STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: December 3, 2012)

HECTOR CANDELARIO	**:**	
	:	
v.	**:**	**C.A. No.: PM-2010-6205**
	:	
STATE OF RHODE ISLAND	**:**	

DECISION

SAVAGE, J. This matter is before this Court on the parties' cross-motions for summary judgment with respect to Petitioner's Amended Application (Fourth) for Post-Conviction Relief. In this action, Petitioner Hector Candelario alleges ineffective assistance of counsel and seeks to vacate his 2008 plea to a misdemeanor drug charge of frequenting a narcotics nuisance in an effort to regain entry to the United States following his deportation in 2009. He argues that his former counsel failed to advise him of the immigration consequences of the plea. He claims further that a hearing justice of this Court violated Rule 11 of the Rhode Island Superior Court Rules of Criminal Procedure by taking his plea without first determining that Petitioner understood the nature of the charge and the consequences of the plea.

For the reasons set forth in this Decision, this Court grants the State's motion for summary judgment and denies Petitioner's motion for summary judgment. As such,

judgment shall enter in favor of the State as to Petitioner's Amended Application (Fourth) for Post-Conviction Relief.

I

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Petitioner Hector Candelario is a native of the Dominican Republic and was a long-time permanent resident of the United States. On May 23, 1980, Petitioner was convicted of first degree robbery in New York and sentenced to a term of imprisonment of six to eighteen years. See Pet'r's Ex. List in Supp. of Appl. for Post-Conviction Relief, filed Dec. 6, 2010, Ex. 6, Decision of Board of Immigration Appeals, at 2 n.2. On September 11, 2000, in a case unrelated to the case at bar, Petitioner pled *nolo contendere* to a charge of unlawful possession of cocaine in the Rhode Island Superior Court and received a sentence of two years probation. See State v. Candelario, C.A. No. P2 00-1183B (R.I. Super. 2000). On March, 19, 2004, a hearing justice of this Court granted the Petitioner post-conviction relief and vacated this plea and sentence. See id. (Clerk's Note dated March 19, 2004; Viera v. State, C.A. No. PM 04-0802 (R.I. Super. 2004) (Petitioner's Application for Post-Conviction Relief) (Order dated March 19, 2004).

On June 17, 2005, the State filed a criminal information in another drug case, charging the Petitioner with one count of unlawful possession of cocaine in violation of R.I. Gen Laws § 21-28-4.01(c)(2)(6). See State v. Candelario, C.A. No. P2-05-1796A (R.I. Super. 2005). Attorney Donna Uhlmann entered her appearance for Petitioner, on June 29, 2005, at the time of his arraignment on this charge. See id. (Entry of Appearance dated June 29, 2005). She continued to represent him actively in the case until at least December 12, 2007 when, for unknown reasons, Attorney Terry McEnaney

entered his appearance for Petitioner "for warrant presentment only." Id. (Entry of Appearance dated December 12, 2007).

A few weeks later, the State agreed to amend the charge to one of frequenting a narcotics nuisance, in violation of § 21-28-4.06, in exchange for Petitioner's plea of *nolo contendere* to the amended charge.[1] Petitioner entered a plea of *nolo contendere* to the reduced charge on January 22, 2008 and received a sentence of 364 days probation. See State's Supp. Mem. Ex. 1, Plea Form. Notwithstanding his previous limited entry of appearance, and even though Attorney Uhlmann never withdrew as counsel of record for Petitioner in the case, Attorney McEnaney apparently acted as counsel for Petitioner at the time of his plea, as evidenced by his signature, as counsel, on the plea form and the references to him as counsel in the transcript of the plea colloquy. Id.; see State's Supp. Mem. Ex. 1, Plea Form; Pet'r's Supp. Mem. for Summ. J., Ex. 1, Tr. of Plea Colloquy dated Jan. 22, 2008. The record is confusing in this regard, however, because the Clerk's Note, from the date of the plea as well as the Judgment and Disposition entered

[1] The Rhode Island statute that criminalizes the frequenting of a narcotics nuisance provides:

> Prohibited acts F--Places used for unlawful sale, use, or keeping of controlled substances
>
> (a) Any store, shop, warehouse, building, vehicle, aircraft, vessel, or any place which is used for the unlawful sale, use, or keeping of a controlled substance shall be deemed a common nuisance.
>
> (b) Any person who violates this section with respect to:
>
> (1) Knowingly keeping and maintaining a common nuisance as described in subsection (a) may be imprisoned for not more than five (5) years, and fined not more than five thousand dollars ($5,000), or both;
>
> (2) Knowingly permitting any store, shop, warehouse, building, vehicle, aircraft, vessel, or any place which is owned or controlled by him or her to be used as a common nuisance may be imprisoned for not more than fifteen (15) years, and fined not more than twenty thousand dollars ($20,000), or both;
>
> (3) Knowingly visiting a common nuisance as described in subsection (a) for the purpose of using or taking in any manner any controlled substance may be imprisoned for not more than one year and fined not more than five hundred dollars ($500).

R.I. Gen. Laws § 21-28-4.06.

thereafter, both record Attorney Thomas Connors as acting as Petitioner's counsel at the time of his plea. See State v. Candelario, C.A. No. P2-05-1796 (R.I. Super. 2005) (Clerk's Note dated Jan. 22, 2008; Judgment and Disposition dated Feb. 13, 2008). It is this plea that is at issue here and that Petitioner claims was the product of a violation of Rule 11 and ineffective assistance of counsel.[2]

On January 22, 2008, prior to entering into his plea, Petitioner and his attorney signed the standard plea form that this Court used at that time. Id. The plea form was written in English. Id. It contained spaces at the top of the form where defense counsel traditionally lists the charge and the maximum possible punishment for that charge. Id. The plea form signed by the Petitioner and his attorney contained a handwritten description of the charge, presumably written by counsel, that states "Poss. [o]f Cocaine" with a maximum penalty of "3 years ACI." Id. The plea form then described the nature of a plea of *nolo contendere* and delineated the rights that Petitioner would be giving up in entering into the plea:

> I, the above named defendant, do hereby request Court permission to withdraw my present plea of Not Guilty and to enter a plea of Nolo Contendere or Guilty. I understand the plea of Nolo Contendere is for all purposes the same as a plea of Guilty and that I will be admitting sufficient facts to substantiate the charge(s) which has (have) been brought against me in the case to which this plea relates. I understand by changing my plea I will be giving up and waiving each and all of my rights as follows:

[2] It goes without saying, as this Court emphasized recently in another decision in a post-conviction relief case, that this pattern of conduct by defense counsel is concerning. See Torres v. State, C.A. No. PM 08-6570 (R.I. Super. filed Sept. 20, 2012). Counsel of record must represent the defendant for all purposes or seek leave to withdraw. Id. Other counsel should not take action in a case—and, in particular, should not put through a plea in a case—before counsel of record has been granted leave to withdraw. Even more importantly, counsel should not put through a plea in a case where another attorney has counseled the defendant regarding that plea and perhaps signed the plea form as counsel. The hearing justice taking the plea must ensure that counsel of record is before the Court on the plea and make a record that establishes the role that counsel of record and any other attorneys have played in counseling a defendant regarding the plea.

> 1. My right to a trial by jury or by a Judge, sitting without a jury, and my right to appeal to the Supreme Court from any verdict or finding of guilt.
>
> 2. My right to have the State prove each and every element of the charge(s) against me by evidence and proof beyond a reasonable doubt.
>
> 3. My right to the presumption of innocence.
>
> 4. My privilege against self-incrimination.
>
> 5. My right to confront and cross-examine the State's witnesses against me.
>
> 6. My right to present evidence and witnesses on my own behalf and to testify in my own defense if I choose to do so.
>
> 7. My right to appeal to the Rhode Island Supreme Court from the sentence imposed by the Court after the entry of my plea of Nolo Contendere or Guilty.
>
> 8. My right to have the Court obtain and consider a pre-sentence report before the imposition of sentence by the Court.
>
> 9. My right to file a motion for a reduction in sentence.

Id. The plea form continued with check marks next to each of these listed rights, which are customarily made by defendants or their attorneys to indicate that the defendant has read, understood and voluntarily waived each of his or her rights after reviewing the plea form with counsel. Id.

The sentence portion of the plea form, again presumably handwritten on the plea form by counsel, stated: "Amended to Frequenting a Narcotics Nuisance. 364 days probation." Id. Preceding this sentence note, the plea form contained the following language:

> No promises have been made to me by my Attorney, the State's Attorney, or the Court, other than the fact the Court has agreed to impose the following sentence in addition to whatever money costs are imposed by law. . . .

Id. Following the sentence note, the plea form stated:

> I understand if the Court imposes the sentence referred to above, I will not be permitted to withdraw my plea of Nolo Contendere or Guilty except by permission of the Court.

Id.

The plea form also contained an immigration warning, which read:

> I understand that if I am a resident alien, a sentence imposed as a result of my plea may result in deportation, exclusion of admission to the United States, and/or denial of naturalization pursuant to the laws of the United States, and that this Court will have no control over those proceedings.

Id. The plea form concluded with an affidavit by which the defendant, by signing, acknowledged that he had read, understood and voluntarily signed the plea form. The affidavit portion of the plea form stated, in pertinent part, as follows:

> I also understand that this conviction will result in the loss of my right to vote only if I am incarcerated and for as long as I am incarcerated, and that my voting rights will be restored upon my release. . . . I have discussed the entire contents of this form with my Attorney, who has explained it to me. I have no questions as to what it states or what it means, and I understand it completely. I swear to the truth of the above.

Id. (emphasis removed).

After Petitioner and his attorney signed the plea form, a hearing justice of this Court proceeded to take the plea. The following plea colloquy occurred between the Court and Petitioner and his attorney on January 22, 2008:

> THE COURT: State vs. Hector Candelario. State your name.
> THE DEFENDANT: Hector Candelario.
> THE COURT: Your date of birth?
> THE DEFENDANT: 2/14/57.

THE COURT: Matter before the Court is P2-2005-1796A. The State's moving to amend this charge to frequenting a narcotic nuisance. There being no objection, that motion's granted. The defendant wishes to plead nolo contendere?
MR. McENANEY: That's correct.
THE COURT: With that plea, you give up the rights contained in the plea form, you understand?
THE DEFENDANT: Yes, I do.
THE COURT: Did you review them with your attorney?
THE DEFENDANT: Yes, I did.
THE COURT: Do you have any questions?
THE DEFENDANT: No, I don't.
THE COURT: What are the facts supporting the amended charge?
MR. DUBE: Your Honor, had this matter proceeded to trial, the State would be prepared to prove that on or about the 12th day of April 2005 in the City of Providence this defendant did unlawfully frequent a narcotics nuisance in violation of the General Laws.
THE COURT: Do you accept that as a true statement?
THE DEFENDANT: Yes.
THE COURT: State's recommending 364 days probation. If I accept your plea and impose that sentence, you can't change your mind. Understand that?
THE DEFENDANT: Yes.
THE COURT: You have to stay out of trouble for the next 364 days. If you violate your probation, you could be sentenced to a year in prison. Understand that?
THE DEFENDANT: Yes.
THE COURT: Any questions?
THE DEFENDANT: No.
THE COURT: I would also advise you if you are not a citizen of this country, this plea could result in your deportation, your exclusion of admission to this country and/or the denial of naturalization under the laws of this country. These are matters outside the control of this Court.

