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COMMENT OPPOSING IMMIGRATION CONSEQUENCE
ADDITIONS TO FLA. R. JUV. P. 8.080

The committee should withdraw its proposal to include immigration consequences to rule 8.080 in what would be sub-paragraph (c)(10)(A-D) because the Florida Supreme Court rejected this same proposed addition to Fla. R. Crim. P. 3.172 Acceptance of Guilty or Nolo Contendere Plea less than two years ago. See proposed rule 3.172 attached marked at bottom as Appendix B-10 and see *In re Amendments to the Florida Rules of Criminal Procedure*, 188 So. 3d 764, 766 (Fla. 2015).

In *In re Amendments, supra*, in rejecting the same proposal, the Court decided as follows:

The Court rejects the Committee's proposal to label subdivision (c)(8) as "Immigration Consequences," and to include in that subdivision consequences that exceed deportation. Instead, subdivision (c)(8) is designated "Deportation Consequences," and includes various requirements placed on the lower court accepting a guilty plea or nolo contendere plea when deportation may be a consequence of said plea. These amendments follow the United States Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), and this Court's decision in *Hernandez v. State*, 124 So.3d 757 (Fla. 2012), each pertaining to ineffective assistance of trial counsel with respect to whether counsel has a duty to advise his or her client whether an offense to which he or she is pleading guilty would subject the client to deportation.

In re Amendments, at 766.

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Counsel submits that in light of the Court's rejection of the criminal rules committee's proposal less than two years ago the juvenile rules committee should withdraw its proposal on immigration consequences. Rather than write a lengthy explanation of the reasons why the committee should withdraw its proposal, counsel invites the committee to read his twenty-page comment that was submitted to the criminal rules committee in 2015 which is included as an attachment to the instant comment.

The only additional argument to what counsel argued in 2015 is that there is even less of an argument in support of the committee's proposal than there was to modifying the criminal procedure rules considering that an adjudication of delinquency does not constitute a conviction for immigration purposes under the Immigration and Nationality Act (INA). See INA § 101(a)(48)(A) codified at 8 U.S.C. § 1101(a)(48)(A) and *Vargas-Hernandez v. Gonzales*, 497 F.3d 919 (footnote 3) (2007); Consequences of Criminal Convictions, 37 April 2004, Maryland Bar Journal 21: "Juvenile adjudications are not grounds of deportation as they are seen as civil adjudications and usually not as grounds for inadmissibility except where the offense involved drug trafficking. A juvenile convicted in adult court will be vulnerable to removal."; Starting Over: The Immigration Consequences of Juvenile Delinquency and Rehabilitation, 40 N.Y.U. Rev. L. & Soc. Change 515, 521, 525-527 (2016): "The general rule in American immigration law is that adjudications of juvenile delinquency are not convictions for purposes of immigration law, so they do not trigger conviction-based grounds of removability or inadmissibility. Meanwhile convictions of juveniles tried as adults carry all of the implications that they would for any other adult."

The New York University Review of Law and Social Change article explains that a drug trafficking juvenile delinquency adjudication can have immigration consequences to inadmissibility. The article explains how juvenile delinquency cases can affect inadmissibility into the United States because the Immigration and Nationality Act contains penalties based on conduct alone and that, "The 'reason to believe standard' does not require a conviction, but rather only requires 'reasonable, substantial, and probative evidence' that an individual has engaged in drug trafficking. Courts have found evidence such as police reports, testimony from police, and juvenile delinquency adjudications to supply the requisite 'reason to believe.'"

Counsel submits that there is no reason to believe that the Florida Supreme Court is inclined to expand the court's plea advisement in juvenile delinquency cases to include this limited drug trafficking delinquency adjudication effect on inadmissibility to the United States considering that in *In re Amendments, supra*, the Court made it clear that the rules of procedure must only advise criminal defendants of deportation consequences of a plea of guilty or no contest.

In view of the Florida Supreme Court's recent rejection of the committee's immigration consequences proposal and considering that juvenile delinquency adjudications do not result in deportation and in only the rare circumstance of drug trafficking may have inadmissibility immigration consequence, counsel recommends that the committee withdraw its proposal to add to rule 8.080(c)(10)(A-D). Counsel submits that if the committee is going to propose an amendment to the court's plea advisement to the child, then the proposal should be to delete the deportation warning that is at rule 8.080(c)(10). The court's deportation warning is false as juvenile delinquency adjudications do not have deportation consequence. The rule needlessly

causes non-citizen children anguish and anxiety. This needless anxiety caused by the court's false warning should be eliminated by deletion of rule 8.080(c)(10).

