ISSUES ON APPEAL

AND

440 MOTIONS INVOLVING NON-CITIZENS

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I THE NOTICE OF APPEAL

A. THE DECISION TO APPEAL BELONGS TO CLIENT AND NOT THE ATTORNEY

The decision to appeal belongs to the client and not the attorney. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). The attorney has the obligation of communicating with the client under Rules of Professional Conduct Rule 1.4. This rule requires the attorney to explain matters to the client to the extent reasonably necessary to make informed decisions.

B. THE DUTY OF THE ATTORNEY TO SEND THE CLIENT AN APPEAL LETTER UNDER THE APPELLATE DIVISION RULES

The attorney has the obligation under the Appellate Division Rules to send the client an appeal letter advising the client in writing of his right to appeal within 30 days of the judgment (sentence), the procedure to apply for assignment of counsel and poor person relief, and that the attorney will file a notice of appeal if requested by the client. See 22 NYCRR §606.5 (First Dept.), §671.3 (2nd Dept.), §821.2 (Third Dept.), §1015.7 (Fourth Dept.).

The failure of the attorney to advise the defendant in writing of his right to appeal, even when there has been appeal waiver, is improper and violates court rules. *People v. June*, 242 A.D. 2d 977 (4th Dept. 1997).

C. THE OBLIGATION OF THE ATTORNEY TO FILE A NOTICE OF APPEAL IF REQUESTED BY THE CLIENT

The attorney has the obligation to file a notice of appeal if so requested by the client. The failure to do so constitutes ineffective assistance of counsel. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *People v. Syville*, 15 N.Y. 3d 391, 397-398 (2010).

Either the client or the attorney needs to make a poor person motion for an attorney to be assigned on the appeal. Unfortunately, the majority of the Court of Appeals, has held there is no sixth amendment right to counsel for a poor person motion. *People v. Arjune*, 30 N.Y.3d 347 (2017)

D. THE DUTY TO ADVISE THE CLIENT OF THE ADVANTAGES AND DISADVANTAGES OF FILING AN APPEAL WHEN A RATIONAL DEFENDANT MAY WANT TO APPEAL

In *Roe v. Flores-Ortega*, supra, the Supreme Court stated that the better procedure is for the attorney to routinely consult with the defendant regarding the possibility of an appeal. However, it did not hold that the failure to consult with

the client regarding an appeal was deficient in every case. It acknowledged that the states can set greater requirements.

Instead, the Supreme Court, required as a matter of federal constitutional law, that the defense attorney had the duty to consult with the client about an appeal whenever: 1) a rational defendant in that situation may want to appeal, or 2) the particular defendant had reasonably demonstrated to counsel that he was interested in appealing.

This duty to consult is greater than just sending the client an appeal letter. It requires that the attorney discuss with the client the advantages and disadvantages of an appeal.

E. THE UNIQUE ADVANTAGES AND DISADVANTAGES OF FILING A NOTICE OF APPEAL IN THE CASE OF A NON-CITIZEN

There are unique advantages and disadvantages of appealing in a case of a non-citizen who pled guilty to a crime that involves immigration consequences. These matters need to be discussed with the client.

The purpose is not to convince the client to vacate a favorable disposition. The client should know that if the plea is vacated, then the client could face a

harsher sentence after a trial if convicted. see *People v. Miller*, 65 N.Y. 2d 502 (1985).

1. THE ADVANTAGES OF FILING A NOTICE OF APPEAL

The issue of whether a conviction is not final until the direct appeal is decided or waived to trigger removal proceedings under the Immigration and Nationality Act, 8 U.S.C. Section 1101 is pending before the United States Court of Appeals for the Second Circuit. In that case, the immigration judge and the Board of Immigration Appeals judge who heard the case granted removal based on a conviction that was pending on direct appeal. The Second Circuit granted review and the appeal is pending on the issue of whether a conviction is not final until the direct appeal is decided. See arguments in Brief of Amicus Curiae Immigrant Defense Project in *Mohamed v. Sessions*, 15-3996-ag, available on the internet.

The Third Circuit has held that a conviction is not final to trigger removal until the direct appeal is decided or waived. It ruled that Congress codified the definition of a conviction in 8 U.S.C. Section 1101(a)(48) because of dissatisfaction with deferred adjudications which applied when a person's conviction was vacated due to a participation in a rehabilitation program. The legislative intent was to make an admission of guilt plus restraint on liberty to be

within the definition of a conviction. The Third Circuit concluded that Congress intended to preserve the finality requirement of a direct appeal when a notice of appeal is filed for convictions arising out of formal adjudications, i.e. when there is a conviction and sentence. *Orabi v. Att'y General of the U.S.*, 738 U.S. 540-543 (3rd Dept. 2014).

The decision of the Third Circuit was consistent with the opinion of the majority of the judges of the Board of Immigration Appeals expressed in *Matter of Cardenas-Abreu,* 24 I & N Dec. 794 (B.I.A. 2009). In that case, seven out of fourteen Board members (one concurring and six dissenting) constituting one-half of the fourteen board members agreed that a pending direct appeal as of right would preclude negative immigration consequences until the direct appeal is dismissed and the conviction becomes final. Five of the Board members in the majority, who did not need to decide the finality issue, were of the opinion that there was forceful support for this argument. Two of the concurring members were of the opinion that finality of a direct appeal was no longer required. Practice Advisory, *Conviction Finality Requirement. The Impact of Matter of Cardenas-Abreu*, Immigrant Defense Project, www.immdefense.org/practice-advisories

The majority decided that since Abreu had been given permission to file a

late notice of appeal pursuant to CPL Section 460.30 that this was a late reinstated appeal and not a direct appeal. It ruled that a late appeal was not entitled to the same degree of finality as a direct appeal as of right since it adds a measure of delay and uncertainty regarding the immigration consequences of the criminal conviction.

The decision of the Board of Immigration Appeals in *Abreu* was vacated by the Second Circuit. The court ruled that in attempting to distinguish between a late reinstated appeal and a direct appeal, the Board misinterpreted New York law. Assuming arguendo that the finality requirement remains in effect after the passage of the IIRIRA statute, an appeal with permission pursuant to CPL Section 460.30 is the equivalent of a direct appeal for the purposes of finality. *Abreu v. Holder*, 378 Fed. Appx. 59 (2nd Cir. 2010). This decision of the Second Circuit demonstrates the importance of the motion for an extension of time for taking an appeal pursuant to CPL Section 460.30 and the writ of error coram nobis discussed in II and III of this article for an attorney representing a non-citizen.

Subsequent to *Abreu*, the Second Circuit upheld the B.I.A.'s denial of a motion to reopen. It ruled that the defendant's pending motion to vacate the

conviction was a collateral attack on the conviction and does not affect finality. The court cited *Montilla v. INS*, 926 F.2d 162 (2nd Cir. 1991) for the proposition that a conviction is final upon conclusion of appellate review. *Persaud v. Holder*, 497 Fed. Appx. 90 (2nd Cir. 2012).