If you were incarcerated as a result of this sentence and registered to vote, you also forfeit your voting rights during that period.

I find this is a knowing waiver of the rights and there is a factual basis for the plea, I accept it.

Do you wish to say anything before you're sentenced?
THE DEFENDANT: No, I don't.
THE COURT: Three hundred sixty-four days probation.

MR. McENANEY: Thank you very much.

Pet'r's Supp. Mem. for Summ. J., Ex. 1, Tr. of Plea Colloquy, at 1-3, ¶¶ 1-2, dated Jan. 22, 2008.

As noted, a hearing justice of this Court accepted the plea and imposed a sentence of 364 days probation. He also signed the certificate that appears on the reverse side of the plea form, which stated:

> This certifies that the defendant has come before me, in the presence of counsel, and presented the attached request, affidavit and attorney's certification. Thereupon, I addressed the defendant personally in open court, and established by responses to my questions that the defendant has been fully informed of the contents of the affidavit, all of the rights enumerated therein, and the nature and consequences of this plea as set forth therein. The defendant has also been made aware of the range of punishment which might be imposed, as well as any assurances made to the defendant by counsel, the prosecuting attorney or the court regarding a sentence. The Court finds the defendant has the capacity to understand all of the above.
>
> I have also been satisfied by the prosecutor's statement of the facts, the defendant's answers, and the content of the affidavit that there is a factual basis for the plea. I find this plea is made voluntarily, intelligently, and with knowledge and understanding of all matters set forth in the attached request and affidavit.

State's Supp. Mem. Ex 1, Plea Form.

Approximately six months later, on August 4, 2008, the State filed a Notice of Violation against Petitioner pursuant to R.I. R. Crim. P. 32(f). See State v. Candelario, C.A. No. P2-05-1796A (R.I. Super. 2005) (Notice of Violation). It based the alleged violation on a new arrest and sought to prove that Petitioner violated the terms and conditions of his probationary sentence that had been imposed as a result of his plea at issue here. Id. Counsel from the Rhode Island Office of Public Defender acted as

Petitioner's attorney with regard to the violation. On September 22, 2008, Petitioner, with benefit of defense counsel, waived his right to a violation hearing and admitted violation. See id. (Clerk's Note dated Sept. 22, 2008); Tr. of Violation Proceedings, dated Sept. 22, 2008. Based on his admission to violation, a hearing justice of this Court declared Candelario to be a violator and sentenced him to serve ninety days at the ACI, with the balance of the term of his probation imposed previously to remain upon release. See State v. Candelario, Id. Significantly, in admitting violation, Petitioner did not quarrel with the plea that he had entered nine months earlier and that he now contests here.[3]

On November 26, 2008, the Department of Homeland Security ("DHS") initiated immigration removal proceedings against the Petitioner. See Pet'r's Ex. List in Supp. of Appl. for Post-Conviction Relief, filed Mar. 3, 2011, Ex. 2, Immigration Judge's Decision and Order. It alleged that Petitioner had three prior criminal convictions that formed the bases for removal: (1) his May 23, 1980 conviction for Robbery 1 in New York for which he received a sentence of six to eighteen years to serve; (2) his September 11, 2000 conviction for unlawful possession of cocaine in Rhode Island; and (3) his January 22, 2008 conviction in Rhode Island for maintaining or frequenting a narcotics nuisance, to wit: cocaine, at issue here, for which he received a sentence of 364 days probation. Id.[4]

[3] These facts regarding the State filing a Notice of Violation and Petitioner admitting violation are not stated in the pleadings, affidavits or exhibits underlying the parties' cross-motions for summary judgment, but are facts of which this Court takes judicial notice based on its review of the court file in the criminal case underlying this post-conviction relief action. See State v. Candelario, P2 05-1796A (R.I. Super. 2005).

[4] Both the Immigration Judge and the Board of Immigration Appeals referred to Petitioner's pleas of *nolo contendere* in Rhode Island in 2000 and 2008 as resulting in convictions, even though a disposition of

After initiating these proceedings, the DHS subsequently withdrew the second allegation, namely Petitioner's alleged Rhode Island conviction for drug possession dated September 11, 2000, as a basis for removal. Id. This withdrawal presumably occurred as a result of its discovery that there was no conviction in that case; as noted previously, on March 19, 2004, a hearing justice of this Court granted a petition for post-conviction relief filed by Petitioner and vacated the plea and sentence that had resulted in that conviction. See State v. Hector Viera, C.A. No. P2 00-1183B (R.I. Super. 2000); Viera v. State, C.A. No. PM 04-0802. The Immigration Court record reflects that the parties thereafter submitted written pleadings to the Immigration Judge, which are curiously absent from the record here. Id.

At a hearing in the Immigration Court, Petitioner denied having a drug conviction in Rhode Island. When the Immigration Judge confronted him with evidence of his plea to frequenting a narcotics nuisance, Petitioner responded, "Your Honor, if I may be able to clear that up for you, I was charged—I was sentenced to 364 days probation for what they call public nuisance, not narcotic nuisance, sir. . . . That's why I pleaded out."

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straight probation may not be considered a conviction under Rhode Island law. See R.I. Gen. Laws § 12-18-3. The broader provisions of federal immigration law, however, provide:

> (A) The term "conviction" means with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where —
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.
>
> (B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

8 U.S.C § 1101(a)(48)(A) and (B). Thus, Petitioner's *nolo contendere* plea at issue here constituted a "conviction" for purposes of the immigration proceedings.

Pet'r's Ex. List in Supp. of Appl. for Post-Conviction Relief, filed Mar. 3, 2011, Ex. 1, Hr'g Tr. Dec. 4, 2008, at 8:5-12. Further, at a subsequent hearing in front of the Immigration Court, Petitioner stated "I was charged with 364 day[s] probation, Your Honor . . . And the charge was dropped to public nuisance, I believe . . . That's what I—according to my lawyer, he said that I wouldn't have anything to do with Immigration if I copped out to 364 day probation." Pet'r's Ex. List in Supp. of Appl. for Post-Conviction Relief, filed Mar. 3, 2011, Ex. 1, Hr'g Tr., Dec. 18, 2008, at 14:10-25.

On March 2, 2009, the Immigration Judge found that Petitioner admitted to the factual allegations that formed the basis for his removal, except that he denied pleading *nolo contendere* to the drug-related aspect of the charge of frequenting a narcotics nuisance in 2008. See Pet'r's Ex. List in Supp. of Appl. for Post-Conviction Relief, filed Mar. 3, 2011, Ex. 2, Immigration Judge's Decision and Order. The Immigration Judge nonetheless ordered his immediate removal to the Dominican Republic. Id.[5]

Petitioner filed a timely appeal of the Immigration Judge's decision with the Board of Immigration Appeals ("BIA"). See Pet'r's Ex. List in Appl. for Post-Conviction Relief, filed Dec. 6 2010, Ex. 6, Decision of Board of Immigration Appeals. The Board upheld the Immigration Judge's decision and order. See id. In its decision, the Board noted that the DHS had provided copies of both Petitioner's New York conviction and his Rhode Island conviction in 2008 for frequenting a narcotics nuisance. See id. at 2 n.2. In particular, the BIA stated that "[d]espite the respondent's appellate contention that he entered a plea to the offense of 'public nuisance,' the respondent's

[5] This Court notes that two pages of the Immigration Judge's decision are missing from the documents filed in this Court. See Pet'r's Ex. List in Supp. of Appl. for Post-Conviction Relief, filed Mar. 3, 2011, Ex. 2, Immigration Judge's Decision and Order.

record of conviction indicates that he entered a plea to the offense of Maint/Freq Narcotics Nuisance (Ex. 4). Therefore, the offense clearly constitutes a violation of any state law relating to controlled substances." Id. Pursuant to the Order of Removal, the Immigration and Naturalization Service removed the Petitioner from the United States on May 29, 2009. See Pet'r's Aff. in Supp. of Appl. for Post-Conviction Relief, June 24, 2011, ¶ 9. He presumably is in the Dominican Republic. Id.

On October 22, 2010, Petitioner filed his initial Application for Post-Conviction Relief in this Court, pursuant to R.I. Gen. Laws §§ 10-9-1 et seq., with benefit of counsel, by which he sought to vacate his plea of January 22, 2008 on grounds of ineffective assistance of counsel. See Pet'r's Appl. for Post-Conviction Relief, Oct. 22, 2010 at ¶ 4. He claimed that his former attorney failed to investigate or advise him of the immigration consequences of his plea in violation of Strickland v. Washington, 466 U.S. 668 (1984) and Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010). Id. at ¶ 5. Petitioner also claimed that he did not understand the rights he was waiving, that his attorney failed to explain his rights to him, and that he did not understand that he had other options available. Id. at ¶ 6. He alleged that he has been prejudiced as a result of the plea because it led to his deportation. Id. at ¶ 7. He did not then include an allegation that his plea violated Rule 11.

Petitioner submitted an Affidavit in support of his Application for Post-Conviction Relief. See Pet'r's Aff. in Supp. of Appl. for Post-Conviction Relief, July 24, 2010.[6] This Affidavit purportedly was notarized in the Dominican Republic. Id. In

[6] The Affidavit stated:

1. That I am the petitioner in the above-captioned matter.

addition to the Affidavit, the Petitioner also submitted exhibits in support of his Application.[7] In neither his Application nor his Affidavit did Petitioner identify the "former defense counsel" who he claimed was deficient.

On March 3, 2011, Petitioner filed a Motion to Permit Petitioner's Testimony by Alternate Means, stating that he is currently residing in his native country, the Dominican Republic, and is unavailable to appear in person. See Pet'r's Mot. to Permit Pet'r's Testimony by Alternate Means, Mar. 3, 2011. On the same date, Petitioner also filed the following exhibits in support of his Application for Post-Conviction Relief: a copy of

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2. That my former defense counsel representing me in the underlying criminal matter did not at any time during the course of the former representation provide an immigration advisement.
3. That my former defense counsel did not during the course of said representation advise me that I would stand convicted as a removable alien should I plead nolo contendre [sic] to the underlying criminal charges.
4. That as a result of pleading nolo contendre [sic] I stood convicted as a removable alien. That as such, I was subject to mandatory deportation from the United States. That as a result of this state conviction I am ineligible for relief from deportation.
5. That my former defense attorney never advised me that I would be subject to automatic deportation from the United States after pleading nolo contendre [sic] to the underlying criminal charges.
6. That in point of fact, I have been physically removed from the United States pursuant to an Order of removal affirmed at by Board of Immigration Appeals on or about May 29, 2009.
7. That had I known I would be subject to deportation and ineligible for relief, I would have exercised my right to trial as opposed to pleading guilty to said criminal charge.
8. That I have been prejudiced by the representation of former counsel. I was a long-time permanent resident in the United States. That all my family resides in the United States.
9. That the representation was not competent within the meaning of applicable case law.
10. That I am in the process of seeking a lawful readmission to the United States after the deportation.
11. That I am asking that the underlying criminal conviction be vacated.

