COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-10888

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

V.

MICHAEL CLARKE,
Defendant-Appellant

BRIEF AND APPENDIX FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE DORCHESTER DIVISION OF THE BOSTON MUNICIPAL COURT

SUFFOLK COUNTY

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ISSUES PRESENTED

I. Whether the defendant is entitled to retroactive application of *Padilla* on this collateral appeal since his conviction became final before *Padilla* was decided.

II. Whether the motion judge properly denied the defendant's motion for a new trial where the defendant did not provide any credible evidence that his plea attorney failed to warn him of the possible immigration consequences of his guilty plea, the plea judge warned the defendant of the possible immigration consequences of his guilty plea, and a rational person in the defendant's position would have accepted the plea deal.

STATEMENT OF THE CASE

This case is before this Court on the appeal of the defendant, Michael Clarke, from the denial of his second motion for a new trial in which, pursuant to *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), he sought to vacate his plea convictions.

On February 17, 2004, the Dorchester Division of the Boston Municipal Court issued a criminal complaint (No. 0407CR000857) charging the defendant with possession of a class B substance with intent to distribute (Count 1), and a related school zone charge (Count 2), in violation of G.L. c. 94C, §§ 32A & 32J; possession of a class D substance with intent to distribute (Count 3), and a related school zone charge

(Count 4), in violation of G.L. c. 94C, §§ 32C & 32J; and possession of liquor while being under twenty-one years of age, in violation of G.L. c. 138, § 34C (Count 5; DA 1-2).[1]

On June 24, 2004, the defendant filed a motion to suppress (DA 4). The next day, Judge James W. Coffey held an evidentiary hearing on the defendant's motion (DA 4; CA 6). On July 16, 2004, in a written decision, Judge Coffey denied the defendant's motion (DA 4; CA 6-8).

On February 2, 2005, the defendant pled guilty to Counts 1, 3, and 5; Counts 2 and 4 were dismissed (DA 1-2; CA 1-2). On Count 1, Judge John Lu sentenced the defendant to two years in a house of correction, five months to serve and the balance suspended for two years (DA 1; CA 1). On Count 3, he sentenced the defendant to two years of probation, to run consecutively to the first sentence (DA 1; CA 1). Count 5 was placed on file (DA 1; CA 1).

On December 15, 2009, the United States Immigration Court served the defendant with a notice to appear, stating that he was subject to removal from the United States for being convicted of possession of a

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[1] The defendant's brief will be referred to as (DB __), and his record appendix as (DA __). The Commonwealth's appendix will be referred to as (CA __).

class B substance with the intent to distribute (Count 1), an aggravated felony (DA 31-32).

On January 14, 2010, the defendant filed a motion for new trial, supported by a memorandum and affidavits from himself and his current counsel (DA 5, 8-9). The defendant sought to withdraw his plea on the basis that his plea was not intelligently due to a lack of understanding and knowledge regarding the intent element of his crimes (DA 9). Judge Rosalind Miller held a hearing on the motion on February 2, 2010, and denied it on February 9, 2010 (DA 5). On February 26, 2010, the defendant filed a motion to reconsider (DA 6). Judge Miller held a hearing on the motion to reconsider on March 10, 2010, and denied it on March 15, 2010 (DA 6).

On April 14, 2010, the defendant filed a second motion for new trial, this time relying on *Padilla*, supported by a memorandum and another affidavit from counsel (DA 6, 11-15). On June 10, 2010, Judge Miller held a hearing on the defendant's motion (DA 6). That same day, the defendant filed an affidavit from his plea counsel, in which she claimed that she had not known at the time of the plea that the defendant was not a citizen, and that she did not recall discussing any immigration consequences of his plea with him (DA 10). The Commonwealth filed an opposition on June

14, 2010 (DA 16-29). On June 29, 2010, Judge Miller denied the motion (DA 6, 11).

On July 12, 2010, the defendant filed a notice of appeal from the motion judge's denial of his second motion for a new trial (DA 7, 30).