Submitted this 14th day of August, 2017, to Kara Fenlon, Chair of the Juvenile Court Rules Committee.

/S/ Blaise Trettis

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**RULE 3.172. ACCEPTANCE OF GUILTY OR
NOLO CONTENDERE PLEA**

(a) **Voluntariness; Factual Basis.** Before accepting a plea of guilty or nolo contendere, the trial judge shall determine that the plea is voluntarily entered and that a factual basis for the plea exists. Counsel for the prosecution and the defense shall assist the trial judge in this function.

(b) **Open Court.** All pleas shall be taken in open court, except that when good cause is shown a plea may be taken in camera.

(c) **Determination of Voluntariness.** Except when a defendant is not present for a plea, pursuant to the provisions of rule 3.180(d), the trial judge ~~should~~must, when determining voluntariness, place the defendant under oath, and ~~shall~~ address the defendant personally and ~~shall determine~~ on the record that he or she understands:

(1) **Nature of the Charge.** ~~¶~~The nature of the charge to which the plea is offered, the maximum possible penalty, and any mandatory minimum penalty provided by law;₂

(2) **Right to Representation.** ~~¶~~If not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, an attorney will be appointed to represent him or her;₂

(3) **Right to Trial By Jury and Attendant Rights.** ~~¶~~The right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury, and at that trial a defendant has the right to the assistance of counsel, the right to compel attendance of witnesses on his or her behalf, the right to confront and cross-examine witnesses against him or her, and the right not to testify or be compelled to incriminate himself or herself;₂

(4) **Effect of Plea.** ~~that a~~Upon a plea of guilty, or nolo contendere without express reservation of the right to appeal, he or she gives up the right to appeal all matters relating to the judgment, including the issue of guilt or innocence, but does not impair the right to review by appropriate collateral attack;₂

(5) **Waiving Right to Trial.** ~~that if~~if the defendant pleads guilty or is adjudged guilty after a plea of nolo contendere there will not be a further trial of

any kind, so that by pleading guilty or nolo contendere he or she waives the right to a trial;

(6) **Questioning by Judge.** ~~that if~~ If the defendant pleads guilty or nolo contendere, the trial judge may ask the defendant questions about the offense to which he or she has pleaded, and if the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against him or her in a prosecution for perjury;

(7) **Terms of Plea Agreement.** ~~¶~~ The complete terms of any plea agreement, including specifically all obligations the defendant will incur as a result;

(8) ~~that if he or she pleads guilty or nolo contendere, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases; and~~ **Immigration Consequences.**

(A) If the defendant is not a citizen of the United States, a finding of guilt by the court, and the court's acceptance of the defendant's plea of guilty or no contest, regardless of whether adjudication of guilt has been withheld, may have the additional consequence of changing his or her immigration status, including deportation or removal from the United States, exclusion from readmission to the United States, detention, denial of naturalization, or ineligibility for citizenship, pursuant to the laws of the United States.

(B) The court should advise the defendant to consult with counsel if he or she needs additional information concerning the potential immigration consequences of the plea.

(C) If the defendant has not discussed the potential immigration consequences with his or her counsel, prior to accepting the defendant's plea, the court is required, upon request, to allow a reasonable amount of time to permit the defendant to consider the appropriateness of the plea in light of the advisement described in this section.

(D) The court should inquire if the defendant is willing to plead guilty or no contest even if entry of the plea would subject the defendant to any of the immigration consequences stated in this rule.

(E) This admonition should be given to all defendants in all cases, and the trial court must not require at the time of entering a plea that the defendant disclose his or her legal status in the United States.

(9) **Sexually Violent or Sexually Motivated Offenses.** ~~that if~~ If the defendant pleads guilty or nolo contendere, and the offense to which the defendant is pleading is a sexually violent offense or a sexually motivated offense, or if the defendant has been previously convicted of such an offense, the plea may subject the defendant to involuntary civil commitment as a sexually violent predator upon completion of his or her sentence. It shall not be necessary for the trial judge to determine whether the present or prior offenses were sexually motivated, as this admonition shall be given to all defendants in all cases.

(10) **Driver's License Suspension or Revocation.** ~~that if~~ If the defendant pleads guilty or nolo contendere and the offense to which the defendant is pleading is one for which automatic, mandatory driver's license suspension or revocation is required by law to be imposed (either by the court or by a separate agency), the plea will provide the basis for the suspension or revocation of the defendant's driver's license.