Pet'r's Aff. in Supp. of Appl. for Post-Conviction Relief, July 24, 2010.

[7] These exhibits include: Judgment of Conviction and Commitment dated Oct. 10, 2008; Judgment and Disposition dated Feb. 13, 2008; Criminal Information in State v. Candelario, C.A. P2-05-1796A (R.I. Super. 2005); Decision of the Board of Immigration Appeals dated May 21, 2009; Letter dated August 2010 requesting transcript. Pet'r's Ex. List in Supp. of Appl. for Post-Conviction Relief, Apr. 25, 2011. On December 6, 2010, Petitioner filed an additional exhibit—the Notice of Decision from the U.S. Department of Homeland Security, dated August 20, 2009, with attachments.

transcripts of hearings from the Boston Immigration Court dated December 4, 2008, December 18, 2008, and January 29, 2009; and the Decision of the Immigration Court ordering removal dated March 2, 2009. See Pet'r's Ex. List in Supp. of Appl. for Post-Conviction Relief, filed Mar. 3, 2011.[8] On March 8, 2011, Petitioner submitted two letters that he had written, one of which is dated June 24, 2009 and the other of which is undated. See Pet'r's Ex. List in Supp. of Appl. for Post-Conviction Relief, filed Apr. 25, 2011, Ex. 1 (two letters). In the undated letter, the Petitioner stated, in pertinent part, as follows:

> In conclusion I am asking this honorable court to notice that when my September, 2000 conviction was vacated, there were no grounds to indicate or imply that in 2008 I pleaded guilty to maintain narcotic nuisance, furthermore the attorney representing me states that I was pleading to public nuisance and getting a sentence of 364 days probation. Therefore, there is no conviction of an aggravated felony in the State of Rhode Island. I feel as though I was misrepresented by my counsel at my immigration hearing. . . .

Id. In the June 24, 2009 letter, Petitioner stated, in pertinent part:

> . . . further more I try to shown the court that the conviction for which I received 364 days probation in Providence R.I. Superior Court was for a charge from 2005, for a simple possession of a $10.00 piece to what the officer believed was cocaine, but was never confirmed or analyzed to be cocaine so on January 22, 2008, the court offer me a plea of nuisance for 364 days of unsupervised probation and according to my lawyer this was not a felony or deportable by immigration, So I accepted the plea and pled guilty. . . .

Id. On April 25, 2011, Petitioner submitted a memorandum in support of his request to appear by video conference or, in the alternative, by telephone. The State filed an

[8] Pages three and four from the Decision of the Immigration Court are missing from this exhibit.

objection to this request on June 1, 2011. For unknown reasons, Petitioner never took steps thereafter to press his motion for permission to testify remotely.

On June 2, 2011, Petitioner filed an Amended Application for Post-Conviction Relief, together with an Amended Affidavit and a copy of an email that his former defense attorney had sent him. The Amended Application expanded upon his initial Application for Post-Conviction Relief by including further allegations of Rule 11 violations and ineffective assistance of counsel. The Amended Affidavit sought to incorporate his previous Affidavit and also allege additional violations of Rule 11. It also added allegations that Petitioner did not understand the nature of the charge to which he had pled and that this charge was based upon an illegal arrest unsupported by probable cause. On June 13, 2011, the Petitioner filed a Motion for Summary Judgment as to his Amended Application, arguing that there were no genuine issues of material fact that would require an evidentiary hearing and that he was thus entitled to judgment as a matter of law as to his claim of ineffective assistance of counsel.

Pursuant to this Court's Order, Petitioner, through counsel, filed a second Amended Application for Post-Conviction Relief on July 5, 2011.[9] Petitioner claims that, at the time of his plea on September 22, 2008, his counsel provided ineffective assistance by not investigating or advising him of the immigration consequences of the plea and not advising him of the nature of the charge. Further, Petitioner asserts that the Court took the plea in violation of Rule 11 of the Rhode Island Rules of Criminal Procedure. The Amended Application (Second) states as follows:

[9] The substance of this Amended Application, further amended later by Petitioner for the limited purpose of adding a new notary clause, is what is at issue here. The Amended Application should have been filed as a Second Amended Application, as it is the second amended pleading filed by Petitioner. This Court will refer to it, therefore, as the Amended Application (Second) in this Decision.

1. That petitioner stands convicted of certain charges as brought forth in the Providence County, Superior Court by way of criminal information number P2-2005-1796A. That on or about January 22, 2008 the defendant came before the Honorable retired Justice Mark A. Pfeiffer and pled nolo contendere to the amended charge of Maintaining/Frequenting a Narcotics Nuisance in violation of Rhode Island General Laws and received 364 days of probation.
2. Because petitioner has no direct right of appeal from the sentence imposed, no such appeal was lodged, and accordingly, petitioner has exhausted all state appellate remedies available and provided to and pursuant to the Rhode Island Rules of Criminal Procedure and its state statutory and constitutional provisions.
3. That petitioner invokes this Court's jurisdiction over the instant matter pursuant to Title Ten, Chapter 9.1 of R.I.G.L. as amended, rights of an alien resident set forth in and pursuant to Title Ten, Chapter 9.1 of R.I.G.L. as amended.
4. That the entry and imposition of sentence herein was in violation of the Constitutional Laws of the United States and the Constitution and Laws of the State of Rhode Island.
5. Specifically and without limitation, petitioner was sentenced upon a guilty plea without first being advised by counsel of immigration consequences. That the failure to advise the petitioner of the immigration consequences of said plea was in violation of Strickland v. Washington, 466 U.S. 668 (1984) and Padilla v. Commonwealth of Kentucky, No. 08-651 decided March 31, 2010.
6. That petitioner did not understand nor was he explained the significance of the rights he was waiving or that he had options otherwise available to him.
7. That petitioner has been prejudiced as a result of the pleas and related sentence that entered in the above-captioned criminal matter facing both deportation and exclusion of readmission.
8. Said conviction should be vacated since it was imposed based on a plea that was not a knowing, intelligent and voluntary waiver of defendant's constitutional rights.
9. That former defense counsel failed to properly investigate the immigration consequences prior to the petitioner pleading guilty/nolo contendere to the underlying criminal charges.
10. That as further grounds for relief, petitioner avers that the plea and related sentence were done in violation of Rule 11 of the Rhode Island Rules of Criminal Procedure.

11. That petitioner was not properly advised by the Court of the constitutional rights he was waiving at the time of said plea.
12. That petitioner was not properly advised by the Court as to the nature of the offense for which he pled nolo contendere.
13. That petitioner was not properly advised by former counsel as to the nature of the offense at the time of plea.
14. Therefore, petitioner prays that he was denied the following statutory and/or constitutional protection and rights:
    a. Right to be adequately represented and apprised of immigration consequences pursuant to applicable case law;
    b. Right to speedy and public trial;
    c. Right to presumption of innocence;
    d. Right to maintain and secure appeal, if necessary;
    e. Right to confront and cross-examine his accusers;
    f. Right to effective assistance of counsel.
15. That the foregoing rights were denied your petitioner through the course of the pendency of those proceedings against him.
16. That these rights were secured to the petitioner under Fifth and Sixth Amendments to the United States Constitution as made applicable to the States through the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and that such sentence and conviction were imposed in violation thereof.
17. Further, respondent, State of Rhode Island, offered your petitioner analog state constitutional protections pursuant to the provisions of Article I, Sections 10 and 14 of the Rhode Island Constitution, of which protections your petitioner, through his conviction, and sentence likewise deprived.
18. That further, such sentence and convictions should be vacated in the interests of justice.

Pet'r's Amended Appl. for Post-Conviction Relief, July 5, 2011 (emphasis removed). Petitioner also submitted an Affidavit in support of his Amended Application (Second), which states, in pertinent part, as follows:

1. That I am petitioner in the above-captioned matter.
2. That my former defense counsel representing me in the underlying criminal matter did not at any time during the course of former representation provide an immigration advisement.
3. That my former defense counsel did not during the course of said representation advise me that I would

stand convicted as a removable alien should I plead nolo contendere to the underlying criminal charges.

4. That as a result of pleading nolo contendere I stood convicted as a removable alien. That as such, I was subject to mandatory deportation from the United States. That as a result of this state conviction I am ineligible for relief from deportation.
5. That my former defense attorney never advised me that I would be subject to automatic deportation from the United States after pleading nolo contendere.
6. That I believe the plea and related sentence that entered in the underlying criminal matter was done in violation of Rule 11 of the Rhode Island Rules of Criminal Procedure. That specifically, I was not advised by the court of the constitutional rights I was otherwise waiving by entering a plea of nolo-contendere.
7. That further, I was not sufficiently or properly advised by the court as to the nature of the allegations and criminal charge for which I was pleading nolo-contendere. That I was under the belief that I was pleading to a charge of frequenting a public nuisance when in fact I plead to a charge of frequenting a narcotics nuisance. That neither the court nor my attorney sufficiently explained to me the nature of the offense which has now resulted in my automatic deportation from the United States.
8. That I believe my arrest for this initial charge was illegal and not supported by probable cause. That I otherwise had defenses to this matter should the case have proceeded to trial on the original charge or any amended charge.
9. That in point of fact, I have been physically removed from the United States pursuant to an Order of removal affirmed at by Board of Immigration Appeals on or about May 29, 2009.
10. That had I known I would be subject to deportation and ineligible for relief, I would have exercised my rights to trial as opposed to pleading guilty to said criminal charge.
11. That I have been prejudiced by the representation of former counsel. I was a long-term permanent resident in the United States. That all my family resides in the United States.
12. That the representation was not competent within the meaning of applicable case law.

13. That I am in the process of seeking a lawful readmission to the United States after the deportation.
14. That I am a disabled veteran who served this country honorably.
15. That I am asking that the underlying criminal conviction be vacated.

Pet'r's Aff. in Supp. of Appl. for Post-Conviction Relief, July 24, 2011 (emphasis removed). Both Petitioner's Amended Application (Second) and the Affidavit that he filed in support of it were notarized in the Dominican Republic. Id.; Pet'r's Amended Appl. for Post-Conviction Relief, July 5, 2011. Again, in neither his Amended Application (Second) nor his Affidavit in support thereof does Petitioner identify the defense counsel who he claims was deficient. He thus does not preclude the possibility that other defense counsel involved in his case advised him regarding the nature of the charge connected with the plea and the immigration consequences connected with pleading to that charge.

Petitioner never refiled his Motion for Summary Judgment to apply to his Amended Application (Second) that post-dated his summary judgment motion, as is required procedurally to make that dispositive motion applicable to the operative pleading. Nonetheless, he filed an additional Memorandum in Support of Motion for Summary Judgment on August 12, 2011, which argued that he could have succeeded on a motion to suppress at trial and that his former counsel was ineffective.