STATEMENT OF FACTS

The following facts are based on Judge Coffey's findings of fact on the defendant's motion to suppress (CA 6-8), supplemented with information from the Boston Police incident report and its supplement (CA 3-5)[2]:

On the evening of February 16, 2004, Boston Police Officers Lucas Taxter and Bowden were monitoring the Mattapan Square area in response to a recent homicide and a drug distribution arrest in the area (CA 6). They saw a group of teenagers standing at the corner of Crossman Street and Babson Street (CA 6). As the officers drove by the group, one of the teenagers, later identified as the defendant, made eye contact with Officer Taxter for ten to fifteen seconds (CA 6).

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[2] This case was commenced by a warrantless arrest. In order for the complaint to issue, the arresting officer provided the clerk-magistrate with both of these reports. *See* District/Municipal Courts R. Crim. P. 2(a). "[T]his [C]ourt, may take judicial notice of the records and files of the court in the same case or in ancillary proceedings . . . ." *Commonwealth v. Kirk*, 39 Mass. App. Ct. 225, 229 n.3 (1995) (citing Liacos, Massachusetts Evidence § 2.8.1 (6th ed. 1994)). Accordingly, the incident reports are part of this case's record.

The defendant proceeded to walk away from the officers, but kept looking over his shoulder at them (CA 6).

The officers turned their cruiser onto Delhi Street, where they saw the defendant standing on the front porch of a home (CA 6). He was standing near the door, but was not knocking or ringing the bell (CA 6). His hands were in his pockets (CA 6). The officers stopped, exited the cruiser, and conducted a threshold inquiry (CA 6). Officer Bowden asked the defendant if they could speak with him, and the defendant complied, stepping off of the front porch and onto the sidewalk (CA 6). The officers asked him if he lived at the residence, and the defendant replied that he did not, but that his friend "Dave" lived there (CA 6). The defendant did not know Dave's last name (CA 6). Officer Taxter spoke with a resident of the house, who did not know or recognize the defendant (CA 6). The defendant was extremely nervous (CA 6). During the inquiry, the officers detected a strong odor of alcohol coming from the defendant (CA 6). The defendant admitted that he had been drinking and that he was only seventeen years old (CA 6).

Concerned for his safety, Officer Taxter conducted a pat-frisk of the defendant (CA 7). He recovered two "nip" bottles of brandy from the defendant's rear

pocket (CA 7). The defendant was placed under arrest for being a minor in possession of alcohol (CA 7).

During a subsequent search incident to the arrest, the officers recovered the following items: a plastic bag containing eight off-white rocks, each wrapped in clear plastic, believed to be crack cocaine; four zip-lock bags, each containing a green herb substance believed to be marijuana; a cell phone; and $1,115.00 in cash (CA 4, 7).

During the booking procedure, after being read his *Miranda* rights, the defendant told Officer Taxter that the marijuana was packaged as "dime bags, $10.00 each," and that the crack cocaine was also packaged in "$10.00 rocks" (CA 4, 7).

The defendant was arrested 339.3 feet from the Mildred Middle School property line (CA 5).

ARGUMENT

I. THE DEFENDANT IS NOT ENTITLED TO RETROACTIVE APPLICATION OF *PADILLA* ON THIS COLLATERAL APPEAL, SINCE HIS CONVICTION BECAME FINAL BEFORE *PADILLA* WAS DECIDED.

The defendant asserts that the holding of *Padilla* is retroactive (DB 12). He is incorrect.

Padilla was decided in 2010, well after the defendant's convictions became final in 2005. Under both Massachusetts and Federal law, "[u]nless they fall within an exception to the general rule, new

constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague v. Lane*, 489 U.S. 288, 310 (1989); *accord Commonwealth v. Sullivan*, 425 Mass. 449, 454 (1997), *cert. denied*, 522 U.S. 1060 (1998) (citing *Commonwealth v. Bray*, 407 Mass. 296, 299-303 (1990)) ("[W]e follow[] the Federal rule on the retroactive application of a new criminal case to a case on collateral review as described by the Supreme Court in *Teague v. Lane* . . ."). Both the Supreme Judicial Court and this Court have applied the *Teague* rule numerous times to deny relief to defendants on collateral appeals. *See, e.g., Sullivan*, 425 Mass. at 454-55 (new rule that intoxication is relevant to third prong of malice did not apply retroactively to collateral appeals); *Commonwealth v. Robinson*, 408 Mass. 245, 247-48 (1990) (new rule that intoxication is relevant to all specific intent crimes did not apply retroactively); *Commonwealth v. Hampton*, 64 Mass. App. Ct. 27, 31-33 (2005) (new rule that youthful offender indictment requires Commonwealth to prove defendant's age and prior confinement did not apply retroactively); *Commonwealth v. Blake*, 49 Mass. App. Ct. 134, 135-36 (2000) (new rule requiring police to have search warrant at the scene before commencing search did not apply retroactively), *rev. denied*, 434 Mass. 1103

