

**IN THE SUPREME COURT OF IOWA**

---

Supreme Court No. 16-0279

---

**STATE OF IOWA**  
PLAINTIFF-APPELLEE

vs.

**THIERNO YAYA DIALLO**  
DEFENDANT-APPELLANT

---

APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR JOHNSON COUNTY

No. SRCR109756

Hon. DEBORAH FARMER MINOT, Assoc. Judge

---

**APPELLANT'S FINAL BRIEF AND ARGUMENT**

---

Anne K. Wilson - AT008621  
Anne K. Wilson Law Office, PLLC  
350 Miller Road, Suite 2  
Hiawatha IA 52233  
319.775.0136; fax 319.774.3995  
[awilson@annwilsonlaw.com](mailto:awilson@annwilsonlaw.com)

ATTORNEY FOR DEFENDANT-APPELLANT

---

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** ..... ii

**ROUTING STATEMENT** .....1

**STATEMENT OF THE CASE**.....1

    1. NATURE OF THE CASE .....1

    2. COURSE OF PROCEEDING .....2

**STATEMENT OF FACTS**.....3

**ARGUMENT**.....6

**THE GUILTY PLEA SHOULD BE SET ASIDE BECAUSE THE CONSEQUENCES WERE NOT FULLY UNDERSTOOD BY THE DEFENDANT, AND THEREFORE WAS UNCONSTITUTIONAL.** .....7

    STANDARD OF REVIEW:.....7

    PRESERVATION OF ERROR: .....8

    SUMMARY OF ARGUMENT:.....8

    FACTUAL DISCUSSION: .....9

    LEGAL ARGUMENT:.....10

        A. THE DEFENDANT CAN PROCEED WITH THIS APPEAL DESPITE NOT HAVING FILED A TIMELY MOTION IN ARREST OF JUDGMENT. .... 10

        B. WHETHER DIALLO WAS PROPERLY INFORMED OF THE IMMIGRATION CONSEQUENCES OF HIS GUILTY PLEA ..... 14

        C. WHETHER THE DEFENDANT WAS PROPERLY INFORMED OF THE FINE, SURCHARGES, AND VICTIM RESTITUTION BEFORE ENTERING HIS GUILTY PLEA..... 17

        D. WHETHER THE DEFENDANT’S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INFORM HIM OF THE CONSEQUENCES OF THE PLEA. 19

**CONCLUSION** .....20

**REQUEST FOR NONORAL SUBMISSION** .....21

**ATTORNEY’S CERTIFICATE OF COSTS**.....22

**CERTIFICATE OF SERVICE** .....22

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS**.....23

## TABLE OF AUTHORITIES

### CASES

<u>Padilla v. Kentucky</u> , 559 U.S. 356 (2010) .....	15, 16
<u>Saadig v. State</u> , 387 N.W.2d, 315, 324-25 (Iowa 1986).....	17
<u>State v. Barnes</u> , 652 N.W.2d 466, 468 (Iowa 2002) .....	8, 15
<u>State v. Bowers</u> , 656 N.W.2d 349, 353 (Iowa 2002) .....	7
<u>State v. Fisher</u> , 877 N.W.2d 676 (Iowa 2016) .....	10
<u>State v. Hinners</u> , 471 N.W.2d 841, 845 (Iowa 1991).....	12
<u>State v. Loye</u> , 670 N.W.2d 141, 148 (Iowa 2003) .....	8, 12
<u>State v. Martin</u> , 704 N.W.2d 665, 669 (Iowa 2005) .....	19
<u>State v. Meron</u> , 675 N.W.2d 537 (Iowa 2004).....	8, 14
<u>State v. Meron</u> , 675 N.W.2d 537, 540 (Iowa 2004).....	10
<u>State v. Oldham</u> , 515 N.W.2d 44, 46-47 (Iowa 1994) .....	11, 13
<u>State v. Ondayog</u> , 722 N.W.2d 778, 784 (Iowa 2006).....	19
<u>State v. Ortiz</u> 789 N.W.2d, 761, 764 (Iowa, 2010).....	7
<u>State v. Straw</u> , 709 N.W.2d 128, 132 (Iowa 2006).....	7, 13
<u>State v. Taylor</u> , 301 N.W.2d 692, 692 (Iowa 1981).....	11, 13
<u>State v. Utter</u> 803 N.W.2d 47, 649 (Iowa 2011).....	7
<u>State v. Utter</u> , N.W.2d 647, 650 (Iowa 2011) .....	14
<u>State v. White</u> , 587 N.W.2d 240, 242 (Iowa 1998) .....	15
<u>State v. Worley</u> , 297 N.W.2d 368, 370 (Iowa 1980). .....	8, 11
<u>Strickland v. Washington</u> , 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed. 2d 674, 693 (1984).....	19

