NOTE: This sample document contains a wholly fabricated scenario and is only to be used as a reference point *prior to* conducting your own independent legal research and factual investigation. The footnotes in this sample document are intended to be included as integral parts of the brief itself. The endnotes provide additional information and practice tips to help users of this sample document.

INTRODUCTION

In Mr. Client's case, Mr. Prior Lawyer made a critical error by advising Mr. Client to plead guilty at arraignment to attempted criminal possession of a controlled substance, a B misdemeanor, in exchange for an unconditional discharge and a six month license suspension. The error carried severe consequences because, unbeknownst to Mr. Client, the plea rendered him deportable.

At the time of the plea, Mr. Client had been a lawful permanent resident (LPR) in the United States for nearly seven years; he had been married for 6 years to a U. S. citizen who was pregnant with their first child. He had no prior convictions or arrests, and has had none since. He had worked full-time at an auto repair shop for five years. His entire family was in the United States and he had no ties to the Dominican Republic. Thus, it would have been entirely rational for Mr. Client to reject an arraignment offer that carried the penalty of mandatory deportation.[1]

Mr. Client's co-defendant, his U.S. citizen brother-in-law, rejected the same arraignment plea because he drove a delivery truck for a living, and a six month license suspension would

[1] This plea rendered Mr. Client ineligible for discretionary relief from deportation, called "cancellation of removal," because of the timing of the offense. *See* 8 U.S.C. § 1229b(a)(2)&(d)(1) (cancellation of removal requires seven years residence in the U.S., the accrual of which is stopped by the commission of a controlled substance offense). Thus, this plea virtually assured Mr. Client's deportation because the immigration judge is prohibited from cancelling deportation despite Mr. Client's strong equities. The *Padilla* duty extends to advice regarding eligibility for discretionary relief. *See People v. Ramos*, 100 A.D.3d 487 (1st Dep't 2012) (remanding for a hearing on defendant's allegation "that his counsel at the plea proceeding failed to inform him that a plea to criminal sale of a controlled substance in the third degree would subject him to automatic deportation without the possibility of discretionary relief from removal").

cause him to lose his job. His attorney eventually negotiated a plea to disorderly conduct (N.Y. Penal § 240.20) with a one year conditional discharge. The two defendants were quite similar – both first-time offenders with generally prosocial lifestyles (stable families, employment, and residences).[a] Mr. Client would have even offered a short jail sentence because avoiding deportation was so important to him. Thus, it is very likely that Mr. Prior Lawyer could have negotiated a plea to a disorderly conduct violation in Mr. Client's case.

Mr. Prior Lawyer failed to inform Mr. Client that the arraignment plea to a B misdemeanor controlled substance offense rendered him deportable,[b] and also failed to negotiate a reasonably available plea to disorderly conduct, a non-deportable offense. Additionally, the Court failed to adequately notify Mr. Client of the possibility of deportation. Each of these separate failures renders Mr. Client's guilty plea invalid under the federal and state constitutions. *See Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Baldi*, 54 N.Y.2d 137, 147 (1981); *People v. Peque, et al.*, 22 N.Y.3d 168 (2013). Thus, the Court must vacate the conviction for attempted criminal possession of a controlled substance in the seventh degree.[2] In that scenario, Mr. Client is prepared to enter a guilty plea to disorderly conduct (N.Y. Penal § 240.20), and to accept the sentence that the court deems appropriate, or to proceed to trial.

I. Mr. Prior Lawyer's advice to Mr. Client, a first time offender with significant family and employment ties to the U.S., to plead guilty at arraignment to a B misdemeanor controlled substance offense, without advising Mr. Client that the plea rendered him deportable, and Mr. Prior Lawyer's failure to negotiate a reasonably available plea to disorderly conduct, violated Mr. Client's right to the effective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel under the Sixth Amendment, Mr. Client must show that: 1) counsel's conduct fell below an objective standard of reasonableness, and 2) the defendant suffered prejudice as a result of the attorney's deficient performance. *Strickland v.*

[2] If the court finds that the attorney's performance violated either the federal or state constitution, the court must vacate the conviction. *See* N.Y. Crim. Proc. Law § 440.10(1)(h).

Washington, 466 U.S. 668. In the context of a defense attorney's error that causes a defendant to enter an ill-advised guilty plea, a defendant establishes 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). This is accomplished by demonstrating that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010); *People v. Picca*, 97 A.D.3d 170, 179 (2d Dep't 2012). Mr. Client has established both of the *Strickland* prongs via his 440 filing and the court must therefore vacate his misdemeanor conviction for attempted possession of a controlled substance.

A. Mr. Prior Lawyer's representation of Mr. Client fell below an objective standard of reasonableness.

Mr. Prior Lawyer's failure to advise Mr. Client of the mandatory deportation consequence of his arraignment plea to a controlled substance offense violated the standards enunciated by the Supreme Court in *Strickland* and *Padilla*. *See Padilla*, 559 U.S. at 374. Additionally, Mr. Prior Lawyer's failure to negotiate a plea agreement that would have avoided the penalty of deportation constitutes a separate ground of ineffectiveness. *See id*.; *see also Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (2012). Therefore, the court must find that Mr. Prior Lawyer's conduct fell below an objective standard of reasonableness, thus violating the first prong of *Strickland*.

i. Mr. Prior Lawyer's advice to Mr. Client, a first time offender with significant family and employment ties to the U.S., to plead guilty at arraignment to a B misdemeanor controlled substance offense, without advising Mr. Client that the plea rendered him deportable, fell below an objective standard of reasonableness.

Padilla made clear that a defense attorney's failure to provide accurate advice regarding the deportation consequences of a criminal conviction is a per se violation of the first prong of

Strickland, which requires that counsel's representation meets "an objective standard of reasonableness." *Strickland*, 466 U.S. at 688; *see also Padilla*, 559 U.S. at 366-68. The United States Supreme Court grounded its decision in *Padilla* in the "critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement" as supported by the Court's "longstanding Sixth Amendment precedents." *Id*. at 370, 374 (internal quotations omitted).

The petitioner in *Padilla*, a lawful permanent resident of the United States, pleaded guilty to transporting a large amount of marijuana. His attorney told him that he "did not have to worry about immigration status since he had been in the country so long." *Id*. at 359. The *Padilla* petitioner asserted, via a state post-conviction relief petition, that his attorney's conduct violated *Strickland* and the United States Supreme Court agreed, holding that "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." *Id*. at 360.

In reaching its decision, the Court explained that as of 1996, the "drastic measure" of deportation was "virtually inevitable for a vast number of noncitizens convicted of crimes." *Id*. (internal quotations omitted). The Court concluded that "accurate legal advice for noncitizens accused of crimes has never been more important" and "that, as a matter of federal law, deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id*. at 364. Thus, the Court recognized that advice regarding immigration consequences fell within the ambit of Sixth Amendment protections and applied the *Strickland* test to the petitioner's claim. *Id*. at 366.

Addressing the first prong of the *Strickland* test, whether counsel's performance fell below an objective standard of reasonableness, the Court surveyed standards that existed prior to the *Padilla* petitioner's 2002 plea and concluded that "the weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." *Id*. at 367. It noted that it had "previously recognized that 'preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *Id*. at 368, quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001). In concluding that counsel's performance was deficient, the Court noted that the "terms of the relevant immigration statute are succinct, clear and explicit" and that, by simply reading the statute, counsel could have ascertained that the petitioner's plea would render him deportable. *Id*. Thus, the petitioner's allegations satisfied the first prong of *Strickland*. *Id*. at 369.

The Court rejected the government's argument that counsel had no obligation to provide immigration advice and that the application of *Strickland* should be limited to the petitioner's claim that he received erroneous advice. *Id*. at 369-70. The Court cited *Strickland* for the proposition that "acts or omissions" can violate the Sixth Amendment, and found that in this context there was no "relevant difference" between acts of commission and omission. *Id*. at 370. Rather, the Court noted that not only was silence "fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement . . . " but it would also "deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available." *Id*. at 370-71 (internal quotations omitted). In conclusion, the Supreme Court stated that "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" mandate

that counsel must inform the defendant of the deportation consequence of a guilty plea. *Id*. at 374.

The Affidavits of Mr. Client and Mr. Prior Lawyer corroborate each other, and establish that Mr. Prior Lawyer failed to advise Mr. Client that his guilty plea to attempted possession of a controlled substance rendered him deportable. The failure to provide advice on immigration consequences is further corroborated by the lack of file notes regarding immigration advice or research.

Mr. Prior Lawyer is charged with the duty of reading the same statute at issue in *Padilla,* 8 U.S.C. § 1227(a)(2)(B)(i), which reads "[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance ..., other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." The *Padilla* Court found this statute "succinct, clear, and explicit," and described the duty of counsel in the following manner: "The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." *Padilla,* 559 U.S. at 369.[c] This failure to provide accurate advice regarding deportation fell below the standard of a reasonably competent defense attorney in 2009. *See People v. Garcia*, 907 N.Y.S.2d 398, 400 (Sup Ct, Kings County 2010) (failure to advise regarding immigration consequences of controlled substance plea in 2008 constituted deficient performance); *People v. Mercado*, 32 Misc 3d 1220(A), 2011 NY Slip Op 51373(U) (Sup Ct, Bronx County 2011) (same, 2004 plea to controlled substance offense); *People v. Mercedes*, 2012 N.Y. Slip Op. 52019(u) (Sup Ct, NY County 2012) (same, 2002 plea to

controlled substance offense); *People v. DeJesus*, 935 N.Y.S.2d 464 (Sup Ct, NY County 2011) (hereinafter *DeJesus III*) (same, 1999 plea to controlled substance offense).

It is of no import that Mr. Client did not volunteer his LPR status to Mr. Prior Lawyer. *See People v. Chacko*, 99 A.D.3d 527 (1st Dep't 2012); *Picca*, 97 A.D.3d at 179 (2d Dep't 2012) ("to require that defendants apprehend the relevance of their non–citizenship status, and affirmatively provide this information to counsel, would undermine the protection that the *Padilla* Court sought to provide to noncitizen defendants [and] . . . would lead to the absurd result that only defendants who understand that criminal convictions can affect their immigration status would be advised of that fact").[d] The *Chacko* Court directly addressed the issue:

> The People would place the burden on a defendant to show that his or her attorney was aware, or should reasonably have been aware, that the client was a noncitizen in order to trigger the obligation to give advice regarding immigration consequences. However, we see no reason to limit *Padilla* to cases where the client volunteers that he or she is not a U.S. citizen, or some other circumstance casts doubt on the client's U.S. citizenship. Instead, the burden of asking the client about his or her citizenship should rest on the attorney. A defendant who is unaware that his or her immigration status is relevant to the criminal proceedings "would have no particular reason to affirmatively offer information regarding his or her immigration status to counsel."

