To be argued by:

Alfred O'Connor
(10 minutes)

State of New York
Court of Appeals

The People of the State of New York

-against-

Bruce McDonald,

Defendant-Appellant.

Brief for Defendant-Appellant

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Date Completed: March 7, 2003

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent

-against-

BRUCE McDONALD,

Appellant.

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PRELIMINARY STATEMENT

By permission of Chief Judge Judith S. Kaye, granted December 17, 2002, Appellant Bruce McDonald appeals from an order of the Appellate Division, Third Department, entered July 18, 2002, which affirmed an order of the Tompkins County Court (Barrett, J.), dated January 24, 2000, denying appellant's motion to vacate his conviction pursuant to CPL § 440.10 without a hearing. By the same order, the Appellate Division also affirmed a judgment of the Tompkins County Court dated October 5, 1999, convicting Appellant, upon a plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16) and criminal sale of marijuana in the third degree (Penal Law § 221.45) and sentencing him to 1 to 3 years imprisonment.

Questions Presented

1. Did defense counsel's performance fall below an objective level of reasonableness when counsel misadvised Appellant – a long term resident alien – that he faced no risk of deportation by pleading guilty to felony drug and marijuana charges when, in fact, hash amendments to the immigration laws enacted in 1996 subjected Appellant to mandatory deportation once he pleaded guilty?

The Appellate Division did not squarely rule on this issue.

2. Did the Appellate Division misapply the governing federal prejudice standard for ineffective assistance of counsel claims raised in the context of a guilty plea when it held that a defendant must demonstrate a reasonable probability of a favorable trial outcome?

The Appellate Division implicitly answered no.

3. Did the Appellate Division properly consider arguments concerning the factual sufficiency of Appellant's CPL § 440.10 motion when these arguments were not raised by the People below or otherwise identified by the trial court in its summary order denying the motion without a hearing?

The Appellate Division implicitly answered yes.

STATEMENT OF FACTS

The charges, plea negotiations, guilty plea and sentence

In the spring of 1999, Appellant, Bruce McDonald was charged in an eight-count indictment with criminal sale of marijuana in the third degree (two counts), and related possession offenses (three counts), criminal possession of a controlled substance in the third and fourth degrees, and criminally using drug paraphernalia in the second degree (6 – 8). The charges arose when an undercover policewoman, posing as McDonald's co-worker in a Cornell University kitchen, asked him about purchasing marijuana. Defendant then allegedly participated in two transactions between the undercover officer and another Cornell kitchen employee, co-defendant Curtis Alexander, who actually supplied the marijuana (9 –10). After McDonald was indicted and arrested, police executed a search warrant at the apartment he shared with his adult nephew. Cocaine, marijuana and drug paraphernalia were discovered in one of the bedrooms, and the matter was re-presented to a grand jury (10). McDonald waived immunity and offered exculpatory testimony before the grand jury (149). However, he was thereafter charged by superceding indictment with the foregoing crimes.

McDonald's assigned attorney, Thomas Kheel, negotiated a proposed plea-bargain involving a guilty plea to the top count of the indictment, criminal possession of a controlled substance in the third degree (Class B felony), and criminal sale of marijuana in the third degree (Class E felony) with an agreed-upon sentence of 1- 3 years imprisonment (128). McDonald, who was then 37 years old, was born in Jamaica but had lived continuously in the United States as a lawful permanent resident for approximately 25 years. His wife, Tanya, and three daughters (ages 8, 5, and 3) were all U.S. citizens (148). Before McDonald agreed to plead guilty, he expressed concern to Kheel about the possible deportation consequences of the convictions under the terms of the plea offer (148-149, 154). Kheel wrongly assured McDonald that he would not be deported because he had resided in this country for many years and was the father of three U.S. citizens (148). This advice was dead wrong, as highly publicized amendments to the immigration laws enacted in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Anti-Terrorism and Effective Death Penalty Act (AEDPA), rendered McDonald mandatorily deportable under either count of the plea offer.

Falsely assured that his lawful permanent resident status was not in jeopardy, McDonald pleaded guilty on August 16, 1999 (129-139). Counsel's misrepresentation was then compounded when, at the plea proceeding, the court neglected to deliver the statutory warning about possible deportation consequences of a felony conviction [CPL section 220.50 (7)]. The court sentenced McDonald to 1–3 years imprisonment on October 5, 1999 (140-143). He learned the awful truth the very next day at the Tompkins County jail when he was served with a notice of deportation (148-149). A quick phone call by Kheel to the I.N.S. confirmed the terrible news: the guilty pleas had subjected McDonald to mandatory deportation (149). McDonald

immediately authorized Kheel to seek vacatur of the convictions, and counsel did so several weeks later, on November 23, 1999.

The post-conviction motion

Kheel raised two claims in a CPL § 440.10 motion filed on McDonald's behalf. First, he argued the court had violated CPL § 220.50 (7) at the plea proceeding when it neglected to advise McDonald that his guilty plea placed him at risk of deportation (148). Second, candidly admitting that he had mistakenly assured McDonald the proposed plea bargain would not result in deportation, Kheel raised an ineffective assistance of counsel claim. In addition to admitting his own erroneous legal opinion about McDonald's risk of deportation, Kheel alleged that the Tompkins County District Attorney, George Dentes, had stated on "several occasions" during plea negotiations that McDonald did not face deportation because he had "resided in the United States for more than ten years without a felony conviction" (149). Kheel claimed that he shared the District Attorney's view with McDonald during attorney-client plea conferences. Id. By misrepresenting the "dire" consequence of deportation to his client during plea discussions, Kheel argued he had violated McDonald's right to the effective assistance of counsel (149-150). As authority, Kheel cited this Court's decision in People v. Ford, 86 N.Y.2d 397, 405 (1995).

In his affirmation in support of this constitutional claim, Kheel highlighted that McDonald had resided in the United States for "more than twenty years" and has a wife and three children who are U.S. citizens (148). Kheel alleged that McDonald had "entered his plea in reliance on the advice of Defense Counsel and the District Attorney, even though he maintained his innocence and had unabashedly testified to the Grand Jury on his own behalf." Id. Kheel sought vacatur of the convictions on the ground that McDonald had been "deprived of

meaningful representation because his Defense Counsel rendered him wrong advice which proved highly detrimental to the Defendant" (150).

