



IN THE SUPREME COURT OF THE STATE OF DELAWARE

SAMUEL BALTAZAR, * No. 92, 2014
*
Defendant Below, * Court Below:
Appellant, * Superior Court – Sussex County
* Cr. ID No.: 1104009636
*
v. *
*
STATE OF DELAWARE, *
*
Plaintiff Below, *
Appellee. *

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

APPELLANT'S OPENING BRIEF

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Dated: June 10, 2014

TABLE OF CONTENTS

TABLE OF CITATIONS ii

NATURE OF PROCEEDINGS..... 1

SUMMARY OF THE ARGUMENT 4

STATEMENT OF FACTS..... 5

ARGUMENT..... 13

**I. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT’S
 MOTION TO VACATE CONVICTION AND MOTION FOR POST-
 CONVICTION RELIEF..... 13**

CONCLUSION..... 30

*Exhibit A: Letter Decision Denying Motion to Vacate Conviction and
Motion for Post-Conviction Relief,
State v. Baltazar, I.D. No. 1104009636, 2014
(Del. Super. Feb. 5, 2014) (ORDER).*

TABLE OF CITATIONS

Delaware Cases

<i>Baker v. State</i> , 906 A.2d 139, 148 (Del. 2006).....	14
<i>Claudio v. State</i> , 958 A.2d 846, 850 (Del. 2008)	14
<i>Dawson v. State</i> , 673 A.2d 1186, 1190 (Del. 1996)	14
<i>Gattis v. State</i> , 955 A.2d 1276, 1280-81 (Del. 2008).....	13
<i>Gural v. State</i> , 251 A.2d 344, 345 (1969)	8, 14, 15
<i>Harvey v. State</i> , 1996 WL 585912 (Del. Oct. 7, 1996)	15
<i>Keita v. State</i> , No. 493, 2010, Ridgely, Justice (Dec. 7, 2010)(ORDER)	15
<i>Lewis v. State</i> , 797 A.2d 1198, 1201 (Del. 2002).....	15, 16, 17, 18
<i>Miller v. State</i> , 25 A.3d 768, 771 (Del. 2011)	13
<i>Mills v. State</i> , 947 A.2d 1122 (Del. 2007).....	28
<i>United States v. Maynard</i> , 485 F.2d 247 (9 th Cir. 1973)	17
<i>Wainwright v. State</i> , 504 A.2d 1096 (Del. 1986)	14

United States Supreme Court Cases

<i>Chaidez v. United States</i> , 133 S. Ct. 1103, 1105 (2013).....	22, 28
<i>Padilla v. Kentucky</i> , 130 S.Ct. 1473 (2010).....	20, 21, 22, 24, 25, 26, 27
<i>Teague v. Lane</i> , 489 U.S. 288 (1989).....	22

Federal Circuit Court and District Court Cases

<i>Hartmann v. Carroll</i> , 492 F.3d 478, 481-82 (3 rd Cir. 2007).....	17
<i>Montes-Flores v. U.S.</i> , Nos. 2:12-CV-225-JMS-WGH, 2:11-CR-032-JMS-CMM-1, 2013 U.S. Dist. LEXIS 14517 (S.D. Ind. Feb. 4, 2013).....	26
<i>United States v. Bonilla</i> , 637 F.3d 980 (9 th Cir. 2011).....	26
<i>U.S. v. Dwumaah</i> , No. 1:05-CR-0157, 2013 U.S. Dist. LEXIS 20193 (M.D. Pa. Feb. 1, 2013).....	24, 25, 26
<i>United States v. Maynard</i> , 485 F.2d 247 (9 th Cir. 1973)	17
<i>U.S. v. Orocio</i> , 645 F.3d 630 (3 rd Cir. 2011).....	22, 23, 24, 25
<i>U.S. v. Urias-Marrufo</i> , 744 F.3d 361 (5 th Cir. 2014).....	26

State Cases

<i>Enyong v. State</i> , 369 S.W. 3d 593 (Tex. Ct. App. 2012).....	26
<i>State v. Silvera</i> , 309 P.3d 1277 (Alas. App. 2013).....	18
<i>State v. Tinoco-Perez</i> , 179 P.3d 363 (Ida. App. 2008).....	18
<i>State v. Quintero Morelos</i> , 137 P.3d 114 (Wash. App. 2006).....	18
<i>State v. Sway</i> , 828 A.2d 790 (ME. 2003).....	18

Delaware Statutes

11 *Del. C.* § 767.....1, 5, 6, 8, 11
11 *Del. C.* § 769.....1
11 *Del. C.* § 1102.....1, 5, 6, 8, 11

