

CRIMINAL COURT OF THE CITY OF NEW YORK
QUEENS COUNTY: PART JP-1

----- x
THE PEOPLE OF THE STATE OF NEW YORK

- against -

Docket No. 2007QN0340015

DECISION AND ORDER

LEON JAIKARAN

Defendant

----- x
HON. JOHN ZOLL

The defendant, Leon Jaikaran, moves pursuant to Criminal Procedure Law § 440.10(h) to vacate his judgment of conviction of criminal possession of a controlled substance in the seventh degree, PL § 220.03, on the ground that it was obtained in violation of his right to the effective assistance of counsel. The Appellate Term remitted this case to this Court for a *de novo* hearing on the issues raised in the defendant's motion to vacate. A hearing was commenced on January 30 and completed on February 1, 2012.

The defendant called four witnesses: Christina Velez, Esq., an immigration attorney, Daniel Liebersohn, Esq., who represented the defendant in the instant criminal matter, Ms. Casandra Jaikaran, the defendant's wife, and the defendant, Mr. Leon Jaikaran. The People called no witnesses. Both sides introduced several exhibits, which will be discussed below. In addition, subsequent to the hearing, the parties submitted written arguments.

The Court makes the following findings of fact and conclusions of law:

Testimony of Daniel Liebersohn, Esq.

Mr. Liebersohn testified that he assumed representation of the defendant soon after his arraignment. He testified that he had previously represented Mr. Jaikaran. He testified that he had several conversations with the defendant concerning how to proceed in this matter. Mr. Liebersohn testified that he was aware that the defendant was not a citizen of the United States. He further testified that on the day the defendant pleaded guilty, he also agreed to represent the two co-defendants in this case, Mr. Imran Hussein and Mr. Christopher Jaikaran, the defendant's cousin. Mr. Liebersohn testified that between the arraignment and the date of the plea he spoke with the defendant "a few times," including on the date of the plea, prior to the defendant entering the plea of guilty. Mr. Liebersohn testified that he told the defendant that he was going to be pleading guilty to possession of cocaine, PL § 220.03, a class A misdemeanor. Additionally, Mr. Liebersohn testified that he **did not** tell the defendant that if he pleaded guilty he would forever be barred from getting a green card and remaining in the United States. Mr. Liebersohn also testified that as of the date of the plea and sentence, he was **unaware** that a conviction to possession of cocaine would bar the defendant from ever receiving a green card and effectively constitute a permanent bar to re-entry into the United States. Mr. Liebersohn also testified that prior to the entry of the guilty plea, he had spoken with an attorney, whose name he could not recall, who told him that she was representing the defendant in his immigration proceeding. With respect to that conversation, Mr. Liebersohn testified as follows:

"[W]hen I had discussions with the immigration attorney who had called me and told me that they were representing

Mr. Jaikaran, the attorney made pains to discuss with me the fact that he had marihuana in his possession although that was not going to be the plea taken, and that could come up at a later point, the fact of the marihuana possession. And that time I was to put something on the record to the effect, in addition to whatever the plea was to the cocaine to the amounts of marihuana that was in the possession and just put that on the record and make that clear and that's simply what I did. I did that basically on the direction of the immigration attorney knowing that it would not have anything to do with the plea to the cocaine, which was not on his possession but because it was marijuana found on him that's what I was told to do and that's what I did. I didn't think he was pleading guilty to marihuana. I know what 220.03 is; it's a very common plea taken on many, many cases, and I basically did that at the behest to the immigration lawyer to make a record, that was my reason."¹

Mr. Liebersohn was asked if he told the immigration attorney that the defendant would be pleading guilty to possession of cocaine. He answered:

"[T]hat was discussed and the whole totality of the case was discussed. I know that what was discussed was his previous record and what he pleaded guilty to and what he was going to plead guilty to here, and I discussed that plea before he took the plea in court. That's the reason the case took time to resolve, and if I'm wrong – if I'm wrong about the immigration consequences, I take responsibility, but I did have many conversations with the immigration attorney, and once basically getting clearance on the plea and what was to state on the record, then I discussed that with Mr. Jaikaran and he took the plea."²