The People's arguments in opposition to the motion

In response, the District Attorney confirmed "the possibility of deportation was something defendant was pondering as he considered the plea offer" (154). However, Dentes disputed Kheel's allegation that he had concurred in the erroneous opinion concerning deportation. Dentes recalled that, in a single conversation with Kheel on the subject, he had expressed no clear opinion about the possibility of McDonald being deported. Id. According to Dentes, he suggested Kheel contact the I.N.S. for guidance on the question.

On the legal merits of the ineffectiveness claim, Dentes asserted that McDonald had failed to "allege any prejudicial impact on the outcome of the case." Arguing a standard of "prejudice" that would later be adopted by the Appellate Division, the District Attorney claimed only that McDonald had failed to allege a colorable claim of innocence: "*Neither defendant nor his attorney has made any allegation that defendant was innocent of the crime or that, given a trial, the outcome will by any different from the conviction resulting from the guilty plea*" (161) (emphasis in original). Dentes alternatively argued that Kheel's erroneous advice was a form of off-the-record "promise" that was not entitled to judicial recognition, and that the court's CPL § 220.50 (7) violation provided no basis for vacatur of the convictions (157-160).

The motion court's decision

The Tompkins County Court summarily denied the motion "[f]or the reasons set forth in the People's response" (163). The court mischaracterized the motion as one based entirely on a failure to warn theory, as its summary order included no reference to Kheel's admission of

having affirmatively misadvised McDonald about the immigration consequences of the guilty plea:

> The defendant has brought on a motion by notice of motion dated November 23, 1999 for an order pursuant to CPL section 440.10 (1)(h) setting aside the defendant's guilty plea on the ground that the defendant was not advised that he might face deportation proceedings as a result of his conviction upon the guilty plea. The People have filed a response in opposition to the defendant's motion.
>
> For the reasons set forth in the People's response, the defendant's motion is denied.

(163) (emphasis added).

Appeal

McDonald retained pro bono counsel and he appealed from the judgments of conviction and, by permission, from the denial of his post-judgment motion. On appeal, the People conceded that a criminal defense attorney's affirmative misrepresentation to a non-citizen client about the deportation consequences of a criminal conviction falls below an objective standard of reasonableness and may, depending on the circumstances, constitute ineffective assistance of counsel (A.87). However, the People now argued for the first time that Kheel's motion papers were factually insufficient because they had failed to explicitly and sufficiently allege that McDonald *would not have pleaded guilty in the absence of defense counsel's ineffectiveness* (A.74).

In reply, McDonald pointed out that no such argument had been offered in the motion court, where the People had relied solely on the erroneous claim that, in order to warrant a hearing, McDonald was required to allege he was "innocent of the crime or that, given a trial, the outcome [would] be different from the conviction resulting from the guilty plea" (A.92). The People's new prejudice argument, McDonald stressed, was not cognizable for the first time on appeal because it was *not the basis* of the County Court's summary denial of his motion. In any

event, McDonald argued, his papers were sufficient to warrant a hearing on his constitutional claim (A.92-94).

Appellate Division's Decision

The Appellate Division affirmed in a lengthy opinion (A.2-10). The court recognized that McDonald's ineffective assistance of counsel claim raised an issue of first impression, as the question of an attorney's affirmative misrepresentation about the possible deportation consequences of a guilty plea had been specifically reserved in People v. Ford, 86 N.Y.2d 397, 405 (1995) (A.6-7). The court noted the great weight of authority in other jurisdictions, which holds that a defense attorney's express misrepresentation to a non-citizen client about the deportation consequence of a guilty plea falls below an objective standard of reasonableness (A.7-8).

However, the court clearly misconstrued the governing prejudice standard for ineffective assistance of counsel claims raised in the context of a guilty plea. The federal constitutional standard was established in Hill v. Lockhart, 474 U.S. 52 (1985), where the Supreme Court held that a defendant must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Relying on Braun v. Ward, 190 F.3d 1181, 1188 (10th Cir. 1999), a mistaken interpretation of Hill v. Lockhart that had *already* been rescinded by the Tenth Circuit [*see* Miller v. Champion, 262 F.3d 1066, 1073-1074 (10th Cir. 2001)], the Appellate Division held that a showing of prejudice in this context has two separate components. First, the Court held McDonald was required to show that absent counsel's erroneous advice "he would have foregone the plea deal and instead insisted on going to trial" (A.10). Then, he was *additionally* required to show that "had he rejected the plea

bargain, the outcome of the proceeding would have changed" (i.e., he would likely have prevailed in some manner at trial). Id.

Applying Braun v. Ward's two-prong prejudice standard, the Appellate Division cataloged a number of ways in which Kheel's affirmation could have been more factually specific with respect to McDonald's claim that he would have gone to trial had he not been misinformed about the deportation consequences of the plea:

> While counsel's affidavit averred that defendant "relied on" the deportation misadvice in entering a guilty plea and had "maintained his innocence", counsel did not even allege that had defendant been correctly advised, there is a reasonable probability that he would have pleaded not guilty and insisted on going to trial nor does counsel's affidavit demonstrate that defendant had a colorable claim of innocence, and defendant submitted no affidavit on his posttrial motion containing these basis allegations so as to entitle him to a hearing [citations omitted] . . . Furthermore, trial counsel's affidavit did not address other factors often considered in a decision whether to accept a plea offer, including the strength of the People's proof, the availability of defenses, the likelihood of a conviction if defendant insisted on going to trial, counsel's advice on the plea offer, or the comparatively favorable negotiated minimum prison sentence of 1 to 3 years, as compared to the potential maximum sentence of 25 years' imprisonment if convicted as charged of the Class B felonies after a trial [citations omitted] and the potential for consecutive sentences on the two sales counts (A.8).

With respect to the second prong of its prejudice analysis, the Appellate Division "objectively consider[ed] the probable outcome of any trial" in McDonald's case. Based on its examination of the "limited record on appeal," the court found:

> no indication how defendant might have been able to avoid conviction or prevail on specific defenses, where defendant engaged in the direct sale of marihuana to an undercover officer on two occasions and the execution of a search warrant in his home yielded quantities of cocaine and marihuana, supporting an intent to sell inference, whether acting as a principal or an accomplice to his nephew who defendant alleged also lived there [citations omitted] (A.9-10).

