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SUPREME COURT OF NEW JERSEY
DOCKET NO.089274
APP. DIV. DOCKET NO. A-3292-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
	:	
Plaintiff-Appellant,	:	On Certification Granted from a Final
	:	Judgment of the Superior Court of New
v.	:	Jersey, Appellate Division.
	:	
JUAN C. HERNANDEZ-PERALTA,	:	Sat Below:
	:	
	:	Hon. Michael J. Haas, J.A.D.
Defendant-Respondent.	:	Hon. Arnold L. Natali, Jr., J.A.D.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT

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August 26, 2024

DEFENDANT IS NOT CONFINED

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PRELIMINARY STATEMENT

The decision of the Appellate Division should be affirmed because it constituted a straightforward application of defense counsel's well-established obligation to conduct reasonable investigations. When counsel was presented with information that defendant might not be a U.S. citizen – and, indeed, that defendant himself might incorrectly believe that he was – she had a duty to conduct a basic investigation into his immigration status. Contrary to the State's claim, this commonsense rule is not a dramatic expansion of a criminal defendant's right to the effective assistance of counsel at all critical stages of the case. At most, it is an old rule applied to somewhat unique facts.

Here are those facts: defendant honestly and reasonably believed that he was a citizen right up until he was served with a removal proceeding notice while in custody on a probation violation. He had been born in Mexico and brought to New York when he was just two years old, and he has no memories of Mexico, only New York. He may have been confused when he told plea counsel and the court that he was born in New York. But he was not intending to mislead when he said that he was a citizen. He believed he was a citizen because he had a social security number and a green card and, significantly, because his family told him that they had done whatever was necessary to get him citizenship. He had no reason to second-guess them or inquire further.

When asked about his immigration status by sentencing counsel, defendant repeated his mistaken claim of citizenship. However, based on what sentencing counsel had learned by then, she had a duty to investigate further. Counsel had read the presentence report (PSR), which informed her that defendant was born in Mexico and brought here as a child. She was also aware that the checkboxes for "Citizenship" (the choices being "US" or "Other") were left blank. In addition, counsel noted that the PSR was blank where it should have reported defendant's social security and driver's license numbers. She also observed that defendant's mother was in Mexico and that he had no contact with his father.

Collectively, this information should have set off alarm bells. In 2019, a reasonably competent criminal defense attorney knew that immigration law was a minefield and that clients brought here as children were often wrong about their legal status. Under these unique circumstances, counsel had an obligation to do more than merely confirm that defendant believed he was a citizen. And had she inquired into the basis of that belief, she would have either discovered that he was mistaken, or she would have referred his case to an immigration law specialist who would have discovered the mistake. A timely pre-sentence motion to withdraw the plea would then have been filed.

The State's briefing requests application of some variant of the invited error doctrine to punish defendant for his "intentional duplicity." The record does not support that characterization because defendant truly (yet falsely) believed he was a citizen. Defendant was a nineteen-year-old high school dropout, with limited English proficiency, who became addicted to drugs and alcohol as a child. To the extent that the purpose of the invited error doctrine is to combat savvy gamesmanship, it has no application here, where defendant is near-blameless.

This Court is respectfully urged to affirm the Appellate Division's decision recognizing that, on these unique facts, sentencing counsel provided deficient performance. As the Appellate Division correctly ruled, the question of prejudice needs to be determined by the trial court in assessing whether the motion to withdraw the plea would have been granted had sentencing counsel discovered the immigration problem when she should have. This Court should affirm that portion of the opinion, too.

PROCEDURAL HISTORY

Ocean County indictment number 19-06-0946 charged the defendant, Juan C. Hernandez-Peralta, with third-degree burglary, contrary to N.J.S.A. 2C:18-2a(1) (count one), and third-degree theft, contrary to N.J.S.A. 2C:20-3a (count two). (Sa 19-21)[1] In addition, defendant was charged in Ocean County indictment number 19-09-1370 with: two counts of third-degree burglary, contrary to N.J.S.A. 2C:18-2a(1) (counts one and four); two counts of fourth-degree criminal mischief, contrary to N.J.S.A. 2C:17-3a(1) (counts two and seven); second-degree robbery, contrary to N.J.S.A. 2C:15-1 (count three); third-degree theft, contrary to N.J.S.A. 2C:20-3a (count five); third-degree aggravated assault on a law enforcement officer, contrary to N.J.S.A. 2C:12-1b(5)(a) (count six); fourth-degree criminal mischief, contrary to N.J.S.A. 2C:17-3a(1) (count seven); third-degree resisting arrest, contrary to N.J.S.A.