Mr. Liebersohn testified also that he had received "clearance" from the immigration lawyer to take this particular plea. He further answered, "[I]t was not my

¹ Tr., January 30, 2012, p 57, lines 1-19

² Tr. January 30, 2012, p. 58, line 22-25 through p. 58, lines 1-7.

intention to have him deported. He has a record that far surpasses 220.03. I can say now I didn't intend on this being a sole reason, and that's basically the feedback I had gotten prior to taking the plea. I wasn't told under no circumstances should he take a plea to 220.03, he would be deported. I wouldn't have taken the plea in that case. I would have pushed it further and tried to get a disorderly conduct. My practice would be to push the case to JP-1 to trial and exhaust all options before taking that plea."³ Mr. Liebersohn testified that he no longer had his own court file concerning the defendant's case. Mr. Liebersohn testified that after the defendant took a plea, the attorneys representing the defendant in an immigration plea then contacted him to try to vacate his plea.

As to the defendant's other basis for vacatur, an undisclosed conflict of interest, Mr. Liebersohn testified that was contacted by the defendant's family and appeared to represent him on this case soon after his arraignment. He continued to represent Mr. Jaikaran in the instant case up until the time he pleaded guilty. Mr. Liebersohn testified that the factual allegations in the complaint filed against Mr. Jaikaran and his co-defendants alleged that an amount of cocaine was found in the center console of the car he and two others were driving in, as well as some cocaine on the floor of the passenger side of the same vehicle. The amount found in the center console was listed as "residue."

Mr. Liebersohn testified that, according to the criminal court complaint filed against Mr. Jaikaran, Imran Hussein and Christopher Jaikaran, defendant Imran

³ Tr. January 30, 2012, p. 58, lines 10-19.

Hussein was sitting in the front passenger seat. Mr. Liebersohn testified that he accepted representation of Mr. Hussein and Leon Jaikaran in this case on the same day as the defendant pleaded guilty. Mr. Liebersohn was asked if, in his opinion, representing both the defendant and his two co-defendants constituted a conflict of interest. In response to that question, he testified that if the defendant went to trial with the defense that the drugs belonged to Mr. Hussein, because they were found in the center console and at the feet of Mr. Hussein, then it would be a conflict. He further testified that he went over all defenses with all of the defendants and “they were all advised of their options and all wanted to take the pleas at that point based on the information given to them. I hadn’t represented all three at the beginning. I took on the other two people later. We discussed and it was understood, so I didn’t feel like it was a conflict.”⁴ Mr. Liebersohn was asked the following questions concerning the conflict of interest and reiterated as follows:

“Q. So what did you tell the defendant about the conflict, if anything?”

A: I told him this was the offer. I told him he had a right to reject the offer and to pushed the case further to trial. I told him what his defenses could be, that he could deny knowledge of the drugs and that the drugs would be then attributable to the other people, that he had a right to avoid any such conflicts and he wanted to go ahead with the plea.” January 30, 2012 Tr. p 65, lines 3-10.

Mr. Liebersohn testified that he would not have represented all three defendants if the case had gone to trial due to the conflict of interest.

⁴ Tr. January 30, 2012, @ p. 64, lines 3-12.

Testimony of Christina Velez

The defendant also called Christina Velez, Esq. She testified that she represented the defendant on his immigration matter at the time he pleaded guilty in this case. She testified that while she has no independent recollection of speaking with Mr.

