INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AND DEPORTATION CONSEQUENCES

By: Mark M. Baker*

"You have nothing to worry about. I have negotiated a great deal for you, which will save you years of incarceration. Moreover, because of the particular crime to which you will be pleading, and the length of time you have been in the United States, you will not be deported."

Based on this advice from his attorney, Evan Escent, a "green card" carrying, permanent resident for the past twenty years, accepts the prosecutor's offer and pleads guilty to a felony involving allegations of fraudulent conduct which resulted in a $10,001 loss to the victim.[1] Thereafter, at sentencing, a term of probation is imposed. Nonetheless, as Escent leaves the courthouse, United States Immigration and Naturalization Service ("INS") agents place him in custody on a detainer because he has been convicted of an "aggravated felony." In the INS's view, Escent's automatic "removal" from the United States is now mandated under 1996 amendments to the applicable federal statutes.

Because Escent will now be forced to leave behind his wife and ten children, all of whom are United States citizens, he turns to you as new counsel. Escent insists that had he been warned about such a mandatory removal, he would never have pleaded guilty. Instead, Escent convinces you that he would have taken his chances at trial, even at the risk of incarceration.

Escent asks if he has any remedies. In reality, you can reasonably assure him that he might still receive his day in court. For now, as a result of two recent decisions of the New York

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*Mark M. Baker is of Counsel to the Manhattan white collar defense firm of Brafman and Ross, P.C., concentrating in motion and appellate litigation in the state and federal courts.

Court of Appeals and the United States Court of Appeals for the Second Circuit, erroneous advice of counsel concerning mandatory deportation, depending on the particular circumstances of a case, may indeed warrant the vacatur of the underlying conviction in either federal or state Court.

Applicable Congressional Enactments

As part of the Immigration Act of 1990,[2] Congress repealed the former provision of the Immigration and Nationality Act ("INA") which had allowed for Judicial Recommendations Against Deportation ("JRAD"s).[3] Prior to this repeal, the granting of a JRAD by a court would have all but eliminated deportation based on the subject conviction.[4] As a result, since November 29, 1990, the effective date of the 1990 Act, JRADs have been unavailable. Instead, the 1990 Act allowed for eligibility for a waiver of deportation, solely at the discretion of the Attorney General.[5]

Thereafter, in 1996, even that remaining safety valve was plugged. Thus, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), enacted on April 24, 1996,[6] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), enacted on September 30, 1996,[7] further amended the INA, so as to preclude even the Attorney General's discretion to allow for a waiver of what is now denominated as "removal."[8] Specifically, §440(d) of AEDPA and §304 of IIRIRA, upon eliminating relief to certain aliens, included a far broadened scope of offenses, within the definition of "aggravated felonies," [9] pursuant to which removal upon conviction is a virtual certainty.[10]

As a result, "[g]iven these amendments, an alien convicted of an aggravated felony is automatically subject to removal and no one -- not the judge, the INS, nor even the United States Attorney General -- has any discretion to stop the deportation."[11] The only issue remaining, therefore, is what actually constitutes an "aggravated felony."[12]

United States v. Couto [13]

In Couto (wherein the author represented the defendant on appeal), decided in November 2002, the Second Circuit was confronted with a defendant who, in 2000, had been completely ill advised by her attorney. Ms. Couto had been erroneously counseled that, despite its statutory elimination a full ten years earlier, she would be able to secure a JRAD following her guilty plea, thereby virtually assuring that she would not be deported.

Reversing the denial of her motion to withdraw the plea,[14] the Court of Appeals concluded that "an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable"[15] under the test delineated in Strickland v. Washington,[16] for purposes of determining ineffective assistance of counsel claims. Therefore, the Court concluded that "[a]n 'accused who has not received reasonably effective assistance from counsel in deciding to plead guilty cannot be bound by that plea because a plea of guilty is valid only if made intelligently and voluntarily...[citations omitted].' "[17]

The Couto Court found that the first prong of the Strickland test (*i.e.*, that counsel's performance fell below an "objective standard of reasonableness") was clearly satisfied by defense counsel's erroneous advice concerning the effect on removal of the defendant's anticipated plea. Also, in view of Couto's sworn contentions, the Court found the second, "prejudice" prong to have been established, noting that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial."[18] The Defendant's conviction was therefore vacated and she was returned to pre-pleading status. [19]

People v. McDonald[20]

Just recently, on November 24, 2003, the New York Court of Appeals embraced the

Second Circuit's holding in Couto:

> Applying the rule as articulated by the federal circuits, defendant has met the first prong of the Strickland[21] test in that trial counsel admits that he incorrectly advised his client about the consequences of the plea. Specifically, counsel misinformed defendant by telling him that he would not be subject to deportation because he was a long-term resident of the United States and his three children were American citizens by birth and live in the United States. We hold that this type of affirmative misrepresentation falls below an objective standard of reasonableness (see Couto, 311 F.3d at 188).[22]

The McDonald Court likewise addressed the Strickland prejudice prong, which "'focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.'"[23] The prosecution argued, and the Appellate Division had earlier agreed, that even if the erroneous advice had been given, no prejudice resulted because of the likelihood that Defendant would not have prevailed at trial.