Chacko, 99 A.D.3d at 527 (citing *Picca*, 97 A.D.3d at 179). Therefore, the fact that Mr. Prior Lawyer, pursuant to his practice in 2009, neglected to ask Mr. Client whether he was a citizen provides further proof that Mr. Prior Lawyer's representation fell below an objective standard of reasonableness.

Mr. Client's case is on point with *Padilla*; he pled guilty to a controlled substance offense that rendered him deportable under the same federal statute. The professional standards described in *Padilla* established the duty of counsel to provide accurate advice regarding the deportation consequence of a guilty plea in 2009.[e] Thus, Mr. Prior Lawyer had a duty to advise Mr. Client that his guilty plea to attempted possession of a controlled substance carried the

additional penalty of virtually certain deportation. The uncontroverted evidence establishes that Mr. Prior Lawyer failed to do so. Therefore, Mr. Client has satisfied the first prong of *Strickland*.

a. *Padilla* applies to Mr. Client's conviction because it was not final on 3/31/10.[f]

Under federal retroactivity doctrine, convictions that are not yet final get the benefit of "new" rules of constitutional procedure. *See Griffith v. Kentucky*, 479 U.S. 314 (1987). Therefore, to the extent that *Padilla* is arguably a "new" rule, *see Chaidez v. United States*, 133 S.Ct. 1103 (2013), it nevertheless applies to Mr. Client's conviction because the time to file a direct appeal had not yet expired. *See People v. Varenga*, __ N.Y.S.2d __, 2014 WL 840928 (2d Dep't March 5, 2014). The court entered judgment on Mr. Client's conviction on March 25, 2009, and the deadline for filing a notice of appeal under NYCPL 460.30 was on April 24, 2010. *Padilla* was decided on March 31, 2010; thus Mr. Client's conviction was not final until after the issuance of *Padilla* and the rule articulated therein applies to his case.

ii. Mr. Prior Lawyer's failure to negotiate a plea agreement to a disorderly conduct violation was objectively unreasonable.

Mr. Prior Lawyer failed to negotiate a reasonably available plea to a disorderly conduct violation, which Mr. Client's co-defendant obtained fairly easily; this constitutes a separate ground of ineffectiveness under *Strickland*. *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 Padilla*, 559 U.S. at 373; *Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (2012). Therefore, Mr. Prior Lawyer's failure to affirmatively negotiate to avoid deportation violates the first prong of *Strickland*.

The *Padilla* Court addressed the question of how 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.

559 U.S. at 373. 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*, discussed below, mandate that counsel negotiate effectively to avoid or minimize immigration consequences, in the same way that counsel has a duty to negotiate to avoid or minimize criminal penalties.

Counsel has a Sixth Amendment duty to participate effectively in the plea bargaining process. *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." *Picca*, 97 A.D.3d at 177 (internal quotations omitted), citing to *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 that is reasonably likely to be attractive to the prosecutor. The *Frye* Court recognized that plea bargaining benefits 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.

Under the foregoing analysis, Mr. Prior Lawyer's representation of Mr. Client fell below an objective standard of reasonableness in that Mr. Prior Lawyer did not attempt to negotiate a reasonably available disposition, a disorderly conduct violation, that avoided the penalty of deportation. Instead, Mr. Prior Lawyer recommended that Mr. Client accept an arraignment plea to a controlled substance offense that virtually ensured his deportation. Mr. Client's co-

defendant, who was similarly a first-time offender with prosocial community ties, rejected the same arraignment plea to avoid the license suspension that would negatively impact his employment. His attorney was able to obtain a plea to a disorderly conduct violation by explaining to the DA that the co-defendant would lose his job if his license was suspended for six months. Mr. Client would have been willing to agree to the additional penalty of community service, probation, or even jail time if the DA desired it, in exchange for the non-deportable resolution. This was a reasonable alternative that Mr. Prior Lawyer had a duty to suggest; his failure to do so rendered his representation incompetent under *Strickland*.

B. Mr. Client has satisfied *Strickland's* requirement of prejudice because he has demonstrated a reasonable probability that, but for counsel's deficient performance, 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. Ramos*, 100 A.D.3d 487 (1st Dep't 2012); *People v. Reynoso*, 88 A.D.3d 1162 (3rd 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 Picca*, 97 A.D.3d at 177 (inquiry is whether the "ineffective performance affected the outcome of the plea process"). Rather, the defendant merely has to show that the decision to reject the plea and proceed to trial would have been "rational under the circumstances." *Padilla*, 559 U.S. at 372; *Picca*, 97 A.D.3d at 180; *see also Chacko*, 99 A.D.3d 527. Courts have held that, because of the severity of deportation, it is "rational" for a defendant to decide to proceed to trial even at the risk of a life sentence, or other serious punishment. *See*

Picca, 97 A.D.3d at 184-86; *DeJesus III*, 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*, No. 1104/04 (Sup Ct, NY County, Nov. 22, 2010, Ward, J.) (attached). A defendant can also demonstrate the rational nature of the decision to reject the 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 (2011) (internal quotations omitted); *accord Picca*, 97 A.D.3d at 186; *Chacko*, 99 A.D.3d at 527-28.

i. Mr. Client suffered prejudice because he would have rationally rejected the plea agreement had his attorney advised him that the plea rendered him subject to deportation.

Mr. Client avers that that he would have rejected the plea agreement and proceeded to trial if he had known that the guilty plea would render him deportable. This would have been a rational decision because of the following facts, which are established by the record evidence and the affidavits of Mr. and Mrs. Client and Mr. Co-Defendant: 1) at the time of the guilty plea, Mr. Client had strong family ties to the United States consisting of his pregnant United States citizen wife and his entire immediate family, and virtually none to the Dominican Republic; 2) Mr. Client had a solid full-time employment history in the United States; 3) Mr. Client asserted that he was innocent of the charge; 4) Mr. Client's co-defendant rejected the same arraignment plea offer and was able to obtain a plea to disorderly conduct fairly easily; 5) Mr. Client was willing to offer probation or even jail time if needed to convince the DA to agree to the non-deportable resolution; 6) Mr. Client's co-defendant was willing to testify that the cocaine was his, and not Mr. Client's (thus defeating the presumption in N.Y. Penal Law § 220.25 that both occupants in the car were in knowing possession of the cocaine); 7) Mr. Client had a suppression issue to litigate - he maintained that he had not gone through the stop sign and so the stop was

not justified; and 8) Mr. Client's maximum sentencing exposure if convicted was one year in jail, which as a first-time offender he was extremely unlikely to receive. Based on the foregoing facts, Mr. Client has established that he suffered prejudice from Mr. Prior Lawyer's failure to tell him that the guilty plea carried the additional penalty of virtually certain deportation.

People v. Picca, in which the Court 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, offers strong support for Mr. Client's claim of prejudice. *See id*. at 183-87. 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*. at 175. 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*. 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 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*. at 184-85. Given those circumstances, the Court found that the decision to reject the plea agreement could have been rational despite strong evidence supporting the criminal offenses, 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 a prior offense that rendered the defendant subject to mandatory deportation. *See id.* at 184-86. The 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*. at 183. 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*. at 185. 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. *See id*. at 188; *accord Chacko*, 99 A.D.3d at 527 (remanding for a hearing for the trial court to consider whether the defendant "could have rationally rejected the plea offer under all the circumstances of the case, including the serious consequences of deportation, defendant's incentive to remain in the United States, the strength of the People's case and defendant's sentencing exposure").

Mr. Client's situation closely resembles that of the *Picca* defendant, in that Mr. Client had resided in the United States for many years at the time of his guilty plea, had strong family ties and an employment history in the United States, and virtually no connection to his country of origin. Furthermore, Mr. Client risked a much shorter prison sentence after trial – 1 year compared to 25 years for the *Picca* defendant – and did not have the complicating factor of a prior deportable conviction. Thus, the analysis set forth in *Picca* mandates a finding that Mr. Client suffered prejudice from Mr. Prior Lawyer's deficient representation.

People v. Paredes, No. 1104/04 (Sup Ct, NY County, Nov. 22, 2010, Ward, J.) (attached) also provides strong support for Mr. Client's assertion of prejudice. The *Paredes* Court, in

assessing prejudice stemming from a guilty plea to possession of a controlled substance that rendered the defendant deportable, examined the defendant's ties to the United States, which consisted of his entire family. The defendant testified that "had he known the plea would cause him to be deported he would have fought the case." The defendant asserted no viable defense to the two counts of possession of a controlled substance that he initially faced, or a viable alternative non-deportable resolution, and defendant's trial attorney testified that the defendant in a pre-plea meeting had "indicated that the facts as set forth in the complaint were accurate." Nevertheless, the Court found prejudice and vacated the defendant's conviction. The prejudice shown by Mr. Client is substantially stronger than the prejudice shown by the *Paredes* defendant because Mr. Client has asserted his innocence, had a viable defense to the charge and a possible suppression issue to litigate, and had a reasonably alternative non-deportable resolution. Thus, this court must find that Mr. Client suffered prejudice from Mr. Prior Lawyer's failure to provide advice regarding deportation. *See also People v. Hasan*, 2005QN056552, slip op. at 12-13 (Queens Crim. Dec. 26, 2012, Mullings, J.) (attached) (vacating plea to N.Y. Penal Law § 220.03 where defendant had a suppression issue to litigate , as well as a possible defense, and noting that it would have been rational to proceed to trial while using these to attempt to negotiate a non-deportable resolution) .

Mr. Client's case is factually and legally quite similar to *DeJesus III*, where the court found that the defendant suffered prejudice from her attorney's failure to inform her that her plea to sale of a controlled substance rendered her deportable, because a rational person in the defendant's circumstances would have rejected the plea. *See DeJesus III*, 935 N.Y.S.2d 464, *15 (Sup Ct, NY County 2011). The *DeJesus III* defendant, a Lawful Permanent Resident, pled guilty to attempted criminal sale of a controlled substance in exchange for dismissal of a charge

of possession of a controlled substance and a sentence to 5 years of probation. *See id*., *2. To support its finding of prejudice, the *DeJesus III* 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*., *13-15. The *DeJesus III* Court acknowledged that although the defendant's chances of success at trial were fairly slim, the prosecution's case was "not impermeable," and there were triable issues such as identity, and whether the defendant was the seller or buyer in the transaction. *Id*., *12. The *DeJesus III* Court also compared the defendant's sentence pursuant to the plea agreement (5 years of probation with intensive supervision) to her likely sentencing exposure after trial, one to three years imprisonment, and found that risk of trial was reasonable given the possibility it afforded of avoiding deportation. *See id*., *13. Thus, the *DeJesus III* Court found that the defendant had established prejudice flowing from the lack of advice regarding deportation. *See id*., *17-18.