Federal Statutes

Immigration and Nationality Act INA § 237.....26

Rules

D.R.E. 103.....29
Super. Ct. Crim. R. 35.....16, 17
Super. Ct. Crim. R. 61.....14

NATURE OF PROCEEDINGS

Defendant was charged by Indictment on May 23, 2011 with one count of Unlawful Sexual Contact First Degree, a felony, in violation of 11 *Del. C.* § 769 and one count of Endangering the Welfare of a Child, a felony, in violation of 11 *Del. C.* § 1102(b)(3). Defendant resolved these charges by entering a “*Robinson Plea*”¹, on August 23, 2011, to the following charges:

S11-04-1128: Unlawful Sexual Contact 3rd Degree, a misdemeanor, in violation of 11 *Del. C.* § 767 (one count); and

S11-04-1129: Endangering the Welfare of a Child, a misdemeanor, in violation of 11 *Del. C.* § 1102 (one count).

Pursuant to the *Plea Agreement*, the Defendant was *Sentenced*² as follows:

S11-04-1128: Unlawful Sexual Contact 3rd Degree: 6 months at Supervision Level 5, suspended for 1 year at Supervision Level 3 Probation (consecutive to S11-04-1129).

S11-04-1129: Endangering the Welfare of a Child: 12 months at Supervision Level 5, suspended for 12 months at Supervision Level 3 Probation.

¹ A 1.

² A 3.

Defendant successfully completed Level 3 Probation and was subsequently granted an “early discharge” from Probation by the Honorable T. Henley Graves, Resident Judge, Superior Court, Sussex County, on or about August 14, 2012.³

Immigration and Customs Enforcement requested certified copies of the Indictment, Plea Agreement and Sentence Order in January, 2013,⁴ and, upon information and belief, initiated deportation proceedings against the Defendant and took the Defendant into custody relative to same on or about April 9, 2013.⁵ Upon information and belief, the Defendant was ordered to be deported on or about September 5, 2013.⁶

Defendant filed a *pro se Motion for Post-Conviction Relief* on October 9, 2013,⁷ and the undersigned was appointed in December, 2013 to represent the Defendant relative to same.

Pursuant to that appointment, the undersigned filed a *Motion to Vacate Conviction* on or about January 8, 2014⁸ and, in response to a letter from the

³ A 83.

⁴ *Id.*

⁵ A 20 – 40.

⁶ A 41.

⁷ A 20 – 40.

⁸ A 49.

Superior Court of January 13, 2014,⁹ an *Amended Motion to Vacate Conviction* on or about January 30, 2014.¹⁰

The Superior Court issued a decision on February 5, 2014, denying the Defendant's Motion for Post-Conviction Relief as well as denying the Defendant's Motion to Vacate Conviction and Amended Motion to Vacate Conviction.¹¹

This matter is the Defendant's Direct Appeal of the Judgment of the Superior Court denying the Defendant's Motion to Vacate Conviction and Motion for Post-Conviction Relief.

The Notice of Appeal was timely filed on February 24, 2014, and the initial briefing scheduled called for the Defendant to file the Opening Brief and Appendix on or before April 10, 2014.

The undersigned filed a request for an extension of time on the filing and service of the Opening Brief and Appendix on April 1, 2014, requesting an extension until June 10, 2014, and same was granted.

This is the Defendant's Opening Brief.

⁹ A 68.

¹⁰ A 72.

¹¹ A 81.

SUMMARY OF THE ARGUMENT

I. The Trial Court abused its discretion in denying the Defendant's *Motion to Vacate Conviction and Motion for Post-Conviction Relief*.¹²

¹² A 81.

STATEMENT OF FACTS

Defendant, a native and citizen of Guatemala – who was granted *Lawful Permanent Resident Status* on December 1, 1990¹³ – entered into a “*Robinson Plea*”¹⁴ on August 23, 2011, to the following charges:

S11-04-1128: Unlawful Sexual Contact 3rd Degree, a misdemeanor, in violation of 11 *Del. C.* § 767 (one count); and

S11-04-1129: Endangering the Welfare of a Child, a misdemeanor, in violation of 11 *Del. C.* § 1102 (one count).

The *Plea Agreement Form* stated, among other things, that the “[*Defendant*] understands that this plea may affect his immigration status.”¹⁵

The *Truth In Sentencing Form* provided, among other things, that the Defendant acknowledged the following language: “*NON-CITIZENS: Are you aware that conviction of a criminal offense may result in deportation / removal, exclusion from the United States, or denial of naturalization?*” The answer to this question was marked “YES.”¹⁶

¹³ A 20 – 40.

¹⁴ A 1.

¹⁵ A 1.

