IMMIGRANT DEFENSE PROJECT

**Practice Advisory**
July 15, 2014

# Strategies to Achieve Post-Conviction Relief for Immigrant Defendants in New York after *People v. Baret*

On March 31, 2010, in *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Supreme Court held that the Sixth Amendment requires criminal defense counsel to advise a noncitizen defendant regarding the immigration consequences of a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel. On June 30, 2014, the N.Y. Court of Appeals held in *People v. Baret*, No. 105 (N.Y. June 30, 2014) that *Padilla* is a "new rule" that does not apply retroactively to New York State convictions that were final before *Padilla*. This advisory describes strategies for achieving post-conviction relief for immigrant defendants in New York after *Baret*.

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IDP promotes fundamental fairness for immigrants accused or convicted of crimes by working to transform unjust deportation laws and policies and by educating and advising immigrants, their criminal defense attorneys, and other advocates. IDP is a founding partner of the Defending Immigrants Partnership, a national collaboration that works with public defenders and others to ensure that immigrants facing criminal charges are provided effective counsel to avoid or minimize immigration consequences of their criminal cases. IDP also partners with New York State Defender Association in training and advising NYS defenders to represent immigrant clients in a way that minimizes harsh immigration consequences.

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# I. Background

On March 31, 2010, *Padilla v. Kentucky* held that the Sixth Amendment requires criminal defense counsel to advise a noncitizen defendant regarding the risk of deportation arising from a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel. 559 U.S. 356 (2010). The question immediately arose whether the *Padilla* rule applied retroactively to collateral review of convictions that became final prior to *Padilla*. In October 2012, the Appellate Division held that *Padilla* was an application of *Strickland v. Washington*, 466 U.S. 668 (1984), and thus an "old" rule that applied to collateral review pursuant to federal retroactivity principles as described in *Teague v. Lane*, 489 U.S. 288 (1989). *See People v. Baret*, 99 A.D.3d 408 (1st Dep't 2012); *accord People v. Rajpaul*, 100 A.D.3d 1183 (3d Dep't 2012). Subsequently, the United States Supreme Court disagreed, holding that *Padilla* articulated a new rule that, under *Teague*, was not applicable to collateral review of federal judgments that were final when *Padilla* was decided. *Chaidez v. U.S.,*133 S.Ct. 1103 (2013). *Chaidez* did not decide the question of *Padilla* retroactivity under state retroactivity principles, nor did it decide whether *Padilla* fit within any of *Teague's* exceptions to the non-retroactivity of new rules. On June 5, 2013, the N.Y. Court of Appeals granted the People's application for leave to appeal in *Baret*. 21 N.Y.3d 1002 (2013).

# II. *People v. Baret* Decision

***Majority Opinion***

The majority held that *Padilla* established a new rule under *Teague* that did not fall within an exception to the non-retroactivity of new rules, and that the state test articulated in *People v. Pepper*, 53 N.Y.2d 213 (1981) also disfavored the retroactive application of *Padilla*. Thus, under either test, *Padilla* did not apply to convictions that became final prior to March 31, 2010. *People v. Baret*, No. 105 (N.Y. June 30, 2014).

The majority declined to interpret *Teague* more broadly as a matter of state law, although it recognized that adherence to *Teague* was not required. *Id.* at 26-28. The majority characterized

deportation as a "collateral" consequence of a criminal case unrelated to a defendant's guilt or innocence and explained that pre-*Padilla*, New York did not require defense attorneys to inform their clients of potential immigration consequences. *Id*. at 5-6 (citing *People v Ford*, 86 N.Y.2d 397 (1995). The majority echoed the Supreme Court's observation in *Chaidez* that the majority of state and federal appellate courts considered advice about the immigration consequences of a conviction to be outside the scope of the Sixth Amendment at the time *Padilla* was decided; thus, it created a new rule. *Id.* at 26-28.[1]

After concluding that *Padilla* established a new rule under *Teague*, the Court then analyzed whether *Padilla* was subject to *Teague's* "watershed exception" to the non-retroactivity of new rules. *Id.* at 21-26. To qualify as watershed, a rule must "be necessary to prevent an impermissibly large risk of an inaccurate conviction . . . [and] must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (internal quotations and citations omitted). The majority found that the *Padilla* rule met neither of those requirements. *Baret*, slip op. at 26. *Padilla* simply imposed a "modest duty" that is "not critical to an accurate determination of guilt or innocence." *Id.* at 24.[2]

The majority also found *Padilla* non-retroactive under *People v. Pepper*, which allows for retroactive application of a new rule under state law if it meets a three-prong test.[3] *Baret*, slip op. at

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[1] The majority did, however, acknowledge that "inaccurate advice about a guilty plea's immigration consequences constituted ineffective assistance under the Federal Constitution" prior to *Padilla*. *Id.* at 5 (citing to *People v McDonald,* 1 N.Y.3d 109, 111 (2003)).

[2] Although the majority used the term "modest," it quoted directly from *Padilla* in defining counsel's duty and did not elucidate the duty further. *Baret,* slip op. at 24. The quote from *Padilla* has been interpreted in some lower courts as creating a clear/unclear distinction concerning the immigration consequences arising from a criminal disposition, with the duty of counsel varying accordingly. This distinction reflects an incorrect interpretation of *Padilla*, and can be unhelpful when attempting to define the duty for purposes of seeking post-conviction relief. For a more nuanced interpretation, *see* Kathy Brady & Angie Junck, *How Much to Advise: What are the Requirements of* Padilla v. Kentucky*?* Defending Immigrants Partnership (April 20, 2010), immigrantdefenseproject.org/wp-content/uploads/2014/07/how_much_to_advise.pdf.

