SJC-13048

COMMONWEALTH vs. CHRISTOPHER HENRY.

Suffolk. March 5, 2021. - October 1, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, & Georges, JJ.

Controlled Substances. Firearms. Constitutional Law, Plea, Conduct of government agents, Assistance of counsel. Practice, Criminal, Plea, Conduct of government agents, Assistance of counsel, New trial. Evidence, Guilty plea, Exculpatory.

Indictments found and returned in the Superior Court Department on June 21, 2011.

A motion to withdraw guilty pleas and for a new trial, filed on July 21, 2015, was heard by Jeffrey D. Locke, J.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Amy Codagnone for the defendant.
Paul B. Linn, Assistant District Attorney, for the Commonwealth.

GAZIANO, J. In 2012, the defendant entered into a plea agreement with the Commonwealth and pleaded guilty to

indictments charging robbery, assault and battery by means of a dangerous weapon, unlawful possession of a firearm, and possession with intent to distribute a class B controlled substance. After learning of chemist Annie Dookhan's misconduct in falsifying drug test results at the William A. Hinton State Laboratory Institute (Hinton lab), the defendant moved to withdraw his guilty pleas. While the motion to withdraw was pending, the defendant's drug conviction was vacated and dismissed with prejudice pursuant to an order by a single justice in the county court arising from the court's decision in Bridgeman v. District Attorney for the Suffolk Dist., 476 Mass. 298, 332 (2017). A Superior Court judge subsequently held an evidentiary hearing to determine whether to allow the defendant to withdraw his guilty pleas with respect to the nondrug-related charges that had been tendered as part of the over-all plea bargain. The judge then denied the motion; his ruling was affirmed by the Appeals Court, see Commonwealth v. Henry, 98 Mass. App. Ct. 229, 230 (2020), and we allowed the defendant's petition for further appellate review. For the reasons that follow, we affirm the denial of the defendant's motion to withdraw his guilty pleas.

1. Background. a. Facts. We summarize the facts as recited by the prosecutor at the plea hearing, supplemented with undisputed facts from the record. On March 24, 2011, at

9:10 P.M., Boston police received a report of an armed robbery that had taken place in the Mattapan section of Boston. Police officers met the victim at his parents' home at around 9:30 P.M. The victim informed the officers that he had been walking along a residential street when he was approached by two young Black men who had just come from a nearby apartment building. One of the men, later identified as the defendant, pulled a revolver out of his pocket and held it against the victim's head. The other man robbed the victim of his cellular telephone, a ring, and a wallet containing more than $500 in cash. The victim described the individual who was brandishing the revolver as about five feet, nine inches tall, with a dark complexion, and shoulder length braids.

Based on this information and additional evidence, police entered the apartment building later that evening to investigate the crime. Standing at the threshold, the officers spoke to the occupants of a second-floor apartment;[1] police eventually made their way inside the apartment. Once inside, they saw the defendant walk out of a bedroom. The defendant, who was dressed in a white tank top and gym shorts, matched the approximate physical description provided by the victim of the armed

[1] In addition to the defendant, four other occupants of the apartment were arrested, one for armed robbery (the defendant's codefendant), and the other three for possession of drugs (among them, the defendant's girlfriend).

robbery; he had a dark complexion, was close to the described height and age, and appeared to have his hair in braids.

While checking the defendant's pants pockets for weapons, police found a small bag of what appeared to be "crack" cocaine. The defendant was arrested for possession of a class B controlled substance. During a search incident to that arrest, the police located an additional quantity of suspected crack cocaine in the defendant's shorts. Police then secured the scene and returned to the apartment with a search warrant. During a search of the bedroom from which the defendant had emerged, officers found eleven bags of what appeared to be cocaine. In addition to narcotics, the officers found a loaded .22 caliber revolver and a box of .22 caliber ammunition in the bedroom. The defendant's fingerprints were recovered from the box of ammunition.

The substances seized from the defendant's person later were tested by chemist Annie Dookhan at the Hinton lab, and she signed certificates of drug analysis stating that the substances tested positive as cocaine. The bags of powder seized from the bedroom also were tested and certified by Dookhan as class B controlled substances.