¹⁶ A 2.

At the beginning of the *Plea Colloquy*,¹⁷ the Defendant's attorney stated the following:

I've explained to him that, even though this isn't a felony, it might have ramifications regarding his status in this country. He's legal. He has a permanent legal residency, but this may affect his ability to stay in the country, and he's aware of that.

No other discussion relative to the Defendant's immigration status, or the potential impact that the instant plea would have relative to same, was conducted by the Superior Court during the *Plea Colloquy* and *Sentencing*.¹⁸

Defendant was subsequently *Sentenced*¹⁹ as follows:

S11-04-1128: Unlawful Sexual Contact 3rd Degree: 6 months at Supervision Level 5, suspended for 1 year at Supervision Level 3 Probation (consecutive to S11-04-1129).

S11-04-1129: Endangering the Welfare of a Child: 12 months at Supervision Level 5, suspended for 12 months at Supervision Level 3 Probation.

Defendant successfully completed Level 3 Probation and was subsequently granted an "early discharge" from Probation by the Honorable T. Henley Graves, Resident Judge, Superior Court, Sussex County, on or about August 14, 2012.²⁰

¹⁷ A 8 – 19.

¹⁸ A 8 – 19.

¹⁹ A 3.

²⁰ A 83.

Immigration and Customs Enforcement requested certified copies²¹ of the *Indictment, Plea Agreement* and *Sentence Order* in January, 2013, and, upon information and belief, initiated deportation proceedings against the Defendant and took the Defendant into custody relative to same on or about April 9, 2013.²² Upon information and belief, the Defendant was ordered to be deported on or about September 5, 2013.²³

Defendant filed a *pro se Motion for Post-Conviction Relief*²⁴ on October 9, 2013, and alleged, among other things, the following:

Ineffective Assistance of Counsel: Counsel did not advise the Defendant of any immigration consequences prior to the entry of the plea, where Defendant would face the virtual certainty of loss of his status as an LPR [note: lawful permanent resident] and his removal from the U.S.

Denial of Right to Speedy Trial: Defendant was quickly persuaded to enter a plea and he was not provided with a copy of the indictment. He didn't have an opportunity to review the Grand Jury minutes and was forced into a plea without an opportunity to evaluate the matter.

²¹ A 83.

²² A 20 – 40.

²³ A 41.

²⁴ A 20 – 40.

Coerced Confession and Guilty Plea: Defendant has no educational background and could hardly understand his lawyer based on his limited English, where counsel misled the petitioner telling him that he should not proceed to trial as the evidence are so compelling that petitioner will not succeed and that he will end up receiving a life time sentence where he was directed by the counsel to admit guilt and promised a lenient sentence.

The undersigned was appointed by the Superior Court to represent the Defendant in the Defendant's *Motion for Post-Conviction Relief*, and pursuant to that appointment, the undersigned filed a *Motion to Vacate Conviction* on or about January 8, 2014.²⁵

In this *Motion*, the Defendant sought to vacate his convictions for Unlawful Sexual Contact 3rd Degree and Endangering the Welfare of a Child based on the "collateral legal disabilities rule" espoused by this Court in *Gural v. State*, 251 A.2d 344, 345 (1969). In *Gural*, this Court adopted the "federal rule," which provides that²⁶

...the satisfaction of the sentence renders the case moot unless, in consequence of the conviction or sentence, the defendant suffers collateral legal disabilities or burdens; in which event the defendant is considered to have a sufficient legal stake in the conviction or sentence to survive the satisfaction of the sentence and to permit him to obtain a review or institute a challenge.

²⁵ A 49.

²⁶ *Gural v. State*, 251 A.2d 344, 345 (1969).

Defendant argued that his instant deportation order was an “extraordinary circumstance” and constituted a “collateral legal disability” flowing from his convictions, and that, as such, his convictions should be vacated.

In response to the *Motion*, the Superior Court replied, in writing, on January 13, 2014²⁷ and stated, among other things, the following:

1. The Defendant received appropriate “collateral consequence warnings,” based on the language contained within the *Plea Agreement Form* and *Truth In Sentencing Form*; and

2. What is the “extraordinary circumstance” if the Defendant was aware of the collateral consequences?

In response to the Superior Court’s letter, the undersigned submitted an *Amended Motion to Vacate Conviction* on or about January 30, 2014.²⁸

In the *Amended Motion*, the undersigned acknowledged that the Defendant was advised, on the *Plea Agreement Form* and the *Truth In Sentencing Form*, that he could face possible collateral consequences to his immigration status, and that it appeared the Defendant had been adequately advised by his former attorney.²⁹

²⁷ A 68.

²⁸ A 72.

