IN THE CIRCUIT COURT, SEVENTH

 JUDICIAL CIRCUIT, IN AND FOR

 VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA CASE NO.: 16-304892 CFDB

 DIVISION: CASE

VS.

RAJHEA BERLIN

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_/

 **MOTION FOR POST CONVICTION RELIEF**

Comes now the defendant, Rajhea Berlin (“Mr. Berlin”), pursuant to Fla. R. Crim. P. 3.850 and files this Motion for Post Conviction Relief and moves this Honorable Court for an order vacating and setting aside the plea, judgment of conviction, and sentence imposed in this cause and states:

 **Introduction**

In this instance the conviction was obtained by plea of nolo contendere that was unlawfully induced or not made voluntarily with understanding of the consequences of the plea. The Defendant asserts the following three grounds in support of this Motion:

1. Mr. Berlin speaks Patwa, not English, and an interpreter should have been provided for him at all stages of this proceeding.
2. Mr. Berlin’s counsel failed to adequately explain the ramifications of his plea of no contest, specifically he was not adequately informed that he could be subject to deportation if he pled.
3. The plea colloquy was inadequate to fully inform Mr. Berlin of the rights he was waiving by entering his plea.

**Procedural History**

1. The name and location of the Court that entered the judgment of conviction at issue is Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida.
2. Mr. Berlin was charged with Aggravated Assault with a Deadly Weapon in a one count Information, attached hereto as Exhibit A.
3. Mr. Berlin initially pled not guilty. On or about January 17, 2017, Mr. Berlin withdrew his not guilty plea and entered a no contest plea as charged. A video of the plea is attached hereto as Exhibit B.
4. The date of the judgment of conviction was January 17, 2017.
5. The length of the sentence was eighteen months of Drug Offender Probation.
6. No trial or hearing was previously held in this case.
7. No depositions were taken in this case.
8. Mr. Berlin never testified in this case.
9. Mr. Berlin has not previously filed any petitions, applications, motions, etc., with respect to this judgment in this court.
10. Mr. Berlin has not previously filed any petitions, applications, motion, etc., with respect to this judgment in any other court.

**Summary of Facts**

Mr. Berlin was born in Jamaica on November 11, 1993. He grew up speaking Patwa (also known as Patois or Jamaican Creole), which “is an English-based creole language with West African influences . . . spoken primarily in Jamaica.”[[1]](#footnote-1) He attended school in Jamaica until ninth grade, and has had no formal education since that time. On or about April 2015, the Defendant obtained a green card and moved to the United States. The Defendant’s family, including his mother, brother, six sisters, and grandparents all reside in the United States.

For the first three years of his residency in this country, Mr. Berlin had absolutely zero encounters with law enforcement. On October 10, 2016, Mr. Berlin was accused of threatening Sabrina Allen, who was a roommate of his girlfriend’s and who wanted Mr. Berlin to stop staying at the shared apartment. The police responded and found Mr. Berlin sitting on the curb outside the residence. They did not find a weapon. Mr. Berlin was charged with Aggravated Assault with a Deadly Weapon based solely on the alleged victim’s testimony. On January 17, 2017 the Defendant entered a negotiated plea of no contest to Aggravated Assault with a Deadly Weapon. No depositions were taken in his case, Mr. Berlin never received or reviewed discovery, and the plea was entered after about fifteen minutes of total counsel with his attorney, Michael Kapit of the Officer of the Public Defender - all of this despite the fact that his plea would almost certainly ensure Mr. Berlin’s deportation. Crucially, the Defendant was never afforded an interpreter.

As noted, Patwa is English-based. However, it is **not** English. There are many shared words, but the sentence structures, pronunciations, and parts of the vocabularies are very different. For example:

The tense/aspect system of Jamaican Patois is fundamentally unlike that of English. There are no morphological marked past participles; instead, two different participle words exist: en and a. These are not verbs, but simply invariant particles that cannot stand alone like the English *to be*. Their function also differs from the English.

*Id*.

The written language is also similar to, but distinct from, the English language:

* /trii man did a swim/ - Three men swam.
* /mi aalmuos lik 'im/ - I nearly hit him.
* /'im caan beet mi, 'im dʒos loki dat 'im won/ - He can't beat me, he simply got lucky and won.
* /dem pikni de out a awdah/ - Those children are disobedient
* /siin/ - Affirmative particle

*Id*.