[3] *Pepper* has been used to decide the retroactive application of new state rules. *See, e.g., People v. Favor*, 82 N.Y.2d 254 (1993). The majority does not explain its decision to apply *Pepper* to a new rule of federal criminal procedure, although it states that it would have elected to apply *Pepper* instead of *Teague* in *People v. Eastman*, 85 N.Y.2d 265 (1995) if it had recognized that option. The majority indicates that *Padilla* would apply retroactively if it met the requirements of either *Teague* or *Pepper*. As *Pepper* allows for broader retroactive application of new rules, it would seem to render the *Teague* analysis irrelevant to the retroactivity of federal rules on state collateral review.

28-29. The Court held that counsel's failure to inform Baret of the immigration consequences had no bearing on whether there had been a reliable determination of guilt or innocence, as required by the first prong of the test. *Id.* Likewise, the majority also found that the remaining two factors – reliance on the old standard and the effect of retroactivity on the administration of justice – did not work in Baret's favor since the pre-*Padilla* standard did not require defense counsel to advise immigrant clients of possible immigration consequences, and because retroactive application would impede the administration of justice as courts would "have to make factual findings based on off-the-record conversations years after a plea." *Id*. at 29.

***Dissenting Opinions***

Chief Judge Lippman would have exercised the option to interpret *Teague* more broadly, finding that *Padilla* was a new rule that fit within the "watershed exception," adjusted to apply to rules governing guilty pleas. *Baret*, slip op. at 5 (Lippman, C.J., dissenting). He asserted that as a matter of fundamental fairness *Padilla* must apply retroactively because a guilty plea cannot be "knowing and voluntary" unless the defendant was aware that it carried a substantial risk of deportation. *Id.* at 1. Furthermore, he opined that the Court should have repudiated *Ford*, which contained dubious analysis in the first instance, following the passage of the harsh 1996 immigration laws. *Id*. at 2, 9.

Regarding the first "watershed exception" requirement, Chief Judge Lippman suggested that "[a]ccuracy, particularly in the plea context, encompasses more than just convicting the right person, it goes also to the appropriate level of criminality and attendant punitive consequences." *Id*. at 5. *Padilla* goes to "the heart of legal accuracy" of the plea because the plea is involuntary (and therefore legally invalid) absent advice regarding deportation. *Id*. at 5-6. *Padilla* also meets the second "watershed exception" requirement because it "implicates fundamental fairness and altered our understanding of the bedrock procedural element of the Sixth Amendment right to counsel by adding a previously unrecognized requirement that is essential to the fairness of a proceeding." *Id*. at 6 (internal quotations and citations omitted).

Chief Judge Lippman also found "a right to counsel under the State Constitution at least equivalent to that outlined in *Padilla*." *Id*. at 8. He then argued that both state and federal rules requiring advice about deportation consequences are retroactive pursuant to *Pepper*. *See id*. at 7. As with the "watershed exception," he would revise the first *Pepper* factor to focus on the legal validity of the plea, not the factual accuracy of the conviction. *See id*. at 8-9. This prong is satisfied because advice regarding deportation "is necessary as a matter of fundamental fairness, to protect the integrity of plea proceedings and to ensure that a defendant's plea is knowing and voluntary." *Id*. at 9. As for the second prong, Chief Judge Lippman pointed out that the majority's "reliance" analysis ignored professional norms that have existed since at least 1996 requiring defense counsel to advise noncitizens of immigration consequences. *See id*. at 9. Concerning the third prong, Chief Judge Lippman rejected the majority's concern for the administration of justice as speculative, in part because many defendants with pre-*Padilla* guilty pleas have already been deported. *See id*. at 9-10.

Judge Rivera dissented separately. Citing to the *Chaidez* dissent, Judge Rivera opined that *Padilla* was an old rule because it "applied the well-established standard of *Strickland v Washington* to determine that a criminal defense lawyer is constitutionally ineffective when that lawyer fails to inform a client of the immigration consequences of a guilty plea." *Baret,* slip op. at 1 (Rivera, J., dissenting). She further found that "professional norms in New York State have recognized this defense obligation for decades."[4] *Id.* Judge Rivera asserted that *Ford* was irrelevant to the analysis because *Ford* misapplied *Strickland* in failing to consider professional norms. *See id*. at 7. She also advocated discarding *Pepper* in favor of a retroactivity test that "serves the state's interests in the proper, sound, and fair implementation of our criminal justice system." *Id*. at 8.

[4] Judge Rivera conducted a thorough review of New York norms requiring advice on the immigration consequences of a guilty plea. *See Baret*, slip op. at 3-5 (Rivera, J., dissenting).

## III. Strategies to achieve post-conviction relief for immigrant defendants after *Baret*

This section describes various means to accomplish vacatur of convictions for immigrant defendants despite *Baret*. Some of these arguments constitute systemic claims left open by *Baret*, the contours of which are currently unclear. Others reflect arguments that may result in success in individual cases, depending on the facts presented. Practitioners are advised to investigate and research all potential claims before deciding which combination of these claims present the best possibility of success. It is important to frame the claims to maximize the chance of D.A. consent to the post-conviction motion.

### A. Pursue any argument that the conviction at issue was not final on March 31, 2010.

Retroactivity is only at issue in cases where the judgment was final when the *Padilla* rule was announced on March 31, 2010. A judgment that was not appealed becomes final at the conclusion of the "late appeal" filing deadline pursuant to N.Y. Crim. Proc. Law § 460.30. *See People v. Varenga*, 115 A.D.3d 684 (2d Dep't 2014).[5] No other appellate department has addressed this issue, so the *Varenga* holding currently applies in trial courts statewide. *See Mountain View Coach Lines v. Storms*, 102 A.D.2d 663, 664-65 (2d Dep't 1984). Thus, even in cases where no appeal was pending on March 31, 2010, *Baret* is limited in its impact to cases where the defendant was sentenced before March 1, 2009.