After the defendant's arrest, the victim of the armed robbery identified the defendant as the gunman from a photographic array.

b. Procedural history. On June 21, 2011, a grand jury returned indictments charging the defendant with armed robbery, in violation of G. L. c. 265, § 17; assault and battery by means of a dangerous weapon, in violation of G. L. c. 265, § 15A; illegal possession of a firearm, in violation of G. L. c. 269, § 10 (a), as an armed career criminal under G. L. c. 269, § 10G, and a subsequent offender, under G. L. c. 269, § 10 (d); illegal possession of ammunition, in violation of G. L. c. 269, § 10 (h); illegal possession of a loaded firearm, in violation of G. L. c. 269, § 10 (n); possession of a firearm during the commission of a felony, in violation of G. L. c. 265, § 18B; possession of a class B controlled substance with intent to distribute, in violation of G. L. c. 94C, § 32A (c); and violation of the controlled substance laws in a school zone, in violation of G. L. c. 94C, § 32J.

In February 2012, the defendant filed a motion to suppress the physical evidence and the identification from the photographic array. The motion was denied after a hearing; the defendant's motion for reconsideration also was denied, as was his petition in the county court seeking the right to pursue an interlocutory appeal.

On July 13, 2012, the defendant entered into a plea agreement with the Commonwealth under the following terms. The defendant pleaded guilty to (1) so much of the armed robbery

indictment charging robbery, with a sentence of incarceration from three years to three years and one day; (2) assault and battery by means of a dangerous weapon, with a sentence of two years of probation from and after the sentence imposed on the charge of robbery; (3) unlawful possession of a firearm, with a sentence of from three years to three years and a day in prison, concurrent with the sentence on the robbery charge; and (4) possession with intent to distribute a class B substance, with a sentence of from three years to three years and one day of incarceration, concurrent with the sentence on the charge of robbery. The Commonwealth filed a nolle prosequi of the indictments charging armed career criminal, subsequent firearm offense, unlawful possession of ammunition, possession of a loaded firearm, carrying a firearm while committing a felony, and the school zone violation. After a detailed colloquy, a Superior Court judge accepted the defendant's guilty plea.[2]

c. Motion to withdraw guilty plea. In July 2015, the defendant filed a motion pursuant to Mass. R. Crim. P. 30 (b),

[2] That same day, the judge also found the defendant in violation of the terms and conditions of his probation on an unrelated 2008 conviction of illegal possession of a firearm. With the defendant's assent, the probation department recommended a sentence of two and one-half years committed to the house of correction, concurrent with the sentences imposed for the robbery and the evidence seized during the subsequent search of the defendant's apartment. The judge adopted the joint recommendation.

as appearing in 435 Mass. 1501 (2001), to withdraw his guilty plea. He contended that his plea had not been knowingly and voluntarily made due to the withholding of exculpatory evidence regarding Dookhan's misconduct at the Hinton lab, and that his plea counsel failed to inform him of the collateral consequences of pleading guilty, including possible future sentencing enhancements, thus making it impossible for him to assess adequately the "possible risks and advantages" of changing his plea.[3] Relying on Justice Scalia's dissenting opinion in Padilla v. Kentucky, 559 U.S. 356, 391 (2010), and 18 U.S.C. § 924(e), the defendant argued that the risk of the "severe" consequences of a sentencing enhancement in the Federal system, or being found to be a "career criminal" in that system, with its "particularly severe penalty" under Federal sentencing guidelines, was "analogous" to the risk of deportation in Padilla. The defendant also argued that, at the plea colloquy, when the judge asked the prosecutor whether he was "aware of any other collateral consequences" "apart from the [deoxyribonucleic acid] sample requirement," and a possible suspension of the defendant's driver's license, that would "attend" the guilty pleas, the prosecutor said that he was not.

[3] After pleading guilty, the defendant was charged with a new offense in Federal court, and received a sentencing enhancement based on the prior robbery conviction.

In an affidavit attached to his motion, the defendant averred that he would not have pleaded guilty had he been aware of the tainted drug evidence. The defendant asserted, "I was concerned with proceeding to trial on all charges because the Commonwealth alleged that there were drugs found on my person and in my clothing, and I did not believe that I had a strong defense to the drug charges." At the same time, the defendant believed that he had a legitimate basis upon which to challenge the denial of his motion to suppress evidence and identification. He also believed that he had a "strong misidentification case." This belief was based on a statement by the victim to a private investigator expressing some doubt about his identification of the defendant.[4] The misidentification defense, the defendant explained, was further supported by evidence that he did not exactly match the physical description provided by the victim (he did not have braids at the time of the robbery), and because, when he was arrested, he was wearing clothing different from that which had been

[4] The victim told a defense investigator that he was "[sixty percent] or maybe [seventy percent] sure the guy he picked out of the . . . photo array was the guy who robbed him." The victim added that, a couple of days after the robbery, some men who were associated with the defendant came to his workplace and asked him about the certainty of his identification. The victim then related that this experience made him "pretty nervous."

described by the victim. The clothing the victim had described was not found in the apartment where the defendant was arrested.

