

No. 08-651

IN THE
Supreme Court of the United States

JOSE PADILLA,

Petitioner,

v.

KENTUCKY,

Respondent.

On Writ of Certiorari
to the Supreme Court of Kentucky

**BRIEF OF THE AMERICAN BAR ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF THE AMICUS CURIAE¹

Pursuant to Supreme Court Rule 37.3, the American Bar Association (“ABA”), as *amicus curiae*, respectfully submits this brief in support of Petitioner. The ABA requests that the Court consider the broad-based consensus views embodied in the ABA Standards for Criminal Justice and ABA Model Rules of Professional Conduct in deciding whether a defense attorney’s failure to correctly advise a legal permanent resident client concerning the immigration consequences of a guilty plea falls short of the standard of reasonable performance under the Sixth Amendment.

The ABA is the largest voluntary professional membership organization of legal professionals. The ABA membership of more than 400,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and students.²

¹ Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

² Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the ABA. No inference should be drawn that any member of the ABA Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This

Since its inception, and as one of the cornerstones of its mission, the ABA has actively sought to improve the quality of legal representation by “[p]romot[ing] competence, ethical conduct and professionalism.”³ The ABA has long been committed to the provision of competent counsel in criminal matters and to protecting the constitutional and statutory rights of non-citizens.

The ABA Standards for Criminal Justice are among the ABA’s most prominent efforts to improve the quality of the criminal justice system. Begun in 1964, under the aegis of then-ABA President (and later Justice) Lewis F. Powell, Jr., the Standards were originally published in 17 volumes, separated by topical area.⁴ When the first full edition of the Standards was issued, Chief Justice Burger called them “a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual.” Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251-52 (1974). The ABA has continued to

brief was not circulated to any member of the Judicial Division Council prior to filing.

³ ABA Mission and Association Goals, *available at* <http://www.abanet.org/about/goals.html>.

⁴ A history of the development of the ABA Standards for Criminal Justice is available on the ABA Criminal Justice Standards homepage, at www.abanet.org/crimjust/standards/home.html. *See also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14-15 (Winter 2009) (describing the careful and balanced process by which the Standards are developed and promulgated), which is also available on the ABA website.

develop and refine these Standards over the last forty years through the efforts of broadly representative task forces made up of prosecutors, judges, defense lawyers, academics, the public and other groups that may have a special interest in the subject, as well as by the diverse membership of the ABA.⁵

The ABA Standards do not provide *per se* rules or a “checklist” for judicial evaluation of attorney performance, nor do they purport to establish the constitutional baseline for effective assistance of counsel. *See Rompilla v. Beard*, 545 U.S. 374, 399 (2005) (Kennedy, J., dissenting). The Standards do, however, represent the considered consensus views of prosecutors, defenders, and judges, and constitute a realistic and balanced approach to criminal justice that has proven effective over time. As Chief Justice Burger stated in his concurring opinion in *Argersinger v. Hamlin*, “[t]he right to counsel has historically been an evolving concept,” and “[p]art of this evolution has been expressed in the policy prescriptions of the legal profession itself.” 407 U.S. 25, 43-44 (1972) (Burger, C.J., concurring in result) (referring to the ABA Project that produced the original ABA Standards for Criminal Justice).

⁵ The ABA Standards for Criminal Justice became official ABA policy after they were approved by vote of the ABA House of Delegates (“HOD”). The HOD is composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. The Standards have been amended over the years by the same process. *See* ABA General Information, *available at* <http://www.abanet.org/leadership/delegates.html>.

The ABA Standards have frequently been referred to and adopted by courts, legislatures, and executive branch law enforcement agencies. This Court has taken note of the ABA Standards in considering the proper balance of individual rights and societal interests in the criminal justice system, including in the context of the Sixth Amendment right to counsel. *E.g.*, *Rompilla*, 545 U.S. at 387; *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *McKaskle v. Wiggins*, 465 U.S. 168, 179 (1984); *Estelle v. Williams*, 425 U.S. 501, 504 (1976). As this Court has recognized, the Standards provide “guides to determining what [performance of counsel] is reasonable.” *Wiggins*, 539 U.S. at 524 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). As relevant to this case, the Standards require criminal defense counsel to be knowledgeable about the immigration consequences of a non-citizen client’s conviction, and to fully inform the client about those consequences.

SUMMARY OF ARGUMENT

A lawyer’s duties include providing competent representation to a client and communication with the client concerning matters of significance to the client. As elaborated in the ABA Standards for Criminal Justice, the duties of competence and communication oblige a criminal defense lawyer to be fully informed of the facts and the law, and to advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome. The ABA Standards emphasize the importance of the duty to advise in the context of guilty pleas, a duty that includes a determination of the collateral consequences likely to be important

based on a client's personal circumstances and the charges faced.

The ABA Standards provide that defense counsel should advise a non-citizen client about the immigration consequences of conviction when the client is considering whether to plead guilty, because these consequences will frequently be of even greater importance to the client than the court-imposed penalty. The Standards also provide that defense counsel should be fully informed about the immigration consequences of a guilty plea, because these consequences can shape and determine the outcome of criminal proceedings at various stages, including bail decisions, charges and plea bargains, and sentencing. These requirements do not impose an unreasonable burden on criminal defense lawyers, because they have access to extensive relevant resources and, more important, because they represent clients who are entitled to decide to waive or exercise their constitutional rights based on legal considerations that are important to them.