Liebersohn, she knows that they spoke since she has a memorandum of their phone call while she was an attorney at the law firm of Cyrus Mehta. That memorandum was introduced into evidence as Defendant's Exhibit A. She testified that her notes indicate that Mr. Jaikaran was charged with possession marihuana. She testified further that if Mr. Liebersohn had told her that Mr. Jaikaran was facing cocaine charges, she would have necessarily written that down since a conviction or plea to any count of cocaine then "he would not have been eligible for the waiver of inadmissibility that was at the heart of our strategy for getting him a green card and relief from removal."⁵ Ms. Velez testified that her strategy for Mr. Jaikaran was to have him marry his child's mother, Cassandra, at Rikers Island. She stated that a conviction of cocaine possession would render the marriage unnecessary for immigration purposes.

Ms. Velez testified that she did not believe that Mr. Jaikaran was facing cocaine charges. She testified that she was informed that he had other convictions for assault and robbery with youthful offender adjudications. Ms. Velez testified that at the time of her conversation with Mr. Liebersohn and her representation of the defendant on his immigration matter, she **did not know** that when someone is charged with possession of a controlled substance in New York State, it cannot

include marihuana. In other words, she believed that marihuana was a controlled substance. Ms. Velez testified that during her conversation with Mr. Liebersohn, she could not recall if he used the term "cocaine" or "criminal possession of a controlled substance in the 7th degree" or "PL 220.03" when discussing the charges pending against Mr. Jaikaran. She testified that she advised Mr. Liebersohn to put on the record that the defendant was in possession of less than 30 grams of marihuana, which the record indicates that he did make that statement, despite the fact that the defendant was not charged with marihuana in this case. Ms. Velez was also asked the following questions:

Q: When you made that statement and spoke to Mr. Liebersohn is it accurate that you were not aware at the time that Section 220.03 could not include marihuana?

A: That is correct.

The Court: Did Mr. Liebersohn indicate to you there is no marihuana charge in the conversation?

A: I don't believe so. I don't recall.

Ms. Velez testified that she had one brief conversation with the defendant while he was in custody. She testified that all she could remember was that it was hard to hear him.

Testimony of Casandra Jaikaran

The defense also called Casandra Jaikaran, the defendant's wife. She testified that she met the defendant around 2001 or 2002. Their relationship became more serious around 2004. She became pregnant in 2007. She testified that the defendant is being held for deportation based on the conviction in this case.

She testified that in her conversations with the defendant, he never told her he

was being charged with possession of cocaine. She said he told her he possessed marihuana, something for which neither he nor the two co-defendants in this case were ever charged. Mrs. Jaikaran testified that she had "quite a few" conversations with Ms. Velez, her husband's immigration attorney. She said she Ms. Velez told her that a plea to marihuana in this case "is not a deportable charge or anything like that."⁶

She also testified that she contacted the precinct after the defendant's arrest in this case in order to retrieve the vehicle he was driving when he was arrested. She testified that she can't remember exactly what they told her.

Testimony of Leon Jaikaran

The defendant also testified at the hearing. He testified that he is currently incarcerated in ICE (Immigration and Custody Enforcement) custody and is attempting to vacate his plea of guilty in this case.. He was born in Guyana, but has been in the United States since approximately 1992, when he was 5 years old. He testified that he has no family in Guyana. He further testified that he has been given the opportunity to "sign himself out" of the country. He has refused to do that.

On the day he pleaded guilty in this case, the defendant testified that he spoke with Mr. Liebersohn for about "five minutes." The defendant also testified that Mr. Liebersohn told him that he had spoken with Ms. Velez and that "everything is taken care of with the immigration attorney."⁷

⁶ Tr., February 1, 2012, p. 10, lines 19-20.

⁷ Tr., February 1, 2012, p. 16, lines 1-2

The defendant testified that he was aware ICE was considering removal proceedings prior to his guilty plea in this case. The defendant was considering getting married to adjust his status prior to his arrest and conviction in this case.