STATUTES

Iowa Code § 911.1(1) ..... 17

Iowa R. of App. P. 6.1101(3)(a) ..... 1

Iowa R. of Crim. P. 2.24(3)(a) ..... 8

Iowa R. of Crim. P. 2.24(3)(a)..... 10

Iowa R. of Crim. P. 2.8(2)(b)(2) ..... 10, 15, 17

Iowa R. of Crim. P. 2.8(2)(d)..... 10, 11, 13

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- I. Whether the Defendant can proceed with this appeal despite not having filed a timely Motion In Arrest Of Judgment.
- II. Whether the Defendant was properly informed of the immigration consequences of his Guilty Plea.
- III. Whether The Defendant was properly informed of the Fine, Surcharges, And Victim Restitution before entering his Guilty Plea.
- IV. Whether the Defendant's Trial Counsel was ineffective for failing to inform him of the consequences of the Guilty Plea.

## **ROUTING STATEMENT**

Pursuant to Iowa R. of App. P. 6.1101(3)(a), the Appellant requests that this case be transferred to the Court of Appeals, as it involves the application of existing legal principles to the questions presented.

## **STATEMENT OF THE CASE**

### **1. NATURE OF THE CASE**

This is an appeal by Thierno Yaya Diallo from his conviction for Assault Causing Bodily Injury in Johnson County, Iowa. He was sentenced

without hearing on January 22, 2016, after having signed a written Plea of Guilty. A written sentencing order was filed by Judge Deborah Farmer Minot. The Appellant filed a Notice of Appeal.

## **2. COURSE OF PROCEEDING**

Thierno Yaya Diallo was arrested on September 26, 2015, in Johnson County, and charged with Assault Causing Bodily Injury, in violation of Iowa Code Sections 708.1(2) and 709.2(2). (See complaint; Appx. 1). Counsel was eventually appointed from the Linn County Advocate's office. That office acts as the backup office to the Johnson County Public Defender's Office.

The Johnson County Attorney filed the Trial Information on November 06, 2015, charging Mr. Diallo with a single count of Assault Causing Bodily Injury.

In his Written Arraignment, Mr. Diallo pled not guilty and waived his right to a speedy trial (Appx. 8). The Trial was scheduled for February 2, 2016, with the pretrial conference set for January 21, 2016. (Appx. 9). At the time of the pretrial conference, Diallo signed the Written Plea of Guilty presented to him by his attorney. (Appx. 12-16). The file stamp for

the written Plea of Guilty is January 21, 2016. The judgment and sentence is dated and file-stamped on January 22, 2016. (Appx. 17-18) Mr. Diallo filed the notice of appeal on February 11, 2016.

### **STATEMENT OF FACTS**

There are no transcripts in this case as there were no in court proceedings, so facts regarding the offense are found from other sources.

There is a complaint from the Johnson County police dated September 25, 2015 (Appx. 1). The Minutes of Testimony and the Trial Information were filed November 6, 2015. (Appx. 3-7).

The Written Plea of Guilty, file-stamped January 21, 2016, contains Mr. Diallo's signature, and was filed via EDMS at 11:28 a.m. on January 21, 2016. (Appx. 12 ). The pre-printed form used for the Written Plea of Guilty was five pages long, and generally single-spaced, had areas in which the Defendant, his attorney or the county attorney could check a box or handwrite specific clauses. In particular, the box for "serious misdemeanor" was checked, which set out the consequences as follows:

(X)a serious misdemeanor and that the maximum punishment is incarceration in the county jail for a period of one year or six months if the charge is Possession of a Controlled Substance to wit marijuana in violation of 124.401(5) of the Iowa Code; and by being fined at least \$315 and up to \$1,875; or by both such

incarceration and fine. In addition, I realize if the charge is Operating while Intoxicated in violation of Section 321J.2, that there is a minimum sentence of 48 hours in the county jail and a fine of \$1,250.” (Appx. 12).