ARGUMENT

I. UNDER THE ABA CRIMINAL JUSTICE STANDARDS, A LAWYER'S DUTY OF COMPETENCE INCLUDES THE DUTY TO BE INFORMED ABOUT THE CONSEQUENCES OF A CLIENT'S GUILTY PLEA, AND TO ADVISE THE CLIENT ACCORDINGLY.

A lawyer's duty to represent a criminal defendant competently is elaborated throughout all of the volumes of the ABA Standards for Criminal Justice. Specifically, as set out in the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION (ABA 3d ed. 1993) (hereinafter

“Defense Function Standards”),⁶ defense counsel is obligated to investigate “facts relevant to the merits of the case and the penalty in the event of conviction.” Defense Function Standard 4-4.1(a). This includes “all relevant facts known to the accused.” *Id.* at 4-3.2(a). It also includes a duty to investigate fully the client’s situation, which is a particularized example of competent representation that all lawyers owe to their clients. As explained in the ABA Model Rules of Professional Conduct, which form the basis for rules governing the professional conduct of lawyers in almost every state, “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” MODEL RULES OF PROF’L CONDUCT R. 1.1 (ABA 2008) (hereinafter “Model Rules”).

Once defense counsel has performed an appropriate investigation, counsel must consult with the client about the legal situation and how possible courses of action will affect it. Thus, Defense Function Standard 4-5.1(a) provides:

After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

Offering information about the legal situation and consulting with the client about the direction of the

⁶ See *supra* text accompanying note 4 (ABA Standards for Criminal Justice are divided into volumes by topical areas). Of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, only the defense function standards are discussed in this brief.

case, like learning the relevant law and facts, are routine obligations applicable to all lawyers. Under the Model Rules, a lawyer is required to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” Model Rules, R. 1.4(a)(2). The Model Rules also impose a duty to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” *Id.* R. 1.4(b).

A lawyer’s obligation to consult with the client applies in the guilty plea context. Indeed, a decision to plead guilty is considered so important under the Model Rules that it is specifically identified as one of the very few where a lawyer is expressly required to “abide by the client’s decision, after consultation with the lawyer.” Model Rules, R. 1.2(a). *See also* Defense Function Standard 4-5.2(a) (decisions to be made by the accused after full consultation with counsel include what pleas to enter and whether to accept plea agreement). In addition, Standard 14-3.2(b) of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (ABA 3d ed. 1999) (hereinafter “Pleas of Guilty Standards”) emphasizes the importance of consultation with the client when a guilty plea is a possible course of action:

To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a

plea unless appropriate investigation and study of the case has been completed.

The duty to inform the client in the context of plea negotiations, and to assist the client in choosing among available courses of action, includes an obligation to provide information about the collateral consequences of conviction.⁷ Pleas of Guilty Standard 14-3.2(f) provides:

To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any

⁷ Two types of collateral consequences are defined in Standard 19-1.1(a) and (b) of the ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (ABA 3d ed. 2004) (hereinafter “Collateral Sanctions Standards”): collateral sanctions and discretionary disqualifications. A collateral sanction is a legal penalty, disability or disadvantage that is imposed automatically upon conviction, even if not included in the sentence; a discretionary disqualification is a penalty, disability or disadvantage that is authorized but not required to be imposed upon conviction.

As described in the commentary to Standard 19-1.1, a collateral sanction “signifies a direct and immediate change in an offender’s legal status that does not depend upon some subsequent additional occurrence or administrative action, and that would not have occurred in the absence of a conviction.” *Id.* cmt. at 15-16. Deportation may in some cases be a “collateral sanction”:

To the extent a non-citizen’s immigration status changes as a result of a criminal conviction, so that the offender becomes automatically deportable without opportunity for discretionary exception or revision, deportation too must be regarded as a “collateral sanction.”

Id. at 16.

plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

The commentary urges counsel to be “active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant.” *Id.* cmt. at 126-27. The commentary also urges counsel to “interview the client to determine what collateral consequences are likely to be important to a client given the client’s particular personal circumstances and the charges the client faces.” *Id.* at 127.

The ABA Standards contemplate that the court should participate in informing a defendant who is pleading guilty about possible collateral consequences. Pleas of Guilty Standard 14-1.4(c) (“the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to . . . if the defendant is not a United States citizen, a change in the defendant’s immigration status”). The Standards also contemplate that, if the defendant needs additional information concerning the potential consequences of the plea, “[t]he court should advise the defendant to consult with defense counsel.” *Id.* See also Collateral Sanctions Standard 19-2.3(a) (the court should “ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense[. This] may be satisfied [except where otherwise required by law or rule of procedure] by confirming on the record that defense counsel’s duty of advisement under [Pleas of Guilty] Standard 14-3.2(f) has been discharged.”).

As the commentary to Pleas of Guilty Standard 14-3.2 points out, the court's "inquiry is not, of course, any substitute for advice by counsel." *Id.* at 118. This is because:

The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations which will not be covered by the judge in his or her admonition. A defendant needs to know, for example, the probability of conviction in the event of trial. Because this requires a careful evaluation of problems of proof and of possible defenses, few defendants can make this appraisal without the aid of counsel.

Id. See also Pleas of Guilty Standard 14-3.2(f) cmt. at 126 ("[O]nly defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case."); *State v. Paredez*, 101 P.3d 799, 804-05 (N.M. 2004) (no error in court's general advisement of possible deportation, but counsel was ineffective in failing to advise in detail).

II. THE ABA STANDARDS PROVIDE THAT A LAWYER SHOULD ADVISE A NON-CITIZEN CLIENT ABOUT THE IMMIGRATION CONSEQUENCES OF A GUILTY PLEA BECAUSE THEY WILL FREQUENTLY BE OF CRITICAL IMPORTANCE TO THE CLIENT.