The defendant testified that he knew he was charged with criminal possession of a controlled substance in the seventh degree, but asserted that he was never told the substance was cocaine. He testified that he believed he was pleading guilty to possession of marihuana, not cocaine. In addition, he testified that had he known that as a result of taking the plea of guilty to the possession of cocaine he would be deported from the United States, would have a lifetime bar to getting a green card, would not be able to adjust his status through marriage and would have no other remedy to remain lawfully in this country, he would not have pleaded guilty and would have gone to trial in this case.⁸ He said he was unaware that there was cocaine in the vehicle he was driving and was also unaware that Mr. Liebersohn was representing the other co-defendants in this case.⁹

Findings of Fact and Credibility Determinations

The Court makes the following specific findings of fact and credibility determinations: Christina Velez and Casandra Jaikaran testified truthfully and the Court credits those portions of their testimony that are relevant to this hearing. The Court credits that portion of Mr. Liebersohn's testimony concerning what he told Mr. Jaikaran about the immigration consequences of taking the plea to PL § 220.03.

⁸ February 1, 2012, Tr @ p. 19, lines 17.

⁹ February 1, 2012, Tr @ p. 21, line 18 – p. 22, line 12.

However, it does not credit Mr. Liebersohn's recollection concerning the portion of his testimony concerning his discussion with the defendant concerning the conflict of interest and joint representation of Mr. Jaikaran and his two co-defendants.¹⁰ The Court credits, in part, Mr. Jaikaran's testimony and discredits it, in part. Those specific portions will be addressed in the pertinent sections below.

Conclusions of Law

The defendant has moved to vacate his plea of guilty to PL § 220.03, criminal possession of a controlled substance in the seventh degree, pursuant to CPL § 440.10. Section 440.10 provides, in relevant part:

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
 - (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States;

The burden of proof at the hearing is on the defendant by a preponderance of the evidence. CPL § 440.30(6). He argues that his trial counsel, Mr. Daniel Liebersohn, was ineffective insofar as (1) he incorrectly advised him of the devastating immigration consequences he would incur as a result of pleading guilty to criminal possession of a controlled substance in the seventh degree, i.e., permanent removal from the United States with no alternative remedy for re-admittance, and (2) Mr. Liebersohn was ineffective because he had an impermissible and actual conflict of interest when he represented the defendant and then assumed representation of his two co-defendants

¹⁰ This court does not believe that Mr. Leibersohn testified falsely, rather his recollection was not accurate.

on the day he pleaded guilty. Each of these factors, the defendant argues, rendered Mr. Liebersohn's representation of the defendant constitutionally defective and, consequently, his plea of guilty should be vacated.

The People oppose the defendant's motion. They argue that since the defendant relies on *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), that *Padilla* should not be applied retroactively in this case. If this Court does find that *Padilla* applies retroactively, they assert that Mr. Liebersohn's representation of the defendant in this case did not fall below the objective standards of reasonableness and that any deficiencies in his representation did not affect the outcome of the case.

Padilla Claim

The defendant asserts that he "was never informed by either assigned counsel or the Court of the potential devastating consequences the plea/conviction would have on his immigration status and ability to remain in the United States." Relying on *Padilla v. Kentucky*, 130 S Ct 1473, 1478 (2010), the defendant argues that "the failure to advise, notify or warn [him] of the potential devastating immigration consequences of his plea undermined his basic constitutional right to counsel" and that his plea "therefore cannot be allowed to stand."

In *Padilla*, the defendant, a native of Honduras who was a lawful permanent resident of the United States for over forty years, faced deportation after pleading guilty to transporting a large amount of marihuana in his tractor-trailer in Kentucky *Padilla*, 130 S Ct at 1477. Mr. Padilla claimed that his counsel not only failed to advise him of the deportation consequences of his plea but falsely assured him that "he did not have

