Particularly Prejudicial Because Appellant has Raised a Meritorious Padilla Claim

In Padilla v. Kentucky, the Supreme Court held that the Sixth Amendment requires counsel to "inform her client whether his plea carries a risk of deportation." 130 S.Ct. at 1486. The Padilla Court recognized that "[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. at 1483, quoting I.N.S. v. St. Cyr, 533 U.S. 289, 323 (2001).[11]

Defense counsel's advice necessarily depends upon the nature of the plea's immigration consequences. If deportation is "virtually inevitable," counsel must provide that specific information. Id. at 1478. If "the deportation consequences of a particular plea are unclear or uncertain," counsel still must communicate to the non-citizen client that there is a possible risk of adverse immigration consequence. Id. at 1483. The Court concluded:

> Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Id.

[11]There is no question of the applicability of Padilla to this case because appellant's direct appeal was pending at the time of the Supreme Court's decision in Padilla. See Griffith v. Kentucky, 479 U.S. 314, 328 (1987); People v. Picca, 97 A.D.3d 170, 947 N.Y.S.2d 120 (2d Dept. 2012).

The defendant must show that there is a reasonable probability that he would not have pleaded guilty but for counsel's failure to advise him of the immigration consequences. Hill v. Lockhart, 474 U.S. 52, 59 (1985). See Strickland v. Washington, 466 U.S. 668, 694 (1984). Accord People v. McDonald, 1 N.Y.3d 109, 115 (2003) (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 counsel's misadvice where defendant "never argued that he would not have pleaded guilty if he had been properly advised").[12]

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. Rather, as framed in Padilla, the defendant must show only 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)).

[12]Additionally, where the risk of deportation was not disclosed, the plea is 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)).

Appellant's pleas, under Indictment Number 5131/07, to both fifth-degree and seventh-degree drug possession made him deportable. As the Immigration and Nationality Act provides:

> 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 (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1227(a)(2)(B)(1).

However, because appellant had been a lawful permanent resident for at least five years and had resided continuously in the United States for more than seven years before the commission of his controlled substance offense, he could request cancellation from removal, 8 U.S.C. § 1229b(a)(3), since neither criminal possession of a controlled substance in the seventh or fifth degree was an aggravated felony. 8 U.S.C. §§ 1101(a) (43); Penal L. §§ 220.03, 220.06(5).

A grant of cancellation of removal is in the discretion of the Immigration Judge. 8 U.S.C.A. § 1229. Obviously, the more serious the drug offense, the harder to demonstrate that countervailing factors merited cancellation of removal. And, in fact, immigration judges have often held that "[s]erious drug offenses, particularly one relating to the trafficking or

sale of drugs," require a "heightened showing" of positive counterbalancing factors. See Matter of Edwards, 20 I & N Dec 191 (BIA 1990) and numerous cases citing Edwards. Appellant's plea to the D felony, possession of more than 500 milligrams of cocaine, was a grave impediment to obtaining cancellation of removal relief. Before appellant pled guilty to these drug offenses, it was incumbent on defense counsel to explain the immigration repercussions so that appellant could fully understand the consequences of waiving his right to a trial.

The decision to plead guilty "is a calculus, which takes into account all of the relevant circumstances." People v. Picca, 97 A.D.3d 170, 947 N.Y.S.2d 120 (2d Dept. 2012). Citizens may "focus primarily on the strength of the People's evidence and the potential sentence in the event of conviction." 947 N.Y.S.2d at 129. In contrast, for a noncitizen who has established residence in the United States, "the equivalent of banishment or exile . . . is a particularly severe penalty." 947 N.Y.S.2d at 129, quoting Padilla, __ U.S. __, 130 S.Ct. at 1481. The deportation question may well be paramount in the guilty plea calculus.

In this case, defense counsel could not state, even after reviewing his trial file, that he ever advised appellant of the immigration consequences. Independent review of that file suggests that counsel only began to focus on the immigration

problem during the summer of 2008, after appellant's pleas and his subsequent termination from the drug treatment program and remand to Rikers.

Indeed, the record as a whole strongly supports appellant's allegation that counsel failed to explain that his drug-related guilty pleas carried a serious risk of deportation. Throughout the lengthy plea negotiations, the focus of the discussions was on appellant's chances of completing drug treatment and having all matters resolved with conditional discharges. When appellant initially balked at the felony plea and asserted his innocence, the parties reassured him that if DTAP rejected him after he entered his plea, he would still receive only a sentence of probation. At this junction, there was no mention whatsoever of the possibility that appellant was going to be deported as a result of his felony conviction. The court's silence is itself disturbing since C.P.L. § 220.50(7) requires judges in New York to advise defendants, on the record, of the possibility of deportation.

The pre-plea discussion centered only on appellant's risk of a two-year prison term if he went into drug treatment and failed. Two years in prison is a relatively modest sentence that a person might risk in exchange for the possibility of no jail time, but that two-year promise is far less appealing if failure also carries a heavy risk of deportation and

separation from close family members. See Picca, 947 N.Y.S.2d at 130-31 (Despite the leniency of the DTAP plea, it would not be "irrational" for a defendant with strong ties to the United States take his chances at trial).[13]

As the record of Indictment Number 5131/07 shows, this was not a particularly strong prosecution case. The police only recovered drugs from the co-defendant. Appellant, in contrast, possessed no drugs or contraband. Nor was this a buy-and-bust undercover operation where a plainclothes police office exchanged marked money with the suspect who is promptly arrested. Rather, the People's case relied on observations involving appellant's interaction with unapprehended individuals. Appellant's possession of $216 was not particularly inculpatory. On this evidence, appellant may well have prevailed in his defense that he was not involved in the co-defendant's drug dealing.

Appellant repeatedly asserted his innocence during the plea bargaining process. There is every reason to credit appellant's allegation that he would have taken his chance at trial once he understood the risk that he would never see his

[13]Even if appellant managed to succeed in the drug rehabilitation program and was subsequently allowed to re-plead under Ind. No 5231/07 to a misdemeanor, the transcripts of the pleas in both Supreme and Criminal Court reveal no comprehension that the plea bargains for his three drug -related arrests in 2007 would still make him removable and compromise his claim for relief from removal.

infirm and elderly mother again and would be separated from his two young daughters.

In sum, appellant raised a strong Padilla challenge to his conviction. Since the motion court's summary denial was based on the court's mistaken belief that New York law "constrained" the court, the case should now be remanded for a full determination of the merits.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE ORDER DENYING THE MOTION SHOULD BE REVERSED AND THE MATTER REMANDED FOR A HEARING.

Respectfully submitted,

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Appellant

Of Counsel
Abigail Everett
September, 2012

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

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ANTONIO BADIA,

Defendant-Appellant.

STATEMENT PURSUANT TO RULE 5531

1. The indictment number in the court below was 5131/07.

2. The full names of the original parties were People of the State of New York against Antonio Badia and Jesus Munoz. This appeal is on behalf of Antonio Badia, only.

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, convicting appellant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree and criminal possession of a controlled substance in the seventh degree (P.L. §§ 220.06, 220.03), and sentencing him to concurrent determinate terms of one year imprisonment and one year of post-release supervision.

6. This is an appeal from a judgment of conviction rendered on November 13, 2008, and from an order dated May 10, 2011 (Farber, J., at plea, sentence and order).

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

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