The State filed an Objection to Petitioner's Motion for Summary Judgment on August 26, 2010, arguing that the Petitioner failed to demonstrate the absence of a genuine issue of material fact or that judgment should enter in his favor. The State additionally filed a Motion for Summary Judgment, asserting that Petitioner has failed to

prove that his former counsel was deficient or that any deficiency resulted in prejudice to him. The State also argues that Petitioner's claim is moot because his first degree robbery conviction subjected him to deportation regardless of his plea at issue in this case.

Petitioner filed an Objection to the State's Motion for Summary Judgment on August 31, 2011, and a Supplemental Memorandum in Support of Motion for Summary Judgment. He argues that a hearing justice of this Court violated Rule 11 when he took the underlying plea in this case. On September 21, 2011, Petitioner filed additional exhibits, including a number of letters from a friend and family members, a copy of his DD214 Report of separation from active duty, and a copy of an explanation of permission to return after removal. See Pet'r's Ex. List in Supp. of Appl. for Post-Conviction Relief, filed Sept. 21, 2011.

The parties' cross-motions for summary judgment came on for hearing before this Court on October 7, 2011. As the State professed that it was not aware of the Rule 11 arguments raised in Petitioner's supplemental memorandum, it asked for leave to file a reply memorandum. This Court thus continued the hearing to November 8, 2011 to give the State an opportunity to further respond. The State thereafter filed a further Objection and Supplemental Memorandum along with additional exhibits, including a copy of Petitioner's plea form. See State's Supp. Mem., filed Aug. 26, 2011. It argues that the Petitioner has failed to submit evidence proving that he entered into the plea unknowingly or that the hearing justice who took the plea failed to meet the mandates of Rule 11. See State's Objection to Mot. for Summ. J., filed Aug. 26, 2011. The Petitioner, through counsel, further submitted additional authorities, transcripts, and a copy of a warning to an alien who is ordered removed or deported. See Pet'r's Ex. List in Supp. of

Appl. for Post-Conviction Relief, filed Sept. 21, 2011. On November 8, 2011, this Court heard oral argument on the parties' cross-motions for summary judgment.

On July 20, 2012, after taking this matter under advisement and carefully reviewing the extensive pleadings, affidavits, and exhibits in this case, this Court ordered the Petitioner to appear for a hearing to show cause why his Amended Application (Second) should not be summarily dismissed for his failure to properly verify it and the Affidavit that he filed in support of it. See Candelario v. State, C.A. No. PM 10-6205 (R.I. Super. 2012) (Order). This Court expressed concern that the Amended Application (Second) and Affidavit, dated July 24, 2011, appeared to have been signed by a person purporting to be the Petitioner before a foreign notary whose name appeared illegible, whose date of commission expiration had been left blank, and with an affixed seal that also appeared indecipherable. Id. The issues regarding the notarization of the Amended Application (Second) and Affidavit made this Court question whether these documents were legally cognizable under Rhode Island law.

In response, on July 31, 2012, Petitioner filed a Motion to Amend his Amended Application (Second) and Affidavit. See Pet'r's Mot. For Leave of Ct. to Am. Pet'r's Appl. and Aff. filed July 31, 2012. On or about August 8, 2012, Petitioner submitted supplemental exhibits in support of his Amended Application (Second). See Pet'r's Supplemental Ex. List in Supp. of Appl. for Post-Conviction Relief, Aug, 2012. These exhibits included a newly executed Amended Application and Affidavit, dated July 25, 2012, designed to address the issue of legibility of the name of the notary, and a supplemental affidavit that outlined the requirements for notary commissions in the

Dominican Republic and clarified that, under the law of that country, a notary commission does not expire. See id.[10]

On September 5, 2012, the Petitioner filed a Memorandum in Support of Motion to Amend together with another supplemental exhibit list that included a fourth Amended Application and Affidavit, newly executed by the Petitioner before a notary at the United States Embassy in the Dominican Republic.[11] Petitioner asked this Court to grant his Motion to Amend on grounds of excusable neglect or mistake or otherwise allow him to file either his Amended Application (Third) and Affidavit of July 25, 2012 or his Amended Application (Fourth) and Affidavit of August 27, 2012.

On September 13, 2012, this Court granted the Petitioner's Motion to Amend as to his Amended Application (Fourth) and Affidavit. The State does not dispute that the Amended Application (Fourth) and Affidavit, filed by the Petitioner on August 27, 2012, have been properly verified under Rhode Island law. The parties also agree that their earlier filed cross-motions for summary judgment and supporting memoranda and exhibits may be considered as if they were filed after and with respect to the Petitioner's Amended Application (Fourth) and Affidavit dated August 27, 2012.

Accordingly, this Court will consider Petitioner's Amended Application (Fourth) and Affidavit, dated August 27, 2012, as the operative pleadings before this Court. It likewise will consider the parties' cross-motions for summary judgment filed on June 13, 2011 and August 26, 2011, respectively, and all memoranda and exhibits submitted in

[10] This Amended Application made no substantive changes to Petitioner's Application (Second). It should have been filed as a "Third Amended Application." This Court will refer to it, therefore, as "Amended Application (Third)."

[11] This Amended Application made no substantive changes to Petitioner's Amended Application (Second) or his Amended Application (Third). It should have been filed as a "Fourth Amended Application." This Court will refer to it, therefore, as "Amended Application (Fourth)."

support thereof as if they were filed subsequent to Petitioner's Amended Application (Fourth) and proceed to decide those motions as if they pertained to the later-filed Amended Application (Fourth).[12]

II

STANDARD OF REVIEW

Rhode Island's Post-Conviction Remedy Act incorporates the summary judgment standard of Rule 56 of the Rhode Island Rules of Civil Procedure and thus allows for a summary disposition of a post-conviction relief petition "when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Sec. 10-9.1-6(c). The standards for granting summary disposition under the Act are "identical to those utilized in passing on a summary judgment motion." Palmigiano v. State, 120 R.I. 402, 406, 387 A.2d 1382, 1385 (1978).

As such, "the court does not pass upon the weight or the credibility of the evidence but must consider the affidavits and other pleadings in the light most favorable to the party opposing the motion." Palmisciano v. Burrillville Racing Ass'n, 603 A.2d 317, 320 (R.I. 1992) (citing Lennon v. MacGregor, 423 A.2d 820 (R.I. 1980)). In turn, "a party opposing a motion for summary judgment 'carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.'" Chavers v.

[12] In so doing, this Court does not condone the confused state of the pleadings and proceedings in this case. Indeed, these filings made it most difficult for this Court to comprehend and outline the procedural course of this litigation. Counsel are reminded that, although post-conviction relief actions necessarily have criminal cases at their core, the actions are fundamentally civil in nature. See §§ 10-9.1-1 et seq. As such, strict compliance with the Rhode Island Rules of Civil Procedure is required.

Fleer Bank (RI), N.A., 844 A.2d 666, 669-670 (R.I. 2004) (citing United Lending Corp. v. City of Providence, 827 A.2d 626, 631 (R.I. 2003)). "Therefore, summary judgment should enter 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case. . . .'" Lavoie v. North East Knitting, Inc., 918 A.2d 225, 228 (R.I. 2007) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548 2548, 91 L. Ed. 2d 265 (1986)). "[C]omplete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 323.

III

ANALYSIS

A.

Ineffective Assistance of Counsel

To support his claim of ineffective assistance of counsel, Petitioner claims that his former counsel's performance, at the time of his misdemeanor plea to the charge of frequenting a narcotics nuisance on January 22, 2008, was deficient as a matter of law. Petitioner first alleges that his former counsel did not advise him of the immigration consequences of the plea. In support of this allegation, Petitioner presents his Affidavit, which states, in pertinent part, as follows:

> 2. That my former defense counsel representing me in the underlying criminal matter did not at any time during the course of former representation provide an immigration advisement.
> 3. That my former defense counsel did not during the course of said representation advise me that I would stand convicted as a removable alien should I plead nolo contendere to the underlying criminal charges.
> 4. That as a result of pleading nolo contendere I stood convicted as a removable alien. That as such, I was subject to mandatory deportation from the United States. That as a result of this state conviction I am ineligible for relief from deportation.

5. That my former defense attorney never advised me that I would be subject to automatic deportation from the United States after pleading nolo contendere.

Pet'r's Aff. in Supp. of Appl. for Post-Conviction Relief, Aug. 27, 2012, ¶¶ 2-5.

Petitioner next alleges that counsel was deficient for failing to properly advise him of the nature of the offense to which he pled *nolo contendere*. In particular, Petitioner claims that his former counsel failed to inform him that he was entering a plea to a narcotics charge. He supports this assertion with both his Affidavit and a transcript of his testimony before the Immigration Court. His Affidavit states, in pertinent part, as follows:

> That further, I was not sufficiently or properly advised by the court as to the nature of the allegations and criminal charge for which I was pleading nolo-contendere. That I was under the belief that I was pleading to a charge of frequenting a public nuisance when in fact I plead to a charge of frequenting a narcotics nuisance. That neither the court nor my attorney sufficiently explained to me the nature of the offense which has now resulted in my automatic deportation from the United States.

Id. at ¶ 7. In his testimony before the Immigration Court, the Immigration Judge and Petitioner had the following exchange:

> JUDGE TO MR. VIERA[13]
>
> Now look at—aside from what I was just talking about, this document that was served on November 26, there's also another charge against you, but let's start with what I just spoke to you of. Now, the first document says that you're subject to be deporting [sic] because you're a citizen of Dominican Republic.
>
> MR. VIERA TO JUDGE
>
> Yes, sir.

[13] The transcript from the Immigration Court references Candelario as Mr. Viera and Mr. Viera-Candelario. The parties do not appear to dispute that these references are to Petitioner Hector Candelario.

JUDGE TO MR. VIERA

It says you've been a permanent resident since 1963. I mean, that's like 45 years; is that right?

MR. VIERA TO JUDGE

Yes, sir, 46 to be exact. On December (indiscernible) it will be 46 years.

JUDGE TO MR. VIERA

Okay. That's not the way I figure it, but that's all right, I could be wrong. It's a long time, anyway. It says here on May 23, 1980, you were convicted in New York for robbery one. You were sentenced to term—to a term of imprisonment of six to 18 years. Then they say that on January 22nd, 2008, that was this past January, you were convicted in Superior Court, Rhode Island, for maintaining or frequenting a narcotics nuisance, to wit cocaine. They say on September 11, 2000, convicted in Superior Court, Providence, for possession of cocaine. So number one, they say you're subject to be deported because you've been convicted of what they call aggravated felonies, crimes of violence with a big sentence, also the illicit trafficking coming out of the maintaining of frequent narcotics nuisance, so that's not a good thing, either. Now, the second charge is—something was withdrawn here. . . .

. . . .

So the summary, sir, is that they're charging you with being subject to being deported because of a controlled substance violation, that's the possession on maintaining the—

MR. VIERA TO JUDGE

Your Honor, if I may be able to clear that up for you, I was charged—I was sentenced to 364 days probation for what they call public nuisance, not narcotic nuisance, sir.

JUDGE TO MR. VIERA

Well, let me tell you this, number one, I have—

MR. VIERA TO JUDGE

That's why I pleaded out.