The prejudice assessment in Mr. Client's case is quite similar: 1) Mr. Client's case also presented triable issues; 2) Mr. Client's maximum sentencing exposure after trial was 1 year, which the court would almost certainly not impose because Mr. Client was a generally pro-social first time offender; and 3) Mr. Client had equally strong ties to the U.S. and virtually no ties to the Dominican Republic. Unlike the DeJesus *III* defendant, Mr. Client had the added benefit of a reasonably available non-deportable resolution. A defendant in Mr. Client's situation, like the *DeJesus III* defendant, would have rationally rejected a plea agreement that rendered him deportable in favor of one that did not carry that penalty, or in favor of a trial if the non-deportable resolution was not acceptable to the prosecutor. Thus, this court must find that Mr. Client suffered prejudice from Mr. Prior Lawyer's failure to advise him that the plea to attempted

possession of a controlled substance carried the additional penalty of virtually certain deportation.

Mr. Client has established the requisite prejudice to support a finding that Mr. Prior Lawyer provided ineffective assistance of counsel under the Sixth Amendment, in that Mr. Client's decision to reject the arraignment plea and proceed to trial, or seek a non-deportable resolution, would have been rational under the circumstances. Therefore, the court must allow Mr. Client to withdraw his guilty plea to attempted possession of a controlled substance.

ii. Mr. Client suffered prejudice because there was a reasonable probability that the outcome would have been different if Mr. Prior Lawyer had negotiated effectively in light of the immigration consequences.

To establish prejudice where defense counsel has been ineffective in plea negotiations, "it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable." *Missouri v. Frye*, 132 S.Ct. 1399, 1409 (2012). 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." *Id.* The prejudice analysis in the instant case is nearly identical to the analysis described in *Frye*; the only difference is that here the court must evaluate whether there is a reasonable probability that the prosecutor would have accepted the defendant's counter-offer of a plea bargain. If the court finds a reasonable probability that the prosecutor would have done so, the prejudice analysis continues with the *Frye* inquiry into whether the prosecutor would have withdrawn the acceptance, and whether the trial court would have accepted the plea bargain. This analysis is done within the predictable confines of the jurisdiction's plea bargaining practices.[g] *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 County 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 (1st Dep't 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"). These cases support Mr. Client's assertion that he suffered prejudice from Mr. Prior Lawyer's failure to negotiate effectively in light of the deportation penalty.

In the instant case, Mr. Prior Lawyer failed to suggest a plea to a disorderly conduct violation instead of attempted criminal possession of a controlled substance. As asserted above, the prosecutor was likely to accept such a resolution, as he did so in Mr. Client's co-defendant's case. Furthermore, Mr. Client was willing to offer community service, probation, or even jail time in exchange for a non-deportable resolution. Based on the foregoing, the court should find that Mr. Client has demonstrated a reasonable probability that the outcome of the plea process would have been different absent counsel's ineffectiveness. *See Picca*, 97 AD3d at 186 ("[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"); *Chacko*, 99 AD3d at 527-28 ("[I]if immigration consequences had been factored into the plea bargaining process, counsel might have been able to negotiate a different plea agreement that would not have resulted in automatic deportation"). Therefore, the court must vacate Mr. Client's guilty plea to attempted criminal possession of a controlled substance.

iii. The prejudice from Mr. Prior Lawyer's error in advising Mr. Client to accept an arraignment plea that provided little benefit from a criminal justice perspective, and virtually assured his deportation, as well as Mr. Prior Lawyer's failure to negotiate a plea to disorderly conduct, is not erased by the court's mention of immigration status during the plea colloquy.[h]

Towards the end of the plea colloquy, the court made the following statement: "[I]f this plea has a negative effect on your immigration status, you would not be allowed to withdraw your plea." The court's belated reference to immigration status did not cure the prejudice from Mr. Prior Lawyer's deficient advice to accept an arraignment plea that offered little benefit to Mr. Client from a criminal justice perspective, and virtually guaranteed his deportation, as well as Mr. Prior Lawyer's failure to zealously advocate for a plea to disorderly conduct. The roles of the lawyer and the court are fundamentally different such that a court notification during the plea colloquy cannot substitute for individualized advice and advocacy during the plea negotiation process. *See People v. Peque, et al.*, 22 N.Y.3d 168, 190 (2013) ("The right to effective counsel guarantees the defendant a zealous advocate to safeguard the defendant's interests, give the defendant essential advice specific to his or her personal circumstances and enable the defendant to make an intelligent choice between a plea and trial, whereas due process places an independent responsibility on the court to prevent the State from accepting a guilty plea without record assurance that the defendant understands the most fundamental and direct consequences of the plea").

Besides the legal distinction, the court warning did not cure the prejudice flowing from Mr. Prior Lawyer's deficient representation for the following reasons. First, Mr. Client had already told the court that he wished to plead guilty, and had waived all of his constitutional rights; it did not occur to Mr. Client that he should or could pull out of the plea agreement at that time. Second, the court's statement was not an accurate description of the law; in fact, as *Padilla* established, a defendant like Mr. Client who received no deportation advice could withdraw his guilty plea via a 440 motion. Third, the court's vague statement did not inform Mr. Client that he was entering a guilty plea to a deportable offense. The court did not use the term

"deportation," nor did the court convey to Mr. Client that deportation was a virtual certainty as a result of the guilty plea.

General court warnings have been deemed insufficient to inform a defendant that the conviction will render him deportable. This is often because the court warnings do not articulate the virtual certainty of deportation that exists when a defendant pleads guilty to a deportable offense, although at least one court has held that a court admonishment can never cure the prejudice that flows from the attorney's failure to provide accurate advice regarding the immigration consequences of the plea. *See v State v. Favela*, 311 P.3d 1213, *9 (N.M. Ct. App. 2013) *cert. granted*, 313 P.3d 251 (N.M. Oct. 18, 2013) (No. 34,311) ("court's warning or advisement to a defendant regarding possible immigration consequences of accepting a plea is never, by itself, sufficient to cure the prejudice that results from ineffective assistance of counsel in that regard"); *United States v. Akinsade*, 686 F.3d 248, 254 (4th Cir. 2012) (admonishment that does not "properly inform" defendant as to deportation consequence of plea is insufficient to cure counsel's error); *Hernandez v. State*, 124 So.3d 757, 763 (Fla. 2012) (where deportation consequence is "truly clear" as a result of plea to controlled substance offense, equivocal warning from the trial court cannot cure prejudice flowing from counsel's deficient advice); *People v. Garcia*, 907 N.Y.S.2d 398 (Sup Ct, Kings County 2010); *People v. DeJesus*, 33 Misc 3d 1225(A), 2011 NY Slip Op 52112(U) (Sup Ct, NY County 2011) (hereinafter *DeJesus II*); *State v. Sandoval*, 249 P.3d 1015 (Wash. 2011) (defendant prejudiced by inaccurate advice from counsel regarding possibility of deportation despite warning in plea statement, confirmed during colloquy); *State v. Nunez-Valdez*, 200 N.J. 129 (2009) (guilty plea to fourth degree criminal sexual conduct involuntary despite a written court warning that "you may be deported by virtue of your plea of guilty").

Even a strong statement regarding possible deportation has been deemed insufficient to cure this type of prejudice. *See Garcia*, 907 N.Y.S.2d 398 (Sup Ct, Kings County 2010). The defendant in *Garcia*, like Mr. Client, pled guilty to possession of a controlled substance in the 7th degree. *See id*. at 399. The defense attorney failed to advise the *Garcia* defendant that the conviction rendered him deportable. *See id*. at 399-400. The trial court made the following statements:

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

Id. at 400. The *Garcia* court focused on the fact that the warning by the court was general, and held that it did not cure the prejudice caused by the lack of immigration advice from defense counsel. *See id*. at 406-07. The court's statement regarding the possibility of a "negative effect upon . . . immigration status" in Mr. Client's case was far less strong and specific than the warning in *Garcia*; thus, the court's mention of immigration status towards the end of the plea colloquy does not erase the prejudice flowing from Mr. Prior Lawyer's deficient representation.

Likewise, a court's inaccurate rendition of New York's statutorily-required notification of immigration consequences does not cure the prejudice caused by a lack of advice regarding deportation in the context of a controlled substance conviction. *See DeJesus II*, 33 Misc 3d 1225(A), 2011 NY Slip Op 52112(U) (Sup Ct, NY County 2011). The *DeJesus II* Defendant, like Mr. Client, contended that the judge's deportation warning did not mitigate counsel's failure, since she was confused by it. *See id*., *13. In analyzing the effect of the warning on the prejudice prong, the *DeJesus II* Court first noted that "on hearing the judge's admonition that

'since you were not born in this country, I must advise you that if you are not a citizen or a resident alien, as a result of the plea of guilty, you may be deported,' defendant . . .told the judge that she understood him, rather than questioning or challenging him about it. *Id.* The *DeJesus II* Court pointed out that the defendant "was attentive enough to have challenged the judge on his recitation of the facts of the criminal transaction when she felt he had misrepresented her role in it, but she did not raise any question with him regarding his statement as to deportation which she now claims to have found confusing." *Id.* However, the court concluded that "the advisory provided by the court was inaccurate, and reflected neither the text of CPL §220.50(7) nor the removal law of the United States, which provides for deportation of all non-citizens, including legal permanent residents, who commit aggravated felonies." *Id.* The court held that due to its misleading, inaccurate nature, the warning given by the judge did not "in any way" mitigate "counsel's own failure to provide accurate advice on the subject." *Id.* The *DeJesus II* case is right on point with Mr. Client's case, in which the court made a vague, inaccurate statement about immigration status, not even mentioning "deportation."

Mr. Client asserts a separate claim of ineffectiveness based on Mr. Prior Lawyer's failure to negotiate a reasonably available non-deportable resolution. The prejudice flowing from this error cannot be cured by the court's mention of immigration status toward the end of the change of plea hearing, because plea negotiations had concluded at that point.

For all the foregoing reasons, the court's mention of a "negative effect upon . . . immigration status" towards the end of the plea colloquy does not eliminate the prejudice caused by Mr. Prior Lawyer's recommendation of an arraignment plea that carried the penalty of deportation, or his failure to negotiate a reasonably available non-deportable resolution.

Therefore, the court must find that Mr. Client suffered prejudice as a result of Mr. Prior Lawyer's errors.

