

**People v Alegria**

2013 NY Slip Op 30448(U)

March 1, 2013

Supreme Court, Kings County

Docket Number: 534/76

Judge: Wayne M. Ozzi

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM PART 17

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

Indictment No. 534/76  
6265/86

-against-

**DECISION & ORDER**

HECTOR ALEGRIA A/K/A ALFONZO GUITERREZ,

Defendant.

-----X

**Ozzi, J.**

Charles Hynes, District Attorney, Kings County (Leonard Joblove, Diane Eisner, Ian Bronfeld, and Allison Ageyeva, Of Counsel)  
Labe Richman, Esq., for the Defendant

By motion dated September 20, 2011, Defendant Hector Alegria a/k/a Alfonso Guterrez, seeks to vacate his conviction in the above-captioned matter pursuant to CPL §440.10(h), arguing that his prior attorney failed to provide effective assistance of counsel during and prior to his guilty plea. Specifically, Defendant claims that his attorney failed raise a statute of limitations defense to the charge of Bail Jumping in the Second Degree and failed to advise him of the potential immigration consequences of his guilty plea. The People submitted an affirmation in opposition to Defendant’s motion dated November 28, 2011. The defendant filed a reply affirmation in support of his motion on December 13, 2011. In its decision dated January 25, 2012, this court held that issues of fact existed as to whether he received ineffective assistance of counsel due to his attorney’s failure to advise him of the immigration consequences of his guilty plea, as well as his attorney’s failure to raise a defense to the bail jumping charge. The court ordered an evidentiary hearing to resolve these factual issues.

### **Findings of Fact**

An evidentiary hearing was held on February 19, 2013. Defendant was the sole witness, testifying through a Spanish interpreter. During the hearing, the defendant testified that his legal name is Alfonzo Guitierrez and Hector Alegria is a pseudonym which he used on the date of his 1976 arrest. The defendant came to the United States from Columbia, admitting that he entered the United States illegally. On February 18, 1976, the defendant was arrested and charged with Criminal Possession of a Controlled Substance in the Fifth Degree. At his arraignment, bail was set at \$500. The defendant paid the bail and was released. He was to appear in court on April 8, 1976, but failed to do so. In fact, the defendant never returned to court to face the drug charges against him, stating that he was afraid he would have been deported. Due to his failure to return to court, a warrant was issued for the defendant's arrest.

In 1986, the defendant was located and returned on the warrant and charged with Bail Jumping in the Second Degree. He retained attorney Hector Martinez, Esq., who is now deceased, to represent him in the Bail Jumping matter. Mr. Martinez spoke Spanish and was able to communicate with the defendant. The defendant claimed that Mr. Martinez urged him to plead guilty as he could face a lengthy prison sentence if convicted at trial. Mr. Martinez did not advise the defendant of any immigration consequences that could arise from his guilty plea. Defendant subsequently pled guilty and was sentenced to five years probation pursuant to a plea agreement. He stated that he was satisfied with his attorney's representation at the time of his plea, but that he would not have pled guilty had his attorney advised him of the potential immigration consequences of a guilty plea.

As stated above, the defendant entered this country illegally from Columbia. He admitted

that, although he had been living in the United States for over thirty years, he had never met with a Customs Agent before applying for permanent residency in 2007. The defendant's application was denied on March 19, 2008. On January 25, 2010, a Notice to Appear was sent to the defendant from the Department of Homeland Security indicating that removal proceedings had commenced based on the defendant's illegal entry into the United States. The Notice to Appear did not make any reference to the defendant's criminal convictions.

### Analysis

When deciding whether to plead guilty to a charged offense, a criminal defendant is constitutionally entitled to effective assistance of "competent counsel." McMann v. Richardson, 297 U.S. 759, 771 (1970); see Strickland v. Washington, 466 U.S. 668, 686 (1984). In Strickland, the Supreme Court proffered a two-part test for analyzing claims of ineffective assistance of Counsel. Strickland, 466 U.S. at 687.

In the first prong of the Strickland test, the defendant must show that his attorney's representation was "deficient" and "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687-688. This is basically a "restatement of attorney competence." People v. McDonald, 1 N.Y.3d 109, 113 (2003). In making such a determination, the court should assess the attorney's performance against "prevailing professional norms." Strickland at 688. Under the second prong of the Strickland test, commonly referred to as the "prejudice prong," the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. More specifically, the defendant must show that there is a reasonable probability that but for the errors of his attorney, he would not have pled guilty; rather, he would have insisted on going to trial.

Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also People v. McDonald, 1 N.Y.3d 109, 114, 769 N.Y.S.2d 781, 802 N.E.2d 131 (2003). The New York State Constitution requires that a defendant receive “meaningful representation.” People v. Henry, 95 N.Y.2d 565 (2000); People v. Benevento, 91 N.Y.2d 708, 713 (1998).

Prior to the United States Supreme Court’s decision in Padilla v. Kentucky, 559 U.S. —, 130 S.Ct. 1473, 176 L.Ed2d 284 (2010), it was well-settled in New York that deportation was a collateral consequence “peculiar to the individual’s personal circumstances and not one within control of the court system.” People v. Ford, 86 N.Y.2d 397, 403, 633 N.Y.S.2d 270, 657 N.E.2d 265 (1995); see also People v. Gravino, 14 N.Y.3d 546, 902 N.Y.S.2d 8561, 928 N.E.2d 1048 (2010). However, in Padilla, the Supreme Court held that a criminal defense attorney’s failure to advise his or her client of the immigration consequences of a guilty plea constituted a violation of his or her client’s Sixth Amendment right to effective assistance of counsel. The defendant in Padilla was a lawful permanent resident of the United States who pled guilty to a drug offense. Mr. Padilla argued that his attorney advised him that the fact that he had lived lawfully in the United States for forty years would likely prevent any immigration consequences that could otherwise result from a guilty plea. However, Mr. Padilla’s drug conviction was in fact grounds for mandatory deportation.

