COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
No. FAR-

APPEALS COURT
No. 2024-P-0187

COMMONWEALTH

v.

CLAUDE BOLLING

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# APPELLANT'S APPLICATION FOR FURTHER APPELLATE REVIEW OF THE JUDGMENT OF THE PITTSFIELD DIVISION OF THE DISTRICT COURT

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September 9, 2025.

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## REQUEST FOR FURTHER APPELLATE REVIEW

> Although a government officer instructing a defendant to stop attempting to speak with his attorney during his trial might seem on its face like a straightforward denial of his right to counsel, we are constrained by the court's decision in Guerin v. Commonwealth, 339 Mass. 731, 733-735 (1959), to conclude that it is not. . . . Although one might think that this sixty-six year old case was no longer good law, it was cited with approval in both Vazquez Diaz v. Commonwealth, 487 Mass. 336, 355 (2021), and Commonwealth v. Curran, 488 Mass. 792, 798-799 (2021).

Post, at 30-31. With this, the Appeals Court concluded that there was no denial of Claude Bolling's right to the assistance of counsel in this case, notwithstanding that the record showed that he was required to sit apart from his counsel throughout his trial, that he was unable to confer with his counsel during his trial despite attempts to do so, and that a court officer repeatedly told him to be quiet when he was trying to get his counsel's attention.

Because the record establishes that Mr. Bolling was denied his right to consult with counsel during trial and the Appeals Court has interpreted this Court's precedents to be less protective than the right to consult with counsel during trial contained in the Sixth Amendment to the United States Constitution, Mr. Bolling, pursuant to Mass.

R.A.P. 27.1, requests that the Court grant further appellate review and reverse.

## PRIOR PROCEEDINGS

The defendant, Claude Bolling, was charged with violation of an abuse prevention order, in violation of G.L. c. 209A, § 7; two counts of witness intimidation, in violation of G.L. c. 268, § 13B; assault and battery, in violation of G.L. c. 265, § 13A(a); and larceny from the person, in violation of G.L. c. 266, § 25(b).

On September 3, 2020, Mr. Bolling was tried in a bench trial. After trial, guilty findings entered as to the count charging violation of an abuse prevention order, one count of witness intimidation, and the count charging assault and battery. Not guilty findings were entered as to one count of witness intimidation and the count charging larceny from the person. Mr. Bolling was sentenced to one year in the house of correction on the three counts of conviction, to run concurrently. Mr. Bolling filed a timely notice of appeal.

On April 30, 2021, Mr. Bolling filed a motion to reconstruct the record of his bench trial pursuant to Mass. R.A.P. 8(c) due to the failure of the trial court's recording equipment to record any of his trial. On December 7, 2021, Mr. Bolling filed a proposed statement of proceedings for the bench trial. On May 2, 2022, Mr. Bolling filed a motion for a

hearing, given the Commonwealth's failure to file any response to the proposed statement of proceedings.

On May 5, 2022, the court denied the motion for a hearing and approved Mr. Bolling's proposed statement of proceedings as the record of the bench trial pursuant to Mass. R.A.P. 8(c), noting the absence of any objection from the Commonwealth. Mr. Bolling's direct appeal entered in the Appeals Court on May 6, 2022.

On June 15, 2022, appellate proceedings were stayed to allow Mr. Bolling to file a motion for a new trial in the trial court. On June 2, 2023, Mr. Bolling filed a motion for a new trial pursuant to Mass. R. Crim. P. 30(b), arguing that he was denied due process due to the absence of a transcript of his bench trial or an adequate alternative, that he was constructively denied counsel during his trial, and that he received ineffective assistance of trial counsel.

The court held an evidentiary hearing on December 14, 2023, during which three witnesses testified. The court denied the motion for a new trial in a written memorandum and order filed on January 16, 2024. Post, at 32-38. Mr. Bolling timely filed a notice of appeal of the

denial of his motion for a new trial on February 5, 2024. This appeal entered in the Appeals Court on February 21, 2024.

Mr. Bolling's motion to consolidate the two appeals was allowed by the Appeals Court. The consolidated appeals were argued on March 18, 2025. On August 19, 2025, the Appeals Court affirmed Mr. Bolling's convictions and the denial of the motion for a new trial in an unpublished decision pursuant to M.A.C. Rule 23.0. No party is seeking reconsideration or modification in the Appeals Court.

## STATEMENT OF FACTS

The Appeals Court's decision contains a factual recitation. Between the factual recitation and facts included in the analysis of the constructive denial of counsel issue, the decision contains the facts relevant to the appeal.