JUDGE TO MR. VIERA

> I have had some experience with that, and I would need to look at the statute again, but the last time that Ms. Gavegnano [of the DHS], the Board of Immigration Appeals agreed with her that it was, indeed, a controlled substance violation, if my memory serves me right. So let's leave that out for now. I'll have to take another look at the statute. The point, sir, is that this is what you're being charged with, and now I would like to go on to tell you that you are entitled to be represented in these proceedings—

MR. VIERA TO JUDGE

> Okay.

. . . .

Pet'r's Ex. List in Supp. of Appl. for Post-Conviction Relief, filed March 3, 2011, Ex 1, Hr'g Tr., Dec. 4, 2008, at 4-5 ¶¶ 9-14, 8 ¶¶ 2-24. The Immigration Judge and Petitioner engaged in another exchange at a subsequent hearing:

JUDGE TO MR. VIERA

> -- that you were convicted of robbery in 1980, and then on January 22, 2008, maintaining or frequenting a narcotics nuisance, to wit cocaine, and they charge you with an aggravated felony.

MR. VIERA TO JUDGE

> I was charged with 364 day probation, Your Honor.

JUDGE TO MR. VIERA

> Yeah, but --

MR. VIERA TO JUDGE

> And the charge was dropped to public nuisance, I believe.

JUDGE TO MR. VIERA

> Well --

MR. VIERA TO JUDGE

> That's what I—according to my lawyer, he said that I wouldn't have anything to do with Immigration if I copped out to 364 day probation.
>
> JUDGE TO MR. VIERA
>
> Well, what you need to do then, sir, is to have your lawyer get in touch with me and enter his appearance for you, and we'll have a hearing on it. . . .

Id. at 14-15 ¶¶ 9-3.

In addressing Petitioner's claims of ineffective assistance of counsel, this Court must consult settled precepts of state and federal law applicable to such claims. Our Supreme Court has adopted the United States Supreme Court's standard for analyzing ineffective assistance of counsel claims. See Neufville v. State, 13 A.3d 607, 610 (R.I. 2011) (citing Strickland v. Washington, 466 U.S. 668 (1984)). The Court employs a two-part test, which requires that a petitioner first prove that "counsel's performance was deficient, to the point that the errors were so serious that trial counsel did not function at the level guaranteed by the Sixth Amendment." Brennan v. Vose, 764 A.2d 168, 171 (R.I. 2001) (citing State v. Brennan, 627 A.2d 842, 845 (R.I. 2001) (citing Strickland, 466 U.S. at 687)). If the petitioner can show deficiency, he or she then must go on to prove prejudice or "that such deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial." Bustamante v. Wall, 866 A.2d 516, 522 (R.I. 2005) (citing Brennan, 764 A.2d at 171 (citing Strickland, 466 U.S. at 687)).

In applying the Strickland standard in this case, this Court first will address Petitioner's claims that his former defense counsel was deficient. To do so, this Court must begin by considering Petitioner's failure to identify the attorney who he claims was deficient. It then will address Petitioner's claim that his counsel failed to investigate and

advise him properly with regard to the immigration consequences of his plea. It next will address his additional claim that his counsel failed to advise him of the nature of the charge to which he pled *nolo contendere*. Finally, this Court will address whether the Petitioner suffered prejudice as a result of the alleged deficiencies in his former counsel's performance.

1.

Deficiency

a.

The Failure To Identify Counsel

In accusing his former counsel of deficiency in connection with his plea, it is most noteworthy that Petitioner never identifies by name the counsel whose assistance he criticizes as ineffective. While it might be presumed that he means the attorney who signed the plea form as his counsel and who appeared at the plea hearing on his behalf, the state of the record in this case precludes this Court from making that assumption.

Petitioner's counsel of record in the case at the time of the plea was Attorney Uhlmann. See State v. Candelario, C.A. No. P2-05-1796A (R.I. Super. 2005) (Entry of Appearance dated June 29, 2005). She remained active as his counsel at least from the time of his arraignment until several weeks before the plea. Id. She had not withdrawn as Petitioner's counsel at the time of the plea. Id. Attorney McEnaney entered his appearance prior to the plea, but only for a limited purpose not connected with the plea—namely, to represent Petitioner in connection with a warrant cancellation. Id. (Entry of Appearance dated December 12, 2007). While Attorney McEnaney's name appears on the plea form and in the record of the plea colloquy, the Clerk's Note and Judgment and Disposition from the date of the plea record Attorney Connors as Petitioner's attorney. Id.

(Clerk's Note dated Jan. 22, 2008; Judgment and Disposition dated Feb. 13, 2008); see State's Supp. Mem. Ex. 1, Plea Form; Pet'r's Supp. Mem. for Summ. J., Ex. 1, Tr. of Plea Colloquy dated Jan. 22, 2008.

The record is thus murky as to who actually represented Petitioner concerning the plea. It indicates that there were up to three lawyers who may have represented Petitioner and advised him regarding his plea. Petitioner, for his part, has done nothing to clarify the state of the record as to who actually served as his counsel at the time of the plea and who gave him what advice and when. He faults a single unnamed "former counsel" for failing to advise him as to the nature of the charge to which he pled and the immigration consequences of his plea. Yet, one of the other lawyers who represented him may have advised him properly in that regard. By not naming the attorney in question, Petitioner leaves open the possibility that one of his attorneys did not give him immigration advice or advise him regarding the nature of the charge—as he states in his Affidavit—but that he did receive that advice from other counsel whose job it was to counsel him regarding his plea.

As such, Petitioner's claims of deficiency must fail as a matter of law. His failure to identify the attorney who he claims was deficient and describe the nature of the advice given to him by all counsel concerning his plea is fatal to those claims and warrants summary judgment in favor of the State.

b.

Immigration Advice

Assuming, arguendo, that Petitioner's failure to identify his "former counsel" is not dispositive of his claims of ineffective assistance of counsel, this Court needs to address his claim that his former counsel was deficient in failing to investigate and advise

Petitioner of the immigration consequences of his plea. In making this claim, Petitioner relies on the seminal case of Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010). As the United States Supreme Court decided Padilla in 2010, after Petitioner entered his plea in 2008, however, this Court first must address whether Padilla should be applied retroactively to this case.[14]

i.

Retroactive Application of Padilla

In Padilla, the United States Supreme Court held that "[w]hen the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." Id.

In applying this standard, the Supreme Court first had to decide whether the immigration consequences applicable to Padilla following entry of his guilty plea to a charge of illegal transportation of a large amount of marijuana were clear under federal law. Id. at 1477. The federal immigration statute at issue provided that "any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." See id. at 1483 (quoting 8 U.S.C. § 1227(a)(2)(B)(i) (Dec. 23, 2008)). In interpreting and applying that statute to

[14] The parties have not raised this issue expressly, but it is a necessary predicate to addressing Petitioner's claims that are dependent upon the case.

Padilla to determine whether the immigration consequences that might result to him based on his plea were clear on their face, the Supreme Court found:

> . . . the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. See 8 U.S.C. § 1227(a)(2)(B)(i) . . . . Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses.

Id.

Padilla's attorney failed to counsel his client of these clear immigration consequences—namely that his plea would make him eligible for deportation—and instead provided affirmative advice that gave his client "false assurance" that he would not be deported. Id. Specifically, Padilla's attorney advised his client "that he did not have to worry about immigration status since he had been in the country so long." Id. at 1478. The Supreme Court thus concluded that counsel's performance was deficient under Strickland. Id. In doing so, however, the Supreme Court declined to limit its holding to cases where counsel made an affirmative misrepresentation as to immigration consequences, cautioning that silence by a defense attorney as to clear immigration consequences is equally deficient. Id. at 1484. It reasoned:

> [that a] holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available . . . second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide [his or] her client with available advice about an issue like deportation and the failure to do

> so "clearly satisfies the first prong of the Strickland analysis."

Id. (quoting Hill v. Lockhart, 474 U. S. 52, 62, 106 S. Ct. 366, 372 (1985) (White, J., concurring in judgment)).

Our Supreme Court first interpreted and applied Padilla in Neufville v. State, 13 A.3d 607 (R.I. 2011). In Neufville, the petitioner argued that defense counsel had the duty "to inform the defendant that his or her deportation is 'presumptively mandatory' and that failure to do so falls below the acceptable standard of effective assistance of counsel." Id. at 613. The Court rejected this argument, instead holding that "counsel is not required to inform [a defendant] that [he or she] *will* be deported, but rather that a defendant's 'plea would make [the defendant] *eligible* for deportation.'" Id. at 614.

This Court reads Neufville to mean that, under Padilla, counsel has the obligation, where the immigration consequences are clear, to make the defendant aware that his or her plea will make him or her eligible for deportation. This obligation does not mean, however, that counsel is under the obligation to inform the defendant that his or her plea will result in deportation or that deportation will be presumptively mandatory. Id. at 614. As neither counsel nor the court has control over immigration proceedings, they cannot guarantee a defendant that he or she will, in fact, be deported. To read Neufville otherwise would mean that counsel only has the duty to make his or her client aware that immigration consequences may result from a plea, even where the immigration consequences are clear, in contravention of the United States Supreme Court's dictates in Padilla.

Accordingly, counsel does not have the obligation to inform a non-citizen client that he or she will be deported or that deportation is automatic or mandatory as a result of

the plea. Counsel does have the obligation, however, to inform a non-citizen client that he or she will be eligible for deportation as a result of his or her plea where it is in fact clear that the client will be eligible to be deported. In all other cases, counsel is under the obligation to inform a non-citizen client that there may be immigration consequences as a result of the plea.

Prior to Padilla, courts and counsel generally viewed immigration consequences as collateral to the plea. As a result, criminal defense counsel often did not counsel their clients regarding immigration consequences beyond indicating to them generally that a plea may result in immigration consequences. Indeed, the standard plea form used in this case reflects the nature of the advice traditionally given—warning a defendant that "if [he or she is] a resident alien, a sentence imposed as a result of [his or her] plea may result in deportation, exclusion of admission to the United States, and/or denial of naturalization pursuant to the laws of the United States and that this Court will have no control over those proceedings." See State's Supp. Mem. Ex. 1, Plea Form. Padilla, in recasting immigration consequences as critical, rather than collateral, to defense counsel's obligation to advise their clients about the nature and consequences of a plea, thus effectuated a sea change in plea-taking in the state and federal courts.

It is no surprise, therefore, that this issue of whether Padilla may be applied retrospectively has divided the federal appellate courts. Compare United States v. Orocio, 645 F.3d 630 (3rd Cir. 2011) (holding that Padilla may be applied retroactively) with Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011) (holding that Padilla may not be applied retroactively) and United States v. Chang Hong, 671 F.3d 1147, 1155 (10th Cir. 2011) (holding that Padilla may not be applied retroactively). The divide is the product

of differing views as to whether Padilla announced a new rule or simply applied the old rule in Strickland to articulate the duties of counsel under the Sixth Amendment in counseling defendants when their pleas involved immigration consequences. Id. At its core, the split in the circuits may well reflect differing views as to the wisdom of the Padilla decision itself. The significance of the divide recently prompted the United States Supreme Court to grant a petition for a *writ of certiorari* to review one of the federal appellate court decisions that held that Padilla should not be applied retroactively. See Chaidez v. United States, 132 S. Ct. 2101 (2012).