(2001). In determining whether a rule may be applied retroactively, Massachusetts courts therefore consider (1) whether the rule at issue is a "new rule" and, if so, (2) whether the new rule fits within either of the two exceptions set out in *Teague* that would permit retroactive application of a new rule. *Bray*, 407 Mass. at 301. Because *Padilla* announced a new rule that does not fall within either of the limited exceptions, this Court should not apply the Supreme Court's decision in *Padilla* retroactively to the case now before it on collateral review.

Under the framework of *Teague* and *Bray*, a decision announces a new rule when "'it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [or] if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.'" *Bray*, 407 Mass. at 301 (quoting *Teague*, 489 U.S. at 301) (emphasis in original). The Supreme Court's ruling in *Padilla* announces a new rule because it "marks a major upheaval in Sixth Amendment law." *Padilla*, 130 S. Ct. at 1491 (Alito, J., concurring). Prior to the Supreme Court's decision, "the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction." *Id.* at 1487

(emphasis in original). The vast majority of state courts, including Massachusetts state courts, similarly held that "a defendant need not be informed of the collateral consequences of a guilty plea." *Commonwealth v. Fraire*, 55 Mass. App. Ct. 916, 917 (2002); *see also New York v. Kabre*, 905 N.Y.S.2d 887, 893-95 (Crim. Ct. 2010) (citing no less than twenty-seven state court decisions from twenty-three states in support of the proposition that, before the *Padilla* decision, "counsel had no obligation to apprise a defendant of the collateral consequences of a guilty plea").

Prior to the Supreme Court's ruling in *Padilla*, the vast majority of federal and state courts held that immigration consequences were collateral consequences of a conviction. *See, e.g., U.S. v. Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000) ("Along with numerous other courts of appeal, we have held that deportation is only a *collateral* concomitant to criminal conviction." (emphasis in original)), *abrogated by Padilla*, 130 S. Ct. at 1481-82; *Fraire*, 55 Mass. App. Ct. at 917 ("[W]e have repeatedly held that immigration ramifications are one such collateral consequence [of a guilty plea]."). Immigration consequences were held to be collateral not because of the nature of the consequences, but because they are "'not the sentence

of the court which accepts the plea but of another agency over which the trial judge has no control and for which he has no responsibility.'" *Commonwealth v. Quispe*, 433 Mass. 508, 513 (2001) (quoting *Gonzalez*, 202 F.3d at 27). Courts therefore continued to hold that immigration consequences were collateral even after the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, increased the severity of the immigration consequences of a conviction. *See, e.g., Commonwealth v. Villalobos*, 437 Mass. 797, 804 (2002) ("The immigration consequences resulting from disposition of a criminal charge are collateral and contingent consequences of a plea."); *Fraire*, 55 Mass. App. Ct. at 917 ("[D]ecisions of this court and of the Supreme Judicial Court, handed down since 1996, have continued the long practice of deeming immigration consequences collateral in nature.").

Because defense counsel had no obligation to warn of collateral consequences and because immigration consequences, no matter how harsh, were almost universally held to be collateral consequences, federal and state courts alike routinely hold that defense counsel was not ineffective for failing to advise a client of the immigrations consequences of a criminal conviction. *See, e.g., Santos-Sanchez v. U.S.*, 548

F.3d 327, 334 (5th Cir. 2008), *abrogated by Padilla*, 130 S. Ct. at 1481-82; *Broomes v. Ashcroft*, 358 F.3d 1251, 1256 (10th Cir. 2004); *Gonzalez*, 202 F.3d at 25; *U.S. v. Fry*, 322 F.3d 1198 (9th Cir. 2000); *Commonwealth v. Hason*, 27 Mass. App. Ct. 840, 843 (1989); *Kabre*, 905 N.Y.S.2d at 893-95, and cases cited.