The defendant also submitted an affidavit from his plea counsel. Plea counsel stated that prior to the plea agreement, neither he nor the defendant were aware of any problems at the Hinton lab. According to counsel, had he known about Dookhan's misconduct, his advice to the defendant would have been "markedly different." The Dookhan defense to the drug charges, plea counsel asserted, could have been combined with a misidentification defense and a third-party culprit or Bowden defense, to contest the defendant's guilt. See Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980).

In April 2017, the defendant's drug conviction was vacated and dismissed with prejudice by an order of a single justice arising from our decision in Bridgeman, 476 Mass. at 332.

In March 2019, a Superior Court judge who was not the plea judge conducted an evidentiary hearing on the defendant's motion to withdraw his guilty plea. The defendant testified and asserted that he had had three solid defenses to the charge of robbery and the firearms charges: misidentification, alibi, and third-party culprit. The misidentification defense was based on evidence that the victim was unsure of his identification of the defendant, and the defendant did not match the description of the gunman the victim had given police on the day of the

robbery. The defendant also believed that he had had a "strong" alibi because, at the time of the robbery, he had been with his girlfriend at her apartment.[5] In addition, the defendant pointed out that there had been another robbery outside that apartment building in November of 2010, and the individuals who had been charged with that crime had been released from custody shortly prior to the defendant's arrest. The defendant maintained that the drug charges drove his decision to plead guilty, and that, had he known of Dookhan's misconduct, he "would have pushed to go to trial."

After the hearing, the motion judge issued oral findings of fact and rulings of law on the record. The judge focused on the second prong of the two-pronged test this court has established to determine whether a defendant is entitled to withdraw a guilty plea based on Dookhan's misconduct. See Commonwealth v. Scott, 467 Mass. 336, 354-355 (2014). The motion judge found that, had the defendant been aware of Dookhan's misconduct at the Hinton lab, he "would not have acted differently with regard to the pleas that he entered on the nondrug offenses." The judge specifically rejected the defendant's testimony that the

[5] The defendant's girlfriend and her mother lived in the apartment in which the defendant was arrested; the defendant himself lived with his mother in another apartment building on a different street but had been an overnight guest in his girlfriend's apartment.

drug offenses "drove his decision to plead guilty." In particular, the judge noted that the defendant had been facing "substantially greater sentences on [the] violent crimes . . . and then a series of firearm offenses," and received a very favorable plea deal. In light of the defendant's fingerprint found on the box of ammunition, the judge also found that the defendant's contention that he had had a solid defense to the firearm offenses "rings hollow." The judge concluded, "I do not find that the drug offense here would have made any difference in the defendant's decision to plead guilty to the other criminal offenses, both gun-related and armed robbery."

2. Discussion. a. Standard of review. "A motion to withdraw a guilty plea is treated as a motion for a new trial pursuant to Mass. R. Crim. P. 30 (b)." Commonwealth v. Resende, 475 Mass. 1, 12 (2016). "Under Mass. R. Crim. P. 30 (b), a judge may grant a motion for a new trial any time it appears that justice may not have been done. A motion for a new trial is thus committed to the sound discretion of the judge." Commonwealth v. Camacho, 483 Mass. 645, 648 (2019), quoting Scott, 467 Mass. at 344. "We review the allowance or denial of a motion to withdraw a guilty plea to determine whether the judge abused that discretion or committed a significant error of law." Camacho, supra, quoting Commonwealth v. Cotto, 471 Mass. 97, 105 (2015). A judge's findings of fact after an evidentiary

hearing on such a motion will be accepted if supported by the record. Commonwealth v. Kolenovic, 471 Mass. 664, 672 (2015), S.C., 478 Mass. 189 (2017).

