COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT
NO. 2019-P-0655

MIDDLESEX, SS.

COMMONWEALTH,
Appellee

v.

JULIO ALBERTO ESPINAL,
Appellant

ON APPEAL FROM THE ORDERS OF THE DISTRICT COURT

BRIEF FOR APPELLANT

FOR THE APPELLANT:

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JUNE 17, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES CODE

Massachusetts General Laws

Massachusetts Rules of Criminal Procedure

United States Constitution

Massachusetts Declaration of Rights

Other Authorities

ISSUES PRESENTED

I. Whether the motion judge erred in holding that he adequately delivered the warning pursuant to G.L. c. 278, § 29D where he only advised the Defendant on the consequences of a guilty plea despite the fact that the Defendant tendered an admission to sufficient facts.

II. Whether the motion judge abused his discretion in finding that plea counsel rendered constitutionally sufficient immigration advice where the evidence offered no basis to find that plea counsel conveyed the true consequences of the Defendant's admission, and the Defendant suffered prejudice as a result of his attorney's failure.

III. Whether the motion judge failed to impartially consider the Defendant's motion, thereby depriving the Defendant of rights conferred by art. 11 and 29 of the Massachusetts Declaration of Rights, and the 5th and 14th Amendments to the United States Constitution.

STATEMENT OF THE CASE

The Defendant, Julio Alberto Espinal ("Defendant"), appeals the denial of his: 1) Motion to Vacate Admission to Sufficient Facts, and 2) Second Motion to Vacate Admission to Sufficient Facts or, in the Alternative, Motion for Re-Hearing on Motion to Vacate Admission to Sufficient Facts.

The conviction underlying the instant appeal arose from his tender of an admission to sufficient facts as to complaint 1553CR0042, which alleged distribution of cocaine. RA 3, 9, 114.[1]

On September 21, 2016, on the advice of counsel, the Defendant tendered an admission to sufficient facts before the Honorable Timothy Gailey (hereafter "plea judge" or "motion judge"). RA 114.

On November 16, 2017, the Defendant filed a Motion to Vacate Admission to Sufficient Facts ("First Motion"). RA 4, 10. The plea judge held a hearing on that motion on December 29, 2017. Id. RA 5. The plea judge denied the motion on January 2, 2018. RA 5, 77. The Defendant filed a timely notice of appeal on January 22, 2018. RA 80, 5.

[1] The Defendant cites to the record appendix by page number as RA __.

The Appeals Court entered the Defendant's appeal on October 16, 2018 (2018-P-1439). RA 81. On January 24, 2019, the Appeals Court allowed a stay pending the trial court's consideration of a subsequent motion. RA 81, 184.

On January 25, 2019, the Defendant submitted a Second Motion to Vacate Admission to Sufficient Facts or, in the Alternative, Motion for Re-Hearing on Motion to Vacate Admission to Sufficient Facts ("Second Motion"). RA 83. The Honorable Justice Marianne C. Hinkle denied the motion without a hearing on April 3, 2019. RA 187. On April 4, 2019, the Defendant submitted a Request for Findings of Fact and Rulings of Law, and filed a notice of appeal on or around April 17, 2019. RA 6 - 7, 188, 189. On April 18, 2019, Justice Hinkle entered a margin decision, explaining that she declined to hear the Second Motion until the appeals is resolved. RA 190 - 191.

STATEMENT OF THE FACTS

The Defendant is a thirty-five year old lawful permanent resident. In the instant complaint, the Woburn District Court charged him with distribution of cocaine on January 8, 2015. He retained Attorney Paul Lawton as counsel. RA 3.

The Defendant tendered an admission to sufficient facts on September 21, 2016, before the Honorable Justice Timothy Gailey. RA 114. Attorney Lawton requested a continuance without a finding ("CWOF") for a period of two years. Id. The Commonwealth requested a guilty finding and an eighteen month sentence, suspended for a period of two years. Id.

After explaining the Defendant's trial rights, the judge stated:

> You should also understand that if you are not a citizen of the United States, the acceptance by this Court of your plea of guilty may have [statutorily enumerated immigration consequences]." RA 66.[2] (emphasis added).

The Court omitted from its colloquy the statutory language which warns the Defendant that an "admission to sufficient facts" carries those same consequences, G.L. c. 278, § 29D, despite the fact that the Defendant tendered an admission to sufficient facts, not a guilty plea.

The Court then advised the Defendant that "if you agree as to the facts that I've heard I will find you guilty. I will sentence you to probation for a period of two years." RA 66 - 67.

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[2] The Defendant attached to his First Motion a transcript of the change of plea hearing.

The Defendant accepted the Judge's proposed disposition. RA 67 - 68.

Via letter February 8, 2017 undersigned counsel contacted Attorney Lawton on the Defendant's behalf, requesting a complete copy of the Defendant's file and an affidavit describing his recollection of the case, his defense strategy, his understanding of the Defendant's background and equities, the factors that led up to the change of plea, any plea negotiations, and any discussions regarding immigration consequences. T.Mn. 17; RA 42 (Attachment D to Defendant's First Motion).[3]

In response, he sent a letter on March 3, 2017, which stated he advised the Defendant to "seek advice from an immigration attorney given the charge[.]" RA 45 (Attachment D to Defendant's First Motion); T.Mn. 10. He also pointed out that the Defendant signed the "plea sheet ... with an interpreter." RA 45.

On November 16, 2017 the Defendant filed a Motion to Vacate Admission to Sufficient Facts, which alleged: 1) ineffective assistance pursuant to

[3] The Defendant cites the transcript of the First Motion hearing by page number and (where necessary) line number as T.Mn [page]:[line].

Commonwealth v. Sylvain, 466 Mass. 422 (2013); and 2) violation of G.L. c. 278, § 29D, Commonwealth v. Rodriguez, 70 Mass. App. Ct. 721 (2007). RA 10.

On December 4, 2017, the office of the Clerk Magistrate forwarded the Defendant's motion to Judge Gailey. RA 5. Two days later, Judge Gailey ordered a hearing on the motion. Id.

On December 29, 2017, the parties appeared for the hearing. Prior to commencing the hearing, Judge Gailey made the following comments:

> "I am going to say at the outset, I reject utterly defendant's argument that the plea colloquy was inadequate and I will not hear argument or evidence on that issue.
> If you wish to raise that issue, I will give you a response right now that if you are relying on that for your motion, it's denied without further hearing.
>
> However, the first part where the defendant argues that the plea counsel did not give him adequate advice is why I had this matter scheduled for a hearing, and I will address that issue. If you stray into the other issue, I will cut you off and terminate the hearing. You understand?" T.Mn. 3.
>
> The Defendant called Attorney Lawton to testify.

Attorney Lawton testified that he understood the Defendant was "not a citizen," but had no memory of his immigration status, T.Mn. 7, nor where he was born. T.Mn. 7 – 8.

Attorney Lawton testified that he believed the Defendant was "subject to deportation given the plea," "his guilty [plea] had the potential for deportation," T.Mn. 9 – 10, and "he would be subject to deportation if he got a guilty[.]" T.Mn. 24.

Attorney Lawton did not know whether the Defendant would be eligible for relief from deportation if proceedings were initiated. T.Mn. 9, 13 – 14. He admitted that he "wouldn't be aware" of whether the Defendant's plea affected his admissibility into the United States, or whether the Defendant could later naturalize as a citizen. T.Mn. 9 - 10.

When asked if he knew whether Mr. Espinal's conviction constituted an aggravated felony, Attorney Lawton stated "I believe it would constitute an aggravated felony." T.Mn. 10. When pressed on the meaning of that term, Attorney Lawton stated that it would make the defendant "subject to deportation" T.Mn. 13, but later admitted that he "wouldn't be able to tell you" what the term "aggravated felony" means. T.Mn. 14.

As a result, Attorney Lawton recommended that the Defendant "seek advice from an attorney that specializes in immigration law." T.Mn. 10.

The Defendant's counsel asked Attorney Lawton to describe which strategies he considered in the Defendant's defense. Despite claiming he considered "all strategies," he could not recall any strategies because "it's been such a long time." Id.

When asked about his theory on any motion to suppress, Attorney Lawton stated that he "didn't believe a motion to suppress was appropriate." Id. Nevertheless, Attorney Lawton admitted that he filed a motion to suppress, then scheduled no less than seven hearings on that motion before disposing of the case. T.Mn. 12.

The Defendant's attorney next questioned Attorney Lawton regarding his February 8, 2017 letter. Attorney Lawton conceded that the letter contained a request for his file and notes, together with answers to a specific set of questions in affidavit form, but that he furnished neither an affidavit nor any notes. T.Mn. 14, 17.

When asked why he did not provide his notes, the following exchange occurred:

"A: [T]here were no notes. I gave you a complete copy of my file.

Q: So in your file there are no notes regarding Mr. Espinal's background?

A: At that point, no. If there's – I'd have to look. I'm sure there were notes, but they may not have been in the file. I'd have to do a more diligent search."

Q: [I] don't understand. Are there notes ... or not?

A: I don't believe so. In other words, you were provided with a copy of my file." T.Mn. 15.

When asked why he did not provide an affidavit, Attorney Lawton cited attorney/client privilege. T.Mn. 16. Nevertheless, he claimed that he "appropriate[ly]" "responded to" the questions outlined in the February 8, 2017 letter, including "whether or not, he was provided with so-called immigration advice," via his March 3, 2017 letter. T.Mn. 17 - 18.

Attorney Lawton then followed up this testimony by claiming, for the first time, that the co-Defendant's attorney spoke with CPCS "in regards to whether or not [the plea] would have consequences" and that both defendants were told on the plea date, T.Mn. 20, that a plea "would lead to deportation proceedings", T.Mn. 18 – 19. Attorney Lawton added that he considered this conversation redundant because

it was "not the first time" he had explained this to the Defendant. T.Mn. 20.