²⁹ A 69; by way of further explanation, at the time of filing the *Motion to Vacate Conviction* and *Amended Motion to Vacate Conviction*, the undersigned – in all candor – believed the state of the

The *Amended Motion* argued that there is a legal distinction between a possible, yet theoretical, chance at being subject to a deportation order – under which scenario the Defendant’s claim would not be an “extraordinary circumstance” – versus an actual order for deportation (the scenario the Defendant is facing) – which would be an “extraordinary circumstance” under the law.

law was such that merely advising a non-citizen client about the “risk of deportation” attendant to a criminal conviction was “enough” to satisfactorily discharge a criminal defense attorney’s obligations to a non-citizen client in a criminal case. As such, the undersigned believed that a *Motion to Vacate Conviction* was the appropriate vehicle for addressing the Defendant’s claims (when also considering the Defendant’s “timeliness” issue of being currently subject to a deportation order). However, after the initiation of the instant appeal, and upon further research into this matter, the undersigned has become convinced – as asserted *infra* – that the state of the law is such that if a certain criminal conviction will result in the near-automatic deportation of the non-citizen client, a criminal defense attorney has the obligation to clearly advise the non-citizen client of such near-automatic deportation as a consequence of the criminal conviction (and not just provide the generic “risk of deportation” attendant to any criminal conviction). The undersigned did not assert this exact argument in the matter below, but respectfully asserts that the “interests of justice” allows this Court to consider the argument in this appeal. The undersigned recognizes that failing to assert this argument on behalf of the Defendant in the matter below may subject the undersigned to a potential claim for ineffective assistance, but the undersigned believes that candor to the Court trumps all.

The *Amended Motion* further argued that the actions of the United States Department of Homeland Security, in ordering the Defendant to be deported, created the “extraordinary circumstance” that the Defendant was relying upon in seeking to vacate the conviction.

Finally, the *Amended Motion* clarified that the Defendant was being deported based on the Defendant’s conviction for Endangering the Welfare of a Child, and that as such, the Defendant was only seeking to vacate the conviction associated with that charge (leaving the conviction for Unlawful Sexual Contact 3rd intact).

The State of Delaware, by and through the Department of Justice, filed a one page written response on January 31, 2014, stating it was opposed to any and all forms of relief sought by the Defendant.³⁰

The Superior Court issued a decision on February 5, 2014, denying the Defendant’s *Motion for Post-Conviction Relief*, as well as denying the Defendant’s *Motion to Vacate Conviction* and *Amended Motion to Vacate Conviction*.³¹

In denying both motions, the Superior Court stated that the Defendant had been fully advised of the potential impact of the convictions on his immigration

³⁰ A 80.

³¹ A 81.

status, and that as such, "...the Court cannot find that the deportation matters now pending are an extraordinary circumstance."

The Superior Court's decision was based upon the written submissions of the parties and without the benefit of a hearing relative to the claims asserted by the Defendant.

ARGUMENT

I. THE SUPERIOR COURT ABUSED ITS DISCRETION IN DENYING THE DEFENDANT'S *MOTION TO VACATE CONVICTION* AND *MOTION FOR POST-CONVICTION RELIEF*.

QUESTION PRESENTED

Did the Superior Court abuse its discretion in denying the Defendant's *Motion to Vacate Conviction* and *Motion for Post-Conviction Relief*? This question was preserved at the Superior Court level.³²

STANDARD & SCOPE OF REVIEW

This Court reviews the denial of a *Motion to Vacate Conviction* and the denial of a *Motion for Post-Conviction Relief* for an abuse of discretion,³³ and reviews questions of law arising from the denial of a *Motion for Post-Conviction*

³² A 81; by way of further explanation, as the Superior Court's decision denying the Defendant's *Motion to Vacate Conviction* and *Motion for Post-Conviction Relief* was presented in one decision addressing both claims, the Defendant's Opening Brief will likewise present one argument addressing both claims.

³³ *Gattis v. State*, 955 A.2d 1276, 1280-81 (Del. 2008).

*Relief de novo*³⁴. To the extent that the Defendant asserts arguments not fairly presented below, this Court will review for plain error.³⁵

MERITS OF THE ARGUMENT

Denial of Motion to Vacate Conviction

Defendant Has Standing to Assert Claim Despite Completion of Sentence³⁶

Generally speaking, once a particular sentence has been completed, any post-conviction claims are rendered moot, as the defendant is no longer in custody as a result of that conviction.³⁷ However, in *Gural v. State*, 251 A.2d 344 (Del. 1969), this Court adopted the “federal rule,” which provides that³⁸

...the satisfaction of the sentence renders the case moot unless, in consequence of the conviction or sentence, the defendant suffers collateral legal disabilities or burdens; in which event the defendant is considered to have a sufficient legal stake in the

³⁴ *Claudio v. State*, 958 A.2d 846, 850 (Del. 2008); *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

³⁵ *Baker v. State*, 906 A.2d 139, 148 (Del. 2006); *Wainwright v. State*, 504 A.2d 1096 (Del. 1986).

