

**ADMONITIONS IN THE CRIMINAL TRIAL COURT:  
Waiver of Counsel, Jury Demand, and Non-citizen Guilty Pleas.**

In January 2004, the Illinois General Assembly passed a law (725 ILCS 5/113-8) which says:

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Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or a felony offense, the court shall give the following advisement to the defendant in open court:

“If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequence of deportation, exclusion from admission to the United States or denial of naturalization under the laws of the United States.”

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(emphasis added)

For some time, members of the trial bar pushed for this legislation (Moran and Kinnally, “Aliens, Guilty Pleas and the Risk of Deportation: Time for Legislative Action,” Illinois Bar Journal (2001) Vol. 89, pp.194-198). Now this warning, posted on courtroom walls or hallways in our circuit courts, appears. Regardless, it has been observed in some courtrooms that trial judges are not giving this admonition. Perhaps, they are relying on written agreements in court orders signed by the accused. Maybe they believe the posting of the notice of this advisement in court rooms is sufficient. But this is not what the law says. Quite plainly, it directs:

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*“the court shall give the following advisement to the defendant in open court”.*

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That denotes it must be given, and insists, much like the waiver of a jury trial, it be announced in open court when the accused is present (People v. Thornton, (2<sup>nd</sup> Dist. 2006) 363 Ill.App.3d 481). So what happens if it is not given in accordance with this statutory requirement?

One example is a recent opinion from an administrative tribunal. (In re: Patryck Michal Adamiak (BIA, 2006) 23 I&N Dec. 878).

Patryck Adamiak was a lawful permanent resident alien. He was convicted of what constituted an aggravated felony, a removable immigration offense under federal immigration law, after pleading guilty to drug trafficking. His guilty plea formed the basis for his state court conviction which occurred in Ohio in 1997. Under the Ohio Revised Statutes, (Oh. Rev. Code 2934.031), the trial court was required to “advise” a person, before pleading guilty, concerning the potential adverse immigration consequences of such a plea. The trial judge never did that. Hence, Adamiak’s guilty plea was vacated five years after it was made the basis for his state court conviction. The Board of Immigration Appeals held, because the guilty plea was vacated, the subsequent conviction was no longer considered valid for immigration and naturalization purposes, and Mr. Adamiak could not be deported due to that conviction.

The issue of a trial court admonishing anyone of the potential immigration ramifications surrounding a guilty plea is substantial if the accused is a non-citizen. This is because it addresses whether the plea is knowing and voluntary. Moreover, the statute says the court “shall” give the advisement as to a “misdemeanor or felony offense” in “open court”. Since this statutory requirement is mandatory, a cogent argument can be made that such warning should be given by the trial court in open court. It does not suffice merely to have placards attached to courtroom walls which state such a caveat.

Until recently, the result the Adamiak tribunal presaged, may or may not occur depending on where the plea is entered in the State of Illinois. In the First District Appellate Court, a criminal defendant had an equal chance of having the admonishment have a consequence if it is or is not given. In People v. Bilelgene (2008) 381 Ill.App.3d 292, one division of that District held the trial

court's failure to give the admonishment did not permit the defendant to vacate his guilty plea. Another panel ruled otherwise, in People v. Del Villar (2008) 383 Ill.App.3d 80, vacating a plea where the admonishment was not announced in open court. To say the least, it is aberrant that the venue of a proceeding in a criminal case could be outcome determinative of the validity of a guilty plea.

The Second District joined the Bilegene majority opinion in concluding the language of the statute, even though it says the trial court "shall" give the admonishment does not mean a trial judge has to do that. People v. Leon (2009) --- N.E.2d ---, 2009 WL 153957 (Ill.App. 2d Dist.). This is a curious ruling. It ignores the definite requirement of a statute in the guise of what the court decrees as statutory interpretation. The Leon court found that even though the Legislature said a trial judge shall give the admonition, the word "shall" does not mean "shall." And, because it did not, the imperative of giving the admonition was not mandatory but only directory.

To get to this result the Leon court noted there was no statement in the legislation which indicated that any consequence would ensue if the trial judge failed to obey the statute. (People v. Robinson (2005) 217 Ill.43). It is true, as the Leon court observed, that whether a statute is mandatory or directory is a question of legislative intent. However, Leon fails to focus on what consequences flow from the failure to give the admonition. It seems quite obvious that the General Assembly was concerned that unknowing defendants, not judges, prosecutors or defense attorneys, were entering into plea arguments – contracts with the government – that were not undertaken with full knowledge of the consequences of the deal they were making. (See, People v. Reed (1997) 177 Ill.2d 389; People v. Youngbey (1980) 82 Ill.2d 556). The Leon tribunal ignored the fact that plea agreements are contracts that require the parties enter into them with full knowledge of all the terms of such a pact.