Attorney Lawton failed to offer any explanation as to why, if this conversation occurred, he had failed to describe it in his March 3, 2017 letter, or at any earlier point in his testimony. T.Mn. 19 – 21.

On cross-examination, Attorney Lawton clarified that he told the Defendant that a plea would "potentially" lead to deportation and that there was a "possibility of deportation" given the plea. T.Mn. 22.

The Defendant testified next. The Defendant explained that he was a Dominican national who entered the United States as a lawful permanent resident in January, 2012. T.Mn. 25 – 26.

In late 2014, the Defendant met, fell in love with, and became engaged to Denise Garcia. T.Mn. 26. She is a United States Citizen. T.Mn. 35. The Defendant enjoys a "super good" relationship with her children from a prior relationship. T.Mn. 27.

The Defendant is also extremely close with his sister and her two daughters, who the Defendant picks up from school, takes out for activities, and provides for when needed. T.Mn. 28 – 29.

At the time of the Defendant's plea, he was expecting the birth of his first son, who would be born a United States Citizen. T.Mn. 28 – 29.

The Defendant described working as a driver for an elder care service while working as a barber. T.Mn. 27. Eventually he was able to start his own business -- 056 Barbershop, while also working at Cash Multiservices in Lawrence. T.Mn. 27 – 28.

In connection with his criminal case, the Defendant described meeting with Attorney Lawton several times, using the co-Defendant as a Spanish interpreter. T.Mn. 29 – 30. When the Defendant raised concerns about immigration, Attorney Lawton told him not to worry. T.Mn. 31.

The Defendant did not know that he was resolving his case with an admission until his attorney pulled him aside in the hallway on his last court date. T.Mn. 31 – 32. Attorney Lawton did not describe any immigration issues during that "short" conversation, though the Defendant recalls the Judge mentioning immigration during the plea hearing. T.Mn. 32-33. The Defendant remained calm, given his attorney's consistent refrain that, as related to immigration, there was "nothing to worry about." T.Mn. 39.

Attorney Lawton "never" informed the Defendant that his plea would result in mandatory deportation without any defense, exclusion from the United States, and would prevent him from ever becoming a United States citizen. T.Mn. 33. Attorney Lawton "never" informed the Defendant that an immigration lawyer would be unable to help him in the event his case caused immigration issues. Id.

Prior to the instant conviction the Defendant would visit his mother in the Dominican Republic. T.Mn. 34 - 35. Although he would like to continue visiting her, the instant conviction rendered him inadmissible, so he is no longer able to do so. T.Mn. 34:10. Further, prior to the instant conviction, the Defendant had plans of becoming a citizen, so that he can remain in the United States and be sure his son will get an American education. T.Mn. 35:15

When asked if he would have tendered an admission if he knew it "would result in deportation without any chance of defense and a permanent lifetime ban from the U.S.," the Defendant responded: "Never in this life" because "here I have my job, my family and my son who was on his way." T.Mn. 34. The Defendant

wanted his son "to get the education that maybe I missed." T.Mn. 35.

The Defendant stated, in open court, that he would have been willing to give information to the police about "Lou," (the target of their investigation) "if it would help [him] in [his] case," but that Attorney Lawton never gave him that option. T.Mn. 36.

The Commonwealth conducted a short cross-examination, during which the prosecutor asked the Defendant if he recalled the meeting with the co-Defendant's lawyer which Attorney Lawton claimed occurred. The Defendant denied any such meeting took place. T.Mn. 38 – 39.

After hearing arguments, the Court took the matter under advisement, and then on January 2,2018, denied the motion. RA 77.

On January 25, 2019, the Defendant submitted his Second Motion. RA 83, 4 - 5. The Honorable Justice Marianne C. Hinkle denied that Motion on April 3, 2019, stating on April 18, 2019 that she would not consider "this issue before the Appeals Court makes a final decision on the current appeal." RA 187, 190 - 191.

SUMMARY OF THE ARGUMENT

I. Judge Gailey committed a significant error of law in holding that he adequately delivered the warning pursuant to G.L. c. 278, § 29D, where he only warned the Defendant of the consequences of a guilty plea despite the fact that the Defendant tendered an admission to sufficient facts. The Defendant suffers prejudice from the Court's failure. [pages 22 - 31]

II. Judge Gailey abused his discretion in finding that plea counsel rendered constitutionally sufficient immigration advice where the evidence offered no basis to find that plea counsel conveyed the true consequences of the plea and in finding that the Defendant was not prejudiced by plea counsel's deficient advice. [pages 31 - 42]

III. Judge Gailey was unable to impartially consider the Defendant's motion, thereby depriving the Defendant of rights conferred by art. 11 and 29 of the Massachusetts Declaration of Rights, and the 5th and 14th Amendments to the United States Constitution. The Judge demonstrated his bias by unlawfully threatening to deprive the Defendant of a hearing despite the fact that the Defendant's motion raised a substantial issue, and by thereafter making findings

of fact and rulings of law that were clearly erroneous and unsupported by the evidence. [42 - 58]

ARGUMENT

I. The motion judge erred in holding that he adequately delivered the warning pursuant to G.L. c. 278, § 29D where he only advised the Defendant on the consequences of a guilty plea despite the fact that the Defendant tendered an admission to sufficient facts.

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. DeJesus, 468 Mass. 174, 178 (2014). The Court must examine the motion judge's ruling to determine "whether there has been a significant error of law or other abuse of discretion." Commonwealth v. Grace, 397 Mass. 303, 307 (1986).

b. The motion judge committed an error of law in denying the Defendant's motion to vacate pursuant to G.L. c. 278, § 29D.

General Laws, c. 278, § 29D states that a judge must advise a Defendant:

> "If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendre, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States." G.L. c. 278, § 29D (emphasis

added); see also Commonwealth v. Marques, 84 Mass. App. Ct. 203, 204 (2013).

If the Court fails to so warn a defendant who later shows that his conviction may have resulted in one of the enumerated consequences, "the court, on the defendant's motion, shall vacate the judgement, and permit the defendant to withdraw [the plea], and enter a plea of not guilty." G.L. c. 278, § 29D.

The Commonwealth bears the burden of proving that the plea judge adequately provided this warning. Commonwealth v. Ciampa, 51 Mass. App. Ct. 459, 462 (2001). A defendant's signature on the Tender of Plea or Admission & Waiver of Rights form ("green sheet") does not satisfy the requirements of § 29D. Commonwealth v. Hilaire, 437 Mass. 809, 815 (2002).

Here, the record of the plea hearing establishes that the plea judge's colloquy did not comport with the requirements of § 29D.

The plea judge warned Mr. Espinal that a "plea of guilty" may carry immigration consequences. RA 66. However, Mr. Espinal tendered an admission to sufficient facts, not a plea of guilty. The Judge mentioned nothing about the consequences of an admission to sufficient facts. Consequently, the

Judge's recitation of the § 29D colloquy was incomplete and misleading. G.L. c. 278, § 29D, supra; Marques, 84 Mass. App. Ct. at 204, supra; see also Commonwealth v. Villalobos, 437 Mass. 797, 805 (2002) (pre-2004 version of § 29D colloquy which contemplates only "plea of guilty or nolo contendre" runs the risk of suggesting to a defendant that an admission to sufficient facts will avoid immigration consequences).

Because the plea judge failed to warn the Defendant pursuant to § 29D, the Court was required to vacate the judgement and allow the Defendant to withdraw his admission upon a showing of prejudice. G.L. c. 278, § 29D.

Although the colloquy in the instant case was inarguably incomplete due to its omission of the "admission to sufficient facts," Judge Gailey nevertheless denied the Defendant's motion to vacate.

In his Order, Judge Gailey stated that although the Defendant "did submit an 'admission to sufficient facts,'" the Court decided to enter a "Guilty finding, not a continuance without a finding." RA 77. Thus, the motion judge appears to reason that his incomplete recitation of the § 29D warning did not prejudice the Defendant because, at the moment the Court decided to

find the Defendant guilty, the Defendant's admission to sufficient facts metamorphosed into a plea of guilty. Consequently, the Court reasoned, the omitted portion of the § 29D warning would not have applied to the Defendant.

This rationale conflates the form of the tender (admission to sufficient facts) with the proposed disposition of the charges (CWOF). In other words, Judge Gailey did not recognize the difference between a tender and a disposition. He confused the Defendant's role of pleading with the Court's role of finding. He believed that in rejecting or modifying the proposed dispositional terms and imposing a guilty finding instead of a CWOF, this changed the form of the Defendant's tender. It did not. The judge's ultimate disposition of the tender has nothing to do with the form of the tender itself. That Judge Gailey chose to dispose of the matter with a guilty finding and not a CWOF does not somehow undo the tender of an admission to sufficient facts.

Following a tender, in cases such as the instant matter where there is no conditional plea agreement, "the parties are each free to make any dispositional request permitted by law." Mass. R. Crim. P. 12,

Reporter's Notes to Rule 12(b)(4). In cases such as the instant matter, where the Court intends to impose a disposition more severe than the defendant's proposal, the Court will so notify the defendant, and permit him to withdraw his admission. Mass. R. Crim. P. 12(c)(6)(B). Although Rule 12 contemplates a procedure by which the Court can reject or modify the disposition, it provides no similar process by which the Court can reject or modify the form of the tender.

Judge Gailey's contention that an admission to sufficient facts is uniquely associated with a CWOF was plainly wrong. In addition to the traditional plea procedure of not guilty, guilty, and (with the Judge's permission) nolo contendere, in the District Court, a defendant possesses an absolute right to tender an admission to sufficient facts. Mass. R. Crim. P. 12(a)(1), (2). A person can admit to sufficient facts and be found guilty. See Mass. R. Crim. P. Rule 12(a)(1), (2); see also G.L. c. 278, § 18 (a "statement consisting of an admission of facts sufficient for finding of guilt ... shall be deemed a tender of a plea of guilty for purposes of [disparate plea procedure]").