³⁶ Defendant respectfully asserts that he has standing to bring this action. Notably, the State did not challenge standing in its written submission to the Superior Court, nor did the Superior Court conclude the Defendant did not have standing in its decision denying the Defendant’s Motion and Amended Motion.

³⁷ Super. Ct. Crim. R. 61(a)(1).

³⁸ *Gural v. State*, 251 A.2d 344, 345 (Del. 1969).

conviction or sentence to survive the satisfaction of the sentence and to permit him to obtain a review or institute a challenge.

This Court, in addressing “collateral consequences,” has previously held that “[an] appellant seeking to invoke the collateral consequences exception...bears ‘the burden of demonstrating specifically a right lost or disability or burden imposed, by reason of the instant conviction which had not already been lost or imposed by reason of his earlier convictions.’”³⁹

Respectfully, Defendant asserts that (1) the loss of status as a Lawful Permanent Resident, (2) the threat of removal due to deportation, (3) the actual order for removal and deportation from the United States and (4) the hardship on the Defendant and the Defendant’s family that resides within the United States due to the removal and deportation – when considered together and individually – constitute a “right lost,” a “disability,” or “burden imposed” as a direct and collateral consequence of the Defendant’s convictions, and that as such, the Defendant has standing to assert his claims in the Superior Court and in the instant appeal before this Court.⁴⁰

³⁹ *Keita v. State*, No. 493, 2010, Ridgely, Justice (Dec. 7, 2010)(ORDER), citing to *Harvey v. State*, 1996 WL 585912 (Del. Oct. 7, 1996), and *Gural*, 251 A.2d at 344-45.

⁴⁰ *See Lewis v. State*, 797 A.2d 1198, 1201 (Del. 2002) (“...the Court held that collateral consequences, such as the inability to engage in certain business activities or restricted civil

Deportation as “Extraordinary Circumstance”

In *State v. Lewis*, 797 A.2d 1198, 1202 (Del. 2002), this Court affirmed a Superior Court ruling that granted a defendant’s Motion to Modify Sentence, over the objections of the State, based on the collateral legal disabilities rule.

In *Lewis*, the defendant, a citizen of Jamaica who had resided in the United States since 1977, pleaded guilty to Assault 2nd Degree in 1991, and was sentenced to a period of suspended incarceration.⁴¹ In 2000, well after Lewis had completed probation and completed his sentence, the Immigration and Naturalization Service initiated deportation proceedings against Lewis, and Lewis was subsequently ordered to be deported.⁴² Thereafter, Lewis filed a Motion to Modify Sentence.⁴³

The Superior Court granted Lewis’ motion, and in so doing, held that the risk of deportation constituted “extraordinary circumstances” within the meaning of Criminal Rule 35.⁴⁴ The Superior Court further held that the *Gural* “collateral consequences” exception for mootness provided a basis for relief for Lewis, even

rights, could be grounds to permit relief after the completion of a sentence...[t]he open language of Rule 35(b)...can be plainly read as permitting such considerations.”)

⁴¹ *Lewis*, 797 A.2d at 1199.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

though Lewis had completed his sentence and was not subject to current or future custody.⁴⁵

This Court, in affirming the Superior Court’s decision to grant Lewis’ motion, held that “the Superior Court has authority to modify a sentence under Rule 35(b) so long as collateral consequences attach to the sentence.”⁴⁶ In affirming the Superior Court’s decision, this Court cited – approvingly – to the Ninth Circuit’s view that a motion under rule 35 is, essentially, a “plea for leniency,” and “allow[s] the...court to decide if, on further reflection, the original sentence now seems unduly harsh.”⁴⁷ This Court also cited – approvingly – to several factors identified by the Superior Court that constituted “extraordinary circumstances” to justify relief, such as (1) the possible deportation of the defendant, and (2) the hardship on innocent persons that would result from the defendant’s deportation.⁴⁸

⁴⁵ *Id.*

⁴⁶ *Lewis*, 797 A.2d at 1203.

⁴⁷ *Lewis*, 797 A.2d at 1201 (citing to *United States v. Maynard*, 485 F.2d 247 (9th Cir. 1973)). See also *Hartmann v. Carroll*, 492 F.3d 478, 481-82 (3rd Cir. 2007) (“Rule 35(b) ‘allows for a reduction of sentence without regard to the existence of a legal defect’ ...[and]...is a plea for leniency...based on mercy and grace, rather than on the law.”)(internal citations omitted).

