

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT
NO. 2015-P-0160

WORCESTER, SS.

COMMONWEALTH,
Appellee

v.

MIGUEL JIMINEZ,
Appellant

ON APPEAL FROM THE ORDERS OF
THE SUPERIOR COURT

BRIEF AND RECORD APPENDIX
FOR APPELLANT

FOR THE APPELLANT:

MATTHEW BINGHAM, ESQ.
ERKAN & ASSOCIATES
300 HIGH STREET
ANDOVER, MA 01810
(978) 474-0054
BBO # 684913

MURAT ERKAN, ESQ.
ERKAN & ASSOCIATES
300 HIGH STREET
ANDOVER, MA 01810
(978) 474-0054
BBO # 657307

APRIL 13, 2015

ISSUES PRESENTED

- I. Whether the motion judge committed a significant error of law or abused his discretion by denying the Defendant's Motion to Vacate Guilty Plea without holding an evidentiary hearing, where the Defendant's affidavits submitted in support of his Motion to Vacate Guilty Plea and subsequent Motion to Reconsider Denial of Motion to Vacate Guilty Plea raised a substantial issue of ineffective assistance of counsel in the Defendant's plea proceedings and made a substantial evidentiary showing in support of the same.

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STATEMENT OF THE CASE

The Defendant, Miguel Jiminez ("Defendant"), appeals the denial of his Motion to Vacate Guilty Plea and subsequently-filed Motion to Reconsider Denial of Motion to Vacate Guilty Plea Without an Evidentiary Hearing. (RA 96; 149).¹

The convictions underlying the instant appeal arose from his tender of guilty pleas in two sets of indictments (WOCR2003-01638 and WOCR2004-00091) alleging drug and false name charges. (RA 14-18).

On January 5, 2006, on the advice of counsel, the Defendant tendered guilty pleas to amended indictments before the Honorable John S. McCann (hereafter "plea judge" or "motion judge"). (RA 29). Plea counsel erroneously advised the Defendant that the negotiated plea would not affect his immigration status. (RA 59; 62).

On August 21, 2006, the Defendant filed a motion for post-conviction relief captioned "Motion to Vacate Alternative Nunc Pro Tunc Motion to Modify Disposition by Pre-Trial Probation." (RA 19). The plea judge

¹ The Defendant cites to the record appendix by page number as RA ___. The Defendant cites the transcript of the hearing on his Motion to Reconsider by page number and (where necessary) line number as TR [page]:[line].

denied this motion without a hearing in a margin decision dated August 23, 2006. Id.

At the conclusion of the Defendant's committed sentence, he was deported to the Dominican Republic based on his convictions at issue here. (RA 92).

On January 23, 2014, the Defendant filed a Motion to Vacate Guilty Plea. (RA 38). The Commonwealth submitted an opposition to the Defendant's motion on April 14, 2014. (RA 74). The plea judge denied the Defendant's motion without a hearing in a margin decision dated May 7, 2014. (RA 96).

On May 15, 2014, the Defendant submitted a Motion to Reconsider Denial of Motion to Vacate Without an Evidentiary Hearing. (RA 98). The plea judge heard oral argument on June 17, 2014, (TR 1, et seq.) and issued a margin decision denying the motion on June 19, 2014. (RA 149-150). The Defendant filed a notice of appeal on June 23, 2014. (RA 6).

STATEMENT OF THE FACTS

The Defendant is a thirty-two year old national of the Dominican Republic. The Defendant immigrated to the United States in 1997 at the age of sixteen. He obtained lawful permanent resident status after his

arrival, and lived and attended school in New York before moving to Massachusetts in 1999. (RA 57).

The Defendant's entire family lives in the United States, and most of them have become naturalized citizens.

His mother, Dulce Fajardo, lives in Boston. She has lived in the United States since 1989, and became a citizen in 2004. (RA 58). His father, Miguel Jiminez, Sr., has lived in the United States since 1989, became a naturalized citizen in 2003, and currently lives in Long Island, New York. Id.

The Defendant also has three sisters and a brother. The oldest sibling, Syndia Jiminez, is a thirty years old naturalized citizen. She is a psychologist for the Florida Health Department. Id.

His middle sister, Milicent Jiminez, is a twenty-six years old naturalized citizen. Milicent lives in New York with her three children, all natural-born citizens of the United States. Id.

The Defendant's youngest sister, Janine Lorenzano, is twenty-one years old. She was born in the United States. She is a senior at the University of Massachusetts, studying criminal justice. Id.

The Defendant's maternal grandparents also live in the United States. The Defendant's grandfather, Diogenes Fajardo is eighty years old. His grandmother, Benicia Fajardo, is seventy-five years old. Diogenes and Benicia are lawful permanent residents, living together in Boston. Id.

Much of the Defendant's extended family lives in the United States as well. He has five aunts, three uncles, and numerous cousins, all of whom are naturalized citizens of the United States. (RA 59).

On November 20, 2003, the Worcester Superior Court arraigned the Defendant on indictments (docket number 2003-01638) alleging trafficking in cocaine and a school zone violation. (RA 3). On June 17, 2004, the Worcester Superior Court arraigned the Defendant on a second set of indictments (docket number 2004-00091), alleging possession of a class B controlled substance with intent to distribute, an accompanying school zone violation, and furnishing a false name to police officers. (RA 10).

The Defendant and his family retained Attorney John Benzan ("plea counsel") to represent him in both matters. (RA 59). Throughout the pendency of the

proceedings, the Defendant's immigration status remained his primary concern. (RA 59).

