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Cover Page Footnote

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**CRIMINAL COURT OF THE CITY OF NEW YORK
KINGS COUNTY**

People v. Artusa¹
(decided August 16, 2006)

Frank Artusa, a non-citizen resident of the United States, motioned to vacate his conviction of seventh degree criminal possession of a controlled substance, pursuant to Criminal Procedure Law section 440.10.² Since the misdemeanor in question was his second drug conviction and it was considered an “aggravated felony” by the Department of Homeland Security (“DHS”), it subjected Artusa to automatic deportation.³ Artusa’s motion to vacate alleged that his state and constitutional rights were violated because he suffered from ineffective assistance of counsel and was uninformed of the consequences of deportation as a result of his guilty plea.⁴ The issues before the court were whether the trial court and defense

¹ 2005KN003209, 2006 N.Y. Misc. LEXIS 2199, at *1 (Crim. Ct. Aug. 16, 2006).

² *Id.* N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2006) provides: “[a]t any time after the entry of judgment, the court in which it was entered may, upon motion of the defendant vacate such judgment upon the ground that . . . [t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or the United States.” N.Y. PENAL LAW § 220.03 (McKinney 2006) states: “[a] person is guilty of criminal possession of a controlled substance in the seventh degree when he knowingly and unlawfully possesses a controlled substance. Criminal possession of a controlled substance in the seventh degree is a class A misdemeanor.”

³ *Artusa*, 2006 N.Y. Misc. LEXIS 2199, at *5.

⁴ *Id.*, at *1. Artusa alleged that “he suffered from ineffective assistance of counsel, including allegations that his attorney failed to advise him of the immigration consequences of his plea.” *Id.* U.S. CONST. amend. VI states in pertinent part: “In all criminal prosecutions, the accused shall enjoy a right to . . . have the Assistance of Counsel for his defence.” N.Y. CONST. art. I § 6 states in pertinent part: “In any trial in any court wherever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her.”

counsel were under a duty to inform a non-citizen defendant of the consequence of deportation when entering a guilty plea and whether Artusa's constitutional rights were violated due to the failure to obtain effective assistance of counsel.⁵ The court first held that the trial judge was under no constitutional duty to advise Artusa of deportation consequences because deportation is not a direct consequence, but rather, a collateral consequence.⁶ The court then held that Artusa's allegations did not constitute ineffective assistance of counsel and that Artusa's counsel did in fact provide meaningful representation.⁷

Frank Artusa is a forty-six year old non-citizen of the United States who arrived in United States from Italy when he was three years old and is now a resident of New York.⁸ In the past decade, the Immigration and Naturalization Service ("INS") and its successor DHS have substantially increased their activity in the deportation of non-citizens.⁹ While in the past, courts had jurisdiction to issue recommendations against deportation, recent Congressional Acts repealed the ability for courts to make such recommendations.¹⁰ In

⁵ *Artusa*, 2006 N.Y. Misc. LEXIS 2199, at *1. Artusa also argued on this motion that he was not properly arraigned and that the trial judge failed to advise him of his rights in his plea allocation. *Id.* Although these issues also raise constitutional violations, they were all procedurally barred by the court because the defendants arraignment and allocation were inadequate on the face of the record and therefore could not be reviewed under the § 440.10 motion to vacate the judgment. *Id.*, at **13-14. *See also* *People v. Cooks*, 491 N.E.2d 676, 678 (N.Y. 1986) ("When sufficient facts appear on the record to permit the question to be reviewed, sufficiency of the plea allocation can be reviewed only by direct appeal.").

⁶ *Artusa*, 2006 N.Y. Misc. LEXIS 2199, at *8.

⁷ *Id.*, at *19.

⁸ *Id.*, at *2.

⁹ *Id.*, at *11.

¹⁰ *Id.*, at **11-12. The Immigration Reform and Immigrant Responsibility Act of 1996 repealed the provision which granted courts power to make Judicial Recommendations against deportation. 8 U.S.C. § 1182(c) (2000).