Meanwhile, the Ninth Circuit has literally interpreted the unambiguous language of the statute to mean that a conviction is final when the judgment is entered upon the sentence. *Planes v. Holder*, 652 F.3d 991, 995 (9th Cir. 2011) and a rehearing en banc was denied with seven judges dissenting, 686 F.3d 1033, 1036-41 (Reinhardt, J). The panel decision refers to decisions of the second, fifth, and seventh circuits that have made similar rulings. The previous decision of the Second Circuit involved an interpretation of the statutory definition of a conviction in the context of a naturalization case. *Puello v. Bureau of Citizen and Immigration Services*, 511 F.3d 324 (2nd Cir. 2007).

If the Second Circuit rules in favor of Mohamed, then a conviction would not be considered final to trigger removal proceedings until the direct appeal as of right is decided or waived. Thus, the filing of a notice of appeal in that circumstance will delay removal proceedings if the conviction is the basis for deportation.

Therefore, if the client would want to oppose removal proceedings, if later instituted, then it is recommended that the client should request that a notice of appeal be filed. The notice of appeal could always be withdrawn.

2. THE DISADVANTAGES OF AN APPEAL

If the client wants to go back to his or her country of origin or if the client is satisfied with the plea disposition since it was the best possible disposition and mitigated the immigration consequences, then there would be no reason to file the notice of appeal.

Also, if client wants early/conditional parole for deportation purposes a pending appeal could delay it. It may be better to file the notice of appeal and then withdraw it if it is determined the client is a good candidate for early/conditional parole for deportation. The statute requires that there be a final order of deportation issued against the inmate to be eligible under the statute. Executive Law Section 259-i(d)(i); Markowitz, *Step by Step Guide to ECPDO & CPDO* (updated by Immigrant Defense Project, 2011); New York State Department of Corrections & Community Supervision, *Research in Brief, Early Conditional Parole for Deportation Only (ECPDO)* – 2011.

The disadvantage in perfecting an appeal is that if successful in seeking a withdrawl of a guilty plea, it could expose the client to a greater sentence if convicted after a trial. *People v. Miller*, supra. It could also expose the client to a felony charge if he pled guilty to a misdemeanor in satisfaction of a felony.

F. *ROE V. FLORES-ORTEGA* HAS BEEN INTERPRETED TO REQUIRE A CONSULTATION AS TO THE ADVANTAGES AND DISADVANTAGES OF FILING A NOTICE OF APPEAL IN THE CASE OF A NON-CITIZEN

The Court of Appeals of Washington in interpreting *Roe v. Flores-Ortega*, supra, held that an attorney was deficient in representation for failing to consult with the non-citizen client about appealing. It granted a motion to extend the time to appeal.

Significantly, the court held that *Roe*, which was decided in 2000, applied to a case that occurred prior to *Padilla* which was decided in 2010. In this case, the court found that the defendant knew he had the right to appeal, knew that an appeal meant review by a higher court, and did not request that a notice of appeal be filed within 30 days. The lawyer was deficient because he did not discuss with the

client the advantages and disadvantages of an appeal. *State v. Chetty*, 167 Wash. App. 432, 272 P. 3d 918 (Court of Appeals of Washington, 2012) on remand, 184 Wash. App. 607 (Court of Appeals of Washington, 2014).

G. IF THE APPEAL IS TO THE COUNTY COURT OR APPELATE TERM FROM A JUDGMENT, SENTENCE OR ORDER OF A LOCAL CRIMINAL COURT THAT WAS NOT RECORDED BY A COURT STENOGRAPHER, THEN AN AFFIDAVIT OF ERRORS NEEDS TO BE FILED

In cases where the appeal is to a County Court or Appellate Term from a local criminal court and the proceeding was not recorded by a stenographer, an affidavit of errors has to be served and filed pursuant to CPL §460.10 (3). This statute has now been amended to permit the filing of an affidavit of errors within 60 days after the receipt of the transcript for the appeal when a notice of appeal has been filed within 30 days after entry of the judgment, sentence, or order being appealed.

The failure to file and serve the affidavit of errors is a jurisdictional defect. However, the time can be extended pursuant to CPL §460.30 for the enumerated grounds. *People v. Smith*, 27 N.Y. 3d 643 (2016).

II MOTION TO FILE LATE NOTICE OF APPEAL UNDER CPL §460.30

This motion can be made pursuant to CPL §460.30 within one year of the expiration of the 30 day period to appeal. This motion has to be made in writing to the appellate court on the grounds that the failure to timely file the notice of appeal to the intermediate appellate court or make the application for leave to appeal to the Court of Appeals was due to:

a) improper conduct of a public servant or improper conduct, death, or disability of the defendant's attorney; or

b) inability of the defendant and his attorney to have communicated in person or by mail concerning whether an appeal should be taken prior to the expiration of the time to which to take an appeal due to the defendant's incarceration in an institution and through no lack of due diligence or fault of the attorney or the defendant.

The failure of the attorney to send the client an appeal letter as required by court rules has been held to be improper conduct of the attorney, even where there has been a waiver of the right to appeal as part of the guilty plea, as a basis to grant a motion pursuant to CPL §460.30. *People v. June*, 242 A.D.2d 977 (4th Dept.

1997). In addition, the Appellate Division has held that a) oral advice at sentencing as to the right to appeal is insufficient; and b) the failure of the attorney to inform the client in writing of his right to appeal and the other information required by the court rule entitles the defendant to an extension of time to appeal pursuant to CPL Section 460.30. *People v. Zanghi*, 159 A.D.2d 1030(4th Dept. 1990). The failure to comply with the court rule and advise the defendant in writing as noted in the above decisions has been repeatedly cited as "improper conduct" of the defendant's attorney within the meaning of CPL Section 460.30. *People v. Storms*, 161 A.D.2d 1215 (4th Dept. 1990); *People v. Jackson*, 166 A.D.2d 933 (4th Dept. 1990).

Likewise, the failure of the attorney to consult with the non-citizen client about the advantages and disadvantages of filing a notice of appeal has been found to be ineffective assistance of counsel in the State of Washington based on *Roe v. Flores-Ortega*, supra, and a basis of a motion to extend time to file the notice of appeal. *State v. Chetty*, supra.

III MOTION FOR A WRIT OF ERROR CORAM NOBIS

The writ of error coram nobis is a procedure that is utilized in the rare case when a right to appeal was lost solely due to an unconstitutionally deficient

performance of counsel.

It has been applied to the situation where a defendant timely notified his attorney to file a notice of appeal and the failure of the attorney to file it could not reasonably been discovered by the defendant during the one year period following the expiration of 30 days to appeal. *People v. Syville*, 15 N.Y. 3d 391 (2010).

However, the use of the writ of error coram nobis has been rejected where the defendant made only perfunctory claims that he asked to appeal and the lawyer said he discussed it with the client who decided not to appeal. *People v. Andrews*, 23 N.Y. 3d 605 (2014).

It has also been rejected where the defendants claimed they were not advised of the right to appeal and had defendants known of the right to appeal, they would have requested one. The record as a whole reflected that the defendants knew of their right to appeal. Significantly, the defendants did not make any showing that they took steps toward discovering the omission or explaining why years passed before they sought coram nobis relief. The court held that defendants must show due diligence to obtain relief beyond the one year period in CPL §460.30. In *Rosario*, the defendant waited five years and in *Llibre* (the companion case), the

defendant waited six years to bring the coram nobis application. *People v. Rosario*, 26 N.Y. 2d 597 (2015).