Consequently, the Appellate Division concluded McDonald had failed to satisfy these twin requirements for a showing for ineffective assistance of counsel in the context of a guilty plea:

> In the end, based on our examination of the record, we find that defendant has not demonstrated that he was prejudiced by counsel's misadvice, i.e., that it was reasonably probable that he would have foregone the plea deal and instead insisted on going to trial had he been correctly advised regarding the deportation consequences of the proposed guilty plea, or that, had he rejected the plea bargain, the outcome of the proceeding would likely have changed and thus, we cannot conclude that he was deprived of the effective assistance of counsel under either the State or Federal Constitution (A.10).

Bruce McDonald was paroled from his 1 – 3 year prison sentence on September 29, 2000 (187). He was discharged from parole supervision upon the maximum expiration of the sentence on September 29, 2002. Deportation proceedings against him have been adjourned pending the outcome of this appeal.

ARGUMENT

Because defense counsel admittedly told Appellant that he faced no risk of deportation by pleading guilty to felony charges when, in fact, the resulting convictions exposed him to mandatory deportation, Appellant alleged a legal basis for relief on the ground of ineffective assistance of counsel. As neither the People nor the motion court identified a legitimate factual deficiency in his motion papers concerning the prejudice component of this constitutional claim, Appellant has a right to a hearing to prove that his guilty plea was involuntarily induced by his lawyer's ineffective representation.

Introduction

At the time he was accused of felony drug and marijuana charges in Tompkins County, Bruce McDonald had been a lawful permanent resident of the United States for over 25 years. His wife and three young daughters were U.S. citizens. McDonald was, therefore, understandably concerned that his acceptance of a proposed plea bargain might jeopardize his lawful permanent resident status in his adopted home and country. He naturally turned to the person whose job it was to answer his legal questions, his assigned lawyer, Thomas Kheel. Kheel wrongly assured McDonald that he would not be deported if he pleaded guilty under the terms of the plea offer. Relying on his lawyer's advice, McDonald pleaded guilty and, at the

plea proceeding, the court failed to deliver the required warning to non-citizens about the possibility of deportation. It later sentenced McDonald to 1 – 3 years imprisonment. The very next day the I.N.S served him with a notice of deportation. Only then did McDonald learn the heartbreaking truth that his guilty plea had rendered him mandatorily deportable. He immediately moved to vacate the convictions pursuant to CPL § 440.10, but the County Court summarily denied the motion without a hearing, and the Appellate Division affirmed. Because McDonald's motion established a legal basis for relief on the ground of ineffective assistance of counsel, and the courts below misinterpreted the governing prejudice standard when reviewing the factual sufficiency of his pleadings, the order of the Appellate Division should be reversed and the matter remitted for an evidentiary hearing.

Part A.

Appellant's CPL section 440.10 motion alleged a legal basis for relief on the ground of ineffective assistance of counsel.

i. Contrary to what defense counsel told his client, the guilty pleas exposed McDonald to mandatory deportation.

In the summer of 1999, when Bruce McDonald asked his lawyer about the possible deportation consequences of a proposed guilty plea to drug and marijuana charges, life as he knew it hung in the balance of his lawyer's reply. Three years earlier Congress had enacted harsh amendments to the immigration laws, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which eliminated any hope of discretionary relief from deportation for a non-citizen convicted of

an "aggravated felony."[1] Both of the crimes contemplated by the proposed plea agreement, criminal possession of a controlled substance in the third degree [Penal Law § 220.16 (1)] and criminal sale of marijuana in the third degree (Penal Law § 221.45), are drug trafficking offenses under federal immigration law and have long been considered "aggravated felonies." *See* 8 U.S.C. § 1101 (a) (43) (B). Therefore, once McDonald pleaded guilty under the terms of the plea offer, and the court accepted his plea, the following legal consequences would ensue:

> ➢McDonald would be charged in immigration court with being a deportable alien on the basis of the criminal convictions, and would be subjected to mandatory deportation. The immigration judge would have no authority to grant him any kind of discretionary relief. *See* 8 U.S.C. § 1101 (a) (43) (B) (defining "aggravated felony" to include any "drug trafficking crime"), § 1227 (a) (2) (A) (iii), § 1229 (b) (a) (3) (barring cancellation of removal relief for a lawful permanent resident convicted of an "aggravated felony").
>
> ➢Because a controlled substance conviction constitutes grounds for inadmissibility to the United States, McDonald would be permanently barred from ever returning to the U.S., even to visit his wife and children, or to attend the funeral of a parent or sibling. *See* 8 U.S.C. § 1182 (a) (2) (A) (i) (II) (including conviction of any controlled substance offense as a ground of inadmissibility), § 1182 (h) (barring a waiver of inadmissibility except where conviction was for simple possession of 30 or fewer grams of marijuana).
>
> ➢If he were to return to the United States illegally after being deported, he would face up to 20 years in prison for illegal re-entry of the country. *See* 8 U.S.C. § 1326 (b) (2).

See United States v. Amador-Leal, 276 F.3d 511 (9th Cir. 2002) (Deportation consequences under AEDPA and IIRIRA are automatic).

Despite the inherently serious nature of McDonald's legal question, Thomas Kheel chose to answer it without conducting any legal research. If Kheel had looked up the law in the United States Code, or referred to any number of immigration law treatises or practice aids, or simply

[1]The AEDPA rendered defendants convicted of an "aggravated felony" ineligible for deportation relief under Immigration and Nationality Act (INA) Section 212(c), which had previously offered long-term permanent resident aliens like McDonald a chance to avoid deportation. Pub. L. No. 104-132, § 440 (d), 110 Stat. 1214 (1996). Subsequently, the IIRIRA wholly repealed INA Section 212(c). Pub. L. 104-208, § 304(b), 110 Stat. 3009 (1996). It is noteworthy that an aggravated felony is a term of art under the immigration code that can even include misdemeanor convictions. *See e.g.*, United States v. Graham, 927 F.Supp. 619 (W.D.N.Y. 1996) (New York misdemeanor of criminal sale of marijuana in the fourth degree is an aggravated felony).

conferred with an immigration lawyer, he would have quickly learned that the proposed plea bargain carried dire consequences for his client. But, for some reason, instead of telling his client the honest truth – *i.e*., that he didn't really know the answer – Kheel assured McDonald he would not be deported if he pleaded guilty. This legal opinion was apparently based on nothing more than Kheel's gut instinct and one or two brief hallway conversations with the prosecutor. Under these very narrow circumstances, Kheel's sin of commission, which he quickly and commendably sought to rectify, provides a clear legal basis for a finding of ineffective assistance of counsel pursuant to CPL § 440.10 (1)(h). This court should, therefore, remit the matter for a hearing on McDonald's constitutional claim.

ii. As the People correctly conceded below, defense counsel's affirmative misrepresentation fell below an objective level of reasonableness.

