COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

LAWRENCE DISTRICT COURT
DOCKET NO. 1418CR6286

COMMONWEALTH,)
Plaintiff)
)
v.)
)
PATRICIA PIMENTEL,)
Defendant)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE GUILTY PLEA

FACTS AND PROCEDURAL HISTORY

The Defendant is a national of the Dominican Republic, born on February 27, 1994 to parents Annie Cordero and Policarpio Pimentel. Her mother, a long-suffering survivor of familial and spousal abuse, fled the Dominican Republic to the United States in 2000. Her father followed, entering the United States illegally in 2003. See Affidavit of Patricia Pimentel; Affidavit of Annie Cordero, attached.

In 2003, the Defendant's parents - themselves undocumented aliens - paid a "coyote[1]" to bring her to the United States at the age of nine. The same coyote facilitated the entrance of her brother, Hairol Pimentel, and sister, Seanny Pimentel, in 2003 and 2004

[1] "Coyote" is a term used to describe smugglers who facilitate the migration of people across the Mexican - United States border. See Lovelace, Ryan, "Coyotes" Lure Immigrants with Promises of Amnesty, National Review (July 2014) (available at http://nationalreview.com /article/383655/coyotes-lure-illegal-immigrants-promises-amnesty-ryan-lovelace).

(respectively). Id. The Defendant and her family have struggled to survive in the United States as undocumented aliens ever since. Id.

Like the countless immigrants that have flocked to this country since its birth, the Defendant's parents came to the United States to seek opportunities for betterment not available in the Dominican Republic. Education, in particular, was the Defendant's focus. And despite the hardships of being a child without legal status in a foreign land, the Defendant flourished. See Affidavit of Patricia Pimentel, attached.

Notwithstanding her lack of legal status, the Defendant grew up as any American child would. The Defendant's parents enrolled her in South Lawrence East Elementary School when they arrived. She then attended South Lawrence East Middle School, and eventually Lawrence High School. She graduated with honors in 2013. Id.

On June 15, 2012, the Secretary of Homeland Security announced a discretionary program called Deferred Action for Childhood Arrivals (hereafter "Deferred Action" or "DACA"). "Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time." See Department of Homeland

Security, Deferred Action for Childhood Arrivals (last updated Jan. 2016).[2]

This program, available only to aliens who met certain criteria[3], allowed for temporary relief from removal. Id. Successful applicants could also request and be granted work authorization, allowing formerly undocumented aliens to gain lawful employment. Id.

After leaving high school, the Defendant hoped to enroll in college and study criminal justice. See Affidavit of Patricia Pimentel. However, her undocumented status precluded her from obtaining student loans or financial aid. The Deferred Action program, therefore, presented a golden opportunity for the Defendant - she could finally obtain employment authorization, and therefore employment, which would enable her to save for college. Id.

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[2] Available at https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca.

[3] Deferred Action is available to aliens who "[1] were under the age of 31 as of June 15, 2012; [2] came to the United States before reaching [their] 16th birthday; [3] have continuously resided in the United States since June 15, 2007, up to the present time; [4] were physically present in the United States on June 15, 2012, and at the time of making [their] request for consideration of deferred action with USCIS; [5] had no lawful status on June 15, 2012; [6] are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and [7] have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety." Id.

On May 14, 2013, the Defendant submitted an application for Consideration of Deferred Action for Childhood Arrivals. Id. The Department of Homeland Security granted her application, and issued an employment authorization card and social security number. Id.

The Defendant promptly obtained employment in the packaging department at JMB Industries in Hudson, New Hampshire. Id. She plugged away towards her dreams of continuing her education. Id.

However, from then until the fall of 2014, the Defendant suffered a series of hardships and setbacks. An abusive former boyfriend resurfaced. The Defendant became pregnant, but lost the child due to an ectopic pregnancy[4]. See medical records, attached. Her grandmother, who cared for her when her parents left the Dominican Republic for the United States, passed away. Id.

The young Defendant struggled with these mounting hardships, seeking solace in the company of her friends Lucy Rodriguez and Deanna Guzman on the night of October 21, 2014. That night, the Defendant and her friends gathered at Ms. Guzman's house to watch movies. The

[4] "An ectopic pregnancy is a pregnancy that occurs outside the womb (uterus). It is life-threatening to the mother." See U.S. National Library of Medicine, Ectopic Pregnancy (last updated Feb. 2014) (available at https://www.nlm.nih.gov/medlineplus/ency/article/000895.htm).

Defendant, though under twenty-one, drank in the hope of momentarily chasing away the previous months' accruing sadness. Id.

Unaccustomed to alcohol, the Defendant, who had driven herself to Ms. Guzman's house, became ill and called a cab to take her home. Instead, however, Ms. Rodriguez volunteered to take the Defendant home, driving the Defendant's car. The Defendant agreed and Ms. Rodriguez canceled the cab. Id.

As she drove the Defendant's car, Ms. Rodriguez spoke on the phone with her husband. An argument ensued. Ms. Rodriguez drove to her own home, rather than dropping the Defendant off. When they arrived, Ms. Rodriguez pulled into her driveway, parked the Defendant's car, and entered her residence to continue arguing with her husband. Id.

The Defendant waited in her car. Within moments, she observed Angel Luis Mercedes, her abusive former boyfriend, sitting in a car outside Ms. Rodriguez's house. The Defendant became nervous - Mercedes had no known connection to Ms. Rodriguez or her husband, and she believed he followed her there. Her cell phone rang; the caller ID showed Mercedes' number. Her fear worsened. Id.