Recently, the writ of error coram nobis was rejected in *People v. Arjune*, 30 N.Y3d 347 (2017). In that case, the defendant was convicted after a trial with a retained attorney. The attorney filed a notice of appeal. The defendant was given written notice at sentencing of his right to appeal and the procedure for applying to the Appellate Division for assignment of counsel. The defendant did not apply for poor person relief and assignment of counsel. Four years after the notice of appeal was filed the court dismissed the appeal on motion of the District Attorney. A year later a writ of error coram nobis to reinstate the appeal was made and denied.

The Court of Appeals held that there was no sixth amendment right to counsel to apply for poor person relief because eligibility would be within the knowledge of the defendant. The court distinguished this case from a motion to extend time to appeal under CPL Section 460.30 where the defense attorney violated court rules in not providing a defendant with written notice of his appellate rights. Cf. *People v. Zanghi*, 159 A.D.3d 1030 (1990). It interpreted *Roe v. Flores-Ortega*, supra, as applying just to the consultation as to whether to file

the notice of appeal.

IV THE INTERMEDIATE APPELLATE COURT DOES NOT HAVE THE DISCRETION TO DISMISS A DIRECT APPEAL AS OF RIGHT WHEN THE DEFENDANT HAS BEEN INVOLUNTARILY DEPORTED. IT DOES HAVE THE DISCRETION TO DISMISS A PERMISSIVE APPEAL BECAUSE THE DEFENDANT HAS BEEN DEPORTED.

The above ruling was by the Court of Appeals in *People v. Harrison* and *People v. Serrano*, 27 N.Y. 3d 281 (2016). It was premised on the fact that CPL §450.10 granted the defendant an absolute right to seek direct appellate review of the conviction to the intermediate appellate court in *Serrano*. In comparison, the right to appeal the denial of a CPL §440.10 motion to the intermediate appellate court was permissive in *Harrison*. Likewise, the right to seek leave to appeal to the Court of Appeals is permissive.

Significantly, the Court of Appeals rejected the District Attorney's argument in *Serrano* that the intermediate appellate court had the discretion to dismiss the appeal because the conviction was not the basis of his involuntary deportation.

If *Serrano* is successful on the appeal in vacating the guilty plea, then the parties will have to deal with the situation that the defendant may be unable to return to the United States to enter a guilty plea or go to trial.

Even though the intermediate appellate court has the discretion to dismiss an appeal of a CPL Section 440.10 motion of a person who has been deported since it is a permissive appeal, this does not mean that the court has to grant such an application. In *People v. Bennett*, 139 A.D.3d 1350 (4th Dept. 2016), the court noted that it had the discretion to dismiss the appeal of the defendant who was deported. Instead, it chose not to exercise that discretion and reversed the summary denial of the CPL Section 440.10 to vacate the conviction and ordered a hearing.

Likewise, the direct appeal of a sex offender registration act hearing is not academic because the defendant was involuntarily deported. The Appellate Division denied the District Attorney's motion to dismiss the appeal and decided the appeal on the merits. *People v. Shim*, 139 A.D.3d 68 (2nd Dept. 2016); see also *People v. Edwards*, 117 A.D.3d 418 (1st Dept. 2014). The writ of error coram nobis is also available to move for permission to file a late notice of appeal in the case of an incarcerated individual who had difficulty communicating with his attorney concerning filing a notice of appeal on a Sex Offender Registration Act hearing decision and order. *People v. Arroyo*, 92 A.D.3d 745 (2nd Dept. 2012).

V *PEOPLE V. PEQUE*, 22 N.Y. 3D 168 (2013) – DUTY OF THE COURT TO ALERT DEFENDANTS THAT GUILTY PLEA MAY SUBJECT THEM TO ADVERSE IMMIGRATION CONSEQUENCES

People v. Peque, 22 N.Y. 3d 168 (2013) applies to all cases that were pending on direct appeal when it was decided and those cases after the decision. *People v. Shabban*, 138 A.D. 3d 407 (1st Dept. 2016), *People v. Fermin*, 123 A.D. 3d 465 (3rd Dept. 2014).

It requires that the court provide a short, straightforward statement on the record notifying the defendant that, in sum and substance, if the defendant is not a United States citizen, that he or she may be deported upon a guilty plea to a felony. The court may also wish to encourage the defendant to consult defense counsel about the possibility of deportation. In the alternative, the court may use the admonition in CPL §220.50 (7). These examples are illustrative, not exhaustive, of potentially acceptable advisements regarding deportation.

The warning has to be given by the court to all defendants and not single out those that are non-citizens. People v. Palmer, _A.D.3d_, 2018 WL 650845 (1st Dept. 2018).

The failure to apprise a defendant of deportation as a consequence of a guilty plea only affects the voluntariness of the plea where the consequence is of such great importance to him that he would have made a different decision had that consequence been disclosed.

Therefore, in order to withdraw or obtain a vacatur of a plea, a defendant must show that there was a reasonable probability that he would not have pleaded guilty and would have gone to trial had the trial court informed him of potential deportation.

In determining whether the defendant has shown such prejudice, the court should consider, among other things, the favorability of the plea, the potential consequences the defendant may face 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 advice from his attorney regarding potential deportation.

Although the holding in *Peque* involved a felony, the Appellate Term has now applied it to a misdemeanor. *People v. Bello*, 55 Misc.3d 152 (App. Term, 2nd Dept. 2015).

VI THE ISSUE OF *PEQUE* AND/OR THE DEFICIENT PLEA VOIR DIRE OR DEFECTIVE ACCUSATORY INSTRUMENT MUST BE RAISED ON A DIRECT APPEAL SINCE THEY INVOLVE MATTERS OF RECORD OF THE COURT PROCEEDING

The issue concerning the failure of the trial court to advise the defendant under *People v. Peque*, 22 N.Y. 3d 168 (2013) must be raised on a direct appeal and is not cognizable on a CPL Article 440 motion. This is because it is matter of record of the court proceeding. *People v. Shabaan*, 138 A.D. 3d 407 (1st Dept. 2016); *People v. Llibre*, 125 A.D. 3d 422 (1st Dept. 2015). Preservation would not apply if defendant did not know of deportation consequences. *People v. Charles*, 117 A.D. 3d 1073 (2nd Dept. 2014).

Likewise, the issue of a deficient plea allocution must be raised on a direct appeal since it is matter of record of the court proceeding. see *People v. Tyrell*, 22 N.Y. 3d 359 (2013). In *Tyrell*, the court reversed the conviction because the record did not affirmatively demonstrate the defendant's understanding or waiver of constitutional rights. Since the plea and sentence occurred during the same proceeding, preservation did not apply since there was no opportunity to move to withdraw the plea prior to sentencing.

If sentencing on the above case had been adjourned and there was no motion to withdraw the guilty plea, then this issue could be denied for lack of preservation. *People v. Conceicao*, 26 N.Y.2d 375 (2015).

