

STATE OF NEW YORK
_____ COURT

COUNTY OF _____

THE PEOPLE OF THE STATE OF NEW
YORK

UNOPPOSED MOTION TO VACATE
CONVICTION & SENTENCE
C.P.L. § 440.10(1)(h)

-against-

[FIRST NAME] [LAST NAME],

Ind. No. I-XXXXXXX
Index No: 15-XXXXXXX

Defendant.

STATE OF NEW YORK)
COUNTY OF _____) SS.:

1. I, [NAME], am the attorney for the defendant in the above captioned matter. I hereby move that Mr. [LAST NAME]'s above-captioned conviction for Assault in the 2nd Degree in violation of Section 120.05(1) of the Penal Law be vacated under C.P.L. § 440.10(1)(h). All facts below are stated on information and belief, based on:

- a. My review of the files and records of the _____ County Public Defender's office;
- b. Communication with _____, Esq., attorney for the _____ Regional Immigration Assistance Center; and
- c. Communication with _____, Esq., immigration attorney for Mr. [FIRST NAME] [LAST NAME], with the _____.

FACTS

2. Mr. [LAST NAME] is a long time lawful permanent resident from Sudan, and is not a citizen. He was charged with various criminal charges in _____ County Court in

2014, and on [DATE], he pled guilty to Assault in the 2nd Degree in violation of Section 120.05(1), of the Penal Law, a Class D Felony. On [DATE], he was sentenced to a determinate term of imprisonment for 1 year (i.e. 365 days).

3. Mr. [LAST NAME] was represented at trial by [ORIGINAL DEFENSE COUNSEL], Esq.

ARGUMENT

4. Having reviewed the original criminal file and having reviewed the affidavit of _____ of the Western New York Regional Immigration Assistance Center, the undersigned asserts that this plea was obtained in violation of the Constitution of the United States and of New York.

I. Failure to Provide Accurate Advice on Immigration Consequences

5. This case occurred after the case of Padilla v. Commonwealth of Kentucky, 559 U.S. 356 (2010) and upon information and belief, before the NYS Office of Indigent Legal Services created its network of Regional Immigration Assistance Centers. As such, Mr. [LAST NAME]'s former counsel Mr. [ORIGINAL DEFENSE COUNSEL], Esq. was not able to rely on expert, detailed advice in the subject.

6. Due to this constraint, Mr. [ORIGINAL DEFENSE COUNSEL] has confirmed that he was only able to provide general warnings that this conviction “may” have immigration consequences (*see* Exhibit 1, Affirmation of [ORIGINAL DEFENSE COUNSEL], Esq.). This language mirrored the warning given by Judge _____ during the plea colloquy pursuant to People v. Peque (22 NY3d 168 [2013], cert denied _ U.S. _, 135 SCt 90 [2014]) as follows:

THE COURT: If you're not a citizen of the United States, are you aware that you *may* face deportation as a consequence of your guilty plea in this case?

THE INTERPRETER: He's not aware of that, Your Honor.

THE COURT: Okay. That certainly is a *possibility* based upon a plea to assault in the second degree.

Now knowing that you *may* face deportation as a result of these proceedings, do you still want to go forward?

THE DEFENDANT: Yes, Your Honor.
(Through the Interpreter)

(Exhibit 3, Sentencing Transcript _____, p.3) (Emphasis added)

7. In this case, both Mr. [LAST NAME]'s counsel and the court warned of a *possibility* of deportation or immigration consequences. The reality was, however, that by pleading guilty to this charge, he was in fact pleading guilty to a guaranteed aggravated felony in immigration terms, as defined in 8 U.S.C. § 1101(a)(43) (*See*, Exhibit 2, Affirmation of [RIAC ATTORNEY], Esq.).