The Defendant answered, and the pair began to argue over the phone. Mercedes informed the Defendant that he

was going to "fuck [her] up." She watched as he exited his car and started walking towards her car. He reached the driver's side and began trying to open the car door. In a panic, the Defendant moved into the driver's side and started to drive away. Id.

As she drove hurriedly out of Ms. Rodriguez's drive way, she struck two parked vehicles. Mercedes followed in his car, quickly speeding past and overcoming the Defendant. They reached a stop sign on Oakland Street in Methuen, where Mercedes blocked her path. He again exited his car and approached the Defendant's. He gained entry to the Defendant's car and struck her in the face. Id.

Fortunately, the beckoning call of approaching sirens frightened Mercedes. He alighted from the scene, leaving the battered Defendant and her battered vehicle alone. The Defendant phoned Ms. Guzman for help. As she did so, the police arrived and placed her under arrest. Id.

At the Methuen police station, the Methuen Police Department presented the Defendant a waiver of rights form in Spanish. That form informed the Defendant that: (1) refusal would cause a 120 day license suspension, (2) there was no presumption of impairment for a blood alcohol content (BAC) of .10 or less, (3) there was a presumption of impairment for a BAC of .10 or more, (4) the jury would

be told that the police had a duty to offer the Defendant a breath test, and (5) the jury would be told the Defendant had a right to refuse the breath test. See Rights Form, attached; Translation of Rights Form and Affidavit of Alyssa Alonzo, attached.

The next day, this Honorable Court arraigned the Defendant on the instant complaint, charging operating under the influence and two counts of leaving the scene of an accident causing property damage. See Criminal Docket 1418CR6286, attached. The Court appointed attorney Alex Moskovsky to represent her. Id.

Following her arraignment, the Defendant met with Attorney Moskovsky in his office. She explained her immigration status, and described the events leading up to her arrest. Her attorney made no discernable efforts to follow up on or investigate her claims. See also Affidavit of Patricia Pimentel, attached.

The Defendant and her attorney next appeared in Court for a pre-trial date on December 4, 2014. The docket does not reflect that the Defendant's attorney filed any motions or a pre-trial conference report. See Criminal Docket 1418CR6286, attached.

Despite having knowledge since March 14, 2013 that the Statutory Rights form which Methuen Police presented to the

Defendant was grossly misleading, the Commonwealth never disclosed this exculpatory evidence to the Defendant. See Motion to Suppress, Commonwealth v. Reyes Morillo, 1218CR3791, attached.

The parties next appeared on January 6, 2015. On that date, counsel informed the Defendant that she needed to determine whether she would offer a change of plea or seek trial. The Defendant, unschooled in the intricacies of Massachusetts criminal defense practice, informed her attorney that a friend had resolved an OUI offense with a continuance without a finding. She asked her attorney to explain this procedure, if it was available to her, and to explain how it might affect her immigration status. See Affidavit of Patricia Pimentel, attached.

Plea counsel informed the Defendant that criminal convictions "might" affect her status, and "might" make her deportable. He continued, however, that a continuance without a finding did not constitute an adjudication of guilt, and thus would preserve her Deferred Action status. Id.

Trusting her attorney's advice, the Defendant tendered a change of plea. This Honorable Court (Uhlarik, J.) accepted her admission to sufficient facts, and continued the matter for one year with a 210 day loss of license.

The Court further imposed numerous conditions of probation, requiring that the Defendant enter and complete a fourteen day inpatient treatment program and undergo an evaluation pursuant to Mass. Gen. Laws ch. 90 § 24Q. See See Criminal Docket 1418CR6286; transcript of plea hearing, attached.

On April 30, 2015, with the criminal matter's resolution behind her, the Defendant submitted an application to renew her Deferred Action status and employment authorization. On September 7, 2015, the Defendant received two letters from the Department of Homeland Security denying her application. See Letter re: Application for Employment Authorization, dated September 7, 2015; Letter re: Deferred Action for Childhood Arrivals, dated September 7, 2015, attached.

The letters informed the Defendant that her applications were denied due to her conviction for "a felony or a significant misdemeanor." Id. Only through the denial of the applications did the Defendant learn that her plea in this case created such convictions, which rendered her ineligible for the discretionary relief from removal she had previously been granted. As a result of her plea, the Defendant is again deportable at the government's whim.

ARGUMENT

I. PLEA COUNSEL AFFIRMATIVELY MISADVISED THE DEFENDANT OF THE SPECIFIC, ADVERSE IMMIGRATION CONSEQUENCES OF HER PLEA, THEREFORE DEPRIVING HER OF EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED TO HER UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 12 OF THE MASSACHUSETTS DECLARATION OF RIGHTS.

The Sixth Amendment and Article 12 both guarantee a defendant the effective assistance of counsel. Padilla v. Kentucky, 559 U.S. 356 (2010), citing Strickland v. Washington, 466 U.S. 668 (1984); see also Commonwealth v. Saferian, 366 Mass. 89 (1974). Due process under both the State and Federal Constitutions further requires that a guilty plea or admission to sufficient facts be made knowingly, intelligently, and voluntarily. Commonwealth v. Nikas, 431 Mass. 453, 456-57 (2000) citing Boykin v. Alabama, 395 U.S. 238, 242-244 (1969).