1996, the Immigration and Nationality Act was amended and provided that any illegal alien that was convicted of a crime relating to a controlled substance is deportable and any illegal alien convicted of an “aggravated felony” is subject to mandatory deportation.¹¹

Artusa was found to be in possession of a ziplock bag of crack cocaine while in his car on the night of January 16, 2005.¹² He was arraigned the next day and pled guilty to Criminal Possession of a Controlled Substance in the Seventh Degree.¹³ The guilty plea resulted in no jail time for Artusa, and he was released upon conditional discharge of completion of two days of community service.¹⁴ Artusa was previously convicted of the same crime in 2003.¹⁵ He was sentenced to a conditional discharge on the condition that he complete a drug treatment program, but when the court learned he was already in the program for a prior conviction, Artusa re-sentenced him to community service.¹⁶ Artusa’s second conviction of possession of a controlled substance was considered an “aggravated felony” under immigration law and he was therefore

¹¹ 8 U.S.C. § 1227(a)(2)(B)(i) states:

Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1228(b)(5) provides for the “[e]xpeditious removal of aliens convicted of committing aggravated felonies No alien described in this section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General’s discretion.”

¹² *Artusa*, 2006 N.Y. Misc. LEXIS 2199, at *4.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*, at *5.

¹⁶ *Id.*, at *4.

subject to mandatory deportation.¹⁷ Artusa asserted that he met with his attorney and told her that he was innocent, but upon conversations with counsel, she told him he could get out of jail if he pled guilty.¹⁸ He claimed that he was under the impression that, because of his record, if he did not plead guilty he would go to jail.¹⁹ In his affidavit, he stated that he was never told by counsel or the judge at allocution that his plea would be considered an “aggravated felony,” subjecting him to mandatory deportation.²⁰ Both the trial judge and the prosecution asserted that at the time Artusa entered his plea, they were unaware that he was not a citizen and was subject to deportation upon his plea of guilt.²¹ Because of his assertions, he believed that his state and federal constitutional rights to effective assistance of counsel were violated and thus, he sought to vacate his conviction.²²

In *Artusa*, the court first discussed the threshold issue of whether the court was under a duty to inform the defendant of the mandatory deportation consequences of his guilty plea.²³ The court followed New York precedent in holding that because immigration-related consequences are collateral rather than direct, the court is under no duty to inform the defendant of such consequences.²⁴ However, since the immigration law changes have made deportation

¹⁷ *Artusa*, N.Y. Misc. LEXIS 2199, at *5.

¹⁸ *Id.*, at *22.

¹⁹ *Id.*, at **22-23.

²⁰ *Id.*, at *22.

²¹ *Id.*, at *3.

²² *Artusa*, N.Y. Misc. LEXIS 2199, at *1.

²³ *Id.*, at *8.

²⁴ *Id.*, at *9; *see* *People v. Ford*, 657 N.E.2d 265, 268 (N.Y. 1995) (“Deportation is a collateral consequence of conviction because it is a result peculiar to the individual’s personal circumstance and one not within the control of the court system.”).

a mandatory and automatic consequence, Artusa urged that it be considered a direct consequence requiring disclosure before a plea is made.²⁵ Although the court was aware of the plight of Artusa and noted the concerns of collateral consequences in deportation, it remained bound to follow New York precedent, holding that immigration consequences are collateral consequences that require no disclosure.²⁶

The court then focused on the issue of whether Artusa's constitutional rights were violated by ineffective assistance of counsel. Artusa argued that counsel advised him to take the plea bargain, knowing that he told her in conference that he was innocent of the charges against him.²⁷ The court stated that counsel was not bound to advise Artusa against the plea bargain solely on the fact that he told her he was innocent.²⁸ The court looked at the totality of the circumstances to determine whether the constitutional protection of effective assistance was satisfied.²⁹ In addition, the court considered the strong presumption that a favorable plea, resulting in a substantially reduced sentence, satisfied the constitutional requirement of effective assistance of counsel.³⁰ Taking both into

²⁵ *Artusa*, 2006 N.Y. Misc. LEXIS 2199, at *9.

²⁶ *Id.*, at *12. *See also Ford*, 657 N.E.2d at 268 (holding that since deportation is a collateral consequence, "the trial court need not, before accepting the plea of guilty, advise a defendant of the possibility of deportation").

²⁷ *Artusa*, 2006 N.Y. Misc. LEXIS 2199, at **24-25.

