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Defending the People of Massachusetts

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SAMPLE PADILLA MOTION

Attached you will find an **example** of a basic *Padilla* motion. **This is ONLY a sample.**

This sample was put together in 2014 and case law may have evolved since its drafting. This sample should not be relied upon as a complete statement of current law.

Furthermore, depending on the facts of a case, counsel may make different choices in drafting their own motions. For instance:

- In many cases counsel may want to have additional corroborating affidavits or additional evidence;

- In most cases a defendant's affidavit would be more detailed;

- **The legal analysis is different in every case.** The explanation of the immigration consequences in this sample motion may not be the same as in other cases. (For all appointed cases, be sure to submit a post conviction IIU intake to receive an analysis of the consequences in your specific case.)

COMMONWEALTH OF MASSACHUSETTS

XXXXXXXX, SS

DISTRICT COURT
CRIMINAL SESSION
DOCKET NO.

COMMONWEALTH

V.

LUZ SILVA

DEFENDANT'S MOTION TO VACATE CONVICTION

Pursuant to Mass. R. Crim. P. 30(b), the defendant, Ms. Luz Silva, now moves to vacate her conviction in the above-entitled matter on the ground that her admission to sufficient facts was obtained in violation of her right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights.

In support, and as more fully set forth in the affidavits and memorandum filed herewith, Ms. Silva states that:

1. She was denied effective assistance of counsel under the Sixth Amendment and art. 12 when her trial counsel failed to adequately advise her of the immigration consequences that could result from her admission to sufficient facts. Padilla v. Kentucky, 130 S. Ct. 1473 (2010), citing Strickland v. Washington, 466 U.S. 668 (1984); Commonwealth v. DeJesus, 468 Mass. 174 (2014); Commonwealth v. Sylvain, 466 Mass. 422 (2013); Commonwealth v. Marinho, 464 Mass. 115 (2013); Commonwealth v. Clarke, 460 Mass. 30 (2011); see also Commonwealth v. Saferian, 366 Mass. 89 (1974).

Defendant requests that a hearing be held in this matter on DATE before Greenberg, J.

Respectfully Submitted,
LUZ SILVA
By her attorney:

_____
XXXXX (BBO# XXXXX)

COMMONWEALTH OF MASSACHUSETTS

XXXXXXX, SS

XXXXX DISTRICT COURT
CRIMINAL SESSION
DOCKET NO. XXXXX

COMMONWEALTH

V.

LUZ SILVA

AFFIDAVIT OF DEFENDANT IN SUPPORT OF MOTION TO VACTE CONVICTION

I, Luz Silva, hereby state the following to be true to the best of my knowledge and belief:

Background

1. My name is Luz Silva. I was born in Portugal on February 6, 1988. In 1994, my grandparents came to the United States. Five years later, my parents brought me and my sisters to live here as well. They wanted the whole family to be together. We were all lawful permanent residents. My oldest sister has become a U.S. citizen.

2. After coming to America, my family settled in Boston, Massachusetts. I attended XYZ High School as part of a special education program. After high school, I got a job working at CVS. I worked as a cashier and clerk for five years.

3. I live at ADDRESS with my parents. My sisters are older and live in their own homes, but I see them often. My parents help me manage my money and help me with daily life. They make sure I have groceries and cook my meals. My parents are very important to me and I don't know what I would do without them.

4. On September 13, 2012, I was arrested and charged with possession with intent to distribute cocaine and school zone.

5. On September 15, 2014, I went before the judge and he appointed Attorney Smith to represent me on Docket Number XXXXX.

6. After that day in court, I met Attorney Smith at his office once. He told me that there was a strong motion to suppress and if we won the motion the case would go better for me. The motion was scheduled for November 15, 2012. At that meeting, Attorney Smith did not ask me whether or not I was a U.S. citizen. He did not discuss immigration consequences with me.

7. On November 15, 2012, I met Attorney Smith at court. He told me that the prosecutor had made a good offer. The prosecutor said that if we agreed not to go forward with the motion to suppress, she would agree to a CWOF on the charge and to drop the school zone. He told me this was a good deal because at the end, the CWOF would be dismissed. Since Attorney Smith thought this was a good idea, I agreed.

8. When we were reviewing the green sheet, Attorney Smith asked if I was a U.S. citizen. I said I had lived here for many years and had a green card. He told me that he wasn't an immigration attorney and didn't know immigration law, but that the plea deal might make me eligible for deportation. He also told me it was a good deal and would mean I wouldn't go to jail.