## ISSUE PRESENTED

Mr. Bolling seeks further appellate review of the Appeals Court's conclusion that Mr. Bolling's right to counsel was not constructively denied where the trial court ordered Mr. Bolling to sit apart from his counsel, Mr. Bolling tried and was unable to consult with his counsel throughout the trial, and a court officer repeatedly told Mr. Bolling to be quiet while he was attempting to consult with his lawyer.

## ARGUMENT

### Mr. Bolling was constructively denied counsel when he was required to sit apart from his counsel during his bench trial and was unable to speak with his counsel at any point during the trial, despite several attempts to do so.

As a precaution against the spread of COVID-19, Mr. Bolling was required to sit apart from his lawyer during his bench trial. The trial court found, and the Appeals Court noted, that he attempted to get his lawyer's attention at several points during the trial, but was unable to speak to his lawyer throughout the trial. The Commonwealth conceded during oral argument that a court officer repeatedly told Mr. Bolling to be quiet when he was trying to get his counsel's attention during trial. Post, at 30.

Because a court order resulted in Mr. Bolling being unable to consult with his lawyer throughout his bench trial, his right to counsel under art. 12 of the Massachusetts Declaration of Rights and the 6th Amendment to the United States Constitution was violated. See Geders v. United States, 425 U.S. 80, 91 (1976). The Appeals Court came to a contrary conclusion, relying exclusively on this Court's decision in Guerin v. Commonwealth, 339 Mass. 731 (1959). Post, at 30-31. Further appellate review is appropriate to clarify the holding and continuing vitality of Guerin, and to ensure that courts of the Commonwealth are not interpreting the right to counsel inconsistently with almost fifty years of United States Supreme Court precedent on the right to consult with counsel during trial.

Decided in 1959, Guerin v. Commonwealth, 339 Mass. 731 (1959), predated the development of the modern understanding of the right to counsel guaranteed by the Sixth Amendment. Guerin was decided more than three years before the United States Supreme Court recognized that the right to counsel contained in the Sixth Amendment, as applied to the states by the 14th Amendment, required the appointment of counsel in a criminal case where a defendant was unable to afford a

lawyer. Gideon v. Wainwright, 372 U.S. 335, 343-345 (1963). It also predated the Supreme Court's recognition, in Geders v. United States, 425 U.S. 80, 91 (1976), that the right to counsel included the right to consult with counsel during trial. The Supreme Court later reaffirmed the holding in Geders, describing the right to consult with counsel during trial as a "defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters," while acknowledging that limitations on communication of a short duration may be permissible. Perry v. Leeke, 488 U.S. 272, 284 (1989).

This appeal raises the issue of the right to consult counsel during trial as recognized in Geders and as refined in Perry. At his bench trial, the court ordered Mr. Bolling to sit apart from his counsel during trial. Mr. Bolling was told to raise his hand if he needed to speak to his lawyer. In ruling on Mr. Bolling's motion for a new trial, the trial judge implicitly found that Mr. Bolling attempted to speak to his lawyer at several points and that he was unable to do so throughout the trial. Post, at 34-36. As noted by the Appeals Court, the Commonwealth conceded during oral argument that a court officer repeatedly told Mr.

Bolling to be quiet when he was trying to get his counsel's attention. Post, at 30.

Where a court order has the effect of preventing a criminal defendant from consulting with his attorney for more than a de minimus portion of his trial, a constructive denial of counsel occurs. See Perry, 488 U.S. at 284; Moore v. Purkett, 275 F.3d 685, 688-689 (8th Cir. 2001). This constitutes a denial of counsel even when the order is not a direct bar on communicating with counsel and even in the absence of active interference by a court official. See Moore, 275 F.3d at 688-689. See also United States v. Miguel, 111 F.3d 666, 669, 672 (9th Cir. 1997) (noting that inability of defendant to initiate communication with counsel where court permitted alleged victim to testify by videotaped deposition outside of defendant's presence "would have raised extremely serious Sixth Amendment problems."). For example, a defendant was constructively denied counsel when a trial court ordered him to communicate with counsel only in writing during his trial and the defendant had limited ability to communicate in writing. See Moore, 275 F.3d at 688-689. Another defendant was denied counsel when he was ordered to wear "stun belt" during trial, was informed that belt

could be activated if he "communicate[d] with persons in his immediate vicinity" during trial, and the defendant "never initiated conversation with his attorney during the trial." See Gonzalez v. Pliler, 395 F. Appx. 453, 454, 456-457 (9th Cir. 2010).