²⁸ *Id.*, at *25.

²⁹ *Id.*, at **25-26. *See also People v. Boodhoo*, 593 N.Y.S.2d 882, 883 (App. Div. 2d Dep't 1993) ("The evidence, the law, and the circumstances of [the] case, when viewed in their totality as of the time of the representation, indicate that defense counsel provided meaningful representation.").

³⁰ *Artusa*, 2006 N.Y. Misc. LEXIS 2199, at **21-22 (citing *Boodhoo*, 593 N.Y.S.2d at 883).

account, the court held that counsel's advice to take the plea, knowing that Artusa professed his innocence, was not under the totality of the circumstances evidence of a failure to provide "meaningful representation."³¹

Finally, defendant argued that counsel was required to inform him of the adverse deportation consequences of his guilty plea, and the failure to do so violated his constitutional right to effective assistance of counsel.³² In accord with New York precedent, the court stated that the only determinative question of ineffective assistance of counsel is whether counsel provided poor advice or made misstatements relating to deportation, which was not at issue in the instant case.³³ The court held that under current law, the failure of counsel to warn of possible collateral consequences of his plea does not rise to the level of ineffective assistance of counsel.³⁴

In determining whether the defendant's constitutional rights have been violated, the court applied the standard of meaningful representation under the totality of the circumstances.³⁵ The court held that under the New York standard, "a reasonable probability that counsel's representation would have affected the result of the proceeding is considered a 'significant but not indispensable element in assessing meaningful representation.'"³⁶ Although Artusa was

³¹ *Id.*, at *27.

³² *Id.*, at *22.

³³ *Id.*, at *28; *see also Ford*, 657 N.E.2d at 269 (stating that some federal courts have held that misstatements and poor advice by counsel as to the consequences of deportation may be evidence of ineffective assistance of counsel).

³⁴ *Artusa*, 2006 N.Y. Misc. LEXIS 2199, at *28.

³⁵ *Id.*, at *25.

³⁶ *Id.*, at *21 (quoting *People v. Caban*, 833 N.E.2d 213, 222 (N.Y. 2005)).

certainly prejudiced by the result of the plea, the court nevertheless held that under the “meaningful representation” standard, the totality of the circumstances warrants the court to determine that counsel did effectuate effective assistance of counsel and therefore the defendant’s constitutional rights were not violated.

The Sixth Amendment acts as a safeguard to protect those accused of crimes in our adversarial system.³⁷ The right to effective assistance of counsel is of fundamental importance in assuring that the accused is provided a fair and just trial.³⁸ In *Strickland v. Washington*, defendant Washington pled guilty in his indictment to three charges of capital murder and was convicted and sentenced to death.³⁹ Washington sought collateral relief on the ground that his counsel provided ineffective assistance at trial in failing to make proper procedural decisions and failing to introduce adequate mitigating circumstances.⁴⁰ The *Strickland* Court implemented a two-part test to determine whether an accused’s constitutional right to effective assistance of counsel was met.⁴¹ Under this test the defendant must show 1) that the “counsel’s performance was deficient”; and 2) that the “deficient performance prejudiced the

³⁷ See *Strickland v. Washington*, 466 U.S. 668, 685 (1984). The Court stated that the Sixth Amendment envisions “counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.” *Id.*

³⁸ *Id.*

³⁹ *Id.* at 675.

⁴⁰ *Id.* The Defendant sought collateral relief for ineffective counsel on six grounds. *Id.* He asserted that counsel was ineffective because he failed to move for a continuance and prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a pre-sentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner’s reports or cross-examine medical experts. *Id.*

⁴¹ *Id.* at 687.

defense.”⁴²

In assessing the “performance component” the proper analysis is whether counsel’s assistance was “reasonable considering all the circumstances.”⁴³ The burden is on defendants to identify the acts and omissions of their counsel that resulted in their alleged ineffective assistance.⁴⁴ The Court held that the defendant did not satisfy the first prong because “[c]ounsel’s strategy choice was well within the range of professionally reasonable judgments and the decision not to seek more character or psychological evidence than already in hand was likewise reasonable.”⁴⁵

The analysis under the “prejudice component” is whether the deficiencies in counsel’s performance were so prejudicial to the defense that it more likely than not altered the case.⁴⁶ Even if the defendant shows that counsel’s performance was unreasonable, the conviction will not be overturned unless the defendant proves that the performance had an adverse effect on the outcome of the case.⁴⁷ The Court held that the second prong was not satisfied because there was no reasonable probability that anything that counsel could have admitted as to mitigating factors would outweigh the ample

⁴² *Strickland*, 466 U.S. at 687. The two-prong analysis under *Strickland* can be abbreviated to the “performance component” and the “prejudice component.” *Id.* at 699.