The issue of the failure of the court to advise the defendant at the plea of the period of post release supervision in a case involving a determinate sentence is another issue that must be raised on a direct appeal. This is an issue that also involves a limited exception to preservation. *People v. Louree*, 8 N.Y. 3d 541 (2007).

There is also a limited exception to the preservation requirement when the court accepts a plea where a defendant denies the crime or states a defense in the plea allocation. *People v. Lopez*, 71 N.Y. 2d 662 (1988). The preservation rule also does not apply when the trial judge does not conduct any allocution in accepting the plea. A guilty plea is inadequate when the plea allocution does not establish a factual basis for the offense, or establish that the defendant understood any of the rights that he was giving up by pleading guilty. *People v. Rivera*, 55 Misc.3d 141(A) (App. Term, 2nd Dept. 2017).

The issue of a defective superior court information as well as the defective

local court accusatory instrument has to be raised in a direct appeal. *People v. McKenzie*, 151 A.D.3d 1080 (2nd Dept. 2017); *People v. Davis*, 31 Misc.3d 142(A) (App. Term, 2nd Dept. 2011). In addition, the issue of excessive sentence should be raised in the direct appeal where it can result in a modification to 364 days to avoid an aggravated felony in the case. *People v. Scott*, _A.D.3d_, 2017 WL 6600377 (2nd Dept. 2017).

Significantly, in Scott, the court held that the fact she completed her sentence did not render the appeal academic. It recognized that the one year sentence may have immigration consequences. The court reduced the sentence to 364 days.

VII THE COMPLETE DEPRIVATION OF THE RIGHT TO COUNSEL IS AN EXCEPTION TO THE RULE REQUIRING MATTERS THAT CAN BE DECIDED ON THE RECORD TO BE RAISED ON APPEAL AND NOT IN A CPL §440.10 MOTION. THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL IS A SINGLE ISSUE AND CAN BE RAISED AS A MIXED MOTION THAT INCLUDES MATTERS THAT ARE ON THE RECORD AND OUTSIDE THE RECORD. THE ISSUE OF AN ILLEGAL SENTENCE CAN ALWAYS BE RAISED IN A CPL SECTION 440.20 MOTION EVEN IF NOT PRESERVED IN THE TRIAL COURT.

If a defendant did not knowingly or intelligently waive his right to counsel

when he pled guilty pro se, then the erroneous denial of the right to counsel can be raised on a CPL §440.10 motion to vacate the guilty plea. *People v. Grubstein*, 24 N.Y. 3d 500 (2014).

The court has to conduct a searching inquiry to insure that the defendant is aware of the dangers and disadvantages of self- representation before permitting a waiver of the right to counsel and allowing the defendant to represent himself. *People v. Crampe*, 17 N.Y.3d 469 (2011).

An issue which is a matter of record of the court proceedings that generally can only be raised in a direct appeal can be raised in a CPL Section 440.10 Motion when there was no unjustifiable failure to appeal. CPL Section 440.10(2)(c); *People v. Syville*, 15 N.Y.3d 391, fn.3 (2010); *People v. Lard*, 45 A.D.3d 1331 (4th Dept. 2007).

In *Lard*, cited with approval in *Syville*, the defendant contended that the superior court information was jurisdictionally defective, a ground based on the record which could have been raised in an appeal. The defendant alleged that he timely told his attorney that he wanted to appeal, the attorney did not file a notice of appeal, and he did not realize that it was not filed until a subsequent resentence. Under these circumstances, the Appellate Division ordered a hearing pursuant to

CPL Section 440.30(5) to determine whether there was an unjustifiable failure to appeal.

The issue of ineffective assistance of counsel is concerned with the fairness of the process as a whole, and in reviewing such a claim, the court has to view the totality of the circumstances of the case. It constitutes a single ground or issue of ineffective assistance of counsel when some of the allegations appear on the record and some are outside the record. This is considered a mixed motion that is properly reviewed in a CPL Section 440.10 motion to vacate the conviction. The on the record allegations in a mixed motion based on ineffective assistance of counsel are not procedurally barred because they were not raised on an appeal. *People v. Maxwell*, 89 A.D.3d 1108 (2nd Dept. 2011); see also *People v. Taylor* 156 A.D.3d 86 (3rd Dept. 2017).

The concept of a mixed motion is important in the case of a non-citizen because there is no time limit on filing a CPL Section 440.10 motion to vacate the conviction. The non-citizen maybe raising the issue now because he or she is in removal proceedings and the time to file a notice of appeal has expired.

The Court of Appeals has also advised the Appellate Divisions that they should grant permission to appeal the denial of CPL Section 440.10 mixed motion

on the issue of ineffective assistance of counsel and consolidate it with a pending direct appeal. *People v. Evans*, 16 N.Y.3d 571, 574-575 (2011).

The issue of an illegal sentence can be raised in a motion to set aside a sentence pursuant to CPL §440.20 even if the issue was not preserved in the trial court. *People v. Jurgins*, 26 N.Y.3d 607 (2015). In that case, the Court of Appeals held that the defendant can raise the issue of an illegal second felony offender sentence based on an out of state conviction that was not the equivalent of a New York felony. Unlike a motion to vacate under CPL Section 440.10, a motion to set aside a sentence under CPL Section 440.20 does not have the provision requiring a denial of the motion where there has been an unjustifiable failure to appeal the issue under CPL Section 440.10(2)(c).

VIII THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL (*MCDONALD, PADILLA, LAFLER, FRYE, BORIA*) MUST GENERALLY BE RAISED IN A CPL §440.10 MOTION BECAUSE IT INVOLVES MATTERS OUTSIDE THE RECORD OF COURT PROCEEDINGS OF ADVICE TO THE CLIENT AND/OR ATTORNEY STRATEGY

This is because the advice and/or strategy that the attorney provides to the client is usually outside the record of the court proceeding or involves a mixed

motion that involves matters outside the record and those on the record of the court proceeding.

In *People v. Moore*, 141 A.D.3d 604 (2nd Dept. 2016), the court held that a CPL §440.10 motion was proper since the defendant's claim of ineffective assistance of counsel depended, in part, upon matter that would not appear on the record had there been a direct appeal from the judgment.

In *Moore*, the defendant pleaded guilty on one indictment to Burglary 2nd Degree and on the other he pleaded guilty to Grand Larceny 4th Degree. The judge adjudicated him a youthful offender and sentenced him to 1 1/3 - 4 years on the Burglary indictment. On the Grand Larceny conviction, he sentenced him 1-3 years concurrent.

If the judge had instead sentenced him to 364 days on the Grand Larceny conviction concurrently, then it would not have been an aggravated felony that would mandate deportation.

The Appellate Division found there was "no strategic reason" for the attorney not to advocate for a sentence that would have been the same overall but would not have made the conviction an aggravated felony.

IX POTENTIAL INEFFECTIVE ASSISTANCE GROUNDS

A. *PEOPLE V. McDONALD*, 1 N.Y. 3D 109 (2003) ERRONEOUS ADVICE ON IMMIGRATION CONSEQUENCES

Prior to *Padilla v. Kentucky*, 559 U.S. 356 (2010), New York recognized that it was ineffective assistance of counsel under the federal constitution to provide incorrect advice to a criminal defendant. However, it rejected the claim because the defendant did not meet the second prong of the *Strickland v. Washington*, 466 U.S. 668 (1984) test of showing prejudice in affecting the outcome of the plea process.