If the case was appealed, and the process of appellate review exhausted, the conviction became final after the ninety day period during which the defendant could have filed a petition for a writ of certiorari in the U.S. Supreme Court. *See Teague v. Lane*, 489 U.S. 288, 295 (1989) (case is "final" where "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari ha[s] elapsed").

[5] As of the publication date, there is a pending leave application in *Varenga*. See the IDP website for updates: immigrantdefenseproject.org/criminal-defense/padilla-pcr.

Practitioners are encouraged to check with the appeals clerk in the court of conviction to ascertain whether a notice of appeal was filed. In a small percentage of cases, a notice of appeal was filed and the court neglected to process it. Thus, some defendants who entered guilty pleas many years ago still have appeals pending post-*Padilla*.

### B. Seek D.A. consent to filing of a *Padilla* claim pertaining to a judgment that was final on March 31, 2010.

Non-retroactivity is a defense that the D.A. elects to affirmatively plead. *See Collins v. Youngblood*, 497 U.S. 37, 41 (1990). The D.A. is not obligated to make non-retroactivity arguments, and the court is not obligated to address it *sua sponte*. *Id.* Thus, *Baret* does not prevent the D.A. from consenting to a motion filed pursuant to N.Y. Crim. Proc. Law § 440 (hereinafter "440 motion"), raising a *Padilla* claim, and does not prohibit the judge from ordering vacatur, even for a case final on March 31, 2010.

### C. Assert that counsel gave inaccurate advice or otherwise misled the defendant regarding immigration consequences.

*Baret* affirmed that under *McDonald*, defense counsel's inaccurate advice to defendant regarding the deportation consequences of a plea amounted to ineffective assistance of counsel pre-*Padilla*. *See* slip op. at 5; *see also U.S. v. Couto*, 311 F.3d 179, 188 (2nd Cir. 2002) (affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea constitutes ineffective assistance). In *McDonald*, the defense attorney misadvised the defendant that he would not be rendered deportable by a guilty plea due to his lengthy residence in the country and his U.S. citizen children. *See McDonald*, 1 N.Y.3d at 112.

*Chaidez* explicitly distinguished misadvice claims from its holding, referring to a "separate rule for material misrepresentations." 133 S.Ct. at 1112. The Court articulated the rule thus: A lawyer violates the Sixth Amendment when he "affirmatively misrepresent[s] his expertise or otherwise actively mislead[s] his client on any important matter, however related to a criminal prosecution." *Id*. The Second Circuit has recognized this distinction between misadvice and the

failure to advise, applying the prohibition against misadvice retroactively, reasoning that "*Couto* did nothing more than apply the age-old principle that a lawyer may not affirmatively mislead a client." *Kovacs v. U.S.*, 744 F.3d 44, 51 (2nd Cir. 2013) (internal quotations omitted).

The contours of this type of claim remain largely undefined, leaving room for vigorous advocacy for a broad definition of "inaccurate" or "misleading" advice prohibited by the federal and state constitutions.[6] Besides cases where the defense counsel assures the defendant that a deportable plea actually avoids deportation, there are at least two other categories of affirmative misrepresentations regarding immigration consequences: 1) defense counsel misrepresented the risk of deportation attached to the guilty plea; and 2) defense counsel refrained from advising the defendant regarding immigration consequences, but otherwise misled the defendant into believing that there were no immigration consequences.

**1. Defense counsel misrepresented the risk of deportation attached to a guilty plea.**

These claims typically involve an assertion that defense counsel underestimated the risk of deportation arising from a guilty plea. *See People v. McKenzie*, 4 A.D.3d 437, 439 (2d Dep't 2004) (finding the first prong of *McDonald/Strickland* satisfied relative to a 1997 plea where the attorney incorrectly advised the defendant that deportation was a possible consequence of the plea, and that there were things he could do to avoid deportation, when it was in fact mandatory); *People v. Worrell*, Dckt. No. 2003QN024434 (Queens Crim. March 24, 2014, Lopez, J.)[7] (vacating plea where attorney told defendant that plea could impact citizenship application, when plea also rendered defendant deportable, because defendant was misled by reference to only citizenship); *People v. Paredes*, No. 1104/04, 2010 WL 3769234, at *3 n.1 (Sup. Ct., N.Y. County Sept. 21, 2010) (in the

[6] *McDonald* raised only a federal claim, and the Court did not address the question under state law. *See Baret*, slip op. at 6 n.3. There is a strong argument that inaccurate advice regarding deportation would constitute ineffective assistance under the N.Y. Constitution, under the standard articulated in *People v. Baldi*, 54 N.Y.2d 137, 147 (1981) ("[s]o 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 [state] constitutional requirement will have been met").