to worry about immigration status since he had been in the country so long” *Id.* at 1478. The defendant in *Padilla* alleged that he would not have pleaded guilty and would have insisted on going to trial had he not received this incorrect advice. *Id.* at 1478. The Kentucky Supreme Court denied Mr. Padilla post-conviction relief, ruling that the Sixth Amendment guarantee of effective assistance of counsel does not extend to erroneous advice about the collateral consequence of deportation. *Id.* at 1478. The Supreme Court granted *certiorari* to decide whether, as a matter of federal law, Padilla’s counsel had an obligation to advise him that his guilty plea would result in removal from the United States. *Id.* 1478 Reasoning that “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,” *Id.* at 1480, the Supreme Court concluded that the “collateral versus direct distinction is . . . ill-suited” to evaluating an ineffective assistance of counsel claim concerning advice about the risk of deportation. *Id.* at 1482. Observing that “the consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory and his counsel’s advice was incorrect.” *Id.* at 1483. The Supreme Court held that “constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation.” *Id.* at 1478.

The Supreme Court analyzed Mr. Padilla’s claim under the two-pronged test enumerated in *Strickland v Washington*, 466 US 668 (1984). Under *Strickland*, to decide an issue of ineffective assistance of counsel, the court must first determine whether counsel’s representation “fell below an objective standard of reasonableness.”

Strickland, 466 US at 688, and if so, whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694; *see Padilla*, 130 S Ct at 1482-1484; *see also People v McDonald*, 1 NY3d 109, 113-114 2003. Accepting *Padilla*’s allegations as true, the Supreme Court found that he had sufficiently alleged that his counsel was constitutionally deficient but remanded the case for further proceedings to determine whether *Padilla* could demonstrate that he was prejudiced as a result. *Id.* at 1484.

In New York State, a defendant who seeks to challenge the voluntary and intelligent character of his guilty plea on the ground of ineffective assistance of counsel likewise must establish that his attorney’s advice did not meet the standard set forth in *Strickland*. *see McDonald*, 1 NY3d at 113. A defendant therefore must show that his counsel’s performance fell below an objective standard of reasonableness and that “that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 113.

Retroactivity

The People argue that *Padilla* should not be applied retroactively. While they set forth a lengthy and compelling argument in support of their position, they also acknowledge in their brief that the Appellate Term has ruled that *Padilla* is to be applied retroactively in this jurisdiction and that decision is binding on this Court. *People v. Nunez*, 30 Misc3d 55(App Term 2d Dept 2010). As such, the ruling in *Padilla* shall be applied to the facts in this case.

Conversations between Mr. Liebersohn and Ms. Velez

The critical part of this inquiry concerns the conversations between Mr. Liebersohn, the defendant's plea counsel and his immigration attorney, Ms. Velez. Both witnesses agree they had a conversation about the defendant's pending case prior to his entering a plea of guilty to PL § 220.03. The documentary evidence indicates the conversation occurred on or about August 20, 2007.¹¹ Mr. Liebersohn testified that he told Ms. Velez that Mr. Jaikaran was charged with possession of a controlled substance. He testified that he believed he used the word "cocaine" in detailing what the defendant was charged with and that he also used the term "controlled substance" during his conversations with Ms. Velez. She testified that she does not recall him using the word "cocaine." Ms. Velez has hand-written intake notes that defendant was charged with marihuana. There was no mention of "cocaine" in those notes. Mr. Liebersohn testified that he told the defendant on the day he pleaded guilty, before going out to court, that the plea had been "cleared with the immigration lawyer." Mr. Liebersohn also testified that he was advised by Ms. Velez that he should place on the record that the defendant was in possession of less than 30 grams of marihuana.

Based on the testimony adduced at this hearing, this Court cannot conclusively determine what was said exactly in this conversation. However, it is clear from the evidence adduced at the hearing that the defendant was not given proper or accurate advice concerning the immigration consequences of his plea and conviction, which is

¹¹ Defendant's Exhibit A

the only issue this Court needs to determine.