Here, the Defendant exercised his right to tender an admission to sufficient facts, as his attorney indicated on the top of the "green sheet." RA 114. Judge Gailey did not, as he indicated in his Order, reject in writing the Defendant's admission to sufficient facts. Although Judge Gailey noted the terms upon which he suggested to dispose of the Defendant's case -- "G. prob. 2 yrs" -- he did not state that his disposition was contingent on the Defendant withdrawing his admission to sufficient facts and tendering a guilty plea.[4] Id. Indeed, following the plea hearing, the only box at the top of the form that was checked was the box labeled "admission to sufficient facts." Id. The other box, in which a plea of guilty is to be noted, remains empty. Id.

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[4] Although the "Judges Disposition" box reads "G. prob. 2 yrs ..." this is not an indication that Judge Gailey converted the Defendant's admission into a guilty plea. In the "Prosecutor's Recommendation(s)" box of the tender form, the Commonwealth wrote "G. 18 months HOC." In so doing, the Commonwealth suggested a disparate disposition, which was its right. Of course, the Commonwealth did not pretend to have a say in the form of the Defendant's tender (plea of guilty or admission to sufficient facts) which, again, is the Defendant's sole prerogative.

Nor did Judge Gailey's oral colloquy transform the Defendant's admission to sufficient facts into a guilty plea. During the colloquy, Judge Gailey informed the Defendant that he was "not entirely in agreement with either attorney's recommendation." RA 64 (emphasis added). As discussed above, the attorney's dispositional recommendations -- a guilty finding versus a CWOF -- are distinct from the form of the Defendant's tender. Although Judge Gailey next stated, "If you would agree to this disposition, you would be admitting that ... you distributed ... cocaine[,]"[5] he mentioned nothing about rejecting the Defendant's admission to sufficient facts, nor did he make his proposed resolution contingent on a guilty plea -- if indeed that was his intent. Id.

Thus, where the Defendant tendered an admission to sufficient facts but Judge Gailey's colloquy only addressed a plea of guilty, the warning was deficient.[6, 7]

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[5] Indeed, the Defendant's "admission" that he distributed cocaine is semantically indistinguishable from an admission to facts sufficient of the same fact. For example, one may admit "facts sufficient," because one is admitting the fact is true.

[6] Setting aside the doubtful premise that a judge has a say in the form of a defendant's tender in the

The Defendant was prejudiced by the Court's failure to properly deliver the § 29D warning, where he actually faces the prospect of not just one, but

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District Court, supra at p. 29, it may have been Judge Gailey's desire to decline to accept the Defendant's tender altogether, and insist that the Defendant plead guilty. If that was his intent, he failed to say so. By leaving the Defendant to scry his purpose, the nature of the tender, and whether it was covered by Judge Gailey's incomplete § 29D warning, was hopelessly unclear.

An unclear § 29D warning risks "misleading" a defendant. Villalobos, supra, at 804. It is because of this risk that the SJC called upon the legislature to revise the § 29D warning, which the legislature did in 2004. Marques, supra, at 205 n. 7. Although under an old formulation of the § 29D warning Judge Gailey's colloquy in the instant case would have technically sufficed (despite being misleading), the post-2004 version requires an explicit warning as to the consequences of an admission to sufficient facts.

[7] Judge Gailey's conflation of his finding of guilty with the form of the Defendant's tender of an "admission to sufficient facts" appears to be linked to the pre-2004 version of the statute, which required a judge to warn:

> "If you are not a citizen of the United States, you are hereby advised that conviction of the offense [may have immigration consequences]." Villalobos, supra, at 800 (emphasis added).

The old version of the statute warned about the disposition (conviction), whereas the current version warns about the tender (plea of guilty, nolo, or admission to sufficient facts). Viewed in this light, it is reasonable to infer that Judge Gailey persisted in a disposition-focused warning, despite the fact that the warning has, since 2004, focused on the tender, not the disposition.

all three, of the enumerated consequences. Commonwealth v. Berthold, 441 Mass. 183, 185 (2004).

Where the government has an "express written policy [that] calls for the initiation of deportation proceedings[,]" he faces the consequence of removal. Commonwealth v. Grannum, 457 Mass. 128, 136 (2010); RA 71.

Where the Defendant has "a bona fide desire" to leave and reenter the United States, and a substantial risk of exclusion from admission due to his conviction, he suffers the consequence of exclusion. Commonwealth v. Valdez, 475 Mass. 178, 187 (2016); T.Mn. 34:10 - 35:14.

Lastly, although the Defendant wishes to become a United States citizen, with the hope of remaining in the United States with his family, and ensuring that his son gets an American education, T.Mn. 35:15, the instant admission to sufficient facts renders the Defendant permanently ineligible to naturalize as a citizen. 8 U.S.C. § 1101(f); 8 U.S.C. § 1427(a).

Because both the inadequacy of the colloquy and the existence of prejudice are clear, no rehearing is necessary and this Court must remand the Defendant's

case to the District Court with instructions to enter an order allowing the motion.

II. The motion judge abused his discretion in finding that plea counsel rendered constitutionally sufficient immigration advice where the evidence offered no basis to find that plea counsel conveyed the true consequences of the Defendant's admission, and the Defendant suffered prejudice as a result of his attorney's failure.

a. Standard of Review

An appellate court must review the motion judge's conclusions to determine whether there has been a significant error of law or abuse of discretion. Grace, supra, at 307. "[A] judge's discretionary decision constitutes an abuse of discretion where ... the judge made a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives." LL., a juvenile v. Commonwealth, 470 Mass. 169, 185 n. 27 (2014) (internal citations, quotations, and punctuation omitted). The reviewing court may only accept a motion judge's findings of fact if they are supported by the evidence. DeJesus, supra, at 178.[8]

[8] In the instant case, the motion judge's findings of fact are not entitled to the typical level of deference a reviewing court would apply, due to the

b. The motion judge's findings of fact are not supported by the evidence.

The evidence at the hearing on the Defendant's motion established that Attorney Lawton gave constitutionally insufficient immigration advice.

A defendant's right to the effective assistance of counsel pursuant to the Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights require that an attorney advise the defendant of the specific immigration consequences of a plea or admission. Padilla v. Kentucky, 559 U.S. 356 (2010); Commonwealth v. Sylvain, 466 Mass. 422 (2013).

In the instant case, the evidence made clear that at best, Attorney Lawton rendered incomplete, misleading immigration advice to the Defendant. Moreover, his testimony revealed that he, himself, does not understand the immigration consequences of the Defendant's conviction, and thus, could not possibly have rendered constitutionally sufficient immigration advice.

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judge's impermissible bias, which infected the proceeding, as discussed in Section III, infra.

Attorney Lawton testified that this conviction made the Defendant "subject to deportation" (T.Mn. 9:13); that "his guilty [sic] had the potential for deportation" (T.Mn. 9:22); and that a CWOF or a finding of guilty could "potentially" "lead to deportation" (T.Mn. 22:4-9). This advice fails to communicate the reality of the clear, unambiguous immigration consequences of the Defendant's conviction -- it constitutes an aggravated felony, which rendered the Defendant automatically and permanently removable, inadmissible, and ineligible for citizenship, without any possibility for discretionary relief. 8 U.S.C. § 1101(a)(43)(B); 8 U.S.C. § 1227(a)(2)(A)(iii); 8 U.S.C. § 1182(a)(2)(A)(i)(II); 8 U.S.C. §§ 1101(f)(8), 8 U.S.C. 1427(a); 8 U.S.C. § 1229b(a)(3).

Attorney Lawton's advice that the Defendant was "subject to deportation" and "potentially" deportable did not convey the reality that the Defendant's plea would satisfy "all the conditions necessary for removal[.]" Id. Commonwealth v. DeJesus, 468 Mass. 174, 181 - 182 (2014).

Further, Attorney Lawton could not possibly have rendered sufficient immigration advice where he

admitted ignorance of the actual immigration consequences of the Defendant's conviction.

He was unaware whether the Defendant's conviction rendered him inadmissible. T.Mn. 9:18-22. He did not know whether the Defendant's conviction had any impact on the Defendant's ability to naturalize. T.Mn. 10. When asked whether he believed the Defendant's conviction created an "aggravated felony," he stated that he believed it did. T.Mn. 10:7. However, when prompted further, he admitted that he did not know what the term "aggravated felony" means (T.Mn. 14:6), a concession supported by his admission to being oblivious as to whether the Defendant might qualify for discretionary relief if removal proceedings were initiated. T.Mn. 13:25 - 14:2.

Thus, viewed in its most favorable light, Attorney Lawton's testimony reveals a deficient understanding of the basic immigration consequences tied to the Defendant's admission.

Without knowing the simple legal principles governing the immigration consequences of the Defendant's plea, Attorney Lawton was utterly unequipped to convey to his client, in language he

could understand, the specific, dire immigration consequences of his admission.[9]

[9] Adding to the problem, Judge Gailey's comments during the hearing and in his Order reveal that he may not understand the true consequences of the Defendant's conviction either. During the hearing, he commented: "Counsel, your presumptively mandatory client, presumptively mandatory deportable client, is sitting next to you here in the United States. How do you find that consistent with your mandatory language? ... It seems like it's not quite mandatory, is it?" T.Mn. 43:5. However, it is beyond dispute that the Defendant's conviction constitutes an aggravated felony, which carries unavoidable immigration consequences with no possibility of relief.

Further, he does not recognize that the language on the green sheet, unclarified, is misleading and is "not an adequate substitute for defense counsel's professional obligation to advise [his] client of the likelihood of specific and dire immigration consequences" of the Defendant's admission. Compare RA 78 - 79 (Order) with Commonwealth v. Clarke, 460 Mass. 30, 48 n. 20 (2011).