Mr. Client has established that Mr. Prior Lawyer's representation violated the Sixth Amendment. Therefore, the court must vacate Mr. Client's guilty plea to attempted possession of a controlled substance. In that event, Mr. Client is prepared to 1) enter a guilty plea to a disorderly conduct violation, and to accept the sentence that the court deems appropriate, or 2) go to trial on the charge.

II. The defense attorney's conduct in failing to tell Mr. Client that the plea was to a deportable offense, and failing to negotiate a resolution that avoided deportation, in the context of counsel's representation of defendant as a whole, violates the "meaningful representation" standard.

Under the New York Constitution, to establish a claim of ineffective assistance the defendant must show that counsel failed to provide "meaningful representation." *People v. Baldi*, 54 N.Y.2d 137, 147 (1981) ("So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met"). The New York Constitution may not have required in 2009 that a defense attorney inform a non-citizen defendant of every immigration consequence of a guilty plea, or negotiate to avoid immigration consequences in every case; however, information regarding deportation, at a minimum, was required in a case where the defendant was focused on establishing a life in the United States, and maintaining family and employment ties. *See DeJesus III*, 935 N.Y.S.2d 464, *18-20 (Sup Ct, NY County 2011); *People v. Burgos*, 950 N.Y.S.2d 428, 448 (Sup Ct, NY County 2012).

The *DeJesus III* defendant was indicted in 1999 on two B felonies, 220.39 (sale of a controlled substance) and 220.16 (possession of a controlled substance). *See DeJesus III*, 935

N.Y.S.2d 464, *2. Following the advice of counsel, and unaware of the deportation consequence, she pled guilty to attempted sale of a controlled substance, a C felony, in full satisfaction of the indictment. *See id.* She received a 5 year probation sentence. *See id.* The court acknowledged that the defense attorney "secured a favorable, non-incarceratory plea bargain" for a defendant facing a B felony indictment. *Id*., *19. However, the court concluded that "[g]iven defendant's focus at the time of the representation on establishing a life for herself and her children in the United States, and maintaining her family and employment ties in this country, counsel's shortcomings were serious enough to deprive his client of the meaningful representation to which she was entitled under the state constitution." *Id.*

The *Burgos* case is quite similar to *DeJesus*. The indictment was identical, as was the resolution. *See Burgos* at 432, 435. The *Burgos* plea was entered significantly earlier in time, in 1988. *See id*. at 432. The defense attorney in *Burgos* failed to tell the defendant, who lacked lawful status, that the guilty plea would make him ineligible to get a green card. *See id*. at 435-36. The court engaged in a similar analysis to hold that the defense attorney's representation, viewed as a whole, violated the "meaningful representation" standard. *Id*. at 448.

Mr. Client's case is remarkably similar to *Burgos* and *DeJesus*. Mr. Client had built a life for himself in the United States; he was married, he and his wife were expecting their first child, his entire family was here, and he had enjoyed full-time employment with the same company for five years. He fully intended to maintain and improve his life in the United States. Mr. Client also had a defense to present at trial, and a suppression issue to litigate. The foregoing facts rendered imprudent Mr. Prior Lawyer's advice to take an arraignment plea that assured Mr. Client's deportation. Thus, the failure of Mr. Client's attorney to tell him that the plea rendered him deportable, and to negotiate a reasonably available non-deportable resolution,

viewed in the context of the representation as a whole, falls short of the "meaningful representation" required under the New York Constitution.

People v. Ford, 86 N.Y.2d 397 (1995) does not contradict this conclusion. The *Ford* Court, analyzing whether the non-citizen defendant received "meaningful representation," focused on the fact that the defense attorney had accomplished the dismissal of two felony charges, and reduced the defendant's sentencing exposure from thirty years to two to six years. Given those accomplishments, the Court held that counsel provided meaningful representation despite the failure to warn the defendant of the possibility of deportation. Given the meager benefit obtained by Mr. Client's plea agreement, which was vastly outweighed by the consequence of virtually certain deportation, *Ford* does not contradict the conclusion that Mr. Prior Lawyer failed to provide "meaningful representation."

Furthermore, *Ford's* statement that defense counsel in that scenario had no duty to warn the defendant "of the possibility of deportation" does not control Mr. Client's claim that he was denied "meaningful representation," for three reasons. First, the legal landscape changed dramatically soon after the *Ford* decision, with the passage of harsh federal immigration laws in 1996. *See Antiterrorism and Effective Death Penalty Act of 1996*, Pub. L. 104-132, 100 Stat 1214; *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. 104-208, 100 Stat 3009. In light of these drastic changes in immigration law, the Court of Appeals recently overruled the portion of *Ford* that addressed the court's obligation to warn a defendant of possible deportation as a consequence of the plea:

> *Ford* rested largely on the weight of authority at the time, i.e., prior to the 1996 amendments to the INA, which held deportation to be a collateral consequence of a guilty plea (*see e.g. United States v. Parrino*, 212 F.2d 919, 921–922 [2d Cir 1954]).

> However, the weight of authority and the will of Congress have shifted since our decision in *Ford.* To the extent *Ford* stands for the proposition that the court's complete omission of any discussion of deportation at the plea proceeding can never render a defendant's plea involuntary, that discrete portion of our opinion in *Ford* "no longer serves the ends of justice or withstands the cold light of logic and experience" (*Policano,* 7 N.Y.3d at 604, 825 N.Y.S.2d 678, 859 N.E.2d 484). *Ford* 's discussion of deportation was rooted in a legal and practical landscape that no longer exists, and the realities of the present-day immigration system have robbed it of much of its logical and experiential foundation. Given the nearly inevitable consequence of deportation, it no longer serves the ends of justice to perpetually uphold, without regard to the significance of deportation to the individual's decision to plead guilty, every guilty plea of a non-citizen defendant entered in ignorance of the likelihood of removal from this country. We therefore overrule only so much of *Ford* as suggests that a trial court's failure to tell a defendant about potential deportation is irrelevant to the validity of the defendant's guilty plea.

People v. Peque, et al., 22 N.Y.3d 168, 195-96 (2013). The Court's discussion of "meaningful representation" in *Ford* was tied to the specific facts and legal context of the representation, and so a finding that Mr. Prior Lawyer failed to provide meaningful representation does not similarly require that the court overrule that portion of *Ford*. However, the *Peque* Court gave tremendous importance to the 1996 changes in immigration law as well as the increased coordination between immigration enforcement and the N.Y. criminal justice and correctional systems. *See id*. at 187-89. The Court noted that the 1996 laws greatly expanded the category of offenses resulting in automatic (not possible) deportation, and removed much discretion from the Attorney General to grant relief from removal for immigrants with convictions, even minor ones. *See id* at 187-88; *see also Padilla v. Kentucky*, 559 U.S. 356, 363-64 (2010).[3] These changes render inapposite *Ford's* "meaningful representation" discussion as it was tied to the quality of the representation "viewed in totality and **as of the time of the representation**." *See Baldi*, 54 N.Y.2d at 147 (emphasis added). Thus, given the sea change in the law in 1996, *Ford's*

[3] The only question for a defendant like Mr. Client is when ICE would encounter him and place him in removal proceedings, not whether ICE would do so. In the present day, with greater ICE-law enforcement collaboration, defendants like Mr. Client are identified by ICE upon arrest, when fingerprinted, so that deportation becomes absolutely certain as opposed to virtually certain. *See* http://www.ice.gov/secure_communities/.

conclusion as to what the N.Y. Constitution required in 1995 is virtually irrelevant to the analysis of what it required in 2009.

Second, the *Ford* Court engaged in no analysis to support its conclusion that deportation advice was not part of "meaningful representation." Had the *Ford* Court conducted a thorough analysis, it would have discovered a wealth of New York standards and resources that indicated that "meaningful representation" comprised advice about deportation. *See People v. Burgos*, 950 N.Y.S.2d 428, 441 (Sup Ct, N.Y. County 2012) ("treatises dating back to 1982 . . . support the concept that defense attorneys have an affirmative duty to advise criminal defendants of the immigration consequences of their pleas," citing 3 *ABA Standards for Criminal Justice* 14–3.2 Comment, 75 [2d ed. 1982] and James E. Bond, *Plea Bargaining & Guilty Pleas* § 3.46 [1982]); *People v. Bennett*, 903 N.Y.S.2d 696, 701 (Crim Ct, Bronx County 2010) ("[T]he New York State Bar Association has been publishing articles advising criminal attorneys to study and advise their clients regarding the immigration consequences of guilty pleas and criminal convictions since 1989," citing Bendik and Cardoso, *Immigration Law Considerations for the Criminal Defense Attorney*, 61 N.Y. St. B.J. 33 (July 1989) and Muldoon, *Collateral Effects of a Criminal Conviction*, 70 N.Y. St. B.J. 26 (July/ August, 1998). There were myriad additional resources available to New York defense attorneys prior to 1995. *See* Sarah M. Burr, *Immigration Consequences of Criminal Convictions for Non-Citizen Clients*, 1990/1991 (training materials prepared for Criminal Defense Division of The Legal Aid Society of the City of New York); Kari Converse, *Criminal Defense of Non-Citizens, The Judicial Recommendation Against Deportation*, Mouthpiece: Newsletter of the New York State Association of Criminal Defense Lawyers, Vol. 3 No. 1, June 1990; Marvin E. Schechter, *Aliens, Drug Convictions and the Certificate of Relief from Civil Disabilities*, New York State Defenders Association Public

Defense Backup Center Report, Vol. III No. 3, Mar. 1988; Margaret McManus, *Immigration Consequences of Criminal Conduct,* Sept. 1985 (training materials prepared for Criminal Defense Division of the Legal Aid Society of New York); Training: *Immigration Law for the General and Advanced Practitioner,* New York State Bar Association, New York, May 1984.

Third, the New York criminal defense bar reacted conscientiously to the draconian immigration laws passed in 1996 such that even if advice about deportation was not required in New York in 1995, by 2009 the requirement that defense attorneys advise their clients about immigration consequences had become part of "meaningful representation." *See* Marvin E. Schechter, *New and Severe Consequences of Criminal Convictions*, New York State Defenders Association Public Defense Backup Center Report, Vol. XI No. 6, July 1996; Training: *Changes in Law Have Dire Consequences for All Immigrants in Criminal Court*, ACLU Immigrants' Rights Project, Nov. 20, 1996; *Criminal Immigration Practice Tips for Criminal Defense Attorneys* (Immigrant Defense Project, 1997-2009); Manuel D. Vargas, *Representing Immigrant Defendants in New York, Including a Quick Reference Chart for New York Offenses* (Immigrant Defense Project *et al.*, 1998-2011); Training: *Immigration Consequences of New York Criminal Dispositions,* New York State Defenders Association, Albany, N.Y. (May 16-17, 2003); Training: *Immigration Consequences of Criminal Dispositions*, New York State Association of Criminal Defense Lawyers (Sept. 2004); Training: Linda Kenepaske, *The Intersection of Criminal & Immigration Law – What You Don't Know May Hurt Your Client*, New York City Bar Association, CLE, Feb. 18, 2009; Training: *The Criminal Lawyer's Guide to Immigration Law: Questions and Answers*, Second Edition, New York City Bar Association, CLE, May 29, 2009; Carmen Maria Rey, *Immigration Consequences of Criminal Behavior*, The New York Immigration Coalition, Immigrant Concerns Training Institute, June 16, 2009.