Instead, the Leon court focused on the “type of plea” which dictates whether the admonition must be given. Apparently, the variety of a plea only applies to people who are immigrants, whether documented or otherwise. The court observed the statute would also apply to every citizen which the Legislature could never have intended. This is odd logic for two reasons: although there may be different kinds of plea agreements (Alford, etc.) such contracts are not generally classified on citizenship (or lack thereof) status. The statute does not classify whether a person is a permanent resident alien, is undocumented, or is a citizen. It applies to all defendants. Next, the Legislature did say trial courts need to give the advisory to every defendant in plain and concise terms and in “open court”. They did not say you only give such a warning to non-citizens in some other venue such as chambers. In reviewing Del Villar and reversing the Appellate Court, the Supreme Court effectively has rendered this notification statute toothless. (People v. Del Villar No.106909 (12/17/09 Ill.S.Ct., 2009 WL 4843455) (“Del Villar”).

Leobardo Del Villar, at a circuit court hearing on November 2, 2005, pled guilty to aggravated unlawful use of a weapon by a felon. Before doing so, the trial judge asked him whether he was entering into the plea agreement in return for a sentence recommendation, freely and voluntarily. He answered, affirmatively. The trial court next asked, "Are you a citizen of the United States?" Del Villar said, "Yes." Sentencing was deferred until the end of November, when a term of four years imprisonment was imposed.

Two weeks later, Del Villar asked the trial court to vacate his plea stating he was a legal permanent resident alien, not a United States citizen, and the trial court failed to admonish him consistent with 725 ILCS 5/113-8. The trial court refused the request because Del Villar had lied to the court in November about his citizenship status. The Appellate Court reversed, stating the trial court was required by the statute to warn Del Villar based on the statute's plain and mandatory

language. The Supreme Court disagreed, and reinstated Del Villar's plea based on the guilty plea he sought to withdraw in the trial court.

Obviously the plain language of the statute says, "The trial court shall give the following advisement to the defendant in open court". This would seem to be a straightforward command. Something a layman reading the statute would understand. Not so. In a bifurcated analysis predicated on a thirty year old California Supreme Court opinion (Morris v. County of Marin, (1977) 18 Cal. 3d 901, 908) ("Marin"), the Supreme Court said the admonition statute posed two questions: (a) whether the statute is mandatory or permissive; and (b) whether the statute is mandatory or directory. (see, e.g., People v. Robinson (2005) 217 Ill. 2d 43). Even though the initial inquiry may find a statute to incorporate an obligatory duty (*i.e.*, "the trial court shall give the advisement"), apparently, it is the resolution of the second question that determines whether a statute is truly mandatory. Thus, if the statute does not contain a provision which dictates a particular consequence for noncompliance by the governmental actor, it is directory in nature. The upshot being, in Del Villar's situation, that the trial court's failure to admonish him results in no particular consequence from the trial court's failure to adhere to statute's command.

This interpretation of a legislative decree is remiss for various reasons. It relies on People v. Huante (1991) 143 Ill.2d 61, for the proposition that immigration consequences relating to a guilty plea and subsequent conviction are collateral to that process. The genesis for this rule, however, does not emanate from a legislative act. It emanates from an attorney's failure to advise his client of all consequences regarding entering a plea consistent with the defendant's rights to the effective assistance of counsel inherent in the Sixth Amendment of the United States Constitution. The United States Supreme Court will have the last word on whether immigration consequences are truly collateral in Padilla v. Kentucky (253 S.W.2d 482 (2008) cert. granted 08 -651 (2009), a case argued

before that court in October 2009. The point being, in Del Villar, the issue is not the interaction between a client and a lawyer: it is a governmental duty, the work of a trial judge, that has been created by the Legislature.

Next, the issue in Del Villar is one of procedural default: namely, the trial court's failure to do what that statute requires. Indeed, the trial court asked Del Villar if he was a United States citizen. Later, when the trial court learned Del Villar was a non-citizen, he refused to admonish him because of his prior prevarication. The fact remains, however, he is still a non-citizen and the consequences which flow from that status are the ones the statute sought to address at the time the plea was entered, whether or not he lied about his immigration status.

Understandably, the trial court was concerned that Del Villar had lied to the court. Yet, this does not denote that because of that fact the court need not comply with the statute, and therein in the final analysis whether the plea Del Villar was agreeing to, was knowing and voluntary.

Lastly, the court's reliance on Marin, a decision of the California Supreme Court, is troubling. Procedurally, it is very doubtful that members of the General Assembly were reading California jurisprudence as to how the statutes they enact should be interpreted at the time the admonition statute was drafted. Also, the court's mandatory/directory analysis in People v. Robinson postdates the admonition statute's effective date.

