


CLERK'S NOTICE	DOCKET NUMBER 0385CR01638	Trial Court of Massachusetts The Superior Court 
CASE NAME: Commonwealth vs. Miguel A Jimenez		Dennis P. McManus, Clerk of Courts
TO: Murat Erkan, Esq. Erkan & Associates, LLC 300 High Street Andover, MA 01810		COURT NAME & ADDRESS Worcester County Superior Court 225 Main Street Worcester, MA 01608
<p>You are hereby notified that on 09/02/2016 the following entry was made on the above referenced docket:</p> <p>MEMORANDUM & ORDER:</p> <p>For the reasons stated, the defendant's motion to vacate his guilty plea is ALLOWED, and these indictments shall be scheduled for trial as soon as possible.</p>		
DATE ISSUED 09/07/2016	ASSOCIATE JUSTICE/ ASSISTANT CLERK Hon. David Ricciardone	SESSION PHONE# (508)831-2356

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
WOCR 2003-01638,
2004-00091

COMMONWEALTH OF MASSACHUSETTS

v.

MIGUEL JIMENEZ,
Defendant

MEMORANDUM OF DECISION AND ORDER ON MOTION
TO VACATE GUILTY PLEA (P#15)

The defendant claims that justice was not done in this case due to ineffective assistance of counsel that caused him prejudice. For reasons that follow, the court agrees, and therefore this motion is ALLOWED.

The court held an evidentiary hearing on this matter at which the defendant, the lawyer who represented him at his plea hearing, his mother and cousin all testified. The undersigned finds as follows based on the credible testimony.

Miguel Jimenez was born in the Dominican Republic and came to the United States as a teenager in 1997. He was surrounded by a close-knit family that preceded him here and that included his parents, siblings, grandmother, cousins, aunts and uncles. He lived with his mother, Dulce Fajardo, until he moved to Fitchburg against her will in his early 20's.

Through this point in his life, virtually all of the defendant's extended family was in the U.S. He attended high school here (although he did not graduate), and worked several jobs (mostly at retail establishments), and considered this country his "home". By the time of the

guilty plea here, Mr. Jimenez had a fiancée, and he had not returned to the Dominican Republic. He had his green card and embraced life in this country.

It was in Fitchburg that the defendant's troubles began. In 2003, he was arrested twice, in close succession, for drug charges that included possession with intent to distribute and trafficking in cocaine. He was held for 60 days on these charges and subsequently released on bail. His mother sought legal representation for him from an attorney who was well known in her community. This individual referred her to his son, John Benzan, Esq., who had a criminal law practice. Ms. Fajardo hired Attorney Benson to represent her son Miguel.

For the next three years, various members of the defendant's family attended virtually every meeting between the defendant and his attorney. This group usually included Ms. Fajardo, the defendant's Aunt Isabel, one of his sisters, and his cousin Laura Perez Fajardo. Attorney Benzan spoke some Spanish, but young Ms. Perez Fajardo provided the main interpreting services at these meetings.

As mentioned, Dulce Fajardo and Laura Perez Fajardo testified at the hearing of this matter. They were each adamant that in every one of some twenty meetings between the attorney, the defendant and his family, the topic of immigration consequences was discussed should Miguel be convicted of drug charges.

The number of times that the same immigration questions were asked and answered may have been somewhat overstated by the defendant's mother and cousin. (The defendant himself did not testify to such repetition of the topic of potential deportation, a factor that actually enhanced his credibility.) Nevertheless, the court completely accepts as credible the fact that the possibility of deportation was a deep-seated fear of the defendant's and his entire family, and was discussed at some length in several meetings with Attorney Benzan. The specter of

deportation was at least as important as the length of the sentence to the defendant. His own testimony that he would have even preferred a longer sentence (after trial) had the ring of truth to it when he explained that he would have been gotten to be around his family longer.