Plea bargaining negotiations conducted after the initiation of formal criminal charges are critical stages of criminal prosecutions at which a defendant is entitled, under both the state and federal constitutions, to the effective assistance of counsel. *See* McMann v. Richardson, 397 U.S. 759 (1970); People v. Claudio, 83 N.Y.2d 76 (1993); Boria v. Keane, 99 F.3d 492, 496-497 (2d Cir. 1996). Effective representation means "the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense" [People v. Droz, 39 N.Y.2d 457, 462 (1976)] and, in the context of plea bargaining, includes counsel's duty to advise a client about the available options and possible consequences of choosing to plead guilty in lieu of exercising the constitutional right to trial. A guilty plea must represent a defendant's informed and voluntary choice among the available alternatives. Boykin v. Alabama, 395 U.S. 238 (1969); North Carolina v. Alford, 400 U.S. 25 (1970). A defendant's decision to plead guilty is not the product of a conscious, informed choice if counsel renders ineffective advice about the consequences of the guilty plea, and the defendant is thereby

prejudiced. Hill v. Lockhart, 474 U.S. 52 (1985). The voluntariness of the guilty plea depends, in the first instance, on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771 (1970); Tollett v. Henderson, 411 U.S. 258 (1973).

As the People correctly conceded below, a criminal defense attorney's affirmative misrepresentation to a non-citizen client about the possible deportation consequences of a guilty plea falls below an objective standard of reasonableness, and may, depending on the circumstances, give rise to a viable claim of ineffective assistance of counsel (A.87). A clear consensus emerged before enactment of AEDPA and IIRIRA that a defense lawyer's mere *failure to warn* a non-citizen client about the possibility of deportation does not, without more, constitute ineffective assistance of counsel. *See e.g.*, People v. Ford, 82 N.Y.2d 397 (1995); United States v. Santelises, 509 F.2d 703 (2d Cir. 1975); United States v. Campbell, 778 F.2d 764 (11th Cir. 1985); People v. Huante, 571 N.E.2d 736 (Sup. Ct. Ill. 1991). However, virtually every court that has ever considered the issue has concluded that an attorney's *affirmative misrepresentations* on the subject during plea discussions with a client may give rise to a constitutional violation. *See* United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002) ("[A]n affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable."); In re Resendiz, 19 P.3d 1171, 1185 (Sup. Ct. Ca. 2001) ("clear consensus is that an affirmative misstatement regarding deportation may constitute ineffective assistance of counsel"); *accord* Aldus v. State, 748 A.2d 463 (Sup. Jud. Ct. Maine 2000); State v. Garcia, 727 A.2d 97 (N.J. App. Div. 1999); United States v. Khalaf, 116 F.Supp.2d 210 (D. Mass. 1999); United States v. Corona-Maldonado, 46 F. Supp.2d 1171 (D. Kans. 1999); United States v. Mora-Gomez, 875 F.Supp. 1208 (E.D. Va. 1995); Williams v.

State, 641 N.E.2d 44 (Ct. App. Ind. 1994); Dugart v. State, 578 So.2d 789 (Ct. App. Fl. 1991); Mott v. State, 407 N.W.2d 581 (Sup. Ct. Iowa 1987); People v. Correa, 485 N.E.2d 307 (Sup. Ct. Ill. 1985).

The few older cases in which courts have reached a contrary conclusion [*see e.g.*, United States v. Parrino, 212 F.2d 919 (2d Cir. 1954); United States v. Sambro, 454 F2d. 918 (D.C. Cir. 1971)] have been aptly criticized as "aberrations" [Strader v. Garrison, 611 F.2d 61, 64 (4th Cir. 1979)], and have effectively been overruled.

This well-recognized distinction between an attorney's failure to warn a client about the possibility of deportation and affirmative misrepresentations on the subject is easily understood. Since Congress enacted IIRIRA and AEDPA in 1996, "criminal defense attorneys have become increasingly . . .aware of their need to stay abreast of immigration law." People v. Sandoval, 73 Cal. App.4th 404; 86 Cal.Rptr.2d 431 (Ct. App. Ca. 1999). Given the elimination of most discretionary deportation relief mechanisms in the immigration code, there is now universal agreement in the defense bar that counsel should strive to provide accurate information to non-citizen clients about the deportation consequences of convictions arising from guilty pleas. *See* ABA Standards for Criminal Justice, Pleas of Guilty, 14-3.2 (commentary); NLADA Performance Guidelines for Criminal Defense Representation, 6.2 (a) (3), 6.(3) (a); Vargas, Representing Noncitizen Criminal Defendants in New York State (NYSDA 1998, 2001)[2], *see also* Darby & Darby, P.C. v. VSI Int'l, Inc., 95 N.Y.2d 308, 314 (2000) ("attorneys should familiarize themselves with current legal developments so that they can make informed

[2]Numerous criminal law practice guides and treatises stress the importance of a defense lawyer's careful counseling of a non-citizen client on the subject of deportation. *See e.g.*, Gray ed., New York Criminal Practice at 273 (NYSBA 1998); Muldoon & Feuerstein, Handling a Criminal Case in New York § 21:232 (Thomson/West 2002); Amsterdam, Trial Manual for the Defense of Criminal Cases (Vol. 1) § 205 (ALI 1988); Bender, Criminal Defense Techniques §§ 60A.01, 60A.02 (2) (1999); Connell & Valladares, Cultural Issues in Criminal Defense § 11 (Juris. Pub. 2001).

judgments and effectively counsel their clients"). Indeed, these drastic changes in the immigration code have led one court to openly question whether standards of representation may have now "evolved to the point that a [defense lawyer's] failure to inform a defendant of the deportation consequences of a plea would by itself now be objectively unreasonable." United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002).

But even though a defense lawyer who today overlooks the subject of deportation in plea discussions with a non-citizen client fails to live up to professional expectations, it is obviously far worse to give false assurance to a client than to offer no counsel at all. When a defense attorney commits an error of omission and fails to warn a non-citizen client about deportation, there is clearly less cause for concern about the voluntariness of the guilty plea. The defendant may, in fact, be aware of deportation consequences of the criminal proceedings through other sources of legal information, such as the advice of an immigration lawyer. At the very least, a defendant whose attorney has neglected to offer advice about deportation will normally take heed of the court's CPL § 220.50 (7) warning immediately prior to entry of the plea. And, in some situations, a client's failure to raise the subject in attorney-client conferences may be a reflection of the defendant's genuine lack of concern about the prospect of deportation.

