

## Judges Must Warn About Deportation, New York Appeals Court Rules

*By James C. McKinley Jr., Published in The New York Times November 19th, 2013*

New York judges must warn immigrant defendants that they face deportation if they plead guilty to a felony, the state's highest court ruled on Tuesday.

In a 5-to-2 decision, the Court of Appeals overturned its 1995 ruling that deportation is a "collateral consequence" of a guilty plea, and so judges need not warn foreign defendants it might happen.

Writing for the majority, Judge Sheila Abdus-Salaam said that times had changed since the mid-1990s, when about 37,000 noncitizens were deported after criminal convictions.

That number stood at 188,000 in 2011, Judge Abdus-Salaam wrote, and, with stricter enforcement of immigration laws, deportation has become "an automatic consequence of a guilty plea for most noncitizen defendants." She said defendants who took plea bargains often found themselves stripped of their jobs, cut off from their family in the United

States and returned to a country they hardly remembered.

The majority concluded "that deportation constitutes such a substantial and unique consequence of a plea that it must be mentioned by the trial court to defendant as a matter of fundamental fairness," Judge Abdus-Salaam wrote.

More than 20 states already require judges to issue such warnings, and in the 1990s the New York State Legislature put a similar requirement in the criminal procedure law. But failing to give the warning carried no consequence, and judges sometimes skip it, defense lawyers said.

"Courts should be doing this already but in practice they are not," said Rosemary Herbert, a lawyer for Richard Diaz, one of the three defendants in the case. "This decision is putting some teeth in that requirement."

Chief Judge Jonathan Lippman and Judges Victoria Graffeo, Susan P. Read and Jenny Rivera joined Judge Abdus-Salaam in the majority. Judges Robert S. Smith and Eugene F. Pigott Jr. dissented.

In 2010, the United States Supreme Court ruled in *Padilla v. Kentucky* that defense lawyers have a duty to tell clients they face deportation before they offer a guilty plea.

The Court of Appeals decision

this week came in response to three criminal cases in which judges failed to tell defendants about their likely deportation.

Mr. Diaz, a legal United States resident from the Dominican Republic, was arrested in October 2006 with another man in the back of a taxicab in Upper Manhattan after the police found a two-pound brick of cocaine on the car's floor during a traffic stop.

He pleaded guilty to a reduced charge in return for a two-and-a-half-year sentence, but as soon as he was released, Immigration and Customs Enforcement moved to deport him.

Because a trial judge in Manhattan never warned Mr. Diaz of the deportation, the Court of Appeals ruled that he had a right to move to withdraw his guilty plea. The majority said the motion would not be granted automatically, though, as is done with other violations of due process. Instead Mr. Diaz, and other defendants like him, must show that if he had been warned, he would have insisted on going to trial.

On this point, Judges Lippman and Rivera dissented, arguing that similar pleas in the absence of a warning should be reversed automatically.

Lawyers for the three defendants in the case — Mr. Diaz, Juan Jose Peque and Michael Thomas — said the decision was a sea change. "The decision certainly makes clear that judges from now going forward must warn, and it opens up an avenue for defendants who are already convicted and haven't been warned

to appeal,” said Lynn W. L. Fahey, who represented Mr. Thomas.

## Why is my case moving so slowly?

*By Johanna S. Zapp, Esq.*

Everyone is asking the same question. Why is it taking so long to get anything done on my case? For months now I have been trying to explain to my clients that budget cuts have led to a slower prosecutor’s office. AUSAs are leaving, either moving on to bigger and better jobs, or simply leaving for personal reasons. The problem is, when an AUSA leaves, they aren’t being replaced. This means that the 20, 30, or 40 cases that this prosecutor was working on, now gets delegated to all of the other prosecutors remaining in the office.

According to an article recently published in the New York Times (parts of which appear below) 22 prosecutors are leaving the US Attorney’s Office in the Southern District of New York every year without being replaced (you can be sure that the same is true for the Eastern District of New York too.) So, when you’re sitting there at MCC or MDC and your lawyer explains that things are moving slowly, and calls aren’t being returned, this is why. These prosecutors are over worked and under paid. They have more cases on their desk than ever before.

Its frustrating for everyone. But rest assured, you will be taken care

of. Patience is necessary, and I’ve said this before, your patience will be rewarded. A prosecutor’s goal is to get your file off their desk as soon as possible. However, there aren’t enough hours in the day to do it efficiently or quickly, and there aren’t enough prosecutors around to attend to all of the cases that exist. The result is this – why is my case moving so slowly?

## Prosecutor Sees Danger in Budget Cuts

*By Benjamin Weiser, Published in The New York Times December 2nd, 2013*

Preet Bharara, the United States attorney for the Southern District of New York, told a lawyers group on Monday that at some point, his office could reach crisis mode.

His office has 210 assistant United States attorneys assigned to criminal and civil cases, which is almost 20 fewer than it had in 2011. The office also loses about 22 a year through attrition, and they are not being replaced.

In a phone interview, he added that with his office pursuing so many kinds of important cases, “the Hobson’s choice of picking one over another as resources dwindle away is, you know, a bit horrifying.”

Mr. Bharara appeared with other leading court and bar figures at a public hearing organized by the New York County Lawyers’ Association on the continuing impact of budget cuts on the justice system. The other witnesses who testified included the chief judges of the city’s federal

courts; Loretta E. Lynch, the United States attorney in Brooklyn; and David E. Patton, the federal public defender.

The issue has become a heated one: Last week, Judge Kimba M. Wood of Federal District Court in Manhattan told another bar group that in October, the court came within one day of not being able to pay jurors for their service, which could have led to a suspension of jury trials.

Mr. Patton, whose office currently represents about 40 percent of indigent defendants in federal courthouses in Brooklyn, Long Island, Manhattan and Westchester County, has said that cutbacks had resulted in 12 days of unpaid furloughs for his staff, which includes 35 lawyers. One result was that his office had asked judges to reassign about half a dozen cases to private court-appointed lawyers so that defendants could be adequately represented.

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