9. Attorney Smith never told me this charge was an aggravated felony. He never explained the consequences of pleading guilty to an aggravated felony. He never told me that I would be deported and could never come back to the U.S. If I had known that pleading to a CWOF on possession with intent to distribute would have these consequences, I would not have accepted the deal. Instead, I would have risked going to trial or tried to negotiate a better plea.

10. I would have done anything to avoid being deported to Portugal. I don't have any family left there. Most significantly, my parents and my sisters all live here in the Boston area.

11. My parents play an incredibly important role in my life. I live with my parents and they help me live an independent life. I rely on them for support and assistance. I don't know what I would do without them. If I were deported to Portugal, I would have no support system. Therefore, I would have gone forward on the motion to suppress and gone to trial regardless of the risks or asked to negotiate a safer plea, rather than simply agree to an aggravated felony.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____.

_____
XXXXX

COMMONWEALTH OF MASSACHUSETTS

XXXXXXX, SS

XXXXX DISTRICT COURT
CRIMINAL SESSION
DOCKET NO. XXXXX

COMMONWEALTH

V.

LUZ SILVA

AFFIDAVIT OF TRIAL COUNSEL IN SUPPORT OF THE MOTION TO VACATE CONVICTION

I, Robert Smith, hereby state the following to be true to the best of my knowledge and belief:

1. I am an attorney licensed to practice in the Commonwealth of Massachusetts.

2. I have reviewed my case file, the docket sheet, and the police report for Commonwealth v. LUZ SILVA, Docket Number XXXXX. I was appointed to represent Ms. Silva at arraignment on September 15, 2012. On November 15, 2012, I represented Ms. Silva as she accepted a CWOF on possession with intent to distribute cocaine.

3. On November 15, 2012, I was prepared to go forward on a motion to suppress. At that time, the DA offered to drop the school zone charge and agree to a CWOF on possession with intent to distribute. This was a good offer and would mean that Ms. Silva would not spend any time in jail.

4. I knew that Ms. Silva was not a citizen and that a CWOF was a conviction for immigration purposes. I told Ms. Silva that her plea could cause immigration problems for her. She wanted to go forward so that she would not go to jail.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____.

_____
Robert Smith

COMMONWEALTH OF MASSACHUSETTS

XXXXXXX, SS

XXXXXX DISTRICT COURT
CRIMINAL SESSION
DOCKET NO. XXXXXX

COMMONWEALTH

V.

LUZ SILVA

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO VACATE CONVICTION

This memorandum is submitted in support of the defendant's Motion to Vacate Conviction on the above-numbered matter, as such conviction was obtained in violation of the Sixth Amendment of the United States Constitution and Article 12 of the Massachusetts Declaration of Rights.

FACTUAL BACKGROUND

The defendant, Ms. Luz Silva, is a lawful permanent resident of the United States. She was born in Brazil, and first came to the U.S. when she was eleven years old. She has lived here for almost 25 years. On September 14, 2012, Ms. Silva was stopped by an officer of the Boston Police Department as she was walking down the street in ABC area. Officer Johnson, having heard a report that a "young woman" had been assaulted in the area, identified Ms. Silva as a "young woman" who "appeared nervous" and questioned her about the assault. Ms. Silva denied all knowledge of the attack. At this point Officer Silva "told her to take her hands out of her pockets" and when she failed to comply, he grabbed her right arm. Ms. Silva began to run away

while Officer Johnson held on to her sweatshirt, pulling it off her. Unable to catch Ms. Silva, Officer Johnson returned to the place of the seizure and searched the sweatshirt, where he discovered a plastic bag that appeared to contain cocaine. According to Officer Johnson, the cocaine was packaged for distribution.

On September 15, 2012, Ms. Silva was charged with possession with intent to distribute class B (cocaine) (herein after "PWID") and a drug violation within a school zone. On November 3, 2012, trial counsel filed a motion to suppress. In response, the Commonwealth offered to drop the school zone charge and agree to a continuance without a finding ("CWOF") in exchange for not pursuing the motion to suppress. On November 15, 2012, the defendant accepted the Commonwealth's offer and admitted to sufficient facts in exchange for dropping the school zone charge. She received 18 months of probation after which, the case was dismissed. Prior to the plea, trial counsel was aware that Ms. Silva was not a U.S. citizen. He told Ms. Silva that the plea would probably make her eligible for deportation, but that he was not an immigration attorney. He further told her it would be a "good deal" because the plea avoided jail time and would be dismissed at the end of probation.