Similarly, he failed to recognize that a non-citizen defendant "confronts a very different calculus" than a citizen faces in assessing the benefits of a plea agreement. Compare RA 78 - 79 (Order) with DeJesus, supra, 468 Mass. at 184; see also Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958, 1966 – 1967 (2017) (reasonable for non-citizen to choose "Hail Mary" trial over plea); Commonwealth v. Lavrinenko, 473 Mass. 42, 62 (2015) (reasonable for non-citizen to choose trial over plea when facing only house of correction sentence).

Additionally, so lacking in credibility was Attorney Lawton's testimony that the Court's decision to credit it was a clear abuse of discretion.

From the beginning, Attorney Lawton sought to avoid any inquiry into his representation of the Defendant. Counsel sent written requests to Attorney Lawton, requesting that he provide an affidavit detailing his recollection of the Defendant's case, including: his understanding of the Defendant's background and equities; the factors that led to a change of plea; any plea negotiations; and his recollection of any discussions regarding the immigration consequences of the case. T.Mn. 17; see also RA 42 (Attachment D to Defendant's First Motion).

Attorney Lawton refused to provide an affidavit. T.Mn. 15:23, 19:12, 20:22; see also RA 47 (Attachment E to Defendant's First Motion).

When asked why he did not provide an affidavit, he claimed that the information counsel requested "was privileged information. It was between an attorney and his client." T.Mn. 16. This is an absurd claim considering the fact that the Defendant hired a new lawyer to request this information due to Attorney Lawton's failings -- a clear and unambiguous waiver of

any privilege. See Commonwealth v. Brito, 390 Mass. 112, 119 (1983) ("Once [a charge of ineffective assistance] is made, the attorney-client privilege may be treated as waived[.]") Additionally, Attorney Lawton provided a letter discussing his opinions of the Defendant's case and copies of a portion of his case file, something he would not have done were he genuinely concerned about any "privilege."[10]

In his response to counsel's request, Attorney Lawton sent court documents, along with a letter stating that he advised the Defendant to seek advice from an immigration attorney. T.Mn. 10; RA 45 (Attachment D to Defendant's First Motion).

But at the hearing, Attorney Lawton claimed for the first time that on the day of the plea, the co-defendant's lawyer contacted an attorney at CPCS to get information regarding the immigration consequences of the Defendants' admissions and shared that information with the Defendants simultaneously. T.Mn. 18 – 19, 20, 24.

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[10] Attorney Lawton implies that he refused to provide an affidavit for the protection of his client, a claim belied by the fact that did not even bother to review his file to confirm that he provided a complete copy upon the Defendant's request. T.Mn. 15.

This claim contradicts his letter in which he stated that he merely instructed the Defendant to find an immigration lawyer. He provided no explanation why he omitted from his letter the story about contacting CPCS. He further claimed that he did not provide an affidavit because his letter, in which he asserted only that he instructed the Defendant to find an immigration lawyer, constituted a "sufficient" response to counsel's request. T.Mn. 15:23 – 16:4.

Moreover, Attorney Lawton refused to provide a clear answer about whether his file contained any. When asked why he did not provide his notes, the following exchange occurred:

> "A: [T]here were no notes. I gave you a complete copy of my file.
>
> Q: So in your file there are no notes regarding Mr. Espinal's background?
>
> A: At that point, no. If there's – I'd have to look. I'm sure there were notes, but they may not have been in the file. I'd have to do a more diligent search.
>
> Q: [I] don't understand. Are there notes ... or not?
>
> A: I don't believe so. In other words, you were provided with a copy of my file." T.Mn. 15.

The forgoing reveals that either Attorney Lawton took no notes on the Defendant's personal background,

a key step in understanding a client's immigration concerns, or refused to provide the Defendant with a complete copy of his file. See Lavrinenko, supra, at 53 ("the failure of a criminal defense attorney to make a reasonable inquiry of the client regarding his or her citizenship and immigration status is sufficient to satisfy the deficient performance prong of the ineffective assistance analysis."); see also Mass. R. Prof. C. 1.15A(a), (b) (lawyer must make client's file available within reasonable time upon request).[11]

Where the evidence revealed Attorney Lawton's refusal to commit to any one story regarding his representation of the Defendant and his lack of knowledge regarding the immigration consequences of a straightforward drug distribution conviction, the evidence does not support the Court's conclusion that

[11] As discussed in Section III, infra, Judge Gailey's choice to credit Attorney Lawton's testimony over the Defendant's despite Attorney Lawton's credibility problems, and findings that Attorney Lawton rendered constitutionally adequate assistance despite undisputed evidence to the contrary, underscores the arbitrary way in which Judge Gailey approached the task of fact-finding, and compels in inference that his findings and rulings were based on personal animus instead of the evidence and the law.

Attorney Lawton rendered constitutionally sufficient immigration advice.

That Judge Gailey made such a finding, and found Attorney Lawton credible, provides insight on his conclusions regarding the Defendant's testimony.

The Defendant testified, without impeachment, that he had important relationships in the United States at the time of his admission. He was actively participating in the lives of his sister's two children. T.Mn. 28. He was deeply in love with his fiancé, and had a "super good" relationship with her children. T.Mn. 26 - 27. He and his fiancé worked together in a store she owned. T.Mn. 27 - 28. Most importantly, the Defendant was awaiting the birth of his first biological child, who would be born a United States citizen. T.Mn. 28 - 29.

When asked if he would have agreed to tender an admission if he knew that his admission carried disastrous hidden immigration consequences, he testified, "never in this life" because "here I have my job, my family and my son who was on his way." T.Mn. 34. The Defendant wanted his son "to get the education that maybe I missed." T.Mn. 35. The Defendant's immigration concerns took such paramount

importance that, in open court, he testified that had he known of the immigration consequences of his admission, he would have taken any risk, including cooperation with law enforcement, in the hopes that doing so might lead to a resolution without immigration consequences. T.Mn. 36.

That Judge Gailey found Attorney Lawton's representation competent despite Attorney Lawton's own testimony revealing the opposite, but could not believe that the Defendant valued his family, shows that Judge Gailey's conclusions regarding prejudice fall "outside the range of reasonable alternatives."[12] LL., a juvenile, supra, at 185 n. 27.

III. The motion judge failed to impartially consider the Defendant's motion to vacate, thereby depriving the Defendant of rights conferred by art. 11 and 29 of the Massachusetts Declaration of Rights, and the 5th and 14th Amendments to the United States Constitution.

a. Standard of Review

The Honorable Justice Marianne C. Hinkle ("second motion judge"), who made no findings of fact and declined to rule on the merits of the Defendant's Second Motion, did not preside over the hearing on the

[12] As discussed in Section III, infra, Judge Gailey's factfinding reveals the impermissible bias with which he approached the Defendant's motion.

Defendant's motion to vacate and therefore could not benefit from any first-hand exposure to the evidence. Because her review would have been limited to "careful scrutiny" of the record, the appellate court is "in as good a position . . . to evaluate the [motion] record." Commonwealth v. Leaster, 395 Mass. 96, 101 (1985).

b. The record of the motion hearing reveals that Judge Gailey failed to impartially consider the merits of the Defendant's motion.

Article 29 of the Massachusetts Declaration of Rights demands that judges be "as free, impartial and independent as the lot of humanity will admit." This must be so in both practice and appearance. "The administration of justice by the courts ought not only to be, but it ought to appear to be, impartial[.] The principles of natural justice as well as the mandates of the Constitution establish a strict and lofty standard." King v. Grace, 293 Mass. 244, 247 (1936).

The test of a judge's "capacity to rule fairly" in a given matter is two-tiered: the judge must "consult first his own emotions and conscience. If he passed the internal test of freedom from disabling prejudice, he must next attempt an objective appraisal of whether this was a proceeding in which his

impartiality might reasonably be questioned." Lena v. Commonwealth, 369 Mass. 571, 575 (1976) (internal citations omitted).

In evaluating the first (subjective) tier of the Lena test, a judge's decision to preside over a party's objection constitutes "a most unequivocal assertion that on his own conscience there was no disqualification." King, supra, at 247. The courts have also considered any available evidence demonstrating a reflective process. See, e.g., Commonwealth v. Eddington, 71 Mass. App. Ct. 138, 143 (2008) (following question of recusal, judge recessed for two hours in order to reflect prior to proceeding).

Because the Defendant did not move for disqualification,[13] there is no indication as to whether Judge Gailey did, or did not, conduct the reflective self-scrutiny which Lena envisioned. Consequently, the Court must look elsewhere in determining whether Judge Gailey's handling of the

[13] Where grounds for disqualification exist, the judge must disqualify himself regardless of whether any motion is filed. Commonwealth v. Gogan, 389 Mass. 255, 259 (1983); see also S.J.C. Rule 3:09, Canon 2, Rule 2.11, comment 2.

instant matter implicated the Defendant's art. 29 and due process rights.

Consideration of the second (objective) prong of the Lena test reveals substantial doubt as to Judge Gailey's ability to impartially consider the Defendant's claims. In considering this prong, the Court must conduct "an objective appraisal of whether this was a proceeding in which [the judge's] impartiality might reasonably be questioned." Lena, 369 Mass. At 575.

i. Judge Gailey's comments regarding the Defendant's G.L. c. 278, § 29D argument.

The Court need look no further than Judge Gailey's preliminary remarks to find reasonable grounds to question his impartiality. There, Judge Gailey stated that he "reject[ed] utterly" the Defendant's argument regarding the G.L. c. 278, § 29D colloquy. T.Mn. 3. Judge Gailey then warned that if the Defendant were to so much as "raise" or "stray into [the adequacy of my colloquy], I will cut you off and terminate the hearing. You understand?" Id.