Obviously, none of this holds true when a non-citizen client expressly asks about deportation during plea discussions and is given false assurances by defense counsel. A client is entitled to rely on the legal advice of a trained member of the bar, who is ethically bound to act competently in legal matters, or to associate with counsel who is competent in the subject area. *See* Code of Professional Responsibility, Canon DR 6-101; Cicorelli v. Capobianco, 59 N.Y.2d 626 (1983), *affirming on the decision below* 90 A.D.2d 524 (2d Dept. 1982) (even highly sophisticated clients are entitled to rely on the superior knowledge of counsel with respect to

legal matters). "One who relies on the advice of a legally trained representative when answering criminal charges is entitled to assume that the attorney will provide sufficiently accurate advice to enable the defendant to fully understand and assess the serious legal proceedings in which he is involved." People v. Pozo, 746 P.2d 523, 526 (Sup. Ct. Co. 1987). Under prevailing professional norms, a reasonably competent criminal defense lawyer would not have answered McDonald's serious question without being sure of the answer, without taking time to adequately research the law, or without consulting a knowledgeable colleague. Certainly, a reasonably effective criminal defense lawyer would not have relied – as Kheel apparently did to some extent – on the *prosecutor's* legal opinion of the matter. Indeed, according to the District Attorney, he cautioned Kheel to contact the I.N.S. for guidance, a simple and practical idea that Kheel regrettably did not take up until *after* his client had been served with a notice of deportation.

Even before enactment of IIRIRA and AEDPA, conscientious criminal defense lawyers had been mindful of the immigration consequences of criminal convictions, and had sought to carefully advise clients on the subject during plea discussions. *See* I.N.S. v. St. Cyr, 533 U.S. 289, 323 fn.50 (2001) ("Even if defendant were not initially aware of [discretionary relief section of immigration code] *competent* defense counsel [prior to 1996], following the advice of numerous practice guides, would have advised him concerning the provision's importance.") The dramatic changes wrought by these harsh 1996 amendments were covered extensively in the legal and popular press. [3] The IIRIRA and AEDPA quickly became the topic of continuing legal

[3] *See e.g., Deported / The No. 1 Priority for State, INS: Criminal Aliens*, Newsday, May 11, 1997 at p. A-5; *Immigration Law Upheaval: Lawyers must adjust to changes fostered by two new federal laws that come down hard on aliens,* ABA Journal (Oct. 1997); *Pall Over Immigrants' American Dream: Many Are Alarmed by New Law's Tougher Requirements for Remaining in U.S*, Washington Post, March 27, 1997 at p. A-1; *Woman Jailed for Shoplifting Faces Exile to Strange Land*, Associated Press, December 14, 1999; *As More are Deported, a '96 law Faces Scrutiny*, New York Times, December 21, 1999, at p. A-1. Most notably, former New York Times columnist, Anthony Lewis, chronicled the harsh and unjust treatment accorded many long-term resident aliens under the 1996 amendments in dozens of commentaries published between 1996 and 2001. *See e.g., Forgive No Trespasses*, New York Times, March 31, 1997 at p. A-15.

education programs that further heightened the criminal defense bar's sense of responsibility to its non-citizen clients.[4] Unfortunately, Bruce McDonald's assigned attorney did not keep abreast of these developments in federal law.

In a fast-paced law practice, even major oversights in continuing legal education are sometimes difficult to avoid, and Kheel's failure to stay informed of important developments in immigration law, if not entirely excusable, is at least understandable. However, when he affirmatively misrepresented the law on a matter of such grave importance, he crossed a line and committed an unpardonable breach of a lawyer's duty to a client. Guessing about the law might be a reasonable strategy when a law graduate is sitting for the bar examination; but it has no legitimate place in the real world interactions between lawyers and clients. A reasonably competent criminal defense lawyer would not have committed Kheel's mistake. *See e.g.*, Hart v. Carro, Spanbock, Kaster & Cuiffo, 211 A.D.2d 617 (2d Dept. 1995) (Law firm failed to exercise skills of an ordinary member of legal community when it improperly structured purchase agreement with collateral that was unenforceable under law of Bahamas – "When . . .counsel is retained in a matter involving foreign law, it is counsel's responsibility to conduct the matter properly and to know, or learn, the law of the foreign jurisdiction."); In re Pollack, 142 A.D.2d 386 (1st Dept. 1989) (In attorney disciplinary proceeding involving mishandling of estate funds

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[4]Partly in response to the 1996 immigration law changes, the New York State Defenders Association initiated its Criminal Defense Immigration Project in September, 1997. In 1998, NYSDA published a comprehensive manual on the interplay between criminal law and immigration law: Representing Non-Citizen Criminal Defendants in New York State (NYSDA 1998, 2001). Authored by Project Director, Manuel Vargas, the manual is specifically designed for New York criminal defense lawyers, and was distributed to every public defense office and assigned counsel program in the state. In addition, since 1997, the Project has conducted scores of CLE training programs about the immigration consequences of criminal convictions, and has offered a popular telephone consultation hotline for criminal defense lawyers to discuss the ramifications of specific plea offers with an immigration lawyer. NYSDA's immigration hotline is free of charge and has responded to over 1700 calls since September, 1997.

attorney's inexperience in estate matters was not a mitigating factor where counsel made no effort to educate himself or to consult with knowledgeable counsel).[5]

v. The collateral consequences doctrine does not define the scope of a defense lawyer's duty to a client in the context of plea discussions.