The People correctly assert that the defendant has a constitutional right to effective assistance of *criminal defense counsel*. The immigration attorney's mistakes, lack of knowledge of New York State Penal Law and/or misinformation to Mr. Liebersohn, if any, cannot be imputed to trial counsel, for the purposes of a *Padilla/Strickland* analysis. However, applying this principle the result is that under *Padilla* and *Strickland*, Mr. Liebersohn remains under a duty to correctly ascertain and advise the defendant of the consequences of a plea, if removal from the country is all but certain. As *Padilla* holds, a review of the applicable federal statute would have indicated that this conviction was going to result in the defendant's removal from the country, with no possibility of a waiver or change in his status. 8 U.S.C. § Section 1182(h). There is but one consequence, permanent removal from this country with no chance for relief or change in status. This consequence materially differs from a conviction that would permit the defendant to alter his status through marriage or other means. Where the defendant's status would be uncertain or could potentially change depending on certain future events, e.g., getting married to a US citizen, then counsel's advice is not required to be so exact. *Padilla*, p. 1484. However, where the result is clear from the statute, as it is in this case, counsel's advice to the defendant must be more accurate than that which was given to the defendant by Mr. Liebersohn. Mr. Liebersohn, as trial counsel, had an affirmative duty to tell the defendant that this plea of guilty would likely or almost certainly result in his permanent removal from this country with no remedy.. He did not so advise the defendant and, as such, his

representation fell below the objective standard required under both the Federal and State Constitutions. Therefore, the defendant has satisfied the first prong of the *Strickland* test beyond a preponderance of the evidence.

The second prong of the *Strickland* test is also satisfied in this case. *Strickland* requires, that but for counsel's errors in advising the defendant, "there is a reasonable probability that the result would have been different." *Strickland*, at p.694. Here, Mr. Liebersohn was fully aware that the defendant was a non-citizen who was charged with criminal possession of a controlled substance in the seventh degree, a class A misdemeanor, punishable by up to one year in jail. PL § 70.15(1). The evidence against Mr. Jaikaran was not so overwhelming that a conviction was certain. In fact, the evidence consisted of two separate quantities of cocaine: one recovered near the feet of the front passenger seat and a second quantity, listed as residue, from the center console. Neither was found on the defendant's person. While the People could certainly utilize the presumption found in PL § 220.25,⁷ this presumption is a permissive inference and may be rebutted by the defendant or even rejected entirely by the trier of fact. This was not a factual scenario where the drugs were found on the defendant's person, or where there was a large quantity of drugs found in the vehicle and the defendant was charged with a felony and a misdemeanor plea was offered in lieu of a potential lengthy upstate prison sentence. In both of these scenarios, a denial of knowing possession would be very unlikely to prevail at trial and the outcome of the case would not likely have been different had the defendant chose to go to trial. In addition, had the defendant been properly advised that pleading guilty to criminal possession of a controlled substance in the seventh degree would result in a

permanent bar from remaining in or re-entering this country where he has resided in since he was five years old, his entire family resided, his fiancé resided with her child, force him back to a country where he did know anyone and has not been to since he was 5-6 years old, and leave him without any remedy before the immigration board, there is little doubt that anyone in the defendant's position, after being properly advised, would have rejected the plea and proceeded to trial. The defendant has established this prong of the *Strickland* analysis beyond a preponderance of the evidence.

Therefore, since the defendant's trial counsel failed to correctly inform the defendant of the immigration consequences of his plea and had he been properly advised he would have undoubtedly decided to go to trial, the defendant's conviction to PL § 220.03 is hereby vacated and a new trial is ordered.

Conflict of Interest

The defendant also claims that Mr. Liebersohn's representation was ineffective insofar as he had an impermissible conflict of interest which deprived the defendant of effective assistance of counsel. It is indisputable that one accused of committing a crime is entitled to effective assistance of counsel. U.S. Const., 6th Amdt; N.Y. Const, art. I, § 6; CPL § 210.15, sub 2. Trial counsel's duty to the defendant may become impaired where one attorney "simultaneously represents a number of defendants." *People v. Gomberg*, 38 NY2d 307, 312(1975), citing *Glasser v. U.S.* 315 US 60,70 (1942). While not every circumstance involving joint representation of the multiple defendants in the same criminal transaction is a denial of effective assistance of counsel, a conflict exists when the defenses "run afoul of each other." *People v. Gonzalez*, 30 NY2d 35(1972) *cert denied* 409 US 859(1972). This principle also