There are many videos available showing the differences between the languages, which may be helpful in illustrating how a superficial conversation between an English speaker and a Patwa speaker may not reveal a poor command of the English language: [See Video.](https://www.bing.com/videos/search?q=youtube+jamaican+patois&qpvt=youtube+jamaican+patois&view=detail&mid=125DF378E0C59709C39A125DF378E0C59709C39A&FORM=VRDGAR)

Important to note is the fact that the Volusia County court system does recognize Patwa as a language requiring an interpreter.

A video of Mr. Berlin’s plea is attached hereto as Exhibit B, as a transcript of the event would not adequately illustrate the salient points discussed below.

**Argument**

As noted above, Mr. Berlin challenges three aspects of his no contest plea:

* 1. An interpreter should have been provided for him at all stages of this proceeding.
	2. Mr. Berlin’s counsel failed to adequately explain that Mr. Berlin could be subject to deportation if he pled.
	3. The plea colloquy was inadequate to fully inform Mr. Berlin of the rights he was waiving by entering his plea.
1. No Interpreter Appointed

That every accused should be afforded the means to adequately understand the proceedings against him is an inviolate right protected by the Constitution. *Suarez v. State*,481 So. 2d 1201 (Fla. 1985), *cert. denied,* 476 U.S. 1178, 106 S. Ct. 2908, 90 L. Ed. 2d 994 (1986) (a non-English speaking defendant has the right to an interpreter, a right grounded on due process and confrontation considerations of the Constitution). A defendant does not waive this right by failing to assert it, and the Court must be vigilant in protecting it:

The right is not necessarily waived by the failure to assert it, since a defendant's inability to understand the language may be the cause of the failure to assert his rights. *State v. Neave,*117 Wis.2d 359, 344 N.W.2d 181 (1984), *approved in Suarez,*481 So.2d at 1204. Once the trial court is aware that an accused has difficulty with the English language, the court should determine whether a defendant understands English sufficiently to aid in his defense, much as the court has a duty to determine whether a defendant is mentally competent. 344 N.W.2d at 188.

*Tehrani v. State*, 764 So. 2d 895, 898 (Fla. Dist. Ct. App. 2000).

It is not enough for a defendant to have a passing familiarity with the English language. That a defendant can “get by” on his limited English does not mean that he is capable of understanding the ramifications of a complicated legal matter delivered only in English. The standard is much higher:

If a trial judge determines that a witness cannot hear or understand the English language, or cannot express himself in English sufficiently to be understood, an interpreter who is duly qualified to interpret for the witness shall be sworn to do so. § 90.606(3), Fla.Stat. (1981). If a defendant does not understand the full significance of his change of plea because of a language difficulty, then his plea has not been freely and voluntarily made. *See Kadar v. State,* 370 So.2d 1231 (Fla. 4th DCA 1979).

*Balderrama v. State*, 433 So. 2d 1311, 1313 (Fla. Dist. Ct. App. 1983).

Mr. Berlin speaks Patwa as a first language, not English. What makes this situation unique is how closely related English and Patwa are to each other, because that makes it difficult to tell that Mr. Berlin does not fully understand what is being said to him. In fact, the first few minutes of his plea hearing make it seem as if he knows exactly what is happening, and that may in fact be true for that portion of the discussion. However, just before 1:05 p.m., as memorialized on the disc attached as Exhibit B, the wheels fall off. Within the span of a few minutes, Mr. Berlin asserted that he lives at the residence where the alleged victim resided, then that his girlfriend lived in the residence but that he stayed there sometimes, then that he did not live there at all. This is an example of Mr. Berlin “going along to get along,” because the truth was that he did live there, had a state I.D. with that address, and was subsequently homeless after he entered his plea. He ended up living out of a car shortly thereafter.

Also during this time the Judge clearly has trouble communicating with Mr. Berlin, and eventually Mr. Kapit begins to interpret the defendant for the Judge. This should have been a red flag that an interpreter was needed, because, as noted, “[o]nce the trial court is aware that an accused has difficulty with the English language, the court should determine whether a defendant understands English sufficiently to aid in his defense.” *Tehrani*, 764 So. 2d at 898.