For all these reasons, the portion of *Ford* that addresses the provision of information regarding possible deportation does not aptly describe "meaningful representation" when Mr. Client entered his guilty plea in 2009. Mr. Prior Lawyer failed to provide meaningful representation to Mr. Client when he advised him to accept an arraignment plea to a controlled substance offense that rendered him deportable, and failed to negotiate a reasonably available non-deportable resolution. Therefore, the court must vacate Mr. Client's conviction.

III. The Court's failure to issue a notification regarding possible deportation renders Mr. Client's plea invalid under the federal and state constitutions.[i]

The court's failure to notify the defendant that the plea may result in his deportation presents a separate ground for vacatur.[4] *See Peque*, 22 N.Y.3d 168 (state and federal due process requires a trial court to notify a non-citizen defendant that he may be deported as a result of a felony plea). Although the *Peque* decision did not address the applicability of such a rule to misdemeanor pleas, *see id*. at 197 n.9 ("[g]iven that defendants were convicted of felonies here, we have no occasion to consider whether our holding should apply to misdemeanor pleas"), the Court's reasoning applies with equal force to misdemeanor controlled substance convictions. The Court's due process analysis does not distinguish between felony and misdemeanor drug offenses, noting that the INA does not either: "[U]nder the current version of the INA, an alien may be deported for a wide array of crimes, including most drug offenses." *Id*. at 187; *see also* 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance ..., other than a single offense

[4] The trial judge did not notify Mr. Client that the conviction may subject him to deportation, and neither did Mr. Client's attorney. As in the case of defendant Diaz, Mr. Client was unaware of the possibility of deportation during the plea and sentencing proceedings, and accordingly had no opportunity to withdraw his plea based on the court's failure to notify him of potential deportation. *See Peque*, 22 N.Y.3d at 183. Thus, like defendant Diaz, Mr. Client's claim falls within the "narrow exception to the preservation doctrine." *Id.*

involving possession for one's own use of 30 grams or less of marijuana, is deportable"); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. Davis L.Rev. 277, 298 (2011) (noting that "[n]umerous misdemeanor drug convictions . . . lead to automatic deportation for non-citizens"). In this case, due to the timing of the offense, Mr. Client is subject to virtually automatic deportation because he is ineligible for the most common form of relief, cancellation of removal. *See* 8 U.S.C. § 1229b(a)(2)&(d)(1) (cancellation requires seven years residence in the U.S., the accrual of which is stopped by the commission of a controlled substance offense). Thus, this guilty plea assured Mr. Client's deportation in the same way that the guilty pleas of the *Peque* defendants assured their deportation.

The statement issued by the judge in the instant case was very similar to the statement made by the judge in defendant Diaz' case. The judge in *People v. Diaz* said, "And if you're not here legally or if you have any immigration issues these felony pleas could adversely affect you." *Peque*, 22 N.Y.3d at 178-79. The judge in the instant case said, "[I]f this plea has a negative effect on your immigration status, you would not be allowed to withdraw your plea." Considering the adequacy of the *Diaz* notification, the Court reasoned thus: "[T]he trial court clearly failed to tell defendant that he might be deported if he pleaded guilty. Thus, if defendant has been prejudiced by that error, he is entitled to vacatur of his plea." *Id*. at 200. Likewise, the trial court clearly failed to notify Mr. Client that he would be deported if he pleaded guilty. Thus, as Mr. Client has established that he would not have entered the plea had he known that it rendered him deportable,[5] *see section IB, supra*, Mr. Client is entitled to vacatur of his plea due to the court's failure to notify him of the possibility of deportation.

[5] The considerations informing the prejudice analysis for the due process claim are similar to those that inform the Sixth Amendment prejudice analysis. *See Peque*, 22 N.Y.3d at 199 ("In determining whether the defendant has

While this issue can be raised on direct appeal, as it was in *Peque*, there are good reasons to litigate the claim in this 440 motion. Here, Mr. Prior Lawyer's ineffectiveness played a critical role in the court's error. Mr. Prior Lawyer did not advise Mr. Client, on or off the record, of the immigration consequences, which is relevant to both the *Peque* and *Padilla* claims, and Mr. Client was not advised by anyone of his right to appeal. Furthermore, it is necessary to resort to evidence both on and off the record to address these various and intermingled claims, rendering N.Y. Crim. Proc. Law § 440.10 the appropriate vehicle to resolve these issues.[6] *See People v. Evans*, 16 N.Y.3d 571 (2011); *People v. Edmunson*, 109 A.D.3d 621 (2d Dep't 2013) (where issues involve both on and off the record ineffectiveness claims, the proper vehicle to resolve them is N.Y. Crim. Proc. Law § 440.10). All these factors are indicative of an unknowing and involuntary plea and a pattern of deficient representation that severely prejudiced Mr. Client in this case. Therefore, the court should address the *Peque* claim in this 440 motion, find that Mr. Client has demonstrated prejudice, and vacate the plea.

CONCLUSION

Mr. Client has established that Mr. Prior Lawyer failed to inform him that his arraignment plea to attempted possession of a controlled substance carried the additional penalty of deportation, and also failed to negotiate a reasonably available non-deportable resolution. As an additional ground for vacatur, the court failed to notify Mr. Client that the plea rendered him deportable. Mr. Client has also established that, if he had known that the arraignment plea

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shown such prejudice, the court should consider, among other things, the favorability of the plea, the potential consequences the defendant might face upon a conviction after trial, the strength of the People's case against the defendant, the defendant's ties to the United States and the defendant's receipt of any advice from counsel regarding potential deportation. This assessment should be made in a commonsense manner, with due regard for the significance that potential deportation holds for many noncitizen defendants.").

[6] Mr. Client is in the process of filing a petition of error coram nobis to file a late notice of appeal so he can raise this issue on direct appeal.

rendered him deportable, he would never have entered it. Instead, he would have rejected the plea agreement and proceeded to trial, or attempted to negotiate a non-deportable resolution, which would have been a rational decision for a defendant in his circumstances. The record of conviction and the Affidavits submitted in support of this motion support Mr. Client's assertions, which are uncontroverted by the record before this court. Therefore, this court should find that Mr. Client received ineffective assistance of counsel and vacate his guilty plea to attempted possession of a controlled substance. In that scenario, Mr. Client is prepared to enter a guilty plea to disorderly conduct and to accept the sentence the court deems appropriate, or to proceed to trial.

Dated: _____

_____
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[a] In this scenario, you might consider also submitting an affidavit from the co-defendant's attorney describing the negotiation strategy.

[b] If your client received advice as to immigration consequences but that advice was somehow deficient (either incorrect, incomplete, or misleading), the argument is supported by the following cases: *Kovacs v. United States*, __ F.3d __, 2014 WL 803089 (2d Cir. March 3, 2014); *People v. McDonald*, 1 N.Y.3d 109 (2003); *United States v. Couto*, 311 F.3d 179 (2nd Cir. 2002). *Chaidez* specifically excluded cases involving affirmative misadvice from its holding. *See Chaidez v. United States*, 133 S.Ct. 1103, 1112 (2013) ("recognize[ing] a separate rule for material misrepresentations . . . [that] does not apply to Chaidez's case").

[c] If the conviction at issue was a Crime Involving Moral Turpitude (CIMT), it may be a bit trickier to argue that defense counsel's reasonable research would have produced a clear answer because CIMTs are not defined in the Immigration and Nationality Act (INA). It may be helpful to assert that the defense attorney could have consulted the IDP publication, *Representing Immigrant Defendants in New York*, which classifies offenses according to whether they are likely CIMTs. There are five editions, so be careful to reference the edition that was current for the year of conviction. IDP's current classification chart is online at http://immigrantdefenseproject.org/wp-content/uploads/2011/02/FINALappendix-A_Final5thed2011.pdf. To ensure that the crim-imm answer was up to date, it is best to assert that checking the manual, paired with a call to the free IDP Hotline (operational since 1997),

would have been an easy way to ascertain the risk that the offense would be deemed a CIMT. If the manual/hotline is not helpful in an individual case, you may want to consider using an affidavit from an immigration attorney, or including cites to the relevant immigration case law in your memorandum. These options must be implemented carefully, however, for they run the risk of suggesting that the immigration analysis is more complicated than the analysis for the controlled substance offense at issue in *Padilla*, thus arguably impacting the duty of defense counsel to provide a clear answer.

[d] If you are litigating the "duty to inquire" issue in the 3rd or 4th Dept., for research and arguments supporting a "duty to investigate" citizenship, please see IDP's website: http://immigrantdefenseproject.org/defender-work/padilla-pcr. Also, see *People v. Carty*, 97 A.D.3d 1093, 1094-96 (3rd Dep't 2012) (no duty to inquire further where information provided to successor attorney from prior attorney indicated that the defendant is a citizen); *People v. Rajpaul*, 100 A.D.3d 1183, 1184 (3rd Dep't 2012) (where police report and PSI stated that defendant was not a United States citizen, counsel had duty to inquire as to his client's citizenship).