Because of their concerns regarding the Defendant's immigration status, the Defendant's family attended the Defendant's meetings with his attorney, repeatedly questioning Attorney Benzan on the subject of potential immigration consequences. (RA 136-137; 140)

In response to these concerns, plea counsel erroneously advised the Defendant and his family that conviction on the charged offenses would not carry immigration consequences so long as he received a committed sentence of one year or less. (RA 59; 137; 140).

Relying on his attorney's advice, the Defendant pleaded guilty on January 5, 2006 to amended indictments alleging two counts of possession of a class B controlled substance with intent to distribute and one count of furnishing a false name. (RA 29; 59).

During the plea colloquy, the Honorable Justice John McCann provided the statutory warning set forth in Mass. Gen. L. Ch. 278, § 29D. (RA 33).

The Court accepted the Defendant's plea and imposed an agreed upon sentence of two years committed

in the House of Corrections, one year to be served with sixty days credit, and the balance to be suspended for two years. (RA 35-36).

Soon after the Defendant began serving his sentence, the Department of Homeland Security – Immigration and Customs Enforcement (“ICE”) instituted removal proceedings against the Defendant. (RA 124). The Defendant immediately sought immigration counsel, retaining Attorney Joseph O’Neil on June 6, 2006. (RA 124).

In August 2006, the Defendant first sought post-conviction relief in a motion captioned “Motion to Vacate Alternative Nunc Pro Tunc Motion to Modify Disposition by Pre-Trial Probation.” (RA 19). In support of this motion, the Defendant submitted an affidavit in which he asserted that his plea counsel advised him that a guilty plea to the amended indictments would not result in immigration consequences, because he “would only get a year or less in jail[.]” (RA 26).

The Defendant also submitted an affidavit from plea counsel (hereafter “2006 affidavit”), in which plea counsel averred that he discussed the “immigration consequences” attendant to the

Defendant's guilty plea. (RA 28). Plea counsel did not expound on what sort of discussion he and the Defendant had relative to his immigration status. Id. The Court denied the Defendant's 2006 motion without a hearing in a margin decision dated August 23, 2006. (RA 19).

In September 2006, an immigration judge ordered the Defendant removed as a result of the Defendant's conviction on the instant indictments. (RA 92; 94). The Defendant was ultimately deported to the Dominican Republic on or about October 4, 2006. (RA 5; 94).

The Defendant's deportation precluded him from reporting to the probation department at the termination of the committed portion of his sentence. His inability to report constituted a technical violation of the terms of his probation, for which the probation department sought and obtained a warrant for the Defendant's arrest. (RA 6; 92).

Sometime prior to January 2014, the Defendant unlawfully re-entered the United States. (TR 6-7). He returned to the Boston area, where he reunited with his family. Together, the Defendant and his family sought legal advice regarding the potential for further motions for post-conviction relief. (TR 3).

However, before the Defendant could submit any such motions, the Boston Police Department arrested him on the outstanding probation warrant. (TR 3).

On January 23, 2014 the Court took custody of the Defendant based on his failure to report to probation. (RA 6; 12). On the same day, the Defendant filed a Motion to Vacate Guilty Plea, in which he argued that plea counsel's failure to properly advise him about the immigration consequences of his plea amounted to ineffective assistance of counsel. (RA 6; 12). In support of this motion, the Defendant submitted his own affidavit, in which he averred that plea counsel informed him his plea would not carry immigration consequences. (RA 38).

Shortly thereafter, the Defendant supplemented his motion with an affidavit from plea counsel (hereafter "2014 affidavit"). (RA 61). In his affidavit, plea counsel acknowledged his awareness of the importance which the Defendant and his family placed on his immigration status. (RA 62). Plea counsel further averred that the Defendant specifically asked if a guilty plea to the instant indictments would result in his deportation. Id. Finally, plea counsel acknowledged that he advised the

Defendant that “because the committed sentence did not exceed one year, his plea did not constitute an aggravated felony and he would therefore not be deportable.” Id.

On April 25, 2014, the Commonwealth submitted a written opposition to the Defendant’s Motion to Vacate Guilty Plea. (RA 74). The Commonwealth urged the Court to deny the Defendant’s motion, arguing that 1) the Defendant’s showing was not credible (RA 82); 2) the Defendant failed to show prejudice from plea counsel’s claimed deficiencies (RA 86); 3) principles of collateral estoppel barred the Defendant’s claim (RA 81); and 4) the Defendant’s unlawful re-entry rendered him unable to “avoid the consequence he asserts would have caused him to risk a trafficking conviction and significant jail time: deportation” (RA 89).²

² The Commonwealth’s last argument was essentially one of mootness – that the alleged unlawful re-entry rendered him removable irrespective of the status of the instant convictions. However, the Commonwealth curiously disputed the Defendant’s averments that he actually suffered deportation (though its own evidence indicated that he had). Compare RA 89 (the Commonwealth questions whether the Defendant “is being truthful when he avers that he was deported”) with RA 92 (“Department of Homeland Security Immigration Detainer – Notice of Action” attached as Exhibit I to

In response to the Commonwealth's opposition, the Defendant supplemented his motion with an affidavit from Attorney Rhonda Selwyn Lee. (RA 93). Attorney Lee is an immigration attorney whom the Defendant's family retained to provide an opinion "as a practitioner of immigration law in the 1st Circuit [as to] the possible legal, immigration options of the defendant under his present circumstances." (RA 94).