As the United States Supreme Court held in Padilla v. Kentucky, failure of plea counsel to advise an alien defendant of the immigration consequences of a guilty plea violates the Sixth Amendment's guarantee of effective assistance of counsel. Padilla, supra, 369. Similarly, deficient performance of counsel in the context of plea proceedings renders a guilty plea involuntary. Hill v. Lockhart, 474 U.S. 52, 55 (1985); McMann v. Richardson, 397 U.S. 759, 771 (1970).

Here, plea counsel's failure to correctly and completely advise the Defendant of the immigration consequences of her guilty plea constituted ineffective assistance of counsel and renders the resulting plea involuntary.

"[C]hanges to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part - indeed, sometimes the most important part - of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." Padilla, supra, at 364.

If the immigration consequences are "succinct, clear and explicit," defense counsel is likewise required to provide specific, substantive advice regarding those consequences. Id. at 368-369. An attorney's inadequate understanding of the law does not render the law "not succinct and straightforward." Id., see also Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 399 (2012) (immigration consequences "not so complex or confused that a reasonably competent attorney would be uncertain of the consequences

of the plea," despite the fact that "several provisions of the Federal Code must be read in concert").

Counsel's obligations to provide succinct, clear, and accurate advice is dependent on the attorney's understanding of the client's particular status. Commonwealth v. Lavrinenko, 473 Mass. 42 (2015). To that end, counsel has a duty to inquire of the client's particular immigration status. Id. at 51-52. "[T]he failure of a criminal defense attorney to make a reasonable inquiry of the client regarding his or her citizenship and immigration status is sufficient to satisfy the deficient performance prong of the ineffective assistance analysis." Id. at 53.

Likewise, the failure to investigate the effects of a conviction on a particular status constitutes deficient performance. While "the ordinary, fallible criminal defense attorney may not be an expert in immigration law," effective assistance of counsel requires that "an attorney who learns of a complex immigration issue either ... research the applicable immigration law or seek guidance from an attorney knowledgeable in immigration law." Id. at 54, n. 15.

Here, the immigration consequences of the Defendant's plea are succinct, clear, and explicit, and would have been

apparent to plea counsel after even the most cursory research.

It is true that the Defendant lacked lawful status in the United States, and was removable and inadmissible on that basis. See 8 U.S.C. § 1182; 8 U.S.C. § 1227. However, the Defendant, prior to plea counsel's representation and the resulting guilty plea, obtained discretionary relief from removal. Prior to her arrest, the Department of Homeland Security granted the Defendant's application for Deferred Action for Childhood Arrivals. As a result, despite her lack of lawful status, she was not imminently removable and was authorized to work lawfully in the United States. See Affidavit of Patricia Pimentel, attached; Employment Authorization, attached.

Deferred Action is conditional, however. Eligibility is contingent on a number of conditions, including that the alien has not been convicted of a "felony, significant misdemeanor, or three or more other misdemeanors[.]" See Department of Homeland Security, Deferred Action for Childhood Arrivals (last updated Jan. 2016) (see also footnote 2, supra).

A "felony" in this context is "a federal, state or local criminal offense punishable by imprisonment for a term exceeding one year." Id. Likewise, "[a] significant

misdemeanor is a misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) and ... [r]egardless of the sentence imposed, is an offense of ... driving under the influence[.]" Id.

Federal immigration law treats an admission to sufficient facts as equivalent to a guilty plea. Commonwealth v. Villalobos, 437 Mass. 797, 802-803 (2002).

Therefore, the offenses of conviction here are felonies and significant misdemeanors under the relevant Deferred Action guidelines. Had counsel sought to investigate the contours of the Defendant's particularly delicate status, the effects of her plea would have been abundantly clear. As a result, Defendant's plea counsel had a constitutional obligation to provide her with clear, specific, and substantive advice regarding the certain and inevitable immigration consequences resulting from her plea. Commonwealth v. DeJesus, 468 Mass. 174 (2014).

In DeJesus, the Court considered whether an attorney's advice that an alien defendant pleading guilty to a narcotics offense would be "eligible for deportation" constituted sufficiently clear advice under the standard of Padilla and Commonwealth v. Clarke, 460 Mass. 30 (2011). Id.

at 175. The Court held that the language informing the defendant that he was simply "'eligible for deportation,' and that he would 'face deportation,' was not adequate advice because it did not convey what is clearly stated in Federal law." Id. at 181.

Here, plea counsel's advice failed to meet this clear constitutional standard.

Counsel has provided an affidavit, in which he avers that he understood that "she was legally in the United States on a work permit as a lawful non-immigrant[.]" See Affidavit of Attorney Moskovsky, attached. He reports that he "explained the immigration consequences of a plea as outlined in Padilla v. Kentucky and Commonwealth v. Marinho[.]" Id.

In particular, plea counsel avers that he informed the Defendant that "even pleading to sufficient facts ... could subject her to possible deportation proceedings."[5] Further, counsel states he "explained to Ms. Pimentel that since she was lawfully admitted to the United States, but not a permanent resident or a United States Citizen, she could be

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[5] The Defendant disputes this assertion. Instead, she asserts that her attorney informed her that her plea would not constitute a conviction and thus, would not serve as a basis for removal pursuant to federal law. See affidavit of Patricia Pimentel. The Defendant's mother, who attended all court proceedings, submitted an affidavit which corroborates the Defendant's version of events. See Affidavit of Annie Cordero, attached.

removed based on grounds of deportability[.]" Id. Finally, counsel encouraged the plea based on his belief that it would "mitigate the consequences ... in the event the matter went to trial." Id.