[e] For some *Padilla* 440 motions, it may be unnecessary to cite to specific New York and national standards, because *Padilla* establishes that professional norms have required advice regarding immigration consequences for "at least the past fifteen years." However, depending on the facts of your case and the timing of the plea, you may want to establish that at the date of your client's plea, professional norms required advice regarding immigration consequences. If so, consider including some version of the following section:

In New York there have been ample such resources available for the past few decades. *See People v. Burgos*, 950 N.Y.S.2d 428, 441 (Sup Ct, N.Y. County 2012) ("treatises dating back to 1982 . . . support the concept that defense attorneys have an affirmative duty to advise criminal defendants of the immigration consequences of their pleas," citing 3 *ABA Standards for Criminal Justice* 14–3.2 Comment, 75 [2d ed. 1982] and James E. Bond, *Plea Bargaining & Guilty Pleas* § 3.46 [1982]); *People v. Bennett*, 903 N.Y.S.2d 696, 701 (Crim Ct, Bronx County 2010) ("[T]he New York State Bar Association has been publishing articles advising criminal attorneys to study and advise their clients regarding the immigration consequences of guilty pleas and criminal convictions since 1989"). The *Bennett* Court cited with approval the following articles: Bendik and Cardoso, *Immigration Law Considerations for the Criminal Defense Attorney*, 61 N.Y. St. B.J. 33 (July 1989), and Muldoon, *Collateral Effects of a Criminal Conviction*, 70 N.Y. St. B.J. 26 (July/ August, 1998). *See id*. There have been myriad additional resources available to New York defense attorneys throughout the years. *See* Manuel D. Vargas, *Representing Immigrant Defendants in New York, Including a Quick Reference Chart for New York Offenses* (Immigrant Defense Project *et al.*, 1998-2011); Carmen Maria Rey, *Immigration Consequences of Criminal Behavior*, The New York Immigration Coalition, Immigrant Concerns Training Institute, June 16, 2009; Training: *The Criminal Lawyer's Guide to Immigration Law: Questions and Answers*, Second Edition, New York City Bar Association, CLE, May 29, 2009; Training: Linda Kenepaske, *The Intersection of Criminal & Immigration Law – What You Don't Know May Hurt Your Client*, New York City Bar Association, CLE, Feb. 18, 2009; *Criminal Immigration Practice Tips for Criminal Defense Attorneys* (IDP, 1997-2009); Training: *Immigration Consequences of Criminal Dispositions*, New York State Association of Criminal Defense Lawyers (Sept. 2004); Training: *Immigration Consequences of New York Criminal Dispositions*, New York State Defenders Association, Albany, N.Y. (May 16-17, 2003); Training: *Changes in Law Have Dire Consequences for All Immigrants in Criminal Court*, ACLU Immigrants' Rights Project, Nov. 20, 1996; Marvin E. Schechter, *New and Severe Consequences of Criminal Convictions*, New York State Defenders Association Public Defense Backup Center Report, Vol. XI No. 6, July 1996; Sarah M. Burr, *Immigration Consequences of Criminal Convictions for Non-Citizen Clients*, 1990/1991 (training materials prepared for Criminal Defense Division of The Legal Aid Society of the City of New York); Kari Converse, *Criminal Defense of Non-Citizens, The Judicial Recommendation Against Deportation*, Mouthpiece: Newsletter of the New York State Association of Criminal Defense Lawyers, Vol. 3 No. 1, June 1990; Marvin E. Schechter, *Aliens, Drug Convictions and the Certificate of Relief from Civil Disabilities*, New York State Defenders Association Public Defense Backup Center Report, Vol. III No. 3, Mar. 1988; Margaret McManus, *Immigration Consequences of Criminal Conduct*, Sept. 1985 (training materials prepared for Criminal Defense Division of the Legal Aid Society of New York); Training: *Immigration Law for the General and Advanced Practitioner*, New York State Bar Association, New York, May 1984.

Numerous other professional guidelines and standards articulated the duty of defense counsel to provide advice regarding deportation consequences prior to 2009. *See* 2 *Criminal Practice Manual* §§ 45:3, 45:15 (West 2009); S. Bratton & E. Kelley, *Practice Points: Representing a Noncitizen in a Criminal Case*, 31 The Champion 61 (Jan./

Feb.2007); A. Campbell, *Law of Sentencing* § 13:23, pp. 555, 560 (3d ed.2004); N. Tooby, *Criminal Defense of Immigrants* § 1.3 (3d ed.2003); Chin & Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L.Rev. 697, 713–18 (2002); 3 *Criminal Defense Techniques* § 60A.01 (Scott Daniels & Ellen Smolinsky Pall eds., 2002) ("[an] attorney who suspects that his client is an alien has a duty to inquire and to protect his client's immigration status"); ABA Standards for Criminal Justice, Pleas of Guilty 14–3.2(f), p. 116 (3d ed.1999); National Legal Aid and Defender Assn., Performance Guidelines for Criminal Prosecution, §§ 6.2–6.4 (1997); G. Herman, *Plea Bargaining* § 3.03, pp. 20–21 (1997); National Legal Aid and Defender Assn., Performance Guidelines for Criminal Defense Representation § 6.2(a)(3) (1995) ("make sure the client is fully aware of . . . other consequences of conviction such as deportation"); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4–5.1(a), p. 197 (3d ed.1993); Anthony G. Amsterdam, *Trial Manual for the Defense of Criminal Cases* § 204 (1988)("[n]o intelligent plea decision can be made by either lawyer or client without full understanding of the possible consequences of a conviction . . . [including] liability to deportation if the defendant is an alien"); Maryellen Fullerton and Noah Kinigstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 Am. Crim. L. Rev. 425 (1986). For additional New York crim-imm resources dating back to 1984, *see* Brief of Natl. Assn. of Criminal Defense Lawyers, et al., *Chaidez v. United States*, 133 S.Ct 1103 (2013) (No. 11-820), 2012 WL 3041305, at *32aa-34aa.

[f] As of April 2014, the appellate division has uniformly taken the position, with some variation in the legal analyses, that *Padilla v. Kentucky* does not apply retroactively to convictions that were final when *Padilla* was decided on March 31, 2010. *See People v. Verdejo*, 109 A.D.3d 138 (1st Dep't 2013); *People v. Andrews*, 108 A.D.3d 727 (2d Dep't 2013), *leave denied*, __N.Y.3d (2013) (December, 2013); *People v. Bent*, 108 A.D.3d 882 (3rd Dep't 2013). The issue of *Padilla* retroactivity as a matter of state law is at the Court of Appeals in *People v. Baret*, 99 A.D.3d 408 (1st Dept. 2012), *leave granted*, 21 N.Y.3d 1002 (June 5, 2013) (Smith, J.). Oral argument is scheduled for May 1, 2014. Due to the difficulty of arguing *Padilla* retroactivity in NY trial courts and the expected impact of *Baret*, retroactivity is not briefed in this motion. For an up-to-date consult on 440 motions relying on *Padilla* retroactivity, please consult Dawn Seibert, dawn@immdefense.org, or call the Immigrant Defense Project at 212-725-6422.

[g] To establish a reasonable probability that the DA would have agreed to the alternative non-deportable resolution, and that the court would have accepted the plea agreement, you may consider using an expert criminal defense attorney to provide an affidavit explaining that the alternative resolution comports with the plea bargaining practices in that jurisdiction.

[h] For an amicus brief containing a more thorough argument that court immigration notifications do not cure the prejudice that flows from defense counsel's failure to competently counsel the defendant on the advisability of entering a plea in light of the immigration consequences, or failure to negotiate a non-deportable resolution, please see http://immigrantdefenseproject.org/wp-content/uploads/2012/04/Lambert-amicusTOCTOAfinal.pdf.

[i] The DA may assert in opposition that the rule described in *Peque* does not apply retroactively to convictions that were final when *Peque* was decided. It is probably advisable not to address that issue in the 440 motion, but to wait to see whether the DA raises it, and then respond in your Reply. For further briefing on the retroactivity of *Peque*, please check the IDP website (http://immigrantdefenseproject.org/criminal-defense/padilla-pcr) or contact Dawn Seibert at dawn@immdefense.org.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 23

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
IND.# 1104/04

- against -

ISIDRO PAREDES,

Defendant.

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Laura A. Ward, J.:

On September 21, 2010, this court found that the Supreme Court's decision, *Padilla v. Kentucky*, ___ U.S. ___, 130 S.Ct. 1473 (2010), is retroactive, mandates a finding of ineffective assistance counsel in this case and a hearing is required to determine whether the defendant was prejudiced by the failure to provide effective counsel. The burden is on the defendant to show that he was prejudiced. Familiarity with the prior decision is assumed.

A hearing was held on November 16, 2010. The sole witness for the defense was Isidro Paredes. The defendant, who is currently in federal custody in a facility in upstate New York, was produced via closed circuit television.[1] Paredes testified that in 2004, he was in the United States legally, having received his "green card" in 2000. Parades had arrived in the United States on January 8, 2000, from the Dominican Republic. He testified that when he was arrested in the underlying case, in 2004, his entire family was in the United States and he had no relatives remaining in the Dominican Republic. After his arrest he met with his attorney, Steven Hornstein who argued for his release at arraignment. The defendant was released on his own recognizance. Thereafter, the defendant met with Mr. Hornstein to discuss the strengths and weaknesses of his case. According to the defendant, Mr. Hornstein told him that if he was found guilty, he could receive a sentence of between ten and fifteen years, but on a plea of guilty he would receive a sentence of five years probation. The defendant testified that he had had enough time to discuss his plea with his attorney. According to the defendant, he pleaded guilty because he was guilty and would receive a probationary sentence rather than an incarceratory sentence.[2]

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[1] The defendant testified with the assistance of the court's official Spanish interpreter.

[2] The defendant successfully completed five years of probation. He was rearrested in 2009 and charged with federal narcotics violations. He was placed in the custody of the United States Immigration and Customs Enforcement based upon both his 2004 and 2009 arrests. The court was informed that the plea taken in the underlying 2004 case would result in mandatory deportation. The plea taken in the defendant's subsequent 2009 case may result in the

The defendant claimed that his attorney never told him that with a sentence of probation he would avoid being detected by the immigration authorities. He said he would not have pleaded guilty to the crime of criminal possession of a controlled substance in the fourth degree, in violation of Penal Law § 220.09, if he had know that he would have been deported.

The People called, Steven Hornstein, the defendant's attorney in the 2004 case. Mr. Hornstein testified that he was admitted to the bar in 1982 and worked as an Assistant District Attorney in the Bronx, rising to a supervisory position before leaving for private practice in 1992. Ninety-nine percent of his practice deals with criminal cases. Although he did not have an independent recollection of the defendant's case, he did have his file. Mr. Hornstein was contacted by a member of the defendant's family to represent the defendant. He first met the defendant in the holding cells behind the arraignment court. There Mr. Hornstein learned from the defendant that he was born in the Dominican Republic, but had a green card. At arraignment, Mr. Hornstein argued for, and gained, the defendant's release on his own recognizance. Mr. Hornstein filed cross grand jury notice and the case was adjourned for grand jury action. Mr. Hornstein testified that although he had no independent recollection of his meetings with the defendant, it was his practice to discuss the strengths and weaknesses of a client's case with his clients. Mr. Hornstein's notes indicated that the defendant gave two different versions of what occurred at the time of his arrest. The first version, given by the defendant at arraignment was inconsistent with the facts set forth in the complaint. At a subsequent meeting the defendant indicated that the facts as set forth in the complaint were accurate. Mr. Hornstein testified that it was his practice to advise clients who were not United States citizens of the potential consequences of taking a plea, including the possibility of deportation. He would also advise clients that based upon his experience, the client was "less likely" to be deported when the sentence was probation rather than incarceration, but he has no independent recollection of what he told the defendant in this case.[3]

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defendant's deportation, but deportation is not mandatory in the latter case.