The court held that a defendant must demonstrate a reasonable probability that but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial. Since there was no factual allegation to support the second prong involving prejudice, the trial court did not err in denying the motion. *People v. McDonald*, 1 N.Y. 3d 109 (2003).

B. ALTHOUGH *PADILLA* HAS BEEN HELD TO BE NOT RETROACTIVE, ERRONEOUS ADVICE AND INEFFECTIVE ASSISTANCE IN PLEA NEGOTIATIONS CAN BE RAISED IN PRE-PADILLA CASES. ALSO, WE SHOULD ARGUE THAT RETROACTIVITY SHOULD BE RECONSIDERED BASED ON CPL SECTION 220.50(7).

Padilla has been held not to be retroactive to convictions that were final before the date of that decision. *Chaidez v. United States*, 568 U.S. 342 (2013); *People v. Baret*, 23 N.Y.3d 777 (2014). A conviction is final on a guilty plea 30 days after the sentence when there has been no appeal. If there was an appeal, it is final when the direct appeal was decided and discretionary review was denied or if discretionary review was not sought then when the time for seeking discretionary review has expired. *People v. Varenga*, 26 N.Y.3d 529 (2015). Therefore, *McDonald* is generally the basis to move to vacate pre-Padilla convictions.

In pre-*Padilla* cases, the Appellate Division has held pursuant to *McDonald*, that it is inaccurate advice to advise a defendant that the conviction carries the possibility of deportation when in fact deportation would be mandatory. *People v. Pinto,*133 A.D.3d 784 (2nd Dept. 2015); see also *People v. Corporan*, 135 A.D.3d 485(1st Dept. 2016). It was also inaccurate advice under *McDonald* to tell a defendant, who was a permanent resident, that the class B misdemeanor of

attempted intentional assault, which was a crime of moral turpitude, would not have a negative impact on his immigration status when the lawyer knew the client had a prior misdemeanor conviction for a crime of a moral turpitude. *People v. Richards*, 55 Misc.3d 148(A) (App.Term, 2nd Dept., 2017).

Subsequent to our Court of Appeals finding that *Padilla* was not retroactive in *People v. Baret*, supra, the Supreme Court of Washington found that *Padilla* was retroactive because it had a similar statute to New York CPL Section 220.50(7) that was used as an advisal at the guilty plea. *In the Matter Yung-Cheng Tsai*, 183 Wash 2d 91, 351 P.3d 138 (Supreme Court of Washington, en banc, 2015).

It makes no sense to provide the CPL Section 220.50(7) advisal without at the same time requiring the defense attorney to provide correct advice to the client. *Peque* suggested that the court in the advisal could direct the defendant to consult with his attorney concerning the immigration consequences.

Meanwhile, the "may" in the plea advisal has the effect of diminishing the seriousness of the immigration consequence in the case of aggravated felony where the deportation would be virtually certain or mandatory. In that circumstance, I

would argue in the pre-Padilla case that the defendant received incorrect advice under *McDonald* if he or she was not informed of the virtually certain or mandatory consequence by his attorney.

It is also important to note that the Second Department affirmed an order that granted a CPL Section 440.10 motion to vacate a conviction based on ineffective assistance of counsel in plea negotiations under our state constitution for the failure of the attorney to advocate for a plea that would not mandate deportation in a pre-*Padilla* case. *People v. Guzman*, 150 A.D.3d 1259 (2nd Dept. 2017).

C. *PADILLA V. KENTUCKY*, 559 U.S. 356 (2010) IT IS ERROR TO FAIL TO GIVE CORRECT IMMIGRATION ADVICE WHEN THE CONSEQUENCE IS CLEAR. IF THE CONSEQUENCE IS NOT CLEAR, IT IS ERROR NOT TO ADVISE THAT THE CONVICTION MAY HAVE ADVERSE IMMIGRATION CONSEQUENCES.

1. *PADILLA* AND ITS PROGENY

Padilla requires the defense attorney to give correct legal advice to the client when the deportation consequences are clear. If the consequence is not clear, then the attorney has to advise the client that a plea of guilty may carry adverse immigration consequence.

Padilla involved a guilty plea conviction for transportation of a large amount of marijuana. *Padilla* brought a motion for post-conviction relief on the grounds that his attorney not only failed to advise him of the immigration consequences of his plea but also gave him wrong advice that he did not have to worry because he had been in this country for a long time.

In *Padilla's* case, the immigration consequences were succinct, clear and explicit. This drug trafficking conviction could subject *Padilla* to automatic deportation. *Padilla* should have been correctly advised of this consequence.

The court recognized that there may be some situations where the deportation consequence is unclear or uncertain. In that situation, the criminal defense attorney need only advise the non-citizen client that the pending criminal charges may carry a risk of adverse immigration consequences.

It rejected the state's argument to limit its holding to non advice. This would create an incentive for the attorney to be silent on a matter of great importance. It would also deny clients least able to represent themselves the most rudimentary advice on deportation when it is readily available.

Padilla v. Kentucky, 569 U.S. 356 (2010) specifically recognized at p. 368 that preserving the possibility of discretionary forms of relief from deportation as

the principal benefit sought by defendants in deciding whether to plead guilty instead of going to trial. The Supreme Court specifically directed criminal defense attorneys (who were unaware of discretionary relief measures) to familiarize themselves with them from various practice guides. The final part of the decision at p. 373 recognized that informed consideration of the deportation consequences can only benefit the state and the non-citizen during the plea bargaining process. A criminal episode may involve multiple charges where only some or one involve mandatory deportation. This could lead to creative plea bargaining to craft a conviction that would reduce the likelihood of deportation. Thus, *Padilla* recognized that the negotiation of a plea bargain is a critical stage in the litigation for the purposes of the Sixth Amendment right to effective assistance of counsel.

Thus, under *Padilla*, a defendant is entitled to a zealous advocate, to give him or her essential advice specific to his or her circumstance to enable the defendant to make a choice between a plea and trial. *People v. Peque*, 26 N.Y.3d 168, 190 (2013). It is precisely for this reason that the burden is on defense counsel to ask the necessary questions to determine the defendant's status and the relevance of the status to the plea. *People v. Picca*, 97 A.D.3d 170, 179-180 (2nd Dept. 2012).

It is important that the attorney be familiar the requirements of cancellation of removal under 8 U.S.C. 1229b. A legal permanent resident is ineligible for cancellation of removal by a conviction for an aggravated felony. The inadmissible (undocumented) person would be ineligible for a hardship cancellation of removal by a conviction that would make the person inadmissible or deportable. This would include an aggravated felony or certain other types of convictions or determinations referred to by the above statute to 8 U.S.C. Sections 1182(a)(2), 1227(a)(2), and 1227(a)(3).