[1] The following abbreviations will be used:
Sa – appendix to the State's brief
PSR – pre-sentence report (filed in State's confidential appendix)
Sb – State-Appellant's brief
1T – transcript of November 22, 2019
2T – transcript of December 10, 2019
3T – transcript of February 24, 2020
4T – transcript of August 17, 2020
5T – transcript of April 4, 2023
6T – transcript of May 23, 2023

2C:29-2a(3) (count eight); and fourth-degree resisting arrest, contrary to N.J.S.A. 2C:29-2a(2) (count nine). (Sa 22-26)

On November 22, 2019, defendant appeared before the Honorable Steven F. Nemeth, Jr., J.S.C., to enter a guilty plea to select charges from both indictments, including three counts of third-degree burglary and one count of second-degree robbery. (Sa 27-33) In exchange, the State agreed to allow defendant to serve a five-year term of special probation in Ocean County Drug Court, with an alternate five-year NERA custodial sentence. N.J.S.A. 2C:43-7.2 (Sa 29)

On December 10, 2019, defendant appeared before Judge Nemeth for sentencing and was sentenced in accordance with the plea agreement. (Sa 34-41) On February 24, 2020, defendant appeared before Judge Nemeth on a violation of probation. Defendant pled guilty to the violation with the agreement that the court would "leave sentencing open" to allow defendant to remain in Drug Court. (3T 5-21 to 10-18) On August 17, 2020, defendant appeared before Judge Nemeth on a second violation of probation. After pleading guilty to that violation, defendant was sentenced to the alternate

prison sentence: five years with an 85% period of parole ineligibility. (4T 9-24 to 16-11; Sa 42-44)[2]

On July 11, 2022, defendant filed a timely petition for post-conviction relief (PCR), alleging ineffective assistance of counsel regarding the immigration consequences of his guilty plea. (5T 87-12 to 14; Sa 53-57) The Honorable Guy P. Ryan, J.S.C., granted an evidentiary hearing on the PCR, which was held on April 4, and May 23, 2023. On the second day, Judge Ryan granted the PCR, delivering an oral opinion on the record, and later issuing a written amplification of the oral opinion. (6T 72-22 to 114-15; Sa 58-77)

The Appellate Division granted the State's motion for leave to appeal on July 3, 2023. On March 8, 2024, the Appellate Division issued an unpublished opinion affirming the trial court's ruling that sentencing counsel rendered deficient performance, but remanded the matter to the trial court to determine whether defendant was prejudiced by that deficiency. (Sa 78-106)

On June 14, 2024, this Court granted the State's motion for leave to appeal. State v. Hernandez-Peralta, 257 N.J. 599 (2024). The issue as framed on the New Jersey Courts website is:

> In this post-conviction relief matter, where defendant had told plea counsel that he was a United States citizen born in New York, but the pre-sentence report revealed

[2] An amended judgment of conviction was issued on September 9, 2020, to clarify the terms of confinement. (Sa 45-48)

> that he was born in Mexico, was sentencing counsel's performance deficient under the first prong of Strickland v. Washington, 466 U.S. 668 (1984), for failing to further investigate whether defendant was a United States citizen?

Available at https://www.njcourts.gov/courts/supreme/appeals; last visited July 9, 2024.

STATEMENT OF FACTS

A. The Trial Court Proceedings.

The facts of the underlying crimes are not of particular importance to this appeal, which challenges the propriety of the lower courts' rulings that defendant received deficient advice concerning the deportation consequences of his guilty plea. Accordingly, the facts here will focus on the plea and sentencing proceedings, and the facts adduced at the evidentiary hearing on the PCR.

During the trial court proceedings, defendant had three attorneys representing him at various times: Frank McCarthy (his "trial" attorney, who would represent him had the case been resolved by trial or plea outside of drug court), Carol Wentworth (his drug court attorney who would typically handle the plea and sentencing proceedings for entry into drug court), and Michael Vito (Wentworth's supervisor, who handled the plea proceedings in Wentworth's absence). (6T 4-22 to 5-23; 24-5 to 7; 33-1 to 13)

On November 22, 2019, defendant appeared before Judge Nemeth, Jr., to enter a guilty plea and was represented by Vito. When asked by the court whether he was a U.S. citizen, defendant replied, "Yes, sir." And when asked where he was born, defendant replied, "I was born in New York." (1T 5-8 to 12) Consistent with this belief, question 17a of the plea form – which asks, "Are you a citizen of the United States?" – was marked "Yes." (Sa 30)

At the PCR hearing, defendant testified that he is not, in fact, a U.S. citizen. He explained that he has a green card and a social security card, and that based on those documents, in addition to discussions with family members, he believed that he was a U.S. citizen. (5T 10-6 to 17) Defendant testified that he was born in Mexico, was brought here before he turned two years old, and grew up in New York before moving to New Jersey as a teenager. (5T 10-22 to 11-23) Defendant further testified that he met with Vito about two times before entering his plea, and that he did not recall having any conversation with Vito about his citizenship. (5T 13-23 to 14-22)