Attorney Lee first explained that vacating the instant convictions on constitutional grounds would allow him to seek relief from the pre-existing order of removal. (RA 94). In response to the Commonwealth's claim that the Defendant's re-entry rendered him removable, Attorney Lee provided the Court with First Circuit precedent to the contrary. (RA 95).

its written opposition, identifying the Defendant as having allegedly "illegally re-entered the country after a previous removal or return"). If, as the Commonwealth suggested, the Defendant was not actually deported, he could not have committed the offense of unlawful re-entry. See 8 U.S.C. § 1326(a). Nevertheless, because the Commonwealth's position is contrary to settled law, Commonwealth v. Martinez, 86 Mass. App. Ct. 545, 547 n.3 (2014), and because it abandoned this argument below (TR 33-34), the Defendant does not address it here.

The Court denied the Defendant's Motion to Vacate in a margin decision docketed May 5, 2014 but dated May 7, 2014. (RA 6; 13; 96). The Court docketed Attorney Lee's affidavit on May 6, 2014. (RA 6; 13; 96). In its decision, the Court rejected the affidavits of the Defendant and plea counsel without making any findings. (RA 96).

Thereafter, the Defendant filed a Motion to Reconsider Denial of Motion to Vacate Without Evidentiary Hearing, which the Court docketed on May 19, 2014. (RA 98). In support of this motion, the Defendant submitted numerous documents addressing the issues raised in the Commonwealth's opposition. (RA 122).

In response to the Commonwealth's assertion that the Defendant may not have actually been deported, the Defendant submitted exhibits showing a retainer agreement for an immigration attorney and a Department of Justice document filed by that same attorney captioned "Notice of Entry of Appearance or Representative Before the Immigration Court." (RA 125).

In response to the Commonwealth's suggestion that the Defendant's and plea counsel's averments could not

be credited, the Defendant submitted further affidavits from Dulce Maria Fajardo and Laura Perez Fajardo, whom he had intended to call as witnesses, had the Court conducted an evidentiary hearing. (RA 136-143). These witnesses, his mother and sister (respectively), attended numerous meetings between the Defendant and plea counsel, and would have further corroborated their averments. Id.

The Court heard oral arguments on the Defendant's Motion to Reconsider on June 17, 2014. (TR 1, et seq.). Apparently acknowledging the Defendant's showing of prejudice, the Court noted the appearance of "probably 15 family members" (TR 23:20-21) in attendance for the hearing, and that "deportation issues are draconian, especially to family members." (TR 40:17-18).

However, the Court's questioning of both parties indicated its continued reservations regarding the credibility of plea counsel's affidavits. (TR 38). Describing plea counsel as "the critical witness," the Court suggested it would "want him under oath, and [to] hear exactly what he said[.]" (TR 38-39). Though the Defendant initially disputed that plea counsel was

a "critical witness," the Defendant agreed to seek his attendance for any hearing ordered by the Court. Id.

Shortly following the conclusion of this hearing, the Court denied the Defendant's Motion to Reconsider in a one-word decision dated June 19, 2014. (RA 149; 150).

On July 10, 2014, the Defendant stipulated to a violation of probation owing to his failure to report, which resulted from his first deportation. (RA 6; 13). The Court (Lemire, J.) terminated probation and discharged the Defendant. Because the Department of Homeland Security had previously lodged a detainer (see footnote 2, *supra*, and RA 92), the Court's termination and discharge operated to transfer the Defendant to the custody of immigration authorities for removal proceedings.

SUMMARY OF THE ARGUMENT

I. The motion judge committed a significant error of law and abuse of discretion in denying the Defendant's Motion to Vacate Guilty Plea and Motion to Reconsider Denial of Motion to Vacate Without Evidentiary Hearing. The Defendant's affidavit and other documentation raised and provided significant evidentiary support to the Defendant's claim that his

guilty plea resulted from ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. The Defendant's showing therefore required the Court to hold an evidentiary hearing. (Pgs. 17-28, *infra*).

Moreover, the motion judge committed a significant error of law in adopting the Commonwealth's Opposition to the Defendant's Motion for a New Trial (RA 96) as the basis for denying the Defendant's Motion to Vacate. The Commonwealth's Opposition misstated the relevant law, erroneously claimed that collateral estoppel barred the Defendant's claim, and erroneously labeled the Defendant's claim as moot. (Pgs. 28-39, *infra*).

ARGUMENT

I. THE MOTION JUDGE ERRED IN DENYING THE DEFENDANT'S MOTION TO VACATE GUILTY PLEA WITHOUT HOLDING AN EVIDENTIARY HEARING; THE DEFENDANT'S MOTION AND SUPPORTING DOCUMENTS RAISED AND SUPPORTED A SUBSTANTIAL ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL RELATIVE TO THE PLEA PROCEEDINGS.

A post-conviction motion seeking to withdraw a guilty plea brought pursuant to Mass. R. Crim. P. 30(b) is properly allowed where "it appears that

justice may not have been done.” Commonwealth v. Williams, 71 Mass. App. Ct. 348, 353 (2008). “Justice is not done if the defendant has received ineffective assistance of counsel in deciding to plead guilty.” Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 394 (2012), citing Commonwealth v. Hiskin, 68 Mass. App. Ct. 633, 637-638 (2007).

A judge has discretion to deny a new trial motion on the papers “where no substantial issue is raised by the motion or affidavits.” Mass. R. Crim. P. Rule 30(c)(3); see also Commonwealth v. Martinez, 86 Mass. App. Ct. 545, 550 (2014). “The guideline for [conducting an evidentiary hearing] is ‘whether a substantial issue necessitating a hearing’ has arisen from the submitted affidavit material.” Commonwealth v. Almonte, 84 Mass. App. Ct. 735, 738 (2014), quoting Commonwealth v. Shuman, 445 Mass. 268, 278 (2005).

