

**SUPREME COURT OF LOUISIANA**

**No. 2000-KP-2739**

**STATE OF LOUISIANA**

**VERSUS**

**ARNOLDO MONTALBAN**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL  
FIFTH CIRCUIT, PARISH OF JEFFERSON**

**CALOGERO, Chief Justice dissents and assigns reasons.**

While I agree with the majority that deportation is a collateral consequence of defendant's pleading guilty, I would remand this case to the district court to conduct an evidentiary hearing based on the effectiveness of the defendant's counsel. Under the Sixth Amendment to the United States Constitution, defendants are guaranteed the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55; 77 L.Ed. 2d 158 (1932). The United States Supreme Court recognized the right to the effective assistance of counsel in relation to the entering of a guilty plea in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). Similarly, this court stated in State v. Beatty, 391 So. 2d 828,831 (La.1980) "When a defendant enters a counseled plea of guilty, this court will review the quality of counsel's representation in deciding whether the plea should be set aside." We characterized the counsel's role at the guilty plea stage as "absolutely critical in assuring that the defendant is able to weigh his options intelligently." Id. Furthermore, several courts have held that an attorney has a duty to advise a client of the immigration consequences of a guilty plea. See Wallace v. Reno, 24 F.Supp. 2d 104, 110 (D. Mass 1998); Mojica v. Reno, 970 F.Supp. 130, 177 (E.D.N.Y. 1997); People v. Pozo, 746 P.2d 523, 529 (Colo. 1987);

Williams v. State, 641 N.E.2d 44, 48-49 (Ind. Ct. App. 1994).

The United States Supreme Court set out the standard for proving ineffective assistance of counsel in a two-prong test in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). According to Strickland, for a defendant to show that he received ineffective assistance of counsel, he must show 1) “counsel’s representation fell below an objective standard of reasonableness” and 2) “there is a reasonable probability that, but for counsel’s unprofessional error, the result of the proceeding would have been different.” Strickland, 466 U.S. at 687-88, 694. The United States Supreme Court applied this standard in the context of a guilty plea in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). In addition to proving unreasonable performance, the defendant must also 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.” Id. at 59. This court adopted the Strickland and Hill tests in State v. Washington, 491 So. 2d 1337, 1338-39 (La. 1986).

In analyzing the first prong of the Strickland test, whether defendant’s attorney’s representation fell below the standard of reasonableness, it is important to note that this court has emphasized the importance of a defendant’s knowing the maximum penalty that may result from his pleading guilty. In State ex rel. LaFleur v. Donnelly, 416 So. 2d 82, (La. 1982), this court recognized that, while it is important to explain to the accused the elements of the offenses of which he is charged, as well as the rights he will waive by pleading guilty, it is probably more important to the defendant’s decision to plead guilty that he understand the maximum penalty exposure. Id. at 84. In LaFleur, defendant’s attorney erroneously informed him that if he pled guilty and accepted a six year plea bargain, he would be eligible for parole after two years. This court found that defendant was justified in believing that he would be eligible for parole

in two years and that he pleaded guilty based in part on that misconception. As a result, while defendant's guilty plea was voluntary, it was not knowingly and intelligently entered. Id.

Furthermore, in State ex rel. Curry v. Guillory, 441 So. 2d 204 (La. 1983), this court remanded a defendant's case to the district court, allowing him to withdraw his guilty plea because his attorney advised him to enter the plea under the mistaken impression that defendant would serve a maximum of two-years. In reality, the plea would also have automatically caused revocation of his parole on a prior conviction, and caused the need to serve an additional eight years in prison.

The reasonableness of an attorney's representation is a question of fact to be determined on a case-by-case basis. In analyzing the reasonableness of the representation, a court should consider whether defendant's counsel knew or should have known that deportation was a serious concern of the client's, and should also consider the attorney's treatment of that concern when advising his client, including whether the attorney failed to provide his client with information or, on the other hand, provided his client with incorrect information. However, because the reasonableness of defendant's attorney's representation is a fact-intensive question, and this defendant has not had the opportunity to present evidence relating to this issue,<sup>1</sup> I would remand this case to the district court to conduct an evidentiary hearing and to determine whether defendant's attorney's representation fell below a standard of reasonableness.

Furthermore, according to the second prong of the Strickland and Hill tests, a finding that defendant's attorney's representation fell below the standard of

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<sup>1</sup>The trial court conducted a hearing on defendant's motion to vacate the guilty plea. However, no evidence was presented, and defendant was not present at the hearing because he was being held by the Immigration and Naturalization Service in Oakdale, Louisiana.

reasonableness does not render the attorney's performance constitutionally ineffective absent a finding of prejudice to the defendant. Based on this, in order to prove ineffective assistance of counsel, along with proving the unreasonableness of his attorney's representation, defendant also must prove that, had his attorney advised him of the possible deportation proceedings, he would not have pleaded guilty and would have insisted on going to trial.

Criminal defendants must consider multiple possible consequences before deciding whether to plead guilty or proceed to trial. Although the significance of the possibility of deportation may be different in every case, deportation may well be more severe than a prison sentence, or a suspended prison sentence as in this case, and may result in separation from family or in the "loss of property or life; or of all that makes life worthwhile." Williams v. State, 641 N.E.2d 44, 49 (Ind. App. 5 Dist. 1994); See also Ng Fung Ho v. White, 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938 (1922).

In this case, defendant pled guilty to the crime with which he was charged, not to a lesser offense, and he received a bargained for suspended sentence of three years, with probation. The deportation consequence of his guilty plea may well, to him, have been more severe than the risk of a sentence of up to fifteen years, his maximum exposure.<sup>2</sup> Therefore, it is very possible that in this case, defendant may not have pleaded guilty had he known of the possibility of deportation. Accordingly, I would remand this case to the district court to also determine whether defendant would have pleaded guilty had his attorney advised him of the deportation that might follow his conviction.

For these reasons, I would vacate the judgment of the court of appeal and

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<sup>2</sup>Defendant, who was born in Costa Rica, moved to the United States at the age of three, and has resided in this country since that time.

remand this case to the district court to conduct an evidentiary hearing, and determine whether under Strickland and Hill, defendant's guilty plea should be vacated based upon ineffective assistance of counsel.