If the conviction would make the defendant ineligible for cancellation of removal, then deportation would be virtually certain or mandatory. *United States v. Rodriguez – Vega*, 797 F.3d 781 (9th Cir. 2015); *People v. Wilson*, 56 Misc.3d 22 (App. Term, 2nd Dept., 2017); *People v. Doumbia*, 153 A.D.3d 1139 (1st Dept. 2017).

In *People v. Wilson*, supra, the attorney was deficient since he did not advise the client that the conviction for the misdemeanor of attempted sale of marihuana would make deportation mandatory since it was considered an aggravated felony. Under that circumstance, the defendant even though deportable because his visa had expired (undocumented), would be ineligible for cancellation of removal.

In *People v. Doumbia*, supra, the majority held that the defendant received ineffective assistance of counsel because his counsel failed to advise him that his guilty plea to an aggravated felony would result in mandatory deportation. The defendant was entitled to know more than it is possible that a guilty plea would lead to removal. He was entitled to know, as here, that it was a virtual certainty.

In People v. Loaiza, supra, the attorney told the client that he "maybe deported" when the crime involved mandatory deportation. This was erroneous advice.

2. THE REQUIREMENT OF PREJUDICE AND HOW TO PROVE IT

In the plea context, under the *Strickland* standard of the United States Constitution, the defendant must prove 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. Hernandez*, 22 N.Y. 3d 972 (2013).

In *Hernandez*, the court found that there was support for the lower court's finding that the defendant failed to prove the prejudice prong. The court determined that there were compelling reasons for the defendant to plead guilty. He had learned that the People possessed strong evidence of his guilt. His ties to

his family in the United States were strained since the crime involved attempted rape in the 1st degree of his sister-in-law. In addition, he faced a lengthy sentence after trial if convicted, and would then have been deported.

In comparison, in *People v. Picca*, 97 A.D. 3d 170 (2nd Dept. 2012), the trial court erred in summarily denying the defendant's motion based on a failure to sufficiently allege prejudice. The Appellate Division held that neither a previous deportable conviction, nor strong evidence against the defendant, nor a favorable plea bargain necessarily requires a finding that a defendant was not prejudiced. The determination of whether to plead guilty is a calculus that takes into account all relevant circumstances. The People's evidence against a defendant, potential sentences, and the effect of a prior conviction are but factors in this calculus.

In light of the primary importance that aliens may place upon avoiding exile from this country, the evaluation of whether an individual in the defendant's position could rationally reject the plea offer must take into account the particular circumstances concerning his desire to remain in the United States.

In this case, the defendant was born in Italy, left his country of origin at age 3 and never returned, is now 50 years old, and has been a lawful permanent

resident here for over three decades. He has been employed only in the United States. His entire family including his wife and three sons (all American citizens) and his parents and siblings reside in the United States. Based upon these alleged circumstances, the defendant averred that he would never have pled guilty if he had known that removal from the country would be a mandatory consequence of the plea.

The Appellate Division concluded that these statements sufficiently alleged that a decision to reject the plea would have been rational even if the chances of an acquittal after a trial would be slim. The lower court erred in summarily denying the motion. The Appellate Division remitted the case for a hearing on ineffective assistance of counsel.

Likewise, based on *Picca*, the Appellate Term, Second Department, has on the issue of prejudice reversed the summary denial of the motion to vacate the conviction based on the strength of the evidence against the defendant. It held that where a defendant has strong ties to the United States, including family and job connections, the defendant has raised a question of fact as to whether he would have gone to trial, rather than pleading guilty and risking deportation. *People v. Richards*, 55 Misc.3d 148(A) (App. Term, 2nd Dept., 2017).

Meanwhile, the Appellate Term has also reversed the summary denial of a motion to vacate on the issue of prejudice based on *Picca* where a defendant was already deportable because his visa had expired before the guilty plea and the notice to appear in immigration court was unrelated to the conviction. Significantly, the prejudice in that case was that the conviction would make the defendant ineligible for discretionary cancellation of removal and make deportation mandatory. *People v. Wilson*, 56 Misc.3d 22 (App. Term, 2nd Dept. 2017). This is a very important case to argue for undocumented clients.

Prejudice can also be shown when if the immigration consequences would have 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. The defendant is entitled to a hearing. *People v. Chacko*, 99 A.D.3d 527 (1st Dept. 2012); *People* v. *Pinto,* 133 A.D.3d 787, 792 (2nd Dept. 2015).

More recently, a pre-Padilla conviction was vacated under our New York constitution that does not require a reasonable probability of a different result but is based on fairness of the process as a whole. *People v. Guzman*, 150 A.D.3d 1259 (2nd Dept. 2017) citing *People v.Caban*, 5 N.Y.3d 143, 156 (2005). This case

demonstrates the importance of arguing this issue under both the United States and New York Constitutions. In *Guzman*, the attorney failed to negotiate for a different subdivision of the same crime which would not have been an aggravated felony for immigration purposes. It appears that the District Attorney would not have opposed such a plea if the defense would have advocated for it.

Likewise, in *People v. Abdallah*, 153 A.D.3d 1424 (2nd Dept. 2017), the defense attorney failed to advocate for a plea to a crime of equal degree that would not have had mandatory deportation consequences. The attorney also gave erroneous advice that the plea of guilty he entered would preserve his eligibility for cancellation of removal.

Significantly, in *Abdallah*, the Appellate Division held that the trial court improperly relied exclusively on the prosecutor's testimony at the hearing that it would have been her preference to offer only the plea to grand larceny in the second degree. The prosecutor also admitted that she did not care about the immigration consequences and incorrectly thought the disposition permitted cancellation of removal.

The Appellate Division held that the *Strickland* standard for prejudice of a reasonable probability of a different result is met when there is a probability

sufficient to overcome confidence in the outcome. Given the defendant's focus on the immigration consequences, that he had a large incentive to negotiate a plea that would not mandate deportation, and the prosecutor was not concerned with the immigration consequences of the plea, the defendant established a reasonable probability that his attorney could have negotiated a plea agreement that would not have mandated deportation without eligibility for relief. It found that the defendant was deprived of meaningful representation under the New York Constitution because the error was egregious and prejudicial.

Significantly, the U.S. Supreme Court has now rejected the finding of the lower court that a defendant could not show prejudice because no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter sentence. In that case, the Sixth Circuit found that the defendant charged with possession of ecstasy with intent to distribute had no bona fide defense, not even a weak defense and stood nothing to gain by going to trial but more prison time.

The Supreme Court held that the trial court must focus on the particular defendant's decision making which may not turn only on the likelihood of conviction. In that case, it was whether but for counsel's erroneous advice, there

was a reasonable probability that he would have gone to trial rather than plead guilty if he knew the conviction would result in mandatory deportation. *Lee v. United States,* _U.S._, 2017 WL 2694701. It relied on the fact that Lee lived in the United States for nearly three decades, had established two businesses, and was the only person who could care for his elderly parents who were both naturalized U.S. citizens. The court could not find that it would have been irrational for a defendant in Lee's position to reject the plea offer in favor of going to trial if he had been properly advised of the deportation consequences. Significantly, the Supreme Court found that Lee met his burden of proof.