When the United States Supreme Court announces a rule, its effect on a defendant's conviction will differ, as these federal appellate courts have noted, depending on whether that rule is considered new. Whorton v. Bockting, 549 U.S. 406, 416, 127 S. Ct. 1173, 1180 (2007). The Supreme Court has held that new rules should not be applied retroactively to cases on collateral review. Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed 2d 334 (1989). A rule is new, within the meaning of Teague, if it breaks new ground, imposes a new obligation on the states or the federal government, or was not dictated by precedent existing at the time the defendant's conviction became final. Graham v. Collins, 506 U.S. 461, 467, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993) (citing Teague, 489 U.S. at 288.) In determining whether a rule is new, the Supreme Court has advised the lower courts to consider whether reasonable jurists could differ as to whether a rule was compelled or dictated by precedent. Id.

The Third Circuit Court of Appeals was the first federal appellate court to decide whether Padilla should be applied retroactively. See Orocio, 645 F.3d at 635. It held that, "because Padilla followed directly from Strickland and long established professional

norms, it is an old rule for Teague purposes and [should be] retroactively applied." Id. at 641. The Court reasoned that the Padilla decision was hardly novel based on prevailing professional norms and that its application of Strickland "broke no new ground" because defense counsel was long required to provide effective assistance regarding all important decisions that could affect the plea process, which had long included immigration consequences. Id. at 639.

The Seventh and Tenth Circuits, however, disagreed. These federal appellate courts held that Padilla announced a new rule that should not apply retroactively to convictions that were final at the time of its announcement. See Chang Hong, 671 F.3d at 1155; Chaidez, 655 F.3d at 687-94. These courts reasoned that, prior to Padilla, most state and federal courts had considered the failure to advise a client of potential immigration consequences to be collateral to the plea and hence outside of the requirements of the Sixth Amendment. In addition, both courts noted the split 7-2 decision in Padilla that included a strongly worded concurrence by two justices and a dissent by two justices that foreshadowed the danger of its retroactive application. In particular, Justice Alito's concurrence, in which Chief Justice Roberts joined, called the Court's decision in Padilla a "dramatic departure from precedent." Padilla, 130 S. Ct at 1488. Justice Scalia's dissent, in which Justice Thomas joined, stated, "there is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand." Id. at 1495. The logic of the concurring and dissenting justices in Padilla convinced both the Seventh and Tenth Circuits that Padilla marked a dramatic shift in constitutional law when it expanded Strickland to include the collateral consequences of a criminal conviction.

This Court agrees. Indeed, this Court would go so far as to suggest that Padilla created a dramatic change in the state trial courts with respect to the obligation of counsel to advise of immigration consequences that had been accepted by counsel and the courts, prior to Padilla, as consequences collateral to the plea. Presumably, that is why twenty-eight states have joined in filing an *amicus* brief with the United States Supreme Court in Chaidez to protest the retroactive application of Padilla.[15] It is hard to see how Padilla could be characterized as not announcing a new rule under Teague where reasonable jurists not only could differ as to whether the holding in Padilla was dictated by precedent, but where most reasonable jurists would have found that it was not. See Graham v. Collins, 506 U.S. at 467 (citing Teague, 489 U.S. at 288.)

Moreover, retroactive application of Padilla, in this Court's view, could open the door to the re-litigation of legions of criminal cases through applications for post-conviction relief and thus undermine judicial finality. As many of those criminal case judgments are decades old, resurrecting those cases now could prejudice the government in its attempts to prosecute the cases and burden the courts with the task of addressing once settled cases anew. It seems unfair to criticize attorneys for failing to give their clients proper immigration advice when the obligation to do so became crystal clear to counsel and the courts only with the advent of Padilla.

In this Court's view, therefore, the better view is that Padilla should not be applied retroactively. While Padilla may well have announced an important new rule, the newness of the rule, and not its wisdom, should control the determination of retroactivity.

[15] See Brief for New Jersey, Alabama, Alaska, Arizona, Colorado, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin, & Wyoming as Amicus Curiae, Chaidez v. United States, 132 S. Ct. 2101 (2012). It does not appear that Rhode Island, however, has joined this effort.

As Petitioner's plea at issue here occurred before Padilla, it necessarily follows that his claims of ineffective assistance of counsel, to the extent premised on counsel's alleged failure to give him proper immigration advice under Padilla, must fail.

ii.

Applying Padilla

Assuming, *arguendo*, that Padilla can be applied retroactively to the plea at issue here, this Court must go on to consider whether Petitioner's former counsel was deficient in counseling him regarding his plea. To prevail with respect to his Motion for Summary Judgment on this issue, Petitioner must prove that his former counsel's performance was deficient under Padilla as a matter of law. To withstand the State's motion for summary judgment on this issue, Petitioner must show, at a minimum, that there is a genuine issue of material fact under Padilla as to the deficiency of his former counsel.

Relying on Padilla, Petitioner appears to argue that his plea of *nolo contendere* to a charge of frequenting a narcotics nuisance in violation of § 21-28-4.06 clearly made him deportable under § 1227(a)(2)(B)(i), such that his former counsel had a duty to inform him, prior to his entering the plea, that the plea would make him at least eligible for deportation. The Rhode Island statute that criminalizes the frequenting of a narcotics nuisance states, in pertinent part, as follows:

> (a) Any store, shop, warehouse, building, vehicle, aircraft, vessel, or any place which is used for the unlawful sale, use, or keeping of a controlled substance shall be deemed a common nuisance.
> (b) Any person who violates this section with respect to:
> (3) Knowingly visiting a common nuisance as described in subsection (a) for the purpose of using or taking in any manner any controlled substance may be imprisoned for not more than one year and fined not more than five hundred dollars ($500).

Sec. 21-28-4.06. This statute, by its terms, makes criminal the "knowing visitation" of a "place which is used for the unlawful sale, use, or keeping of a controlled substance." Id. As such it is a "law . . . of a State . . . relating to a controlled substance" that, if violated by an alien, can subject that person to deportation. 8 U.S.C. § 1227(a)(2)(B)(i) (eff. Dec. 23, 2008). This Court concludes, therefore, that the immigration consequences of the plea were clear and that counsel had a duty under Padilla and Neufville to do more than inform Petitioner that there may be immigration consequences. Counsel had the obligation to inform Petitioner that his plea would make him eligible for deportation.

In this case, Petitioner does not claim that his attorney provided affirmative incorrect advice that he would suffer no immigration consequences.[16] He claims instead that his counsel committed a sin of omission. Petitioner states in his Affidavit "that my former defense counsel . . . did not at any time during the course of former representation provide an immigration advisement" and, more specifically, "[t]hat my former defense counsel did not . . . advise me that I would stand convicted as a removable alien" or "be subject to mandatory deportation should I plead nolo contendere to the underlying criminal charges." Pet'r's Aff. in Supp. of App. for Post-Conviction Relief, June 24, 2011, ¶¶ 3-4.

While the State has not submitted an affidavit of Petitioner's former counsel or any other evidence to contradict Petitioner's Affidavit, it has submitted the plea form signed by Petitioner and a transcript of his plea colloquy with the Court. The plea form

[16] While Petitioner testified before the Immigration Court that "according to my lawyer, he said that I wouldn't have anything to do with Immigration if I copped out to 364 day [sic] probation," he does not appear to characterize this advice as an affirmative misrepresentation by counsel that he would suffer no immigration consequences nor does he rely on this statement in arguing for summary judgment. See Pet'r's Ex. List in Supp. of Appl. for Post-Conviction Relief, filed March 3, 2011, Ex 1, Hr'g Tr., Dec. 4, 2008, at ¶¶ 5-12.

signed by the Petitioner and his counsel, while not containing a statement that his plea would make him eligible for deportation, states: "I understand that if I am a resident alien, a sentence imposed as a result of my plea may result in deportation, exclusion of admission to the United States, and/or denial of naturalization pursuant to the laws of the United States, and that this Court will have no control over those proceedings." State's Supp. Mem. Ex 1, Plea Form. It also describes a sentence of 364 days probation—a sentence commonly crafted as a way to attempt to avoid immigration consequences. Id. In signing the plea form, Petitioner swore to having discussed its contents with his attorney. Id. In addition, during his subsequent plea colloquy with the Court, Petitioner reaffirmed that he had read and discussed the plea form with his attorney. See Pet'r's Supp. Mem. for Summ. J., Ex. 1, Tr. of Plea Colloquy, at 1, ¶¶ 12-16, dated Jan. 22, 2008.

Taken together, Petitioner's plea form and plea colloquy contradict Petitioner's statement in his Affidavit that his attorney did not give him *any* immigration advisement. To the contrary, these documents suggest that Petitioner and his attorney discussed immigration consequences and, at a minimum, that counsel informed Petitioner that his plea might result in deportation. As such, the plea form and the plea colloquy put at issue the credibility of the statements contained in Petitioner's Affidavit. Petitioner's credibility is placed further at issue because his testimony before the Immigration Court, contrary to his Affidavit, states that his counsel assured him there would be no immigration consequences. Moreover, as a result of Petitioner's deportation, the State has had no opportunity to depose Petitioner to cross-examine him regarding his inconsistent statements.

As a result, even in the absence of an affidavit of Petitioner's former counsel or other evidence opposing his Affidavit, there exist genuine issues of material fact as to whether Petitioner's attorney discussed with him the immigration consequences of his plea and, if so, the nature of any immigration advice given. It thus would be inappropriate for this Court to grant summary judgment as to Petitioner's claim that his counsel was deficient—assuming, contrary to this Court's finding, that Petitioner's failure to identify his counsel is not dispositive and that Padilla is to be applied retroactively—without the benefit of an evidentiary hearing. The question of whether such a hearing would be required in the event that either of this Court's findings were not to stand, however, depends on whether Petitioner has made a sufficient showing of prejudice to withstand summary judgment. Before addressing that question, however, this Court will examine Petitioner's additional argument for claiming that his former counsel's performance was deficient.

c.

Nature of the Charge

Again, assuming, arguendo, that Petitioner's failure to identify his "former counsel" is not dispositive of his claims of ineffective assistance of counsel, this Court also needs to address his claim that his former counsel was deficient in failing to apprise him of the nature of the charge to which he pled. He avers in his Affidavit that he was under the mistaken belief that he had pled to the charge of frequenting a public nuisance when in fact he had pled *nolo contendere* to the charge of frequenting a narcotics nuisance. See Pet'r's Aff. in Supp. of Appl. for Post-Conviction Relief (Fourth), dated August 27, 2012, ¶ 7. The State has submitted no counter-affidavit from Petitioner's former counsel or anyone else to refute these allegations of deficient performance. Yet,

the State contends that the plea form and plea colloquy make it clear that Petitioner understood the nature of the charge. The signed plea form explicitly describes the charge as "Frequenting a Narcotics Nuisance." State's Supp. Mem. Ex 1, Plea Form. Moreover, during the subsequent plea colloquy, the trial justice informed the Petitioner that the State was proposing to amend the charge to one of frequenting a narcotics nuisance and stated the nature of the charge, to which the defendant had no objection. Pet'r's Supp. Mem. for Summ. J., Ex. 1, Tr. of Plea Colloquy, at 1, ¶¶ 7-18, dated Jan. 22, 2008. The Court further elicited the factual basis for the amended charge from the State as unlawfully frequenting a narcotics nuisance and asked Petitioner if he accepted that as a true statement, to which the Petitioner responded in the affirmative. See id.