[7] *People v. Worrell* available at: immigrantdefenseproject.org/wp-content/uploads/2014/07/Yovanni-Worrell-Official-Decision.pdf

context of a guilty plea to an offense triggering mandatory deportation,[8] an affirmative statement that the plea *may* result in deportation would have constituted ineffective assistance under *McDonald*) (emphasis in original); *see also, e.g., State v. Perez*, A-0286-11T1, 2013 WL 3466431, at *7 (N.J. Super. Ct. App. July 11, 2013) (defense counsel provides "misleading or false information about immigration consequences" when he advises the defendant that he *may*, as opposed to *would*, suffer immigration consequences) (emphasis added).[9]

The Third Department has developed some unfavorable law in this area. *See People v. Glasgow*, 95 A.D.3d 1367, 1369 (3d Dep't 2012) *leave to appeal denied*, 20 N.Y.3d 1061 (2013); *People v. Obeya*, 110 A.D.3d 1382 (3d Dep't 2013) *leave to appeal denied,* 22 N.Y.3d 1201 (2014). In *Glasgow* the defendant pleaded guilty to an aggravated felony triggering mandatory deportation based on his attorney's advice that although deportation was possible, "the likelihood of removal proceedings being pursued by federal authorities may be diminished when a plea is to a reduced lower level felony, . . . or is served in local jail rather than state prison." *Glasgow*, 95 A.D.3d at 1368-69. The defendant was in removal proceedings based in part on this plea. *Id*. at 1367. Despite this seemingly grossly misleading advice, the Court held that defense counsel's "experience-based assessment of the *likelihood* that removal proceedings might or might not be initiated . . . was not misleading." *Id*. at 1369. In *Obeya*, defense counsel told the defendant, who was also in removal proceedings based on the plea, that "he [did not] know of anybody that ever got deported off a misdemeanor." *Obeya*, 110 A.D.3d 1382. The Court repeated the *Glasgow* language regarding the "likelihood" of removal proceedings in finding that counsel's advice was not misleading. *Id.*

Practitioners in the Third Department may challenge *Obeya* and *Glasgow* by arguing that there is a distinction between advice as to the risk of deportation arising from a plea (if given, it must be accurate pursuant to *McDonald* and *McKenzie*), and a prediction about whether the

[8] The court's subsequent decision granting the 440 motion confirmed that this offense resulted in mandatory deportation. *See People v. Paredes*, Ind. 1104/04 (Sup. Ct., N.Y. County Nov. 22, 2010, Ward, J.) (on file with author).

[9] New Jersey Appellate cases are cited herein not for precedential value, but as examples of successful framing of misadvice claims.

defendant will fly under the radar for a period of time. Advice regarding federal immigration enforcement is purely speculative, and a competent lawyer would understand that federal policy is subject to change. *See Secure Communities*, (indicating that federal immigration enforcement policy has shifted over time; however, "criminal aliens" have been a priority since 2008);[10] *see also The Morton Memos: Giving Illegal Aliens Administrative Amnesty*[11], (featuring eight memoranda issued in a period of twenty-two months by Director of Immigration and Customs Enforcement John Morton, describing shifts in enforcement policy). Advice that a defendant may avoid enforcement, therefore, presents an unacceptably high risk of misleading the defendant into failing to apprehend the accurate risk of deportation presented by the guilty plea. If "enforcement" was not discussed, and defense counsel underestimated the risk of deportation arising from the plea, practitioners can argue that the case is distinguishable from *Glasgow* and *Obeya* and that *McDonald* and *McKenzie* support a finding of deficient performance.

**2. Defense counsel did not explicitly or specifically misadvise regarding immigration consequences, but otherwise misled the defendant into believing that there were no immigration consequences.**

New Jersey attorneys have been arguing that silence can constitute "misadvice" since 2012, when the New Jersey Supreme Court found *Padilla* nonretroactive. *See State v. Gaitan*, 209 N.J. 339, 379-81 (2012) (finding *Padilla* nonretroactive but excluding misadvice claims from its holding); s*ee also, e.g., State v. Michel*, A-6258-12T1, 2014 WL 1257136, at *2 (N.J. Super. Ct. App. Div. Mar. 28, 2014) (defense counsel did not mention immigration consequences, but circled "N/A" in response to Question Seventeen of the standard plea form,[12] thus "creat[ing] the false impression that deportation was not in the realm of possible consequences of entering the plea"); *State v. Morris*, A-1621-11T3, 2013 WL 869503, at *5 (N.J. Super. Ct. App. Div. Mar. 11, 2013) (similar factual scenario, court held that "the [plea] form itself constituted affirmative misadvice"); *State v.*

[10] Between fiscal years 2008 and 2011, ICE removed more convicted criminal aliens from the United States than ever before, with the number of convicted criminals that ICE removed from the United States increasing by 89 percent. *See Secure Communities*, http://www.ice.gov/secure_communities/ (last visited July 11, 2014)
[11] http://www.fairus.org/morton-memos
[12] Question Seventeen of the standard NJ plea form asked, "Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty?"

*Marshall*, A-6075-12T1, 2014 WL 1375752, at *8 (N.J. Super. Ct. App. Div. Apr. 9, 2014) (similar factual scenario, unclear whether defendant viewed "N/A" answer to Question Seventeen, yet court held that "counsel's failure to render advice with respect to the deportation consequences of a guilty plea resulted from *conduct that equates to* affirmative misadvice") (emphasis added)].

The New Jersey cases cited above demonstrate that information in the record regarding immigration status or consequences, combined with defense counsel's silence, might support an argument that defendant was misled into believing that immigration consequences were not pertinent to the plea decision. New York does not have a similar standard plea form, but there may be other information in the record regarding the defendant's immigration status, and possible immigration consequences, such as in the Pre-Sentence Report, on the arrest records or RAP sheet, or in treatment court records. If this information existed, and the defense attorney failed to inform the defendant of its relevance by explaining that the plea entailed a risk of deportation, practitioners may be able to argue that defense counsel's silence in the face of this highly relevant information misled, or lulled, the defendant into believing that the plea did not carry a risk of deportation. Also, if the court fails to give the defendant the notification of immigration consequences required by N.Y. Crim. Proc. Law § 220.50(7), and neither the defense attorney nor the D.A. corrects the court's omission, a practitioner may be able to argue that silence in the face of the court's lapse misled the defendant into believing that the notification was not relevant to his case. This argument becomes significantly stronger if the defendant had been given the notification in another criminal case, or if he had heard the court give it in another defendant's case.