In *Padilla*, the Supreme Court completely altered this established rule by holding that "counsel must inform her client whether his plea carries a risk of deportation." *Padilla*, 130 S. Ct. at 1486. Additionally, the majority abrogated the distinction between direct and collateral consequence in the context of immigration, holding that "[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence." *Id.* at 1482. This decision is thus a "new approach" which marks a "dramatic departure from precedent." *Padilla*, 130 S. Ct. at 1488 (Alito, J., concurring). Because the rule announced in *Padilla* was not "dictated by precedent existing at the time the defendant's conviction became final," *Bray*, 407 Mass. at 301 (quoting *Teague*, 489 U.S. at 301), this Court should find that *Padilla* announced a new rule for the purposes of the *Teague* retroactivity analysis.

The mere fact that the Supreme Court looked to its earlier decision in *Strickland v. Washington*, 466 U.S. 668 (1984), does not answer the question of whether *Padilla* announced a new rule. The "fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision is not conclusive for the purposes of deciding whether the current decision is a 'new rule' under *Teague*." *Bray*, 407 Mass. at 302-03 (quoting *Butler v. McKellar*, 494 U.S. 407, 415 (1990)); *see also Commonwealth v. Amirault*, 424 Mass. 618, 638 (1997) ("A rule counts as new for this purpose [retroactivity analysis] even if it is the logical extrapolation of a principle already stated in prior decisions."). What is conclusive is whether the announced rule was "'*dictated* by precedent.'" *Bray*, 407 Mass. at 301 (quoting *Teague*, 489 U.S. at 301) (emphasis in original). The rule announced in *Padilla* abrogated both widespread federal and state precedent and is therefore a new rule. Thus, it cannot be applied retroactively to cases on collateral review unless it fits within either of the two narrow exceptions announced in *Teague* and adopted by the Supreme Judicial Court in *Bray*. *See Teague*, 489 U.S. at 311; *Bray*, 407 Mass. at 303.

Teague established two exceptions to its holding that a new rule will not apply retroactively to those cases that became final before the new rule was announced. *Teague*, 489 U.S. at 310-12. The Supreme Judicial Court has described these two exceptions as "very limited." *Bray*, 407 Mass. at 300. The first exception calls for retroactive application of a new rule if the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Bray*, 407 Mass. at 303 (quoting Teague, 489 U.S. at 311) (internal quotation marks omitted). This exception does not apply to the *Padilla* holding and is therefore not relevant to an analysis of the retroactive application of the new rule.

The second exception applies to "watershed rules of criminal procedure" that reflect an alteration in "our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." *Teague*, 489 U.S. at 311 (emphasis in original). The plurality in *Teague* limited the scope of this second exception to "those new procedures of fundamental fairness without which the likelihood of an accurate conviction is seriously diminished." *Bray*, 407 Mass. at 300 (quoting *Teague*, 489 U.S. at 312-13). In the years since *Teague*, the

Supreme Court has rejected nearly "every claim that a new rule satisfied the requirements for watershed status." *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (rule announced in *Crawford v. Washington*, 541 U.S. 36 (2006), was not "watershed").

"In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id.* at 418 (internal citations omitted). With respect to the first requirement, the dispositive inquiry here is whether the *Padilla* rule "remedied an impermissibly large risk of an inaccurate conviction." *Id.* The Supreme Court's ruling in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that counsel must be appointed for any indigent client charged with a felony, provides guidance in answering this question. The *Gideon* rule, which eliminated the "intolerably high" risk of an unreliable verdict associated with the denial of representation, is the only rule to qualify as watershed under this exception. *Whorton*, 549 U.S. at 419. However, the new rule announced in *Padilla* "is in no way comparable to the *Gideon* rule." *Id.* Unlike the *Gideon* rule, the *Padilla* rule has no bearing on the

accuracy of the fact-finding process. Unless the "likelihood of an accurate conviction is *seriously* diminished," a new rule is neither fundamental nor retroactive, even if it is based on a fundamental right in the abstract. *Schriro v. Summerlin*, 542 U.S. 348 (2004) (quoting *Teague*, 489 U.S. at 313). Thus, the *Padilla* rule cannot be said to be "necessary to prevent an impermissibly large risk of an inaccurate conviction." *Whorton*, 549 U.S. at 418.