On substantive level, as Justice Freeman observed (Del Villar, sl. op. at p. 12, Freeman specially concurring) that the court's two-part test for determining when a statute is mandatory is confusing to say the least. And with respect to that view, the Marin court, although acknowledging the interpretive dichotomy of mandatory/permissive and mandatory/directory, it rejected its application to the facts of the case before it. It is respectfully submitted there is another way to analyze this.

Like the waiver of a jury demand, the right to make a knowing and voluntary guilty plea is basic. (See, People v. Thornton, (2<sup>nd</sup> Dist. 2006) 363 Ill. App.3d 481). One cannot make an agreement to plead guilty unless the person assenting to such an obligation knew the effect of such an undertaking. Just as a defendant may waive the right to a jury trial, he or she can only do so when such a relinquishment is knowingly and understandingly made. (People v. Bracey (2004) 213 Ill. 2d 265). And, if a trial court does not admonish a defendant as to the potential immigration aftermath of a guilty plea, the conviction upon which the plea rests is equally suspect. (See, People v. Scott (1999) 186 Ill. 2d 283, written waiver of jury trial by accused, without an admonishment in open court held insufficient). As our Supreme Court has observed, “Preserving an accused's right to remain in the United States may be more important than any potential jail sentence.” (*Immigration & Natz. Service v. St. Cyr* (2001) 533 U.S. 289, 322).

Walter Thornton was accused of leaving the scene of an accident without exchanging personal information (625 ILCS 5/11-402(a)). A public defender was appointed to represent him in August 2001. The defendant answered ready for trial in December 2001, but the case was continued to March 2002. On that day, the court informed Mr. Thornton his case was being passed for a bench trial in the afternoon. The Defendant said, “Okay”. That afternoon, Thornton’s attorney, Ms. Yetter, indicated she was not ready to proceed because a witness had become unavailable. The court denied the motion to continue, but ultimately continued the case and said, \*\*\* “Thornton, that being a bench trial, I’ll set it for the bench trial in the week of July 1<sup>st</sup>.” \*\*\* However, the case was continued to a new setting on June 14, 2002, for “bench trial”. The record contained a written jury waiver signed by Mr. Thornton and acknowledge by his attorney, Ms. Yetter. In May, the State moved for a continuance. A different attorney appeared for Thornton. She said, \*\*\*“Judge, I believe, Judge, it’s a bench trial, also.”\*\*\*\* The court said, “Yes”. The matter was set for trial on

October 11, 2002, and Thornton failed to appear. Two weeks later, the Defendant appeared in court with his attorney and explained he did not receive notice because he had moved. Since a bench warrant for his arrest had been issued, the court vacated the warrant and set the matter for a bench trial in February 2003. It was then continued again for bench trial on March 14, 2003. At trial, he was convicted and sentenced to a year of conditional discharge.

Eventually, Defendant, by counsel, filed a post trial motion claiming he was not proven guilty beyond a reasonable doubt. No mention was ever made in that filing of the Defendant's waiver of a jury trial. The motion was denied.

The single issue on appeal was whether Defendant validly waived his right to a jury trial. The Appellate Court said he did not. Justice Bowman noted the Illinois Code of Criminal Procedure, and stated:

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Every person accused of an offence shall have the right to a trial by jury unless (1) understandingly waived by Defendant in open court (725 ILCS 5/103-6); and that such waiver should be in writing (725 ILCS 5/115-1). Yet the fact that it is in writing does not mean that a valid waiver of the jury trial has been made. To be valid, such a waiver can only occur where it is made understandingly, and in open court. (People v. Scott (1999) 186 Ill.2d 283). And this means that at some point in the pretrial proceedings, the waiver of a jury trial must be discussed by the trial judge in open court with the Defendant present.

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Justice Bowman observed that Thornton's written waiver was never discussed in open court; and, even his attorney's agreement to a "bench trial" did not satisfy the statute's requirement. In short, the trial judge failed to comply with the statute, and accordingly, no waiver of a jury trial resulted.

A recent opinion from our Supreme Court confirms this interpretation of what constitutes an effective waiver of counsel. (People v. Campbell, 224 Ill.2d 80). The court concluded that Supreme

Court Rules governing an accused's right to counsel are not just suggestions to trial judges, prosecutors and defense counsel. They are meant as safeguards to the accused.

Sherman Campbell was charged with driving with a suspended license. That offense is a Class A misdemeanor, which is punishable by imprisonment. (625 ILCS 5/6-303(a)). Mr. Campbell appeared in court without a lawyer and requested a bench trial. The following colloquy occurred at that time:

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Court: And, you are proceeding to trial without an attorney, is that correct?  
Campbell: Yes.  
Court: All right. And do you want an attorney?  
Campbell: No.  
Court: All right. Then have a seat right there at the counsel table and we will begin.