Thus, the court also rejected categorical rules and emphasized that assessing prejudice is a fact intensive inquiry specific to the case. Zota et al, *Practice Advisory, Jae Lee v. U.S.: Establishing Prejudice under Padilla v. Kentucky*, July 7, 2017, www.immigrantdefenseproject/practice-advisories-listed-chronologically.

The Appellate Division has followed *Lee* in rejecting the District Attorney's claim of a strong case and a beneficial plea as a basis to deny a hearing on the issue of prejudice. In that case, the defendant lived here for 20 years and had received asylum which proved his fear of returning to Cameron. *People v. Mebuin*,

_A.D.3d_, 2017 WL 6616796 (1st Dept. 2017).

It has also been held that credibility decisions as to whether the defendant would have gone to trial and not have pled guilty if he had been correctly advised should only be made after a hearing, even if the defendant had received a very beneficial plea deal, given the time he has lived legally in the United States. *People v. Samuels*, 143 A.D.3d 401 (1st Dept. 2016).

D. *LAFLER V. COOPER*, 566 U.S. 156 (2012) A DEFENDANT IS ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL IN PLEA NEGOTIATIONS

Recently in the cases of non-citizens, the Second Department has reversed the denial of a motion to vacate and affirmed the granting of such motion in two cases where the attorney did not attempt to advocate for a plea disposition with either the same overall sentence or degree of crime (different subdivision of the same statute) that was being offered but which would not have resulted in an aggravated felony that would make deportation mandatory.

In *People v. Moore*, 141 A.D.3d 604 (2nd Dept. 2016), the defendant pled guilty to an indictment for burglary where he received a youthful offender and a sentence of 1 1/3 -4 years. He pled guilty on the same date to a grand larceny

indictment where he received a sentence of 1-3 years concurrent. The court found that there was ineffective assistance of counsel for the defense attorney to fail to advocate for a sentence of 364 days on the grand larceny conviction.

A sentence of 364 days on the grand larceny conviction would not have affected the overall sentence that the judge wanted to impose because it would be concurrent with the 1 1/3-4 years that the defendant was receiving on the youthful offender finding. However, it would have prevented the grand larceny count from being an aggravated felony that would make deportation mandatory.

In *People v. Guzman*, 150 A.D.3d 1259 (2nd Dept. 2017), the defendant pled guilty to attempted criminal possession of a controlled substance under Penal Law Section 220.16(1) (intent to sell) which was an aggravated felony. The attorney failed to attempt to negotiate for a plea under Penal Law Section 220.16(12) (based on weight of the drugs). This was a failure to negotiate for a plea to a different subdivision of the same crime that would have prevented the defendant from having an aggravated felony for immigration purposes. It would not have affected the degree of crime or the sentence the defendant could receive for the crime.

The defense attorney did not know that the plea under Penal Law Section 220.16(1) was an aggravated felony that would make deportation mandatory, that

plea under Penal Law 220.16(12) would have made the defendant eligible for a possible waiver of deportation, and that the District Attorney conceded that their office would have consented if the defense attorney would have attempted to have negotiated the plea under subdivision (12).

The Appellate Division affirmed the granting of the CPL Section 440.10 motion which vacated the conviction. It found that there was ineffective assistance of counsel under our New York constitution which focuses on the fairness of the process as a whole citing *People v. Caban*, 5 N.Y.3d 143, 156 (2005).

Significantly, *Guzman* was a pre-*Padilla* case and apparently because this was ineffective assistance in plea negotiations there was no retroactivity problem under *Baret*. It also demonstrates the importance of presenting your arguments under both the United States and New York Constitutions.

People v. Abdallah, 153 A.D. 3d 1424 (2nd Dept. 2017) discussed on pp. 36-37, is also significant. It held that the trial court improperly relied exclusively on the testimony of the prosecutor that it was her preference to only offer the grand larceny in the second degree plea. The defense attorney did not advocate for a plea to a crime of the same degree in the indictment which would not have resulted in mandatory deportation, the prosecutor admitted that she did not care about the

immigration consequences, and thought the defendant would have been eligible for cancellation of removal on the grand larceny conviction. The Appellate Division ruled that the defense proved a reasonable probability that the defense attorney under these circumstances could have negotiated a different plea which would not mandate deportation.

Lafler v. Cooper, supra, is broader than *Padilla* since it established the right to effective assistance of counsel in plea negotiations in all cases. Before *Lafler,* the New York courts had recognized the right to effective assistance of counsel in plea negotiations. *People v. Fernandez*, 5 N.Y.3d 813 (2005); *People v. Garcia*, 19 A.D.3d 17 (3rd Dept. 2005); *People v. Roy*, 122 A.D.2d 478 (3rd Dept. 1986).

In *Lafler*, the defendant was charged with assault with intent to commit murder. The attorney told the client that the state could not prove the element of intent to murder because she had been shot below the waist. This was incorrect advice. The defendant turned down the plea offers and went to trial, and received a much greater sentence. To establish prejudice, the defendant would have to show that but for the attorney's erroneous advice the defendant would have accepted the plea.

Lafler has been argued as a basis that the attorney failed to resolve the case with a pre-indictment plea offer that would have resulted in a less severe penalty. Since this argument involves matters outside the record, it was held that it should be raised in a CPL §440.10 motion and not an appeal. *People v. Mangiarella*, 128 A.D. 3d 1418 (4th Dept. 2015).

Significantly, *Lafler* has been cited for the principle that it is ineffective assistance of counsel to fail to properly investigate the defendant's prior criminal history for plea negotiations. In that case, the defendant moved to vacate his trial conviction on the ground that the plea agreement should not have been rejected by the judge based on his predicate status. He also moved to set aside his sentence on the ground that he was erroneously sentenced as a persistent violent felony offender. The Appellate Division ordered a hearing on both motions.

On remittal, the court and the parties agreed that the defendant was a second violent felony offender and he was resentenced. The Appellate Division, on the appeal of the resentence, held that the trial court should have conducted a hearing to determine whether the plea, which was more favorable than the trial verdict, should be restored. P*eople v. Baker*, 85 A.D.3d 935, after remittal, 116 A.D. 3d 1058 (2nd Dept. 2014).

Thus, it is important that attorneys investigate any legal issue concerning a predicate felony or a conviction that raises a misdemeanor to a felony before recommending that the client admit it as a part of a guilty plea.

If a client has a predicate felony, then he or she would have to be sentenced to state prison on a grand larceny 4th degree. The conviction would then be an aggravated felony for immigration purposes.

If the out of state felony was not the equivalent of a New York felony or there was a constitutional defect in any predicate felony, then a defendant would not have to go to state prison on e.g. grand larceny 4th degree. It may be possible to negotiate a sentence of less than one year, i.e., 364 days, to avoid it being an aggravated felony for immigration purposes.

A resource for investigating the client's predicate and persistent status is *Klem* and *Zolot*, *Challenging Your Client's Predicate Felony Adjudication,* Appellate Division, First Department, September 18, 2014 CLE (written materials available on the First Dept. website under Past CLE Programs).