ARGUMENT

The defendant requests that this Honorable Court vacate her conviction and grant her a new trial. First, she was denied effective assistance of counsel by her trial counsel's failure to properly advise her regarding the immigration consequences that would result from her admission to sufficient facts. This denial prejudiced Ms. Silva, because there was a reasonable probability that had she been properly advised, she would not have admitted to sufficient facts, would have pursued the motion to suppress and would have insisted on going to trial. In the alternative, she would have tried to negotiate a better plea. Effective assistance of counsel is

guaranteed by the Sixth Amendment of the United States Constitution and by Article 12 of the Massachusetts Declaration of Rights and includes the obligation to provide correct advice regarding immigration consequences. Padilla v. Kentucky, 130 S. Ct. 1473 (2010), citing Strickland v. Washington, 466 U.S. 668 (1984); Commonwealth v. DeJesus, 468 Mass. 174 (2014); Commonwealth v. Sylvain, 466 Mass. 422 (2013); Commonwealth v. Marinho, 464 Mass. 115 (2013); Commonwealth v. Clarke, 460 Mass. 30 (2011); see also Commonwealth v. Saferian, 366 Mass. 89 (1974). Second, due process requires that the defendant's plea be withdrawn and a new trial be granted because her plea was not made knowingly and voluntarily. Commonwealth v. Nikas, 431 Mass. 453, 456-57 (2000) citing Boykin v. Alabama, 395 U.S. 238, 242-244 (1969); See also, Commonwealth v. Chleikh, 82 Mass. App. Ct. 718, 723 (2012) (plea cannot be "knowing and voluntary" unless correct immigration advice is provided). For these reasons, Ms. Silva requests that this Court vacate the conviction in the above-entitled matter.

A. Ineffective Assistance of Counsel

1. Trial counsel's failure to correctly advise the defendant regarding the immigration consequences of her plea in this matter fell below an objective standard of reasonableness.

It is by now firmly established that defense counsel is obligated to advise a noncitizen client of the immigration consequences of a criminal conviction under both the Sixth Amendment of the United States Constitution, Padilla, 130 S. Ct. at 1482, and Article 12 of the Massachusetts Declaration of Rights, Sylvain, 466 Mass. at 436.[1] More than merely a general

[1] The Sixth Amendment and art. 12 right to be advised of the immigration consequences, though articulated in cases decided after the defendant pled guilty in 2012, apply retroactively to convictions made final after April 1, 1997 as a matter of Massachusetts common law. Sylvain, 466 Mass. at 424. In Sylvain, the Supreme Judicial Court concluded that the 2010 decision in

warning, defense counsel is required to advise a defendant about the specific immigration consequences of a plea. Padilla, 130 S. Ct. at 1483; See also, Commonwealth v. DeJesus, 468 Mass. 174 (2014)(holding that trial counsel was obligated to inform the defendant that an aggravated felony conviction made deportation presumptively mandatory). Advice that a conviction "may carry a risk of adverse immigration consequences" or "may make you eligible for deportation" is insufficient where the immigration consequences are clear. Id. The failure to give "correct" advice constitutes deficient performance under Strickland and Saferian. Padilla, 130 S. Ct. at 1483; Clarke, 460 Mass. at 45-46.

In the case at bar, it was "clear" that a CWOF for PWID class B is considered an aggravated felony under federal immigration law and made the defendant deportable, subjected her to presumptively mandatory removal, and was a bar to almost every form of relief from removal. Under the federal statutory definition of "conviction," it is well-established that a CWOF is a conviction for immigration purposes. 8 U.S.C. §1101(a)(48)(A). The defendant's conviction fell under two criminal grounds of deportability: 1) a controlled substance offense, pursuant to 8 U.S.C. § 1227(a)(2)(B)(i), and 2) an aggravated felony, pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). Aggravated felonies, listed at § 1101(a)(43), include convictions for "illicit trafficking in a controlled substance . . . including a drug trafficking crime." 8 U.S.C. § 1101(a)(43)(B). "Drug trafficking crime" is defined by statute as any felony punishable under the federal Controlled Substances Act, Matter of Davis, 20 I. & N. 536, 538 (BIA 1992), including possession with intent to distribute, Berhe v. Gonzales, 464 F.3d 74, 84 (1st Cir. 2006)

Padilla applies retroactively under Massachusetts law, notwithstanding the U.S. Supreme Court's decision in Chaidez v. United States, 133 S. Ct. 1103 (2013), holding that the Padilla decision should not apply retroactively as a matter of federal law. 466 Mass at. 435-36. The Sylvain decision similarly held that the art. 12 right to be advised of the immigration consequences of criminal convictions applies retroactively. Id. at 436-37.