The defendant's challenge to the denial of his motion to withdraw his guilty pleas requires this court to decide three issues. First, the court must determine whether the defendant is entitled to withdraw his guilty pleas to the nondrug offenses based on governmental misconduct. Second, the court must decide whether the defendant also was entitled to withdraw his guilty pleas to the nondrug offenses on the grounds of newly discovered or withheld exculpatory evidence. Third, the court must determine whether plea counsel provided ineffective assistance because he failed to inform the defendant that if the defendant were convicted of additional crimes in the future, he could be subject to State or Federal sentencing enhancements or armed career criminal charges as a result of pleading guilty to the charges at issue here.

b. Governmental misconduct. i. Ferrara-Scott framework. In Scott, 467 Mass. at 347-358, this court used its superintendence authority to establish a two-pronged test for analyzing a defendant's motion to withdraw a guilty plea on the ground that governmental misconduct at the Hinton lab rendered that plea involuntary. Ordinarily, a defendant claiming that a guilty plea was induced by government misconduct is required to

demonstrate that (1) "egregiously impermissible conduct . . . by government agents . . . antedated the entry of his [or her] plea;" and (2) "the misconduct influenced [the defendant's] decision to plead guilty or, put another way, that it was material to that choice." Id. at 346, quoting Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006). Given the "breadth and duration" of Dookhan's misconduct, however, and the difficulties faced by any one defendant in attempting to reconstruct the damage done to the integrity of samples processed at the Hinton lab, we established a special evidentiary rule for cases affected by Dookhan's misconduct. Resende, 475 Mass. at 3. Under this rule, in cases where Dookhan signed the certificate of analysis as the primary or secondary chemist, a defendant seeking to vacate a guilty plea is "entitled to a conclusive presumption that egregious government misconduct occurred in the defendant's case." Scott, supra at 352. Thus, a defendant is relieved of the evidentiary burden to establish the first prong of the Ferrara-Scott framework. Id. at 353-354.

This court has yet to address explicitly whether the conclusive presumption of governmental misconduct applies to all crimes that were combined in a plea agreement, or whether the conclusive presumption of governmental misconduct is limited to drug offenses tainted by Dookhan's misconduct. We take this

opportunity to clarify our holding in Scott. Compare Commonwealth v. Lewis, 96 Mass. App. Ct. 354, 360 (2019) (declining to apply conclusive presumption that defendant satisfied first prong of Ferrara-Scott framework to drug conviction where Dookhan did not sign certificate of drug analysis) with Commonwealth v. Williams, 89 Mass. App. Ct. 383, 388 (2016) (applying first prong of Ferrara-Scott framework to nondrug charges where drug charges were predicate sentencing enhancements as armed career criminal). See Commonwealth v. Guzman, 92 Mass. App. Ct. 1120 (2017) (applying conclusive presumption of first prong of Scott to nondrug charges included in "package" plea agreement)

The defendant argues that "[t]he Scott court did not . . . parse out charges within a case." In support of this position, he points to the following discussion in Scott, 467 Mass. at 338: "[W]here Dookhan signed the certificate of drug analysis as either the primary or secondary chemist in the defendant's case, the defendant is entitled to a conclusive presumption that Dookhan's misconduct occurred in his [or her] case . . ." (emphasis added). The defendant contends that the use of the word "case" refers to all of the charges that were before the court, and not just the indictments for drug offenses.

The defendant's interpretation, however, is inconsistent with this court's subsequent decision in Bridgeman, 476 Mass. at

330-332, with respect specifically to the governmental misconduct at issue. In Bridgeman, the court declined the petitioner's request to exercise its powers of superintendence to vacate the thousands of drug convictions affected by Dookhan's misconduct. Id. at 300. Instead, the court adopted a three-phase protocol for case-by-case adjudication of all relevant "Dookhan defendants." Id. One step in the initial phase required the district attorney, in the exercise of his or her discretion, to reduce the number of Dookhan defendants by moving to vacate and dismiss all drug charges the district attorney either would not, or could not, reprosecute. Id. at 327-328. Once these convictions were vacated and dismissed with prejudice, the defendants were to "be notified of the action taken." Id. at 328.

As relevant here, Bridgeman limited postconviction relief to tainted drug convictions. Id. at 327-328. In so holding, the court specifically excluded associated nondrug offenses; the court explained, "Where a defendant pleaded guilty to multiple charges at a plea hearing or was convicted at trial of multiple counts, the vacatur of these drug convictions with prejudice will not affect any nondrug convictions." Id. at 328 n.26.