The status of deportation as a "collateral consequence" of a criminal conviction has no bearing on whether a defense lawyer's affirmative misrepresentations on the subject may give rise to a constitutional violation. The collateral consequences doctrine defines the scope of a trial court's duty when accepting a guilty plea, insofar as the court is required to advise a defendant of the direct -- as opposed to collateral -- consequences of the conviction. *See e.g.*, People v. Goss, 286 A.D.2d 180 (3d Dept. 2001). As this Court recognized in People v. Ford, 86 N.Y.2d at 405, the collateral consequences doctrine does not purport to define the breadth and scope of a defense lawyer's obligations to a client in the context of private plea discussions. *See also* Williams v. State, 641 N.E.2d at 49 ("attorney's duties to a client are [not] limited by a bright line between the direct consequences of a guilty plea and those consequences considered collateral"). A defense lawyer "clearly has far greater duties toward the defendant than has the court taking a plea." Therefore, it is "illogical and counterproductive to tie defense counsel's Sixth Amendment duties to the constitutional minima the due process clause requires of courts" in the matter of

[5]This case is not about whether criminal defense attorneys must, upon specific inquiry, research and offer accurate advice to non-citizen clients about the immigration consequences of a proposed guilty plea. In his or her professional capacity, a criminal defense lawyer should strive to provide accurate answers to a non-citizen client's questions about the possibility of deportation, just as a conscientious attorney in any other specialized field of law would seek to address a client's relevant legal concerns that arise outside the attorney's immediate area of expertise. The narrow issue here is not whether a reasonably competent criminal defense lawyer must answer such questions; it is whether one would have refrained from informing a non-citizen client that he faced no risk of deportation when the opposite was true. If a criminal defense lawyer believes he is not capable of researching immigration law, or consulting with a lawyer with expertise in the area, then, recognizing the limits of his own knowledge and the client's need for accurate information, he can always advise the client to consult with an immigration lawyer. Here, for example, if Kheel had done nothing more than admit his lack of knowledge, McDonald could have sought advice from another lawyer, or, as a last resort, researched the law himself. In either case, because the immigration law pertaining to his situation was distressingly straightforward, McDonald would have quickly learned the truth about his legal predicament.

acceptance of guilty pleas. In re Resendiz, 19 P.3d at 1182-1183; *see also* Mott v. State, 407 N.W.2d at 583 ("if a defendant has been affirmatively misled by an attorney concerning the consequences of a plea, the plea may be held to be invalid, even though the consequences are characterized as collateral"); People v. Correa, 485 N.E.2d 307; State v. Garcia, 727 A.2d at 99-100; United States v. Russell, 686 F.2d 35, 41 (D.C. Cir. 1982); Strader v. Garrison, 611 F.2d at 63-64.

vi. Deportation is a uniquely severe consequence of a criminal conviction.

Finally, while an attorney's misrepresentations about less serious collateral consequences would not likely involve errors of constitutional dimension, deportation has long been recognized as a uniquely devastating repercussion of a criminal conviction. For most persons, "deportation is far more significant than . . . other [collateral] consequences, such as losing one's driver's license or losing the right to vote." In re Resendiz, 19 P.3d at 1182**.** "Perhaps nowhere outside of the criminal law are the consequences for the individual so serious." Id. [citing Wallace v. Reno, 24 F.Supp.2d 104, 112 (D. Mass. 1998)]. The United States Supreme Court recently noted "[t]here can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." I.N.S. v. St. Cyr, 533 U.S. at 322. For some non-citizens, preserving "the right to remain in the United States may be more important . . . than any potential jail sentence." 3 Bender, Criminal Defense Techniques, § 60A.01, 60A.02(2). As Justice Brandeis observed many years ago, deportation "may result in the loss of all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). For a criminal defendant like Bruce McDonald, who essentially knows no other way of life than the one he has lived since childhood in the United States, this is surely no exaggeration. For him and others like him, "[d]eportation to a country

where a legal permanent resident of the United States has not lived since childhood; or where the immigrant has no family or means of support; or where he or she would be permanently separated from a spouse, children and other loved ones, is surely a consequence of serious proportions that any immigrant would want to consider in entering a plea." Mojica v. Reno, 970 F. Supp. 130, 149 (S.D.N.Y. 1997).

Because Kheel's affirmative misrepresentation concededly fell below an objective standard of reasonableness, Appellant's CPL § 440.10 motion alleged a legal basis for relief on the ground of ineffective assistance of counsel. And, as both the motion court and the Appellate Division evaluated the prejudice prong of this constitutional claim under the wrong standard of review, McDonald should now be granted an opportunity to prove his contention at an evidentiary hearing.

Part B

Neither the People nor the motion court identified a legitimate factual deficiency in McDonald's motion papers concerning the prejudice component of his constitutional claim.

i. The governing federal prejudice standard of Hill v. Lockhart, 474 U.S. 52 (1985)

In Hill v. Lockhart, 474 U.S. 52 (1985), the Supreme Court held that in order to satisfy the Strickland[6] prejudice requirement for ineffective assistance of counsel claims raised in the context of a guilty plea the "defendant must show 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" (at 59). The Court observed that in "*many*" such cases the prejudice inquiry "will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through trial." For example, the Court noted that where counsel's alleged error is a

[6] Strickland v. Washington, 466 U.S. 668 (1984)

failure to investigate or discover exculpatory evidence, "the determination of whether the error prejudiced the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a predication whether the evidence *likely would have changed the outcome of the trial*" (at 59) (emphasis added).

When read in context, the italicized language above does not mean that defendants are required to plead or prove the likelihood of a favorable trial outcome in order to show prejudice. The Court simply noted that, in the context of claims arising after guilty pleas, *many* allegations of ineffective assistance of counsel cannot fairly be understood without reference to the trial evidence. For example, a bare allegation that a defense attorney failed to interview a particular witness would be meaningless without some explanation in the motion papers of how that witness's testimony would have been helpful and thus supported the defendant's claim that he would not have pleaded guilty but for counsel's error. As the Supreme Court implicitly made clear, however, this is not true of *every* claim of ineffective assistance of counsel raised in the context of a guilty plea. Notably, it does not pertain to ineffective assistance of counsel claims that are unrelated to the weight or quality of the trial evidence, such as allegations that counsel misrepresented the sentencing parameters of a conviction after trial, as opposed to those under the terms of a plea bargain. *See e.g.*, Miller v. Straub, 299 F.3d 570 (6th Cir. 2002) (Ineffective assistance of counsel found where defense counsel failed to inform guilty-pleading client that prosecutor could appeal from trial court's decision to sentence him as a juvenile and State's appeal thereafter resulted in adult life sentence).