“When a substantial issue has been raised, and supported by a substantial evidentiary showing, the judge ‘should hold an evidentiary hearing.’” Commonwealth v. Muniur M., 467 Mass. 1010, 1011 (2014), quoting Commonwealth v. Marrero, 459 Mass. 235, 240 (2011). Thus, a proper determination of whether a judge abused his discretion by denying a

Rule 30 motion without an evidentiary hearing requires consideration of “both the seriousness of the issue raised and the adequacy of the [defendant’s] showing on that issue[.]” Muniur M., 467 Mass. at 1011.

A judge’s decision denying a new trial motion without conducting an evidentiary hearing is reviewed for significant error of law or abuse of discretion. Commonwealth v. Balthazar, 86 Mass. App. Ct. 438, 440 (2014), citing Commonwealth v. Chleikh, 82 Mass. App. Ct. 718, 722 (2012). “[A] judge’s discretionary decision constitutes an abuse of discretion where ... the judge made ‘a clear error of judgment in weighing’ the factors relevant to the decision, see Picciotto v. Continental Cas. Co., 512 F.3d 9, 15 (1st Cir. 2008) [,] such that the decision falls outside the range of reasonable alternatives.” L.L. v. Commonwealth, 470 Mass. 169, 185 n. 27 (2014).

Here, the Defendant’s motion alleged that his attorney misadvised him regarding the immigration consequences of his plea, thus depriving him of effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. The Defendant supported his

motion with his own affidavit, which detailed both the erroneous advice which his attorney provided and the prejudice caused thereby. (RA 57). The Defendant's plea counsel also furnished an affidavit, which confirmed that he gave erroneous advice. (RA 62). The Defendant later supplemented his showing with affidavits from family members present during the Defendant's meetings with plea counsel, during which plea counsel gave the erroneous advice. (RA 136-143).

Both the seriousness of the issue raised and the Defendant's showing in support thereof thus necessitated an evidentiary hearing. Compare Martinez, 86 Mass. App. Ct. at 552-553.

a. The Defendant's Motion Raised a Serious Issue of Constitutional Importance.

The motion judge here correctly found that the Defendant raised "important issues" (TR 40:18) regarding plea counsel's advice and the consequences of his plea. "Counsel's advice regarding the immigration consequences for a permanent resident tendering a guilty plea to controlled substance

charges is a serious issue.” Martinez, 86 Mass. App. Ct. at 550, citing 8 U.S.C. § 1227(a)(2)(B)(i).³

Given the inevitability of the Defendant’s deportation in the event of conviction for the charged offenses, “[c]ounsel ... was obligated to provide to [the defendant] ... the information that presumptively mandatory deportation would have been the legal consequence of pleading guilty.” Commonwealth v. DeJesus, 468 Mass. 174, 181 (2014), citing Padilla v. Kentucky, 559 U.S. 356, 368 (2010). “Without the benefit of such counsel, a client cannot enter a knowing and voluntary plea.” Commonwealth v. Chleikh, 82 Mass. App. Ct. 718, 723 (2012).

Thus, the Defendant has raised a “serious issue,” bearing on the base validity of his convictions in this case – that is, the constitutional underpinnings of his guilty plea as a function of his plea counsel’s erroneous advice. See Commonwealth v. Marrero, 459 Mass. at 240 (defendant’s claim on motion for new

³ Pursuant to 8 U.S.C. § 1227(a)(2)(B)(i), “[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) 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.”

trial that trial counsel impeded the defendant's exercise of his right to testify in his own defense "raises 'an issue of constitutional importance' that readily qualifies as a serious issue").

b. The Defendant Made a Substantial Evidentiary Showing In Support of His Motion Sufficient to Justify an Evidentiary Hearing.

The Defendant has made a "substantial enough evidentiary showing to justify an evidentiary hearing." Gordon, supra, at 395. In order to merit an evidentiary hearing, "the defendant's submissions in support of a motion for a new trial need not prove the factual premise of that motion, but they must contain sufficient credible information to 'cast doubt on' the issue." Marrero, supra, at 240 (citations omitted). In other words, "[t]he defendant must aver to sufficient facts" to support his claim for relief. Chleikh, supra at 722-723. See also Commonwealth v. Clarke, 460 Mass. 30, 47 (2011).

The Defendant supported his motion with his own affidavit, setting forth plea counsel's erroneous advice, his connections to the United States which supported his claim of "special circumstances" supporting particular emphasis on the immigration

consequences of his plea⁴, and the consequences he suffered as a result of the plea. (RA 57). The Defendant supplemented his motion with an affidavit from plea counsel acknowledging his mistaken advice. (RA 62). The Defendant corroborated his showing (in connection with his Motion to Reconsider) through affidavits from family members percipient to meetings in which plea counsel misadvised the Defendant. (RA 136-143). By this substantial showing, the Defendant at least earned an evidentiary hearing. Gordon, supra.

This Court has recently reversed the denial of a motion for new trial without an evidentiary hearing where the defendant's showing in support of his motion closely resembled the Defendant's showing in the instant matter. Commonwealth v. Martinez, 86 Mass. App. Ct. 545 (2014).

There, the defendant claimed by way of his motion for new trial that "he was affirmatively misinformed by his counsel that the plea and agreed upon sentence would not affect his status as a permanent resident in

⁴ See DeJesus, supra, at 183-184 (prejudice prong of ineffective assistance claim satisfied by averment of "'special circumstances' showing that the defendant 'placed or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty'").

the United States.” Id. at 546. In support of the motion, the defendant submitted his own affidavit and one from Migdalia Garcia, the mother of his four children, who “was present during the conversation between the defendant and plea counsel” during which plea counsel gave the advice at issue. Id. at 547 and n. 9.⁵

The judge denied the defendant’s motion, “not[ing] the absence of an affidavit from plea counsel and describ[ing] the defendant’s affidavit as ‘self-serving’ and Garcia’s affidavit as ‘hearsay,’” and otherwise “adopt[ed] the legal arguments set forth in the Commonwealth’s brief and incorporated it by reference.” Id. at 548-549.