The ABA Standards for Criminal Justice and the Model Rules contemplate that a guilty plea to original

or bargained-for charges, with or without a sentence promise, requires the client's knowing, voluntary, and intelligent assent. *See, e.g.*, Defense Function Standard 4-5.2(a) (decision after full consultation with counsel); Pleas of Guilty Standard 14-3.2(b) (defense counsel should advise client after appropriate investigation); Model Rules R. 1.2(a) (decision after consultation with counsel). As discussed in Section I, *supra*, this requires that the client be fully apprised of the legal consequences that might follow various courses of action.

The Standards recognize that a “serious and growing issue in a significant number of cases involving non-citizens is the grave immigration consequence that may flow from a guilty plea.” Pleas of Guilty Standard 14-1.4 cmt. at 58. A plea to an offense defined as an “aggravated felony,” such as the drug trafficking charge against petitioner, “generally means certain and speedy deportation” under the 1996 amendments to the Immigration and Nationality Act. *Id.* at 58 n.96. Deportation may be of greater concern to a non-citizen defendant than a prison sentence or fine, because it may deprive the defendant “of all that makes life worth living.” *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (Brandeis, J.). Deportation is “at times the equivalent of banishment or exile.” *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

This Court has recognized that “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *INS v. St. Cyr*, 533 U.S. 289, 323 (2001) (quoting 3 BENDER, CRIMINAL DEFENSE TECHNIQUES §§ 60A.01, 60A.02[2] (1999)). A non-citizen subject to

deportation whose children or spouse are United States citizens faces an agonizing choice: either deprive them of the opportunities afforded to them as citizens in the United States by taking them to a country they do not know, or leave the United States without them. See Bryan Lonagan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 71-76 (2007). Moreover, a non-citizen who came to the United States while young might not even speak the language of the country to which he or she would be deported. In countries such as Haiti, deportees from the United States are imprisoned in brutal and unhealthy conditions. *Id.* at 75.

Recognizing that the prospect of deportation is frequently more important to a criminal defendant than the court-imposed penalty, the Standards emphasize counsel's obligation to fully investigate the relevant facts and law, and to counsel the client about the available options:

[M]any clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client.

Pleas of Guilty Standard 14-3.2 cmt. at 127.

In discussing the importance of immigration consequences in these circumstances, this Court has noted the role of counsel, citing the ABA Standards:

“If a defendant will face deportation as a result of a conviction, defense counsel ‘should fully advise the defendant of these consequences.’” *St. Cyr*, 533 U.S. at 322 n.48 (quoting Pleas of Guilty Standard 14-3.2 cmt. at 75 (ABA 2d ed.1982)).⁸ *See also Wallace v. Reno*, 24 F. Supp. 2d 104, 110 (D. Mass. 1998) (at the time of conviction in 1996, “it was widely recognized as a violation of an attorney’s professional duty to her client not to advise her of the immigration consequences of a plea or conviction”) (citing, *inter alia*, cases), *aff’d*, 194 F.3d 279 (1st Cir. 1999); Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 713-15 (2002) (discussing deportation consequences and lawyer competence); ABA 2007 Report with Recommendation #103E (Commission on Effective Criminal Sanctions) at 3 n.4 (report notes failure of defense counsel to advise non-citizen client about exposure to almost certain deportation “would raise competency questions”).⁹

A majority of United States jurisdictions now require a court to notify a defendant of immigration

⁸ In the current, third edition of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY, published in 1999, Standard 14-3.2(f), which specifically discusses collateral consequences, was added. *See supra* pp. 8-9.

⁹ Available at www.abanet.org/leadership/2007/midyear, under “Daily Journal.” Although only Resolutions are adopted by the House of Delegates as policy of the ABA, their accompanying Reports must be approved by the sponsoring entity and are considered by the House in determining whether to adopt the Resolutions. *See* ABA Constitution and Bylaws, Article 45.2(3) and (6) (2008-2009) (available from the ABA).

consequences at the time of the plea.¹⁰ As discussed in Section I, *supra*, however, this “is not, of course, any substitute for advice by counsel.” Pleas of Guilty Standard 14-3.2 cmt. at 118. In fact, the plea form currently available for use in Kentucky courts both ensures notice of immigration consequences and confirms that the defendant has discussed them with counsel. Ky. Admin. Office of Courts, Form AOC-491 (Rev. 2/2003) (“Motion to Enter Guilty Plea”) (requiring defendant to acknowledge, “I understand that if I am not a United States citizen, I may be subject to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service,” and requiring defense counsel to certify, “I have reviewed with defendant . . . the foregoing ‘Motion to Enter a Plea of Guilty,’ and I believe he/she understands these documents”).¹¹

Defendants who, like petitioner, have been legal residents of the United States for decades, may not realize without competent legal counsel that pleading guilty to a drug trafficking offense will result in almost certain deportation. *See Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008) (discussing Padilla’s long-time residence in the United States, including his service in Vietnam). Similarly, defendants charged with comparatively minor offenses

¹⁰ *See Brief Amici Curiae National Association of Criminal Defense Lawyers, et al.*, App. B (citing 28 states, the District of Columbia and Puerto Rico in which notification by the court is required by rule, statute, or plea form as of 2009); *see also St. Cyr*, 533 U.S. at 322 n.48 (citing 18 states and the District of Columbia as of 2001).