The issue thus becomes whether the Petitioner can defeat summary judgment by arguing that his self-serving Affidavit and testimony before the Immigration Court raise a genuine issue of material fact that he was not advised by counsel of the nature of the charge to which he pled. His argument in this regard depends on sufficient proof that he did not understand that the offense to which he plea *nolo contendere* was a drug charge.

It is well-established that a party cannot attempt to manufacture an issue of fact through an affidavit in an attempt to defeat summary judgment where the affidavit contradicts that party's own sworn testimony. Colantuoni v. Alfred Calcagni &Sons, Inc., 44 F.3d 1, 4 (1st. Cir. 1994). As such, Petitioner's Affidavit submitted in support of his Amended Application (Fourth) must be disregarded, as it contradicts his sworn plea affidavit on the plea form and his statements in the plea colloquy. Even if it were considered, however, the statements in the Affidavit fail to create a genuine issue of material fact where Petitioner's plea form that he signed under oath clearly described the

charge as a narcotics offense and, in the plea colloquy, he clearly admitted to frequenting a narcotics nuisance. The plain and ordinary meaning of the word "narcotics" within a criminal charge—clearly referenced on the plea form and in the plea colloquy—are enough to put Petitioner on notice that the charge is a narcotics charge. Significantly, Petitioner does nothing in his Affidavit to explain away his statements in the plea form and plea colloquy. Petitioner has failed, therefore, to create a genuine issue of material fact as to his claim that he did not understand the nature of the charge to which he pled because his counsel was deficient in explaining the nature of the charge to him.

Moreover, even assuming, *arguendo*, that Petitioner could establish a genuine issue of material fact as to his lack of understanding of the charge and counsel's deficiency in not explaining it to him, he still cannot prevail with respect to his Amended Application (Fourth) for Post-Conviction Relief, however, unless he also can prove that counsel's alleged deficient performance, here the alleged failure to inform him of the nature of the charge, prejudiced his defense.[17] Strickland, 466 U.S. at 687; Neufville, 13 A.3d at 612. This Court thus will go to address the prejudice prong of Strickland as it applies to both this claim of deficiency and his earlier claim that counsel failed to advise him properly as to the immigration consequences of his plea. Such inquiry is pertinent should it be determined, contrary to this Court's view, that summary judgment in favor of the State is not otherwise warranted as a result of Petitioner's failure to prove deficiency of counsel as a matter of law.

[17] It should be noted that the same logic articulated by this Court in finding no genuine issue of material fact as to his claim of deficiency based on a lack of understanding of the charge applies to his claim of prejudice resulting from that alleged deficiency. It is difficult to see how any deficiency on the part of counsel in failing to explain the nature of the offense to Petitioner could prejudice him where the plea form and plea colloquy make it clear that he did understand the charge to be a narcotics offense.

2.

Prejudice

Proving prejudice requires the Petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Strickland, 466 U.S. at 694. "It is not enough for the [Petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding . . . not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." Id. at 693. According to the Rhode Island Supreme Court, for a petitioner to show prejudice arising out of a negotiated plea, he or she must "'demonstrate a reasonable probability that but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial; and, importantly, that the outcome of the trial would have been different.'" Neufville, 13 A.3d at 610-11 (quoting State v. Figueroa, 639 A.2d 495, 500 (R.I. 1994)). Our Supreme Court also has held that "when counsel has secured a shorter sentence than what the defendant could have received had he gone to trial, the [Petitioner] has an almost insurmountable burden to establish prejudice." Id. at 614 (citing Rodrigues, 985 A.2d at 317).

Here, a hearing justice of this Court sentenced the Petitioner to 364 days of straight probation in exchange for his plea to an amended misdemeanor charge of frequenting a narcotics nuisance—clearly a more lenient sentence than the sentence of up to three years to serve for illegal possession of cocaine that he would have faced had he chosen to go to trial. See §§ 21-28-4.01(c)(2)(i) and 21-28-4.06. As the Petitioner's sentence was substantially less than three years and was not a conviction, he is hard-

pressed to establish prejudice. See Hassett v. State, 899 A.2d 430, 437 (R.I. 2006) (finding that because defendant could have received a more severe sentence had he not accepted a plea, the defendant could not demonstrate prejudice).

Moreover, the police report—attached to his original application for post-conviction relief—suggests evidence sufficient to support a finding of guilt on the charge of possession of cocaine. The police stopped the Petitioner after he ran from the police. Id. The officer(s) then performed a Terry frisk, finding a glass pipe and a plastic bag containing two small rocks on his person that tested positive in the field for cocaine. Id. Although the toxicology results are not in the record, there is no evidence to suggest that the substance found was not cocaine.

It appears likely, therefore, that had he not pled *nolo contendere* to the lesser offense of frequenting a narcotics nuisance, Petitioner would have been unsuccessful in seeking to suppress the drug evidence, he would have been found guilty of possession of cocaine, and he would have been sentenced on a more serious drug charge to a longer sentence than that imposed in exchange for his plea. His deportation under that scenario would have been even more likely. While the Petitioner asserts that his arrest was made without probable cause, there is no evidence on the face of the police report to support his claim in this regard and his bare allegation that he believes that he had other defenses to the charge and would have succeeded at trial is insufficient to raise a genuine issue of material fact. "Something more than conclusory statements must be offered by the party opposing the entry of a summary judgment. Although an opposing party is not required to disclose in its affidavit all its evidence, it must demonstrate that it has evidence of a

substantial nature, as distinguished from legal conclusions, to dispute the moving party on material issues of fact." Bourg v. Bristol, 705 A.2d 969, 971 (R.I. 1998).

Furthermore, as Petitioner is arguing that the prejudice he faced was his removal from this country, the existence of Petitioner's prior conviction also serves to negate any prejudice that he may have suffered as a result of pleading *nolo contendere* to the plea of "frequenting a narcotics nuisance." His earlier May 23, 1980 conviction for Robbery 1 in New York also was listed along with this charge as a basis for the Petitioner's removal. See Pet'r's Ex. List in Supp. of Appl. for Post-Conviction Relief, filed Mar. 3, 2011, Ex. 2, Immigration Judge's Decision and Order. Even if this Court were to vacate his plea of *nolo contendere*, therefore, Petitioner still would be subject to removal.

In addition, courts that have interpreted the prejudice prong for purposes of Padilla have found that a petitioner's own knowledge of immigration consequences of a plea from a source other than trial counsel also defeats a claim of prejudice. See Wang v. U.S., No. 10 Civ. 4425 (BMC), 2011 WL 73327, at * 5 (E.D.N.Y. Jan. 10, 2011); Gonzalez v. U.S., Nos. 10 Civ. 5463 (AKH), 08 Cr. 146 (AKH), 2010 WL 3465603, at *1 (S.D.N.Y. Sept. 3, 2010); Brown v. U.S., No. 10 Civ. 3012 (BMC), 2010 WL 5313546, at * 6 (E.D.N.Y. Dec. 17, 2010). This knowledge can come from the Court. See Wang, 2011 WL 73327, at * 5 ("[b]ut even if his trial counsel did not apprise him of his basic rights and the risks of pleading guilty, [petitioner] cannot prove prejudice because he was so informed by this Court at the plea hearing"); Gonzalez, 2010 WL 3465603, at *1 ("[a]ssuming that [petitioner's] trial attorney failed to advise him that he could be deported as a result of pleading guilty, that failure was not prejudicial since, prior to accepting his plea, [the Court] advised [petitioner] that he could be deported as a

result of his guilty plea"). It also can come from some other source. See Brown, 2010 WL 5313546, at * 6 ("[a]s courts applying Padilla have recognized, when a defendant learns of the deportation consequences of his plea from a source other than his attorney, he is unable to satisfy Strickland's second prong because he has not suffered prejudice").

Here, Petitioner has not stated in his Affidavit or otherwise that he lacked knowledge, at the time of his plea, of its immigration consequences or the nature of the charge from a source other than his unnamed "former counsel." For this reason and the other reasons stated, therefore, the Petitioner has failed to prove prejudice as a matter of law or demonstrate the existence of any material fact as to prejudice that would defeat summary judgment. Accordingly, Petitioner's Motion for Summary Judgment as to his claim of ineffective assistance of counsel is denied, and the State's Motion for Summary Judgment as to that claim is granted.

B.

RULE 11

Perhaps mindful of the weaknesses in his claims of ineffective assistance of counsel, Petitioner amended his original post-conviction relief petition to assert in his Amended Application (Fourth) that his plea violated Rule 11 of the Rhode Island Rules of Criminal Procedure. Petitioner then supplemented his initial memorandum to address this claim. Petitioner argues, as he did in asserting a claim for ineffective assistance of counsel, that the factual basis of his plea, as evidenced by the record, is vague and that it is not clear from the record that he understood the nature of the offense to which he pled *nolo contendere*. Moreover, he contends that the record does not contain an adequate explanation of the essential elements of the offense to which he pled. Petitioner argues further that the hearing justice who took the plea at no time advised him of the

constitutional rights that he was waiving nor is there any indication on the record that Petitioner understood those rights. Essentially, the Petitioner argues that the hearing justice violated Rule 11 by not ensuring that Petitioner entered into the plea knowingly, intelligently and with full understanding of its nature.

The State counters that, viewing the record in its totality, the hearing justice met the requirements of Rule 11. The State argues that based upon the plea form and affidavit, the statement of facts offered by the State and Petitioner's admission to them during the plea colloquy, Petitioner's statements to the Court, and the overall circumstances of the plea, Petitioner understood the nature and elements of the offense to which he pled *nolo contendere* and entered his plea intelligently and with full knowledge and understanding of the rights he waived in entering into the plea. The State contends, therefore, that the Petitioner's Rule 11 arguments should be summarily rejected.

A "decision to plead *nolo contendere* is not one to be taken lightly." State v. Feng, 421 A.2d, 1258, 1266 (R.I. 1980). A plea *of nolo contendere* signals that the defendant "waives several federal constitutional rights and consents to the judgment of the court." Id. at 1266. As such, the plea colloquy must be in accordance with requirements of Rule 11 of the Superior Court Rules of Criminal Procedure, which states:

> The court . . . shall not accept . . . a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.

R.I. R. Crim. P. 11.

In Rhode Island, for a plea to be in accordance with Rule 11, the Court must "engage in as extensive an interchange as necessary so that 'the record as a whole and the circumstances in their totality' will disclose to a court reviewing a guilty or nolo plea that

the defendant understood the nature of the charge and the consequences of the plea." State v. Feng, 421 A.2d 1258, 1267 (R.I. 1980). When determining whether a defendant waived his rights knowingly and voluntarily, our Supreme Court has held that:

> the record must affirmatively disclose the voluntary and intelligent character of the plea because a valid waiver of constitutional rights cannot be presumed from a silent record.