Here, the motion judge implicitly found, and the Commonwealth does not dispute, that Mr. Bolling was required to sit apart from his counsel during trial, that Mr. Bolling attempted to speak to his counsel, and that Mr. Bolling was unable to speak to counsel throughout the trial. Post, at 34-37. Although the court created a mechanism for Mr. Bolling to indicate that he needed to speak with counsel by raising his hand, Mr. Bolling's attempts to speak with his lawyer went unnoticed, and Mr. Bolling was never able to speak with counsel during the trial. Because the court-ordered seating arrangement resulted in Mr. Bolling's inability to consult with his lawyer for the entirety of his trial, he was constructively denied counsel. See Moore, 275 F.3d at 688-689.

Notwithstanding the clearly established right to consult with counsel during trial, the Appeals Court concluded that there had been no constructive denial of counsel in this case. Post, at 30-31. In so doing, the Appeals Court did not cite to Geders or its progeny or acknowledge

that a constructive denial of counsel could occur even absent a court official's active interference in communicating with counsel. Id. Rather, the Appeals Court relied exclusively on this Court's decision in Guerin, without any meaningful analysis. Id.

The application of Guerin to this case, however, requires more careful analysis than that included in the decision in this case. As indicated supra, Guerin predates the federal constitutional precedents that recognize the right to consult with counsel during trial. Perhaps for this reason, some of its language is difficult to square with the Sixth Amendment jurisprudence articulating the right to consult with counsel. Compare Perry, 488 U.S. at 284 (describing defendant's "constitutional right . . . to unrestricted access to his lawyer for advice on a variety of trial-related matters), with Guerin, 339 Mass. at 734 ("recogniz[ing] that it may be of value to a defendant in a criminal case to be able to communicate orally with his counsel in the course of a witness's testimony") (emphasis added). However, the Appeals Court did not attempt to harmonize the holding in Guerin with the precedents recognizing the right to consult with counsel during trial.

Further, the Appeals Court applied the Guerin case beyond what its facts and procedural posture support. Guerin was an appeal of order of a single justice of this Court denying a petition for a writ of error. 339 Mass. at 732. The defendant alleged that he had been "led to believe by the court officer's words and acts that he could not at that precise time speak to his counsel." Id. at 734. In denying the petition, the single justice made findings and drew inferences that "the petitioner could have spoken with his counsel or gotten messages to him at recess and before and after court, with or without an application to the judge or during trial on an application to the judge." Id. at 734.

In affirming the single justice's order, the Court emphasized that it was bound by the factual findings of the single justice and "[o]n the facts found by the single justice and the inferences drawn by him we cannot say that any right of the petitioner was infringed." Id. at 734-735. Properly understood, Guerin stands for the proposition that temporary restrictions that could have prevented a defendant from consulting with counsel do not constitute a denial of counsel if the defendant did not attempt to use available means to consult with counsel.

Indeed, this Court's recent citations to the Guerin case cite it for this limited proposition. In Vazquez Diaz v. Commonwealth, 487 Mass. 336, 355 (2021), this Court cited Guerin for the proposition that restrictions on the manner of initiating consultation are constitutional where "the defendant could have asked for permission to communicate with counsel at any time." Similarly, the Court in the Curran case cited Guerin noting that the defendant "could have asked [the] judge during trial for permission to speak with counsel." Commonwealth v. Curran, 488 Mass. 792, 798-799 (2021).

The Appeals Court, however, did not apply Guerin in this limited manner or recognize its limited application to the facts of this case where Mr. Bolling made repeated, unsuccessful attempts to speak to his counsel during trial. Rather, the Appeals Court applied Guerin to reach the conclusion that no denial of counsel occurs even if a court order results in a defendant being unable to speak with his counsel throughout trial and even if a court officer actively interferes with attempts to speak with counsel. Post, at 30-31. Such a result is blatantly contrary to long established federal law. See Perry, 488 U.S. at 284; Moore, 275 F.3d at 688-689. In misreading the holding of Guerin

and this Court's recent citations to that case, the Appeals Court impermissibly diminished the content of the right to counsel in Massachusetts below what is guaranteed by the federal constitution. See Perry, 488 U.S. at 284.

The Appeals Court's treatment of Guerin in this case illustrates why further appellate review is appropriate. The Appeals Court interpreted this Court's recent citations to Guerin as condoning interference with the right to consult counsel during trial that is inconsistent with Supreme Court's interpretations of the Sixth Amendment. Clarity on the continuing vitality of Guerin and the scope of its holding is necessary to ensure that a defendant's "constitutional right . . . to unrestricted access to his lawyer" during trial is respected in Massachusetts. See Perry, 488 U.S. at 284.