Another type of factual scenario that may support this argument is where the defense attorney makes statements that give the defendant the impression that the criminal penalties are the sole consequence of the criminal case. The following types of statements by defense counsel may support this argument: 1) All you have to do is two years of probation and this will all be over; or 2) Plead guilty today for time served and you can get back to your job and your family. This argument may prove particularly compelling in a case where the defendant demonstrated a strong

interest in a disposition that would get him back to his home and family as soon as possible, only to find himself in immigration detention at the conclusion of his sentence, facing the prospect of permanent separation from loved ones.

### D. Argue that failure to advise regarding immigration consequences violated the state constitution.

Judge Lippman found that "[i]t should be evident that defendant has a right to counsel under the State Constitution at least equivalent to that outlined in *Padilla*." *Baret*, slip op. at 7 (Lippman, C. J., dissenting). Failure to advise of immigration consequences, in certain circumstances, has been found to violate the state constitution. *See People v. DeJesus*, 935 N.Y.S.2d 464, 479-80 (Sup. Ct., N.Y. County 2011) (information regarding deportation was required under the state constitution, at least, in cases where the defendant was focused on establishing a life in the United States, and maintaining family and employment ties); *People v. Burgos*, 950 N.Y.S.2d 428, 448 (Sup. Ct., N.Y. County 2012) (same holding, issue was inadmissibility not deportability). The *Baret* decision did not address whether failure to advise an immigrant defendant of immigration consequences can present a claim under the state constitution; thus, this argument remains viable.

Practitioners can use Chief Judge Lippman's dissent in *Baret*, as well as the *DeJesus* and *Burgos* decisions, to develop this argument. The duty under the state constitution must be defined more narrowly than the duty at issue in *Baret*, or else the majority's discussion of retroactivity under *Pepper* will foreclose an argument that this state constitutional duty applies retroactively. However, the Sixth Amendment duty to advise of possible deportation consequences applies in all criminal cases with immigrant defendants, no matter their specific circumstances. In contrast, the *DeJesus* and *Burgos* decisions found a more limited duty under the state constitution, holding that "meaningful representation" required advice regarding immigration consequences only in cases where defendants exhibited strong ties to this country that they were focused on maintaining. If the state constitutional duty is described in this fashion, then the *Pepper* analysis in *Baret* does not control the retroactivity analysis pertaining to this narrower duty.

Practitioners should also consider advocating for a *Pepper* analysis better suited to evaluate the retroactivity of rules pertaining to guilty pleas. *See Baret*, slip op. at 8-9 (Lippman, C.J., dissenting) (first *Pepper* factor ought to focus on the legal validity of the plea, not the factual accuracy of the conviction, and is satisfied because advice regarding deportation "is necessary as a matter of fundamental fairness, to protect the integrity of plea proceedings and to ensure that a defendant's plea is knowing and voluntary").

## E. Seek vacatur based on the court's failure to notify the defendant of immigration consequences.

A court's failure to notify the defendant that the plea may result in his deportation may present a ground for vacatur. *See Peque*, 22 N.Y.3d 168 (2013) (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).[13] The D.A. may argue that this issue must be raised on direct appeal, as it was in *Peque*; however, resolution of the claim requires presentation of material outside the record. *See id*. at 200-01 (describing remedy of remittal to trial court to determine whether defendant was prejudiced by the court's failure to notify him that the plea might result in deportation). Thus, there are good reasons for the court to permit litigation of the claim in a 440 motion. For briefing regarding this claim, please see the Model Memorandum of Law in Support of 440 Motion, p. 30-32, available at immigrantdefenseproject.org/wp-content/uploads/2012/04/Model-Motion-Doc-3-Memorandum-of-Law-combined.final .pdf.[14]

[13] 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"), practitioners can argue that the Court's reasoning applies with equal force to many misdemeanor convictions, particularly controlled substance convictions.

[14] Subsequent to the Model Memorandum, trial courts have held that a defendant must raise a *Peque* claim on direct appeal, and that the rule announced in *Peque* does not apply retroactively. *See People v. Lovejoy*, 2014 N.Y. Slip Op. 24149 (Sup Ct, Bronx County 2014); *People v. Moran*, 2014 N.Y. Slip Op. 51018(u) (Sup Ct, Bronx County 2014). There is a leave application pending in the First Dept. in *Lovejoy*. See the IDP website for updates: immigrantdefenseproject.org/criminal-defense/padilla-pcr.

## F. File a coram nobis petition to reinstate the defendant's direct appeal.

Relief pursuant to coram nobis may be available to a defendant who can demonstrate that his attorney failed to file a notice of appeal and that failure constituted ineffective assistance of counsel.[15] *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *see also People v. Syville*, 15 N.Y.3d 391 (2010); *People v. Andrews, et al.,* No. 93, 94, 120 (N.Y. June 12, 2014). *Syville* permits relief pursuant to coram nobis where "an attorney has failed to comply with a timely request for a filing of a notice of appeal and the defendant alleges that the omission could not reasonably have been discovered within the one-year period" for filing a late notice of appeal under N.Y. Crim. Proc. Law § 460.30. *Syville*, 15 N.Y.3d at 399-400. Additionally, relief pursuant to coram nobis may lie where the defense attorney fails to meaningfully "consult with the defendant about an appeal where there is reason to believe (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Flores-Ortega*, 528 U.S. at 480. The court must consider "all relevant factors in a given case [to] properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal." *Id.*