The limitation in Bridgeman is consistent with our holding in Resende, 475 Mass. at 14, where we limited the application of the conclusive presumption of Scott to tainted drug convictions.

In Resende, supra at 11, 15-16, we considered whether the Scott conclusive presumption is available to a defendant in a case where Dookhan played a minor role in the testing but did not sign the certificate of drug analysis. We held that a special magistrate did not abuse his discretion or commit an error of law in determining that such a defendant was not entitled to the conclusive presumption of governmental misconduct articulated in Scott. Resende, supra at 14.

In light of the above, we clarify that where a plea agreement or trial involved multiple charges, some drug-related and others not, the conclusive presumption of governmental misconduct set forth in Scott applies only to the tainted drug convictions. A defendant seeking to withdraw a guilty plea to nondrug charges that were combined with tainted drug charges in a single plea agreement, on the asserted ground of governmental misconduct, therefore must establish both prongs of the Ferrara-Scott test.

ii. Application. Here, without objection from the Commonwealth, the judge focused solely on the second prong of the Ferrara-Scott framework. After an evidentiary hearing, the judge found that the defendant did not establish a reasonable probability that, had he known of Dookhan's misconduct, he would not have pleaded guilty to the nondrug offenses. Although the defendant was not entitled to the conclusive presumption of

governmental misconduct, the Commonwealth waived the issue at the hearing, see Commonwealth v. Yasin, 483 Mass. 343, 349 (2019). We therefore consider the judge's findings with respect to the second prong, and we review for abuse of discretion. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

The judge's finding that the defendant's plea was motivated, in part, by the favorable terms of the over-all plea arrangement is amply supported by the record. As the judge noted, the defendant faced "substantially greater sentences on violent crimes -- an armed robbery, [an] assault and battery [by means of] a dangerous weapon, and then a series of firearm[] offenses" -- than the three-year sentence he received. The potential sentence on these charges included the possibility of life in prison, and a minimum of five years, on the armed robbery charge, see G. L. c. 265, § 17; up to ten years' incarceration for the charge of assault and battery by means of a dangerous weapon, see G. L. c. 265, § 15A (b); and up to fifteen years of incarceration if the defendant were convicted of unlawful possession of a firearm as an armed career criminal and as a subsequent offender, see G. L. c. 269, §§ 10G and 10 (d). In addition, if he were convicted at trial, the defendant could have been sentenced to a minimum of five years in prison on the charge of possession of a firearm while in the commission of a felony, see G. L. c. 265, § 18B; and an

additional term of up to two and one-half years for unlawful possession of a loaded firearm, see G. L. c. 269, § 10 (n). Taking into account the time that the defendant had served awaiting trial, the plea arrangement assured that he would be released from custody less than two years after he entered into the agreement.

The motion judge also observed that the asserted defenses to the firearm charges were not as solid as the defendant claimed. As the defendant argued, he did not live in the apartment in which the gun and most of the drugs were found; rather, it was his girlfriend's apartment. The defendant conceded, however, that he had spent the entire evening there on the date of the robbery, and a police officer investigating the building for the two suspects immediately after the offense saw him leave the bedroom where the contraband ultimately was found and then enter the shared living spaces. In that bedroom, police located the .22 caliber firearm and a box of .22 caliber ammunition; the defendant's fingerprint was on the box. Thus, the judge observed, the defense that the apartment was not the defendant's, and therefore that the firearm and ammunition found in the bedroom were not his, was not as persuasive as the defendant had posited.

The defendant also testified at the hearing on his motion to withdraw his plea that he "would have pushed to go to trial"

had he been aware of Dookhan's misconduct. Before us, as he did at the motion hearing, the defendant contends that the drug charge was "the pivotal indictment" in his decision to plead guilty, and "thus Dookhan's misconduct went to the heart of the case." The judge explicitly did not credit this testimony; the judge noted, "I do not find that the drug offense here would have made any difference in the defendant's decision to plead guilty to the other criminal offenses, both gun-related and armed robbery."