Given the number of cases impacted by protocols to reduce the spread of COVID-19 and the increasing use of videoconferencing in the trial courts, the resolution of this issue will have effects beyond this case. See Vazquez Diaz, 487 Mass. at 369 (Kafker, J., concurring) ("as virtual hearings become a fixture of the judicial process, judges must be keenly attentive . . . to the proper functioning of the technology"). This

Court should grant further appellate review to provide the necessary clarity and to ensure that the right to counsel is not being applied to be less protective than federal interpretations of the Sixth Amendment.

Should the Court grant further appellate review on this issue, Mr. Bolling respectfully requests that it be granted for the other issues before the Appeals Court as well. In particular, Mr. Bolling argued that he was denied due process on appeal due to the unavailability of a transcript of his bench trial or an adequate substitute. In concluding that there had been no due process violation, the Appeals Court failed to apply the requisite burden-shifting analysis, see Mayer v. Chicago, 404 U.S. 189, 195 (1971), and functionally required Mr. Bolling to establish a substantial risk of a miscarriage of justice arising from the inadequate record on the basis of that inadequate record. Post, at 26-28. This conclusion is contrary to the burden-shifting framework employed by state and federal courts so that a defendant is not placed in the "Catch-22" situation of having to prove claims that he would have made if he had a complete record. See Mayer, 404 U.S. at 194-195; Commonwealth v. McWhinney, 20 Mass. App. Ct. 444, 446-447 & n.4 (1985). The Court should reach this issue as well.

## CONCLUSION

"[T]he public interest [and] the interests of justice," Mass. R.A.P. 27.1(a), call the Court to grant further appellate review to ensure that courts of the Commonwealth do not diminish a defendant's constitutional right to consult with counsel during trial.

Respectfully submitted,

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By his attorney:

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Dated: September 9, 2025.

## CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with the applicable rules of appellate procedure, including, but not limited to: Rule 27.1 (b) (contents of application for further appellate review); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). Compliance with Rule 27.1 (b) was ascertained using the word count feature of Microsoft Word for Office 365. This application for further appellate review has been produced using 14-point Century Schoolbook, a proportionally spaced font. The number of words in the argument section of the application is 1,992.

Signed under pains and penalties of perjury,

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## APPENDIX

# Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 24-P-187

COMMONWEALTH

*vs.*

CLAUDE BOLLING.

Pending in the Pittsfield District Court for the County of Berkshire

Ordered, that the following entry be made on the docket:

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court,

Paul Sitthe, Clerk

Date August 19, 2025.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

24-P-187

COMMONWEALTH

vs.

CLAUDE BOLLING.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was found guilty after a bench trial of violating an abuse prevention order, in violation of G. L. c. 209A, § 7, witness intimidation, in violation of G. L. c. 268, § 13B, and assault and battery, in violation of G. L. c. 265, § 13A (a). There is no transcript of the trial due to an issue with the recording system in the Pittsfield District Court on the day of the defendant's trial.

Pursuant to Mass. R. A. P. 8 (c), as appearing in 481 Mass. 1611 (2019), the defendant filed a motion to reconstruct the proceedings of his bench trial. He filed a proposed statement of proceedings.

Inexplicably, the Commonwealth failed to file any response. The judge made no alterations or additions of any kind to the proposed statement of proceedings and approved the defendant's proposed statement of proceedings. The statement of proceedings approved by the judge explicitly states that the defendant's counsel was unable to recall certain details of the proceedings, including whether there were any objections during either direct or cross-examination of the Commonwealth's two witnesses, and, as relevant here, the answer of the complaining witness to a question about her prior drug use.

The defendant filed an appeal from his convictions. That appeal was stayed so that he could bring a motion for a new trial in the trial court, which he did, and which was denied. He also filed a notice of appeal from that denial. The two appeals have been consolidated and are now before us.

1. Facts. These facts are taken from the statement of proceedings approved by the judge. This case arose from an alleged altercation between the defendant and the victim outside of the victim's home in the early morning hours of November 17, 2019. The victim and the defendant had previously been in a romantic relationship, but the victim had recently obtained an abuse prevention order against the defendant. The victim testified that, at roughly 2:00 A.M. on the morning in question,

she looked out her window and saw the defendant standing on her front porch. She went out to speak with him, and he asked her to drop the restraining order. In her account, she told him that she would not do so, and he became upset and struck her in the face three times. She testified that she had brought her purse with her when she went outside to speak with the defendant, and that she dropped it when he struck her. According to the victim, after striking her, the defendant left, taking her purse and her cell phone battery with him. The victim's parents came to see her later that day and called the police to report the incident. Officer Jason Costa of the Lanesborough police department responded. Officer Costa testified that, when he spoke with the victim, he saw a contusion under her eye. During cross-examination, defense counsel asked the victim about her history of drug use, but as discussed, the reconstructed record does not reflect her answer. Defense counsel also asked the victim about her relationship with her parents, and the victim admitted that she had a troubled relationship with her parents and was working on repairing it.