Here, because Kheel's error – his misrepresentation concerning deportation – was unrelated to the trial evidence, a showing of prejudice did not hinge on allegations concerning

the relative strengths or weaknesses of the proof at trial. McDonald's simple claim was that he would not have pleaded guilty had Kheel not so disastrously misinformed him about the truth of his predicament: that a guilty plea meant more than a 1- 3 year prison sentence, it also meant permanent exile from his adopted home and country. The federal standard under Hill v. Lockhart requires McDonald to demonstrate a reasonable probability that he would not have pleaded guilty if Kheel had not misinformed him in this manner, nothing more and nothing less.[7]

ii The Appellate Division applied a discredited and erroneous interpretation of Hill v. Lockhart's prejudice standard.

However, the Appellate Division held McDonald to a far more onerous pleading requirement. Relying on Braun v. Ward, 190 F.3d 1181, 1188 (10th Cir. 1999) and another, unreported Tenth Circuit decision, Beavers v. Saffle, 2002 U.S. App. Lexis 9321 (10th Cir. May 16, 2002), the Appellate Division held that McDonald's motion papers failed to satisfy an additional prejudice requirement involving his prospects of "avoid[ing] conviction" or "prevail[ing] on specific defenses" at trial:

> In the end, based on our examination of the record, we find that defendant has not demonstrated that he was prejudiced by counsel's misadvice, i.e., that it was reasonably probable that he would have foregone the plea deal and instead insisted on going to trial had he been correctly advised regarding the deportation consequences of the proposed guilty plea*, or that, had he rejected the plea bargain, the outcome of the proceeding likely would have changed . . .*" (A.8) (emphasis added).[8]

[7] In People v. Ford, 86 N.Y.2d at 404, this Court articulated a corresponding standard for ineffective assistance of counsel claims under the New York State Constitution: "In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel." Because the Appellate Division clearly misapplied the federal prejudice standard, there is no need for this Court to decide whether the New York Constitution would require a different result here.

[8] The Court's application of this erroneous standard is apparent throughout its prejudice analysis. For example, the Appellate Division faulted Kheel's affidavit because it did not "demonstrate that defendant had a colorable claim of innocence," which the Court characterized as a "basic allegation so as to entitle him to a hearing" (A.8). Moreover, although no hearing was conducted, the Court considered the "probable outcome of any trial in this matter" and concluded, "there is no indication how defendant might have been able to avoid conviction or prevail on specific defenses" (A.8 – 9). Such an analysis of McDonald's chances of acquittal could only be relevant at the pleading stage of this CPL Article 440 proceeding under the Appellate Division's flawed construction of Hill v. Lockhart's prejudice standard.

But as the Tenth Circuit itself recognized when it later disavowed the standard announced in Braun v. Ward, this two-prong prejudice standard is inconsistent with Hill v. Lockhart. *See* Miller v. Champion, 262 F.3d 1066, 1073-1074 (10th Cir. 2001) (Two-part prejudice standard announced in Braun v. Ward disavowed as it "does not reflect the law as established by the Supreme Court or as applied in the Tenth Circuit in the cases that preceded Braun"); *see also*, Beavers v. Saffle, 2002 U.S. App. Lexis 9321 (on petition for rehearing - judgment revised "to comply with this Court's decision in Miller v. Champion"); State v. Berkow, 573 N.W.2d 91 (Ct. App. Minn. 1997) (Lower court applied wrong prejudice standard when it found defendant "failed to demonstrate by a preponderance of evidence that, but for the alleged errors of his counsel, the result of a trial would have been different" - correct subject of inquiry is not the result of a trial, but whether a trial would have occurred); People v. Sandoval, 73 Cal. App.4th 404, 418; 86 Cal.Rptr.2d 431, 441-442 (Under Hill v. Lockhart "whether a different outcome would result if the matter proceeded to trial is not determinative on the issue of prejudice suffered during the plea process"); Brazeail v. State, 821 So.2d 364, 369 (Ct. App. Fl. 2002) (it is "not necessary for the defendant to show that he actually would have prevailed at trial").

This is not to say that the nature and quality of the evidence that could have been mounted against a defendant is irrelevant to the ultimate resolution of an ineffective assistance of counsel claim raised in the context of a guilty plea. The relative strengths or weaknesses of the prosecution's case can provide circumstantial evidence bearing on the *credibility* of a defendant's claim that he would not have pleaded guilty but for counsel's error. *See* Miller v. Champion, 262 F.3d 1066, 1074 (In evaluating ineffective assistance of counsel claims in context of guilty plea "strength of the case that could have been mounted against one pleading guilty . . . is relevant only because it offers circumstantial evidence of what the petitioner would

have done had his counsel not proved to be ineffective"). Here, for example, if a hearing had been ordered, the prosecution could have sought to persuade the court that, given the strength of its case, McDonald would likely have pleaded guilty anyway, even if he had known about mandatory deportation. *See* In re Resindez, 19 P.3d 1171 (Ct App. Ca. 2001) (Where petitioner alleged misrepresentation by counsel about deportation consequences of guilty plea, court ultimately rejected claim based on evidence presented at a hearing). Likewise, McDonald could have pointed to evidentiary weaknesses and defenses, or a host of other considerations, both case-related and personal, as corroborative of his claim that he would have insisted on a trial.[9] But these *evidentiary* matters are relevant only to the ultimate issue of whether McDonald will, in the end, prevail on his claim, not to the threshold question of whether his motion papers were sufficient to warrant a hearing.

iii. As neither the People nor the motion court identified any factual deficiencies in Kheel's affirmation relating to the proper federal prejudice standard, the Appellate Division should not have reviewed the People's belated claim, raised for the first time on appeal, concerning the factual sufficiency of McDonald's pleadings.

While the Appellate Division also held McDonald's motion papers failed to satisfy the correct Hill v. Lockhart standard – that he would not have pleaded guilty absent counsel's error – this issue was not properly before the Appellate Division because it was not the basis of the County Court's summary denial of the CPL § 440.10 motion. The County Court denied the motion "for the reasons set forth in the People's response" (163), which, in this context, were limited to the mistaken claim that McDonald was required to allege a colorable claim of

[9]For example, the circumstances surrounding the marijuana charges against McDonald would appear to support a strong agency defense, as the People's own account of the transactions reveals that McDonald had an established relationship with the buyer, did not exhibit salesman-like behavior, and did not personally profit from the transactions [People's Voluntary Disclosure (9-10)]. *See* People v. Lam Lek Chong, 45 N.Y.2d 64 (1978). With respect to the drugs discovered in the apartment, McDonald always claimed, as late as the day he pleaded guilty, that they belonged to his nephew (136-137).