¹¹ Available at <http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf>.

may not anticipate the disproportionately severe immigration consequences of conviction. *See, e.g., United States v. Graham*, 169 F.3d 787 (3d Cir.1999) (state-law misdemeanor petty larceny considered aggravated felony for purposes of deportation). As this Court noted, in discussing the frequency with which relief under Section 212(c) of the Immigration and Nationality Act of 1952 had been granted in the years leading up to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, “Even if the defendant were not initially aware of § 212(c), competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision’s importance.” *St. Cyr*, 533 U.S. at 323 n.50.

III. THE ABA STANDARDS PROVIDE THAT A LAWYER SHOULD BE INFORMED ABOUT THE IMMIGRATION CONSEQUENCES OF CONVICTION BECAUSE THESE CAN SHAPE AND DETERMINE THE OUTCOME OF A CRIMINAL PROCEEDING.

Consideration of a client’s immigration status is not only for the specific benefit of the defendant whose legal status will change. It is also intended to enhance the quality of criminal justice generally, because “the draconian nature of [automatic removal of non-citizens upon conviction, without regard to the equities of their particular situations] may have unanticipated adverse consequences for the integrity of the justice system, and for its fair and regular operation.” ABA 2006 Report with Recommendation #300 (Criminal Justice Section) at 3 (citing Robert

M.A. Johnson, *Collateral Consequences*, Message from the President, THE PROSECUTOR (National District Attorneys Association), May/June 2001).¹²

Where deportation is a potential consequence, competent defense counsel will identify the best available courses of action for the client, and will work with other systemic actors to shape a just outcome. The ABA Standards suggest the importance of this approach where the consequence of deportation may be disproportionate to the culpable behavior:

[A] plea deal that might otherwise seem attractive – for example, a suspended one-year sentence for misdemeanor theft – may often look considerably different once it is determined that that plea would in fact be deemed an “aggravated” felony conviction leading to the alien client’s swift deportation.

Pleas of Guilty Standard 14-1.4 cmt. at 58 n.96. In such a case, the defense lawyer might convince the prosecutor that justice would be better served by “a higher fine or more time in jail rather than a longer probationary period,” so as to avoid deportability. Brian Bates, *Good Ideas Gone Bad: Plea Bargains and Resident Aliens*, 66 TEX. B.J. 878, 882 (2003). Where a client is considering the government’s offer of a six-month jail sentence, the defense lawyer should counsel that the theoretical possibility of probation after trial is worth little if the defendant, because of her undocumented status, is unlikely to avoid

¹² Available at www.abanet.org/leadership/2006/midyear, under “Daily Journal.” See *supra* note 9. Mr. Johnson’s article is available from the National District Attorneys Association, at www.ndaa.org/publications/ndaa/toc_may_june_2001.html.

incarceration if convicted. Of course, the choice of which available course of action to pursue belongs to the client.

Because conviction has been a basis for deportation for nearly a century, immigration issues have historically been taken into account in the criminal process. Thus, for almost a century until 1990, state and federal sentencing judges could issue binding “Judicial Recommendations Against Deportation” (“JRAD”) that would prevent deportation. Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L. J. 1131, 1143 (2002). Since JRAD relief was abolished in 1990, most jurisdictions have provided for notice of the possibility of deportation to defendants pleading guilty to criminal charges.¹³ The location of the deportation may also be a consideration. *See, e.g., United States v. Nam Hong*, No. 07-CR-172-S (01), 2009 WL 688610, paras. 15 & 16 (W.D.N.Y. Jan. 28, 2009) (Plea Agreement) (noting opportunity for defendant to fully determine consequences to his immigration status of conviction and the government’s agreement not to oppose his request to serve sentence in Canada).

A. Immigration Status Can Affect Bail Decisions.

The ABA Standards require defense counsel to “take all necessary action to vindicate” defendant’s rights, including “motions seeking pretrial release of

¹³ *See supra* note 10 and accompanying text.

the accused.” Defense Function Standard 4-3.6. The petitioner in the present case was held without bond before trial “because he was suspected of being an illegal alien.” *Padilla*, 253 S.W.3d at 483. However, petitioner claimed that the record showed that he was a legal permanent resident. *Id.* at 484.

Some states provide by statute for mandatory or discretionary denial of bail in consideration of undocumented immigration status. *See, e.g.*, Ariz. Const. Art. II, § 22(a)(4) (bail prohibited for those who entered or remained in the United States illegally “if the proof is evident or the presumption great as to the present charge”); 725 Ill. CSA 5/110-5(a) (factors for setting bail include whether a non-citizen was lawfully admitted or is deportable); Va. Code Ann. § 19.2-120.1 (presumption of denial of bail for certain illegal aliens). In other states, immigration status is a consideration in a court’s balancing of factors. *E.g.*, *Ex parte Rodriguez*, No. 01-03-00550-CR, 2004 WL 1234001, at *3 (Tex. Ct. App. June 1, 2004) (quantity of drugs seized weighed with factors that included defendant’s undocumented alien status in denying reduction of bond). Thus, a rule that defense counsel need never consider a client’s immigration status could result in detention without bail or release with higher bail, based on mistakes about the client’s legal status.

B. Immigration Status Can Affect Charges and Plea Bargains.

Defense counsel’s consideration of the possible immigration consequences of conviction can affect prosecutorial charging decisions. Where defense counsel advises a prosecutor that the defendant will be deported if convicted, the prosecutor may choose

not to bring charges or to defer prosecution. *See, e.g.*, Pleas of Guilty Standard 14-4.1 cmt. at 146 (diversion may be appropriate based on “special characteristics or difficulties of the offender”) (citing NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS, Standard 44.4(b) (2d ed. 1991)). *See also, e.g.*, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS at Standard 43.6(1) (prosecutor should exercise discretion and file only charges considered to be consistent with interests of justice, which include “undue hardship to the accused”).