There is also a handwritten sentence following this paragraph reading, Defendant has been advised of any possible immigration consequences”.

(Appx. 12). This was not initialed by the Defendant or other indication that this clause was added before Diallo signed it, nor did it indicate specific immigration consequences he had been advised that may be a result of the conviction. There is also no mention of any surcharge to the fine, which is now 35%, or court costs, or any special surcharges, such as the \$125.00 law initiative surcharge, that are required and routinely added to criminal sentences, and there is no mention of victim restitution.

On page 2, a blank line in the plea form was filled in which reads as follows: “\$315 fine; 90 days jail, 10 days to serve and 80 days suspended 1 year supervised probation”. This appears to be written in by the Mr. Diallo’s attorney. The Johnson County Attorney appeared to use a different pen, and had added in to the form a check mark to “If the charge is domestic, the no contact order is to \_\_\_\_”; and crossed out “If the charge is domestic”; “no contact order” was boxed, and the following was added “Remain – 5 years”. There also appears a clause added by the Johnson County attorney reading



“victim does not wish to be present”. There is again no indication that Diallo was aware of these additional terms and consequences of his guilty plea prior to signing the Written Plea of Guilty. The form also includes a separate section “Waiver of Presence at Sentencing”. Which was not signed or initialed by Diallo. Additionally, the form contained the following provisions with regard to defenses and a Motion in Arrest of Judgment.

“I understand that a guilty plea waives all defenses I may have, except that the information/indictment which charges no offense or a challenge to the plea.

I have been advised of my right to challenge this plea of guilty by filing a Motion in Arrest of Judgment at least five days prior to the date that the Court sets for sentencing and within 45 days after the Court accepts my plea” (Appx. 15).

In addition, the form contains the following paragraph regarding the factual basis of the plea:

“I’ve read the Minutes of Testimony filed with the Trial Information and do not contest the accuracy of those minutes, except for:

“N/A”  
\_\_\_\_\_” (Appx. 15).

The “N/A” was handwritten into the form. The form does not provide that the Defendant understood the elements of the charge.

On the same day as the filing of the Written Plea of Guilty, Judge Farmer Minot filed the Written Sentencing Order via EDMS , which accepted the guilty plea and imposed sentence. The Sentencing Order stated in part: “The Defendant appears by written plea, with the approval of Attorney Brandon Schrock ....”. In addition, the Sentencing Order imposed judgment as follows:

1. 90 days in jail, with credit for time served, and 80 days suspended;
2. Supervised Probation, which required Mr. Diallo to pay the Department of Correctional Services fee;
3. Fine of \$315.00, plus all applicable surcharges and victim restitution, payable in installments. This included the option of performing community service for credit towards these costs.
4. Extension of the No Contact Order;
5. Restitution of Court-Appointed Attorney Fees at \$60.00.

Mr. Diallo’s trial attorney filed the Notice of Appeal, along with his withdrawal from representation and request for court-appointed appellate counsel on February 11, 2016.

### **ARGUMENT**

**THE GUILTY PLEA SHOULD BE SET ASIDE BECAUSE THE CONSEQUENCES WERE NOT FULLY UNDERSTOOD BY THE DEFENDANT, AND THEREFORE WAS UNCONSTITUTIONAL.**

**STANDARD OF REVIEW:**

An appeal court generally reviews a challenge to a guilty plea for corrections of error at law. State v. Ortiz 789 N.W.2d, 761, 764 (Iowa, 2010). When, as in this case, a claim amounts to a constitutional claim, the review is *de novo*. See State v. Utter 803 N.W.2d 47, 649 (Iowa 2011).