In sum, there was adequate evidence to support the judge's finding that the defendant failed to establish that there was a reasonable probability he would not have pleaded guilty had he known of Dookhan's misconduct. The motion judge's assessment of the defendant's credibility at the hearing on the motion for a new trial is entitled to deference, and we discern no reason to disturb his findings. See Commonwealth v. Grace, 397 Mass. 303, 307 (1986).

c. Exculpatory and newly discovered evidence. The defendant contends, in the alternative, that his convictions must be vacated because Dookhan's misconduct constitutes newly discovered evidence or withheld exculpatory evidence. See, e.g., Commonwealth v. Lykus, 451 Mass. 310, 326 (2008) (new trial claim raised based on failure to provide exculpatory evidence); Commonwealth v. Tucceri, 412 Mass. 401, 408-409

(1992) (argument new trial was required based on failure to disclose exculpatory evidence need not be considered only on constitutional grounds, and could be addressed under Mass. R. Crim. P. 30 [b]); Grace, 397 Mass. at 305-306 (where new trial sought based on newly discovered evidence, evidence must be material and credible). The defendant argues that the office of the Suffolk district attorney was aware of Dookhan's misconduct prior to his guilty plea, and that her misconduct "was only substantially revealed in September 2012." This misconduct, and the knowledge of the misconduct, was exculpatory because it called into question whether the seized items were, in fact, controlled substances. The motion judge did not reach this argument.

On appeal, the court may affirm a ruling on an issue on grounds different from those relied upon by the motion judge, so long as "the correct or preferred basis for the affirmance is supported by the record and the findings." See Commonwealth v. Mauricio, 477 Mass. 588, 595 (2017), quoting Commonwealth v. Va Meng Joe, 425 Mass. 99, 102 (1997). In Scott, 467 Mass. at 361, the defendant also raised the alternative ground that the judge could have found that Dookhan's misconduct constituted newly discovered evidence or withheld exculpatory evidence. We noted that both claims require a defendant to demonstrate prejudice or materiality. Id. at 360. In deciding whether the evidence

"casts real doubt on the justice of the conviction," such that a new trial is necessary, "[t]he motion judge decides not whether the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the jury's deliberations" (citations omitted). Commonwealth v. Ellis, 475 Mass. 459, 476-477 (2016). Just as where a defendant presents newly discovered evidence that the defendant argues would have been a real factor in the jury's deliberations, "where the defendant[] argue[s] on the basis of a newly available analysis that likely would have rendered inculpatory evidence presented at the original trial inadmissible, we ask whether that inculpatory evidence 'likely was a "real factor" in the jury's deliberations such that its elimination would cast real doubt on the justice of the defendant's conviction.'" Commonwealth v. Cowels, 470 Mass. 607, 618 (2015), quoting Commonwealth v. Sullivan, 469 Mass. 340, 350 (2014).

We also have observed that our prior cases concerning newly discovered or withheld exculpatory evidence had arisen largely in the context of a defendant's motion for a new trial, and that in those cases we had examined how likely it would be that the evidence would have had a prejudicial effect on the jury's deliberations. Scott, 467 Mass. at 361. In the context of a motion to withdraw a guilty plea, we have addressed the issues by borrowing from our jurisprudence on claims that the

ineffective assistance of counsel induced a guilty plea. Id. at 360-361. In these claims, the question of prejudice is focused on the defendant's decision whether to enter into a plea agreement. Id. at 361, citing Commonwealth v. Clarke, 460 Mass. 30, 46-48 (2011). The defendant in such a case has the burden of demonstrating a reasonable probability that, but for counsel's ineffective assistance, he or she would not have pleaded guilty and instead would have insisted on going to trial. See Scott, supra, quoting Clarke, supra at 47. We have observed that, "were we to determine the specific formulation of the standard for prejudice to be applied to defendants seeking to withdraw a guilty plea based on either newly discovered evidence or prosecutorial nondisclosure, we may well conclude that the most appropriate formulation would be the reasonable probability standard that we adopted in Clarke." See Scott, supra at 361.[6] Based on the similarities between the Clarke standard and the second prong of the Ferrara-Scott framework, we have concluded that, where a defendant reformulates a claim of prosecutorial misconduct as one for newly discovered or

[6] In Scott, 467 Mass. at 361, we noted that we "may well conclude" that this would be the appropriate standard. Our reluctance to set forth a definite conclusion was based on the Commonwealth's argument, which we did not reach, that, by entering a voluntary and intelligent plea, the defendant waived the right to contest the claims of newly discovered evidence or prosecutorial nondisclosure. Id. at 359, 361.

nondisclosed evidence, if the "defendant is unable to establish prejudice under the second prong of the Ferrara analysis, it is likely that he or she would be unable to make the showing of prejudice required by the other two grounds [newly discovered or withheld exculpatory evidence] as well." Scott, supra.