According to defendant, he first learned that he was not a U.S. citizen when he received deportation papers while in state custody. (5T 18-3 to 14) Defendant explained that he told the court that he was born in New York because that was where he was raised from a young age, and he had forgotten that he was born in Mexico. (5T 21-18 to 22-5) Defendant testified that his

ability to read and write English is "50-50," that he dropped out of high school in his senior year, and that he was not sure that he understood everything that Vito had explained to him. (5T 25-10 to 18) When pressed by questioning from the PCR court, defendant acknowledged that knew it was not true when he told Vito and the plea judge that he was born in New York. Defendant struggled to explain the discrepancy, maintaining that he was not able to think clearly and that, "I guess I was paranoid around that time." (5T 25-24 to 27-10; 36-14 to 21) Defendant, however, still honestly thought that he was citizen, based on his belief that he had been born in the United States and on the fact that he had a social security number and a green card.

Vito testified that, prior to entering the guilty plea, he went over the plea forms with defendant. Vito read section 17 of the plea form to defendant, and defendant told him that he was born in New York. (6T 5-21 to 6-11)

On December 10, 2019, defendant appeared before Judge Nemeth for sentencing and was represented by his third attorney, Wentworth. There were no discussions on the record about defendant's immigration status. (2T 3-1 to 10-25) Wentworth represented to the court that:

> We received and reviewed the presentence report, Your Honor. It does appear to be accurate for the purposes of sentencing.

(2T 3-11 to 13) The first page of that PSR indicates that defendant was born in Mexico, and the box for his social security number was left blank. (PSR 1) Similarly, page ten indicates that defendant was born in Mexico and the "Alien Status" and "Other Citizenship (Nationality)" boxes were left blank. (PSR 10) In addition, the "Citizenship" box – which includes a check box for "US" and "Other" – was left blank. (Ibid.)

At the PCR hearing, defendant testified that he had had an interview with a probation officer who prepared the PSR prior to sentencing. He told the officer that he was born in Mexico and that he had a green card. At that time, defendant still did not understand his true immigration status. (5T 15-13 to 16-9) Defendant further testified that he discussed the PSR with Wentworth for "probably like a couple seconds" immediately prior to sentencing, but he did not tell her that he had previously told the plea judge and Vito that he was born in New York. (5T 41-1 to 19)

Wentworth testified that she met with defendant for the first time on the day of sentencing, prior to going on the record with him, and that she had obtained the file and PSR for a couple of days before sentencing. (6T 33-6 to 34-4) Wentworth acknowledged that the PSR indicated that defendant was born in Mexico, but that the plea form said he was a U.S. citizen. (6T 35-5 to 7) She testified that she had assumed that defendant had also told McCarthy

and Vito that he was born in Mexico, but if she had known that he had said he was born in New York, she would have explored that discrepancy. (6T 35-16 to 23; 43-3 to 10) She also testified that defendant having been born in Mexico did not raise a concern for her because it was common for her to have clients born outside the U.S. who are U.S. citizens. (6T 36-13 to 37-4)

According to Wentworth, when she asked defendant if he was born in Mexico, he said "yes"; when she asked him if he was a U.S. citizen, he again said "yes." (6T 37-18 to 22) When she asked defendant his social security number, he said he did not recall, so she left that box of the form blank. (6T 35-10 to 16) Wentworth did not believe it was unusual for a client to not know his social security number. (6T 42-12 to 19) Ultimately, Wentworth did not have any documentation that revealed a discrepancy between what defendant said during the plea proceedings and what he told the probation officer who prepared the PSR, so she did not attempt to contact an immigration law specialist. (6T 50-19 to 51-9; 44-21 to 45-4) However, she acknowledged, she did possess the plea form indicating that defendant was U.S. citizen, which the PSR contradicted, or at least did not confirm. (6T 52-5 to 53-5)

In granting the PCR, the PCR court delivered a thorough oral opinion and written amplification. (6T 72-22 to 114-15; Da 34-55) First, it found Vito's testimony to be credible, and it found that he was not ineffective because he

had no evidence to contradict defendant's assertion that he was a U.S. citizen. (6T 37-14 to 18; 92-24 to 93-4) The court observed that defendant admitted that he knew it was not true when he told Vito and the plea court that he was born in New York, and that "defendant essentially had no explanation" for the inconsistency between that and telling the probation officer that he was born in Mexico. (6T 82-15 to 83-11)

Next, the court found that the second-degree robbery conviction is an "aggravated felony" for immigration purposes, so conviction for that offense mandates defendant's removal from the country. (6T 92-2 to 15) And, under prevailing caselaw, a defendant must be informed that his plea to an aggravated felony will have that definite effect. (6T 112-6 to 12)

Finally, the court found that Wentworth was presented with sufficient evidence that defendant would be subjected to deportation to require further investigation. (6T 93-13 to 20) The court shared the State's concern that granting the PCR could be perceived as rewarding defendant for being untruthful to Vito and the plea court. (6T 97-19 to 23) But the court found that page 10 of the PSR showed that defendant was born in Mexico, and the failure to check the citizenship box indicated a problem that Wentworth needed to investigate. (6T 97-23 to 98-17) The written amplification elaborated:

> This court finds that a competent defense attorney in the shoes of sentencing counsel would have been

> expected, under prevailing professional norms, to address the discrepancy between the plea form and the PSR on the record with defendant in the presence of the sentencing judge and to advise defendant that because of his foreign place of birth and other missing information that, if he was not a U.S. citizen, he faced deportation from the United States, would be barred from reentering and would not be able to become a naturalized citizen.