Following the motion judge’s decision, the defendant moved for reconsideration, detailing motion counsel’s fruitless attempts at obtaining an affidavit

⁵ The defendant further supplemented his showing with a third affidavit from an “an immigration law specialist with the Committee for Public Counsel Services.” Id. at 548. This attorney averred that all controlled substances offenses (other than “straight possession”) constituted deportable “aggravated felonies.” Id., citing 8 U.S.C. § 1101(a)(43). The immigration attorney concluded that in her experience, “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.” Id.

from plea counsel. The motion judge denied the motion for reconsideration. Id.

The Appeals Court held the denial of the motion without an evidentiary hearing to be reversible error. Noting first that the defendant raised a "serious issue," the Appeals Court held "[b]ecause the motion judge appears to have based her decision in large part on the defendant's failure to produce an affidavit from plea counsel, without appearing to consider the circumstances of that failure, this case must be remanded for an evidentiary hearing on the defendant's motion for a new trial. The hearing will permit the judge not only to hear from plea counsel, but also to assess first-hand the credibility of the defendant and Garcia." Id.

In the instant matter, the Defendant made largely the same showing as that held sufficient to merit an evidentiary hearing in Martinez. The advice complained of in the present case – that the Defendant would avoid deportation with a committed sentence under a year (see RA 62) – is exactly that which the Court described as deficient in Martinez. Moreover, the Defendant here, as did the defendant in Martinez, sought to corroborate his own averments with

affidavits of family members percipient to the challenged advice. (RA 136-143).

However, the Defendant's showing in the present case is demonstrably stronger in one key respect. The instant Defendant succeeded where the defendant in Martinez failed: obtaining and presenting an affidavit from plea counsel, in which plea counsel acknowledged giving the Defendant erroneous advice. (RA 62). Plea counsel's candid admission - which powerfully corroborates the Defendant's claim - is further amplified in light of this Court's recent recognition of the relative rarity of such affidavits. Martinez, supra, at 551 ("a lawyer who is aware that his assistance some five or ten years earlier was less than exemplary might very well be reluctant to describe that lapse in an affidavit").

The Commonwealth here, as in Martinez, took the position that the Defendant's affidavit was self-serving and otherwise lacked credibility. However, as Martinez makes clear, the proper mechanism for testing credibility is an evidentiary hearing.

In Commonwealth v. Broomfield, the Appeals Court agreed that a motion judge has discretion not to credit the defendant's showing, and the Commonwealth

has the right to "test the factual accuracy of the representations of the defendant." 85 Mass. App. Ct. 1104 (2014) (Memorandum and Order Pursuant to Rule 1:28). However, the answer to the question as to "when and how that decision should be made" is clear: "at an evidentiary hearing." Id. See also Commonwealth v. Freeman, 29 Mass. App. Ct. 635, 640 (1990) (remanded for evidentiary hearing where "[q]uestions of credibility remain to be resolved by the motion judge").

Below, the judge apparently declined to hold an evidentiary hearing based on the Commonwealth's argument that the defendant's affidavits were self-serving, contradictory, and therefore not credible. (RA 96). The judge erred in denying the Defendant's motion on this basis.

So long as the affidavits set forth a non-conclusory, "substantial initial showing of both ineffective assistance ... [and] prejudice," denial without an evidentiary hearing is inappropriate. Where the Defendant's showing specifically addresses each element of the basis for the requested relief, an evidentiary hearing is warranted, notwithstanding the Commonwealth's default position that a defendant's

showing is self-serving and undeserving of credit. See also Commonwealth v. Cano, ___ Mass. App. Ct. ___, 13-P-1761 (April 3, 2015); Martinez, supra.

Indeed, no reported decision in the wake of Padilla has ever supported summary denial of a motion for new trial where the defendant's submissions made a complete, prima facie showing of ineffective assistance and prejudice. See Commonwealth v. Martinez, 81 Mass. App. Ct. 595, 600 (2012) (motion alleging ineffective assistance and prejudice denied without hearing; remanded for hearing on prejudice); Commonwealth v. Sylvain 466 Mass. 422, 439 (2013) (same); Balthazar, supra, at 444 (same); Martinez, 86 Mass. App. Ct. at 553 (same); Gordon, supra, at 402 (motion allowed without evidentiary hearing; remanded for court to address "ambiguities and gaps in the affidavits"); Almonte, supra, at 742 (2014) (same); DeJesus, supra at 175, 185 (motion allowed after evidentiary hearing; affirmed).

Rather, as described above, evidentiary hearings have not been required only in cases where the defendant failed to allege eligibility for relief⁶;

⁶ See Commonwealth v. Clarke, supra at 49 (motion for new trial denied without a hearing, affirmed where

where the defendant challenges ancient convictions in light of federal sentencing enhancements supported only by his conclusory, self-serving affidavit alleging defects in the plea colloquy⁷; where "obscure or impressionistic and conclusory" factual allegations do not raise a "substantial issue"⁸; where the defendant suspiciously fails to present evidence from an "expected and available source"⁹; or where the judge is able to assess the merits of the defendant's new trial claim based on having presiding at the trial¹⁰.

None of those circumstances exist here. The Defendant provided several detailed affidavits

defendant failed to allege prejudice); Chleikh, supra at 725 (2012) (same); Commonwealth v. Marinho, 464 Mass. 115, 128-129 (2013) (same).