Here, the motion judge had adequate grounds upon which to find that the defendant failed to establish a reasonable probability that he would not have pleaded guilty had he been aware of Dookhan's misconduct. Therefore, having failed to establish prejudice under the second prong of the Ferrara-Scott test, the defendant's recasting of his claim for relief from governmental misconduct to one of newly discovered or withheld exculpatory evidence also must fail. See Commonwealth v. Antone, 90 Mass. App. Ct. 810, 821 (2017) (where defendant failed to satisfy second prong of Ferrara-Scott test, he had not satisfied his burden on his claims of prosecutorial nondisclosure and newly discovered evidence "concerning [the] same misconduct").

d. Ineffective assistance of counsel. The defendant argues also that his plea counsel was ineffective for not having advised him that his plea could subject him to future State or Federal sentencing enhancements if he were rearrested. The defendant contends that the requirement that a defense attorney advise his or her client of the potential collateral

consequences of a conviction or plea is based on Padilla v. Kentucky, 559 U.S. 356 (2010), where the United States Supreme Court held that a defense attorney has a duty to advise clients in criminal matters about certain collateral consequences of a guilty plea, such as the risk of deportation, and that the failure to do so constitutes ineffective assistance of counsel. See Clarke, 460 Mass. at 49 (applying Padilla retroactively on collateral review to guilty pleas made after effective date of immigration reform legislation). The defendant maintains that the rationale underlying the holding in Padilla regarding immigration advice "is equally relevant to counsel's failure to provide advice about the collateral criminal consequences of a conviction." These consequences, the defendant argues, include being subject to sentencing enhancements for armed career criminals or habitual offenders, see G. L. c. 279, § 25 (d), and G. L. c. 269, § 10G, or qualifying as a career offender under the Federal Sentencing Guidelines Manual § 4B1.1 (updated Aug. 2016).

In considering a claim of ineffective assistance of counsel, we ask whether counsel's performance fell "measurably below that which might be expected from an ordinarily fallible lawyer," and "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). We do not agree with the

defendant's view that, under Padilla, a failure to advise a defendant of all possible collateral consequences results in constitutionally ineffective assistance. See Commonwealth v. Roberts, 472 Mass. 355, 356, 362-363 (2015) (concluding that analogy between consequences of deportation under Padilla and potential civil commitment as sexually dangerous person "is inapt"). Padilla did not address any distinction between the direct and collateral consequences of pleading guilty and limited its holding to "the unique nature of deportation." Padilla, 559 U.S. at 365. See Commonwealth v. Sylvester, 476 Mass. 1, 6-7 (2016) (Padilla did not abrogate distinction between direct and collateral consequences); Roberts, supra at 363 n.10 ("it is clear that the [Padilla] Court's holding was limited to the context of deportation").

Generally, in Massachusetts, a failure to inform a defendant of the collateral or contingent consequences of a plea does not render the plea involuntary. See Sylvester, 476 Mass. at 6, and cases cited. It is unlikely, therefore, that counsel's purported failure to advise the defendant of the collateral consequences of his plea agreement with respect to possible future sentencing enhancements should he be convicted of another crime deprived him of an otherwise available, substantial ground of defense. See Commonwealth v. Murphy, 73 Mass. App. Ct. 57, 67-68 (2008) (counsel was not ineffective for

not appealing from denial of motion for new trial where judge did not inform defendant that violation of probation would result in previously mentioned minimum mandatory sentence); Commonwealth v. Shindell, 63 Mass. App. Ct. 503, 505 (2005) (counsel was not ineffective for failure to inform defendant that she could be subject to then-current sex offender registration requirements if she pleaded guilty). See also Sylvester, supra at 2 (concluding that counsel's incomplete advice regarding duty to register as sex offender under 2002 version of registration statute was not ineffective, but declining to decide whether that would be the case under current registration requirements). In sum, the defendant has not demonstrated that his counsel's failure to inform him of certain possible, but contingent, consequences of a guilty plea was behavior that was less than would be expected of an ordinary fallible attorney.

Order denying motion for a new trial affirmed.