It is generally within a judge's prerogative to deny without a hearing a motion for new trial that raises no substantial issue. Mass. R. Crim. P. 30,

Reporter's Note (c)(3) (the rule "encourage[s] the disposition of post-conviction motions upon affidavit"). In fact, given the importance of a robust and independent judiciary, even wildly incorrect rulings can create no Article 29 concerns -- such rulings must remain unimpeachable, subject only to appellate review for "significant error of law or other abuse of discretion." Commonwealth v. Rodriguez, 467 Mass. 1002, 1004 (2014).

But the record here does not reflect a ruling motivated only by judgments of law or discretion.

Instead, rather than dispassionately exercising his discretion to deny the Defendant's motion, the record suggests that Judge Gailey reacted to the Defendant's challenge to the adequacy of his colloquy in a deeply personal manner. In fact, the record suggests that Judge Gailey was so affected by the critique of his colloquy that he threatened to deny the Defendant a hearing as to the substantial issue of ineffective assistance of counsel if the Defendant so much as broached the subject of his colloquy.

On December 4, 2017, upon receipt of the First Motion, the Woburn District Court furnished a copy of

the same to Judge Gailey for his review. On December 6, 2017 Judge Gailey ordered a hearing on that motion.

A necessary implication of the judge's decision to order a hearing on the Defendant's Padilla/Saferian claim was his determination that the Defendant's pleadings raised a substantial issue of ineffective assistance. Commonwealth v. Licata, 412 Mass. 654, 660 (1992) (error to refuse hearing on new trial motion which raised a substantial issue of ineffective assistance of counsel).

Given that implication, Judge Gailey's threat to strip the Defendant of his right to a hearing on the substantial, constitutional claim of ineffective assistance violated the Defendant's right to due process and a hearing before an impartial judge. This is because Judge Gailey threatened to deny the Defendant a hearing, not because the Defendant failed to raise a substantial issue, but because the Defendant insulted the judge by questioning the adequacy of his colloquy.

Inquiry beyond the record of the hearing before Judge Gailey reveals that he previously held out his colloquy as unassailable -- even in the face of evidence to the contrary. In Commonwealth v. Cortez,

86 Mass. App. Ct. 789 (2014), the Court considered Judge Gailey's denial of a motion for new trial premised on his failure to warn the Defendant that an "admission to sufficient facts" might create immigration consequences, despite the legislature's amendment of G.L. c. 278, § 29D to require such a warning, one month prior to the plea. Id.

In that case, no plea transcript was available due to the passage of time. But,

> "other contemporaneous evidence suggests that the new warnings may not have been given. Specifically, the judge's signed certification on the 'green sheet' states: 'I further certify that the defendant was informed and advised that if he or she is not a citizen of the United States, a conviction of the offense [may carry the statutorily enumerated immigration consequences].'" Cortez, 86 Mass. App. Ct. at 790 (emphasis in original).

Notwithstanding the contemporaneous evidence in the form of his own signed certification, Judge Gailey made the following declaration:

> "Regardless of what the green sheet said, this Court's practice for years before that [2004] statutory change was to include both convictions and continuations without a finding in the language on my own accord because I was somewhat familiar with the change in immigration policy." Id. at 791.

The Appeals Court affirmed Judge Gailey's ruling, given his representation and finding of fact as to his

standard colloquy, but noted that it would have been "helpful" if Judge Gailey "explained the discrepancy" and "tension" between, on the one hand, what he claimed about his usual practice and, on the other, his signed certification which appeared to directly contradict his claim. Id. at 791 - 792, and n. 7, 8 and 9.[14]

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[14] During the hearing on Cortez' motion, defense counsel asked why, if his practice was as represented, Judge Gailey wouldn't simply create some contemporaneous note on the tender to reflect what he in fact said in court. Judge Gailey answered "Because Counsel we expect motions to be brought within a reasonable period of time while the tape of the proceeding is still available." The Appeals Court pointed out that this response "did not help explain or eliminate" the discrepancy. Id. at 791, n. 7.

Though the Appeals Court intimated elsewhere that he "misapprehended the requirements of the statute," Id. at 792, n. 8, Judge Gailey's "reasonable period of time" comment also supports that inference. That is, if Judge Gailey were as conversant in the requirements of G.L. c. 278, § 29D as he claimed, he would understand that statute to uniquely not require "motions to be brought" at any particular time. Instead "the explicit language of the statute unambiguously manifests a legislative intent to place on the Commonwealth the burden of proving that the requirements of G.L. c. 278, § 29D have been satisfied, irrespective of the amount of time that may have passed between a conviction and a defendant's motion to withdraw his plea or his admission to sufficient facts." Commonwealth v. Jones, 417 Mass. 661, 664 (1991) (emphasis added).

Unlike in Cortez, the transcript of the plea in the instant matter was available. The transcript of this plea, conducted almost 12 years after the Cortez plea, reveals that Judge Gailey specifically did not make any reference to the consequences of an "admission to sufficient facts." Instead, just as Cortez claimed back in 2004, Judge Gailey warned only that a "guilty plea" might cause the enumerated immigration consequences, with no reference at all to the immigration consequences of an admission to sufficient facts.

It was perhaps the implications of this direct contradiction of Judge Gailey's claims -- claims which were memorialized in a reported decision of the Appeals Court -- claims which the Appeals Court accepted, in the absence of a transcript, only after expressing reservations about unexplained "discrepancies" and concerns about Judge Gailey's possible "misapprehension" of the statute -- which stirred such a strong response from Judge Gailey.

In Cortez, Judge Gailey claimed that his practice was so regular that he could assure the Court that he made no mistake, even in the absence of a transcript, and even in the face of a signed certification to the

contrary. The transcript in the instant case reveals he was mistaken.

Viewed in this context, though not required, it is easy to draw reasonable inferences as to the genesis of Judge Gailey's strong reaction to the Defendant's claim. It is equally clear that this reaction intolerably impaired the Court's ability to impartially rule on the Defendant's claim.

ii. Judge Gailey's factfinding regarding the Defendant's credibility.

Judge Gailey's factfinding regarding the Defendant's Saferian/Padilla argument highlights his impermissible bias.

In his Order, Judge Gailey pointed out that he did not "credit an iota of Defendant's testimony as to any immigration advice given by Counsel at the time of the plea(s), or any lack thereof." He commented that one reason for finding the Defendant's testimony "utterly lacking in credibility" was that:

> "Defendant seems to have forgotten the acknowledgement he signed at the time of the pleas ... that he understood that the pleas could result in deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States." RA 78 - 79 (Order, p. 2 - 3).

Thus, Judge Gailey posits, the Defendant's signature on the green sheet is the final word on the subject of plea counsel's immigration advice, regardless of the Defendant's sworn testimony.

Apparently, Judge Gailey holds the Defendant to a higher standard than he holds himself. In Cortez, supra, Judge Gailey signed a green sheet, affirming that he gave one version of the § 29D warning, but later claimed that he gave a completely different version, "Regardless of what the green sheet said." Cortez, supra, at 790 – 791.

The forgiving standard to which Judge Gailey held himself as to the discrepancy between his representations and his signed certification on the green sheets contrasts notably with his willingness to reject every "iota" of the Defendant's testimony in light of the Defendant's green sheet certification.

Judge Gailey graduated from law school, became a lawyer, and distinguished himself sufficiently to receive the honor of a judgeship. But even that degree of learning and accomplishment did not prevent him from signing a declaration in Cortez which he later claimed was not what he said in court. Despite that incident, 12 years later, Judge Gailey certified

the green sheet in the instant matter, only to be later contradicted by an official transcript of that hearing. Despite these two events, Judge Gailey did not doubt his correctness.

In contrast, the Defendant -- unlettered, unsophisticated, untrained in the law, unable to speak the language, and completely at the mercy of his attorney to explain the green sheet to him, through an interpreter -- was deserving of not "an iota" of credibility, because of what Judge Gailey deemed a discrepancy between the Defendant's assertions and the language on that form.[15]

iii. Judge Gailey's factfinding regarding the adequacy of Attorney Lawton's advice and his credibility.

Additionally, Judge Gailey exhibited his bias in his finding that Attorney Lawton provided constitutionally sufficient immigration advice.

As discussed in Section II, supra, Attorney Lawton's testimony revealed that he affirmatively

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[15] But unlike Judge Gailey's discrepancy in Cortez, and unlike his discrepancy here, the perceived discrepancy between the Defendant's assertions and the green sheet are much less clear. See Clarke, supra, at 48 n. 20 (unclarified green sheet potentially misleading and inadequate substitute for counsel's advice).

misadvised the Defendant and did not understand the immigration consequences of the Defendant's conviction. Nevertheless, Judge Gaily found plea counsel's performance constitutionally sufficient.

Also as discussed in Section II, supra, Attorney Lawton sought to evade the Defendant's inquiry into the adequacy of his representation altogether, from his tepid response to successor counsel's correspondence to his ever-changing testimony as to what he told the Defendant. Regardless, Judge Gailey credited his testimony and found that he provided constitutionally sufficient immigration advice.

The manner in which Judge Gailey conducted the hearing -- turning a blind eye to clear evidence of Attorney Lawton's deficient performance and credibility problems -- reveals the biased manner in which he approached the Defendant's motion.

Judge Gailey attempted to exclude any reference to counsel's letter to Attorney Lawton, despite the letter's clear relevance to the substance of Attorney Lawton's advice as well as his credibility. Counsel first sought to question Attorney Lawton regarding the contents of the letter, but Judge Gailey precluded him from doing so, ruling, "The letter speaks for itself."

T.Mn. 4:25 – 5:13. Consequently, counsel offered the letter as an exhibit, which Judge Gailey refused to accept. T.Mn. 5:14.

Additionally, when counsel attempted to cross-examine Attorney Lawton on his preposterous claim of attorney-client privilege, a subject probative of his credibility, Judge Gailey precluded him from doing so. T.Mn. 16.