It is also beyond dispute that the lawyer advised the defendant and his family that as long as the sentence imposed was less than a year and a day he would not be deported. This was a commonly held misconception of attorneys who were not immigration specialists at the time. All of the witnesses were in agreement of the fact that Mr. Benzan consistently and confidently gave this advice, including the attorney himself.¹ It is also given that this advice was profoundly incorrect, and that drug cases of this level (despite being negotiated down from trafficking to possession with intent) most commonly resulted in automatic deportation.

It appears that plea negotiations were the main focus of the attorney's services for the defendant. Attorney Benzan informed the defendant and his family early on that he thought Mr. Jimenez might be looking at a sentence of up to five years. When he finally obtained the agreement of the prosecutor to a joint recommendation of a split sentence to the house of correction with one year to serve, together with the trafficking charge being reduced to possession with intent to distribute, he thought the goal of avoiding deportation would be met and advised the defendant and his family of this.

¹ Attorney Benzan's attempt to reconcile his unfavorable affidavit of 2006 with that of 2013 that supports this motion was not so credible, in the opinion of the undersigned. He said that he prepared the first very quickly in response to Dulce Fajardo's request, and otherwise testified that by stating the defendant was "more concerned with the exact number of days he would be incarcerated than the possibility of the immigration consequences" he meant that getting less than the 366 days thought to avoid deportation was the most important thing to his client, and he just "didn't write that right".

It appears more likely to the undersigned that the attorney adopted a face-saving approach in writing the first affidavit which is understandable, given the noteworthy leniency of the negotiated plea recommendation. This does not undermine the believability of his ultimate admission that he did in fact give incorrect immigration advice to the defendant who acted in reliance on it.

Again, the defendant's own testimony in this regard is not so clear.² He claims that he did not know he would be going to jail at all the day of his plea and was still of a mind that he would get straight probation. Nevertheless, even if this is inconsistent with his responses to the plea judge's colloquy questions, he was convincing in his claim that accepted the attorney's assurances, and that he never would have pled guilty if he knew that he would be deported. The expression of shock and despair at the news that he found out in jail that he would be deported struck the undersigned as authentic. This reverberated through his mother's testimony also as she described receiving his phone call informing her of this, and the frantic efforts she immediately undertook to get an immigration lawyer involved.

Based on all of the above, the court concludes that the defendant has met the burdens outlined in Commonwealth v. Saferian, 366 Mass. 89 (1974), Padilla v. Kentucky, 559 U.S. 356 (2010), and Commonwealth v. Clarke, 460 Mass. 30 (2011). Attorney Benzan's erroneous assurances that Mr. Jimenez would not be deported upon pleading guilty to the drug offenses here when such a result was virtually automatic in such cases, amounts to conduct falling measurably below that of an ordinary fallible lawyer. Saferian, *id.* at 96. Padilla, *id.* at 368. The court further concludes that the defendant has shown prejudice. There is a specific, rational basis on the record of this case to find that Mr. Jimenez was motivated to accept the plea bargain due to his lawyer's assurances that he would not be deported. On the special circumstances of this case, where the defendant cut all ties to the Dominican Republic and would have placed great emphasis on immigration consequences, there is more than "a reasonable probability that,

² I did not take from this that the defendant was intentionally trying to obfuscate, but rather that he is not very astute, a situation that in this context buoys his credibility. He was unable to finish high school or his GED classes. He consistently had difficulty giving direct responses to questions from his own attorney. As his lawyer said here, "[the defendant] is not the best advocate for himself". The fact that the defendant testified by telephone and through an interpreter may explain some of the difficulty. The way the defendant presented however did not detract from his credibility; his overall demeanor, at least to the undersigned, was guileless.

but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Clarke, id.* at 47.

ORDER

For the reasons stated, the defendant's motion to vacate his guilty plea is **ALLOWED**, and these indictments shall be scheduled for trial as soon as feasible.



David Ricciardone, Superior Court Justice

Dated: September 2, 2016