Immigration consequences arising from a plea are seemingly relevant factors in the decision to pursue an appeal, whether or not defense counsel had a duty to apprise the defendant of such consequences. However, practitioners may argue that the attorney had a duty under the federal and state constitutions to advise regarding immigration consequences to render meaningful the consult regarding the appeal.[16]

To obtain relief pursuant to coram nobis, the defendant must demonstrate diligence in effectuating his appeal rights, both during the N.Y. Crim. Proc. Law § 460.30 appeal period and

[15] For a terrific primer on appellate issues pertaining to guilty pleas, *see* Lynn W. L. Fahey, *Guilty Plea Issues* (March 2014), posted on the IDP website: immigrantdefenseproject.org/wp-content/uploads/2014/07/pleas-from-fahey-1.pdf.

[16] The duty to advise regarding immigration consequences post-plea, relative to a decision regarding an appeal, was neither presented or decided in *Padilla*, and so this argument remains viable.

subsequently. *See Andrews,* slip op. at 11. Although this requirement of diligence may make it difficult to seek coram nobis relief relative to pre-*Padilla* convictions, if the defendant can assert that he acted with diligence upon discovering the immigration consequences of the plea, this may suffice to fulfill the requirement.

The coram nobis petition must supply, at a minimum: 1) specific details about the lack of a meaningful appeal consult and the consequent prejudice, 2) defendant's reasons for desiring an appeal, 3) at least one nonfrivolous ground of appeal, and 4) facts supporting the assertion that the defendant could not reasonably have discovered the ineffectiveness within the one-year period for filing a late notice of appeal under N.Y. Crim. Proc. Law § 460.30, and that the defendant acted with diligence thereafter. *See Flores-Ortega*, 528 U.S. at 480; see *generally Andrews, et al.,* No. 93, 94, 120 (N.Y. June 12, 2014). Every Appellate Department imposes specific obligations on counsel regarding notification of the right to appeal. *See id*, slip op. at 2 n. 1 (Rivera, J., dissenting). Coram nobis counsel should determine whether the defense attorney complied with the relevant appeal requirements, and detail any failures in the petition.

The defendant may also have waived his right to appeal, which is not necessarily fatal to a coram nobis petition, since the defendant likely can argue that the waiver was uninformed. However, the petition should address the factual and legal significance of the waiver.

## G. Argue that an initial 440 motion is the equivalent of a direct appeal for purposes of the *Padilla* claim.

This argument attempts to address the problem of a conviction that was final when *Padilla* was decided by asserting that an initial post-conviction proceeding is the equivalent of a direct appeal for the purpose of raising a claim of ineffective assistance of counsel. It is an argument of first impression in New York; it was raised in an *amici* brief in *Baret* but the Court did not address it. *See* Brief for Lenni Benson et al. as Amici Curiae Supporting Appellee, *People v. Baret*, No. 105 (N.Y. June 30, 2014). This *amici* brief is very useful for its adaptation of a more general argument

under N.Y. law. This general argument was also raised in *Chaidez* but the Court declined to address it as it was not raised below. 133 S.Ct. at 1113 n.16 (2013).[17]

## H. Pursue ineffective assistance of counsel claims unrelated to *Padilla*.

There are many grounds unrelated to *Padilla* that immigrant defendants can potentially use to achieve vacatur of a conviction that carries immigration consequences.[18] In light of the *Baret* decision, for pleas final prior to *Padilla*, it is imperative to investigate and research all grounds for vacatur that have a colorable chance of success, including violations of the duties described below. In light of *Baret*, practitioners should consider raising claims unrelated to *Padilla* as the primary claim, with the *Padilla* claim either as an alternative, or as a factual backdrop to bolster the assertion of prejudice.

### 1. Failure to comply with duty to negotiate effectively

Counsel has a duty to negotiate effectively, the contours of which are largely undefined. *See Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (2012). The *Frye* Court deemed it "neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the [plea bargaining] process." 132 S.Ct. at 1408. Thus, practitioners have wide latitude in defining counsel's negotiation duties, and should consider consulting relevant professional standards. Also, there exists a long-standing duty to mitigate harm in the plea (i.e. obtain the best plea possible). *See Glover v. U.S.,* 531 U.S. 198 (2001) (defendant suffers prejudice from sentence even one day longer caused by ineffective assistance of counsel). Although generally "harm" has been defined in terms of penal consequences, practitioners can argue that defense counsel has a duty to attempt to prevent other consequences of significance to the defendant.

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[17] For a Sample Party Brief on this "Initial-Review" Argument in the context of a federal conviction, *see* Sejal Zota & Dawn Seibert, *Seeking Post-Conviction Relief under* Padilla v. Kentucky *after* Chaidez v. U.S., Defending Immigrants Partnership, 13 (Feb. 28, 2013), http://immigrantdefenseproject.org/wp-content/uploads/2013/03/Chaidez-advisory-FINAL-2013022281.pdf.

[18] *See* N. Tooby, *Post-Conviction Relief for Immigrants* (updated monthly), http://nortontooby.com/ (describing forty different grounds to set aside pleas).