This summation of his advice betrays plea counsel's shortcomings in representing this particular Defendant.

First, his advice hinged on the flawed assumption that she "was lawfully admitted to the United States." Id. However, "[d]eferred action does not provide lawful status." See Department of Homeland Security, Deferred Action for Childhood Arrivals (last updated Jan. 2016); see also footnote 2, supra.

Second, his advice exposes an objective of avoiding sentence-based immigration consequences. However, sentence-based consequences were irrelevant to the impact of this case on the Defendant's immigration status. As the DACA guidelines make clear, the conviction alone is sufficient to destroy the status - the sentence is entirely irrelevant.[6] This misapprehension on the part of plea counsel reveals his inability to accurately advise his

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[6] Contrast, e.g., crimes of violence, which become aggravated felonies if the sentence imposed exceeds one year. 8 U.S.C. § 1101(a)(43) See also Commonwealth v. Martinez, 86 Mass. App. Ct. 545, 548 (2014) ("It is a common misperception among criminal defense attorneys that keeping a committed sentence under one year on any offense will avoid an aggravated felony.")

client. Where plea counsel did not understand the applicable law, he necessarily was unable to counsel his client on its impact. Accord, Lavrinenko, supra at 53 ("the failure of a criminal defense attorney to make a reasonable inquiry of the client regarding his or her citizenship and immigration status is sufficient to satisfy the deficient performance prong of the ineffective assistance analysis.")

Third, the advice that her plea "could subject her to possible deportation proceedings," and she "could be removed based on grounds of deportability" (emphasis added) fell wide of the mark. This advice, as the DeJesus Court made clear, "does not convey what was the case here: that all of the conditions necessary for removal would be met by the defendant's guilty plea[.]" DeJesus, supra at 181-182.

Plea counsel's duty of clarity was particularly pronounced in the instant matter. The Defendant had been in the country since she was a young child, having grown up in the United States. She did not choose her perilous status, it was thrust upon her by her parents smuggling her into the country at the age of nine. She attended school here, sharing the same childhood experiences as United States citizens. She knew only one way of life, the American way. The Defendant had no remaining connections to the Dominican Republic.

At the time of her plea, all of her roots were in the United States. The Defendant was not a sophisticated consumer of the court system, a fact made abundantly evident during her discussion with counsel. Here, with so much at stake, complete clarity was of paramount importance.

Plea counsel's affidavit evidences a misunderstanding of his client's fragile and unique immigration status. Vague and general warnings that a conviction "could" make her deportable simply did not convey the truth of her situation. She was already deportable, but had gained a narrow foothold on remaining in the United States in her successful application for discretionary relief from removal. But that discretionary relief would be, and was, automatically lost due to her plea in the instant matter.

The Defendant's actions in seeking to renew her Deferred Action status following her tender of plea fully evidences plea counsel's failure to inform her of the "specific and dire" immigration consequences of her plea. As discussed supra, her convictions here are both felonies and significant misdemeanors under the relevant guidelines. That the Defendant applied to renew her status following her plea reveals that her attorney failed to inform her that any such application would be doomed as one of the inevitable consequences of her conviction. Put another way,

why would the Defendant file an immigration application if her attorney had explained to her that application would be doomed by virtue of her criminal conviction?

In these circumstances, it is beyond dispute that plea counsel failed to provide representation that meets constitutional standards. Had counsel truly investigated the Defendant's status, the effects of conviction to the charged offenses would have been abundantly clear. But because he failed to investigate, "counsel failed to learn what he needed to know to advise his client competently regarding the immigration consequences of a guilty plea." Lavrinenko, supra, at 54. Counsel, therefore, provided deficient performance of counsel.

In addition to showing that plea counsel's advice, or lack thereof, fell below the standard of objective reasonableness, the Defendant must show that counsel's failure to advise her of the immigration consequences of her guilty plea prejudiced her. Commonwealth v. Fenton F., 442 Mass. 31, 37 (2004), citing Commonwealth v. Saferian, 366 Mass. at 96. (1974).

This Honorable Court's analysis on this point is governed by Commonwealth v. Clarke, 460 Mass. 30 (2011). Under this analysis, a defendant can demonstrate prejudice in the context of a plea through "showing that (1) he had

an 'available, substantial ground of defence,'... that would have been pursued if he had been correctly advised of the dire immigration consequences attendant to accepting the plea bargain; (2) there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated at the time; or (3) the presence of 'special circumstances' that support the conclusion that he placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty." Id. at 47-48 (internal citations and footnote omitted).

Prejudice in the instant matter is most clearly established by the loss of a substantial trial defense and by special circumstances which suggest that the Defendant placed or would have placed particular emphasis on immigration consequences in deciding whether to plead guilty.

In advising the Defendant to plead guilty, plea counsel avers that he considered, among other issues, the Defendant's "agree[ment] to submit to the breath tests when the officer's [sic] asked her in Spanish." See Affidavit of Attorney Moskovsky, attached. This assumes the admissibility of any breath test, however, and reveals that plea counsel failed to explore a motion to exclude that

evidence. In the unique circumstances of this case, this failure deprived the Defendant of a powerful defense to the Commonwealth's most damning evidence.