⁴⁸ *Lewis*, 797 A.2d at 1202.

In addition to Delaware, other State Courts have found that deportation as a consequence of a criminal conviction can constitute an “extraordinary circumstance” to justify modifying or otherwise amending a defendant’s sentence to lessen the threat or risk of deportation.⁴⁹

Respectfully, Defendant asserts that (1) the loss of status as a Lawful Permanent Resident, (2) the threat of removal due to deportation, (3) the actual order for removal and deportation from the United States and (4) the hardship on the Defendant and the Defendant’s family that resides within the United States due to the removal and deportation of the Defendant – when considered together and individually – constitute “extraordinary circumstances” to justify the Defendant seeking relief in the Superior Court via the Defendant’s *Motion to Vacate Conviction and Amended Motion to Vacate Conviction*, and to seek review of these claims by this Court in the instant appeal.⁵⁰

Superior Court Abused its Discretion

Respectfully, Defendant asserts that the Superior Court abused its discretion in denying the Defendant’s *Motion to Vacate Conviction and Amended Motion to*

⁴⁹ See *State v. Silvera*, 309 P.3d 1277 (Alas. App. 2013); *State v. Tinoco-Perez*, 179 P.3d 363 (Ida. App. 2008); *State v. Quintero Morelos*, 137 P.3d 114 (Wash. App. 2006); *State v. Sway*, 828 A.2d 790 (ME. 2003).

⁵⁰ *Lewis*, 797 A.2d at 1202.

Vacate Conviction – without the benefit of a full hearing relative to the Defendant's claims – and that, as such, the Superior Court's decision denying the Defendant's Motions should be reversed.

Denial of Motion for Post-Conviction Relief

Padilla v. Kentucky and Immigration Consequences

In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the United States Supreme Court held that defense counsel has an affirmative duty, under the Sixth Amendment to the United States Constitution, to provide accurate advice to a non-citizen client regarding the immigration consequences of a guilty plea in a criminal case.⁵¹

Padilla held that since deportation is a “particularly severe penalty,” that is “intimately related to the criminal process,” and which is “nearly an automatic result for a broad class of non-citizen offenders,” advice regarding deportation falls within the “ambit of the Sixth Amendment right to counsel.”⁵²

Padilla further held that deportation as a consequence of a criminal conviction – due to its “close connection to the criminal process” – is “uniquely difficult to classify as either a direct or collateral consequence,” and that, as such, the distinction between “collateral” consequences versus “direct” consequences is “ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation.”⁵³

⁵¹ *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

⁵² *Id.*, at 1481.

⁵³ *Id.*, at 1481-82.

Scope of Duty Established by *Padilla*
“Certainty of Deportation” vs. “Mere Risk of Deportation”

At first blush, *Padilla* appeared to establish that defense counsel has the affirmative duty to provide specific advice to a non-citizen client regarding the automatic, certain or mandatory deportation that will result as a consequence of a particular plea of guilty: “We agree with *Padilla* that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.”⁵⁴

However, later in the opinion, *Padilla* appeared to suggest that the scope of advice required was not quite clear: “When the law is not succinct and straightforward...a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges may carry a risk of adverse consequences. But, when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.”⁵⁵

In essence, this later statement appears to suggest that, if the immigration consequences are “certain,” [i.e., if it is clear that the defendant will be subject to automatic, or near automatic, removal for the conviction] than a defense attorney has the duty to provide “certain” advice to a non-citizen client [i.e., the defense attorney has the duty to advise the defendant that the defendant’s guilty plea will

⁵⁴ *Id.*, at 1478.

⁵⁵ *Id.*, at 1483.

result in automatic, or near automatic, removal]. Conversely, if the immigration consequences are not “certain,” [i.e., if it is not clear that the defendant will be subject to automatic, or near automatic, removal for the conviction] than a defense attorney has the duty to merely provide advise concerning the attendant “risks” of deportation.

The *Padilla* holding has come to stand for the proposition that “the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea.”⁵⁶

However, the undersigned would respectfully represent that the broader language of *Padilla* – holding that where the immigration removal consequences are clear, the defense attorney has a duty to provide correct advice regarding the removal – is the true holding of *Padilla*.