⁴³ *Id.* at 688.

⁴⁴ *Id.* at 690. Once identified, “[t]he court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance.” *Id.*

⁴⁵ *Id.* at 699.

⁴⁶ *Id.* at 692-93.

⁴⁷ *Strickland*, 446 U.S. at 691. This burden, however, may be very difficult for the defendant to sustain because there is a presumption that an attorney’s errors are harmless and not so prejudicial as to warrant a Sixth Amendment violation. *Id.* at 693.

aggravating factors that led to the sentence.⁴⁸

The New York Court of Appeals has held that the test for effective assistance of counsel is met “ ‘[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided *meaningful representation*, the constitutional requirement has been met.’ ”⁴⁹ In *People v. Ford*,⁵⁰ the New York Court of Appeals was faced with the same issue of whether defense counsel and trial court judges hold a duty to warn defendants of the possibility of deportation.⁵¹ The defendant in *Ford* was an illegal alien who pled guilty to manslaughter at the advice of his counsel and was thereafter subject to deportation based on his conviction of a crime of moral turpitude.⁵² He motioned to vacate the judgment on the basis that he received ineffective assistance of counsel because neither the trial judge nor his attorney informed him of his deportation consequences.⁵³

The court first considered whether the trial judge has a duty to inform the defendant of the deportation consequences of his guilty plea.⁵⁴ It found that deportation is a collateral consequence because the result of the conviction is peculiar to the individual and “generally result from the actions taken by agencies the court does

⁴⁸ *Id.* at 700.

⁴⁹ *Ford*, 657 N.E.2d at 268 (quoting *People v. Baldi*, 429 N.E.2d 400, 405 (N.Y. 1981)).

⁵⁰ *Ford*, 657 N.E.2d 265.

⁵¹ *Id.* at 267.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 267-68.

not control.”⁵⁵ The court held that because deportation is collateral, neither the trial court nor attorneys need inform a defendant of deportation consequences of his plea.⁵⁶

The court then discussed main constitutional issue of ineffective counsel. When analyzing a guilty plea, the court stated that the New York standard of “meaningful representation” is satisfied when “he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel.”⁵⁷ If ran consecutively, the defendant’s charge would have resulted in a thirty-year sentence.⁵⁸ The Court held that the defendant received “meaningful representation” in part because counsel effectuated a favorable plea for the defendant that minimized his sentence.⁵⁹ Some courts have held that failure to warn of deportation consequences is evidence of ineffective assistance of counsel under the circumstances of an affirmative misstatement concerning deportation.⁶⁰ Although he did not advise Ford of the possible deportation, the court held that

⁵⁵ *Ford*, 657 N.E.2d at 268. The court distinguished consequences that are “direct”, of which the defendant must be advised, and those that are “collateral,” which require no mention by the court. A direct consequence is one “which has a definite, immediate, and largely automatic effect on defendant’s punishment.” *Id.* at 267 (citations omitted). Whereas, a collateral consequence is one which is “peculiar to the individual and generally result from the actions taken by agencies that the court does not control.” *Id.* at 268.

⁵⁶ *Id.* at 268. *See also* *People v. DeJesus*, 819 N.Y.S.2d 442, 445 (N.Y. Crim. Ct. 2006) (holding that deportation is a collateral consequence with no constitutional protection to be advised of immigration consequences).

⁵⁷ *Ford*, 657 N.E.2d at 268 (citing *Boodhoo*, 593 N.Y.S.2d at 883).