Following her arrest, the Methuen Police transported her to the police station for booking. In the course of that booking, the police presented her with Spanish language forms listing her Miranda rights and her rights with respect to the breath test. She signed the form, consenting to the test. After several failed attempts, she provided a sufficient testing sample, showing a .25 blood alcohol content. <u>See</u> Police report, case no. 533879, attached.

The breath test form improperly informed the Defendant that: (1) refusal would cause a 120 day license suspension, (2) there was no presumption of impairment for a blood alcohol content (BAC) of .10 or less, (3) there was a presumption of impairment for a BAC of .10 or more, (4) the jury would be told that the police had a duty to offer the Defendant a breath test, and (5) the jury would be told the Defendant had a right to refuse the breath test. <u>See</u> Rights Form, attached; Translation of Rights Form and Affidavit of Alyssa Alonzo, attached.

These statements are grossly inaccurate. The license loss for refusal is 180 days, not 120. See Mass. Gen. Laws

ch. 90, § 24. There is a statutory presumption of impairment beginning at .08 BAC. See Mass. Gen. Laws ch. 90, § 24. Any jury would not be instructed that the police had a duty to offer a breath test, or that the Defendant had a right to refuse. Opinion of the Justices, 412 Mass. 1201, 1211 (1992).

"General Laws c. 90, § 24(1)(e), places several conditions on the admissibility of the results of a breathalyzer test, and the prosecution must prove compliance with those conditions as a foundational matter before the judge may admit the results in evidence." Commonwealth v. Lopes, 459 Mass. 165, 172 (2011). "[B]reathalyzer test results 'shall be admissible and deemed relevant' only if the defendant actually consented to the test; was properly notified of the right to an independent medical examination under [Mass. Gen. Laws ch. 90,] § 5A; and if the test's administrator promptly provided the defendant with the results of the test. The prosecution must also establish, as a predicate to admissibility, conformity with regulations governing annual certification and periodic testing of the breathalyzer machine." Id., quoting Mass. Gen. Laws ch. 90, §§ 5A, 24.

Moreover, "[p]ursuant to the statutory scheme, a person in custody must also be advised that his consent is

required before a breathalyzer test may be conducted, and if that person refuses, his driver's license is automatically suspended for 180 days." Id. at n. 8, citing Mass. Gen. Laws ch. 90, § 24(1)(f).

In the instant matter, the rights form provided to the Defendant contradicted the rights provided in the statutory and regulatory framework. Because the Commonwealth could not show "compliance with those [statutory] conditions," the breath test results would not have been admissible. Id. at 173.

Thus, had plea counsel explored that defense and challenged the admissibility of the breath tests, the trial court[7] would have been constrained to exclude the breath test results, which would have deprived the Commonwealth of its most prejudicial evidence. In failing to investigate the Defendant's consent, plea counsel sacrificed a powerful and substantial defense.

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[7] It is disappointing, to say the least, that the Commonwealth even sought to admit the breathalyzer results in this case. The Commonwealth was fully aware of the inadequacies of the Methuen Spanish Language Consent Form since at least March 14, 2013. In Commonwealth v. Reyes Morillo, Docket 1218CR3791, undersigned counsel identified the inadequacies of the Methuen form to the Commonwealth, and filed a motion to suppress the results of that test. The Commonwealth correctly conceded that motion on May 9, 2013, after which the defendant was acquitted at trial. That the Commonwealth failed to take steps to correct that form is egregious. At this point in time, it is unknown how many people were, and continue to be, prejudiced by the continued use of the misleading form. See Docket 1218CR3791; Transcript of Motion Hearing, docket 1218CR3791, attached.

Plea counsel also neglected another obvious defense to the charges, which (if successful) would have served to exonerate the Defendant notwithstanding the Commonwealth's evidence aside from the breath test. That is, the Defendant informed plea counsel that she drove under the influence prior to her arrest to escape a violent assault by her boyfriend. See Affidavit of Patricia Pimentel, attached.

Moreover, a cursory review of the police report provided a clear springboard for any reasonably diligent attorney to investigate a necessity defense. The two page police report attached to the complaint in this matter contains the following statement:

> "During the observation period Pimental [sic] had stated that she was assaulted by her boyfriend in Lawrence. Lawrence P.D. was notified of this incident. Lawrence responded to the station and investigated the matter." See Police report, case no. 533879, attached.

However, despite the patrolman's commendable effort to highlight the Defendant's defense in his police report, the Defendant's attorney did nothing to flesh out this claim. Failure to investigate a defense constitutes ineffective assistance of counsel. Commonwealth v. Garcia, 66 Mass. App. Ct. 167, 171 (2006).

Plea counsel undertook no investigation into this issue. He interviewed no witnesses, sought no criminal records for Mercedes, never contacted Lawrence Police to obtain a report, and otherwise did nothing to follow up on this crucial information. Had he done so, plea counsel could have developed a defense of necessity. Similar to Garcia, counsel possessed "exculpatory evidence that he inexplicably failed to use" and thus "was never in a decision making position" regarding the merits of this defense. Id., at 171-172.

"The common law defense of 'necessity' is often referred to as the 'choice of evils' defense." Commonwealth v. Lora, 43 Mass. App. Ct. 136, 139 (1997), quoting LeFave & Scott, Handbook on Criminal Law § 5.4, at 442 (2d ed. 1986). "In essence, it involves a judgment as to whether public policy concerns eclipse those values protected by the law, rendering punishment under the criminal law inappropriate." Id.

The necessity defense is available in operating under the influence prosecutions where "(1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger; (3) there is [no] legal

alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue." Commonwealth v. Kendall, 451 Mass. 10, 13-14 (2008).