(d) **DNA Evidence Inquiry.** Before accepting a defendant's plea of guilty or nolo contendere to a felony, the judge must inquire whether counsel for the defense has reviewed the discovery disclosed by the state, whether such discovery included a listing or description of physical items of evidence, and whether counsel has reviewed the nature of the evidence with the defendant. The judge must then inquire of the defendant and counsel for the defendant and the state whether physical evidence containing DNA is known to exist that could exonerate the defendant. If no such physical evidence is known to exist, the court may accept the defendant's plea and impose sentence. If such physical evidence is known to exist, upon defendant's motion specifying the physical evidence to be tested, the court may postpone the proceeding and order DNA testing.

(e) **Acknowledgment by Defendant.** Before the trial judge accepts a guilty or nolo contendere plea, the judge must determine that the defendant either (1) acknowledges his or her guilt or (2) acknowledges that he or she feels the plea to be in his or her best interest, while maintaining his or her innocence.

(f) **Proceedings of Record.** The proceedings at which a defendant pleads guilty or nolo contendere shall be of record.

(g) **Withdrawal of Plea Offer or Negotiation.** No plea offer or negotiation is binding until it is accepted by the trial judge formally after making all the inquiries, advisements, and determinations required by this rule. Until that time, it may be withdrawn by either party without any necessary justification.

(h) **Withdrawal of Plea When Judge Does Not Concur.** If the trial judge does not concur in a tendered plea of guilty or nolo contendere arising from negotiations, the plea may be withdrawn.

(i) **Evidence.** Except as otherwise provided in this rule, evidence of an offer or a plea of guilty or nolo contendere, later withdrawn, or of statements made in connection therewith, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

(j) **Prejudice.** Failure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice.

Committee Notes

1977 Adoption. New in Florida. In view of the supreme court's emphasis on the importance of this procedure as set forth in *Williams v. State*, 316 So.2d 267 (Fla. 1975), the committee felt it appropriate to expand the language of former rule 3.170(j) (deleted) and establish a separate rule. Incorporates Federal Rule of Criminal Procedure 11(c) and allows for pleas of convenience as provided in *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

(a), (b) Mandatory record of voluntariness and factual predicate is proper responsibility of counsel as well as the court.

(c)(iv) This waiver of right to appeal is a change from the proposed amendments to the rules of criminal procedure now pending. A sentence if lawful is not subject to appellate review; a judgment, however, is. The committee was of the opinion that the proposed rule should be expanded to include a waiver of appeal from the judgment as well as the sentence. Waivers of appeal have been approved. *United States ex rel. Amuso v. LaValle*, 291 F.Supp. 383 (E.D.N.Y. 1968), *aff'd* 427 F.2d 328 (2d Cir. 1970); *State v. Gibson*, 68 N.J. 499, 348 A.2d 769 (1975); *People v. Williams*, 36 N.Y.2d 829, 370 N.Y.S.2d 904, 331 N.E.2d 684 (1975).

(vii) Requires the court to explain the plea agreement to the defendant, including conditions subsequent such as conditions of probation.

(e) Provides a readily available record (either oral or by use of standard forms) in all cases where a felony is charged.

(h) Rewording of federal rule 11(e)(6).

2005 Amendment. Rule 3.172(c)(9) added. See section 394.910, et seq., Fla. Stat.; and *State v. Harris*, 881 So. 2d 1079 (Fla. 2004).

2016 Amendment. In view of the holdings in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010) and *Hernandez v. State*, 124 So. 3d 757 (Fla. 2012), the Committee felt it appropriate to expand the requirements in subdivision (c)(8).

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA)
RULES OF CRIMINAL PROCEDURE) CASE NO. SC15-177
_____)

I.

COMMENT OPPOSING PROPOSAL TO CHANGE DEPORTATION
CONSEQUENCES OF RULE 3.172 BECAUSE CHANGES ARE
NOT REQUIRED BY *PADILLA V. KENTUCKY*, 130 S.CT. 1473 (2010)

Undersigned counsel, Blaise Trettis, Public Defender for the Eighteenth Judicial Circuit, recommends that change of immigration status, exclusion from readmission to the United States, detention, denial of naturalization, and ineligibility for citizenship be deleted from paragraph A of the committee's proposal to change rule 3.172. Counsel recommends this deletion because advice by counsel on these immigration consequences of a guilty or no contest plea are not required by *Padilla v Kentucky*, 130 S.Ct. 1473 (2010) and *Hernandez v State*, 124 So.3d 757 (Fla. 2012).