That Judge Gailey found plea counsel's performance constitutionally sufficient, despite uncontested evidence of misadvice, his own inability to understand the immigration consequences of the Defendant's conviction, and his lack of credibility, reveals Judge Gailey's bias towards the Defendant's motion. Compare Eddington, supra, at 146 ("the record demonstrates that the judge gave substantial weight to all of the defendant's arguments in a fair and impartial manner").

While no record exists of Judge Gailey's examination of his conscience during this hearing, the foregoing offers a window into his thought process, making it apparent that, had Judge Gailey "consulted [his] emotions and conscience" disqualification would

have been the result. Lena, supra, at 575.[16] Even absent a motion for recusal, Judge Gailey should have recused himself given the circumstances.

Moreover, the foregoing raises reasonable questions regarding Judge Gailey's impartiality.[17] Simply by creating the impression that he permitted his feelings to seep into the structure of the proceeding, Judge Gailey threatened to undermine the public confidence in the impartiality of the judiciary. In and of itself, this appearance

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[16] The Defendant could not have moved for recusal during the hearing for two reasons. First, Judge Gailey threatened to "terminate the hearing" if counsel "stray[ed] into the [G.L. c. 278, § 29D] issue." T.Mn. 3. Consequently, had counsel moved for recusal based on matters relating to the G.L. c. 278, § 29D issue, counsel ran the risk of prompting the Court to deprive the Defendant of any hearing whatsoever. Second, only by reading Judge Gailey's findings of fact and rulings of law in his Order did the extent of his prejudice towards the Defendant's motion reveal itself.

[17] Judge Gailey's bias in the instant case meets the "extrajudicial source" requirement of Liteky v. United States, 510 U.S. 540 (1994). In Liteky, the Supreme Court explained that a judge is free to develop an unfavorable disposition towards an individual or his case, so long as it derives from a proper source -- the evidence and the law. Liteky, 510 U.S. at 550. Judge Gailey's bias here derives from his feelings of anger and embarrassment resulting from the Defendant's criticism of his colloquy, an improper source.

threatens an intolerable erosion of the dignity of the judiciary, and calls for correction to prevent the public from doubting that "the principles of natural justice and the mandates of the Constitution" still adhere to the "strict and lofty standard" which art. 29 mandates. King, supra, at 247.

No less important, Judge Gailey deprived the Defendant of his right to due process. By permitting his personal feelings to affect the outcome of the Defendant's motion, the Court was unable to judge any of the issues raised in the motion on their merits. Not only was the judge unable to hear argument on the issues surrounding his colloquy, but he was so affected by the Defendant's claim that he threatened to deprive the Defendant of his right to a hearing on his Padilla/Saferian claim. And although the Court gave the Defendant a hearing, it was little more than a sham, as the judge's emotional response prevented him from reasonably and impartially assessing the credibility of witnesses or making findings of fact and rulings of law.

The record in this case compels an inference that Judge Gailey was unable to impartially consider the Defendant's motion. Because this Court is in as good

a position as the lower Court to evaluate the record, this Court should enter an Order directing the lower court to allow the Defendant's Second Motion.[18]

CONCLUSION

For the foregoing reasons, the Defendant requests: that this Honorable Court vacate the first motion judge's Order denying the Defendant's First Motion with instructions to allow the same, or vacate the second motion judge's Order denying the Defendant's Second Motion with instructions to allow the same.

Respectfully submitted,
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By his Attorneys,

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June 17, 2019

[18] If the Court agrees with the Defendant's argument regarding the G.L. c. 278, §29D colloquy, no remand is necessary.

ADDENDUM TABLE OF CONTENTS

Massachusetts Declaration of Rights

Other Authorities

COMMONWEALTH OF MASSACHUSETTS

Trial Court
District Court Department

Woburn District Court
1553CR0042

COMMONWEALTH OF MASSACHUSETTS	)	
	)	FINDINGS AND DECISION ON
VS.	)	MOTION TO VACATE GUILTY
	)	PLEA
JULIO ALBERTO ESPINAL, Defendant	)	

Defendant Julio Alberto Espinal ("Defendant") filed a motion to vacate his conviction, plea and sentence on one count of Distributing a Class B Substance (Cocaine)in this case entered in 2016. His Attorney characterizes the motion as a "Motion to Vacate Admission to Sufficient Facts", which as discussed below is somewhat disingenuous. He does so on two principal grounds: due to alleged inadequacy in the advice of counsel relating to possible immigration consequences at the time of the plea and alleged inadequacy of the Court's so-called immigration warning pursuant to G.L.c. 278, sec. 29D. He also argues that special circumstances militate for vacating the plea. For the following reasons the motion is DENIED.

The Court has had the benefit of reviewing the entire docket in the above captioned file as well as the motion papers, as well as a for the most part complete transcript of the plea proceedings. Importantly, the Court also had an opportunity to hear live testimony from Defendant and from plea counsel, and has been able to assess the credibility of both witnesses on the basis of their live testimony after both direct and cross examination.

The Court finds Defendant's testimony in support of this motion utterly lacking in credibility. I do not credit an iota of Defendant's testimony as to any immigration advice given by Counsel at the time of the plea(s), or any lack thereof. I do not credit Defendant's assertions that he had only limited conversations with Plea Counsel as to his immigration status and the consequences of the plea, and in fact find that he had lengthy meetings with his then attorney and that the consequences of the plea were discussed in those meetings. Defendant seems to have

forgotten the acknowledgments he signed at the time of the pleas - with the attested help of a certified Court interpreter - that he understood that the pleas could result in deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States. He also ignores his attorney's certifications at that time that the attorney explained those matters to Defendant so as to enable him to tender his pleas of guilty knowingly, intelligently and voluntarily. He also seems not to remember the immigration warning this judge clearly gave him. If it was indeed important to him at the time, he would possibly remember those things. After 14 months I do not fault him for not remembering things, but I do not credit his sworn testimony now as having any persuasive weight on the issue of whether his attorney did not give him competent immigration advice then.

Moreover I find that Defendant's disposition as a result of the pleas was highly favorable - a guilty finding with straight probation on a crime involving cocaine distribution. He knew fully what he was doing when he accepted a guilty finding in this case. Speculating that electing to go to trial might have resulted in a better outcome is just that - rampant speculation. Defendant pled guilty on a charge fully supported in the detailed police report in the case. To assert or imply that a better outcome might have been available is at best speculative, and in fact totally unrealistic. I therefore conclude that even if there had been any arguably inadequate immigration advice by counsel - which I do not find - it did not prejudice Defendant in any way.

On a review of the case, and I do not find that there is any likelihood that the case's disposition resulted in a substantial miscarriage of justice.

The other grounds asserted in the motion were utterly without support. Defendant asserts that it was a violation of G.L.c. 278, sec. 29D for this Court to have phrased the immigration warning premised on the Court's acceptance of Defendant's "guilty plea" instead of being premised on the Court's acceptance of Defendant's "admission to sufficient facts". Defendant did submit an "admission to sufficient facts", <u>but the Court rejected it</u> orally and in writing. Instead, the Court (as appears in the Docket and the transcript) having rejected the Defendant's proffered

admission to sufficient facts proposed a disposition pursuant to which Defendant would actually admit "that [he] distributed a class B substance, cocaine" (not that there were sufficient facts to prove it). Defendant swore under oath that he understood that. The disposition proposed by the Court was a Guilty finding, not a continuance without a finding after a finding of sufficient facts which is what the Defendant had originally requested. Defendant unequivocally accepted the disposition proposed by the Court.

In those circumstances to suggest that the Court should have phrased the G.L.c.278, sec. 29D warning in the form of the Court accepting the rejected admission to sufficient facts is beyond credulity.

As to "special circumstances", having listened to Defendant's self-serving testimony as to his "special circumstances", I do not find that special circumstances exist to set aside this plea.

Consequently, Defendant's motion is DENIED.

T. H. Gailey

Timothy H. Gailey,
Justice

DATED: January 2, 2018

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DISTRICT COURT DEPARTMENT
DOCKET No: 1553CR0042

COMMONWEALTH)
)
v.)
)
JULIO ALBERTO ESPINAL,)
Defendant)

FILED
JAN 25 2019
WOBURN DISTRICT COURT

4/3/19

DENIED

SECOND MOTION TO VACATE ADMISSION TO SUFFICIENT FACTS
OR, IN THE ALTERNATIVE, MOTION FOR RE-HEARING
ON MOTION TO VACATE ADMISSION TO SUFFICIENT FACTS

Now comes the Defendant and respectfully requests that this Honorable Court vacate his admission to sufficient facts and grant him a new trial. As reasons therefor, the Defendant states:

1: His plea counsel failed to counsel him regarding the immigration consequences of his admission, which prejudiced the Defendant. Commonwealth v. Sylvain, 466 Mass. 422 (2013).

2: The Court failed to warn the Defendant in the manner prescribed by G.L. c. 278, § 29D. Commonwealth v. Rodriquez, 70 Mass. App. Ct. 721 (2007).

On January 2, 2018, the Honorable Justice Timothy Gailey denied a Motion to Vacate Admission to Sufficient Facts, which the Defendant filed on November 16, 2017.

The Defendant submits that review of the assembled record compels an inference that Justice Gailey was unable to impartially consider the Defendant's motion, thereby depriving the Defendant of rights conferred by art. 11 and 29 of the Massachusetts Declaration of Rights, and the 5th and 14th Amendments to the United States Constitution. Commonwealth v. Eddington, 71 Mass. App. Ct. 138, 142-43 (2008).