applies to the plea negotiation stage of a criminal proceeding as well. *People v. Macerola*, 47 NY2d 257(1979). “[A]n attorney may be less than willing to fervently engage in plea negotiations to obtain a lesser charge for one defendant if to do so would require that defendant to testify against the other defendants, or to call a defendant to testify on his own behalf when his testimony may be detrimental to other defendants whom the attorney represents.” *Id.*, p. 262. Where an actual conflict exists, the Court must make an inquiry, on the record, to insure that the defendants are aware of the conflict and informed of their right to proceed with separate counsel. *People v. Gomberg*, p. 314. “Attorneys are under a continuing ethical obligation to disclose to their clients, at the earliest possible time, any conflicting interests that might cloud their representation.” *Id.*; citing Code of Prof. Resp., EC 5-16, DR 5-101[A], DR 5-105[B], [C].

Applying these principles to the case at bar, Mr. Liebersohn testified that he initially represented the defendant, Mr. Leon Jaikaran. He testified further that he was aware of the defendant’s non-citizen status. He was also aware that the cocaine in this case was not found on the defendant’s person. He added that if he were to take this case to trial, one of the defenses he would use for Mr. Jaikaran was that the drugs belonged to another person in the vehicle, one of Mr. Jaikaran’s co-defendant’s. However, Mr. Liebersohn accepted representation of those other two defendant’s on the date of the plea. While he did not testify as to the extent of the plea discussions with the prosecutor after he agreed to represent the other two co-defendants, Mr. Hussein and Mr. Christopher Jaikaran, he would have been necessarily ethically


precluded from advocating the defendant's [Leon Jaikaran] perhaps strongest argument for a better disposition, that the cocaine belonged to Mr. Hussein.

Mr. Liebersohn testified that he explained "all of the defenses with all of the defendants and they all wanted to go forward with the plea." This Court does not credit Mr. Liebersohn's recollection in this regard. The conclusory statement that he went over all defenses with all defendants does not, in this particular case, satisfy the obligation he owed to the defendant, Leon Jaikaran. He did not specify what he told each individual defendant including Mr. Leon Jaikaran. Mr. Jaikaran testified that his conversation with Mr. Liebersohn lasted about "five minutes" in the pens before going out to court on the date he pleaded guilty. This Court credits that portion of Mr. Jaikaran's testimony and further finds that a meaningful discussion with Mr. Jaikaran concerning his two new clients, the actual conflicts of interest, in addition to discussing the immigration issues above was not possible in this short time frame and did not in fact occur. At this point in time, after agreeing to represent the other two defendants in this case, at a minimum, Mr. Liebersohn had to specifically tell Mr. Jaikaran that he could not assert any defenses that could potentially exculpate him if it inculpated one of his new clients. He testified that he was aware of what defenses were available to the defendant and that at least one of those defenses would necessarily conflict with Mr. Hussein at trial. Therefore, it also conflicted with Mr. Leon Jaikaran during plea negotiations. Absent such a specific conversation or a waiver by the defendant, on the record, Mr. Liebersohn's representation of the defendant fell below an objectively reasonable standard. While Mr. Jaikaran's prior criminal history may have made it difficult or impossible, at that point, to negotiate a more favorable plea, such as a plea

to a violation, this is all the more reason why the defendant needed to have an attorney focused singly on his own interests and not on those his co-defendants, particularly when taken together with the potential immigration concerns that Mr. Jaikaran faced. Accordingly, the defendant's motion to vacate judgment is granted. A new trial is ordered.

This constitutes the decision and order of the Court.

Dated: May 16, 2012, 2010
Queens, New York



John Zoll
Judge of the Criminal Court