(Sa 76)

The court noted that plea withdrawals are much more liberally granted pre-sentencing, which is when the discrepancy should have been investigated. (6T 104-1 to 16) The court also acknowledged that Wentworth had been put in a difficult situation due to the way the case was handled by three different attorneys. (6T 107-25 to 108-4) Wentworth assumed defendant's place of birth was Mexico (as indicated on the PSR) because she did not represent defendant at the plea and did not have the plea hearing transcript. Instead, she relied on the plea agreement, which said that he was a U.S. citizen, but said nothing of his place of birth. (6T 108-14 to 21)

Moreover, the court found, counsel could not consider the missing information in isolation. The lack of a social security number; place of birth being Mexico; the U.S. citizenship box not checked; a mother who was not in the U.S.; no contact with the father; and the present matter being a first felony conviction led to the conclusion that "there was an obligation triggered by all

the facts and circumstances at the time of sentencing to require Ms. Wentworth to make some type of inquiry and then to rectify that inquiry on the record." (6T 109-12 to 110-5)

B. The Appellate Division's Opinion.

In an unpublished opinion issued on March 8, 2024, the Appellate Division affirmed the trial court's ruling that sentencing counsel provided deficient performance for not investigating defendant's immigration status before proceeding to sentencing, but remanded the matter to the trial court to assess whether defendant was prejudiced by that deficient performance. State v. Hernandez-Peralta, A-3292-22 (App. Div. Mar. 8, 2024) (slip op. 2).

The court "agree[d] with the [trial] court and defendant … that there were sufficient facts in the PSR to put sentencing counsel on notice that defendant may not be a United States citizen." Hernandez-Peralta, slip op. at 23. The court acknowledged that "defendant stated to sentencing counsel that he was a United States citizen, and that a person born in another country may nevertheless be a citizen of the United States." Ibid. However, most significant to the court was that the "PSR stated defendant was born in Mexico but did not confirm his citizenship or alien status." Ibid. In addition, "[o]ther facts in the PSR such as the lack of driver's license information and defendant's mother's residence outside the United States, while not necessarily proof defendant was

not a citizen, provided further cause for suspicion as the court correctly found." Ibid. Thus, "defendant's misrepresentations did not vitiate sentencing counsel's independent duty to investigate the discrepancies between defendant's claim to be a United States citizen and the contrary information in the PSR." Id. at 29.

The court rejected the "State's argument that counsel's duty to advise a defendant of the immigration consequences of their guilty plea arises only at the time of the plea," and further noted that it was undisputed that the charge to which defendant pled guilty was an "aggravated felony" subjecting him to mandatory deportation. Id. at 24. The court "recognize[d] that had sentencing counsel inquired further of defendant as to how or when he became a citizen, she likely would have discovered that he was, in fact, a green card holder rather than a citizen." Hernandez-Peralta, slip op. at 23-24. She then could have requested an adjournment of the hearing or moved to withdraw the guilty plea. Id. at 24.

Accordingly, the court determined that whether defendant was prejudiced by sentencing counsel's deficient performance turned on whether a motion to withdraw the guilty plea would have been granted at that time. Id. at 26. Departing from the trial court's ruling granting the PCR, the Appellate

Division remanded the matter to the trial court to make a prejudice determination. Id. at 26-28.

LEGAL ARGUMENT

POINT I

THE APPELLATE DIVISION'S DECISION SHOULD BE AFFIRMED BECAUSE IT WAS A PROPER APPLICATION OF DEFENSE COUNSEL'S WELL-ESTABLISHED DUTY TO CONDUCT REASONABLE INVESTIGATIONS.

There is nothing particularly novel about this case. Sentencing counsel was presented with information that would cause a reasonably competent attorney to conduct additional investigation into her client's immigration status. She failed to do so, and as a result, defendant entered a guilty plea to an aggravated felony and was deported. Nothing here warrants departure from well-established principles of law, nor application of the invited error doctrine. This Court should affirm the Appellate Division's opinion finding that sentencing counsel's performance was deficient and remanding the matter to the trial court to determine whether defendant was prejudiced by that deficiency.

A. A Criminal Defendant Has the Right to the Effective Assistance of Counsel Which Includes Providing Correct Immigration Advice to a Noncitizen Pleading Guilty to an Offense That Clearly Mandates Deportation.