[3] The only independent recollections Mr. Hornstein had of this case was that during the plea, the court asked if the defendant was in the country legally. Mr. Hornstein remembered verifying with his client that his client had an alien registration card, a fact Mr. Hornstein originally learned at the defendant's arraignment. Mr. Hornstein also had an independent recollection that he was on vacation in February 2004, and had to ask that the defendant's case be adjourned to a date in March 2004.

Although Mr. Hornstein's statement regarding the immigration consequences was the general practice in 2004, in New York State, it was not an accurate statement of the law. Thus, if the court were to determine that Mr. Hornstein had advised the defendant, as was his practice, such advice would have constituted a finding of ineffective assistance of counsel pursuant to pursuant to *People v. McDonald*, 1 N.Y.3d 109 (2003), and this court would not have had to decide the issue of whether or not the Supreme Court's decision in *Padilla v. Kentucky*, ____ U.S. ____, 130 S.Ct. 1473 (2010), was retroactive. The issue remains, however, did the

Unfortunately, Mr. Hornstein had no independent recollection of what immigration advise he actually gave the defendant in 2004. Even if the court accepts that Mr. Hornstein followed his general practice regarding advise given to non-citizen defendants' the court must still decide if the defendant was prejudiced.

An argument could be made that in 2004 all the defendant wanted was to remain at liberty and thus understanding the strength of the People's case chose to plead guilty and receive a probationary sentence. However, the defendant, now facing deportation, claims had he known the plea would cause him to be deported he would have fought the case. Although this court feels that a defendant who was initially given the benefit of a non-incarceratory sentence and proceeds to violate the law again does not deserve to benefit from the Supreme Court decision, which changed the law in New York State, based upon the defendant's claim and the testimony of his then counsel as to what the defendant may have been told, this court feels constrained to grant the defendant's motion.

For the reasons set forth above the defendant's motion to withdraw his plea is granted. The criminal court complaint is reinstated and the case is adjourned to criminal court for grand jury action.

The foregoing is the decision and order of the court.

Dated: New York, New York
November 22 , 2010

Laura A. Ward
Acting Justice Supreme Court

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defendant establish that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *People v. McDonald,* 1 N.Y.3d at 114 (citation omitted).

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: PART AP-N
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THE PEOPLE OF THE STATE OF NEW YORK — DECISION AND ORDER

-against- — Dkt. No. 2005QN056552

SHAHED HASAN,

Defendant.

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PAULINE A. MULLINGS, J.C.C.:

INTRODUCTION

This matter is again before this Court on remand from the Appellate Term, Second Department (*People v Hasan*, No, 2010-2643 Q CR, September 13, 2012).

The defendant stands convicted of Criminal Possession of a Controlled Substance in the Seventh Degree *(Penal Law § 220.03)*. Defendant previously moved through counsel, pursuant to Criminal Procedure Law Section 440.10, to vacate the conviction and sentence on the grounds that he received ineffective assistance of counsel, guaranteed by the Sixth Amendment to the United States Constitution, as well as Article I, Section 6 of the New York State Constitution. By Decision and Order dated September 15, 2010, this Court denied the defendant's motion without a hearing (*Mullings, J.*).

The defendant appealed and the Appellate Term reversed this Court's decision, remanding the matter for an evidentiary hearing prior to the Court adjudicating the defendant's motion on the merits. On December 21, 2012, this Court conducted a hearing. Based upon the hearing record and the arguments of counsel, the defendant's motion to vacate his conviction is granted. The case is restored to the AP-N calendar on January 23, 2012.

PROCEDURAL HISTORY

The defendant was arrested on November 26, 2005, as a result of a car stop occasioned by the defendant's illegal "U-turn" *(7/7/10 Affirmation of Ayelet Sela)*. During the ensuing investigation, a police officer observed a glassine envelope containing heroin in the center console of the defendant's vehicle *(Id.)*. A search of the defendant's jacket pocket revealed a gravity knife *(Id.)*. The defendant made a statement to the arresting officer in which he admitted to possessing an additional ten glassine envelopes of heroin hidden in his shoe *(Id.)*.

On the above-described facts, the defendant was charged with Criminal Possession of a Controlled Substance in the Third Degree *(Penal Law § 220.16)*, a class "B" felony; Criminal Possession of a Weapon in the Fourth Degree (*Penal Law § 265.01*) a class "A" misdemeanor; Criminal Possession of a Controlled Substance in the Seventh Degree *(Penal Law § 220.03*), a class "A" misdemeanor; and Improper U-turns *(Vehicle and Traffic Law § 1160[E])*, a traffic infraction *(Id.)*. The most serious charge, Criminal Possession of a Controlled Substance in the Third Degree, carried a sentence exposure of a minimum indeterminate sentence of from one to three years to a maximum of eight and one-third to twenty-five years.

On February 21, 2006, the People dismissed the felony count of Criminal Possession of a Controlled Substance in the Third Degree *(Court Record)*. The defendant then waived his right to be prosecuted by information and pled guilty to the crime of Criminal Possession of a Controlled Substance in the Seventh Degree *(Penal Law § 220.03)*, a class "A" misdemeanor, in exchange for a promised sentence of a conditional discharge *(Id.)*. On that date, the defendant was sentenced to a conditional discharge *(Id.)*. The defendant did not file a notice of appeal *(Id.)*.

The defendant was represented at the plea and sentence by Arthur Camponanes, Esq. *(Court File)*.

THE DEFENDANT'S CLAIM

The defendant is a Bangladesh national who is a lawful permanent resident of the United States *(1/14/10 Affidavit of Shahed Hasan)*. On or about March 19, 2008, the defendant was taken into custody by Immigration and Customs Enforcement and served with a Notice to Appear for deportation proceedings *(Appendix D, Defendant's Motion)*. The aforementioned Notice advised the defendant that he was removable from the United States based upon his conviction for the instant offense *(Id.)*.

Defendant moved to vacate his conviction based upon the claim that he was misadvised by his former attorney regarding the possible immigration consequences of his guilty plea. The defendant avers that he asked his former attorney whether taking the plea would affect his ability to travel outside the country, as well as his immigration situation *(1/14/10 Affidavit of Shahed Hasan)*. The defendant avers further that his former attorney replied that it would not *(Id.)*. The defendant avers further that he asked his former attorney if he was sure, to which the attorney answered, "yes," and advised the defendant to stay out of trouble for "six months or one year or something like that" *(Id.)*.

THE HEARING

The sole witness at the hearing was the defendant, Shahed Hasan[1]. On direct examination, the defendant testified, in sum and substance, that he was currently detained in an immigration facility in Georgia, that he was married and that he had a six-month old child. At the time of his arrest, he was concerned about the effect a conviction might have on his immigration status. He testified that he discussed pleading guilty with his retained attorney, Arthur Campomanes, on the steps of the courthouse shortly before appearing in court on the day he pled guilty. The defendant testified that he asked Mr. Campomanes whether a guilty plea would affect his immigration status and was told that it would not because immigration had nothing to do with the plea. As Mr. Campomanes was providing the aforementioned advice, the defendant testified that he was gesturing to a blue book, which supposedly contained relevant information about the effect of similar guilty pleas on immigration status. The defendant testified that he was aware that he could have an immigration problem because a friend of the family who had been arrested shared anecdotal information concerning how immigration agents detained him after he had disposed of a minor criminal charge.

The defendant testified that he conducted his discussion with Mr. Campomanes in English and that had he been properly advised, he would have refused to plead guilty and would have instead fought the case.

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[1] The witness testified remotely by telephone, inasmuch as the immigration facility in Georgia, where he is presently detained, does not possess video-teleconferencing capability. Prior to receiving his sworn testimony, the Court allocuted him on a written waiver of his right to be physically present and his consent to appear by telephone.

On cross-examination, the defendant testified that he that he was born in Frankfurt, Germany. From the ages of 13 to 21, he lived and worked in Bangladesh, where he has cousins, aunts and uncles. Despite making trips to Bangladesh in 2001, 2003 and 2007 to visit his father[2], the defendant testified that he did not and does not maintain contact with his family there. In 1999, the defendant entered the United States as an immigrant from Bangladesh. He testified In 2005, he was working three days per week at a Farmers Market in Jamaica, New York. The defendant was also employed as a waiter at a Hyatt Regency Hotel three days per week. He provided financial support to his mother and sister, with whom he resided.

After his arrest, he moved to Raleigh, North Carolina, where he worked 40 hours per week at a gas station. Whenever he had a court appearance in this case, he took a day off and traveled to Kew Gardens by Greyhound Bus.

At his arraignment, the defendant did not speak to an attorney, although a woman met him in the pens and provided him a business card[3]. During the initial appearance, the defendant recalled there being some discussion about bail, after which he was released on his own recognizance. Once he returned to North Carolina, he attempted to call the attorney who had provided him the business card on several occasions, but he was unable to speak with her. On the recommendation of a friend of the family, the defendant retained Mr. Campomanes. The defendant never visited him at his office, always meeting him in the courthouse. All of his conversations with Mr. Campomanes were conducted in English.

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[2] The defendant's father eventually emigrated to the United States and died in North Carolina in 2007.

[3] The Court Record contains a Notice of Appearance filed by Florence Morgan of the Legal Aid Society, dated contemporaneously with the defendant's arraignment. The Court takes judicial notice that Ms. Morgan is a woman.

The defendant never sent any information relative to his immigration status to Mr. Campomanes, who never asked about it on his own volition. The defendant testified that he did not have an understanding at that time about the seriousness of a felony conviction. He was advised by his former attorney that he would have to be on probation from 6 months to a year or pay a fine. He had no idea that if he had fought the case and lost, he could have faced serious jail time. In his discussions with Mr. Campomanes, the defendant discussed the effect of the guilty plea on his future travel and his immigration status, not his ability to continue working. The defendant was aware that the plea agreement did not call for any reporting on his part and he was satisfied with his former attorney's advice until he was arrested by immigration authorities.

The defendant testified that he had no contact with immigration officials until 2007. He traveled to Bangladesh to visit his father, who was seriously ill. The defendant continued to believe that he had no issues with his immigration status until he was detained at O'Hare Airport upon his return to the United States from Bangladesh. During the course of Mr. Campomanes' representation, there was never a discussion of pleading guilty to possession of the knife, as opposed to a plea to a controlled substance offense.