The effects on victims, the community, and individuals should also be considered. For example, in 2001, the then-president of the National District Attorney’s Association wrote, “Judges often consider the collateral consequences of a conviction” and prosecutors also “must consider them if we are to see that justice is done.” He explained:

This struggle for justice was evident in the mind of a highly respected district attorney in a major jurisdiction when he shared his agony in deciding the fate of a father who abused his child. This father, after all, would be deported upon conviction, destroying a family that the district attorney and the victim's family thought could be saved.

Robert M.A. Johnson, *Collateral Consequences, supra*, at 15 and n.12.¹⁴

¹⁴ Prosecutors may also consider lesser charges, diversion, or non-prosecution to allow offenders to avoid deportation. *See also* Karen E. Crummy, *Deportations Avoided Via Plea Deals*, Denver Post, Oct. 1, 2006

On the other hand, Congress has specifically authorized stipulation to deportability as part of plea bargains. 8 U.S.C. §1228(c)(5). Prosecutors sometimes agree that consent to deportation warrants a downward departure. *United States v. Bernal-Castillo*, 2007 WL 4818673, Para. 10 (N.D. Ohio June 20, 2007) (Plea Agreement) (in exchange for defendant's agreement not to contest deportation/removal, United States agreed that a one (1) level downward departure from Sentencing Guidelines was justified under U.S.S.G. § 5K2.0).

In state courts also, defense counsel may advise the client to agree not to contest deportation in exchange for a plea to a lesser charge, dismissal of counts, or imposition of a reduced prison term. *See People v. Antonio-Antimo*, 29 P.3d 298 (Colo. 2000) (defendant received sentence of probation and release to INS for deportation hearing); *State v. Rodriguez*, 45 P.3d 541, 547 (Wash. 2002) (witness pleaded guilty because prosecutor agreed to recommend deportation instead of jail sentence).

Where charges cannot be avoided but deportation is not inevitable, defense counsel can sometimes advance the client's interests by negotiating a plea to a different charge, or one requiring more incarceration. *See* Pleas of Guilty Standard 14-3.1(c) ("The prosecuting attorney, in considering a plea agreement, may . . . (iv) enter an agreement with the

(http://www.denverpost.com/counties08/ci_4424481); Jennifer Emmons, *Crane Suspect Gets Five Years Probation*, El Defensor (N.M.) Chieftain, Mar. 5, 2005 (<http://www.dchieftain.com/news/49261-03-05-05.html>); Peter Shinkle, *New Plea Helps Man Avoid Deportation*, St. Louis Post-Dispatch, Dec. 11, 2004, at 13.

defendant regarding the disposition of related civil matters. . . including civil penalties and/or civil forfeiture”); *People v. Bautista*, 8 Cal. Rptr. 3d 862, 870 & n.8 (Ct. App. 2004) (in ineffective assistance of counsel claim, court considered expert’s declaration that techniques used to defend against adverse immigration consequences include pleading to different but related offense, ‘pleading up’ to a nonaggravated felony even if the penalty is stiffer, and obtaining disposition of 364 days instead of 365 days.). One day’s difference in the sentence may have significant legal effect: for certain offenses, a term of imprisonment of less than a year will not be a conviction for an aggravated felony, which has significant immigration consequences under 8 U.S.C. § 1101(a)(43)(F) and (G). See also *United States v. Andino*, 148 Fed. Appx. 828, 829-30 (11th Cir. 2005) (sentence of 364 days for robbery not aggravated felony under Section 1101(a)(43)(F)). While a person sentenced to 364 days in the federal system normally serves more time than a person sentenced to a year and a day, because sentences of a year or less do not earn the 54-day reduction provided in 18 U.S.C. § 3624(b), a low-level offender can trade serving more time for the possibility of avoiding deportation.

C. Immigration Status Can Affect Sentencing.

Defense counsel can also use deportation and other immigration consequences of conviction to influence the sentence to be imposed by the judge. The ABA Standards contemplate an important role for defense counsel at the sentencing stage, including developing facts and making arguments within the law that would support reducing the sentence

imposed. Thus, Defense Function Standard 4-8.1 provides:

(a) Defense counsel should . . . be or become familiar with all of the sentencing alternatives available to the court . . . [and] with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including any guidelines applicable at either the sentencing or parole stages. The consequences of the various dispositions available should be explained fully by defense counsel to the accused.

(b) Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused.

...

Defense counsel may request courts to amend a judgment on a guilty plea to avoid deportation, and courts are sometimes willing to do so. *Commonwealth v. Gevorgyan*, No. 2003-CA-002743-MR, 2005 WL 1125194, at *1 (Ky. Ct. App. May 13, 2005) (affirming lower court's retroactive designation of a felony drunk driving and endangerment conviction as a misdemeanor, which was requested "so that [defendant] would not be subject to immediate deportation.").¹⁵

¹⁵ It is noted that the dissent argued that defendant's claim should have been evaluated on an ineffective assistance of counsel theory, opining, "A blanket rule precluding an ineffective assistance of counsel claim where the attorney has failed to inform a defendant of possible immigration consequences does