"It has long been established under the federal Constitution that the right to effective, unhindered, assistance of counsel is among those 'immutable principles of justice which inhere in the very idea of free government.'" State v. Fritz, 105 N.J. 42, 50 (1987) ((citing Powell v. Alabama, 287 U.S. 45, 71-72 (1932) (quoting Holden v. Hardy, 169 U.S. 366, 389 (1897))). This Court has held that "under Article I, paragraph 10 of the State Constitution a criminal defendant is entitled to the assistance of reasonably competent counsel, and that if counsel's performance has been so deficient as to create a reasonable probability that these deficiencies materially contributed to defendant's conviction, the constitutional right will have been violated. Fritz, 105 N.J. at 58.

To establish a prima facie claim of ineffective assistance of counsel, a petitioner must satisfy the two-prong test under Strickland v. Washington, 466 U.S. 668, 687 (1984). Defendant must establish (1) that his counsel's performance was deficient and he made errors so serious that counsel was not functioning as counsel as guaranteed by the Sixth Amendment, and (2) that defendant was prejudiced such that there existed a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.

Id. at 694. See also Fritz, 105 N.J. at 58 (adopting Strickland standard). A "reasonable probability" must be "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. A petitioner must establish the right to relief by a preponderance of the credible evidence. State v. Presciose, 129 N.J. 451, 459 (1992).

In the context of plea agreements of non-citizen defendants, the performance of plea counsel is deficient under the first prong of the Strickland standard where counsel "provides false or misleading information concerning the deportation consequences of a plea of guilt." State v. Nuñez–Valdéz, 200 N.J. 129, 138 (2009). In addition, in Padilla v. Kentucky, 559 U.S. 356 (2010), the United States Supreme Court held that plea counsel "is required to address, in some manner, the risk of immigration consequences of a non-citizen defendant's guilty plea." State v. Blake, 444 N.J. Super. 285, 295 (App. Div. 2016) (citing Padilla v. Kentucky, 559 U.S. 356, 367 (2010)). The Padilla Court created a "two-tiered analytical structure for assessing the duty of effective assistance," which "depend[s] on the certainty of immigration consequences flowing from the plea." State v. Gaitan, 209 N.J. at 339, 356, 380 (2012).

"[I]mmigration law is often complex, and the consequences of a conviction are often far from clear." Blake, 444 N.J. Super. at 295 (citing

Padilla, 559 U.S. at 369). In circumstances where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[s]," then an attorney is obliged to be "equally clear." Padilla, 559 U.S. at 368–69. Counsel's failure "to point out to a noncitizen client that he or she is pleading to a mandatorily removable offense," constitutes "deficient performance of counsel." Blake, 444 N.J. Super. at 296 (quoting Gaitan, 209 N.J. at 380).

Where "the deportation consequences of a particular plea are unclear or uncertain[,] . . . 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." Padilla, 559 U.S. at 369. Where "removal is not 'mandated' in the sense that a state offense is not identified on published lists of offenses equating to aggravated felonies or like mandatorily removable offenses, counsel must highlight for noncitizen clients that entering a guilty plea will place them at risk of removal" and advise clients to seek immigration advice. Gaitan, 209 N.J. at 381; see also Blake, 444 N.J. Super. at 301 ("[W]here the law is 'highly complex and not capable of being reduced to any clear, succinct, or certain answer,' an attorney may fulfill his duty by conveying to his client that the immigration consequences of his plea are

uncertain." (quoting State v. Telford, 420 N.J. Super. 465, 469 (App. Div. 2011), certif. denied, 209 N.J. 595 (2012))).

Here, there is no question that second-degree robbery is an aggravated felony and that defendant was subject to mandatory deportation by virtue of his conviction for this offense. See 8 U.S.C.A. § 1101(a)(43)(F) (defining "aggravated felony" to include "a crime of violence … for which the term of imprisonment [is] at least one year"); 8 U.S.C.A. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."). The State does not challenge the trial court's nor the Appellate Division's findings on these basic principles. (Sb 1-27) Thus, because the law is clear that an aggravated felony mandates deportation, counsel's duty to advise defendant of that certain consequence was equally clear, and the failure to do so was deficient performance under the Strickland/Fritz standard. Padilla, 559 U.S. at 368–69.

B. From Its Inception, The Right to The Effective Assistance of Counsel Has Required Counsel to Conduct Reasonable Investigations, And That Duty Applies to All Facets of Representation.

The Strickland Court observed that a necessary component of the right to the effective assistance of counsel is the obligation of counsel to conduct reasonable investigations. Recognizing that counsel is "presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," the court noted that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690. Conversely, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690–91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. Accordingly, "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances…." Ibid.