⁷ Commonwealth v. Lopez, 426 Mass. 657 (1998).

⁸ Commonwealth v. Stewart, 383 Mass. 253, 259-260 (1981).

⁹ In Cano, as to one of the defendant's Padilla claims, the Court affirmed summary denial "given 'the suspicious failure to provide pertinent information [as to counsel's advice per Padilla] from plea counsel, an expected and available source.'" __ Mass. App. Ct. __, supra, quoting Commonwealth v. Goodreau, 442 Mass. 341, 354 (2004). As to a similar claim on a separate docket, the Court remanded for an evidentiary hearing where the defendant submitted a complete affidavit from plea counsel which addressed the Padilla issue.

¹⁰ Commonwealth v. DeVincent, 421 Mass. 64, 69 (1995).

alleging ineffective assistance on a serious issue - the immigration consequences of his plea. His pleadings were neither "conclusory," "obscure," nor "impressionistic," but rather factual and confirmed by his attorney. The Defendant did not fail to provide an affidavit from an "expected and available source" of pertinent information. Finally, the plea judge had no special familiarity with the merits of the Defendant's claim, which focused on advice which his Attorney furnished during meetings outside of court.

Moreover, in the context of a defendant's claim of ineffective assistance of plea counsel, an evidentiary hearing serves a particularly critical function. "[I]n a case like this, in the absence of a hearing followed by findings of fact, or of a stipulation of facts, it is not possible for an appellate court to know 'whether there has been serious incompetency, inefficiency, or inattention of counsel - behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer [and] whether it has likely deprived the defendant of an otherwise available, substantial ground of defense.'" Commonwealth v. Brookins, 416

Mass. 97, 104 (1993), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

Here, "the absence of a hearing followed by findings of fact" leaves this Honorable Court to guess as to the basis for the motion judge's denial of the Defendant's Motion. The motion judge's initial decision indicates only that he discredited the Defendant's affidavits and adopted the positions advanced in the Commonwealth's written Opposition (see RA 72-90; 96) and the motion judge's decision on the Defendant's Motion to Reconsider gave no reasons whatsoever for the denial. (RA 149; 150).

c. The Defendant's Motion is Not Moot and is Not Barred by Collateral Estoppel or Any Other Ground Advanced by the Commonwealth Below.

In denying the Defendant's Motion, the motion judge adopted various arguments set forth in the Commonwealth's Opposition (RA 96). The motion judge erred in doing so.

In its Opposition, the Commonwealth argued first that the Defendant "is estopped from arguing that his trial attorney provided ineffective assistance of counsel" by reason of the denial of his 2006 Motion for New Trial. (RA 81).

The Commonwealth's "collateral estoppel" claim misconstrues entirely the applicable legal concepts. The Commonwealth conceded in its opposition (RA 81) that "the issues in the two proceedings must be the same" and "the applicable law must be identical in both proceedings" for collateral estoppel to apply. Commonwealth v. Cabrera, 449 Mass. 825, 829 (2007).

But neither of these elements is satisfied in the present case.

In the 2014 motion, the Defendant presented an ineffective assistance of counsel claim grounded in principles first articulated in Padilla, *supra*, Clarke, *supra*, and their progeny. The Defendant and the motion judge did not have the benefit of these cases in 2006. These cases represent the first controlling precedent recognizing ineffective assistance claims in the context of immigration consequences. As a result, the law cannot with any credibility be said to be "identical" in both proceedings. Cabrera, *supra*, at 829.

Further, the issues in the two proceedings are not the same. In the 2006 motion, the Defendant's argument focused on his claim that his plea was not offered "voluntarily, and with sufficient awareness of

the relevant circumstances.”¹¹ The Defendant also focused on a portion of the colloquy in which the Defendant expressed confusion regarding the false name charge. Confusion regarding a misdemeanor charge and the voluntariness of the Defendant’s plea did not raise the “same issue” as the Defendant’s 2014 ineffective assistance claim founded on Padilla.¹² Cabrera, supra, at 829.

Because two key elements of collateral estoppel are absent here, the Commonwealth’s argument that the issue is precluded is meritless and should be discarded as such. Further, to the extent that the motion judge adopted this position in his denial of the Defendant’s Motion, doing so constituted a significant error of law.¹³

¹¹ See RA 20-21, citing Commonwealth v. Fernandes, 390 Mass. 714, 715 (1984) (reversing conviction based on inadequate plea colloquy).

¹² The 2006 motion contained a single line reference to “ineffective assistance of counsel” in the introductory paragraph, unsupported by authority or argument. This single reference did not rise to the level of legal argument. See Zora v. State Ethics Commission, 415 Mass. 640, 642 n. 3 (1993).

¹³ The Commonwealth also argued that the Defendant’s claim is moot by reason of his illegal re-entry to the United States after deportation resulting from the instant convictions. The Commonwealth correctly

The Commonwealth's other argument below focused on the credibility of the Defendant's showing. To the extent that the motion judge engaged in an exercise of discretion in ruling on the papers as to this issue, his reasoning for summary denial of the motions was flawed.

The Commonwealth argued below that plea counsel's affidavit contradicted one previously filed in connection with the Defendant's 2006 motion, and thus lacked sufficient credibility to warrant the relief which the Defendant's Motion sought. (RA 84-86). However, the two affidavits are not inconsistent or contradictory, and a reading of the two affidavits together does not support the inference which the Commonwealth urged.