Mr. Berlin has no problem understanding or speaking very basic English, and even when he has to fill in words through context he is fairly successful. But that does not mean that he understood the complicated legal jargon that he had to digest during his fifteen minutes with his attorney and during his plea to the Court. Candidly, when asked by undersigned counsel why he pled guilty to something he never did, he replied that he thought that during Arraignment the Judge was telling him that if he did not accept a plea agreement from the State, he would be sentenced to five years in prison. Obviously, he misinterpreted the Judge informing him of the maximum penalty allowed by law as the only alternative to a negotiated agreement. It is precisely this type of misunderstanding that informs the law requiring an interpreter for a defendant in need.

1. Ineffective Assistance of Counsel

There are two things are necessary in establishing an ineffective assistance of counsel: “First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” *Strickland v. Washington*, 104 S. Ct. 2052, 2062 (1984). When ineffective assistance of counsel is alleged at the plea phase, a defendant must show that “but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 106 S. Ct. 366 (1985). Aggravated assault is listed among the crimes for which deportation can be expected. 8 U.S.C. § 1227(a)(2)(A)(i). If a plea to a crime will most likely result in deportation, even a warning that a plea *could* affect the defendant’s immigration status is insufficient to overcome a claim for ineffective assistance. *Hernandez v. State*, 124 So. 3d 757, 762 (Fla. 2012). *Hernandez* cites to *Padilla*, the Supreme Court case addressing this matter. *See generally* *Padilla v. Kentucky*, 599 U.S. 356 (2010).

Mr. Berlin, as a first time offender in a he-said-she-said case, should not have exposed himself to deportation from the country in which all of his relatives now reside without at least some investigation into the State’s ability to prove the crime alleged. No depositions were taken in the matter. No motions were filed. Mr. Berlin’s entire defense consisted of a fifteen minute meeting with his attorney that resulted in a plea. No counsel was ever provided as to the probability of Mr. Berlin being deported, and Mr. Berlin was never told of the relative certainty that he would come under ICE scrutiny, as he subsequently did. In all likelihood, this was because Mr. Berlin’s attorney was not made aware of his problems with English, nor maybe even about his residency status. Eighteen months of probation and a withhold of adjudication is generally a job well done for a criminal defense attorney. But here, more attention was required. Mr. Berlin needed counsel that he was not provided.

1. Inadequate Plea Colloquy

According to Rule 3.172 of Florida Criminal Procedure, Acceptance of Guilty or Nolo Contendere Plea:

the trial judge should, when determining voluntariness . . . determine that [the defendant] understands . . . 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**.

Fla. R. Crim. P. 3.172(c)(8) (emphasis added).

A review of the video of the plea, attached as Exhibit B, will show that no such warning was ever provided to Mr. Berlin. In watching the video, it seems that the Judge’s typical plea colloquy, usually sterling, is thrown off by numerous interruptions. A mere oversight, to be sure, but still violative of Rule 3.172’s mandate that the immigration warning “**shall** be given to all defendants in all cases.” *Id* (emphasis added).

**WHEREFORE**, movant requests that the Court grant all relief to which the movant may be entitled in this proceeding, including but not limited to:

1. Defendant requests this Honorable Court to vacate his plea and set aside the conviction and return the case to the Court’s active case docket.
2. Such other and further relief as the court deems just and proper

Please note that there is no attestation attached to this document. The undersigned attorney has been unable to retain a Patwa interpreter to review the Motion in Mr. Berlin's native language. The last time this issue was before this Court, the Honorable Judge asked for this case to be set for a status hearing at the earliest opportunity. The undersigned attorney believes that the time it would take to find an available Patwa interpreter to review the document with Mr. Berlin would push the status conference past the next VOP hearing day. The foregoing represents the undersigned attorney’s good faith effort to present the facts to this Honorable Court as accurately as possible.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service via the Florida Courts E-Filing Portal, in accordance with Administrative Order No. AOSC13-49, to the Office of the State Attorney, at eservicevolusia@sao7.org this 10thday of June, 2017.

 DAMORE, DELGADO & ROMANIK

 \_/s/ Blake A. Taelman\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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1. <https://en.wikipedia.org/wiki/Jamaican_Patois>. Hopefully the Court will forgive the Wikipedia references in this Motion. The undersigned does not have any scholarly linguistic references at hand. [↑](#footnote-ref-1)