innocence. In his memorandum in opposition to the motion, the District Attorney argued only that "*Neither defendant nor his attorney has made any allegation that defendant was innocent of the crime or that, given a trial, the outcome will by any different from the conviction resulting from the guilty plea*" (A.161). Therefore, the Appellate Division should not have considered the People's belated argument, which was raised for the first time on appeal, regarding the sufficiency of the pleadings under the appropriate Hill v. Lockhart prejudice standard. The Appellate Division had no basis to *affirm* on this ground because the County Court had not exercised its discretion and denied McDonald a hearing for this reason. Even when motion papers are factually insufficient, CPL § 440.30 (4) does not *require* the court to deny a hearing. As this Court stated in People v. Mendoza, 82 N.Y.2d 415, 430 (1993):

> If neither the People nor the motion court identify a pleading deficiency, an appellate court should generally avoid using such a deficiency as a basis for denying the motion. The People can and often do waive pleading defects . . . and while such a waiver is not binding on the trial court, the Judge also might have, in the exercise of discretion, chosen not to invoke the defect in denying the motion. When an appellate court in the first instance identifies an inadequacy in defendant's submission, it deprives the movant of the opportunity to seek leave to cure the defect, often a simple matter.

See also People v. Bonilla, 82 N.Y.2d 825 (1993); People v. Romero; 91 N.Y.2d 750, 753-754 (1998).

According to the Appellate Division, the principal defect with defendant's motion was that Kheel had failed to *expressly* allege that "had [McDonald] been correctly advised, there is a reasonable probability that he would not have pleaded guilty and insisted on going to trial" (A.8). This would seem to be a hyper-technical objection, as a fair reading of Kheel's affirmation reveals that this was precisely the gravamen of McDonald's complaint. The motion was brought, after all, within several weeks of sentencing and McDonald specifically requested that his convictions be set aside. It stands to reason that McDonald would not have requested such relief

if he were not prepared to stand trial on the reinstated indictment, and the timing strongly corroborates his claim that he would not otherwise have pleaded guilty. But in any event, even if Kheel's failure to include such an express allegation was a "defect," it was a highly technical one that could easily have been cured. The same holds true for the Appellate Division's observation that Kheel did not include an affidavit from his client in support of the motion. CPL § 440.30 (1) does not require the defendant to submit an affidavit. The required sworn allegations of fact can be made by counsel based on information and belief, so long as counsel indicates the "sources of such information and the grounds for such belief." Here, Kheel complied with the statute when he noted his sworn allegations were derived from "conversations with my client" (147). And, in any event, Kheel could have easily submitted an affidavit from McDonald if any objection had been raised in the motion court.

While not characterizing these factors as "basic allegations" that were indispensable to the sufficiency of the motion, the Appellate Division also observed that Kheel's affirmation failed to address "other factors often considered in a decision whether to accept a plea offer." The court mentioned "the strength of the People's proof, the availability of defenses, the likelihood of conviction if defendant insisted on going to trial, counsel's advice on the plea offer" and the comparatively favorable negotiated sentence of 1 – 3 years as compared to McDonald's maximum possible sentence exposure if convicted after trial (A.8 – 9). All of these factors, and more, are potentially relevant to the adjudication of McDonald's constitutional claim. But no rule of law demands that every conceivable evidentiary issue that might arise in support or opposition to a claim be addressed in the motion papers. That is what hearings are for. CPL § 440.30 (4)(b) authorizes summary denial only when the "moving papers do not contain sworn allegations substantiating or tending to substantiate all of the <u>essential</u> <u>facts</u>" (emphasis

added). Therefore, to the extent the Appellate Division might have held that McDonald's pleadings were factually insufficient for failing to address these evidentiary matters, the court was wrong. And, in any event, if there was a defect here, it was easily curable, and should not have been considered by the Appellate Division for the first time on appeal.

iv. In any event, McDonald's motion papers were factually sufficient.

Finally, assuming, arguendo, that the Appellate Division properly considered these alleged factual defects for the first time on appeal, the court reached the wrong conclusion. Defense counsel's affidavit included sufficient allegations to require a hearing on McDonald's claim that he would not have pleaded guilty had counsel not mislead him about deportation. Counsel's affidavit highlighted McDonald's long residence and strong family ties in the United States, that deportation was his ongoing concern as he considered the plea offer (a fact corroborated by the District Attorney's own affirmation), that McDonald had "maintained his innocence" of the charges, and had testified before the grand jury in the case. Moreover, Kheel's allegation that his error had been "highly detrimental" (150) to McDonald was just another way of asserting that his client would have gone to trial if he had known about mandatory deportation. If McDonald would have pleaded guilty anyway, Kheel's error would not have been "detrimental" in any sense of the word. As noted, McDonald's claim that he would have declined to plead guilty was implicit in the filing itself, which was made within several weeks of sentencing and expressly requested that the convictions be set aside. *Compare*, Hill v. Lockhart, 452 U.S. 52, 55 (Where counsel allegedly misadvised petitioner regarding parole eligibility date - relief requested by petitioner years after entry of guilty plea was a downward adjustment of sentence – not vacatur of conviction); People v. Angelakos, 70 N.Y.2d 670 (1987) (Unexplained one year delay in filing of post-judgment motion alleging ineffective assistance of counsel in

context of guilty plea reflected negatively on merits of claim); People v. Sandoval, 73 Cal. App.4th 404, 418; 86 Cal.Rptr.2d 431, 442 (Timing of motion relevant to evaluation of whether defendant would have insisted on trial but for counsel's ineffective advice regarding deportation consequences of conviction). Therefore, while Kheel's affirmation could certainly have been more detailed, it alleged sufficient core facts to warrant a hearing.

Conclusion

From the moment he first learned the shocking news that his guilty pleas had condemned him to exile from the United States and permanent separation from his wife and children, Bruce McDonald has tirelessly pursued the true promise of the American ideal of equal justice under law: his day in court. Because his case concededly raises a viable constitutional claim, and there is no legitimate reason to deny him the opportunity to now prove that his guilty plea was involuntarily induced by his lawyer's ineffective performance, this Court should now remit the matter to the Tompkins County Court for an evidentiary hearing on his post-judgment motion.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE ORDER OF THE APPELLATE DIVISION SHOULD BE REVERSED AND THE MATTER REMITTED TO THE TOMPKINS COUNTY COURT FOR A HEARING ON APPELLANT'S CPL § 440.10 MOTION.

Respectfully submitted

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Dated: March 7, 2003