Third Circuit After *Padilla*

In *U.S. v. Orocio*, 645 F.3d 630 (3rd Cir. 2011), the Third Circuit Court of Appeals considered, among other things, whether *Padilla* applied retroactively,⁵⁷

⁵⁶ *Chaidez v. United States*, 133 S. Ct. 1103, 1105 (2013). *Chaidez* held that *Padilla* did not apply retroactively under *Teague v. Lane*, 489 U.S. 288 (1989); however, the Defendant’s case was resolved after *Padilla*, and as such, *Padilla* applies to the instant matter.

⁵⁷ Prior to the Supreme Court’s decision in *Chaidez*, the Third Circuit held in *Orocio* that *Padilla* applied retroactively (this decision was subsequently overruled by *Chaidez*).

and, if it did, whether Orocio’s attorney was ineffective for failing to advise Orocio of the “near-certain removal consequence of pleading guilty...”⁵⁸

In *Orocio*, the defendant, a native of the Philippines and a Lawful Permanent Resident of the United States since 1997, pled guilty in October, 2004, to one count of Possession of a Controlled Substance in federal court, and was sentenced to time served followed by a two year period of supervised release.⁵⁹ The defendant successfully completed the supervised release period and was discharged from supervision in 2007.⁶⁰ Following the completion of supervision, the defendant was placed in removal proceedings due to the conviction for the controlled substance offense.⁶¹

Thereafter, the defendant filed for post-conviction relief in the District Court asserting that the defendant’s attorney was ineffective for failing to advise the defendant of the “immigration consequences – namely, mandatory removal – of pleading guilty...”⁶² The District Court denied the claim without a hearing.⁶³

⁵⁸ *U.S. v. Orocio*, 645 F.3d 630, 642 (3rd Cir. 2011).

⁵⁹ *Id.*, at 634.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*, at 635.

⁶³ *Id.*

In its decision vacating the District Court’s denial of the defendant’s post-conviction claim, and remanding the case to the lower court for further proceedings, the Third Circuit cited to, among other things, the defendant’s claim that his attorney “failed to advise [the defendant] of the near-certain removal consequence of pleading guilty...” (emphasis added).⁶⁴

This language would seem to imply that the Third Circuit was adopting the “certainty of deportation” standard in assessing the scope of the duty of representation; however, in Footnote 5, *Orocio* cites to *Padilla*’s broader holding that⁶⁵

“[w]hen the law is not succinct and straightforward...a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. This, like *Padilla*, is not such a case.

The language of Footnote 5 in *Orocio* would seem to imply that the Third Circuit has adopted the broader *Padilla* holding that where the immigration removal consequences are clear, the defense attorney has a duty to provide correct advice regarding the removal.

In *U.S. v. Dwumaah*, No. 1:05-CR-0157, 2013 U.S. Dist. LEXIS 20193 (M.D. Pa. Feb. 1, 2013), the Middle District of Pennsylvania (within the ambit of

⁶⁴ *Id.*, at 642.

⁶⁵ *Id.*, at Footnote 5.

the Third Circuit) held that a defense attorney – though he advised the defendant that “deportation would still be a possibility as a result of his guilty plea” – was ineffective for failing to advise the defendant that the guilty plea to a particular offense would render the defendant’s removal and deportation near-automatic.⁶⁶

The *Dwumaah* court relied on the Third Circuit’s analysis in *Orocio* in reaching its conclusion that, where the immigration consequences – and the removal and deportation consequences – are clear, the defense attorney has a duty to provide advice to the non-citizen client that is also clear about the consequences (and that merely advising about the possible risks was not enough).⁶⁷

Further, and most importantly, the *Dwumaah* decision held – also in reliance on the Third Circuit’s analysis in *Orocio* – that mere warnings of possible immigration consequences, by counsel and the Court during its plea colloquy, were insufficient, as none of the warnings advised the defendant “that his guilty plea would make deportation a virtual certainty.”⁶⁸

⁶⁶ *U.S. v. Dwumaah*, No. 1:05-CR-0157, 2013 U.S. Dist. LEXIS 20193 (M.D. Pa. Feb. 1, 2013)(*Dwumaah* was later abrogated on other grounds following the *Chaidez* decision).

⁶⁷ *Id.*

⁶⁸ *Id.*, at *8.

Thus, it would seem that the Third Circuit has adopted the broader *Padilla* holding that where the immigration removal consequences are clear, the defense attorney has a duty to provide correct advice regarding the removal consequences.