The Court of Appeals completely rejected this analytical approach. Instead, it determined that, "[c]ontrary to the People's contention, and the Appellate Division's holding below, the prejudice inquiry here does not necessitate a prediction analysis as to the likely outcome of the proceeding."[24] Rather, the McDonald Court held that "[t]o establish ineffective assistance of counsel, defendant's allegations must be sufficient to 'show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial'..."[25] It then added that "[t]he sufficiency of defendant's factual allegations as to prejudice should be evaluated with reference to the face of the pleadings, the context of the motion and defendant's access to information.[26]

Nonetheless, McDonald was ultimately denied relief because his trial attorney, who had submitted the requisite supporting affirmation,[27] merely stated that he had misinformed

McDonald as to the deportation consequences of his guilty plea, and that the defendant had relied on that incorrect advice when entering the plea. What was missing was any averment that, but for such misrepresentation, McDonald would not have pleaded guilty"[28] Had such a claim been asserted, it seems apparent that, just as in Couto, the Court of Appeals would have ruled in McDonald's favor.

Conclusion

Owing to the Couto and McDonald holdings, it is now the law in both the Second Circuit and the State of New York that an affirmative misrepresentation by an attorney to a pleading, non-citizen defendant that a conviction of an "aggravated felony" will not result in mandatory removal, falls below the objective standard of reasonableness that would otherwise be required in order for there to be afforded effective assistance of counsel under the United States Constitution. Therefore, if a defendant can establish that, but for such erroneous advice, he or she would not have pleaded and, instead, would have insisted on proceeding to trial, the necessary quantum o f prejudice will have been demonstrated. In such event, there will be required the vacatur of the resulting conviction upon appropriate application.

1. *See* 8 U.S.C. §1101(a)(43)(M)(i).

2. Pub. L. No. 101-649, §505, 104 Stat. 4978, 5050 (1990).

3. Former 8 U.S.C. §1251(b).

4. Former 8 U.S.C. §1251(a)(4). *See* Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986).

5. *See* INS v. St. Cyr, 533 U.S. 289, 294-95, 121 S.Ct. 2271, 2276 (2001), noting that Francis v. INS, 532 F.2d 268 (2d Cir. 1976), interpreted former 8 U.S.C. §1182(c) (§212[c] of the INA) as applicable to both exclusion proceedings and discretionary waivers of deportation.

6. 110 Stat. 1214.

7. 110 Stat. 3009-3546.

8. In INS v. St. Cyr, 533 U.S. 289, 326, 121 S.Ct. 2271, 2293 (2001), the Supreme Court held that retroactive application of this law was not appropriate, at least insofar as the *conviction* would have preceded the effective date of the new statute.

9. 8 U.S.C. §1101(43).

10. *See gen.* INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271 (2001).

11. United States v. Couto, 311 F.3d 179, 189-190 (2d Cir. 2002).

12. *See e.g.* Chery v. Ashcroft, 347 F.3d 404 (2d Cir. 2003).

13. 311 F.3d 179 (2d Cir. 2002).

14. *See* Fed. R. Cr. P. 11(d)**.**

15. 311 F.3d at 188.

16. 466 U.S. 668, 104 S.Ct. 2052 (1984).

17. 311 F.3d at 187.

18. 311 F.3d at 187.

19. Notably, at the time of Couto's plea, a federal judge was *not* required, under Fed. R. Cr. P. 11, to inform a defendant of the collateral consequences thereof, including the potential of deportation. *See* Michel v. United States, 507 F.2d 461 (2d Cir. 1974). Accord: People v. Ford, 86 N.Y.2d 397, 633 N.Y.S.2d 270 (1995) (holding that the mere possibility of deportation was a collateral and not a direct consequence of a conviction, and hence, the failure of a court to so warn a non-citizen did not render such plea to be either unknowing or involuntary, so as to violate due process). *Cf.* CPL §220.50(7) (requiring a court to so advise a defendant, but disallowing the absence of such advice to form the basis for a successful challenge to the plea). It was urged, however, that owing to the automatic removal that now results upon conviction of an aggravated felony, a plea allocution, at this time, is constitutionally deficient if the court does not warn the defendant of such automatic consequences. In dictum, the Second Circuit noted that Defendant's argument that Fed. R. Crim. P. Rule 11 "must now be read to require that the court ascertain, before accepting a plea, that the defendant is aware of this virtually certain, and unquestionably significant, consequence of a guilty plea," certainly "deserves careful consideration."

20. __N.Y.2d __, 2003 WL 22764237 (Nov. 24, 2003).

21. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

22. People v. McDonald, ___N.Y.2d at __, 2003 WL 22764237, at 3 (Nov. 24, 2003)

23. _N.Y.2d at __, 2003 WL 22764237, at. 2, quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985).

24. _N.Y.2d at __, 2003 WL 22764237, at. 3

25. _N.Y.2d at __, 2003 WL 22764237, at. 3, quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985).

26. _N.Y.2d at __, 2003 WL 22764237, at. 3, citing People v. Mendoza, 82 N.Y.2d 415, 426, 604 N.Y.S.2d 922, 926 (1993).

27.CPL §440.30(1).

28. _N.Y.2d at __, 2003 WL 22764237, at. 3.