Feng, 421 A.2d at 1267. Similarly, when ruling on the hearing justice's compliance with the mandate of Rule 11 that the defendant must understand the nature of the charge, a reviewing court must:

> examine the record [at the time the Court took the plea] for all indices that a guilty or nolo plea was based on fact[,] [and] shall not vacate a plea unless the record viewed in its totality discloses no facts that could have satisfied the trial justice that a factual basis existed for a defendant's plea.

State v. Frazar, 822 A.2d 931, 935-936 (R.I. 2003).

In determining whether the hearing justice could have found that a factual basis existed for the plea, the Rhode Island Supreme Court has followed the dictates of the United States Supreme Court in Henderson v. Morgan, which stated that a "ritualistic litany of the formal legal elements" of an offense is not required and that instead the totality of the circumstances should be examined to determine if the substance of the charge had been conveyed to the defendant. State v. Williams, 4040 A.2d 814, 819 (R.I. 1979) (citing Henderson v. Morgan, 426 U.S. 637, 644-45 (1976)). As noted in Henderson, "it may be appropriate to presume that in most cases defense counsel routinely explain[s] the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." Id. at 647.

"At the conclusion of the plea hearing, the trial justice should be able to say with assurance that the accused is fully aware of the nature of the charge and the consequences of the plea." Williams, 122 R.I. at 42, 404 A.2d at 819. This objective may be obtained by:

> (1) an explanation of the essential elements by the judge at the guilty plea hearing;
> (2) a representation that counsel had explained to the defendant the elements he admits by plea; [or]
> (3) defendant's statement admitting to facts constituting the unexplained element or stipulations to such facts.

Id.

A reviewing court, in ruling on a claimed violation of Rule 11, need only find that the record affirmatively discloses the defendant's voluntary and intelligent waiver of his or her constitutional rights and facts sufficient to satisfy the hearing justice that there was a factual basis for the plea. See Frazar, 822 A.2d at 935-936. In addressing these requirements in the context of petitions for post-conviction relief, our Supreme Court has never vacated a plea based on a violation of Rule 11 where a plea colloquy has occurred. Compare State v. DePasquale, 413 A.2d 101, 104 (R.I. 1980) (vacating a guilty plea where a plea colloquy did not occur and trial judge did not address the defendant personally) with See Moniz v. State, 933 A.2d 961, 696 (R.I. 2007) (affirming denial of post-conviction relief on Rule 11 grounds because, viewing the record as a whole, the plea was voluntary and intelligent even though based on an erroneous toxicology report); Feng, 421 A.2d at 1269 (upholding denial of post-conviction relief even though only limited colloquy occurred); Williams, 122 R.I. 32, 404 A.2d 814 (upholding denial of post-conviction relief based on the totality of the circumstances).

In Williams, for example, the Supreme Court considered the fact that the plea form at issue might be considered the type of "boilerplate litany" that the United States Supreme Court has deemed insufficient to satisfy a court's obligation to ensure that a defendant understands the nature and consequences of a plea. Williams, 122 R.I. at 42, 404 A.2d at 820 (citing Henderson v. Morgan, 426 U.S. 637 (1976)). The Court upheld the entry of the plea, however, based on the totality of the circumstances, as shown by the record, which included, in addition to the plea form, an additional affidavit of the defendant, a plea colloquy between the trial justice and the defendant that evidenced the defendant's ability to understand the plea form, and facts that supported her plea. See id.

Specifically, the hearing justice, at the time of the plea, received assurances from counsel that the "defendant had 'read the affidavit carefully with [counsel], very carefully, and very closely, and we have rehashed this and rehashed it again, and rehashed it back and forth, and she has finally agreed, voluntarily, that this is what she wants to do, Your Honor.'" Id. The hearing justice additionally asked the defendant whether she had reviewed the plea form and affidavit with counsel, and she responded that "she had, that she was able to understand everything she read, that she was satisfied" with her representation, and had discussed the facts of the case with her counsel. Id. After a recitation of the facts by the State, the trial justice also asked the defendant whether she understood those facts, and she stated that she did, although noting some discrepancies. Id. The Supreme Court held that "[n]o more was required either to satisfy the constitutional test or to comply with Rule 11's mandate." Id.

In State v. Feng, the Supreme Court upheld the denial of defendant's application for post-conviction relief despite the fact that the "trial justice did not undertake a lengthy

examination of petitioner concerning the nature of the charges or the consequences of the plea." Feng, 421 A.2d at 1267. The Supreme Court noted that the hearing justice in Feng confirmed, during his plea colloquy with the defendant, that the defendant had read the plea form before signing it, understood the rights outlined in the plea form and the consequences of waiving them, knew that the Court probably would sentence him to time to serve in prison based on his plea, and understood that the State had sufficient facts to convict him at trial. Id.[18] While observing that "[a] defendant's ability to read and understand the English language does not invariably indicate that he will understand without further explanation the legal rights enumerated in the affidavit," the Supreme Court emphasized that the affidavit, contained in the plea form, indicated that the defendant had discussed the plea form with his attorney. Id. at 1268. The fact that the

[18] The plea colloquy in Feng consisted of the following:

> THE COURT: How about you, Mr. Feng? I have this affidavit and attorney certification which appears to have the name of F. David Feng executed apparently, before Mr. Fortunato. Is that your signature?
> DEFENDANT FENG: Yes, your Honor.
> THE COURT: And did you read the document before you signed it?
> DEFENDANT FENG: Yes, sir.
> THE COURT: Did you fully understand the rights that you have as contained in that document?
> DEFENDANT FENG: Yes, your Honor.
> THE COURT: Do you understand the consequences of giving up those rights?
> DEFENDANT FENG: Yes, sir.
> THE COURT: You appreciate the fact that if I accept your plea of nolo as to each of these counts, all that remains for the Court to do is to impose sentence?
> DEFENDANT FENG: Yes, sir.
> THE COURT: Do you appreciate the fact that the probability is that the Court may send you to jail?
> DEFENDANT FENG: Yes, your Honor.
> . . .
>
> THE COURT: Mr. Feng, do you consider that the State has a capability of submitting sufficient facts to a jury to convict you on every one of the counts?
> DEFENDANT FENG: Yes, sir.

Feng, 421 A.2d at 1267.

defendant was college-educated and literate thus suggested to the Court that he understood the plea form when he read it and discussed it with counsel. See id.

Similar to the plea colloquy in Feng, the plea colloquy in this case is limited. Yet, the plea colloquy and plea form, when considered together, suggest that the Petitioner understood the nature of the charge to which he pled *nolo contendere*, that there was a factual basis for that charge, and that he admitted that the State had sufficient facts to substantiate the charge. The plea form that the Petitioner signed here contained not only the original charge of unlawful possession of cocaine, but also the amended charge of frequenting a narcotics nuisance. State's Supp. Mem. Ex 1, Plea Form. By signing the plea form, the Petitioner swore that he understood not only the nature of the charge, but also the rights that he was waiving in signing the plea. Id. This understanding also manifests itself during the plea colloquy. In outlining the factual basis for the plea, the State asserted that, "Your Honor, had this matter proceeded to trial, the State would be prepared to prove that on or about the 12th day of April 2005 in the City of Providence this defendant did unlawfully frequent a narcotics nuisance in violation of the General Laws." Pet'r's Supp. Mem. for Summ. J., Ex. 1, Tr. of Plea Colloquy, at 1, ¶¶ 21-25, dated Jan. 22, 2008. The Court then asked the Petitioner, "Do you accept that as a true statement?" to which the Petitioner responded, "Yes." Id. at 2, ¶¶ 1-2. There is no evidence in the record to indicate that the Petitioner could not or did not understand the charge due to limited education, illiteracy or any language barrier; the record instead suggests that he was an English speaker who fully understood the nature of the charge to which he pled.

As to the Petitioner's waiver of his constitutional rights at the time of the plea, the record containing the plea form and plea colloquy affirmatively disclose to this Court a voluntary and knowing waiver. The plea form signed by both the Petitioner and his former counsel contained an enumerated list of the rights the Petitioner waived in pleading *nolo contendere*, including: "(1) My right to a trial by jury or by a Judge, sitting without a jury, and my right to appeal to the Supreme Court from any verdict or finding of guilt; (2) My right to have the State prove each and every element of the charge(s) against me by evidence and proof beyond a reasonable doubt; (3) My right to the presumption of innocence; (4) My privilege against self-incrimination; (5) My right to confront and cross-examine the State's witnesses against me; (6) My right to present evidence and witnesses on my own behalf and to testify in my own defense if I choose to do so; (7) My right to appeal to the Rhode Island Supreme Court from the sentence imposed by the Court after the entry of my plea of Nolo Contendere or Guilty; (8) My right to have the Court obtain and consider a pre-sentence report before the imposition of sentence by the Court; (9) My right to file a motion for a reduction in sentence." State's Supp. Mem. Ex 1, Plea Form. Next to each of these rights are handwritten check marks traditionally used to demonstrate that, at the very least, the defendant read these rights or had them read to him by his attorney. Id.

In the subsequent plea colloquy, the hearing justice personally addressed the Petitioner as follows:

> The Court: With that plea, you give up the rights contained in the plea form, you understand?
>
> The Defendant: Yes, I do.
>
> The Court: Did you review them with your attorney?

The Defendant: Yes, I did.

The Court: Do you have any questions?

The Defendant: No, I don't.

Pet'r's Supp. Mem. for Summ. J., Ex. 1, Tr. of Plea Colloquy, at 1, ¶¶ 12-18, dated Jan. 22, 2008. Thus the plea form and the plea colloquy affirmatively disclose that the Petitioner knowingly and voluntarily waived his rights.

Further, at a later violation hearing in front of another hearing justice of this Court on September 22, 2008, the Petitioner in essence ratified his earlier plea to the amended charge of frequenting a narcotics nuisance by not challenging the plea and admitting that he violated the terms of his probation with respect to that plea. See State v. Candelario, C.A. No. P2-05-1796A (R.I. Super. 2005) (Tr. of Violation Proceedings dated Sept. 22, 2008). If he did not understand the nature of the charge to which he had pled earlier, the rights he had waived or the consequences of his plea, he presumably would have sought to vacate his plea at the time of the violation hearing and not admitted to violation.

Accordingly, this Court finds that the Petitioner has failed to prove a violation of Rule 11 with regard to his plea. Indeed, the plea met the requirements of Rule 11 as a matter of law. As such, the Petitioner's Motion for Summary Judgment as to his claim for violation of Rule 11 is denied, and the State's Motion for Summary Judgment as to Rule 11 is granted.

IV

CONCLUSION

For the reasons set forth in this Decision, this Court grants the State's Motion for Summary Judgment and denies Petitioner's Motion for Summary Judgment as to Petitioner's Amended Application (Fourth) for Post-Conviction Relief dated September 5, 2012. Counsel shall submit to this Court forthwith for entry an agreed upon form of Order and Judgment that are consistent with this Decision.