In *Padilla*, the Court held that when deportation resulting from a guilty plea is clear, the Sixth Amendment requires that counsel must advise the immigrant client that deportation is mandatory. The Court found that "constitutionally competent counsel would have advised him [Padilla] that his conviction for drug distribution made him subject to automatic deportation," *Padilla*, 130 S.Ct. at 1478. The Court observed that Padilla's "is not a hard case in which to find

deficiency,” because the consequences of the plea “could easily be determined from reading the removal [i.e. deportation] statute,” which is “succinct, clear, and explicit in defining the removal consequence for Padilla’s conviction.”

1. *Padilla v. Kentucky* applies only to lawful permanent residents

Padilla was a lawful permanent resident (i.e. green card holder).

Undersigned counsel submits that the holding in the *Padilla* is limited to the advice on deportation that counsel must give to lawful permanent residents like Padilla.

The *Padilla* decision did not create a Sixth Amendment requirement to give comprehensive legal advice on every possible immigration consequence of conviction to defendants with all types of immigration status such as visa-holder, visa over-stayers, or to illegal alien border-crossers with no immigration status.

The Fourth District Court of Appeal has held that the *Padilla* decision is limited to the advice regarding deportation consequence of conviction that must be given to defendants lawfully in the U.S. In affirming the denial of relief from a claim alleging ineffective assistance of counsel for inaccurate advice about the immigration consequences of a plea, in *Ibarra v. State*, 125 So.3d 820 (Fla. 4th DCA 2013), the court held that the *Padilla* decision does not apply to illegal aliens:

Further, as argued by the State in its response below, appellant is not subject to deportation based solely on his plea in this case, which is a requirement for obtaining relief under *Padilla*. *Ioselli v. State*, 122 So.3d 388, 2013 WL 611781 (Fla. 4th DCA Feb.20, 2013) (Citing *Forrest v State*, 988 So.2d 38 (Fla. 4th

DCA 2008) see also *Diez v. State*, 102 So.3d 19, 20 (Fla. 4th DCA 2012).

The Department of Homeland Security's Notice to Appear for removal proceedings reflects that appellant is an illegal alien and is subject to removal on that basis alone. As an illegal alien, appellant had no legitimate expectation that he would be allowed to remain in this country when he committed the offenses and entered the plea at issue. *Joseph v. State*, 107 So.3d 492 (Fla. 4th DCA Feb.13, 2013) ("*Padilla* applies only to those who were present in the country lawfully at the time of the plea.") Any reliance that appellant allegedly placed on counsel's purported advice that appellant would not be deported as a result of this plea is unjustified and illegitimate. The possibility that Ibarra might otherwise qualify for an adjustment in status is not a basis for relief. See *Rosas v. State*, 991 So.2d 1003 (Fla. 4th DCA 2008).

Ibarra v. State, 125 So.3d at 821.

The committee's proposal requires criminal defense attorneys to give comprehensive expert immigration advice to every client who is not a U.S. citizen, including visa holders, visa overstayers, and illegal aliens who have illegally crossed the border into the United States. This is because paragraph B of the committee's proposal requires the court to advise the defendant to consult with their lawyer for advice regarding every type of immigration consequence that is listed in paragraph A. The *Padilla* decision does not impose this burden on criminal defense attorneys to provide this exhaustive, comprehensive, all-encompassing, expert immigration advice to every client no matter what the client's immigration status or non-status. As argued above, and as held by the Fourth District Court of Appeal, the *Padilla* decision applies only to immigrant

defendants legally in the U.S. at the time of their plea (i.e. lawful permanent residents under the *Padilla* decision) and the *Padilla* decision does not apply to illegal aliens.

The committee's proposal will likely lead to the filing of many post conviction motions to vacate convictions claiming that defense counsel was ineffective for not providing the expert immigration legal advice required by the new rule to every defendant irrespective of their immigration status and irrespective of the complexity of their immigration situation. This outcome would be especially unfortunate because the exhaustive, comprehensive, immigration advice required by the committee's proposal is unnecessary under *Padilla*.

The committee's proposal can be amended to meet the narrow requirement of *Padilla* by making the following deletions and additions which limit the court's warning to the deportation consequence of a plea of guilty or no contest:

8. IMMIGRATION CONSEQUENCE-DEPORTATION CONSEQUENCE

(A) that if the defendant is not a citizen of the United States, a finding of guilt by the court, and the court's acceptance of the defendant's plea of guilty or no contest, regardless of whether adjudication of guilt has been withheld, may have the additional consequence of ~~changing his or her immigration status, including~~ deportation or removal from the United States; ~~exclusion from readmission to the United States, detention, denial of naturalization, or ineligibility for citizenship, pursuant to the laws of the United States;~~

(B) the court should advise the defendant to consult with counsel if he or she needs additional information concerning the potential immigration deportation consequences of the plea;