Federal and State Courts After *Padilla*

A variety of other Federal Courts and State Courts have interpreted *Padilla* as requiring a “certainty of deportation” standard of duty.⁶⁹

Application of “Certainty of Deportation” Standard to Defendant’s Case

In the instant matter, the Defendant alleges that he is being removed and deported from the United States due to his guilty plea to Unlawful Sexual Contact Third Degree and Endangering the Welfare of a Child, as these offenses are

⁶⁹ See *United States v. Bonilla*, 637 F.3d 980 (9th Cir. 2011) (“[a] criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty.”); *U.S. v. Urias-Marrufo*, 744 F.3d 361 (5th Cir. 2014) (“Urias correctly argues that, under *Padilla*, she was required to be advised of the certain deportation consequences of her plea prior to her plea hearing.”); *Enyong v. State*, 369 S.W. 3d 593 (2012) (“...*Padilla* commands that ‘when the deportation consequence is truly clear,’ counsel’s ‘duty to give correct advice is also clear.’”); *Montes-Flores v. U.S.*, Nos. 2:12-CV-225-JMS-WGH, 2:11-CR-032-JMS-CMM-1, 2013 U.S. Dist. LEXIS 14517 (S.D. Ind. Feb. 4, 2013) (“Under *Strickland* and *Padilla*, counsel’s failure to inform Montes-Flores that a conviction...would result in presumptively mandatory deportation was objectively unreasonable.”)

classified as “deportable offenses” under the Immigration and Nationality Act, INA § 237(a)(2)(E)(i).⁷⁰

As stated *supra*, it appears from the record that the sum total of the advice provided to the Defendant concerning the removal and deportation risks that he faced by entering into the plea agreement would fall into the category of “mere risk advice,”⁷¹ and not the “certainty of deportation” standard, as required by *Padilla* and the Third Circuit. Stated plainly, it would appear, based solely on the record before this Court, that the Defendant was not provided with effective assistance of counsel, in that the Defendant’s attorney did not specifically advise the Defendant that this particular guilty plea would make the Defendant’s removal and deportation a “virtual certainty.”

Unfortunately, as also stated *supra*, the particular argument that is now being asserted by the Defendant – that the offenses that the Defendant pled guilty to would require mandatory or automatic removal and deportation, and as such, the Defendant was entitled to be advised of this “certainty of deportation,” and the

⁷⁰ A 20 – 40.

⁷¹ A 1; A 2; A 8 – 19.

failure to do so constituted ineffective assistance of counsel and prejudiced the Defendant – was not fairly presented to the Superior Court in the filings below.⁷²

Remand for Evidentiary Hearing is Appropriate

As stated *supra*, the Superior Court’s decision denying the Defendant’s *Motion to Vacate Conviction* and *Motion for Post-Conviction Relief* was based upon the written submissions of the parties and without the benefit of a hearing relative to the claims asserted by the Defendant.

Additionally, this Court’s review of the Superior Court’s denial of the Defendant’s Motions is limited to a review of the circumstances, facts and evidence properly before the Superior Court at the time of the Superior Court’s decision.

⁷² As previously stated, at the time of filing the *Motion to Vacate*, the undersigned was of the mistaken belief that the “commonly known” holding of *Padilla* (which was, unfortunately, repeated in *Chaidez*) was the “law of the land,” to-wit: merely advising a non-citizen client that a guilty plea could have potential immigration consequences was sufficient. However, after initiating this appeal, the undersigned endeavored to conduct thorough and conscientious research into this issue in an effort to more properly perfect the Defendant’s matters for appeal and discovered that the “true holding” of *Padilla* is more complex than just advising a non-citizen client of the immigration risks attendant to a guilty plea. This is not meant to excuse the undersigned’s failure to advance this argument in the Superior Court, which the undersigned should have done.

However, Delaware Rule of Evidence 103(d) allows this Court to “take notice of plain errors affecting substantial rights, although they were not brought to the attention of the court.”⁷³

This Court has the power and authority to remand this matter for further proceedings to create an appropriate record relative to the Defendant’s Motions to address the following (unanswered) issues:

Did the Defendant’s guilty plea subject the Defendant to mandatory or near-automatic removal and deportation from the United States upon entry of the plea?

If so, did the Defendant’s attorney provide the appropriate scope of advice concerning the immigration consequences attendant to the entry of the plea?

As such, the Defendant respectfully requests that this matter be remanded to the Superior Court for an evidentiary hearing relative to the Defendant’s Motions.

⁷³ D.R.E. 103(d); *see also Mills v. State*, 947 A.2d 1122 (Del. 2007), citing to *Wainwright v. State*, 504 A.2d 1096, 1110 (Del. 1986).

CONCLUSION

For the reasons and upon the authorities cited herein, the undersigned respectfully requests this Honorable Court reverse the Superior Court's decision denying the Defendant's *Motion to Vacate Conviction* and *Motion for Post-Conviction Relief*, and remand the Defendant's case to the Superior Court for a full evidentiary hearing relative to the Defendant's claims.

Respectfully Submitted,

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