(Massachusetts conviction for possession with intent to distribute is aggravated felony). Furthermore, not only does a conviction for PWID make Ms. Silva deportable, it is a bar to most forms of relief from removal. 8 U.S.C. § 1229b(a)(3)(aggravated felonies bar cancellation of removal); 8 U.S.C. §§ 1158(b)(2)(A)(ii), (b)(2)(B)(i) (aggravated felony is per se "particularly serious crime" and therefore bar to asylum). As in Padilla, the "terms of the relevant immigration statute are succinct, clear, and explicit," so that "the duty to give correct advice is equally clear." 130 S. Ct. at 1483; see also, DeJesus, 468 Mass. at 181. When the consequences are clear, trial counsel's advice that the offense "may make you eligible for deportation," is insufficient. Id.

Trial counsel acknowledged that he only provided a vague warning about deportation and informed Ms. Silva that he was not an immigration attorney. See Affidavit of Trial Counsel, Bob Smith. Ms. Silva asserts that trial counsel never explained that this offense would be considered an aggravated felony and never discussed the consequences of such a conviction. See Affidavit of Defendant. Because the consequences of a CWOF for PWID are clear, under both Padilla and Clarke, such failure of counsel is objectively unreasonable and the showing made by the defendant is sufficient to satisfy the first prong of Strickland.

2. The defendant was prejudiced by trial counsel's failure to correctly advise because there is a reasonable probability that, but for trial counsel's errors, the defendant would have insisted on going to trial.

Where the defendant demonstrates that her attorney's representation fell below an objective standard of reasonableness, she must show that her counsel's error materially prejudiced her. See Padilla, 130 S. Ct. at 1482; Commonwealth v. Fenton F., 442 Mass. 31, 37 (2004) citing Commonwealth v. Saferian, 366 Mass 89, 96 (1974). The defendant must establish that "there was a reasonable probability that, but for counsel's errors, [she] would not have pleaded guilty and would have insisted on going to trial." Clarke, 460 Mass. at 47 (internal

citations omitted). Further, she must show that such a decision "would have been rational under the circumstances." Padilla, 130 S. Ct. at 1485. In the context of a guilty plea, where defense counsel failed to provide adequate advice regarding immigration consequences, the defendant can meet this burden by showing that:

> (1) [she] had an available, substantial ground of defence . . . that would have been pursued if he had been correctly advised of the dire immigration consequences attendant to accepting the plea bargain; (2) there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated at the time; or (3) the presence of special circumstances that support the conclusion that [she] placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty.

Clarke, 460 Mass. at 47-48 (internal citations omitted).

In the instant case, if not for trial counsel's deficient performance, there is a reasonable probability that Ms. Silva would have tried to negotiate a different plea bargain or insisted on going to trial because she had both an available, substantial ground of defense and because there existed special circumstances such that she placed particular emphasis on avoiding immigration consequences.

a. Negotiate a Different Plea Bargain

Ms. Silva was a lawful permanent resident with no prior criminal record. Prior to her plea in this case, she was not deportable. Because PWID is considered an aggravated felony, see supra, her plea meant that despite the many years she had lived in the U.S., there was no way for her to avoid deportation. See 8 U.S.C. § 1229b(a)(3)(aggravated felonies bar cancellation of removal); 8 U.S.C. §§ 1158(b)(2)(A)(ii), (b)(2)(B)(i) (aggravated felony is per se "particularly serious crime" and therefore bar to asylum); see also, DeJesus, 468 Mass at 181 (finding that a person convicted of PWID would have "virtually no avenue for relief from deportation."). However, had Ms. Silva pleaded to simple possession instead of PWID, she would have been

able to apply for a form of relief from removal called "cancellation of removal." See, 8 U.S.C. §1229b. Ms. Silva could have accepted a guilty plea and received a committed or suspended sentence of any length and she still would have maintained the possibility of applying to remain in the U.S.