Other courts have likewise considered the possibility of deportation in fashioning sentences. *State v. Tinoco-Perez*, 179 P.3d 363, 365 (Idaho Ct. App. 2008) (because deportation “is often a very significant consequence for the defendant . . . the effect [of conviction] on immigration status is an appropriate consideration for a trial court in fashioning a sentence”); *State v. Svay*, 828 A.2d 790, 791 (Me. 2003) (“defendant's immigrant status and the effect that criminal convictions and criminal sentences can have on deportation are factors that a sentencing court can consider”); *People v. Ping Cheung*, 718 N.Y.S.2d 578 (Sup. Ct. 2000) (resentencing to avoid deportation); *Ochoa v. Bass*, 181 P.3d 727, 731 (Okla. Crim. App. 2008) (“[W]here the sentencing judge has discretion in what sentence will be imposed, citizenship status is a circumstance that may affect the sentencing”); *State v. Quintero Morelos*, 137 P.3d 114 (Wash. Ct. App. 2006) (affirming reduction of sentence to less than a year to prevent deportation). *But see, e.g., People v. Mendoza*, 90 Cal. Rptr. 3d 315 (Ct. App. 2009) (trial court may not resentence to 364 days after term completed, where defendant had understood immigration consequences of plea); *State v. Kebaso*, 713 N.W.2d 317, 324 n.7 (Minn. 2006) (“we leave resolution of [the question whether a court may consider immigration consequences in criminal sentencing] for another day”).

Federal courts imposing sentence can downwardly depart based on a defendant’s agreement not to contest deportation. *United States v. Ramirez*-

not allow for the kind of case-by-analysis that the *Strickland* test envisions.” *Id.* at *4 (Johnson, J., dissenting).

Marquez, 372 F.3d 935, 938-39 (8th Cir. 2004) (citing cases from several circuits). Of course, they need no authority to assign a sentence within, but at the lower end of, a range.

Defense counsel can also urge sentencing courts, when fashioning a sentence, to consider immigration-related consequences other than deportation that can result in a punishment more severe than would be received by a citizen, such as disenfranchisement to serving any part of a sentence in a halfway house or a minimum security prison. *See, e.g., United States v. Guzman*, 236 F.3d 830, 834 (7th Cir. 2001) (status as deportable alien “is relevant only insofar as it may lead to conditions of confinement, or other incidents of punishment, that are substantially more onerous” than framers of guidelines contemplated in fixing punishment range). *See generally* Nora V. Demleitner, *Terms of Imprisonment: Treating the Non-citizen Offender Equally*, 21 FED.SENT.RPTR. 174 (2009) (non-citizens ineligible for residential drug treatment carrying one-year sentence reduction under 18 U.S.C. § 3621(e)(2)(B)).

As authorized by Congress, state and federal prisoners may be eligible for early discharge and deportation, shortening their term of incarceration because of their immigration status. 8 U.S.C. § 1231(a)(4)(B); Ariz. Rev. Stat. § 41-1604.14(A); Cal. Penal Code § 3082; Ct. Gen Stats. §§ 54-125d, 54-130b; Rev. Code Wash. § 9.94A.685. Defense counsel may also move a court to recommend a prisoner’s transfer to his home country pursuant to treaty and the Transfer of Offenders To and From Foreign Countries Act, 18 U.S.C. §§ 4100-4115. *Cf. Aujla v. U.S. Dept. of Justice*, No. 1:CV-06-1668, 2007 WL

1074469 (M.D. Pa. Apr. 5, 2007) (Attorney General has discretion under Act to approve or disapprove transfers of convicted foreign nationals).

Defense counsel should also be aware of a client's immigration status because many courts consider undocumented status or the likelihood of deportation as reasons to deny otherwise available sentences of probation. *E.g., People v. Espinoza*, 132 Cal. Rptr. 2d 670 (Ct. App. 2003) (probation under Proposition 36 denied because deportation made it impossible for defendant to complete drug treatment program); *People v. Hernandez-Clavel*, 186 P.3d 96, 99-100 (Colo. Ct. App. 2008), *cert. granted*, 2008 WL 2580193 (Colo. June 30, 2008) (discussing cases in which probation denied, on bases that include defendant's undocumented status as evidence of unwillingness to obey the law and as resulting in inability to comply with terms of probation).

Finally, defense counsel must anticipate that non-citizens charged with federal crimes may face deportation as part of the court-imposed sentence, since federal judges are authorized by law to issue orders of criminal deportation under 8 U.S.C. § 1228(c), and to make deportation a condition of probation under 18 U.S.C. § 3563(b)(21). This authority to order deportation tends to blur any distinction between direct and collateral consequences where deportation is concerned.

IV. REQUIRING DEFENSE COUNSEL TO UNDERSTAND AND ADVISE THE CLIENT ABOUT THE IMMIGRATION CONSEQUENCES OF A GUILTY PLEA DOES NOT IMPOSE AN UNREASONABLE BURDEN ON CRIMINAL DEFENSE LAWYERS.

The requirement under the ABA Standards to advise about immigration consequences is not an unreasonable burden on criminal defense lawyers: they have ready access to the information needed to advise their non-citizen clients competently because, for decades, this information has been a staple of professional writing for defense attorneys. *See, e.g.*, ROBERT MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS (ABA 2d ed. 2004); William R. Maynard, *Deportation: An Immigration Law Primer for the Criminal Defense Lawyer*, THE CHAMPION 12 (June 1999); Maryellen Fullerton, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 AM. CRIM. L. REV. 425 (1986); David F. Aberson, *Deportation of Aliens for Criminal Conviction*, 2 PEPP. L. REV. 52 (1974). Defender offices and organizations in almost every state engage in training on immigration issues and designate lawyers to consult with colleagues when such issues arise, and bar and related professional organizations in most states sponsor publications and continuing legal education training regarding immigration and criminal defense.¹⁶

¹⁶ A survey of state bar and related professional organizations is provided in the Appendix.