In contrast, the defendant testified that the victim had called him earlier in the night, stating that she wanted to get high with him. He declined, and the victim became angry and

hung up the phone. The defendant testified that he did not go to the victim's house on the morning of November 17.

Based on his testimony and the victim's responses on cross-examination, defense counsel's theory at trial was that the alleged interaction between the defendant and the victim at the victim's house did not occur and that the victim was lying about this incident to conceal from her family that she had relapsed on drugs.

2. Discussion. a. The reconstructed record. The defendant asserts in his appeal from the denial of his new trial motion that trial counsel was ineffective in failing to investigate the complaining witness's family situation and history of drug use. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974) (test for ineffective assistance of counsel is "whether there has been serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer -- and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defence"). "The duty to investigate is one of the foundations of the effective assistance of counsel," Commonwealth v. Long, 476 Mass. 526, 532 (2017), and we will assume, without deciding, that the failure to investigate here

indeed fell below what might have been expected of an ordinary fallible lawyer, satisfying the first prong of the Saferian test. See Saferian, supra. To succeed on his claim, however, the defendant must also satisfy the second prong by demonstrating prejudice from any such failure. See id.

The defendant argues that the reconstructed record is inadequate to allow for appellate review of his claim that his trial counsel provided ineffective assistance, and that, therefore, the lack of an adequate transcript violated his due process rights under both the State and Federal Constitutions. See Mayer v. Chicago, 404 U.S. 189, 198 (1971); Commonwealth v. Harris, 376 Mass. 74, 77-78 (1978). We disagree.

In this case, the defendant argues that we do not know the complaining witness's response to a question about her prior drug use. The defendant testified that on the night of his alleged violation of the abuse prevention order held against him by the complaining witness, she had, in fact, called him and asked him to get high with her and that he declined to do so. Subsequently, Officer Costa noticed, when he responded to her house, that she had a contusion on her face. The defendant's theory at trial was that the victim had relapsed on drugs, that her injury occurred that evening when she went out without him

in order to get high, and that she was lying about her encounter with the defendant to hide this relapse from her family.

The defendant argues that the failure to investigate amounted to ineffective assistance of counsel because the information that would have been discovered through proper investigation would have been useful in two ways and that the inability so to use it prejudiced him.

The first way is that, if the complaining witness denied any prior drug use, she could have been impeached with it, and her credibility would have been degraded. Even assuming the witness would have answered as the defendant suggests, in this case the judge had already explicitly found parts of her story not credible; specifically, while announcing the verdict, the judge stated that she did not find the victim's testimony about the defendant taking her purse and cell phone battery credible. In light of that, we do not think the effect of such further lying about her drug use raises "a serious doubt whether [the result] would have been the same had the defense been presented." Commonwealth v. Millien, 474 Mass. 417, 432 (2016).

A second, and more complex, suggestion made by the defendant is that further investigation would have revealed information about the victim's family situation that would have

shown she had a motive to lie to her parents about the origin of the bruise.

The defendant reasons that investigation would have uncovered not only her drug use, but that she had lost custody of her child due to drug use. The defendant then argues that if her parents, and therefore her sister, who had custody of her child at the time of the alleged altercation, had discovered that she was again taking drugs, they would have restricted her access to her child. Therefore, the theory goes, in order to avoid that, she needed a different explanation for the injury, that it was not a consequence of renewed drug use. Thus, the defendant argues, she had a motive to lie and blame the defendant for her injury that would have been uncovered with a proper investigation.

The problem with this argument is that it relies on a great deal of speculation. If the defendant had discovered posttrial sufficient facts to support this theory, his argument might have some force. However, there is no evidence in the record about whether the complaining witness represented to her family that she was sober during the period leading up to the events at issue in this case, nor is there evidence whether her parents or her sister thought she was. Likewise, there is no evidence about what contact the victim was allowed to have with her child

by her sister, nor was there any evidence about how that might have been affected by information that she was, in fact, engaged in using drugs.