The burden of proof rests with the state to prove the plea was voluntary, as a constitutional matter. The State has the burden to show that a defendant's plea of guilty is made voluntarily and intelligently. State v. Reaves 254 N.W.2d 488, 493 (Iowa 1977). It is the State's burden to show an accused's awareness of the rights being waived by a plea of guilty. Id. The State must make the required showing by a preponderance of the evidence. State v. Bowers, 656 N.W.2d 349, 353 (Iowa 2002). The Court looks at whether there has been substantial compliance with the Rules. State v. Straw, 709 N.W.2d 128, 132 (Iowa 2006).

### **PRESERVATION OF ERROR:**

This claim was not raised before the District Court. The Defendant did not file a Motion in Arrest of Judgment. Generally, a defendant must file a Motion in Arrest of Judgment to preserve a challenge to a guilty plea on appeal. Iowa R. of Crim. P. 2.24(3)(a); State v. Worley, 297 N.W.2d 368, 370 (Iowa 1980).

However, where the Written Plea contains an inadequate advisory about the Motion in Arrest of Judgment, this allows the challenge to the voluntariness of the plea to be raised on appeal. State v. Meron, 675 N.W.2d 537 (Iowa 2004); State v. Barnes, 652 N.W.2d 466, 468 (Iowa 2002).

Failure to file a Motion in Arrest of Judgment can be excused upon a showing of ineffective counsel. State v. Loye, 670 N.W.2d 141, 148 (Iowa 2003),

### **SUMMARY OF ARGUMENT:**

Mr. Diallo pled guilty in Johnson County to Assault Causing Bodily Injury. This was done in writing, using a Written Plea of Guilty form from the Defendant's court-appointed counsel. The form was outdated and lacked substantial compliance with constitutional requirements. The entirety of the consequences of the plea of guilty, including the consequences of not filing a

Motion in Arrest of Judgment were not explained to Mr. Diallo in the Written Plea of Guilty or by his counsel. There were no statements regarding the inadequacies in the plea. Therefore, the wavier of filing a Motion in Arrest of Judgment by Mr. Diallo should preclude his right to proceed an appeal of his conviction.

The Court should conclude that the written plea did not come close to advising Diallo about the consequences of the plea for Assault Causing Bodily Injury. He was not told about the immigration consequences, fine, surcharges and law initiative surcharge, or victim restitution. Because of these defects, the written Plea of Guilty was involuntary. The plea and sentence should be vacated.

**FACTUAL DISCUSSION:**

In Diallo's case, there were three defects in the written plea, as follows:

- 1) There was no sufficient advisory regarding the necessity of filing a Motion in Arrest of Judgment to attack the sentence prior to filing an appeal;
- 2) Diallo was not sufficiently advised of the immigration consequences of his guilty plea;
- 3) Diallo was not advised about the fine, which would include a 35% surcharge and law initiative surcharge, or victim restitution, or court costs.

**LEGAL ARGUMENT:**

**A. THE DEFENDANT CAN PROCEED WITH THIS APPEAL DESPITE NOT HAVING FILED A TIMELY MOTION IN ARREST OF JUDGMENT.**

Generally, “[a] defendant’s failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant’s right to assert such challenge on appeal.” Iowa R. of Crim. P. 2.24(3)(a). This rule is inapplicable in cases such as this one, in which the defendant was not advised during the plea proceedings, as required by Rule 2.8(2)(d), that challenges to the plea must be made in a motion in arrest of judgment and that the failure to challenge the plea by filing the motion within the time provided prior to sentencing precludes a right to assert the challenge on appeal. State v. Fisher, 877 N.W.2d 676 (Iowa 2016); State v. Meron, 675 N.W.2d 537, 540 (Iowa 2004) (emphasis added). Iowa R. of Crim. P. 2.8(2)(d) states,

The court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal.

Substantial compliance with Rule 2.8(2)(d) is mandatory and “[n]o defendant . . . should suffer the sanction of rule [2.24(3)(a)] unless the court has complied with rule [2.8(2)(d)] during the plea proceedings.” Fisher; State v. Worley, 297 N.W.2d 368, 370 (Iowa 1980).