At the time of Ms. Silva's plea, the Commonwealth had already shown a willingness to negotiate in an effort to avoid the suppression motion. Had trial counsel provided the Commonwealth information regarding the immigration consequences of their initial offer, he may have been able to work with the prosecutor to craft a better disposition for Ms. Silva. See Clarke, 460 Mass. 30, at FN 18 (2011) ("including deportation consequences in the plea bargaining process . . . 'may well [create] agreements that better satisfy the interests of both parties"). Had trial counsel proposed an alternative plea that at a minimum avoided an aggravated felony conviction, he would have preserved the possibility of Ms. Silva remaining in the United States. Commonwealth v. Martinez, 81 Mass. App. Ct. 595, FN2 (2012) (establishing that the ability to maintain eligibility for cancellation of removal is a significant benefit.) Therefore, it is likely that trial counsel could have negotiated a better plea that would have avoided the immigration consequences Ms. Silva currently faces.

b. Substantial Ground of Defense

In addition, Ms. Silva had a substantial ground of defense to the criminal charges she was facing, because she had a strong argument that all the evidence against her should have been suppressed as the fruit of an unlawful seizure and search. Officer Johnson seized Ms. Silva when he ordered her to take her hands out of her pockets. See Commonwealth v. Knowles, 451 Mass. 91, 94 (2008) ("We agree with the Appeals Court that the defendant was 'seized' when the officer ordered him to stop what he was doing, move away from the automobile, and to walk

toward him with his hands out of his pockets."). At this point, no reasonable person would have felt free to simply walk away. This seizure was not justified by reasonable suspicion that Ms. Silva was committing or had committed a crime. Instead, the only information Officer Johnson possessed at the moment of the seizure suggested that Ms. Silva might have been the victim of a crime. The only description he had was of a "young woman" – insufficient details to tie her to the incident, see Commonwealth v. Cheek, 413 Mass. 492 (1992) (man who matched description of "black male with a black 3/4 length goose" found .5 miles from stabbing scene in high crime neighborhood around midnight not enough) – and certainly insufficient to tie her to any criminal conduct.

Even if a court were to disagree as to the moment of the initial seizure, Ms. Silva was certainly seized when Officer Johnson grabbed her arm. See Commonwealth v. Gomes, 453 Mass. 506, 510 (2009) (pat frisk constitutes seizure). This seizure was likewise not justified by reasonable suspicion that she was engaged in, had engaged in, or was about to engage in any crime and therefore was unlawful. As the Supreme Judicial Court has explained, "police officers may not escalate a consensual encounter into a protective frisk absent a reasonable suspicion that an individual has committed, is committing, or is about to commit a criminal offense and is armed and dangerous." Commonwealth v. Narcisse, 457 Mass. 1, 9-10 (2010) (emphasis added). Refusing to remove hands from pockets, without more, cannot be the lawful basis for a seizure, or police could patrol the streets ordering innocent civilians to take their hands from their pockets, with the threat of a search if they refuse. For these reasons, all the evidence, including the alleged narcotics, seized as the fruit of this unlawful seizure should have been suppressed. Had Ms. Silva pursued this motion to suppress, she would have had a viable defense to the criminal prosecution.

c. Special Circumstances

Ms. Silva was born on February 6, 1988 in Portugal. Affidavit of Defendant, ¶ 1. She came to the United States as a lawful permanent resident (LPR – "green card" holder) in 1999, at the age of eleven, along with her parents and siblings. Id. Her grandparents had already emigrated to the U.S. five years earlier. Id. Ms. Silva attended school in Boston, graduating from the special education program at XYX High School. Id. ¶2. She has worked as a cashier at CVS for the last five years and continues to live at home with her parents. Id. ¶2-3. Because of her intellectual disabilities, she requires assistance with managing her daily life. Ms. Silva continues to rely on her parents for this support. Ms. Silva has no family remaining in Portugal and has not lived there since she was a child. If forced to return, she would not have anyone to help her and she would not be able to live independently. Ms. Silva's entire life is in the United States, therefore, she has consequently established that there existed special circumstances such that she placed particular emphasis on avoiding immigration consequences and "would have gone to trial regardless of the risks" had she known that a conviction would make her deportable. Id.¶9; See also, DeJesus 468 Mass. 174, 184 (finding that a non-citizen's calculus when deciding to plead or go to trial will be different from a citizen).

The defendant has therefore met her burden of showing both deficient performance and prejudice under Saferian and her motion to vacate the plea should be granted.

CONCLUSION

Wherefore the defendant, by and through counsel, respectfully requests that this Honorable Court vacate the above captioned conviction and grant a new trial based on the violation of the defendant's federal and state constitutional rights under Sixth Amendment of the United States Constitution and Article 12 of the Massachusetts Declaration of Rights.

Respectfully Submitted,
LUZ SILVA
By her attorney:

_____
XXXX (BBO# XXXXXX)