### a) To avoid deportation

For an example of this argument, see IDP's Model Memorandum of Law for a *Padilla* 440 Motion, p. 8-11, 17-19, immigrantdefenseproject.org/wp-content/uploads/2012/04/Model-Motion-Doc-3-Memorandum-of-Law-combined.final_.pdf (last visited July 12, 2014). Since the publication of the Model Motion, the Second Department has issued a decision finding *Padilla* non-retroactivity dispositive of this claim:

> [I]nsofar as the defendant contends that his attorney's failure to negotiate a plea and sentence that would have put him in a better position to fight deportation fell short of the professional norms of the day, his contention is without merit. Even if his attorney's representation fell short of the professional norms of the day, prior to *Padilla* a "breach of those norms was constitutionally irrelevant because deportation was a collateral consequence" of the plea (*Chaidez v. United States,* ––– U.S. at ––––, 133 S.Ct. at 1113 n. 15).

*People v. Clarke*, 116 A.D.3d 786 (2d Dep't 2014).[19] To try to avoid a similar result, practitioners who press this argument should emphasize that its conceptual underpinnings lie in *Lafler* and *Frye*, not *Padilla*.

### b) To consider the impact of an ICE detainer when negotiating a sentence.

Failure to identify a disposition that triggers mandatory ICE detention can derail any criminal sentence that depends on actual release from custody, and thus violates criminal counsel's longstanding duty to get the client out of criminal custody as early as possible. An ICE detainer may result in a longer state sentence, because the detainer typically acts to prevent the immigrant's participation in early release programs such as Shock Incarceration. Therefore, a practitioner may be able to argue that the defense attorney's failure to appreciate the impact of an ICE detainer on the length of time that the defendant would serve, and to use this information in plea negotiations, constituted ineffective assistance of counsel.

[19] The *Clarke* defendant has sought leave to appeal. Also, this issue is pending in the First Department in *People v. Gonzalez*, New York County Ind. No. 01467/08 (opening brief filed in March 2014). Check the IDP post-conviction relief website for updates: http://immigrantdefenseproject.org/criminal-defense/padilla-pcr.

### c) To avoid prolonged and indefinite immigration detention.

If the plea at issue carried the penalty of mandatory deportation, and there was an alternative plea that avoided both mandatory detention and the immigration consequence at issue, practitioners may be able to argue that the defense attorney violated the duty to negotiate to avoid additional incarceration. Minimizing jail time is a long-recognized duty of defense counsel. *See Glover,* 531 U.S. 198 (2001). *Peque* recognized the indefinite, often lengthy nature of immigration detention, stating that it resembles criminal incarceration although the conditions are generally worse. 22 N.Y.3d at 188-89. This argument may be particularly attractive if the defendant went directly from state custody to immigration custody. *See, e.g., State v. Garcia*, 727 A.2d 97 (N.J. App. Div. 1999) (attorney's misinformation not only misled Garcia about the possible deportation consequences of his guilty plea, but also indirectly resulted in lengthening the period of Garcia's incarceration).

In a not-yet-filed *amici* brief, IDP has drafted the following section, detailing the immigration law aspect of this argument:

> In addition to deportation, broad categories of offenses require mandatory immigration detention while administrative authorities and courts determine whether an immigrant is deportable or has available relief. *See* 8 U.S.C. § 1226(c). Immigration detention, although labeled "civil," is in practice indistinguishable from, if not worse than, criminal detention. *See* Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 Am. Crim. L. Rev. 1441, 1445 (2010) (observing that "in general, criminal inmates fare better than do civil detainees").[20] Immigration as well as criminal detainees are "ordinarily detained in secure facilities with hardened perimeters in remote locations that are considerable distances from counsel and their communities." *Id.* at 1444-45. Immigration incarceration can last for months or years, vastly exceeding the jail time associated with the criminal case. In 2012, the Department of Homeland Security detained an all-time high of 477,523 non-citizens, far more than the U.S. Bureau of Prisons or any state or local correctional system.[21] Also, detained New Yorkers, almost two-thirds of whom are transferred to out-of-state prisons,

[20] *See also* Anil Kalhan, *Rethinking Immigration Detention*, 110 Colum. L. Rev. 42, 43 (2010) (coining the term "immcarceration" to describe the quasi-punitive system of excessive immigration detention practices in the U.S.); New York University School of Law Immigrant Rights Clinic, *Immigration Incarceration, The Expansion and Failed Reform of Immigration Detention in Essex County, NJ*, 4 (March 2012), http://www.afsc.org/sites/afsc.civicactions.net/files/documents/ImmigrationIncarceration2012.pdf (finding that "the lack of liberty and conditions of immigrant detainees in Essex County, NJ mirror those of inmates in prison facilities for serious crimes").

[21] *See id*. at 1446 n.42; John F. Simanski & Lesley M. Sapp, *Annual Report Immigration Enforcement Actions: 2012*, 5 (Dec. 2013), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_0.pdf.

experience substantially lower rates of success in removal proceedings than their non-detained counterparts.[22] Many New Yorkers who are detained and deported leave behind U.S. citizen children.[23]

**d) To use immigration consequences to achieve a lesser prison sentence.**

Practitioners may be able to argue that the defense attorney's failure to pursue a lesser prison sentence through plea negotiations, due to the serious immigration consequences of the D.A.'s offer, constituted ineffective assistance of counsel. For example, if the plea at issue constituted an aggravated felony because it carried a one year sentence, then the defense attorney could have argued that subjecting the defendant to mandatory deportation was a disproportionate penalty for the offense, and persuaded the D.A. to agree to a 364-day sentence. *See, e.g.*, *People v. Gomez*, Ind. No. N10911/96 (Queens Crim. May 17, 2012, Camacho, J.)[24] (vacating plea pursuant to *Lafler* and *Frye* where defense attorney failed to use information in mitigation, including immigration consequences, to persuade the D.A. to fashion a more "just" disposition). Practitioners could advocate for the following general duty: "Counsel must use all reasonably available information to advocate for a less serious disposition." *See id.* Specifically, in neglecting to use the consequence of virtually mandatory deportation attached to the disposition as a negotiation tool, defense counsel failed to secure a lesser jail sentence.