Here, Diallo pled guilty to a serious misdemeanor, and other than the specific charges, the procedures in this case render it nearly identical to Fisher, decided by the Iowa Supreme Court on April 8 of this year. The facts are strikingly similar, including the same trial attorney using the same form to submit his clients’ guilty plea to the court without properly advising them of the consequences of the plea. In Fisher, the defendant was successful in arguing that the form he signed was not in substantial compliance with Rule 2.8(2)(d) in that he was not informed that immediate written sentencing would eliminate his right to question the legality of his plea of guilty. Fisher. Id. State v. Taylor, 301 N.W.2d 692, 692 (Iowa 1981).

In contrast, State v. Oldham, 515 N.W.2d 44, 46-47 (Iowa 1994) found that a colloquy together with a written application to withdraw the non-guilty plea was sufficient to notify the defendant of the consequences of his failure to file a Motion in Arrest of Judgment, because the colloquy

advised the defendant that he had the right to file a motion in arrest of judgment, but that it had to be filed no later than five days prior to sentencing. However, in this case, like Fisher, there was no colloquy, and although the form set out the right to challenge the plea by filing a Motion in Arrest of Judgment. A separate page, in the form, set out that Diallo was waiving this right, it did not indicate that he no longer had the right to challenge the plea in district court or to appeal the sentence. In State v. Loye, 670 N.W.2d 141, 148 (Iowa 2003), the Court held that the right to appeal is waived only if such a waiver is an express element of the particular agreement made by the defendant. In State v. Hinnners, 471 N.W.2d 841, 845 (Iowa 1991), the Court held that the waiver of the right to appeal should be voluntary, knowing and intelligent. There is a presumption that a defendant has been advised of his right to appeal and intentionally waived the right. Here, there was nothing in the written plea form, or told to the defendant by his attorney, that would indicate he would lose his right to challenge the guilty plea or appeal the plea if a Motion in Arrest of Judgment was not filed, nor was there a colloquy for the sentencing judge to address the same with the defendant.



In contrast, the written plea in Oldham, advised the defendant in his written application to withdraw the not-guilty plea:

I understand that if I wish to attack the validity of the procedures involved in the taking of my guilty plea, I must do so by a motion in arrest of judgment filed with this court. I understand that such motion must be filed at least five days before sentencing and also within 45 days of the date my plea of guilty is accepted by the court.

This, coupled with a colloquy in front of the sentencing judge were “considered together” and adequately informed the defendant of the necessity of filing a Motion in Arrest of Judgment, and if he did not do so, any appeal would be precluded. Oldham at 47. Here, there was neither a colloquy nor a clear directive to the defendant.

The standard the court applies is substantial compliance with whether the court has discharged its duty under Rule 2.8(2)(d). State v. Straw, 709 N.W.2d 128, 132 (Iowa 2006). Like in Fisher, this case falls well short of the substantial compliance required by Straw, Taylor, and Oldham, as the plea form used did not include any statement that by signing it and proceeding to immediate sentencing, Diallo was giving up his ability to contest the plea in the future. Even if the conviction resulted in other consequences that he was not told about before pleading guilty. Although

Diallo's counsel, who was the same attorney as in Fisher, certified in the plea form that he explained about filing a Motion in Arrest of Judgment, as in Fisher, it was insufficient to satisfy the requirements of 2.8(2)(d). Meron, 675 N.W.2d at 541. Thus, as in Fisher, the Court must conclude that Diallo can proceed to appeal his guilty plea, as there was no substantial compliance with the sentencing court's duty to inform Diallo that failure to file a timely motion in arrest of judgment would waive appeal or other challenge of his guilty plea. Fisher.

**B. WHETHER DIALLO WAS PROPERLY INFORMED OF THE IMMIGRATION CONSEQUENCES OF HIS GUILTY PLEA**

Diallo's plea was not a voluntary, knowing and intelligent waiver of the consequences of his plea, and thus it is invalid. A plea of guilty must be considered "a serious act that he or she must do so voluntarily, knowingly, and intelligently, with an awareness of the relevant circumstances and consequences." State v. Utter, N.W.2d 647, 650 (Iowa 2011). The failure of a voluntary plea is a violation of a Defendant's due process under the United States Constitution and the State of Iowa Constitution. Diallo was not informed that there would be immigration consequences, and, in addition, he

was not informed about the fine surcharges or potential restitution (see argument below). Under Rule 2.8(2)(b)(2), the court is required to ensure due process for the defendant in accepting a plea of guilty by:

Address[ing] the defendant personally in open court and inform the defendant of, and determine that the defendant understands . . . [t]he mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.