(C) if the defendant has not discussed the possible immigration deportation consequence with his or her counsel, prior to accepting the defendant's plea, the court is required, upon request, to allow a reasonable amount of time to permit the defendant to consider the appropriateness of the plea in light of the advisement described in this section;

(D) furthermore, the court should inquire if the defendant is willing to plead guilty or no contest, even if entry of the plea would subject the defendant to ~~any of the immigration~~ deportation consequence stated in this rule;

(E) this admonition should be given to all defendants in all cases, and the trial court must not require at the time of entering a plea that the defendant disclose his or her legal status in the United States; and

Limiting the warning to deportation consequence of conviction as proposed by undersigned counsel applies equally to immigrants who are in the U.S. lawfully and to noncitizen defendants who are not lawfully in the U.S. Pleading guilty or no contest to crimes listed in removal statute 8 U.S.C. § 1227(a)(2) or to aggravated felony crimes listed in 8 U.S.C. § 110(a)(43) will result in automatic deportation no matter what is the immigration status, or non-status, of the immigrant defendant. Thus, there is no need to try to fashion a warning by the court that is limited to or that is specifically directed at lawful permanent residents.

The committee's proposal may be based on the suggestion of Justice Alito in his concurring opinion in *Padilla* that, instead of the majority's creation of a new Sixth Amendment rule, a better way to address the underlying problem is administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences:

As *amici* point out, “28 states and the District of Columbia have already adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas.” Brief for State of Louisiana et al. 25; accord, Chin & Holmes 708 (“A growing number of states require advice about deportation by statute or court rule”). A nonconstitutional rule requiring trial judges to inform defendants on the record of the risk of adverse immigration consequences can ensure that a defendant receives needed information without putting a large number of criminal convictions at risk; and because such a warning would be given on the record, courts would not later have to determine whether the defendant was misrepresenting the advice of counsel.

Padilla, 130 S.Ct. at 1491, Justice Alito concurring.

Justice Alito may have inadvertently used the words “immigration consequences” instead of the word “deportation”. It may be as argued by *amici* in *Padilla* that a growing number of states require advice about deportation by statute or court rule but that these states do not require courts to advise defendants of “possible immigration consequences” of their pleas. Or it may be that “possible immigration consequences” is in reality deportation consequence only. Whatever the situation may be across the U.S., it is important to recognize that Justice Alito’s suggestion and his concurring opinion and his use of the words “immigration consequences” is not the opinion for the Court.¹ A close reading of the majority

¹ It is worth noting that the Court in *Hernandez v. State*, 124 So.3d 757(Fla.2012), rejected Justice Alito’s position that a plea colloquy in which the court advises defendants that their plea could have adverse immigration consequences would bar the defendant’s post conviction challenge to the conviction on grounds of misadvice on immigration consequences by defense counsel.

opinion proves that the Court's holding focused exclusively on the deportation consequence of a plea. Nowhere in the majority opinion are other immigration consequences mentioned like the consequence of a change of the defendant's immigration status, exclusion from readmission to the United States, detention, denial of naturalization, or ineligibility for citizenship. There is only one sentence of *obiturn dictum* in the majority opinion in *Padilla* which even uses the words "immigration consequences": "When the law is not succinct and straight forward (as it is in many of the scenarios posited by Justice Alito), 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*, 130 S.Ct. at 1483. The committee has incorrectly turned this sentence of *dictum* that a defense lawyer should in some cases provide the most general immigration warning about deportation into the impractical requirement that the defense attorney must be an expert in the intricacy of immigration law - of which jurisdiction is in the federal court system - to provide expert immigration advice to every noncitizen client no matter the complexity of immigration law and no matter what the immigration consequence that the noncitizen client might be facing as a result of a plea of guilty or no contest. This is not required by *Padilla*. The committee should not try to impose this onerous obligation on defense counsel when it is not required by the *Padilla* decision.

2. The Maxim of Judicial Review

Undersigned counsel submits that the committee's extension of the holding in *Padilla v. Kentucky* - which only applies to legal advice that must be given regarding the deportation consequences of conviction - to all immigration consequences including exclusion from readmission to the U.S., detention, denial of naturalization, or ineligibility for citizenship, is contrary to the maxim of judicial review enunciated in *State v. DuBose*, 99 Fla. 812, 128 So. 4,6 (Fla. 1930), that courts "consistently decline to settle questions beyond the necessities of the immediate case. This court is committed to the 'method of a gradual approach to the general, by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted.' " Undersigned counsel submits that the Court should be particularly cognizant of its proper function to not violate the maximum of judicial review in a rules amendment case such as the instant case, especially when there are multiple decisions cited in this comment from the Fourth District of Appeal which contradict the committee's proposal on the attorney advice that must be given to defendants. Counsel submits that the committee's proposal which requires exhaustive, comprehensive advice on all of the possible immigration consequence of a guilty plea should be rejected because there is no Florida case law which holds that this exhaustive advice must