Moreover, review of the assembled record "would create in reasonable minds a perception that the judge violated [the Code of Judicial Conduct] or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament or fitness to serve as a judge." Code of Jud. Cond., Canon 1, Rule 1.2.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. DISTRICT COURT DEPARTMENT
DOCKET No: 1553CR0042

COMMONWEALTH)
)
v.)
)
JULIO ALBERTO ESPINAL,)
Defendant)

DEFENDANT'S REQUEST FOR FINDINGS
OF FACT AND RULINGS OF LAW

Now comes the Defendant and respectfully requests that, with respect to its April 3, 2019 Order denying the Defendant's Second Motion To Vacate Admission To Sufficient Facts Or, In The Alternative, Motion For Re-Hearing On Motion To Vacate Admission To Sufficient Facts, this Honorable Court make such findings of fact and rulings of law "as are necessary to resolve the defendant's allegations of error of law." Mass. R. Crim. P. 30(b); Commonwealth v. Almonte, 84 Mass. App. Ct. 735, 739 (2014) ("[r]ecorded reasoning ... enables informed appellate review[.]")

Respectfully submitted,
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By and through his Attorney,

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Date: April 4, 2019

Judge Gaziano's decision on the Motion to Vacate is currently under appeal. The defendant should withdraw his Motion for re-hearing since the Appeals Court makes final decision on the issue before me. I will not schedule the Motion to Vacate Plea.

4/18/19

TYPE-WRITTEN VERSION OF COURT'S HANDWRITTEN DECISION ON DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW

The Defendant appealed Judge Gailey's decision on the Motion to Vacate Guilty Plea. That Decision is currently under appeal. I will not re-hear this issue before the Appeals Court makes a final decision on the current appeal.

4/18/19

UNITED STATES CODE

8 U.S.C. § 1101(a)(43)

(43) The term "aggravated felony" means—

(A)
murder, rape, or sexual abuse of a minor;

(B)
illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C)
illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D)
an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i)
section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii)
section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii)
section 5861 of title 26 (relating to firearms offenses);

(F)
a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at least one year;

(G)
a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;

(H)

an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I)

an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J)

an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i)

relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii)

is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii)

is described in any of sections 1581–1585 or 1588–1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

(i)

section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii)

section 3121 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii)

section 3121 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i)

involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii)

is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

8 U.S.C. § 1101(f)

(f) For the purposes of this chapter—No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was—

(1)
a habitual drunkard;

(2)
Repealed. Pub. L. 97–116, §2(c)(1), Dec. 29, 1981, 95 Stat. 1611.

(3)
a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4)
one whose income is derived principally from illegal gambling activities;

(5)
one who has been convicted of two or more gambling offenses committed during such period;

(6)
one who has given false testimony for the purpose of obtaining any benefits under this chapter;

(7)
one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8)

one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)); or

(9)

one who at any time has engaged in conduct described in section 1182(a)(3)(E) of this title (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 1182(a)(2)(G) of this title (relating to severe violations of religious freedom). The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.

8 U.S.C. § 1182(a)(2)(A)

(2)Criminal and related grounds

(A) Conviction of certain crimes

(i) In general Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I)

a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II)

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 (as defined in section 802 of title 21),

is inadmissible.

(ii) Exception Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I)

the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II)

the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

8 U.S.C. § 1227(a)(2)(iii)

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 U.S.C. § 1427(a)

(a) Residence

No person, except as otherwise provided in this subchapter, shall be naturalized unless such applicant, (1) immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application has been physically present therein for periods totaling at least half of that time, and who has resided within the State or within the district of the Service in the United States in which the applicant filed the application for at least three months, (2) has resided continuously within the United States from the date of

the application up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

8 U.S.C. § 1229b(a)

(a) Cancellation of removal for certain permanent residents: The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
(2) has resided in the United States continuously for 7 years after having been admitted in any status, and
(3) has not been convicted of any aggravated felony.

MASSACHUSETTS GENERAL LAWS

G.L. c. 278, § 29D

Conviction upon plea of guilty, nolo contendere or an admission to sufficient facts; motion to vacate

The court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts from any defendant in any criminal proceeding unless the court advises such defendant of the following: ''If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.'' The court shall advise such defendant during every plea colloquy at which the defendant is proffering a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts. The defendant shall not be required at the time of the plea to disclose to the court his legal status in the United States.

If the court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have or has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty, plea of nolo contendere, or admission of sufficient facts, and enter a plea of not guilty. Absent an official record or a contemporaneously written record kept in the court file that the court provided the advisement as prescribed in this section, including but not limited to a docket sheet that accurately reflects that the warning was given as required by this section, the defendant shall be presumed not to have received advisement. An advisement previously or subsequently provided the defendant during another plea colloquy shall not satisfy the advisement required by this section, nor shall it be used to presume the defendant understood the plea of guilty, or admission to sufficient facts he seeks to vacate would have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization.

G.L. c. 278, § 18:

Pleas of not guilty, guilty or nolo contendere; requests for specific disposition; pretrial motions

A defendant who is before the Boston municipal court or a district court or a district court sitting in a juvenile session or a juvenile court on a criminal offense within the court's final jurisdiction shall plead not guilty or guilty, or with the consent of the court, nolo contendere. Such plea of guilty shall be submitted by the defendant and acted upon by the court; provided, however, that a defendant with whom the commonwealth cannot reach agreement for a recommended disposition shall be allowed to tender a plea of guilty together with a request for a specific disposition. Such request may include any disposition or dispositional terms within the court's jurisdiction, including, unless otherwise prohibited by law, a dispositional request that a guilty finding not be entered, but rather the case be continued

without a finding to a specific date thereupon to be dismissed, such continuance conditioned upon compliance with specific terms and conditions or that the defendant be placed on probation pursuant to the provisions of section eighty-seven of chapter two hundred and seventy-six. If such a plea, with an agreed upon recommendation or with a dispositional request by the defendant, is tendered, the court shall inform the defendant that it will not impose a disposition that exceeds the terms of the agreed upon recommendation or the dispositional request by the defendant, whichever is applicable, without giving the defendant the right to withdraw the plea.

If a defendant, notwithstanding the requirements set forth hereinbefore, attempts to enter a plea or statement consisting of an admission of facts sufficient for finding of guilt, or some similar statement, such admission shall be deemed a tender of a plea of guilty for purposes of the procedures set forth in this section.

Any pretrial motion filed in a criminal case pending in the Boston municipal court or district court or a district court sitting in a juvenile session or a juvenile court and decided before entry of defendant's decision on waiver of the right to jury trial shall not be refiled or reheard thereafter, except in the discretion of the court as substantial justice requires. Any such pretrial motion not filed or filed but not decided prior to entry of the defendant's decision on waiver of the right to jury trial may be filed thereafter but not later than twenty-one days after entry of said decision on waiver of the right to jury trial, except for good cause shown.

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Mass. R. Crim. P. 12(a)

Pleas in general

(1) Pleas that may be entered and by whom

A defendant may plead not guilty, or guilty, or with the consent of the judge, nolo contendere, to any

crime with which the defendant has been charged and over which the court has jurisdiction. A plea of guilty or nolo contendere shall be received only from the defendant personally except pursuant to the provisions of Rule 18(b). Pleas shall be received in open court and the proceedings shall be recorded. If a defendant refuses to plead or if the judge refuses to accept a plea of guilty or nolo contendere, a plea of not guilty shall be entered.

(2) Admission to sufficient facts

In a District Court, a defendant may, after a plea of not guilty, admit to sufficient facts to warrant a finding of guilty.

(3) Acceptance of plea of guilty, a plea of nolo contendere, or an admission to sufficient facts

A judge may accept a plea of guilty or a plea of nolo contendere or an admission to sufficient facts only after first determining that it is made voluntarily with an understanding of the nature of the charge and the consequences of the plea or admission. A judge may refuse to accept a plea of guilty or a plea of nolo contendere or an admission to sufficient facts.

Mass. R. Crim. P. 12(c)

Procedure if no plea agreement or if plea agreement does not include both a specific sentence and a charge concession

(1) Disclosure of the terms of any plea agreement

If the parties have entered into a plea described in Rule 12(b)(5)(B), the parties shall disclose the terms of that agreement on the record in open court unless the judge for good cause allows the parties to disclose the terms of the plea agreement in camera on the record.

(2) Tender of plea

The defendant's plea or admission shall be tendered to the judge.

(3) Colloquy

The judge shall:

(A) Provide notice to the defendant of the consequences of a plea

The judge shall inform the defendant:

(i)
that by a plea of guilty or nolo contendere, or an admission to sufficient facts, the defendant waives the right to trial with or without a jury, the right to confrontation of witnesses, the right to be presumed innocent until proved guilty beyond a reasonable doubt, and the privilege against self-incrimination;

(ii)
of the maximum possible sentence on the charge, and, if applicable,

(a) any different or additional punishment based upon subsequent offense provisions of the General Laws;

(b) that the defendant may be subject to adjudication as a sexually dangerous person and required to register as a sex offender;

(c) the mandatory minimum sentence on the charge; and

(d) that a conviction or plea of guilty for an offense listed in G.L. c. 279, § 25(b) implicates the habitual offender statute, and that upon conviction or plea of guilty for the third or subsequent of said offenses: (1) the defendant may be imprisoned in the state prison for the maximum term provided by law for such third or subsequent offense; (2) no sentence may be reduced or suspended; and (3) the defendant may be ineligible for probation, parole, work release or furlough, or to receive any deduction in sentence for good conduct;

(iii) of the following potential immigration consequences of the plea:

(a) that, if the defendant is not a citizen of the United States, the guilty plea, plea of nolo contendere, or admission may have the consequence of deportation, exclusion of admission, or denial of naturalization; and

(b) that, if the offense to which the defendant is pleading guilty, nolo contendere, or admitting to sufficient facts is under federal law one that presumptively mandates removal from the United States and federal officials decide to seek removal, it is practically inevitable that this conviction would result in deportation, exclusion from admission, or denial of naturalization under the laws of the United States.

(B) Factual basis for the charge

The prosecutor shall present the factual basis of the charge.