The facts of the Defendant's case, had plea counsel investigated or developed them, would have supported this defense. The Defendant faced a clear and immediate danger of a violent assault by her former partner, who promised to "fuck her up." See Affidavit of Patricia Pimentel. The Defendant could reasonably expect that her action in fleeing her assailant could abate the danger. Id. Finally[8], the Defendant, alone and overmatched by her violent partner who was attempting to gain entry to her vehicle, had no legal alternative in that moment but to flee, notwithstanding her intoxication. Id.

The foregoing reveals that plea counsel ignored two unique defenses, which if properly presented, could have drastically altered the legal landscape of the Defendant's case. Had plea counsel successfully excluded the breath test, the Commonwealth would have lost its most damaging

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[8] Regarding the final factor, "[t]here is no suggestion in Mass. Gen. Laws ch. 90, § 24(1) (a) (1), that the Legislature has restricted the availability of a defense of necessity in cases of operating while under the influence of intoxicating liquor." Kendall, supra, at n. 4, citing Lora, supra, at 139 n. 5.

evidence. Had plea counsel developed the necessity issue, the Defendant may have mounted a compelling and complete defense to the charged offenses.

But plea counsel did neither. This failure "resulted in the 'forfeiture of a substantial defense,'" satisfying the prejudice prong of the ineffective assistance of counsel test. Garcia, supra, 172-173.

The Defendant has also established prejudice in the form of special circumstances which suggest that the Defendant placed or would have placed particular emphasis on immigration consequences in deciding whether to plead guilty.

The Defendant's attached affidavit sets forth the deep connection rooting the Defendant to the United States. The Defendant has lived in the United States since she arrived as a young refugee in 2003. She has grown up in Lawrence, Massachusetts, experiencing all the rites of passage, milestones, and hurdles faced by the citizens and residents who shared her community. Her parents, siblings, and extended family are all in the United States.

The Defendant has tirelessly struggled to embody the values of hard work and love of family. She excelled in school, helping her fellow students succeed when they struggled. See letters from faculty, honors certificates,

attached. However, at this hour, the Defendant imminently faces outright banishment and, concurrently, the inability to reunite with her beloved family in the United States. This draconian consequence is all the more deleterious given that the Dominican Republic is little but a distant and terrible memory to the Defendant. She has not returned there since her family escaped - she would be a stranger in a strange land, forced to acclimate into a country as foreign to her as any other nation besides the United States.

The Supreme Judicial Court's decision in DeJesus describes the showing of "special circumstances" necessary to demonstrate constitutional prejudice in a case such as the Defendant's. DeJesus, supra. There, the Court considered that defendant's showing that he "was 'very concerned' not only about the risk of a five-year mandatory sentence of incarceration, but also about the risk of deportation, and that [he] 'had a lot to lose if he were to be deported' because he had been in the country since he was eleven years old, his family was in Boston, and he had maintained steady employment in the Boston area." Id.

The Court began by rejecting the Commonwealth's argument, which it is likely to make in the instant matter, that "the defendant was not prejudiced notwithstanding

these circumstances because he 'got a very good deal': he received straight probation when he was facing a mandatory minimum sentence of five years of incarceration." Id.

The Court held that "[i]f an assessment of the apparent benefits of a plea offer is made, it must be conducted in light of the recognition that a noncitizen defendant confronts a very different calculus than that confronting a United States citizen. For a noncitizen defendant, preserving his 'right to remain in the United States may be more important to [him] than any jail sentence.'" Id., citing Padilla, supra at 368.

In DeJesus, the Court found "special circumstances" supported by the defendant's long-time residency in the United States, as well as his local familial connections and employment history. Id. Here, the Defendant's pleadings amply show special emphasis on maintaining her Deferred Action status. She has extensive family here, went to school here, tried to start a family here, and hopes to continue her efforts to build a family. See Affidavit of Patricia Pimentel. She now faces removal to a country she hardly remembers and separation from everything she holds dearly in her adoptive country. Id.

Where these facts supported a finding of "special circumstances" in DeJesus, this Honorable Court should

reach the same conclusion here. That she received a favorable disposition as a result of her plea does not foreclose a finding of prejudice from this plea, tendered in absence of the advice required by Article 12 of the Massachusetts Declaration of rights.

A more recent decision of the Appeals Court gives further form to the special circumstances such as these, "especially given the emphasis by the Supreme Judicial Court on family circumstances in Commonwealth v. DeJesus, 468 Mass. at 184." Commonwealth v. Henry, 86 Mass. App. Ct. 446, 456 (2015).

In Henry, the defendant appealed from denial of two motions for new trial. In remanding to the trial courts for factual findings regarding prejudice, the Court held that "more specific and definitive findings are required here, especially given that the defendant's children and grandchildren live in the United States." Id., citing Sylvain, supra, at 439.

That is, the Court held, that a proper consideration of prejudice requires a motion judge to "address the nature and extent of the defendant's family ties in the United States and thus whether there were special circumstances that would have justified going to trial despite the strong case the judge found against him." Id.

The Court ultimately concluded that "without findings of fact that address the defendant's specific contentions, particularly regarding special family circumstances, 'it is not possible for us to say with any certainty whether the defendant's affidavit is merely self-serving or whether he was sufficiently prejudiced to justify vacating his guilty plea and ordering a new trial.'" Id. at 457, quoting Sylvain, 466 Mass. at 439.