be given under the Sixth Amendment to the U.S. Constitution or Article I, section 16 of the Florida Constitution. Counsel submits that the Court should not make the law proposed by the committee when the factual scenarios encompassed by the committee's proposal have not come before the circuit courts to be litigated and ruled-on and then appealed, briefed, and decided in the district courts of appeal. There will be cases in which noncitizens file motions to vacate convictions due to the alleged ineffectiveness of defense counsel for failing to advise them that their guilty plea would result in a change of immigration status, exclusion from readmission to the U.S., denial of naturalization and ineligibility for citizenship. When these cases come before the circuit courts and district courts of appeal, the judicial branch will ultimately decide whether or not the United States or Florida Constitution require that defense counsel give noncitizens this exhaustive, comprehensive legal advice on all of the immigration consequences of pleading guilty to a crime. If these future cases result in appellate decisions which hold that the U.S. or Florida Constitution require that this comprehensive immigration advice must be given, then of course the rules of criminal procedure will be changed then. But unless that happens, counsel submits that the committee's proposal constitutes an expensive, *discretionary*, new legal requirement in criminal law that will be borne by the public defenders, office of criminal conflict and civil regional counsel, and court-appointed private counsel, who provide representation

to the approximate 70% of criminal defendants who cannot afford to hire private counsel. If the Court were to adopt the committee's proposal, then the Florida Legislature will be asked to fund this new, expensive legal requirement in criminal cases.

3. Separation of Powers

The legislature has expressed its intent that in criminal cases the state will fund counsel to provide the legal representation that is required by the U.S. or Florida Constitution or general law. For example, in creating the office of criminal and civil regional counsel, the legislature stated: "It is the intent of the Legislature to provide adequate representation to persons entitled to court-appointed counsel under the Federal or State Constitution or as authorized by general law. It is the further intent of the Legislature to provide adequate representation in a fiscally sound manner, while safeguarding constitutional principles." Section 27.511(1) Fla. Stat. (2014). The legislature has specifically prohibited public defenders and criminal conflict and civil regional counsel from representing "any plaintiff in a civil action brought under the Florida Rules of Civil Procedure, the Federal Rules of Civil Procedure, or the federal statutes, or represent a petitioner in a rule challenge under chapter 120, unless specifically authorized by statute." Section 27.51(1)(d) Fla. Stat. (2014); Section 27.511 (6)(d) Fla. Stat. (2014).

Undersigned counsel submits that the legislature has made its intent clear that the state will fund counsel in criminal cases only to the extent necessary to provide the representation required by the Florida and U.S. Constitutions and general law. Counsel submits that there is the issue of a violation of separation of powers if the Court were to adopt the committee's proposal. When the Florida Constitution, the U.S. Constitution, and Florida Statutes do not require the comprehensive immigration advice in the committee's proposal, then undersigned counsel submits that it should be the legislature's decision whether or not to fund this comprehensive legal advice for indigent defendants on immigration law in criminal cases. As it stands, however, if the Court were to adopt the committee's proposal, then the Court would essentially be forcing the legislature to fund a specific type of legal representation in criminal cases that is not required by the U.S. or Florida Constitution or by the Florida Statutes.

4. The complexity of immigration law

As argued above, the *Padilla* holding is limited to deportation consequence of a plea of guilty or no contest. The committee's proposal encompassing warnings on all of the other immigration consequences of such pleas are unnecessary under *Padilla*. Their inclusion in rule 3.172 will make criminal defense counsel's duties impossible to fulfill because, as noted in the majority and concurring opinions in *Padilla*, "Immigration law can be complex, and it is a legal

specialty of its own,”; and, “...many criminal defense attorneys have little understanding of immigration law,”; “criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess - and very often do not possess - expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and expertise.”; “... many criminal defense attorneys have little understanding of immigration law.”; “...thorough understanding of the intricacies of immigration law is not ‘within the range of competence demanded of attorneys in criminal cases,’ ” and is a, “complex specialty that generally lies outside of the scope of a criminal defense attorney’s expertise.” *Padilla*, 130 S.Ct at 1483,1487-1488, 1492, 1494.