So, at least since Padilla, counsel has had a duty to inquire into a defendant's immigration status. See Padilla, 559 U.S. at 367 (Observing that "[t]he weight of prevailing professional norms supports the view that counsel

must advise her client regarding the risk of deportation" and citing authorities extending back to the early 1990s.)

Indeed, even well before the watershed Padilla decision, the Colorado Supreme Court incisively observed:

> The determination of whether the failure to investigate those [potential deportation] consequences constitutes ineffective assistance of counsel turns to a significant degree upon whether the attorney had sufficient information to form a reasonable belief that the client was in fact an alien. When defense counsel in a criminal case is aware that his client is an alien, he may reasonably be required to investigate relevant immigration law.
>
> [People v. Pozo, 746 P.2d 523, 529 (Colo. 1987) (citing People v. Soriano, 194 Cal.App.3d 1470 (1987)).]

Significantly, this pre-Padilla rule was grounded in the bedrock principle that reasonable investigation is essential to competent representation:

> This duty stems not from a duty to advise specifically of deportation consequences, but rather from the more fundamental principle that attorneys must inform themselves of material legal principles that may significantly impact the particular circumstances of their clients. In cases involving alien criminal defendants, for example, thorough knowledge of fundamental principles of deportation law may have significant impact on a client's decisions concerning plea negotiations and defense strategies.
>
> [Ibid.]

A practice advisory from the Immigrant Defense Project widely distributed immediately after Padilla observed that "merely knowing that your client is a noncitizen may not be enough: while the degree of certainty of the advice may vary depending on how settled the consequences are under immigration law, it is often not possible to know whether the consequences will be certain or uncertain without knowing a client's *specific* immigration status." A *Defending Immigrants Partnership Practice* Advisory: Duty of Criminal Defense Counsel Representing an Immigrant Defendant After Padilla V. Kentucky; Available at https://www.publiccounsel.net/wp-content/uploads /2014/07/Padilla-v-Kentucky-IDP-advisory.pdf. "Thus, it is necessary to identify a client's specific status (whether lawful permanent resident, refugee or asylee, temporary visitor, undocumented, etc.) in order to ensure the ability to provide correct advice later about the immigration consequences of a particular plea/sentence." Ibid.

Here, as discussed in the next section, there can be no doubt that sentencing counsel had a duty to investigate defendant's immigration status – notwithstanding her limited role in the case – based on information that was brought to her attention in the PSR and that was not reconciled by her limited discussion with defendant.

C. Sentencing Counsel's Performance Was Constitutionally Deficient Because Information She Learned Prior to Sentencing Would Have Caused Reasonable Counsel to Investigate Defendant's Immigration Status, Determine That He Was Not a Citizen, And Advise Him That He Would Be Subject to Mandatory Deportation.

Defendant told plea counsel and the plea court that he was born in New York and that he was a U.S. citizen. Plea counsel had no reason to doubt that assertion. Sentencing counsel, however, did. The PSR – which she acknowledged reading – informed her that defendant was born in Mexico and brought here as a baby. The checkboxes for "Citizenship" (the choices being "US" or "Other") were left blank, as were the boxes for defendant's social security and driver's license numbers. In addition, the PSR informed her that defendant's mother was in Mexico and that he had no contact with his father. Collectively, this information would have alerted competent counsel that further investigation was required.

Sentencing counsel was not aware that defendant told plea counsel and the plea court that he was born in New York, but she did have the plea form indicating that defendant said he was a citizen. In the typical case, question 17 of the plea form and the discussion it prompts with counsel adequately address Padilla concerns. (Sa 30) But this was not the typical case. The PSR informed sentencing counsel that defendant was born in Mexico. If defendant had not received piecemeal representation – and plea and sentencing counsel were the

same person – counsel would have noted the contradiction and inquired further. Even putting aside that discrepancy, the PSR informed sentencing counsel that defendant was born in Mexico and came here as a baby, so she knew that he could not be a citizen by virtue of being born on U.S. soil.

More important, page 10 of the PSR was left blank for the boxes for "Alien Status," "Citizenship," and "Other Citizenship (Nationality)." (Sa 116) Counsel knew that defendant had been brought here as a baby, knew that he believed he was a citizen, and should have known that immigrants brought here as children are often wrong about their legal status. See, e.g., O'Riordan v. Barr, 925 F.3d 6, 9 (1st Cir. 2019) ("I came here as a child not knowing the consequences with my parents."); Escobar v. Garland, 55 F.4th 662, 665 (8th Cir. 2022) ("Escobar entered the United States as a child but claims to know little about the circumstances of his birth or his entry into the country."); Stacciarini, Jeanne-Marie R et al. I Didn't Ask to Come to this Country…I was a Child: The Mental Health Implications of Growing Up Undocumented. Journal of Immigrant and Minority Health vol. 17,4 (2015) ("In the United States, approximately 4.5 million children of undocumented Latino parents are naturalized citizens due to the fact that they were born on US soil; however, 1 million more remain undocumented because they were brought to the US as

minors…."). In light of this knowledge, the missing citizenship information should have stuck out like a sore thumb.[3]