Further, the Supreme Judicial Court's recent decision in Commonwealth v. Lavrinenko, 473 Mass. 42 (2015) created a distinct form of "special circumstances" supporting a finding of prejudice in this case. That is, prejudice may also be found where "the clear immigration consequence of [a] defendant's plea ... [is] the substantial risk that [she] would lose a viable opportunity for discretionary relief." Lavrinenko, 473 Mass. at 62.

Here, this is the explicit consequence that the Defendant suffered from her plea. She was already removable at the time of her plea, but had obtained discretionary relief in the form of Deferred Action. That, however, is exactly what she lost by way of her conviction. Thus, more so than a mere "substantial risk of losing a viable opportunity for discretionary relief," the loss of

her Deferred Action status was a certain and inevitable consequence of her guilty plea.

The essence of the prejudice determination is that a motion judge "must determine, based on the credible facts, whether there is a reasonable probability that a reasonable person in the circumstances of the defendant would have chosen to go to trial had he or she received constitutionally effective advice from his or her criminal defense attorney regarding the immigration consequences of a guilty plea." Id. at 55.

There can exist no clearer demonstration of prejudice than in the instant case. By her plea, the Defendant lost the only delicate immigration status she had carved out for herself. This result would have arisen whether she admitted to sufficient facts, pleaded guilty, or was convicted at trial. In these circumstances, had she been informed of the true consequences of any conviction, she would have been well within the realm of rationality in insisting that her attorney put the Commonwealth to its burden, especially given the favorable defenses available.

The Defendant has therefore established the prejudice contemplated by Clarke and as exemplified in DeJesus and Henry. She has established "special circumstances," which would have caused her to place particular emphasis on the

immigration consequences of her plea, if counsel were to have adequately informed her of the same.

Consequently, plea counsel's failure to properly advise the Defendant of the immigration consequences of her guilty plea and failure to represent the Defendant as outlined above all prejudiced the Defendant. This Honorable Court, therefore, should grant a new trial.

II. THE DEFENDANT'S PLEA WAS INVOLUNTARILY INDUCED BY EGREGIOUS GOVERNMENTAL MISCONDUCT, WHERE THE COMMONWEALTH FAILED TO DISCLOSE EXCULPATORY EVIDENCE THAT WOULD HAVE RENDERED THE COMMONWEALTH'S KEY EVIDENCE INADMISSIBLE

"[W]hen a defendant seeks to vacate a guilty plea as a result of underlying government misconduct, rather than a defect in the plea procedures, the defendant must show both that 'egregiously impermissible conduct ... by government agents ... antedated the entry of his plea' and that 'the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice.'" Commonwealth v. Scott, 467 Mass. 336, 346 (2014) quoting Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006).

The Court in Scott applied the holding of Ferrara and described a two-prong test to be applied in cases where a defendant claims alleged governmental misconduct rendered his guilty plea involuntary. A defendant must show first that the misconduct is egregious, that it is attributable

to the government, and that it occurred in his case. Second, there must be a showing that the misconduct influenced the defendant's plea. Id.

Here, the Scott test is amply met by the Commonwealth's failure to disclose the involuntary nature of the Defendant's "consent" to the breathalyzer test.

First, the misconduct was egregious, directly attributable to the Commonwealth, and it occurred in the Defendant's case.

Here, the Commonwealth was aware that the form which Methuen Police used was grossly misleading. As discussed supra at fn. 7, undersigned counsel revealed the misleading nature of the form to the Commonwealth on March 14, 2013 in the case of Commonwealth v. Morillo, 1218CR3791. Upon its recognition of the misleading form, the Commonwealth conceded that the breathalyzer test[9] was inadmissible. A jury of six later acquitted Mr. Morillo of operating under the influence. See Docket 1218CR3791, supra.

As a result, the Commonwealth was aware of the profoundly misleading form since March 14, 2013, and the obvious importance this evidence would have on any defendant's case. However, the Commonwealth took no

[9] Mr. Morillo's breathalyzer result was a .14. See Police Report, case no. 463206, attached.

further action to prevent this form's use in future cases, as is evidenced by the form's use in the instant Defendant's case nineteen months later.

After the Methuen Police Department obtained the Defendant's "consent" to the breathalyzer using the defective form, the Commonwealth relied upon the breathalyzer result in prosecuting Ms. Pimentel. Despite its full knowledge of the defective nature of the form, the Commonwealth stood mute, never revealing its defect to the Defendant or her attorney.

It is axiomatic that "[d]ue process of law requires that the government disclose to a criminal defendant favorable evidence in its possession that could materially aid the defense against the pending charges." Commonwealth v. Tucceri, 412 Mass. 401, 405 (1992). This duty extends to members of the prosecution team, including the police. Id., at 407.

Evidence that tends to negate the Commonwealth's evidence is clearly exculpatory. Here, as in most OUI prosecutions, the breathalyzer result formed the linchpin of the Commonwealth's case. An "over the limit" breathalyzer result alone constitutes sufficient proof of guilt, and effectively eliminates any hope of vindication at trial. Even more than the drug certificate in Scott,

the breathalyzer result "was central to the Commonwealth's case, and an affirmative misrepresentation [as to the breathalyzer] may have undermined the very foundation of [the Defendant's] prosecution." Scott, supra at 348.

The issue of prejudice is also easily met here.