In his 2006 affidavit, plea counsel alleged that he discussed the "immigration consequences" of pleading guilty with the Defendant, and that on the date of the Defendant's guilty plea, the Defendant "seemed more concerned with the exact number of days he would be incarcerated than with the possibility of

abandoned the "mootness" argument below (see footnote 2) and the Defendant does not address it here.

the immigration consequences.”¹⁴ (RA 28). Of import, in the 2006 affidavit, plea counsel neglected to describe in any way the “immigration consequences” he believed applied to the Defendant’s case. (RA 28).

The 2014 affidavit remedies the gaps left in plea counsel’s earlier affidavit. In his 2014 affidavit, plea counsel admitted that he advised the Defendant that so long as “the committed sentence did not exceed one year, his plea did not constitute an aggravated felony and he would therefore not be deportable.” (RA 62). Thus, rather than contradicting the 2006 affidavit, the 2014 affidavit supplements it with a missing, critical detail to which the earlier affidavit made no reference.

¹⁴ Even were this Court, as the Commonwealth urged below (RA 85), to “reject the [2014] affidavit as unreliable and not credible and concluded [sic] that the 2006 affidavit is credible,” the Defendant’s showing would still demonstrate deficient performance pursuant to Commonwealth v. DeJesus, 468 Mass. at 181-182. The discussion of the “possibility” of immigration consequences described in the 2006 affidavit did not satisfy plea counsel’s constitutional obligation, as “[s]uch advice [did] not convey ... that all of the conditions necessary for removal would be met by the defendant’s guilty plea, and that, under Federal law, there would be virtually no avenue for discretionary relief once the defendant pleaded guilty and that fact came to the attention of Federal authorities.” Id.

Contrary to the Commonwealth's urging, the affidavits, read together, are entirely harmonious.¹⁵ That is, that the Defendant "seemed more concerned with the exact number of days he would be incarcerated" is precisely because the exact number of days would, according to the erroneous advice of his attorney, be the controlling factor in the deportation calculus.

The Commonwealth made a similarly flawed argument that the Defendant's claim lacks credibility because the ch. 278, § 29D warning "gave him no pause."¹⁶

This contention misrepresented the Supreme Judicial Court's decision in Clarke, which the Commonwealth cited as authority for support on this point. The relevant text of the footnote, conspicuously omitted from the Commonwealth's citation, provides that "the receipt of such warnings

¹⁵ The Commonwealth strained so strenuously to portray the Defendant's claims as self-serving fabrications that it suggested outright that the motion judge not credit his representations regarding his own deportation – despite the fact that the very pleading which advanced that suggestion also corroborated the Defendant's averments as to his prior deportation. (RA 92). See also footnote 2, *supra*.

¹⁶ See RA 88, citing Commonwealth v. Clarke, 460 Mass. 30, 48, n. 20 (2011).

is not an adequate substitute for defense counsel's professional obligation to advise her client of the likelihood of specific and dire immigration consequences that might arise from such a plea." Id. (emphasis added).

The Commonwealth's selective citation obscures the import of the caveat quoted from Clarke. There, plea counsel did not address the issue at all, given that the defendant did not advise plea counsel of his non-citizen status. Id. at 45. In such cases, hearing the boilerplate warnings in § 29D might "give pause" to someone concerned about their immigration status, in the absence of any advice from plea counsel on the subject. But the factual scenario described in Clarke differs significantly from the instant case.

In this case, plea counsel knew of the Defendant's immigration status, and affirmatively, repeatedly, and incorrectly assured him that based on the length of his sentence, his plea carried no immigration consequence. Based on his attorney's specific advice, the boilerplate warning that any conviction "could" have immigration consequences was entirely irrelevant. To the same degree that counsel's representation that the sex offender

registry warning contained in a pre-printed waiver of rights form would give "no pause" to an individual pleading guilty to drunk driving, a generic deportation warning would naturally be dismissed by a defendant relying on advice from his attorney that it had no application in his case.

Finally, the Commonwealth argued below that plea counsel's affidavit "strains credulity" because he claimed ignorance of the "general" rule that drug convictions constitute aggravated felonies, but evidenced knowledge of the "more specific" rule that a broad class of cases become aggravated felonies by application of the so-called "one year rule." (RA 85).

The Commonwealth's designation of "specific" versus "general" rules simply contradicts what is widely accepted as a common misapprehension of trial lawyers in the relevant time period. See Commonwealth v. Gordon, 82 Mass. App. Ct. at 392. (attorney described the "one year rule" as "firmly established" and the "annual" subject of CPCS CLE programs); Martinez, 86 Mass. App. Ct. at 548 ("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.'). Far from

"straining credulity," the credibility of plea counsel's admission regarding his misunderstanding of immigration law is enhanced by this known historical narrative.

Despite its efforts to suggest that the Defendant's showing did not justify an evidentiary hearing, the Commonwealth succeeded exactly at showing why one should have occurred. Where the credibility of plea counsel's averments formed the tent-pole of the Commonwealth's argument and may have been the basis of the motion judge's decision, an evidentiary hearing was necessary to allow for a direct assessment of the relevant parties' credibility.

Again, this Honorable Court's decision in Martinez guides the way. In both Martinez and the instant matter, the motion judges placed significant emphasis on the credibility of the claims pertaining to counsel's advice. Id., compare with TR 38. In Martinez, the plea judge's negative assessment of the credibility of the defendant's submission rested on a flawed interpretation of the significance of the defendant's failure to secure an affidavit from plea

counsel.¹⁷ The Court therefore required an evidentiary hearing so that the judge could properly assess the credibility of the affiants and hear from plea counsel directly. Martinez, supra, at id.