Contrary to arguments of the State, neither defendant nor the lower courts has suggested that asking defendant if he was a citizen and then marking the "US" check box on the PSR when he replied in the affirmative

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[3] Children not knowing their true legal status is so common that the U.S. Code contains an express carveout for children who falsely but reasonably believed they were citizens from being deemed inadmissible for representing themselves to be citizens:

> (C) Misrepresentation
>
> (i) In general
>
> Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.
>
> (ii) Falsely claiming citizenship
>
> (I) In general
>
> Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any other Federal or State law is inadmissible.
>
> (II) Exception
>
> In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.
>
> [8 U.S.C. 1182(a)(6) (emphasis added).]

would solve the problem. (Sb 23) Rather, knowing what was known at that time, the reasonable investigation expected of competent counsel was as simple as posing a question to her client. All that was required was some version of, "How do you know that you're a citizen?" Defendant would have said that he knew because he had a social security card and a "green card." Competent counsel would know that these documents do not confer citizenship, would have inquired further, and would have referred the matter to an immigration law specialist, if necessary.

Indeed, the lower courts correctly found that there were additional facts known by sentencing counsel that pointed to the necessity of this basic investigation. Sentencing counsel testified that she asked defendant if he had a social security number and he said that he did, but he did not remember the number. She further testified that in her experience it was not uncommon for her clients to not know their social security numbers. Nonetheless, it was one more suspicious fact in "all the circumstances" that must be considered, Strickland, 466 U.S. at 691, because virtually all citizens have social security numbers, whereas many noncitizens do not. See Social Security Numbers for Noncitizens, Social Security Administration Publication No. 05-10096, available at https://www.ssa.gov/pubs/EN-05-10096.pdf ("Generally, only

noncitizens authorized to work in the United States by the Department of Homeland Security (DHS) can get an SSN.").

Similarly, the absence of a driver's license number was significant. Defendant was sentenced on December 10, 2019. On December 19, 2019, Governor Murphy signed into law A4743 creating a "Standard Basic driver's license and ID, which will be available to all New Jersey residents regardless of immigration status." See Governor Murphy Signs Legislation Expanding Access to Driver's Licenses, Office of Governor, Available at https://www.nj.gov/governor/news/news/562019/20191219a.shtml. Before that law was enacted, undocumented immigrants could not lawfully obtain a driver's license. Ibid.; N.J.S.A. 39:3-10. Again, defendant's lack of a driver's license was not conclusive proof of anything, as there is obviously no legal requirement that U.S. citizens obtain a driver's license. Yet, it is reasonable to expect competent counsel to note its significance in the totality of circumstances.[4]

[4] In fact, before defendant had a green card he had a U-visa, which is issued to victims of certain crimes who have suffered abuse and are helpful to law enforcement in the investigation or prosecution of criminal activity. So, while defendant could have obtained a driver's license prior to the 2019 amendment to N.J.S.A. 39:3-10, the absence of a license at that point in time remains a potentially important fact in the totality of circumstances that competent counsel must consider when deciding whether to investigate.

Finally, as the Appellate Division noted, the PSR informed sentencing counsel that defendant's mother was living in Mexico. (slip op. 23) Defendant was a young adult at the time of sentencing, so this fact is not dispositive. But, "while not necessarily proof defendant was not a citizen, [it] provided further cause for suspicion," ibid., in light of the other circumstances known by counsel. Defendant's mother might have been visiting her homeland or she might have decided that life in Mexico was preferable. Or, she might have been among the hundreds of thousands of people deported to Mexico in 2019 alone because, like her son, she was not a citizen. See, e.g., Table 41. Aliens Removed by Criminal Status and Region and Country of Nationality: Fiscal Year 2019, Office of Homeland Security Statistics, Available at https://ohss.dhs.gov/topics/immigration/ yearbook /2019/table41 (Indicating that of the 359,885 people removed from the United States in 2019, 215,205 were returned to Mexico.). A simple question or two would have gone a long way in determining defendant's true legal status.

To be clear, knowing that defendant was brought here from Mexico as a baby and observing the missing citizenship information from the PSR should have been enough to prompt the basic investigation. The additional missing information underscored the need. Cf. State v. Sewell, 314 So. 3d 811, 815 (La. 2020) (rejecting Sewell's argument that defense counsel's investigation

was deficient where "there was simply nothing to cause counsel (or the court) to question respondent's citizenship.").

D. The Invited Error Doctrine Has No Applicability Here, And the Appellate Division Correctly Ruled That a Remand for Further Proceedings Was Necessary.