Consequently, we are unpersuaded by the defendant's argument. Because on this record the defendant would not have been able to prove his claim of ineffective assistance of counsel even had the complaining witness given the utterly false answer to the question about drugs, which is to say the best possible answer from the defendant's point of view, the absence of a transcript did not deprive him of due process.

We note that, as the judge made no corrections or additions to the actual reconstructed record, see Harris, 376 Mass. at 79; Mass. R. A. P. 8 (c), we do not, in reaching our conclusion, rely on any of the judge's statements in her decision on the motion for a new trial about what she knew at the time of trial about the complaining witness's prior use of drugs, or on any other facts that go beyond the reconstructed record.

b. Constructive denial of counsel. The defendant also argues that he was constructively denied his right to counsel. His trial was one of the first to take place in person after our courts reopened during the COVID-19 pandemic. As a health and safety measure, rather than allowing the defendant and counsel to sit together at defense counsel's table, where the distance

between them would have been two feet, the defendant was placed in a chair approximately six to ten feet to the left of the defense table, roughly parallel to or slightly behind where his attorney was sitting.

Although he was handcuffed, the defendant was instructed by the judge to raise his hand if he wanted to speak with his counsel. We will assume that the testimony, which the judge appeared to credit, was true that during the bench trial, while the complaining witness was on the stand, the defendant attempted to get the attention of his lawyer. He raised his hands, as he had been instructed to, but neither the judge nor counsel noticed this. Indeed, as the Commonwealth concedes, a court officer repeatedly told the defendant to be quiet.

The constructive denial of counsel claim of error is preserved, as counsel did not know about these events until after trial, and the claim was raised at the first possible time, in the motion for a new trial. See Commonwealth v. Randolph, 438 Mass. 290, 293-294 (2002).

Although a government officer instructing a defendant to stop attempting to speak with his attorney during his trial might seem on its face like a straightforward denial of his right to counsel, we are constrained by the court's decision in Guerin v. Commonwealth, 339 Mass. 731, 733-735 (1959), to

conclude that it is not. In that case, the court held that when a defendant was "prevented by a court officer during the course of his trial from consulting with his counsel," id. at 733, no violation of either the Federal or State constitutional right to counsel occurred. Id. at 735. Although one might think that this sixty-six year old case was no longer good law, it was cited with approval in both Vazquez Diaz v. Commonwealth, 487 Mass. 336, 355 (2021), and Commonwealth v. Curran, 488 Mass. 792, 798-799 (2021).

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court (Meade, Rubin, & Hand, JJ.[1]),

Clerk

Entered: August 19, 2025.

[1] The panelists are listed in order of seniority.

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

BERKSHIRE, ss.

PITTSFIELD DISTRICT COURT
DKT 1927CR2242

COMMONWEALTH

v.

CLAUDE BOLLING

---

DECISION ON DEFENDANT'S MOTION FOR NEW TRIAL

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The defendant raises three issues in his motion for a New Trial: a Due Process violation due to the lack of a transcript, a Sixth Amendment deprivation of counsel claim based on the configuration of the courtroom, and various ineffective assistance of counsel claims.

1. Lack of transcript

On the day of trial, September 3, 2020, the "For the Record" recording system did not record any court business in the Pittsfield District Court. A Notice of Appeal was filed on September 4, 2020. On November 19, 2020, Attorney Christopher Loud filed a Notice of Appearance as Appellate Counsel for the defendant and subsequently filed a motion to withdraw on January 21, 2021. Current Appellate Counsel was appointed by CPCS in March of 2021 (see Affidavit of Post-Conviction Counsel, #7, Def. APPX:3) and filed a Notice of Appearance on March 15, 2021. At some point between September 4, 2020, and March 2021, trial counsel learned that there was no recording of the trial (Id.) and took no steps to reconstruct the record. A Motion to Reconstruct the Record was eventually filed on April 30, 2021. Mass. R. App. Pro. 8(c) states "if

no report of the evidence or proceedings at a hearing or trial was made and a transcript is unavailable, the appellant shall file a motion to reconstruct the record within 14 days of the filing of the notice of appeal."

The Appellant filed a Proposed Statement of the Proceedings pursuant to Mass. R. App. Pro. 8(c) on December 7, 2021. After much stonewalling and no cooperation from the District Attorney's Office (see Affidavit of Post-Conviction Counsel, #10-16, Def. APPX: 3-5), the Appellant's Proposed Statement of the Proceedings was approved by this Court, without objection, on May 5, 2022. That is, the Statement of the Proceedings is entirely from the perspective of the defense, without objection, correction, or dispute.