8. Such a conviction has dramatic consequences – far beyond simply rendering an individual *subject* to deportation or other immigrations consequences. It instead almost guarantees deportation as it forecloses the vast majority of forms of relief from removal in immigration court. (*See further*, Exhibit 2, [RIAC ATTORNEY] Affirmation)

9. In *People v. Doumbia*, 153 A.D.3d 1139 (September 5, 2017) the First Department reviewed the applicable caselaw and confirmed that merely advising on a 'risk' of deportation - or that there 'could be' immigration consequences – when dealing with an aggravated felony, constituted the ineffective assistance of counsel.

10. In particular, it held that:

“Defendant was deprived of effective assistance when his counsel failed to advise him that his guilty plea to an aggravated felony would result in mandatory deportation. Since an aggravated felony results in mandatory deportation (*see People v Corporan*, 135 AD3d 485, 486, [1st Dept 2016] [a guilty plea to an aggravated felony "triggered mandatory deportation under federal law"], counsel is under a duty to provide clear advice as to that consequence. **It is thus ineffective assistance [**2] to advise a noncitizen of a mere risk or possibility that he "could be deported"** (*see e.g. United States v Bonilla*, 637 F3d 980, 984 [9th Cir 2011] ["(a) criminal defendant who faces almost certain deportation (for committing an aggravated felony) is entitled to know more than that it is *possible* that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty"]; *Encarnacion v State*, 295 Ga 660, 663, [Ga 2014] ["where, as here, the law is clear that deportation is mandatory (for the aggravated felony of burglary) ... an attorney has a duty to accurately advise his client of that fact" and it is not sufficient that the client is merely advised deportation might occur or was a risk of conviction]).

[...]

Lawyers have an affirmative duty to adequately inform their clients about the serious effects of criminal convictions to the extent, and with as much specificity, as possible. **Once a defense attorney determines that a client is not a U.S. citizen, the attorney is required to implement the Sixth Amendment protection to which noncitizen defendants are entitled.** As *Padilla v Kentucky* (559 US 356 [2010]) clarified, **if "the deportation consequence [**3] is truly clear" from reading the Immigration and Nationality Act, "the duty to give correct advice is equally clear"** (559 US at 369).”

Id at 158 (emphasis added)

11. As such, unfortunately the judge’s accurate warnings that Mr. [LAST NAME] “may face deportation as a consequence” of his plea were insufficient – as a matter of law - to cure the ineffective assistance of counsel in failing to specifically advise about aggravated felonies.

II. Failure To Enter Adequate Plea Negotiations To Avoid Immigration Consequences

12. Beyond advising that this charge “may” cause Mr. [LAST NAME] immigration problems¹, Mr. [LAST NAME]’s attorney took no further steps to avoid the collateral consequences of this criminal case.

13. In Mr. [LAST NAME]’s case, there were several viable options which could have had drastically lesser immigration consequences,² it is submitted that any of these would have been realistically considered by the District Attorney’s office as viable possibilities to dispose of the case – if they had been offered. In particular, [ORIGINAL DEFENSE COUNSEL] could have entered in to plea negotiations for:

- a. Criminal Trespass in the First Degree, contrary to NYPL § 140.17 (D Felony)
- b. Attempted Assault in the 2nd Degree, sub 4, contrary to NYPL § 110-120.05(4) (E Felony)
- c. The existing charge with 364 day sentence instead of the agreed 365 days.

14. Any such agreement would have ended up with Mr. [LAST NAME] pleading guilty to a serious felony charge with a similar *actus reus* to the ultimate conviction, while sustaining an identical sentence of incarceration., albeit with 24 fewer hours credited to him.³

¹ See, Exhibit 1, Affirmation of [ORIGINAL DEFENSE COUNSEL], Esq.

² Per the Affirmation of [RIAC ATTORNEY] .Esq., see Exhibit 2

³ It is important to note that Mr. [LAST NAME] has already served his sentence. As such, were this court to grant this motion for vacatur and accept his new guilty plea, Mr. [LAST NAME] is not asking to be punished any less – quite to the contrary, he is asking to receive one less day’s credit than he has already served.