Here, though the motion judge made no specific findings, the judge's remarks at the hearing and earlier (though brief) decision on the Defendant's motion for new trial indicated that he adopted the Commonwealth's negative view of the credibility of the Defendant's and plea counsel's affidavits.

However, as described above, the motion judge's denial of the Defendant's motions rested on a flawed construction of plea counsel's affidavits. Where this Honorable Court required a hearing in Martinez in order to allow for a proper assessment of the

¹⁷ The Appeals Court in Martinez also noted the motion judge's "puzzling" dismissal of Migdalia Garcia's affidavit as "hearsay," given Garcia's "representation that she was present during the conversation between the defendant and plea counsel." Id. at n. 9. In the instant matter, though focused on plea counsel and not his family members' affidavits, the motion judge made similarly "puzzling" comments during oral argument. The judge theorized that, in essence, defense attorneys might intentionally create Padilla errors to help out their clients in the future, although he conceded "hav[ing] nothing to base that on." (TR 36:15-25; 37:1-16). Because he made no specific findings, it is impossible to tell what impact the judge's speculation may have had on his decision.

defendant's claims, it should do the same in the instant matter. Here as in Martinez, an evidentiary hearing will allow the motion judge to assess the credibility of plea counsel first hand. Further, an evidentiary hearing would have served to "address ambiguities and gaps in the affidavit" which the judge apparently perceived. Gordon, supra at 401.

In the instant matter, the Defendant advanced a claim of ineffective assistance of counsel – a serious issue of constitutional importance. The Defendant supported his claim with a substantial evidentiary showing, consisting of several interlocking affidavits all corroborating the Defendant's claim of ineffective assistance of counsel.¹⁸ The Defendant's submissions

¹⁸ Plea counsel's 2006 affidavit contains details consistent with his 2014 affidavit and the affidavits of the Defendant and his family, which belies the Commonwealth's claim of recent fabrication. For instance, plea counsel's 2006 affidavit confirms that the Defendant's family was present for the discussions of immigration consequences of the pleas – a fact averred to by the Defendant and his family members. (RA 28; 136; 140). Moreover, the Defendant's immediate filing of a Rule 30 motion upon the lodging of an immigration detainer against him (RA 19) corroborates his claim that he was incorrectly advised of the immigration consequences of his plea. That he immediately took action to negate his plea shows that he would not have accepted the plea if he knew of its direct and inevitable immigration consequence.

addressed each element of the necessary showing, establishing both deficient performance and constitutional prejudice.

The Defendant therefore met his burden sufficient at least to merit the Court's conduct of an evidentiary hearing. Id. See also Commonwealth v. Cano, supra; Commonwealth v. Caban, 48 Mass. App. Ct. 179 (1999) (abuse of discretion to deny motion for new trial without evidentiary hearing where defendant advanced claim of ineffective assistance arising from trial counsel's failure to investigate potentially viable defense; hearing necessary to resolve issues of fact pertaining to defendant's claims and Commonwealth's showing in opposition).

As the foregoing demonstrates, the Defendant's "motion papers 'raise[d] serious issues as to the adequacy of [plea] counsel's [representation] ... [and made a] substantial showing on an issue of constitutional importance.'" Commonwealth v. Brookins, 33 Mass. App. Ct. 626, 635 (1992), affirmed S.C. 416 Mass. 97 (1993), quoting Commonwealth v. Licata, 412 Mass. 654, 660-661 (1992). The motion judge therefore "made 'a clear error of judgment in weighing' the factors relevant to the decision," such that the

judge's refusal to conduct an evidentiary hearing
amounted to an abuse of discretion. L.L. v.

Commonwealth, supra, at n. 27 (citation omitted).

As a result, this Honorable Court should reverse the
order denying the Defendant's Motion to Vacate Guilty
Plea and remand for an evidentiary hearing.

CONCLUSION

For the foregoing reasons, this Honorable Court should vacate the motion judge's orders denying the Defendant's Motion to Vacate Guilty Plea, and enter an order remanding the matter to the Superior Court for conduct of an evidentiary hearing.

Respectfully submitted,
Miguel Jiminez,
By his Attorneys,

Matthew Bingham, Esq.
Erkan & Associates
300 High Street
Andover, MA 01810
(978) 474-0054
BBO # 684913

Murat Erkan, Esq.
Erkan & Associates
300 High Street
Andover, MA 01810
(978) 475-6112
BBO # 637507

April 13, 2015

Rule 16(k) Certification

I, Matthew Bingham, counsel for Miguel Jiminez, hereby certify that this brief complies with the Rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(6), 16(e), 16(f), 16(h), 18, 19, and 20.

Date: _____

Matthew Bingham, Esq.
BBO: 684913

Rule 16(k) Certification

I, Murat Erkan, counsel for Miguel Jiminez, hereby certify that this brief complies with the Rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(6), 16(e), 16(f), 16(h), 18, 19, and 20.

Date: _____

Murat Erkan, Esq.
BBO: 637507

CERTIFICATE OF SERVICE

I, Matthew Bingham, hereby certify that on _____, 2015, a copy of the Appellant's brief on the merits relative to the instant appeal was served by certified first class mail at the following address:

Jane A. Sullivan
Office of the District Attorney/Worcester
225 Main Street
Room G-301
Worcester, MA 01608

Date: _____
Matthew Bingham

CERTIFICATE OF SERVICE

I, Murat Erkan, hereby certify that on _____, 2015, a copy of the Appellant's brief on the merits relative to the instant appeal was served by certified first class mail at the following address:

Jane A. Sullivan
Office of the District Attorney/Worcester
225 Main Street
Room G-301
Worcester, MA 01608

Date: _____
Murat Erkan

RECORD APPENDIX