With respect to the second requirement, the *Padilla* rule did not "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id.* at 420. This requirement "cannot be met simply by showing that a new procedural rule is *based on* a 'bedrock' right." *Id.* at 420-21 (emphasis in original). Rather, "a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Id.* at 421. For example, the *Gideon* rule, the quintessential watershed rule, "effected a profound and 'sweeping' change." *Id.* (quoting *Beard v. Banks*, 542 U.S. 406, 418 (2004)). The Supreme Court has "not hesitated to hold that less sweeping and fundamental rules [than *Gideon*] do not qualify [as watershed]." *Id.* (internal quotation omitted). The *Padilla* rule "simply lacks the primacy and centrality

of the *Gideon* rule" and is thus "less sweeping and fundamental" than *Gideon*. *Id.* It does not qualify as a rule that "altered our understanding of the bedrock procedural elements essential to the fairness of a [plea] proceeding." *Id.* The *Padilla* rule, therefore, does not fall within the exception for watershed new rules.

In sum, because *Padilla* announced a new rule, not dictated by precedent, which does not fall within either of the two narrow exceptions set forth in *Teague*, this Court should not apply *Padilla* retroactively to the instant case.

II. THE MOTION JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL BECAUSE THE DEFENDANT DID NOT PROVIDE ANY CREDIBLE EVIDENCE THAT HIS PLEA ATTORNEY FAILED TO WARN HIM OF THE POSSIBLE IMMIGRATION CONSEQUENCES OF HIS GUILTY PLEA, THE PLEA JUDGE WARNED THE DEFENDANT OF THE POSSIBLE IMMIGRATION CONSEQUENCES OF HIS GUILTY PLEA, AND A RATIONAL PERSON IN THE DEFENDANT'S POSITION WOULD HAVE ACCEPTED THE PLEA DEAL.

In the alternative, even if *Padilla* applies to the defendant's claim, it would fail. It is within the motion judge's discretion to allow a motion for new trial. *Commonwealth v. Medina*, 430 Mass. 800, 802 (2000); *Commonwealth v. Stewart*, 383 Mass. 253, 257 (1981). Hence, a reviewing court will review the judge's decision only for an abuse of discretion. *Commonwealth v. Rebello*, 450 Mass. 118, 130 (2007); *Commonwealth v. Candelario*, 446 Mass. 847, 858 (2006).

Here, there was no such abuse of discretion. The motion judge properly denied the defendant's motion for a new trial without an evidentiary hearing because the defendant did not raise a substantial issue.

It is the defendant's burden to prove that he is entitled to a new trial based on ineffective assistance of counsel. *Commonwealth* v. *Watson*, 455 Mass. 246, 256 (2009). In order to prevail on such a claim, he must first establish that there was "serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer." *Commonwealth v. Britto*, 433 Mass. 596, 601 (2001) (quoting *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974)); *accord Padilla*, 130 S. Ct. at 1482 (citing *Strickland*, 466 U.S. at 694). Second, this substandard performance must have "likely deprived the defendant of an otherwise available, substantial ground of defense." *Britto*, 433 Mass. at 601 (quoting *Saferian*, 366 Mass. at 96); *accord Padilla*, 130 S. Ct. at 1482 (citing *Strickland*, 466 U.S. at 694). "In this context, whether the behavior of counsel has 'likely deprived the defendant of an otherwise available substantial ground of defen[s]e,' means whether the defendant would not have . . . pleaded guilty but for the advice." *Commonwealth v. Moreau*, 30 Mass. App. Ct.

677, 682 (1991), *cert. denied*, 502 U.S. 1049 (1992) (citing *Hill v. Lockhart*, 474 U.S. 52, 56, 59 (1985); *Commonwealth v. Stirk*, 392 Mass. 909, 912-13 (1984)).[3] The defendant has failed to meet his burden under either prong, and, thus, his motion was properly denied.

A. The Defendant Has Not Proved That His Plea Attorney Was Ineffective Because He Has Provided No Credible Evidence That His Plea Attorney Failed To Warn Him Of The Possible Immigration Consequences Of His Guilty Plea.