This colloquy may be waived in a serious misdemeanor, such as in Diallo's case, with the written plea and approval of the defendant, under Rule 2.8(2)(b). State v. Barnes, 652 N.W.2d 466, 468 (Iowa 2002).

As in Fisher, the written plea form used in Diallo's case did not substantially comply with Rule 2.8(2)(b), as it did not inform Diallo of all of the consequences of his guilty plea. State v. White, 587 N.W.2d 240, 242 (Iowa 1998).

The most serious consequence the guilty plea of which he was not properly advised were the immigration consequences. Under Padilla v. Kentucky, 559 U.S. 356 (2010), a criminal defendant must be competently advised of immigration consequences before entering a plea. In Diallo's case, he is in the United States under a Green Card, which expires in 2016.

As he wishes to remain in this country, he must make application for citizenship well before the Green Card expires. Although there was a handwritten clause added into the plea form by Diallo's attorney stating that there may be immigration consequences, there is nothing to indicate that this was added prior to Diallo's signature on the form, or what specifically was discussed between Diallo and his attorney regarding the immigration consequences, and there was no colloquy in which a sentencing judge would have advised Diallo of potential immigration consequences. Additionally, counsel did not provide to Diallo anything in addition to the one sentence advising him there could be immigration consequences; there was no information that he should consult with an immigration attorney prior to agreeing to the plea, about what his immigration consequences could be, or how soon the consequences would take place.

Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Padilla at 1481. Padilla requires that counsel must inform his counsel client whether his plea carries the risk of deportation. Id. Here, Counsel did not appear to take the time to investigate whether the plea agreement would result in probably or

possible deportation, and did not inform his client prior to the plea agreement.

**C. WHETHER THE DEFENDANT WAS PROPERLY INFORMED OF THE FINE, SURCHARGES, AND VICTIM RESTITUTION BEFORE ENTERING HIS GUILTY PLEA**

Diallo was also sentenced to a fine, including surcharges, for his conviction, and was not informed of these surcharges prior to his sentencing. The written plea form stated that the maximum punishment included “...being fined at least \$315.00 and up to \$1,875.00,” either in lieu of or coupled with jail time. Diallo received a sentence including “\$315.00 plus all applicable surcharges and any victim restitution”.

This diversion from the written plea does not substantially comply with Rule 2.8(2)(b)(2), which requires the court to inform the defendant of the “mandatory minimum punishment” and the “maximum possible punishment” before accepting a guilty plea, which are considered direct consequences of the plea. Saadiq v. State, 387 N.W.2d, 315, 324-25 (Iowa 1986). In Fisher, the Court held that the plain language of the statute, the surcharge of thirty-five percent is a mandatory “additional penalty” under Iowa Code § 911.1(1), and is punitive on its face. Fisher. Diallo, like Fisher, should have been informed of the mandatory minimum and

maximum possible fines, including surcharges. The Court in Fisher also held that the other court-ordered payments, such as victim restitution, court costs, and reimbursement for court-appointed counsel, are regarded as non-punitive or collateral, but are instead compensatory. *Id.* In this case, Diallo was also ordered to pay victim restitution, to which he was not informed about prior to the plea agreement. However, in a case in which the charge is Assault Causing Bodily Injury, it seems that victim restitution is a necessary and automatic consequence of the charge. If a victim sustains a bodily injury which is substantial enough to convince law enforcement to add the Causing Bodily Injury to an assault charge, it is logical that the injury would have required some type of treatment by a medical professional. Any treatment would necessarily have a cost, and although may be initially covered by the victim's health insurance, such insurance company would likely seek subrogation. Therefore, victim restitution would be an automatic consequence of Assault Causing Bodily Injury sentences, and should be treated as punitive, instead of collateral or compensatory, and a direct consequence of the sentence.