Lack of knowledge about a category of facts that the legal system deems relevant to the judicial process, including charges and sentence, is inconsistent with the duty of competence contemplated by the ABA Standards and Model Rules. *See State v. Yanez*, 782 N.E.2d 146, 154-55 (Oh. Ct. App. 2002) (citing ABA Pleas of Guilty Standard 14-3.2(f); *St. Cyr*, 533 U.S. at 323 n.50; and *Strickland*, 466 U.S. at 668). As the *Yanez* court stated:

[In Ohio courts,] competent counsel may successfully use the prospect of the defendant's deportation as a bargaining chip with the prosecution for reduction of the offense charged in return for a negotiated guilty plea. When unaware of the immigration consequences of a plea, defense counsel puts the defendant at risk of an actual sentence [that is] not consistent with sentences imposed for similar crimes committed by similar offenders.

. . . Unless defendant is aware of the risk of deportation, he cannot appreciate whether it is in his best interest to waive his rights by entering a guilty plea.

Yanez, 782 N.E.2d at 155 (internal quotation marks and citation omitted).

The Supreme Court of Kentucky nevertheless adopted a bright line *per se* rule that defense counsel need never consider immigration consequences when representing a client. This determination – that a matter of great importance in many cases need never be considered in any case – is inconsistent with the principle, reflected in the ABA Standards for Criminal

Justice and ABA Model Rules, that clients facing criminal charges are entitled to decide to waive or exercise constitutional rights based on knowledge of the legal consequences that are important to them. For non-citizen clients considering a guilty plea, knowledgeable decision-making requires that defense counsel understand and can competently advise them about the immigration consequences of the plea.

CONCLUSION

For the reasons set forth above, the ABA respectfully submits that the decision of the Supreme Court of Kentucky should be reversed, and the case remanded for a hearing on petitioner's Sixth Amendment claim.

Respectfully submitted,

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APPENDIX

EXAMPLES OF BAR-SPONSORED
EDUCATIONAL RESOURCES CONCERNING
IMMIGRATION CONSEQUENCES OF CRIMINAL
CONVICTIONS**Alabama**

Immigration Law and Crimes, Ala. State Bar,
CLE, Jan. 13, 2009
([http://www.alabar.org/cle/class_detail.cfm?
Class=95059](http://www.alabar.org/cle/class_detail.cfm?Class=95059))

American Bar Association

*What All Attorneys Should Know About
Immigration Consequences of Criminal
Convictions for Non-Citizen Clients*, ABA
Commission on Immigration et al., CLE,
Jan. 29, 2009
([http://www.abanet.org/cle/programs/t09waa
1.html](http://www.abanet.org/cle/programs/t09waa1.html))

Robert McWhirter, *The Criminal Lawyer's Guide
to Immigration Law: Questions and
Answers* (ABA 2d ed. 2004)

Arizona

Representing Criminal Aliens, State Bar of Ariz.,
CLE, Mar. 10, 2006
([http://www.legalspan.com/AZBar/catalog.as
p?UGUID=&CategoryID=200307015391781
03837&ItemID=20060310-314499-100237](http://www.legalspan.com/AZBar/catalog.asp?UGUID=&CategoryID=20030701539178103837&ItemID=20060310-314499-100237))

*Criminal Immigration Issues in the Post 9-11
Era*, State Bar of Ariz., CLE, Nov. 30, 2005
([http://www.legalspan.com/AZBar/catalog.as
p?UGUID=&CategoryID=200307015391781
03837&ItemID=20051130-272095-153052](http://www.legalspan.com/AZBar/catalog.asp?UGUID=&CategoryID=20030701539178103837&ItemID=20051130-272095-153052))

California

Immigration Consequences of Criminal Convictions and Crimes, State Bar of Cal., CLE, Mar. 24, 2008
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Colorado

Hans Meyer, *Immigration Consequences of Criminal Pleas and Convictions*, Colo. Bar Ass'n, CLE, 2008
 (<http://www.cobar.org/cle/datadetail.cfm?productid=IM032608C-02>)

Jeff Joseph, *Immigration Consequences of Criminal Pleas and Convictions*, 35 COLO. LAW. 55 (Oct. 2006)

Jennifer L. Bahnson & Robert J. Dieter, *Collateral Effects of a Criminal Conviction in Colorado*, 35 COLO. LAW. 39 (June 2006)

Cecelia M. Espenoza, *Crimes of Violence by Non-Citizens and the Immigration Consequences*, 26 COLO. LAW. 89 (Oct. 1997)

Connecticut

Immigration 101: What Every Attorney Should Know, New Haven County Bar Ass'n, CLE, May 10, 2007
 (http://www.newhavenbar.org/files/2007-05-10CLE_Immigr.pdf)

District of Columbia

David Cleveland, *Deportation and Removal*, DC Bar, CLE, May 19, 2003
 (http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/april_2003/happenings.cfm)

Federal Bar Association

Ethics for Criminal Attorneys Representing Non-U.S. Citizens, Annual Immigration Seminar, May 16, 2009
(<http://www.fedbar.org/immigration-seminar.pdf>)