The committee’s proposal creates the “Catch 22” situation where the trial court instructs the noncitizen defendant to consult with their lawyer about, for example, the immigration consequence of exclusion from readmission to the United States, but the defense lawyer is unable to advise the client because (paraphrasing *Padilla*) criminal defense attorneys are not expected to possess expertise in other areas of the law and it is unrealistic to expect them to provide expert immigration advice because a thorough understanding of the intricacies of immigration law is not within the range competence demanded of attorneys in criminal cases. Justice Alito, in his concurring opinion, argues that criminal

defense attorneys in this situation should advise the client to consult an immigration specialist if the client wants immigration advice. *Padilla*, 130 S.Ct. at 1494. In reality, that is the only way that a defendant would be able to get the expert advice on immigration that the committee's proposal requires. The committee, however, does not offer its opinion on who is to pay for this expert advice.

5. The limited holding in *Padilla v. Kentucky*

Undersigned counsel submits that it is not difficult for an attorney to fulfill their obligation under *Padilla* to properly advise noncitizen defendants of the deportation consequence of a guilty or no contest plea because all the attorney must do is refer to the list of deportable crimes in removal statute 8 U.S.C. §1227(a)(2) and aggravated felony crimes in 8 U.S.C. §1101(a)(43). Counsel disagrees with Justice Alito's criticism in *Padilla* that attorneys will have to try to make the difficult, uncertain, determination whether or not a crime qualifies as a deportable crime "involving moral turpitude" pursuant to the removal statute 8 U.S.C. §1227(a)(2)(A)(i-ii). Because the immigration statutes do not list the crimes which involve moral turpitude and because attempting to determine whether a crime qualifies as a crime involving moral turpitude is uncertain and unclear, undersigned counsel submits that under the *Padilla* decision counsel does not have the obligation under the Sixth Amendment to inform their noncitizen

client that a crime is a crime involving moral turpitude which will cause their deportation. This is the holding in *Facey v. State*, 143 So. 3d 1003 (Fla. 4th DCA 2014), in which the court held that trial counsel was not ineffective for failure to advise the lawful permanent resident defendant that pleading guilty to grand theft would result in deportation because grand theft was not shown to be an aggravated felony crime which results in automatic deportation but which may be a crime of moral turpitude which can result in removal if committed within five years of admission. In *Facey*, the court concluded that counsel is not ineffective for failing to give advice on the deportation consequences of crimes except those aggravated felony crimes listed in 8 U.S.C. § 1101(a)(43) and the list of crimes in removal statute 8 U.S.C. § 1227(a)(2). In *Facey*, the court concluded that counsel is not ineffective for failing to advise a client that a crime qualifies as a crime of moral turpitude which will lead to deportation. Counsel has attached as an appendix to this comment an article written by him published in 2010 in the Ex Parte magazine, the magazine of the Brevard County Bar Association. This article explains how, in counsel's opinion, a defense lawyer can rather easily comply with their Sixth Amendment obligation under *Padilla*. Undersigned counsel submits that *Padilla v. Kentucky* requires criminal defense counsel to give two sentences of legal advice to noncitizens regarding the immigration consequences of pleading guilty: 1) If the defendant is charged with a crime listed in removal statute 8 U.S.C. § 1227(a)(2) or

with an aggravated felony crime listed in 8 U.S.C. § 110(a)(43), then the lawyer's advice to the non-citizen required by *Padilla v. Kentucky* is: "You will be deported from the United States if you plead guilty to this crime."; 2) If the non-citizen defendant is charged with any other crime, then the legal advice as stated by the majority opinion in *Padilla v. Kentucky* is: "Pleading guilty to this charge *may carry a risk of adverse immigration consequences.*" (italicized words are verbatim from *Padilla* decision).

In summary, the *Padilla* decision does not require counsel to advise their client on all of the immigration consequences listed in paragraph A of the proposal. Complying with the proposal will be impossible for almost all criminal defense practitioners because they are not experts in immigration law. The ineffective assistance of counsel claims that are likely to result from the committee's proposal will be completely unnecessary because *Padilla* does not require that counsel give the comprehensive legal advice on all immigration consequences of a guilty or no contest plea listed in paragraph A. Undersigned counsel submits that the committee should therefore make the deletions and additions to its proposal set forth in this comment.

II.

COMMENT RECOMMENDING THE DELETION OF THE COURT-INITIATED WAIVER OF INEFFECTIVE ASSISTANCE OF COUNSEL IN PARAGRAPH D OF RULE 3.172 PROPOSAL

The 2015 Amendment Committee Notes say that the amendments are made in view of the holding in *Hernandez v. State*, 124 So. 2d 757 (Fla. 2012).