⁵⁸ *Id.*

⁵⁹ *Id.* *See* *People v. Lewis*, 497 N.Y.S.2d 297, 297 (App. Div. 3d Dep’t. 1986) (holding that under a totality of the circumstances, a defendant charged with crimes that would potentially result in life imprisonment, whose counsel struck a plea limiting him to two concurrent sentences of three to four years, was provided with meaningful representation).

⁶⁰ *Ford*, 657 N.E.2d at 268-69. *See* *United States v. Campbell*, 778 F.2d 764, 768-69 (11th Cir. 1985) (holding that had the defendant alleged that counsel made an affirmative misrepresentation, the defendant may have had a claim of affirmative misrepresentation).

counsel provided “meaningful representation” because the defendant never alleged that counsel wrongly advised him of the deportation consequences of his guilty plea.⁶¹

Moreover, in adopting a “meaningful representation” standard, New York Court of Appeals in *People v. Benevento*⁶² provided a more flexible standard than the one utilized under the federal system.⁶³ In *Benevento*, the New York Court of Appeals rejected the defendant’s claims of ineffective assistance of counsel based on defendant’s assertion that counsel had no defense strategy.⁶⁴ The court found that counsel’s strategy to convince the jury that defendant lacked the requisite intent to rob the victim of her property was sufficient to constitute “meaningful representation” under the New York standard.⁶⁵ The court stated that “meaningful representation” is analyzed under the totality of the circumstances and refused to apply the prejudicial component of the *Strickland* standard.⁶⁶ Therefore, the court considered that whether defendant would have been acquitted but for the acts of counsel, is relevant under the “meaningful representation” test, but is not dispositive.⁶⁷

⁶¹ *Id.* at 269.

⁶² 697 N.E.2d 584 (N.Y. 1998).

⁶³ *Id.* at 587.

⁶⁴ *Id.* at 588-89.

⁶⁵ *Id.* at 588. The court applied the New York standard announced in *Baldi* and applied in *Ford*, holding that the constitutional requirement of effective assistance of counsel is met “so long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met.” *Id.* See also *Baldi*, 429 N.E.2d at 405.

⁶⁶ *Benevento*, 697 N.E.2d at 588. (“Under the State Constitution ‘prejudice’ is examined more generally in the context of whether defendant received meaningful representation.”).

⁶⁷ *Id.*

In conclusion, the landscape of this issue is still questionable. In light of the mandatory nature of deportation, many states have enacted statutes requiring the court to advise a defendant of deportation consequences upon conviction.⁶⁸ In contrast however, many federal courts hold that deportation consequences are of a collateral nature and require no notice to the non-citizen criminal.⁶⁹ The *Artusa* court made it very clear that it is sympathetic to the adverse consequences of its decision and the unjust nature of deporting an individual, who had been in the country for forty years, in relation to such a small offense.⁷⁰ The court noted the unjust and cruel nature of the immigration consequences of these criminal proceedings in comparison to the crimes committed in recent years.⁷¹ However unjust the result may be in the eyes of the court, it bound itself by *stare decisis* to follow the precedent laid out in *Baldi*, *Ford*, and *Benevento*.

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⁶⁸ See *Artusa*, 2006 N.Y. Misc. LEXIS 2199, at *11; D.C. CODE § 16-713(A) (2006); CAL. PENAL CODE § 1016.5 (Deering 2006); OHIO REV. CODE ANN. § 2943.031 (LexisNexis 2006).

⁶⁹ See *DeJesus*, 819 N.Y.S.2d at 445 (discussing the Federal appeals courts that remained holding deportation as a collateral consequence in consideration of the recent changes in immigration law). See also *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002) (holding that the “automatic nature of the deportation proceeding does not necessarily deportation a direct consequence”); *United States v. Amador-Leal*, 276 F.3d 511, 517 (9th Cir. 2002) (holding that deportation consequences continue to remain collateral and therefore, district courts are under no duty to warn non-citizens about the consequences of a plea); *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000) (holding that the deportation consequences of the defendant’s conviction are out of the control of the court and are thus, collateral consequences).

⁷⁰ *Artusa*, 2006 N.Y. Misc. LEXIS 2199, at *31.

⁷¹ *Id.* (citing *People v. Resendiz*, 19 P.3d 1171, 1189 (Cal. 2001)).