Florida

Mary Kramer, Stuart Karden, Jeff Joseph & Hon. Denise N. Slavin, *Dealing with the Effects of Clients' Criminal Activity on their Immigration Status*, The Florida Bar, CLE, Feb. 8, 2008
(<https://www.floridabar.org/FBweb/CLEReg.nsf/zLocations2/AFRH-759PAG?OpenDocument>)

Eric C. Pinkard, *Representing the Foreign National in Criminal Court: Deportation Consequences of a Criminal Convict*, 73 FLA. B.J. 16 (June 1999)

Jeffrey N. Brauwerman & Stephen E. Mander, *Immact90 Revisions Regarding Immigration Consequences of Criminal Activity*, 66 FLA. B.J. 28 (May 1992)

Alfred Zucaro, Jr. & Beth L. Mitchell, *Criminal Convictions: The Immigration Consequences*, 63 FLA. B.J. 36 (May 1989)

Georgia

Christina Hendrix & Olivia Orza, *No Second Chances: Immigration Consequences of Criminal Charges*, 13:4 GA. B.J. 26 (2007)

Grace A. Sease & Socheat Chea, *The Consequences of Pleas in Immigration Law*, 6:2 GA. B.J. 24 (2000)

Idaho

Sara Bearce, *Immigration Consequences in State Courts: Idaho Criminal Rule 11's New Protection for Non-Citizen Defendants*, 51 *ADVOCATE (IDAHO)* 26 (June/July 2008)

Illinois

Immigration Consequences of Criminal Offenses, Ill. State Bar Ass'n, CLE, May 1, 2009 (<http://www.isba.org/lawed/2009/05immigrationcons/>)

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Indiana

Indiana Public Defender Council, *Immigration Consequences of Criminal Convictions* (2007) (<http://www.in.gov/ipdc/general/manuals.html>)

Iowa

What Every Lawyer Should Know About Immigration Law, Immigration Consequences of Criminal Conduct, University of Iowa College of Law, Sept. 30, 2006 (<http://www.law.uiowa.edu/documents/2006%20Immigration%20Law%20CLE.pdf>)

Kansas

Kathleen A. Harvey, Rekha Sharma-Crawford & W. Michael Sharma-Crawford, *Disaster on the Horizon: It's Post-'Conviction' Time; Do You Know Where Your Alien Client Is?* 73 *J. KAN. B.A.* 16 (2004)

Kentucky

Help! I Have Aliens in My Office! Immigration Law Basics for a General Practice, Kentucky Bar Ass'n, CLE, June 12, 2009 (http://www.kybar.org/documents/ac/ac2009_cle.pdf)

Louisiana

Robert McWhirter, *The Rings of Immigration Hell: The Collateral Consequences of Criminal Conduct to Aliens*, La. Ass'n of Criminal Defense Lawyers, CLE, Apr. 28, 2007 (<http://lacdl.org/documents/Winter2007.pdf>)

Maine

Immigration Traps for Unwary Lawyers, Maine Bar Ass'n, CLE, Sept. 20, 2007, (<http://www.legalspan.com/mainebar/catalog.asp?UGUID=&ItemID=20070924-272095-102424>)

Maryland

Immigration Consequences of Criminal Activity, Md. Institute for Continuing Professional Education of Lawyers, CLE, Oct. 24, 2008 (<http://www.micpel.edu/seminars/Immigration%20Consequences%20of%20Criminal%20Activity.htm>)

Fernando A. Nunez, *Collateral Consequences of Criminal Convictions to Non-citizens*, 41 MD. B.J. 40 (2008)

Immigration Pitfalls in Family and Criminal Cases, Md. State Bar Ass'n, 9th Annual Solo and Small Firm Conference, Nov. 3, 2007 (<http://www.msba.org/events/soloconference/solobrochure.pdf>)

Immigration Consequences of Criminal Convictions, Maryland Partners for Justice Conference, Baltimore, Maryland, May 3, 2007
(http://www.probonomd.org/docs/pbrc_conference_2007.pdf)

Alison J. Brown & Mark H. Shmueli, *Pitfalls in the Bewildering Legal World of the "Criminal Alien"*, 39:4 Md. B.J. 22 (2006)

Marvin J. Muller, III, *Only a Misdemeanor? For non-US citizens facing criminal charges, the stakes are often much higher*, Md. State Bar Ass'n, Bar Bulletin, Immigration Law, Sept. 2004
(http://www.msba.org/departments/commpubl/publications/bar_bult/2004/sept04/misdemeanor.htm)

Rex B. Wingerter, *Consequences of Criminal Convictions*, 37 MD. B.J. 21 (Apr. 2004)

Massachusetts

Immigration Consequences of Criminal Conduct: Overview of Concepts & Discussion of Emerging Issues, Mass. Bar Ass'n, CLE, Feb. 12, 2009
(<http://www.massbar.org/for-attorneys/professional-development/continuing-legal-education/cle-programs?p=767>)

Michigan

David C. Koelsch, *Proceed With Caution: Immigration Consequences of Criminal Convictions*, 87 MICH. B.J. 44 (2008)

Randy E. Davidson, *Resources on Collateral Consequences of Criminal Convictions*, 87 MICH. B.J. 52 (2008)

Ronald Kaplovitz, *Criminal Immigration – The Consequences of Criminal Convictions on Non-U.S. Citizens*, 82 MICH. B.J. 30 (2003)

Minnesota

Immigration and Criminal Defense Strategies: How to Keep Your Client from Being Deported (What Every Immigration Lawyer Needs to Know About Criminal Cases and "Visa" Versa), Minn. State Bar Ass'n, CLE, Nov. 14, 2008
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