**2. Ineffective assistance of counsel claims unrelated to the immigration consequences**

It is imperative to investigate all possible claims of ineffective assistance of counsel under the state and federal constitutions prior to filing the 440 motion, to maximize the chance of success, and because claims not raised in an initial 440 motion may

[22] *See* N.Y. Immigrant Representation Study, Study Grp. on Immigrant Representation, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 363-64 (2011), *available at* http://www.cardozolawreview.com/Joomla1.5/content/33-2/NYIRS%20Report.33-2.pdf. The Study Group reported that 73 % of non-detained immigrants in New York City have counsel, as opposed to 21% of detainees transferred out of state. The data also indicated that represented and non-detained immigrants have successful outcomes 74% of the time, as opposed to 3% of the time for unrepresented and detained immigrants.

[23] *See* NYU School of Law Immigrant Rights Clinic, et al., *Insecure Communities, Devastated Families*, 17-19 (July 23, 2012), http://immigrantdefenseproject.org/wp-content/uploads/2012/08/NYC-FOIA-Report-2012-FINAL-Aug.pdf

[24] People v. Gomez available at: http://immigrantdefenseproject.org/wp-content/uploads/2014/07/Peo-v-Gomez-Qns-Camacho-IAC-plea-bargaining.pdf

be deemed waived. *See* N.Y. Crim. Proc. Law § 440.10(3)(c)("court may deny a motion to vacate judgment when . . . [u]pon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so").[25] Practitioners who lack significant criminal defense experience should consider consulting with an experienced criminal defense attorney for assistance in developing these claims, examples of which follow.

**a) Failure to pursue a viable motion to suppress**

Practitioners should examine the underlying case for a colorable suppression issue, of either a statement made by the defendant, or of evidence obtained pursuant to a search or seizure. If a viable issue existed, and was not fully litigated by defense counsel, a practitioner may be able to argue that failure to litigate that issue constituted ineffective assistance of counsel. *See People v. Hasan*[26], No. 2005QN056552 , slip op. at 12 (Crim. Ct., Queens County Dec. 26, 2012, Mullings, J.) (describing "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"). Strategic reasons may exist for failing to fully litigate suppression issues, particularly weak ones, so practitioners must consider the impact of litigation of these issues on the case as a whole.

**b) Conflict of interest relative to co-defendant representation**

A conflict of interest due to representing co-defendants may present a ground for vacatur. *See People v. Webb*, 32 Misc. 3d 1228(A), *15-16 (Dist. Ct., Nassau County 2011) (vacating conviction where the defendant did not knowingly waive the conflict, and it infected the plea); *People v. Jaikaran*, Dckt. No. 2007QN30015, slip op. at 19-20 (Crim.Ct., Queens County May 16, 2012, Zoll, J.) (vacating conviction due to conflict of interest because "defendant needed to have an

[25] Check the annotations to N.Y. Crim. Proc. Law § 440.10 for case law regarding other grounds for vacatur of a conviction.

[26] *People v. Hasan* available here: http://immigrantdefenseproject.org/wp-content/uploads/2014/07/people-v.-hassan.pdf

attorney focused singly on his own interests . . .particularly [due to] the potential immigration concerns that Mr. Jaikaran faced").[27]

### c) Failure to seek a Youthful Offender disposition

If the defendant was eligible for a Youthful Offender (YO) disposition, and the attorney failed to zealously seek a YO, this may present a ground for vacatur. *See People v. Chou*, Ind. No. 1770/1998 (Sup. Ct., Bronx County Dec. 11, 2013, Newbauer, J.).[28] This error is critical in the case of an immigrant defendant because a YO disposition is not a conviction for immigration purposes. *See Matter of Devison-Charles*, 22 I. & N. Dec.1362 (B.I.A. 2000).

### d) Various other grounds pertaining to trial or sentencing preparation, or plea negotiations

Various other grounds exist to argue for vacatur based on ineffective assistance of counsel. These include the failure to conduct a diligent factual and legal investigation, see *Wiggins v. Smith*, 539 U.S. 510 (2003), failure to investigate or present a viable defense or sentencing argument, *Porter v. McCollum*, 558 U.S. 30 (2009), and failure to advise of a plea offer which the defendant would have accepted if competently advised. *See Missouri v. Frye*, 132 S.Ct. 1399 (2012). This list is non-exhaustive; defense practitioners should attempt to put themselves in the position of defense counsel at the inception of the case, and ascertain whether counsel failed to take any steps in trial or sentencing preparations, or negotiations, that might have proved fruitful. Evaluating such a claim generally involves going back and performing the steps omitted to see whether there is a reasonable probability that the client was prejudiced by the error.

## IV. Conclusion

Post-conviction relief for certain immigrant defendants may be more difficult in light of *Baret*, but it is still possible to vacate a problematic conviction or sentence. IDP is available to support aggressive litigation of post-conviction relief issues affecting immigrant defendants, and is

[27] *People v. Jaikaran* available here: http://immigrantdefenseproject.org/wp-content/uploads/2014/07/People-v.-Jaikaran.pdf
[28] *People v. Chou* available here: http://immigrantdefenseproject.org/wp-content/uploads/2014/07/Chou.pdf

deeply committed to moving the law in a positive direction. Thus, IDP is particularly interested in providing amicus briefing at the appellate level in appropriate high-impact cases. Please contact Staff Attorney Dawn Seibert at dawn@immdefense.org to request technical or amicus support.