E. *MISSOURI V. FRYE*, 566 U.S. 133 (2012) DUTY TO INFORM CLIENT OF PLEA OFFERS

The defense attorney has the duty to inform his or her client of any formal plea offers from the prosecutor before such plea offers would expire. To show prejudice from the attorney's failure to inform the client of the plea offer, the defendant must prove a reasonable probability that he would accepted the offer without the prosecutor canceling it or the court rejecting it.

F. *BORIA V. KEANE*, 99 F. 3D 492, ON REHEARING 90 F. 3D 36 (2ND CIR. 1996) DUTY TO ADVISE CLIENT AS TO THE ADVISABILITY OF ACCEPTING OR REJECTING THE PLEA

It is insufficient for the attorney just to relay the plea offer. The defendant is entitled to the attorney's professional recommendation as to the advisability of accepting or rejecting the plea offer. *Boria v. Keane*, 99 F. 3d 492 (2nd Cir. 1996). In *Boria*, the defendant was charged with a Class AII drug felony. He was offered a reduced plea to a Class B felony with a sentence of 1-3 years. The prosecutor told his attorney that if the defendant did not accept the plea, the People would seek a superceding indictment for an AI drug felony.

Although the attorney thought it was suicidal for the client to reject the plea offer, the attorney never provided the client with his recommendation as to the advisability of accepting or rejecting the plea offer.

The defendant rejected the plea offer, was convicted on the superceding indictment for AI drug felony, and was sentenced to 20 years to life. The court held that the absence of any advice constitutes ineffective assistance of counsel. Under the circumstances of this case (where the lawyer believed that rejecting the plea was suicidal and there was a vast disparity between the sentence to be served upon rejection of the plea and subsequent conviction), the absence of advice prejudiced the client. *Boria v. Keane*, 90 F. 3d 36, fn. 2 (2nd Cir. 1996).

XI SUGGESTED PRACTICAL POINTERS

1. Interview the client concerning the facts of the crime, the discussions with client's former attorney, and the advice or lack of advice his former attorney gave client concerning the immigration consequences and whether he should plead guilty or go to trial.

2. Obtain written authorization from your client to obtain a copy of his former attorney's file on the client's case and for permission for his former attorney to discuss it with you and your law firm. The client is entitled to a copy of his former attorney's file. *Sage Realty Corp. v. Proskauer*, 91 N.Y.2d 30 (1997).
3. Obtain a copy of the court's file including the information(s) (charges against the client), the supporting depositions and witness statements that may be in the court's file, and any written waiver of rights form. In addition, obtain a copy of the outside file jacket on any local court case. This jacket would indicate the various court appearances, their purposes, who was present, and the court reporter. Significantly, it will also state whether an interpreter was necessary on the case and the language.
4. If an interpreter was necessary, did the attorney interview the client with an interpreter? Was the interpreter present for the plea and sentence? Was the written waiver of rights form in a language that the defendant understands? Is there any evidence that it was translated for the defendant? If there was an order of protection, was it explained to him or her in a language that he understands? As a corollary to the right to

counsel, non-English speaking individuals have the right to an interpreter to enable them to participate meaningfully in their defense. *In the Matter of ER-MEI Y.*, 29 A.D.3d 1013 (2nd Dept. 2006); *People v. DeArmas*, 106 A.D.2d 659 (2nd Dept. 1984); *People v.Nowakowski*, 13 Misc. 3d 127(A)(App. Term 2nd Dept. 2006).

5. Order the plea and sentence transcripts. If the transcripts of the plea and / or sentence do not indicate the presence of any interpreter but the court jacket indicates that there should be an interpreter, then order a copy of the arraignment transcript. The arraignment is the place that either a defendant or an attorney generally indicates the need for an interpreter.
6. After you obtain the court's file and the former attorney's file, discuss the case with the former attorney and any questions that you have after reviewing the court records and the attorney's file. If the former attorney does not remember the case, then ask the attorney what was his usual practice. This information would indicate whether the attorney's usual practice was correct or not concerning the advice or plea negotiation involving a non-citizen. If the attorney made a mistake in the advice or representation of the client, then the attorney may be willing to sign an

affidavit as to these facts. The Appellate Division has recognized that an affidavit of the former attorney is not necessary. *People v. Pinto*, 133 A.D.3d 787 (2nd Dept. 2015). It has been recognized that the defendant is taking an adverse position to his former attorney by alleging ineffective assistance of counsel. *People v. Radcliffe*, 298 A.D.2d 533 (2nd Dept. 2002). Therefore, it is not expected that you obtain an affidavit from the former attorney. You can put the facts of your discussion with the former attorney in your affirmation as upon information and belief from the former attorney. You can show the facts of deficient representation through your client's affidavit to obtain a hearing.

7. It is essential that your client's affidavit detail whether the client would not have pled guilty if the client knew that the conviction would have subjected the client to mandatory deportation or removal, whatever the circumstances that apply to the client. In addition, it needs to include facts as to the client's ties to the United States, his family members that live here, and any employment history in the United States.

8. The attorney's affirmation for the motion should address the strength of the District Attorney's case. It should also address whether there was a failure to attempt to negotiate for a plea which would not have mandated deportation. The memorandum of law should argue the issues under both the New York and United States Constitutions.

9. You should determine whether there are other issues besides those involving immigration that would make the conviction unconstitutional under the New York and the United States Constitutions. If all issues are not raised in the CPL Section 440.10 motion, then a subsequent motion raising them may be denied. CPL Section 440.10(3)(c). This is discretionary. If the issue is meritorious, then a subsequent motion can still be considered. *People v. Thomas*, 153 A.D.3d 860 (2nd Dept. 2017); *People v. Pinto*, 133 A.D.3d 787 (2nd Dept. 2015).

10. You should consider trying to negotiate an immigration favorable disposition with the prosecutor as part of the CPL Section 440.10 motion. The American Bar Association Criminal Justice Standards on the Prosecution Function, Standard 3-4.4, Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges, states that among the

factors the prosecutor may properly consider are: (vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the offense or particular offender. Also, in Standard 3-8.5, Collateral Attacks on Conviction, it states that the prosecutor need not raise every possible defense and should consider possible negotiated dispositions or other remedies, if the prosecutor and the prosecutor's office reasonably conclude that the interests of justice are thereby served.

It is important that you coordinate any strategy for a negotiated disposition with the immigration attorney as the bottom line is to obtain relief for the client in Immigration Court.

Furthermore, it is important that any disposition vacating the conviction be based on the legal issues and not based on rehabilitation or for immigration purposes. *Sutherland v. Holder*, 769 F.3d 144 (2nd Cir. 2014); *Saleh v. Gonzalez*, 495 F.3d 17 (2nd Cir. 2007); *Matter of Jose Marquez Conde*, 27 I & N Dec 251, April 6, 2018; *People v. Amer*, _Misc. 3d_, 2018 WL 1415869 (App. Term 2nd Dept 2018). Otherwise, the

original conviction will still be valid in Immigration Court even if it is vacated by the state court.

11. If the motion to vacate the conviction or set aside the sentence is denied, then if the client wants to appeal a motion needs to be made within 30 days of service of the order for permission to appeal to the intermediate appellate court. See Criminal Procedure Law Sections 450.15; 450.60; 460.10(4); 460.15 and 22 NYCRR Sections 670.12(b); 730.10(c).

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