#### **D. WHETHER THE DEFENDANT’S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INFORM HIM OF THE CONSEQUENCES OF THE PLEA**

The standard for determining whether a criminal defendant received ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed. 2d 674, 693 (1984), which is that counsel failed to perform an essential duty, and that breach of duty resulted in prejudice. To prove a claim of ineffective assistance of counsel, the applicant must show by a preponderance of evidence that counsel failed to perform an essential duty and prejudice resulted. State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006). The prejudice element is satisfied if a reasonable probability exists that, “but for counsel’s unprofessional errors, the result of this proceeding would have been different.” State v. Martin, 704 N.W.2d 665, 669 (Iowa 2005) (quoting *Strickland*). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Martin.

In this case, counsel had an essential duty to inform the Defendant of the consequences of his guilty plea. The breach of that duty resulted in the Defendant being at risk of deportation, loss of his Green Card, or inability to apply for citizenship. Prejudice clearly resulted. There is more than a

reasonable probability, that if Diallo had been advised of the potential consequences, he would have not agreed to the guilty plea as presented, and therefore the outcome of the proceeding would have been different.

### **CONCLUSION**

Mr. Diallo can raise this appeal despite the failure to file a Motion in Arrest of Judgment, because he did not receive the proper advisory regarding the need to file same in order to challenge his guilty plea.

Mr. Diallo's guilty plea to the simple misdemeanor charge of Assault Causing Bodily Injury should be vacated and remanded back to the Johnson, County Associate district court. The plea he made was on an outdated form, with no colloquy with the sentencing judge, and he was not sufficiently informed of the consequences of his plea to make a voluntary, knowing and intelligent decision. He was not informed of the financial consequences, or the immigration consequences of his plea. The plea was wholly inadequate to advise the defendant of his rights and consequences of the plea. In addition, counsel was ineffective in that his performance was constitutionally deficient in that he did not adequately explain the



consequences of the plea to Diallo. This case should be remanded to the District Associate Court for further proceedings.

Respectfully Submitted,

*Anne K. Wilson*

---

Anne K. Wilson, AT008621  
Anne K. Wilson Law Office, PLLC  
350 Miller Road, Suite 2  
Hiawatha IA 52233  
319.775.0136; fax 319.774.3995  
[awilson@annewilsonlaw.com](mailto:awilson@annewilsonlaw.com)

**REQUEST FOR NONORAL SUBMISSION**

Appellant requests that this appeal be submitted without oral argument.

*Anne K. Wilson*

---

Anne K. Wilson, AT008621  
Anne K. Wilson Law Office, PLLC  
350 Miller Road, Suite 2  
Hiawatha IA 52233  
319.775.0136; fax 319.774.3995  
[awilson@annewilsonlaw.com](mailto:awilson@annewilsonlaw.com)

**ATTORNEY’S CERTIFICATE OF COSTS**

I, Anne K. Wilson, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant’s Proof Brief was \$0.00.

*Anne K. Wilson*

---

Anne K. Wilson, AT008621  
Anne K. Wilson Law Office, PLLC  
350 Miller Road, Suite 2  
Hiawatha IA 52233  
319.775.0136; fax 319.774.3995  
[awilson@annewilsonlaw.com](mailto:awilson@annewilsonlaw.com)

**CERTIFICATE OF SERVICE**

The undersigned certifies a copy of this Reply Brief, was served on the 4<sup>th</sup> Day of October 2016, upon the following persons and upon the Clerk of the Supreme Court:

VIA EDMS:  
Attorney General  
Criminal Appeals Division  
1305 E. Walnut Hoover  
Building  
Des Moines, IA 50319

VIA FIRST CLASS MAIL:  
Thierno Yaya Diallo  
2010 Broadway St. Apt K  
Iowa City, IA 52240

*Anne K. Wilson*

---

Anne K. Wilson, AT 0008621

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE  
REQUIREMENTS**

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 4163 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in Microsoft Word 2016 in 14 point font.



\_\_\_\_\_  
Anne K. Wilson, AT 0008621