(C) Rights of victims and witnesses of crimes

If applicable, the judge shall inquire of the prosecutor as to compliance with the requirements of G.L. c. 258B , Rights of Victims and Witnesses of Crimes. At any time prior to imposing sentence, the judge shall give any person entitled under G.L. c. 258B to make an oral and/or written victim impact statement the opportunity to do so.

(4) Disposition requests

(A) When there is no agreed-upon recommendation as to sentence

The judge shall give both parties the opportunity to recommend a sentence to the judge. In the District Court, the judge shall inform the defendant that the disposition imposed will not exceed the terms of the defendant's request without first giving the defendant the right to withdraw the plea. In the Superior Court, the judge shall inform the defendant that the disposition imposed will not exceed the terms of the prosecutor's recommendation without first giving the defendant the right to withdraw the plea. At any time prior to accepting the plea or admission, the judge

may continue the hearing on the judge's own motion to ensure that the judge has been provided with, and has had an opportunity to consider, all of the facts pertinent to a determination of a just disposition in the case.

(B) Where there is an agreed-upon recommendation as to disposition

The judge shall inform the defendant that the sentence imposed will not exceed the terms of the agreement without first giving the defendant the right to withdraw the plea. At any time prior to accepting the plea or admission, the judge may continue the hearing on the judge's own motion to ensure that the judge has been provided with, and has had an opportunity to consider, all of the facts pertinent to a determination of a just disposition in the case.

(5) Findings of judge; acceptance of plea

The judge shall inquire whether the defendant still wishes to plead guilty or nolo contendere or admit to sufficient facts. If so, the judge will then make findings as to whether the plea or admission is knowing and voluntary, and whether there is an adequate factual basis for the charge. The defendant's failure to acknowledge all aspects of the factual basis shall not preclude a judge from accepting a guilty plea or admission. At the conclusion of the hearing, the judge shall accept or reject the tendered plea or admission.

(6) Sentencing

After acceptance of a plea of guilty or nolo contendere or an admission, the judge shall sentence the defendant.

(A) Conditions of probation

If the judge's disposition includes a term of probation, the judge, with the assistance of probation where appropriate and after considering the recommendations of the parties, shall impose appropriate conditions of probation.

(B) Intent to impose sentence exceeding requested disposition

In District Court, if the judge decides to impose a sentence that will exceed the defendant's request for disposition under Rule 12(c)(4)(A) or the parties' request for disposition under Rule 12(c)(4)(B), the judge shall, on the record, advise the defendant of that intent and shall afford the defendant the opportunity to withdraw the plea or admission. In Superior Court, if the judge decides to impose a sentence that will exceed the prosecutor's request for disposition under Rule 12(c)(4)(A) or the parties' request for disposition under Rule 12(c)(4)(B), the judge shall, on the record, advise the defendant of that intent and shall afford the defendant the opportunity to withdraw the plea or admission. In both District and Superior Court, the judge may indicate to the parties what sentence the judge would impose.

Mass. R. Crim. P. 12, Reporter's Note (b)(4)

Rule 12(b)(4) pleas without an agreement

If there is no plea agreement under Rule 12(b)(5), Rule 12(b)(4) provides that the procedure for taking a plea or admission set forth in Rule 12(c) applies. In such a case, the parties are each free to make any dispositional request permitted by law.

Mass. R. Crim. P. 30, Reporter's Note (c)(3)

The primary purpose of subdivision (c)(3) is to encourage the disposition of post conviction motions upon affidavit. In accordance with prior practice, see Commonwealth v. Hubbard, 371 Mass. 160, 174 (1976) quoting Commonwealth v. Coggins , 324 Mass. 552, 556-57, cert. denied, 338 U.S. 881 (1949), such motions should ordinarily be heard on the facts as presented by affidavit, although in particular circumstances, the judge may in the exercise of discretion receive oral testimony. See Commonwealth v. Figueroa , 422 Mass. 72, 77 (1996) (the decision whether to hold an evidentiary hearing on a new trial motion under Rule 30 is within the sound discretion of the judge). Where

a substantial issue is raised, however, the better practice is to conduct an evidentiary hearing. See Blackledge v. Allison , 431 U.S. 63, 75-76 (1977). Compare Commonwealth v. Licata , 412 Mass. 654, 660 (1992) (error to refuse a hearing on new trial motion which raised a substantial issue of ineffective assistance of counsel) with Commonwealth v. Stewart , 383 Mass. 253, 257 (1981) (not error to refuse a hearing on new trial motion which failed to raise substantial issue concerning perjury by prosecution witness). In determining whether the motion raises a substantial issue which merits an evidentiary hearing, the judge should look not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing. See id. at 257-58. Whether or not a substantial issue is presented must, of course, be determined on the face of the motion and affidavit. The motion should specify the grounds for relief, see Commonwealth v. Saarela , 15 Mass.App.Ct. 403, 407 (1983), and the affidavit should provide the factual support necessary to determine the issue. The court is fully warranted in dismissing a motion unaccompanied by affidavit, see Commonwealth v. Colantonio , 31 Mass.App.Ct. 299, 302 (1991); or one whose the factual allegations are "obscure," cf. Sayles v. Commonwealth , 373 Mass. 856 (1977), "impressionistic and conclusory," cf. Commonwealth v. Coyne , 372 Mass. 599, 600 (1977), or untrustworthy, see Commonwealth v. Lopez , 426 Mass. 657, 662 (1998).

UNITED STATES CONSTITUTION

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President

and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

MASSACHUSETTS DECLARATION OF RIGHTS

Article 11 of the Massachusetts Declaration of Rights

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Article 12 of the Massachusetts Declaration of Rights

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his

person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Article 29 of the Massachusetts Declaration of Rights

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws. [See Amendments, Arts. XLVIII, The Initiative, II, sec. 2, and The Referendum, III, sec. 2, LXVIII and XCVIII.]

OTHER AUTHORITIES

S.J.C. Rule 307, Mass. R. Prof. C. 1.15A(a)

For purposes of this Rule, the client's file consists of the following physical and electronically stored materials:

(1) all papers, documents, and other materials, whether in physical or electronic form, that the client supplied to the lawyer;

(2) all correspondence relating to the matter, whether in physical or electronic form;

(3) all pleadings and other papers filed with or by the court or served by or upon any party relevant to the client's claims or defenses;

(4) all investigatory or discovery documents, including but not limited to medical records, photographs, tapes, disks, investigative reports,

expert reports, depositions, and demonstrative evidence;

(5) all intrinsically valuable documents of the client; and

(6) copies of the lawyer's work product.

Paragraph (a) does not impose an obligation to preserve documents that a lawyer following customary practices would not normally preserve in the client's file. For purposes of subparagraph (5), documents are intrinsically valuable where they constitute trust property as defined in Rule 1.15 or have legal, operative, personal, historical or other significance in themselves, including wills, trusts and other executed estate planning documents, deeds, securities, negotiable instruments, and official corporate or other records. For purposes of this Rule, work product shall consist of documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer's direction by the lawyer's employee, agent, or consultant, and not described in subparagraphs (2), (3), (4) or (5) above. Examples of work product include without limitation legal research, closing binders, records of witness interviews, and reports of negotiations.

S.J.C. Rule 307, Mass. R. Prof. C. 1.15A(b)

A lawyer must make the client's file available to a client or former client within a reasonable time following the client's or former client's request for his or her file, provided however, that:

(1) the lawyer may at the lawyer's own expense retain copies of documents turned over to the client;

(2) the client may be required to pay (i) any copying charges for copying the material described in subparagraphs (a)(3) and (a)(6), consistent with the lawyer's actual copying cost, unless the client has already paid for such material, and (ii) the lawyer's actual cost for the delivery of the file;

(3) the lawyer is not required to turn over to the client investigatory or discovery documents for which the client is obligated to pay under the fee agreement but has not paid; and

(4) unless the lawyer and the client have entered into a contingent fee agreement, the lawyer is only required to turn over copies of the lawyer's work product for which the client has paid.

Notwithstanding anything in this paragraph (b) to the contrary, a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would unfairly prejudice the client.

S.J.C. Rule 3:09, Canon 2, Rule 2.11, Comment 2

[2] Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system. See Rule 3.7.

Rule 16(k) Certification

I, Christopher Basso, counsel for Julio Espinal, hereby certify that this brief complies with the Rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(a), 16(d), 16(e), 16(g), 16(h), 16(k) 18, 19, and 20. This brief contains 50 pages of non-excluded pages, using 12 point "Courier New" font, a monospaced font, with fewer than 10.5 characters per inch, and was created on Microsoft Word for Mac (version 16.16.8).

Date: 6/17/2019

Christopher Basso
BBO: 695588

Rule 16(k) Certification

I, Murat Erkan, counsel for Julio Espinal, hereby certify that this brief complies with the Rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(a), 16(d), 16(e), 16(g), 16(h), 16(k) 18, 19, and 20. This brief contains 50 pages of non-excluded pages, using 12 point "Courier New" font, a monospaced font, with fewer than 10.5 characters per inch, and was created on Microsoft Word for Mac (version 16.16.8).

Date: 6/17/2019

Murat Erkan
BBO: 637507

CERTIFICATE OF SERVICE

I, Christopher Basso, hereby certify that on June 17, 2019, a copy of the Appellant's brief on the merits relative to the instant appeal was served electronically via the eFile-MA system to:

Assistant District Attorney Thomas D. Ralph
Essex County District Attorney
Tom.Ralph@state.MA.US

Date: 6/17/2019

Christopher Basso
BBO: 695588

CERTIFICATE OF SERVICE

I, Murat Erkan, hereby certify that on June 17, 2019, a copy of the Appellant's brief on the merits relative to the instant appeal was served electronically via the eFile-MA system to:

Assistant District Attorney Thomas D. Ralph
Essex County District Attorney
Tom.Ralph@state.MA.US

Date: 6/17/2019

Murat Erkan
BBO: 637607