The Appellant claims that the Statement of Proceedings "is not adequate to address Mr. Bolling's claim of ineffective assistance of counsel for failure to investigate the background of the alleged victim." (Appellant's Motion for a New Trial, p.15). In a motion for a new trial based on a lack of trial transcript, "the fact that the transcript is unavailable through no fault of the parties does not warrant a new trial unless the trial proceedings cannot be reconstructed sufficiently *to present the defendant's claims*." Commonwealth v. Harris, 375 Mass. 74, 78 (1978)(emphasis added). The Appellant has not shown that he has a "colorable need" for a complete transcript in order to substantiate his claims of ineffective assistance of counsel, particularly when said claims are based on an alleged failure to investigate. In this case, the Appellant's Statement of Proceedings is an adequate substitute for a complete transcript.[1]

This case comes down to the assessment of credibility of the witnesses—it was a "he said – she said" case. The Appellant does not allege that the complaining witness' testimony *as his counsel remembers it* was insufficient as a matter of law. In trial counsel's narrative of her cross

[1] I note that this was a relatively short trial and the Statement of Proceedings drafted by the defense comports with this Court's memory.

examination of the complaining witness, she only notes one issue that she does not recall:[2] counsel asked the complaining witness about her history of drug use, but does not recall her answer. (Appellant's appendix p.32). Testimony regarding the complaining witness' history of drug use, in the context of this case, would not have had an impact on the outcome of this case. I found the Appellant not guilty of two of the five charges. These two charges stemmed from the allegation that the Appellant took a purse (Larceny from the Person) and a cell phone battery that had allegedly fallen out of the complaining witness' phone onto the front porch, at night (Intimidation of a Witness). "While announcing the verdict, the judge stated that she did not find Ms. Malloy's testimony credible as to Mr. Bolling taking Ms. Malloy's cellular phone battery or purse." (Defendant's Statement of the Proceedings, Def. APPX:35).

2. Configuration of the Courtroom

The Appellant was not constructively deprived of the assistance of counsel during the bench trial due to the configuration of the courtroom. There were no barriers or restrictions on trial counsel from communicating with her client-- she simply did not. (Trial counsel's admitted failure to communicate with her client throughout the trial will be addressed in the following section with the Appellant's other claims of ineffective assistance of counsel.)

After a hearing on January 6, 2020, the Appellant was found dangerous and held without the right to bail under 276/58A. A bench trial was scheduled for March 30, 2020. In accordance with District Court Standing Order 1-20, this matter was rescheduled. The Appellant filed several motions for immediate release from custody, which were denied. On June 24, 2020, District Court Standing Order 7-20 announced the resumption of in-person bench trials for

[2] The Statement of Facts prepared by the defense does indicate that trial counsel does not recall objections made by the Commonwealth or the defense, or if there was any redirect or recross of the witnesses. Appellate Counsel was unable to articulate, even hypothetically, any objectionable evidence that may have been admitted or evidence that may have been impermissibly precluded.

persons in custody, as of July 13, 2020. The Appellant remained in custody from his arraignment on January 2, 2020 to his trial on September 3, 2020. The Appellant did not waive his right to a speedy trial.

The Appellant's was the first trial conducted under the COVID protocols in the Pittsfield District Court. For bench trials in the first session of the Pittsfield District Court during non-pandemic times, defense counsel and their client are seated next to each other at a 5 foot long table. On the recommendation of the CDC to maintain a six foot distance between people sharing the same space for extended periods of time, the Appellant was seated in a chair approximately four feet away from where he would normally have been seated. This configuration placed him six to ten feet from counsel—not from counsel table. When counsel was seated at the table, the defendant was approximately six feet to her left (as opposed to two feet if he was at the table). When counsel stood at the podium for cross examination, the defendant was approximately 10 feet to her left (as opposed to six feet if he was at the table). There was nothing preventing counsel from seeing or hearing her client (other than slightly turning her head).[3] Counsel agreed to this configuration. There was nothing prohibiting counsel from stepping over to her client to consult, or requesting a recess for her to consult in private if she did not want to get within six feet of her client. Everyone in the courtroom wore masks.

The courtroom setup for the trial did not create a structural error. Counsel had access to her client, she just chose not to speak to him during the trial. See Vazquez Diaz v.

[3] I do not credit the testimony of Attorney Jill Sheldon that the Appellant was waving his arms during the complaining witness' testimony to try to get the attention of trial counsel. Attorney Sheldon described the arm waving with her arms spread wide apart, but the Appellant was handcuffed during the trial. Additionally, Attorney Sheldon was trial counsel's supervising attorney: If she had observed the Appellant trying to speak to his lawyer as desperately as she described--and she thought it was warranted for the client to interrupt cross examination of the complaining witness--surely this very experienced supervising trial attorney would have intervened. I note that Attorney Sheldon did not alert trial counsel to what she claimed to have seen even after trial counsel had finished her cross examination, the point at which trial lawyers typically check in with their clients.