To establish prejudice, the Defendant must show a "reasonable probability" that she would have rejected the plea had the governmental misconduct not occurred. The Scott Court listed several factors identified in Ferrara that may be relevant to a defendant's showing. "These factors include (1) whether evidence of the government misconduct could have detracted from the factual basis used to support the guilty plea, (2) whether the evidence could have been used to impeach a witness whose credibility may have been outcome-determinative, (3) whether the evidence was cumulative of other evidence already in the defendant's possession, (4) whether the evidence would have influenced counsel's recommendation as to whether to accept a particular plea offer, and (5) whether the value of the evidence was outweighed by the benefits of entering into the plea agreement." Id. at 355-356.

Here, the Defendant easily surpasses the standard described in Scott.

First, evidence of the breathalyzer test was a key element of the factual basis which the Commonwealth presented at the plea. TR 8.[10] The breathalyzer result provided the only direct evidence of guilt which the Commonwealth presented at the plea hearing. Thus, it cannot be seriously disputed that its absence would have detracted from the factual basis presented at the plea.

Second, the evidence could have been used to impeach a witness whose credibility may have been outcome-determinative. Here, where the patrolman would have testified that the Defendant consented to a breathalyzer test, evidence that the form was invalid would have obviously destroyed that testimony. Again, where the breathalyzer is outcome-determinative in virtually all OUI cases, nullification of this evidence would have dramatically altered the landscape of this case.

Third, the evidence was not cumulative of other evidence already in the Defendant's possession. Here, the Commonwealth concealed from the Defendant all evidence as to the invalidity of her breathalyzer result. The Commonwealth disclosed nothing to the Defendant which would

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[10] The Defendant references a transcript of her change of plea hearing as follows: TR [page number].

have revealed the flawed foundation upon which its most powerful evidence was perched.

Fourth, the evidence would have influenced counsel's recommendation as to whether to accept the plea offer. It cannot be credibly disputed that the existence of a valid breathalyzer reading is the key factor in deciding whether an OUI case is triable. Given the devastating impact of a breathalyzer result, any reasonable attorney's advice on the merits of a trial will necessarily hinge on the admissibility of a breathalyzer reading. Here, as in most cases, apart from the breathalyzer, the only evidence of the Defendant's impairment came from the subjective opinion of a patrolman, a fertile landscape in which a competent defense attorney may plant the seed of reasonable doubt.

Fifth, the value of the plea was not outweighed by the benefits of the plea agreement. The disposition of first offense OUI cases are highly structured by statute. Typically, the only difference between a plea and trial in an OUI case is the existence of a guilty finding. Where the Defendant here earned immediate deportation as a result of her plea, the benefit of a CWOF to her was obviously meaningless. Unlike a case where a defendant received, for example, probation in lieu of a mandatory prison sentence, see, e.g., Dejesus, supra, this case represents one where

the Defendant earned very little by pleading out - other than certain deportation.

The Court in Scott recognized that, beyond the five factors referenced in Ferrera, other circumstances may surface which bear on the issue of prejudice. The Court explained, "[f]or example, these factors may include ... whether any other special circumstances were present on which the defendant may have placed particular emphasis in deciding whether to accept the government's offer of a plea agreement." Id., at 356, citing Clarke at 47-48. The Court continued, "[s]uch special circumstances could include, for example, the collateral immigration consequences of the defendant's conviction of a particular crime." Id. at n. 13, citing Clarke, supra, at 47-48.

Here, as described above, the Defendant's case amply demonstrates the special circumstances which were implicated by the government's suppression of exculpatory evidence. The Defendant clung to a tenuous thread which allowed her to remain in the United States - the only country which she called home. By representing its possession of a "smoking gun" as to her guilt in the form of her breathalyzer reading, the Commonwealth created the illusion that she had no hope of escaping conviction in this case. Securing a conviction in this matter offends

all notions of due process and fair play, and should be condemned in the strongest terms by the Court.

As Justice Stevens observed: "For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.' He is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence." United States v. Agurs, 427 U.S. 97, 111 (1976) (internal citations omitted).

CONCLUSION

For the foregoing reasons the Defendant respectfully requests that this Honorable Court allow the Defendant's instant Motion to Vacate Guilty Plea.

Respectfully submitted,
Patricia Pimentel,
By and through her Attorney,

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Date: July 26, 2016

EXHIBITS

Affidavit of Patricia Pimentel............................A
Affidavit of Annie Cordero................................B
Medical Records of Patricia Pimentel......................C
Rights Form...D
Translation of Rights Form and Affidavit of Alyssa Alonzo....E
Criminal Docket no:1418CR006286 - Patricia Pimentel........F
Police Report incident no:533879- Patricia Pimentel........G
Transcript of Plea Hearing- Patricia Pimentel..............H
Letter re: Application for Employment Authorization
Dated September 7,2015....................................I
Letter re: Deferred Action for Childhood Arrivals
Dated September 7, 2015...................................J
Affidavit of Attorney Alex Moscovsky......................K
Allowed Motion to Suppress,
Commonwealth v. Reyes Morillo, Docket 1318CR3791...........L
Transcript of Motion Hearing, May 9th ,2013................M
Commonwealth v. Reyes Morillo Docket No: 1218CR3791........N
Police Report incident no: 463206 - Reyes Morillo...........O
Letter,David Walsh, High School Learning Center..........P
Letter, Elizabeth Delle Chiaie, Lawrence High School........R
Letter, Sherry Lynne Aghoian, Arlington Middle School.......S
Letter, John Sardella, Lawrence High School................T
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