In Padilla, the Supreme Court held that defense counsel’s misrepresentation concerning the immigration consequences of Defendant’s guilty plea fell below the objective standard of reasonableness enumerated by the first prong of Strickland. Padilla, supra at 1484. The Court further elaborated that when the deportation consequences of a guilty plea are “succinct, clear, and explicit,” a Defendant’s attorney must inform the client of those consequences. See Padilla at

1483; see also People v. Bennett, 28 Misc.3d 575 (Sixth Amendment requires a criminal defense attorney to advise noncitizen clients of risks of deportation stemming from a criminal conviction).

Since the Supreme Court issued its decision in Padilla, there has been much debate as to whether Padilla is to be applied retroactively. See People v. Ramirez, 2010 N.Y. Slip Op. 51661(U) (N.Y. City Crim. Ct. 2010) (the Supreme Court's holding in Padilla applies retroactively); People v. Paredes, 2010 N.Y. Slip Op. 51668(u) (Sup. Ct. N.Y. Co. 2010) ( Padilla governs guilty pleas entered into at the time of the defendant's plea of guilty); People v. Bennett, – Misc. 3d —. 2010 WL 2089266 (N.Y. City Crim. Ct. 2010)(Padilla may be applied retroactively); but see People v. Kabre, 2010 WL 2872930 (NY City Crim. Ct. 2010) (“effectiveness of [a defendant's] counsel will be judged as of the time of the representation”). However, the Supreme Court's recent holding in Chaidez v. United States, 568 U.S. \_\_\_ (February 20, 2013) resolves that question by concluding that Padilla will not be applied retroactively if a defendant's conviction is final. In this matter, the defendant's conviction became final in December 1986, upon the expiration of the time to file a Notice of Appeal. As such, the defendant's motion to vacate judgment on the grounds that his attorney, in 1986, failed to advise him of the potential immigration consequences of his guilty plea, is denied.

Turning to the second prong of Strickland, a defendant must (1) demonstrate a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different” (Strickland, supra at 1484) (emphasis added) and (2) must convince the court that Defendant's rejection of the plea agreement “would have been rational under the circumstances” (Padilla at 1486). Courts have held that when performing its prejudice inquiry, a court “should consider what immigration risks would be triggered by a conviction after trial as well. In this

respect, a more appropriately framed prejudice inquiry... would ask whether there is a reasonable probability that [D]efendant would not have pled guilty and would have insisted upon going to trial had [D]efendant been fully advised *not only* of the adverse immigration consequences of his guilty [plea], *but also the adverse immigration consequences of insisting upon going to trial.*" People v. Cristache, —N.Y.S. 2d —, 2010 WL 3547998, 2010 N.Y. Slip Op. 20370 (N.Y. City Crim. Ct. 2010) (Emphasis in original).

At the evidentiary hearing, the defendant testified that he would not have pled guilty and would have insisted on going to trial had he known that he would have faced deportation as a result of his plea. The People argue that Defendant has not adequately demonstrated that he suffered prejudice since he received the benefit of a favorable plea bargain. The Court of Appeals has held that counsel is not ineffective for failing to raise a statute of limitations defense as a part of the defendant's legal strategy. People v. Evans, 16 N.Y.3d 571 (2001). The People note that, if convicted of Criminal Possession of a Controlled Substance in the Fifth Degree after a trial, the defendant faced the possibility of up to seven years incarceration. By pleading guilty, the defendant was able to avoid jail time. Thus, Defendant received meaningful representation when his attorney worked on his behalf to limit his sentence to a term of five years probation.

The People further argue that Defendant's contention that he would not be subject to deportation proceedings had counsel apprised him of the potential immigration consequences of his guilty plea in the instant action is belied by the documentary evidence which demonstrates that the defendant is subject to deportation due to the fact that he entered this country illegally without reporting to immigration, and not due to this, or any other, criminal conviction. Indeed, the Notice to Appear for Removal Proceedings issued by the Department of Homeland Security

makes clear that deportation proceedings were commenced against the defendant due to his illegal entry into the United States and his failure to thereafter be “admitted or paroled after inspection by an Immigration Officer.” Nowhere in the Notice to Appear does it state that the defendant is being subject to deportation due to a criminal conviction.

Additionally, the Court does not find the defendant’s self-serving testimony to be credible. Notably, although the defendant’s legal name is Alfonso Gutierrez, when he was arrested in 1976 for the drug charges, he gave the police the pseudonym “Hector Alegria.” The defendant continued to use this pseudonym during court appearances, including the plea allocution in 1986, at which time the defendant was under oath. Further impacting the defendant’s credibility, the defendant’s DMV driver abstract reveals that the defendant, despite not having a driver’s license, not only continually operated a motor vehicle, but had multiple convictions for driving while intoxicated. These convictions belie the defendant’s contentions in his original motion that he has been a law abiding citizen since 1976, thus raising serious doubts about the defendant’s credibility.

For the foregoing reasons, the defendant’s motion is denied. This constitutes the decision and Order of the court.

Dated: March 1, 2013

  
HON. WAYNE M. OZZI, J.S.C.

**ENTERED**  
MAR -5 2013  
NANCY T. SUNSHINE  
COUNTY CLERK