Commonwealth, 487 Mass. 336 (2021). Commonwealth vs. Watt, SJC-13279 (January 11, 2024)(where the Court noted that "momentary lapses in attention or consciousness are insufficient" to support a claim of structural error).

3. Ineffective Assistance of Counsel

a) Communication with her client

The Appellant testified during the hearing on his Motion for a New Trial that he was trying to get his lawyer's attention when she was in the middle of cross examining the complaining witness and that the Court Officer told him to be quiet.[4] Trial counsel claims not to have noticed his attempts. Significantly, what the Appellant was trying to tell his lawyer was that the complaining witness was not testifying truthfully. He had gone over the allegations with his lawyer prior to trial and told her repeatedly that the complaining witness' allegations against him were not true. He was not trying to convey any new information to his lawyer that he had not already discussed. Trial counsel did not stop in the middle of her cross examination to talk to her client, nor did she consult with him before she yielded the floor. Tactical and strategic decisions, such as questions to ask on cross examination, are typically within the purview of the attorney. Any review with respect to the effectiveness of counsel will consider whether the lawyer's decisions were "manifestly unreasonable when made." Commonwealth v. Kolenovic, 471 Mass. 664, 674 (2015). In this case, trial counsel effectively cross examined the complaining witness with the information she had obtained through speaking with her client in preparation for trial.

[4] I do not recall if the Appellant was trying to get his lawyer's attention during testimony or her questioning of the complaining witness. I do recall that he was very animated during the trial—reacting to the testimony by shaking his head and rolling his eyes and otherwise fidgeting in his seat. Attorney Sheldon agreed during the hearing that in her experience the Appellant is very "animated." In point of fact, during the hearing on the Appellant's motion for a new trial, as he was on the witness stand and testifying, the Appellant got himself so worked up over his own testimony that he jumped up from his seat, knocking his chair over.

Trial counsel was not ineffective by failing to notice her client trying to get her attention during cross examination or for failing to consult with him during the trial, because the topics the Appellant were reacting to were topics already discussed during trial prep and were the very topics about which trial counsel was cross examining the complaining witness. Vazquez Diaz v. Commonwealth, 487 Mass. 336 (2021). Commonwealth vs. Watt, SJC-13279 (January 11, 2024).

b) Failure to Investigate

The Appellant claims his attorney was ineffective for failing to investigate the complaining witness' relationship with her parents (the status of a guardianship) and her record of prior convictions, including a violation of probation for positive drug screens from January of 2018 (more than a year prior to the charged offense). I was aware through the cross examination by trial counsel that the complaining witness had a difficult relationship with her parents and that they had custody of their child. I recall that the parents had gone to the complaining witness' home the morning after the charged event because she was late for a visit with her daughter and could not be reached by phone. It was the parents that called the police and reported the incident. I was aware through cross examination by trial counsel and the Appellant's testimony at trial that the complaining witness struggled with a substance use disorder.

It was clear to me based on the evidence presented that the complaining witness had circumstances in her life that could affect credibility and could also make her vulnerable. I weighed these circumstances and came to the conclusion that the complaining witness was not being truthful about the larceny of her purse and the deliberate taking of a phone battery to prevent her from calling the police, but was being truthful about the Appellant being at her home in violation of a restraining order, yelling at her to drop the restraining order, and punching her in

the face (which was additionally supported by the officer's observation of a contusion under her eye). Evidence of the complaining witness' prior convictions or of positive drug tests the year before would not have altered my analysis in any substantial way. Trial counsel's representation in this case did not fall "measurably below that which might be expected from an ordinary fallible lawyer" and her alleged inadequacy did not deprive "the defendant of an otherwise available, substantial ground of defense." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Furthermore, the Appellant has not shown that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

Conclusion:

Mass. R. Crim. P. 30(b) provides that a judge "may grant a new trial at any time if it appears that justice may not have been done." After consideration of the issues raised by the Appellant, I find that justice was done in this trial, therefore his Motion for a New Trial is DENIED.

January 16, 2024

Jennifer Tyne, First Justice

## CERTIFICATE OF SERVICE

I hereby certify, under pains and penalties of perjury, that I have on this date made service upon the Commonwealth by directing that a copy of this application be electronically served via the court's e-file protocol on counsel for the Commonwealth:

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Dated: September 9, 2025.