Paragraph D of the proposal is presumably in response to the holding in *Hernandez* that the equivocal warning in rule 3.172 that the guilty or no contest plea may subject the defendant to deportation is insufficient to categorically eliminate the prejudice of incorrect advice by counsel regarding the deportation consequences of a guilty plea. *Hernandez*, at 763. Paragraph D appears to have been written so that the court's warning is no longer equivocal, but instead is unequivocal so that it will act as a bar to claims of ineffective assistance of counsel asserting that defense counsel either gave incorrect advise on the deportation consequence of the plea or gave no advice on the deportation consequence of the plea in violation of the Sixth Amendment requirement imposed by the holding in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). Paragraph D thus constitutes a court-initiated waiver of any future claim of ineffective assistance of counsel. By including this court-initiated waiver in rule 3.172, the judiciary will be conditioning the guilty or no contest plea in every case on the waiver of a claim of ineffective assistance of counsel. This is unethical. The Florida Bar Committee on Professional Ethics, in 2012 in opinion

12-1, concluded that it is impermissible for a plea bargain in a criminal case to be conditioned on the defendant's waiver of a future claim of ineffective assistance of defense counsel. Likewise, the ethical opinion concludes that it is impermissible for the plea bargain to be conditioned on the waiver of a future collateral attack of the conviction based on a claim of prosecutorial misconduct. The opinion states that such a plea bargain is prejudicial to the administration of justice and violates the Rules of Professional Conduct of the Rules Regulating the Florida Bar.

Undersigned counsel submits that while it is wrong and unethical for the state attorney and defense counsel to condition a plea bargain on the waiver of a claim of ineffective assistance of counsel, it is especially wrong and unethical for the waiver to be a requirement of the court's acceptance of every plea of guilty or no contest.

The court-initiated waiver of a claim of ineffective assistance of counsel in paragraph D is unconscionable considering the results that it will produce. A lawful permanent resident can live their entire lives lawfully in the U.S. without ever having to apply for citizenship. Lawful permanent residents serve their country in the military, pay taxes, and raise families just as do U.S. citizens. But "removal statute" 8 U.S.C. § 1227 (a)(2) lists crimes that result in mandatory deportation of lawful permanent residents and includes the misdemeanor crimes of domestic violence battery or assault, and misdemeanor violation of domestic

violence injunction, or repeat, sexual, or dating violence injunction, possession of drug paraphernalia, felony possession of marijuana, and misdemeanor improper exhibition of a dangerous weapon and misdemeanor carrying a concealed weapon if the police report shows that the weapon exhibited was a firearm. See *Adafemi v. Ashcroft*, 386 F. 3d 1022 (11th Cir. 2004).

Paragraph D's waiver of a claim of ineffective assistance of counsel will lead to the mandatory deportation of lawful permanent residents who have served in the military, lived lawfully in America for decades, raised a family, *et cetera*, but who plead no contest to misdemeanor domestic violence because their lawyer either never mentioned deportation as a consequence of the plea bargain or because their lawyer said there could not be deportation as a result of the plea because, for example, the negotiated plea bargain resulted in adjudication of guilt withheld. See *Matter of Cabrera*, 24 I & N Dec. 459 (B,A 2008) (A "conviction" within the meaning of the Immigration and Nationality Act means a formal judgment of guilt or a withholding of adjudication of guilt if the defendant pled guilty or *nolo contendere* and the court imposed some sort of punishment or penalty including only a sentence of court costs or a suspended sentence.). This result, counsel submits, is a travesty of justice considering the Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) that the Sixth Amendment requires that defendants be given correct legal advice regarding the deportation consequences of

a guilty or no contest plea when the deportation consequences can easily be determined from reading the removal (i.e. deportation) statute.

The committee's proposal in paragraph D vitiates the United States Supreme Court's monumental decision in *Padilla v Kentucky* and it should be deleted for that reason alone. The waiver of ineffective assistance of counsel claims made mandatory by the court in every plea of guilty or no contest is unethical and impermissible according to the Florida Bar's ethical opinion. For these reasons paragraph D should be deleted from the committee's proposal.

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing comment was delivered to Judge Samantha Ward, Committee Chair, George Edgecomb Courthouse, 800 E. Twiggs St., Ste. 421, Tampa, FL 33602-3549, by e-mail, address wardsl@fljud13.org and to Heather Telfer, Bar Staff Liaison to the Committee, 651 E. Jefferson St., Tallahassee, FL 32399-2300, by e-mail, address htelfer@Flabar.org, on March 30, 2015.

/S/ Blaise Trettis

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that these comments were prepared using Times New Roman, 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(1)(2).

/S/ Blaise Trettis

Blaise Trettis
Public Defender, Eighteenth Judicial Circuit