In *Padilla*, the Supreme Court held that a defendant's attorney's conduct in providing affirmative mis-advice about deportation met the first prong of ineffective assistance of counsel. *Padilla*, 130 S.Ct. at 1484. The attorney in *Padilla* affirmatively misinformed the defendant that, as a result of his guilty plea, he "did not have to worry about immigration status since he had been in the country so long." *Id.* at 1478. Contrary to this advice, the defendant faced deportation consequences because the offenses he pled guilty to -- possession of class B and D substances with the intent to distribute -- are two of a large number of automatically deportable offenses.

[3] The defendant bases his claim on both Federal and State grounds (D.Br. 11-13). This distinction is of little import, as it is well established that "if the *Saferian* test is met, the Federal test is necessarily met as well." *Commonwealth v. Callahan*, 401 Mass. 627, 635 n.10 (1988) (quoting *Commonwealth v. Fuller*, 394 Mass. 251, 256 n.3 (1985)).

See 8 U.S.C. § 1227(a)(2)(B)(i). The Court held further that, in cases where the immigration consequences are "truly clear," counsel has an equally clear "duty to give correct advice." *Padilla*, 130 S.Ct. at 1483. The Court remanded the case for a determination of whether the defendant was prejudiced as a result of his attorney's mis-advice. *Padilla*, 130 S.Ct. at 1484.

Here, as in *Padilla*, it is "truly clear" that the defendant's crime would render him deportable. *See* 8 U.S.C. § 1227(a)(2)(B)(i). The defendant, however, has presented no credible evidence that his plea attorney, Regina Hughes, failed to instruct him that he was deportable. The affidavit provided by Attorney Hughes merely states that she does not remember discussing immigration consequences regarding the defendant's change of plea (DA 10). She does not state that she did not discuss immigration consequences with the defendant, or that she mis-advised him about those consequences. Moreover, Attorney Hughes does not discuss her typical practice at the time of the defendant's plea regarding her advice to her clients of the immigration consequences to guilty pleas. The motion judge was entitled to consider these omissions when she denied the defendant's motion. *See Commonwealth v. Goodreau*, 442 Mass. 341, 354 (2004)

(citation omitted) ("When weighing the adequacy of the materials submitted in support of a motion for a new trial, the judge may take into account the suspicious failure to provide pertinent information from an expected and available source."). In addition, at the time of the defendant's plea, Attorney Hughes signed the defendant's plea tender sheet, which documents that she discussed immigration consequences with him (CA 2).

The defendant's affidavit is similarly unavailing. Although the defendant avers that Attorney Hughes did not tell him that he "could be removed f[rom] this country for a conviction of intent to distribute the drugs" (DA 9), his affidavit is self-serving and apparently was not credited by the motion judge. *See Commonwealth v. Lanoue*, 392 Mass. 583, 588 (1984) (citing *Commonwealth v. Quigley*, 391 Mass. 461, 463 (1984)) ("In the absence of subsidiary findings, we assume that the judge's determination of credibility was adverse to the losing party, the defendant."); *see Commonwealth v. Grant*, 426 Mass. 667, 673 (1998) ("The judge, of course, had the right to reject as not credible the defendant's self-serving, conclusory affidavit"); *Commonwealth v. Lopez*, 426 Mass. 657, 661 (1998) (judge may disbelieve a defendant's self-serving affidavit). *Cf. Commonwealth v. Coyne*, 372 Mass. 599, 600 (1977) (Court is fully warranted in dismissing a

motion accompanied by an "impressionistic and conclusory" affidavit).

Indeed, the judge was especially justified to discredit the defendant's affidavit because it contained false assertions. For example, in paragraph three, the defendant states that, at his plea hearing, he "did not admit to intending to distribute the drugs" (DA 9). However, the record establishes that he did, in fact, plead guilty to possession of a class B substance with intent to distribute (Count 1), and possession of a class D substance with the intent to distribute (Count 3) (DA 1-2; CA 1-2).

As the defendant made no credible showing that Attorney Hughes failed to discuss immigration consequences with him prior to his plea, the motion judge properly denied the defendant's motion for a new trial.

B. The Defendant Cannot Show That, Had He Been Advised Of The Immigration Consequences Of His Guilty Plea By His Plea Attorney, He Would Have Gone To Trial Because The Plea Judge Did Advise The Defendant Of These Consequences And The Defendant Still Chose To Accept The Plea Deal And, Moreover, A Rational Person In The Defendant's Position Would Have Accepted The Plea Deal In Light Of The Commonwealth's Strong Case And The Potential Onerous Sentences.