15. The Supreme Court has reiterated that this requirement for zealous advocacy applies to the plea negotiation stage of criminal proceedings. In particular:

“Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process. *Frye, ante*, at 144, 132 S. Ct. 1399; see also *Padilla v. Kentucky*, 559 U.S. 356, 364, 130 S. Ct. 1473 (2010); *Hill, supra*, at 57, 106 S. Ct. 366. During plea negotiations defendants are "entitled to the effective assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771, (1970). In *Hill*, the Court held "the two part *Strickland v. Washington* [*163] test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S., at 58. The performance prong of *Strickland* requires a defendant to show "'that counsel's representation fell below an objective standard of reasonableness.'" 474 U.S., at 57 [****13] (quoting *Strickland*, 466 U.S., at 688).⁴”

16. As such, simply giving generalized warnings about possible consequences to the plea – without zealously advocating to *avoid* them in the first place through robust plea negotiations – means this conviction was secured in violation of Mr. [LAST NAME]’s right to the effective assistance of counsel. No matter how well Mr. [LAST NAME] was warned of the consequences of this specific plea, counsel’s failure to advocate to avoid them had already occurred and was incurable at the time of the criminal hearing.

III. Failure to Notify and Advocate With The Court

17. Regardless of how well defense counsel advise their client on immigration consequences, and regardless of how well they negotiate with the District Attorney’s office to avoid them, failure to notify the court and advocate accordingly represents a separate basis for ineffective assistance.

⁴ *Lafler v. Cooper*, 132 S. Ct. 1376, 1384, 566 U.S. 156, 162-163, 182 L. Ed. 2d 398, 406, 2012 U.S. LEXIS 2322, *12-13, 80 U.S.L.W. 4244, 23 Fla. L. Weekly Fed. S 203, 2012 WL 932019

18. This is exactly what happened in the recent case of Anik Roy v. United States, 347 F. Supp. 3d 230 (S.D.N.Y. 2018). In particular, even though that court rejected – on a factual basis – the assertion that the defendant had not been properly advised of the consequences of a plea, it nevertheless held ineffective assistance occurred when counsel failed to advocate for one day less in sentencing:

“In sum, the petitioner has established that trial counsel rendered ineffective assistance under Strickland [*23] by failing to advise the Court of the impact of a one-day reduction in the petitioner's sentence and by failing to request the reduction accordingly. But for trial counsel's ineffectiveness, the petitioner would have received a one-day shorter sentence and might not be subject to mandatory removal. The petitioner was therefore deprived of his Sixth Amendment right to the effective assistance of counsel.”⁵

19. This case is identical; the transcript of the sentencing hearing confirms that nothing was discussed regarding the impact 365 days versus 364 days on Mr. [LAST NAME]'s immigration status. Regardless of whether he was properly advised as to the impact of 365 days (he was not), the failure to request the judge sentence him to 364 days was the ineffective assistance of counsel.

MOTION TO VACATE JUDGMENT OF CONVICTION

20. The petitioner defendant moves, Under the New York State Constitution's and United States' Constitution's guarantee of due process and effective assistance of counsel and Criminal Procedure Law § 440.10(h), that the judgments of conviction entered on [DATE], be vacated.

⁵ Anik Roy v. United States, 347 F. Supp. 3d 230, 242, 2018 U.S. Dist. LEXIS 193366, *22-23

21. Specifically, when pleading guilty to this charge, Mr. [LAST NAME] was deprived of the effective assistance of counsel (*see*, for example, *Padilla*, as discussed in *Anik Roy v. United States*, F. Supp. 3d 230 (SDNY 2018)) and his plea was not knowing and voluntary (*see*, for example *Brady v. United States* :: 397 U.S. 742 (1970) as discussed in *People v Peque, Id.*).

22. The _____ County District Attorney consents to this motion, per agreement with _____.

Respectfully submitted,

[NAME], Esq.
Attorney for Defendant/Petitioner

The Law Office of [NAME]
XXXXXX
XXXXXX
XXXXXX
XXXXXX