The State does not argue that defendant is a citizen, or dispute that he pled guilty to an aggravated felony and that he was deported as a result. Those facts are undeniable. Instead, the State argues that defendant was "deceptive" about his immigration status; "that it was defendant's own actions in lying to his attorney and the plea court that prevented him from receiving accurate immigration advice at the time of his plea." (Sb 13; 17-20) As a general rule, the State proposes:

> [W]hen a defendant intentionally obfuscates their own citizenship status, Padilla no longer mandates his defense counsel to provide accurate immigration advice. [] To hold otherwise is to reward defendants for committing frauds upon the court and places an unreasonable and impossible burden on defense counsel to provide accurate advice when their clients are actively deceiving them.
>
> [(Sb 19)].

Defendant agrees with the general rule. But that is not this case.

An honest appraisal of the record demonstrates no intentional deception.

To be sure, as recognized by the lower courts, defendant provided inconsistent information: he told plea counsel and the plea court that he was born in New York, but thereafter consistently maintained that he was born in Mexico, which he said to sentencing counsel and the probation officer who prepared the PSR.[5] However, defendant's misrepresentation that he was born in New York was not material to his incorrect belief that he was a U.S. citizen. To his mind – although not to the mind of reasonably competent defense counsel tasked with a duty to investigate – where he was born was insignificant because he believed he was a U.S. citizen by virtue of actions taken by his family, which included obtaining a green card and a legitimate social security number. He had no memory of crossing the Mexican border and knew only life in America. Thus, he believed he was a U.S. citizen because he had a green card, and because his mother had done whatever else was necessary, not because of where he was born.[6]

Defendant is neither well-educated nor sophisticated, having dropped out of high school and possessing a mediocre ability to read and write English. (5T 25-10 to 18) Moreover, he had stunted his emotional and intellectual growth

[5] At two subsequent violation of probation proceedings, defendant further maintained that he was born in Mexico. (3T 4-21; 4T 4-6)

[6] It is ironic that defendant believed he was a citizen based, at least partially, on having a green card. Competent defense counsel would recognize that citizens do not have green cards, unless retained as an expired keepsake.

through serious drug use beginning at an early age. See PSR 12 (regular cocaine, marijuana, and alcohol used beginning at age 14, and later including opiates and alprazolam). See also Winters KC, Arria A. Adolescent Brain Development and Drugs. Prev Res. 2011;18(2):21-24 ("Early drug use may alter brain maturation [and] contribute to lasting cognitive impairment of certain functions…."). In this light, defendant's inability to explain the inconsistency makes perfect sense: he was probably confused by the circumstances – in his words, "paranoid." And in any event, he was certainly not plotting to deceive.

Furthermore, it is important to note that, through no fault of his own, defendant received piecemeal legal representation. Defendant was assigned a trial attorney, but he was handed off to (eventual) sentencing counsel because he sought admission into drug court. Yet, he was handed off to sentencing counsel's supervisor for the plea because sentencing counsel was unavailable for reasons not disclosed in the record. Later, sentencing counsel returned and took the case back from plea counsel to represent defendant at sentencing. This practice clearly has the potential to leave gaps in counsel's knowledge. For example, plea counsel did not know what was explained to defendant at the arraignment, and sentencing counsel did not know that defendant told plea

counsel that he was born in New York. She only knew – from the plea forms – that defendant believed he was a U.S. citizen.

Nonetheless, the State argues that defendant "attempt[ed] to manipulate the system by lying to avoid potential deportation consequences, and then waiting to raise a complaint about a lack of immigration advice … only once deportation proceedings began." (Sb 20) It is understandable that the State would seek a neat narrative to fit its proposed rule. Unfortunately, the record does not support that narrative because defendant's mistaken belief that he was a U.S. citizen is to blame, not intentional deception. He never received Padilla advice, and as soon as he became aware that he was not a citizen he filed the PCR. Moreover, whether defendant said that he was born in New York or Mexico, he also would have told plea counsel that he was a U.S. citizen because that was his honest belief. In either case, that would have been the end of the inquiry for plea counsel. Thus, as the lower courts correctly recognized, it was sentencing counsel who was first presented with a discrepancy warranting further investigation.

For this reason, the Appellate Division crafted the proper remedy. Plea counsel's performance was not deficient because he had no reason to second-guess defendant's claim to citizenship. Sentencing counsel's performance, on the other hand, was deficient because she was presented with information that

competent counsel would have recognized needed further investigation. At that point in time, the available remedy would have been a motion to withdraw the plea, judged by the more lenient pre-sentence standard in State v. Slater, 198 N.J. 145, 160 (2009). Whether that motion would have been granted controls whether defendant could satisfy the prejudice prong of Strickland. Hernandez-Peralta, slip op. at 25-26. Accordingly, it is respectfully submitted that the Appellate Division opinion should be affirmed in all respects.

CONCLUSION

The decision of the Appellate Division should be affirmed because it constituted a straightforward application of defense counsel's well-established obligation to conduct reasonable investigations.

Respectfully submitted,

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