The defendant also must show a reasonable probability that, had he been competently advised, he would not have pleaded guilty, but instead, would have

gone to trial. *Padilla*, 130 S. Ct. at 1482; *Moreau*, 30 Mass. App. Ct. at 682.

The defendant cannot meet this burden for two reasons. First, the defendant was, in fact, advised by the plea judge of the adverse immigration consequences of his plea and, yet, still chose to plead guilty. The plea judge signed the defendant's plea tender sheet, confirming that he had given the immigration warning to the defendant during his plea colloquy (CA 2). In addition, the defendant's docket sheet states, "Deportation Warning Given" (DA 4, 8), also reflecting that the plea judge informed the defendant of the possible immigration consequences of his guilty plea. Furthermore, by signing Section IV of his plea tender sheet, the defendant agreed that he had been advised that he was subject to immigration consequences as a result of his plea (CA 2).

Second, in his affidavit, the defendant does not allege that, had he been advised of immigration consequences, he would not have pleaded guilty (DA 9). Accordingly, for either reason, the defendant fails the second prong of the *Padilla* analysis.

Even if the defendant could show that he would have gone to trial, he must still show that such a decision would have been "rational." This inquiry is objective and asks whether, given competent advice

about the chances of prevailing at trial, "a rational defendant [would have] insist[ed] on going to trial." *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000). *See Hill*, 474 U.S. at 59-60 (predictions about the outcome of a trial "where necessary, should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker'") (quoting *Strickland*, 466 U.S. at 695). A defendant must support his assertion by showing that, in view of all the considerations at issue at the time of his plea -- considerations such as his chance of prevailing at trial, the strength of the Commonwealth's case, the availability and viability of defenses, the advantages and disadvantages of a trial and a plea, disposition, and whether conviction on any other offenses with which he is charged would result in deportation -- going to trial would have been rational. *See Hill*, 474 U.S. at 59 (prejudice analysis entails a "prediction whether the evidence likely would have changed the outcome of a trial."). If the defendant cannot make this showing, he cannot show that he was prejudiced. *See Commonwealth v. Pike*, 53 Mass. App. Ct. 757, 763 (2002) (court was not persuaded that defendant would have rejected plea if he believed appeal would have held greater promise than forecast by counsel, particularly where he received favorable disposition and trial was

"fraught with uncertainty"); *Commonwealth v. Franklin*, No. 08-P-277, 2009 Mass. App. Unpub. LEXIS 247, at *3-4 & n.1 (Feb. 6, 2009) (rejecting defendant's motion to vacate plea based on ineffective assistance of counsel where it was "unlikely, if not improbable, that defendant would not have pleaded guilty" where he received a one year sentence instead of a possible twenty year sentence).

Here, it would have been irrational for the defendant to go to trial. The defendant was arrested by officers with crack cocaine, marijuana, a cell phone, and $1,115.00 in cash on his person (CA 4, 7). After being read his *Miranda* rights, he admitted that the substances were crack cocaine and marijuana, and explained how they were packaged for distribution. The defendant's motion to suppress was denied (DA 4; CA 6-8). Thus, the evidence was strong for the Commonwealth.

Additionally, if the defendant had not pleaded guilty, the Commonwealth could have indicted him and, had he gone to trial and been convicted of all five charges, he could have received an onerous sentence. For possession of a class B substance with intent to distribute, the defendant could have been sentenced to up to ten years in prison. G.L. c. 94C, § 32A. For possession of a class D substance with intent to

distribute, he could have been sentenced to up to two years in prison. G.L. c. 94C, § 32C. For each school zone violation, the defendant would have been sentenced to at least the mandatory minimum of two years in a house of correction for each count, but could have been sentenced to up to fifteen years in prison for each count. G.L. c. 94C, § 32J. In agreeing to plead guilty, the defendant had to serve only five months in a house of correction, with a remaining suspended sentence and probation (DA 1-2; CA 1). This sentence was much more favorable to the defendant. Given the favorable disposition, and given the uncertainties of trial, a rational person in the defendant's position would not have rejected a plea deal.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court affirm the defendant's convictions.

Respectfully submitted
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