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After the trial, Campbell was found guilty and was sentenced to 12 months of conditional discharge, fined \$100 and ordered to complete 240 hours of community service. Campbell appealed, claiming the trial court failed to inform him consistent with Supreme Court Rule 401(a). (134 Ill.2d R. 401(a)) The Appellate Court concurred, as did a unanimous Supreme Court, in an opinion authored by Justice Thomas.

Despite the fact that Mr. Campbell had completed his sentence by the time the matter was considered by the Supreme Court, it concluded Campbell's challenge was not to the sentence imposed, but the underlying conviction. Fulfillment of a sentence does not express that a convicted Defendant cannot challenge his conviction even if he has fulfilled the penalty that relates to such conviction. Accordingly, the issue was not moot. (See, In Re Christopher K., (2005) 217 Ill.2d 348).

The court first remarked, as a matter of statutory construction, that Supreme Court Rule 401(a) declares:

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(a) Waiver of Counsel. Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the Defendant personally in open court, informing him of and determining that he understands the following:

- (1) the nature of the charge;
- (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the Defendant may be subjected because of prior convictions or consecutive sentences; and
- (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court.

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The court stated this Supreme Court Rule is unmistakably clear. And, although a trial court must substantially comply with the rule (People v. Haynes (1996) 174 Ill.2d 204) the Supreme Court found the trial court did none of the things the rule mandates. Even though Campbell could have gone to prison (and the prosecution did seek such a sentence), the trial judge let him go to trial without telling him the nature of the charges, the range of penalties a conviction might bring, and, most importantly, the right to counsel.

The Supreme Court said Rule 401(a) is a paradigm of clarity. It says a trial court:

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shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first \*\*\* informing him of and determining that he understands \*\*\* that he has a right to counsel, and, if he is indigent, to have counsel appointed for him by the court.

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The purpose of the rule is to assure the Defendant not only knows what he is about to do, but also understands both, the nature of, and the consequences which may result, with respect to the undertaking in which he is about to engage. Otherwise, the waiver of counsel cannot be knowingly and intelligently made.

The State argued that error by the trial court was harmless. It posited that Campbell was not entitled to counsel (Scott v. Illinois (1979) 440 U.S. 367). It contended that because no term of

imprisonment was actually imposed, the Defendant's Sixth Amendment right to counsel was not infringed under the United States Constitution.

Justice Thomas' response to this argument was accurate and frank. He noted that, by statute (725 ILCS 6/113-3(b)), a Defendant in Illinois has a broader right to counsel than is provided by Federal law. In Illinois, a Defendant has a right to counsel, "in all cases, except where the penalty is a fine only, if the court determines the Defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel." He concluded the source of Mr. Campbell's right to counsel (and other admonishments that Rule 401(a) mandates) is not based on the constitution but a precept promulgated by the Illinois Supreme Court. The court stated, as it had announced in the civil context as well (Bright v. Dicke (1995) 166 Ill.2d 204) that its maxims are the rule of law and must be followed as written. It is no mere coincidence these instructions are to be made openly in the trial court. Obviously, this occurs so a defendant can realize the significance of all the guarantees these admonishments entail. Why should a statute that compels an admonishment about immigration consequences with respect to a guilty plea be different?

Whether one agrees with the requirement of advising any defendant, citizen or otherwise, of the consequences relating to a plea of guilty is not the issue, but the law. 725 ILCS 5/113-8 is not a Supreme Court Rule, but a law enacted by the Illinois legislature. Where the purpose of such legislation is to ensure that a Defendant "knowingly and voluntarily" makes an agreement (*i.e.*, guilty plea), then the analysis cannot proceed based on statutory interpretation alone. The statute's purpose, as it states, is that a trial judge is to advise the defendant of the potential consequences a conviction may create with respect to "deportation, exclusion from the United States or denial of naturalization under the laws of the United States." This is not a passive role, but one that ensures a guilty plea is knowing, voluntary and informed. It cannot be collateral to a conviction when it is the judge's job

to ensure the plea is knowing and voluntary and the admonition is the means to that end. The consequences of not complying with the statute must be the focus, and for non-citizens that may be banishment to a country they never knew. It's purpose, like the admonitions required for the waiver of a jury demand, or those rights contained in Supreme Court Rule 401(a), is to make certain that a Defendant, regardless of citizenship, is making a knowing and intelligent decision before forfeiting a right to the adjudication by his peers, to act without the acumen of a trained advocate, or enter into a contract with the government that surrenders both of these protections as well as the liberty to live in our great State and Nation. Legislative enactments like Supreme Court Rules, which promote and preserve these freedoms, should be the centerpiece of our jurisprudence.

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