On re-direct examination, the defendant testified that when he was asked during the guilty plea allocation whether any additional promises had been made to him which had not been placed on the record, that he did not think the Court was inquiring about the potential immigration issue.

On re-cross examination, the defendant testified that he discussed the immigration issue with Mr. Campomanes in a telephone conversation held while the defendant was still in North Carolina, in between court appearances.

During the hearing, both sides stipulated that Mr. Campomanes, the defendant's former attorney, had been disbarred; that the Office of Court Administration had no contact information for him; and that he was unavailable to both sides.

DISCUSSION

"When a criminal defendant waives the fundamental right to trial by jury and pleads guilty, due process requires that the waiver be knowing, voluntary and intelligent" (*People v Hill*, 9 NY3d 189, 191 [2007]). "Prior to accepting a guilty plea, a defendant must be informed of the direct consequences of the plea. When a court fails to so advise the defendant, the plea cannot be deemed knowing, voluntary and intelligent, and defendant may withdraw the plea and be returned to his or her uncertain status before the negotiated bargain" (*People v Hill*, 9 NY3d at 191).

Defendants in criminal cases have both a state and federal constitutional right to effective assistance of counsel (*People v Ramchair*, 8 NY3d 313, 316 [2007]). Under state law, a defendant's claim that he received ineffective assistance of counsel is evaluated under the "meaningful representation" standard (*People v Ramchair,* 8 NY3d at 316; *citing*, *People v Baldi*, 54 NY2d 137, 147 [1981]). Courts analyzing a claim of ineffective assistance of counsel under federal law apply the two-prong test found in *Strickland v Washington*, 466 US 668 (1984).

The U.S. Supreme Court has held that "counsel must advise her client regarding the risk of deportation" (*Padilla v Kentucky*, 130 S.Ct. 1473 [2010]). That Court reiterated its long-standing position that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel" (*Padilla*, 130 S.Ct. at

1486 *citing Hill v Lockhart*, 474 US at 57). "The severity of deportation – 'the equivalent of banishment or exile' – only underscores how critical it is for counsel to inform her non-citizen client that he faces a risk of deportation" *(Padilla*, 130 S.Ct. at 1486).

"[W]here an attorney fails to advise a criminal defendant, or misadvises the defendant, regarding clear removal consequences of a plea of guilty, his or her representation falls below an objective standard of reasonableness" (*People v Picca*, 2012 N.Y. App. Div. LEXIS 4304, June 6, 2012, *3; *citing Padilla v Kentucky*, 130 SCt 1473, 1482-1483 [2010]). The Appellate Division, First Department, has recently held that *Padilla* applies retroactively *(People v Baret*, 2012 N.Y. App.Div. LEXIS 6512 *2 [October 2, 2012]); *but see*, *Hamad v U.S.*, 2011 U.S. Dist. LEXIS 45851 ["new constitutional rules of criminal procedure, such as that as that laid out by *Padilla*, are not deemed retroactive to cases on collateral review," *citing Schirro v Summerlin*, 542 U.S. 348]; *see also People v Marino-Affaitati*, 88 AD3d 742 [2d Dept. 2011]).

"The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant'" (*Hill v Lockhart*, 474 US at 56). While the decision in *Hill* affirmed the standard announced in *Strickland* for evaluating claims of ineffective assistance of counsel, it clarified *Strickland's* application to claims of ineffective assistance arising from guilty pleas. "In addition, we believe that requiring a showing of 'prejudice' from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas we identified in *United States v. Timmreck*, 441 U.S. 780 (1979):

> 'Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs

> the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.'" (*citation omitted*).

(*Hill v Lockhart*, 474 US at 58).

In order to establish prejudice in a post-conviction motion, the defendant must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial (*People v Picca*, 2012 N.Y. App. Div. LEXIS 4304, *5). "In the context of a *Padilla* claim, the defendant 'must convince the court that a decision to reject the plea bargain would have been rational under the circumstances'" *People v Picca*, 2012 N.Y. App. Div. LEXIS 4304, *5; *citing Padilla v Kentucky*, US at, 130 S Ct at 1485).

The determination of whether to plead guilty is a calculus, which takes into account all of the relevant circumstances (*People v Picca*, 2012 N.Y. App. Div. LEXIS 4304, *6). "In light of the primary importance that aliens may place upon avoiding exile from this country, an evaluation of whether an individual in the defendant's position could rationally reject a plea offer and proceed to trial must take into account the particular circumstances informing the defendant's desire to remain in the United States. Those particular circumstances must then be weighed along with other relevant factors, such as the strength of the People's evidence, the potential sentence, and the effect of prior convictions" (*Id.*).

The uncontradicted testimony of the defendant was that he asked his former attorney whether the proposed guilty plea would have an effect on his immigration status and that the attorney's answer was "no." This advice was rendered in 2005, subsequent to the sea-change in immigration law caused by Congress' 1996 repeal of the Attorney General's discretionary power

to cancel removal, which "dramatically raised the stakes of a non-citizen's criminal conviction. The importance of accurate legal advice for non-citizens accused of crimes has never been more important" (*Medina v United States*, 2012 U.S. Dist LEXIS 34467, *8-9, SDNY, February 21, 2012 [*quoting Padilla v Kentucky*, 130 S.Ct. at 180]). This advice was also rendered subsequent to the terrorist attacks of September 11, 2001. The Court takes judicial notice that there was a dramatic increase in immigration enforcement activity in the United States after the events of that day (Tamar Lewin, *"A Nation Challenged: The Domestic Roundup; As Authorities Keep Up Immigration Arrests, Detainees Ask Why They Are Targets,"* NY Times, February 3, 2002; Rachel L. Swarns, *"Immigrants Feel the Pinch of Post-9/11 Laws,"* NY Times, June 25, 2003; Edwin Meese III, *"An Amnesty By Any Other Name . . .,"* NY Times, May 24, 2006).

The Court credits the defendant's testimony that: (1) he told Mr. Campomanes that he was concerned about the possible immigration consequences of the contemplated guilty plea; (2) that Mr. Campomanes assured him that there would be no immigration consequences so long as he was not rearrested; and (3) that Mr. Campomanes never explored with him the possibility of seeking a plea to a different charge in an attempt to minimize the defendant's exposure to possible immigration consequences.

Under these circumstances, the Court finds that Mr. Campomanes advice to the defendant that he would not face immigration consequences was wrong and should have been known to him to be wrong at the time he rendered it. Any competent attorney at that time should have been more cautious about rendering such a sweeping assurance, unsupported by any meaningful research, to a client. Accordingly, the Court finds that the defendant has established the first

prong of *Strickland*, in that his former attorney's advice fell below an objective standard of reasonableness.

The Court finds further that the defendant has established that he was prejudiced by Mr. Campomanes' unprofessional performance, in that a decision to reject the guilty plea and proceed to trial would have been a rational one.

The defendant, after emigrating to the United States in 1999, appears to have experienced an unremarkable life, typical of the experience of recent immigrants to the United States. Prior to his arrest in 2005, he toiled at two part-time jobs, lived with his mother and sister and contributed to the maintenance of the household from his earnings. He continued to work after his arrest, moving to North Carolina to obtain employment at a gas station.

At the time of his arrest, the Court finds it reasonable to infer that he had invested a significant amount of time and energy in building a life in the United States and that a separation from that life, viewed objectively, would have been significant. Although the defendant conceded that he visited Bangladesh three times since his emigration to the United States, his ties to his country of origin appeared to be attenuated, at best, and were linked to the continued residence of his father, from whom he was separated since 1999. The Court finds it significant that after his father suffered a serious illness, he too emigrated to the United States and died in North Carolina, near the defendant's home at the time.

While it is true that the top count of the felony complaint was a class "B" felony carrying a possible sanction of a minimum indeterminate sentence of from one to three years to a

maximum of eight and one-third to twenty-five years, the plea offer made by the People, which the defendant eventually accepted, suggests that there was flexibility in their negotiation position based upon the state of the evidence. Even though the defendant stipulated at the hearing that he was not arguing actual innocence, the facts of the case, as pled in the felony complaint, are a strong indication that the People would not have prosecuted the case as a felony.

First, the evidence supporting the charge of Criminal Possession of a Controlled Substance in the Third Degree was seized as a result of the arresting officer, after supposedly observing a single glassine envelope containing heroin on the center console of the defendant's vehicle, asked the defendant whether he had more drugs in his possession and the defendant responded that he had an additional ten glassines in his shoe. Moreover, this entire series of observations was made after supposedly observing the defendant make an illegal U-turn. The Court finds that this set of facts falls presents litigable suppression issues which a competent defense counsel could exploit, either through litigating them at a suppression hearing or by using them as a bargaining chip.

Even if the defendant had litigated the suppression issues pre-trial and lost, an objective view of the facts would not lead a competent prosecutor to be assured of a conviction on the top count after a trial. The possession of ten glassines of heroin is not an amount so significant that a finder of fact would readily conclude that they were possessed with the intent to sell them, as the proof of the charge of Criminal Possession of a Controlled Substance in the Third Degree requires. In the Court's view, it is equally plausible that a finder of fact could acquit on the felony possession count and find the defendant guilty of the misdemeanor of Criminal Possession of a

Controlled Substance in the Seventh degree, a class "A" misdemeanor, the charge to which the defendant pled guilty.

Based upon the foregoing, a competent prosecutor may have concluded that a conviction on a simple possession charge was the best outcome that was reasonably attainable from a prosecution perspective. This judgement is consistent with the People's offer of a plea to a misdemeanor and a sentence of a conditional discharge in satisfaction of an accusatory instrument containing a top count of a class "B" felony.

Under these circumstances, had Mr. Campomanes pursued a plea to the Criminal Possession of a Weapon in the Fourth Degree count, another class "A" misdemeanor, it would be difficult for a competent prosecutor to resist accepting a certain guilty plea to a class "A" misdemeanor in favor of a plea to another class "A" misdemeanor. Accordingly, while the defendant was unable to testify to various defense strategies he would have urged his former attorney to pursue, a common sense analysis of the facts suggests that there were enough options other than pleading guilty to the offer made by the People to have rationally rejected the offer and proceeded to trial, even if the path to trial was later redirected to an different guilty plea.

Accordingly, the Court finds that the defendant has satisfied the second prong of *Strickland* in that he was prejudiced by Mr. Campomanes unprofessional performance.

CONCLUSION

Accordingly, the defendant's motion to vacate his conviction and sentence is granted.

This constitutes the Decision and Order of this Court.

Dated: Kew Gardens, New York
December 26, 2012

Pauline A. Mullings,
Judge of the Criminal Court